IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MKUYE, J.A., KIHWELO, J.A. And MGEYEKWA, J.A.)

CIVIL APPEAL No. 76 OF 2022

JOSEPH SHIRIMA.....1ST APPELLANT
TANZANIA COMMERCIAL BANK PLC

(Successor in title to TPB BANK PLC)..... 2ND APPELLANT

VERSUS

FILBERTHA KAYOMBO .....RESPONDENT

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

(Mrango, J.)

dated the 17th day of April, 2018

in

DC Civil Appeal No. 11 of 2017

.....

JUDGMENT OF THE COURT

4th & 12th December, 2023

KIHWELO, J.A.:

This is the second appeal by the appellants, sturdily challenging the High Court (Mrango, J.) by its judgment dated 17th April, 2018 which confirmed the decision of the District Court of Songea that awarded the respondent general damages for malicious prosecution and unlawful

confinement. Nonetheless, the High Court reduced the amount of damages from TZS. 200,000,000 to TZS. 100,000,000.

In order to appreciate the issues of contention in this matter, we find it apt to begin with the essential background of the case. The epicenter of this dispute is the act of the appellants to lodge complaints against the respondent and others alleging that they conspired to obtain credit from the second appellant by false pretense. It was on that account, the respondent and others were arrested and remanded in police custody before they were later arraigned before the District Court of Songea at Songea initially in Criminal Case No. 6 of 2015 which was withdrawn and later, they were re-arrested and charged in Criminal Case No. 51 of 2015 (criminal case) before the same court and for the same charges as before.

It occurred that, on 13th April, 2016 the learned trial Magistrate who was in conduct of the criminal trial elected to mark the prosecution's case closed at the time when only two out of the seven prosecution's witnesses who were lined up to testify had testified and subsequently on 14th April, 2016 the learned trial Magistrate delivered the ruling of no case to answer and all the charges against the respondent and others were dismissed and they were acquitted.

Feeling that justice was not done to him, the respondent lodged a civil case before the District Court of Songea at Songea in Civil Case No. 36 of 2016 (the trial court) (the civil case) claiming against the appellants jointly and severally for tortious liabilities of malicious prosecution and unlawful confinement and seeking for among other things, a declaration that the appellants were liable for malicious prosecution and unlawful confinement, an order for the appellants to pay TZS. 100,000,000 as general damages for malicious prosecution and TZS. 100,000,000 as general damages for unlawful confinement. The appellants gallantly refuted the claims by the respondent and termed the reliefs and prayers sought vexatious and frivolous. Upon full trial, the trial court found the case in favour of the respondent.

Not pleased with the decision of the trial court, the appellants knocked the doors of the High Court seeking to overturn the decision of the trial court, but quite unfortunate luck was not on their side they lost the appeal, the High Court as hinted earlier dismissed the appeal and confirmed the decision of the trial court, except for the reduction on the award. It is on the basis of the above that the appellants have come before the corridors of the temple of justice seeking to impugn the decision of the High Court.

Initially, the appellants filed this appeal which was grounded upon three (3) points of grievance, namely:

1. *That, the learned Judge erred in law and fact in failure to evaluate the evidence by the appellants.*
2. *That, the learned Judge erred in law and fact in holding the appellants liable for malicious prosecution and unlawful confinement.*
3. *That, the learned Judge erred in law and fact for awarding unjustifiable damages to the respondent.*

When, eventually, the matter was placed before us for hearing on 5th December, 2023 the appellants were represented by Mr. Ayoub Gervas Sanga and Mr. Emmanuel George Mwakyembe both learned State Attorneys, whereas the respondent had the services of Mr. Edson Mbogoro, learned counsel. Counsel for the parties, prayed to adopt the written submissions which were lodged earlier on in terms of Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Before hearing of the appeal could commence in earnest, Mr. Sanga prayed that we should invoke rule 111 of the Rules to order change of the second appellant's name from the current TPB Bank PLC to Tanzania Commercial Bank Limited, to which Mr. Mbogoro had no objection. We

ordered that, in terms of rule 111 of the Rules, the successor's name be inserted wherever it appears in the memorandum and record of appeal.

Furthermore, Mr. Sanga prayed and was granted leave to raise an additional ground of appeal to make a total of four (4) grounds of grievance. The fourth ground of appeal which Mr. Sanga raised was:

> *Whether the High Court Judge was right in finding that the learned trial Magistrate was not bias in evaluating the evidence on record.*

Highlighting the written submissions, Mr. Sanga started arguing the first ground of appeal by contending that, the High Court Judge did not evaluate the appellant's evidence which clearly signified that the elements of malicious prosecution were not proved by the respondent since malice which is an important ingredient was not proved as the appellant ably demonstrated that they had probable and reasonable cause in reporting to the police the suspected forgery incident involving Basilisa Kandila the daughter of the respondent who was the borrower and Avelina Ngonyani who was the guarantor. He further, faulted the High Court Judge for arriving to the conclusion which was not supported by evidence on record, and that, instead of relying on the evidence of DW1 and DW2, he relied on the contradictory evidence of PW1 and PW2. To support his

proposition, he referred us to pages 62, 79, 80, 81 and 167 of the record of appeal which are discernible that, the first appellant only mentioned Basilisa Kandila and Avelina Ngonyani and no other person, and that, the respondent was implicated in the cause of police investigation. For in his view, the respondent failed to prove that there was malice which is an essential element in the tort of malicious prosecution. He paid homage to the case of **Amina Mpimbi v. Ramadhani Kiwe** [1990] T.L.R. 6 to support his proposition. To accentuate further his argument, he cited to us the case of **Commonwealth Life Assurance Society Limited v. Brain** [1935] HCA 30-53 CLR 343 for the definition of the term reasonable and probable cause.

On the second ground of appeal, Mr. Sanga argued that, the High Court Judge wrongly held the appellants liable for malicious prosecution and unlawful confinement, since in his judgment, he relied heavily on the decision in the criminal case, exhibit "P1" in which the respondent and others were acquitted in a no case to answer for insufficiency of the prosecution evidence. He referred us to pages 11, 225 and 234 of the record of appeal to support his line of argument and went further to submit that, surprisingly, both the criminal case which acquitted the respondent and the civil case which was determined in favour of the

respondent were determined by the same court and the same Magistrate. Illustrating further, he contended that, the fact that the respondent was acquitted in a criminal case does not necessarily establish that the original complaints which the appellants made before the police were false and malicious. In his view, the respondent failed to prove that the report which was made by the appellant to the police was malicious and not with honest belief citing the case of **Bhoke Chacha v. Daniel Misenya** [1983] T.L.R. 329 and **Mbaraka William v. Adamu Kissute & Another** [1983] T.L.R. 358 to support his stance.

Arguing the third ground of appeal, Mr. Sanga faulted the High Court Judge for awarding astronomical figure without regard to any evidence on record. He contended that, it was erroneous and misleading for the High Court Judge to award punitive damages without regard to the well-established principles of law that although general damages are awarded at the discretion of the court, that discretion must be exercised judiciously and not arbitrarily. He therefore, implored us to interfere with the award and cited the case of **Cooper Motors Corporation Ltd v. Moshi Arusha Occupational Health Services** [1990] T.L.R. 96 for the proposition that the Court can intervene with the amount of damages awarded if satisfied that the Judge in assessing it applied a wrong principle

of law or that the amount awarded is so inordinately low or so inordinately high that it must be a wholly-erroneous estimated damages.

In relation to the fourth ground of appeal, Mr. Sanga was fairly very brief and to the point. He strongly faulted the High Court Judge for not finding that the learned trial Magistrate who determined both the criminal case and the civil case was bias. Illustrating further, Mr. Sanga argued that, it was inappropriate in the eyes of the law for the same Magistrate who dismissed the criminal case involving the respondent on a no case to answer to preside and determine a civil case involving the same respondent and whose determination mainly based upon the decision of the criminal case. For that, he implored us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap.141 (the Act) to nullify the proceedings and quash the judgments of both courts below and order the matter to be tried de novo before another Magistrate. In all, he urged us to allow the appeal with costs.

Conversely, in reply, the respondent's counsel prefaced his written submission with an abridged background of the appeal which for obvious and practical reasons we will not recite. Submitting in response to the first ground of appeal Mr. Mbogoro contended that, this being a second appeal

the Court has no duty of properly evaluating the evidence on record which is the primary duty of the trial court. He went on to submit that the Court may only re-evaluate the evidence where the trial court did not evaluate the evidence at all or relied on a wrong principle of law in evaluating the evidence which in his opinion, it was not the case in the instant appeal.

Responding further to this ground, Mr. Mbogoro argued that malice can rarely be proved by direct evidence, but rather it can be inferred from words spoken and conducts. Elaborating further, he argued that, in the matter before us, central to the dispute was a loan issued by the second appellant to the daughter of the respondent, an adult and not to the respondent. In that sense the respondent was neither a borrower nor a guarantor to the loan in question and therefore it was erroneous for the appellants to report the respondent twice before the police, Mr. Mbogoro submitted. The learned counsel described in minute detail how the first appellant was advised by PW2 D7246 Sergeant Henjewele to consider preferring a civil suit but the first appellant did not heed to the advice and instead went ahead to lodge criminal complaint which ultimately led to the prosecution of the respondent and others. Mr. Mbogoro challenged what he called a misconception that, an individual cannot be held liable for malicious prosecution since prosecution is exclusively done by the

Director of Prosecutions. He therefore contended that, the first ground of appeal has no merit and therefore it should be dismissed.

On the second ground, Mr. Mbogoro countered that the High Court Judge was correct in finding that the appellants were liable for malicious prosecution and unlawful confinement. Illustrating further, the learned counsel contended that, it is evident from the evidence on record that, the first and the second appellants were the ones who reported the respondent and others to the police. He referred us to the testimony of PW2 and exhibit "P2" the loan agreement and argued that, probably the appellants were right to report to the police Basilisa Kandila the daughter of the respondent who was the borrower and Avelina Ngonyani who was the guarantor, but not the respondent who had nothing to do with the loan transaction. Thus, in his view, the appellants by any stretch of imagination had no reasonable and probable cause to report the respondent. He thus, argued that, this ground of appeal too has no merit and therefore, entreated us to dismiss it.

Specifically addressing the third ground of appeal, it was Mr. Mbogoro's essential submission that the appellants are seeking to further reduce general damages awarded to the respondent after the reduction

by half which was already done by the High Court. In his view, general damages are awarded upon the discretion of the court and that what the appellants are seeking the Court to do was already done by the High Court having considered all the circumstances, he argued. He therefore, argued that, this ground of appeal too has no merit.

In response to the fourth ground of appeal, Mr. Mbogoro was fairly very brief and contended that, the appellants are raising the issue of bias for the first time before this Court as the same was not raise before the trial court nor at the High Court and that this is not permissible in law. He therefore implored us to dismiss the appeal in its entirety.

Upon our prompting and when referred to page 225 of the record of appeal where the High Court Judge discussed the issue of bias, Mr. Mbogoro admittedly argued that, the High Court Judge discussed the issue of bias merely in passing but did not give it a deserving treatment by addressing it at considerable length.

Upon our further prompting whether it was legally right and professionally appropriate for the learned trial Magistrate to have determined both the criminal case and the civil case arising from the criminal case which he dismissed at the stage of no case to answer, Mr.

Mbogoro unreservedly admitted that it was not right for the learned trial Magistrate to have presided in both two cases since justice should not only be done but should manifestly be seen to be done. All in all, Mr. Mbogoro was of the view that the appeal has no merit as such it has to be dismissed.

In rejoinder submission Mr. Sanga reiterated his earlier submission and argued that the issue of bias was raised on appeal and insistently contented that, it was not prudent for the learned trial Magistrate to have presided over the two matters.

We begin our determination of the appeal by addressing the fourth ground of appeal which, we think, will appropriately dispose the matter. In this ground Mr. Sanga zealously submitted, and rightly so in our mind, that, it was inappropriate in the eyes of the law for the learned trial Magistrate to have presided over a civil case of malicious prosecution involving the same respondent who was acquitted by the same Magistrate in a previous criminal case.

The complaint by the learned State Attorney calls into question the impartiality and fairness of a Magistrate who has sworn to do justice impartially, in accordance with the Constitution as by the law established,

and in accordance with the laws and customs without fear or favour, affection or ill-will. The oath of office notwithstanding, the Magistrate is all too human and above all the Constitution of the United Republic of Tanzania of 1977 particularly Articles 107A (2) (a) and 107B does guarantee all litigants the right to a fair hearing by an independent and impartial judicial officer.

It is apparent from the record that, there is considerable merit in Mr. Sanga's submission. For clarity, we wish to let the record of appeal at pages 12 and 13 where there is a ruling on no case to answer speak for itself:

> *"At last only two prosecution witnesses appeared in court to adduce their evidence and despite the other remaining prosecution witnesses being in Songea they did not appear and give their testimony in court and no reason was given by the prosecution side.*
>
> *Thereafter the prosecution case was closed. Giving a chance for this ruling to be prepared and delivered against the accused persons.*
>
> *I have carefully perused the prosecution side evidence (sic) testified in court by PW1 and PW2 and tendered thereon exhibits (sic) in supporting*

the evidence. Under section 230 of the Criminal Procedure Act, Cap 20 R.E. 2002, I am not satisfied that a prima facie case has been made against the 1st, 2nd, 3rd and 4th accused sufficient to require them give their defence.....I thus rule that a charge against all accused persons is dismissed and I subsequently acquit them..."

Furthermore, we wish also to let the record of appeal at pages 171, 176 and 177 of the judgment in civil case speak for itself:

"In the matter at hand I will prove the evidence by the Plaintiff that really the criminal proceedings in Case No. 51 of 2015 ended in the Plaintiffs favour....

.....the first defendant on behalf of the second defendant his employer made an accusation at the Songea Central Police Station and at the RCO's offices before filling also another Criminal Case No. 51 of 2015 but failed to justify all accusations as against the Plaintiff.....

It is obvious in the case at hand that the Plaintiffs' liberty was not only endangered but actually lost for four days in remand police custody and for almost two years since the first defendant initiated the criminal proceedings at the Songea Central Police Station in 2014 January to the time the

proceedings ended finally at the Songea District Court in Criminal Case No. 51 of 2015.....

For that reasons given herein above I find no any reason to interfere the serious allegations as against the first and the second defendants prayed by the Plaintiff which proves both specific and general damages including damages to property, damage to a man's reputation such as malicious prosecution and scandalous facts; and damage to a person after his health and liberty are endangered by another unlawfully, thus, all the prayers are granted..."

The issue that emerges from the above excerpts speaks volume in that the Magistrate who presided over the criminal case did not act professionally and with the requisite diligence by also presiding over and determining the civil case which also involved the respondent who was earlier on acquitted by the same Magistrate.

In the light of the above, we think, with respect, that, the learned State Attorney was undeniably right when he argued that, it was inappropriate in the eyes of the law for the same Magistrate who dismissed the criminal case involving the respondent on a no case to answer and yet preside and determine a civil case involving the same

respondent and whose determination mainly based on the decision of the criminal case as it is clearly indicated in the passages we quoted above. It is very unfortunate that, this glaring anomaly escaped the scrutiny of the High Court. Put simply, the High Court did not address this infraction.

By the very nature of judicial function all judicial officers are not only required to be impartial but also, they should appear to be impartial. The question that remains is what is the real test of impartiality?

In order to answer this question we wish to take inspiration from the decision of the East Africa Court of Justice in **Attorney General of Kenya v. Prof Anyang' Nyong'o & 10 Others**, EACJ Application No. 5 of 2007 that applied the test of bias which was adopted by the House of Lords in **R v. Gough** (1993) AC 646 and modified in **Porter v. Magill** [2001] UKHL 67, [2002] 2 AC 357 in which the test applicable is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was bias. In other words, the court has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.

This test appears to have acquired a universal acceptance, in the South African case of **Enrico Bernest v. ABSA Bank Ltd**, Case CCT 37/10 [2010] ZACC 28 in which the Constitutional Court lucidly stated that, the test for bias is now settled, the test is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias. We take this to be a good law in our jurisdiction.

It bears reaffirming that, the apprehension of bias principle reflects the fundamental constitutional principle that courts must be independent and impartial. Fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial. The requirement of impartiality is implicit and is the hallmark to the independence of the judiciary and public trust. It is on that account that the Code of Conduct and Ethics for Judicial Officers, 2020 (Code of Conduct) which has been promulgated pursuant to section 66 (2) (c) of the Judiciary Administration Act, Cap 237 among other things emphasizes integrity of judicial officers in order to sustain and enhance the public confidence in the Judiciary.

We wish to finish part of our deliberation with a little exposition, for the future benefit. Whilst we are mindful that judicial officers do not

choose their cases and litigants do not choose their judicial officers, we hold the view that, judicial officers need to be diligent in their performance of their judicial duties in line with the Code of Conduct which requires them among other things to be competent and diligent in the performance of their duties. That way, they will uphold the integrity of the Judiciary and enhance public confidence which is the cornerstone of the independence of the Judiciary.

In view of what we have endeavored to explain above, we are satisfied that the learned trial Magistrate improperly presided over the impugned decision whose basis for its determination was the criminal case which he earlier on presided and determined by acquitting the respondent and others. Undoubtedly, any fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the trial Magistrate was bias.

Accordingly, we invoke our revisional powers under section 4(2) of the Act on the basis of which we nullify the proceedings and quash the judgments and order that the court file be remitted back to the trial court for a fresh trial to be conducted by another Magistrate.

As regards costs, this should not belabor us much. Given the circumstances of this matter where the error was occasioned by the court, we order that each party should bear own costs.

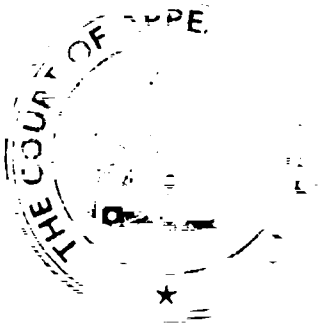
DATED at **IRINGA** this 12th day of December, 2023.

R.K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2023 in the presence of Ms. Ansila Makyao, learned Senior State Attorney for the Appellants and Mr. Noah Utamwa holding brief for Mr. Edson Mbogolo, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL