IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC. CRIMINAL APPEAL CASE NO. 87 OF 2022

(Originating from Criminal Case No. 35/2022 in District Court of Kalambo)

EDWARD S/O KUMBAKUMBA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

16/11/2022 & 25/11/2022

JUDGMENT

MWENEMPAZI, J:

The appellant was charged in the Trial Court with the offence of criminal trespass contrary to section 299(a) of the penal Code, Cap 16 R.E. 2019. The prosecution alleged that on the 24th day of August, 2021 at Katapulo Village within Kalambo District in Rukwa Region the accused did unlawfully enter into the area measured 100 acres the property of Gilbert s/o Mwananzila with intent to acquire, insult and annoy the said owner with the total value of Tshs. 20,000,000/=.

When charge was read over to the accused he pleaded not guilty to the charge. At the hearing the prosecution called four (4) witnesses and two exhibits to prove the charge. The two exhibits are a certificate copy of the judgment in Miscellaneous Land Case No. 60 of 2010 and exhibit P2 which is a certificate copy of an execution order from the District Land and Housing Tribunal in Application No. 10 of 2010.

Upon completion of the hearing the trial Court was satisfied that the prosecution has proved the case against accused person beyond reasonable doubt and found accused person namely Edward s/o Kumbukumba guilty to the offence of Criminal trespass contrary section 299(a) of the Penal Code, Cap 16 R.E 2019). He was sentenced to pay fine f three hundred thousand (Tshs. 300,000/=) or to serve two years jail imprisonment.

The appellant is aggrieved with conviction and sentence of the trial court dated 17th August, 2022. He is appealing against both conviction and sentence. The appellant has raised two grounds of appeal, namely:

1. That, the trial magistrate erred in law to convict the appellant on the offence which he had been previously tried and acquitted by both three competent courts leased on the same facts and parties, in criminal

appeal no. 03 of 2014 of the High Court of Tanzania, a copy of the judgment was provided in Court for Judicial notice.

2. That, the trial Court erred in law to impose a sentence which is not provided by a statute.

At the hearing the appellant was unrepresented and the respondent was represented by Ms. Marietha Maguta, learned State Attorney.

The appellant when submitting praying this Court to set aside the sentence and release him. That is the only substance he presented to the Court.

In reply the Learned State Attorney Ms. Marietha Maguta commenced with the second ground of appeal that the sentence imposed was illegal. She submitted that the law provides for a term of three months imprisonment and if the property upon which the offence is committed is any building, lent or vessel used as human dwelling or any building used as a place of worship or as a place for the custody of property, the offender is liable to imprisonment for one year. Under the circumstances the sentence meted was illegal it should be set aside as prayed.

On the second ground of appeal, the appellant was earlier on charged in the Primary Court for trespass on the said 100 acres in the Primary Court, and upon visiting the locus in quo, the Court was satisfied that the appellant was or did not trespass. The position was upheld by the District Court and the High Court in the Pc. Criminal Appeal No. 3 of 2014.

This time around the matter was taken to the District Court and the decision in Pc. Criminal Appeal No. 3 of 2014 was not disturbed. The complainant/respondent ought to have appealed against the decision of the High Court instead of going back to the District Court relying on the same facts. The respondent therefore is supporting the appeal and prayed that it be allowed.

I have read the record and the law. In the impugned judgment sentence issued to the appellant was to pay a fine of Tshs. 300,000/= (shilling three hundred thousand only or to serve a term of two (2) years hail imprisonment. As rightly argued by the appellant and the Learned State Attorney for the respondent the sentence was illegal. According to section 299(a) of the Penal Code, Cap 16 R.E 16 2019 it is provide that:

"Any person who unlawfully enters into or upon property in the possession of another with intent to commit or annoy any person in possession of the property; is guilty of the Criminal trespass and liable to imprisonment for three months; if the committed is any building, lent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody is liable to imprisonment for one year".

The trespass was on the land and not building. The offender if found guilty, is liable to three months not otherwise unless if it is a building where it is one year.

Under the circumstances it is properly prayed that the sentence be set aside for illegality. On the charges leveled against the appellant in Criminal Case No. 35 of 2022 whose judgement is being challenged, the appellant had pleaded autrefois acquit, that act was a bar to subsequent criminal prosecution. I have read Pc. Criminal Appeal No. 3 of 2014 which emanated from Criminal Case No. 968 of 2012 in Sumbawanga Urban Primary Court and Criminal Appeal No. 2 of 2013. In those cases, the Court High Court) confirmed the concurrent findings of lower courts that the appellant in this case had not trespassed into the land. The complainant in Criminal Case No.

35 of 2022 in the District Court of Kalambo ought to have appealed against the decision of the High Court in Appeal No. 3 of 2014. In the grounds of appeal, the appellant has intimated that he informed the Court of the earlier decision and the findings. What the trial court ought to have done was to dismiss the charges and not to proceed with conviction as it did.

In the case of **MADUHU MASEGE Vs. REPUBLIC [1991] TLR 143** was held that:

> *"It is the duty of the accused to raise the plea of autrefois acquit in order to derive the advantage of or benefit thereof. That plea may be raised at any time either as a plea in the bar to the second prosecution or at any stage in the proceedings before the closure of the defence case and that in pleas of autrefois acquit, the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute".*

In the cited decision the Court observed that the plea of autrefois acquit lands on the provisions of section 137 of the Criminal Procedure Act. That provisions reads:

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence".

The appellant therefore was not supposed to be tried again for the offence of trespass contrary to section 299(a) of Criminal Procedure Act based on the same facts.

Under the circumstances the trial in the District Court was illegal and the judgment emanating from it is thus quashed and sentence set aside for both contravening section 299(a) of Criminal Procedure Act for an illegal sentence and also section 137 of Criminal Procedure Act, Cap 20 R.E 2019. The appeal is therefore allowed.

It is ordered accordingly.

T.M. MWENEMPAZI

JUDGE

25/11/2022