Revisiting Defence of Claim of Right in Nigerian Criminal Law through Elimuya v. Police

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Abstract:
The defence of bonafide claim of right under Nigerian criminal law is an important menu in the consideration of the defences open to a defendant in a criminal trial. In Charge No MAB/43c/2020 Commissioner of Police v. Chief Paul Idima Obi Elimuya the defence came up for consideration before the learned trial Senior Magistrate Grade 1, Edema Doris (Mrs.) sitting at the Magistrates’ Court, Abbi in Delta State, Nigeria. Because of the intricate nature of the defence and the manner in which it was considered in the above mentioned charge, this study is actuated towards revisiting the defence under the Nigerian criminal procedure law and determine whether given the factual circumstances in which the defence arose, the trial court was in the right footing in rejecting the defence as made during the trial proceedings in Elimuya’s case. This study would consider the forgoing issue in relation to the appeal which the defendant later took out against the judgment of the learned trial Magistrate to the High Court of Justice, Kwale Delta State, Nigeria. This study uses the doctrinal method relying on judicial decisions and other relevant statutory instruments in the area of the law under consideration. It uses the locus classicus on the subject area of the law in Nigeria (Nwakire v State) to interrogate both the facts yielded in Elimuya v Police and the judgment delivered by the trial court on 15th October, 2022. As this study is essentially an academic exercise, the aim is to highlight the importance of the defence in criminal procedure law, demonstrating the circumstances under which it is to be raised and upheld and the controversies surrounding its application under Nigerian law. The study finds that the facts in Elimuya v Police were on all fours with the circumstances under which the defence ought to have been upheld and the refusal of the learned trial Magistrate in upholding same led to miscarriage of justice and to the appeal. The study therefore recommends that whenever the question whether the defence of claim of right is applicable during a trial, the trial court and indeed an appellant court should look out for the essential elements of the defence as outlined in this study.

Keywords: Nigeria, Claim of right, Criminal Procedure, Defence, Criminal Appeal.

Introduction
The provision of section 23 of the Criminal Code is that ‘a person is not criminally responsible for an offence relating to property for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.’ As far back as 1973, the trend of the application of the principles of the defence has left much to be desired as courts have shown lack of proper appreciation of the scope of the defence making it quite disturbing up till date.
(Okonkwo, 1973) particularly in respect of the judgment in the specimen charge chosen for this study: Elimuya v Police. Bello (2003) identified some of the complications connected with the application of the defence urging amendment to delimit and or incorporate the offences relating to property that the defence covers than to leave it at large.

However the object of this study is not to interrogate the defences which section 23 of the Criminal Code applies to and those that it does not. This is because, from all intent and purposes, the defence applies to malicious damage of eleven rubber trees which is the corpus of this study. The drift of this study is to critically raise the facts in Elimuya v. Police and subject the facts to the legal principles applicable to section 23 of the Criminal Code and determine whether in the light of the judicial decisions in the cases related to the subject matter, the learned trial Magistrate sitting at the Magistrate’s Court Abbi was right in holding that the defence did not avail the defendant, Chief Paul Idima Obi Elimuya. Abbi is a growing town in Ndokwa West Local Government Area of Delta State, Nigeria.

**Statement of the Problem**

The defence of bonafide claim of right is so notorious and pervading in criminal law and procedure yet the parameters within which it is invoked are largely misconceived in the lower trial courts as well as the appellate courts in Nigeria. For instance and for the purpose of this study, in Elimuya v. Police, the trial Magistrate, His Worship, Edema Doris (Mrs.) Senior Magistrate Grade 1, sitting at Abbi, Delta State Nigeria states, ‘Defence of bonafide claim of right under section 23 of the Criminal Code cannot be claimed at large or in vacuum. For the defence to avail a defendant he must call witness and adduce credible evidence to establish two essential elements or ingredients required of him under the said section 23 of the Criminal Code to wit: (1) his honesty in the claim (2) that he has no intention to defraud.’ Now, is it imperative that a defendant such as Elimuya, given the facts and circumstances of his case, must call a witness or witnesses to establish a defence of bonafide claim of right?

Does the criminal law impose an obligation on a defendant hitching to rely on a claim of right to call a host of witnesses in a trial? In what ways can a defendant demonstrate that his claim of right is honest and has no fraudulent intention? Is the defence merely to introduce a defence of claim of right and for the prosecution to dislodge same, or must the defendant demonstrate to the court that his claim of right is reasonable? What is the extent of the damage a defendant is to wrought, before he can be clothed with the defence or does the law protect the ignorance of the defendant as to the proper manner to pursue his claim of right? Is the defence subjective to the extent that the trial court is called upon to look at the defendant before it, consider his standing, education or experience in life to determine whether he could have honestly made a mistake as to the choice of method used to assert his claim as to the ownership of the property in Elimuya?

**Theoretical Framework**

**Theory of Statutory Interpretation**

The courts’ trial system in Nigeria have, since British colonial rule, been tailored after the accusatorial system where the Crown is to establish the guilt of a subject-prisoner beyond reasonable doubt and the prisoner is entitled at the close of his case, to raise certain defences known to the system of law: one of which is the claim of right that has been codified under section 23 of the Criminal Code. In interpreting the defence of claim of right, the trial court may adopt any of the well established instruments of interpretation. A defence can be regarded as justificatory or excusatory. A justificatory defence is one in which the act done or omitted to be done by the prisoner is intended to prevent an even graver harm. An excusatory defence on the other hand is meant to exculpate a prisoner from guilt by ‘negativing’ his mens rea or guilty intention. A defence of claim of right should be calculated and interpreted more as an excusatory defence than a justificatory one and literally, the
defence seeks to emphasize the rights of the prisoner.

On the other hand, a purposive interpretation of the defence of claim of right panders more to the conduct of the prisoner in the exercise of the right and ultimately the reasonableness of the conduct. In cases where the defence is determined more with regards to the right of the prisoner to be excused from guilt, the honesty of the prisoner in believing in what he did is considered and the defence is readily upheld. But in other cases where the defence is considered with regards to the conduct of the prisoner, reasonableness of the conduct of the prisoner and intention not to defraud are primed and in such cases the defence is largely rejected. It is thus the intention of the framers of the defence of claim of right that in as much as the prisoner is to demonstrate honesty in believing that he had the right to do what he did and should be excused under the law, the honesty must be balanced with a reasonable conduct which the law is unlikely to disapprove. If honesty is not matched with moderation and circumspection, the defence may be rejected. In other words, the prisoner must be lawful, abide by other laws and must not cause harm to third parties.

Theory of Evaluation of Evidence

It is an elementary principle of procedural law that the judgment of a court must be based on or supported by the evidence tendered and given before the court (Ameachi v. INEC & Ors. (2008) 158 LRCN 1 at 150). The law of evidence therefore requires that for a party to prove his case, he must call the best evidence available. This is the best evidence rule (Ezemba v. Ibeneme (2004) 122 LRCN 5163 at 5216). Evaluation of evidence is the primary responsibility of the trial court. This is because it is the court before which the witnesses testified and thus in a better position to watch demeanor, gauge their disposition to and knowledge of the issues involved in the case and assess the veracity and credibility of evidence and attach weight to it.

In Kwajaffa v. Bank of the North Ltd. (2004) 118 LRCN 4006 at 4030 it was held that it is the pre-eminent duty of a trial court which saw and heard the witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate court which neither heard the witnesses nor saw them to observe their demeanors in the witness box. Interference by an appellate court can only occur where and when the trial court fails to do so properly. Where, therefore the trial court has satisfactorily performed its primary duty to the evidence and correctly ascribed the probative value to it, an appellate court has no business interfering with its findings on such evidence (Mannagge v. Gwamma (2004) 120 LRCN 4572). In evaluating any piece of evidence placed before a trial court by the parties, a court of law is duty bound to consider the totality of the evidence led by each of the parties. It shall then place it on an imaginary scale of justice to see which of the two sides weighs more creditably than the other. This shall entail the assessment of same so as to give value or quality to it. It should necessarily involve a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other (Lagga v. Sarhuna (2008) 161 LRCN 133).

It is further a notorious theory of the law of evidence that where the evidence to be evaluated is mainly documentary as in Elimuya v. Police, the facts of which are under close scrutiny in this study, particularly the judgment of the High Court of Justice, Kwale in HCK/15/81 Dick Abajogu & Anor v. Ogboru Ozoma & 2 Ors, the appellate courts are in as good a vintage position as the trial court in the evaluation of the evidence (Yaro v. Arewa Construction Ltd. (2008) 154 LRCN 163 at 199 – 200. And where there is a document, oral evidence is inadmissible and the document must be produced and tendered and it is generally regarded as a hanger with which to gauge oral evidence in the case under trial.

It is also settled law that where the trial court fails or neglects to consider the defence of an accused person, an appellate court is at liberty or under an obligation to consider such a defence having regard to the evidence on record. However, it is not every failure of the trial court to consider the defence opened to the accused person that it will be fatal to the case of the prosecution. For such
a consequence to arise there must be on record, legally admissible evidence in support of the alleged defence as such, evidence is what grounds the defence. Thus the failure of the trial court to consider the defence available or open to an accused person is only fatal where there is evidence in support of such a defence on the face of the records of the trial court and a court of law will not presume or speculate on the existence of facts not placed before it and the accused person is usually enjoined to give evidence viva voce instead of adopting extrajudicial statements or resting his case on that of the prosecution (Shalla v. State (2008) 156 LRCN 34 at 72 & Ekpeyoung v. State (1993) 5 NWLR (Pt. 295) 513 at 522).

Conceptual Clarifications

Parties to the Disputes

It is necessary to clarify the parties to the disputes considered in this study. Chief Paul Idima Obi Elimuya is the defendant, hotelier and Managing Director of Amacha Mainland Hotel, Abbi. Before the High Court of Justice, Kwale then presided over by A. O. M. Bazunu J. in HCK/15/81 Dick Abajogu & Anor. v. Ogboru Ozoma & 2 Ors his Umu-Eyele family of Umueze-Uku Street, Abbi sued Umu-Idionwu family of Ukanabo-Uku Street of Abbi claiming the Umu-Eyele land then in dispute. In proving their case they called Chief Enyabine Odigie alias Nwanni as their first witness (PW1) before the High Court of Justice, Kwale. Chief Paul Idima Obi Elimuya also testified as the second witness for the plaintiffs in the case. At the end of the trial, judgment was delivered in favour of the plaintiffs and the defendants appealed unsuccessfully up to the Supreme Court in SC/161/1995 Ogboru Ozoma & 2 Ors. v. Dick Abajogu & Anor in which two rulings were delivered by A. B. Wali JSC on 9th November, 2001. The two rulings and the judgment of the High Court of Justice, Kwale were tendered as Exhibits before the trial Magistrate’s Court presided over by His Worship, Edema Doris (Mrs.) Senior Magistrate Grade 1.

On the other hand, Chief Enyabine Odigie, alias Nwanni was the father of the Complainants before the Magistrate’s Court, Abbi. That is Ogbuefi Patrick Enyabine (PW2), Joseph Enyabine (PW3) and Peter Emetulu Chibugo (PW1). Chief Enyabine Odigie their father was called as a witness in the High Court case and he stated essentially before the High Court of Justice Kwale that the land of the defendant which is planted with rubber is in common boundary with his land and that the land in dispute before the High Court of Justice, kwale was in boundary with the land of the defendant before the learned Senior Magistrate. In other words, the defendant’s rubber plantation and land was in between the land in dispute at the High Court and Chief Enyabine Odigie’s land. That the land in dispute in the High Court case equally belongs to the defendant’s Umu-Eyele family of Umueze-Uku Street, Abbi. While Chief Paul Idima Obi Elimuya (who testified as a key witness at the High Court case simply as Idima Obi) claimed that he is an in-law to the Complainants at the trial Magistrate’s Court, the father of the Complainants claimed that he was an in-law to the defendants who were sued before the High Court of Justice, kwale. Chief Paul Idima Obi Elimuya also claimed that his rubber plantation and land was in common boundary with Chief Enyabine Odigie alias Nwanni the father of the Complainants.

Literature Review

Facts of Elimuya v. Police

The facts of the case in Elimuya v. Police are relatively straight forward. The appellant, Chief Paul Idima Obi Elimuya was approached that his rubber trees on his land were close to a building under construction because the persons who were constructing the building knew he was the owner as against the Complainants and he gave the instruction to the developers to cut down eleven rubber trees close to the building under construction. The prosecution came after him. Arrested and arraigned him before the trial Magistrate’s Court, Abbi Delta State. He was tried and found guilty. He was sentenced to imprisonment for three years in the alternative
to pay a fine of N100,000.00 and to further pay damages in the sum of N200,000.00 being the value of eleven rubber trees to the Complainants in a judgment delivered on 15th October, 2022. He paid and proceeded on appeal to the High Court of Justice, kwale in a Notice of Appeal filed on 21st October, 2022 wherein his Grounds of Appeal were that the judgment of the learned trial Magistrate was unreasonable and cannot be supported having regard to the evidence and that he was entitled to the defence of bonafide claim of right.

Evidence Presented by the Parties

Prosecution’s Case

(PW2), Ogbuefi Patrick Enyabine, stated before the trial Magistrate as follows, ‘in 1950 my father, Chief Enyabine Odigie, planted rubber trees at the end of the family land. Defendant went to the rubber plantation and cut down eleven trees. He also cut and uprooted the traditional life trees used for demarcation in our boundary between him and us claiming that the rubber trees and the land belong to him. By 1981 there was boundary adjustment between us and the defendant and there was no argument and no issue was raised. Last year 2020, the defendant went to cut down rubber trees and the boundary life trees. He also adjusted the boundary trees. From 1981 to 2020 there was no problem or issue on the land. When the defendant cut down the boundary trees I was not in town.’ Under cross examination, the witness claimed that he does not have land boundary dispute with the defendant but admitted that he told the court that the defendant cut down boundary trees demarcating the land between them and the defendant.

(PW3), Joseph Enyabine, told the court that the defendant cut down eleven rubber trees and stated as follows, ‘my father told me he is the owner of the rubber trees. He planted them. I was surprised that the defendant went there to cut the rubber trees and I know he did not have any there. He first of all cut down the life trees that were on the boundary before cutting down the rubber trees. The life trees have been on the boundary for over 15 years and after the death of my brother, the defendant went to cut them down.’ Under cross examination, the PW3 wholeheartedly admitted, ‘Yes, the defendant is dragging the land with us that is why, he went to cut down the rubber trees.’

(PW1), Peter Emetulu Chibugo, stated that the defendant confronted him that he chased away the person that the defendant asked to cut down the rubber trees and PW1 said yes. PW1 asked the defendant, ‘the rubber on the land, are they yours?’ The defendant said they are his. PW1 asked the defendant, ‘Can you show me the boundary between you and I?’ The defendant said he has cut down the life trees used as boundary because he was not satisfied with the way the boundary was erected to resolve the crisis between the parties in 2014. Defendant said he can adjust the boundary anytime he felt and PW1 replied him that the defendant did not have boundary with him but with Eyele family’. It is necessary to look at the judgment of the High Court of Justice, Kwale in order to see what played out there with respect to the father of the Complainants in Elimuya v. Police and the defendant. The defendant tendered two rulings of the Supreme Court in SC/161/1995 Ogboru Ozoma & 2 Ors. v. Dick Abajogu & Anor delivered by A. B Wali JSC on 9th November, 2001 and the judgment of the High Court of Justice, Kwale in HCK/15/81 Dick Abajogu & Anor v. Ogboru Ozoma & 2 Ors delivered by A. O. M Bazunu J. on 31st May, 1990 wherein the father of the PW1, PW2 and PW3 (Enyabine Odigie) was called as a witness of the defendant and A. O. M. Bazunu J. recorded him as follows, ‘…Enyabine Odigie, alias Nwanni…stated that the plaintiffs (that is the defendant at the trial Magistrate’s Court) are from Umueze-Uku Quarters, Abbi while the defendants who are his in-laws are from Ukanabo-Uku Quarters, Abbi. The land in dispute between the parties is owned by the plaintiffs’ family. The land in dispute has a common boundary with the land of one Idima Obi of Umueze-Uku. There is a rubber plantation between the land of the plaintiffs and his land.’ A. O. M. Bazunu J. in the same proceeding recorded the defendant as follows, ‘Idima Obi…states that the plaintiffs are from Eyele family in Umueze-Uku Street, Abbi while
the defendants are Umu-Idionwu family of Ukanabo-Uku Street, Abbi. The land in dispute is in Eyele in Umueze-Uku Street, Abbi and has a common boundary with his own rubber plantation. His rubber plantation is between the land in dispute and the rubber plantation of PW1 (Chief Enyabine Odigie).’

Defendant’s Case

The greatest significant point made by the defendant can be found in his defence before the trial Magistrate Court when he tied up the superior Courts’ judgments (the Supreme Court and the High Court of Justice, Kwale above) over the land in dispute and the rubber trees on the land with the Complainants in the case before the trial Magistrate’s Court, Abbi. The defendant stated, ‘I know the Complainants. They are my in-laws. I know why they brought me to court. The rubber trees I damaged do not belong to them. They are mine. I stated it in my statement with the Police. I want to adopt my statement with the Police as my own defence. The land is my own; my father planted them before he died and I have been maintaining them. Their father was the person I met to stand witness at the High Court kwale that I am the owner of that land. I also testified in the case as a key witness. I have the judgment up to Supreme Court. That is that of the High Court, Kwale to Supreme Court, Abuja’. Under cross examination, the defendant (Chief Paul Idima Obi Elimuya) stated, ‘Those people came to me that the rubber trees are too close to the house they are building and they begged me to cut them down because they knew am the owner of the rubber trees… the rubber trees were cut down because they are close to their building.’

In his extra-judicial statement to the police, Elimuya had stated as follows, ‘actually I am the one who sent people to cut down the rubber trees in question…They belong to my father which I inherited after his death. There was a land dispute between me and the Complainants’ family which the members of the Baptist Church, Abbi came and divided the land for us and so put boundaries. Actually during the settlement, I was not satisfied because the land belongs to me which I told the entire Church that I am not happy the way the matter was being handled. I am categorically stating that the rubber plantation belongs to my father which I inherited though we have common boundaries with the Complainants right from time immemorial. I know that to damage some economic trees is an offence but the ones I damaged are my own. Although I am not the one who damaged the boundary sticks rather, they died off.’

Principles of Claim of Right

For all defences created under the criminal law, there are principles that determine their application. Bonafide claim of right is not an exception. In R v. Fuge (2001) 123 A Crim R 310 at 314 – 315, the NSW Court of Criminal Appeal propounded nine principles that govern the application of the defence of bonafide claim of right as follows: The claim must be a belief in right to property or money; it must be genuine or honest; it does not have to be reasonable but must have sufficient colour of reason or pretence; it must be legal not moral; it must be a sufficient answer to the crime charged; it must pertain to only property or money but their equivalents in value; it must entail the entire property; if an accessory is charged, his principal must have the right to the claim; and it is for the State to rebut (Ly Lawyers).

The success of the defence does not amount to title to the property. Presiding Magistrate, Mrs. Blessing Kabo Esq, sitting in Anyigba, Kogi State, in Commissioner of Police v. Salami Okolo & Anor while considering the defence of claim of right in charges of criminal conspiracy, mischief and theft stated, after upholding the defence, as follows, ‘this court is majorly with criminal jurisdiction in some criminal cases and a limited jurisdiction over civil claims for money; it lacks jurisdiction to pronounce upon or award title to any portion of land whatsoever to anyone. The entire consideration and holdings in this judgment have not in the least way attempted to do so…no party is to leave the court with that mind set. The court only considered the alleged criminal offences arising out of these conflicting claims of parties in relation to bonafide claim of right. Parties are at liberty after now to approach the proper forum that has the jurisdiction to pronounce on title to
the land and property thereon’ (Edokwe, 2021). It shall be seen later that the holding of Mrs. Edema Doris Esq. is at violent odds to and runs contrary to the foregoing holding of Mrs. Blessing Kabo Esq.

**Holdings in Elimuya v. Police**

In consideration of the issue whether the trial court properly evaluated the evidence before it, it is relevant to quote the trial court on the basis upon which it held that the defendant failed to establish the defence of bonafide claim of right. The trial court found as follows, ‘Defence of bonafide claim of right under section 23 of the Criminal Code cannot be claimed (and or maintained) at large or in vacuum. For the defence to avail a defendant, he must call witness and adduce credible evidence to establish two essential elements or ingredients required of him under the said section 23 of the Criminal Code to wit: (i) his honesty in the claim (ii) that he has no intention to defraud. Arguing against the holding on appeal before the High Court of Justice, kwale in Appeal No HCK/2CA/2023 Chief Paul Elimuya v. Commissioner of Police, learned defence Counsel submitted with the greatest respect to the trial court that it is not imperative that the defendant in the case must call witness or witnesses to established a defence of bonafide claim of right. Defence Counsel submitted that ‘no law imposes such obligation on the defendant. The law on the contrary is that no number of witnesses is required to establish a case. All that is required is credible and qualitative evidence. The defendant is not bound to call a witness or witnesses in this case when he has been able to demonstrate the claim of right from the material and valuable evidence before the court.’ The defendant had relied on the Judgments of the Supreme Court, the High Court of Justice, his extra-judicial statements and his testimony before the court wherein he further adopted the extra-judicial statement. The defendant was also entitled to rely on the evidence of the prosecution witnesses that are favourable to him.

The Defence Counsel then proceeded to ask the following questions, ‘now, given the circumstances of this case and the scenarios painted by the parties, was it absolutely necessary for the appellant to call witness? Of what value would such a witness be and to what issue will such a witness of the defendant-appellant be addressing? Is the witness coming to say that the defendant-appellant cut down the rubber trees or he did not? Is he coming to say that the defendant-appellant and the Complainants are in common boundary or not? Is such a witness coming to say that there was a dispute between the defendant-appellant and the Complainants or not? Is the witness coming to say that the defendant-appellant is entitled to the defence of bonafide claim of right or not? No particular number of witnesses shall be required to prove any fact except in some special circumstances (Alao v. Akano (2005) 126 LRCN 837 at 854). Corroboration is not required in the circumstances of the case (Ogunbayo v the State (2007) 146 LRCN 696 at 708). Indeed, the trial court ought not to have reached such a conclusion because calling a witness in such circumstances is valueless and unproductive. The judgment of the trial court, as opined by the Defence Counsel, was perverse.

A judgment of a trial court is said to be perverse and liable to be set aside when a trial court takes into cognizance what it ought not to or refuses to take into cognizance what it ought to or the trial court shuts its eyes to the obvious (Hamza v. Kure (2010) 187 LRCN 143 at 168). Citing Abubakar v. Joseph (2008) 160 LRCN 159 at 211 -212 defence Counsel argued that for a Judge to produce a judgment which is a fair and just verdict on a case put up by two or more contending parties, the Judge must fully consider the evidence proffered by all the parties before him, ascribe probative value to it, make definite findings of fact, apply the relevant law and come to some conclusions on the case before him. To have held that the defendant-appellant must fail because he did not field witness to corroborate his defence of bonafide claim of right when in the circumstances it had been manifestly established from the extra-judicial statement of the defendant-appellant to the Police, the oral testimony of the defendant-appellant and the Complainants before the trial court and the judgments of the superior Courts tendered
before the trial Magistrates’ Court Abbi, is perverse.

The second significant holding of the trial court leading to the denial of the defendant’s claim of right is as follows, ‘the evidence is clear that the PW1 and his family are the owners of the rubber tree and have been uninterrupted all these years which the defendant destroyed 11 of them…and the defendant is aware of that fact which also amount to his intention to defraud. The learned trial Magistrate, Mrs. Edema Doris, Senior Magistrate Grade 1 went on to hold that, ‘the defendant maliciously without any notice went into the land and destroyed the rubber trees of the Complainants obviously inflicting injury on the Complainants and caused loss.’ The defence Counsel in reacting to the foregoing holdings of the trial Magistrate submitted in the appeal to the High Court of Justice, Kwale that, ‘to say the least, the holding was preserve and the finding was a misdirection. Defence Counsel argued that a holding and or decision is perverse where it runs contrary to evidence or the court took into consideration matters it ought not to have taken into consideration or short its eyes to the obvious thereby occasioning miscarriage of justice (Henshaw v. Effionga (2009) All FWLR (Pt. 466 at 1901). It was argued that the trial court had no jurisdiction to make a finding over the ownership of the land and the rubbers in dispute being a Magistrate’s Court. The ownership of the land and the eleven rubber trees was not the issue before the trial court and even if the ownership was in issue, the defendant-appellant had equally claimed the ownership of the land and the rubber trees with weightier evidence on his side of the scale. It was an evidence of ownership that the father of the Complainants (Chief Enyabine Odigie as PW1 before the High Court of Justice, Kwale in HCK/15/81) had confirmed and testified to in a proceeding that went up to the Supreme Court that Chief Paul Idima Obi Elimuya was the owner of the rubber plantation between the land in dispute in that case and the Complainants’ father.

The defendant-appellant claimed that he had no obligation to put the Complainants on notice before granting the request of those who wanted the rubber trees cut down because they were posing threat and danger to their construction site and building development. Defence Counsel canvassed that the holding of not giving the Complainants notice before the grant was unsustainable. What is more, Uwaifo JCA in a dissenting judgment at the Court of Appeal in Nwakire v. COP cited Ogundere JCA in Ohonbamu v. Commissioner of Police (1990) 6 NWLR (Pt. 155) 201 (where the accused damaged six boys quarters) to the effect that ‘once it is shown that an accused person has a bonafide claim of right the required mens rea is negative. The extent of the damage done by him while it may be a factor to be taken into consideration in determining as a fact, whether his claim of right is honest or bonafide, cannot restore the mens rea that is already negatived by the finding that he had honest belief that he had the right to do what he did…Turning now to the appeal in hand, the learned trial Magistrate and the learned appellate Judge are wrong in rejecting the appellant’s defence of bonfide claim of right on the ground that his conduct was unreasonable judging from the extent of the damage done.’

Critiquing the Holdings in Elimuya

One of the well resorted authorities on bonafide claim of right is Nwakire v. COP (2009) 7 LRCNCC 105 at 116 where Ogundere JCA stated as follows, ‘I think there is misconception about the true meaning of the expression ‘honest claim of right and without intention to defraud…It is often assumed that once a person honestly believes that he is the owner or has some interest in a property then he can, upon a criminal charge for anything done or omitted to be done by him in relation to the property, raise the claim under section 23 that he has a honest claim of right. I believe that if the law is interpreted in this manner, we shall be on a sure road to chaos and a reign of lawlessness. This is because anyone who has a claim to a property will be left free to do anything he likes in relation to the property.’

Ogundere JCA the continues, ‘I may once again refer to the statement of Charles J., in Rex v. Bernhard (Supra) … “A person has a claim of right within the meaning of the section if he is honestly asserting what he believes to be a lawful claim even though it may be unfounded in law and in facts.” In relation to a dispute as to the ownership of land,
where one of the parties to the dispute does anything which forms the subject-matter of a criminal charge, what the expression means is this: (i) the person accused must believe that he has a lawful claim. It does not matter if it is found later that the accused is wrong in his believe. (ii) The accused must show that in doing the act complained of he is honestly asserting his right or claim of ownership over the land.' Section 23 of the Criminal Code only protects a person with a claim (whether real or fancied) to property who does a criminal act in relation to the property in the honest belief that he has a right to assert his claim of ownership in a manner which turns out to constitute the offence complained of. In other words, the law protects the ignorance of the accused as to the proper manner to pursue his claim of right.

When a person raises by his evidence a claim of right in an offence involving property, the burden is on the prosecution to prove the absence of a claim of right made in good faith because that defence negatives the requisite mens rea for malicious damage. In Kamara v. DPP (1973) 2 All ER 1242 at 1252, Lord Hailsham, L. C. held, 'on general principles, in all these cases the burden would rest on the prosecution to exclude these defences, which I will describe as a claim of right made in good faith.’ Thus, when it is said that the test is subjective, it means that the court has to look at the accused before it, consider his standing, education or experience in life to determine whether he could have honestly made a mistake as to the choice of the method to assert his claim as to the ownership of the property. The question then should be, ‘could this man given his status and knowledge have been honestly ignorant or mistaken as to his choice of method?

Chief Paul Idima Obi Elimuya was approached that his rubber trees on his land was close to a building under construction because the persons knew he was the owner as against the Complainants and he gave the instruction to cut down eleven rubber stands close to the building site under construction. Now, has the prosecution been able to negative the honesty in asserting that right and claim? Has the prosecution been able to negative the Chief’s belief in the honesty of his belief when he stated, ‘the land is my own; my father planted them before he died and I have been maintaining them. Their father was the person I met to stand witness at the High Court kwale that I am the owner of that land. I also testified in the case as a key witness. I have the judgment up to the Supreme Court. That is that of the High Court to the Supreme Court.’ The defendant-appellant seemed to have made out a case enshrined under the section. It does not matter if it is found later that he was wrong in his belief.

When the case of Nwakire v. COP (2009) 7 LRCNCC 105 at 116 went to the Supreme Court as Nwakire v. State (1993) 11 LRCN 383 it was further held that reasonableness of the belief is not an ingredient of the defence and that once an accused introduces evidence of a claim of right, the onus shifts to the prosecution to prove absence of a claim of right. Therefore, for the trial Magistrate sitting at Abbi, Delta State to have held that the defendant needed to have called witnesses to establish the defence and that the Complainants were the owners of the land and eleven rubber trees in dispute clearly demonstrated that the holdings, to the greatest respect of the learned trial Magistrate, were perverse and the trial court misdirected itself leading to a miscarriage of justice.

Conclusion

One point which seems to emerge from this study is that the application of the principles of bonafide claim of right as enshrined under section 23 of the Criminal Code applied to the facts of the case in Elimuya v. Police. The holding of the trial court that the defence could not avail and inure to the defendant because he failed to call witness to establish it was perverse. The holding that the ownership of the land and the rubber trees belong to the Complainants even in the face of the more credible and irresistible evidence of the defendant also led to a miscarriage of justice.
Recommendation

- The decision of the learned trial Magistrate sitting at Abbi should be reversed on appeal as same does not represent the position of the law.
- The fine of N100,000.00 imposed on the defendant in lieu of three years imprisonment and the damages of N200,000.00 to the Complainants should be quashed and the fine and damages be refunded to the defendant.

References


Alao v. Akano (2005) 126 LRCN 837 at 854
Ameachi v. INEC & Ors. (2008) 158 LRCN 1 at 150
Ezemba v. Ibeneme (2004) 122 LRCN 5163 at 5216
HCK/15/81 Dick Abajogu & Anor v. Ogboro Ozoma & 2 Ors
Kwajaffa v. Bank of the North Ltd. (2004) 118 LRCN 4006 at 4030
Lagga v. Sarhuna (2008) 161 LRCN 133
Mannagge v. Gwamma (2004) 120 LRCN 4572
Nwakire v. COP (2009) 7 LRCNCC 105 at 116
Ogunbayo v the State (2007) 146 LRCN 696 at 708
Shalla v. State (2008) 156 LRCN 34 at 72