

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**CRIMINAL APPEAL NO. 0035/2013**  
**ARISING FROM GULU CRIMINAL CASE NO. 0639 OF 2013**

OKELLO ORIS ATAMA AND OJOK RICHARD:.....APPELLANTS

**VERSUS**

UGANDA :..... RESPONDENT

**BEFORE HONOURABLE LADY JUSTICE MARGARET MUTONYI**

**JUDGMENT**

Okello Oris Atama here in after referred to as the 1<sup>st</sup> appellant and Ojok Richard the 2<sup>nd</sup> Appellant appealed against the Judgment and conviction arising from Criminal Case No. 639/2013.

They were aggrieved and dissatisfied with the whole judgment, conviction and sentence of His Worship Barigye Saidi Magistrate Grade 1 Gulu delivered on 16/12/2013 in which the appellants were convicted of criminal trespass and sentenced to one year imprisonment.

According to the Memorandum of Appeal dated 23/12/2013, the grounds of appeal were the following:-

1. That the trial magistrate erred in law and facts when he failed to fully and properly evaluate the evidence of ownership, possession, entry and intention thereby reaching a wrong decision of guilt of the appellants.
2. That the sentence was harsh. They prayed that the Appeal be allowed and the conviction and sentence be set aside. The appellants were represented by Mr. Okidi Ladwar Walter while the State was represented by Mr. Omia Patrick the Resident State Attorney Gulu.

Both counsels submitted in favour of their cases and the written submissions are on record. I will refer to them as and when necessary.

### **Background**

The brief background of the case is that the two appellants were charged with the offence of criminal trespass c/s 302 of the Penal Code Act where it was alleged that the two appellants with others still at large during the month of April at Lamin Lupabo village in Gulu District entered the land of Betty Nyeko with intent to intimidate or annoy the said Betty Nyeko.

They were tried before a Grade 1 magistrate, convicted and sentenced to one year.

The complainant in the lower court Betty Nyeko testified in favour of the charge against the appellants.

### **Submissions**

In his submission: Counsel for the Appellants submitted the appeal was premised on one general ground that covers all the legal issues involved and this was that the Trial Magistrate erred in law and fact when he failed to fully and properly

evaluate the evidence of ownership, possession, entry and intentions thereby reaching the wrong decision of guilt of the appellants.

He laid out what constitutes the ingredients of the offence of criminal trespass as follows:

1. Possession of that property by the complainant.
2. Entry into the property by the accused person(s)
3. An intent to intimidate or annoy or commit a crime or offence.

The learned State Attorney agreed with the facts of the case and the ingredients of the offence of criminal trespass as set out by the appellants counsel.

The Appellants Counsel faulted the magistrate for failing to address himself to the essential ingredients of the offence namely possession, of the property by the complainant, entry on the property by the accused and with the intention of intimidating, annoying or committing a crime.

As the first appellate court, I am obliged to re evaluate the evidence together with the judgment to satisfy myself if the trial magistrate exercised his jurisdiction judiciously.

In criminal cases, the trial magistrate while writing a judgment must mention the accused persons, the section of the law under which they are charged and the particulars of the offence.

The particulars of the offence brings 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. In criminal matters, the standard of proof is always very high.

To exhibit knowledge by the trial magistrate of the ingredients of the offence, the magistrate indicates in his/her judgment the ingredients of the offence and apply the facts to the ingredients.

The evidence adduced should prove all the ingredients, before any conviction can be made. The trial magistrate in this case did not mention anywhere in his judgment the particulars of the offence or the ingredients of the offence of criminal trespass.

This was very risky on the side of the judicial officer because he did not have any guidance on what was to be proved given the fact that the law has civil and criminal trespass. Much as both are trespass, the remedies are quite different. Criminal trespass leads to a conviction whereas civil trespass leads to an award of damages and orders or declarations.

In his judgment on page 2, the trial magistrate wrote

***“The complainant’s testimony, supported by all the prosecution witnesses is that she was married to the late Nyeko James. The said Nyeko James was given land by Olal Atama and both stayed there from 1981 until 1996. These two left the land during the war and stayed in Gulu Town. The accused have their land across the road that they left their side and built on her land, they are planting crops like beans, one grass thatched house. She further stated that the matter***

*was taken to LC III at Lakwana Sub County; a copy of that judgment was tendered as PEX1.*

*The accused persons denied the allegation and started that the land they cultivate belongs to them having inherited the same from their grandfather Olal Atama. This was the same message given by the other defence witnesses"*

The above except from his judgment clearly reveals a land dispute between the complainant and the accused. She claims her husband was given land by Olal Atama and the defendants are also claiming they inherited land from their grandfather Olal Atama.

Had the trial magistrate evaluated the evidence and applied the law to the evidence, he would have appreciated that the case before him was more of a civil nature than criminal.

The trial magistrate admitted PEXh 1 which was a judgment of LC III. An exhibit is used to support a fact or an allegation. This exhibit proved further that there was a land dispute in which Betty Nyeko the complainant was involved in. The so called judgment did not indicate it was an appeal from LC II Court.

Betty Nyeko in her statement on page 3 of the typed proceedings started after tendering in her LC Court Ruling thus

*" The accused did not comply with the decision of the LC Court..... and on page 4 second line she stated, " I now stay in town. I stayed on this land from 1981 upto 1996 when I lost my husband."*

The trial magistrate failed to apply the facts to the law because he did not know that possession is one of the essential ingredients of the offence of criminal trespass.

The State Attorney submitted that possession is inferred. I did not agree with him, because the accused must enter on the land and in order to intimidate or annoy, the complainant must be in possession of the property.

In the instant case, she was last on the land in 1996 she was therefore not in possession of the land.

The learned State Attorney in his submission stated that PW1 ran away from the village due to the LRA insurgency and settled in Gulu Town and that when the accused persons started encroaching on the land, she sued them before a Local Council Court where she was the victor but that they defied the court orders and further trespassed on her land. His case was that of encroachment which is a civil matter.

With due respect to the learned State Attorney, he should have advised the police to advise the complainant that this was a civil matter. Instead of accusing the appellants for "*appealing*" to the RDC, the learned State Attorney should have advised them to execute the LCIII judgment if it is legally enforceable i.e. if the matter started from LC II and then LC III.

The trial magistrate was totally blind to that fact which was so staring to him because he even admitted the LC III judgment as prosecution exhibit. Nothing

from the record indicate that the complainant in the criminal case was in possession at the time the accused encroached in the land in dispute.

On the ingredient of entry: the entry must be unlawful without any claim of right or ownership. In the instant case, even if the appellants entered the land which was not in possession of the complainant, they are claiming ownership. They claim the land belonged to their grandfather Olal Atama. The complainant also claims her late husband was given land by Olal Atama.

On page 2 of his judgment last paragraph, the trial magistrate rightly started that *“from the facts, the accused’s family started conflicting with her over the said land”*

Instead of advising them to continue pursuing civil remedies over land conflict, he misdirected himself and continued with the criminal case which in my opinion was bound to fail had the trial court applied the law to the facts.

The particulars of the offence were that the intention was to annoy or intimidate. In her evidence, the complainant did not say anywhere that she was annoyed or intimidated by the accused in the legal sense as to constitute criminal intimidation.

Criminal intimidation occurs when the accused frightens or makes someone to be afraid of him in order to get what he wants;

It is intentional behavior that would cause the complainant if she/he is a person of ordinary sensibilities to fear injury or harm.

There is no evidence on record whatsoever, that the complainant feared she would suffer injury or harm from the appellants. There is no criminal insult either. The learned State Attorney asked in his submission that if it was not their intention to annoy, insult or intimidate, PW1, why did they (Appellants) disobey a court decision (LC II)?

The above statement sums it up. It was purely a civil matter, criminalized to intimidate the appellants.

The learned State Attorney knows very well that civil court orders are executed under the civil Procedure Rules by way of execution if it is legally enforceable. In cases of criminal trespass like any other criminal offence, the court must adhere to the essential ingredients of the offence and apply the facts to the law.

All the essential ingredients of entry on to the land in possession of the complainant with the intention of criminal intimidation, annoyance and or commission of the crime must be proved.

Claim of ownership is a civil right which should be allowed to be proved in a civil court and should never be criminalized as this would amount to prosecution.

Had the appellants disobeyed lawful orders as submitted by the learned State Attorney, he was in a better position to advise on the proper charge of disobeying lawful orders not criminal trespass.

The case is one of the many cases where land conflicts have been criminalized and courts of law are busy convicting accused persons who have the



Constitutional Right to claim what they truly believe belongs to them. This state of affairs of criminalizing land disputes should come to an end as it is an abuse of court process and perverts the course of justice.

It violates the rights of people and denies them the civil liberties to seek legal redress as civil remedies are very different from criminal liability. Perusal of the proceedings and judgment reveal that the trial magistrate indeed erred in law and in fact as he totally failed to fully understand the offence of criminal trespass and failed to evaluate the evidence before him. He failed to evaluate the evidence of ownership, possession, entry and intent to annoy or intimidate as per the charge sheet. In the result he reached a wrong decision of guilt.

It should be emphasized that trespass to land is in tort. One has to prove that a person entered on his/her land on his own volition with the intent to make use of the land without the land owner's permission. This involves a violation of a property owner's right to maintain exclusive control over his or her property.

The property owner in the above scenario sees in a civil court.

The facts in this case disclose the above described scenario. Criminal trespass on the other hand involves a person knowingly entering or remaining on property on which he knows he does not have permission to be. A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by that person with respect to the property is done in the exercise of an honest claim of right and without intention to defraud or intimidate or annoy any one.

The proceedings in the lower court revealed that the defence of the appellants was that innocent claim of right and without any intention to defraud the complainant. They were unfortunately convicted and sentenced to a term of imprisonment. Had the magistrate properly evaluated the evidence and applied the law to the facts, he would have not convicted the appellants.

A sentence netted on the person who should have been acquitted is certainly unlawful.

In the result, the Appeal is allowed, the conviction and sentence is set aside.

Right of appeal explained.

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Margaret Mutonyi

Judge

22/8/2014

Delivered in the presence of Appellants, Resident State Attorney Omia Patrick, Juliet Opoka holding brief for Ladwar. Anna Court clerk.

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Margaret Mutonyi

Judge