

**IN THE HIGH COURT OF TANZANIA**

**AT MTWARA**

**CIVIL APPEAL NO. 1 OF 2011**

**From Mtwara District Court Civil Case No. 11 of 2010**

**FRANK LAURANT KAPWAPWA -----APPELLANT**

**VERSUS**

**ZENA OMARI ----- RESPONDENT**

**JUDGMENT**

6<sup>th</sup> September 2013 and 13<sup>th</sup> September 2013

M. G. MZUNA, J.:

Frank Laurant Kapwapwa, instituted a suit before the District Court of Mtwara against Zena Omari praying inter alia for general damages of Tshs. 1,500,000 for malicious prosecution, defamation and loss of business.

The first issue is whether or not, the criminal case which ended in the appellant's favour was instituted without reasonable or probable cause?

The suit is founded on malicious prosecution after the appellant was arrested, prosecuted and then acquitted in Criminal Case No. 482 of 2009 of Mtwara Urban Criminal Case.

The evidence on record show, the respondent was a tenant in the appellant's house. She failed to pay house rent and electricity bills. At the first request the respondent asked for time and promised to pay. She never paid as requested. Consequently the appellant decided to disconnect the electricity and ordered for her immediate vacant possession of the suit premise. The disconnection was done in the presence of her house girl.

When the respondent came back she noted that her room was so disarranged despite the fact that it was locked. She noted that Shs 260,000/ was missing in her room. The house girl said the appellant was responsible as he passed through the roof. That prompted the police investigation and the appellant say was wrongfully confined for 6 hours before being granted bail. He then attended court from Mangaka to Mtwara for seven months and this had the ultimate effect of halting his business.

The Resident Magistrate who presided over the matter (Hon. F. A. Kahamba RM) found that the appellant failed to prove that the respondent acted falsely and maliciously and he dismissed the suit with no costs.

Dissatisfied, the appellant has appealed to this court, he filed 4 grounds of appeal in his memorandum of appeal. During the hearing of this appeal both the appellant and respondent appeared in person to argue the appeal.

I see some legal points in the filed memorandum of appeal as opposed to the arguments of the parties during hearing where they spent their time on one claiming not to have been paid incidental expenses plus house rent Tshs 74,000/-. A fact which was disputed by the other party who said the appellant does not claim anything from her and no receipts were produced as proof that there was such claim against her.

In answering the first issue above, I am guided by the decision in the case of **Jeremiah Kamama vs. Bugomola Mayandi** [1983] T.L.R. 123 (HC) in which Chipeta, J (as he then was) listed 5 elements in which the plaintiff has to prove in order to succeed for malicious prosecution. First,

that "he was prosecuted", secondly that such "proceedings complained of ended in his favour", thirdly that "defendant instituted the prosecution maliciously", fourthly that "there was no reasonable and probable cause for such prosecution" and fifthly that "damage was occasion to the plaintiff."

The trial magistrate was right to find and hold that there is no dispute on the existence of the first two elements above in the case under consideration. That is, there is no dispute that the appellant was prosecuted and the proceedings complained of ended in his favour.

PW.1 admits that the disconnection was made after DW.1 had failed to clear the bill. PW2 Ally Badru Sinani the electrician also testified that he was informed by PW1 that in his house there was a short he went and resolved the problem. Thereafter PW1 requested him to disconnect the power in three rooms for the reasons that the respondent defaulted to pay the bills. He complied in the presence of the respondent's house girl and by then the rooms were open. The street chairman one Fabian Leonard Msumanje PW.3, after he had received complaints from the parties was not told of the exact money which the respondent said was stolen by the appellant. She only said was to inform him after the arrival of her husband. He was even very categorical during the cross examination that it was the appellant who was familiar with the money which was missing.

DW1 attributed the whole problem for the fine of Tshs. 200,000/- which the appellant paid to the TANESCO for tempering with the meter. Other tenants contributed to foot that amount but the respondent refused as she said paid the bills regularly. The basis of her complaint was based

on the information she received from her house girl DW.2 Salma Juma who said that she heard the appellant talking with the technician at the time when the said house girl was outside and was busy fetching some water. By then, DW. 1 was away doing her physical exercise. According to the evidence of DW.2, when DW.1 came back she found her clothes disarrangement in her wardrobe. She noted that some Tshs. 260,000/- was missing.

Going by the evidence in the District court, the respondent never mentioned to the street chairman (PW.3) the exact amount of money which was stolen. Even in her evidence at that court she never mentioned it. We bank on the evidence of the house girl DW.2 who said was told by DW.1 that Tshs 260,000/- was stolen. The procedure is that a civil court must weigh the evidence in total disregard to the criminal case. That was so held in the case of **George Maleko vs. Thomas Mwaikaja** (1980) TLR 112.

But why is it that the respondent never mentioned that figure in court while she was the one who initiated the prosecution which proceeded in the Primary court. There was no police prosecution or prosecution by State Attorney that would have exonerated her of that blame. This leads me to the conclusion that the "defendant instituted the prosecution maliciously" and that was without "reasonable and probable cause for such prosecution". Due to that "damage was occasion to the plaintiff."

The mere entering in her rooms to disconnect the power does not necessarily mean there was theft which was committed. She might have

been unjustly treated but that does not attract a penal sanction as she did. So DW1 had no reasonable and probable cause for such prosecution.

The trial magistrate with due respect went astray when he said at page 8 of the typed judgment, last paragraph that "I have grasped that, DW1 at the time of reporting PW1, had a reasonable suspicion that an offence was committed and had no malice..." The issue was whether the reporting was so done without reasonable and probable cause not mere 'reasonable suspicion' without evidence to that effect. I see there was no such reasonable and probable cause based on the analysis of the evidence otherwise the respondent would have stated the amount which was stolen. The trial magistrate with due respect never touched on the evidence which led him to that conclusion. His judgment which had no analysis of the evidence, I am sorry to say, lacked the qualities to be described as a judgment in proper legal sense. It can not be allowed to stand.

The first issue is therefore answered in the affirmative that the criminal case which ended in the appellant's favour was instituted without reasonable or probable cause.

The second issue is what damages did the appellant suffer?

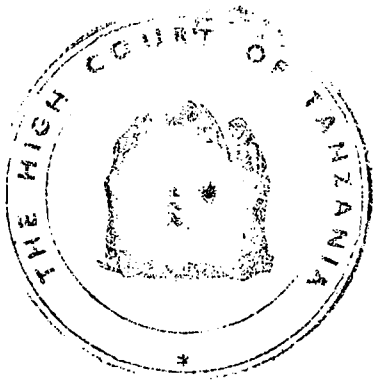
According to his evidence at the District court, he said that he was defamed by that case and as a result after the respondent had vacated the premise he did not get the tenants to rent the premise for fear that he was not descent 'msitaarabu'. So he lost rent for five months and each month he used to get Tshs. 24,000/-. That makes a total of Tshs: 120,000/-. Further that during the pendance of the case for seven months, he incurred a loss of


Tshs. 1.5 million. He never itemized how he arrived at that figure apart from tendering various documents which shows he had a tender. He never said how it affected his tender. I reduce it to Tshs 350,000/ at the average of Tshs 50,000/ monthly. I therefore award him the total sum of Tshs. 470,000/- (without interest) plus costs to this court and the courts' below.

For the reasons I have demonstrated above, the appellant had discharged his onus of proof on the balance of probabilities of which the trial magistrate never considered. In the result, this appeal is allowed with costs.

**M. G. MZUNA,  
JUDGE.  
13/9/2013**

**Court:** Judgment delivered this 13<sup>th</sup> day of September 2013 in the presence of the respondent and in the absence of the appellant.



  
**M. G. MZUNA,  
JUDGE.  
13/9/2013**