IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

PC CRIMINAL APPEAL NO. 12 OF 2023

(Arising from Criminal appeal No. 10 of 2023 of Kwimba District Court, Original Criminal Case No. 02 of 2023 of Nyambiti Primary Court)

CLEMENT MWENDESHA----------APPELANT

VERSUS

NG'HOME BULUNGUTI----------RESPONDENT

JUDGMENT

14th September & 23rd October, 2023

ITEMBA, J.

Before the Primary Court of Nyambiti at Kwimba, the appellant, Clement Mwendesha was charged with the offence of contempt of court c/s 114 (1)(h) of the Penal code Cap. 16 RE: 2019, the complainant being the respondent, Ng'home Balunguti. It was alleged that between the years 2009 and 2023 at Maligisu area within Kwimba District in the Mwanza region, the appellant, did wrongfully retake possession of the land from the respondent, who has recently obtained judgment from a Primary Court of Nyambiti for the recovery of possession of that land. At the trial, the appellant was found guilty, convicted and ordered to pay a fine of TZS 100,000/= and in default, to serve a jail term of 3 months. Dissatisfied, the appellant appealed to the District Court of Kwimba at Kwimba which

confirmed the trial court's sentence. Still aggrieved, the appellant appealed to this court with three grounds of appeal that: -

i. *The Appellate Court erred in law and fact for determining the dispute without considering that it has no jurisdiction as it is a pure land dispute as it is concerned with ownership of land.*
ii. *The Appellate Court erred in law and fact for deciding in favor of the respondent without taking into consideration that the said alternative offences were charged to the appellant and he was acquitted (autrefois acquit).*
iii. *The Appellate court erred in law and fact for misdirecting itself by holding that the said land belongs to the respondent without taking into account that the land which was in dispute by then already the appellant handled to the respondent and the disputed land herein belongs to the appellant.*

When the matter was called up for hearing, the appellant afforded the services of Mr. Majura Kiboga and the respondent was represented by Mr. Masoud Mwanaupanga both learned counsels.

Submitting first, Mr. Kiboga stated that, at the trial court, the offence was court contempt c/s 114 (h) of the Penal Code. He claims that, since there was a dispute over the ownership, the 1st appellate court was wrong to entertain the matter. He insisted that the proper jurisdiction would have

been the land court and not the Primary Court. He went on that; the appellant was charged twice with the same offence in two distinct primary courts with an allegation to have trespassed to the area which he had already handled to the respondent. That, the appellant was not found guilty because the land in dispute was different. He cited the case of **Twaha Hussein vs R** Civil Appeal No. 415 of 2017 that when the facts are similar, the person cannot be charged twice. He insisted that the district court would have set aside the Primary Court decision.

On the 3rd ground, he submitted that the court failed to take judicial notice that the appellant had already handed over the land in dispute to the respondent. He insisted that the court's hands were tied. He therefore prays the appeal to be allowed.

In his reply, Mr. Mwanaupanga opted to respond jointly to all the grounds. He submitted that, before the Primary Court the dispute was not based on land but it was criminal case no. 2/2023. That, the criminality was in the appellant using the land which was awarded to the respondent. He referred the relevant judgment. (Exhibit P2.)

He went on that, there was no issue of *autrefois acquittal* because the appellant did not appeal on the said Primary Court decisions (exhibit D1). He added that even the counts were different and they should not be mixed up. The other counts included threatening to kill, assault,

disobedience while the count at case No. 05 of 2013, was on the land trespass.

On the 3rd ground of appeal, he claims that the ground has no merit for the reasons that, after the respondent was allocated the land, the appellant kept on using it despite the order to vacate. Referring to page 31 of the trial court proceedings, he insisted that the Ward Executive Officer (WEO) of Maligisu testified and showed the boundaries and convinced the court that the disputed land was under the appellant's use. He refers to the decision of **Twaha Hussein vs Republic** Criminal appeal No. 415 of 2017 which he claims that it supports the case at hand and that the appeal should be dismissed with costs.

When the appellant was probed by the court, he stated that he handled the land to the respondent which was 12 acres and the respondent wants more.

After the submissions from both parties, I proceed to determine whether the appeal has merit.

On the 1st ground of appeal, there is no dispute that the main grievance between parties is over the land measuring 12 acres. The matter traces back in 1998 when the Primary Courts were mandated to determine land matters. Therefore, the dispute was properly determined by the then and it was proper for the complainant to institute the criminal case before

Nyambiti Primary Court under section 114(1)(h) of the Penal Code and that does not make it a land dispute to be determined by the land courts. In that regard, I find the 1st ground with no merit.

The 2nd ground of appeal suggests that the 1st appellate court erred in law and fact for deciding in favor of the Respondent without taking into consideration that the appellant was charged with the said alternative offences and he was acquitted, the same does not feature in the records. The offence before the trial court was court contempt under section 114(1)(h) of the Penal code and the records does not show that the appellant was once charged with such offence and acquitted. In that regard, I find the cited case of **Twaha Husein** (supra) not relevant to the case at hand and, therefore, the ground is also wanting of merit.

The 3rd ground is that the appellate court erred in law and in fact for holding that the said land belongs to the respondent without taking into account that the land which was in dispute by then was already awarded to the respondent.

As I go through the records, it is clear that a way back in 1998, parties had a dispute on land measuring 12 acres before Nyambiti Primary court and after the determination of the said dispute, the land was awarded to the Respondent on 27.07.2009 (exhibit P6). The Respondent claims that the Appellant went on using the land even after it was awarded

to him. On the part of the Appellant, he did not dispute that there was a land dispute and the land it was awarded to the Respondent. However, he claims that the land which he possesses, is different from the land which was awarded to the Respondent. His evidence was also supported by SU1 and SU2 who testified before the trial court that the land possessed by the Appellant is different from the one which was awarded to the Respondent.

It is also in records that from 2009 when the piece of land was awarded to the Respondent, the dispute regarding the said piece of land was referred to various fora for determination. Unfortunately, there seem to have been no solution found which triggered the dispute to mutate into a criminal case in the form of contempt of court whereas the Appellant was tried and convicted. I have evaluated the facts of this case including the records of both trial court and the 1st appellate court. No doubt that, parties way back in 1998 before Nyambiti Primary Court litigated their dispute over the piece of land measured 12 acres and after the determination of the matter in 2009, the court ruled in favour of the Respondent who was on 27.07.2009, awarded the 12 acres land.

Later on in 2023, at the trial court, the centre of the claim was that the appellant wrongfully repossessed the land awarded to the respondent way back in 2009. The Respondent who was a claimant testified and tendered evidence to the effect. In his defence, the appellant

acknowledged to have given back the 12 acres land to the respondent but denied to have repossessed the same. He maintained that, the land which is claimed by the respondent belongs to him and it is not among the 12 acres which were awarded to the respondent. He also brought two witnesses SU2 and SU3 who testified in his favor. The trial court also laboured to visit the *locus in quo* and managed to form its opinion.

Now the question is whether the trial court and the 1st appellate court was right holding that the said land belongs to the respondent. The law is clear under rule 1(1) of *The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations G.Ns. Nos. 66 Of 1972* provides that: -

> *1.(1) Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty.*

In the case at hand, the centre of the dispute which establishes the offence is a 12-acre land which was obtained from the judgment of the court. In terms of rule 1(1) above, first, it must be proved by the complainant that a cause of action arose from the specific piece of land by establishing the boundaries. In **Mosi Chacha Iranga and Makiri Chacha vs Republic,** Criminal Appeal No. 508 of 2018, it was stated by the Court of Appeal that:

> '***For an offence of illegal entry to stand, the evidence must prove that*** *the game scouts arrested* ***the appellants strictly within the statutory boundaries*** *of this game reserve. It will not suffice, for the prosecution*

witnesses, to merely allege that the scouts stopped the appellants "at Mto Rubanda area into Ikorongo Game Reserve". The trial court must evaluate competing evidence and be satisfied that the "Mto Rubanda area" is within the Ikorongo Game Reserve'. (Emphasis supplied).

Therefore, it was important for the boundaries of the disputed land to be specifically provided. In the case at hand, the respondent did not specifically provide his boundaries and show the court that, the said 12 acres were specifically the same land which is claimed to be repossessed by the appellant. The trial court should have evaluated the appellant's defence considering that the appellant insisted to not have entered into the respondent's land. And him stating that their pieces of land are located alongside each other.

As I hinted above, the trial court visited the *locus in quo* and formed their opinion. Among of the findings of the trial court were as I quote: -

"-Mlalamikaji alionyesha shamba alilokabithiwa kwa amri ya mahakama ni lile la kaskazini.
-lile la kaskazini lina mazao (mahindi) ***sehemu kubwa lina mahindi ya mshitakiwa na sehemu iliyo ndogo lina mahindi ya mlalamikaji.***
-shamba hilo la kaskazini upande wa kaskazini limepakana na mto na upande wa magharibi limepakana na mto.

-upande wa mashariki kuna njia ndogo ya watembea kwa miguu na upande wa kusini kuna njia kubwa ya kupitisha ngómbe na watembea kwa miguu."

From the expert quoted above, the trial court could not be in a position to specifically locate the land which was centre to the offence. It was wanting to go from the generality to specification in identifying boundaries and enquiring for the size of the respondent's land to be able to clear the doubts raised by the appellant.

Based on the requirement of the law in proof of criminal case, the findings of the trial court were general and the case was not proved beyond reasonable doubt. It is my firm view that, the respondent's claim against the appellant would have succeed only if he could establish that the piece of land which the appellant was occupying was exactly part of the 12 acres land awarded to him on 27.07.2009 by the High Court. In result, the respondent failed to discharge this onus of proof placed on him. This ground has merit and I proceed to allow it.

In the light of the above considerations, I find that there is substance in the appeal. In the event I allow it. The conviction entered against the appellant is quashed and the sentence passed is set aside.

It is so ordered.

Dated at MWANZA this 23rd day of October 2023.

The Right of Appeal is explained to the parties.

L. J. ITEMBA
JUDGE
23.10.2023

Judgement delivered today 23rd day of October 2023, in the presence of both parties, Mr Majura Kiboga and Masoud Mwanaupanga for the appellant and respondent respectively and Ms. Glady Mnjari, RMA.

L. J. ITEMBA
JUDGE