

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 5 OF 2020

*(Arising from Criminal Appeal No. 1 of 2020 Rufiji District Court;
Origin Criminal Case No. 29 of 2019 Utete Primary Court)*

SELEMANI CHARLES NJANGU..... APPELLANT

VERSUS

JONATHAN RABANUS CHINGWILE..... RESPONDENT

JUDGMENT

Date of last order: 19/08/2021

Date of Judgment: 12/04/2022

S.M. KULITA, J.

This is the 2nd appeal by the Appellant herein, **SELEMANI CHARLES NJANGU** who was convicted and sentenced by to pay a fine of Tsh. 100,000/= or to serve the imprisonment of 6 (six) months by Utete Primary Court for Criminal Trespass, contrary to Section 299 of the Penal Code. Aggrieved with the said decision of

the Primary Court the Appellant appealed at Rufiji District Court via Criminal Appeal No. 1 of 2020 in vein, hence this appeal. In his Petition of appeal at this court the appellant raised the following grounds as hereunder;

1. That, the appellate Magistrate erred in law and fact for failure to consider that the case was bad in law for want of ownership of the land in dispute.
2. That, the appellate Magistrate erred in law and fact for failure to observe that there was no charge of criminal trespass relating to the disputed land without bonafide claim of right first.
3. That, the appellate Magistrate erred in law and fact for failure to observe that the Respondent has no *locus standi* to prefer the case against the appellant.
4. That, the appellate Magistrate erred in law and fact when he failed to consider the discrepancy of dates of commission of the offence between 16/6/2019 and 25/6/2019, hence occasioned into miscarriage of justice to the appellant.

The matter was fixed to be disposed of by way of written submissions, but it is the appellant only who had complied with the scheduling order, hence the Appeal was determined *ex-parte*

against the Respondent, **JONATHAN RABANUS CHINGWILE**. While the Respondent is unrepresented the Appellant is represented by Mr. Cleophas James, Advocate from Honeste Vivere Attorneys.

In his written submission in support of the 1st and 2nd grounds of appeal collectively, Advocate for the Appellant, Mr. Cleophas James submitted that this was a pure land matter. Therefore, before the criminal case was entertained the issue of land allocation was supposed to be resolved first under the Village Land Act, 1999.

As for the 3rd ground of appeal the Counsel submitted that the respondent has no *locus standi* to prefer the case against the appellant. He argued that the records do not transpire that the Appellant who identified himself as a Ward Executive Officer (WEO) claims for ownership of the land alleged to have been trespassed. He said that WEO is not a legal person capable to sue or being sued on his own capacity. The Counsel added that the person who brings the matter to court should be able to show that his rights or interests have been breached or interfered.

Submitting on the 4th ground, Mr. Cleophas James stated that the appellate Magistrate failed to consider the discrepancy of dates of commission of the offence between 16/6/2019 and 25/6/2019,

hence occasioned into miscarriage of justice to the appellant. He said that the prosecution case at the trial court is not clear as to whether the offence was committed on 16/6/2019 or 25/6/2019. The counsel averred that SM1 alleged to have received the call about trespass on 16/6/2019 while SM1 and SM3 testified to the effect that, the trespass was committed on 25/6/2019.

That was the end of the written submission by the Appellant's Counsel who concluded by praying the appeal to be allowed.

Upon going through the submission by the Appellant's Counsel as well as the lower courts' records, the following is my analysis;

Starting with the issue of *locus standi*, the appellant never raised this issue during trial nor during appeal at the District Court. However, the fact that the said SM1 identified himself as the Ward Executive Officer (WEO) for the premise that had been trespassed by the Appellant, he had the locus. He was therefore right to take actions against the Appellant, which includes filing this case upon receiving complaints from the citizens who reside over his jurisdiction premises, particularly Luwe and Feri Nyangwai areas who were affected with the Appellant's trespass over their farm premises.

Upon going through the records, I have noted that the said trespass by the appellant was not a serious issue as the same never led to the serious damage of properties, that's why there was no even a charge/count involving malicious damage to property. Thus, the matter that remained, trespass, was found to be within the powers of WEO to resolve, that's why even when they were notified about the matter, the senior District officials namely District Commissioner (DC) and the District Executive Director (DED) left the matter to the said officer, WEO to resolve. As WEO could have not charged the Appellant in his official capacity, he charged the appellant via his personal capacity instead of taking the matter to the DED who was to table the matter at the District Court while the same has already been noted to be the minor issue.

The fact that the Appellant himself admits to have put his cattle and graze them in the village land which was not reserved for that purpose, including some of the villagers' farms, and he did so without the permit of the village officials, there is no doubt that he trespassed their lands.

As for the nature of the case, the technicalities that the appellant tries to raise that the Respondent had no *locus standi*, recently has no chance to be considered, as the doctrine of Overriding Objective requires the court to decide on substantive justice instead of relying

on technicalities. Furthermore, this ground by the appellant has been brought as an afterthought as he had never raised it at the trial court nor the 1st appellate court.

As for the issue of discrepancy on the dates for commission of the offence, the charge sheet mentions it being 12/6/2019. The same date was mentioned during trial by the SM1 at Utete Primary Court. As for SM2 and SM3 they testified to the effect that they witnessed the Appellant's cattle moving around the village premise on 25/6/2019, the allegations that even the Appellant himself never disputed. That was just a further stay of the said cattle over there, after they had been seen by others including SM1 on 12/6/2019 which has been mentioned in the charge sheet as the date for commission of the offence. The evidence reveal that the Appellant's cattle were there in the village since 12/6/2019, the fact which the Appellant does not dispute. In spite of being ordered to vacate the premise with his cattle the Appellant had never complied promptly and that led him to be fined on the 27/7/2019. I therefore find no discrepancy on the date for commission of the crime by the Respondent.

As for the issue of ownership of the land that the appellant is alleged to have trespassed, the Appellant's Advocate tried to convince this court that there was no criminal trespass as the issue

of land ownership had not been resolved. The records do not transpire the presence of dispute on the land ownership for this matter. Even if it could be there, the Appellant is wrong to raise it at this appellate stage, as it can be regarded an afterthought. The Appellant's Advocate is therefore precluded to raise such issue at this stage. The principle of law is that, save for the issues pertaining to points of law, matters not raised in the first appeal, should not be raised in the 2nd appeal. On this, the implication is that where a matter has not been tested and determined by the subordinate court, there is no decision of the lower court fit to be deliberated by the appellate court, except those involving points of law. See **PIUS MATEI @ KIGUTA V. R, CRIMINAL APPEAL NO. 98 OF 2017, CAT AT DSM (unreported)**.

Another thing to note is that, it is not necessary that the matter be first taken to the land court/tribunal before the criminal case of trespass is filed. It means, if ownership of the trespassed land is not an issue, as it was for this case, it was right for the court to deal with the said criminal allegation and decide upon. The fact that the Appellant had been using the other persons' land for grazing his cattle without their consent, the act which led to the destruction of their crops, that amounts to, not only malicious damage to property but also criminal trespass.

Furthermore, as it can be transpired in the lower courts records, the appellant's counsel submitted that the Appellant was invited by the villagers and allocated lands for pastoralism during the dry season regarding the said villagers' meeting convened on 12/6/2019. Here we can get two versions from the said statement; **one**, if the appellant was actually invited by the villagers as alleged by his Advocate, the trial court was right in its findings which was upheld by the 1st appellate court, that even if that was actually done, those persons (villagers) had no mandate to issue such permit to the Appellant. It is the Village Officials who had powers to do so. As well, if the appellant was invited by the said Villagers, why alarms of complaints from the same villagers? The trial court's records transpire that SM2 and SM3 were frightened to see cattle moving around their farm premises which amounted to the destruction of their crops. Furthermore, it was evident that the said premise namely Luwe and Feri Nyangwai where the Appellants' cattle were found grazed were not reserved for pastoral purposes, but cultivation. Not only that but it was also evident that the Local Government Officials including SM1 (WEO) had no information on the presence of person holding cattle over there.

Two, the Appellant's testimony at the trial court that he was invited by the villagers and allocated lands by them regarding their

(villagers') meeting convened on 12/6/2019 can also be interpreted as wrong assertion for having no proof. The trial court and the District Court were therefore right to disregard such evidence. The Appellant failed to call any person among the ones whom he alleges to have provided their lands for him to feed his cattle. Even the persons whose names have been listed in the summary of the meeting (exhibit "A") purported to have been convened on 26/6/2019, neither of them had been called by the Appellant to support his case. Not only that, but also even the listed names of persons purported to have attended the said meeting, neither of them has been signed to prove that those persons actually attended the said meeting. The implication here is that, the said meeting had never been conducted at all, and the said minute for the Villagers' Meeting (exhibit "A") is nothing but a forged document.

Further, upon looking on the date that the said meeting is purported to have been convened ie. 26/6/2019, it is doubtful as it is evident that the trespass by the appellant was there since 12/6/2019 as per the testimony of SM1. According to SM2 and SM3 they witnessed a trespass on 25/6/2019. This creates a picture that the Appellant had decided to prepare the said document (exhibit "A") to justify that he was actually invited to conduct pastoralism

over that premise while in reality it is not true. The fact that the document is dated 26/6/2019 while the complaints were already there before that date, it means the Appellant got an afterthought idea and he actually implemented it by forging the said document, exhibit "A".

Therefore, the authenticity of the document submitted by the Appellant at the trial court (exhibit "A") purported to be a summary for the villagers' meeting consenting him to use the village land for pastoral purposes during the dry season is tainted with a lot of doubts.

From the aforesaid analysis I find the appeal with no merit, hence dismissed.



S.M. KULITA

JUDGE

12/04/2022

