IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT MWANZA

APPELLATE JURISDCITION

(PC) CRIMINAL APPEAL NO. 4 OF 2008

ORIGINAL CRIMINAL CASE NO. 72 OF 2006

(Original Primary Court Bwasi Criminal Case No.59 of 2005)

MPATI MASATU ..... APPELLANT

Versus

DUKE NYAKAREBERE.....RESPONDENT

JUDGEMENT

28/10 & 12/11/2009

Sumari, J.

The respondent **DUKE NYAKAREBERE,** successfully prosecuted the appellant **MPATI MASATU** in Bwasi Primary Court for Disobedience of Lawful Order C/s 124 of the Penal Code, Cap.16 of the Laws (R.E.2002).

The trial court convicted the accused/appellant who unsuccessfully appealed to the District Court of Magu, hence this appeal. Mr. Mhingo, Advocate represented the appellant and Mr. Makowe, Advocate represented the respondent. Through his advocate appellant filed 2 amended grounds of appeal which Mr. Mhingo, argued them as they appear.

As for the first ground that the trial magistrate misdirected himself by failing to appreciate the fact that the offence charged against the appellant has no relevance with the decision of the High court, in civil appeal No.35/1993 since the parties are different, it was submitted that, in Bwasi Primary court criminal case No.59/2005 the appellant was charged with the offence of disobedience of lawful order c/s 124 of the Penal Code. In that case the appellant was found guilty and convicted. The complainant was the respondent while in the High court Civil Appeal No.35/1993 the parties were the respondent Duke Nyakarebere and one Mugeta Mulamba and the case was in respect of a dispute of a piece of land, where the High court decided that the land in dispute belonged to the respondent. So it was wrong for the 1st appellate court to decide that since the appellant was a witness in a civil case originated from the High court – Civil Appeal 35/1993, he committed the offence charged with.

It was further contended that the 1st appellate court ought to have evaluated the evidence and be satisfied that appellant really disobeyed a lawful order and that the ingredients of the offence were proved. The ingredients of the offence of Disobedience of Lawful order are provided under S.124 of the Penal code and in case Laws e.g. in the case of **Wilfred Mlanga Mareale v Rep. (1984) TLR 190.** That there ought to have been

such an order and that it was lawful and that it was made to the appellant.

It is further contended by Mr. Mhingo that there is no evidence in this particular case to prove that there was a lawful order directed to the appellant. And this is so because the said Civil Appeal 35/1993 was not between the appellant and respondent. So it cannot be said the same order made in that case was directed to the appellant. Therefore it was not correct for the 1st appellant court to base its findings in that Civil Appeal No.35/1993.

As for ground 2 he briefly stated, no evidence adduced during the hearing to show that appellant disobeyed a lawful order rather the appellant ought to have been charged with a different offence. He thus prayed the appeal to be allowed.

In reply Mr. Makowe, learned counsel conceded that the present appellant was a witness in Civil Appeal No.35/1993 which started at Primary court of Bwasi ending up before High Court P.C. Civil Appeal No.35/1993. That the appellant testified for one Mugeta Mulamba and in deed he agreed this land in dispute belonged to one Mugeta Mulamba. The court ruled against his testimony. Then the same person went to the very same land as if it is his land that is why he was so charged, as he disobeyed the order of the High Court. In deed he knew that

Mugeta Mulamba lost the case and that the High Court ruled the land to belong to Duke, the respondent.

Mr. Makowe's opinion and suggestion on the appellant's conduct is that, the appellant being a witness as he was in the said P.C Civil appeal cannot go back against his own testimony. In so doing it amounts to the witness querying the findings of the court which is wrong. He was of the view that, if witnesses will not be bound by their testimonies and be left to have a room to start other actions against the court decisions it will cause to have endless cases for nothing.

Challenging the appellant's evidence Mr. Makowe kept on insisting his point that what was done by the appellant amounts to challenge the decision of the High court in which he was a witness.

He crashed the appellant's evidence saying, there is no point given that the two parties shared the boundaries in the civil appeal No. 35/1993 which is the genesis of this case; the appellant never said there were boundaries over the land. Now where does the issue of boundaries come from after 13 years ago, he queried. He prayed the court to see that this period also is a factor to be considered.

Referring to evidence on record Mr. Makowe contended that, in the evidence of Maira Msangi, SU I when XXD by court – **"Katani za mipaka, zipo, katani hizo zilipandwa na wazee".** He

pointed out that, if it is in deed a question of land boundary, it cannot be between the present appellant and the respondent in this premise. If in all those proceedings appellant could not say there were boundaries, how then the appellant comes later saying about his boundaries. He called upon the court to uphold the lower courts' concurrent decisions and the appeal to be dismissed.

With due respect to Mr. Makowe, if he admits that "*if it is in deed a question of land boundary, it cannot be between the present appellant and the respondent in this premises",* it means he admits that there is an issue which is whether there was a boundary between the respondent and appellant to be determined. But then Mr. Makowe had this question on top of the above question i.e. *"if in all those proceedings appellant could not say there were boundaries, how then the appellant comes later saying about his boundaries".* With these two questions above, I'm left with no doubt that such questions are coming out of the evidence available on the record. What does the questions suggest is obvious and clear that the appellant was claiming ownership over the land in issue. There is no doubt on this at all. This been the position, now a question comes, can the issue be determined in this criminal case? Or in other words, can Mr. Makowe's two questions above be answered in this criminal case? The answer is no. Why no, I will discuss it in the cause of this judgement.

In rejoinder Mr. Mhingo, submitted that, since it has been admitted that appellant was just a witness in P.C. Civil Appeal No.35/1993, then the orders given in that case did not concern him, unless it is specifically stated. He vehemently submitted that orders given in cases concerns the litigants and not witnesses.

Sticking to his submission that the offence against the appellant was not proved, he prayed the appeal to be allowed.

In discussing this appeal it is imperative first to put clear that the appellant was charged with the offence of Disobedience of lawful orders C/s 124 of the Penal Code which provides:-

"A person who disobeys any order, warrant or command duly made, issued or given by a court, an officer or person acting in any public capacity and duly authorised in that behalf, is guilty of an offence and is liable, unless any other penalty or mode or proceeding is expressly prescribed in respect of that disobedience, to imprisonment for two years".

As for the 1st ground of appeal there is no dispute that in the High Court Civil Appeal No.35/1993 the parties were the respondent Duke Nyakarebere and one Mugeta Mulamba and the case was in respect of a dispute of a piece of land, where the High court decided that the land in dispute belonged to the respondent. There is no dispute also that the appellant in that Civil Appeal No.35/1993 gave evidence in favour of the said Mugeta Mulamba. So he was just a witness. The main dispute in this particular case is whether the appellant being a witness in

the said Civil Appeal No.35/1993 can be now said to have disobeyed an order given in that appeal by the High Court. The answer to this issue is again no.

It is Mr. Mhingo's submission that it was wrong for the 1st appellate court to decide that since the appellant was a witness in a civil case originated from the High court – Civil Appeal No. 35/1993, then committed the offence charged of Disobeying lawful order c/s 124 of the Penal Code. As well put by Mr. Mhingo the 1st appellate court ought to have evaluated the evidence and be satisfied that appellant really disobeyed a lawful order and that the ingredients of the offence were proved. The ingredients of the offence of Disobeying Lawful order as provided under S.124 of the Penal code are that :-

1. There must be a lawful order, warrant or command made under a specific legislation.
2. That the said lawful order warrant or command must be served to the intended person.

This provision has been a subject for discussion in a number of decisions of this court. In the case of **Wilfred Mlanga Marealle v Rep. (1984)** TLR 190 cited by the appellant's counsel, **Abdallah Yusufu v C Republic [1976] LRT n. 57, Laisi Kitia v Republic Cr. App. No. 4 of 1982, Arusha Registry (Unreported)** and in the case of **Hemedi Kanjunjumele v Republic 1984 TLR 202 (HC)** similar observation was made..

So as well contended by Mr. Mhingo, there is no evidence in this particular case to prove that there was a lawful order directed to the appellant because the said Civil Appeal No.35/1993 was not between the appellant and respondent. Neither is there an order produced as evidence before the trial court to prove the existence of the alleged lawful order directed to the appellant. So it was wrong for the District court exercising its appellant jurisdiction to base its findings in that Civil Appeal No.35/1993. The first ground of appeal is therefore founded.

The only main issue the trial court ought to have addressed and determine was whether the charge against the appellant was proved or not. Had this was addressed both lower courts could decide otherwise. The evidence available does not suggest the commission of the alleged offence. At most what was advanced in the evidence on record is the question of land ownership. While the respondent is claiming that appellant has encroached his land, appellant similarly claims that respondent encroached his boundary. In such circumstances, only a Civil Court via a civil suit can determine matters of land ownership.

There are a number of cases of this kind had been decided by this court, just to mention two of them for the benefit of the appellant. These are: - Sylivery **Nkangaa v Raphael Albertho [1992] TLR 110 (HC)** it was held inter alia :-*(ii) a charge of criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined by a civil suit in a court of law;*

(iii) a Criminal Court is not the proper forum for determining the rights of those claiming ownership of land. Only a Civil Court via a civil suit can determine matters of land ownership.

So where the offence is of criminal nature as in the present case, and the evidence advanced reveals land dispute over ownership or boundaries as it is in this case, the trial court must address its mind on the facts given and direct the parties to institute a civil litigation rather than beseeching on criminal offence. This I believe gives the answer to the above question and the second ground of appeal too.

With these the appellant's appeal should succeed. The conviction and sentence are quashed and set aside. If the appellant paid the fine of Tshs. 50,000/= the same should be returned to the appellant immediate. Appeal allowed.

Accordingly ordered.

A.N. M Sumari
JUDGE

Delivered in presence of Mr. Mhlngo, Advocate for the appellant and Mr. Makowe, Advocate, for the respondent.