IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL CASE NO 2 OF 2008

MAKONYO MASEKE ..... PLAINTIFF

VERSUS

1. **THE OFFICER COMMANDING DISTRICT OF POLICE (OCD) TARIME DISTRICT**
2. **THE INSPECTOR GENERAL OF POLICE .....DEFENDANTS**
3. **THE ATTORNEY GENERAL**

JUDGMENT

15/12/2009 & 24/12/2009

NYANGARIKA,J.

On 13/11/2007 the plaintiff filed a suit against the defendants claiming for the following reliefs;-

(i) Payment of Tshs. 1,380,000 cash seized from plaintiff during arrest

(ii) Payment of Tshs. 13,764,000/= being value of seized medical drugs

(iii) Payment of Tshs 300,000,000/= general damages for wrongful arrest, malicious prosecution, humiliation by ordering plaintiff to sweep the police lock up human dungs by bare hands

(iv) Commercial interest of the decretal amount from date of filing the suit till payment in full.

(v) Costs of the suit.

(vi) Any other reliefs, the honorable court will deem fit to grant.

Briefly the facts of this case are as follows;-

On 6/4/2006 the plaintiff was arrested by policemen at Tarime Township locked up to until on 8/4/2006 when he was taken to his house, where he was searched and beaten on the ground that he had stolen some medicine at Sirari area in Tarime District.

The plaintiff also claims that before he was lock up, he was searched by the police who took from him a total of Tshs. 1,380,000/= as an Exhibit to be tendered in court.

I her testimony in court, the plaintiff said that he was taken by the police to his village at Kimanje called Tarime District where his house was searched and some medicine worth Tshs. 13,764,000/= were taken by the police.

The plaintiff produced in court Exhibit P2 (that is PF_3) in order to impress the court that he was beaten up by the police when he was arrested, searched and locked up.

On 10/4/2006, the plaintiff was charged in criminal case No, 177 of 2006 before the District court of Tarime at Tarime with the offence of ***stealing by agent c/s 273 of the Penal Code (cap 16 RE 2002)*** but on 26/6/2006 the charge against him was dismissed and discharged under the provisions of ***section 225 (5) of the criminal procedure Act*** as shown in Exhibit P1.

The plaintiff told this court that when he was his discharged, the Police refused, failed and ignored to return back his Tshs. 13,764,000/=, which he is now claiming before this court in this suit.

On 10/10/2006 a 90 days statutory notice was issued to the defendants per Exhibit P3 and on 4/1/2007 the 1st defendant responded the notice by Exhibit P4 which is a letter with ***Ref. No. TAR/R1/1/VOL 47/318.***

In short, those were the facts of this case which was heard exparte.

I am aware that an Exparte Judgment had been defined in the case of ***Moshi textile Mills versus B.J Devoet [1975] LRT 17*** as a judgment given when there is no appearance by a party against whom it is given.

Further that there is no appearance when the party has neither given a written statement of defence nor has appeared or his Advocate.

The burden of proof in an Exparte hearing of a civil case is therefore very demanding as in this case.

In my considered view the plaintiff was required to produce in court all the letters from the OCD together with all annextures attached in Exhibit P4 so as to enable this court to fully analyze their contents.

In the letter which was tendered as Exhibit P4, three annextures were referred to as annexture A, B and C but they were not produced in court by the plaintiff.

According to annexture A in Exhibit P4, the plaintiff admitted to be indebted at the shop of Laurent S/O Aloyce and infact paid, a total of Tshs. 639,700/= to, one, Manyenzo Daudi.

According to annexture B in Exhibit P4, on 10/4/2006, the plaintiff was charged with the offence of theft in court and according to annexture C in Exhibit P4, on 27/4/2006, the plaintiff agree to pay one Manyenzo s/o Daudi before Tarime Primary court a total of 2,363,000/= by 8/9/2006, so that the case can be withdrawn.

Also according to the contents of Exhibit P4, when the criminal case was still under investigation, a total of Tshs. 1,300,000/= was seized by the police after the plaintiff had failed to agree how to pay his debt at the pharmacy of Jacob Samarwa @ Labole.

Therefore the said annextures A, B, and C were very crucial documents in determining the present suit failure of which this court can entertain doubt or draw an adverse inferences against the plaintiff. That if they were produced in court they might be against his case.

Further, Exhibit P4 was a copy and no previous notice was given to the court before its production as provided for by ***section 68 of the law of Evidence Act***.

Besides, plaintiff did not produce the receipt of the medicine which he alleges that they were seized by the police or even attach them in his paint.

Morever, the said receipts were not even tendered on the first day of hearing or in any subsequent stages of the hearing of the case as provided for under ***order XIII rule 1 and 2 of the CPC.***

Apart form the testimonial of plaintiff, the plaintiff also called his wife as a witness (this is PW2). She said that the plaintiff was indeed arrested by the police, searched and found with a total of Tshs. 1,350,000/= which were handed over to the OCS called Mrefu at the Police Station.

PW2 also told this court that on 8/4/2006 the police searched at their house and took medicine worth Tshs. 13,764,000/= together with the receipts she could not remember the name of the pharmacy where the medicine were purschased.

In his testimony in court, PW1 (Plaintiff) told this court that although he gave the police photocopies of the receipts for purchasing the medicines, still, the police charged him with the offence of theft before the District court of Tarime in criminal case No. 177 of 2006.

Therefore, in my considered view, the original receipts were still in the hands of the plaintiff, and he was supposed to tender them in court as Exhibit to prove his claim.

The law of evidence is very clear that who ever alleges a fact, unless it is unequalvocally admitted by the adversary, has to prove it, albeit, on the balance of probabilities.

In this case three issue were framed as follows;-

(i) Whether the plaintiff is entitled to Tshs. 300,000,000/= from the defendant as general damages for malicious prosecution and humiliation.

(ii) Whether the plaintiff claims cash Tshs. 1,380,000/= and medicine worth Tshs. 13,764,000/= seized by the defendants when he was arrested, searched and locked up.

(iii) To what relief's are the parties entitled to.

On the first issue, and as the evidence went in court, there was reasonable and probable cause for the plaintiff to be sued. The plaintiff failed to produce in court the receipts as an Exhibits for the allegedly

seized medicine from his house and therefore there is likely hood that the medicine in his possessions were illegal obtained.

Morever, the missing annextures A, B and C from exhibit P4 suggest that the plaintiff appears to have admitted to be in debted to other third parties and was ready to pay back some of the money. ***In other words the plaintiff was indebted.***

In order to maintain an action for malicious prosecution and humiliation, a plaintiff has to prove, among other things, that the prosecution was undertaken without reasonable and probable cause and was actuated by malice.

The plaintiff may as well have been arrested, locked up charged and cleared in a criminal charge based on the same facts but the burden was still on the plaintiff to prove absence of a reasonable and probable cause for the prosecution, a difficult task as he had to prove a negative.

In the case of ***Hicks Versus Faulkton (1878) QBD 167*** a reasonable and probable cause was defined as a honest belief in the guilty of the accused, but current thinking is that it is enough if the defendant believe that there is a reasonable and probable cause for the prosecution to act ***(see also Tempest versus showden (1952) IKB is 130).***

The plaintiff has failed to produce before this court the receipts for purchasing the medicine which he alleges that was seized by the police. There is also no any licence or documents tendered in court to show that the plaintiff was operating a pharmacy.

Therefore any reasonable and objective man could be excused for thinking that there was reasonable and probable cause for prosecution.

On the facts available at the laying of ***criminal case no 177 of 2006,*** it was not unreasonable to believe that the plaintiff was in possession of the medicine illegal.

However, the plaintiff was discharged therefrom under ***section 225 (5) of CPA*** for failure of the prosecution to file a certificate asking for further adjournment after expiration of 60 days.

Besides a discharge was not bar for further proceeding being institute on same facts. The two events cannot therefore be evidence of malice.

I am therefore satisfied that the plaintiff has failed to discharge the burden cast upon him by the law.

The second issue to be proved is whether the police took cash Tshs. 1,380,000/= from the plaintiff.

Although the 1st defendant did not respond by filing written statement defence or testifying in court, the plaintiff tendered in court exhibit P4 , (that is copy of a letter from the 1st defendant without annextures A, B, and C) which could have given clue on this issue may be in his favour.

Under ***section 101 of the law of Evidence Act,*** unless it is unequivocally admitted by the adversary, whoever alleges a fact has to prove it albeit on the balance of probability ***(see the case of Wolfong V Tito Da Costa)*** ZNZ ***Civil appeal No. 102 of 2002 (CA) unreported)***

Therefore, Exhibit P4 shifts the burden of proof of the claims of cash money and medicine to the plaintiff in the circumstances of this case.

As hinted earlier on, the plaintiff had not led any proof that he was operating a pharmacy and had purchased the medicine seized at his house by the police, which were suspected to have been obtained illegal.

After all, malice is in general never evidence of want of reasonable and probable cause, for a prosecution may be inspired by malice and yet have genuine and reasonable belief in the truth of his accusation ***(see Glinski v mclver (1962) AC 726 at 782)***

I am therefore satisfied in my mind that the police acted honestly and on reasonable grounds to prosecute the plaintiff in the Circumstance of this case.

In the final analysis, the suit is dismissed but with no orders as to costs.

K. M. Nyangarika
JUDGE

At Mwanza
16/12/2009