

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 72 OF 2022

(Originating from Mkuranga District Court at Mkuranga in Criminal Case No. 64 of 2021
before Hon. H.I Mwailolo- RM)

HONORATHA D/O ALFRED @MDICHEY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 03/10/2022

Date of Judgment: 18/11/2022

E.E. KAKOLAKI, J.

The appellant Honoratha Alfred @ Mdichey was arraigned before the District Court of Mkuranga at Mkuranga for the offence of Trespass; Contrary to section 299 of the Penal Code, [Cap 16 R.E 2019] now R.E 2022. The particulars of the offence as stated in the charge are that, on 28/02/2021 at about 1100 hrs at Kiparang'anda village, Msasani area within Mkuranga District in Coast Region, the appellant unlawfully entered into the farm of S.A.K International LTD and cultivated therein. Appellant flatly denied the charge, the fact which prompted the prosecution to parade seven (7)

witnesses and relied on three (3) exhibits to prove their case, while defence case had three witnesses and relied on two (2) exhibits. After full trial the trial court was convinced that prosecution case was proved to the hilt, thus convicted the appellant as charged and accordingly sentenced her to conditional discharge for period of 6 months with condition that, he should not commit other criminal offence within that time.

Unpleased with the decision, the appellant lodged this appeal equipped with four (4) grounds of grievances, going thus:

- 1. That the trial magistrate grossly erred in law and fact in hearing and determining the matter which the court has no jurisdiction in land matters.*
- 2. That the trial magistrate grossly erred in law and fact in finding that the charge against the appellant was proved beyond reasonable doubts.*
- 3. That the trial magistrate grossly erred in law and fact in hearing a witness from the victim's company without proof of neither Identification card nor special Power of Attorney*
- 4. The accused person was wrongly sentenced.*

Basing on those grounds the appellant is praying this Court to quash her conviction and set aside the sentence of the trial court and set her at liberty. Nonetheless for the reasons to feature soon, I do not intend to discuss all of the grounds of appeal.

When the appeal was called for hearing, the appellant was represented by Mr. Abdul Aziz, learned advocate whereas the Respondent had the services of Ms. Elizabeth Olomi, learned State Attorney. The appeal was disposed by way of written submission.

As intimated earlier on, in this judgment I am intending to discuss only the 1st ground of appeal. In support of the first ground of appeal, Mr. Aziz started by citing the case of **Ismail Bushaija Vs. R** [1991] TLR 190, where the Court held that, when a dispute arises as to the ownership of the land in the criminal charge of Trespass, the court should not proceed with the said criminal charge. He clarified that, under the circumstances the criminal proceedings cannot proceed until the issue of ownership is settled in a civil case.

The learned counsel submitted that, in this appeal looking at the evidence as adduced in the trial court, there was a clear dispute of ownership of the

alleged trespassed suit premises thus, under such situation the trial court was obliged to direct the complainant to take the matter to the Land Tribunal competent to try it so that the issue of ownership could be resolved first. He stressed his point by citing the case of **Mwita Muhiri Mangera, @ Muhiri Muhiri Vs R**, Criminal Appeal No. 35 of 2021(HC-unreported).

In response, Ms. Olomi indicated from the outset that, the Respondent is in support of the appeal and specifically concentrated on the first ground of appeal. She submitted that, the subordinate court record clearly shows that, there was a dispute of ownership over the piece of land situated at Kiparang'anda area within Mkuranga District in Coast Region between the complainant SAK International Company and the appellant. She referred the court to the evidence of PW2 at page 8 of the proceedings, PW4 at page 13-15, PW6 at page 20-22, who testified on behalf of SAK International Company contending that the land belongs to SAK international who bought it for TZS. 5,000,000 but they paid TZS. 11,500,000 for the reasons that the appellant asked for the loan as additional amount. They tendered a sale agreement Exhibit PE3 and a cheque of Tsh. 11,500,000/= alleged to have been used to pay the appellant exhibit PE 2.

She further referred the court to page 6-11 of the proceedings where the evidence of PW2, PW4, and PW6 were supported by the evidence of PW1 and PW3 who testified to have witnessed the sale agreement of the alleged plot between the appellant and SAK International Company on 28th January, 2008.

She contended further that, the appellant on the other side disputed to have trespassed, whereas during PH at page 4 of the proceedings, appellant stated that was arrested while cleaning her farm, and during defence at page 30-32 of the proceedings her evidence was to the effect that she did not commit criminal trespass as the farm she entered belongs to her as she bought the same from Amina Yusuf on 11/03/1991 for consideration of TSH.2500/= and tendered the sale agreement to that effect which was admitted as Exhibit D1. According to her, the appellant explained that she received TZS. 11,500,000/= as an advance to the sale of the plot in dispute as they agreed with PW4 that if he wanted to buy the alleged plot he had to pay TZS. 11,500,000/= as an advance, two cows and buy or built for her a house and after fulfilment of those conditions then the appellant would be ready to transfer the alleged plot. And that, since PW4 and PW6 did not comply with the conditions then the land was still hers. The learned State

Attorney submitted that, appellant disputed existence of Exhibit PE3, claiming that her signatures might have been forged.

Ms. Olomi submitted further that, appellant's evidence was supported by the testimony of DW2 and DW3 at page 34-36 of the proceedings who confirmed that, the plot in dispute belongs to the appellant and the appellant had never sold the same to SAK international Company as alleged. In view of Ms. Olomi, going by both prosecution and defence evidence adduced before the trial court, it is clear that both SAK international and the appellant claims ownership of the said plot hence the offence of criminal trespass could not have been proved under the circumstances.

She relied on the cases of **Kusekwa Nyanza vs Christopher Mkangala**, Criminal Appeal No. 233 of 2016 and **Sylivery Nkangaa vs Raphael Albertho**, (1992) TLR 110 and implored the court to allow the appeal and direct or advice the parties to file civil suit in court with competent jurisdiction to entertain and determine ownership of the disputed land first.

I have dispassionately considered the submission by both parties regarding the first ground of appeal and accorded it with the weight it deserves. I have

also extensively perused the available lower court records in a bid to satisfy myself of the appellant's complaint.

It is true and I embrace both parties' submission that, the charge for criminal trespass cannot stand when ownership of the land is in dispute. This principle was stated in the case of **Sylivery Nkanga v. Raphael Albertho** (supra) where the court stated inter alia that:

(ii) A charge of Criminal trespass cannot succeed where the matter involved land in dispute whose ownership has not finally determined by a Civil Suit via Court of Law.

(ii) A Criminal Court is not a proper forum for determining the rights of those claiming ownership of Land. Only a Civil Court via Civil Suit can determine matters of Land ownership.

The same principle is enlightened in the case of **Simon Mapurisa vs Gasper Mahuya**, Criminal Appeal No. 221 of 2006 where the court after citing with approval the case of **Sylivery Nkanga** and **Ismail- Bushaija** (supra), had this to say:

"...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 or the whole of the adjacent land, such dispute is resolved in a civil court. From then onwards, encroachment onto the land of the other could be a trespass and a criminal charge be brought against the offending party.

Going by the lower court records, the appellant was convicted for the charge of trespass to the land; contrary to section 299 of the Penal Code. Having revisited the records in which as rightly submitted by Ms Olomi, the Appellant alleges that, the land belongs to her as the sale procedure was not complete, while the complainant SAK international claims to be hers, I am of the firm view that, the dispute of ownership could not have been resolved or decided on by the criminal court. The trial magistrate's conclusion at page 5 of the judgment that, there is no doubt that accused sold her land to complainant, in my conviction was wrongly arrived at, as he had no such jurisdiction to determine the issue of ownership of the land in the circumstances where the appellant was claiming not to have sold the land. Under the circumstances, what the trial magistrate had to do was to stop the proceedings in criminal charge and advice the complainant to file a civil action in the tribunal/court of competent jurisdiction as it was stated in the case of **Ismail Bushaija Vs. R** [1991] TLR 100, where the Court held thus:

In my view, it is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is clearly in dispute between the complainant and the accused. As was pointed out by this court in the case of Saidi Juma v. Republic [1968] H.C.D. 158 ... in a case of criminal trespass, a dispute arises as to the ownership of the land, the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership. That is exactly what the trial court should have done in the present matter.

In the cumulative effect of what I have stated above, it can be safely concluded that the trial court had no jurisdiction to try the matter as the same was the land matter. In the event, I allow the appeal, quash the conviction and set aside the sentence imposed on appellant. The complainant is advised to seek redress in Civil Court first before preferring any criminal course against the appellant over the disputed land.

It is so ordered.

Dated at Dar es Salaam this 18th November, 2022



E. E. KAKOLAKI

JUDGE

18/11/2022.

The Judgment has been delivered at Dar es Salaam today 18th day of November, 2022 in the presence of appellant, Mr. Abdul Aziz, Advocate for the appellant, Mr. Yasintha Peter, senior State Attorney for the respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

18/11/2022.

