

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CRIMINAL APPEAL NO.013 OF 2015

(Arising from Buliisa Criminal Case No.301 of 2015)

1. KOROKONI KEFA
2. KOROKONI MUSISI
3. MPAIRWE FREDRICK
4. ATWINE GERALD ::: APPELLANTS

VERSUS

UGANDA ::: RESPONDENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] This is an appeal from the decision of the Magistrate Grade 1, Chief Magistrate’s Court of Masindi at Buliisa dated 5/7/2017.
- [2] The Appellants; **Korokoni Kefa(A1)**, **Korokoni Musisi(A2)**, **Mpairwe Fredrick(A3)** and **Atwine Gerald(A4)** were charged with the offence of **Criminal Trespass C/ss 302(a) P.C.A** where it was alleged that on the 24/7/2015 at Kasenyi village in Buliisa District, the 4 appellants and others still at large entered onto land in possession of **Mwesigwa Marko** with intent to annoy the said **Mwesigwa Marko**.
- [3] It was the prosecution case, as per **Deus Mugisha** (PW1), the Complainant, **Mwesigwa Marko** acquired the land in dispute by first occupation through the L.CI Chairperson and he has been on the land since 2000. It was on the 24/4/2015 that he saw the Appellants, who came in as a group and started cultivating the land in question.
- [4] The Complainant **Mwesigwa Marko** gave powers of Attorney to his brother a one **Deus Mugisha** to prosecute the case (in the lower court record, the powers of Attorney is marked “A”) for he had a grave sickness and could not talk. As found by the trial Magistrate in her judgment, the Complainant eventually died and the said **Deus Mugisha**

(PW1) acquired letters of administration in respect of the estate of the deceased Complainant, **Mwesigwa Marko**.

- [5] In their defence, the Appellants denied the prosecution allegations and explained that they are the owners of the disputed land for it was owned by their great grandfather and they had been cultivating it from thence.
- [6] They were tried before **H/W Atim Harriet Okello**, Magistrate Grade 1 at Buliisa who convicted and sentenced each of them to a fine of **Ugx 500,000/=** and to further, each compensate the complainant **Ugx 200,000/=** by 12/7/2017. In default, each was to serve 12 months term of imprisonment.
- [7] The Appellants were aggrieved and dissatisfied with the judgment and appealed to this court on one ground thus;
1. *The Learned trial Magistrate erred in law and fact when she found that the accused were guilty of the offence of criminal trespass to property without properly addressing the ingredients of the offence and the defence of claim of right available to the accused and in the result arrived at a wrong conclusion.*

Counsel legal representation

- [8] The Appellants were represented by **counsel Kasumba** and **counsel Kasangaki** while the Respondent was represented by **Ms. Catherine Nakaggwa** of the Office of the Director of Public Prosecutions. The counsel for the Appellants filed their respective submissions as directed by court but the Respondent did not file any.

The duty of the 1st Appellate court

- [9] The duty of this court as a first appellate court is to re-examine, re-appraise and re-evaluate the evidence on record and come to its own decision. In so doing, it should subject the evidence on record to a fresh and exhaustive scrutiny; **Kifamunte Henry Vs Uganda, S.C.Crim.Appeal No.10/1997**. In arriving at its decision, this court is therefore under duty to take into consideration the evidence on record as a whole and evaluate all the material evidence on issues that have to be determined.

- [10] In agreement with the law as submitted by counsel for the Appellant, it is a cardinal principle of law that in all criminal cases, the prosecution bear the burden of proving beyond reasonable doubt the guilt of an accused person. The accused has no duty of proving his innocence except in a few statutory cases; **Woolmington Vs DPP (1935) A.C 462.**
- [11] The accused person bears no burden to prove his innocence since he is presumed innocent until proved guilty. It is also the law that an accused person should never be convicted on the weaknesses of his defence but his conviction should be based on the strength of the evidence as established by prosecution; **Israil Epuku S/o Achietu Vs R (1934) 1 E.A.C.A 166.**

Ingredients of the offence of criminal trespass

- [12] Under **S.302 (a) PCA**, proof of an offence of criminal trespass require the following;
1. There must be an actual entry of the person accused.
 2. The Complainant must be in possession at the time of the entry.
It does not imply that the person in possession must be present at the actual time of the entry.
 3. The entry onto the property must be unlawful.
 4. There must be an intent to intimidate or annoy or commit a crime or offence in respect to the person in actual possession of such property.

The existence of a bonafide claim of right under **S.7 PCA** and ordinarily excludes the criminal intention; See **Opio Enrico Vs Uganda, H.C.Crimi.Appeal No.10/2014.**

- [13] The prosecution in the instant case therefore, had the duty to prove entry onto property by the Appellants and also prove that the entry was unlawful. Mere entry therefore does not render the accompanying trespass a "*criminal trespass*". It must be proved that the accused had the intension to intimidate insult or annoy the complainant in possession when he made the entry. The intimidation, insult or annoyance cannot be inferred from the entry. 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 as a defence was a mere cloak to cover the real intent and, at any rate, constituted no more

than a subsidiary intent; See **Sinna Sommy Vs R (1951) A.C 83(P.C)** and **Uganda Vs Luboyera [1978] HCB 133.**

[15] In the instant case, in its bid to prove its case, the prosecution led evidence of **Mugisha Deus** (PW1) and **Okumu Tegras** (PW2) who merely testified that on the 24/7/2015, the 4 accused persons/Appellants entered onto the complainant's land which he acquired by way of 1st occupation in around 2000.

[16] The Appellants on the other hand in their defence, laid claim on the disputed land that it is of their Balima clan who have utilized it since the existence of the clan and that the complainant did not own any land. That they use the disputed land for grazing animals and cultivation. In other words, the Appellants raised a defence of bonafide claim of right as provided for under **S.7 PCA.**

S.7 PCA provides thus;

“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.”

[17] In this claim of right, the Appellants were supported by the area L.CI chairperson, a one **Kalisa Stephen Muwanga** (DW5) who testified that he had been the area L.CI chairperson since 1986 and knew the disputed land to belong to Balima clan and that the complainant is not from that clan. This evidence rebutted **PW1's** evidence who claimed that the complainant acquired the disputed land by 1st occupation through the area L.CI Chairperson.

[18] The burden was on the prosecution to negative the Appellants' bonafide claim of right over the disputed land which onus the prosecution failed to discharge. Besides, as was held in **Balamu Bwetagine Kiiza & Anor Vs Zephania Kadoobe Kiiza, C.A.C.A No.59/2009**, local councils do not have power to grant land ownership. Available free land is held by the Land Board in the district in trust of the people and can only be given out by the District Land Board.

[19] Lastly on this aspect of the Appellants' bonafide claim of right, it is the position of both the prosecution and the Appellants that there had been a land conflict between the Appellants and the complainant. **PW2,**

Okumu Tegras alluded to this aspect. It follows therefore that in this case, the complainant sought the aid of the criminal process to obtain a remedy that was available only through a civil suit where an unlawful act of entry onto land in possession of another may be trespass but not necessarily an offence under **S.302 (a) P.C.A.** The criminal aspect require proof of an intent to commit an offence, or to intimidate, insult or annoy the occupant. In this case, the prosecution failed to prove any of the above intents.

[20] As noted in **Okello Oris Atama & Anor Vs Uganda, H.C.Crim. Appeal No.35 of 2013**, in criminal cases, the particulars of the offence bring out the ingredients of the offence which have to be proved by the prosecution beyond reasonable doubt as the burden of proof, unless excepted by statute, always rests on the prosecution.

[21] In conclusion, I find that the Appellants raised a reasonable defence of bonafide claim of right over the disputed land. In **Oyat Vs Uganda [1967] E.A 827**, it was held 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; See also **Lubega Bernado Vs Uganda [1985] HCB 9** and **Nkwine Jackson Vs Uganda [1995] 111 KLR 113**.

[22] I, in the premises therefore, find that the trial Magistrate failed to apply the law to the facts as there was no evidence of ownership, unlawful entry as well as intentions to commit an offence or to intimidate, insult or annoy the complainant and thereby reached a wrong decision of guilt against the Appellants. As a result, the charge of criminal trespass was not established. The appeal succeeds, the conviction of the appellants is quashed. The Appellants are accordingly acquitted, the sentence and order of compensation are set aside.

Signed, dated and delivered at Masindi this **11th** day of **October, 2022**.

Byaruhanga Jesse Rugyema
JUDGE.