

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: LUANDA, J. A., MUSSA, J. A. And MUGASHA, J.A.)**

**CIVIL APPEAL CASE NO. 139 OF 2008**

**KISANGA TUMAINIEL ..... APPELLANT**

**VERSUS**

**1. FRANK PIEPER**

**2. TRAVELLERS LODGE LIMITED ..... RESPONDENTS**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam.)**

**(Makaramba, J.)**

**dated the 25<sup>th</sup> day of July, 2008  
in  
Civil Appeal No. 209 of 2006**

.....

**JUDGMENT OF THE COURT**

8<sup>th</sup> October, 2015 & 25<sup>th</sup> January, 2016

**LUANDA, J.A.:**

In the District Court of Bagamoyo at Bagamoyo the above named appellant had sued the respondents for false imprisonment. After a full trial the District Court dismissed the suit and ordered each party to bear its costs.

The appellant was dissatisfied with the decision of that court, he appealed to the High Court of Tanzania (Dar es Salaam Registry) where he was not successful. Still aggrieved, he has come to this Court on appeal.

Briefly the appellant case was to this effect:- On 15/02/2005 around 18:00 hrs the appellant who is a teacher by profession and also doing curving activities and neighbour to the respondents who also were doing curving activities, was arrested by police following a report made by the 1<sup>st</sup> respondent that the appellant had stolen a piece of curving wood belonging to the 2<sup>nd</sup> respondent. The appellant was taken to police, he was interrogated and spent that night in a police cell. On the following day i.e. 16/2/2005 he was released on police bond. On 21/2/2005 he was sent to Bagamoyo Primary Court at Mwambao to answer a charge of theft. The appellant denied the charge and he was released on bail. A month later, the charge was withdrawn following failure of the complainant to enter appearance in Court. It is the foregoing background which prompted him to institute the aforestated suit.

In its judgment, the High Court (Makaramba, J.) was of the view that the appellant's claim was for both the tort of malicious prosecution and false imprisonment. This is what he said in his opening paragraph:-

*"This is an appeal from the decision of the District Court of Bagamoyo at Bagamoyo (Hon. Mkeha, RM) in civil Case No. 12 of 2005 dated the 2<sup>nd</sup> day of October, 2006. In that the appellant had sued the Respondents for damages in the sum of Tshs. 80,000,000/= in (sic) account of **malicious prosecution and false imprisonment.** [Emphasis supplied]."*

But the plaint, as we shall demonstrate hereunder, shows clearly that the appellant's claim is based on tort of false imprisonment only. And the two i.e. false imprisonment and malicious prosecution are not one and the same thing.

*"5. That, the Plaintiff's claim against the Defendants jointly, is for sum of eighty million Tanzanian*

*shillings (80,000,000/=) being damages on account of false accusation and **initiation of false imprisonment by the first defendant against the plaintiff.** [Emphasis ours].*

*13. That, the Defendant maliciously initiated false imprisonment on the person of the plaintiff by the police and subsequently a false accusation. The plaintiff asserts that the Defendants ought to compensate him (plaintiff) for the damages he (plaintiff) has undergone in consequence of the Defendants acts, and which resulted into loss of business and community reputation on the part of the plaintiff, psychological torture and mental anguish.*

Indeed in his judgment the first appellate judge did not discuss at all whether or not the tort of false imprisonment was committed on the appellant. Instead he discussed at length the tort of malicious prosecution which the trial court did not discuss it at all.

In this appeal both learned counsel Dr. Masumbuko Lamwai and Mr. Ibrahim Mbunga for the appellant and respondents respectively like the High Court argued with force their respective position about malicious prosecution which was not pleaded at all. For obvious reason we shall therefore not discuss their submissions.

We have shown that the High Court took up a new claim which was not pleaded at all. That was not proper as a party cannot take up new plea or new contention in appeal, unless, it is pleaded in the plaint or written statement of defence (see **Conrad Dias vs Joseph Dias** AIR 1995 Bom 210).

Since the first appellate High Court adjudicated on an issue which was not pleaded at all during trial and which also is a ground of appeal in this Court, the High Court was wrong to take up an issue of malicious prosecution which was not pleaded and tried by the trial District Court. The decision of the High Court is not based on pleadings and thus that decision cannot be allowed to stand.

In the interests of justice, we think the best solution to the problem is to make an order of rehearing of the appeal. In the exercise of revisional powers of this Court as they are provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 the judgment and decree of the High Court are quashed and set aside. We order the appeal be heard afresh before another judge. We make no order as to costs.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 25<sup>th</sup> day of January, 2016.

B. M. LUANDA  
**JUSTICE OF APPEAL**

K. M. MUSSA  
**JUSTICE OF APPEAL**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

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

  
P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**