

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CRIMINAL DIVISION)

CRIMINAL APPEAL NO. 128 OF 2017

5 **(ARISING FROM MAKINDYE CHIEF MAGISTRATE'S COURT**

CRIMINAL CASE NO. 43 OF 2015)

1) SSEPUUYA VINCENT

2) NAMBOOZE FORTUNATE MUJABI ----- APPELLANTS

VERSUS

10 **UGANDA ----- RESPONDENT**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

15 By this appeal, the Appellants being aggrieved and dissatisfied with the judgment and sentence of Her Worship Nyipiri Fortunate, Magistrate Grade I, appealed to this court against the whole judgment and sentence.

20 The facts of the case are that the two Appellants then accused where charged with two offences.

The First and Second Appellant was charged with criminal trespass contrary to Section 302 (a) of the Penal Code Act. On this count the
25 case of the Prosecution was that the two accused during the month of August, 2014, at Kizito Zone, Kibuye in Rubaga Division, entered upon the land (Kibanja) of Fred Lutwama with intent to intimidate/insult or annoy the said Fred Lutwama.

30 The second count of material damage to property contrary to Section 335 of the Penal Code Act was only against the First Appellant. And the case for the Prosecution was that the First Accused on the same day, time and place, willfully damaged the house of the said Lutwama.

The Appellants were convicted and sentenced to six months imprisonment on first count. While the First Appellant was sentenced to twenty two months of imprisonment on the second count. The sentences were to run concurrently. Hence the Appeal.

The appeal was based on five grounds as set out in the memorandum of appeal.

When the appeal was called for hearing on 03.09.18, Counsel for the Appellant on going through the brief facts of the case, pointed out that the memorandum of appeal had been drafted by the Appellants, who had not been represented at that time. He accordingly summarized the five grounds into three grounds.

1) The trial Magistrate erred in law and fact in failing to take into account the defence of the honest claim of right of the accused and thereby convicting them as charged.

2) The trial Magistrate erred in law and fact in failing to properly evaluate the ingredients of the offence of criminal trespass thereby convicting the Accused/Appellants.

3) The trial Magistrate erred in law and fact in failing to evaluate the ingredients of the offence of malicious damage to property thereby convicting the Accused persons /Appellants

It was then submitted that this being a first Appellate Court, it has a duty to review the evidence and consider the materials that were before the trial court and come up with its own independent position. The case of **Kifamunte Henry vs. Uganda SCCR.A. 10/97** was relied upon to support the submission.

In respect of the first ground of appeal – **failure by the trial court to take into account the defence of honest claim of right:** Counsel stated that, the First Appellant is the registered proprietor of the said land comprised in Kibuga Block 14, Plot 549. This is the same position the trial Magistrate noted in the judgment page 4, paragraph 2, when she acknowledged that the certificate of title tendered in court is conclusive evidence of ownership of the said land. The certificate of title is in the names of the First Appellant.

Counsel contended that, the First Appellant being the registered proprietor was also in possession of the land. However that, the Complainant claims to have purchased a Kibanja on the land and began construction thereon.

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The trial Magistrate then noted that criminal trespass is an issue which is not about ownership but possession.

10 In his defence, the First Appellant clearly told court that he was on the land that belongs to him. He bought Eucalyptus poles put them on the ground in order to stop people from trespassing. He used them to make a boundary after which he was arrested.

15 It was the argument of Counsel for the Appellant that, if someone has land and is in possession of the same, there is no way they can trespass on their own land especially if they are protecting it with boundaries.

20 That the defence of honest claim of right raised by the First Appellant enshrined in S.7 of the Penal Code Act. The Section provides that *"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"*.

25 Counsel then asserted that the First Appellant was in possession of this land and the acts of planting of Eucalyptus poles was an honest claim of right.

30 As to the second ground of appeal - **improper evaluation of the ingredients of criminal trespass**: It was submitted that, the ingredients of criminal trespass are:-

- 1) Possession of property by the complainant,
- 35 2) Entry into the said property by the accused with intent to intimidate, insult or annoy the complainant.

40 Counsel argued that, the Prosecution failed to prove this ingredient of possession, especially since the Appellant was the registered proprietor of the suit land. This was also acknowledged by the trial Magistrate in paragraph 2 page 4 of the judgment.

Further that the Complainant could not prove possession of the suit property, which automatically means that they could not claim or prove entry into the property which they have never possessed.

5 Similarly that the second ingredient of intent to intimidate, insult or annoy the complainant could also not be proved by the Prosecution.

That there is no evidence that the Complainant was criminally intimidated, annoyed or insulted by the acts of the Appellants.

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The case of **Okello and Another vs. Uganda SC. CR. App 35/13** was relied on for the holding that *“only a person in possession can be annoyed, insulted or intimidated by the entry of the accused”*.

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That in this case, it is the Complainant that annoyed, insulted or intimidated the Accused.

It was then prayed that since the prosecution failed to prove the ingredients of criminal trespass, the Appellants should be acquitted of the same.

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In reply, Counsel for the State conceded that there was no criminal trespass on the first count.

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This court therefore, in total agreement with Counsel for the Appellant allows the first and second grounds of appeal. Indeed the trial Magistrate erred in failing to take into account the defence of honest claim of right of the accused person and thereby arrived at the wrong decision.

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The ingredients of the offence were also not proved as pointed out by Counsel for the Appellants.

35 The Appellants are accordingly acquitted of the charge of criminal trespass. Grounds 1 and 2 are accordingly allowed for all those reasons. Ground three: **Failure to evaluate the ingredients of the offence of malicious damage to property.**

40 Counsel for the Appellants submitted that, one of the ingredients of malicious damage to property is to destroy property through willful and unlawful actions.

The case of **Muwanga Angelo & Another vs. Uganda Cr. App 12/09** by Justice Mulangira was cited for the holding that *“Consequently and most importantly for the fact that the trial Magistrate acquitted the Appellants on criminal trespass on the property in issue, the element of willfully and unlawfully which is one of the ingredients of malicious damage to property was done away with. Hence, the offence of malicious damage to property could not stand against the Appellants”*.

Premised on the above holding, Counsel argued, that if this court finds that ground two of is allowed, the third ground should also be allowed.

It was then prayed that the appeal be allowed and the conviction of the Appellants quashed, the judgment and sentences of the lower court set aside. It was pointed out that, in any case, the Appellants have already served their sentence.

In response, Counsel for the State argued that the count of malicious damage to property was proved.

She pointed out that the ingredients of malicious damage to property is that:-

- 1) Property was damaged willfully and unlawfully.
- 2) The accused participated in damaging of the property.

Referring to the evidence of the Prosecution, Counsel stated that, PW1 in his evidence testified that the First Accused (Appellant) bought poles and nails which he attached to the Complainant’s property that is house, which was damaged.

That this was malicious since the Appellant claimed that the Complainant had constructed on his land and had entered therein for six meters. But that the Complainant had a claim of right because he tendered a sale agreement in evidence indicating that he had bought the land from one Nakiwala. That the Appellants had intended to buy back the same land and the Complainant bought it from the person the Appellant had sold it to.

And while it is true that the Complainant may have trespassed Counsel added, he had an interest in the property where they had constructed and kept avowing that they had bought the same from Nakiwala.

- 5 The proper way to settle the matter would have been by mediation or to compensate the Complainant.

That A1 was clearly seen carrying the poles and nails that were used to damage the property of the Complainant page 19.

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Commenting about the case of **Muwanga Angelo (Supra)** relied upon by Counsel for the Appellants; Counsel for the State contended that the facts of the present case are quite different. She urged court to be persuaded by the ruling in the case of **Muhwezi Jackson vs. Uganda Cr. App 149/2008** where the court held that *“much as the Appellant had a registered interest in the land in question, the Complainant too had a legitimate interest because she had been a bonafide occupant”*.

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- 20 That in the present case, the Complainant had interest since he had purchased the land and owned what he had purchased.

Court was urged to uphold the conviction on the second count.

- 25 In rejoinder, Counsel for the Appellants stated that the ingredients of malicious damage to property are clear. That is the property has been damaged through willful and unlawful actions.

The word **“unlawful”** he added was defined in the case of **Muhwezi Jackson vs. Uganda HC. Cr. App 149/06** by Justice Lugayizi – when he stated that *“the more accurate use of the word unlawful conveys this meaning. That is to say, contrary to law. Therefore, when a person has done something unlawfully, it means that he or she has done that thing in a manner contrary to law”*.

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That at P.435 of the word willful is defined to mean *“an act deliberately done, intentionally not by accident or inadvertence but so that the mind of the person who does not act goes with it”*.

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Counsel then stated that the Appellants maintain that they never in any way destroyed the property of the Respondents. And even when the trial Magistrate visited the locus, court made no note of any property that was destroyed.

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And that while Counsel for the State referred to the Respondent as a Bonafide occupant, the Respondent states that he bought the suit property in 2013 as indicated on P.4 of the record of proceedings whereas the First Appellant was registered as owner on 05.02.79.

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Counsel pointed out that the law regarding bonafide occupants as per the Land Act defines bonafide occupant as one who has lived on land for a period of twelve years uninterrupted.

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And therefore that, for the First Appellant to place poles on his land to protect it from trespassers is an act intended to protect his land. The Appellant especially tried to involve the area Chairperson in mediating the parties. He also obtained a letter for the area Chairperson restraining anyone from encroaching on his land but it was ignored. –

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Page 14 and 15 proceedings.

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Asserting that the Prosecution failed to prove the ingredients of wrongful; and unlawful destruction of the property of the Respondent, Counsel prayed that the second count against the Appellant be overturned.

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As already indicated in ground two of the appeal, the Appellants put up a defence of honest claim of right. When evidence was adduced that the First Appellant has title to the disputed land. Indeed in the proceedings of the visit to the locus made by the trial court, it is indicated that the disputed portion of the land falls in the plot of the First Appellant and that the boundaries of AI's land were opened with approval from the KCC and Police, in the presence of all parties.

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It is trite law that *“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 in respect to the property was done in the exercise of an honest claim of right and without intention to defraud”*.

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5 The First Appellant clearly stated in this case that he put out Eucalyptus poles to stop further encroachment in his land by the Complainant in this case. This was therefore no willful or unlawful damage to the property of the Complainant as the Prosecution would like court to believe. More so as the state concedes that there was no criminal trespass committed by the Appellants, who had an honest claim of right to the disputed land.

10 While the Complainant claimed to have an interest in the same land as a result of having brought the portion in dispute from one Nakiwala, Counsel for the State also agrees that the proper way to have settled the matter would have been by mediation or compensation. This is an admission that criminal proceedings were not the appropriate way to settle his matter as they would not solve the issue of ownership.

15 For all those reasons, I agree with Counsel for the Appellant and find that the trial Magistrate failed to properly evaluate the ingredients of the offence of malicious damage to property and accordingly arrived at the wrong decision.

20 The Appellants' conviction on the second count cannot also be allowed to stand.

25 The appeal is allowed, the conviction on the two counts quashed. Unfortunately, the Appellants have already served the sentences that were given by the trial Magistrate, which is an injustice that cannot be reversed in the circumstances.

30 I wish to observe that it seems to have become a common occurrence for civil matters to be turned into criminal matters. And that justice demands that the trend should be reversed by such files that are essentially civil not being sanctioned by the state. The parties ought to be encouraged to instead file civil suits to settle the matters.

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FLAVIA SENOGA ANGLIN
JUDGE
03.10.18