

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB- REGISTRY OF MWANZA
AT MWANZA**

PC CRIMINAL APPEAL NO. 24 OF 2022

*(Arising from Geita District Court Appeal No 4/2022,
Original Katoro Primary Court Crim. Case No. 80/2022)*

SAMSON MABUGA1ST APPELLANT
SIZYA HAMIS.....2ND APPELLANT
MORISI EVARIST.....3RD APPELLANT
FURAHA SHIMENDE4TH APPELLANT
VERSUS
MADUHU MASUNGA.....RESPONDENT

JUDGEMENT

June 27th and 21st, 2023

Morris, J

The appellants are before this Court challenging judgement of the District Court of Geita in Criminal Appeal No 4 of 2022. Primarily, they were jointly charged before Katoro Primary Court (elsewhere herein, '*the trial court*') vide Criminal Case No. 80 of 2022. Together, the appellants herein faced the offence of criminal trespass contrary to section 299 of *the Penal Code*, Cap 16 R.E. 2022. They were subsequently convicted



and sentenced to each pay fine of Tshs. 50,000/= or serve a six month-jail term in lieu in default. Their appeal before the District Court was unsuccessful. The present one is, hence, the second appellate attempt. Three grounds have been fronted hereof. Majorly, the lower courts is faulted on allegations that it failed to consider that the house in dispute was under administration of the 4th appellant. Further, that it was illegitimate for the appellants to be declared trespassers instead of holding that they were legally on the house in dispute. Lastly, the lower court is alleged to had failed to weigh evidence of the appellants.

From available record, the respondent above bought the house situated at Calphonia -Katoro, Geita at Tshs. 6,000,000/=. The purchase was through the public auction culminating from the execution of Primary Court Civil Case No. 46 of 2021. One day, the respondent supposedly found the padlocks of the said house broken while the 1st to 3rd appellants were building/repairing the house. Apparently, the trio masons were under instructions of the 4th appellant. The 4th appellant claimed that the house in question belonged to his late father, one Reuben Donge.

During hearing, Messrs. Stephen Mhoja and Stephen Kaijage, learned advocates, represented the appellants and respondent

respectively. The counsel for the appellant argued the three grounds of appeal simultaneously. He submitted that the subject grounds had a common gist. That the appellants' presence in the land was lawful/legal: the 1st three (3) as laborers under the 4th appellant's instructions or employment. It was submitted further that the former labourers were renovating the house which was under the administration of the 4th appellant. The estate being administered were of late Reuben Donge Supila.

The appellants also argued that, elements of criminal law involve *actus reus* and *mensrea*. But the appellants' *mensrea* was not established by the respondent. That is, an act (of being on the premises) alone did not constitute the crime unless it was also accompanied by the unlawful intent. He referred to the case of ***Kibwana Mohamed v R*** [1980] TLR 321. It was the appellants' further argument that the respondent did not cross-examine the appellants on such aspect. Hence, the uncontroverted testimony seemingly remained to be the truth that there was no guilt mind (*mensrea*) on the part of the appellants. Such argument was reinforced by insistence that failure by a party to cross examine on a fact is

admission. Accordingly, reference was made to the case of ***Khalid Mlyuka v R*** Crim. Appeal No. 442/2019 (unreported).

Further to the above, the appellants' counsel contended that, section 9 of ***the Penal Code*** exonerates a person who deals with the property on honest claim of right (without defrauding elements). To him, the appellants had no bad/ill intention over the land. Thus, the offence of criminal trespass would not ensue. More so, if there is still a dispute over ownership of the land as stated in the case of ***Sylivery Kangaa v Raphael Robert*** (1992) TLR 110.

Reference was made at pages 3 and 9 of trial court's proceedings where the 4th appellant alleged that the land belonged to his deceased parent while the respondent claimed to have purchased it via auction respectively. Hence, the ownership was still contested. That is, ownership over the land ought to be proved first before criminal trespass is proved. Making reference to ***Mussa v Peter Titus & Others***, Criminal Appeal No. 6/2021 (unreported) the appellant reinforced their position that civil proof of ownership of the property supersedes proof of criminal trespass.

In reply, it was submitted by the respondent that the trial court's decision and the 1st appellate courts confirmation of the convictions were

valid. To him, there was no dispute over ownership of the land. That, the respondent's position is that he legally bought it on auction from Mkula Lukaranga following the outcome of Katoro Primary Court Case No. 46/2021. Basing on historical account, he added that the said house was mortgaged and later attached by the court following default in payment. Consequently, the respondent became the lawful owner of the property.

He also submitted that, so long as the 4th appellant did not produce, in court, any evidence to prove that the house belonged to the deceased, the accused-appellants had no bonafide entry thereon. He concluded that both courts were justified to convict the appellants. Moreover, it was submitted that the cases referred to by the appellants are distinguishable for they do not relate squarely to circumstances of the present case. In rejoinder, submission in chief was reiterated.

From the outset, I wish to point out that this being the second appeal, I will not interfere with concurrent findings of two lower courts on matters of facts. That is, I will confine myself to matters of law arising therefrom. I stand guided by a chain of authorities including the cases of ***Hamisa Halfan Dauda v R***; Criminal Appeal No. 231 of 2009; ***Benedict Buyombe @Bene v R***, Criminal appeal No. 354 of 2016. That is, the



second appellate court barely reevaluates the evidence and concurrent findings of courts below; unless doing so is exceptionally of interest in justice given circumstances of the matter.

From the grounds of appeal and submissions of parties only one legal issue arises. That is, whether or not the appellants were on the suit premises legally and/or with any bonafide claim of right. It was the submissions for the appeal that the 1st to 3rd appellants entered into the land upon being employed by the 4th respondent to renovate the house. For the 4th appellant, it was contended that the suit premise belongs to his late father. For the respondent it was contended that he bought the same through public auction under court-supervised execution.

It is cardinal law that, for the offence of criminal trespass to be proved there must be no any claim of right over the suit premise by the accused. In other words, the property alleged of having been trespassed onto must be under exclusive ownership or possession of the complainant. Further, in the criminal proceedings, the court is unjustified to adjudicate upon the issue of ownership of land. It lacks jurisdiction in such aspect. See the case of ***Kusekwa Nyanza v Christopher Mkanyala***, Criminal Appeal No. 233/2016 (unreported).



In the present case, at page 9 of the trial court's proceedings, the 4th appellant claimed that the land belongs to his late father. He is recorded as testifying that; "...*lakini kiukweli nyumba hiyo ni ya mzazi wangu ambaye kwa sasa ni marehemu mzee reuben donge mimi najua ni mali yetu*"(plainly translated that, "in essence, I know the subject house is ours for it belonged to our late father; one Mr. Reuben Donge").

The foregoing evidence was unchallenged during cross-examination. As rightly submitted by the appellant's counsel, failure by a party to cross examine the witness renders evidence given to be believed. Apart from ***Damina Ruhele v R***, (*supra*), reference is further made to ***Nelson s/o Onyango v R***, Criminal Appeal No. 49/2017 (unreported).

Further, prior to dismissing the 4th appellant's claim of right, the trial court was of the view that as the suit house was claimed as belonging to his late father; but he was not a legally appointed administrator of his late father's estate; the 4th appellant had no right over the same property. This holding was bought wholly by the first appellate District Court. The latter court principally restated that there was no dispute over the land as between parties herein.

However; Section 9 of ***the Penal Code*** (*supra*) reads;

"A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."

For the reason that the 4th appellant believed and claimed that the land belonged to his late father; he was justified by law to enter thereat and make any renovation or construction, his legal capacity under probate proceedings notwithstanding. In the same vein, as the respondent also claimed ownership on the basis of disposition through auction, the actual owner of the said property was still contentious. It would, therefore, turn to be an ambiguous decision to conclude in a criminal trial that the property allegedly destroyed was of either party.

I should also restate that it is a cardinal principle of criminal law that the prosecution must prove the case against the accused beyond reasonable doubt. That is, the accused should be convicted only on the strength of prosecution case. Followed hereof are ***Twinogone***



Mwambela v R, Criminal Appeal 388 of 2018; and ***Hassan Singano @ Kang'ombe v R***, Criminal Appeal No. 57 of 2022, (both unreported)].

Therefore, the unchallenged claim of right by the 4th respondent over the suit house left sufficient doubt to the prosecution case. Indeed, it fundamentally warranted the court's consideration as to whether the 4th appellant formed intention to commit the crime; or he only introduced himself to potential civil litigation regarding ownership of the said land. To me, the latter formed part of the equation.

Further, as correctly argued by the appellants, the 1st to 3rd appellants were merely instructed by the 4th appellant to renovate the house. Even by overstretch of imagination, their alleged *mensrea* could not be interwoven in the casual employment from the 4th appellant. Hence, their respective guilt mind was not proved.

In upshot, this appeal is merited. I quash the conviction of and set aside sentence against the appellants. I so order.



The right of appeal is duly explained to parties herein.



C.K.K. Morris

Judge

July 21st, 2023

Judgement is delivered this 21st day of July 2023 in the presence of 4th Appellant; Advocate Stephen Kaijage for the Respondent and also holding the brief of Advocate Stephen Mhoja for all Appellants

C.K.K. Morris

Judge

July 21st, 2023