**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)**

**CIVIL APPEAL NO. 176 OF 2018**

**MASOUND ISSA SUNGURA .....1ST APPELLANT**
**BENJAMIN MALLIONOS ..... 2ND APPELLANT**
**DANIEL MBWAMBO ..... 3RD APPELLANT**
**ABDALLAH MANDA ..... 4TH APPELLANT**
**RAJABU MOHAMED ..... 5TH APPELLANT**
**THADEUS OMARY ..... 6TH APPELLANT**
**ADAMU KIBATI..... 7TH APPELLANT**
**ELIAS MWAKYELU..... 8TH APPELLANT**
**GIDEON BARONGO..... 9TH APPELLANT**
**JOSEPH SANKA..... 10TH APPELLANT**
**SHANTON MKILINDI ..... 11TH APPELLANT**

**VERSUS**

**SECURITY GROUP (T) LTD ..... 1ST RESPONDENT**
**CLIFTON J.F. DESOUZA ..... 2ND RESPONDENT**

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

**(Massengi, J.)**

**dated the 25th day of October, 2013**
**in**
**Civil Case No. 11 of 2007**

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## JUDGMENT OF THE COURT

29th Nov. & 2nd Dec, 2021

**KENTE, J.A.:**

The appellants Masoud Issa Sungura, Benjamin Mallianos, Daniel Mbwambo, Abdallah Manda, Rajabu Mohamed, Thadeus Omary, Adamu Kibati, Elias Mwakyelu, Gideon Barongo, Joseph Sanka and Shanton

Mkilindi were security guards employed by the first respondent company namely Security Group (T) Limited of which the second respondent Clifton J. F. Desouza was the Arusha Branch Manager. Following a frosty relationship between the appellants and their employer which, as days went by without a lasting solution escalated into a serious labour dispute, the appellants were arrested and subsequently charged with the offence of written threats to murder contrary to section 214 of the Penal Code, Cap. 16 R.E. 2002 (now 2019). That was in Criminal Case No. 298 of 2004 before the District Court of Arusha.

The particulars of the offence alleged that on the 10th March, 2004 at about 11.00 a.m., at Unga Limited area within the then Arusha Municipality, without any lawful excuse, the appellants caused the second respondent to receive a letter threatening to kill him. After a full trial, the appellants were found not guilty and thereupon, according to law, they were acquitted.

Upon acquittal deploying the professional services of Mr. Ezra Mwaluko learned advocate, the appellants sued the respondents before the High Court of Tanzania at Arusha (vide Civil Case No. 11 of 2007) in an action for malicious prosecution claiming the following reliefs:

a) Special damages amounting to TZS.9,960,000.00 for loss of half monthly salary.
b) TZS. 6,500,000.00 being money paid as advocate's instruction fees.
c) TZS.100,000,000.00 being general damages for mental and bodily pains together with loss of reputation.
d) TZS.250,000,000.00 being punitive, examplarly or aggravated damages;
e) Interest at the bank rate of 25% on prayers (a), (b) and (c); above from the date of the cause of action to the date of payment in full; and
f) Interest on prayers (a), (b) and (c) above at the rate of 7% per annum from the date of judgment to the date of final payment.

In their joint defence, the respondents totally denied to have acted maliciously in reporting the threats to murder to the police. They also maintained that the report was made upon reasonable and probable cause in view of the circumstances then obtaining at the appellants' and second respondent's workplace. While blaming the appellants for accusing him with racism allegedly calling them monkeys, the second respondent maintained in the pleadings that, he was acquitted of the offence of using abusive language with which he stood charged in Criminal Case No. 296 of 2004 before the same District Court.

After hearing the evidence and the legal arguments from both sides, the learned Judge of the trial court (Massengi, J) was not convinced by the appellants' case. She found that the second respondent did not act maliciously when he reported to the police the written hint of murder which he had received. Instead Massengi, J was impressed by the evidence led by the second respondent so she found that he was justified in reporting the threats to the police. The learned trial Judge was therefore satisfied in the first place that, the prosecution of the appellants was not done by the first respondent and that, even though, it was instituted with a probable and reasonable cause. To that end, she went on dismissing the appellants' claim for lack of merit.

The appellants were aggrieved by this decision, hence this appeal. Through Mr. Mwaluko learned counsel, they have submitted four grounds of disapproval, which, put in other words are that:

1. The learned trial Judge erred both in law and in fact by holding that the appellants were not prosecuted by the first respondent.
2. The learned trial Judge erred in law and in fact by holding that the prosecution of the appellants in Criminal Case No. 298 of 2004 before the District Court of Arusha was not done maliciously.

3. The learned trial Judge erred in law and in fact in holding that the prosecution of the appellants was done with reasonable and probable cause.
4. The learned trial Judge erred in law and fact by holding that the appellants were not entitled to general damages.

As earlier indicated, before this Court, the appellants were represented by Mr. Mwaluko learned advocate. On the other hand, the respondents deployed the professional legal services of Mr. Emmanuel Safari learned advocate to resist the appeal.

Going by the proceedings and the judgment of the trial court together with the submissions made by Mr. Mwaluko, it is the appellants' contention in this appeal that they were prosecuted by the respondents on the charges which were made maliciously without any reasonable or probable cause. In their memorandum of appeal as expounded upon by Mr. Mwaluko who in terms of Rule 106 (1) of the Court Rules, 2009, had filed his written arguments on, 13th October, 2017, the appellants criticized the finding by the trial court and submitted in effect that, the evidence adduced during the trial was sufficient to prove on a balance of probabilities that they were prosecuted by the first respondent. According to Mr. Mwaluko, if the learned trial Judge had carefully and properly

considered the evidence on the record, she would not have arrived at the impugned decision. The learned counsel posed three questions which, he said, were not answered by the evidence from the respondents' side to warrant the prosecution of the appellants in Criminal Case No. 298 of 2004. To rephrase, the said questions which the learned counsel found puzzling are:

1. Why did the respondents (then defendants) not produce the original document which was tendered for identification and marked as $ID_1$ allegedly containing the threatening words if they really received it?
2. Why did the respondents not conduct a proper inquiry to verify if it was the appellants who authored the threat-letter before reporting to the police? and
3. Why did the respondents not lead any evidence of having received the said letter by post as alleged.

Submitting further, Mr. Mwaluko maintained that the trial Judge strayed into error when she held that the appellants were not prosecuted by the first respondent while the alleged letter was addressed to the Managing Director of the first respondent whose one of the Directors accompanied the second respondent to report the incident to the police. Quoting some parts from the testimony of the said Managing Director one Stewart Joseph Malya who testified as DW2 and admitted to have gone

with the second respondent to the police station while believing that all the appellants were involved in the writing of the disputed letter, Mr. Mwaluko was insistent that the trial Judge was wrong to hold as she did that, the appellants were not prosecuted by the first respondent and that, their prosecution was not driven by malice. The learned counsel submitted further that, for the same reasons, the holding by the trial Judge that the prosecution of the appellants in Criminal Case No. 298 of 2004 was done with reasonable and probable cause, was equally erroneous. The learned counsel for the appellants referred us to our decision in the unreported case of **Sunflag (T) Ltd v. Yerome Wambura and Four Others,** Civil Appeal No. 39 of 2005 in support of the proposition that, though not always, where there is no reasonable and probable cause, there will be malice. He also relied on the case of **African Gem Mining Ltd v. Andrew Natai,** Civil Appeal No. 16 of 2010 (unreported) in which we held inter alia that, in the light of the evidence on record indicating that DW1 initiated the arrest, detention and prosecution of the appellant on suspicion, and because he was arrested, searched and nothing was found on him, we agree with the learned Judge that the respondent was falsely imprisoned.

With regard to the fourth ground of appeal which faults the trial Judge for holding that the appellants were not entitled to general damages, it was Mr. Mwaluko's contention that the appellants were entitled to special, general and punitive or exemplary damages given that they had led sufficient evidence, proving on a balance of probability, that they were maliciously prosecuted by the first respondent without any reasonable and probable cause. It was further contended that, all the five ingredients of the tort of malicious prosecution were established in this case and on that account, the trial Judge erred both in law and in fact for not awarding the damages as pleaded in paragraph 11 of the plaint. On this point, Mr. Mwaluko placed reliance on our holding in **Tanzania Breweries Ltd v. Charles Msuku and Another,** Civil Appeal No. 18 of 2000 (unreported) where the learned counsel says the Court held that, to deny a remedy to a person whose liberty has been interfered with as a result of unfounded and malicious accusations in such circumstances, would constitute a serious denial of justice.

Taken as a whole, the gist of Mr. Mwaluko's submissions was that the appellants' case was proven to the required standard since, he argued, the five ingredients of the tort of malicious prosecution were established by the evidence on the record. It was the learned counsel's final

submission that the appeal before us was not without merit and therefore he urged for the same to be allowed with costs.

In opposing the appeal, Mr. Safari learned counsel for the respondents submitted in respect of the first ground that, the evidence on the record does not show that it is the first respondent who reported the written threats incident to the police and therefore the learned trial Judge was justified to hold that the appellants were not prosecuted by the first respondent. With regard to the second and third grounds of appeal which fault the trial Judge for finding and holding that the prosecution of the appellants was not done maliciously and that it was done upon reasonable and probable cause, Mr. Safari submitted that the trial Judge made a correct finding in view of the aggravated state of animosity that existed between the appellants on one hand and the second respondent on the other hand. It was further argued and we think correctly so that, the contention that the appellants were prosecuted by the first respondent was moot for the reason that the appellants' counsel had himself admitted in his written submissions that it is the second respondent who reported the incident to the police. Elaborating on the compelling circumstances which caused the second respondent to report to the police, Mr. Safari told the Court that the appellants had locked the

said respondent out from 9th to 27th February, 2004 and that the lock-out incident was reported to the Arusha District Commissioner who objectively advised the second respondent to report it to the police. With regard to the disputed letter, the learned counsel for the respondents submitted that it was copied to several people including the Regional Labour Officer one Raphael Albert Millinga who testified as DW1. Mr. Safari challenged the appellants for not tendering the statement of the second respondent to the police which, according to the learned counsel, would have shown if the second respondent had no reasonable and probable cause in reporting the threats to the police as alleged.

In ground number four, it was Mr. Safari's stance that, the tort of malicious prosecution was not proven to the required standard and as such, the appellants could not be awarded damages. All in all, counsel for the respondents maintained that the appeal before us had no merit and he therefore prayed for its dismissal with costs.

Mr. Safari relied on the following cases in support of his arguments: **Wilbard Lemunge v. Father Komu & The Registered Trustees of the Diocese of Moshi,** Civil Appeal No. 8 of 2016, **Ally R. Mhando v. Attorney General & Another,** Civil Appeal No. 61 of 2003, **Lwitiko Mwakabuta v. Nineme Mwakang'ata,** Civil Appeal no. 18 of 2020 HCT

at Mbeya, (all unreported) and **William Chamafwa v. Eransis Bitegeko** [1975] LRT n.36.

We have carefully gone through the evidence on the record and in particular the judgment of the trial court. We also have in mind the arguments in support and opposition to the four grounds of appeal. In view of the undisputed fact that the appellants were unsuccessfully prosecuted in Criminal Case No. 298 of 2004 before the Arusha District Court in which the 2nd respondent was the complainant, it is our opinion that the cross-cutting issues of malice and lack of reasonable and probable cause on the part of the respondents are cardinal to the determination of this appeal.

Now, as it was held in England way back in the 19th Century, the position of the law is essentially that:

> *"Before charging a prisoner, a police officer must have 'an honest belief in the guilty of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser to the conclusion that the person was probably guilty of the crime imputed'. Once a plaintiff has*

*established his imprisonment, the onus then lies on the defendant to "plead and prove affirmatively the existence of reasonable cause."*

The above-quoted passage was the message of Justice Hawkins regarding the defence of reasonable and probable cause as given in **Hicks v. Faulkner** (1878) 8 QBD 167. (see also **The Law of Torts by Ratantal and Dhirajlal** 24th Edition at pg 317, **Amina Mpimbi v. Ramadhani Kiwe** [1990] TLR 6 and **Wilbard Lamunge** (supra). Needless to say, we find the above-quoted extract to be good law and we shall apply it to the instant case.

With regard to the question as to whether or not there was malice in the prosecution of the appellants, the law is as clear as stated in the case of **Wilbard Lamunge** (supra) that, the malice referred to in malicious prosecution cases, is not malice in the legal sense, that is, such as may be assumed from a wrongful act done intentionally. Rather it is ***malu animus*** meaning, being actuated by ill spite or ill-will. It follows therefore that, in an action for malicious prosecution, the plaintiff is saddled with a duty to prove to the satisfaction of the court, among other things, that the defendant had another motive other than that of bringing an offender to justice. In that view, what we have to determine in this case is whether, in reporting the written threats incident to the police

which led to the appellants' arrest, prosecution and acquittal, the respondents, had no reasonable and probable cause rather they had the intention to cause harm or suffering to the appellants without any legal justification or excuse. Put in other words, the question is whether the appellants were prosecuted in the criminal case merely because of the respondents' hostile impulse or out of their deep-seated meanness.

We have examined the evidence led by both parties before the trial court. As it will be noted, it is common ground that the appellants who were employed by the first respondent company were under the leadership of the second respondent who was the first respondent's Arusha Branch Manager. While the respondents accused the appellants of writing a letter containing threats to murder the second respondent, similarly, the appellants accused the second respondent of calling them monkeys. Accordingly, at the time which was contemporaneous with the prosecution of the appellants, the second respondent was also charged with but subsequently found not guilty and acquitted of the offence of using abusive language in Criminal Case No. 296 of 2004 which was before the same District Court of Arusha. But before they got there, the evidence shows that the appellants and the second respondent had gone through an entangled relationship at their place of work. As stated before,

the appellants had locked out the second respondent for close to eighteen days consecutively, while pressing for his removal from the office for allegedly being scornful of the black employees.

In an unexpected turn of events, rather than being a labour dispute between the appellants and their employer, steadily the dispute became concerned with personalities in which the appellants were the accusers and the second respondent was singled out as the accused. According to the evidence on the record, as the concerted efforts between the appellants' workers organization and the management of the first respondent to have the dispute resolved barely moved beyond talks, the second respondent became scared ostensibly believing himself to be the unwanted person whom the appellants sought to keep out if not away. The second respondent's fear was compounded when he allegedly received a death threatening letter from the appellants.

While we are mindful to the submission made by Mr. Mwaluko that the letter which was written by the appellants did not contain any threats of murder and that it was cunningly edited by the respondents by inserting the words *"damu itamwagika"* which formed the basis of the second respondent's report to the police, we are of the respectful view that, under these circumstances, it does not require the legal savvy to understand the

second respondent's security predicament. As the dispute seemed likely to escalate into violence, we are of the opinion that, he needed not to wait for some more time so as to report the incident to the law enforcement agency and as one would ask, where else should he have gone if not to the police? And for this, the second respondent cannot be said to have wrongfully or maliciously set the law in motion. While it was argued on behalf of the appellants that there was no reasonable and probable cause to prosecute them, they could not lead any evidence tending to establish, albeit on a balance of probability, the absence of reasonable and probable cause then operating in the minds of the respondents in this case. Moreover, as we have amply demonstrated, put in the position and the situation in which the second respondent found himself, any prudent and cautious man would have quickly reported the incident to the police. As correctly submitted by Mr. Safari, if the victims of crimes who lodge complaints with the police were to be subjected to an action for malicious prosecution, the repression of crime would be incubus.

As the appellants were prosecuted upon reasonable and probable cause without malice, we are satisfied that the learned trial Judge was perfectly entitled to arrive at the conclusion that the action for malicious

prosecution was not proven to the required standard, and if we may add, her decision remains unassailable.

We accordingly find no merit in this appeal and in the circumstances, we hereby dismiss it with costs.

It is so ordered.

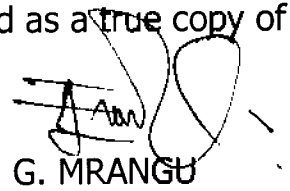
**DATED** at **ARUSHA this** 1st day of December, 2021

A. G. MWARIJA
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

The Judgment delivered this 2nd day of December, 2021 in the presence of Mr. Ezra Mwaluko, learned counsel for the Appellants and Mr. Jeofrey Molel, learned counsel who hold brief for Mr. Emmanuel Safari, for the Respondents, is hereby certified as a true copy of the original.



E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**