

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

**PC CRIMINAL APPEAL NO. 40669 OF 2023**

*(From the District Court of Kyela, Criminal Appeal No. 14 of 2023, Originating from Kyela Urban Primary Court, Criminal Case No. 143 of 2023)*

**PHELISTER/FELISTER KIFULUGA..... APPELLANT**

**VERSUS**

**DAUDI HEZRON MWAKANYIKA..... RESPONDENT**

**EX PARTE JUDGMENT**

*14<sup>th</sup> & 20<sup>th</sup> May, 2024*

**KAWISHE, J.:**

This is a second appeal by the appellant, Phelister/Felister Kifuluga. The respondent in this appeal was charged with the offence of criminal trespass contrary to section 299 (a) and (b) of the Penal Code, Cap 16 R.E 2022. At the conclusion, the trial court, Kyela Urban Primary Court acquitted the respondent. Dissatisfied with the decision of the trial court, the appellant appealed to the District Court of Kyela. The first appellate court upheld the decision of the trial court. Irritated with the second failure in the first appellate court, he has climbed to the second appeal level, hence this appeal before this court.

The facts of the case are from the evidence adduced in the trial primary court. On 8/6/2023 at about 8:30 hours, it was alleged that the respondent unlawfully entered into the farm of the appellant and cultivated by using plough, exceeding the boundaries of the appellant's farm. The appellant claimed to be the lawful owner of the land in dispute. He tendered a total of three documents to prove the same, that is judgement from Ipande Ward Tribunal, judgement from the District Land and Housing Tribunal and the letter from the auction mart limited. That, he was declared as a lawful owner of the land in dispute at Ipande Ward Tribunal, and they declared the boundary is "*mti wa mng'anga*" between the appellant's farm and respondent's father farm. The documents were admitted as exhibit A, B and C without any objection from the respondent's father in the trial court's case. The respondent's father as the defence witness admitted that they have a case with the appellant at Ipande Ward Tribunal, but the respondent denied to have trespass in the appellant's farm.

Having heard both parties, the trial court held that the case being a land dispute, the parties were advised to file their case in the proper court, and the appellant was found not guilty. Being dissatisfied with the decision reached by the trial court, the appellant filed an appeal before

the District Court of Kyela at Kyela, in Criminal Case No. 14 of 2023. The appellant's claim was that the trial court erred in law and fact by failing to convict and sentence the respondent on the offence of trespass to land and ended to acquit the respondent, despite the strong evidence from the appellant.

Having heard both parties' submission, the first appellate court did not see any reason to differ with the trial court's decision hence, upheld the decision. The first appellate court found out that the trial magistrate properly directed herself to hold that the dispute was a land matter to be resolved by land courts.

The appellant again was aggrieved by the decision of the first appellate court hence this appeal. He approached this court with five grounds of appeal reproduced hereunder as follows:

- 1. That, the appellate magistrate erred in both points of law and facts when he gives decision as against the appellant while in reality the case instituted against the respondent was trespass to the land which was already being determined by the competent District and Housing Land Tribunal for Kyela as legally land of the appellant.*
- 2. That, the appellate magistrate erred in law and facts after not considering the evidences of the appellant who proved the case beyond reasonable doubts the involvement of the appellant with regards to the charge of trespass.*

3. *That the appellate magistrate erred both in points of law and facts when he made decision against the appellant after disregarding the evidences of the appellant during the trial and finally the court reached into wrong decision.*
4. *That the appellate magistrate erred both in points of law and facts on imposing judgement as against the appellant without considering the loss accrued to the appellant as a result of respondent trespass.*
5. *That the appellate magistrate erred both in points of law and facts in taking into account irrelevant facts and disregarding relevant facts in the circumstances of the case.*

The respondent did not appear in this court despite being summoned by this court with several summons served and signed with an affidavit of the court processor. The court decided to hear this appeal ex-parte. During hearing the appellant argued almost the same as what has been written in his petition of appeal.

Considering the grounds of appeal and the appellant's submission, there is only two issues to be determined, **firstly**, that whether the appellant proved his case beyond reasonable doubt; and **secondly** whether the first appellate court did not consider the evidence of the appellant.

Kicking off with the first issue as to whether the appellant (prosecution) proved his case beyond reasonable doubt. The first issue will determine the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal collectively. The law in criminal cases is very clear that the prosecution has the duty to prove

its case beyond reasonable doubt. Section 3(2) (a) of the Evidence Act Cap 6, provides that:

*"in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists".*

In the case of **Chausiku Nchama Magoiga vs Republic** (Criminal Appeal No. 297 of 2020) [2023] TZCA 17810 (9 November 2023) at page 11 it was held that:

*"...this being a criminal case, the burden lies on the prosecution to establish the guilty of the accused beyond reasonable doubt. The duty of the prosecution to prove a criminal case beyond reasonable doubt is universal and, in our case, it is statutorily provided for under s.3(2) (a) of the Evidence Act,... The term beyond reasonable doubt not statutorily defined but case laws have defined it. In the case of **Magendo Paul and Another Vs. Republic** [1993] T.L.R 219; the court held; "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed".*

Therefore, in this case at hand the appellant did not prove his case beyond reasonable. The respondent was charged with the offence of criminal trespass. Section 299(a) and (b) of the Penal Code provides in summary that, for the offence of criminal trespass to be proved the appellant has to prove that the respondent unlawful entered into the property of the appellant, with intent to commit an offence. The records

and proceedings of the trial court show that the appellant failed to prove the offence the respondent charged with. The evidence adduced by the appellant and his witnesses failed to connect the respondent with the offence. It was stated that there was a dispute between the appellant and the respondent's father at the Ipande Ward Tribunal. Where the decision was reached in favour of the appellant. Having perused the trial Ward Tribunal's judgment, it was stated:

*"kesi ameshinda mdai, hivyo baraza linatoa maelezo kwamba mti uliopo (mg'anga) utaendelea kuwa mpaka wa mashamba hayo kwa upande wa mdai atarudi nyuma hatua moja kutoka kwenye mti. Vilevile mdaiwa atarudi nyuma hatua moja kutoka kwenye mpaka".*

Basing in the above decision reached by the trial Ward Tribunal, the trial primary court decided that:

*"kwa kuwa kosa lililowasilishwa kwenye hati ya mashtaka linajikita kwenye mgogoro wa ardhi, mahakama hii inashauri kuwa, shauri hili likatatuliwe kwenye mamlaka husika ambapo ni mahakama ya ardhi".*

It is my humble view that, the decision reached by the trial primary court, despite the fact that the documentary evidence which was tendered was not read before the parties, yet I am inclined to her finding which was upheld by the first appellate court. But I am duty bound to put things in the order required. The law is very specific that, failure to read the admitted documentary exhibit before the parties

render the same to be expunged from the evidence. See the case of **Mbagga Julius vs. Republic**, Criminal Appeal No.131/215 CAT Mwanza, **Rashid Kazimoto and Masudi Hamis vs. Republic**, Criminal Appeal No. 458/2016, in both cases it was held:

*"Failure to read out the documentary exhibits after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record".*

From the authorities I have cited, and since the trial court did not follow the required procedures, the only remedy is to expunge the same. Therefore, I hereby expunge the documentary evidence marked as "Kielelezo A" from the record of the trial court. Now, having expunged the document admitted before the trial court, there remain with the oral evidence. In my opinion even the oral evidence did not prove that the appellant is the lawful owner of the land in dispute. It was centred on the boundary dispute and what the Ward Tribunal did was to set a demarcation between the appellant the respondent's father's farms. Having found that even if the documentary evidence especially "kielelezo A" was not expunged the same did not prove ownership of the said land in dispute. Consequently, the appellant did not prove his case beyond reasonable doubt. Its effect renders the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal collectively meritless.

Responding to the second issue, as to whether the first appellate court did not consider the evidence of the appellant. The issue will be responded to, basing on the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal. The appellant claimed that his evidence was not considered. Having a thorough perusal on the first appellate court's judgement, it is evidenced at page 5, 6 and 7 that the appellate magistrate considered the evidence of the appellant. It was stated that:

*"...in this case the prosecution, namely Felister Kifuluga, also known as the appellant (who was the complainant at the trial court) did not manage to prove the same and henceforth did not manage to connect the accused person, namely Daudi Hezron Jamson Mwakanyike with the offence of criminal trespass..."*

Therefore, the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal have no merit, the appellant's evidence was considered, by the first appellate court. The appellate magistrate agreed with the finding of the trial court and upheld the decision of the same. I am neither see any reason to interfere with the decision of the two courts below. Just shade a light on this appeal from the record available, there is a litany of cases between the appellant the respondent's family. First, they had a dispute before the Ward Tribunal on land matters. Second, Criminal Case No. 157 of 2021 at Lusungu Primary Court, parties Felister Kifuluga vs Shekela Matandala, (Shekela is the respondent's mother), the issue is



trespassing to the appellant's land, stealing of maize and groundnuts. The appellant/complainant in that case could not prove the case beyond reasonable doubt the court acquitted the accused. Third, Felister Kifuluga vs. Daudi Mwakanyika, Criminal Case No. 37 of 2021, (Daudi Mwakanyika is the father of the respondent in this appeal). The trial court acquitted the accused as the appellant/complainant did not prove the case beyond reasonable doubt. Fourth, is the Criminal Case No.143 of 2023 which gave birth to this appeal. As I stated earlier, I see no reason to differ with the lower courts' finding. This trend shows that the main source of all these disputes is a land matter which has to be dealt with in the proper manner in order to maintain order and peace to both parties. The decision reached by the trial court and the first appellate court were a result of the evidence adduced and analysed. I see no fault in them; therefore, the second issue is answered in the negative. Given, such finding, the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal lacks merit and are collectively dismissed.

Having done that, much I am of the view that the appeal lacks merit and is hereby dismissed in its entirety. Consequently, the judgement of the trial court, and that of the first appellate court are upheld.

It is so ordered.

Right of appeal is well explained to the appellant.

Dated at **MBEYA** this 20<sup>th</sup> day of May, 2024.



A handwritten signature in blue ink, appearing to read "E.L. Kawishe", written over a horizontal line.

**E.L. KAWISHE**

**JUDGE**

**Court:** Ex parte Judgment delivered this 20<sup>th</sup> May, 2024 in the presence of Ms. Jenipher Biko, learned counsel for the respondent and the respondent present and in the presence of the appellant Mr. Phelister Kifuluga.

A handwritten signature in blue ink, appearing to read "E.L. Kawishe", written over a horizontal line.



**E.L. KAWISHE**

**JUDGE**

**20/5/2024**