IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

(PC) CRIMINAL APPEAL NO. 10 OF 2022

(Arising from Criminal Appeal No. 43 of 2021 at Muleba District Court and Original Criminal Case No. 177 of 2021 at Mubunda Primary Court)

STILIAS KALYONGOSI.....APPELLANT

VERSUS

ZUBAIRI MAHAMUDU.....RESPONDENT

JUDGMENT

Date of Judgment: 28.10.2022
A.Y. Mwenda, J.

This is the second appeal. It emanates from the decision of the District Court of Muleba at Muleba. The appellant is challenging the first appellate's court's decision which partly upheld the decision of the trial court in Criminal Case No. 177 of 2021 at Mubunda Primary Court. Before the trial court, the appellant was charged for theft contrary to section 258 and 265 and for criminal trespass contrary to section 299(a) both counts under the Penal Code [Cap 16 RE 2019]. It was alleged by the complainant that the appellant trespassed into his piece of land and stole two eucalyptus trees after cutting them down. After a full trial, the Hon. trial court's magistrate was satisfied that the case against the appellant was proved beyond

reasonable doubts. He accordingly convicted him on both counts and sentenced him to pay fine to a tune of TZS. 500,000/= for each count or in default thereof to serve a jail term of twenty four (24) months for each count, sentences were ordered to run concurrently. On top of that the appellant was also ordered to pay the respondent a compensation to a tune of TZS 300,000/=.

Aggrieve, he appealed before the District Court of Muleba where the first appellate court upheld the conviction meted by trial court but the fine and sentence were reduced from TZS 500,000/= to TZS. 100,000/= and in default thereof, the 24 months sentence imposed by the trial court was reduced to six (6) months for each count. However, the order compelling the appellant to pay compensation of TZS. 300,000/= to the respondent was set aside.

Aggrieved by the first appellate court's decision, the appellant lodged this appeal with three grounds which read as follows, that;

1. That, the appellate court erred in law and facts for failure to identify that the appellant was wrongly charged and convicted for the offence of criminal trespass and theft since the parties' dispute involved land whose ownership has not been determined by a civil suit in a proper legal forum.

2. That, the appellate court erred in law and facts to hold that in order for the dispute to exist between the parties, the same must be pending before any legal forum.

3. That, the appellate court erred in law and facts for failure to identify that the respondent (prosecution) failed to prove his case beyond reasonable doubt.

When this appeal was fixed for hearing, the appellant was represented by Mr. Gildon Mambo, learned counsel while the respondent was under the legal services from Mr. Derick Zephurine, learned counsel.

When invited to argue the grounds of appeal, Mr. Gildon Mambo informed the court that he intends to argue the grounds of appeal in sequence.

Submitting in respect of the first ground of appeal, the learned counsel for the appellant said that the lower courts ought to have considered that the issue of ownership of the land alleged to be trespassed was not determined by the proper forum. He said, in his defence, the appellant testified that the land in question belongs to his two young brothers under supervision of his mother who instructed him to go and cut down the said two trees. He said, the lower courts accorded no weight to his defence and instead concluded that the respondent proved his ownership of the land relying on the sale agreement (exhibit P.I), Exchequer receipt issued on purchase of land (exhibit P.II), the minutes of the land allocation

committee meeting (exhibit P.III) and the judgment of Civil Case No. 4 of 2015 (exhibit P.IV). The learned counsel stated that, the lower courts erred to conclude that the respondent proved ownership of the land while the said courts are not the proper forum to do so. Again, he faulted their findings which relied on the judgment in Civil Case No. 4 of 2015 while the parties are not the same as in the present matter. Citing the case of ISMAIL BUSHAIJA V. REPUBLIC, [1991], TLR 100 and KUSEKWA NYANZA V. CHRISTOPHER MKANGALA, CRIMINAL APPEAL NO. 233 OF 2016 CAT (unreported) at page 9, the learned counsel for the appellant submitted that it is trite law that if there is a dispute over ownership of the land, the courts are precluded from determining criminal charge until when the issue of ownership is resolved.

In respect to the second ground of appeal, Mr. Gildon Mambo submitted that the first appellate court erred when it concluded that there was no land dispute between the appellant and the respondent because there was neither pending dispute in any proper forum nor formal dispute between the parties. The learned counsel said, even if there was no formal suit which was instituted, still, what was stated by the appellant is sufficient to warrant determination of ownership first. Under these circumstances, he said, the respondent ought to be advised to institute a civil suit first.

In respect of the 3rd ground of appeal, Mr. Gildon Mambo submitted that the respondent failed to prove his case for lack of evidence regarding his ownership of the land against the appellant.

In conclusions, the learned counsel for appellant prayed this appeal to be allowed by quashing the conviction entered against the appellant and to have the subsequent sentence and orders set aside.

In reply to the submissions by Mr. Gildon, Mr. Derick Zephurine, learned counsel for the respondent submitted that the lower court were justified in their findings against the appellant. He said that the respondent was, by the time of the commission of the offence, in occupation of the land for about the past three years and that the appellant knew about it and also knew about a Civil Case No. 4 of 2015 between the respondent and other three persons. He said, despite having such knowledge, the appellant never showed interest of being joined in the said suit.

With the said facts, he said, there was no dispute over ownership between the appellant and the respondent as during his defence, he never tabled any evidence to prove ownership.

With regard to the case of ISMAIL BUSHAIJA V. REPUBLIC (supra) and KUSEKWA NYANZA V. CHRISTOPHER MKANGALA (supra) cited by Mr. Gildon Mambo, Mr.

Zephurine was of the view that the said cases are distinguishable to the present matter because in the cited cases, the dispute was over the boundaries which is not the case in the present matter. In conclusion, Mr. Zephurine prayed this appeal to be dismissed.

After a thorough consideration of the submissions by the learned counsels for the parties it is pertinent to point out that the onus of proof in criminal cases lies on the prosecution and the standard of which is beyond reasonable doubt. See HOROMBO ELIKARIA V. REPUBLIC [2009] TLR 154 where the court held, that;

> *"(iv) in criminal cases the prosecution is required to prove the case against the accused person beyond reasonable doubt..." [emphasis added].*

In this matter, while convicting the appellant for criminal trespass and theft, the trial court ruled out that the evidence tendered by the respondent sufficiently proved both counts. The trial magistrate was of the view that there was no dispute over ownership of the land as the same was already determined in Civil Case No. 4 of 2015 between JOAKIM KAYANDA AND OTHERS V. THOMAS MASHAKARA (who won and transferred it to the respondent). The Hon. trial magistrate was also of the view that the respondent's case was supported by the judgment in Civil Case No. 04 of 2015, receipt No. 0123784 dated 15/7/2010, minutes dated 15/7/2010

and a transfer deed (letter) dated 26/11/2018 which were received and marked exhibits P. I, P. II, P.III and P.IV respectively.

As I have stated earlier, the trial courts decision was upheld by the first appellate court which in its findings added another point in that there was no land dispute at all as there was no pending formal dispute between the appellant and the respondent.

I have scrutinized the reasoning above and it came clear to me that both the trial and the first appellate court were aware that in criminal trespass cases, the proof of ownership is key. This is so because in their reasoning they were of the view that there was no dispute over ownership because that issue was already determined in Civil Case No. 4 of 2015 and further that there was no pending suit in a proper forum.

With their reasoning, it is thus evident that the lower courts stepped into the shoes of the Civil Court when they decided to deal with the issue of ownership. As it was submitted by Mr. Gildon Mambo, this was not proper. It is trite law that in criminal trespass cases, the issue of ownership need be resolved by a proper forum. A proper forum entail a civil court or tribunal vested with mandates to adjudicate land matters. This position finds its genesis in various decisions of the court. In the case of SAMWEL SAMSON WAITE V. CHACHA MWITA WAITE [2011] TLR NO. 318, the court held inter alia that;

"(i) in criminal cases where question of ownership of land arises, it must first be determined in a civil case. A criminal court is not competent to determine matters of Land ownership as the trial court did in this case.

(ii) A criminal court is not a proper forum for determining the rights of those claiming ownership of land. Only a civil court via a civil suit can determine a dispute of land ownership.

(iii) It is after the issue of ownership is determined, the charge against the appellant i.e malicious damage to property can proceed".

While submitting in reply to the submission by the learned counsel for the appellant, Mr. Zephurine, just like the way it was reasoned by the lower courts, was of the view that the dispute over ownership did not exist because the respondent was in occupation of the land in question for about the past three (3) years and the issue of ownership was resolved vide Civil Case No. 4 of 2015. He added that the appellant was at all material times aware of the said facts but opted to take no actions. I have considered Mr. Zephurine's argument and with respect I disagree with him. This is so because, as it was rightly submitted by Mr. Gildon Mambo, Civil Case No. 4 of 2015 did not involve the same parties as appearing in

this matter and for that matter the issue of ownership of the land between the appellant and the respondent was never resolved. On the other hand, the Hon. first appellate magistrate was of the view that the issue of ownership cannot be raised as there was no pending formal suit before civil court. I have considered the Hon. Magistrate's view, but it is important to note that consideration of the issue of ownership does not necessarily require to have a pending formal suit before proper forum or to produce evidence of ownership as Mr. Zephurine suggested. What matters is a genuine belief that the appellant had the right of ownership over the property. In the present matter the appellant testified before the trial court that the land and the trees belonged to his two young brothers under the supervision of their mother (SU2). Their mother testified that she send the appellant to cut down the said trees on her sons' land. This kind of evidence fit within the parameters of the position stated above. Faced with a similar scenario, this court (Twaib's J, as he then was) in MUSTAPHA S/O MUSTAPHA JUMA V. SELEMAN BAKARI [2017] TLR 427 held inter alia that;

> *"(i) It is trite law that in criminal action under section 299(a) of the penal code,* ***especially where the trespasser acted under genuine belief that he had a 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."

On that basis, the appellant having raised his defence, which shows he genuinely believed that the farm in question belongs to his young brothers, that alone was sufficient ground to advise the respondent to institute Civil suit first. Again, faced with the similar scenario, in the case of MUSTAPHA S/O MUSTAPHA JUMA V. SELEMANI BAKARI (supra) the court, while citing the case of KIBWANA MOHAMED V. REPUBLIC [1980] TLR 321, the court held inter alia, that;

"Rather that going on to try the case, which may lead to criminal sanctions, the court must advise the complainant to wait for the outcome of the civil case so that the issue of ownership is first resolved. In the circumstances the appellant's conviction without resolving the civil ownership can hardly be justified in law."

From the foregoing observation, I am of the firm view that it was not proper for the trial court and the first appellate court to deal with the case of criminal trespass while the issue of ownership between the parties was not resolved.

This appeal thereof succeeds. The conviction meted by the lower courts are quashed and sentences and consequential orders for compensation as set aside.

It is so ordered.

A.Y. Mwenda

Judge

28.10.2022

Judgment delivered in chamber under the seal of this court in the presence of Mr. Gildon Mambo learned counsel for the appellant and in the absence of the respondent.

A.Y. Mwenda

Judge

28.10.2022