IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MMILLA, J.A., MWANGESI, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 8 OF 2016

WILBARD LEMUNGE ..... APPELLANT

VERSUS

1. FATHER KOMU
2. THE REGISTERED TRUSTEES OF THE DIOCESE OF MOSHI } **..... RESPONDENTS**

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

(Mugasha, J.)

dated the 8th day of March, 2012
in
Civil Appeal No. 6 of 2012
.....

JUDGMENT OF THE COURT

2nd & 10th October, 2018

MWANGESI, J.A.:

The appellant herein was charged at the District Court of Rombo in Kilimanjaro Region in Criminal Case No. 212 of 2004, with the offence of receiving stolen property contrary to the provisions of section 311 (1) of the Penal Code CAP 16 R.E. 2002. It was alleged by the prosecution that, on the 26th day of April, 2004 at about 05: 30 hours at Ibukoni Village within Rombo District in Kilimanjaro Region,

he did receive three bags of maize valued at TZs 81,000/=, knowing that they were stolen, which was the property of Huruma Catholic Church.

In a judgment that was handed down by the trial magistrate on the 12th day of April, 2005, following a full trial, the appellant was acquitted from the charged offence and set at liberty for the reason that, the evidence which was led against him by the prosecution to establish the commission of the offence was weak. Subsequent to his acquittal from the criminal charges, the appellant successfully instituted civil proceedings in the same court, vide Civil Case No. 3 of 2005 against the respondents herein, for general damages arising from malicious prosecution. It was held by the learned trial magistrate in a judgment that was delivered on the 27th June, 2012 that, the appellant had managed to establish his claim on balance of probabilities. As a result, he was awarded damages to the tune of TZs 7,000,000/=, out of the TZs 10,000,000/= which he had claimed.

The basis of the decision of the trial magistrate was founded on the fact that, since the appellant was acquitted from the criminal charges, and that the respondents did not appeal against such

acquittal, then the same established that the respondents had maliciously instituted the proceedings against the appellant.

It is pertinent however, to point out beforehand that, in the criminal proceedings, the appellant was charged alongside two other people going by the names of Francis Tarimo and Fraterne Vicent Mtei, who were charged with the offence of housebreaking and stealing. The said two persons, were the ones alleged to have broken into the first respondent's premises and stolen from therein three bags, which according to their version, were sold to the appellant. They were convicted of the charged offence in absentia, after they had jumped bail before the hearing of the case.

Dissatisfied by the decision of the trial court in the Civil proceedings, the respondents successfully challenged it in the High Court of Tanzania at Moshi, through Civil Appeal No. 6 of 2012 of which, in a judgment that was delivered by the first appellate Judge on the 8th March, 2013, reversed the finding of the trial court. The said decision is the subject of this appeal to the Court. The grounds of appeal by the appellant are premised on three grievances namely:

1. *That the High Court, erred both in law and facts by not considering evidence adduced by the applicant to prove his claims of malicious prosecution.*
2. *That the High Court, failed to analyze appellant's evidence and eventually came up with erroneous decision, that the appellant failed to establish the case against the respondents.*
3. *That the High Court, erred both in law and facts by not considering the facts that, the respondents lodged false complaints against the appellant to the Police Station.*

In compliance with the stipulation under the provisions of Rule 106 (1) of the Court of Appeal Rules, 2009 **(the Rules**), on the 6th day of January, 2017, the appellant lodged his written submission in support of the appeal. On the part of the respondents, there was no written submission filed in opposition to the appeal in terms of the provisions of Rule 106 (8) of **the Rules**.

On the date when the appeal was called on for hearing before us, the appellant entered appearance in person, legally unrepresented and hence, fended for himself whereas, the respondents enjoyed the services of Mr. Deodatus Nyoni, learned counsel. At the outset, the learned counsel for the

respondents, rose to inform the Court that, after the respondents had failed to lodge their written submission in terms of Rule 106 (8) of **the Rules,** in opposition to the appeal within the prescribed period, they lodged an application, seeking for extension of time within which to file their written submission, vide Civil Application No. 7 of 2017, which was filed on the 13th day of July, 2017. However, the same was yet to be determined. In the circumstance, he sought the indulgence of the Court, to permit him to respond to the grounds of appeal by the appellant orally. The prayer was premised under the provisions of Rule 106 (19) of **the Rules.**

The prayer by Mr. Nyoni, was not objected by the appellant for the obvious reason that, he was a lay man, who could not have anything substantial to chip in, on a matter which was founded on a legal technicality. On our part, we were faced with two options; **first;** either to proceed with the hearing of the appeal *ex parte,* in terms of the provisions of Rule 106 (10) of **the Rules**, which however, would not be fair to the respondents, in view of the fact that, they had already lodged their application for extension of time since July, 2017. Or, **two**; we had to adjourn the hearing of the appeal, to await the outcome of the respondents' application for extension of time.

After giving a deep thought to the situation, we were of the settled mind that, the circumstances pertaining to this appeal, squarely fell within the purview envisaged under the provisions of Rule 106 (19) of **the Rules**, which stipulate that:

> *"The Court may, where it considers the circumstances of an appeal or application to be exceptional, or that the hearing of an appeal must be accelerated in the interest of justice, waive compliance with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions, either wholly or in part or reduce the time limits specified in this Rule to such extent as the Court may deem reasonable in the circumstance of the case.".*

In that regard, we granted the prayer by Mr. Nyoni, to resist the appeal for the respondents orally. For that matter, we invited the appellant to address us on his grounds of appeal.

After taking the floor, the appellant requested us to adopt his written submission which he had earlier on lodged as pointed above, with nothing more to add in the submission in chief.

What could be gleaned from the written submission of the appellant is that, all the three grounds of appeal were argued together due to the fact that, they all hinged on the issue of evaluation of the evidence, which was relied upon by the appellant, during trial of the suit. Generally, the appellant argued in his written submission that, there was ample evidence, which was led by the appellant to establish that, the first respondent was moved by malice, to report him to the police that he had received stolen bags of maize and thereby, leading to his being arrested and prosecuted.

Placing reliance on the decision of the High Court in **Jeremiah Kamama Vs Bugomola Mayandi** [1983] TLR 123, the appellant submitted that the first appellate Judge, erred to reverse the finding of the trial court because, the four ingredients named in the case of **Jeremiah Kamana** (supra), were established, that is; one, the appellant was prosecuted; two, the proceedings ended in his favour; three, the first respondent instituted the proceedings against the appellant without reasonable and probable cause; and four, the appellant suffered damages as a result. He thus invited us to find merit in his appeal, and that we be pleased to reverse the finding of the first appellate Judge, and in lieu thereof, uphold the finding of the trial magistrate with costs.

In rebuttal, the learned counsel for the respondents firmly argued in support of the decision of the first appellate Judge, asserting that the appeal by the appellant, was misconceived. He strongly persuaded us to agree with the finding of the first appellate Judge, because it was very elaborative as to why, the claim by the appellant was unfounded. Mr. Nyoni referred us to page 101 of the record of appeal, where the first appellate Judge, gave reasons as to why she was of the firm view that the circumstances that led to the arrest and prosecution of the appellant, was not moved by evil mind of the first respondent.

In his efforts to persuade us to join hands with the views of the first appellate Judge, the learned counsel referred us to the writings of Indian Authors, in a book titled T**he Law of Torts by Ratantal and Dhirajlal** 24th Edition 2002, at page 317, where the meaning of reasonable and probable cause has been expounded in detail as contained in the holding of the High Court of Tanzania, in **Amina Mpimbi Vs Ramadhani Kiwe** [1990] TLR 6. Even though the said decision was of the High Court, he persuaded us to find it to be good law and apply it.

The learned counsel further challenged the submission of the appellant wherein, he submitted that, since the appellant was acquitted in the criminal proceeding, then, that was sufficient proof to establish that he was maliciously prosecuted and hence, entitled to damages as held by the trial court. He argued that, an acquittal in criminal proceedings, cannot be a basis to institute civil proceedings for malicious prosecution. To back up his argument, reference was again made to **The Law of Torts by Ratantal and Dhirajlal** (supra) at page 319, where the authors have argued that, the dismissal of criminal prosecution or acquittal of an accused, does not create any presumption of absence of reasonable and probable cause. This is indeed what the Court said in **Edward Celestine and others Vs Deogratias Paulo** [1982] TLR 347.

On the basis of what has been highlighted above, the learned counsel invited us to sustain the arguments which have been made on behalf of the respondents, and as such, we be pleased to dismiss the appeal by the appellant for want of merit. He further implored us to condemn the appellant to bear the costs of this appeal.

The appellant had nothing in rejoinder. He only reiterated what is contained in the submission in-chief that, there was strong evidence to establish his claim as held by the trial court. He therefore urged us to allow his appeal, so as to let him get paid what was ordered by the trial court. He also asked for costs of this appeal.

The thrust on us in the light of the submissions from either side above, is whether or not, there was sufficient evidence in the decision that was reversed by the first appellate Judge, to establish the claim for malicious prosecution against the first respondent. As it was held by this Court in **Paul Valentine Mtui and Another Vs Bonite Bottlers Limited,** Civil Appeal No. 109 of 2014 (unreported), where its previous decision in **Yonnah Ngassa vs Makoye Ngassa** [2006] TLR 2006, was referred, for the claim of damages arising from malicious prosecution to stand, there must exist cumulatively five elements namely, **one**, that the plaintiff must have been prosecuted; **two**, the prosecution must have ended in the favour of the plaintiff; **three**, the defendant must have instituted the proceedings against the plaintiff without reasonable and probable cause; **four**, the defendant must have instituted the proceedings against the plaintiff maliciously; and

five; the plaintiff must have suffered damages as a result of the prosecution.

The bone of contention before the first appellate Court, which is also the case before this Court, is whether or not, the above named elements existed in the suit by the appellant. We are going to examine the existence of each element from the available evidence as contained in the trial court's record.

To start with, it is common knowledge that, the appellant was prosecuted vide criminal case No. 212 of 2004, for allegedly receiving property which had been stolen from the premises of the first respondent. There was also no dispute to the fact that, the said criminal proceedings, terminated in favour of the appellant. We also have no reason, to doubt the contention by the appellant that, as a result of the criminal proceeding which was preferred against him, he suffered some damages. In that regard, the first, second and fifth elements named above, did exist in the appellant's suit.

Our next examination is in regard to the third element that is, as to whether or not, the defendant instituted the criminal proceedings against

the appellant without reasonable and probable cause. We are strongly persuaded by the writings of the learned authors **Ratantal and Dhirajlal in the Law of Torts** (supra) at page 317, which we adopt that, the defence of reasonable and probable cause, can be availed by an accuser (defendant), upon establishment of four factors namely:

> ***One****; an honest belief of the accuser in the guilt of the accused (plaintiff);*
>
> ***Two;*** *Such belief must be based on an honest conviction of the existence of circumstances which led the accuser to that conclusion;*
>
> ***Three;*** *the belief as to the existence of the circumstance by the accuser, must be based upon reasonable grounds that, such grounds would lead to any fairly cautious person in the accuser's situation to believe so.*
>
> ***Four;*** *the circumstance so believed and relied on by the accuser, must be such as to amount to a reasonable ground for belief in the guilt of the accused person.*

As earlier pointed out above, the first respondent herein, was a victim of theft of his bags of maize, which moved him to report the incident to the village executive officer. In turn, the village executive officer, reported the incident to the police. There was also ample evidence on record to establish

that, the prior investigation that was made by the police, led to the arrest of Francis Tarimo and Fraterne Vicent Mtei, both of whom admitted to have been behind the theft, and named the appellant to be the one, to whom they sold the stolen bags of maize.

We are alive as to who becomes a prosecutor, when the issue of malicious prosecution comes in as it was held in **Jeremiah Kamana's** case (supra) that, is a person who takes steps with a view of setting in motion legal processes for the eventual prosecution of the plaintiff. While the first respondent was indeed the one who set in motion the machinery of law enforcement leading to the arrest and prosecution of the appellant, we note from the scenario indicated above that, the act which was done by the first respondent, would have been done by any other ordinary person in the ordinary course of life. In that regard, we hold that the first respondent had all the reasons to do what he did. There was no way in which under the circumstances, it could be said that, in doing what he did, the first respondent had no reasonable and probable cause. To that end we hold that, the third element did not exist in the appellant's suit.

In regard to the existence of the fifth element that is, as to whether or not there was malice, we are aware that, the malice referred to in malicious prosecution that, is not malice in the legal sense, that is, such as may be assumed from a wrongful act done intentionally. To the contrary, it is *malu animus* meaning, being actuated by ill spite or ill-will. What we had to ask ourselves, is as to whether in reporting the incident leading to the arrest and prosecution of the appellant, the first respondent was actuated by a genuine desire to bring to justice the appellant. Our answer is in the negative for the reasons which we are going to give hereunder:

First, at the time when the first respondent was reporting his stolen bags of maize to the village executive officer, he was not in the position to know if the appellant would be among the suspects. This is so from the fact that, the appellant was brought into the incident arising from the stolen bags of maize, by Francis Tarimo and Fraterne Vicent Mtei, who named him. **Second**; there was no any testimony by the appellant to suggest as to how the first respondent was actuated by ill-will or motive, to involve the appellant in the incident of the stolen bags of maize.

In view of the foregoing account, we hold that, the third and fourth elements required in establishing the prosecution for malicious prosecution, were not met. And the fact that, the prosecution would only stand if all elements had cumulatively been established, we are of the settled mind that, the learned first appellate Judge, was correct and justified to reverse the decision of the trial court, which had awarded damages to the appellant against the respondents. We uphold the decision of the first appellate Court, the consequence of which, is to dismiss the appeal with costs.

Order accordingly.

DATED at **ARUSHA** this 9th day of October, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL