

UGANDA / JUDGMENT

Sembajjwe v Uganda (Criminal Appeal 37 of 2021) [2022]

UGHCCRD 152 (23 March 2022)

[2022] UGHCCRD 152

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

Criminal Appeal 37 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL No 37 OF 2021

(Arising from Nabweru Chief Magistrates Court sitting at Matugga Criminal Case No. 201 of 2018)

SEMBAJJWE EMMANUEL ::::::::::::::: APPELLANT

vs

UGANDA ::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant, **Sembajjwe Emmanuel** filed this appeal against the judgment, orders and sentence of **HW Nakibinge Latif Abubaker**, Magistrate Grade I Matugga Magistrates Court, who convicted him on three Counts of 1. Criminal Trespass c/ss 302, 2. Malicious Damage to Property c/ss 335 (1), and 3. Removing Boundary Marks c/s 338 all of the **Penal Code Act (PCA)**. The appellant was sentenced on all counts and ordered to serve a sentence of 6 months on each count to run consecutively.

The background to this appeal is that there is a 4.5 acre parcel of land located at Kabunsa, Matugga in Wakiso district. It is alleged the land originally belonged to the father of one Mary Samali Sembajjwe. She is said to be the estranged wife of the appellant. That about 1986, a block of land estimated to be 7 acres in total was given to her, as a gift, from her father, one Henry

Walter Ssebadawo. That she transferred the land into the names of her Husband (the appellant), her son (David Massade) and herself. The name that appears (Samali Sebadawo) is her maiden name. The land had originally been in names of one Gertrude Namatovu.

In 1998, Samalie Sebadawo is said to have gone to the United Kingdom where she lived for the next 15 years. On her return, she found that the appellant had taken another wife with whom he had several children. That she left the home but entered a memorandum of understanding to divide the land between the 3 persons on the title: the appellant, David Massade and Samalie Sebadawo Sembajjwe.

Samalie and her son Massade opted to sell their portion of the land and in August 2015, the complainant called Kiwalabye Charles, purchased the land. The complainant fenced it off.

That the appellant uprooted the fence planted by the complainant. He also cut down a banana plantation and removed barbed wire. It was then that the appellant was arrested and charged as stated above.

The appellant objected to the complainant fencing off the land. His complaint was that the land belonged to him. That he had bought it from Gertrude Namatovu in 1987. That he learnt that his wife had sold part of his land to the complainant. He then reported the matter to the LCs and the Police. He added that the certificate of title was stolen and he had reported that theft to the police. Shortly after his estranged wife and son wanted a share of the land. The appellant maintains that the land is his and it is where his home is located and where he stays. That the fence was on his land and that was why he removed it.

The learned trial magistrate believed the prosecution case and convicted the appellant as above.

The appellant being dissatisfied with the conviction and sentence of the trial court filed this appeal.

There are 2 grounds namely,

- 1. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on court record against each ingredient of the offences and thereby erroneously convicted and sentenced the appellant.
- 2. The learned trial magistrate erred in law and fact when he deliberately ignored the appellant's bona fide claim of right in the land as a complete defence and thereby convicted him on the charge of criminal trespass.

The appellant prayed that this Court:

- i. Allow the appeal
- ii. Quash the conviction and
- iii. Set aside the sentence

Appearance

The appellant was represented by Mr Rubeizi Jacob

The respondent's counsel was Ms Miriam Njuki, State Attorney.

Submissions

The parties were granted leave to file written submissions. After the appellant had filed, the respondent opted not to put in a reply but leave the matter to court for resolution.

This Court reminds itself that as a first appellate court, it has a duty to subject the evidence to a fresh scrutiny and come to its own conclusions, bearing in mind that it has not seen the witnesses testify (**Kifamunte Henry V Uganda SCCA NO. 10 of 1997** unreported).

For the above reason the appellate court may take into consideration evidence lawfully adduced at the trial but overlooked by the judgment of the trial court and it may base its decision on it. The court is also reminded to ensure that it evaluates the evidence as a whole carefully balancing each material piece of evidence against the rest of the material adduced.

It is trite that the onus is on the prosecution to prove all the elements of the offence the appellant was charged with to a standard beyond reasonable doubt.

Grounds

I will start with the second ground of appeal.

2. **The learned trial magistrate erred in law and fact when he deliberately ignored the appellant's bona fide claim of right in the land as a complete defence and thereby convicted him on the charge of criminal trespass.**

It was the submission for the appellant that the he enjoyed a complete defence of an honest claim of right as envisaged in Section 7 of **the Penal Code Act** which stipulates,

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.

The argument was that the appellant had filed a civil suit against the complainant in the High Court. That the trial magistrate ignored this fact. He went on to determine the ownership of the land thereby exercising a jurisdiction not vested in him.

Determination

The appellant argues that because a civil suit was filed in the high court to determine this matter, then the trial magistrate ought to have stayed the trial awaiting determination of the civil suit.

The position is settled in matters where a criminal trial concurrently commenced with civil proceedings. The Constitutional Court considered a matter of this nature in

Nestor Machumbi Gasasira vs Uganda *Constitutional Petition No 17 of 2011* where the Court held that,

We find that it is fairly settled law that criminal and civil proceedings are distinct from one another. They are not in the alternative and/or necessarily parallel. In the case of **Joseph Zagyenda V Uganda, Criminal Application No. 11 of 2011, Hon Justice Lameck Mukasa** held that:

"Civil proceedings are individualistic in nature while the criminal proceedings are public in nature."

We are persuaded with these findings. In general, the remedies offered to victims of crimes through criminal proceedings do nothing to get them back to the state in which they were in, before the crime was committed against them. Similarly, civil proceedings do nothing to prevent future crimes from being committed by a person. In the **Zagyenda case** *(supra)*, the Learned Judge allowed both a criminal case and a civil case regarding the same matter to go forward without either being stayed until the completion of the other. This approach we find is not inconsistent with **Article 28 (9) ...**

In the same way the criminal proceedings against the appellant could not be stayed simply because there is a civil suit. The matters can proceed concurrently. The criminal case will not be halted where the only reason given is that a civil suit arising from the same subject matter is pending.

That said, the appellant in this matter raised the defence of an honest claim of right under Section 7 of the **Penal Code Act**. It was his claim that the land in dispute belonged to him. He asserted that he had bought it in 1987. That he bought it on his own and has agreements to prove it. He added that the fence was put around 'his' land so he removed it. He alleged the complainant razed his coffee, banana plantation, pine trees and so on.

The complainant, on the other hand stated that he bought the land at 125,000,000/ from Samalie Sembajjwe and had paid for it in full.

By stating as he did that the he owned the land the appellant raised the question whether the defence of an honest claim of right was available to him. He insisted the land was his as he had bought it. It should be noted that the court was obliged to avail an accused person with a defence available on the evidence before it, even if it was not raised by him (see **Kiyengo v Uganda** [2005] 2 EA 106).

If a person is honestly asserting what he believes to be a lawful claim, he has a claim of right even though the right asserted is unfounded in law and fact...in cases of criminal trespass the prosecution must prove that the accused is entering premises with an intention to commit an offence. It is however a complete defence for the accused to show that he had a *bonafide* belief that he was asserting a claim to property that belonged to him (see **Criminal Law** by William Musyoka *Law Africa* pg 132 -133).

In exactly the same terms the appellant has shown that he believed the land in dispute here belonged to him. It was immaterial whether the claim of ownership was well founded in law or on the evidence. At that point he was entitled to a consideration of the defence of an honest claim of right. The court ought to have investigated it. Additionally in light of this claim, the evidence that a civil suit had been lodged in the High Court to determine ownership became pertinent.

From all the evidence it is again clear that a civil dispute regarding ownership has been criminalised in this matter. The only way to investigate and make appropriate orders in such a dispute is to determine where the title lawfully lies and that can only be done through civil court proceedings. A criminal trial in trespass cannot make a definitive decision on ownership and is inappropriate in these circumstances.

On the above basis alone, the appellant ought to have been acquitted on all charges. The total defence of an honest claim of right was open to him on all counts as all three charges stemmed from a dispute of ownership of the land.

In the result and for the reasons given, this appeal succeeds on this ground alone.

The conviction entered by the lower court is quashed. The sentence and orders of the trial magistrate are set aside.

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Michael Elubu

Judge

23.3.2022

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