IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 3 OF 2023

(Originating from the District Court of Arumeru at Sekei, Criminal Case No. 14 of 2022)

JULIUS LOTOVUAKI KAAYA ..... 1ST APPELLANT

MATHAYO SINGO KAAYA ..... 2ND APPELLANT

FRANK SINGO KAAYA ..... 3RD APPELLANT

SIMON SINGO KAAYA ..... 4TH APPELLANT

SANDE SINGO KAAYA .... 5TH APPELLANT

MOSSES MERINYO KAAYA .... 6TH APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

20/04/2023 & 30/05/2023

GWAE, J.

In the District Court of Arumeru (henceforth "the trial court"), the appellants herein were arraigned, prosecuted and convicted of two offences, namely; Criminal Trespass and Malicious Damage to property contrary to sections 299 (a) and 326 (1) respectively, both of the Penal Code, Cap 16, Revised Edition, 2019.

It was alleged by the prosecution that, on 31st August, 2021 at Moivaro Village, Arumeru District within Arusha City in Arusha Region, the appellants unlawfully trespassed and entered into farm No. 809, the property of Tanzania (2000) Adventure Limited and after entering in the said land, they damaged properties by cutting down crops, trees and vegetables worth TZS 16,627,546.30/=. The accused persons now appellants patently denied both counts flattened against them.

The brief facts of the case as can be gathered from the testimonies of the witnesses during trial before the trial court is to the effect that, Gibson Blasius Meiseyeki (PW2) who testified as the owner of the tour company known as Tanzania (2000) Adventure Limited (the company) dully registered on 25th August 2004. On 12th July day of 2010, the company purchased a piece of land measuring 1.568 hectors, which is equivalent to four acres owned by Mr. Lekoko Ole Sululu and Ms Tanya Pergola (joint owners). The land was surveyed and registered as farm No. 809 with certificate of title No. 13914. The PW2 bought the land on behalf of the company. The sale documents were admitted PE7 collectively. The title deed of the said farm was admitted as PE4.

Formally, the land was located at Moivaro village within Arumeru District but after changes in geographical locations, which brought formation of Arusha City, some of the villages were relocated. Thereafter, the land was relocated at Ambureni ward and village, in Msorongo hamlet, Meru District while Moivaro village remained in Arumeru District.

According to testimony of PW2 acts of planting trees, vegetables, sugar cane, maize, beans and other crops developed the farm. That, one Sadieieli Samweli (PW1) was taking care of the land since 2010. The 1st appellant had sued PW1 in the District Land and Housing Tribunal for Arusha (the DLHT), vide Application No. 116 of 2015 for trespassing on his piece of land measuring 20 x 20 paces, which was part of a farm measuring 5½ acres. The judgment (PE1) in respect of that case was delivered on 31st August 2021, whereby the case was dismissed by the DLHT as the 1st appellant was found to have failed to prove his ownership over the suit land. Nevertheless, the DLHT did not declare PW1 who respondent on the ground that, he was not the owner.

On the same day (31/8/2021), at about 18: 00hrs, PW1 found the appellants to have trespassed into the said land, putting up demarcations, while others cutting down trees, bananas, damaging whatever had been

planted there. According to PW1, all the appellants including Julius, Frank, Mathayo, Simon and Sande were at the crime scene, equipped with bush knives and axes. PW1 sought assistance by reporting the matter to PW2 and at User River police station. On 14th September, 2021, PW2 accompanied by valuers went to the farm to ascertain the extent of loss. While there showing the valuers the damaged plants, the appellants invaded PW1, laid him down and beat him by using fists. Noting the fracas, PW2 fired one gun-bullet to threaten the appellants who subsequently ran away.

Lekoko Ole Sululu (PW3) testified that his partner Dr. Tanya and him bought the land subject of the case from Mr. Gabriel Simon. In 2009-2010, they sold the same to PW2 at a consideration of TZS 40,000,000/=. PW3 admitted to have signed exhibit P7 for transferring ownership of the land to PW2.

F. 6633 D/SGT Elishaeri, PW4 was assigned case file to investigate on 02/ 09/ 2021. On 7th September, 2021, he visited the crime scene accompanied by PW2. The said land was located at Ambureni village where they found the appellants cutting down vegetables, trees and banana trees. When PW4 interrogated the appellants, they claimed the farm to be theirs. The appellants were fencing the area. They also built a small hut by using

the trees they had cut down. PW4 drew sketch map of the crime scene (PE8). He informed the appellants to attend at the police station the following day. As they attended the following day, their statements were recorded. In their statements, the appellants claimed that, their late father allocated the land to them. On 14th September 2021, PW4 participated during valuation process.

Denis Steven Mosha, PW5 who went at the crime scene on 14th September 2021 carried out the valuation. Prior to that date, PW5 regularly visited the crime scene for intelligence purposes where he noted the alleged destruction. On the valuation day, PW5 found trees cut down, banana trees and vegetables destroyed, and upon valuation, he found out that, the loss occasioned by the appellants tallied to TZS 16,627,546.30/=. He took photographs of the damaged plants and prepared the valuation report which was admitted as PE9. According to PW5, during the valuation exercise, the appellants, PW1, PW2, and PW3 were also present.

Goodluck William Mollel (PW6) confirmed that, the land subject of the trespass was the property of the company relying on the title deed, PE4. Justifying the variation of the names of the location where the land is situated, PW6 accounted that previously, the land was located at Moivaro

village within Arumeru District. Later, Arumeru District was merged through G.N No. 190 forming Meru District and Arusha District. In 2010, some of the areas were converted including Moshono and Moivaro wards forming part of Arusha City. Significantly, the land in dispute remained in the new formed Ambureni village within Arumeru District Council. According to PW6, in the back days, they were using centralized system from Dar es Salaam which did not recognize the word Moivaro, rather the nearest word was Moivo, rendering the rent payment receipts to read Moivo instead of Moivaro. He further contended that change in geographical locations does not change ownership of land.

After close of the prosecution case, the appellants entered their defence denying commission of the offences they stood charged with. They jointly claimed that, the land said to be trespassed is their own, which they inherited from their deceased father, who died in 2011. According to Julius Kaaya (DW1), he buried his wife and son on the land in issue. DW1 sued PW1 in the District Land and Housing Tribunal for trespassing in the suit land and damaging the graves. On 31st August, 2023 the judgment was delivered whereby the case was dismissed for lack of proof of ownership. DW1 retired back home with his relatives, at about 02:00pm they were informed by their

brother Sande that he saw PW1 in the farm, cutting grasses. On 1st September, DW1 realized the damage whereby he found 36 banana trees had been cut down and some vegetables were damaged.

Moses Merinyo Kaaya (DW2), Mathayo Lotovoaki Kaaya (DW3), Saimon Kaaya (DW4), Sande Lotuvuaki Singo Kaaya (DW5) and Frank Singo Kaaya (DW6) were unanimous that the land subject of the dispute is theirs, which they inherited from their late father. They denied to have trespassed in the said land, but they agreed that they fenced the area for security purposes.

Olais Simon Meinyai (DW7) testified as the chairman of Ambureni village. He accounted that the appellants reported in the village office about the damage that, happened in their farm. DW7 paid a visit in the said farm and noted the destruction. He accounted that the said land belongs to the appellants. He neither know PW2 nor the company as the owners of the land subject of the offence of trespass, as transfer process was not reported in the village offices.

After hearing the evidence of both the prosecution and that of the defence, the trial magistrate was fully satisfied that the offence in both counts against the appellants were proved to the hilt. They were convicted

and sentenced to serve **one-year** and **2 ¼** years custodial sentences for the 1st and 2nd count respectively. The imposed sentences were ordered to run consecutively. The trial court further ordered the appellants to compensate the owner, of the farm, at the tune of TZS 16,627,546.30/= being the value of the damaged properties.

The appellants were aggrieved by both convictions and sentences imposed on them. They preferred this appeal on eight grounds of appeal as reproduced hereunder:

1. *That, the learned trial magistrate erred in law and in fact by convicting and sentencing the appellants in complete disregard of the fact that there is a pending case at the District Land and Housing Tribunal for Arusha which is Application No. 14 of 2021, instituted by the Tanzania (2000) Adventure, the complaint in criminal case, regarding ownership of the land allegedly to have been trespassed by the appellants consequently arriving to an erroneous decision;*
2. *That, the learned trial magistrate erred in law and fact for failure to appreciate the location, size and ownership of the land allegedly to have been trespassed by the appellants, hence arriving to an erroneous decision as there was a dispute over where the land is located and its size with regard to what has been testified and tendered by prosecution against the defence;*

3. *That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellants while the prosecution did not prove the alleged offences to the standard required by law in proving criminal cases;*
4. *That, the learned trial magistrate erred in law and fact for failure to scrutinize and evaluate the evidence adduced during trial hence arriving to an erroneous decision;*
5. *That, the learned trial magistrate erred in law and fact for failure to consider and neglecting the strong evidence adduced by the appellants which contradicted the evidence adduced by the prosecution witnesses hence arriving to an erroneous decision;*
6. *That, the learned trial magistrate erred in law and fact for failure to appreciate that the whole matter involved ownership of land which need to be dealt by the competent court, hence she arrived to an erroneous decision by convicting and sentencing the appellants;*
7. *That, the learned trial magistrate erred in law and fact for failure to appreciate that the appellants were in occupation of the land and therefore no malicious damage to their properties as the appellants cannot damage properties raised by themselves; and*
8. *That, the learned trial magistrate erred in law and fact in issuing a sentence (sic) that is inconsistence (sic) with the alleged offences and did not consider any mitigating factors and with no alternative sentence.*

It was the appellants' prayer that the appeal be allowed, urging this Court to quash the conviction and set aside the sentence imposed by the trial court and set them at liberty.

At the hearing of the appeal before, the appellants were represented by four advocates namely; Mr. A. Abdallah, Mr. Mackmillian Makawia, Mr. Mbwambo and Deogratius Bugalama while Ms Alice Mtenga, learned State Attorney represented the respondent Republic. The appeal was heard *viva voce*.

Each counsel for the appellants was assigned separate grounds to argue. Submitting in support of the 1st, 6th and 7th grounds of appeal jointly, Mr. Abdalah contended that the case in the trial court was prematurely determined because even the court itself noted that, there was a civil case pending as shown at pages 2 and 8 of the judgment and page 57 of the proceedings. He strenuously accounted that during trial, the controversy was on ownership of parcel of land, which the trial magistrate lacked jurisdiction to determine. According to the appellants' counsel, once there is dispute of ownership, the issue of ownership has to be resolved first before embarking on the criminal trespass. To bolster his contention, he relied on the following decisions: **The DPP vs. Zhiling**, Criminal Appeal No. 74 of 2022 and **Sara**

vs Bushes, Criminal Appeal No. 11 of 2021 (both unreported), which stressed that, the offence of criminal trespass cannot stand once there is dispute of ownership of the parcel of the land alleged to be trespassed. According to Mr. Abdallah, the same principle applied to the offence of malicious damage to property because the damaged property is connected to the land in dispute.

Mr. Abdallah added that, the eyewitnesses testified that there was an injunction against the appellants in a case instituted by the complainant. He urged the Court to quash the proceedings and set aside the sentences because the proper procedure was to stay the proceedings until the dispute over ownership of the disputed land was finally and conclusively determined by a competent court.

Expounding the 2nd and 3rd grounds of appeal, Mr. Mbambo amplified that the exhibit tendered by the complainant (exhibit P4) shows that the disputed land is located at Moivo area-Sanawari Arusha District while the reality is that the same is located at Ambureni Ward-Tengeru area within Arumeru District. He intimated that the DLHT was to entertain the dispute of ownership vide Application No. 14 of 2021 which is still pending before Kagaruki chairperson. It was counsel's further contention that the appellants

were in physical/actual possession of the suit land and the trees alleged to have been damaged were used for enhancing the burial area, reiterating his position that the controversy was over ownership of the land. He firmly insisted that the offences against the appellants were not proved pursuant to section 3 (2) of TEA, making reference to this Court's decision in the case of **Daniel @ Andrew vs Republic**, Criminal Appeal No. 207 of 2018 (unreported).

Mr. Mwakwai submitted on the 4th and 5th grounds of appeal combined asserting that there was contradiction which ought to have been resolved in favour of the appellants because it went to the root of the matter. He referred page 7 of the judgment, which shows that the land subject of the case between the parties was unsurveyed measuring four acres. He added that, the purchaser did not know the nationality of the seller of the said land. Therefore, it was his opinion that, the doubts ought to have benefited the appellants.

Mr. Bugalama deliberated the 8th ground of appeal challenging the sentence imposed on the appellants. He argued that the sentence was ordered to run consecutively instead of running concurrently referring page 22 of the Sentencing Manual, 2021. The learned counsel stressed that there

were no exceptional reasons put forth by the trial magistrate for ordering the sentences to run consecutively. He prayed that in the event the decision of the trial court is confirmed, this Court be pleased to order the sentences to run concurrently and taking into account the mitigating factors of each appellant.

On her part, the learned State Attorney supported the decision of the trial court. She generally argued the grounds of appeal stating that the contention that the judgment was prematurely made is unfounded. She argued that, the testimony of DW1 at page 57 of the typed proceedings was a mere statement without any supporting document that, there was a pending case. She contended that, the appellants totally failed to prove their ownership over the disputed land, which is located at Ambureni village as per the evidence of PW6.

Ms Mtenga maintained that all elements of criminal trespass existed and were proved as the victim managed to produce necessary documents to establish ownership over the suit land. Similarly, there was a case instituted by the 1st appellant which was dismissed as he failed to prove his ownership over the same land, hence, the trial court was justified to find the victim the lawful owner of the disputed land. That, the appellants unlawfully and

unjustifiably damaged the trees, vegetables, grasses and tomatoes planted by PW1 who was employed by PW2. According to Ms. Mtenga, whether the issue of ownership is resolved or not, it does not warrant any person to maliciously damage property, including his/her own property. She added that even when one wants to harvest a forest produce being his or otherwise, there are procedures to follow including seeking permit from the responsible offices.

Regarding the sentence imposed on the appellants, the learned State Attorney was in support of the sentences imposed by the trial court stating that the trial magistrate gave reasons as to why the ordered sentences should run consecutively, referring page 13 of the judgment. However, she was quick to point out that this court is at liberty to step into the shoes of the trial court and order the proper sentence, once the imposed sentence is found unjust. She concluded by maintaining her prayer that, the appeal be dismissed.

In a brief rejoinder, Mr. Abdallah maintained that the person who instituted the case in the DLHT is the one who initiated the criminal case on 18/7/2022. That apart, the trial magistrate was aware of existence of the land case before the DLHT, hence she was not justified to determine

ownership of the land as she did. He distinguished the case of **Lawrence Mateso vs Republic** [1996] TLR 118 which was relied on by the trial magistrate stating that, the case was struck out for lack of locus standi, therefore, neither of the appellants nor PW2 was declared the lawful owner of the disputed land.

I have carefully examined the grounds of appeal, the trial court record and the oral arguments by counsel for both sides. With the exception of the 8th ground of appeal which is challenging the sentences imposed on the appellants. The rest of the appellants' grounds of appeal, seemingly, centre on challenging the trial court's decision for convicting the appellants on the offences of criminal trespass and malicious damage to property while the dispute over ownership of the land was not resolved. Giving due regard to the above court's observation. Thus, determination of this appeal will base on the following three issues. **Firstly**, whether the trial court was vested with jurisdiction to entertain the offence of criminal trespass. **Secondly,** whether there was proof in 2nd count against the appellants; and **thirdly**, whether the sentences imposed against the accused persons now appellants were justified or lawful.

As to the 1st issue, at the outset, I absolutely agree with the learned counsel for the appellants that, a criminal charge for an offence of criminal trespass cannot stand once ownership of a piece of land subject of the trespass is in dispute. A civil court or competent quasi-judicial body must finally determine the issue of ownership before embarking into entertaining the charge pertaining the offence of criminal trespass. This legal position has been maintained by our courts in our jurisdiction since the time immemorial. For example, in the case of **Ismail Bushaija vs. Republic** [1991] TLR 100, it was held;

> *"In my view, it is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is in dispute between the complainant and the accused. As was pointed by this court in the case of Said Juma versus Republic, H.C.D No. 158, cited by Mr Nasmire, when, in a case of criminal trespass, 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."*

That position has been emphasized in a chain of judicial decisions including **Sylivery Nkangaa vs. Raphael Albertho** [1992] TLR 110, **Kusekwa Nyanza vs. Christopher Mkangala**, Criminal Appeal No. 233

of 1016 (unreported), **Sara Kapela vs. Bushesha Faustine**, Criminal Appeal No. 11 of 2021 (unreported-H C).

Basing on the above position of law and without wasting much of the court's precious time, the trial court is found to have prematurely determined the offence in 1st count since the issue of ownership of the land measuring 20 x 20 paces has never been conclusively determined between the 1st appellant and PW2. Looking at the nature of the DLHT's decision, though, the 1st appellant was found to have failed to establish his locus standi over the land in dispute but neither PW1 nor PW2 was declared a lawful owner by DLHT. Hence, this appeal in this aspect succeeds.

Regarding the **2nd issue**, I am alive of the principle that in an offence of malicious damage to property, there must be proof that the accused person must have willing and unlawfully damaged the property. I would like to subscribe my holding to the case of **John Chize Bahinganyi vs. Republic** (1988) TLR 234 where it was held that in order to prove a charge of malicious damage to property,

> *"It must be proved that the accused wilfully and unlawfully "caused the damage".*

(See also decisions of this court in **Yusufu Hussein vs. Republic** (1969) HCD. 16 and **Scolastica Paulo vs. Republic** (1984) TLR 187.

I am however; I aware of the legal principle that, the courts in adjudging cases must not lose sight on the cherished principle of the law that each case must be decided depending on its peculiar facts and circumstances. In the appeal at hand, the prosecution through the oral testimonies of PW1, PW2, PW3, PW5 and PW6 confirmed that, the land was developed by the PW2 via PW1. This the reason why the 1st appellant instituted a land case before DLHT through Application No. 116 of 2015 (PE1), which was struck out instead of the word used therein "dismissal" on 31st August 2021 for non-joinder of the owner, PW2.

I am of the increasingly of the view that, since the damaged crops and forest produce were clearly planted by the victim, PW2 taking into account that, there had been dispute over the same land, measuring 20 x 20 paces since 1990s (See PE8 followed by PE6 where the original owner, Gabriel successfully complained against the 1st appellant's father). I have further taken judicial notice that the 1st appellant's further was evicted from the suit land via Criminal Case Instituted (PE5) by one Gabriel Simon in Enaboishu Primary Court in 1992. The appellants were therefore not justified to

maliciously damage the properties or crops and trees planted by other persons by PW2 any other person.

Perhaps the appellants might enter the land in dispute since the nature of the DLHT's decision did not declare any party between the 1st appellant and PW1 a lawful owner on the context that, they were still claiming ownership over the suit land and the fact that, there are burial yards belonging to their relatives as explained in the 1st issue. The fact, which exonerates them from criminal liability for the offence of criminal trespass unlike the offence of malicious damage to property. Nonetheless, the appellant could not rely on the defence of bonafide claim pursuant to section 9 of the Code (supra) since there is total absence good faith and honest as was correctly stressed in **John Chize Bahinganyi vs. Republic** (1988) TLR 234, where this court held inter alia;

> *"The defence of bonafide claim of right, embodied in section 9 of the Penal Code, is only available where the claim of right is **fairly, honestly** and **reasonably** held having regard to all facts and circumstances."*

Examining the evidence adduced by PW1 that on 31st August 2021 when the DLHT's judgment was delivered the 1st appellant threatened him

(PW1) that, if he finds him into his farm he shall cut him his neck ("Wewe Sadiki umesikia Hakimu alichozungumza, nikikukuta kwenye shamba langu nitakukata shingo"). Equally, the appellants' threats and being armed at the suit land and the damages that they so caused per the testimonies of the prosecution witnesses. It follows therefore, the appellants acted unfairly, dishonestly and unreasonably.

Another complaint advanced by the appellants' advocates is that there is pending Application No. 14 of 2021, which was instituted in the DLHT by PW2 seeking to be declared the lawful owner of the suit land. In this assertion a much as there is no proof brought in court to support the same, it remains unproved. Even if I assume that such case exists, (which is not the case), still the appellants had no justification of causing damages of properties in the suit land and doing whatever they did during pendency of the purported case. Doing so is tantamount to interfering due process of the law, which is against the rules of natural justice. Above the appellants ought to have avoided use barbaric means in solving the land dispute that has been pending since 1990s.

I should now revert to the last issue, regarding the sentences imposed on the appellants. The record is clear that the appellants were charged and

convicted of two counts. Having convicted them on both counts, the learned Principal Resident Magistrate sentenced them differently. In the 1st count, they were sentenced to serve one custodial term and in the 2nd count, they were sentenced to serve 2 ¼ years' imprisonment. The imposed sentences were ordered to run consecutively. His Lordship **Msofe, J** as he then was now retired JA) in **Deli Bura and Mandoo Burav. Republic** (2002) T.L.R 8 at page11, stated inter alia that;

> *"It is not clear why the learned Senior District Magistrate ordered the same to run consecutively. Apparently he did not assign any reason (s) as to why he thought there was a need for the sentences to run consecutively, it might be useful to bring to the attention of the learned magistrate that the principle has been that unless there are exceptional circumstances sentences of imprisonment should always be ordered to run concurrently".*

Close scanning of the trial court judgment, I agree with the advocates for the appellants that, there was no reason assigned by the trial magistrate for ordering the sentences to run consecutively. As stipulated at page 22 of the Tanzania Sentencing Manual for Judicial Officers, 2021, it is a general practice that, sentences for the offences arising in the course of the same transactions shall run concurrently unless under exceptional circumstances.

Once the sentences are ordered to run consecutively, reasons for so ordering must be spelled out.

Since in the instant case, notwithstanding the appellants' unfavourable acts, the sentences were ordered to run consecutively without assigning reasons, the order was made in total disregard of the law. As urged by the learned State Attorney, this Court has mandate to step into the shoes of the trial court and order appropriate sentence. I thus fault the decision of the trial magistrate ordering the sentence to run consecutively. Therefore, this ground of appeal succeeds.

Regarding the appellants' complaint that, the trial court did not consider the appellants' mitigating factors. The trial court's record reveals that, all the appellants sought the mercy of the trial court based on being first offenders and few, 1st and 4th accused who stated that they are suffering from serious sickness. Considering the sentence in respect of the 2nd count to the charge whose trial court finding is upheld, in the circumstances of the case, I find it fair and just if the imposed sentence in respect of the 2nd count is reduced to one and half (1 1/2) years for the 2nd, 3rd , 5th and 6th accused. For the 1st and 4th accused now appellants the term of the imposed sentence

is reduced to the extent of their immediate release from prison forthwith unless held therein for different lawful cause.

In totality of the foregoing, the appeal is partly allowed to the extent that, the finding of the trial court in respect of the 1st count is quashed and set aside as it was premature to determine the offence of trespass where the issue of ownership was yet to be established. I further fault the decision of the trial court in that, it was wrong for it to order the imposed sentences to run consecutively. However, the trial court decision on the 2nd count is hereby confirmed serve to the reduction of the sentence from **2 ¼ to 1 ½** years' jail for the 2nd, 3rd, 5th and 6th appellant whereas the sentence imposed to the 1st and 4th appellant is reduced to the effect of immediately release from prison custody due to their illness. Nevertheless, the trial court's order as to compensation is confirmed.

Order accordingly,

DATED at **ARUSHA** this 30th May, 2023

SGD. MOHAMED. R. GWAE
JUDGE

Court: Right of appeal fully explained

SGD. MOHAMED. R. GWAE
JUDGE
30/05/2023