IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL APPEAL NO.6 OF 2008

KIBO MARCH GROUP LTD. .... APPELLANT

- Versus -

COSMAS UNGELLE ... ... RESPONDENT

(Appeal from the decision of the District Court of Arusha)

(J. J. KAMALA – RM))

Dated the 22nd day of November 2007

In

Civil Case No. 30 of 2005

Dated the 17th February & 27th March, 2009

JUDGMENT

Before Mmilla, B.M.J.;

The appellant, Kibo Match Group Ltd. is appealing against the judgment of the District Court of Arusha in Civil Case No. 30 of 2005 which was in favour of the respondent, Cosmas Ungele. The latter had sued the appellant company in that court for malicious prosecution.

The facts of the case revealed that the respondent was a former employee of the appellant, having been employed way back in 1988 as a manager at Doly Sisal Estate Farm. They revealed further that the respondent had his services with the appellant terminated in 2001, and that the said termination

was preceded by a criminal charge against him on account that he was reported to the police to have stolen his employer's property worth of shs. 2,600,000/=. That was criminal case no.253 of 2001. However, that case was later on withdrawn. About two years later, the police re-instituted the same charge against him, allegedly on the instructions of the appellant company. That was Criminal Case No. 384 of 2003. That case proceeded to trial and he was acquitted. It was then that he filed the said civil case in the District Court whose judgment is the subject of this appeal. Before that court, the appellant was adjudged and decreed to pay shs. 60,000,000/= to the respondent being general damages for malicious prosecution. It was also condemned to pay costs of the suit.

Like in the trial court, the appellant before this court is being represented by Maruma & Company, Advocates while Kimale & Company, Advocates are representing the respondent. The appeal is being disposed of by way of written submissions.

The memorandum of appeal has raised seven (7) grounds. Learned counsel Maruma has argued the first two grounds together. He has submitted in the first place that the trial court failed to appreciate the meaning of the expression "to prosecute" or indeed who a prosecutor is under the law governing the tort of malicious prosecution. Basing on the definition given by **Clerk and Lindsell on Torts, 13th Edition, paragraph 1887 at page 1061,** he has submitted that the expression "to prosecute" entails the setting of the law in motion by lying information before a judicial authority, adding that in the circumstances of this case it was the police who laid the charge before

the court and not the appellant. He sought support from **Salmon on Tort, 13th Edition,** citing **page 720**, also from the judgment of Lugakingira, J. (as he then was) in the case of **Edward Celestine & Others v. Deogratias Paulo (1982) T.L.R. 347 at page 350,** and the case of **Yohana Mujuni v. Isaya Bakabi (1969) H.C.D. 23.** He has submitted that these authorities are to the effect that if the information is laid to the police in consequence of which they decide to make an arrest and subsequently prosecute the person against whom the information is given, it cannot be said that the private person who gave such information to the police is the prosecutor. He has similarly referred this court to the provisions of section 7(1) of the Criminal Procedure Act which he says, places duty on the community to give information on crimes without fear of any reprisals. In view of this, learned counsel Maruma has asked this court to allow these two grounds of appeal.

On her part, while appreciating the definition rendered by **Clerk** and **Lindsell** cited by her learned friend, learned counsel Kimale has submitted that in the circumstances of the present matter, the appellant did more than furnishing information to the police for two reasons; firstly that when the respondent pleaded for leniency and requested for withdrawal of Criminal Case No. 253 of 2001 from the court, it was the appellant who instructed the Officer Commanding District (O.C.D.) of Arumeru District to withdraw the charge against the respondent. Secondly, upon request for his terminal benefits after a period of one year had elapsed, the appellant wrote again to the police instructing them to re-open the charge against the respondent, also that the appellant had served a letter to the respondent threatening to reactivate the previous charge (Exh.P1). It is submitted that re-institution

of the same charge vide Criminal Case No. 384 of 2003 was occasioned by the appellant in order to frustrate the respondent's endeavour to be paid the terminal benefits he was entitled to. She has rested her submission in this regard on the case of **Jeremia Kamama v. Bugandila Mayandi (1983) T.L.R. 123.** She has also submitted that the decision in the cases of **Edward Celestine** and **Yohana Mujuni** cited by her learned friend in essence favour the respondent rather than the appellant in as much as they are to the effect that a private person who gives information to police will not be held liable provided he acts in good faith which fact, it is submitted, is lacking in the present case. She has asked this court to hold, as did the trial court, that the appellant company unjustifiably and maliciously set the law in motion against the respondent.

In view of the interwoven nature of the arguments in respect of the first two grounds of appeal on the one hand, and the third and fourth grounds on the other, I think it will be most convenient for me to similarly discuss them together. So is the seventh ground.

While the third ground allege that the trial magistrate erred in fact and law for finding that there was no reasonable and probable cause for the appellant furnishing information to the police leading to respondent's prosecution, the fourth ground allege that the trial magistrate erred in fact and law in holding that the appellant's conduct which led to respondent's prosecution, was actuated by malice by failing to make proper inquiries. On the other hand the seventh ground alleges that the trial court did not properly evaluate the evidence it received.

Although avoiding to repeat the submission regarding the aspect touching on who prosecuted the respondent on the basis of the submission he has given in respect of the first two grounds of appeal; learned counsel Maruma has thrown more weight in this regard on whether or not there was evidence of malice at all on the part of the appellant in the report it made to the police. He has submitted that there was no such evidence. He has stated that the problem may have arisen because the legal meaning of malice was not appreciated by the trial court. On this, he resorted to the explanation given in **Halsbury's Laws of England, 2nd Edition, Vol. 22 paragraph 15 on page 13** at which the term "malice" has been explained as follows:-

> "The malice which the plaintiff...has to prove is not malice in its legal sense, that is, such as may be assumed from a wrongful act done intentionally without just cause or excuse, but malice in fact – malice animus- indicating that the defendant was actuated either by spite or ill will against the plaintiff, or by indirect or improper motive".

As regards the requirement of reasonable or probable cause, learned counsel Maruma has submitted that it is enough if the appellant had a reasonable bonafide belief in the existence of such facts as would justify making a report to the police. He relied on the expression in **Winfield and Jolowic on Tort, 15th Edition (1998) at page 684** and **Halsbury's Laws of England, 3rd Edition, Vol. 23 paragraph 700**. He similarly cited the case of **Dawson v. Vanandave (1863) II W.L.R. 516 at page 518** in which it was held that the term

"reasonable and probable cause" does not mean the prosecution has to believe in the probability of conviction".

It has also been submitted by learned counsel Maruma that had the respondent been in doubt as to the reasonable and probable cause of the complaint against him, he would not have been moved to write to the appellant on 3rd August, 2001 pleading for lenience. He requested them to withdraw the complaint against him.

Responding to this, learned counsel Kimale has submitted that the trial court properly held that there was no reasonable and probable cause for the appellant to furnish information to police leading to the arrest and prosecution of the respondent as it was. She relied on the case of **Hicks v. Faulkner (1878) 8 QEB 167** referred to in the case of **Festo v. Mwakabana (supra)**. She expressed the view that since the charge in respect of Criminal Case No. 253 of 2001 involved shs.2, 600,000/=, but that the re-instituted charge in Criminal Case No. 384 of 2003 involved a colossal sum of money of Tshs. 46,287,000/=, and since that was done without conducting proper inquiries, the trial court rightly held that the prosecution had been actuated by malice, hence the conclusion that the act of the appellant company was without reasonable and probable cause. She has asked this court to dismiss these two grounds too.

To begin with, the learned authors **Clerk** and **Lindsell** have defined the term to "prosecute" as follows:-

"To prosecute is to set the law in motion by lying information before a judicial authority such as a magistrate who then issues a warrant of arrest and it is not prosecution by the defendant if he merely furnishes information to the police officer who then acts on his own discretion as a result of his own investigation".

The term prosecution has been defined in paragraph 684 of **Halsbury's Laws of England, 3rd Edition, Vol. 23 at page 349** as follows:-

"A prosecution exists where a criminal charge is made before a judicial officer or tribunal, and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute it, and is called a prosecutor...."

Our courts in Tanzania have had opportunities of discussing who a prosecutor is. I refer to the cases of **Jeremia Kamama v. Bugandila Mayandi (supra)** and **Hosia Lalata v. Gibson Zumba Mwasote (supra).** In these cases, a prosecutor has been defined as a person who is actively instrumental in putting the law in motion. It was held in the case of **Hosia Lalata** that:-

"(iii) in malicious prosecution a prosecutor is a person who is actively instrumental in putting the law in motion".

Three years later, this same expression was repeated in the case of **Jeremia Kamama** in which it was held that:-

"For the purpose of malicious prosecution a person becomes prosecutor when he takes steps with a view to setting in motion legal process for the eventual prosecution of the plaintiff."

On the basis of these authorities, I am confident that the appellant in our present case qualifies, as I accordingly hold, to be a prosecutor for having been actively instrumental in putting the law in motion.

It should be pointed out however, that on whether or not the person being alleged to have set the law in motion is liable, the court has to look for evidence tending to establish, among other elements, that in giving the information which is the subject of complaint, the defendant was actuated by spite or ill will also called malice, similarly that he had no reasonable and probable cause in furnishing such information to the police. May I begin by posing one question: What does the phrase malice entail?

The term malice means the presence of some improper and wrongful motive, that is, intent to use the legal process in question contrary to its legally appointed and appropriate purpose. In the old English case of **Brown v. Hawkes (1891) 2 QB at pg. 722,** the court said:-

> "Malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor".

It is similarly essential to try and explain the meaning of the phrase "malicious prosecution". Briefly stated, malicious prosecution entails

institution of proceedings against another for improper purpose. In **Blacks Law Dictionary, 7th Edition, Bryan A. Gardiner, West Group, St. Paul, Minn, 1999,** the phrase "malicious prosecution" is defined at page 970 to mean:-

> "...the institution of a criminal or civil proceedings, for an improper purpose without probable cause".

It should similarly be pointed out that the action for malicious prosecution will not lie, however destitute of reasonable and probable cause, unless it has been instituted maliciously, that is to say, from some wrongful motive. Let me also state here that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted as was stated in the case of **Dallison v. Caffery [1965] 1 Q.B. 348).** It is also essential to point out that malice and absence of reasonable cause must unite in order to produce liability.

In this court's view, the expressions given above correspond to the authorities relied upon by learned counsel Maruma that the malice which the plaintiff has to prove is not malice in its legal sense, that is, such as may be assumed from a wrongful act done intentionally without just cause or excuse, but malice in fact – malice animus – indicating that the defendant was actuated either by spite or ill will against the plaintiff, or by indirect or improper motive. I also agree with him that it is enough if the appellant had reasonable bonafide belief in the existence of such facts as would justify making a report to the police.

In the case of **Edward Celestine & Others v. Paulo (supra),** the court stated that in order for the plaintiff to succeed in an action for malicious prosecution, he is duty bound to prove five elements. At page 350 the court said, I quote:-

> "In order for the plaintiff to succeed in an action for malicious prosecution he had to establish unity of four elements; first, that he was prosecuted by the defendant; second, that the prosecution terminated in his favour; third, that it was without reasonable and probable cause; fourth, that it was malicious".

See also the cases of **Yohana Mujuni v. Isaya Bakabi, Festo v. Mwakabana,** and **Hosia Lalata v. Gibson Zumbe Mwasote.** It should be emphasized that all these four elements must be clearly proven.

In our present case, the appellant company does not dispute furnishing information to the police, which report led to respondent's arrest and prosecution. As I have already said, the appellant company qualified to be a prosecutor as it was actively instrumental in setting the law in motion. Similarly, it is a fact that the prosecution in respect of Criminal Case No.384 of 2003 ended in the respondent's favour since he was acquitted of the said charge. In the circumstances, the trial court properly held that these two aspects were proven. The issue that follows is whether the appellant company had reasonable and probable cause in furnishing the said information to the police as it were.

In addressing this point, the trial court sought guidance from the case of **Commonwealth Life Assurance Society Ltd. v. Brain (1935) 53 C.I. R. 343** in which Dixon, J. said at page 382 that:-

> "The prosecutor must believe that the possibility of the accused's guilty is such that upon general grounds of justice a charge against him is warranted".

Basing on this, that court said that because the appellant "...failed to give a proper evidence that shows the plaintiff was suspected to be a thief and to ask himself that under what circumstances he was involved..." it had no basis to believe that the charge against the respondent was warranted.

Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified. In **Hicks v. Faulkner 8 QBD 171** the court said:-

> "I should define reasonable and probable cause.....to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime implied".

See also the case of **Herniman v. Smith [1938] A.C. 305 at page 316.**

I gather from these authorities that no action will lie for institution of legal proceedings however malicious, unless they have been instituted without reasonable and probable cause

Learned counsel Maruma has repeatedly submitted that the appellant had reasonable and probable cause in laying the report to the police since he genuinely believed that the respondent had caused it to suffer loss. It is his further submission that Criminal case No 253 of 2001 was withdrawn on the respondent's request for leniency. On this, the appellant relied on a letter a photo copy of which was annexture D6 to the Written Statement of Defence. It was in the testimony of DW1 Pius Hugo Malya that the respondent had pledged in that letter to take no any action or challenges against the appellant were they to withdraw the case. It is unfortunate however, that although annexture D6 was talked about as reflected on page 18 of the typed proceedings of the trial court, DW1 did not tender the original letter so as to become evidence in the case. Indeed, that was necessary if it was intended to convince that court that there was such request made. No justification for failure to do so was revealed. As such, no weight could have validly been attached to such document. Under normal circumstances, I would have discarded this piece of evidence.

However, the situation in the present case is different. The reason is that learned counsel Kimale has admitted in her submission that the respondent

had pleaded for leniency and requested the appellant to withdraw Criminal Case No. 253 of 2001 from the court. The case of **Pushpa d/o Raojibhai M. Patel v. The Fleet Transport Company Ltd [1960] E.A. 1025** can guide us on the point.

In that case, the appellant claimed damages for injuries she suffered when she was struck by a vehicle belonging to the respondent. It was alleged in the plaint that she was struck by the trailer attached to the lorry and that the driver was negligent inter alia by driving a large lorry and trailer too close to the footpath at the left-hand side of the road and/or permitting part of the trailer attached to the lorry to encroach from the roadway over the footpath at the left-hand side of the road. The respondent denied negligence and in the alternative pleaded contributory negligence on the part of the appellant. At the trial the respondent argued that the appellant was bound by her pleadings and that having failed to prove that she had been struck by the trailer in the manner given in evidence, she could not rely on evidence which indicated by inference that she might have been struck either by the trailer or the lorry. In summing up his case to the court **counsel for the appellant conceded that if the front part of the trailer did not hit the appellant then the court should find for the respondent.** The Supreme Court dismissed the action holding that how the accident happened was a matter of conjucture and accordingly the appellant had not proved that the injuries were due to the negligence of the respondent's driver.

While appreciating the intimation by the advocate for the appellant to the judge to find for the respondent if the front part of the trailer did not hit

Pushpa, the Court of Appeal expressed the view that the learned judge could not have been right if at all he was influenced by that submission and confined his consideration to that aspect. It was held that:-

> "(iii) the admission by the advocate for the appellant was on a matter of law and, if incorrect, was not binding on the appellant."

In that the admission of the respondent's advocate in our present case is on factual matters, such admission is binding on the respondent. In view of the fact that he had requested for lenience, it is proper to infer that the respondent had also believed, as did the appellant, that there was a possibility of a guilt verdict in Criminal Case No. 253 of 2001. Otherwise, I fail to understand why he could have asked for leniency had he thought he was all innocent. It is to say therefore, that the appellant had reasonable and probable cause in re-furnishing the report to the police as rightly submitted by learned counsel Maruma, and that it was not at all a new complaint, though it carried some amendments, particularly as to the extent of loss.

Since the respondent had pledged in that letter (annexture D6) that he was going to take no any legal action against the former, the letter constituted in exhibit P1 cannot be regarded as having been an unwarranted response so as to qualify as evidence of malice.

It should also be stated that, where the legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability, and conversely, if there are reasonable grounds for the proceedings (for example the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability. It is also proper to hold that since the appellant had reasonable and probable cause in furnishing the said information to the police as I have just found, it cannot be said that the prosecution was malicious, not withstanding the fact that the criminal case terminated in his favour. The reason is clear that as I have stated above, malice and absence of reasonable cause must unite in order to produce liability. The respondent therefore was not entitled to recover any damages.

Let me pose here to say that, while I appreciate the submission of learned counsel Maruma that section 7 (1) of the Criminal Procedure Act places duty on the community to give information on crime without fear of any reprisals, which obligation on the citizenry is mandatory, I would like to state that since the foundation of the action of malicious prosecution lies in abuse of the process of court by wrongfully setting the law in motion, the rationale being the intention of this area of law to discourage the perversion of machinery of justice for an improper purpose, an action of this nature does not in my view conflict with the provisions of section 7(1) of the Criminal Procedure Act. There is therefore no cause for alarm.

The fifth and sixth grounds refer to damages. While the fifth ground allege that the trial magistrate erred in fact in holding without evidence that the

respondent's business in Tanga was adversely affected because he was not allowed to go out of Arusha Region, the sixth ground alleges that the trial magistrate erred in law for awarding damages without any assessment.

I have carefully gone through the submissions of both counsel for the parties in this regard. I have noted that both sides have raised contentious points, which in a proper case would deserve serious consideration. These include the question of special damages which were allegedly not pleaded in the plaint, also whether the general damages which were awarded were justified, among other matters.

In my considered opinion however, since I have found that the trial court erred in holding that the prosecution was void of reasonable and probable cause, also that it erred in holding that the prosecution was actuated by malice; I find that there is no need to consider whether or not special damages would be recoverable where they were not specifically pleaded, also as to how much of the general damages would have been requisite in the circumstances of this case since to do so will serve no any good purpose.

However, I wish to point out two things in the passing. Firstly that in dealing with the question of damages, the court is required to be clearly versed with the requisite principles of law governing this area. We should remind ourselves that unlike general damages which need not be proved where they are pleaded because they are implied in every violation of a legal right, special damages require to be specifically pleaded and strictly proved. There are a number of cases which have had opportunity of stressing this

point, including the often cited case in this judgment that is, **Hosia Lalata.** No doubt, the reason is clear that because they arise out of special circumstances, such damages refer to the actual loss which has in fact been suffered. In the premises, where the plaintiff fails to offer such proof, he is precluded from recovering.

The second aspect is that the respondent specifically prayed in the plaint for the court to award him a specified amount of shs. 60, 000,000/= as general damages, and was indeed awarded that amount. This amount is now being contested as unjustified. In this court's view, although not fatal, it is improper for the plaintiff to aver in the plaint that he is entitled to be paid so much an amount of money because that is for the court to decide. The reason is clear that the suffering such as which was alleged in the present case is usually but not exclusively non-pecuniary therefore not capable of precise quantification in monetary terms.

In conclusion therefore, for the reasons I have attempted to give, the appeal has merits and succeeds. Costs to follow the event.

(Sgd)

Mmilla, B.M.

Judge

27.3.2009

Date: 27/3/2009

Coram:- B. M. K. Mmilla, J.

For the Appellant: Mr. Maruma.

For the Respondent: Mr. Maruma/Kimale

B/c: Priscila.

Court: Judgment delivered this 27th day of March, 2009 in the presence of learned counsel Maruma for the appellant who also held brief for learned counsel Kimale for the respondent.

(Sgd)

B. M. K. Mmilla

Judge

27/03/2009

I certify that this is a true copy of the original.

G. HERBERT

AG. DISTRICT REGISTRAR

ARUSHA

BMM/jn.