



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0020 of 2017

In the matter between

**1. OLANYA MARIO
2. OLOYA SAMMUEL**

APPELLANTS

And

UGANDA

RESPONDENT

Heard: 23 June, 2020.

Delivered: 14 August, 2020.

Criminal Law—*Criminal Trespass C/s 302 of The Penal Code Act — There should be proof of of a deliberate unauthorised or otherwise illegal actual entry onto premises or other direct interference with possession of such premises, by way of intruding into the airspace, throwing or placing objects on the premises, while such premises are in actual possession of another. — The intent referred to in the section is “to commit an offence,” or to “to intimidate or insult or annoy and mere intention to do so will amount to criminal trespass though mere knowledge that the trespass is likely to cause insult or annoyance does not amount to intent to insult or annoy within section — section 7 of The Penal Code Act — The existence of an honest claim of right ordinarily excludes the criminal intention. A person has a claim of right if he or she is honestly asserting what he or she believes to be a lawful claim, even though it may be unfounded in law or in fact.*

Criminal Procedure —*Criminal Appeals— the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The appellants were jointly charged with the offence Criminal Trespass C/s 302 of *The Penal Code Act*. It was alleged that the appellants during the month of January, 2015 to-date at Barogal village in Gulu District, having lawfully entered onto land in possession of Oryema Bazil Ramtho, remained there with intent thereby to intimidate, or annoy or take it away from the possession of the said Oryema Bazil Ramtho. The appellants pleaded not guilty. They were tried and convicted. The 1st appellant was sentenced to two months of community service while the 2nd appellant was sentenced to one year's imprisonment.
- [2] The prosecution case was that there was a land dispute between the appellants and the complainant, which was the subject of a pending suit. The complainant accused the 1st appellant of unlawful construction of a kiosk on his land. The 2nd appellant claimed to be digging his father's land.

The appellants' evidence in the court below:

- [3] In his defence, the 1st appellant testified that he does not live in the neighbourhood of the complainant and does not share a common boundary with him. He was utilising land given to him by his uncle, Adonga Antonio, brother to his father Gaudensio Obonyo.
- [4] The 2nd appellant testified that he was utilising land given to him by his uncle, the 1st appellant and although he lives about a mile to two away, he had used the land both before and after insurgency, for the last 35 years. The land originally belonged to his late grandfather Adonga Antonio. He was arrested while digging

in the garden. Although he had a panga and a hoe in the garden, he never used them to threaten anyone.

- [5] D.W.3 Langol Sarafino testified that the land where the 1st appellant built a kiosk previously belonged to the late Adonga Antonio. He inherited it. D.W.4 Akot Caroline testified that she is the mother of the 2nd appellant. Her late husband acquired the land in dispute, measuring approximately 20 acres, from the late Adonga Antonio. P.W.1 was their neighbour.

Judgment of the court below:

- [6] In his judgement, , the trial Magistrate found that the evidence showed that the complainant and the appellants were involved in a land dispute. However it is the complainant in possession of the land. The 2nd appellant claimed that the land belonged to his grandfather Adonga Antonio, but he lives two miles away from it. It appeared that the 1st appellant occupies the land with the permission of his uncle, the 2nd appellant. When a person takes possession of land in dispute, threatens to fight, kill others two miles away in spite of various attempts to prevent him, these acts turn to be criminal in nature. The acts of threats of assault, to kill are criminal tendencies on intention to intimidate or annoy the other parties. This was not a mere tort. It was unlawful entry coupled with criminal acts. The prosecution had proved the case of criminal trespass against each of the appellants beyond reasonable doubt. Each of the appellant was found guilty and convicted accordingly. The 1st appellant was sentenced to two months of community service while the 2nd appellant was sentenced to one year's imprisonment.

The grounds of appeal:

- [7] Being dissatisfied with that decision, the appellants jointly appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and in fact when he held that the land in dispute belonged to the complainant, as investigated by the prosecution.
2. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate the rest of the evidence on record and came to the wrong conclusion that the respondent had proved its case.
3. The learned trial Magistrate erred in law and in fact when he meted out the respective sentences to the appellants.

Arguments of for the appellant:

[8] The appellants were self-represented on appeal and In their submissions submitted that the conviction was erroneous since the appellants were occupying their own land. The accusations were false. One cannot be convicted of using one's own land. The dispute over the land was already the subject of a pending suit. Both the L.C1 and L.C.2 courts had decided in favour of the appellants. It was ruled that the complainant did not have land in that area, but was rather taking over the land forcefully with threats. Counsel for the respondent did not file submissions in response.

Duties of a first appellate court:

[9] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[10] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic* [1957] EA. 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R.* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post* [1958] E.A 424).

Ingredients of the offence of Criminal Trespass.

[11] For the appellant to be convicted of the offence of Criminal Trespass C/s 302 (a) of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. Intentional entry onto property in possession of another.
2. The entry was without authorisation.
3. The entry was for an unlawful purpose.
4. The appellant entered onto the premises in those circumstances.

1st issue; whether there was an intentional entry onto property in the possession of another.

2nd issue; whether that entry was without authorisation.

[12] The first two elements of the offence of criminal trespass will be considered together, and these require proof of a deliberate unauthorised or otherwise illegal entry onto premises or other direct interference with possession of such premises, by way of intruding into the airspace, throwing or placing objects on the premises, while such premises are in actual possession of another.

- [13] The possession is clearly intended to be possession at the time of entry and it does not imply that the person in possession must be present at the actual time of the entry. Possession within the meaning of this section refers to effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession or detention as distinct from a legal right to possession.
- [14] There must be a corresponding actual entry by the person accused. Constructive entry by a servant, for instance, acting on the orders of his master is not an entry, within the meaning of the section. The section covers both movable and immovable property, for instance there can be a criminal trespass to a motor car as well as to land and proof of the use of force is not necessary. One enters another's premises if he or she physically crosses a boundary onto that person's premises. He or she may enter on the surface of the land, but she also may enter above or below the surface, because ownership of land extends below the earth and above the earth for some distance that's reasonably useable in connection with the surface. The entry may be intentional or negligent. A person commits an intentional trespass as long as he or she intentionally takes the action that interferes with the complainant's right to exclude. An entry resulting from intentional action is a trespass even if the trespasser didn't mean to trespass or didn't realize that his or her action would be a trespass, unless perhaps a court feels that the trespasser's mistake was excusable.
- [15] The entry onto the property must be unlawful. The section does not protect a trespasser in possession as against a party lawfully entitled to possession. It is worthy of note that the party lawfully entitled to possession has a right to private defence of his property embedded in the defence of bona fide claim of right under section 7 of The Penal Code Act.
- [16] P.W.1 Oryema Bazil testified that the 1st appellant resides two miles away from the land in dispute. While he was in possession of the land, the 1st appellant laid

bricks and constructed a kiosk on the land without his consent. P.W.2 Okello John Felix, son of P.W.1, testified that he came to know the 1st appellant during the year 2014 when he constructed a kiosk and later laid bricks on their land. He tried to stop him and so did the L.C.1 Chairperson Opira but without success. The 2nd appellant began cultivating around the house of P.W.1. The appellants then alleged that children of P.W.1 were cutting down their trees. The 2nd appellant became wild claiming that the land belongs to his father, Adonga Antonio.

[17] P.W.3 Akello Hellen, daughter of P.W.1, testified that the 1st appellant constructed a kiosk and laid bricks on their land. The 2nd appellant began cultivating part of their land. P.W.4 Odiyo Denis testified that he is a tenant of P.W.1. The 2nd appellant found him splitting wood on the land and stopped him claiming that the land belonged to his grandfather. The 2nd appellant cultivates on the same land. P.W.5 Hassan Lukwiya testified that P.W.1 enjoyed quiet possession of the land until intrusion by the 1st appellant who lives about 1.5 kms away. The late Adonga Antonio had been given a part to live on. His son and son-in-law were buried on the land. P.W.6 D/IP Onencan Dicks testified that when he visited the scene on 15th March, 2015 he found burnt bricks on the land and he was told they belonged to the appellants. On 16th April, 2015 he received a report that the 1st appellant was digging on the land and was threatening the complainant with a hoe. He sent another police officer to arrest him. The 2nd appellant was arrested at the police station when he followed up the arrest of the 1st appellant.

[18] The dispute escalated when the 1st appellant attempted to rent the land to Chinese. The home of the appellants was 2 kms from the land in dispute. The 2nd appellant claimed to be a relative of someone who had lived on the land with P.W.1. P.W.7 No. 39546 D/C Okoto Francis Kasule testified that he arrested the 2nd appellant on 16th April, 2015 upon the instruction of P.W.6. He found him digging on the land in dispute. The following day the 1st appellant came to the

police station and he too was arrested. Photographs of the kiosk and bricks on the land were taken (exhibit P. Ex.2 – P. Ex.5).

[19] This evidence was neither discredited by cross-examination, nor was it manifestly unreliable. No evidence was led to controvert it. I therefore find that the trial court came to the right conclusion when it found that the land was in possession of the complainant at the time of the alleged intrusion. That entry was without his consent.

3rd issue; whether the entry was for an unlawful purpose (an intention to commit an offence, or, to intimidate, insult or annoy the person in possession of the property).

[20] The intent referred to in the section is “to commit an offence,” or to “to intimidate” (meaning to overawe, to put in fear by a show of force or threats or violence), or “to insult” (meaning to assail with scornful abuse or offensive disrespect) or to annoy (meaning to molest). (See *Kigorogolo v. Rueshereka* [1969] EA 426). It is not necessary that the accused actually commits an offence or actually intimidates, annoys or insults the person in possession of the property, mere intention to do so will amount to criminal trespass.

[21] A person will be guilty of the offence if he or she knows or ought to know that his or her course of conduct will cause the other so to fear or get annoyed. The intent to annoy and intimidate must be not with respect to any and every person connected with the property but with respect to any person in actual possession of such property. A person in constructive possession is not contemplated by the section. The word "annoy" as used in the section should be taken to mean annoyance which would reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual.

- [22] A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to intent to insult or annoy within section. In order to establish criminal trespass, the prosecution must prove a specific intention to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover of the real intent or, at any rate, constituted no more than a subsidiary intent.
- [23] Intent implies having something in mind as a plan, purpose or design, committing an act with a specific goal in mind, i.e. what one has clearly formulated in mind to do or bring about or alternatively, a decision to bring about, insofar as it lies within the accused's power, the commission of the offence, no matter whether the accused desired that consequence of his or her act or not. For this offence, the concept of intent involves acting knowingly and purposely. This intention can be inferred from the circumstances but it must be actual and not a probable one. It may be inferred from conduct which was calculated in an objective sense to cause alarm and distress, which will depend on the context of the conduct in each case. For this offence, a person is considered to have acted with intent if the definitions of purpose and knowledge are satisfied.
- [24] There has to be evidence of such intention, or facts from which such an intention might be reasonably inferred, e.g. if it is shown that the person in possession of the property expressly prohibited the accused from coming to the property, an intent to annoy may be legitimately inferred (see *Elineo Mutyaba v. Uganda H.C. Criminal Appeal No. 45 of 2011*, where the complainant asked the appellant to leave the premises but he opted to remain there).
- [25] In general terms, where a person is aware of probable and possible consequences of his or her planned action, the decision to continue with such a plan means that all the foreseen consequences are to some extent intentional. The court will combine both subjective and objective elements but being an element of specific intent, court will tend to use a more subjective than objective

test, hence this specific intent must also be demonstrated on a subjective basis. The more certain the consequences would be to a reasonable person and the accused, the more justifiable it is to impute sufficient desire to convert what would otherwise only have been recklessness into intent. But if the degree of probability is lower, the person will be considered to have acted with mere knowledge or recklessness.

[26] Alternatively, a person will be held to intend a consequence (obliquely) when that consequence is a virtually certain consequence of their action, and they knew it to be a virtually certain consequence (see *R v. Woollin [1999] AC 82* where use of the phrase "substantial risk" in place of "virtual certainty" was held to have blurred the line between intention and recklessness). The court is therefore entitled to infer the necessary intention, where it feels sure that the prohibited consequence was a virtual certainty (barring some unforeseen intervention) as a result of the accused's actions and that the accused appreciated that such was the case. An accused person will be taken to intend to accomplish all outcomes necessary to the overall plan, including all additional consequences that flow naturally from the original plan, when it is his or her conscious object to engage in conduct of that nature or to cause such a result. Merely knowing that a result is likely does not prove intention, but once it is shown that the accused was aware of the nature of the act and was practically certain of the consequences, the court may then infer that he or she intended to cause that particular result when committing the act.

[27] Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved (see *Sinnasamy Selvanayagam v. R [1951] AC 83 at 87*). If there are no admissions, to be found guilty of this offence, The circumstantial evidence must be of such a quality that the only rational inference open to the Court to find in the light of the evidence must be that the accused intended to intimidate or annoy a person by threatening to do some unlawful act. Being a mental element, the intention may be deduced from

utterances, or certain acts designed to intimidate, insult or annoy any person in possession of such property. Before the court may rely on circumstantial evidence to conclude that the accused had the required intent, yet must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the accused had the required intent.

[28] If the court can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the accused did have the required intent and another reasonable conclusion supports a finding that the accused did not, the court must conclude that the required intent has not been proved by the circumstantial evidence. However, when considering circumstantial evidence, the court must accept only reasonable conclusions and reject any that are unreasonable.

[29] The prosecution evidence as whole only showed that the appellants' entry on the land was unauthorised by the complainant, but there is no clear evidence of an intention to commit an offence, to intimidate, insult or annoy the complainant. Indeed the appellant raised a defence of bona fide claim of right. The rival claims over that land were already the subject of a pending civil suit, which fact was brought to the attention of the trial court, but was never accorded sufficient weight.

[30] According to section 7 of *The Penal Code Act*, a person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud. The existence of an honest claim of right ordinarily excludes the criminal intention. A person has a claim of right if he or she is honestly asserting what he or she believes to be a lawful claim, even though it may be unfounded in law or in fact, (see *R v. Bernhard (1938) 26 Cr App R 137; [1938] 2 All ER 140; [1938] 2 KB 264*] at page 145).

[31] Anything “bona fide” connotes “good faith”. Thus, for a claim of right to qualify a bona fide claim of right, it must be made in good faith, without fraud or deceit. It must be sincere and genuine (see *Black’s Law Dictionary* 8th ed). In *Lubega Bernado v. Uganda* [1985] HCB 9, on a charge of attempted theft, the appellant raised the defence of bonafide claim of right. The court held that a person who takes property which he believes to be his own does not take it fraudulently however unfounded his claim. Similarly in *Oyat v. Uganda* [1967] EA 827 that in a criminal proceeding, the defence of claim of right is available to an accused person, however ill founded, where the accused firmly believed that he had a claim of right over the property. A similar holding can be found in *Nkwine Jackson v. Uganda, H.C. Criminal Appeal No. 59 of 1992, [1995] III KALR 113*. The belief therefore need not be reasonable provided it is must be sincere and genuine.

[32] An unlawful act of entry onto land in possession of another may be a trespass but is not necessarily an offence. The penal law deals with offences and an unlawful act which does not amount to an offence is a matter which has to be investigated by a Civil Court. P.W.1 Oryema Bazil and both appellants testified that there was a pending civil suit. It was never proved by the prosecution during the trial that by the appellant’s conduct in asserting a claim in respect of this land, they were not honestly asserting what they believed to be a lawful claim. There is no evidence to show that the appellant’s assertion of a claim over the land is not sincere and genuine. Whether or not it is ill founded, in law or in fact is not to be decided in the criminal trial. That aspect is irrelevant to the defence. On the facts of this case, the prosecution failed to disprove this defence. The complainant in this case thus sought the aid of the criminal process to obtain a remedy that was available only through a civil suit.

[33] Had the trial court properly directed itself, it would have found that this element of the offence was not proved to the required standard.

4th issue; whether the appellants entered onto the premises in those circumstances.

[34] There had to be direct or circumstantial evidence placing each of the appellants at the scene of crime as a participant in its commission. None of the appellants denied entry onto the land in their respective defences. While the 2nd appellant claimed to be digging his father's land, the 1st appellant testified that he was utilising land given to him by his uncle, Adonga Antonio, brother to his father Gaudensio Obonyo. Indeed P.W.7 No. 39546 D/C Okoto Francis Kasule testified that when he arrested the 2nd appellant on 16th April, 2015 upon the instruction of P.W.6, he found the 2nd appellant digging on the land in dispute. I therefore find that the trial court came to the right conclusion when it found that the prosecution had proved beyond reasonable doubt that the evidence placed each of the appellants at the scene as a participant in the commission of the acts alleged to have been criminal.

[35] However, in light of the findings made in respect of the other two ingredients, this finding is inconsequential. Having found that the court misdirected itself on its findings on two elements of the offence, the appeal succeeds.

Order:

[36] In the final result, the judgment of the court below is set aside. Instead the conviction of each of the appellants is quashed, the sentence set aside and each of the appellants is acquitted of the offence of Criminal Trespass C/s 302 of *The Penal Code Act*.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellants : Self represented.

For the respondent :