

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MPIGI  
CRIMINAL APPEAL NO. 005 OF 2020**

(ARISING FROM CR. CASE No. 327 OF 2018 AT THE CHIEF MAGISTRATE'S  
COURT OF MPIGI AT MPIGI)

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1. SSEMAKULA FREDRICK } .....APPELLANTS  
2. SERUNJOGI ROBERT }

**VERSUS**

UGANDA.....RESPONDENT

10  
**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE**

**Judgment**

15 The appellants brought the instant appeal being dissatisfied with the decision of His Worship Muhamadi Kasakya, Chief Magistrate Mpigi delivered on the 16<sup>th</sup>/07/2020 where they were found guilty of the offence of Criminal trespass Contrary to **Section 302(a)** of the Penal Code Act and accordingly convicted and sentenced to a prison term of two months.

The grounds of appeal according to the Memorandum of appeal are as follows;

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1. That the learned Trial Chief Magistrate erred in fact and law when he failed to evaluate the evidence on record thus wrongly convicting and sentencing the Appellants.
  2. That the learned Trial Chief Magistrate erred both in fact and law when misdirected himself on the ingredients of the offence of Criminal trespass.
  - 25 3. That the learned Trial Chief Magistrate erred both in law and in fact on the propriety and tenability of the charge and/or defectiveness of the charge sheet upon which the conviction and sentence of the Appellants was premised.
  4. That the learned Trial Chief Magistrate erred in law and fact when he failed to take into consideration the defence of honest claim of right to the

charge against the appellants this wrongly convicting and sentencing the appellants.

**Background:**

5 The appellants were jointly charged with two counts of; Count I of Criminal Trespass contrary to **Section 302 (a)** of the Penal Code Act and Count II of threatening Violence contrary to **Section 81** of the Penal Code Act.

It was alleged under **Count I** that the appellants between 2012-2018, entered onto land comprised in Mawokota Block 175 – 178 Plot 57 at Kanyike Village, Mpigi District, which land was in the possession of Hon. Capt. Francis Babu with the intent to intimidate the said Capt. Babu and his workers.

It was alleged under **Count II** that the appellants between 2012 – 2018 at Kanyike Village in Mpigi District with intent to intimidate Hon. Capt. Francis Babu and his workers threatened to injure them.

15 In the course of the trial however, Count II was amended to the effect that it was one Magira Joseph Jeptha and his workers that were threatened by the appellants.

The appellants denied committing both offences.

Issues for determination in the lower court were as follows;

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1. Whether or not the accused entered in or upon property in the possession of another person?
  2. Whether or not the accused intended to intimidate, insult or annoy any person or to commit an offence?

25 The prosecution called six witnesses in a bid to prove its case. At the closure of the prosecution case the court found that there was no sufficient evidence adduced to warrant the appellants to be put on their defence on count II and were accordingly acquitted in regard to Count II and put to their defence in regard to Count I.

The appellants opted not to testify or call any witnesses.

30 It was brought to the attention of this Court during hearing that the 1<sup>st</sup> appellant had since passed on and proof of death was availed, so the case abated against him as per **Section 43** of the Criminal Procedure Code Act.

**Representation:**

M/s Owoyesigire, Muhereza & Co. Advocates represented the Appellants and the office of the Resident Chief State Attorney represented the Respondent. Both parties filed written submissions.

5 **Duty of the Appellate court:**

It is the duty of the first appellate court to re-evaluate the evidence on record and make its own conclusions keeping in mind that it neither heard nor saw the witnesses in the lower court. **(See: Kifamunte Henry v. Uganda, S.C.C.A No. 10 of 1997).**

10 **Resolution of the appeal:**

Grounds 1 and 2 are discussed jointly while grounds 4 and 3 are discussed separately in that order.

**Grounds 1 and 2:**

15 **1. That the learned Trial Chief Magistrate erred in fact and law when he failed to evaluate the evidence on record thus wrongly convicting and sentencing the Appellants.**

**2. That the learned Trial Chief Magistrate erred both in fact and law when misdirected himself on the ingredients of the offence of Criminal trespass.**

20 Counsel for the appellants submitted that the trial Magistrate failed to properly evaluate the evidence in regard to the fact that there was a contention of ownership between the appellants and complainant which was disguised as a criminal case of criminal trespass against the appellants when actually the persons in occupation were not the ones that were charged with criminal trespass. That the evidence on record did not prove that the complainant was in  
25 possession of the property physically at the time the alleged trespass took place. That the trial Magistrate was misled by the fact that the complainant being the registered proprietor of the property was the standard of possession required as an ingredient for the offence of criminal trespass.

30 Counsel for the appellants added that even if the appellants had entered on the suit land, the complainant had never been in possession of the same and the people in possession were Lubowa and Mugaga who were using the property and

planted trees thereon and not the appellants and this was also allude to by the trial Magistrate in his judgment.

5 Counsel for the appellants further submitted that the prosecution ought to have proved that the appellants intended to intimidate the complainant and there was no evidence in regard on record. That the prosecution had a duty to prove that there was intimidation and not the presence of the intent. Thus, the evidence as adduced by the prosecution did not show that the complainant was frightened or afraid of the appellants and that if the trial Magistrate had properly evaluated the evidence he would have come to the correct conclusion that the offence of  
10 criminal trespass was not proved against the appellants.

Counsel for the respondent on the other hand submitted that it was proved beyond reasonable doubt that the complainant PW1 was in possession of the suit land and the same was corroborated by PW2.

15 In regard to entry on the suit land, it was submitted for the respondent that the appellant did enter the land and PW6 was collecting rent on behalf of the 2<sup>nd</sup> appellant on this land who told court that he used to stay in Sserunjogi's house on the suit land.

20 Secondly, that there was circumstantial evidence to the effect that the appellant had signed a Hire Purchase Agreement with Orange Company that erected a mast on the land. That the appellant also went ahead and leased the land to Joseph Lubowa and Mugaga to plant trees. That all this could not be possible if the appellant had not entered on the land.

25 Counsel for the respondent relied on the case of **Okello Oris Atama & Another v. Uganda, H.C.C.A No. 0035 of 2013**, where it was held that; on the ingredient of entry, entry must be unlawful without any claim of right. That in the present case, it was clear that PW1 was the owner/registered proprietor of this land and a certificate of title is conclusive evidence of ownership and the land did not form part of the estate of the late Sebugulu.

30 Further, Counsel for the respondent in regard to the ingredient of intent to commit an offence or to intimidate, insult or annoy a person submitted that 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.

Counsel added that much as there was no proof that there was intimidation, there only needs to be intent to commit an offence, intimidate or insult or annoy a person and there is no requirement of actualization of the intent. That however, the appellant's intent was evidenced by the leasing of the land while he was aware that the same belonged to PW1.

**Analysis of court:**

I have carefully considered the submissions of both parties under these grounds of appeal.

The offence of criminal trespass involves entering upon property or land in possession of another, with the intent to commit an offence or to intimidate, insult or annoy any other person.

"In the possession of another" refers to actual possession.

The intent of the offender can be gathered from the circumstances of the case. According to **Section 202** of the Penal Code Act, intent is referred to as, the intent to intimidate meaning to put fear by show of force or threat or violence or to insult meaning to assail with scornful abuse or offensive disrespect. (See: **Kigorogolo v. Rueshereka(1969) E.A 426**).

In the instant case PW1 told court that he purchased the land in 2000 and was not in physical occupation of the same, that he brought a surveyor in 2012 to open boundaries when he wanted to lease the land to Stratham University whereof, he and his workers were chased from the land.

PW1 also told Court that the appellant became known to him in 2010 when there was a mast erected on his land and it was said to have been erected by Orange Company having obtained permission from Sserunjogi Robert. That the two met and discussed and Sserunjogi admitted trespassing on the land.

PW1 was not able to prove his physical occupation of the land at time the alleged offence of criminal trespass occurred, which means that he could not claim or prove entry onto property that he never possessed.

In the case of **Okello and another v. Uganda SC. CR. App 35/13**, it was held that;

*"Only a person in possession can be annoyed, insulted or intimidated by the entry of the accused".*

The ingredient of intent to criminally intimidate, annoy, insult was also not proved by PW1 and this was even confirmed by PW1 who told court that he was never insulted or intimidated by the appellant, who he categorically called a good man. There was therefore no evidence on record whatsoever, that the complainant feared he would suffer injury or harm from the appellants. There was no criminal insult either.

The prosecution in my view failed to prove that the appellant entered onto land that was in the possession of the complaint and that the same was done with intent to annoy or intimidate PW1. The ingredients of the offence of criminal trespass were therefore not proved by the prosecution against the appellant.

These grounds of appeal hereby succeed.

**Ground 4: That the learned Trial Chief Magistrate erred in law and fact when he failed to take into consideration the defence of honest claim of right to the charge against the appellants this wrongly convicting and sentencing the appellants.**

Counsel for the appellant cited **Section 7** of the Penal Code Act and submitted that a claim of right is a complete defence to a charge of criminal trespass. That in the instant case there was a dispute on ownership of land since 2010. That the trial Magistrate was even alive to the claim of right made by the appellants who through Sempa Kibuuka had leased the land to Lubowa under the authority of Serunjogi.

Further, that the evidence and statements as made at Police all point to the fact that the alleged Plot 57 was curved and/or mutated off what at one time belonged to the late Sefirini/Zevirini Katende Sebugulu and currently the subject matter in **High Court Civil Suit No. 21 of 2016 arising from Civil Suit No. 276/2013 – Robert Serunjogi & Others versus Grace Nabukalu, Capt. Francis Babu & Another**, seeking to cancel the certificate of title for Block 175, Plot 57 allegedly registered in the name of Edward Francis Babu. That the appellants as co-administrators of the estate of Sefirini/Zevirini Katende Sebugulu who were seeking to recover the property from which Plot 57 was curved out in protection of the estate. Counsel quoted the case of **Okello Oris Atama and Another v. Uganda, High Court Criminal Appeal No. 0035/2013** where Court held that;

*“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.”*


5 Counsel for the respondent on the other hand submitted that for one to raise a  
defence of claim of right it must be honest and genuine as per the case of **Matovu**  
**Hamidu v. Uganda, Criminal Appeal No. 10/2006**. That in the instant case  
before purchase PW2 did due diligence through Kihika & Company Advocates  
and found the land unencumbered. That even at the time of registration  
10 (27/06/2000), there were still no encumbrances. And subsequent searches still  
revealed no encumbrances as was evidenced by PE5 and PE7. That this was  
corroborated by PW3 who sold the land to PW1 and that the land was vacant at  
the time of sale.

**Analysis of court:**

15 **Section 7** of the Penal Code Act 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”.*

20 In the instant case, the appellant entered the land which was not in possession of  
the complainant; the appellant had a claim of ownership that the land belonged  
to the estate of Sefirini/Zevirini Katende Sebugulu where he was a co-  
administrator and currently the subject matter in **High Court Civil Suit No. 21 of**  
**2016 arising from Civil Suit No. 276/2013 – Robert Serunjogi & Others versus**  
25 **Grace Nabukalu, Capt. Francis Babu & Another**, seeking to cancel the certificate  
of title for Block 175, Plot 57 allegedly registered in the name of Edward Francis  
Babu.

30 In my view the issue at hand is a land dispute that is civil in nature and not one  
that can be resolved criminally. It involves matters of ownership which cannot be  
resolved by this court under a criminal case. The land in issue in this criminal  
case is the same subject matter in a civil suit before this very court. I do not see  
the essence of holding the appellant criminally liable (if at all) well knowing this  
will leave unresolved issues of land ownership. 

5 The appellant in the instant case claims that the land belongs to the estate of Sefirini/Zevirini Katende Sebugulu and therefore he had an honest claim of right which can only be solved under a civil claim. Claim of ownership is a civil right which should be allowed to be proved in a civil court and should never be criminalized.

10 I accordingly find this criminal suit was an abuse of court process, which wasted courts time and parties should desist from running to court without first seeking proper legal guidance. The office of the State Attorney should equally give Police proper advice in regard to land matters so that matters that would ordinarily be suitable for civil remedies should not be brought as criminal cases. It is not just a matter of sanctioning any file that comes before them.

15 It is even mind boggling how a criminal matter was instituted in the lower court 2018 with the complainant well aware that the same subject matter was in this court under a civil suit arising from 2013. This is utter disregard to the court process.

20 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. **(See: Okello Oris Atama and Another v. Uganda, High Court Criminal Appeal No. 0035/2013).**

25 I find and hold that the learned Trial Chief Magistrate erred in law and fact when he failed to take into consideration the defence of honest claim of right to the charge against the appellants this wrongly convicting and sentencing the appellants. Let the parties pursue the civil matter that is already before this court since that is why their remedies lie.

This ground of appeal also succeeds.

30 **Ground 3: That the learned Trial Chief Magistrate erred both in law and in fact on the propriety and tenability of the charge and/or defectiveness of the charge sheet upon which the conviction and sentence of the Appellants was premised.**

Counsel for the appellants submitted that the trial Magistrate did not address the issue of a defective Charge sheet under which the appellants were charged even when it was brought to his attention as preliminary point of law. That the charge sheet did not show that the appellants committed the alleged offences in the



course of the same transaction nor that they abated or attempted to commit the said offences, nor that the offences were committed by them jointly within a period of 12 months nor were they different offences committed in the course of the same transaction.

5 Further, that during examination in chief and cross examination, PW5 Magira Joseph told court that he was threatened once in 2012 and reported the matter to Police under reference CRB: KAM 065/12 only for it to be found that the offence reported under that reference number was theft. Thus, that offence of theft reported in 2012 could not be joined with the case reported by PW1 Capt. E. Francis Babu, under reference CRB 1296/2017.

10 Counsel for the appellants concluded that the charge was bad in law, a misjoinder and did not fall under the ambit of **Section 87 (a) (b) (c) (d) (e) (f)** of the Magistrates' Court Act.

15 Counsel for the respondent on the other hand submitted that the appellant was acquitted on the 2<sup>nd</sup> count and the alleged misjoinder was cured and therefore there was no miscarriage of justice occasioned to the appellant. That there was ample evidence that alluded to the commission of criminal trespass and the trial Magistrate rightly held so.

**Analysis of court:**

20 I concur with the submissions for the respondent that issue of the defective charge sheet and misjoinder were cured when the appellants were acquitted of count II after they were found with no case to answer in that regard.

This ground therefore fails.

25 The prosecution having failed to prove the ingredients of the offence of criminal trespass as against the appellant, and this court finding that the trial Magistrate did not properly evaluate the evidence presented before him in the lower court hereby acquits the appellant of the offence of criminal trespass, conviction and sentence are accordingly set aside.



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This appeal is accordingly allowed in part.  
Right of appeal explained.



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5 **OYUKO. ANTHONY OJOK**  
**JUDGE**  
**17/11/2021**