

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CIVIL CASE NUMBER 94 OF 2008

DAUDI KAYONGOYA.....1ST PLAINTIFF
SHABANI MUSSA.....2ND PLAINTIFF
ISSA SELEMANI.....3RD PLAINTIFF
OMARY MOHAMED.....4TH PLAINTIFF
SAID ABDALLAH.....5TH PLAINTIFF

VS

FK MOTORS.....DEFENDANT

JUDGMENT

Date of last Order: 25-08-2010

Date of Judgment: 11-11-2010

JUMA, J.:

The Plaintiffs Daudi Kayongoya, Shabani Mussa, Issa Selemeni, Omary Mohamed, Said Abdallah, Ayubu Mussa and Hamisi Haji brought this suit by Plaint, claiming from defendant a sum of Tshs. 600,000,000/= as damages arising out of alleged false and malicious complaints defendant (FK MOTORS) made to the police against the plaintiffs. Ayubu Mussa and Hamisi Haji later abandoned the suit and their names were taken off the record of plaintiffs.

The five remaining Plaintiffs allege that on 22nd day of May 2006 policemen went to the premises of defendant where plaintiffs worked. The police were following up on the suspicion that unknown

people had broken into one of the stores and stole a number of television sets, air conditioners and mobile phones. Plaintiffs were taken to the Buguruni Police station where their statements were first taken down. They were later on 26th August 2006 taken to the Ilala District Court to answer charges of Conspiracy c/s 384, Store breaking c/s 296 and neglect to prevent commission of an offence c/s 383 all of the **Penal Code, Cap. 16**. The criminal prosecution case against the plaintiffs was based on only one prosecution witness, a fellow employee who told the trial District Court that she did not see the Plaintiffs breaking into the store to steal. The District Court found that the prosecution had failed to make out a *prima facie* case and therefore the Plaintiffs had no case to answer. All the plaintiffs were as a result acquitted.

Following their acquittal, the Plaintiffs considered that they being respectable persons in their society; their arrest, remand in custody on suspicion of theft and their criminal prosecution combined to lower their reputation in the eyes of the public at large. The Plaintiffs filed this civil suit to request this Court to order the Defendant:

- (i) to pay them Tshs. 600 000 000/= for making false and malicious claim against them to the police leading to their arrest, prosecution and acquittal.
- (ii) To pay interest on the decretal sum at the court rates of 7% per annum from the date of judgment to the date the decree is satisfied in full.

The Defendant opposed this suit by appearing and filing a written statement of defence wherein the defendant disputed the plaintiffs' claim for Tshs. 600,000,000/= to be baseless. According to the

defendant, the plaintiffs are not entitled to this claim because all what the defendant did in the circumstances was to report to the police the incident of theft at the premises of FK Motors. And it was the duty of the police to ascertain both the culprits and whether there was reasonable and probable cause before prosecution could go ahead. Defendant believes that after reporting to police they the defendants had no subsequent control over the way the police conducted subsequent criminal investigation and prosecution.

When parties to this suit came up to settle on issues for my determination, the issue whether the plaintiffs were arrested, charged and tried was not disputed. The issues that remained for my determination were whether the plaintiffs before their arrest were employees of the defendant between 2003 and 2005 as alleged. Second issue for my determination is whether plaintiffs were maliciously prosecuted by the defendant. The third issue is whether the report defendant made to the police was made without reasonable and probable cause. The other issues are whether plaintiffs suffered any damage and what relief if any, the plaintiffs are entitled to. I must point out here that all the plaintiffs were well known to the management of FK Motors since they worked either as casual labourers or on more permanent terms.

In order to understand the scope and nature of the issues that the plaintiffs and the defendants have raised for my determination it is necessary to look back briefly upon the salient facts arising from evidence that was tendered during the trial. Sometime in May 2006 there was an incident of theft at one of the stores in the offices of defendant FK Motors along Nyerere Road Dar es Salaam. The

management of the defendant FK Motors reported the incident at Buguruni Police Station.

The Plaintiffs have testified that there was no justification for their arrests, charge and subsequent prosecution. Testifying as PW1, the 1st plaintiff stated that he was remanded for six days at Police Station. He was surprised why only the plaintiffs but not other employees working at FK Motors, were singled out for arrests and subsequent prosecution. Although conceding that theft actually took place at FK Motors before his arrest, 2nd plaintiff (PW2) believed that plaintiffs were maliciously prosecuted. The 3rd plaintiff (PW3) testified that it was the police who accused him of having stolen television sets, air conditioners and mobile phones from FK Motors. When he was arrested within the precincts of FK Motors at around 18.30 p.m. the 4th Plaintiff (PW4) claimed that he was not furnished with any reason. It was later while at the police station where he was told that he was being accused of breaking and stealing air conditioners and refrigerators from his employer valued at Tshs 22 million. Like other plaintiffs, 5th plaintiff (PW5) learnt that he was being accused of theft while he was at the police station.

Anwar Fazal who is one of the Directors of FK Motors testified as DW1 for the defendant. DW1 knew all the plaintiffs as former casual labourers at FK Motors. He remembered the incident of theft that had occurred in May 2006 between 18.00 and 06.00 at one of the stores within a showroom. The store's door was opened and items were stolen without breaking down any door. At 9 a.m. the management of FK Motors reported the incident at Buguruni Police Station. Police conducted their investigations by visiting the FK Motor

office. DW1 maintained that it was not the management of FK Motors who directed the police who to arrest. Before the incident, management of FK Motors and the plaintiffs had no prior bad working relationship. Even DW1 did not know why only Ms Martha Mbatia of FK Motors was summoned to testify in the criminal case facing the plaintiffs.

Legal principles governing the tort of malicious prosecution were well 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. These five elements constitute the basic requirements which the plaintiffs needed to establish in order to succeed in their malicious prosecution suit against the defendant. 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 suit before me, 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. With all due respect, to single out

only a few of the many employees for the focus of police prosecution and the fact that only one employee testified in the criminal case against the plaintiffs; does not amount to malice, for the purposes of tort of malicious prosecution.

Plaintiffs were supposed to show that the complaint which the defendant filed with the Buguruni Police Station was not so much designed to report any theft that had occurred at their store, but was for the purpose of using the legal process through the police to punish the plaintiffs for ulterior motives. To succeed in their tort of malicious prosecution, the intention of the defendant in lodging their complaint to the police must have been so actuated with malice as to cause wrongful harm to the plaintiffs, and not merely to report the incident of theft that had actually taken place. It was not enough for the plaintiffs to merely contend in their evidence that they were innocent and did not steal anything from the store. To succeed in the tort of malicious prosecution the plaintiffs were required to lead evidence to show that the criminal prosecution was instituted against them by the defendant without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, defendant was not reporting the theft to invite the police to investigate and punish the culprits, but the defendants had own malicious intention against the plaintiffs.

Law abiding citizens are encouraged to report incidents of crime whenever these occur. Tort of malicious prosecution is not intended to prevent the law abiding citizens from reporting commission of offences to the law enforcement organs. Evidence has established that theft did occur at the premises of the defendant FK Motors.

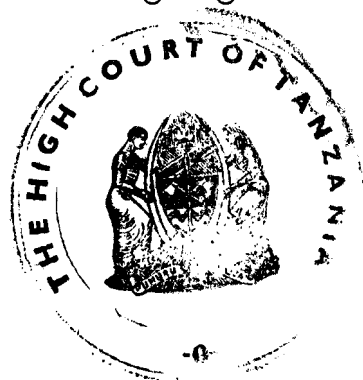
Once a crime is committed at their premises and the incident is reported to police, the defendant cannot be said to have reported the incident without probable cause even where the defendant mentioned the names of only a few people he suspected to have committed the offence. This position of the law was taken by the Court of Appeal in the **Abdul-Karim Haji vs. 1. Raymond Nchimbi Alois, 2. Joseph Sita Joseph, Civil Appeal No. 99 of 2004- Court of Appeal of Tanzania, at ZANZIBAR (unreported)**. The background to the Court of Appeal arose from the Judgment and Decree of the High Court of Zanzibar at Vuga-(Kihio, J.). The appellant owned a shop in Mlandege area of Zanzibar. During the night of 14th August, 2002 the shop was broken into and shillings 3,600,00/= cash was stolen from therein. He reported the theft to the Police. Subsequently the police arrested the respondents in a motor vehicle and taken to the police station. The respondents were then taken to court where they were charged with shop-breaking and theft. The trial court set free the respondents because witnesses were not cooperating with the police. After being set free the respondents filed a a civil case of malicious prosecution against the appellant in the High Court. The Court of Appeal noted that there was no scintilla of truth in the claims that the appellant had caused the prosecution of the respondents even by giving their names to the police as possible suspects in the breaking and stealing from his shop.

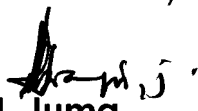
In my opinion the persuasive case of **Fernandes v. Commercial Bank (1969) E.A 482** correctly suggests that what amounts to "reasonable and probable cause" depends on facts in individual cases. In this case before me, there is no dispute that theft indeed and in fact

took place at the stores of the defendant FK Motors where the Plaintiffs were employed as casual labourers. There was reasonable and more than probable justification to report the incident of theft to the Buguruni Police station. High Court in the case of **Mboya v. Kitambia and Others HCD No.168** also restated a principle of law that if a defendant in a malicious prosecution case 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. The defendant FK Motors did not make up the story of theft in order to maliciously prosecute the plaintiffs.

Likewise, the Police from Buguruni Police station were entitled to treat the plaintiffs as suspects in absence of any evidence as to who was responsible for breaking and stealing from the defendant FK Motors. Having come to the foregoing conclusion, the Plaintiffs' claim for malicious prosecution must fail. I am satisfied that theft took place from the store of defendant FK Motors and as a result there was justification for the police investigations, arrests, remands and prosecution of the plaintiffs even if the plaintiffs were later set free. The fact that the plaintiffs had no case to answer does not take away the fact that the defendant had a civic duty to report the crime and the police had initial justification to arrest the plaintiffs upon receiving of the report of theft.

For the foregoing reasons, the suit is hereby dismissed with costs.




I.H. Juma,
JUDGE
11-11-2010

Delivered in presence of: (1) Daudi Kayongoya; (2) Shabani Mussa;
(3) Issa Selemani; (4) Omary Mohamed; (5) Saidi Abdallah – (Plaintiffs)
and Mkilindi Nkinda (Legal Officer of the Defendant).




I.H. Juma
JUDGE
11-11-2010