

UGANDA / JUDGMENT

Ntege v Uganda (Criminal Appeal No. 70 of 2022) [2023] UGHCCRD 17 (19 January 2023)

[2023] UGHCCRD 17

COURT

HC: Criminal Division (Uganda)

BEFORE

Muwata, J

CASE / FILE NUMBER

Criminal Appeal No. 70 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.071 OF 2022 ARISING FROM CRIMINAL CASE NO. MAK-00-
CO-250/2022 5 KATWE /CRB/2059/2019 NTEGE
GODFREY----- APPELLANT VERSUS
UGANDA----- 10 RESPONDENT

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

- 15 This appeal arises from the Judgement of His Worship Osauro John Paul Magistrate Grade One at the Chief Magistrates Court of Makindye at Makindye. The appellant was charged and convicted on two counts of occupying land without the consent of the owner contrary to section 92(1)(c) & 92(4) of the Land Act as amended and Removing boundary 20 Marks contrary to section 338 of the Penal Code Act. The appellant being dissatisfied with this decision appealed to this court on the following grounds;
 - 1. That the learned trial magistrate erred in law, fact and failed in his duty to evaluate the evidence on record when he failed to 25 put into consideration the findings of the survey report which was exhibited in Court
 - 2. That the learned trial magistrate erred in law, fact and failed in his duty to evaluate the evidence on record when he failed to
- consider the appellant's defense of bonafide claim of 30 right/ownership of the suit property

- 3. That the learned trial magistrate erred in law, fact and failed in his duty to evaluate the evidence on record when he held that the tree trucks were the boundary marks of the suit property
- 4. That the learned trial magistrate erred in law and fact and failed
- 35 in his duty to evaluate the evidence on record when he found that the prosecution had proved the ingredients of the offences whereas not.

At the hearing of this appeal, the appellant was represented by Counsel Edwin Muhumuza while the respondent was represented by Mr. Amerit 40 Timothy a State Attorney

Both parties filed their written submissions which I have considered.

Consideration

The duty of this court as the first appellate court has been highlighted in a wealth of authorities, it has a duty to rehear the case and to consider the 45 materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. **See: Kifamunte Henry Vs Uganda Criminal Appeal No.10 of 1997**

Having this statement in mind, I will now deal with the grounds of the 50 appeal as argued by counsel for the appellant

Ground one

According to counsel for the appellant, the learned trial magistrate erred in law, fact and failed in his duty to evaluate the evidence on record when he failed to put into consideration the findings of the survey report which

55 was exhibited in Court.

On the other hand, the respondent contends that the author of the purported survey report exhibited in court was not called and thus its credibility was wanting. It was their contention be that it may, the learned trial magistrate considered the report in his evaluation of evidence.

60 At the trial, DW1 gave evidence they requested for a survey to be done on the suit land in the presence of both parties. It was his evidence that the survey was conducted on the 3/11/2019 in the presence of the complainant.

The survey was exhibited in court without objection from the respondent 65 and was admitted as defense exhibit D. E. X.4. The contents of this report are thus deemed to have been admitted by the both parties and therefore the issue of its credibility wanting does not arise.

The scope of this report was to open boundaries of Plot 4738 Block 273 Kyadondo and show the existing features on and around the report. The 70 report also indicates that part of the land is developed with a residential house wall fenced and was also affected by the Southern by pass. However, the report does not ascertain if there was an intrusion by the appellant but only refers to the boundaries.

The prosecution by its own admission also concurs that the learned trial 75 magistrate did not refer to the survey report and I can understand why, the learned trial magistrate in his view found this report to be of less evidential value since it did not ascertain whether there had been an intrusion and even if he had considered it, it was not conclusive enough to prove that the appellant was an encroacher. This survey report only 80 points to a claim of ownership which in my view ought to be determined by a civil court and not criminalized.

The courts have over the time held that issues of land should not be confused with criminal issues and were issues with regard to claim of ownership arise, the claims ought to be allowed to be proved in a civil 85 court and should never be criminalized. **See: Chris Otama & Anor Vs Uganda Crim. Case No.693 of 2013.**

It therefore my considered view that had the learned trial magistrate properly considered this report, he would have found that a claim of ownership existed on the suit land that ought to have been proved in a 90 civil court.

Ground two.

It is contended by the appellant that the learned trial magistrate erred in law, fact and failed in his duty to evaluate the evidence on record when he failed to consider the appellant's defense of bonafide claim of 95 right/ownership of the suit property

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 100 of an honest claim of right and without intention to defraud.

And as rightly pointed out by counsel for the appellant in his submissions an honest belief whether justifiable or not that property is the appellants own would negate the element of men's rea. This is the general position but court must be satisfied that there was a possibility that there were 105 grounds on which the appellant would claim the suit land. **See: Nasibika**

Peter Wejuli V Uganda HCT-04-CR-CN-0040-2009

It does not matter if the accused's belief was based on a mistake of fact or a mistake of law. If the accused genuinely believed he had a legal claim of right, he will not have acted dishonestly therefore he lacks the guilty mind. 110 Further, the accused only need have believed he had a legal right to the

property.

Once the claim is raised in evidence, the prosecution must refute the defence of claim of right beyond reasonable doubt. The accused must show that they held an honest belief at the time of the offence that they 115 did not act dishonestly. The defence has an evidentiary burden to prove this belief.

It is not contested that complainant had a certificate of title on part of the suit land, while the appellant also had sale agreements to prove that he had acquired part of suit land. He had also undertaken developments on

120 the suit land and had been in occupation for over 15 years as stated in his

evidence in chief. The said agreements were also admitted in without objection. The appellant testified that he removed this marks on the honest belief that the land belonged to him. To show that this honest belief existed, they both together with complainant agreed to a survey 125 report of the suit land. The existence of a certificate of title and sale agreements in respect of the suit land clearly pointed to an issue of ownership and boundaries which could not have be conclusively determined by a criminal court.

It is my considered view therefore that the appellant did not act 130 dishonestly in removing the boundary marks, he held an honest belief at the time that that part of the suit land belonged to him. The learned trial magistrate should have considered this defense.

Having found that a defense of claim of right /ownership existed and further having noted that this defense negated the aspect of mens rea as

135 to the offences he was charged with, this ground is answered in the affirmative.

It was held in the case of **Byekwaso Mayanja Sebalijja V Uganda 1991 HCB 15** that where court is satisfied that there is an honest claim of right, the justice of the case requires that the accused person be acquitted of 140 the case, similarly in this case the same ought to have been done. I find that the learned trial magistrate erred in law and fact when he ignored this defense of claim of right.

This in my considered view was purely a civil matter that ought to have been resolved by a civil court as it involves a pure dispute on ownership

145 and boundaries. Criminalizing such matter would be unfair especially where the appellant was only claiming his rights to the suit land.

I have found it not necessary to discuss the other grounds of appeal raised by the appellant.

Accordingly, the appeal is allowed, the conviction and sentence of the 150 lower court is set aside

I so order.

JUDGE**19/01/2023**

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