IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 265 OF 2020

(Originating from the decision of Kilosa District Court in Criminal Case No 187 0f 2019, dated 6th October 2020)

JUMA MIRAJI MUHOMBLAGE.....1ST APPELANT

ATHUMANI HAMISI KIBWANA.....2ND APPPELLANT

ASHURA HAMISI KIBWANA.....3RD APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order:17/09/2021
Date of Judgment: 29/10/2021

NGWEMBE J.

This appeal is against conviction and sentence entered by the District Court of Kilosa. The appellants were found guilty for an offence of criminal trespass contrary to section 299 (a) Penal Code Cap 16 [R.E 2019] subsequently were sentenced to conditional discharge to the effect that they should not commit any criminal offence within three months.

The genesis of this appeal traces back to 27th December, 2018 at around 0900 hours at Manzese B area, within Kilosa District in Morogoro Region, the appellants were alleged to have unlawfully entered into and dug four

acres of farm land owned by Nassib Yusuph Madurufu without his permit. Thus, were charged and tried for criminal trespass in a court of law. At the end, they were found guilty of the offence as charged. Further, they were ordered to pay compensation on the loss of income (if any) which would have been obtained by the complainant if he used that land for income purpose.

However, the appellants were aggrieved by that conviction and sentence, hence this appeal armed with nine grounds, which are recapped hereunder:-

(1) The trial court erred in law for entertaining the offence, which it had no jurisdiction to try, criminal trespass is triable by the Primary Court;

(2) That the trial court erred in law by failing to analyse the evidence on record;

(3) That the trial magistrate erred in law and in fact by convicting the appellants while the offence, criminal trespass, was not proved beyond reasonable doubt, as the claimant (Nassib Yusuph Madurufuu) failed to prove his ownership on the trespassed land. There was no evidence on the appellants' intention to commit an offence thereon or intimidate, insult or annoy the complainant;

(4) The trial Magistrate erred in law and fact for proceeding to entertain the matter while there was evidence that there is a land dispute on the ownership of the trespassed land;

(5) That the trial court erred in law and fact for convicting the appellants while the boundaries of the trespassed land were uncertain not indicated and unknown;

(6) That, the trial court erred in law and fact for convicting the appellants basing on the decision on land disputes without taking into consideration that the 1st and 3rd appellants were not parties, and the disputed land was different from trespassed land;

(7) That, the trial court erred in law and fact by rejecting the 1st appellants (DW 1) defence of alibi on the ground that he did not give notice while the notice was given during preliminary hearing;

(8) That, the trial Magistrate erred in law and in fact by ordering the appellants to compensate the complainant while there was no evidence to such effect, and alleged offence took place within one minute at 0900 on 27th December, 2018; and

(9) That, the trial court erred in law by turning itself into the land Tribunal and giving orders which had no mandate to grant.

At the end of those grounds of appeal, they proceeded to pray that, the appeal be allowed, quash the conviction and set aside the sentence.

On the hearing of this appeal, the appellants appeared in persons, while the Republic was represented by Mwanaamina Kombakono Senior State Attorney. In turn both parties agreed to dispose of this appeal by way of written submissions, which prayer was granted and both industriously argued the appeal with useful precedents. This court appreciates their inputs. In the cause of arguing the appeal, the appellants abandoned ground 9 and combined grounds 4 and 6 together. Other grounds were argued separately.

It is also important to take note that throughout, the appellants were not represented, but in their written submission, same indicates that they engaged an advocate Anold katunzi to draft their written submission.

Submitting on the first ground of appeal, the appellants argued that, as per part I of the first schedule to the Magistrate Court Act, it is only the Primary Court, which is empowered to try an offence of criminal trespass, hence it was not proper for the said offence to be tried by the District Court. Added rightly that any trial conducted by a court lacking jurisdiction is nullity. To support their argument, they referred this court to the case of **Melisho Sindiko Vs. Julius Kaaya (1977) LRT No. 18.** Thus prayed this court to nullify the trial court's judgement.

In turn the learned senior State Attorney replied that, the challenges on jurisdiction of the trial court based on Part 1 of the first schedule to Magistrate Courts Act Cap 111 of 2019, is irrelevant and immaterial for the provision does not confer exclusive jurisdiction to the Primary Court, rather the same jurisdiction may be exercised by either Primary Court or other courts subordinate to the High Court.

Further referred this court to part 5 of the first schedule to the Criminal Procedure Act Cap 20 R.E 2019, whereby the jurisdiction of the court to try criminal trespass is vested to subordinate courts, in which subordinate courts includes District Court.

Argued further by referring this court to section 40 (1) of the Magistrate Courts Act, Cap 11 R.E 2019, which confer jurisdiction to the District

Court to determine cases of criminal nature at the first instance. Thus, rested by inviting this court to dismiss this ground forthwith.

In brief rejoinder, the appellants reiterated their submission in chief, and maintained that; part 5 of the first Schedule to the CPA Cap 20 R.E 2019 is triable by a subordinate court, such alone does not confer jurisdiction directly to the District Court, as subordinate courts include Primary Court, District Court and Resident Magistrate Court.

After passing through the rival arguments of the learned advocates, this ground is purely based on legal interpretation of provisions of law. I fully agree with the understanding of the learned senior State Attorney. On 1st schedule to the Magistrate Courts Act (CMA) that, the jurisdiction of Primary Court to try some of the offences under the provisions of Penal Code are not exclusive to other subordinate courts. Section 40 (1) of the MCA Cap 11 R.E 2019 is quoted hereunder for easy of reference:-

> *Section 40 (1) A district court shall have and exercise original jurisdiction:-*
>
> *(a) in all proceedings of a criminal nature in respect of which jurisdiction conferred on a district court by any such law for the time being in force;*

Notably, it is elementary principles of law that, issues of jurisdiction of any court is primary and is provided for by enabling provisions of law. Moreover, parties can never confer jurisdiction to any court of law if it does not have. Therefore, the issue of jurisdiction to hear criminal trespass is conferred to any subordinate court to the High Court,

meaning any court, be it Primary, District or Resident Magistrate Courts. Accordingly, this ground is baseless same lacks merits.

On the second ground of appeal the appellants contended that, the evidence on record were not properly analysed by the trial Court. According to them, the judgement was not based on applicable law and facts as required by law.

Appellants further argued that, the decision of the trial court was based on weaknesses of the appellants' defence as if the burden to prove the case was on their side. Therefore, referred this court to section 3 (2) (a) of the Evidence Act, Cap 6 R.E 2019. Rightly pointed that to prove criminal case against the accused is always on the shoulders of the prosecution to the standard required by law, which is beyond reasonable doubt.

In response therein the learned senior State Attorney submitted that, section 312 of the CPA provides what should be contained in the judgment, which are the points for determination. She referred this court to pages 3, 4 and 5 of the trial court's judgment, where the trial magistrate analysed all relevant evidences of both sides and proceeded thereof to give decision and reasons for such decision. She maintained that the trial magistrate was able to show how the case was proved by the prosecution beyond reasonable doubt.

I find this ground should not waste much of the precious time of this court. Undoubtedly, criminal trespass once alleged, obvious the following issue, the complainant must establish and prove ownership of the trespassed land. In respect to this appeal the documents speak

louder that the prosecution proved that the trespassed land belongs to the complainant. That's is why in the trial court's judgment, the trial Magistrate referred into several useful documents tendered by the prosecution, to prove ownership. Therefore, the evidence on record leaves no doubt, the prosecution dutifully performed their duty in proving ownership of the trespassed land.

Concerning the allegations of failure to prove the accusations beyond reasonable doubt, it is I think a settled law in our jurisdiction that, in criminal law, guilty of the accused is never gauged on the weakness of his defence, rather on the strength of the prosecution case. In this appeal, the record speaks louder that, prosecution proved all elements of trespass, that is; appellants unlawfully entered into the properties of the complainant and cultivated the same with intention to annoy the complainant. I therefore, find this ground likewise follow the same trend of being baseless.

With regard to the third (3) ground of appeal, appellants submitted that, the offence of criminal trespass as per section 299 (a) of the Penal Code Cap 16 R.E 2019 must be proved beyond reasonable doubt. Rightly pointed that, there must be evidence/elements on the unlawful entrance into the suit land or property, such property must be in possession of another (complainant), and there must be intention to commit an offence there on or intimidate, insult or annoy the person in possession of that property.

According to them, the issue of unlawful entrance was not proved beyond reasonable doubt as the appellants were able to show that they

were using that land as their own land being inherited from the late **SONGANYA FARAHANI**, whose estate is administered by the 1st appellant. Therefore, the entrance to that land was lawful.

On the issue of ownership of the said land, the appellant contended that, one **Nasibu Yusuph Madurufu**, initiated the proceedings in personal capacity, while prosecution witnesses proved that the said land belong to Amina Ally. The appellant contended that, the prosecution failed to prove ownership of that land by the complainant.

Replying on this ground, the respondent contended that, the case was proved beyond reasonable doubt. Accordingly, Pw1 tendered before the trial court the judgment by the High Court Land Division, Land Appeal No 98/2014, which held that Amin Ally was the rightful owner of the said land. Further they tendered before trial court a letter of appointment as an administrator by Manzese Primary Court of the estate of the deceased Amina Ally, which included the disputed land. Those exhibits were not objected by the appellants herein, thus were admitted in court to form part of the prosecution evidence. As such the complainant proved to be the rightful owner of the said land.

Arguing on whether the appellants intended to commit the offence on the land, responded that in fact the prosecution did not only intend, but they committed the offence of trespassing and cultivating four (4) acres on the complainant without permission.

It is a common ground that; Amina Ally was declared the lawful owner of the disputed land by the legally constituted High Court of Tanzania and no one dared to appeal against it, thus binds everyone including all

appellants. Since the issue of ownership was settled by the High Court of Tanzania, same cannot be a ground of dispute in any court of law. In case the appellants consider that the trespassed land is not the same which belong to the complainant, obvious they ought to prove that fact by producing evidences indicating that differences. More so, that proof cannot be done in a Criminal Case but in a land case. Since they failed to do so in the cited land dispute, same cannot be a ground in this appeal.

On grounds 4 and 6, the appellants argued that, the disputed land is their property since they have been using the same for many years peacefully. According to them, on 20th August, 2018 the 1st Appellant in his administrative capacity as an administrator of the estate of the late Songanya Farahani distributed that land to all heirs who were present, including the 2nd and 3rd appellant, except the late Amina Ally whose estate is administered by the complainant.
Further submitted that, the distribution was done after the complainant started to complain that the whole land of the late Songanya Farahani belong to himself.

In their views, the trial court relied on different judgments, which were decided in favour of the late Amina Ally in the suit against 2nd Appellant, but unfortunate the same did not say on how the said judgment bind the 1st and 3rd appellants and did not ascertain on whether the land in dispute is the same which was trespassed.

In response, the respondent contended that, the High Court settled the dispute by holding Amina Ally as rightful owner of the said land and

appellants did not show any intention of appealing against it. She further submitted that, though the judgment does not indicate boundaries the same is not fatal. It is curable under section 388 of Criminal Procedure Act Cap 20 R.E 2019 since it does not lead to the miscarriage of justice.

Going by the facts adduced during trial, which is reflected in page 5 of the impugned judgment, expresses clearly that, the appellants claimed that, the said land is theirs and they were cultivating it. Such claim is purely an afterthought, since the same was not raised during trial. Considering on the appellants' allegations that, prosecution did not indicate the boundaries of the trespassed land, but the record is very clear that, the issue in the trial court was not land dispute, but was a criminal trespass to the complainant's land. The record further reveals that, the appellants were aware of the High Court judgement on the ownership of the suit land, but they decided to annoy the complainant by cultivating that land. In the light of the above reasoning, it follows therefore that, this ground is unfounded and the same is equally dismissed.

Arguing on the 5th ground of appeal, the appellant submitted that, the judgment and the proceedings of the trial court is silent on the boundaries of the trespassed land. Instead, it is indicated that, the same is measured as four (4) acres located at Manzese Kilosa District in Morogoro Region. According to the appellants, since the trespassed land is not surveyed land, the prosecution ought to have indicated the boundaries at that land including neighbours, or object or structures along the trespassed land from East, North, West to South.

In reply to this ground, the learned senior State Attorney submitted while answering ground 4 that, failure to indicate boundaries is not fatal. This ground is a replica of the above ground which I have already decided. I need not to repeat it what I have already decided.

With regard to ground 7, the appellants argued that, the trial court denied the defence of Alibi by the 1st appellant on the ground that he did not give notice prior to the hearing date. Submitted that the law is silence on how that notice should be issued to the court. Contended further that, the 1st accused person denied to have been on crime scene from the preliminary stages of trial and that ought to operate as a notice of alibi.

In rebuttal, the respondent argued quite forcefully that, the trial magistrate was right in denying the defence of alibi, since it was not raised in accordance to the requirement of the law. The law requires the accused person to give notice to the court and the prosecution on his intention to use and rely on defence of alibi before the hearing date commences as provided for under section 194 (4) (5) and (6) of Criminal Procedure Act Cap 20 R.E 2019.

However, the appellant neither notified the court and prosecution before hearing nor did he furnish the court after the closure of prosecution case on his intention to rely on the defence of alibi. The major allegation that he was not present at the scene of the crime does not mean that the accused intended to rely on such evidence. The law requires proper and clear notice to that effect.

I think this ground is one which our laws and numerous court judgements have dealt with. Section 194 (4), (5) and (6) of Criminal Procedure Act Cap 20 R.E. 2019 is quoted herein for ease of reference:-

> Section 194 (4) *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.*
>
> *(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish case for the prosecution is closed.*
>
> *(6) Where the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence".*

The above provisions communicate clearly that, if the accused fails to give notice, it is the court's discretion to disregard the same. Going by the facts of this case during trial, it is clear that the accused did not properly give notice to rely on the defence of alibi.

As properly submitted by the learned senior State Attorney, the fact that 1st appellant denied to have been at the scene of crime does not mean that, he issued notice of his intention to rely on the defence of Alibi. Thus, the trial court was correct to disregard the defence of alibi.

With regard to ground 8 of appeal, the appellants contended that, the trial court ordered the appellants to compensate the complainant

without any evidence that complainant suffered loss. And that the said offence took place within 1 minute at 0900 hrs on 27th December, 2018. Responding to this ground of appeal the Republic replied that, the law is very clear under section 348 (1) of CPA that the court is at the discretion to order compensation to any party suffered loss.

The issue of compensation is a valid point of appeal bearing in mind that the trial court was not specific on what should be compensated and how much, if any. The impugned judgement at page 7 had this to say:-

> *"I also order them to pay compensation on the loss of income (if any) which would have been obtained by the complainant if he used that land for income purpose"*

Such order is unclear, ambiguous and confusing, because the trial court gave mandate to the complainant to determine, if he suffered any income, he may demand compensation from the appellants. I think rules of procedure requires a court judgement should be clear, direct and capable of being executed.

Nevertheless, the evidence was not clear as for how long did the accused cultivated that piece of land and the extent of loss occurred. It was also not clear on the extent of compensation awarded to the complainant. Hence, this order was ambiguous, unclear, and irregular. Accordingly, this ground is upheld.

In the cumulative effect of what I have stated above I can safely conclude that, this appeal is allowed in respect to ground 8 only, the rest are dismissed forthwith and this court proceed to uphold the decision of the trial court.

Order accordingly.

Dated at Dar es Salaam this 29th October, 2021

NGWEMBE J
JUDGE
29/10/2021

Judgment delivered on 29th October, 2021 in the presence of the appellants and Edgar Bantulaki State Attorney for the Republic/respondent

Right of appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

NGWEMBE J,
JUDGE
17/06/2021

Order accordingly.

Dated at Dar es Salaam this 29th October, 2021

NGWEMBE J
JUDGE
29/10/2021

Judgment delivered on 29th October, 2021 in the presence of the appellants and Edgar Bantulaki State Attorney for the Republic/respondent

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