

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

APPELLATE JURISDICTION

(Shinyanga Registry)

(DC) CRIMINAL APPEAL NO. 60 OF 2018

(Original Criminal Case No.38 of 2017 in the District Court of **SHINYANGA** at **SHINYANGA**
Before **N. S. GASABILE RM**)

THE DIRECTOR OF PUBLIC PROSECUTIONAPPELLANT

VERSUS

MYETE SABODE & 2 OTHERSRESPONDENTS

Date of last order: 15/11/2018

Date of Judgment: 10/12/2018

JUDGMENT

KIBELLA, J.

The appellant, the DIRECTOR OF PUBLIC PROSECUTION has instituted this appeal against MYETE S/O SABODE, SUZANA D/O MABULA and KIYOZI S/O SHIJA @ LINGAI S/O SHIJA, hereinafter referred as the Respondents who stood jointly and together charged with the offence of Criminal trespass contrary to section 299 (a) of the Penal Code, (Cap.16 R.E.202), vide Criminal Case No.38 of 2017 before the District Court of Shinyanga at Shinyanga.

The particulars of the offence were that, MYETE s/o SABODE, SUZANA d/o MABULA and KIYOZI s/o SHIJA @ LINGAI s/o SHIJA on 24th at December,

2016 about 11.00 hours at Manyinya Usanda area within Shinyanga District in Shinyanga Region, jointly and together unlawfully entered into 45 acres of land which belongs to one SHIJA s/o KATINA @ MHEKELA with intent to commit an offence therein.

They denied to the charge.

At the end of the day, all were found not guilty and acquitted.

Aggrieved with that decision, the Director of Public Prosecutions has preferred this appeal.

Briefly the evidence by the prosecution side before the trial tribunal was to the following effect, Shija Mhekela Katina, PW1 testified that, the accused persons had a case against him before the High Court at Tabora where judgment was entered in his favour.

However, the case was directed that, when a party died then the case does not die so ordered the matter to be returned to the District Land Tribunal to call the relatives of the deceased vide Land Application No.33 of 2015 which was lodged. This was a new application as ordered by the High Court (Ref. exhibit PE.2).

According to PW1, the application was against the clan members of Shaban Manyiluzu to one Swalehe Shabani Manyiluzu and others who refused to have that case against them. They were then re-summoned whereby another summons was sent to Ng'walu Shabani Manyiluzu (Suzana Shabani Manyiluzu) who refused to enter appearance before the trial tribunal and

the case proceeded exparte. At the end and on 23/02/2015, the same was decided in the favour of PW1. The exparte judgment was admitted as PE4 where PW1 declared the lawful owner of the suit land by the Shinyanga District Land and Housing Tribunal at Shinyanga. No appeal was preferred by the Respondents.

On 23/12/2016 upon application for execution of an exparte judgment, PW1 was handed over the Land in dispute by the Court Broker and the accused persons removed.

However, on 24/12/2016, the accused persons started building house and cultivate the Land they were removed by the Court Broker. Thus PW1 reported the matter at the VEO who reported the same at police who arrived and arrested the accused persons/respondents and later were charged with the offence of Criminal Trespass.

Abdallah Subira, PW2, the Court Broker, of the District Land and Housing Tribunal, testified to the effect that, he knows Shija Katina, PW1, as followed the order for execution from the District Land and Housing tribunal Shinyanga. PW2 issued a notice of 14 days and thereafter, notified the tribunal that the responsible persons (s) were still on the suit land. Upon the assistance of police, the execution of the decision by the trial tribunal was effected. Thus the accused persons were evicted from the suit land and the same handed over to PW1, the lawful owner according to the exhibit PE 4.

In their defence, Myete Sabode, affirmed and testified as DW1, and state that, the land in dispute was inherited from his father one Sabode Mahona who acquired the same in 1975 during operation Vijiji whereby he passed away in 2003. In 2005 PW1, Shija Katina, filed a case before the District Land and Housing Tribunal at Shinyanga where he won the case. For that therefore he tendered a judgment vide Land application No.18 of 2008.

In cross-examination by the prosecution, DW1 replied inter alia that:-

"I don't know what judge said because I never went at Tabora (PE2 show the High Court Tabora issued a decree in presence of the parties)."

Suzana Mabula, in her sworn defence, testified as DW2, where stated that the land in dispute is hers as inherited from her parents who got that area in 1993 after bought it from the late Mpinga where they paid head of cattle (cow). From 1993 her father planted 23 mango trees and other fruit trees. Her father fenced the area and in 2008 her father and Shaban Manyiluzu were complained of by PW1, Shija Katina over that shamba/area/land.

However, in 2009 on the 2nd day of February, PW2's father passed away where the case was dismissed on that reason of the death.

Later one Ibrahim Jilang'wa was appointed the administrator of the estate properties of DW2's late father (Ref. exhibit Dw2). She (DW2) was surprised when was arrested whereby she had no case with PW1, Shija Katina. On cross- examination, DW2 replied inter alia that:-

"Yes my late father bought the land in dispute in the years of 1990; I don't have an exhibit of sale agreement of my land."

In his sworn defence, Kiyosi Shija, testified as DW3, where he stated that, the farms were inheritance from his grandfather to his mother side. That her mother took him there for cultivation where his father died in 1990 and he continued cultivating the same while it being 70 acres. In 2008 he travelled to DSM and left the same shamba whereby Shinyami Shija charged DW3 over the same land. However, Shinyami in later days of 2008, got sick and passed away whereby there was a land matter at the District Land and Housing Tribunal. In 2012 he was arrested that he trespassed the said land.

On cross-examination, by the prosecution side, DW3 replied inter alia that:-

"My parents once all died together with my uncle, so I inherited the same. There is no probate case filed. There is no document on the land and I still use the same."

From the above evidence from both sides, the trial court found that the offence of Criminal trespass was not proved beyond reasonable doubt as there was a dispute upon the ownership of the land in dispute. Therefore, found all the accused persons not guilty acquitted them.

The appellant in its petition of appeal has advanced only one ground of appeal that is:-

- 1. The trial magistrate gravely erred in both point of Law and facts in failing to sufficiently evaluate and appreciate prosecution evidence which proved the offence beyond all reasonable doubts.*

The respondents when served with the above appellant's petition of appeal, 1st and 2nd respondent replied the petition of appeal equally that:-

- 1. That, the trial magistrate was right to its decision delivered in favour of the respondents in both points of Law and facts in evaluating sufficiently and appreciating evidence as which did not prove the offence evidences tendered before court during the hearing date by the appellant was full of probabilities to let the respondents be convicted. See Annexure "A1" to prove the matter on which the 1st respondent and Shija Katina were parties in the Land Application No.18 of 2008 of the Shinyanga District Land and Housing Tribunal Shinyanga as Annexure A2 as he claimed his land trespassed by the respondents.*

At the hearing of the appeal, the appellant was represented by Ms. Mapunda, learned State Attorney whereby each of the respondents appeared in person and thus were unrepresented.

Arguing in support of the appeal, Ms Mapunda, learned State Attorney stated that, the case before the trial court was of Criminal trespass c/s.299 (a) of the Penal Code, (Cap.16 R.E.2002). Where at the hearing, the

prosecution established that, there was a court which already had prior determined the dispute of the ownership of the piece of land parcel where the land tribunal declared that the victim was the owner of the disputed piece of land parcel. And in proving the same Ms. Mapunda went on that, in the judgment in Land Application No.18/2008 judgment was entered in favour of the respondents. However, the same on appeal before the High Court of Tanzania at Tabora was quashed and set aside. And fresh application was ordered to be filed which vide Land Application No.33/2015, the victim instituted the same where judgment was entered in his favour and never challenged by way of appeal.

PW2, the court broker testified proving that he handed over the land in dispute to the victim PW1 where the respondents were removed on the dispute land.

From the above, Ms. Mapunda, learned State Attorney was of the contention that, the trial court did not appreciate that the issue of ownership was prior determined before the Criminal trespass offence was instituted against the respondents. And that since there was land Application No.33/2015 which determined the dispute of ownership between the parties therefore the criminal trespass before the trial court was correct to be determined. To support her submission cited the case of SYLIVESTER NKANGAA V. RAPHAEL ALBERTO (1992) TLR 110 where it was held inter alia:-

- (ii) A charge of Criminal trespass cannot succeed where the matter involved land in

dispute whose ownership has not finally determined by a Civil Suit via Court of Law.

- (iii) A Criminal Court is not a proper forum for determining the rights of those claiming ownership of Land. Only a Civil Court via Civil Suit can determine matters of Land ownership.

Finally, submitted that, since the Republic had proved that, the issue of land ownership was already determined vide land Application No.33/2015 and no appeal against it was preferred by the respondents, then a charge of Criminal trespass was proper for any person who had interfered with the land ownership of the victim, PW1.

Under the circumstances, prayed for this court to find that the trial court went wrong, its findings and decision be quashed and set aside, respondents be found guilty, convicted and properly sentenced. Thus the appellant's appeal be allowed.

The appellants each had nothing to add to the reply of her/his grounds of appeal. But each prayed for the same be considered so that justice be rendered to each of them.

Ms. Mapunda, learned State Attorney had nothing in rejoinder.

Having thoroughly gone through the evidence on the record from both sides, the ground of appeal and reply thereto, the submissions by the

learned counsel for the appellant and that by the respondents, the central issue for determination is whether the appellant's appeal has merits.

To start with answering this question it is trite Law that for proving an offence of Criminal trespass there must be no dispute upon ownership of the land in dispute. And that where there is a dispute over the ownership of the land in dispute, criminal trespass proceedings should stop pending the determination of the dispute upon land ownership before a court of competent jurisdiction (now Land Tribunal), as rightly was so decided in the case rightly cited by Ms. Mapunda, learned State Attorney, SYLIVESTER NKANGAA V.R. (supra).

However, in the instant case, before the trial tribunal, there was evidence that there was Land Application No.33/2015 (whose judgment referred as exhibit PE4), where the victim PW1 was declared lawful owner of the disputed area against the respondents. That the execution of that decision was carried out by PW2, the Court Broker where the respondents were removed from that disputed land parcel, and the victim PW1 was handed the same as lawful owner. Anyone who could have interfered with the lawful possession of the victim (PW1) could be labeled as criminal trespasser.


Therefore under the circumstances since the respondent's failed to file objection proceedings upon the execution of the decision vide Land Application No.33 of 2015, and that never appealed against such a decision, certainly the issue of the dispute of ownership cannot be said not

have been determined by a competent court with jurisdiction over land matters.

Since there was full evidence that the respondents had interfered with the legal ownership of the PW1, the victim, that is proof of criminal trespass.


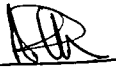
In the upshot, I find that the trial court went wrong when failed to appreciate that the dispute of ownership between the parties had been prior determined. Therefore, the appellant's appeal is found to be meritorious, thus the findings that the respondents committed no criminal trespass and acquitted them are hereby quashed and set aside, however, all of the three respondents hereby found guilty of criminal trespass, convicted and sentenced each to conditional discharge that they have to commit no similar offence within twelve months.

Otherwise the appellant's appeal is hereby allowed.


R. M. Kibella
JUDGE
10/12/2018

Order: Judgment delivered in chambers, this 10th day of December, 2018 in the absence of the Representative of the Director of Prosecution the appellant, and in the presence of the respondents each in person.

Right of Appeal fully explained.



R. M. Kibella
JUDGE
10/12/2018