

IN THE HIGH COURT OF TANZANIA
AT MTWARA
DC. CIVIL APPEAL NO. 6 OF 2007
ORIGINAL CIVIL CASE NO. 9 OF 2005
IN MTWARA RESIDENT MAGISTRATE COURT

MOHAMEDI HAMISI HOKORORO APPELLANT
VERSUS
SELEMANI LIBUBURU RESPONDENT

Date of Last Order – 03/03/2009

Date of Judgment – 31/03/2009

JUDGMENT

MIPAWA, J.

The appellant Hamisi Hokororo filed a Civil suit in the Resident Magistrates' Court of Mtwara claiming against the Respondent the sum of Shs.5,000,000/= [five million only] being compensation for malicious prosecution allegedly instituted by the Respondent which resulted to the appellant's economic loss, financial loss and suffering. The appellant lost the suit and hence this appeal.

Now a cursory glance on the evidence adduced before the lower court reveals that on the 1st day of January, 2002, the appellant was arrested and charged with the offence of stealing by agent contrary to section 273(b) of the Penal Code Cap.16 Vol.I of the Laws vide Criminal case No.22 of 2003. In which the appellant was

acquitted but ordered to pay the deficit thereof. According to the appellant, the Respondent had complained falsely, maliciously and without probable cause against the plaintiff/appellant to the police that the appellant was a conman and unfaithful in their business transactions, where the Respondent alleged that the appellant being the Respondent's agent failed to account for 660 bags of cashewnut sulphur pesticide powder valued at tsh.4,948,600/=. After carefully evaluating the evidence of both side the learned Resident Magistrate asserted that the testimony of the appellant Mohamed Hamisi Hokororo which was to the effect that one day he received a letter which was brought by Mwema s/o Dadi Mohamed and Seif s/o Mwaya at the appellant's farm at Mtimbwilimbwi. They told the appellant that an order was had that he, appellant should be taken to police station upon reporting at police station [Mahuta Police Station] he was told to have stolen 5660 bags of sulphur pesticides. The appellant at Police Station was given a letter to call the Masasi Mtwara Cooperative Union [MAMCU] authorities where the chairman secretary and a deputy secretary of MAMCU came at police station. The aftermath was that the appellant was prosecuted. Nevertheless the learned trial Magistrate found that there was no place in the evidence adduced where the Defendant/Respondent was mentioned to participated in instigating the criminal proceedings against the plaintiff/appellant and further that even in the judgment of the criminal case no.22 of 2003 before the District Court the defendant now Respondent did not testify. Though the appellant was acquitted the learned Resident Magistrate was of the view that the case against the

appellant in the lower court did not infact terminate in his favour he observed that at page six of the typed judgment.

.... This court wondering (sic) how the defendant instigated the criminal proceedings against the plaintiff [Even if you read the judgment of the criminal case no.22 of 2003 the defendant did not testify]... the last paragraph of the judgment of the criminal case it was written as follows "..... Accused is ordered to pay the left amount not paid to MAMCU at the end of the coming season [harvest]. It means the criminal proceedings did not terminate in his favour because he was ordered to pay the deficit.... The plaintiff himself admits to be indebted till this day of judgment by MAMCU....

The Respondent himself had told the lower court that as a director of the Rural Cooperative Society they agreed with the plaintiff to be an agent of selling pesticide known as sulphur he was supplied with 2910 bags of sulphur pesticide and ordered to sell at 7,500/= per bag and the appellant would be getting a commission of 250/= of sulphur pesticides. The appellant sold the bags and brought or remitted the amount of Tsh.15,100,000/= but was supposed to remit a total amount of 22,000,050/= if he could sell all bags. The manager of MAMCU made a follow up of the matter to see if the sulphur pesticide bags were all sold by the appellant. However according to DW.1 [The Respondent] the manager found no sulphur bags in the godown and so there was a deficit of Tsh.4,948,600/= after deducting the commission of Tsh.250/= @ bag the total comes at 800,400/= when the appellant/plaintiff was asked about the money he failed to give an account of it. He only said that he would pay, but he did not pay at

all. Then he reported the matter to the justice of the peace/police station at Mahuta where an investigation was conducted and the appellant was arrested and charged accordingly. The defendant or accused in the lower court in criminal case no.22/2003 who is now the appellant defended himself that he gave the farmers the bags of pesticide on credit worth at 6,000,000/= but they only paid 3,481,000/= and it remained Tsh.2,599,000/= the appellant admitted the facts and the court ordered him [appellant] to pay Tsh.4,948,600/= which has been paid to date.

In his memorandum of appeal the appellant asserts that the learned Resident Magistrate seriously misdirected himself when he failed to deal with relevant and crucial issues instead he dealt with trivial ones such as court order. That the officials of MAMCU knew of the credit facilities and thence there was no reason to charge the appellant on unfounded allegations which was purely malicious. Further he contended that the trial magistrate seriously failed to distinguish between an acquittal and court order because an order does not make a party liable. Lastly he averred that the trial magistrate failed to use the finding of the Criminal Case No.22/2003 of Newala District Court which acquitted the appellant for want of prosecution.

This appeal was heard by each party submitting a coherent written submission as ordered by the court. In determining this appeal I will not bound myself to follow the grounds of appeal of the appellant **seriatim**.

In cases of malicious prosecution a person becomes a prosecutor if he commences the steps geared to getting in motion legal process for the eventual prosecution of a person whom he contends that he has committed a crime. The prosecution must be done maliciously. Further it must be proved that a person was not activated by a genuine desire to bring to justice the person he alleges to be guilty of a crime. In a nutshell for a malicious prosecution case to succeed a number of ingredients should be proved by the plaintiff simultaneously as follows here under: It must be proved

..... That the plaintiff was prosecuted, that the proceedings complained of ended in his favour that the defendant instituted the prosecution maliciously. Further that there was no reasonable and probable cause for such prosecution and that the plaintiff was damaged as a result... [see also the case of **Jeremiah Kamama v. Bagomola Mayandi 1983 TLR.123.**

In the case before the trial court the Respondent defendant himself that the plaintiff was supplied with 2940 bags of sulphur pesticide powder and was told to sell at an 7,500/= and that he could get a commission of 250/= per bag of sulphur sold. The plaintiff sold the bags and he once brought tsh.15,100,055/= however according to the defendant he was supposed to remit to MAMCU – Masasi Mtwara Co-operative Union the sum of Tshs.22,000,050/= if he could sell all the bags of sulphur but he didn't do that. A follow up which was made by the manager of MAMCU revealed a deficit of 4,948,600/= after deducting the commission of 250/= from each bag of sulphur. They inspected also the godown at Tandahimba district where the

plaintiff had stored the sulphur bags but found that there was no sulphur pesticide bags left in the godown and therefore an inference was drawn that the plaintiff had sold all the bags but remitted less money to MAMCU. When the plaintiff was interrogated by the Respondent he offered unsatisfactory explanation on the whereabouts of the money remaining both the plaintiff insisted that he will foot the deficient. It was when the Respondent reported the matter to justice of peace/police station, investigation was carried on and the plaintiff was arrested.

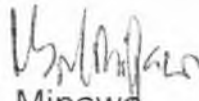
The narration of the Respondent story as explained *supra* reveals to my mind that the Respondent was the one who took steps with a view to setting in motion legal process for the ultimate arrest and prosecution of the plaintiff. Really the plaintiff was arrested and prosecuted after the Respondent had reported to the police who carried out the investigation. I do not agree with the learned trial magistrate who said in his judgment that there was no place where the defendant is mentioned to participate in investigating criminal proceedings against the plaintiff. I think the learned magistrate failed to comprehend the testimony of the Respondent that it was him who suspected the plaintiff to have stolen the deficient money from the bags of sulphur which he had sold because the plaintiff remitted a small amount of money as compared to the total sulphur bags he was handed by MAMCU and the fact that there was no bags remained in the godown. This suspicion made the Respondent to question the appellant on the remaining balance but he offered no explanation which satisfied the Respondent and hence entitled to take the steps

he took in order that the deficient could be realized for the benefit of the society or union MAMCU and its members at large. Although the plaintiff had alleged that the MAMCU authorities knew that there was what the appellant/plaintiff called "lending the bags on credit to farmers" he failed to substantiate that in his evidence or produced any document or agreement that there was such an agreement which was well known by MAMCU authorities. Further he [the appellant] failed even to produce any documents that could show that certain farmers took the sulphur bags on credit. The main nagging question in this regard is whether or not the Respondent acted or was in the process actuated by either spite or ill will against the plaintiff or by indirect or improper motives. In my settled view having thorough contemplated on the evidence of the Respondent the answer to these questions is by and large in the negative. There was no evidence that the Respondent acted with malice, spite or ill-will against the plaintiff when he reported the matter to the police following the failure of the plaintiff to account for the remaining balance of money after all sulphur bags had been sold. The Respondent who was the Director of Rural Co-operative Union of Masasi Mtwara MAMCU, was to call some of them to testify that they were given the sulphur bags by the appellant on credit basis. The appellant therefore failed to prove that there was no reasonable and probable cause for such prosecution.

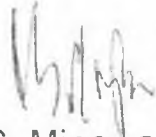
The appellant in his petition of appeal has also asserted that the learned trial magistrate erred to dismiss the suit. He attacked the trial Magistrate that he failed to use the finding of Criminal Case No. 22/2003 of Newala District Court in which he [appellant] was

acquitted for want of prosecution. I think rightly that the appellant has missed the point because an acquittal *per se* in a criminal case is not a proof that the Respondent acted without any reasonable or probable cause and that he was motivated by spite or ill will and what-have-you. I think by and large that the *onus probandi* that the Respondent report to the police was malicious and made without any reasonable and/or probable cause, still rested on the shoulders of the appellant, the fact which he had failed to prove before the lower court and the fact that the appellant was subsequently acquitted does not establish that the original complaint to the police was false and malicious. The appellant infact should consider himself a lack person for being acquitted but ordered to pay the deficient which he admitted that he is indebted by MAMCU otherwise the appellant could here found himself behind the bars. Therefore he should not take his acquittal in the District Court in Criminal proceedings as a proof that he was falsely and maliciously prosecuted see **Bhoke Chacha v. Daniel Misenya [1983] TLR.329.**

I think I have duly considered the appellants petition of appeal and thorough gone through the lower court records from cover to cover and read between the lines on the submissions of both sides. I have on the foregoing found no substance in this appeal and in the event I proceed to dismiss it in its entirety. Appeal dismissed with costs.


I.S. Mipawa,
Judge
31/3/2009

Delivered today in the presence of the appellant and the Respondent.



I.S. Mipawa,
Judge
31/3/2009

Further rights explained.



I.S. Mipawa,
Judge
31/3/2009