

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

PC CRIMINAL APPEAL NO 02 OF 2022

(Arising from Criminal Appeal No 22 of 2021 in District Court of Tarime at Tarime and
Originating from)

BONIPHACE MHINDI APPELLANT

VERSUS

NYAMHANGA CHACHA RESPONDENT

JUDGMENT

14th Feb & 13th March, 2023.

BEFORE F.H. MAHIMBALI, J.

This is the second appeal, after the appellant had lost the case before both lower courts.

The appellant was charged before the trial court with offence of criminal trespass contrary to section 299 (a) of the penal code. The appellant pleaded not guilty to the charge. In establishing the guilty of the appellant, the respondent testified on his own and so was the appellant. Upon assessing the evidence between the two parties, the trial court,

convicted the appellant for the charge of criminal offence as charged and sentenced him to six months conditional discharge which findings were confirmed by the appellate court that the charge was established beyond reasonable doubt.

Not amused with the findings and verdict of the two lower courts, the appellants has knocked the doors of this court again challenging the decision of the first appellate court which confirmed the decision of the trial court. In challenging the said findings of the first appellate court, the appellant has preferred three grounds of appeal namely:

- 1. That, the first appellate court erred in law and fact for failure to determine that the trial court it lacks the jurisdiction to entertain this criminal trespass contrary to section 299 of the Penal Code Cap 16 R. E. 2019, against the Appellant for failure to put into consideration that in order criminal trespass to be established the court before starting to determine who is the legal owner of the land it must warm itself if the there is any civil action case which have already determine who is the legal owners of the land in dispute.*
- 2. That, the first appellate court erred in law and facts for convicting and sentence the Appellant for offence of trespass the village land of Mori while the Respondent who is the representative of the village government have no locus standi to sue on behalf of the village accordingly to the local government (District Authority Act Cap 287) R. E. 2019.*

3. That, the first Appellate Court erred in law fact for convicted the Appellant as the prosecution failed to prove the case against Appellant beyond reasonable doubt.

The hearing of the appeal was done by way of written submissions, in which both parties complied with the scheduling order.

With the first ground of appeal, it has been submitted that where there is no proof of ownership of the said land by a party to the suit, there cannot be established criminal trespass. Therefore, the District Court (first appellate court) erred in confirming the decision of the trial court which in essence there was no legal proof that between these two parties that the said land belonged to the respondent.

To the contrary, the respondent maintains that the trial court as well as the first appellate court rightly determined the suit in his favor as per available evidence in record.

In scanning the evidence in record, I have first gone through and examined what was the complaint before the trial court. The same states:

Habari ya kosa:

"Wewe Boniphace s/o Mhindi, unashtakiwa kwamba mnamo tarehe 26/11/2020 majira ya saa 4:00 asubuhi huko Mori ... bila ya halali na kwa

*makusudi **ulivamia** ardhi ya serikali ya kijiji cha Mori na kuingilia kwenye eneo hilo kwa nguvu bila ya ridhaa ya kijiji cha Mori, kitendo ambacho ni kinyume cha sheria”* [Emphasis added]

In his testimony in support of the charge, the respondent being village chair and suing on behalf of Mori village stated, I quote:

*“Mwaka 2016 serikali ya kijiji pamoja na mkutano wa kijiji, ulipendekeza lililokua shamba la mifugo ya serikari lilipo kijiji cha Mori litumike kwa ajili ya Miundo mbinu ya serikali, (shule, zahanati, vibanda vya biashara). Mwaka 2017 kila eneo lilipimwa na 2019 pia lilipimwa na kupata viwanja vya biashara na **hakukua na lalamiko lolote**. Tarehe 2/10/2019 nikiwa mwenyekiti wa kijiji nilipewa taarifa Bwana Boniphace Mhindi **amevamia eneo** lililopimwa viwanja na kupanda mikonge, nilienda huko na kushuhudia. Tulipomwambia mshtakiwa alikana ...”* [Emphasis added]

In his defense testimony this appellant testified.

*“Mnamo tarehe 23/7/2019 Nyamhanga Chacha **alivamia eneo langu na kuliuza**. Sababu sijui. Eneo analosema kung’oa mikonge ni **eneo langu ambalo nimelimiliki kabla ya kijiji cha Mori kuanzishia na hapakuwa na mgogoro wowote**. Hivyo mlalamikaji alitoa taarifa ya uaongo Mahakamani ...”* [Emphasis added]

According to first schedule of the MCA, Cap 11 R. E. 2019, as per section 18 (1), amongst the offences the primary court is mandated to try, Criminal trespass as per section 299 of the penal code, Cap 16 R. E. 2022, is one amongst them. The said section reads:

Any person who:-

- a) Unlawfully enters into or upon property in the possession of another with intent to commit an offence or intimidate, insult or annoy any person in possession of the property or,*
- b) Having lawfully entered into or upon the property unlawfully remains there with intent thereby to intimidate, insult or annoy the person in possession of the property or with intent to commit an offence, is guilty to criminal trespass ...”*

In my considered view, as per facts presented before the trial court and the complaint lodged (J/PCF1), there is nothing of criminal trespass as per law but land dispute between the two parties.

As well stated in the case of **Juma vs Republic**, (1968) HCD 150 that when in criminal trespass, the dispute arises as to the ownership of the land, the court cannot proceed with criminal charge but should advise the complainant to bring a civil action to determine a question of ownership. A similar view was stated in the case of **Kibwana Mohamed**

vs Republic, (1980) TLR 32, **Ismail Bushaija vs Republic** (1991) TLR 100, **Slivery Mkangaa vs Republic** (1992) TLR 110.

I thus agree with the appellant's first ground of appeal that, since the dispute between the parties was purely land, the trial court lacked legal jurisdiction to determine the matter as it ought first to have advised/directed the parties to channel their dispute before land court for appropriate remedy. It was therefore, a misplaced case before the trial court and thus the first appellate court.

Regarding the second ground of appeal, I fully agree that the respondent has no locus to sue on behalf of the village which after its incorporation becomes body corporate, thus the said powers are vested to the village council in terms of section 26 c (2) of the Local Government (District Authority Act, Cap 287) R. E. 2019.

Having said all this above, as far as the third ground of appeal is concerned, it goes without saying that the offence of criminal trespass as per facts and evidence of this case have not been established.

All this said and done, appeal is allowed. The proceedings of the two lower courts are hereby declared a nullity for purporting to entertain a land


dispute without jurisdiction. The decision orders and sentence thereof are hereby quashed and set aside.

Parties are advised if still mindful, to channel their dispute to the appropriate forum for resolution.


It is so ordered.

DATED at MUSOMA this 13th day of March, 2023.




F.H. Mahimbali
Judge

Court: Judgment delivered this 13th day of March, 2023 in the presence of the both parties present in person and Mr. Kelvin Rutalemwa, RMA.


F.H. Mahimbali
Judge