IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

(PC) CRIMINAL APPEAL NO.3 OF 2017

(Appeal from the decision of the District Court of Masasi at Masasi in Criminal Appeal No. 3 of 2017, original Lisekese Primary Court Criminal Case No. 87 of 2017)

MUSTAPHA s/o MUSTAPHA JUMA .....APPELLANT

VERSUS

SELEMANI BAKARI .....RESPONDENT

Date of submissions: *12/12/2017*

Date of judgment: *12/12/2017*

JUDGMENT

Twaib, J:

The appellant is aggrieved by the decision and orders of the District Court of Masasi on appeal, which overturned the Primary Court's decision to acquit him of the offence of criminal trespass, contrary to section 299 (a) of the Penal Code, Cap 16 [R.E. 2002]. The District Court found him guilty of criminally trespassing into the respondent's farm. Upon conviction, he was sentenced to serve a term of 12 months imprisonment.

The appellant has raised four grounds of appeal, but his advocate, Mr. Kamalamo, decided to abandon the first ground and argue only three.

I think the second and third grounds can be combined into one, and I will discuss them together. The gist of learned counsel Kamalamo's submissions

on these grounds was that the learned appellate Magistrate erred in law and fact in altering the findings of the trial court, which had the opportunity of seeing the witnesses, and in convicting the appellant while there was a *bona fide* claim of right which was not yet resolved by a civil court.

Mr. Kamalamoasserted that the learned RM was wrong to find that there was already a decision in a civil case in which a Ward Tribunal had ruled on the issue of ownership in favour of the respondent, and to use that decision as the basis for his finding that the respondent was the lawful owner of the disputed land and the appellant a trespasser thereon.Counsel contended that the dispute that was sent to the Ward Tribunal was between the respondent and a third party, and not the appellant. That was the reason why the trial court found the appellant not liable for criminal trespass. In his view, the RM on appeal should have advised the respondent to first file a civil case (a land case) before seeking criminal redress.

Mr. Kamalamo cited several cases as his authority for this proposition. One such case was ***Ismail Bushaijav.R,*** (1991) TLR 100. Then, in ***Kibwana Mohamed v.R*** [1980] TLR 321, it was held:

> *"From the facts, there could be no doubt that at the time the appelant entered into the land, he honestly believed he had an honest claim over the land."*

The court further stated:

> *"When in a case of criminal trespass a dispute arises as to the ownership of the land, the court should advise the*

complainant to file a civil suit to determine the question of ownership."

The last ground of appeal related to the sentence imposed. The learned advocate argued that the same was excessive. The law, he said (referring to section 299 (a) of the Penal Code), provides for a maximum of 3 months imprisonment, except where the accused has trespassed into *a 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*, whereupon the offender would be liable to imprisonment for one year.

He cited the decision of the Court of Appeal of Uganda in **Kanzese John v.R,** Criminal Appeal No. 008/2009, where the court stated that sentencing is upon the discretion of a Judge, and an appellate court will not normally interfere with the sentence, unless it is illegal or the court is satisfied that the sentence imposed by the trial Judge was manifestly excessive as to amount to an injustice. He thus opined that the sentence imposed by the District Court was manifestly excessive, and did amount to an injustice.

Counsel concluded by praying that the appeal be allowed.

When given the opportunity to submit in response to these submissions, the respondent did not make any submissions. Instead, he asked the court to refer to his "Reply to Petition of Appeal", which he filed in response to the ground of appeal, as his reply submissions. The court obliged.

Basically, the respondent resists the second and third grounds of appeal by saying that as an appellate court, the District Court had powers to overturn the Primary Court's decision and orders where it found the lower court to

have erred, as, in his opinion, the Primary Court did in this case. Further, the respondent contends that all the ingredients of the offencewere proved in thiscase, that there was no defence of *bona fide* claim of right raised before the trial court or the District Court, and that this is a new point being raised in this appeal. He referred to Exh. SMK2 (the decision of the Ward Tribunal) to show that there was no dispute on ownership, since the farm belonged to him.

On the sentence, the respondent argued that the same was proper in law and was intended to be a deterrence. He prayed that the appeal be dismissed and the judgment of the District Court be upheld.

With respect, it is my view that this appeal has a lot of merit. It is trite law, as Mr. Kamalamo so forcefully argued, 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 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. Rather than 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 case at hand, the learned appellate Magistrate used Exh. SMK2 to conclude that the ownership issues had already been determined by the Ward Tribunal atNamatutwe. However, as Mr. Kamalamo correctly submitted, that case did not involve the appellant. It was between the respondent and one Mohamed Hamisi. In the circumstances, the appellant's conviction without resolving the civil issue of ownership can hardly be justified in law.

My holding on these points would amount to a finding that the second and third grounds of appeal are meritorious, and I would allow them.Despite this finding,however, I feel that there is need to say something about the sentence imposed by the appellate District Court, if only by way of *obiter dicta*. Section 299 (a), which creates the offence of criminal trespass, also provides for the sentence. The possible sanction is a maximum sentence of imprisonment for three months. Only where 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", would the offender be liable to imprisonment for more than three months, with the maximum punishment set at one year.

The appellant was alleged to have trespassed into the respondent's "land", and the evidence shows it was actually a farm. He was, however, sentenced to serve a term of imprisonment for one year. For one, the learned Resident Magistrate did not consider any mitigating factors, such as the appellant's young age (which is stated as 26 years) or that he was not a repeat offender.

Worse still, however, the sentence was clearly unlawful, as the property upon which the offence was alleged to have been committed was a farm. Hence, even if the conviction was proper, the one year sentence imposed on the appellant was unlawful and must have resulted in injustice to him. It was especially for this reason that I decided to compose this judgment today immediately after I had heard the parties on theappeal this morning. The appellant did not deserve to spend even a single day in custody, let alone the almost six months that he has already spent, counting from 22nd June 2017 (the date of his conviction and sentencing).

In the final result, I hereby quash the appellant's conviction and set aside the sentence imposed on him. Unless there is some other lawful reason to hold him in custody, he is to be released from prison forthwith.

F.A. Twaib

Judge

12/12/2017