

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NUMBER 142 of 2009

(Originating from Civil Case No. 294 of 2005-Resident Magistrate's Court of Dar es Salaam at Kisutu-N.R. Mwaseba-RM)

MSAFIRI MALILO....

1ST APPELLANT

MANAGING DIRECTOR OF SHIVACOM....

2ND APPELLANT

VS

RAMADHANI JUMA MAZOLA.....

1ST RESPONDENT

MOHAMED ABUBAKAR.....

2ND RESPONDENT

JOHN KAIZA.....

3RD RESPONDENT

JUDGMENT

Date of last Order: 17-08-2010

Date of Ruling: 19-10-2010

JUMA, J.:

This appeal emanates from the Judgment and Decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu. Mr. N.R. Mwaseba, the learned Resident Magistrate delivered his Judgment on 3rd September 2009 wherein he concluded that the appellants (MSAFIRI MALILO and MANAGING DIRECTOR OF SHIVACOM) maliciously prosecuted the respondents (RAMADHANI JUMA MAZOLA, MOHAMED ABUBAKAR and JOHN KAIZA). Appellants are aggrieved by the general damage of Tshs. 5,000,000/= which the trial court awarded each respondent. Appellants' grounds of appeal can conveniently be summarized into two. First, appellants

contend that the tort of malicious prosecution was not established at the trial court. Second, the trial court erred by failing to consider appellants' counter claim.

Briefly, the background facts leading to this appeal traces back to 27th December 2004 when the 1st appellant, an employee of the Shivacom Tanzania Ltd was involved in a road accident. The motorcycle the 1st appellant was riding was hit by a speeding vehicle at Jangwani stretch of the Morogoro road. Respondents were passengers in the vehicle that hit the 1st appellant. Following that accident the respondents joined a group of good Samaritans who assisted the 1st appellant back to the offices of Shivacom Company. Police arrived few minutes later and took with them all the respondents back to the Central Police Station where the respondents were arrested and their statements taken. Respondents remained under police custody for about five days before they were taken to court and charged with two offences, of conspiracy to commit an offence and of attempted robbery. Later the Director of Public Prosecutions entered a *nolle prosequi* in his favour of the respondents.

Respondents manifested their grievance by filing a malicious prosecution case at the Resident Magistrate's Court, Kisumu. Respondents gave their own version of what the 2nd appellant had allegedly told them which respondents regarded as actuated by malice. According to 1st respondent upon reaching the offices of Shivacom Company, the 2nd appellant thanked the appellants for

helping the 1st appellant but asked them to wait at the reception since he had called the police. The 2nd appellant explained that he wanted the good Samaritans to narrate to the police how the accident involving the 1st appellant occurred. The 1st respondent testified that after the police had consulted with 2nd appellant, the 2nd appellant told the police, - "*chukua hao, watu weusi wezi.*" On his part, 2nd respondent gave the version that the 2nd appellant had told the police- "*chukua wezi tu hao*" literally accusing them to be thieves. The 3rd respondent testified that 2nd appellant had told the police -"*kamata, chukua, hiyo wizi waswahili nyinyi hamuaminiki*"- (arrest and take away these dishonest Swahili people).

Appellants prefaced their submissions by reiterating the principles governing the tort of malicious prosecution as restated by Chipeta, J. in the case of **Jeremiah Kamama v Bugomola Mayandi 1983 TLR 123**. According to this case, for a suit for malicious prosecution to succeed the plaintiff must prove simultaneously first, that he was prosecuted; secondly the proceedings complained of ended in his favour; thirdly, the defendant instituted the prosecution maliciously; fourthly there was no reasonable and probable cause for such prosecution; and fifthly, the damage was occasioned to the plaintiff.

The issue whether the respondents were prosecuted for the purposes of the tort of malicious prosecution need not detain us long. I am in full agreement with the restatement of the law

governing the tort of malicious prosecution as restated by Chipeta, J. in **Jeremiah Kamama v Bugomola Mayandi [supra]**. For purposes of this appeal, I will restrict myself only to the two ingredients constituting the tort of malicious prosecution. The two ingredients are, whether the appellants had any reasonable and probable cause for setting into motion the prosecution of the respondents; and whether, the appellants acted with malice when setting into motion the events that finally led to the criminal prosecution of the respondents.

Mr. Kamala, the learned Advocate for the appellants submitting that there was reasonable and probable cause for the appellants to report the motorcycle accident to the law enforcement organs. Mr. Kamala further every reasonable man will be suspicious of the motive of respondents by looking at the circumstances in which the accident occurred. Mr. kamala referred this court to the evidence of the 1st appellant [DW1] who in his testimony expressed his fears that the respondent's had ill motive when they raced their vehicle and knocked the 1st appellant off his motorcycle. The learned Advocate also asserted that other facts which added to the prevailing reasonable cause to be suspicious was the failure of the respondents to disclose the registration number of the vehicle they were riding and the decision of the driver of this vehicle to escape with his car from the scene of the accident. Mr. Kamala completed his submission by reiterating that the decision of the appellants to report the accident to the police was not actuated by spite, ill-will or by any improper motives.

Mr. Kirigiti, the learned Advocate for the respondents considered the arrests and subsequent criminal prosecution of the respondents not only wrongful, but was actuated by malice. Mr. Kirigiti submitted further that it was the 2nd appellant who through his racist words ordered the police to arrest the respondents instead of asking the police to investigate the accident. Failure of the 2nd appellant to testify in the criminal case was according to Mr. Kirigiti a clear indication of the instructions which the 2nd appellant issued to the police.

Having given the submissions of the two learned Counsels due weight and respect they deserve, I propose to evaluate the evidence record to determine whether there was any reasonable and probable cause for the appellants to report the respondents to the police and the police to initiate criminal proceedings against the respondents. In other words, whether the evidence before the trial court could enable a prudent and cautious person to believe that there were reasons to involve the police and the police to take criminal action.

In his evaluation of evidence, the trial court magistrate regarded the accident involving the 1st appellant and the vehicle conveying the respondents to have been a normal accident and that the three respondents had nothing to do with the accident. To the trial magistrate, the three respondents were good Samaritans who had stopped by the road in order to offer assistance to the victim of the accident.

It is not in dispute that the 1st appellant was knocked off his motor cycle by a speeding car while he was conveying his employer's money back to the city centre. It is not in dispute the 1st appellant strongly believed that passengers in the speeding car were looking at him while trying to over-take his motorcycle. There is evidence to the effect that the 1st appellant wore clothes that identified him as Shivacom employee and he was conveying his employer's money from his daily collections.

The issue is whether it was reasonable to suppose that persons with bad intentions must have known that 1st appellant was conveying the money to the city centre. Another issue is whether these suspicions by the 1st appellant were reasonable and worth reporting to the police for further investigations.

Malicious prosecution is the malicious institution of unsuccessful criminal proceedings against another without reasonable or probable cause. There are a number of established principles of law governing how to discern reasonable and probable cause for purposes of prosecution. The case of **Fernandes v. Commercial Bank (1969) E.A 482** correctly in my view suggests that what amounts to "reasonable and probable cause" depends on facts in individual cases. This Court in **Mboya v. Kitambia and Others HCD No.168** also enunciated a principle that if the Defendant knowingly makes a false report as a result of which an innocent person is sent for trial he will be liable as a prosecutor even if the prosecution was not technically his.

Applying the foregoing enunciated principles of law, I am satisfied that the 1st appellant did not fabricate up a story of having been knocked down by a speeding vehicle. He had a legal duty to report both the accident to the police together with his own suspicions on who caused the accident. The decision by Lindley, J in the case of **Danby v. Beardsley (1880) 43 L.T 603** is persuasive in so far as its restatement of the law to the effect that where the defendant merely informs the Police of certain facts which incriminate the plaintiff, and the police as a result decide to prosecute, the defendant will not be regarded as having instituted the proceedings since the decision to prosecute is not his and the stone set rolling by the defendant is a stone of suspicion only.


There is another angle as to whether the police arrested the respondents on the strength of racist words which according to the respondents were made by the 2nd appellant. I am of the considered opinion that the police officers who carried out the arrests and prosecutions of the respondents did not do so on the strength of racist words allegedly spoken out by the 2nd appellant, but on the strength of the accident involving employee of the 2nd appellant who was conveying sums of money. It was reasonable on the part of Shivacom management to report the accident to the police. My re-evaluation of evidence leads me to make a finding and to hold that the 1st and 2nd appellant did not abuse the process of the court by setting the law in motion on a criminal charge levelled against the respondents.

The trial magistrate did not seem to have evaluated relevant evidence to determine whether after receiving complaints from 1st and 2nd appellants, the police on their own had any reasonable and probable cause to prosecute the respondents. In this respect, the trial magistrate should have evaluated the evidence of the police D/Sgt Amos (DW2) who testified on the suspicions which police had. DW2 investigated the criminal case and testified at the trial how the police received information that at Shivacom there were people who had tried to carry out a robbery. He interrogated the appellants at Shivacom offices. According to DW2 the Police wondered why after knocking the cyclist down the taxi driver ran away and left the respondents. The police charged the respondents because their statements were not satisfactory.

Records of the trial court show that even upon his cross examination by Mr. Kiligiti DW2 maintained that the police were suspicious because the respondents were army officers and police wondered why they allowed the driver of the hired vehicle to escape. DW2 further claimed that one of the respondents was in police garments and another in civilian clothes. DW2 stated that the police suspicions were raised because many offences were increasingly being committed by people wearing police garments. In addition, the police showed more interest in respondents because the victim of the accident had a lot of money. The fact that a nolle prosequi was entered in favour of the respondents is not prima facie evidence that the charge that had earlier been preferred against them was unreasonable, false and

actuated by racist motive. Lack of reasonable and probable cause is all what is important to prove their claim. In my opinion, the two appellants and the police had reasonable grounds to believe that the accident which occurred at Jangwani stretch of Morogoro road was probably part of a criminal conspiracy.

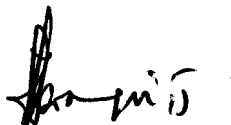
Having reached the foregoing conclusion, the tort of malicious prosecution must fail. Appellants were not actuated by malice when they reported the accident to the police. Appellants had reasonable and probable cause to report the accident to the police. Appeal is allowed and the judgment and decree of the trial court is set aside. Appellants are awarded the costs.



I.H. Juma
JUDGE
19-10-2010

Delivered in Chambers in the presence of:

Mr. Magusu Adv. for the Plaintiffs and Mr. Ramadhani Juma
Mazola 1st Respondent, Mohamed Abubakar, 2nd Respondent.



I.H. Juma
JUDGE
19-10-2010

