

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL APPEAL No. 0010 OF 2014
(Arising from Nebbi Chief Magistrates Court Criminal Case No. 0092 of 2012)

OPIO ENRICO **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The Appellant was on 27th March 2012 charged with the offence of Criminal Trespass c/s 302 (a) of *The Penal Code Act* before the Chief Magistrate’s Court of Nebbi at Nebbi. It was alleged that on 7th March 2012 at Nyacara Primary School in Nebbi District, the appellant and others at large entered into a piece of land in possession of Nyacara Primary School, with intent to intimidate or annoy the said Nyacara Primary School. He was granted bail and the hearing of the case commenced on 8th August 2012. The prosecution called four witnesses and closed its case on 15th August 2013. Having found that a prima facie case had been established against the appellant, the trial court put him to his defence. He made a sworn statement in his defence on 18th October 2013 and called two other witnesses in his defence and closed his case on 15th November 2013. The court directed the parties to file written final submissions and fixed the case for judgment. In its judgment delivered on 6th December 2013, the appellant was found guilty as charged, he was therefore convicted and sentenced to ten months’ imprisonment, with an order of compensation made in favour of the complainant in the sum of shs. 400,000/=.

The prosecution case was briefly that during the year 1999, Nebbi Town Council allocated the land in issue to Nyacara Primary School but the appellant hired some people to till it without authorisation of the school. P.W.I, Ovuro Juma, the Chairman of the School Management

Committee testified that on 7th March 2012 he found some people on land belonging to the school digging and when he asked them who had authorised them to do so, they told him it was the appellant. P.W.2, Adage Paula, the Head Teacher of the school testified that on 7th March 2012 after being tipped off by the Deputy Head teacher, he found some people on the school land digging. P.W.3, Anecho Stephen, the Clerk to Nebbi Town Council testified that the land in issue was donated by Nebbi Hospital and the Town Council together with an NGO constructed a primary school on the land. Nebbi Town Council donated the land to the parents of Nebbi Town Council. P.W.4, D/Sgt. Opio John, the Investigating Officer testified that he visited the scene of crime and found a freshly dug area measuring approximately 170 by 180 metres but he did not find anyone on the land. He prepared a sketch map of the scene which was tendered in court as an exhibit. He attended a meeting of District Officials on 14th March 2012 at which it was confirmed the land had been allocated to the school. He arrested the appellant on 26th March 2012 when he reported to the police.

The appellant's defence was briefly that he did not trespass on the land as alleged. The people found tilling the land in issue on 7th March 2012 were hired by his uncle's wife, Kalimensa Ozelle but were stopped by the school authorities. He went to garden at around 9.00 am and found the labourers still tilling the land but there were no school authorities around. Together with them, he went to the school and they pointed out Masendi Collins as the one who had stopped them from tilling he in turn said he had acted on the instructions of P.W.1. The appellant then wrote a letter to P.W.1. notifying him that the land belonged to their family, of the late Grasio Olar Ojok and Ojok Oyukutu, and not the school. He attended a meeting at the school but the dispute was not resolved only to be arrested on 14th March 2012 upon allegations of criminal trespass. D.W.2 Karmella Ozelle testified that she employed some people to weed her cassava garden near Nyacara Primary School but they were stopped by teachers of the school and asked to call the appellant. The teachers of Nyacara Primary School would from time to time chase her and her late husband from the land whenever they attempted to till it yet it belonged to the late father of the appellant, who was a brother to her husband. The teachers of Nyacara Primary School took over most of the land and began growing crops on it and construction of building, but were stopped. She retained only about 2 ½ acres of the land which she continues to cultivate. D.W.3 Fuambe Fulumena, the appellant's sister, testified that the appellant had began

utilising the land in issue since the death of their father and it belongs to him. D.W.4 Majja Nelson Patrick, administrator of the estate of the late Olar Ojok, testified that the land belongs to the family of the appellant and there is a pending suit filed in the year 2004, between that family and Nyacara Primary School. The school had since the year 20016 taken over the land and undertaken various activities thereon including cultivation and construction of buildings.

In his judgment, the trial magistrate found that the prosecution had proved that on 7th March 2012, the appellant was together with other persons, found on the disputed land digging. The land had since 1999 and at the material time, in possession of Nyacara Primary School. The court rejected his evidence regarding the ownership of the land as inconsistent and thus incredible. There was no credible evidence of long user by the appellant. On basis of the letter the appellant wrote to the school authorities on 9th March 2012, the court found that the prosecution had intent to intimidate. He was thus convicted and sentenced to ten months' imprisonment and to pay compensation of shs. 400,000/=

Being dissatisfied with the decision, the appellant appealed both conviction and sentence on the following grounds, namely;

1. The learned trial magistrate erred in law and fact when he convicted the appellant who had put up a defence of honest claim of right to the offence of criminal trespass c/s 302 of the Penal Code Act.
2. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on the record and wrongly made a finding that the land was in occupation of the complainant, whereas not.
3. The learned trial magistrate erred in law and fact when he sentenced the appellant to a term of imprisonment of 10 months which in the circumstances of the case was harsh and excessive.
4. The learned trial magistrate erred in law and fact when he ordered the appellant to pay Ugx 400,000/= as compensation to the complainant without justification.

Submitting in support of the appeal, counsel for the appellant Mr. Paul Manzi argued that there was ample evidence before court to justify the defence of honest claim of right. Such a belief

need not be reasonable, as long as it is honest. He cited *Nkwine Jackson v. Uganda, H.C. Criminal Appeal No. 59 of 1992 [1995] III KALR 113* and *Oyat v. Uganda [1967] EA 827*. The evidence on record does not support the finding that the land was in possession of the complainant. In the alternative, being a first offender, the sentence of 10 months' imprisonment was harsh and excessive. Since there was no evidence of any injury or damage to property occasioned by the offence, the award of compensation had no legal basis.

In response, the learned State Attorney, Mr. Emmanuel Pirimba submitted that the trial magistrate properly evaluated the evidence and came to the correct conclusion. The complainant was in possession of the land at the material time. The complainant had crops and unfinished structures on the land. The appellant did not have an honest belief in laying claim to the land. The land has clear boundaries in the form of roads. The court was justified in rejecting the appellant's evidence of ownership and user of the land since it had many inconsistencies. The maximum punishment for the offence is one year's imprisonment. A sentence of ten months' imprisonment is neither harsh nor excessive. It is up to the court to determine the lawfulness of the order of compensation.

This being a first appeal, it is the duty of this court to rehear the case, reconsider the material evidence and subject it to a fresh and exhaustive scrutiny. It must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it (see *Uganda v. George William Ssimbwa, S. C. Criminal Appeal No. 31 of 1995*; *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No. 10 of 1997* and *Okwonga Anthony v. Uganda, S. C. Criminal Appeal No. 20 of 2000*). But in doing so, the court must bear in mind the decision in *Bogere Moses and another v. Uganda S. C. Criminal Appeal No. 1 of 1997* to the effect that:

A first appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses and should, where available on record, be guided by the impression of the trial judge on the manner and demeanour of the witnesses. What is more, care must be taken not only to scrutinise and re-evaluate the evidence as a whole, but also to be satisfied that the trial judge had erred in failing to take the evidence into consideration.

However an appellate court will not normally interfere with the finding of fact by a trial court or be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence, or on a misapprehension of the evidence, or the court below is shown demonstrably to have acted on wrong principles in reaching his conclusion. The appellate court though is not bound by the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

Section 302 (a) of *The Penal Code Act* seeks to punish any person who enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person. The offence requires that;

- i. There must be an 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.
- ii. 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.
- iii. 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*.
- iv. 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.
- v. The existence of a bona fide claim of right under section 7 of *The Penal Code Act*, ordinarily excludes the criminal intention.

The ingredients for proving criminal trespass under section 302 (a) of *The Penal Code Act* are as follows: a) unlawful entry into or upon a property in the possession of another, b) an intention to commit an offence, or, to intimidate, insult or annoy the person in possession of the property.

The first element of the offence that had to be proved was entry onto property by the appellant. The evidence relating to entry by the appellant onto the land was inconclusive. P.W.1, Ovuro Juma, the Chairman of the School Management Committee testified that on 7th March 2012 he found some people on land belonging to the school digging and when he asked them who had authorised them to do so, they told him it was the appellant. P.W.2, Adage Paula, the Head Teacher of the school testified that on 7th March 2012 after being tipped off by the Deputy Head teacher, he found some people on the school land digging. P.W.4, D/Sgt. Opio John, the Investigating Officer testified that he visited the scene of crime and found a freshly dug area measuring approximately 170 by 180 metres but he did not find anyone on the land. D.W.2 Karmella Ozelle testified that she employed some people to weed her cassava garden near Nyacara Primary School but they were stopped by teachers of the school and asked to call the appellant. The appellant's defence was briefly that he did to trespass on the land as alleged. The people found tilling the land in issue on 7th March 2012 were hired by his uncle's wife, Kalimensa Ozelle but were stopped by the school authorities. He went to garden at around 9.00 a.m. and found the labourers still tilling the land but there were no school authorities around. It would seem therefore that despite the appellant having gone to the land upon invitation of teachers of the school, the trust of the prosecution evidence was that his was a constructive entry by servants acting on his orders. Aside from the fact that they were not his servants but those of D.W.2, constructive entry by servants acting on the orders of an accused person does not constitute entry by the accused within the meaning of the section.

As part of this element, the prosecution was also required to prove the fact that the entry was unlawful. There was evidence that the property had been allocated to Nyacara Primary School. Despite this, the appellant laid claim to it as his customary holding acquired through inheritance. He in effect raised the defence of claim of right within the meaning of section 7 of *The Penal Code Act*. Even if the appellant's assertion of a bona fide title may have constituted an unlawful act, every unlawful act is not necessarily an offence. 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. There is nothing on record to show that the appellant was not sincere and genuine in his belief that the land had been wrongly allocated to the school. Indeed there was evidence of a pending civil suit filed to help in resolving the dispute. The trial magistrate therefore misdirected himself in considering the entry unlawful without taking into account the appellant's defence. Had he done so, he would have come to a different conclusion.

The last aspect of the element is proof that the property was at the time of entry, in possession of another person, the complainant. The complainant must be a person in actual possession of such property. 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. The complainant in this case is Nyacara Primary School, which from its name appears to be an unincorporated entity. Its possession of the property in question was evidenced by the existence of crops grown by the staff of the school and an unfinished structure as evidenced by exhibit P. Ex. 6, being a sketch map of the scene which was prepared and tendered in court by P.W.4. D/Sgt. Opio John, the Investigating Officer. This evidence sufficiently established possession by Nyacara Primary School.

The second element required was proof of an intention to commit an unlawful act, being one of the acts mentioned in section 302 (a) of *The Penal Code Act*. Mere entry does not render the accompanying trespass a criminal trespass. There is a distinction between the phrases "with intent" and "with knowledge"; it must be proved by the prosecution that the accused had the intention to intimidate, insult or annoy when he made the entry, and it is not enough that the

prosecution should ask the court to infer that the entry is bound to cause intimidation, insult or annoyance. 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.

If the prosecution only succeeds in proving that annoyance is the natural consequence of the act and if it is known to the person who does the act that such is the natural consequence, then it will have failed to prove that there was intent to annoy. That a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction under this section. 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).

The allegation in this case as contained in the particulars of offence was that appellant and others at large entered into a piece of land in possession of Nyacara Primary School, with intent to intimidate or annoy the said Nyacara Primary School. What constitutes intent to intimidate, insult or annoy was considered in the case of *Kigorogolo v. Rueshereka [1969] EA 426* where it was held as follows:

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).

The phrase "in possession of another" has to be borne in mind. 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. Although an intent to commit an offence may

accrue in respect of a juridical person, reference to the intent “to intimidate, insult or annoy any person” in section 302 (a) of *The Penal Code Act* bears meaning only in reference to natural persons since it is only natural persons that are capable of experiencing those emotions. In the instant case, the particulars of the charge sheet stated that the appellant intended to “to intimidate or annoy the said Nyacara Primary School,” which is either a corporation or an unincorporated association. Being an artificial person, Nyacara Primary School is incapable of being insulted, intimidated or annoyed. No natural person was named in the charge sheet. To that extent, the appellant’s alleged activities on the property were incapable of accomplishing the outcome envisaged by that section.

Conceptually, trespass to land consists in any unjustifiable intrusion by one person upon the land in possession of another. Also trespass is actionable at the suit of the person in possession of the land who can claim damages or injunction or both. 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. The complainant in this case sought the aid of the criminal process to obtain a remedy that was available only through a civil suit. This prosecution was in a way an abuse of court process and the conviction cannot be allowed to stand. In that case it is not be necessary to consider the grounds relating to the propriety of the sentence.

In the final result, I hold that the criminal intent specified in section 302 (a) of *The Penal Code Act* not having been established the charge of criminal trespass must fail and for that reason the appeal succeeds. I accordingly quash the conviction, acquit the accused and set aside the sentence and order of compensation.

Dated at Arua this 10th day of January 2017.

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Stephen Mubiru
Judge