IN THE HIGH COURT OF TANZANIA

[MTWARA REGISTRY]

AT MTWARA

CIVIL CASE NO. 2 OF 2012

RASHID SAID GEUZA ..... PLAINTIFF

VERSUS

THE REGIONAL POLICE COMMANDER ..... 1ST DEFENDANT
THE ATTORNEY GENERAL ..... 2ND DEFENDANT

Date of last order: 26/11/2015

Date of Judgment: 09/02/2015

JUDGMENT

F. Twaib, J:

The Plaintiff's claim against the defendants is set out in paragraph 4 of his plaint, where he states as follows:

> *"…payment of Tanzania Shillings 100,000,000/=…being compensation for malicious prosecution and the economic and financial loss, as well as psychological, mental and physical sufferings resulted from the said maliciously prosecuted criminal case numbered 222 of 2010…that ended in the 2nd, 3rd and 4th accused favour (being acquitted) the plaintiff being one of them."*

It is not disputed that the plaintiff used to work as a supervisor at Raz Company, a cashewnut trading business at Mtwara. On 3rd December 2010, the company's 145 bags of cashew nuts went missing after they were loaded on a Fuso lorry at the warehouse where they were supposed to be taken to Mtwara port. They did

not reach there. The plaintiff was the one who supervised the loading of the cargo at the warehouse and he entrusted the same to the driver and conductor of the lorry.

The plaintiff states that when he learnt that the cargo did not reach its destination, he reported the matter to the Police at the Central Police Station, Mtwara. The cargo was found the next day, 4th December 2010 at a place known as Magomeni in Mtwara. However, the Police later decided to include the plaintiff as the second accused in the criminal case.

The plaintiff claims that his inclusion as a suspect in the criminal case and later on as a co-accused was "without reasonable justification". During the criminal trial, which took about seven months to finalize, the plaintiff remained in custody at Ilunga prison after failing to fulfil bail conditions. At the closure of the prosecution case, the plaintiff, like the other accused persons, was found to have a case to answer. However, the court ultimately acquitted the plaintiff and all other accused persons except the 1st accused, who was convicted.

The plaintiff was aggrieved with the Police decision to charge him in the case, and the experience he had to go through as a result. He sent a three-month statutory notice of intention to sue the defendants, and demanded payment of compensation in the sum of Tshs. 100 Million/=. The defendants did not heed to the plaintiff's demand, prompting him to file this suit. Apart from claiming the said sum of Tshs. 100 Million, he is also claiming for interest and costs.

In their joint written statement of defence (WSD), the defendants denied any liability, and stated that there was justification for the plaintiff's arrest and prosecution and that his involvement in the offence was probable, which was why the trial court found him with a case to answer before acquitting him at the end of the trial.

Having laid down the above background, I find it pertinent to discuss the principles upon which the tort of malicious prosecution is based.

Our law of torts derives its foundation from the English common law. That law forms the bedrock of our law of torts, by virtue of the provisions of section 2 (2) of the *Judicature and Application of Laws Act*, Cap. 358 and section 5 of the *Constitutional (Consequential, Transitional and Temporary Provisions) Act*, 1984. Fortunately, our courts have already shown the way on how this particular subject of the English law of torts applies in Tanzania.

In *Jeremiah Kamama v Bugomola Mayandi* [1983] TLR 123, the late Chipeta J laid down the elements that need to be proved for the plaintiff to succeed in a case of malicious prosecution. I can do no better than to follow the same footsteps as did the distinguished Judge, who elaborately discussed the principles applicable in these cases. He held, *inter alia*, as follows:

> *(1) For a suit for 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) that there was no reasonable and probable cause for such prosecution; and*
>
> *(e) that damage was occasioned to the plaintiff;*
>
> *(ii) … [not relevant]*
>
> *(iii) malice exists where the prosecution is actuated by spite or ill-will or indirect or improper motives.*

There is no dispute about the existence of the first and second factors in this case. The plaintiff was prosecuted in Criminal Case No. 222 of 2010, Mtwara District Court, where he, together with four other persons, was charged with conspiracy to commit an offence. The other accused persons were also charged with other

offences. It is also not in dispute that the case ended in the plaintiff's favour when he was acquitted in a judgment delivered on 30th June 2011.

The only issues that remain to be determined in this case relate to whether the defendant was malicious in his decision to prosecute the plaintiff actuated by spite, ill-will, indirect or improper motives and that there was no reasonable and probable cause for such prosecution. Before the trial began, the following issues were framed:

1. Whether the prosecution of the plaintiff in Criminal Case No. 222 of 2010, Mtwara District Court was malicious;

2. If the answer to issue No. 1 is in the affirmative, whether the plaintiff suffered damage as a result;

3. To what reliefs are the parties entitled?

From the nature of the case, the pleadings and evidence adduced, the real question in controversy between the parties depends on the answer to the first issue, which constitutes the most crucial issue to be determined in this case. Damages and reliefs are merely consequential.

Chipeta J. in *Jeremiah Kamama (supra)* conceded that what amounts to "malice" is not easy to define. He began with a reference to the English case of **Brown v Hawkes** [1891] 2 Q.B. 718, where, at page 723, Cave, J. defined malice as a motive other than a desire to bring to justice a person whom he (the accuser) honestly believes to be guilty. The learned Judge adopted the definition given in *Halsbury's Laws of England*, 3rd ed., vol 25, at p. 356, which runs as follows:

> *"The malice which a plaintiff in an action for damages for malicious prosecution...has to prove is not malice in its legal sense, that is, such as may be assumed from a wrongful act done intentionally, without just cause or excuse, but malice in fact - malus animus - indicating that the defendant*

was actuated either by spite or ill-will against the plaintiff, or by indirect or improper motives."

Hence, the position according to Chipeta, J, which position I accept as representing the correct position of our law, is that the accuser must have been actuated by spite or ill-will and not by a genuine desire to bring to justice the person he alleges to be guilty of a crime. In addition to proving that he was prosecuted and the proceedings ended in his favour, the claimant must also prove that the defendant had no reasonable and probable cause for such prosecution.

Hence, the law assumes that not every prosecution which ends in an accused's favour exposes the accuser to a suit for damages for malicious prosecution. The rationale for this position is to protect complainants, police informers and/or (as in this case), public prosecutors and Police investigators from countless suits based on malicious prosecution. This is why, in *Tumaniel v Aisa Issai* [1969] H.C.D. n. 280, Georges CJ (as he then was), found it necessary to explain the reason for the position taken by the law. He put it this way:

"When there is reasonable suspicion that an offence has been committed and good grounds for thinking that a particular person is responsible, it is the duty of every citizen to pass on such information... to the police to help them to find the offender. If the police act on such information and arrest anyone then the person who has given the information should not be liable for damages for defamation unless it is plain that he had no good grounds for suspecting the person named and that he was acting spitefully...Similarly there will be cases where the Police take a person into custody for investigation which seems quite reasonable and no steps are taken. Again in such a case the accuser should not be charged unless it can be shown that he deliberately made a false report....(Where) a report to the Police (is) intended to lead to the investigation of a crime...there should be no compensation payable in such case unless the report is shown to be false and prompted by malice."

In that case the learned Chief Justice was referring to suits for defamation, but in Justice Chipeta's view, a view I also share, the principle applies with equal force to suits for damages for malicious prosecution.

Now, the question whether or not an accuser acted maliciously and without reasonable and probable cause are questions of fact to be decided on the basis of the circumstances revealed by the evidence in each particular case. It is also the position that the fact that the appellant was subsequently acquitted does not necessarily establish that the original complaint was false and malicious: See Bhoke Chacha v Daniel Misenya [1983] TLR 329 (per Mushi J).

Moreover, it was the view taken by the High Court of Kenya in **Kagane and Ors v Attorney-General & Anor** [1969] 1 EA 643 that when it comes to the liability of Public Prosecutors and Police Officers it is a matter which requires very careful consideration as regards two aspects:

1. Whether the evidential material on which the prosecution was based was such that a prudent and cautious man could have honestly believed that it was sufficiently credible and cogent to justify the institution of a prosecution; and

2. The effect of the fact that the prosecution was instituted on the direction of a State Counsel in the Attorney-General's Chambers.

According to the plaintiff (PW1), he was the supervisor at a warehouse belonging to his then employer, Raz Company, which dealt with the buying of cashew nuts, presumably for export. The plaintiff's duties included supervision of loading cashew nuts on lorries from warehouses when the company buys them, for transport to other warehouses or the port at Mtwara. In paragraphs 5 and 6 of the Plaint, the plaintiff states as follows (I quote *verbatim*):

> *5. That on 3rd December 2010 the plaintiff as the supervisor reported to Central Police Mtwara about the stilling event occurred in his working place. On 4th day of December police informed the plaintiff that the property (cashew nuts), he reported to be stolen has been found by police officers…*

The plaintiff did not state what constituted the particulars of malice. The closest he came to saying so was in paragraph 6 of the plaint, where he stated:

> 6. *The surprisingly and without any reasonable justification on the same day 4th December 2010, after the arrival of the plaintiff to Central Police for follow up of the matter, was caught and joined with the other suspects for being accused of participating in stealing 145 bags of cashew nuts and later being charged for conspiracy in Criminal Case No. 222/2010 which the plaintiff was the 2nd accused on which was remanded for the period of seven months at Mtwara prison…*

Nowhere else is there anything that could, even remotely, amount to laying the foundation for a case of malicious prosecution. In this paragraph the Plaintiff's only reason for claiming that his prosecution was malicious is in the phrase "*surprisingly and without any reasonable justification".* With due respect, this phrase does not amount to sufficient basis upon which to lay the basis for the tort of malicious prosecution.

Be that as it may, and especially because the issue has not been raised before in the case so as to give the plaintiff a right to be heard thereon, I shall consider the merits of the plaintiff's case on the basis of the particulars he has given in his evidence in court (and he was the only witness) as to what constitutes malice. I will start with a narration of what, according to the plaintiff in his testimony, constituted the basis for his suit.

The plaintiff pleads that he was joined as a suspect after he went to the Police Station in response to a call from the Police that informed him that the cargo had been found. In his testimony in court, the plaintiff told the court the following:

> *It was PW1 [in the criminal case] Corp. Steven who brought me into the case. He was vindictive against me, because I went to the Police after hearing that the stolen cashew nuts had been recovered from the 1st accused. I went there to follow up on the case. Corp. Steven took me to the door leading to the remand cell. I found the 4th and 5th accused (Felice*

Abdulmaalim and Thabit Salum). He asked them 'Is this the one who gave you the cargo?' They said 'No, it was not him'. He asked me: 'Who did you give the cargo to?' I told him I gave the cargo to the driver and turn boy of the vehicle No. T846 ARW. Afande Steven insisted that I had sold the cargo. By then, the cargo had not yet been discovered. He then sent me into the remand cell."

The plaintiff went on to say that Corp. Steven had grudges against him. He gave several reasons for saying so, namely:

1. He refused to ask his employers about his (the plaintiff's) trustworthiness;
2. He had failed to catch him several times when he (the plaintiff) was a sugar smuggler from Mozambique and had vowed to fix him.
3. He had asked for a Tshs. 3 Million bribe, which the plaintiff refused to give.
4. He had once arrested him for no reason and was only released after a huge quarrel at the Police Station. It was after that incident that he decided to move his residence from Mtwara to Morogoro, seeing that he was no longer safe in Mtwara.
5. The Police had all the evidence before them and the witnesses because of the report the plaintiff made to them. Instead, they used the documentary evidence that was favourable to him in the criminal case and used it for the prosecution.

In defence, Ms. Mangu, learned State Attorney who represented the two defendants, brought three witnesses. DW1 was Saidi Laini, who told the court that he works as head of coolies (Sarahange), who load and offload cashew nuts at warehouses in Mtwara. He also supervises escorts when needed when the cashew nuts are on transit from one place to another. He works according to instructions received.

DW1 explained the procedure, saying that he would be called by the clerk who would inform him that his services were needed. His clerk at the time was the plaintiff, who worked for Raz Company. On 3rd December 2010, when DW1 was at KPR warehouse, he was informed by one Anand of Raz Company that a lorry that

was loaded at MCC warehouse did not reach the port where it was supposed to be sent. Answering questions during cross-examination and re-examination, PW1 said that the plaintiff did not inform him on the material day that he (the plaintiff) was loading cargo at MCC warehouse. PW1 said that the cargo was supposed to move with an escort all the time, and that on that particular day the plaintiff did not inform him that an escort was needed. The person responsible for so informing him was the plaintiff, who did not do so on that particular day.

Hence, apparently, the relevant cargo had no escort on that day.

DW2 was the person PW1 referred to as to as Corporal Steven. He had been promoted to Sergeant by the time he testified. The gist of Det. Sgt. Steven's evidence was to explain the reasons why he, as the investigator of the case, had reached the decision to include the plaintiff as an accused person in the criminal case. He narrated the events that led to the discovery of the cargo at the house of the third accused. He said that after they had found the lorry and its driver [one Thabit Salum] and conductor [4th accused Feli Abdulmaalim] he told them why they were arrested. At this point, I will quote DW2 *verbatim*:

> *"They did not admit at first. I put them in remand prison. Within ten minutes or so, I was called by the Police officers at the charge room who told me the driver wanted to talk to me. I went to the remand cell. He told me that he had spoken to his conductor and he (the conductor) admitted that they had stolen the cashew nuts cargo the day before…He thus asked me to remove them from the cell and they would give them statement. I took them to our officers."*

DW2 went on explaining what the driver of the lorry told him—that they had come with a consignment of potatoes from Kilimanjaro, but were involved in an accident at Mtwara and their lorry sustained body damage. The driver had to find another driver based in Mtwara who would find some work for the lorry right here at Mtwara so that they could get some money to repair their lorry and return to Kilimanjaro. On 3rd December 2010, the driver told the Mtwara driver (5th accused in the criminal case), together with his conductor, to take the lorry to a garage

while he went around looking for spares. Instead, the Mtwara driver and the conductor went to the warehouses.

DW2 further told the court what he learnt from his investigations. He said:

> *At Raz, they found the company had bought cashew nuts at an auction. Rashidi Salum Geuza [the plaintiff] was responsible for loading lorries that the company hires and after loading, he would inform Salanga who was the head of coolies (his name is Saidi Laini) could provide an escort up to the cargo's destination (either the port or some other warehouse). The driver told me that when they (the Mtwara driver and the conductor) had loaded cargo, Rashidi Geuza told them to go with someone (whose name the conductor did not know) who would take them to the place where they would unload the cargo. I interrogated the conductor. He confirmed all that the driver told me. Then I asked him one question: 'Where is the cashewnut cargo?'*

The conductor then took DW2 to where they had off-loaded the cargo, where they found it at the house of the 3rd accused. It later turned out that it was the first accused who had sent it there. DW2 concluded, at the end of his investigations, that the plaintiff had conspired with the 1st accused to steal the cashew nuts by not following the company's procedures, which was why he made him a co-accused in the criminal case. He said he had no other reason to suspect the plaintiff and charge him. On cross-examination, he told the court that the conductor (4th accused) was the one who gave him instructions as to where to take the cargo. He gave five reasons why he reached the conclusion that the plaintiff was involved, insisting: "*I had no ill-intentions against the plaintiff—nothing outside my work as a Police Officer*". The reasons he gave were that:

1. The plaintiff was responsible for loading the cashew nuts into lorries;
2. The plaintiff was supposed to call Saidi Laini, the Salanga or head of coolies, to inform him to bring an escort before the lorry left the warehouse. He did not do that;

3. The plaintiff had no authority to assign an escort for any cargo. But in this case, he did;
4. The plaintiff appointed the 1st accused to take the driver and the 4th accused to the destination;
5. The cargo was supposed to be taken to the port. Instead, on the instructions of the person appointed by the plaintiff, it was taken to Magomeni, where we found it the next day.

DW3, Insp. Esau James Ikamaza, who is currently Assistant OC-CID, Mtwara District Police Station, was the officer in charge of search team that found the cashew nuts. He did not add much to what DW2 Det. Sgt. Steven said, except to corroborate his testimony.

The evidence produced in court, as set put above, reveal certain features that I feel pertinent to mention at this point: It would appear that the plaintiff's evidence as to when he was arrested and first treated as a suspect by the Police departed from his own statement in the plaint and is also self-contradictory. While in the plaint he said that he was arrested ***after*** he responded to a Police call that informed him that the cargo had been found, he told the court in his testimony that it was ***before*** the recovery. He said:

> *He [Corp. Steven] asked them [the driver and the conductor]'Is this the one who gave you the cargo?' They said 'No, it was not him'. He asked me: 'Who did you give the cargo to?' I told him I gave the cargo to the driver and turn boy of the vehicle No. T846 ARW. Afande Steven insisted that I had sold the cargo.* ***By then, the cargo had not yet been discovered. He then sent me into the remand cell.***

However, moments before making this statement in court, the plaintiff said he went to the Police to follow up on the matter ***after*** hearing that the stolen cashew nuts had been recovered from the first accused. This is contradictory. It is not clear why, in the same breath, the plaintiff changed in his testimony. Perhaps he was trying to show that Det. Sgt. Steven had not yet been informed by the 4th accused (the conductor) about his (the plaintiff's) involvement, thus trying to show

that the investigator had no reason to include him as a suspect and remand him, that attempt cannot be of much help, especially considering Sgt. Steven's testimony.

Viewed against the principles applicable in cases involving malicious prosecution as discussed earlier in this judgment, I am unable to conclude that Sgt. Steven had no reasonable justification, (using the term used by the plaintiff in the plaint), to place charges against him. I also see nothing to show that DW2's decision was actuated by spite, ill-will, indirect or improper motives or that there was no reasonable or probable cause for such prosecution. In the context of this case, the burden lay on the plaintiff to prove that the prosecution was instituted without reasonable and probable cause. In **Herniman v Smith**, [1938] 1 All E .R. 1, the House of Lords passage quoted with approval the definition of the term "Reasonable and probable cause" given by Hawkins, J. in **Hick v Faulkner** (1878) 8 Q.B. 167. Hawkins, J. put it this way (at p. 171):

> *"I should define reasonable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any reasonable and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."*

Sgt. Steven himself summarized his reasons into five grounds as set out earlier.

In conclusion on the first issue framed, can one say that the prosecution in Criminal Case No. 222 of 2010 was actuated by malice? Does the evidence the plaintiff has adduced in this case, considered against the defence evidence, capable, on a balance of probabilities, to have run fault of the cardinal rule, as Hawkins put in **Hick v Faulkner**, that upon a full conviction founded upon reasonable grounds of the existence of the state of circumstances as he narrated to the court, assuming them to be true, would have led to the decision to prosecute the plaintiff?

With respect, I am unable to give an affirmative answer to the question posed. On the contrary, I am of the considered view that the circumstances were such that the decision was a sound one, and that any reasonable and cautious Police officer in that position would have decided to place charges against the plaintiff as Sgt. Steven did. As earlier stated, the fact that the prosecution ended in the plaintiff's favour, though a relevant factor, does not necessarily mean that the original complaint was false and/or malicious. The question as to whether any accused person in a criminal case is guilty of the offence charged depends on a lot of factors, and a civil court cannot take the failure of that prosecution, *ipso facto*, as evidence of malice. Hence, my answer to the first issue in this case is that the plaintiff's prosecution in Criminal case No. 222 of 2010 was not malicious within the meaning the term "malicious prosecution" represents in tort law.

With this answer for the first issue, the second and third issues become superfluous. The result, therefore, is that the suit is without merit, and it is accordingly dismissed.

Considering the nature of the case, the fact that the plaintiff is currently a student who fended for himself in this case without the aid of counsel, while the 1st defendant (the proper party) is a senior public official who enjoyed the services of the 2nd defendant's learned State Attorneys throughout this case, I shall make no order as to costs.

F. A. Twaib
Judge
09/02/2016