

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(TABORA SUB-REGISTRY)  
AT TABORA**

**DC. CRIMINAL APPEAL No. 03 OF 2023**

*(Arising from PC. Criminal Appeal No. 02 of 2023 in the District Court of Nzega, Original  
from Criminal Case No. 01 of 2023 before Bukene Primary Court)*

**SOZI MAGANGA ..... APPELLANT**

**VERSUS**

**SAMWEL KASELA ..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 22/04/2024  
Date of Judgment: 10/06/2024*

**KADILU, J.**

In the Primary Court of Bukene, the appellant filed Criminal Case No. 01 of 2023 alleging a criminal trespass against the respondent. The trial court decided the case in favour of the respondent. The decision annoyed the appellant. She filed PC. Criminal Appeal No. 02 of 2023 before the District Court of Nzega which was again decided in favour of the respondent. Still dissatisfied, the appellant preferred the instant appeal in this court based on the following grounds of appeal:

- 1. That, the two courts below failed to analyze the evidence on record in which the appellant proved that she is the lawful owner of the disputed land and the respondent is a trespasser.*
- 2. That, the courts below erred in holding that since there is a dispute over ownership of land, criminal trespass cannot stand.*

She averred that the court of competent jurisdiction fully determined the land dispute so there is no existing land dispute between her and the appellant. She prayed for the appeal to be allowed by quashing and setting

aside the judgment and orders of the lower courts. The respondent filed a reply to the petition of appeal in which he refuted all the allegations by the appellant putting her on strict proof thereof.

The background of the matter as can be discerned from the records is that the appellant and the respondent are mother and stepson respectively. They had a dispute over land belonging to the respondent's late father, Kasela Magigisi who was the appellant's husband. In 2015, the deceased's brother, Mbirika Magigisi was appointed the administrator of the estate of the late Kasela Magigisi. When the dispute between the appellant and the respondent arose, the administrator was yet to distribute the deceased's estate to the heirs so, the land in dispute was being occupied and used by the respondent. The record indicates that the said land is near the appellant's compound. In 2019, the appellant filed Criminal Case No. 03 in Bukene Primary Court (before Hon. Neema M. Luhamba) claiming that the respondent trespassed criminally on her land.

The respondent was convicted and sentenced to conditional discharge subject to court supervision for three (3) months from 15/02/2019. He served the sentence and continued to occupy the disputed land. In 2021, the appellant filed Land Case No. 08 before Kahamanhalanga Ward Tribunal claiming ownership of the same land which was allegedly trespassed by the respondent. The case was decided in favour of the appellant and the tribunal's order was duly executed by demolishing a part of the respondent's house built on the said land. He repaired the house and continued to use the land. In 2023, the appellant filed Criminal Case No. 01 in Bukene Primary Court (before Hon. Yolanda C. Malya) claiming that the respondent

trespassed criminally on her land. The case was decided in favour of the respondent. The appellant appealed unsuccessfully to the District Court of Nzega, then the present appeal. In this appeal, the parties appeared in person, without legal representation. The appeal was disposed of by way of written submissions. I am grateful to both parties for compliance with the court's scheduling order. In the course of composing the judgment, I observed a legal issue that was not among the grounds of appeal and it was not pointed out in the written submissions of the parties.

I, therefore, invited the parties to address the court on the issue. The issue relates to the judgment of Bukene Primary Court dated 15/02/2019. It is apparent from that judgment that the respondent was charged with, convicted of criminal trespass, and sentenced to conditional discharge in 2019 and the complainant was the appellant herein. Addressing the court concerning the point, the appellant stated that she was obliged to file another criminal case after the respondent resisted vacating her land. The respondent on his part, explained that in 2019, he served conditional discharge and completed it after he was convicted and sentenced by Bukene Primary Court in a criminal trespass case filed by the appellant.

Therefore, the issue in this appeal is whether Bukene Primary Court was right in entertaining Criminal Case No. 01 of 2023 without considering that the same matter was determined to the finality by the same court in Criminal Case No. 03 of 2019. This court has carefully gone through the case file and what transpired between the parties since the dispute arose. My starting point is Section 21 of the Penal Code, [Cap. 16 R.E. 2022] which prohibits any person from being punished twice for the same offence.

The same provision has been echoed under Section 137 of the Criminal Procedure Act, [Cap. 20 R.E. 2022] which provides:

*"A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence."*

The provisions lay down a principle of double jeopardy in our law. The principle protects a person from being tried twice on the same facts for the same offence unless the previous conviction has been reversed or set aside. Glanville L. Williams, in Text Book of Criminal Law (1978) on page 24 explains the principles as follows:

*"Suppose a transgressor is charged and acquitted for lack of evidence, and evidence has now come to light showing beyond doubt that he committed the crime. Even so, he cannot be tried a second time. He has what is termed in legal French, the defence of autrefois acquit. Similarly, if he is convicted, even though he is let off very lightly, he cannot afterwards be charged on fresh evidence, because he will have the defence of autrefois convict. These uncouth phrases have never been superseded, though they might well be called the defence of 'previous acquittal' and 'previous conviction'; and 'double jeopardy' makes an acceptable generic name for both."*

The Court of Appeal in ***Twaha Hussein v. R.***, Criminal Appeal No. 415 of 2017 discussed this issue by stating *inter alia* that what has to be considered is whether the crime, or offence charged in the later indictment is the same, or is in effect or is substantially the same as the crime charged. Looking at the facts of this case, it is crystal clear that the incident underlying this appeal is the criminal trespass of the appellant's land by the respondent. As hinted, the matter involves the same parties, the same land, and the

same offence under Section 299 of the Penal Code. The case was conclusively determined by Bukene Primary Court in 2019. None of the parties appealed against the court's decision in that case. The respondent was sentenced and served a conditional discharge to the completion.


It is, therefore, the finding of this court that the trial of the respondent by Bukene Primary Court in Criminal Case No. 01 of 2023 was illegal for having offended the laws of this country. It follows that the impugned decision of Nzega District Court in PC. Criminal Appeal No. 02 of 2023 proceeded on illegal proceedings of Bukene Primary Court. For these reasons, I dismiss the appeal by nullifying the proceedings of Bukene Primary Court, quashing and setting aside its resultant judgment and orders. Likewise, the proceedings and decision of Nzega District Court in PC. Criminal Appeal No. 02 of 2023 are hereby nullified, quashed, and set aside for being based on illegal proceedings of Bukene Primary Court. The right of appeal is fully explained for any party aggrieved by this decision.

**Order accordingly.**

  
**KADILU, M.J.,**  
**JUDGE**  
**10/06/2024**

Judgment delivered in chamber on the 10<sup>th</sup> day of June 2024 in the presence of the parties.



  
**KADILU, M. J.**  
**JUDGE**  
**10/06/2024**

arraignment in court. In ***Chakwe Lekuchela v. R.***, Criminal Appeal No. 204 of 2006, it was stated that unexplained delay raises serious doubt as to why there was such a delay in arresting the appellant while he was in the same village with the victim.

In ***Juma Shabani @ Juma v. R.***, Criminal Appeal No. 168 of 2004, the Court of Appeal observed as follows:

*"... the issue pertaining to the unexplained delay in arresting the appellant was not addressed by the trial magistrate and the learned Judge on appeal as well. It is an important aspect which if not resolved casts doubt on the veracity of the witnesses."*

Although the above authorities relate to delay in arresting the accused, they are equally applicable where the appellant was not charged and arraigned in court immediately after the arrest. Section 32 of the Criminal Procedure Act [Cap. 20 R.E. 2022] requires a formal charge to be laid against the accused person within twenty-four hours after he was arrested and he should be arraigned in the court without unnecessary delay. Before convicting the accused of statutory rape, the trial court was expected to consider all these factors along with the appellant's defence that the victim's brother (PW4) stole the appellant's wife's phone and TZS. 20,000/=. He promised to repay the property he stole but instead, he implanted the rape case to the appellant. Unfortunately, the trial court did not consider the appellant's lamentation on this issue. In ***Hussein Idd & Another v R.***, [1986] TLR 166, the Court of Appeal found non-consideration of the accused's defence a serious misdirection and stated as follows:

*"It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the*

*conclusion that it was true and credible without considering the defence evidence."*

It is a cardinal principle of law that he who alleges must prove. In criminal matters, the accused person has no duty to prove his innocence. The prosecution is obliged to prove beyond reasonable doubt that the accused person is guilty as charged. I have shown how the prosecution evidence was tainted with numerous doubts which deserved to be resolved in favour of the appellant. I, thus, find merit in the appellant's contention that the prosecution did not prove the case beyond reasonable doubt as required by the law. It failed to discharge its duty of proving that the victim was raped and that it was the appellant who raped her.


Consequently, I allow the appeal, quash the conviction, and set aside the sentence against the appellant. I order his immediate release from prison unless held for other lawful cause. The right of appeal is fully explained.

**Order accordingly.**

  
**KADILU, M.J.**  
**JUDGE**  
**10/06/2024**

Judgment delivered in Chamber on the 10<sup>th</sup> Day of June, 2024 in the presence of the appellant and Mr. Steven Mnzava, State Attorney for the Respondent.



  
**KADILU, M. J.**  
**JUDGE**  
**10/06/2024**