IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J. A., MWAMBEGELE, J. A. And MWANDAMBO, J. A.)

CIVIL APPEAL NO. 201 OF 2017

MARTIN KIKOMBE..... APPELLANT

VERSUS

EMMANUEL KUNYUMBA ..... RESPONDENT

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

(Kihwelo, J.)

dated the 30th day of June, 2016
in
DC Civil Appeal No. 5 of 2015
.....

JUDGMENT OF THE COURT

8th & 13th May, 2020

MWANDAMBO, J.A.:

This appeal traces its origin in a suit founded on the tort of malicious prosecution which the appellant unsuccessfully instituted before the District Court of Njombe. On appeal, the High Court, sitting at Iringa found no merit in the suit. It dismissed it hence this second appeal predicated on three grounds of appeal.

The facts giving rise to the appeal discerned from the record of appeal, show that the plaintiff stood charged in the Primary Court of Njombe at Makambako for the offence of property destruction at the instance of the respondent. The Primary Court convicted the appellant. His appeal to the District Court at Njombe did not succeed, for that court dismissed it in a judgment handed down on 3rd August, 2010 in Criminal Appeal No. 1 of 2010. The record also shows that the appellant stood charged before the District Court of Njombe for malicious damage to property in Criminal Case No. 41 of 2010. He was again found guilty and convicted accordingly in a judgment delivered on 30th May, 2011. It would appear the appellant preferred an appeal against that judgment to the High Court but took no steps against the verdict against him in Criminal Appeal No. 1 of 2010.

Subsequently, the appellant instituted a suit the subject of this appeal before the District Court in Civil Case No. 20 of 2014 for malicious prosecution. In his plaint (at para 5) the appellant alleged that the High Court had acquitted him in Criminal Appeal No. 32 of 2011 but he did not annex a copy of the decision. Neither did he tender any during the hearing. Whilst admitting that he was behind the institution of the criminal cases,

the respondent disputed the appellant's claims in his written statement of defence contending that the convictions against him had never been quashed by any court.

At the end of the trial, the District Court dismissed the appellant's suit upon being satisfied that he had not proved the essential ingredients in a suit founded on malicious prosecution particularly, proof that the Criminal prosecution terminated in his favour. Dissatisfied, the appellant appealed to the High Court. Grounds 1 and 3 before the first appellate court faulted the trial court for not holding that the respondent prosecuted the appellant without reasonable or probable cause actuated by malice. Ground 2 in the memorandum of appeal before the High Court challenged the District Court for not holding that the criminal prosecution ended in the appellant's favour. The High Court (Kihwelo, J.) found no merit in all of the grounds of appeal before it.

In particular, the first appellate court concurred with the trial court that there was no evidence of criminal prosecution being terminated in the appellant's favour contrary to his contention relying on exhibit DE2 which indicated that he was convicted and sentenced by the District Court.

Believing that the two courts below erred in their decisions, the appellant preferred the instant appeal faulting the High Court for dismissing his appeal on three grounds of appeal namely; **one**, failure to re-evaluate evidence adduced by the parties during the trial; **two**, erroneous interpretation and application to the case principles governing malicious prosecution; and, **three**, failure to ascertain properly the facts of the case before the trial court.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent had the services of Mr. Michael Joachim Kisakali, learned advocate.

Being a layperson, the appellant did not have much to submit. He complained generally that he was acquitted by the High Court but admitted that a copy of the judgment acquitting him was not made part of the record, neither was it produced in evidence during the trial. With that, he urged the Court to consider his grounds in the memorandum of appeal in his favour and allow the appeal with costs.

Mr. Kisakali stood firm resisting the appeal urging the Court to uphold the judgment of the first appellate court which dismissed the appellant's

appeal. The learned advocate argued grounds 1 and 3 together. The essence of the learned advocate's submission on the combined grounds was that the High Court rightly held that the appellant did not establish a case founded on malicious prosecution on the strength of decided cases. The learned advocate invited us to dismiss the two grounds on the strength of the cases included in the list of authorities he had filed earlier on. Additionally, Mr. Kisakali drew to our attention the fact that this is a second appeal in which the Court has held in numerous cases against interference with the concurrent findings of the two courts below. However, he could not cite any particular case and instead, he sought to refer to a decision of the High Court in **Bushangila Ng'oga v. Manyanda Maige** [2002] T.L.R. 333.

In relation to ground two, Mr. Kisakali argued that contrary to the appellant's contention, the first appellate court properly applied the principles in determining cases founded on malicious prosecution on the strength of case law. He cited to us our decision in **Yona Ngasa v. Makoye Ngasa** [2000] T.L.R. 215 at p. 217 which underscored the ingredients to be proved in order to succeed in cases founded on malicious prosecution. In this case, the learned advocate argued, the appellant failed

to prove that the criminal prosecution ended in his favour, the prosecution was taken without unreasonable or probable cause and that in setting the legal machinery in motion, the respondent did so with malice. Counsel invited us to dismiss this ground and the appeal with costs.

When called upon to rejoin, the appellant had nothing in rejoinder.

Having examined the grounds of appeal and heard both the appellant and the respondent's learned advocate resisting the appeal, we now turn to consider the merits or demerits of the appeal in the light of the submissions, facts and evidence gleaned from the record of appeal. However, before doing that we find it apposite to preface our discussion with the obvious principles which will guide us in determining the appeal.

The first relates to the extent to which the court sitting on a second appeal such as this one can go. It is settled law that a second appellate court's power to interfere with concurrent findings of the courts below is limited to situations where it is plain that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. There is a thick wall of authorities on this settled legal position exemplified by;

Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel [1980] TLR 31, **Neli Manase Foya v. Damian Mlinga** [2005] T.L.R 167, **Aloyse Maridadi v. R.**, Criminal Appeal No 208 of 2016, **Wankuru Mwita v. R**, Criminal Appeal No. 219 of 2012 (unreported) cited in **Daimu Daimu Rashid @ Double D. v. R**- [2019]TZCA 377 at www.tanzlii.org, to mention but a few. In **Neli Manase Foya** (supra), the Court had the following to say:

> *"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."*

The second principle relates to what it takes to succeed in a case founded on the tort of malicious prosecution. Settled law has it that to succeed in the suit, the plaintiff has to prove the existence of four elements constituting his course of action cumulatively. One, that he was prosecuted

by the defendant in criminal proceedings, two, the defendant acted without reasonable or probable cause in initiating, prosecuting and/or continuing criminal proceedings, three, the defendant acted with malice and four, the criminal proceedings terminated in the plaintiff's favour. See for instance: **Yohana Ngasa** (supra**), James Funke Gwagilo v. Attorney General** [2004] T.L.R 161 cited in **Shadrack Balinago v. Fikiri Mohamed @ Hamza @ 2 others,** Civil Appeal No. 223 of 2017 (unreported). These are among the cases appearing in the respondent's list of authorities Mr. Kisakali invited us to apply in dismissing the appeal.

Having regard to the foregoing, we now turn our attention to grounds 1 and 3 in the memorandum of appeal. Our examination of the record shows that the trial court (at pp. 71, 72 & 73) was alive to the law as it relates to malicious prosecution. It answered the first issue affirmatively and found that the respondent prosecuted the appellant in criminal case No. 41 of 2010. However, it found no evidence proving that criminal case No. 41 of 2010 terminated in the appellant's favour. As to the appellant's claim that the High Court quashed that judgment, the District Court found as a fact that no proof of any such assertion was laid before it despite the appellant being adamant that that was so placing reliance on

exhibit DE4; a judgment of the District Court in criminal case No. 41 of 2010 convicting the appellant.

In relation to whether the respondent had probable or reasonable cause in initiating criminal prosecution against the appellant again, the trial court answered it affirmatively relying on the uncontroverted evidence from the respondent who testified as DW1 corroborated by three other witnesses. According to the trial court, there was ample evidence proving that the appellant had willfully damaged fruit trees belonging to the respondent and hence he had reasonable and probable cause to initiate and continue the prosecution of the appellant in criminal case No. 41 of 2010. Having held that the respondent was justified in initiating criminal proceedings against the appellant, the trial court found no reason to determine the issue relating to existence of malice, rightly so in our view.

The High Court concurred with the finding of the trial court and stated:

> *"It can be gleaned from the evidence on record that the only documentary evidence to prove that the appellant was prosecuted in exhibit DE4 which however, did not indicate that the appellant was*

acquitted and [on] the contrary, Exhibit "DE4" revealed that the appellant was convicted and sentenced accordingly." (At P. 94 of the record).

Without saying in many words, the first appellate court concurred with the trial court that the appellant failed to adduce satisfactory evidence proving unity of four elements required to be proved in a case for malicious prosecution having regard to its decision in **Edward Celestine & Others v. Deogratias Paulo** [1982] TLR 347. Apparently, despite admitting that the alleged decision of the High Court quashing conviction in criminal case No. 41 of 2010 was not part of the record, the appellant was adamant that the High Court and the trial court denied him justice for not relying on a decision which was, nonetheless, not part of the evidence before the trial court.

In view of the clear evidence on record relied upon by the trial court in dismissing the suit which was sustained by the first appellate court guided by the Court's previous decisions, particularly; **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores** (supra) and **Neli Manase Foya** (supra), we cannot disturb the concurrent findings of both courts below. This is so because first, the only evidence on record is that

the appellant was convicted by the District Court in Criminal Case No. 41 of 2010 and as rightly held by the High Court, the appellant failed to produce documentary evidence by way of a decision of the High Court quashing his conviction. That means, the appellant did not prove that the criminal proceedings terminated in his favour as rightly found by the courts below. Secondly, both courts below were alive to and correctly applied the law as it relates to suits founded on malicious prosecution. As hinted earlier, there was no evidence proving that the respondent acted with reasonable and probable cause in initiating criminal prosecution against the appellant [pp. 72 and 73 of the record].

In our view, even assuming there was evidence proving that the criminal proceedings terminated in his favour, the appellant's case could not have succeeded because he failed to prove that the prosecution of him was without reasonable or probable cause which negated the existence of any malice. The appellant has not gone beyond complaining against the two courts below for not relying on a decision of the High Court which allegedly acquitted him which was not produced in evidence. With the foregoing discussion, we endorse the submissions by Mr. Kisakali in grounds 1 and 3 argued together and dismiss them for lack of merit.

The complaint in ground 2 is equally destitute of merit. Despite his general assertion, the appellant did not go further justifying in what way the two courts below misinterpreted the principles governing suits founded on malicious prosecution. Quite the reverse, as rightly submitted by Mr. Kisakali, both courts correctly applied the principles established through case law to the facts. Both courts referred to **Hosia Lalata v. Gibson Zumba Mwasote** [1980] TLR 154 which discussed eloquently the principles applicable in the cases founded on malicious prosecution. It will be noted that this Court subscribed to **Hosia Lalata** (supra) in **Shadrack Balinago** (supra). In addition, the High Court relied on **Edward Celestine & Others** (supra) which underscored the obligation by the plaintiff to prove the existence of four elements in malicious prosecution cases. We have not found anything in this case suggesting that the High Court applied a wrong principle or misinterpreted the established principles in dismissing the appellant's appeal before it. The upshot of the foregoing is that this ground is likewise devoid of merit and we dismiss it.

In conclusion, the appeal lacks merit and we dismiss it in its entirety. The respondent shall have his costs.

Order accordingly.

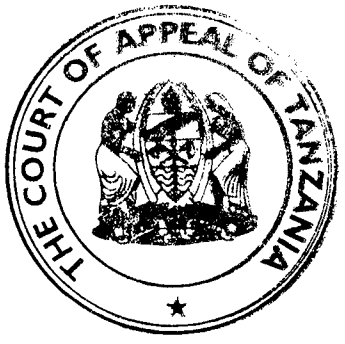
DATED at **IRINGA** this 12th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 13th day of May, 2020 in the presence of the Appellant in person and Mr. Michael Joachim Kisakali, learned advocate for the Respondent is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL