IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 299 OF 2020

NORTH MARA GOLD MINE LIMITED.....APPELLANT

VERSUS

JOSEPH WEROMA DOMINIC .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Musoma

(Kahyoza, J)

Dated the 3rd day of June, 2020

in

Civil Case No. 4 of 2019

JUDGMENT OF THE COURT

29th November, 2021 & 26th January, 2022

WAMBALI, J.A.:

The respondent, Joseph Weroma Dominic was employed as an underground miner by Byrnecut Offshore Tanzania Limited, a subcontractor company that provided underground mining services at the appellant's, North Mara Gold Mine Limited premises at Nyamongo. The circumstances which gave rise to the respondent's decision of lodging Civil Case No. 4 of 2019 before the High Court of Tanzania at Musoma was due to the alleged

appellant's allegation concerning his involvement in the theft of gold bearing materials weighing eleven (11) kilograms valued at TZS. 26,700,000.00. Consequent to the allegation, the respondent was arrested by the police and prosecuted at the District Court of Tarime together with his fellow employees.

The respondent contended further that though he was not among the employees on duty that day, that is, 23rd June, 2015, following his arrest and consequent prosecution, his access card to the site was revoked by the appellant and ultimately, his employment was terminated on 28th July, 2015 by his employer.

As it turned out, at the height of the prosecution case before the District Court of Tarime, the respondent was found with no case to answer and was thus acquitted in Criminal Case No. 336 of 2015. In the circumstances, as alluded to above the respondent instituted Civil Case No. 4 of 2019 before the High Court (the trial court) in which he claimed the following reliefs: TZS. 424,222,074.45 as special damages; general damages to be assessed by the trial court; 12% interest on the decretal sum from the date of the judgment to the date of full payment; costs and any other relief the trial court would have deemed fit and just to grant.

The respondent's claims were strongly contested by the appellant through the written statement of defence that was lodged at the trial court. It is noteworthy that at the trial the following issues were framed: first, whether or not the defendant (appellant) maliciously prosecuted the plaintiff (respondent); second, whether the defendant acted without reasonable and probable cause; third, whether the plaintiff suffered damages; and fourth, to what reliefs are the parties entitled to.

The respondent's case was supported by himself as PW1 and one Jackson Gabriel Musaroche, his fellow employee, as PW2. On the adversary side, the appellant summoned Enock Alex Nguka (DW1) and Scholastica Kubonge (DW2).

At the end of the trial, after considering the evidence of both sides, the learned trial judge decided in favour of the respondent. Particularly, he awarded the respondent: TZS. 100,000,000.00 and TZS. 15,016,710 as general and special damages respectively; 7% interest per annum from the date of judgment to the date of full payment and costs of the suit.

It is thus against the judgment and decree of the trial court that the appellant has approached the Court armed with a memorandum of appeal comprising ten grounds of appeal reproduced hereunder: -

"1. That Trial Court erred in law and in fact in holding that the Respondent was prosecuted by the Appellant in the absence of evidence to that effect.

2. The Trial Court erred in law and in fact in holding that there was no reasonable and probable cause for prosecuting the Respondent.

3. The Trial Court erred in iaw and in fact in finding that there was malice on part of the Appellant.

4. The Trial Court erred in law and in fact in shifting the burden of proof to the Appellant.

5. The Trial Court erred in law and in fact in determining the fairness of the Respondent's termination of employment.

6. The Trial Court erred in law and in fact in awarding specific damages to the Respondent based on unfair termination of employment.

7. The Trial Court erred in awarding excessive specific damages which were not proved.

8. The Trial Court erred in law and in fact by finding that the Respondent suffered damages for malicious prosecution in absence of evidence to that effect.

9. The Trial Court erred in law and in fact in awarding excessive general damages amounting to Tshs. 100,000,000.00.

10. The Trial Court Judgment is not supported by evidence adduced at the trial."

At the hearing of the appeal, Mr. Faustin Anton Malongo and Ms. Caroline Lucas Kivuyo, learned advocates entered appearance for the appellant; whereas Mr. Alhaji Abubakar Majogoro, also learned advocate, appeared for the respondent. Notably, counsel for the parties adopted their respective written submissions they had earlier on lodged in Court in support of their respective positions for and against the appeal.

Submitting in response to the first ground of appeal, Mr. Malongo argued that the trial judge wrongly concluded in absence of the evidence in the record that the appellant was the complainant in Criminal Case No. 336 of 2015 which ended in favour of the respondent. He submitted that according to the respondent who testified as PW1 at the trial, before he was arrested by the police and charged at the District Court of Tarime, he was summoned by the security guards who were employees of K. K. Security Company who handed him to the police. He added that PW2 who testified for the respondent also confirmed that the respondent joined them

at Police Station Tarime after he was sent by police officers and not the employees of the appellant. Mr. Malongo emphasized further that according to the testimony of DW1 and DW2 the issue of security was manned by the independent security companies, namely, K. K. Security and ASSEY RISK and there were no directions from the appellant on how they should conduct their duty. He thus submitted that the appellant cannot be held responsible of initiating the prosecution of the respondent though the property which was stolen belonged to it. To support his contention, he referred the Court to the decision in an English case of **Honeywill and Stein Ltd v. Larkin Brothers Ltd** (1934) 1KB 191 at page 196 and a paragraph in a book by Clerk and Lindsell on Torts, 17th Edition, Sweet and Maxwell, 1995 at pages 192 – 193. In this regard, Mr. Malongo implored us to allow the first ground of appeal.

In reply, Mr. Majogoro submitted that according to the charge sheet and the judgment which emanated from the record of proceedings of the District Court of Tarime in Criminal Case No. 336 of 2015 which were tendered at the trial court as exhibits PII and PIII respectively, the appellant was a complainant in a case which ended in favour of the respondent. He contended further that according to the evidence of the

respondent (PW1) he was telephoned by the appellant's security guard who directed him to report at the office and when he responded to the request he was interrogated and later handed to the police who was called to take him to the police station. The learned advocate emphasized that the testimony of the respondent is supported by that of PW2 who stated categorically that the respondent was summoned by the appellant's security guards, who handed him to the police after interrogation. He therefore disputed the appellant's counsel submission that the respondent was arrested by the guards from K. K. Security, the independent contractor. Ultimately, he urged us to dismiss the first ground of appeal.

It is noteworthy that in concluding his determination on the issue of the complainant who set in motion the prosecution of the respondent before the District Court of Tarime, the learned High Court judge stated as follows:-

> *"It is trite law that for the purpose of tort of malicious prosecution, a prosecutor is the one who is "actively instrumental in putting law in force...".*

The trial judge then quoted the holding from the decision of the High Court of Tanzania in **Hosia Lalata v. Gibson Mwasote** [1980] T.L.R. 154 to cement his observation on the issue of active involvement in the prosecution of the plaintiff and stated that: -

> *"Applying the above position to the present case, it is clear that the defendant could not act on matters concerning security of her property unless through the company providing security. Thus, for the purposes of malicious prosecution of the defendant company, which was actively instrumental in putting the law in force is construed as the prosecutor. Furthermore, the defendant was a complainant in the Criminal Case involving the plaintiff...*
>
> *Having considered the evidence on record and the rival submission, I find that the defendant prosecuted the plaintiff and the prosecution ended in favour of the plaintiff... I agree with the plaintiff's advocate that there was no evidence to establish that the police charged the plaintiff following their independent investigation. That piece of evidence is hearsay. Had that been true the defendant would have requested the police to give him the plaintiff's co-accused persons' statement and*

produced it before the court. Not only that but also, the prosecution did not call any witness or tender any exhibit to prove the plaintiff's involvement, in the matter before District Court."

We have critically reviewed the evidence in the record of appeal and considered the rival submissions of the counsel for the parties in relation to the findings of the trial court. Firstly, we have no doubt that the respondent was prosecuted and that the prosecution ended in his favour. Secondly, the crucial issue is whether it is the appellant who was actively instrumental in the respondent's prosecution at the District Court of Tarime. It is important to emphasize that this being the first essential element in a suit for malicious prosecution, it was the respondent's duty to prove that he was prosecuted by the appellant. Indeed, in terms of sections 110 and 111 of the Evidence Act, Cap. 6 R.E. 2019 he who alleges the existence of a fact has to prove it and that the burden of proof lies on a person who would fail if no evidence were given at all.

According to the record of appeal, although during examination in chief the respondent maintained that he was summoned and interrogated by the appellant's security guards who later handed him to the police, during cross examination he retreated and stated as follows: -

"It was a security guard who summoned me and handed me to police. It was MOBILE SECURITY COMPANY's employee who handed me to police. I do not know that the security guards were employed by different company. A security guard informed the police that I was in his office. Policemen came and took me to police station. I was arrested by police.

On further cross examination the respondent (PW1) stated as follows:-

"I was arrested by police who were ordered by North Mara. I saw the order in court, written by North Mara. It was not a written notice. North Mara rang police to arrest me. North Mara gave an order to police to arrest me. It was by phone. I do not remember the date of the order. I do not know who signed it."

It is noted that from the reproduced part of the respondent's testimony, there is no firm indication that his arrest by the police was due to the direction of the appellant. We also note that what the respondent stated during cross examination was not stated in his evidence in chief.

On the other hand, according to the testimonies of PW2, DW1 and DW2, while the arrest of the respondent's co-accused emanated from the search conducted by the K. K. Security Company at the appellant's premises on 23rd June, 2015; the respondent was arrested some two days later and charged at the direction of the police. According to PW2, who testified in support of the respondent's case, he was arrested by the security guards along with Majungu Masatu and Mabala on 23rd June, 2015 at the time of leaving the work place on suspicions of having stolen Gold Bearing Materials (GBM), the property of the appellant. PW2 also testified that the respondent was arrested on a later date on Friday by the police and joined them at the police station. PW2 also affirmed that K. K. Security which facilitated the respondent's arrest was an independent company like his employer Byrnecut and that it was normal procedure to be searched at the time of leaving underground.

The evidence of PW2 on the arrest and prosecution of the respondent by the police is in tandem with the evidence of DW1 and DW2, both of whom were employees of ASSEY RISK Company which had contracted the security services to K. K. Security Company and remained with the issues concerning administration and investigation of crimes and

other violations at the appellant's premises. Particularly, DW1 testified that: -

> *"... Other three suspects were arrested after we received directions from the police that those should be arrested and taken to police station. One among the names ordered to be arrested was Mr. Joseph Weroma Dominic. Yes, the additional suspects were found and police informed. Police arrested them.*
>
> *North Mara Gold Mine did not arrest and charge Joseph Weroma Dominic. It was the policeman who arrested and charged. Joseph Dominic was arrested by Police on the ground that his fellow employees were arrested suspected to have stolen Gold Bearing Materials, mentioned him....*
>
> *It was the police which interrogated Joseph Weroma Dominic and others and decided to charge them. A Criminal Case was instituted by the police. Joseph Dominic was not prosecuted by North Mara Gold Mine but by the police force of Tanzania.*
>
> *The police force prosecuted Joseph Dominic because his fellow employees who were found with*

stolen GBM mentioned him. He was mentioned as a facilitator. I got that information from the police, who told me that Dominic was mentioned by his fellow employees."

We note from the record of appeal that the testimony of DW1 on this issue was not seriously challenged by the respondent's counsel during cross examination.

Similarly, the evidence of DW2 also an employee of ASSEY RISK Company affirmed that the respondent was arrested at the request of the Police and they just facilitated by summoning him as per the direction. Specifically, DW2 testified as follows: -

"After two days, the manager told us that one person was required by police. It was Dominic. We summoned him. He was rung by Subulele as he was not at site. Yes, Dominic came and we notified the police who came and arrested him. That was the end of my involvement with the police. Dominic was not employed by North Mara Gold Mine. He was employed by Byrnecut Company. North Mara Gold Mine was not involved in the arrest of Dominic. Dominic was mentioned by the accused persons or suspects who were arrested by K. K. Security. I do

not remember if North Mara Gold Mine instituted any case against Dominic, but I got information that Subulele was summoned to testify."

During cross examination, DW2 testified that: -

"I got information through the control naming sheet. We were informed by investigation manager. Police had no direct communication with Dominic. We got his telephone number from the three suspects who were arrested. We informed the police that Dominic was at our office."

From the foregoing evaluation of the evidence of the parties with regard to the issue of prosecution of the respondent, it is clear that though the GBM which were suspected to have been stolen was the property of the appellant, there is no direct evidence from the respondent side showing that the appellant or his employee was actively instrumental in his arrest and prosecution. Moreover, there is no evidence to show that it was the security company's guards who reported to the police concerning the involvement of the appellant in the alleged theft of GBM. Indeed, though the learned trial judge in his judgment initially, in our view, properly found that "the appellant could not act on matters concerning security of her property unless through the company providing security", yet he held that

"she was actively instrumental in putting the law in force and thus she was construed as a prosecutor".

In this regard, we respectfully hold the firm view that, it was unfortunate for the learned trial judge to have come to that findings by imposing the burden of proof on the appellant to prove that she was not involved and that, she should therefore have shown that it was the police who prosecuted the respondent through their independent investigation. On the contrary, it is trite law that the burden of proof lies on the person who alleges that he was prosecuted by the respective person. Thus, it was the duty of the respondent to prove that it was the appellant who was actively instrumental in prosecuting him at the District Court of Tarime in order to be entitled to succeed in a suit of malicious prosecution.

It is further settled law as stated by the Court in **Yonah Ngassa v. Makoye Ngasa** [2006] T.L.R. 123 where reference was made to a book by Salmond and Heuston on the Law of Torts, 21st Edition at page 393 that 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; and*
4. *That the proceedings terminated in the plaintiff's favour.*

It is equally settled that each of the above listed ingredients must be proved to entitle a party to succeed in the suit for malicious prosecution.

In the present case, as we have sufficiently demonstrated above through the evaluation of the parties evidence in the record of appeal with regard to the first ingredient, there is no dispute that the respondent did not prove that the criminal proceedings at the District Court of Tarime were instituted or instigated and continued by the appellant as held by the trial court. Indeed, there is no evidence from the respondent and his witness (PW2) that it is the appellant or her employee who reported the incident of theft of GBM and directed the police to arrest and prosecute him. It is in this regard that in **Mbowa v. East Mengo Administration** [1972] EA 353 the defunct East Africa Court of Appeal stated that: -

"The plaintiff in order to succeed, all the four essentials or requirement of malicious prosecution; as set out above, have to be fulfilled and that he

has suffered damage. In other words, the four requirement must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action."

Consequently, in the light of what we have deliberated above with regard to the first ground of appeal, we respectfully differ with the finding of the trial court that the appellant was actively instrumental in putting the law in force in prosecuting the respondent. Ultimately, we allow the first ground of appeal.

Admittedly, having found that the first element of proving a suit for malicious prosecution was not proved by the respondent against the appellant, we think it will be a futile exercise to embark on the deliberation and determination of the rest of the grounds of appeal which concern the other elements of malicious prosecution and the disputed reliefs granted by the trial court much as they are essentially linked to the issue of who prosecuted the respondent.

It is our settled view that it was incumbent upon the respondent to first of all prove that the appellant was actively instrumental in his prosecution before embarking on proving the issue of absence of probable

or reasonable cause, presence of malice and entitlement to damages. This is notwithstanding the fact that there is no dispute that the prosecution ended in the respondent's favour.

In the result, we allow the appeal with costs.

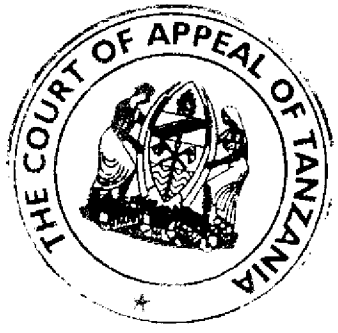
DATED at **DAR ES SALAAM** this 24th day of January, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 26th day of January, 2022 in the presence Ms. Caroline Kivuyo, learned advocate for the Appellant, she also holding brief for Mr. Alhaji Majogoro, learned advocate for the respondent is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL