

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

PC CRIMINAL APPEAL NO. 10 OF 2023

(Arising from PC Criminal Appeal No. 14 of 2022 of the District Court of Misungwi and Originating from Criminal Case No. 170 of 2022 of the Bukumbi Primary Court)

PETER KINASA.....APPELLANT

VERSUS

NORBART DEOGRATIAS.....RESPONDENT

JUDGMENT

24th October & 03rd November, 2023.

Kilekamajenga, J.

The respondent is the son of Anastasia Buswelu who is a resident of Kiseke in Mwanza. On 23rd August 2008, Anastasia Buswelu purchased three (3) acres of land from Peter Kinasa (appellant) at the price of Tshs. 1,500,000/= . The land is located at Misungwi within Mwanza region. On 21st May 2014, Anastasia Buswelu passed on leaving behind, *inter alia*, the purchased piece of land. The respondent being the first son of the Anastasia stepped into the administration of the deceased's properties. The appellant resisted and went further removing the fixed boundaries arguing that, Anastasia only purchased a piece of land measuring 30 times 40 meters. The respondent considered the appellant's act as criminal trespass to the land and filed a case against him in the Primary Court of Bukumbi. Consequently, the appellant was arraigned for the offenses of criminal trespass contrary to section 299 and destruction of property contrary to section



326 of the Penal Code Cap. 16 RE 2019. At the end of the trial, the appellant was found guilty and sentenced to pay a fine of Tshs. 50,000/= or serve a prison term of one month for the first count. On the second count, he was ordered to pay a fine of Tshs. 200,000/= or be imprisoned for four months. He was further ordered to pay compensation to the respondent at the tune of Tshs. 200,000/=. Irked with the decision, the appellant approached the District Court for justice where his appeal was dismissed for lack of merit. The appellant filed the instant appeal with six grounds thus:

- 1. That, the evidence on record does not support the offence which the appellant was convicted of.*
- 2. That, the appellate District Court had erred in law and fact to rule out that there is no dispute on ownership of land merely in absence of land dispute before any Land Tribunal referred by the appellant to exonerate him from the offence he was charged with.*
- 3. That, the Appellate District Court Magistrate had erred in law to hold out that the Appellant admitted to have sold the dispute land whilst he did not.*
- 4. That, in the circumstances of the case the Appellate District Court was totally wrong to uphold the decision of the trial court as it has no jurisdiction to entertain the matter being land related matter.*
- 5. That, without prejudice as the sentence of compensation and fine amounting to Tshs. 400,000/= in lieu of the imprisonment is illegal and further as it had no basis in fact and law, the Appellate District Court erred in leaving the same undisturbed.*
- 6. As a whole the District Appellate Court has failed to evaluate the evidence of the trial court properly hence it has arrived to the decision not justifiable in law.*

To defend the appeal, the appellant hired the professional legal services of the learned advocate, Mr. Mathias Mashauri. In his oral submission, Mr. Mashauri simultaneously argued some of the grounds of appeal and some argued them separately. On the fourth ground, Mr. Mashauri argued that, the trial court erred in entertaining this matter because it was a land dispute. Under section 3 of the Land Disputes Courts Act, Cap. 216, this matter ought to be determined by the Land Tribunal. As the appellant alleged to have sold only part of the land, the parties were supposed to exhaust civil remedies before resorting to criminal trial. He cemented his argument with the case of **Hassan Hamis v. R**, Criminal Appeal No. 4 of 2012. Submitting on the first ground, the counsel was of the view that, the evidence at hand was not sufficient to sustain a conviction as the land dispute was not resolved. On the second ground, Mr. Mashauri further reiterated that the trial court was not supposed to determine this matter as it is a land dispute. On the third ground, the counsel blamed the trial court for condemning the appellant for criminal trespass. On the fifth ground, he argued that, the principle governing sentence was wrongly applied by granting fine and compensation at one time. The counsel finally implored the court to allow the appeal.

In reply, the respondent who was unrepresented supported the conviction and sentence against the appellant arguing that there was no land dispute in this

matter as the appellant had sold the land to Anastasia. Furthermore, the appellant never objected on the sale of the land to Anastasia hence there was no land dispute. The respondent further insisted that, the trial court had jurisdiction to determine this matter as the appellant admitted to have sold the same land to Anastasia. The respondent believed, the case was decided based on the strength of evidence. He urged the court to dismiss the appeal with costs and uphold the decision of the lower courts.

In the rejoinder, Mr. Mashauri insisted that, the trial court had no jurisdiction to entertain this matter as the case ought to be tried by the land tribunal.

In this appeal, the pertinent issue is whether the respondent proved the offenses of criminal trespass and destruction of property as required by the law. In addressing the above issue, I wish to revisit the provisions of the law under which the appellant was charged. In this case, the appellant was charged with criminal trespass under **section 299(a) of the Penal Code Cap. 16 RE 2022**.

The section provides that:

299. Any person who-

(a) unlawfully enters into or upon property in the possession of another with intent to commit an offence or to 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 of criminal trespass and liable to imprisonment for three months;
if the property upon which the offence is committed is any building, tent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody of property, the offender is liable to imprisonment for one year.*

The above provision of the law provides the following elements of the offense of criminal trespass: **first**, the accused must have done an act entering into the property; **second**, the act of entering into the property must be done without any justifiable cause (unlawful); **third**, the property must be in possession or owned by the complainant; **fourth**, the entering must be intended to commit an offense, intimidate, insult or annoy the possessor or owner of the property; **fifth**, the entering may be lawful but the act of remaining in the property with intent to intimidate, insult, annoy the owner or remain in the property with intent to commit an offense may amount to criminal trespass.

Therefore, the major element to be proved is whether or not the property is in possession or ownership of the complainant. Where the possession or ownership is contested, the offense of criminal trespass cannot stand. On this point, there has been several decisions of the Court of Appeal stressing on the need to prove ownership of the property for the offense of criminal trespass to stand. For

instance, in the case of **Kusekwa Nyanza v. Christopher Mkangala**, Criminal Appeal No. 233 of 2016, the Court of Appeal of Tanzania emphasized that:

"...neither the criminal charges of trespass nor of malicious damage to property could stand against the appellant before the issue of ownership over the disputed plot of land had been resolved."

Also, in the case of **Sylivery Nkangaa v. Raphael Albertho** [1992] TLR 110, this court stated that:

"A charge of criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined by a civil suit in a court of law."

Furthermore, in the case of Mustapha **Mustapha Juma v. Selemani Bakari** [2017] TLR 427, this court stated that:

"It is trite law that in a criminal action under section 299(a) of the Penal Code, especially where the alleged trespasser acted under a genuine belief that he has right of ownership over the property, that the complainant be advised to pursue civil redress first, and only resort to criminal action after the question of ownership has been resolved."

In this case, there is no doubt that the appellant sold a piece of land to Anastazia Buswelu. When the dispute arose, the contention is hinged on whether Anastazia purchased three acres or an area with a size of 30 times 40 metres. In my view, this issue ought to be resolved through civil remedies before the appellant could be held for criminal trespass. On this point alone, I joint hand with the

appellant's counsel that, there was a land dispute which ought to be resolved in the appropriate forum before charging the appellant for criminal trespass. I understand, the appellant admitted to have sold the land to Anastazia but the fact that he is contesting on the size of the land he sold invites the application of land laws. On this aspect, I allow the appeal and proceed to quash the proceedings and decisions of the Primary Court and that of the District Court. Either of the parties is at liberty to file a land dispute in the appropriate tribunal or court. No order as to costs. Order accordingly.

DATED at **Mwanza** this 03rd day of November, 2023.



Ntemi N. Kilekamajenga.
JUDGE
03/11/2023



Court:

Judgment delivered this 03rd Day of November 2023 in the presence of the appellant and respondent all present in person. Right of appeal explained to the parties.



Ntemi N. Kilekamajenga.
JUDGE
03/11/2023

