IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUNUO, J.A., KIMARO J.A., And MJASIRI, J.A.)

CIVIL APPEAL NO 37 OF 2009

1. PETER JOSEPH KILIBIKA
2. CRDB BANK PUBLIC COMPANY LTD } .....APPELLANTS

VERSUS

PATRIC ALOYCE MLINGI .....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Tabora)

(Mujulizi, J.)

dated 24th June, 2010

in

Civil Case No. 4 of 2008

.....

JUDGMENT OF THE COURT

15 & 28 May, 2012

MJASIRI, JA:

This is an appeal against the decision of the High Court of Tanzania at Tabora (Mujulizi, J.) dated June 24, 2010 in Civil Case No. 4 of 2008. The 1st appellant Joseph Kilibika is an employee of the 2nd appellant, CRDB Bank, a public company involved in banking business. The respondent Patrick Aloyce Mlingi was a former employee of the 2nd appellant.

The facts in this appeal can be simply stated. Both the 1st appellant and the respondent were stationed at the CRDB Bank, Tabora branch. The 1st appellant was the branch manager and the respondent was the bank branch controller. Before the incident three computers were brought at the branch office. The whole saga started when one of the computers went missing. The 1stappellant accused the respondent of stealing the missing computer. He reported the theft to the police. A policeman came to the office and was informed by the 1st appellant that it was the respondent who was responsible for the theft of the computer. This statement was made to the police in the presence of other employees at the Bank. This led to the arrest and confinement of the respondent at the police station. He was taken to the police station where he was confined overnight. After his arrest his home was searched by the police. The search was conducted in the presence of his family, friends and neighbours. The respondent owned a guest house in the Tabora vicinity which was also subjected to a police search. After being released from custody, his employment was suspended and he was therefore forced to remain at home. He was then asked to return to work but the situation at

the office was so tense, that a fight ensued in the office between him and the 1st appellant. He was later transferred to the bank branch in Shinyanga. The Managing Director of the CRDB Bank, the 2nd appellant wrote a letter of apology to the respondent for what had transpired and asked him to forget the past and to look ahead. Consequently the respondent instituted a suit against the 1st and 2nd appellants, in the High Court, jointly and /or severally for: -

(a) General damages of Shillings Eight Hundred Million (800,000,000).

(b) Interest on the decretal amount.

The appellants denied liability and they challenged the claim made by the respondent.

The High Court found in favour of the respondent and awarded the respondent the following heads of damages jointly and severally against both appellants.

1. (a) Shillings One Thirty Four Million Two Hundred and Eighty Four Thousand Five Hundred (134,284,500) as general damages (equivalent to his seven years salary at his last scale) for malicious prosecution.

(b) Fifteen (15,000,000) million as general damages for slander.

2. The Respondent was also awarded punitive damages of Shillings One Hundred and Ninety Nine (199,000,000) million to be paid by the 1st respondent without interest.

The appellant was aggrieved by this decision hence the appeal to this Court.

At the hearing of the appeal, the appellants were represented by Mr. Deus Nyabiri, learned advocate and the respondent had the services of Mr. Method Kabuguzi, learned advocate.

The memorandum of appeal presented by the appellants' Counsel contained 10 points. However at the hearing of the appeal Mr. Nyabiri sought leave of the Court to file an additional ground of appeal. Leave to do so was granted. The additional ground of appeal was in respect of the jurisdiction of the High Court. It was stated as follows:-

> *"That, the High Court of Tanzania at Tabora had no pecuniary jurisdiction to entertain the suit, it being based on general damages only without a substantive claim".*

The remaining grounds of appeal are reproduced as under:

1. *That, the learned trial Judge grossly misdirected himself in fact and in law in holding that a tort of malicious prosecution had been established by the respondent on the balance of probabilities.*

2. *That, having regard to the evidence on record and the circumstances of the case, the learned trial judge grossly misdirected himself in law and in fact, in holding that the 1st appellant had named the suspect to the police and that the 1st appellant had "convicted" and "sentenced" the respondent.*

3. *That, having regard to the evidence on record, the learned trial Judge grossly misdirected himself in failing to hold that there was reasonable and probable cause in reporting the loss of the computer to the police and in failing to hold that the report to the police was not actuated by malice.*

4. *That, the learned trial Judge grossly misdirected himself in fact and in law in finding that the 2nd appellant had through exhibit P4, admitted the respondents claim of malicious prosecution.*

5. *That, having regard to the evidence on record and the circumstances of the case, the learned trial Judge grossly misdirected himself in holding that the respondent had suffered damages.*

6. *That, the learned trial Judge grossly misdirected himself in fact and in law in holding that the transfer of the respondent to another duty station was done in bad faith.*

7. *That, having regard to the circumstances of the case, the learned trial Judge grossly misdirected himself in fact and law in holding that the 2nd appellant was not entitled to terminate the contract of service on the ground stated in the certificate of service.*

8. *That, the learned trial Judge grossly misdirected himself in fact and in considering the wording, of the certificate of service when the respondent had not even challenged the said certificate before labour institutions.*

9. *That, the learned trial Judge grossly misdirected himself in fact and in law in awarding and assessing general damages in favour of the respondent.*

10. That, the learned trial Judge grossly misdirected himself in law in assessing and awarding punitive damages against the 2nd appellant.

Mr. Nyabiri commenced his submissions by addressing the Court on the additional ground of appeal. He forcefully argued that the High Court had no jurisdiction to hear the respondent's case. He contended that there was no substantive claim before the Court as in *pa*ragraph 4 of the plaint the respondent was claiming general damages of Shs. 800,000,000 for unlawful confinement by the police and defamation. It is the substantive claim which determines jurisdiction and not general damages which determines jurisdiction as general damages are awarded at the court's discretion. He relied on the case of **MS Tanzania China Friendship** v **Our Lady of Usambara Sisters**, Civil Appeal No. 84 of 2002 CA (unreported).

On his part, Mr. Kabuguzi argued that the High Court had jurisdiction to hear the suit. He submitted that though it was erroneous to quantify general damages, however it did not mean that the Court had no jurisdiction. He stated that the **Tanzania**

China Friendship Textile case (supra) was distinguishable from the facts of this case. The courts need to look at substantive justice.

In relation to the award of TZS 134,284,500 for malicious prosecution, Mr. Nyabiri submitted that the trial Judge wrongly reached a conclusion that the tort of malicious prosecution was established. The elements required to prove the tort of malicious prosecution were absent in this case.

Mr. Kabuguzi on his part readily conceded that malicious prosecution was not established. He stated that the claim for damages by the Respondent was in respect of unlawful confinement by the police. The respondent has clearly established that he was arrested by the police on 15 November,2007 in the evening and was released from police custody the next day on 16th November 2007 in the evening. This fact has not been contested by the appellants. He submitted that the findings by the trial Judge on malicious prosecution was a human error. The claim was unlawful confinement.

With regards to whether or not the respondent was defamed, Mr. Nyabiri argued that there was no cogent evidence to establish the tort of defamation. According to him the words stated in Kiswahili at page 56 of the record *"huyu ndio mshtakiwa"* simply meant this is the suspect. This could not have been defamatory in any way. The trial Judge was therefore not justified in finding that there was slander and should not have granted the respondent damages of TZS 15 million. Mr. Nyabiri argued that even if the Court declares that the words uttered were defamatory, the principle of award of damages was not followed.

On the issue of defamation Mr.Kabuguza argued that the respondent was defamed . He relied on the testimony of PW2 at page 56 of the record and the testimony of DW1 and DW2. The respondent was branded a thief and taken into custody. His arrest by the police took place in the branch manager's office in the presence of other employees. Even though the publication was limited but given the respondent's standing in the branch office as Controller, defamation was established. The house of the respondent and that of his neighbor were subjected to police search while neighbours, friends and family looked on.

On the award of punitive damages, Mr. Nyabiri submitted that the trial Judge reached an erroneous decision in granting punitive damages to the respondent. The trial Judge did not base the award of TZS 199,000,000 million on any legal principle relating to punitive damages. He argued that the respondent neither pleaded nor prayed for punitive damages .

On the question of punitive damages, Mr. Kabuguzi was of the view that though punitive damages were not pleaded, the circumstances of the case called for punitive damages. He made reference to the case of **Beda Jonathan Amuli v Kuboja Ngungu and two others,** Civil Case No 29 of 2008 H.C. (unreported).

The Counsel for the appellants has presented 11 points for consideration in his memorandum of appeal. After carefully reviewing the record and the submissions made by both Counsel, we are of the view that the major issues for consideration are as follows:

1. *Whether the High Court had jurisdiction to*

hear the respondent's suit.

2. *Whether the tort of malicious prosecution was established.*

3. *Whether the respondent was defamed and whether there was evidence of slander.*

4. *Whether the trial Judge applied proper principles in assessing damages.*

5. *Whether the respondent was entitled to special damages.*

6. *Whether it was proper for the trial Judge to award punitive damages under the circumstances of this case.*

We shall deal first with the issue of jurisdiction of the High Court. In the suit before the High Court, the subject matter was defamation and unlawful confinement. The respondent claimed for damages for TZS 800,000,000. There was no claim made which could lead to a conclusion that the pecuniary value of the claim is not within the jurisdiction of the High Court. The circumstances of this case are different from the circumstances prevailing in the **Friendship Textiles** (supra). In the

Friendship Textile case the principal claim was below TZS 10000. It was a specific claim for TZS 8,136,720 being the cost incurred for the production of the Vitenge fabrics and tax paid. We are therefore of the considered view that this ground has no basis.

The next issue for consideration is whether or not the tort of malicious prosecution has been established. However this issue needs not detain us. Mr. Kabuguzi, readily conceded that there is nothing on record establishing malicious prosecution. What was pleaded in the plaint was unlawful confinement by the police and not malicious prosecution. The findings of malicious prosecution by the trial Judge was an error as it was not part of the pleadings. Given the circumstances, it is our finding that malicious prosecution has not been established. What the respondent was subjected to was unlawful confinement. As it has been clearly established in evidence that the respondent was arrested and confined for over twenty four hours, we are of the view that the respondent was entitled to damages for unlawful confinement.

We now move to the next issue on defamation. Looking at the evidence on record it has been clearly established that the appellant was defamed. Given the status and standing of the respondent at the Bank, for him to be implicated with the theft of the missing computer, without any cogent evidence, calling upon the police and directing them to arrest him as the person who was responsible for the theft of the computer in the presence of some of his fellow employees was a slanderous act. Taking into account the unsolicited apology made by the Managing Director of the second appellant, it is very obvious that the respondent was wronged, defamed, and /or subjected to mental anguish, humiliation and shame. We are therefore in agreement with the findings of the trial Judge. Like the trial Judge we observe that the publication was limited to the 2nd appellant branch office, and respondent's family members, friends and neighbors who witnessed his home being subjected to a police search and the people who were present at his guest house which was also subjected to a police search.

This brings us to the pertinent issue on assessment of damages.

Damages, generally, are:-

That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation. See Lord Blackburn in ***Livingstone v Rawyards Coal Co.*** *(1850) 5 App. Case. 25 at page 39.*

Asquith, C.J. in **Victoria Laundry v Newman** [1949] 2 K.B. 528 at p. 539 said damages are intended to put the plaintiff

"... in the same position, as far as money can do so, as if his rights had been observed."

In **P.M. Jonathan v Athuman Khalfan**1980 TLR175 at page 190 Lugakingira J (as he then was) stated thus:

"the position as it therefore emerges to me is that general damages are compensatory in character.

They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering".

With regards to the issue on damages, we need to consider whether or not the trial Judge assessed the damages using a correct principle of law.

This would determine whether or not the Court should disturb the quantum of damages awarded by the trial Court. **Black's law dictionary** (7th Edition) defines general damages as under:

> *"Damages that the law presumes follow from the type of wrong complained of General damages do not need to be specifically claimed or proved to have been sustained"*

The sum of TZS 134,284,500 was awarded to the respondent as damages by the trial Judge as an amount equivalent to seven years salary at his last scale for malicious prosecution (unlawful confinement) We are of the view that the damages awarded falls under special damages. The law is clear on special damages. Special damages have to be specifically pleaded and proved. We would like to emphasize the need to distinguish the difference between special and general damages. The law is very clear, that special damages must be proved specifically and strictly. Lord Mcnaughten in

Bolag v Hutchson1950 A.C. 515 at page 525 laid down what we accept as the correct statement of the law that special damages are:-

"such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly".

In **Zuberi Augustino v Anicet Mugabe,** [1992] TLR 137 (CA) at page 139 it was stated thus:-

It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved.

The sum of TZS 15,000,000 was awarded to the respondent for slander by the trial Judge. It is the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of **Admiralty Commissioners v SS Susqehanna** [1950] 1 ALL ER 392.

"If the damage be general, then it must be averred that such damage has been suffered, but

the quantification of such damage is a jury question."

In **Davies v Powell** 1942 1 ALL ER 657 which was approved by the Privy Council in **Nance v British Columbia Electric Raily Co. Ltd** (1951) AC. 601 at page 613 it was stated as under:

> "*whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case... before the appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...."*

This position was adopted by the Court of Appeal for Eastern Africa in **Henry Hidaya Ilanga v Manyema Manyoka** [1961] EA 705 at page 713. See also **The Cooper Motor Corporation v Moshi /Arusha Occupational Health Services** (1990) TLR 96 (CA); **Silas Simba V**

Editor Mfanyakazi Newspaper and another, Civil appeal No. 7 of 1997 (unreported); **Prof. Ibrahim Lipumba V Zuberi Juma Mzee,**

Civil Appeal No. 92 of 1998 (unreported) and **Musa Mwalugala v Ndeshe Hota, [1998] T.L.R. 4**

In applying the principle to the present case, we are fully aware that we ought not to interfere even if we would have arrived at a different figure if we had tried the case. However we agree with the Counsel for the appellants that the trial Judge in assessing the damages did not take into consideration the move by the appellant to reinstate the respondent almost with immediate effect and the apology offered by the Managing Director of the 2nd appellant. It is also our considered opinion that the amount awarded is so inordinately high given the limited publication. We are of the view that the sum of TZS 10 million would be adequate under the prevailing circumstances.

Regarding damages for unlawful confinement, we are of the view that TZS 5 million would be adequate given the totality of the period the respondent was subjected to unlawful confinement.

The last issue for consideration is whether or not it was proper for the trial Judge to award punitive damages under the circumstances of this

case. We need to consider whether this is a case where a court is entitled to award heavy exemplary damages because of the particularly high-handed, insolent, vindictive or malicious conduct of those who committed the tort.

Jowitt's Dictionary of English Law (Second Edition) defines exemplary damages as follows:-

> *Exemplary or punitive or vindictive damages are damages given not merely as pecuniary compensation for the loss actually sustained by the plaintiff, but also as a kind of punishment of the defendant, with the view of discouraging similar wrongs in the future, as in actions for defamation, malicious injuries, oppression, continuing nuisances, etc.*

In **Rookes v Barnard** [1964] A.C. 1129 it was held that exemplary damages for tort may only be awarded in two classes of case (apart from any case where it is authorized by statute): these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the

government and, secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the

expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account. It will be seen that the House took the firm view that exemplary damages are penal, not consolatory as had sometimes been suggested.

It is now recognized that courts in East Africa can award punitive and or exemplary damages in torts and contracts. **Rookes v Barnard** (supra) was considered with approval in **Obongo Vs Kisumu Municipal Council** (1971) EA 91, Spry, V.P., in his lead judgment, at page 96B, stated: -

> *"On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit of them goes to the person who was wronged, their object is entirely punitive. In the present case, it is not clear how far* damages at large were *contemplated either in the consent judgment or in the proceedings that followed.*

Certainly the judge made no general award,

possibly because he considered that the consent judgment precluded it. Aggravated damages were, therefore, inappropriate. On the other hand, I am satisfied that the intention was that the damages should be punitive and that the judge was entitled in law to award exemplary damages".

In **P.M. Jonathan** (supra) Lugakingira J (as he then was) at page 90 stated as follows:-

".....Exemplary damages, on the other hand, are a punishment to the defendant for misconduct which general and aggravated damages cannot reach, and as a reminder that tort does not pay. They should be recoverable from any defendant whose outrage deserves punishment. It may be anomalous to use the civil court for criminal purposes but I do not desire to express myself on the issue. I would only add that where the defendant is a servant of the people and commits wrong under the guise of his power, or where the defendant is motivated by expectations of gain, that would be reason for the court to take an even more serious view and to

award such exemplary damages as the occasion would require"

The purpose of punitive damages is to punish the defendant for outrageous misconduct and to deter the defendant and others from similar misbehavior in the future. We need to establish whether there was *arbitrary and unconstitutional action, bad faith, fraud, malice, oppression, outrageous, violent, wanton, wicked*, and *reckless* behavior on the part of the appellants in order to justify the award of punitive damages. We do not think the circumstances of this case fall under that category. Therefore there was no justification for the award of punitive damages.

In **Obongo** (supra) it was stated as under:-

Exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct.

Consequently, we hereby set aside the award of damages for malicious prosecution of TZS 134,000,500 and punitive damages of TZS 199,000,000. Instead of TZS 15 million awarded by the High Court for slander, we will award TZS 10 million and TZS 5 million, for unlawful confinement. The damages awarded shall bear no interest. Save for the variations made on damages, the appeal is hereby dismissed with costs.

DATED at **TABORA** this 23rd day of May, 2012

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(Z. A. Maruma)
DEPUTY REGISTRAR
COURT OF APPEAL