

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 32 OF 2021

**(Arising from Criminal Case No. 19 of 2020 of the Resident Magistrate Court
of Mtwara at Mtwara)**

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

1. ESHA ABDALLAH KOMBO.....1ST RESPONDENT

2. HASSAN BASHA NJANGALE.....2ND RESPONDENT

JUDGMENT

6 Oct. & 8th Nov., 2021

DYANSOBERA, J:

In the Resident Magistrate's Court of Mtwara Region, the respondents herein were acquitted in Criminal Case No. 19 of 2020 on two counts of criminal trespass contrary to Section 299 (a) and (b) (1st count) and disobedience of lawful order contrary to section 124 (2nd count) both of the Penal Code [CAP. 16 R.E.2019].

The Director of Public Prosecutions was dissatisfied with that decision, hence this appeal. According to the petition of appeal filed on 19th March, 2021, the following complaint has been raised:-

1. That the Honourable trial Magistrate erred in law and fact for failure to properly evaluate the prosecution evidence.

The prosecution case was, briefly, the following. Salim Issa Hatakiwi (PW 1) is the owner of the disputed land but which was trespassed into by the two respondents. His efforts to stop them from using the land proved futile. He then successfully filed Civil Case No. 10 of 2017 before Madimba Ward Tribunal against the 1st respondent. As the 1st respondent and her husband, 2nd respondent could not give vacant possession of the premises; PW 1 took the matter to the District Land and Housing Tribunal for execution of the decree of the said Ward Tribunal. He filed Misc. Application No.6 of 2018 (exhibit P1). The application for execution was granted as per the drawn (exhibit P 2) and eviction order (exhibit P 3) issued. Despite PW 1 employing the Yono Auction Mart to execute the decree, the respondents refused to give vacant possession.

Seeing this, PW 1 reported the matter to the police authorities who decided to institute Criminal Case No. 19 of 2020 against the two respondents. This evidence was supported by the Chairperson of the Ward Tribunal one Hussein Ismail Lukeha (PW 2) and the Secretary to the Madimba Ward Tribunal one Abdallah Issa Abdallah (PW 3). PW 3, in addition to his oral testimony, produced a copy of proceedings before the Madimba Ward Tribunal (exhibit P 4).

In her defence, the 1st respondent Esha Abdallah Kombo told the trial court that the farm in dispute was being used by their son one Issa Hassan Basha who went

missing during the reign of President Mkapá. That the 1st respondent began servicing the farm but was surprised to be charged in court. The 1st respondent admitted to have been sued before Madimba Ward Tribunal but denied to have been ordered to give vacant possession. She asserted that she and her husband, the 2nd respondent have been servicing it. The 2nd respondent Hassan Basha Njagale supported what the entire 1st respondent stated.

In his judgment delivered on 14th day of December, 2020, the learned trial Resident Magistrate acquitted the respondents of both two counts. He supported his finding by questioning the validity of the cases/records of before the Ward Tribunal and Mtwara District Land and Housing Tribunal. He reasoned that the 1st respondent was not properly served to appear before the Ward Tribunal and the suit was heard ex parte. Additionally, the 2nd respondent was wrongly charged in a criminal case as he was not sued before Madimba Ward Tribunal.

At the hearing of this appeal, the appellant was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney while the respondents defended the appeal on their own.

Supporting the appeal, the learned Senior State Attorney submitted that the main allegations were that the two respondents had been sued by Salim Issa Hatakiwi before the Ward Tribunal at Madimba. In that case, the decision was given in their disfavour. The respondents did not appeal against the decision; Salim Issa Hatakiwi

decided to execute the decision decree in Mtwara District Land and Housing Tribunal. Hussein Ismail Lukeha granted the application for execution ordering the respondents to give vacant possession of the suit premises. The order was not challenged. The respondents failed to give vacant possession and obey the order of Tribunal. At the trial PW1 Salum Issa Hatakiwi proved how he executed the order of the Court/ Tribunal and the respondents did not appeal. Mr. Ndunguru complained that the lower court failed to evaluate the evidence, instead challenged the legality of the ownership. In his view, that went beyond his powers as the issue of ownership had already been settled. He cited the case of **Sylvester Nkaanga V. Republic Alberto** [1992] TLR is a case in point. He contended that the trial magistrate also reviewed the evidence in the land case which had already been determined and the complainant was in the process of executing the decree. According to him, since the issue was not on ownership, there was misdirection on part of the trial court. He prayed this court to quash and set aside the acquittal of respondents and other orders as the Court may deem appropriate.

The respondents' response was that they did not commit the offence. The 2nd respondent denied to have been called at the Tribunal at Madimba. We were not called at the Ward Tribunal at Madimba. He asserted that he was the second accused while his wife was the 1st accused at Mtwara. He asserted that no decision was given against us and that the farm belonged to their son who is nowhere to be seen and has no child.

In a short rejoinder, Mr. Ndunguru insisted that the lower Tribunal gave decisions against respondents who were ordered to vacate but they have refused to give vacant possession. He pressed that Court's orders have to be obeyed and respected.

I have gone through the records of the lower Tribunals, the grounds of appeal and the submission, particularly that of the learned Senior State Attorney. It is the established principle of law that where ownership of land has already been determined, then any encroachment thereto attracts a charge of criminal trespass. This legal position was elaborated by the Court of Appeal of Tanzania in the case of **Simon Mapurisa v. Gasper Mahuya**: Criminal Appeal No. 221 of 2006 (unreported) where at p. 9 observed:

"...disputed ownership of land is not resolved in criminal proceedings. The law on that issue is that where there is a dispute regarding boundaries of adjacent private land or the ownership of a part of the whole of adjacent land, such dispute is resolved in a civil court. From then onwards, encroachment onto the land of the other could be trespass and a criminal charge can be brought against the offending party.

This is the law and I am bound to follow it.

In the case under considering the Ward Tribunal at Madimba had in Civil Case No. 10 of 2017 had already determined ownership of the disputed land. The decree holder Salim Issa Hatakiwi sought to execute the decree and made an application for

execution. The application was granted and eviction order issued. The respondents defied the order. There is no appeal against that order. The execution order must be complied with.

The Court of Appeal in the case of the **General Manager KCU (1990) LTLD v. Mbatama Rural Primary Cooperative Society, BKB**, and Civil Application No. 1 of 1999 at Mwanza underscored this legal position when it held:

“...the execution order, although its correctness might be questionable remains a court order unless and until appropriate steps have been taken to set it aside if it is in fact defective. So far no such steps have been taken and so these proceedings have to proceed on the basis of it”

I accept the argument by the learned Senior State Attorney that the trial Resident Magistrate went beyond his powers when he questioned the validity of the Tribunals’ decision. In the first place, the issue of ownership had already been settled by Madimba Ward Tribunal in Civil Case No. 17 of 2017 as evidenced by exhibit P 4.

Second, it was improper for the Resident Magistrate to review the evidence which was produced before the Ward Tribunal as he was not sitting as an appellate court. His duty was only to determine, by evidence and the law, whether the charged offences were proved to the hilt. A case in point is that of **Sylvester Nkaanga V. Republic Alberto** [1992] TLR is a case in point. He contended that the trial magistrate also reviewed the evidence in the land case which had already been

determined and the complainant was in the process of executing the decree. According to him, since the issue was not on ownership, there was misdirection on part of the trial court. I should remind the Hon. Chairman to adhere to the wisdom of this Court in the case of **Zuliat Sued v. Issack Issa and 2 others**, High Court Reference Non. 2 of 1997 when it remarked:-

“Every judgement, whether obtained by fraud or given without jurisdiction, **remains effective and binding** and is capable of execution, until it is reversed by a higher court”

Third, it was against the law and reason for the respondents to defy orders of the Tribunals. That constituted a contempt of court envisaged under section 124 of the Penal Code.

The importance of implementing and complying with court orders was emphasized by this court in the case of **Olam Tanzania Ltd v. Halawa Kwilabya**, DC Civil Appeal No. 17 of 1999 where it observed *inter alia* that:-

‘Court orders are made in order to be implemented; they must be obeyed. If orders made by Courts are disregarded or if they are ignored, the system of Justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them’.

That said, the presence of a civil judgment establishing ownership of the farm in dispute and the absence of respondents’ claim of right to the disputed land coupled

with their refusal to obey the orders of both the District Land and Housing Tribunal and the Ward Tribunal implicated the respondents on both counts with which they stood charged. For those reasons, I am satisfied that the case against the respondents was proved beyond reasonable doubt.

The appeal is allowed, the acquittal of the respondents is set aside. The respondents are convicted of both criminal trespass under section 299 (a) of the Penal Code [CAP 16 R.E.2019] and disobedience of lawful order contrary to section 124 of the same Code.



W.P. Dyansobera

Judge

8.11.2021

Antecedents

Mr. Wilbroad Ndunguru:

My Lord, the respondents are first offenders but we pray the court to make sure that its orders are obeyed and implemented and the decree holder gets his rights decreed by the court.

Mitigation:

1st respondent:

The decision of the Madimba Ward Tribunal was not right

2nd respondent:

The piece of land does not belong to the complainant.

SENTENCE

Having considered both the mitigating factors and antecedents, I sentence the 1st and 2nd respondents to a fine of Tshs. 80,000/= each in the first count of trespass c/s 299 (a) of the Penal Code, in default of payment of the fine, to two (2) months term of imprisonment.

Further, the 1st and 2nd respondents are each sentenced in the second count of disobedience of lawful orders to a fine of Tshs. 200, 000/= or in default of payment of the fine, to four (4) months term of imprisonment.

The sentences to run consecutively.

Rights of appeal are explained.




W.P.Dyansobera

Judge

8.11.2021

Judgment has been delivered this 8th day of November, 2021 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney for the appellant and in the presence of both respondents.


W.P.Dyansobera

Judge

