

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**PC. CRIMINAL APPEAL NO. 6 OF 2022**

*(Arising from Mbinga District Court in Criminal Case No. 18/2021 which originated from Criminal Case No. 84 of 2021 before Mkumbi Primary Court)*

**DEBORA KAPINGA.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**EMMAKULATA NCHIMBI..... RESPONDENT**

**JUDGEMENT**

24.06.2022 & 18.07.2022

**U. E. Madeha, J.**

The Appellants herein were charged of criminal trespass contrary to section 299(a) of the Penal Code Cap 16 R.E. 2019 before the Primary Court of Mkumbi at Mbinga. At the end of the trial, both of them were found guilty and sentenced to pay a fine of a number of Tanzanian shillings ninety thousand (90,000) in default to serve four (04) months in prison.

Subsequently, the Appellants became dissatisfied with the decision of Mkumbi Primary Court and thus filed an appeal at Mbinga District Court. On the same note, the District Court dismissed the Appellants' appeal. Hence,

they preferred this second appeal relying on three (03) grounds of complaints. For easy reference. I have reproduced them as follows:

- 1. That, the appellate Court erred in law and in fact when it upheld the decision of the primary Court without justification for doing so.*
- 2. That, the appellate Court erred in law when it failed to take into account the Appellant's evidence during the hearing at the Primary Court that in the said land there is a dispute between the Respondent and the Appellant's witnesses who testified that he gave the said land to the Respondent.*
- 3. That, the appellate Court erred in law and in fact decided the matter as a criminal trespass while there was a dispute between the Appellant and the Respondent over the land which was alleged to be criminal trespass by the Appellant.*

In view of the grounds of appeal raised and submissions made from both sides, I am of the opinion that the burning issue in this appeal is whether the charge of criminal trespass was proved beyond reasonable doubt.

The Appellant explained in her testimony that the area or piece of land belonged to her. That it was given to her by her paternal uncle known as Tanesco because his daughter worked as a brick maker. On his side, the Respondent testified before the Primary Court that, the area was invaded by the Appellant who claimed the same to be his property. Hence, contrary to the judgement of the tribunal which declared the Respondent as the owner of the property.

It was further alleged that on 26<sup>th</sup> day of July 2021 the Appellants went to invade the Respondent's area by making bricks therein. That, such act was against the landowner's order which required the Appellants to vacate the Respondent's premises. On the same note, having been dissatisfied with the decision made at the District Court of Mbinga he, therefore, filed this appeal.

At the hearing of the appeal, the Appellants were represented by the learned advocate Mr. Geofly Sanga. Similarly, the Respondent enjoyed the services of the learned advocate Mr. Frank Kapinga.

Mr. Geofly Sanga submitted that the District Court of Mbinga erred in law and fact when it upheld the decision of the Primary Court without

considering the evidence tendered at the Primary Court. He highlighted that for the charge of criminal trespass, there is a need to prove actus reus and men's rea. Consequently, when perusing the records of the Primary Court he realized that men's rea was not proved. He contended that the Appellant was given that particular area by Tanesco Kapinga to build the house. That, Tanesco Kapinga testified before the Primary Court that he owned the title deed over the disputed land and had bequeathed it as a gift to the Appellant. Moreover, the Counsel insisted that the disputed piece of land was the property of the Appellant's brother who had paid her legally. Above all, he added that in order to establish criminal trespass, the legal owner of the disputed land must initially be identified. The Counsel emphasized that it was not appropriate for the Respondent to invade that particular piece of land by way of criminal trespass. On that note, he claimed that the land was owned by Tanesco Kapinga. Ultimately, he prayed that this Court to allow the appeal and other reliefs which it deem fit and just to grant.

On the contrary, Mr. Frank Kapinga submitted that the men's rea was established because the Appellant trespassed on the Respondent's land. Apart from that, he argued that there is no evidence to prove that the Appellant's paternal uncle Mr. Tanesco Kapinga gave that piece of land to

the Appellant. Exclusively, the counsel refuted that the Primary Court has jurisdiction to entertain this matter because it was already determined by the tribunal as a land case. Moreover, he contended that the matter which was in the Primary Court records was not the disputed land but trespass to the Respondent's land. Lastly, he prayed that this appeal be dismissed and the decision of the District and Primary Court be upheld. In his brief rejoinder submission, Mr. Geofly Sangary submitted that the Appellant was given the land by his father called Mr. Tanesco Kapinga.

My examination of the evidence as presented in the Primary Court has revealed that there was sufficient evidence warranting the Appellant's conviction on the offence of criminal trespass since it is evident from the record that the disputed land is owned by the Respondent wherein the Appellants intruded therein by proceeding to produce bricks.

It was the Appellants' advocate who submitted that the Respondent did not own the landed property; that he was given the same as a gift by his father, called Tanesco Kapinga. Again, the Appellant's advocate emphasized that this case should be filed in the land Tribunal so as to determine ownership of the same. On the other side, the Respondent's side claims that the land which the Appellant entered belongs to him. However, the

Appellants did not deny that the Respondent had already filed a land dispute with the Ward Tribunal whereby he was declared the rightful owner of the disputed land.

The law on criminal trespass is explicit as expounded in innumerable Court decisions. For instance, in the case of **Nkanga v Albertho** [1992], TRL 110 (HC), it was observed that:

*"A charge of criminal trespass cannot succeed where the matter involves land in a dispute whose ownership has not been finally determined by a civil suit in a court of law."*

We gather from the above exposition of the law that where in a criminal trespass a dispute arises as to ownership then the land dispute must first be resolved. Consequently, when the ownership of the land is determined then one might sue for a criminal trespass and claim compensation.

In this case, ownership of the disputed land is not at issue as the same was determined by the Ward Tribunal where through its judgement, it declared the Respondent to be the lawful owner of the disputed land. Principally, even if the Appellants noticed that the land was determined to

be the property of the Respondent, they ought to have filed an appeal to the District Land and Housing Tribunal so as to challenge the said decision instead of unlawfully interfering with the land. Under this premise, it cannot be said that the matter was civil in that there was an ongoing dispute between the parties hence the Primary Court had no jurisdiction to deal with the matter. It is my settled opinion that the District Court was justified to uphold the Primary Court conviction.

In the upshot, I hereby uphold the decision of the District Court on the Appellant's conviction. Accordingly, this appeal is dismissed to the extent indicated herein. It is so ordered.

**DATED** and **DELIVERED** at **SONGEA** this 18<sup>h</sup> day of **July** 2022.



**U. E. MADEHA**

**Judge**

**18/07/2022**

