THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

(Arising from Entebbe Criminal Case No. 0488 of 2003)

SSEBINA JOSEPH
SSEBUNYA GEORGE
MANDE DEOGRATIOUS
MUKASA DAVID

:::::::::: ACCUSED / APPELLANTS

VERSUS

UGANDA :::::::::::::::::::::::::: PROSECUTOR /RESPONDENT

BEFORE HON. JUSTICE GIDEON TINYINONDI:

JUDGMENT:

I was not able to get hold of the Charge Sheet from the lower court file. I will therefore rely on the proceedings and judgment to glean the nature of the charges the four Appellants faced.

From the lower court judgment the four Appellants were arraigned for criminal trespass contrary to Section 302 (b) of the PCA, 2000 Laws of Uganda. It is stated that the prosecution alleged that “the accused

persons having entered on the property of the complainant remained therein with intent to intimidate insult and annoy the said complainant."

The grounds of appeal were: -

"1. The learned trial Magistrate erred in law and fact when she failed to correctly and adequately evaluate all the evidence on the court record.

2. The learned trial magistrate erect in law and fact when she held that it is not the duty of the court to determine whether the accused persons are bonafide or lawful occupants which issue was crucial to the appellants' defence.

3. The learned trial magistrate erred in law and fact when she held that the appellants had failed to prove their ownership or legal interest and so she deemed the appellants trespassers – thus unlawfully imposing a burden of proof on the appellants.

4. The learned trial magistrate erred in law and fact when she based her conviction solely on the finding that the complainant was the registered proprietor of the land.

5. The learned trial Magistrate erred in law and fact when she held that the accused persons are guilty of criminal trespass contrary to **S.302 (b)** of the Penal Code Act Cap."

In her judgment the learned trial Magistrate stated: -

> "the main issue for consideration is whether or not the prosecution has adduced enough evidence to sustain the offence of criminal trespass against the four accused persons."

The learned trial Magistrate went on to lay down the elements of the offence. She did this correctly in my view.

The hearing proceeded ex parte before me, because notwithstanding that the Director of Public Prosecution was duly served no State Attorney appeared and no reason was sent to court to explain why.

Counsel for the Appellants argued grounds 1, 2 and 3 together, laying emphasis on ground 3. Essentially he contended that the lower court shifted the burden of proof on to the Appellants to prove ownership. That yet all along they maintained they were bibanja holders through succession. Counsel further argued that the prosecution failed to prove two essential elements of the offense. That the prosecution had failed to prove that the Appellants had no claim of interest on the land.

Counsel further pointed out that the Appellants had explained how they came onto the land. But that the trial Magistrate did not consider this. That the trial Magistrate's only reference was: -

> "Without dwelling so much on issues that can only be resolved by a civil suit, a ….complainant is the recognized owner of the land in dispute….Since the accused have failed to prove ownership or legal interest it makes them trespassers having refused to comply with the requirement of letter by the complainant but instead went to cultivate on the land."

That thereby the trial Magistrate exhibited bias by overlooking the Appellants' interest when she was aware of it.

Learned Counsel referred to exhibits "R1" and "R2" and stated that these were proof that A2 and A4 owned Kibanja interest on account of a donation by their father. That exhibit "D3" was further evidence of the Appellants' interest in the land.

Counsel further stated that the above submissions took care of grounds 4 and 5 of the memorandum of appeal.

Learned Counsel prayed for the appeal to be allowed, the convictions to be set aside, and the fines paid to be refunded.

I elect to start with the second ground of the appeal. On page 8 line 2 the learned trial Magistrate stated:

> "The issue of ownership is not in dispute, and it is not the duty of this Court to determine whether accused persons are bona Fide or lawful occupants that being a civil matter per se since hey all failed to prove ownership."

This was a serious error in law because this was a criminal trial where the court is entreated to do justice by evaluating the whole evidence and the accused's defence. It was also a further grave error in law because the accused had no duty to prove ownership. It was an error in fact because there was more than enough evidence on the record which proved that the Appellants actually owned interest on the land which evidence the Magistrate, true to her word, regarded as "not the duty of this Court to determine."

Let me go into some detail about the evidence that the prosecution and defence led in respect of the charge. PW1 testified, inter alia, that before he sold to the Complainant (PW3) in 1989.

PW2 testified: -

"Kinyozi was keeping the land and owned coffee plants on it."

a). He did not know when all the accused occupied the land prior to 1993 when PW3 appointed him caretaker of this land.

b). He knew Yoweri Kibuka Kinyozi to be the father of A2 and A4.

c). There were coffee trees on this land before PW3 bought the land.

PW3 testified, inter alia,

a). he bought the land in 1987 from Batenda.

b). When he bought the land there were coffee trees taken care of by Kinyozi.

c). The coffee trees belonged to Batenda.

d). At the time he bought the land, there was a house belonging to a Kenyan called Muchuka.

e). Kinyozi was A2’s father.

d). He did not know Kinyozi was also A4’s father.

f). He did not know if Muchuka sold his house on the land to Sulaiman Matovu, before he went back to Kenya after PW3 got himself registered on 18/01/1990.

g). He did not know that Sulaiman Matovu lived on this land before PW3 bought or that Sulaiman Matovu was A3's father.

h). He did not know that any of the accused was a Kibanja holder on this land.

PW4 testified, inter alia,

a). In 1988 her cousin sold land at Bugiri-Busisi village to PW3.

b). Since she got married in 1962 she had never set foot in Bugiri village where the land is situate.

c). She did not know the land Kinyozi had, had his residence on it and did not know any of his children.

Both PW4's and PW5's evidence did not add value to the prosecution case. I will not dwell on it.

I revert to a summary of defence evidence A1 testified that he was born on the land in dispute in 1977; has had both parents buried there;

has his residence thereon; has cultivated coffee and other food crops there on 29/07/2003 he received a letter from the Kisubi police station requiring him to remove everything of his from this land because it belonged to the Complainant. He refused to vacate because he had nowhere else to go. The prosecution did not wish to cross-examine A1.

A2 testified that he was born on the land in dispute 34 years ago. His father was Yoweri Kibuuka alias Kinyozi. They occupied and cultivated this land till his father died on 07/09/2003. The accused had a permanent house on the land. He first heard of the Complainant when on 29/07/2003 the complainant wrote to him to remove all his crops and those planted by his parents. Before his father died he showed him a sale and purchase agreement whereby his late father had bought a Kibanja from Kasoma. The Kibanja was the one in dispute. The agreement was admitted without objection as exhibit “R1”. Further before his father died, he donated the said Kibanja to him. The document was admitted without objection as exhibit “R2”. A2 further testified that A4 was born of same mother and father. A4 also received a donation of his father’s Kibanja on the Complainant’s land on which he was cultivating his food crops. The prosecution did not wish to cross-examine A2.

A3 testified as follows:

He was 33 years old. In October 2002 he bought a Kibanja from Sulaiman Matovu. The Kibanja was on Sulaiman Matovu's land. A sale and purchase agreement to this evidence was made. Sulaiman Matovu also gave to A3 an earlier agreement whereby Sulaiman Matovu had bought. Both documents were admitted without objection as exhibits "R3" and 'R4" respectively. He learnt that the land/Kibanja in dispute was on the Complainant's land on 29/07/2002 when he received a letter from the Complainant instructing him to simply uproot all his crops on and then leave. He did not comply with the letter because he did not believe that the land belonged to the Complainant since A3 had bought it after ascertaining that it was genuinely offered for sale and the sale and purchase agreement was witnessed by the LC members. The prosecution opted not to cross-examination this evidence.

A4 testified, inter alia, that he was 26 years old. He had a house on the land in dispute. His father Yoweri Kibuuka alias Kinyozi originally occupied and utilized this land which he divided between A2 and A4 who are blood brothers. Yoweri Kibuuka alias Kinyozi died on 08/08/2003. On 29/07/2003 the Complainant wrote a letter to A4

instructing him to uproot all his crops from this kibanja. He refused to comply. The prosecution opted not to cross-examination this evidence.

This being a first appeal I have been duty-bound to subject the evidence to fresh and thorough crutiny. See: WILLIAMSON DIAMOND LTD VS. BROWN: {1970} EA 1].

The following are my findings. The prosecution failed miserably to prove beyond any reasonable doubt the elements of the offence in Section 302 (b) of the Penal Code Act. After evaluating the whole evidence it is abundantly clear that none of the prosecution witnesses alluded to any of the accused persons having intimidated, insulted, annoyed any person or having exhibited any intent to commit any offence. On the other hand all the accused admitted refusing to vacate for reasons I have already summarized herein before. In my considered view each of the accused's reasons affords a defence under, inter alia, the Constitution Land Act, Cap. 227 Laws of Uganda, 2000, and the RTA Cap. 230, Laws of Uganda 2000. None of the accused was guilty of criminal trespass. A salient factor in the whole evidence is that the prosecution offered not to cross-examine anyone of the accused's evidence. Yet in each case court offered the

prosecution the opportunity to cross-examine. It was held in MOSES SEBITENGERO GANYA VS. UGANDA: CR. APPEAL NO. 32/95 (SC)] that evidence which is not cross-examined when an opportunity is given to the prosecution is presumed to be accepted. I follow this decision in my finding herein.

In light of the foregoing I further uphold ground two of the appeal which complains about the trial Magistrate's holding on page 8 lines 2 to 5 that: -

> "it is not the duty of this Court to determine whether the accused persons are bona fide or lawful occupants, that being a civil matter per se since all failed to prove ownership."

This statement read against the evidence amounted to a misdirection both in law and in fact.

In conclusion I allow the appeal, set aside the convictions and order that any fines paid be refunded.

Sgd: Gideon Tinyinondi

JUDGE

07/06/2006.

07/06/2006: 9.30 A.M.

Mr Balikuddembe for Appellants

No appearance for state

Ms. Kauma, Court Clerk.

COURT:

Judgment delivered in open court.

Sgd: Gideon Tinyinondi

JUDGE

07/06/2006.