

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

DC CRIMINAL APPEAL NO. 44 OF 2021

(Arising from Criminal case No. 52 of 2021 of the Kibondo District Court at Kibondo dated 13/07/2021 before Mcharo S.G RM)

JULIUS S/O MKWASHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

11th & 25th February, 2022

F. K. MANYANDA, J

The Appellant was charged with an offence of criminal trespass; contrary to section 299 (a) of the Penal Code, [Cap. 16 R. E. 2019]. He was arraigned before the District Court of Kibondo at Kibondo allegedly to have unlawfully entered and build a house into a piece of land alleged to belong to one Agnes d/o Malinzi.

The trial court having heard the evidence for both sides was satisfied that the prosecution case was proved beyond all reasonable doubts. It



consequently convicted the Appellant and sentenced him to pay fine of Tshs. 200,000/= or suffer a custodial sentence of three months.

The Appellant was aggrieved, hence, this appeal in which he was armed with seven grounds, which I need not to reproduce them, but I will refer to them in this judgement, challenging the decision of the trial court finding that the prosecution's case was proved beyond all reasonable doubts.

At the oral hearing of this appeal, the Appellant was present in person and represented by Mr. Ignatus R. Kagashe, learned Advocate, while the Respondent/Republic was represented by Ms. Edna Makala, learned State Attorney.

The learned Advocate for the Appellant chose to argue the first and third grounds together. In arguing the said two grounds, he submitted that the ingredients of the offence of criminal trespass were not proved to the required standard in criminal law. He argued that each offence has *actus reus* and *mens rea*; that though the *actus reus* in this case, which constitute the act of entering into the disputed land, was established; the *mens rea* which constitute the intention to commit the offence was not proved.

He stated that there was no proof that the land was in possession of PW3, the Appellant proved that he purchased the land from DW8, Revocatus Macarius, who also had purchased the same from DW9, Elias Rutaba and

the sale of the land in dispute to the Appellant was witnessed by DW7 Nyamaliza Nicodemus, the Village Executive Officer and a Kitongoji Chairman, DW5 Leonia Alisen. In the circumstances, *mens rea* was not established thus the appellant deserves benefit of doubt.

In respect of ground two, the Counsel argued that, the complaint is on evaluation of evidence. He prayed to this Court, being a first appeal, to re-evaluate the evidence. He referred to the cases of **Standard Chartered Bank (T) Ltd vs National Oil (T) Ltd and Another**, Civil Appeal No. 98 of 2008 which was cited in the case of **Registered Trustees of Joy in the Harvest vs Hamza Sungura**, Civil Appeal No. 149 of 2017 (unreported) at page 9.

He contended that the evidence of the Appellant and his witnesses' raised doubts to the prosecution's case. He said, it was established that he lawfully acquired the land after purchasing it. He therefore urged this Court to re-evaluate the evidence and find in favour of the Appellant that the intention was not established.

As regard to ground four which is about Criminal Case No. 52 of 2021 of the District Court of Kibondo to have been sub-judice to Criminal Case No. 103 of 2018 at Kibondo Urban Primary Court, the Counsel for the Appellant stated that Criminal Case No. 103 of 2018 of Kibondo Urban Primary Court



which was filed against the Appellant was not yet finally decided when the complainant refiled the same case in the District Court.

The Appellant's Advocate stated further that in respect of ground five the complaint is on unjustified rejection of the admission of some exhibits. He pointed out that at page 33 of the proceedings, the Appellant prayed to tender in documentary exhibits. The trial court rejected though the Public Prosecutor didn't object. The Counsel argued that the trial court erroneously reasoned that the documents would be tendered by other witnesses, because the prayer came late. The Counsel observed that the reasoning was wrong because it was the Appellant who owned the three documents; therefore, he was competent to tender the same. The Counsel was of the views that the Appellant was wrongly denied his rights to fair hearing. The counsel prayed this Court in case it finds it expedient to remit the file to the trial court for to admitting the exhibits.

Mr. Kagashe argued together grounds six and seven where the complaint is that the Appellant ought to be convicted on the strength of the prosecution's evidence on weakness of his defence. He argued that, the duty of the Appellant was to raise reasonable doubts only to the prosecution's evidence which he did. He referred to the cases of **Christian Kale and Another vs Republic** [1992] TLR 302 and **Mwita and others vs Republic** [1977] LRT 54.



Mr. Kagashe explained that the appellant's evidence was weighty compared to the prosecution's evidence as he didn't have *mens rea* when he entered into the land. The evidence shows that there was a quarrel between PW3 and DW8 who were married couple, the Appellant just fell a victim.

Lastly, Mr. Kagashe submitted, referring this Court to the last page of the judgment, that the trial court convicted the Appellant but didn't sentence him. Moreover, it didn't give any order of demolition. He stated that, this contravened section 235 of **the Criminal Procedure Act**, [Cap. 20 R. E. 2019], hereafter referred to as "the CPA". The irregularities which he said are incurable under section 388 of the CPA. It is his prayer that, the conviction be quashed and the sentence and demolition order set aside.

Ms. Edna Makala, learned State Attorney for the respondent submitted supporting the conviction, sentence and order meted out to the Appellant. She argued that, in respect of the first and second grounds, the State Attorney submitted that Republic proved the case beyond all reasonable doubts. She cited the case of **Silvery Nkangaa vs Raphael Alberto** [1992] TLR 110 where it was stated that a charge of criminal trespass cannot stand where ownership of the property is disputed. However, the State Attorney stated that although that is the proper position of the law, in the matter at hand, the land was in dispute between PW3 and DW8. She



stated further that the dispute over ownership of the land in dispute was finally determined by the Kibondo Ward Tribunal which declared PW3 a lawful owner and the said PW3 executed the decree via Misc. Application No. 220 of 2019. The State Attorney was of the views that the trial court rightly convicted the Appellant because the offence was proved beyond all reasonable doubts. She added that the Appellant ought to have conducted search as to ownership of the land in dispute before purchasing.

In grounds two and six which are about evaluation of evidence, the State Attorney submitted that, the trial court thoroughly evaluated the evidence. She gave an example that at page 5 of the judgement of the trial court, it summarised the evidence then compared the evidence of both sides and well found the prosecution's evidence as weighty.

In respect of ground four, the State Attorney stated that, the issue of sub-judice has no evidence that there was in existence a Criminal Case No. 103 of 2018. She added that, it is a fact which was not born out by the proceedings.

In respect of ground five, Ms. Edna Makala stated that it was during the testimony of DW7 when the Appellant attempted to tender the documents. The appellant by then had not already testified, hence the court directed the documents to be tendered by a proper witness. Moreover, the State



Attorney stated that the trial court found the documents inadmissible for being uncertified photocopies hence, it rightly rejected them.

As regard to grounds six and seven, the State Attorney submitted that the trial court evaluated the evidence of both sides and rightly found the prosecution evidence weighty relative to that of the Appellant.

Concerning the issue of conviction without sentencing, Ms. Edna submitted that, the proceedings show that there was neither sentence nor order pronounced by the trial court. Therefore, she prayed the court to find that trial court erred in not sentencing the appellant and that this court has power to step into the shoes of the said trial court and sentence the appellant. She referred this Court to the case of **Kaimu Said vs Republic**, Criminal Appeal No. 391 of 2019 (unreported) where the Court of Appeal of Tanzania referred to its earlier decision in the case of **Siza Patrice vs Republic**, Criminal Appeal No. 19 of 2010 (unreported).

About the issue of marriage, Ms. Edna stated that, there is no evidence on the record that PW3 and DW8 were married couple. She added that, even the trial court found that they were married, then DW8 ought to have obtained a consent of PW3 before selling the land in dispute. She finally prayed the court to dismiss the appeal.



In his rejoinder, Mr. Kagashe insisted that, the Republic more concentrated on proving ownership than possession because the law requires proof of possession and guilty mind. He stated that PW3 might have been the owner but she was not in possession of the property at the time sale was effected, therefore, Appellant was a *bona fide* purchaser. He distinguished the case of **Sylvester Nkangaa (supra)**.

Mr. Kagashe added that, the trial court used only three (3) paragraphs to evaluate the evidence of the prosecution evidence alone, as appears at page 5 of the judgment, his view was that it was not sufficient, the trial court ought to have considered also the defence evidence.

As regard to search before purchase, the Appellant's Counsel argued that, the land in dispute was not registered, therefore it was not to conduct a search at the land authorities. Moreover, he insisted that the evidence shows there was no guilty mind on the part of the Appellant. Finally, the Counsel instead also that there is evidence of existence of a Criminal Case No. 103 of 2018 at Kibondo Primary Court concerning an offence of obtaining money by false pretences over the same piece of land, which was still pending. He pointed out that PW3 mentioned about the case at page 16 of the proceedings and at pages 33 and 35 the witnesses mentioned it. The Counsel also reiterated that there is evidence which tells about marriage relationship between PW3 and PW8. The Counsel admitted the



documents been photocopies, but insisted that it was DW7 who wanted to tender them not the Appellant himself. He observed that save for the uncertified photocopy of the first Contract, which was rightly rejected, the second Contract and the judgement were wrongly rejected.

He insisted that since the guilty mind was not established then, the benefit of doubt be given to him.

Those were the submissions by the Counsel for both parties. Having carefully gone through the grounds of appeal and reply thereto, also the submissions for and against the appeal, and going through the evidence I find the central issue for determination is whether the Appellant's appeal has merits.

The offence of criminal trespass provided under section 299(a) of the Penal Code, [Cap. 16 R. E. 2019], has two essential elements namely: -

- i. Unlawful entry into or upon property in the possession of another *actus reus*; and
- ii. such entry must be with intent; to commit an offence (this is *mens rea* alleged in the charge in this case), or to intimidate, insult or annoy the person in possession of the property.

The next question that arises now is what was the Appellant's mind at the material time. In the instant matter it has been submitted by Mr. Kagashe,

that the Appellant lead evidence which shows that he entered into the land in dispute after purchasing it from DW8 whom they executed a sale contract. This evidence was not controverted. The evidence lead by the prosecution is, as contended by the State Attorney, that he ought to have conducted search before purchasing in order to satisfy himself as to ownership. Mr. Kagashe submitted that it is not ownership, but possession of the property at the time of purchase that matters. PW3 might be the owner yes, but it was PW8 who sold the land in dispute.

I join hands with Mr. Kagashe that the mind of the Appellant is to be looked from the prevailing status of possession of the property at the time of purchase, hence the use of the word "possession" in the section of the law creating the offence. Where it is established that the mind was that he purchased the property from a person who had possession thereof, then unless it is proved to the contrary, he has a bona fide claim of right. The duty of proving "the contrary" lies on the prosecution. Unlike what the State Attorney contends that it was a duty of the Appellant to prove "the contrary" by proving that he conducted a search as doing so is to shift the burden of proving the charge to the accused, which in criminal law is not allowed.

In the circumstances, the Appellant deserves the benefit of doubts as a bona fide purchaser, he had bona fide claim of right and therefore not

criminally liable. It was necessary for the trial court to address its mind on this question of intent. The trial court was obliged to consider whether the entry by the Appellant was with intent to commit the offence of criminal trespass. As it was decided in the case of **Ally Kauzeni vs Republic**, [1985] TLR 79. Hon. Mapigano, Judge, as he then was, quoted from a book **Ratanal and Thakore on the Law of Crimes**, 14th Edition, at pages 1083 - 1084 where it was stated as follows: -

"The word "intent" is not to be taken as identical with "wish" or "desire". The intention constitutes the entry criminal. Merely to trespass is not ordinarily such an offence; but when the trespass is in order to the commission of an offence, or when it is to intimidate, to insult, or to annoy, it is punished. Thus, the essence of the offence is the intent in committing the trespass. It is essential for the prosecution to prove the intention laid down in the section. The intention must always be gathered from the circumstances of the case, and one matter which has to be considered is the consequences which naturally flow from the act, because a man is usually presumed to intend the consequences of his own act."

In this case even the issue of ownership is considered still does not establish the guilty of the Appellant. It is my understanding that, the law requires that for proving an offence of criminal trespass there must be no dispute over ownership of the land or property. And that where there is a



dispute, criminal trespass proceedings should stop pending the determination of the ownership dispute by a court of competent jurisdiction. That was the holding in the case cited by Ms. Edna, learned State Attorney of **Syivester Nkangaa vs. Republic (supra)**. See also the case of **Ismail Bushaija vs. Republic**, [1991] TLR 100 where it was held that,

"... 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."

In **Ismail Bushaija's case (supra)**, the court referred to the famous case on criminal trespass of **Saidi Juma vs. Republic [1968] H.C.D. 158** where it was held that,

"In a case of criminal trespass, where 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."

In the instant matter, there is evidence on record that before the Kibondo Mjini Ward tribunal, was a Land dispute where PW3 was conclusively declared lawful owner of the disputed area against DW8 the seller of the land in dispute to the Appellant and PW3 executed the decree vide Land

Application No. 220 of 2019. This means that, DW8 sold the land with maliciously to the Appellant knowing that he had no title. However, the evidence does not show that these facts were known to the Appellant. It was a duty of the prosecution to prove that these facts were known to the Appellant.

Generally, without wasting much time to determine the other grounds of appeal, I see that the reasons explained in the first and third grounds suffice to dispose of this appeal. Since the ingredients that establish the offence of criminal trespass were not proved.

In the result, I find that the prosecution case was not proved to the required standard, thus the Appellant was wrongly convicted and sentenced.

I accordingly allow the appeal, quash the Appellant's conviction, and set aside the sentence and orders meted to him. To use the wise words of this Court in **Saidi Juma vs. Republic (supra)** parties are advised to resort to a court of competent jurisdiction to sort out matters of ownership. Order accordingly.




F. K. MANYANDA

JUDGE

25/02/2022