

IN THE HIGH COURT OF TANZANIA

AT TABORA

PC.CRIMINAL APPEAL NUMBER 2 OF 2019

(Arising from Original Criminal Case No. 44 of 2018 of Isevy Primary Court and Criminal Appeal No. 15 of 2018 of Tabora District Court)

HUSSEIN RASHIDI ----- APPELLANT

VERSUS

RAMKA NKANGALA ----- RESPONDENT

JUDGEMENT

06/12/2019 & 28/02/2020

BONGOLE J.

This is a second appeal from the decision of Isevy Primary court where the respondent herein **Ramka Nkangala** was charged with the offence of Criminal Trespass contrary to section 299 of the Penal Code Cap 16 R.E 2002.

The particulars of the charge reads as follows:-

"Wewe RAMKA s/o NKANGALA KAZINA unashitakiwa kuwa bila idhini mnamo mwaka 2011 huko kata ya mtendeni manisipaa na mkoa wa Tabora ulivamia shamba la mlalamikaji na kuanza kulilima pamoja na kujenga bila idhini ya mwenye shamba ambaye ni Hussein s/o Rashid Matibhi kitendo ambacho ni kinyume na sheria za Jamhuri ya Muungano wa Tanzania na kinaweza kusababisha vurugu na uvunjifu wa Amani."

The respondent did deny the charge and the complainant called two witnesses to prove the charge. The trial court found the charge to have not been proved beyond reasonable doubt, it thus acquitted the respondent.

Aggrieved, the appellant appealed to Tabora District Court where the court found the appeal to have no merit consequently upholding the decision of Isevy Primary court. Still aggrieved the appellant has lodged this appeal.

The appellant raised two grounds of appeal couched thus:-

- 1. The honorable Magistrate grossly erred in law and fact by deciding in favour of the Respondent without considering, evaluate and analyse the heavyweight evidence of the appellant adduced at the trial court.**
- 2. That, the Honorable Magistrate grossly erred in fact and law by not considering the defect before Trial Court which reached into decision inspite of failure of the trial court to realize and understanding the boundaries fixed by the Court Broker from District Land and Housing Tribunal of Tabora between the appellant and respondent lands.**

These two grounds can neatly be condensed into one major ground that the two courts below erred in law and fact in finding the respondent not guilty as a result of failing to objectively evaluate the entire evidence adduced by the appellant in the trial court.

When this appeal came for hearing the appellant enjoyed the legal service of Mr. Hassan Killingo learned Advocate while the respondent

appeared in person. With the permission of the court, parties filed written submission in disposing this appeal.

Mr. Kilingo submitted that the appellant's evidence of photograph was not considered despite its weight in building his case, one photograph showed the respondent accepting to buy extra part of the appellant's land to legitimize his trespass however the respondent did not accept to purchase the trespassed plot.

That, the appellant won a suit against the respondent over the disputed land where the DLHT for Tabora directed Kumepambazuka Auction Mart & Court Broker to set boundaries over the disputed land, boundaries were set and the respondent was ordered not to exceed five meters from his house but the respondent exceeded the boundaries and trespassed into Appellant's land.

He submitted further that, the trial court visited the disputed place and failed to understand the boundaries fixed by Kumepambazuka Auction Mart & Court Broker but at the end the trial court considered assessors opinion that there was no criminal trespassing over the disputed land. The question is how did the trial court concluded on no trespassing while it did not recognize the boundaries fixed by the court broker.

Further the appellate magistrate erred by excluding himself from discussing the boundaries of the disputed land by reasons that the district court has no jurisdiction since the DLHT had already decided and fixed the boundaries of the disputed land thus criminal trespass could be scrutinized in every angle including recognizing the boundaries.

He added that, the DLHT through letter dated 06th August,2012 with Ref. TBR/LHT/Land Appl.No.24/2011 directed the court broker to set boundaries over the disputed land but the district Magistrate tightened his hands in discussing boundaries of the disputed land which was the cause of criminal trespass.

In reply the respondent submitted that the honorable Magistrate was correct in law and in fact to decide on merits by considering the evidence adduced by the respondent and visiting the disputed land which had been used by the respondent as a place of permanent domicile since 1944 and he has a house there.

That the trial court properly visited the locus in quo and by considering opinion of the assessors and witnesses found that there was no boundaries in between thus the trial court was correct in law and in fact by not discussing issues of boundaries for having no jurisdiction.

Before I go to the substance of this appeal I would like to make it clear that this appeal originates from a criminal case that is Criminal trespass contrary to section 299 of Penal Code Cap 16 R.E 2002 not a land case (though you will see its connection to previous decided land dispute). That being the case I will digest this appeal basing on the principles of criminal justice not otherwise.

I have had an opportunity to read all the evidence adduced before Isevy primary court or trial court also I perused all the exhibits admitted to the trial court and realized that the nucleus of the charges against the respondent emanated from a land dispute which had earlier being resolved

by the District Land and Housing Tribunal for Tabora and the respondent being ordered not to trespass again to the appellant's land.

The facts of the case show that the decision by the DLHT was passed on 08/11/2011 and the same tribunal ordered court broker to set new boundaries between the appellant and respondent lands and further warned the respondent not to trespass again into the appellant's land after putting new boundary.

The record from the DLHT show that the respondent acted against the orders of the tribunal and continued to trespass to the appellant's land hence charges for criminal trespass.

If I were a trial magistrate the main issue that had to be proved before me would be whether the respondent crossed the boundaries set by the broker but surprisingly the trial magistrate never communicated those issue to honorable assessors that is why they reached a conclusion that the matter was a land dispute.

It is quite clear that honorable assessors had no knowledge of the content of the exhibits admitted to court i.e The judgement of the District Land and Housing Tribunal and the letter that was sent to Kumepambazuka Auction Mart and Court Broker stating the conduct of the respondent over the appellant's land that is why they reached erroneous decision.

On appeal the honorable magistrate never consulted the evidence adduced during trial instead he quoted a paragraph in the trial court judgment that acquitted the respondent and rushed into conclusion that the ground of appeal has no merit in the eye of the law.

In **D. R. PANDYA v. R [1957] E.A. 336** It was held therein that on a first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny, (which was not done here) and that failure to do that is an error of law, which can be remedied on a second appeal. That has been the stance of the law since then.

As I said herein above, this is a criminal case but its better conclusion is intended to resolve series of disputes that are behind it, so leaving this case unresolved is as good as the parties never sought court's assistance.

All said and done, I am constrained to hold that the evidence adduced in trial court lacked proper scrutiny by both trial and first appellate court. I hereby allow the appeal and set aside judgments of District court and Isevy primary court.

I further order retrial by another magistrate with another set of assessors.

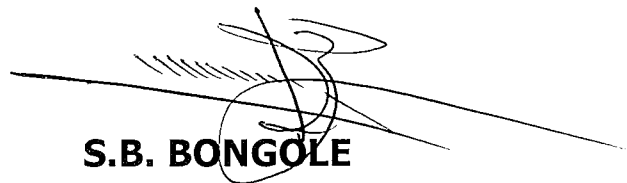


S. B. BONGOLE

JUDGE

28/02/2020

Judgement delivered under my hand and seal of the court in chambers, this 28/02/2020 in the presence the parties.



S.B. BONGOLE

JUDGE

28/02/2020

Right of Appeal is explained.



S.B. BONGOLE

JUDGE

28/02/2020

