

**IN THE HIGH COURT OF TANZANIA
AT MBEYA**

DC CIVIL APPEAL NO. 04/2013

(Originating from Civil Case No. 7/2012 Mbozi District Court Vwawa)

CHARLES GABRIEL NYARUTU.....APPELLANT

VERSUS

CONSLIDATED CONTRACTORS GROUP S.A.L...1ST RESPONDENT

HAN ABBU.....2ND RESPONDENT

ESSAU KABUJE.....3RD RESPONDENT

DISMAS KIVIKE.....4TH RESPONDENT

JUDGMENT

Date of last order: 23/09/2013

Date of Judgment: 24/09/2013

A.F. Ngwala, J

In the District Court of Mbozi at Vwawa the Plaintiff now the Appellant, asserted that he had been maliciously and without a probable cause prosecuted by the Defendants sometime in July, 2011. He claimed for a declaration that the Plaintiff is not a thief but a trust worth person. He also prayed that the Defendant be ordered to pay the general damages to the tune of Tshs. 12,000,000/= and specific damages to the tune of Tshs. 18,000,000/= as a one year loss of income.

A written Statement of Defence was filed by the Defendants which disputed the claims. The Defendants stated that the charges against the Plaintiff were true but due to lack of evidence, poor investigation conducted by Investigative Authority the same could

not be proved. The Primary Court Magistrate judged in favour of the Plaintiff by giving him the benefit of doubt. The Defendants therefore prayed for the dismissal of the suit.

At the conclusion of hearing the trial Magistrate framed three issues. These are:- Whether the Defendant maliciously prosecuted the Plaintiff? Secondly, whether the Plaintiff suffered damages because of malicious prosecution and lastly to what reliefs are the parties entitled too. The trial Magistrate found that the Defendant was not prosecuted maliciously and clearly gave the reasons for so holding. He also found that the Plaintiff had failed to prove on balance of probabilities the claims to be paid a total sum of Tshs. 30,000,000/= for general and specific damages. The claims by the Plaintiff that he had sold his shop at Tunduma were found to be remote and unconnected to the suit. For these reasons the Plaintiff's case failed. Judgment was entered in favour of the Defendants. An order that the costs of the suit should be borne by the Plaintiff was lastly issued in the Judgment.

The Appellant has set four grounds in his Memorandum of Appeal. Three Grounds of Appeal have been seriously argued by the Appellant; namely:-

“2. That the trial Magistrate erred in fact and law for not considering the ingredients of malicious prosecution that were specifically proved by the Appellant.

3. That the trial magistrate erred in fact and law for considering much of assumptive evidence instead of evidence on record.

4. That the trial magistrate erred in holding that the Appellant should pay costs while the same did suffer damages by selling some of his properties including the shop at Tunduma”.

In regard to the first ground it was pointed out by the Appellant that the Primary Court Magistrate was fair to acquit him but the District Magistrate did not consider the evidence in the Primary Court. The Appellant argued that the magistrate received the fabricated evidence of the Defendants which was not strong and it was not on record. The Appellant insisted that the said magistrate relied on a forged document a letter which he had refused to accept, but the magistrate considered the same in his judgment in showing the fact that the Appellant had resigned work while he had never done so. On the last ground the appellant submitted that it was wrong for the magistrate to hold that he had failed to prove his claims on compensation because he had clearly proved that he had suffered a lot as a result of the case. He sold his properties including the shop at Tunduma. The exhibit showing the dates when he sold the shop at Tunduma was accepted by the same magistrate to prove this fact.

The only question now is whether these arguments furnish sufficient grounds that merit the appeal?

In my reflection of the proceedings in the trial court record and the judgment, it is quite clear that the trial magistrate held that the proceedings in the criminal case at the Tunduma Primary Court were terminated in favour of the Plaintiff. The learned Magistrate gave reasons for not awarding the claims by the Appellant. Mr. Mchomvu the learned counsel for the Respondent, who were then the Defendants, rightly argued that the fact that the Appellant was subsequently acquitted does not establish that the original complaint was false and or malicious. This is the true position as rightly found by trial magistrate that this cannot be the only basis for the decision that there was malicious prosecution.

I also decline for the purpose of his appeal to agree with the Appellant's contentions that the trial magistrate erred in disregarding the evidence adduced by the Appellant. It is in record that the Appellant failed completely to prove the ingredients of malicious prosecution. His case was not in all the fours of the Tort of Malicious Prosecution. In the case of **Edward Celestine and others Versus Deogratias Paulo [1982] T. L. R. 375**, it was held by Lugakingira J, as he then that malicious prosecution is committed when there is unity of the four elements, namely:-

- " (a) That the Plaintiff was prosecuted by the Defendant;*
- (b) That the prosecution terminated in Plaintiff's favour,*
- (c) That it was without reasonable and probable cause;*
- and (d) That it was malicious".*

In the case of **Jeremiah Kamane Versus Bugamola Manyandi (1983) T. L. R. 123**, Chipeta J, as he then was, expounded further that for a suit of malicious prosecution to succeed the Plaintiff must prove simultaneously that:-

- (a) He was prosecuted,
- (b) That the proceedings complained of ended in his favour,
- (c) That the Defendant instituted the prosecution maliciously.
- (d) There was no reasonable and probable cause for such prosecution; and
- (e) That damage was occasioned to the Plaintiff.

The Appellant's contention that the trial Magistrate had considered much of assumptive evidence instead of the evidence on record, as denied by him that he had neither written a letter to resign the work nor conspired to sue the company in a civil matter have no basis in court. The trial Magistrate might have assumed in the course of his Judgment. Moreover it must be understood by the Appellant that what matters in the cases of this nature is the evidence which is relevant to the ingredients of the tort of malicious prosecution.

I have duly studied the evidence on record, and would say as aforesaid that the 2nd and 3rd grounds of appeal leave alone the 1st ground of appeal which is not quoted herein that they have no foundation at all. It is on the record which is quite clear that the trial District Resident Magistrate found that the Plaintiff was

prosecuted as a security guard responsible for watching the camp where the machines containing fuel were kept. It was also stated on truth that fuel was stolen. It was not only the Plaintiff who was prosecuted but also his fellow who was convicted while the Plaintiff was acquitted. This was on the good ground that the Plaintiff was prosecuted for want of determining who was guilty and responsible for the fuel theft. It is on this point that I see no reason to fault the eloquent findings of the trial learned Resident Magistrate, when there is no evidence to the contrary to establish that the Defendants instituted the prosecution maliciously.

More so there was reasonable and probable cause for such prosecution. The evidence on record clearly show that the Appellant did not prove on balance of probabilities that malice in fact which is termed in other words as ***“animus Malus”*** or ***“animus Mallus”*** indicating that in setting the law in motion the Defendant was actuated either by spite, or ill will against the Plaintiff, or by indirect or improper witness. The trial Magistrate properly analysed the evidence on record when he found that the copy of the Judgment which acquitted him, by itself could not prove his innocence and establish malicious prosecution. This is in line with the holding of Mushi J, in the case of **Bhoke Chacha Versus Daniel Misenya T. L. R. (1983)** at page 329, who held that:-

“That fact that the Appellant was subsequently acquitted does not establish that the original complaint was false and malicious”.

Furthermore the trial Magistrate correctly analysed the evidence and the issue when he found that the Plaintiff's did not adduced strong evidence to prove and establish a tortious liability against the Defendants. The quoted case of **Edwards Celestine and others** *supra*, for emphasis held that:-

"A final judgment in a previous criminal proceedings is relevant where it declares any person to be guilty of a criminal offence, but where there is an acquittal, the judgment in a criminal proceedings is not, in a civil suit, evidence of innocence".

Coming to the last ground of Appeal; For the Appellant to be entitled to the damages he should have proved that he had suffered physical or mental pain as a result of malicious prosecution. He should also have adduced evidence to show that as a result of the said prosecution his dignity, fame had been lowered that he has suffered to his detriment as a whole. The Appellant had not proved exactly how much he had suffered. In the circumstances of this case as the tort of malicious's prosecution had not been proved, there could be no accord and satisfaction to the trial Resident Magistrate that the Plaintiff could be awarded the reliefs claimed. For the foregoing reasons the Appeal fails. It is accordingly dismissed with costs.



A.F. Ngwala
A.F. NGWALA
JUDGE
24/09/2013

Date: 24/09/2013

Coram: A. F. Ngwala, J


For Appellant: Present

For Respondent: Absent

C/C: Japhet

Court: Judgment delivered in court in the presence of the Appellant and absence of the Defendant.

Court: Right of Appeal to the Court of Appeal of Tanzania explained.



A.F. NGWALA

JUDGE

24/09/2013