

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE

HCT-03-CR-CN-23-2017

ARISING FROM IGANGA-00-IG-CO-110/2016)

BUYINZA KANSWA ESTINERI : APPELLANT

VERSUS

UGANDA : RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The appellant, **BUYINZA KANSWA ESTINERI**, filed this appeal against the Judgment, orders and sentence of **HIS WORSHIP TUHIMBISE VALERIAN**, Magistrate Grade I Iganga, who convicted him on one count of Removing Boundary Marks **C/S 338 of the Penal Code Act**, and sentenced him to 15 months imprisonment.

The background to this appeal is that the complainant Kanswa Benifansio is an 80 year old Uncle of the Appellant. He testified as PW1 and accused the appellant of uprooting boundary marks on his land in Naitandu village in Makutu Sub County in Iganga District. The complainant is the younger brother of the appellant's father (Yeseri Kasagha) and the two were given land by their father (appellants grandfather). The complainant thereafter went to stay in Mayuge leaving the appellant on part of his portion of the land. The complainant allowed the appellant to come onto his land following a misunderstanding that Estineri had had with his own father (Kasagha). It is said

the appellant offered to buy the portion he had occupied but later changed his mind insisting the land was his. The complainant reported the matter to the clan leaders and LCs in the area. A meeting was convened where the appellant was given a deadline within which to pay for the land but failed or refused to do so. It was then that the clan leaders went and planted 'Birowa', a plant used as a boundary mark, on the land. It was these 'Birowa' that the appellant uprooted prompting the complainant to report the matter to the police who arrested and charged Besweri Kanswa with the offence of Removing Boundary Marks.

The appellant denied the charges. His case is that the land was his and that he had inherited it from his late father, Yeseri Kasagha, an elder brother of the complainant. There was never a claim to ownership of the land throughout his father's life time. The complainant only started proclaiming his said ownership of the land on Yeseri Kasagha's death. The appellant states that the clan committee forced itself onto the land and planted the boundary marks which the appellant maintained was wrong and amounted to evicting him from his own land. Buyinza however denies uprooting the 'birowa' that were planted by the clan.

The trial magistrate believed the prosecution case and convicted the appellant as stated above.

The appellant being dissatisfied with the finding of the Trial Magistrate filed three grounds of appeal namely,

1. The learned trial Magistrate, failed to assess and weigh the evidence on court record as adduced by either party to the case, thereby arriving at a wrong/ erroneous decision in the case.
2. The Learned Trial Magistrate erred in law when he failed to make a finding to the effect that the entire evidence, adduced by the prosecution against the Appellant, was flimsy and purely speculative as no prosecution witness saw the Appellant, uprooting

the boundary marks, and worse of all no removed boundary marks were exhibited in court or that the purported boundary marks were in the first place lawfully planted.

3. That in the circumstances of this case, the sentence of 15 months, was harsh and excessive.

WHEREFORE the Appellant prayed for Judgment in his favour with orders that:

- i) The lower court judgment be set aside and the conviction be quashed accordingly.
- ii) The sentence be set aside, or reduced, with orders that The Appellant, be set free immediately.
- iii) Orders that the Appellant be compensated a sum of money to be specified by court, for false imprisonment, as he indeed committed no crime.

As this is a first appeal, this Court is enjoined to subject the evidence to a fresh scrutiny and come to its own conclusions remaining mindful of the fact that it has not observed the witnesses testify to see and draw conclusions on their truthfulness or otherwise from their demeanor.

I shall deal with the grounds jointly. I note farther that the submissions of counsel on both sides are on record and will not be reproduced here but will be referred to as the court proceeds.

The complainant contends that this was a land dispute. His evidence at Pg 3 of the record is,

Then the accused uprooted the marks. Now the accused claims the land is his and he is using the land. He has now planted coffee and oranges. After

discovering that the accused has taken over the land I brought him to Court. I want court to order for the return of the land’.

The appellant on the other hand states at pg 16 that,

“The case against me is unfounded because the land had been given to me by my late father. After the death of my father, the complainant started claiming that the land in dispute was co-owned with my father yet before my father died he had never said so. If he had told me that he co-owned the land in the lifetime of my father I would have given the land away to him. The clan and the complainant used force, divided the land without giving me evidence that that the land was co-owned by my late father and the complainant ... if the clan replants the ‘birowa’ I would have a big problem with that ... because I would have been evicted from my land”.

These two pieces of evidence show that the two parties are really contesting the ownership of the land. There is also sufficient evidence on the record to prove that the appellant uprooted the marks.

Secondly the appellant has clearly set up a claim of right.

Section 7 of **the Penal Code Act** provides,

Claim of right

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.

... a person has a claim of right within the meaning of s. 1 of the *Larceny Act, 1916*, if he is only asserting what he believes to be a lawful claim, even though his claim may be unfounded in law or in fact (**Sewava (Francisko) v Uganda [1966] EA 487**).

Although **Sewava** [supra] dealt with theft the principle on claim of right is the same.

Where a person acts with an honest claim, that is one that is bonafide and made in good faith, however unjustifiable his claim may be, in a matter where he is charged with an offence, relating to land, then he is not criminally responsible.

In this instant case it is clear, that the appellant believes that land belongs to him and clearly asserts he is being disposed. He appears to be trying to enforce his property rights however misguided the method he has adopted. It is this court's finding that the appellant is asserting an honest claim of right over the land and should not be found criminally responsible for the offence he is charged with.

For that reason the appeal succeeds and as the conviction against him cannot stand - it is quashed. His sentence is set aside.

For the avoidance of doubt this court has not pronounced itself on the ownership of the land. The parties here are at liberty to pursue civil proceedings to determine the ownership of the land in dispute.



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Michael Elubu

Judge

20.9.17