**IN THE COURT OF APPEAL OF THE NORTH-WEST PROVINCE**

**HOLDEN AT BAMENDA**

**BEFORE THEIR LORDSHIPS JUSTICES:**

**H.N. MORFAW, C.J. - PRESIDENT**

**B.B. BAWAK, J. - VICE PRESIDENT**

**COL. DJONGA - MILITARY ASSESSOR**

**THIS TUESDAY THE 23RD DAY OF MARCH 2004**

**BCA/MS/1C/2004**

**BETWEEN:**

1. **OUSMAN HAMAN**
2. **YUNUSA BANGOJI**
3. **3. ADAMU ISA …….. APPELANTS**

**VS.**

**THE PEOPLE …… RESPDONDENT**

**PARTIES:** Present

**APPEARANCES**: Mr Fon Robert and Barrister Sendze for appellants

**"REPUBLCI OF CAMEROON"**

**"IN THE NAME OF THE PEOPLE OF CAMEROON"**

**JUDGEMENT**

**THE UNANIMOUS JUDGEMENT OF THE COURT**

**WRITTEN AND DELIVERED BY JUSTICE H.N. MORFAW, C.J. – PRESIDENT**

Prior to the 29th April 2002, one Alhadji Baba Ahmadou , proprietor of ELBA Ranch in Ndawara in Boyo Division encroached into part of Sabga grazing land in Tchabal, belonging to the inhabitants of Sabga in Tubah Sub-Division and therein constructed two buckaroos or semi-permanent structures with planks for is shepherds.

In reaction to this unwarranted encroachment, the Sabga population consisting mostly of Mbororos complaint to the Mezam and Tubah administrative authorities who did not immediately react. As a consequence on the 29th of April 2002, some Mbororo youngsters went to invaded area and burnt down the semi-permanent structures. On the day of the incident, the Assistant Divisional Officer for Tubah, as well as the Gendarme investigators went to the area of the alleged offences.

While there, they arrested the 1st appellant who had a video camera and some other objects which were retrieved from him. After torture, the first appellant was detained and later moved to the Bafoussam Central Prison with the other appellants who had been apprehended thereafter.

After trial, each of the appellants was not only convicted and sentenced each, to ten years imprisonment with hard labour, but they were equally, jointly and severally, adjudged to pay 1,500,000 francs as compensation to Alhadji Baba proprietor of ELBA Ranch.

Dissatisfied with the conviction and sentences, the appellants have each through their Counsel filed the following grounds of appeal:

1. That the trial court lacked the jurisdiction to try the accused persons.
2. That the trial court erred in law in conducting the trial with manifest bias against the accused persons, by deliberately ignoring any evidence that favoured the accused persons.
3. The sentence passed on the appellants was excessive in the circumstances of the case.
4. The trial court erred in law in not recording and ruling on the mitigating circumstances that were in favour of the accused persons before sentence.
5. The decision of the trial court is unreasonable, unwarranted and cannot be supported having regard to the evidence adduced during the trial.
6. The damages awarded in favour of the civil party had no basis in law because '*ex turpi causa non oritur actio'.*

At the end of his submission Barrister L.K. Sendze who led the case for the appellants called on the Court to determine whether it shall retry the matter following the procedure of the trial court or whether it shall do so, according to the procedure in practice in this Court. He emphasised that this was important because the court shall be called upon to rule on the admissibility of some documents inside the proceedings from the trial court.

In reply the Learned Commissioner for Government after referring us to Section 34 of Ordinance No. 72/2 of the 26th August 1972, on the Judicial Organisation and subsequent amendments posited that this court knows no imported or foreign procedure and ended up by quoting the dictum *'Ubi est forum ibi ergo est jus'* - where the forum is there accordingly is the law. We shall avert our minds to the submissions of Counsel for the civil claimant in ground xix only relating to the civil claim in the main; his submissions are in consonance with those of the Commissioner of Government.

Now Article 1 of Ordinance No. 72/02 of the 26th of August 1972, relating to the Military Justice Organisation amended, stipulates that there is created a Military Tribunal with national territorial competence which sits in Yaounde. It adds that on the decision of the Head of State or by Delegation of the Minister of the Armed Forces, it can hold court sessions in other localities. Further Decree No. 72/588 of 25th October 1972, creating two Military Tribunals, one for Buea and the other for Bafoussam which covers both Provinces of the West and North-West Provinces is silent on procedure, which means that whenever the court sits, it is entitled to adopt and use the law of the venue and consequently its procedure. It follows that we shall follow the law and the procedure applicable in this court, particularly so, having regards to the provisions of Section 34 of the Ordinance on the Judicial organisation which stipulates that:

*"Pending the promulgation of the enactments provided for under Article 3 of the Ordinance, the Courts of First Instance, High Courts and Courts of Appeal of the North-West and South-West, shall follow the procedure, usages and practices formerly in force in the old courts, which they replaced in so far as such procedures, usages and practices are compatible with the Constitution and present Ordinance."*

That having been dispensed of, we now focus our attention on the grounds of appeal. Though both counsel argued the appeal on the order in which it was filed, we propose for reasons of convenience

to change the order. After dealing with ground one, we shall deal with grounds two and five together, grounds three and four together before ending up with ground six.

Ground one impeaches the jurisdiction of the trial court which heard and determined the matter at first instance.

In support of this ground of appeal, learned counsel for the appellants referred us to Article 5 of law No. 98/007 of 14th April 1998, which modifies certain provisions of Ordinance No. 72/5 of 26th August 1972 on the Organisation of Military Justice and which stipulates that the Tribunal will have jurisdiction inter alia, to try offences committed with war weapons (*l'armes de guerre et de defense)* or theft committed with the possession of arms. He then argued the empty shell of a 'calibre 12' cartridge, which was recovered from the 1st appellant, cannot constitute a war weapon or a firearm within the meaning of the law. Counsel ended up by strongly submitting that since the Assistant Divisional Officer for Tubah Sub-Division stated positively that guns were retrieved from Alhadji Baba's group, the empty shell retrieved from the 1st appellant must have been fired by a member of that group.

In answer to these averments the Learned Commissioner for Government after citing Section 2 of Law No. 73-658 of 22nd October 1973, regulating the importation, sale, transfer, possession and carriage of fire arms and their ammunition which empowers the Minister In Charge of Defence to determine the classification of weapons and their ammunition, submitted that the Minister has conclusively classified the cartridge that was found on the person of the 1st appellant as a defence ammunition. He then referred the court to page 35 of the records of appeal, in which it is stated that four empty shells of 'calibre 12' cartridges were picked up from the scene of the offences and that a life cartridge was found on the person of the first appellant.

The Learned *Procureur General* submitted in the interest of the law, having regards to the Provisions of Section 23(a) of the Ordinance on Judicial Organisation as amended which stipulates that;

*"The Legal Department shall: 'Ensure the enforcement of Laws, regulations and judgements and may in the interest of the law make any request it considers necessary to the court."*

He was of the considered opinion that the Military Tribunal had no jurisdiction to entertain this suit. We have carefully studied the views expressed by both counsel and more importantly the opinion of the Learned *Procureur General.*

Having regard to the classification by the Minister-Delegate in charge of the Armed Forces and the fact that guns, empty shells of cartridges as well as cartridges were found on the scene of the offence, this court holds the view the Military Tribunal rightly assumed jurisdiction and consequently this ground of appeal collapses.

But what did the Military tribunal do with its jurisdiction? It is intended to examine and answer this vital interrogation by dealing with grounds two and five because both encompass the omnibus ground of appeal and describe the conduct of trial as being manifestly biased.

In arguing these vital grounds of appeal, learned counsel for the appellants referred the Court to the preamble of the 1996 Constitution, which obliges the Courts to conduct a fair trial and to presume every citizen standing trial innocent until proven guilty. He continued that since no law stipulates that the language of the Military Tribunal is French, the Court would have convened in a circuit session in Bamenda so that appellants would be more at ease. He invited us to invoke the provisions of Section 148(d) of the Evidence Ordinance in favour of the appellants because of the suppression

of the evidence of Mr. Ekwedebong Gideon, Assistant Divisional Officer for Tubah who was a neutral witness between the contending parties. He submitted that there were serious inconsistencies about possession of arms and ammunition in the testimonies of the Prosecution witnesses, that the plea of alibi in favour of the 3rd Appellant was not considered and finally that the cartridge purportedly recovered on the first appellant was not identified and he urge us to uphold these grounds of appeal.

In answer to these averments, the Learned Commissioner for Government after positing that the submissions of counsel for the appellants are rather strange and unacceptable, submitted in the main that the appellants were presumed innocent and given a fair trial because there was a Police Inquiry, an Interpreter and that they were represented by counsel. He continued that since the decree creating the Military Tribunal of Bafoussam empowers it to sit both in both the Western and North-West Provinces, no miscarriage of justice seems to have been committed, that the court has a discretion to pick and chose witnesses, that Mbororo youths mistakenly thinking that their land had been invaded, took the law into their hands and lastly that the first appellant was arrested in *"flagrant delicto"* carrying a 'calibre 12' cartridge on his body and urged us to disallow both grounds of appeal.

Having painstakingly studied and restated the essentials of the extra-ordinarily almost convincing submissions of both counsel, the court holds that each case has its peculiarities and that it insufficient to submit that there were Police investigations, Preliminary Inquiries and use of interpreters to warrant a fair trial. Though they were important what is more germane in the mind of the court is the manner in which such preliminaries to the trial were carried out, and most importantly how the evidence emanating there from was evaluated to establish the convictions and consequential sentencing of the appellants in the instant case.

In other words was there enough evidence to convict the appellants or did the Prosecution prove its case with the standard of proof required in a criminal case as it was established in the time honoured case of WOOLMINGTON VS. DPP (1935) AC.462 SANKEY, J., said;

*"It is not till the end of the evidence that a verdict can properly be found. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

In answering this question we shall reproduce the relevant parts of the testimony of Mr. VIYUOH, Traditional Ruler and Fon of Small Babanki, and that of the Assistant Divisional Officer for Tubah.

At Page 32 Mr. Viyuoh stated:

*"During a Council meeting held at my Palace on the 20/04/2002, on farmer/grazier issues, the Representative from Sabga informed us of the invasion into Sabga's land by Elh. Baba from Ndawara. I formed a commission to go to the site so that an authentic report be made to the Administration. I received the report from the Commission that stated that as they reached the disputed area on the 29/04/02 the incident had already occurred with two huts burnt and a fence destroyed."*

At Page 34 of the records, Mr Ekwedebong Gideon, Assistant Divisional Officer for Tubah stated thus;

*"On Saturday 27/4/02 early in the morning my boss commissioned me to go to the boundary with Elh. Baba and the Sabga population where Elh. Baba a business magnate has occupied the Tubah land with cows. We got to the site where some Mbororo guys from Sabga had to indicate the site to*

*us. We then witnessed the newly constructed huts and a fence by Elh. Baba with his shepherds and cows. We were then taken to the boundary. The Sabga population asked Elh. Baba to quit the land. I advised them to be patient since the problem was with the administration and that that they should stay calm as the issue was examined by us. I was surprised to revisit the site 48 hours later under the instructions of my boss and that the Sabga population had marched to the site to dismantle whatever Elh. Baba had constructed there. I went with 4 gendarmes from the Tubah Brigade. We arrived there when this population had burnt down the rugars built by Elh. Baba. The invade land stretches for more than three kilometers."*

From the foregoing testimonies of the Traditional Ruler and the Administrative Officer, whose testimonies were not impeached throughout the trial, we find and hold that contrary to the submissions by the Learned Commissioner for Government that the alleged offences were committed on land owned by the Proprietor of ELBA Ranch, the offences if any were instead committed on land in Tubah Sub-Division peacefully inhabited by the appellants and their families.

In answer to the question why some witnesses who took part in the investigation, and notably the Assistant Divisional Officer for Tubah were not called to give evidence in court, the Learned Commissioner for Government submitted that the court, I will imagine he meant the Prosecution, has the right to choose its witnesses. Contrary to the view of the Learned Commissioner for Government, we are of the considered opinion that the duty of the Prosecution is to make available o the court all the vital and important witnesses in a case so that at the end of the day the court will in turn do justice to all manner of men, be they the down trodden or the rich without fear or favour, affection or ill-will.

That having been said, were the appellants expected to fold their arms and encourage the proprietor of ELBA Ranch to continue with the uncontrollable expansion of his ranch and render the appellants and their families destitute or homeless in our country? Before attempting an answer to this question we propose to reproduce the salient points of the evidence of the 1st appellant, who alone was charged and convicted of illegal possession of arms and ammunition. We shall equally reproduce the salient points of the testimonies of investigators in respect of this offence.

At Page 18 of the records of appeal, the first appellant stated as follows:

*"I am one of them, to immortalize our action so that Alhadji doesn't say the contrary I carried my video camera, on the spot, the guys destroyed the fence and two buckaroos. My role was to film the action. To avoid bloodshed the Mbororos ran away. I was on foot and hid in the bush. After Alhadji's departure I came out of my hideout and presented myself to the gendarmes. After searching me they kept my watch, my cellular phone and my camera. Thereafter I was taken to Ndawara Ranch and presented to the Assistant Divisional Officer and two gendarme officers."* He continued ***"Lorsque Alhadji est sorti il a demande qu'on me fouette copieusement et c'est ainsi que j'ai été bastonné a mervelle par le commandant, les mains menottées par derière. Après ce traitement inhumaine, j'ai été embarqué dan un véhicule pour Bamenda ou j'ai été gardé a vue."*** *Translated into English this means: "When Alhadji Baba came out, he ordered the gendarmes to beat me severely and I was given a snake beating by the Commander with my hands handcuffed behind my back. After this inhumane treatment I was thrown into a vehicle and driven to Bamenda, where I was remanded in custody."*

As against this defence of the 1st appellant the evidence adduced by the Prosecution and tending to incriminate him is found in various pages of the records of appeal.

At Page 35 it is stated by the investigators that they found four empty shells of freshly used cartridges at the scene of the offence and retrieved from the 1st appellant, a calibre 12 hunting cartridge. At Page 35 one Dickson Martin who testified for the prosecution stated that they found in the bag of the 1st appellant three caliber 12 cartridges. Still, at Page 69 the famous Commandant Fotsing Benjamin testified that the 1st appellant carried a gun and a black bag containing a 'caliber 12 cartridge'.

From the foregoing, and in answer to the interrogation as to whether the appellants were rightly convicted and sentenced by the trial court, this court finds and holds that whereas the testimony of the 1st appellant on the alleged possession of arms and ammunition is simple, coherent and straightforward, the evidence adduced by the Prosecution in respect thereof, riddled with gaps and unprecedented discrepancies. It is unclear in our minds whether, what was recovered from the 1st appellant was a gun, a hunting life caliber 12 cartridge or three caliber 12 cartridges. The evidence of the 1st appellant that his role was to immortalize their action by filming it stood unchallenged throughout the trial. How could the 1st appellant be filming and be expected to shoot at the same time? If he couldn't logically be expected to do both at the same time, why should he be carrying a gun and cartridges?

By and large, what were the gendarme officers doing at Ndawara Ranch? Why the first appellant was arrested, taken to the said Ranch and subjected to torture, to inhumane and degrading treatment and to an abuse of his human rights in a civilised society such as ours? When we consider the glaring contradictions in the evidence of the Prosecution vis a vis the statement of the 1st Appellant in the aftermath of the arrest, we find that a doubt ought to have been raised in the minds of the court, that the story against him was a meticulously planned and mischievous fabrication, and consequently that there is insufficient evidence to find him guilty of the offence of possession of arms and ammunition. Though 1st Appellant pleaded guilty to offence of the disturbance of quiet enjoyment we find and hold that it is trite law that *"La possession vaut titre*" in other words that possession is two thirds of ownership. Since there is preponderance of evidence the Mbororos and by extension, the appellants were in peaceful possession of the disputed piece of land we hold that the Learned trial Judge misdirected his mind in finding him guilty of participation in commission of the offence of disturbance of quiet enjoyment. The 2nd and 3rd appellants, the appeal having been withdrawn against the 1st appellant, cannot for the aforementioned reason be found guilty of the said offence of disturbance of quiet enjoyment.

We are now left with the offence of arson and destruction with which all the appellants were found guilty as co-offenders by the learned trial judge.

Though the third appellant raise a vague alibi, without saying precisely where he was in Douala, we have no doubt from a careful perusal of the records and in particular from the testimony of the 1st appellant that, after premeditation they agreed that, whereas the 1st appellant would be filming, the 2nd and 3rd appellants would do the burning and destruction of the huts and the fence.

Though Alhadji baba was a trespasser, the question is: was the action of the appellants reasonable and proportionate to the incursion?

It was held in the cases of GREGORY VS. HILL 1799 TR 299 as well as in COLLINS VS. RENISON 1754, both reported at page 1110 in The Common Law Library on Torts that:

*"A person entering premises over which he has title, after forceful entry by another, must be careful to request the other to depart before he can justify laying hands on him to turn him out and in no*

*case must he use more force than the occasion requires for any violence in excess of what is reasonably necessary to effect the expulsion the owner will be liable."*

We are satisfied that the reaction of the appellants to expel Alhadji Baba was excessive and disproportionate to the invasion, though the appellants were entitled to defend their property. In the offshoot we hold that they were rightly found guilty of the said offences. This is more so, not only because two wrongs do not make a right but also because the Assistant Divisional Officer for Tubah had advised contending parties to be patient and give the administration time to look for solutions to their problems. In the off shot both grounds of appeal succeed partially.

Having so held, we now turn to grounds three and four, which impeach on the excessiveness of the sentences passed on the appellants as well as the failure of the trial court to record and rule on the mitigating circumstances that were pleaded in favour of the accused persons.

In arguing these grounds of appeal, learned counsel for the appellants in his submissions wondered why the trial court imposed the maximum sentence of ten years imprisonment on each appellant, whereas the offence subsequent upon which the court assumed jurisdiction carries a maximum sentence of two year. Continuing, he submitted that in violation of the provisions of Section 90 of the Penal Code, the court failed to record the mitigating circumstances that were pleaded in favour of the appellants, and urged us not only to quash the sentences passed but also to allow both grounds of appeal.

In reply the Commissioner for Government submitted that mitigating circumstances are at the discretion of the court, adding that since there were no such circumstances, the court had nothing to record. He said the sentences imposed were with the range provided by law, and that because of the gravity and prevalence of the offences within the vicinity, deterrent sentences were necessary.

Having considered the brilliant arguments of each counsel, the court finds and holds that though mitigating circumstances are at the discretion of the court, such discretion must be judiciously used only to promote the cause of justice in the light of each case, particularly where they are not expressly excluded by law.

It is superfluous for the learned Commissioner for Government to argue that the learned trial judge acted judiciously to inflict deterrent sentences on the appellants whereas it is they who were in possession of the invaded land.

Though their defence was disproportionate to Alhadji's trespass, yet they were first offenders, and did not equitably deserve the severe sentences which were imposed on them by the Learned Trial Judge. Consequently both grounds of appeal are allowed.

We now turn to ground six which impeaches the damages awarded to the Civil Claimant as having no basis in law because *'Ex turpi causa non non oritur actio'*

In arguing this ground of appeal learned counsel for the appellants submitted, in the main that there is a preponderance of evidence that, it is Alhadji Baba who trespassed into the land in question and constructed huts in violation of the instructions of the Assistant Divisional Officer, who stated above all that the incident was provoked by the trespasser. He ended that, since Alhadji's invasion was illegal and there was no evaluation report of the damages he suffered, the award in his favour of the sum of one million five hundred thousand (1,500,000) francs was biased and urged us to discuss it.

In reply the Learned Commissioner for Government argued in the main that since the proprietor of ELBA Ranch did not commit any wrong up till when his property was destroyed, the maxim cited by learned counsel for the appellant is inapplicable.

In support of his averments, learned counsel for the Civil Claimant argued substantially that his client suffered loss because of the acts of the appellants. He ended up by submitting that since his client was in possession of the disputed piece of land, the means he got it notwithstanding the maxim cited by learned counsel for the appellants is out of context.

Having given most anxious considerations to the submissions of counsel, we find and hold from what we have already stated that the maxim adequately fits the circumstances of the present case, because the Proprietor of ELBA Ranch was the trespasser. In the absence of any evaluation report to ascertain the damages that were allegedly suffered, we hold that the learned trial judge erred in law in making an award of one million five hundred thousand (1,500,000) francs to the civil claimant.

On that score, this ground of appeal succeeds and consequently the whole appeal succeeds in part.

As a result the convictions and sentences of the first appellant in respect of illegal possession of arms and ammunition under Section 237(2) of the Penal Code are hereby quashed, so also are the convictions and sentences of the appellants for disturbance of quiet enjoyment under Section 239 of the Penal Code.

With regard to the conviction and sentences for arson and destruction under Section 227 of the Penal Code, against the 1st, 2nd and 3rd appellants, we confirm their conviction, invoke the provisions of Section 90 and 54 of the Penal Code in their favour and substitute a prison term of 2 years I.H.L. plus a fine of give thousand (5,000) each, suspended for a period of three years for the sentences that was passed by the trial court.

The civil claim is hereby dismissed for reasons already advanced in the judgement.

**The court orders as follows:**

The parties, their agents or assigns are hereby restrained from interfering with the piece of parcel of land, the subject matter of this prosecution, or engaging in any provocative acts in relation thereto, which is likely to lead to a breach of the peace until the Administration determines the pending dispute between the parties.

This court reserves the right to sanction by way of contempt any contravener of this order.

"IN WITNESS WHEREOF, this present court judgment has been signed by the President, Vice President, Military Assessor and the Registrar-In-Chief."

DATED AT BAMENDA THIS 23RD DAY OF MARCH 2004

SGD:

COL. DJONGA – MILITARY ASSESSOR

H.N. MORFAW - PRESIDENT

B.B. BAWAK – VICE PRESIDENT

J.J. ATABONG – REGISTRAR-IN-CHIEF