IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC. CRIMINAL APPEAL NO. 26 OF 2019

(Arising from Criminal Appeal No. 09 of 2019 of Misungwi District Court which originated from Criminal Case No. 26 of 2019 of Misungwi Primary Court of Misungwi District)

LUCAS KASATO..... APPELLANT

VERSUS

CHARLES PANTONY ..... 1ST RESPONDENT

SHOMI PANTONY ..... 2ND RESPONDENT

MATHIAS PANTONY..... 3RD RESPONDENT

GABRIEL PANTONY ..... 4TH RESPONDENT

JUDGMENT

30th March & 06th May, 2020.

TIGANGA, J.

Before Misungwi Primary Court, the respondents in this appeal namely **Charles Pantony**, **Shomi Pantony, Mathias Pantony** and **Gabriel Pantony** stood charged with one offence of criminal trespass contrary to section 299 of the Penal Code (Cap 16 RE 2002). The land allegedly to be trespassed into was the property of one **Lucas Kasato**, the appellant, and it is located in Masawe village within Misungwi District. The offence was

alleged to be committed on 08/01/2019 and the activities they were alleged to be doing on that land was is farming.

After full trial, the trial Primary Court, relying on the authority of **Kibwana Mohamed Vs Republic** (1980) TLR 321 acquitted the respondents on the ground that, the land alleged to have been trespassed into, was actually in disputed ownership, therefore being the criminal court, the trial court could not deal with criminal trespass while the dispute over the ownership is still pending.

Aggrieved by the decision of the trial Primary Court, the appellant appealed to the District Court of Misungwi by filing three grounds of appeal, which appeal was also dismissed by upholding the decision of the trial Primary Court.

Still aggrieved, by the decision of the District Court, the appellant filed three grounds of appeal which read as follows:-

1. That the learned District Resident Magistrate erred in law and fact for holding that the Land in dispute is not the one which the appellant won from Mahuma Mashahidi in Land Application No. 122/2009 in the absence of any sufficient evidence to the contrary.
2. That the learned District Resident Magistrate erred in law and fact for upholding the decision of the trial court which did not properly analyse and evaluate the evidence on the record thereby occasioning miscarriage of justice.

3. That the learned District Resident Magistrate erred in law and in fact for failure to convict the respondents whilst the evidence on record was strong enough to warrant conviction.

He prayed the appeal to be allowed, and all the respondents be held liable for criminal trespass and be convicted accordingly. The respondents were served with the petition of appeal and the summons to appear. According to the affidavit sworn and filed by the court process server one S. L. Isangi, they refused the service. Therefore the appeal at hand was argued *exparte* in the absence of the respondents.

At the hearing, the appellant was represented by Mr. Ng'wanzalima Mponeja, learned Advocate who started by informing the court that he would abandon the second ground of appeal and argue only the first and third grounds. In support of appeal, he submitted that, the Land which was trespassed onto was contested for by the appellant in Land Application No. 122/2009 before the District Land and Housing Tribunal for Mwanza in which he was suing the aunt of the respondents one Mahuma Shahid. According to him, the appellant him actually won the case and was handed over the said land by the court broker who was instructed by the tribunal. He submitted further that, these facts were revealed to the trial Primary Court and were proved by exhibit P1, a copy of the judgement.

He submitted further that it was to his surprise that on 08/01/2019 the respondents who are sons of the person defeated by the appellant in Land Application No. 122/2009, trespassed on the Shamba and started farming without justification.

Having found them in the shamba and identified them, the appellant decided to complain against them in the Primary Court, which in its decision did not take into account the evidence he gave in proof of the offence, so was the District Court. He submitted further that the evidence given by the appellant before the trial court proved that it was the same land the appellant won against the respondents' aunt. While the respondents did not give evidence to prove it to be the different land from the one the appellant was referring to.

According to him, the evidence submitted before the trial court proved the case beyond reasonable doubt, therefore the trial court erred to acquit the respondents, and so did the District Court which erred to dismiss the appeal. He prayed in the end that the appeal be allowed and respondents be convicted for criminal trespass.

Now, looking at the two argued grounds of appeal, they are very interrelated, while in the first ground the complaint is that, the District Court erred in its judgement when it found that the farm on which the respondents are alleged to have trespassed in this case, is not the one which the appellant won in Land Application No. 122/2009 while there is no evidence to the contrary. In the third ground, the appellant complains of the failure of the trial court to convict the respondents whilst the evidence on record was strong enough to warrant conviction. Generally, these two grounds raise a general complaint that the complainant submitted strong evidence, and actually proved the case at the required standard but the court shut its eyes on the evidence and found otherwise. Looking at these grounds, I find that

it is best, for easy flow of ideas in this judgment, to deal with both grounds of appeal all together.

In so doing, I find it imperative to point out the law which provides for the principle of burden and standard of proof in criminal cases, as applicable in the primary court. This is because it is only where the complainant has proved the case at the required standard, he can justly complain against the decision.

The Magistrates' courts (Rules of Evidence in Primary Court) Regulations GN No. 22 of 1964 and 66 of 1972 provides in regulation 1 (1) that;

> *"Where a person is accused of an offence, the complainant must prove ail the facts which constitute the offence unless the accused admits the offence and pleads guilty".*

Regarding the weight of evidence, regulation 5 (1) (2) of the same regulations sets a standard and makes it a requirement for the court to abide, it provides that;

> *"5 (1) In criminal cases the court must be satisfied beyond reasonable doubt that the accused person committed the offence.*
>
> *(2) If at the end of the case the court is not satisfied that the facts in issue have been*

proved the court must acquit the accused person"

Regulation 7 of the same regulation further provides as follows:-

> *"In deciding all cases the court must confine itself to the facts which are* ***proved*** *in the case and the matters it is deemed to know or may presume under rule 3 and 4. A court must not take into account any fact relating to the case which it hears of out of court except facts learnt in the presence of the parties during a proper visit to any land or property concerned in the case"*

From the phraseology of these provisions it is obvious that the appellant, was supposed at the trial to prove all the facts which constitutes the offence of Criminal trespass.

Now section 299 of the Penal Code requires a complainant to prove the followings;

i. That the complainants owns or possesses the land,
ii. That the accused person entered in that land of the complainant with intent to commit an offence or intimidate, insult or annoy any person in possession of the property, or
iii. Having entered there remained there for the same purpose.

The issue is whether the appellant proved these important elements?

Looking at the evidence, the appellant merely alleged that he was the owner of the said land because he won Land Application No. 122/2009, and

was handed over the land by the court broker in execution of the decree of the District Land and Housing Tribunal. Looking at the proceedings, it has not been shown in the proceedings that, the appellant tendered the copy of judgment of Land Application No. 122/2009 to prove that he won the said case and was actually handed over the said farm land.

There is, in the case file, a bundle of photocopy documents which includes the judgement, which were not tendered and admitted as exhibits, but are filed in the case file. In the judgments of both the trial and appellate District Court, these documents were referred and actually relied upon. In my opinion, it was wrong for the two courts to make reference to the said documents, without first being tendered and admitted in evidence, they cannot be taken to have formed part of the record of the case. See the case **Semeni Mgonela Chiwanza Vs The Republic** Crim. Appeal No. 49 of 2019 CAT- Dodoma (Unreported). Being not part of the record of the case, they could not be referred, and relied upon in the judgments. Using them, is going against the provision of regulation 7 of the regulations cited above, as the documents (including the judgment subject of the discussion) were not **proved** before the court, before they were used to found the decision of the court. That said, the appellant cannot be taken to have proved the case, and that also goes far and taint even the judgements of both lower courts for referring and using the evidence which was not part of the record.

The procedure in a case where a party wants to tender the exhibit is that, the witness so intending to tender the said exhibits must ask to tender the exhibit, the opposite party be asked to respond, then the court make findings of whether to admit it or not. That should be reflected in the

proceedings before the court has relied on the said exhibits. In this case at trial, the record does not reflect such a procedure to be followed. It may be possible that the appellant tendered the documents for admission by the court, but that is not reflected in the proceedings as required.

That being the case, I find no merit in both grounds of appeal, I find the appellant to have failed to prove the case beyond reasonable doubt, that the land was his. Also as the second and third ingredients of the offence are dependent to the first ingredient and since the first ingredient was not proved, then the second and third ingredients cannot in any way be taken to be proved.

Ordinarily this case would have ended here, however, my findings that the decisions of the trial court and of the appellate court based on the evidence not admitted in court, taints the said judgements, and therefore I am forced makes me to take one more step ahead. As there is such irregularities, this court, being the supervisor of the subordinate courts under section 30 of the Magistrates' Courts Act (Cap 11 R.E 2002), invokes the powers under the said section 30 of the MCA (supra), and revise the proceedings of the Primary and District courts, quash the proceedings and decisions of both courts and order the case to be tried a fresh before the Primary Court by another magistrate with competent jurisdiction and a new set of assessors. The records be returned to the subordinate courts for compliance with this order. It is so ordered.

DATED at MWANZA, this 6th day of May 2020

J. C. TIGANGA
JUDGE
6/5/2020

Judgement delivered in open chambers in the absence of the parties with notice and reason.

J. C. TIGANGA
JUDGE
6/5/2020