IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 05 OF 2020

(Originating from Criminal Case No. 21 of 2019 OF THE Court of Resident Magistrate of Katavi)

THE DIRECTOR OF PUBLIC PROSECUTION .....APPELLANT

VERSUS

NGASA MAFULUKA
JUMA NGASA @ MAFULUKA
PAUL LUBINZA @ NDAGI } **THE RESPONDENTS**
MOSHI NJILE
MABULA SIMON
JOSHORA SIANTEMI

JUDGEMENT

Date of Last Order: 30/12/ 2022
Date of Judgment: 20/02/2022

NDUNGURU, J

The respondents, Ngasa Mafuluka, Juma Ngasa @ Mafuluka, Paul Lubinza @ Ndagi, Moshi Njile, mabula Simon and Joshora Siantemi were jointly arraigned and charged in the Court of Resident Magistrate of Katavi at Mpanda in Criminal Case No. 21 of 2019 with one count, that is Criminal Trespass contrary to section 299 (a) of the Penal Code, Cap 16 RE 2002.

It was alleged that, on diverse dates between July, 2016 and January, 2019 at Mnyangala village within Tanganyika District in Katavi Region, the accused persons did enter into 38 acres farm situated at Mnyangala village, the property of one Mbizo s/o Reuben with intent to annoy the person in possession of the property.

The respondents denied charges against them and to prove the allegation, prosecution called six witnesses along with six exhibits while the respondents had fourteen witnesses on their side with one exhibit. Trial Court found accused person had a case to answer during closure of prosecution case. After full trial, the trial court found the respondents not guilty of the offence charged with and thereafter acquitted him forthwith.

Dissatisfied by the outcome, the appellant *cum* the Director of Public Prosecution has preferred the present appeal based on five grounds of appeal, which are reproduced hereunder:

1. *That the learned trial magistrate erred in law and fact by disregarding the prosecution evidence despite the strong, credible, firm, and uncontroverted evidence adduced on the ownership of the 38 acres of land by PW1 who was declared by the District Land and Housing*

Tribunal for Katavi in Appl. No. 17/2015 (Exh. P1) and confirmed by High Court in Appeal No. 9 of 2016 (Exh. P2) to be the lawful owner.

2. *That the learned trial Magistrate erred in law and facts by holding that there are conflicting decisions of District Land and Housing Tribunal for Katavi in Appl. No. 17/2015 (Exh. P1) and Kabungu Ward Tribunal Case No. 45 /2012 (Exh. D1) without considering that PW1 was not a party to the case at Kabungu Ward Tribunal (Exh. D1). Also, he ought to consider the powers of the two tribunals and the fact that District Land and Housing Tribunal for Katavi considered the decision of Kabungu Ward Tribunal in its judgement.*

3. *That the learned trial Magistrate erred in law and facts by conferring himself the appellate powers without being vested with jurisdiction. The trial Magistrate erroneously challenged the decision of the District Land and Housing Tribunal for Katavi in Appl. No. 17/2015 (Exh. P1) hence arrived into unjust decision.*

4. *That the trial Magistrate erred in law by holding that the ownership of the land in dispute is not yet resolved without considering the fact that PW1 was declared to be the*

lawful owner of the 38 acres by District Land and Housing Tribunal for Katavi in Appl. No. 17/2015 (Exh. P1) and High Court in Appeal No. 9/2016 (Exh. P2).

5. *That the learned trial Magistrate erred in law for failure to properly analyse, assess and evaluate the evidence on records, he ought to have judicially considered and scrutinize the evidence of the prosecution in order to arrive into a just decision that the prosecution proved the charge beyond reasonable doubt.*

When the appeal was called for hearing the appellant was represented by Mr. Abel Mwandalama, learned state attorney. While respondents' defaulted appearance despite three public publications on government newspapers. Thus, the hearing proceeded ex parte.

Mr, Mwandalama, learned Principal State Attorney submitted that he prayed to argue the 2nd, 3rd and 5th ground as the 5th ground carries the 1st and 4th ground.

As regards the 2nd ground he submitted that the prosecution tendered Exh. P1 which is the judgement of the District Land and Housing Tribunal of Katavi. That the said judgement was between Reuben vs Ngasa Mafuluka while Exh. D1 was between Ngasa Mafuluka vs Masunga Ngasa. These involve two different cases. They involved two different parties. Exh.

D1 was not applicable in this case where the complainant was PW1. The case was between PW1 vs DW1. The fact that these were two different cases in which the Chairman were different, likewise parties and likelihood subject matter. In the premises he submitted that the trial Magistrate erred in law to hold that there are two different decisions while in reality the case involved two different parties and subject matter. He thus prayed for this court to hold that the trial Magistrate erred to hold that there were two conflicting decisions.

On the 3rd ground of appeal, para 4 of page 5 of the typed judgement, is seen that the trial Magistrate analysed the contents in Exh. P1 and D1 and these found the errors in the said exhibits and made it a base of his judgement. By so doing he acted as the appellate organ while there was no pending appeal before him. Further, the court had no jurisdiction to entertain appeals from the District Land and Housing Tribunal. His role was to use these documents and not to analyse the contents of Exh. P1 and D1 and reach into decision he erred in law.

On the 5th ground, page 7 of the judgement the trial court submitted that the case was not proved beyond reasonable doubt. He submitted that it is the position of law that whoever enter one's land without the owner's consent is a criminal trespasser. See **Amrato Domoda & Another vs A. H. Galiwala** [1981] T. L. R 31. The respondents were charged under

section 299 (a) of the Penal Code, the prosecution was required to prove two factors; one That the respondents entered without the consent of the owner of the land and two that when entered therein, they intended to either commit an offence or annoy the owner. See the case of **Said Uledi vs Kalesi Mbonela** [1997] TLR 195 at page 199.

In the case at hand, Exh. P1-P6 shows that the suit land is the property of Mbizo Reuben (PW1). The said exhibts proves that the said suit land was already handed over to him under court procedure. Even when they entered the land had knowledge that the said land belonged to Mbizo Reuben, but they still entered therein without consent, just for the purpose of intimidating or annoy him. He submitted therefore that the prosecution proved the case beyond reasonable doubt.

As regards Exh. D1 he submitted that it had no relationship with the case before him. It had no relationship with the subject matter of controversy between him and Reuben Mbizo. The case relied upon by the trial Magistrate of Silvester Inkangaa vs Raphael Alberto [1992] TLR 110 is distinguishable in this case because in the case at hand, the ownership of land was already been resolved in favour of the Reuben PW1. He prayed for this court to find the case was proved beyond reasonable doubt. He prayed the decision be quashed and find the respondents were guilty of the offence, and they be severely punished according to the law.

Having gone through the arguments of the appellant the Director of Public Prosecution and I have read between the lines the appellants grounds of complaint and the entire proceedings of the trial court. The question to determine is whether the present appeal has merit.

It is a strong contention by the appellant the Director of Public Prosecution that the trial court erred in law and facts to find the accused now the respondents are not guilty while the prosecution evidence on the records was tangible and sufficient to convicting the respondents as the evidence proved the offence beyond all reasonable doubt.

Considering the above main complaint. There is a need for this court to go into the merit of the appeal. That is re-valuation of the evidence as adduced before the trial court. As articulated in **Standard Chartered Bank Tanzania Ltd versus National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 (unreported) on this subject, the Court of Appeal held that;

> "The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (peters v. Sunday Post, 1958 EA 424; William Diamonds Limited and

Another v. R,1970 EA 1; Otieno v. R, 1972 EA 32)"

The position was borrowed from the judgement of Sir Kenneth O'Connor in the well-known case of **Peters vs Sunday** [1958] E.A 424 at 429 where he said:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

In the light of the above position, I would first consider briefly the evidence as adduced in the trial court. In the trial court a total of eighteen (18) witnesses testified; six (6) were called by the appellant

along with six exhibits and thirteen (13) testified for the respondents. PW1 was Mbizo Reuben, a peasant carrying cultivation in his farms. He remembered that he sustained a motor accident in 2013 as a result he was hospitalized, and in 2014 Mr. Ngasa Mafuluka, invaded his farm to wit 38 acres. He then reported the matter to ten cell leader, hamlet leader and he finally lodged the land case at District Land and Housing Tribunal. He was represented by Tatu d/o Mbizo as he was seriously sick. The matter was determined in his favour. However, Mr. Mafuluka lodged an appeal to the High Court of Tanzania at Sumbawanga Registry, but the same was dismissed for non-appearance. PW1 testified that despite judgement of the tribunal, the first respondent went on using the suitland. He testified further that Ngasa Mafuluka is the first respondent and 2nd respondent was his son. The 3rd, 4th, 5th, and 6th respondents are known by the first respondent.

PW2, Mwami Mwayombya, a peasant resident of ngudu Mwanza, but he transferred to Mnyagala village in 2001 and he knew Mbizo Reuben. PW2 testified that he was welcomed by PW1 and he was given 20 acres of land. He testified that dispute arose between Mbizo Reuben and Ngasa Mafuluka in respect of the land measure 38 acres. He testified that the disputed was determined at the District Land and

Housing Tribunal in favour of PW1. The first respondent did not vacate despite order of court through court broker.

PW3, Tatu Samson Mbizo, resident of Mnyagala village. He testified that he remembered that in 2013 PW1 encountered motor cycle accident which disturbed his mental fitness and he was hospitalized for a long time. Then the first respondent took the advantage and invaded the farm to wit 38 acres. She testified that PW1 lodged a complaint in the District Land and Housing Tribunal and because of his health, she appointed her to represent him in April 2015. The matter ended in favour of Mbizo Reuben (PW1). PW3 tendered copy of judgement of the District Land and Housing Tribunal for Katavi and a copy of dismissed High Court Order which were admitted in court as exhibit P1 and P2 respectively. She further testified that the first respondent went on trespassing the suit land and on 28th May, 2018 Court Broker Kasia Company evicted the first respondent but denied eviction. She testified that 2nd, 3rd ,4th, 5th and 6th respondents joined the first respondent in using the suit land.

PW4, Salum Iddy Kapililigi, a Court Broker working with Kasai Enterprises Co. Ltd. He testified that on 14th May 2018 he received the order delivered by Mpanda District Land and Housing Tribunal for

execution. PW4 tendered the eviction order and copy of a letter dated 14/05/2018 as exhibit P3 and P4 respectively.

PW5, Kuyenge Mkame Kayenga, a village executive officer of Mnyagala village. PW5 testified to have resolved the dispute of land between Ngasa Mafuluku who a judgement of Kabungu Ward Tribunal and Mbizo Reuben who had both judgement of the District Land and Housing Tribunal and order of the High Court of Sumbawanga. He failed to resolve the matter; however, he joined hand with court broker to execute the eviction order, but still the first respondent is still using the suit land.

PW6, Mazengo Mbizo Reuben, testified that he knew the land dispute between Mbizo Reuben and Ngasa Mafuluka. He found Mbizo possessing 38 acres of suit land since 1997. His father encountered an accident and was seriously injured and in the same year the first respondent invaded the suit land. In a year 2015 Tatu Mbizo filed a land case represented the PW1. PW6 knew the respondents as they reside at Mnyagala village.

As for the defence, the first witness DW1, Ngasa Mafuluka testified that he has not trespassed at on the land of PW1. He testified to have

own the copy of the Kabungu Ward Tribunal showing the land is his and he tendered the same as exhibit D1.

DW2 Juma Ngasa Mafuluka testified that he remembered the dispute between the first respondent who is father and Masunga. He testified athat Mbizo Reuben was a witness in the dispute. He wondered how Mbizo claimed ownership of the land. To his understanding the suit land belongs to the first respondent who is his father. DW2 said he has been using the land since childhood. He did not know the dispute between the first respondent and Mbizo but knowing the dispute between first respondent and Masunga before Kabungu Ward Tribunal.

DW3, Paulo Lubinza testified that he has just hired the land from Ngasa Mafuluka with the knowledge that the land belongs to him. He testified that he was not aware that the land belongs to Mbizo Reuben.

DW4 Moshi Njile testified that he did not commit the offence as he hired the land from the first respondent knowing the land belongs to him. He informed the court that he did not know the dispute between the first respondent and Mbizo Reuben.

DW5 Mabula Simon testified that he came to Mnyagala village in 2017; he then hired the land from Ngasa Mafuluka. He had a knowledge

that the land belongs to him. He did not know whether the land had a dispute. He started using the dispute land in a year 2018.

DW6 Johora Siantemi testified that he came to Mnyagala village in a year 2014. He hired the land for cultivation from the first respondent from 2015 to 2019. He testified that he had no knowledge that the land had a dispute.

DW7 Adolf Kapita Mserepete, a VEO of Isengula village within Isengula Ward. He remembered that on 29/09/2012 while at Mnyagala village one Masunga came complaining against the first respondent Ngasa Mafuluka that he has trespassed his land. He stopped Ngasa Mafuluka from proceeding using the land until the dispute is determined and the matter was in favour of the first respondent Ngasa Mafuluka. The dispute was about 38 acres.

DW8 Maria Mabula testified that she is a chairperson of Kabungu Ward Tribunal. She heard the dispute between Ngasa Mafuluka and Masunga Ngasa. The tribunal visisted the locus in quo and dealt with the dispute accordingly. The tribunal found that the land is owned by Ngasa Mafuluka and np appeal was preferred.

DW9 Lauteri Joseph Fatoki, a peasant and secretary of Kabungu Ward Tribunal. He testified that in 2012 Masunga Ngasa lodged a

complaint against Ngasa Mafuluka, the dispute was settled, whereas the matter was in favour of the first respondent.

DW10 Maria Ngasa, a peasant. She knew that there was a dispute between Masunga Ngasa and Ngasa Mafuluka whereas the dispute was resolved in favour of the first respondent.

DW11 Masungu Ntunze, a peasant. He testified that he knew Paulo Subinza that he has been hiring the land from Ngasa Mafuluka for 4 years.

DW12 Laurent Charles, a peasant. He testified that he knew first respondent who had a farm which he used to hire people for cultivation.

DW13 Khamis Siasa, a peasant. He testified that he has been in the village for 5 years. However, he testified further that he had no proof to show that the land belongs to Ngasa Mafuluka. He urged the law court to decide who the owner of the land is.

With the above evidence at my hand and to decide whether the respondent managed successfully to prove his case at the standard required by the law, I have to revisit the general rule in criminal prosecution, the onus of proving the charge against the accused beyond

reasonable doubt lies on the prosecution. The rule was articulated in the case of **Jonas Nkize vs Republic** [1992] 213 Katiti, J had this to say: -

> "The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking."

Having re-evaluated the evidence, my duty now is to determine whether the prosecution did prove the offence beyond reasonable doubt.

It is noteworthy that, the respondent herein was arraigned and charged before the trial court with the offence of criminal trespass contrary to **section 299 (a)** of the Penal Code, Cap 16 RE 2019. The offence has two essential elements namely: -

i. Unlawful entry into or upon property in the possession of another actus reus, and

ii. Such entry must be with intent; to commit an offence 9this is means rea alleged in the charge in this case), or to intimidate, insult

or annoy the person in possession of the property.

In my re-evaluation of evidence on the five grounds of appeal I will be guided by the question whether the ingredients constituting the offence of criminal trespass under section 299 (a) of the Penal Code for were proved to the required standard. The first essential ingredient constituting the offence of criminal trespass is entry i.e the physical part or actus reus of the offence. This physical part of the offence of criminal trespass should be evidenced by proof that there was unlawful entry into or upon property in the possession of another. Closely looking, the actus reus of criminal trespass requires proof of not only entry that is unlawful, but also proof that the complainant was in possession of property subject of entry. Therefore, a lawful entry or an entry into a property whose ownership is not determined does not constitute the actus reus of criminal trespass.

Now relating the evidence on record to the requirements of actus reus of criminal trespass for which the respondents were convicted; the aspect of unlawful entry is clearly lacking from evidence before the trial court. The aspect of unlawful entry can only be sustained it is established that the complainant (PW1) was in possession of the

property. My own evaluation of evidence in this matter, there is evidence on record that the subject matter of this case that is 38 acres of land was subject of the two different disputes which were determined conclusively by two different land tribunals. The first respondent was conclusively declared lawful owner of the disputed land 38 acres against Masunga Ngasa (Exh. D1) by Kabungu Ward Tribunalv in 2012. While, Mbizo Reuben was also declared the lawful owner of the disputed farm 38 acres against first respondent (Ngasa Mafuluku) by the District Land and Housing Tribunal for Katavi (Exh. P1) in 2015. A rightly determined by the trial criminal court, the evidence from both sides reveals that, there are two conflicting decisions which are still subsisting as far as the question of ownership of 38 acres farm situated at Mnyagala village. The two different tribunals have conclusively declared two different persons as the lawfully owners of the same disputed land (38 acres). The District Land and Housing Tribunal for Katavi having noted that Land Application No. 17 of 2015 related to Land Case No. 45 of 2012 in term of the same subject matter that is 38 acres, of which it was the case could have not proceeded to determine over ownership. Rather PW1 complainant in Land Application No. 17 of 2015 should have been advised by the District Tribunal to file application for revision of Land Case No. 45 of 2012 for the reason that he had an interest in the

disputed farm while he was not the party therein in the proceedings. Otherwise, it was the duty of the prosecution to prove at the trial criminal court that disputed land that is 38 acres was not the same subject in both Land Case No. 45 of 2012 and Land Application No. 17 of 2015 which declared Ngasa Mafuluka and Mbizo Reuben conclusively lawful owners of disputed land respectively.

As regard the mens rea of the offence of criminal trespass, that is guilty mind in the form of an intention to commit any offence or to intimidate, or insult or to annoy. There is no any evidence on record to show any guilty mind on the part of the respondents. The first respondent along his fellow were on diverse dates since 2012 using the disputed land for cultivation believing the same to be lawful property of the first respondent.

With due respect, as pointed out by Mwalusanya, J in **Syliver Nkangaa vs Raphel Albertho** [1992] TLR 110, I do not think it appropriate for this criminal appellate court like criminal trial court on the basis of evidence above to establish ownership over the disputed farm. In this above case Mwalusanya, J (as he then was) observed that:

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> "A charge of criminal trespass cannot succeed where the matter involves disputed land whose ownership has not been finally determined by in a civil suit and that a criminal court is not proper forum for determining the rights of those claiming land ownership"

I do not in agreement with the learned State Attorney Mwandalama for the Director of Public Prosecution that the trial Magistrate erred in law to hold that there are two different decisions determining the same subject matter though somehow parties were different.

From the foregoing, it is clear to me that the prosecution did not prove beyond reasonable doubt that the respondents unlawfully entered into suit land belonging to the PW1 Mbizo Reuben. Consequently, it is my finding and holding that the actus reus of the offence of criminal trespass was not proved to the required standard.

Generally, without wasting much time to determine the grounds of appeal, I see since the ingredients that establish the offence of criminal trespass were not proved. In the result, I find that the prosecution case was not proved to the required standard, thus respondents were right

found not guilty of the offence. Consequently, I dismiss the entire appeal.

It is so ordered.

D.B. NDUNGURU

JUDGE

30 /01/2023

Date - 20/02/2023

Coram - Hon. M.S. Kasonde – DR

Appellant - Ms. Safi Kashindi S/A

Respondent - Absent

B/C - A.K. Sichilima - PRMA

Ms. Safi Kashindi - State Attorney: The matter comes for judgment we are prepared.

Court: Judgment delivered in this 20th February 2023, in the presence of Ms. Safi Kashindi State Attorney for the DPP (Appellant) and in the absence of all Respondents.

M.S. KASONDE

DEPUTY REGISTRAR

20/02/2023

Right of Appeal fully explained.

M.S. KASONDE

DEPUTY REGISTRAR

20/02/2023