

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

PC. CRIMINAL APPEAL NO. 16 OF 2021

*(Arising from the decision of the District Court of Bunda at Bunda in
Criminal Appeal No 17 of 2021)*

DANIEL BAKARI APPELLANT

VERSUS

BERTHA LAMECK (PAUL DEUS KULIGA) RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

This is a second appeal from the District Court of Bunda. The appellant, Daniel Bakari was arraigned in the Primary Court of Kenkyombo on a charge of criminal trespass contrary to section 299 of the Penal Code. It was alleged that Daniel s/o Bakari on 22nd day of May, 2019 at around 18:00rs at Kibara 'B' within Bunda District in Mara Region knowingly trespassed into the land of Bertha d/o Lameck without her consent and therein erected the building. The appellant pleaded not guilty to the charge as such, the matter went through a full trial. After hearing the evidence from both sides, the trial Court was satisfied with the respondent's evidence that the disputed piece of land belongs to the

respondent and that the appellant committed the offence of criminal trespass. Consequently, the appellant was convicted of and sentenced to a conditional discharge for six months.

Dissatisfied, he preferred an appeal to the District Court of Bunda in Criminal Appeal No. 17 of 2021 but his appeal was dismissed. Still undaunted, the appellant is now before this Court challenging the first appellate court for upholding his conviction and the sentence on the following grounds: -

- i. That the appellate court Magistrate erred on point of law when he failed to find that the matter was purely a civil one.
- ii. That the appellate court Magistrate erred on point of law and misdirected himself on facts when he failed to find that the trial court had used the law not applicable in the trial court yet he condoned the errors.

When the matter called on for hearing, the appellant had the legal service of Mr. Baraka Makowe learned advocate whilst, the respondent was represented by Mr. Emmanuel Mg'arwe, learned advocate. The hearing of the appeal proceeded *viva voce*.

Submitting in respect of the 1st ground of appeal, the learned counsel for appellant contented that, the lower courts erred in law for failure to find

out that this matter was civil in nature because neither of the parties tendered any document to substantiate that they have been declared as lawful owner of disputed land. The learned counsel for appellant reasoned that the controversy between the parties was ownership of the land therefore it was not proper to convict the appellant on the offence of trespass while there was dispute over ownership.

Submitting on the 2nd ground of appeal, the learned counsel for appellant had it that, the appellate Magistrate misdirected himself when he applied section 110 of the Evidence Act in the Primary Court. He submitted further that Section 110 of the Evidence Act is not applicable in Primary Court hence it was not correct for the court to make reference to it because each law has its own application. According to the learned counsel for appellant, the first appellate court ought to have seen the anomaly failure of which it has prejudiced the appellant. On the strength of the above submission, the learned counsel for appellant urged this court to allow the appeal quash proceedings and decisions of the two lower courts.

In rebuttal, the learned counsel for respondent, started his submission in respect of the 2nd ground of appeal. He contended that the 2nd ground of appeal is new ground for it was not raised before the 1st appellate court, the practice which is not allowed in our jurisdiction. To cement his

submission, he referred this court to the case of **Halfani Charles vs Makapu & Another**, Misc. Land Appeal No. 85 of 2021 (unreported) in which the court at pg. 7 and 8 held that it is not proper to raise a new ground at the second appellate court.

Replying on the applicability of section 110 of the Evidence Act, he had it that, making reference to section 110 of the Evidence Act by the trial court did not prejudice the respondent because the said section is *in pari materia* with Rule 10 of the Primary Court Evidence Rules.

Responding on the 1st ground of appeal, the learned counsel for respondent argued that, evidence complained of was sufficient to prove that, the respondent was lawful owner of the suit premise because the exhibits tendered indicated clearly that the owner of the suit premise is the respondent. He added that, there was no dispute over ownership that is why the complainant found it fit to pursue it through criminal case. On the strength of the above submissions, the respondent urged the court to dismiss the appeal for being meritless.

In his brief rejoinder, the learned counsel for appellant reiterated what was submitted in chief and added that, the 2nd ground in respect of application of section of the Evidence Act was covered under 2nd and 3rd grounds of the appeal before the 1st appellate court.

I have considered the rival arguments of the learned advocates to this appeal and I will deliberate on the grounds of appeal *seriatim*. Starting with the first ground which was couched that, the appellate court Magistrate erred on point of law when he failed to find that the matter was purely a civil one. From the record of the proceedings, the appellant does not disputes entering into the land in dispute and building foundation therein. The respondent tendered a certificate of title No. 42582 to prove his ownership. It is the clear position of law that a person with a certificate of title is taken to be a lawful owner unless it proved that the certificate was unlawfully obtained. See the case of **Amina Maulid Ambali and 2 Others vs Ramadhani Juma**, Civil Appeal No. 35 of 2019 CAT at Mwanza. In this case, the complainant has proved that he is a holder of certificate of title. Thus, until it is proved otherwise, an exercise which is not the function of a criminal court, the complainant is taken in law to be the lawful owner of the premises in which the appellant unlawfully entered.

In view of the foregoing deliberation, I concur with the two lower courts that the matter was criminal per se as the appellant entered into the land of the respondent without his consent. In the upshot, the first ground of appeal is devoid of merits and therefore I hereby dismiss it.

With respect to 2nd ground of appeal which was to the effect that, the appellate Magistrate erred in point of law and misdirected himself on facts when he failed to find that the trial court had used the law not applicable in the trial court and yet he condoned the errors. The learned counsel for respondent contended that the 2nd ground of appeal is new ground for it was not raised before the 1st appellate court, the practice which is not allowed in our jurisdiction. On the other hand, the learned counsel for the appellant had it that it was covered under 2nd and 3rd grounds of appeal before the 1st appellate court. As stated above this is the second appeal, as such, as matter of principle, this court can only entertain matters raised and determined by the 1st appellate court. See the case of **George Mwanyingili vs R, Criminal Appeal No. 335 of 2016**. However, there is exception to this general principle especially where the new matter is purely on point of law. In the case **Eliah Bariki vs the Republic, Criminal Appeal No.321 of 2016, CAT at Arusha**, the Court held;

'We are in agreement with Mr. Mwinuka that this Court may not decide on matters that were not first put before the High Court for determination, and the rationale is that this Court only sits on appeals against decisions arising from the High Court or from Magistrates' courts in their extended powers, and this is in accordance with Sections 5 and 6 of the Appellate Jurisdiction Act,

Cap 141 RE 2002. We however hasten to add that this principle does not apply when the matter involves a point of law.'

Upon a careful scrutiny of the record, it is obvious that appellant did not raise the issue of the applicability of Section 110 of the Evidence Act before the first appellate court hence it is the first time the appellant has raised it. However, much as it is an issue of law, this court is enjoined to deal with it. I have considered the complaint by the appellant. Whereas, as rightly submitted by the appellant, the Evidence Act does not apply in Primary Court by virtue of section 2, the provision similar to section 110 of the Evidence Act is found under Rule 10 of the Primary Court Evidence Rules. As such, the reference by the trial Magistrate to the Evidence Act, is, in my view, inconsequential.

All the above considered, it is my findings that the appeal is devoid of merits. I consequently dismiss it.

It is so ordered

The right to appeal is fully explained.




A.A. Mbagwa

JUDGE

09/06/2023