

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MUSSA, J.A.)

CIVIL APPEAL NO 109 OF 2014

**1. PAUL VALENTINE MTUI }
2. ANDREA YAKOBO }APPELLANTS**

AND

BONITE BOTTLERS LIMITED.....RESPONDENT

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

(Sambo, J.)

dated the 9th day of April, 2013

Civil Appeal No. 18 of 2011

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JUDGMENT OF THE COURT

25th & 27th February, 2015

KILEO, J.A.:-

The key issue in this appeal hinges on malicious prosecution. The finding on this issue will determine the rest of the issues as raised in the memorandum of appeal.

The background to this matter is very brief and is to the following effect: On 16/01/2003 the 1st appellant's vehicle was hired by the respondent through its employee to transport crates of soda from the

respondent's depot at Sanawari to an address at Njiro within Arusha Municipality. The crates of soda never reached their destination. The second appellant was the driver of the motor vehicle which was hired to transport the crates of soda. As the crates of soda never reached their destination the matter was reported to the police by an employee of the respondent. It was not disputed that the crates of soda were stolen.

The appellants lost their suit in the District Court of Arusha where the matter originated. They also lost in the High Court, hence this second appeal.

At the hearing of the appeal both appellants were represented by Ms Christine Kimale learned advocate while Mr. Colman Ngalo learned advocate appeared on behalf of the respondent. Both counsel had filed written submissions which they requested us to adopt.

In her oral submission before us Ms Kimale asked us to find that the report to the police against the second appellant was without probable or reasonable cause and malicious in so far as the second appellant was merely hired to transport the crates of soda to Njiro. She further argued that basically the crates of soda could not be said to have been lost while

in the second appellant's possession as it was the respondent's employee who had control over the same.

Mr. Ngalo, on the other hand, expounding on the principles underlying the tort of malicious prosecution submitted that in order to succeed on a suit founded on this type of tort both malice and lack of probable and reasonable cause must be established. He made reference to SALMOND AND HEUSTON ON THE LAW OF TORTS.-21st Edition pages 393 et seq. He also made reference to **Yonah Ngassa vs. Makoye Ngassa**, [2006] TLR 213. The Court in the above case reiterated what was stated by the learned authors in the above cited writing. A party suing for malicious prosecution must prove the following ingredients:

- 1. That the proceedings were instituted or continued by the defendant;*
- 2. That the defendant acted without reasonable and probable cause;*
- 3. That the defendant acted maliciously;*
- 4. That the proceedings terminated in the plaintiff's favor.*

Each of the above listed ingredients must be proved for a plaintiff to succeed in the suit for malicious prosecution.

From the circumstances of the case we can say that ingredients 1 and 4 were established. However can we, given the circumstances of the case, say that ingredients 2 and 3 were proved? The starting point is did the respondent act without probable and reasonable cause? The undisputed scenario is that the respondent's crates of soda which had been loaded in the vehicle that was being driven by the 2nd appellant never reached their destination. In a nutshell, the crates were stolen. In these circumstances was not the respondent entitled to report to the police? We are settled in our minds that he was entitled to report the matter to the police. The two courts below found that the report to the police was with reasonable and probable cause and there was no malice in it. We see no justification whatsoever to fault the concurrent findings of the courts below on the ingredient of probable and reasonable cause. On the question of malice we have noted, as submitted by Mr. Ngalo that there is nowhere in the testimonies of the appellants that suggest that the respondent was actuated by malice in reporting the theft to the police. Neither can malice be inferred from the circumstances of this case. The ingredient that the respondent acted with malice naturally goes down the drain.

Admittedly, the damages that form the subject of this appeal depend on the proof of malicious prosecution. Since we have found that there was no malicious prosecution established against the respondent it will be futile to embark on a discussion of the question of damages which form the subject of the appeal.

In the result we find the appeal to be lacking in merit. We accordingly dismiss it with costs.

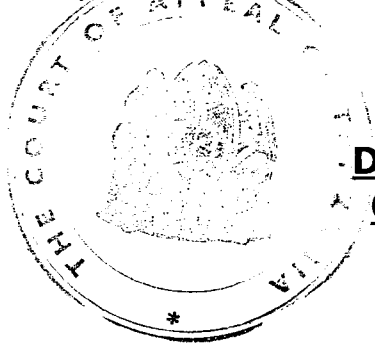
DATED at **ARUSHA** this 26th Day of February 2015

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL