IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPEAL NO. 67 OF 2020

(CORAM: MUGASHA, J.A., KENTE, J.A. And MASHAKA, J.A.:)

GEITA GOLD MINING LIMITED.....APPELLANT

VERSUS

1. EDWIN PETER MGOO
2. JOHN MAGIGE **.....RESPONDENTS**
3. SAMWEL PAUL

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Mgeyekwa, J.)

dated the 12th day of October, 2018

in

Civil Appeal No. 09 of 2018

JUDGMENT OF THE COURT

4th & 11th July, 2023.

KENTE, J.A.:

This is a second appeal by the appellant company Geita Gold Mining Limited. It emanates from the decision of the High Court (sitting at Mwanza) in Civil Appeal No.9 of 2018. In that decision, the first appellate Judge (Mgeyekwa J, as she then was) agreed with the trial Resident Magistrate's Court of Geita and consequently held, among other things, that the appellant company was liable for malicious prosecution of the respondents who were her former employees. Accordingly, the first

appellate court went on dismissing the appellant's appeal with costs to the respondents.

Dissatisfied with the decision of the first appellate court, the appellant appealed to this court fronting four grounds of complaint. If we may paraphrase, the appellant complained that:

1. The learned Judge of the first appellate court erred both in law and in fact by sustaining the position taken by the trial court that the respondents had proved their case against the appellant to the effect that they were prosecuted by the appellant without probable cause while according to the evidence, their prosecution proceeded on the basis of the investigation conducted by the police before institution of the criminal case;
2. That the learned first appellate Judge erred in law and fact by finding that, it was the appellant who reported the crime against the respondents to the police while there was no evidence establishing that it was the appellant who reported and mentioned the respondents to the police;
3. That the learned first appellate Judge erred both in law and in fact in her position that, the tort of malicious prosecution was proved to the required standard in total disregard of the evidence adduced by the appellant's witness during the trial; and

4. The learned Judge of the first appellate court erred in law by affirming the grant of general damages to the respondents by the trial court without proof that they had suffered such damage.

Before the trial court, it was alleged by the respondents that, at the behest of the appellant who accused them maliciously and without any reasonable and probable cause, they were arrested and detained in custody for four days and subsequently charged with conspiracy to commit a criminal offence, attempt to commit an offence and neglect to prevent the commission of an offence. The respondents went on alleging that, following the appellant's allegations which were both untrue and actuated by malice, they were charged with the above-mentioned offences and that, however, upon a full trial, they were acquitted for lack of evidence.

More solemnly, the respondents claimed that, the appellant had misled the police by falsely stating that they (respondents) had either conspired or attempted to steal or neglected to prevent the commission of theft at their workplace. As a result, the respondents went on complaining, they were wrongfully charged, deprived of their liberty which caused them to suffer both physically and mentally. They also complained that, because of unwarranted arrest and prosecution, their reputation in the eyes of ordinary members of the society in which they lived, was lowered and that they suffered great loss and damage.

As stated earlier, despite the appellant's denial of the allegations levelled against her, the two courts below believed the respondents' case. After hearing what the parties had to say, the two lower courts were of the concurrent view and they accordingly found that, indeed the appellant had maliciously and without any reasonable cause set the law in motion against the respondents and that, as a consequence of being maliciously prosecuted, the respondents had suffered considerable damage for which they were to be recompensated.

In considering this appeal, we shall first reflect briefly on the factual back ground which forms the basis of the respondents' claim against the appellant. Up to the time which is material to the occurrence of the dispute between the parties herein, the respondents were employed by the appellant. Whereas the first and second respondents were employed as security officers, the third respondent was a front-line manager. Going by the judgment of the Geita District Court in Criminal Case No. 199 of 2015 which was admitted in evidence as Exhibit P3, on 18th May, 2015 at about 1.32 a.m. one Mateja Mugeta who was a Security Officer in the appellant's Production Department received a phone-call from his informer informing him that there was an ongoing theft activity at a place called Rompad area within the appellant's mining compound. In response, the said Mateja Mugeta who was then at his home informed his colleague one Selemani Machila to rush and pick him. Mateja Mugeta went on recounting that, his

informer had told him that three motor vehicles all of which were from the appellant's security department and one of which was loaded with some gold bearing material would be involved in the intended theft. He was accordingly advised to go to the main gate area where the said motor vehicles were expected to get out of the appellant's mining area. The ultimate aim of Mr. Mugeta was to block the three motor vehicles and haply, arrest their respective drivers and the people on board. Unfortunately, however, upon approaching the main gate and on realizing that the road was blocked by another motor vehicle, the three motor vehicles diverted to a side road leading to Muruman Camp.

According to Mr. Mugeta, frantic attempts to pursue the said motor vehicles together with those on board proved futile as two out of the three suspected vehicles managed to escape while the persons in the third car which had sustained a rear tyre burst got off and took to their heels.

With regard to the most important question as to why were the respondents suspected and finally charged with the above-mentioned three criminal offences, it was alleged by some of the appellant's witnesses in the criminal case that, whereas in general the respondents were charged with a duty to safeguard their employer's property on the compound, as a result of breach of their duty, the said property was found in the process of being stolen. With regard to the third respondent, it was the appellant's case that, on the material day, the gold-bearing-stones

were taken from Rompad area which was under his supervision and, that, given the circumstances, it had to be surmised that he had neglected his duties if at all he was not privy to the stealing scam. It was also not materially disputed that the second respondent was among the security officers in the appellant's Security Department while the first respondent who was a driver was at the material time driving one of the suspected motor vehicles.

According to Mr. Mateja Mugeta who was the appellant's solitary witness in the civil case giving rise to this appeal and the appeal before the first appellate court, after the police had arrived at the crime scene, they tried to trace and call the first and second respondents who were very close but they could not respond when it mattered most. The third respondent is also blamed for not reporting the attempted theft incident notwithstanding the fact that he was the overall incharge of the affected area. The upshot of all this, according to the appellant, was that, the respondents were in some way involved in the attempt to steal. Briefly stated, that is the way the prosecution of the respondents arose.

On her part, the appellant denied to have set the law in motion against the respondents. According to the appellant, it is the police officers who arrested the respondent and the office of the Director of Public Prosecutions who decided to prosecute them.

At the hearing of the appeal before us, whereas Ms. Marina Mashimba, learned counsel appeared for the appellant, Mr. Duttu Chebwa learned counsel held the brief of Mr. Erick Rutehanga, learned counsel who was said to be indisposed. As luck would have it, Mr. Chebwa informed the Court that, he had the instructions from Mr. Rutehanga together with the respondents' nod to proceed to argue the appeal.

Having adopted the appellant's written submissions which she had earlier on filed in terms of Rule 106(1) of the Tanzania Court of Appeal Rules, 2009, Ms. Mashimba made oral submissions which may be conveniently summarized as follows: **one**, that, had the learned Judge of the first appellate court taken into account the evidence of Mateja Mugeta (DW1) regarding the respondents' role in the foiled theft attempt together with the judgment of the Geita District Court in Criminal Case No. 199 of 2015 (Exh.P3), she would not have held that there was no probable and reasonable cause for prosecuting the respondents; and **two**, that, it was not proved that it is the appellant who was instrumental in the prosecution of the respondents. Going forward, the learned counsel submitted further that, even if it is the appellant's officers who reported the attempted theft incident to the police, the prosecution was initiated with reasonable and probable cause without malice.

In his reply submissions, Mr. Chebwa was firmly of the view that, the respondents were maliciously prosecuted and as a consequence, they

suffered damage. He contended that, on the material day, the respondents were called and directed to go to the main gate to block the motor vehicle which was involved in the commission of the alleged theft and therefore it was wrong for the appellant to allege, without evidence, that the respondents were involved in the commission of that crime which they were called upon to prevent, in the first place.

Regarding the contention that the first and second respondents had jumped out of the suspected vehicles and run away after being intercepted, Mr. Chebwa wondered how could the security officers who were working hand in hand with other officers in pursuing thieves turn around to be thieves themselves! The learned counsel surmised that, it is highly probable that for the reasons that are best known to the appellant herself, she was all out to put the respondents in trouble. The learned counsel referred to our earlier decision in the case of **Wilbard Lemunge V. Father Komu and Another**, Civil Appeal No. 8 of 2016 (unreported) with regard to the five ingredients of the tort of malicious prosecution which he said, were all proved by the respondents. He also relied on the case of **Jeremiah Kamama V. Bugomola Mayandi** [1983] T.L.R 123 to underscore the position of the law that, for purposes of malicious prosecution, a person becomes a prosecutor when he takes steps with a view to setting in motion the legal process for the eventual prosecution of the plaintiff.

We have appraised the written submissions filed by the respective counsel and the brief oral submissions expounding on them. We have as well looked at the evidence on the record together with the impugned judgment of the first appellate court.

In the case of **James Funke Ngwagilo V. The Attorney General** [2004] T.L.R. 161, this Court is on record as having held that, in an action for malicious prosecution, a plaintiff has to prove, among other things, that the prosecution was undertaken without reasonable and probable cause and was actuated by malice. In that case, we also reminded the legal fraternity of the requirement that, in such an action, the plaintiff is saddled with a burden to prove absence of reasonable and probable cause for the prosecution which is a difficult task as the plaintiff has to prove a negative. Having briefly referred to the famous English case of **Hicks V. Faulkner** (1878)8 QBD 167 in which the phrase *"reasonable and probable cause"* was defined as an honest belief in the guilt of the accused, relying on **Tempest V. Snowden** (1952) 1 KB 130, we finally observed that, the current jurisprudential thinking is that, it is enough if the defendant believes there is reasonable and probable cause for the prosecution.

In the instant case, the first appellate Judge held that the respondents had managed to prove that they were prosecuted maliciously without any reasonable and probable cause simply because they were tasked to prevent the commission of the offence which was about to be

committed. Apparently, in expressing concern about what the appellant company did, the learned Judge could not but put into words her own belief that, it was impossible for any reasonable man to suspect a person whom he had himself assigned to prevent the commission of a crime as having been the perpetrator of the same crime.

With due respect, we do not subscribe to the learned Judge's interpretation of the law, given the evidence on the record which was based on the facts available when the criminal charge was preferred against the respondents. Having considered the fact that the first and second respondents who were security officers were alleged to have been on board of the motor vehicles which were used to steal gold-bearing-materials and the third respondent's absence from his area of supervision together with his sort of unexplained inaction in the whole scam, any reasonable man, put in the shoes of the appellant could be understood for suspecting the respondents and thinking that there was reasonable and probable cause for prosecuting them. It is worthwhile to note here that, it matters not that the respondents' duty was to ensure, among other things, that people and valuables on the appellant's mining area are safe and out of harm's way. It can hardly be gainsaid that, by merely being security officers of the appellant company, the respondents cannot claim the attainment of sinless perfection. Similarly, it does not matter that the respondents were acquitted of all the three offences with which they were

charged. In this connection, we again wish to state as we did in the unreported case of **Audiface Kibala V. Adili Elipenda and Two Others**, Civil Appeal No. 107 of 2012 that, the acquittal of an accused person in a criminal case may not necessarily mean that he was prosecuted maliciously or without good and probable cause.

Upon the foregoing discussion of the law and the facts obtaining in this case, we are of the view that, the respondents were unable to discharge the burden cast on them by the law which required them to prove among other things, that they were prosecuted maliciously, without reasonable and probable cause.

In the circumstances, we are satisfied that both the trial and first appellate court had not properly addressed and satisfied themselves that there was no reasonable and probable cause for the appellant to believe that the respondents could have been privy to the foiled theft incident to warrant their prosecution.

Since the ingredients of the tort of malicious prosecution as stipulated in a myriad of case law have to be cumulatively proved by the plaintiff, and in view of the position we have taken hereinabove, it would be rather otiose for us to deal with the remaining grounds of appeal.

In the ultimate event, and for the foregoing reasons, we allow the appeal, quash and set aside the decision of the High Court. Needless to

say, the appellant company will have her costs both in this Court and the two lower courts.

DATED at **MWANZA** this 11th day of July, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2023 in the presence of Mr. Galati Mwantembe, learned counsel for the Appellant and Mr. Dutu Chegwa Counsel for the 1st, 2nd and 3rd Respondents is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL