

IN THE HIGH COURT OF TANZANIA

**AT DAR ES SALAAM
CIVIL APPEAL NO 68 of 2010**

**TANZANIA INTERNATIONAL
CONTAINER TERMINAL SERVICE LTDAPPELLANT**

VS.

ATHUMANI MOHAMED NDULLAH.....RESPONDENT

JUDGMENT

Date of last Order: 28-06-2011

Date of Ruling: 21-07-2011

JUMA, J.:

This appeal by the appellant and cross-appeal by the respondent originate from the Judgment and Decree of Resident Magistrate (Mwaseba-RM) which was delivered on 22nd February 2010 in the Resident Magistrate's Court of Dar es Salaam at Kisutu (Civil Case No. 173 of 2004).

Briefly stated, the background facts leading up to this appeal and cross appeal traces back to 10th September 2000 when Athumani Mohamed Ndullah (respondent

herein) was employed as a Clerk by the Tanzania International Container Terminal Services Ltd (appellant herein). Respondent was stationed at Dar es Salaam where the appellant had a depot for receiving containers from ships that call at the Dar es Salaam harbour. Two months into his employment, respondent was arrested by the police and taken to the Kilwa Road Police Station. According to the respondent, from 14-11-2000 to 15-11-2000 and also from 17-11-2000 he was locked up by the police before he, and three others were taken to the District Court of Temeke (**Criminal Case Number 823 of 2000-B.R. Mutungi-RM**) where they were charged with two counts of conspiracy to commit an offence and an offence of stealing a container. Respondent further alleged that he was denied bail by the district court and remanded from 20-11-2000 to 24-11-2000 when he was admitted to bail pending the completion of his criminal trial.

After hearing five prosecution witnesses the trial court found that the prosecution had failed to establish any prima facie case and acquitted the respondent. Being

aggrieved by his arrest, detention and criminal trial he had to endure, the respondent sued the appellant and the AIR CLEARING AND FORWARDING COMPANY LTD in a civil suit (Civil Case No. 173 of 2004) at Resident Magistrate's Court at Kisumu. Respondent wanted the trial court to order the appellant to pay him TZS 80,000,000/= as general damages for mental and physical torture he suffered. Respondent also wanted to be paid an award of TZS 15,000,000/= as general damages for malicious prosecution and wrongful imprisonment or confinement. Respondent additionally wanted to be awarded TZS 500,000/= specific damages he suffered when defending the criminal case number 823 of 2000.

In its defence before the subordinate court the appellant company stated that no false or malicious allegations were preferred by any of the appellant's officers against the respondent. That respondent's arrest by the police on criminal charges was not a result of the appellant's complaint. Similarly, appellant disputed that the respondent was unlawfully confined by Mr. Masawe as alleged and that the appellant was merely availing the

respondent to the police following the complaint by the 2nd defendant in the subordinate court (AIR SEA CLEARING & FORWARDING LTD.)

At the conclusion of the trial, the learned trial magistrate granted the respondent TZS 5,000,000/= as the general damage for mental torture resulting from malicious prosecution. The trial magistrate in addition awarded the respondent TZS 500,000/= as special damage resulting from suffering the respondent had to endure defending the criminal case. Appellant was also ordered to pay the costs incurred by the respondent.

Certified copies of the Judgment and the Decree of the trial RM's court were finally ready for collection on 19th May, 2010 and the appellant lodged this appeal on 14th June, 2010 and has preferred the following grounds:-

- i) The learned Resident Magistrate erred in law and in fact in not addressing the contradictory evidence of PW1 (respondent's) regarding his alleged unlawful confinement.

- ii) The learned Resident Magistrate erred in law and in fact in not applying and satisfying simultaneously the required five elements for a suit of malicious prosecution to succeed.
- iii) The learned Resident Magistrate erred in law in finding that the prosecution was malicious simply because the person who reported the incident did not give evidence in the criminal case.
- iv) The learned Resident Magistrate erred in law and in fact in awarding the respondent general damages for mental torture of TZS 5,000,000/= and special damages of TZS 500,000/= without supporting evidence.

On 21st July 2009 the respondent lodged his own cross appeal. He too preferred four grounds of cross appeal. And like the appellant, respondent would like this court to set aside the Judgment and the Decree of the trial court.

I propose to deal first with appeal by the Tanzania International Container Terminal Services Limited.

Submitting on appellant's contention respondent (PW1) gave contradictory evidence regarding his alleged unlawful confinement, the counsel from the M/S M.A. ISMAIL & CO, Advocates pointed out that while respondent testified that he was arrested and confined by an employee of the appellant going by the name Masawe, respondent contradicted himself by testifying that it was two police officers who informed him that he was under police custody before they took him to Kilwa Road Police Station. According to the learned counsel, this testimony of the respondent at least confirms that it was the police who confined the respondent. The learned counsel submitted further that the appellant had many employees who could have witnessed the unlawful confinement if it had taken place at all. But the respondent did not bring any such witness.

In his replying submission on unlawful confinement, respondent refers this court to the evidence of witness of the appellant Sadiki N. Abdallah (DW1) who under cross examination had testified that respondent was seated in a bench in security section waiting for the police to arrive

and that at 15:30 hrs the security Manager of the appellant sent the respondent in the company of two police officers, to the police station. Respondent further referred this court to page 37 of typed proceedings of the trial court where under cross examination DW1 testified that the police found the respondent in appellant's compound seated on a bench at security section of the compound. DW1 also conceded that he did not know for how long the respondent was at the security section before the arrival of the police.

From the submissions by the two opposing sides, and upon my perusal of the record of trial proceedings, I see no reason to interfere with the finding of facts by the learned trial magistrate with respect to unlawful confinement of the respondent. The trial magistrate was entitled to conclude as he did that the security officer of the appellant (one Mr. Masawe) had no power to arrest suspects and confine them. Even the appellant's witness (DW1) did not know for how long the respondent had been detained before the two policemen arrived. The trial magistrate was also fully justified to note the demeanour

of witnesses and to observe that the act of DW1 failing to tell the trial court the time he took the respondent to police station made the trial court to believe the evidence by respondent that he was confined from 11:30 to 15:30. The two police officers, who came to arrest the respondent, must have been called by the appellant. These two police officers were not permanently stationed in the appellant's compound. I have no doubt from evidence that the police on their arrival, found the respondent already restrained by the appellant's security officers. The first ground of appeal is without merit and is hereby dismissed.

With regard to the second ground of appeal it was submitted on behalf of the appellant that the law required the respondent to simultaneously prove all the five elements constituting the tort of malicious prosecution. Appellant has contended that the respondent did not establish that the appellant was actuated with malice when its employee reasonably suspected the respondent and reported him to the police. Respondent did not in his submissions direct his

mind to the second ground of appeal on the need to prove all elements constituting the elements making up the tort of malicious prosecution.

I should point out that apart from some minor modifications which I will elaborate later with respect to the element of "malice," I agree with the principle of law governing the tort of malicious prosecution which was restated by Chipeta, J. (as he then was) in the case of **Jeremiah Kamama v Bugomola Mayandi 1983 TLR 123**. According to this restatement, for a suit for malicious prosecution to succeed the plaintiff must prove simultaneously-

- i) *that he was prosecuted;*
- ii) *the criminal proceedings complained of ended in his favour;*
- iii) *the defendant instituted the prosecution maliciously;*
- iv) *there was no reasonable and probable cause for such prosecution; and*
- v) *the damage was occasioned to the plaintiff*

The plaintiffs need to prove these elements in order to succeed in their malicious prosecution suit against the

defendants. Applying the restatement of the law to the present appeal, there is evidence that proves on balance of probability that the respondent was indeed prosecuted. There is also evidence that further proves that the **Criminal Case Number 823 of 2000** at the District Court of Temeke ended up in favour of the respondent.

In my re-evaluation of the evidence that was presented before the trial court, I will restrict myself to only two of the five above-mentioned 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.

With regard to re-evaluation of evidence establishing reasonable and probable cause I will take into account the judicial guide provided by the persuasive case of **Fernandez v. Commercial Bank (1969) E.A 482**. This

case in my opinion correctly restates the law applicable in Tanzania by suggesting that what amounts to “reasonable and probable cause” depends on facts in individual cases. In this case before me, appellant had at the very least the evidential burden to show reasonable and probable cause for setting into motion the detention of the respondent in its security section and calling in the police and subsequent criminal prosecution of the respondent. Unfortunately, appellant’s witness did not shift the evidential burden with respect to whether there was any reasonable and probable cause to arrest the respondent.

At the subordinate court, appellant’s only witness (Sadiki N. Abdallah who testified as DW1) testified that respondent was sent to police after the disappearance of the container. This witness did not elaborate how the theft of the container took place and the nature of the probable involvement of the respondent in the disappearance of the container. It is not enough, for purposes of reasonable and probable cause; to merely testify in a civil case that there was a loss of a container.

In my opinion, mere loss of property does not necessarily justify indiscriminate arrests and criminal prosecution without reasonable and probable cause. A person who sets the prosecution of another into motion has at least an evidential burden of proof to show to show reasonable and probable cause to set the arrest into motion. DW1 should have testified on what made the appellant to suspect the respondent but not anyone else with respect to the loss of the container. Similarly, although it was the appellant's security guards who had confined the respondent and reported him to the police; SGT Joseph who testified in the the District Court of Temeke **(Criminal Case Number 823 of 2000)** as PW2 did not say anything about reasonable and probable cause to suspect the respondent with commission of any offence.

From the foregoing, the trial magistrate was in my opinion entitled to conclude as he did that there was no reasonable and probable cause for the appellant to set the law against the respondent. The trial magistrate was with all due respect; correct to find that there was no

evidence in any way suggesting that the respondent had any hand in the disappearance of the container. Similarly, the trial court magistrate was fully entitled to wonder aloud why, after reporting the theft to police, Mr. Masawe could not testify as a key witness to offer evidence to discharge the evidential burden showing the basis of the appellant's reasonable and probable cause to report the respondent. From the foregoing, it is clear to me that on balance of probabilities the respondent established that he was prosecuted, the criminal proceedings against him ended in his favour, and there was no reasonable and probable cause for such prosecution.

With regard to the requirement to prove malice, I have my own slight modification on the principle of law respectfully restated by Chipeta, J. (as he then was) in the case of **Jeremiah Kamama Vs. Bugomola Mayandi (supra)**. In my opinion where a plaintiff establishes that there was no reasonable and probable cause to launch a prosecution against him, a tort of malicious prosecution is still established even if the plaintiff does not give any

particular evidence proving malice. In my opinion, malice need not be specifically proved where a person sets into motion the prosecution of a defendant without any reasonable and probable cause. I make a finding and I hereby hold that the third ground of appeal is without merit and is dismissed.

In the fourth ground of appeal, appellant contends that there was no evidence before the trial court to support its award of the general damages for mental torture (TZS 5,000,000/=) and special damages (TZS 500,000/=), which the trial court granted the respondent. It was submitted on behalf of the appellant that proof of malicious prosecution is not enough to show that damage had been suffered. According to the appellant, respondent should have proved that he suffered. Appellant believes that the general damages of TZS 5,000,000/= should not have exceeded the special damages of TZS 500,000/= which was awarded. Respondent had nothing to say about this ground of appeal on award of general and special damages by the trial court.

From the submissions made on the issue of general and special damages, law in Tanzania is now settled that general damages are those which this court presumes to have arisen out of defendants' wrongful act. Quantification of general damages is a matter for the court to decide and its calculation depends on the circumstances of individual cases. With regard to special damages, the Court of Appeal of Tanzania has in the case of **Zuberi Augustino V Anicet Mugabe 1992 TLR 137 (CA)** laid down the law that special damages must be specifically pleaded and proved.

I have carefully re-examined the record of proceedings of the trial court with regard to the award of general and special damages to the respondent. I have also re-examined the evidence that established the time the respondent spent in custody and the time he was out on bail awaiting his criminal trial, and the costs of defending his criminal case number 823/2000. From the foregoing re-evaluation and re-examinations, I do not see any justification for this Court on appeal, to interfere with the

general and special damages which the learned trial magistrate awarded. I hereby dismiss the fourth ground of appeal.

I should perhaps now pause here and consider the merits of the Cross-Appeal. I have studied the documents relating to the cross-appeal which the respondent filed. While Civil Appeal Number 68 of 2010 was filed by the appellant on 14th June 2010, respondent filed his own Cross Appeal on 21st July 2010. The grounds in the cross appeal can easily be paraphrased as contending:

- 1) That the trial magistrate failed to consider all issues which were framed by the same court.
- 2) That the magistrate who delivered the judgment was not a trial magistrate.
- 3) The trial magistrate erred in law and fact by failing to grant all amounts which respondent had asked despite preponderance of evidence.
- 4) The trial magistrate erred in law and fact for failing to grant the respondent TZS 15,000,000/= he had prayed for.

Before dealing with the grounds raised in the cross-appeal I should first deal with the objection which the appellant raised in his written submissions. Appellant has asked this Court to disregard the respondent's cross appeal because it was filed out of time without any leave of this Court. Judgment of the trial court was delivered on 22nd February 2010 and records of proceedings were certified to be ready for collection on 19th May 2010. Both the **Civil Procedure Code, Cap. 33** and the **Magistrates Courts Act, Cap. 11** do not have provisions directly prescribing time within which to lodge an appeal to the High Court from the District Court or Resident Magistrates' Court. **Civil Procedure Code** applies to the High Court when the High Court is hearing appeals originating from the District Court or Resident Magistrates' Court. The **Law of Limitation Act, Cap 89** is a fall back law since it prescribes the limitation period governing appeals to the High Court from District Court where the period of limitation is not otherwise provided for by any written law. Item Number 1- PART II of the Schedule to the **Law of Limitation Act** provides that

limitation period prescribed for an appeal under the **Civil Procedure Code** is ninety days.

Time begun to run against the appeal and cross appeal on 19th May 2010 this is when the copies of the Judgment and Decree of the subordinate Court were certified to be ready for collection by the appellant and cross appellant. Counting the 90-days from 19th May 2010, the appellant and cross appellant/respondent had up to 18th August 2010. Respondent was within the prescribed period of limitation when he filed his cross appeal on 21st July 2010.

With regard to the first ground of cross appeal, page 8 of the judgment of the trial court (Mwaseba-RM) shows the following four issues which guided the trial court,

- 1) Whether the plaintiff was unlawfully confined in a conference room by the security officers of the 1st defendant on 14/11/2000 from 11:30 am to 3:30 p.m.
- 2) Whether the plaintiff was maliciously prosecuted by the defendant.

- 3) Whether the plaintiff suffered any damages.
- 4) What reliefs are the parties entitled.

With due respect to the respondent, the judgment of the trial court clearly shows that the trial court answered the first issue in affirmative and in favour of the respondent when the learned trial magistrate on **page 9** of his judgment stated,

"The act of DW1 to fail to tell this court the time plaintiff was taken to the police station, make this court to believe on the evidence of PW1, that the plaintiff was confined from 11:30 am to 3:30 pm.

For the reasons shown above, issue No. 1 is answered in the affirmative."

It is clear from the foregoing that the first ground of cross appeal is an afterthought, without merit and is hereby dismissed.

I have also scrutinized the second, third and fourth grounds of cross appeal and found them to be similarly without merit since the learned trial magistrate addressed himself to these grounds of cross-appeal. The trial magistrate in opinion very properly sought the judicial guidance of the case of **Martin vs. Watson**

(1964) 2 All ER 66 which restated the law with respect to four essential elements constituting the tort of malicious prosecution. The learned trial magistrate went on to evaluate evidence with respect to each of these four salient elements. Upon my re-evaluation of how the learned magistrate applied evidence on these elements; I see no reason whatsoever to fault the conclusion reached by the learned trial magistrate. The second, third and fourth grounds are hereby dismissed.

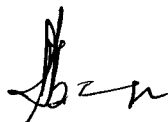
From my foregoing findings and resulting conclusions on appeal and cross appeal, I found no basis for this Court to interfere with the discretion of the trial court to award of TZS 5,000,000/= as general damages. Similarly, this Court shall not interfere with the TZS 500,000/= special damages the trial court awarded the respondent. Both the Appeal and Cross Appeal are dismissed in their respective entirety. Each side shall bear its own costs of the appeal and cross appeal.

It is ordered accordingly.



I.H. Juma
JUDGE
20-07-2011

**Delivered in presence of Athuman Mohamed Ndulla
(Respondent) and in the absence of the appellant.**



I.H. Juma
JUDGE
20-07-2011

