IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL No. 25 OF 2012

(Originating from Civil Case No. 106 of 2007 in the Resident Magistrates' Court of Dar es salaalm, at Kisutu).

THE NATIONAL MICROFINANCE BANK.....APPELLANT

Versus;

BEATRICE MBASHA.....RESPONDENT

JUDGMENT

10/10/2012 & 10/07/2014

Utamwa, J.

This is a first appeal against the judgement of the Resident Magistrates' Court of Dar es salaam at Kisutu (trial court), dated 19th January, 2012, in Civil Case No. 106 of 2007. The background of this appeal goes thus; The respondent, Beatrice Mbasha sued the appellant, National Microfinance Bank for the sum of Tanzanian Shillings (Tshs.) 100, 000, 000/= being general damages for wrongful imprisonment and malicious prosecution in Criminal Case No. 1392 of 2000 at the same trial court. She also claimed 31% interests of the claimed sum from the date of judgement to the date of full payment. At the end of the day, the trial court granted the claim at the tune of Tshs. 80, 000, 000/= plus 10% interests from the date of judgement to the date of full payment, hence this appeal supported by the following four grounds;

1. That the trial magistrate erred in law and fact in holding that the appellant had no probable cause against the respondent to prosecute her in criminal case no. 1392 of 2000.

2. That the trial court erred in law and fact in failing to analyse the ingredients of malicious prosecution before finding the appellant liable for damages.
3. The trial magistrate erred in law and fact in holding that the respondent suffered a lot including being ashamed of being called a thief, lowering her status plus disturbances.
4. The trial court erred in law and fact in finding that the respondent was entitled to Tshs. 80, 000, 000/= plus interests of 10% from the date of judgment to the date of payment as general damages.

The appellant thus urged this court to allow the appeal and quash the judgment of the lower court. The appeal was argued by way of written submissions whereby the appellant was represented by Maleta and Ndumbalo advocates while the respondent used the legal services of Nassoro and Co. advocates.

In supporting the first and second grounds of appeal, the learned counsel for the appellant argued that; the judgment of the lower court offended Order XX rule 4 of the Civil Procedure Code, 1966, Cap. 33 R. E. 2002 which requires a judgment to contain a concise statement of the case, the points for determination, the decision and reasons for such decision. But in the case under discussion the lower court judgement lacked the reasons of the decision which include the analysis of the issues and evidence related to the ingredients of the tort of malicious prosecution.

The learned counsel further contended that the five ingredients of the tort of malicious prosecution which is designed to redress loss resulting from an unjustified prosecution, according to the case of **Festo v. Mwakabana (1971) HCD, n. 417** are these;

a. That the defendant prosecuted the plaintiff.
b. That the criminal proceedings were terminated in the claimant's favour,
c. That the prosecution was instigated without reasonable and probable cause.
d. That it (prosecution) was actuated with malice.
e. That the claimant suffered some damages recognised by law.

The learned counsel also submitted that, for purposes of malicious prosecution, a defendant is taken to have prosecuted the plaintiff if he is proved to have been instrumental in putting the law into force, citing the cases **Hosea Lalata v. Gibson Zumba Mwasote [1980] TLR. 154** and **Jeremia Kamama v. Bugomola Mayandi [1983] TLR. 123** to support the argument. He added that the prosecution must however, be with malice. He thus submitted that the fact that the prosecution in the matter at hand ended in favour of the respondent did not suffice for the tort of malicious prosecution. He also argued that the phrase "reasonable and probable cause" means an honest belief in the guilt of the accused/plaintiff founded upon reasonable grounds under the circumstances of the case which reasonably lead an ordinary prudent and cautious man to conclude that the person charged was probably guilty of the crime imputed, he cited the case of **Amina Mpimbi v. Ramadhani Kiwe [1990] TLR. 6** which followed the English case of **Hick v. Faulkner (1878) 8 QBD 167** to fortify the contention.

The counsel further submitted that, in the case at hand, the appellant reported the respondent to police with a reasonable and probable cause for believing that the respondent had committed the crime for, according to exhibit P. 1, her account with the appellant had been credited and debited with proceeds from telegraphic messages and in the process some monies belonging to some clients of the appellant had been withdrawn.

Again, the counsel argued that there was no any malice in reporting the matter to police; the report was only intended to cause the necessary procedures taken. Basing on the Oxford Student Dictionary, 10th edition, Sweet & Maxwell, London, 1968, the learned counsel defined the term "malice" to mean an active hatred or desire to harm others. He added that the appellant's report to police was thus in accordance with article 26 (1) and (2) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2, R. E. 2002 (the Constitution) and s. 7 of the Criminal Procedure Act, 1985, Cap. 20 R. E. 2002 which require every person to observe the law and take legal action to ensure protection of the laws of the land.

Moreover, the learned counsel gave examples of malice in some cases in an endeavour to show that in the case at hand, there was no malice in reporting the matter to police. He cited **Peter Ng'omango v. G. M. K. Mwanga [1993] TLR. 77** where malice was implied by a prior conflict between the person who reported

the matter to police and the prosecuted appellant. In the **Jeremia Kamama case** (supra) malice was exemplified by the political rivalry between the defendant and the plaintiff. In the **Hosea Lalata case** (supra) malice was demonstrated by the fact that the criminal case against the plaintiff had been manufactured. The learned counsel thus argued that, there is a great difference between these three cases in which malice was established and the case under discussion.

As to grounds of appeal No. 3 and 4 the counsel for the appellant submitted that, there was no any proof of damages caused to the respondent because not all the ingredients of the tort of malicious prosecution were proved in evidence. The claimed damages were thus not supported by the evidence. Consequently, it was not proper for the trial court to award the respondent with the said sum of Tshs. 80, 000, 000/= with 10% interests.

In her replying written submissions, the respondent through her learned counsel (Nassoro and Co. Advocates) argued in respect of grounds Nos. 1 and 2 that the judgement of the trial court fully complied with the requirements of Order XX rule 4 of Cap. 33 since it contained the statement of the claim, points for decision and reasons thereof. She submitted that the observation in the judgement of the trial that "the plaintiff suffered a lot including being ashamed of being called a thief" and that "This lowered her status plus causing mental disturbances" amounted to a reasoning in reaching into its decision.

The respondent further contended that, as long as in the criminal case there was no any evidence implicating her, then there was neither a probable nor reasonable cause in prosecuting her, hence the prosecution was actuated by malice which was proved by evidence in the suit before the trial court. She added that, as a banker the appellant would be in a better position to investigate the allegations against the respondent before initiating the prosecution against her, but it did not do so. The respondent however, conceded to the ingredients of the tort of malicious prosecution as enlisted above.

Regarding grounds No. 3 and 4 the respondent submitted that, the awarded damages were discretional and corresponded to the wrong committed by the appellant, hence the justification of the awarded damages. She thus urged this court

to dismiss the appeal. In the rejoinder submissions, the appellant essentially reiterated the submissions in chief.

Upon considering the grounds of appeal, the arguments by the parties and the record, I am of the view that the dispute between the parties revolve around one main issue which must be decided by this court. The issue is whether or not the trial court erred in law and fact in finding that the respondent had proved the torts of malicious prosecution and false imprisonment against the appellant. However, the trial court and the parties put more emphasis on the tort of malicious prosecution than on false imprisonment. This court cannot avoid discussing the tort of false imprisonment in this matter because, it was one of the torts allegedly committed according to the plaint (especially under paragraph eight) and evidence before the trial court. It seems that the trial court and the parties did not give equal weight to both torts because they took it that the two were one and the same. But there is a clear distinction between them as demonstrated herein below;

False imprisonment is defined as an infliction of bodily (or liberty) restraint against another person, which said restraint is not authorised by the law, see the case of **Moris A. Sasawata v. Matias Malieko [1980] TLR. 158**. On the other hand, malicious prosecution is a tort resulting from the act of maliciously and without reasonable and probable cause, initiating against another person, judicial proceedings which terminate in favour of that other person and which result in damage to his reputation, person, freedom and property, see the definition by Brazier, Magaret the author of the book titled the Law of Torts 8th Edition, Butterworths, London 1988 at Page 433 approved by the Court of Appeal of Tanzania (CAT) in the case of **Tanzania Breweries Limited v. Charles Msuku and another, CAT Civil Appeal No. 18 oof 2000, at Dar es Salaam** (Unreported). Another salient distinction between the two torts in my view is that; the former may be committed even without prosecuting that other person in court while the latter must be committed by first initiating judicial proceedings against that other person. In support of the distinctions between the two torts, my brother, Manento, JK (as he then was) observed in **Ahmed Chilambo v. Murray & Roberts Contractors (T) Ltd, High Court Civil Case No; 44 of 2005, at Dar-es-Salaam** (unreported, at page 5 of the typed decision) that the two wrongs are independent torts and not generally dependent on one another.

I will thus begin my discussion with the sub-issue of whether or not the tort of malicious prosecution was proved before the trial court. In the first place I agree with both parties that the important ingredients of the tort of malicious prosecution are those enlisted herein above as per the case of **Festo v. Mwakabana** and the **Jeremiah Kamama case** (both cited supra by the learned counsel for the appellant). The ingredients were also underscored in the cases of **Charles Kaberuka v. Samson Malifedha & another, High Court, Civil Case No. 7 of 2000, at Mwanza** (unreported) and **Ambindwile Nteba v. Peter Msyani and another DC High Court Civil Appeal No. 5 of 1998, at Mbeya** (unreported). These ingredients in fact tally with the definition of the tort of "malicious prosecution" offered previously. I also underscore here that in law, the ingredients must be proved cumulatively and not alternatively. In testing this sub-issue therefore, I will be examining whether or not all the five ingredients of the tort of malicious prosecution were proved.

Regarding the ingredients numbered **a.** and **b.** I can discuss them cumulatively. According to the evidence in record and the arguments by the parties, it is not disputed that the appellant's officials made a report to the police. The report led to the arrest and prosecution of the respondent and another person, one Gabriela Akonay, former co-worker of the respondent at the appellant bank (but not party to this appeal). The prosecution was in Criminal Case No. 1392 of 2000, at the trial court as hinted earlier for three offences namely; Conspiracy to defraud c/s 306 of the Penal Code, Cap. 16 R. E. 2002; Forgery c/s 333, 335 and 337 of the Cap. 16 and Obtaining money by false pretences c/s 302 of the same Cap. 16. Both of them were acquitted. It follows thus that; the ingredients of the tort numbered **a.** and **b.** herein above (that the defendant prosecuted the plaintiff and the criminal proceedings were terminated in the claimant's favour) were not disputed and thus proved. This follows the understanding that in law, a prosecutor, as far as the tort of malicious prosecution is concerned, is a person who is actively instrumental in putting the law into motion, like reporting the matter to police, see the case of **Eljeseri Mwaibanje v. Lusubilo Simba, DC High Court Civil Appeal No. 6 of 1998, at Mbeya** (unreported).

As to the ingredients numbered **c.** and **d.** herein above (that the prosecution was instigated without reasonable and probable cause and was actuated with malice) they can also be discussed simultaneously. The appellant argued that the

two ingredients were not proved while the respondent argued that they were proved in the balance of probabilities. I will first determine whether or not the appellant had any reasonable and probable cause in reporting the respondent to police before I test whether or not the reporting was actuated by malice.

From the evidence in record, it is established that before the criminal case the respondent was an employee of the appellant bank, she operated an account therein. At a time (according to the record in the appellant bank), her account was credited with money of the appellant bank which were latter withdrawn from the account. The money resulted from what the bank termed Government Telegraphic Transfer. There is also evidence from the respondent herself (page 12 of the trial court proceedings, in short proceedings) that the said Gabriela had given information that she (the respondent) had a hand in the transfer of the money. Again, though the appellant maintained that her account was used without her permission, she did not dispute all the other evidence narrated above. Her main argument is that the appellant, as a banker, had to investigate first before reporting her to police. She also testified that it was the appellant who had asked the police to arrest and prosecute her. The appellant before the trial court maintained that as long as the money had been stolen through the respondent's account, she was the first suspect and there was thus no any bad intention to accuse her.

As rightly argued by the appellant's counsel, the phrase "reasonable and probable cause" was defined in the **Amina Mpimbi case** (supra) following the English case of **Hick v. Faulkner** (supra) to mean, and I quote the definition for a trouble-free reference;

> "An honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the offence imputed."

In my view therefore, the evidence demonstrated here in above would in fact, reasonably lead any other ordinary prudent and cautious person, placed in the position of the appellant bank, to the conclusion that the respondent was probably

guilty of the offences she was charged with, though, of course, that could not necessarily be true.

The argument by the respondent that the appellant, as a bank had to investigate the matter first before it could report her to police, does not have any legal backing as long as the appellant had reasonable and probable cause to believe that she was involved in the offences charged. Investigation of criminal offences (prevention and detection of crimes) is essentially one of the professional responsibilities statutorily assigned to the Police Force of this country and not to civilian natural or legal persons like the appellant bank, see s. 5 of the Police Force and Auxiliary Services Act, Cap. 322. This is also the spirit under Part II of Cap. 20 titled "PROCEDURE RELATING TO CRIMINAL INVESTIGATIONS (ss. 5-69)" outlining the procedure to be followed by the Police Force in investing crimes. It is also for this reason that s. 7 (1) (2) of Cap. 20 requires all persons to give criminal information to the Police Force, and restricts criminal or civil proceedings to be entertained by any court against any person for damages resulting from any such information given by him to the Police Force.

For the above understanding, it was also observed in the **Amina Mpimbi case** (supra) [following another decision of this court in **Amina Mpimbi v. Tabuy Kilongo, High Court Civil Appeal No.16 of 1984, at Dodoma Registry** (unreported) and the English case of **Herniman v. Smith [1938] D A.C. 305**], that and I quote the remarks for a smooth perusal;

> "It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for prosecution."

As to whether or not the appellant was actuated by malice in reporting the matter to police, I am of the view that there is no evidence showing that the appellant acted with malice. The respondent did not disclose any fact that would imply malice on the part of the appellant. Her assertion before the trial court that the police had told her that the appellant had directed them to arrest and prosecute her was hearsay which does not have any evidential value in law. This follows the fact that no any police officer testified to that effect. In cases of this nature, police officers

(especially the one who received the complaint/report) are key witnesses for purposes of proving the way the matter was reported so that the court can gauge and determine whether or not there was malice in the report, see the envisaging by the CAT in the case of **Abdul-Karim Haji v. Raimond Nchimbi Alois and another, CAT Civil Appeal No. 99 of 2004, at Zanzibar** (unreported). In my view therefore, the respondent had the onus of proving malice (before the trial court) in the preponderance of probabilities for, our law which is mainly based on the common law adversarial system is to the effect that he who alleges must prove. It was thus not sufficient for the respondent to merely allege malice without proving it as she did.

For the above reasons, I find that the appellant had reasonable and probable cause in reporting the matter to police against the respondent and the report was not motivated by any malice. The ingredients numbered **c.** and **d.** were thus not proved. The law commands that where the accuser had reasonable and probable cause to report the matter to police, the tort of malicious prosecution cannot stand and that forms a good defence, hence no damages may be awarded; see the **Martin Ngage case** (supra). Moreover, the law is to the effect that, without proving malice, the tort of malicious prosecution cannot stand, see **Martin Ngage v. Juli Jonathan & Others High Court Civil appeal No. 4 of 1989, at Arusha** (unreported). The law further guides that, a defendant is not liable for malicious prosecution or false imprisonment only because he reports the matter to police and the police in turn arrests and prosecutes the plaintiff, see the **Eljeseri Mwaibanje case** (cited above). The Kenyan High Court also supported this view in the case of **Koech v. African Highlands and Produce Company Limited and another [2006] 2 EA 148** where it held that, an acquittal in a criminal case is not alone, a sufficient ground for filing a civil suit to claim damages for malicious prosecution. Evidence of spite, ill-will lack of reasonable and probable cause must be established.

In my view, there is rationale in the precedents just cited herein above for, had it been otherwise, people would be hesitant to report crimes to the police, the result of which crimes would triumph, justice would be suppressed, hence chaos in our society. It is for avoiding this situation that the legislature prudently and rightly so, enacted s. 7 (1) and (2) of Cap. 20 and article 26 (1) of the Constitution which in essence require every person in this country to genuinely report crimes to the

Police Force with impunity as rightly argued by the learned counsel for the appellant.

The finding I have just made herein above reliefs me from testing the ingredient of malicious prosecution numbered **e.** herein above (That the claimant suffered some damage recognised by law) for, as I hinted previously, the law says that all the five ingredients must be proved cumulatively, and I have held herein above that two of the ingredients (**c.** and **d.**) were not proved before the trial court. I therefore, hold the sub-issue negatively to the effect that the tort of malicious prosecution was not proved.

In regard to the tort of false imprisonment, the sub-issue is whether or not it was proved before the trial court. In the first place, following the definition of this tort offered earlier, for this tort to stand a plaintiff must prove *inter alia,* that the infliction of the bodily (or liberty) restraint against him/her was not authorised by the law, see the **Moris A. Sasawata case** (supra) and the holding in the case of **Simon Chatanda v. Abdul Kisoma [1973] LRT n. 11.** It follows thus that, as long as I have held herein above that the appellant had probable and reasonable cause in reporting the respondent to police, and the report was not actuated with malice, and as long I have held that under the circumstances of the case the appellant was obliged by the law to report the matter to police, it cannot be safely found that the arrest of the respondent by the police following that report was not authorised by the law. Upon considering various references this court also held that, a person will not be liable for the tort of false imprisonment only because he made a report to the police upon which the police, in their own discretion, decided to arrest, detain and prosecute the person complained against, see the **Eljeseri Mwaibanje** case (cited above). In the Kenyan case of **Koech v. African Highlands and Produce Company Limited and another (supra)** it was also held that, an acquittal in a criminal case is not alone, a sufficient ground for filing a civil suit to claim damages for false imprisonment, evidence of spite, ill-will lack of reasonable and probable cause must be established. The tort of false imprisonment was not thus proved and the sub-issue in respect of this tort is negatively determined.

For the aforesaid grounds, the main issue is hereby determined positively to the effect that the trial court in fact, erred in law and fact in finding that the

respondent had proved the torts of malicious prosecution and false imprisonment against the appellant. I consequently uphold all the four grounds of appeal, allow the entire appeal and set aside the impugned judgment of the trial court. The respondent shall pay the costs in this appeal and in the trial court for, in law costs follow event unless there are good reasons to be recorded for deciding otherwise, which said reasons are lacking in this matter. It is accordingly ordered.

JHK. UTAMWA

JUDGE

1/8/2014

01/08/2014

CORAM; Hon. Utamwa, J.
For Appellant; Mr. Mtanga advocate for Mr. Kambo advocate.
For Respondent; Present in person.
BC; Mrs. Kaminda.

Court; Judgment delivered in the presence of Mr. Mtanga learned counsel holding briefs for Mr. Kambo learned counsel for the appellant, and the respondent in person, this 1st day of August, 2014 in chambers.

JHK. UTAMWA

JUDGE

01/08/2014