

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

CRIMINAL APPEAL No. 144 OF 2021

(Original from Criminal Case No. 102 of 2020 of Simanjiro - Orkesumet)

KONE TETO @ KASARO.....1ST APPELLANT
REHEMA SHILALO.....2ND APPELLANT
THERESIA JACOB.....3RD APPELLANT
AMANI SHAWISHI.....4TH APPELLANT
MAGDALENA LEMAYAKA.....5TH APPELLANT
ESTER MILYA.....1ST APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

11th & 22nd July 2022

TIGANGA, J.

Before the District Court of Simanjiro at Orkesumet, Kone s/o Teto @ Kasaro and five others as listed above hereinafter referred to as the appellants, were arraigned before that court charged with one offence of disobedience of lawful order contrary to section 124 of the Penal Code [Cap. 16 R.E 2019].

They were accused to have jointly and willfully disobeyed the lawful order of the District Commissioner on 31st day of October 2020 at Nadonjukin Village within Simanjiro District in Manyara Region which was issued on 31st day of October 2020 ordering them to vacate the area.

They pleaded not guilty to the charge. However, after full trial, they were found guilty and convicted for an offence they were charged with and sentenced to one-year conditional discharge.

The were aggrieved by the decision, they decided to appeal against both the conviction and sentence. In their endeavour to challenge the conviction and sentence, they filed six grounds of appeal which are as follows: -

1. That, the trial court erred in law and fact by convicting the appellants basing on the hearsay evidence.
2. That, the trial court erred in law and fact by convicting the appellants without hearing any evidence from the complainant who is a District Commissioner of Simanjiro District.
3. That, the trial court erred in law and in fact by convicting and sentencing the appellants without first determining the right of ownership claimed by the appellant on the disputed land.

4. That, the trial court erred in law and in fact by admitting evidence without following proper procedure of admitting documentary evidence.
5. That, the trial court erred in law and in fact by failure to evaluate evidence and therefore reached an erroneous decision.
6. That, the trial court erred in law and in fact by convicting the appellant while the case for the prosecution was not proved beyond reasonable doubt.

At the hearing, the appellants were represented by Mr. Deogratias Njau, Learned Advocate while the respondent, Republic was represented by Ms. Akisa Mhando, learned Senior State Attorney.

Before hearing commences, Mr. Deogratias Njau dropped the 1st ground of appeal and argued the 5th and 6th grounds of appeal together. The argument in support of those grounds, he submitted that the trial court did not consider the evidence by the defence and evaluate the same.

He submitted further that, in law, a judgment must consider the evidence of both sides and evaluate the same. In support of his contention, he cited the case of **Kaimu Saidi vs. The Republic**. Criminal Appeal No. 391 of 2019, at page 7 of the typed Judgment. He then called upon this court being the 1st appellate court to evaluate the evidence as

held in the case of **Yusuph Aman Vs. The Republic**, Criminal Appeal No. 251 of 2014, where it was held that the 1st appellant court may evaluate the evidence.

He pointed out a number of instances, from the record which prove that the defence evidence was neither considered nor evaluated. He asked the court to re-evaluate the evidence and come up with its own findings.

He also joined the 2nd and 4th grounds of appeal, that the court did not inform the appellants that they had the right to call and cross examine the author of the letter which contained the alleged lawful order. In support of that contention he cited the principle in the case of **Isaya Job vs. The Republic**, Criminal Appeal No. 319 of 2017. He prayed the court to expunge the said letter from the record as the procedure of admitting it was not followed.

Regarding the 3rd ground of appeal he contended that, there was a land dispute which had not been resolved and that the District Commissioner is not mandated in law to settle land dispute. Therefore, the criminal case was also supposed not to take off for hearing where there was still a land dispute which has not been resolved by the competent authority. At the end, he requested this court to allow the appeal, quash the conviction and set aside the sentence.

In reply Ms. Akisa Mhando, Senior State Attorney started by supporting the appeal. She did so on the ground that, the District Commissioner has no power in law to settle land disputes.

She further submitted that, section 124 of the Penal Code (supra) requires a person to be charged with disobedience of lawful order of the court or any person with authority and duly authorized to act in the capacity of a public official. She said in this case, the District Commissioner is not an officer authorized to issue lawful orders in relation to land disputes.

She submitted that, for the same to be legal it must have some legal back up as held in the case of **Abdallah Yusuph vs. The Republic**, (1976) T.L.R 57, that for an order to be lawful it must be promulgated vide a specific legislation.

In this case, the order of the District Commissioner which the appellant was charged to have disobeyed had no legal backup, therefore the court had no base upon which to convict the appellant.

She ended up praying this court under section 366(1)(a)(i) of the Criminal Procedure Act [Cap 20 R.E 2019] to revise the findings and sentence, and consequently acquit the accused persons who are the current appellants.

After reviewing the evidence on record, and the submission made by the parties both in support of the appeal, I am in agreement with the submission made by both parties that in the first place, the appellants were not supposed to be found guilty and convicted for disobeying of the lawful order. I hold so because under section 124 of the Penal Code for a person to be found guilty of disobeying the lawful order, the following must be proved by the prosecution.

- (i) That, the order disobeyed should be either an order warrant or command duly made, issued or given by the court, or
- (ii) The order given by a public officer or person acting in any public capacity who is dully authorized in that behalf to give such an order.
- (iii) That, the order must be lawful.

From the record, the order under scrutiny was allegedly issued by the District Commissioner while resolving the land dispute between two villages of Nadonjugin and Terrat which arose from the pasture land dispute. He ordered all people on that land to vacate from the area within 30 days, is following their refusal or non-compliance to that order they were arrested and charged.

The question which arises is whether in the circumstances, the District Commissioner was a person acting in public capacity authorized in that behalf to give such an order?

The land from which the appellants were ordered to vacate, was the area where the appellant had settled and by necessary implications, they were claiming to be the owner of the land.

That facts turns the land to be disputed land, which dispute ought to have been referred to the proper forum for settling land dispute as established by the law to deal with land dispute as established under section 3(1) and (2), of the Land Disputes Courts Acts [Cap. 216 R.E 2019] which are the Village land council, Ward Tribunal, the District land and Housing in Tribunal, the High Court and the Court of Appeal of Tanzania.

If there was any dispute, it was supposed to be referred to these authorities depending on the subject matter and pecuniary jurisdiction of the land in question.

I hold so because taking cognizance of the principle enunciated in the case of **Silvery Nkangaa vs. Raphael Albertho** [1992] TLR 110, that any charges of criminal trespass cannot be maintained in criminal cases, unless the land disputes between parties has been resolved by the competent court.

In this case, looking at the functions of the District Commissioner as provided under section 14 and his powers under section 15 both of the **Regional Administration Act** Cap 97 of the laws of Tanzania, I find no any function or powers which are conferred on the District Commissioner which empowers him to resolve land dispute.

That said, basing on the above exposition that the District Court would not have found the appellants guilty of the offence they were charged with, as on that regard there was no lawful orders issued, upon which the court could have based its findings.

That being the case, I allow the appeal, quash the judgment and its findings that the appellants are guilty as well as setting aside the sentence passed in that regard. The appellants are accordingly **acquitted from** the offence they were charged, prosecuted, found guilty and convicted.

It is accordingly ordered.

DATED at **ARUSHA** on 22nd day of July, 2022




J. C. TIGANGA
JUDGE