

IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

PC. CRIMINAL APPEAL NO. 1 OF 2021

(Originating from Songea District Cr. Case No. 1/2021 PC. No. 37 of 2021)

FRANCE GABRIEL NGONYANI1ST APPELLANT

BENJAMINI BENJAMINI NGONYANI.....2ND APPELLANT

VERSUS

LADISLAUS SIMON KOMBA..... RESPONDENT

JUDGEMENT

30.11.2021 & 05.01.2022

U. E. Madeha, J.

Ladislau Simon Komba initiated criminal proceedings at Songea Town Primary Court for criminal trespass c/s Section 299 (a) of the Penal Code Cap 16 (R.E.2019). It was alleged that on 5.11.2021 at about 11:00 hours, at Matimila village within Songea District in Ruvuma Region, illegally and intentionally, the appellant invaded the complainant's farm and cut down trees worth 9,000,000 shillings.

The appellants, through criminal trespass, trace their genesis to Songea urban primary court in criminal case number 387 of 2020. The appellants were convicted and ordered to pay a fine of Tshs 100,000 in default to serve three months in prison. Also he was ordered to compensate the appellants herein Tshs 9,000,000/= forthwith. The appellants herein challenge the compensation of Tshs 9,000,000/= issued by the urban primary court at Songea. In the district court, the appeal was allowed partly. The order of compensation, which amounted to Shs 9,000,000/= as issued by the trial court, was quashed for being inconsistent with the governing laws. The appellants were found cutting down trees in the respondent's land. The respondent went for a walk to check on his tree farm. When he arrived, he saw four young men in possession of a sword, axes, and a chainsaw, held by someone else who was pulling trees and arranging them. They were all talking aloud and encouraging one another. The next day, on 6.11.2020, they went with the local chairman to the respondent's land. They entered the land in the morning and found three people: the appellants, as well as a third person called Mlope. The village chairman said that there were several reported cases of the appellants in the same jungle. They returned the next day to report the matter to the

police. The appellants were arrested and taken to the police station. The appellant told the court that he did not know if the land belonged to the complainant and that it was mistakenly given to him by his father. PW2 pointed out that the complainant was legally given the farm by the village government and then started using it. He said he was attacked in his area by five people, including the first and second appellants, who were arrested at the scene of the crime. That was the evidence of the prosecution. In their defence, the appellants denied all allegations made by the prosecution. In the petition of appeal, the appellants have raised the following grounds:

1. *The appellate court erred in law and facts in upholding the decision of the trial court that the respondent had successfully proved the ownership of the trespassed land while all documents supporting his claim of ownership were tendered and admitted unprocedural.*
2. *That the first appellate court erred in law and facts in upholding the decision of the trial court that the respondent had successfully proved his charge of criminal trespass beyond a reasonable doubt while the trespassed land was not identified by the respondent.*

3. That the first appellate court erred in law and facts in upholding the decision of the trial court, which was decided contrary to the law,

The appellants were represented by Mr. MelkioniMpangala, the learned advocate, whereas the respondent appeared in person and was unrepresented. The petition of appeal encompasses three grounds. They boil down to two issues.

1. Whether the documents supporting the charge of criminal trespass were tendered and admitted in court according to the procedures.
2. Whether the charge of criminal trespass was proven beyond a reasonable doubt.

Starting with the first issue whether the documents supporting the charge of criminal trespass were tendered and admitted in court according to the procedures. In his submission, Mr. MerikionMpangala, advocate, submitted that the exhibits were tendered after the cross-examination was completed. The court did not question the exhibits received in court. The court dealt with the exhibits submitted by the respondent; the exhibits were received contrary to the procedures. He cited the case of **Ramadhan Mboya Mahimbo versus Republic**, Criminal Appeal No. 326 of 2017.

CAT Moshi, which observed that every exhibit given in court must be read. Failure to do so is a misdemeanor that leads to injustice. The said exhibit was improperly admitted. The remedy is to disregard the exhibit and expunge it from the court records. He prayed to the court to quash the conviction and set aside the sentence and orders of the trial court.

On the other hand, the respondent explained that the exhibits were related to the ownership of the land and that he was given the land by the village government through their meeting. There were minutes of the village meetings to show that they agreed to give him the land. Fortunately, the appellants were present when he was given the property and signed the minutes of the village meetings. The second appellant went to cultivate the complainant's land. He requested that this appeal be dismissed.

I went through the proceedings of the primary court during the tendering of exhibits and found that the exhibits were tendered when the court assessors gave their opinion. The procedure for tendering the exhibits was violated because the appellants did not have time to cross-examine the witness about the exhibits. The exhibits were not admitted in court. The exhibit was not read in court as stated by the appellant advocate. I concur with the argument of the appellant advocate concerning the exhibits. For

the sake of this appeal at hand, these exhibits are hereby expunged from the court record.

Coming to another issue, whether the charge of criminal trespass was proven beyond a reasonable doubt, Mr. Melkion Mpangala, the advocate, submitted all the grounds of appeal together and he said that the land in dispute where the alleged appellants had entered was the subject matter of a criminal dispute between the appellants and the complainant. They had to start in a land-specialized court after proving the question of ownership and then filing a criminal trespass charge to ensure that the land is free of a dispute concerning ownership. He cited with approval **Rule 1 (1) of the Magistrates' Courts (Rule of Evidence in Primary Courts) Regulations, GN 432 of 1966**, which requires the complainant to prove all the facts constituting the offence. He made the remarks in **Ismail Bushaila Versus Republic** TLR [1991] 100 and argued that it was unlawful to convict the appellant for criminal trespass when the issue of ownership of the property had not yet been resolved. They had to start in the land court after proving ownership of the area and then filing criminal trespass charges. The land in question is the appellant's father's land. He added that, the matter of criminal trespass cannot succeed where

the matter involves land in dispute whose ownership has not been finally determined by a civil suit in courts of law. The evidence did not indicate the location and boundaries of the appellants' criminal trespass.

The respondent submitted that the district court was right by upholding the primary court's decision. With the foregoing response of the respondent, the appellant's learned advocate, prayed for this court to set aside the trial court's judgment as the case was not proved beyond a reasonable doubt.

I have examined the evidence presented in court to determine if there is sufficient evidence for the appellants to be convicted for the offence of criminal trespass. Looking at the evidence carefully, it is clear that appellants entered the complainant's farm and cut down the complainant's trees without his consent. The appellants' advocate addresses the issue that the respondent did not own the landed property, so the case should first go to the land court to prove the ownership of the farm. However, appellants have not been denied to exercise the right to file a civil claim against the respondent to the land tribunal if there is a real land dispute. The respondent side claims that the land that the appellant entered into and caused the charge of criminal trespass belonged to him. I found that if the appellant found that he was claiming the land, he was supposed to file

a land case in the land court. Many decisions have been made about criminal trespass. See the case of **S. Nkanga Versus Albertho (1992)** TRL 110 (HC), which 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."

Considering that, if there is a land dispute, the land case must be proven first to discover the issue of ownership. When the ownership of the land is known, then the case goes to the claim for compensation and criminal trespass. The reason is that the land involved was not determined in the land court.

I have come to discuss the issue of compensation, and I realise that the amount of compensation paid should not have been given because there is no evaluation of the property report to prove the amount of the damaged property. The prosecution has failed to prove compensation because there is no evaluation of the property on how many trees were cut down. The size of the land and its boundaries have not been discussed, so the court cannot calculate the number of costs or amount of damage without an

evaluation of the property report as directed by the Valuation and Valuer Registration Act No. 7 of 2016.

For the foregoing reasons, this appeal is meritorious. It is, consequently, allowed. The primary court and district court proceedings and decisions are quashed and set aside. I give an order for the release of the appellants unless they are held there for other lawful purposes. Order accordingly.



DATED and **DELIVERED** at **SONGEA** this 5th day of January 2021.

A handwritten signature in black ink, appearing to read "Madeha", is written over a horizontal line.

U. E. MADEHA

Judge

5/01/2021