

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TANGA DISTRICT REGISTRY**

**AT TANGA**

**PC CRIMINAL APPEAL NO. 9 OF 2019**

**(Appeal from Criminal Case No. 5/2019 at Muheza District Court, Originating  
from Criminal Case No. 92 of 2019 at Mbaramo Primary Court)**

**ATHUMANI MAHEYA..... APPELLANT**

**VERSUS**

**ROBERT SAID.....RESPONDENTS**

**JUDGMENT**

**MRUMA, J.**

The appellant Athumani Maheya was charged before Mbaramo Primary court for Criminal trespass Contrary to Section 299 (a) and (b) of the Penal Code [Cap 16 R.E. 2019]. It was stated by the prosecution that in January 2019, the Appellant having entered on the Land of the Complainant Robert Saidi remained and worked therein by cultivating and harvesting crops therefrom.

After trial the Appellant was found guilty of the charged offence and was sentenced to twelve (12) months conditional discharge. Being aggrieved, the Appellant filed an appeal to the District Court of Muheza which

dismissed his appeal. Still aggrieved, he has appealed to this court and has cited the following grounds in his petition.

1. That the trial Magistrate erred in law and fact for not considering the Appellant's evidence.
2. That the trial Magistrate erred in law and in fact by convicting and sentencing the Appellant on a charge which does not create an offence.
3. That the trial Magistrate erred in law and fact since have basis of probate [sic] and the Appellant is newly appointed administrator.
4. That the trial Magistrate erred in law and fact to give judgment in favour of the Respondent while the said land was first allocated to the appellant mothers.
5. That the Appellant refused to talk about probate at primary court ad appellate court blessed the said decision.

The hearing proceeded inter parties and viva voce.

The appellant argued all five grounds together laying emphasis on ground 1.

Essentially he contended that the whole issue revolved around administration and distribution of the Estate of the late of Stephano Hiza

who was the parties' grandfather. He contended that the trial court erred in treating the case as a Criminal Case while it was a dispute over ownership of a piece of land.

The Appellant further pointed out that he had explained to the trial court how he came into the land but that the trial magistrate did not consider this. He said that he gave evidence to the effect that the land he was alleged to have trespassed belonged to his mother as her share in her deceased father's estate.

Responding to the Appellant's submissions, the Respondent contended that the Appellant's appeal was without any merit.

He said that during the trial he gave evidence to show that the portion of the land which the Appellant trespassed into belonged to her mother who is now deceased and has taken it over from her. The Respondent further stated that the Appellant was charged with Criminal trespass and he cannot base his case on the Administration of the Estate because the said estate had already been distributed to the lawful heirs of the deceased.

I beg to start with the 1<sup>st</sup> ground of the appeal which revolves around evidence adduced during the trial. From the records of the trial court it is clear that the issue of ownership of the land which the Appellant entered

into was resolved in Respondent's favour. This being a Criminal Case, the trial court was entreated to do justice by evaluating the whole evidence and the Appellant's defence. That was done. Let me go into some detail about the evidence that the prosecution and defence led in respect of the charge. PW1 Robert Said testified inter alia that originally the land which the Appellant trespassed into belonged to their grandfather one Stephano Hiza Mhina. After the demise of the said Stephano Hiza Mhina, his estate was distributed to his heirs including the Appellant's and Respondent's mothers.

The Respondent's mother is dead therefore he (i.e. the respondent) inherited his mother's share. The Appellant's mother is still alive therefore she took her share. The distribution of the late Stephano Hiza Mhina's estate was done by the administrator of his estate one Charles Mhina and was endorsed by the court which appointed him to administer that estate – i.e Tanga Urban Primary Court (as shown in exhibit KMA).

Apparently the Appellant was dissatisfied and he continued to occupy and use that portion of land which was given to the Respondent's mother. The Respondent lodged a complaint in the Village Land Council which after hearing them ordered the Appellant to vacate the suit land.

Aggrieved, the Appellant lodged a complaint before Magila Ward Tribunal where he lost. Similarly his appeal to Tanga District Land and Housing Tribunal was not very successfully. The District Land and Housing Tribunal ordered parties to revert back to the first allocation of the land in dispute and in the event there was any dispute the same should be referred to an appropriate forum.

The ruling of the District Land Housing Tribunal (Land Appeal No. 69 of 2016) notwithstanding, the Appellant didn't stop from trespass into the Respondent's land. The respondent instituted Criminal trespass Case No. 252 of 2018 before Mbaramo Primary Court against the Appellant. After a full trial the Appellant was convicted and was sentenced to a conditional discharge and was advised not to commit any criminal offence within the period of conditional discharge lest of which he would be liable for imprisonment in respect of his conviction for the offence he was convicted for. His appeal to the District Court of Muheza (Appeal No. 14 of 2018) was dismissed on 15/08/2018.

Despite his Land Case Appeal No. 69 being not in his favour, and his Criminal Appeal No. 14 of 2018 being dismissed the Appellant continued to trespass into the Respondent's land the act which compelled the

Respondent to institute another Criminal trespass Case no. 92 of 2019 in Mbaramo Primary Court. The Appellant was convicted and his appeal to the District Court (Appeal No. 92 of 2019) was dismissed and hence this appeal.

PW2, Sija Zuberi Mhando the Kitongoji Chairman of Mangachini where the Appellant and Respondent live testified inter alia that in 2015 he witnessed when the administrator of the estate of the late Stephano Hiza Mhina was distributing his estate. He said that in that distribution the land which the Appellant has trespassed into was given to the Respondent because his mother who was entitled to it had already died. The Appellant's mother was given her portion or share of the estate.

PW2, Steven Silvester Mgalawa, the Chairman of the Village Land Council of Mikwamba Village testified inter alia that the land which the Appellant trespassed into belongs to the Respondent.

I revert to a summary of defence evidence. The Appellant denied to have trespassed on the Respondent's land. He raised a defence of alibi saying that on 19/01/2019 when the offence is alleged to have been committed he was away in Korogwe attending a burial ceremony.

○ He also said that he was admitted in hospital on 04/01/2019 and underwent eye surgery on 05/01/2019. He said that since he was discharged from the hospital he had never set foot in the land.

DW2, Blandina James the Appellant's sister testified that the land in dispute belongs to the Respondent's mother and that the Appellant was invited to the land by the children of the Respondent's mother.

DW3, Charles James testified that the Appellant was away on the date he is alleged to have trespassed on to the Respondent's land and that if it were true, the Respondent would have taken his picture and produce it in court as evidence.

This being a second appeal I am not duty bound to subject the evidence to fresh and thorough scrutiny. That is the duty of the first appellate court [see Williamson Diamond Ltd vs Brown (1970) EA.1, it is trite that a Court of Appeal should not interfere with the exercise of discretion of a Magistrate unless it is satisfied that he/she misdirected himself/herself in some matters of facts as a result arrived at a wrong decision.

The trial primary court refused the defence of alibi and held that case against the Appellant was proved beyond reasonable doubt. This position was confirmed by the District Appellate Court.

To begin with the count that faced the Appellant as I said was related to trespass c/s 299 of the Penal Code which state that:

*'Any person who unlawfully enters onto or upon property in the possession of another with intent to commit an offence or intimidate, insult or annoy any person in possession of the property or*

*(b) having lawfully entered into or upon the property unlawfully remains there with intent thereby to intimidate, insult or annoy the person in possession of the property or with intent to commit an offence;*

*is guilty of Criminal trespass and liable to imprisonment for three months.*

*If the property upon which the offence is committed is any building, tent or vessel used as a human dwelling or any building used as a place of workshop or as a place of the custody of property, the offender is liable to imprisonment for one year.'*

I have evaluated the evidence by the prosecution at the trial and decisions of the Village Land Council, the Ward Tribunal and the District Land and Housing Tribunal of Tanga in Land Appeal No. 69 of 2016 and I do find that the issue of ownership was settled first by Tanga Urban Primary Court, and then by the Ward Tribunal of Magila and finally by the District Land



- and Housing Tribunal of Tanga in Land Appeal No. 69 of 2016 which ordered parties to revert back to the first allocation of the land in dispute. Further to that, the District Land and Housing Tribunal advised parties to report any dispute over that land to an appropriate farm. That decision had never been challenged. Thus, according to the first allocation, i.e distribution of the estate of the late Stephano Hiza Mhina, the land the Appellant trespassed onto belongs to the Respondent.
- The Appellant was and still is aware of that position. That notwithstanding, he has been repeatedly trespassing onto that land. He has been charged and convicted twice for the same offence on different dates. On both occasions he was sentenced to a conditional discharge.

I have carefully gone through the evidence adduced during the trial, the Appellant's grounds of appeal and the submission of both parties and the following are my findings. The prosecution (i.e. the complainant) proved his case beyond reasonable doubt. After evaluating the whole evidence it is abundantly clear that the prosecution alluded to the appellant having trespassed onto and remaining on the Respondent's land or farm. Without dwelling so much on issues that were resolved by Civil Suits (i.e. Probate and Administration cause and Land Disputes) the Respondent is

the recognized owner of the land in dispute. Since the Appellant failed to prove ownership (both in Probate and Administration Cause and in Land cases ensued therefrom) but instead went on to cultivate on the land, it makes him a trespasser within the ambit of section 299 (a) and (b) of the Penal Code [Cap 16 R.E. 2019] and therefore was properly convicted.

In light of the foregoing I dismiss grounds of appeal which complains about the trial Magistrates holdings and the appellate District Court's confirmation. I therefore dismiss the appeal in its entirety.

Regarding sentence, I note that the Appellant was sentenced to a condition discharge despite the fact that attention of the court was drawn to the fact that he was a habitual offender. While it is trite that sentences are often dependent on the offence proved, but where the offence is repeatedly committed custodial sentence is more appropriate.

Under section 29.(a) (i) of the Magistrate Courts Act [Cap 11 R.E. 2019] in exercise of its appellate jurisdiction under part III of that law, this court has power substitute and enhance the sentence passed by the trial court. In my view this is a fine case which this court should exercise its discretionally power under the law to intervene and substitute the sentence

passed by the trial court and pass a sentence which is appropriate in the circumstance of the case.

A.R. Mruma

JUDGE

13/11/2020

**Court:** Appellant is given opportunity to explain as to why the conditional discharge sentence not be substituted to a custodial sentence.

A.R. Mruma

JUDGE

13/11/2020

Appellant:

My Lord, currently I am the Administrator of the Estate of the late Stephano Hiza. I was appointed on 12/09/2019 after I complained to the Primary Court of Tanga Urban which removed the 1<sup>st</sup> administrator and appointed me in his place. After my appointment, I redistributed the deceased's estate afresh on 18/10/2019. Thereafter I filed an inventory. The appellant appealed to the District Court in District Court Pc Appeal.

I pray for leniency. I have a sick mother who is sick. I am the Administrator of the estate. I have a wife children and grandchildren who depend on me. I pray for leniency.

COURT: SUBSTITUTION OF THE SENTENCE:

I have heard the Appellant's arguments and grounds as to why this court should not substitute the sentence from conditional discharge sentence imposed by the trial primary court to a custodial sentence for committing the same offence twice notwithstanding his previous conviction.

According to the records of the trial Primary court, he was convicted for the second time on 24/06/2019 three (3) months before he was appointed to administer the estate of the late Stephano Hiza Mhina on 12/09/2019, thus this offence was committed (for the second time) well before he was appointed to administer the said estate. In the circumstances, his appointment cannot save him from the offence he committed before such appointment. That being the case, and as it had not been challenged that the Appellant is a habitual offender, I substitute the sentence 12 months conditional discharged passed by the trial primary

court and instead order that the appellant shall be sent to prison and be imprisoned for a period of six (6) months from the date of this order.

Right of Appeal Explained.



  
A.R. Mruma

JUDGE

13/11/2020