**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE No. 146 OF 2012**

**FRANCIS MGARE .....PLAINTIFF**

**VERSUS**

**THE INSPECTOR GENERAL OF POLICE.....1ST DEFENDANT**

**A/INSPECTOR EUSEBIO W. NYALIFA.....2ND DEFENDANT**

**HON. ATTORNEY GENERAL.....3RD DEFENDANT**

***20/06/&26/08/2016***

**JUDGMENT**

**MWANDAMBO, J**

Following an acquittal from a traffic case before Ilala District Court, the Plaintiff, an Advocate of this Court and Courts subordinate thereto instituted a suit founded on malicious prosecution, unlawful arrest and detention. The Plaintiff claims damages against the Defendants jointly and severally in the sum of Tshs. 300,000,000/=plus interest thereon and costs

The facts of the suit emanate from an event which took place on 27 October 2010 along the junction of Nyerere Road and Vingungutiin Ilala District within the city of Dar es salaam. The Plaintiff was, on the material date at/about 7:45 a.m driving his motor vehicle Reg. No. T223 ASA Toyota Starlet to the city centre accompanied by two passengers,

amotherand an aunt. At the junction of Nyerere Road/Vingunguti, DW2, a Traffic Police Officer controlling the traffic at the time under the supervision of the second Defendant (DW1) instructed the Plaintiff to drive to Kiembembuzi a direction opposite to where the Plaintiff was going. Naturally, DW1's instructions irked the Plaintiff. He refused DW2's instructions insistingindriving on a service road towards D.T. Dobie offices to drop his passengers and later join Nyerere Road to the city centre. DW1 found the Plaintiff's refusal to obey his instructions uncalled for. On the second Defendant's instructions, DW2 ordered the Plaintiff to park his car at someplace to allow other cars to pass as he wascausinga traffic jam. After exchange of arguments, DW1 caused a notification to be issuedon the Plaintiff which entailed paymentof a fine for disobeying instructions from a Police Officer. The Plaintiff refused to accept because he did notfind himself having committed any traffic offence attracting the issue of notification.

The refusal to pay a fine on thenotification resulted in the arrest and restraint of the Plaintiff and later on he was taken to Buguruni police stationwhere he was put under police custody and recorded a statement before he was released on bail at the central police station later in the day. The following day, the Plaintiff was taken to Ilala District Court to answer the charge of obstructing a driver of another motor vehicle contrary to section 60 (1) (2) and 63(1) of the Road Traffic Act, Cap.168 R.E 2002.That charge was substituted twice and the final charge became one for failure to observe instructions given by a Police Officer to which he denied. After the closure the prosecution's case, the District Court found

the Plaintiff with no case to answer dismissing the charge followed by an acquittal vide ruling (exh. P2) delivered on 12March 2012.

No sooner had the District Court made its decision than the Plaintiff commenced his efforts to pursue a claim for compensation for the alleged unlawful arrest, detention and malicious prosecution. This he did through his Advocate by a letter Ref. No. **FAM/NTC/02/2012** dated 20March2012 addressed to the First Defendant copied to the Second and Third Defendants (exh. P3). That letter demanded compensation in the sum of 150,000,000/= payable within ninety (90) days and by reason of the Defendants'refusal to heed to it, the Plaintiff instituted the instant suit. Briefly, the Plaintiff alleges that his arrest, detention was unlawful and the prosecution of him at the behest of the 2nd Defendant wasmaliciousand without reasonable and probable cause subjecting him to humiliation, defamation, injury to his reputation before his clients and the public generally. Not unusual, the Defendants deny all of the Plaintiff's claims for being misconceived maintaining that his arrest and detention resulted from his own wrong doing andat any rate, the prosecution was without any malice. The Defendants have accordingly prayed that the suit ought to be dismissed with costs.

The pleadings in the suit generated the followingissues for determination namely:

1. Whether the arrest and detention of the Plaintiff by the second Defendant was lawful.
2. Whether the Plaintiff was prosecuted by the 2nd Defendant and if so, whether the prosecution was malicious.

3. If the answers to issue 1 and 2 above are in the affirmative, whether the Plaintiff suffered damages.
4. What reliefs are the parties entitled to.

Before I revert to the issues I find it apposite to preface my judgment with a survey of the law as it relates to the tort of malicious prosecution. I am alive to the fact that thePlaintiffclaims damages on two heads that is to say; Tshs 200,000,000/= for arrest and detention resulting into defamation and lowering his reputation against all Defendants jointly and severally and Tshs 100,000,000/= against the 1st and 3rd Defendant only for the alleged failureto follow the law and failure by the 3rd Defendant to advise the former properly. As it will become apparent later, the Plaintiff's evidence in the suit is largely one of malicious prosecution and hence my resolve to direct my attention specifically to that area.

It is common ground from the submissions by counsel that the law on suits involving malicious prosecution is fairly settled. There is a long list of decided cases and legal materials within and outside the jurisdiction. A few of the cases will be sufficient for the purpose represented by **HosiaLalataVs. Gibson ZumbaMwasote[1980] TLR 154, JeremiahKamama Vs. BugomolaMayandi[1983] TLR 123, BhokeChacha V Daniel Misenya [1983] TLR 329, Mbaraka William V Adams Kisute [1983] TLR 358 and Tumainiel Vs. AisaIssai**(1969) HCD n. 280. It is clearfromthecases some of which were referred by counsel in their respective submissionsthat a party who seeks judgment in a suit for malicious prosecution must prove thathe was prosecuted in proceedings ending in his favour and that the defendant

instituted or carried out the prosecution maliciously and without reasonable and probable cause leading into the plaintiff suffering damages. Each of the ingredients must be proved by the Plaintiff in order to succeed in his suit which means in effect that proof of one or some of them will not entitle the Plaintiff to a judgment.

According to authorities, a Defendant is deemed to be a prosecutor if he reports another person to a prosecutingmachinery like the police. It is not in dispute in this case that the arrest of the Plaintiff was conducted by the 2nd Defendant whereas the actual prosecution was done by the Public Prosecutors within the offices of the 1st Defendant. Of course thelawfulness of the arrest is a matter which is in dispute to be determined on the basis of evidence later in this judgment. A determination whether the Defendant prosecuted the Plaintiff with malice and without reasonable or probable cause has to be judged from the peculiar facts of each case having regard to what constitutes each of the terms used. Halsbury's Laws of England (3rdEdn) (Vol.25)at page35 defines malice as:-

*"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"*

Prosecution is said to be malicious where a defendant does it for some other motive than a desire to bring to justice a person whom he (the accuser) honestly believes to be guilty (see: **Brown Vs. Hawkey** [1891] 2 QB 718 at p.723 per Cave, J.

On the other hand probable and reasonable cause was discussed in **JeremiaKamamavs. BugomolaMayandi (supra) (Chipeta, J- as he then was)** quoting **Hernimanvs. Smigh [1983] 1 ALL ER 1** to which reference was made to **Hickvs. Fraulkner [1878]** 8 QB 167, at p 171. This Court adopted with approval definitions given earlier on what constitutes reasonable and probable cause thus:

> "..... *an honest belief in the guilt of the accused based on full conviction, founded upon reasonable grounds, or existence of a state of circumstances which assuming them to be true, would reasonably lead any reasonable and cautions man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed*....."(atpp 126 and 127).
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> His lordship quoted a passage from the judgment of Georges, CJ(as he then was) in **Tumainiel Vs. AisaIssai**(1969) HCD n. 280 in which it was stated:
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> "...*when there is reasonable suspicion that an offence has been committed and good grounds for*

*thinking that a particular person is responsible, it is a duty of every citizen to pass 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 ground for suspecting the person...."(at page 126)*

Just as it is with the first two ingredients constituting a cause of action in a tort of malicious prosecution, there is no controversy in relation to the third one that is to say; termination of the criminal proceedings in favour of the plaintiff by an acquittal. However, it is trite law that the termination of the criminal charges by an acquittal is not of itself sufficient to prove a case founded on malicious prosecution. That position was reiterated in **YonahNgassa V MakoyeNgassa** [2006] TLR 213 cited by the learned State Attorney to the effect that acquittal is one thing but proof of malice is another thing altogether which the plaintiff is duty bound to discharge his burden in order to succeed in a suit such as this one.

Lastly, unlike in cases founded on trespass to person which are actionable per se without proof of damages, the plaintiff in a suit for malicious prosecution has to prove that he suffered damages as a result of malicious prosecution. The learned Advocate for the Plaintiff agrees as such referring to the treatise by the authors of **Winfield** on Tort 7$^{th}$edition by J AJolowicz and T. Ellis Lewis at page 706(see also:

**Winfield and Jolowicz on Tort 12**th edition by W.V.H Rogers at page 552).

It is common ground in this suit and indeed in many other cases of this nature that two of the ingredients are less controversial that is to say; prosecution and an acquittal. It is not always the case with proving existence of malice and of necessity damages. There is little dispute in this case that the Plaintiff was prosecuted by the 2nd Defendant by setting the legal machinery in motion which resulted into criminal charges before the District Court in Traffic case No 972 of 2010 terminated by an acquittal. The Plaintiff's suit can stand upon proving the existence of malice leading to his prosecution. Having regard to the foregoing in mind, I will now turn my attention to a determination of the issues in the light of the evidence on record.

The first issue is whether the arrest and detention of the Plaintiff was lawful. The Plaintiff's counsel has invited the court to make a finding that the arrest was unlawful advancing several reasons in that direction. Firstly, the whole saga was created by DW2 who blocked him from driving on a service road to D.T. Dobie offices to which direction he had indicated and instead directed him to drive to VingungutiKiembembuzi where he had no business to transact. Secondly, the learned Counsel argues that the service road to D.T. Dobie offices was free and other cars were allowed used to use the same road he was being refused. Thirdly, the Plaintiff's arrest and detention and handcuffing him was a result of the 2ndDefendant's own creation as the Plaintiff did not resist to an arrest without the use of force. Fourthly, the offence which led to the Plaintiff's arrest, detention and prosecution was a traffic offence which could be

enforced by issuing him with a notification under section 95(3), (4),(5) and (6) of the Road Traffic Act, Cap 168 R.E 2002. It is contended that the Plaintiff had seven days to pay a fine pursuant to the notification failing which he could face criminal charges in court but instead of allowing him to comply with the notification the 2nd Defendant arrested him. Mr. Benson Hosea learned State Attorney urges the Court to answer the first issue affirmatively. Like the Plaintiff, the learned State Attorney invites the Court to pay regard to: one, the Plaintiffs refusal to obey instructions given by a police officer which is an offence under section 73(4) and 89(a) of Cap. 168 based on the testimonies given by DW1 and DW2, two the Plaintiff's refusal to accept the notification opting to face his day in Court.

I think there is hardly any controversy that generally, a police officer's arrest of a person suspected to have committed an offence is deemed lawful unless proved otherwise. The foregoing is consistent with a statement ofDixon J cited by the learned state Attorney in **Commonwealth Life Assurance Society V Brain** (1935) CLR 343 at page 382 at which his Lordship is quoted thus:

> *'The prosecution must be believed that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted"*

It follows thus that a person who would want the Court to hold that an arrest was unlawful must discharge his burden of proof on the standard required in civil cases on the authority of section 110(1) of the Evidence Act Cap 6 R.E 2002. As observed in Halisbury's Laws of England Vol.45 (2)

at paragraph 473, citing **Liste**r ***v. Perryman*** **(**1870) LR 4 HL 521 at 536, 538 and ***Chatfield v. Comerford***(1866) 4 F&F 1008, an arresting officer need not be satisfied that the prosecution will result in conviction rather the existence of reasonable belief held in good faith in the existence of factswhich would justify prosecution. The evidence by DW1 and DW2 was to the effect that the arrest of the Plaintiff was justifiable given the conduct of the Plaintiff in response to the instructions given to him which he refused to comply. It isthedefence evidence that the prevailing circumstances on the material date and time necessitated taking the action DW2 took by directing traffic to a certain direction to allow for the passage of a motor cade of a national leader shortly thereafter. It is that act which irked the Plaintiff who says that he refused to follow the instructions given to him by DW1 and instead insisted indrivingon the service road to D.T. Dobie offices which, according to him was free and being used by other drivers. To believe the Plaintiff on this requires evidence to contradict DW1 and DW2. Such evidence is conspicuously wanting. Unlike PW1, DW1 and DW2 testified that the road was not in use at the material time and that is why the Plaintiff was directed to the opposite direction which he refused. It is common ground that the Plaintiff had two passengers in his carwho could have been called to testify on that aspect.Admittedly, there is no law compelling a party to call a certain number of witnesses but the Plaintiff's failure to call his own passengers to give credence to his evidence cannot be without consequences. Itis trite law that failure to call material witness (es) by a party entitles the Court to draw adverse inference. That this is the law is evident from decided cases including; **Hemed Said V. Mohamed Mbilu** [1984] TLR 113. To the extent it is relevant, the

abridged holding of the Court (Sisya, J- as he then was) appearing at the head note runs thus:

> *"Where for undisclosed reasons, a party fails to call a material witness on his side the Court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the parties interest"*

That case has been applied in subsequent cases including:**Engen Petroleum (T) Ltd V. Kobil Tanzania Ltd**, HC commercial case No. 250 of 2002, **Scania Tanzania Limited V. Gilbert Wilson Mapande,** HC commercial Case No. 180 of 2002 and **Tanzania Forestry Research Institute V. National Microfinance Bank Public Limited Company**, HC Civil case No. 45 of 2010(all unreported). The principle gleaned from the cases I have referred to above holdstrue in the instant case where for undisclosed reason the Plaintiff elected not to call his passengers who were material witnesses to corroborate his evidence. Accordingly, I have no hesitation in finding that the Plaintiff has not adduced sufficient evidence to substantiate his claim with regard to the status of D.T. Dobie service road on the material date and time. The second aspect material to the determination of the first issue relates to refusal to pay a fine per notification. DW1 and DW2 testified that the Plaintiff refused to pay the fine as he did not see any justification to pay a fine for an offence which he had not committed and if so, he would have his innocence vindicated in Court. That evidence was adduced to prove that the arrest was inevitable and that the option for paying a fine within seven days was no longer available to the Plaintiff. The learned Counsel for the Plaintiff would have

me hold otherwise but the evidence on record speaks to the contrary. The Plaintiff has clearly stated in his evidence thathe was mistreated as he did not see himself having committed any traffic offence to attract payment of a fine on the notification pursuant section95(3),(4),(5) and (6) of Cap 168. DW1 is on record that the Plaintiff refused to produce his driving licence upon being asked to do so. Having refused to admit the offence on the basis of which a notification would have been issued to him, Ifail to see any merit let alone logic in the Plaintiff'sclaim faulting the arrest as he does for the reason that he had seven days to pay a fine per notification. There is no basis in that argument and I accordingly reject it.

The third aspect relates to the use of force in arresting and putting the Plaintiff in detention and handcuffing him. The Plaintiff through his evidence stated that he was man handled by the use of excessive force through such means, to use his own expression, *Tanganyika Jerk.* The evidence adduced by defence witnesses is that that the Plaintiff did not cooperate with the arresting officer by not only refusing to surrender his car key to the police officer when asked to do so but also acted rudely and keen to flee to resist the arrest and that necessitated the use of force to effectan arrest. Again, like in the first two aspects, the Plaintiff was bound to produce his passengers as witnesses to prove that he willingly surrendered himself to the police officers thereby diluting the defence evidence on the use of force. The Plaintiff did not do that and the court takes adverse inference against his failure to call the said witnesses. I would thus not accept the Plaintiff's submissions in that regard because the evidence on record speaks against him. In conclusion on this issue, I hold that on the facts and evidence on record, the Plaintiff's evidence falls below

the standard required in civil cases to sustain a finding in favour of the Plaintiff. In consequence, I answer the first issue against the Plaintiff and hold that the arrest and detention of the Plaintiff was lawful.

Having held that the Plaintiff's arrest was lawful I think the determination of the second issue must as of necessity follow suit. It is common ground that the prosecution of the Plaintiff in Traffic case No. 972 of 2010 was a direct consequence of an arrest by the 2nd Defendant which I have already held to be lawful. Whilst it is trite thata person who sets a legal machinery in motion is taken to be the prosecutor, there is no dispute at all in this case that the second Defendant was the prosecutor. It is him who caused the arrest of the Plaintiff on traffic offences he subsequently faced in court and I wouldaccordingly answer the first part of the second issue in the affirmative. The next question falling for my determination is, was the prosecution of the Plaintiff with malice and without reasonable probable cause? The Plaintiff's evidence on the issue is to the effect that the second Defendant acted with malice at the time of arresting him because he was not even sure of the offence the Plaintiff had committed as a result of which the charge was amended two times after the Plaintiff had been taken to the District court as evident with exhibit P1(a),P1(b) and P1(c).His submissions are anchored on that evidence on which basis the learned Advocate invites the court to uphold the second issue citing a number of authorities the majority of which I have already referred to earlier in this judgment. The defence evidence on this is naturally a total denial. DW1 denies having done what he did maliciously or without probable cause and states that his involvement in the traffic case ended with giving evidence in the District Court before which he attended in

three different occasions but could not testify due to adjournments. It is DW1's further evidence that he did not know the Plaintiff personally before the incidence and thus he could not have just had any malice or ill will against a person he never interacted with before. The learned State Attorney submits that malice has not been proved by the Plaintiff citing several authorities to back up his submissions. One of such authorities is a decision of Dixon J in **Commonwealth Life Assurance Society V Brain** (supra).In addition, reference has been made to the works of HonourableMr.Justice GuruPrasanna Singh in his book titled **The Law of Torts**, 21st edition, Law Publishers, 1987 at page 253 where there is a quotation which is equally reflected in **Tumainielvs. AisaIssai** (supra). Relying on the said authorities, the learned State Attorney submits that there is no evidence to prove that the prosecutor in this case was actuated by malice or caused the prosecution of the Plaintiff for a cause other than to enforce the law thereby negating the existence of reasonable or probable cause.

There is no dispute on the evidence for and against on this issue, that the extent to which the 2ndDefendant was involved in prosecuting the Plaintiff is limited to the arrest and causing the Plaintiff taken to Buguruni Police station for recording a statement to facilitate preparation of a charge against the Plaintiff.The 2nd Defendant has testified that he attended in the District court on three occasions to give evidence in support of the charge but did not succeed by reason of adjournments and the last thing he heard later was that the Plaintiff was acquittedbecause he had no case to answer as a result of the prosecution's failure to establish a primafacie case against him. There is no evidence to prove that the 2nd Defendant refused to

appear in court to give evidence when summoned. In the circumstances I can hardly see any malice in the 2nd Defendant who, as I have already held lawfully arrested the Plaintiff and was ready to give evidence to prove that the Plaintiff committed the offence he stood charged. The fact that the charges were substituted in two different occasions is not of itself proof of existence of malice but even if it was so there is no evidence to prove the 2nd Defendant's role in that.In **LudovickMbona V Consolidated Hoding Corporation** Civil Case No 245 of 2001(unreported) this court upheld a claim for malicious prosecution upon being satisfied that the Defendant's officers acted with malice and were indeed instrumental in prosecuting the Plaintiff regardless of several orders for his discharge. That case involved series of arrests and prosecutions following discharge of the plaintiff on related charges facing him in different courts in Tabora the last of which terminated in his favour after the trial court had dismissed the charges ordering his acquittal. There is nothing in this case closer to the above cited case to warrant this court making a similar finding. The learned Advocate for the Plaintiff concedes that on the authorities discussed, a mere acquittal in a criminal charge is one thing and existence of malice a different one altogether. I would, in the event hold as I do that the Plaintiff's prosecution was not actuated by any malice nor was it without reasonable and probable cause.

After holding that the Plaintiff's arrest and detention was lawful in the first issue followed by a finding that in any event the prosecution was without any malice in the second issue, the determination of the third issue in relation to damages must likewise follow suit. This is because an action for damages presupposes a wrong, that is to say; an unlawful act or

omission of some kind affecting the Plaintiff committed by the Defendant or by someone for whose acts he is responsible. Having failed to prove the first two issues there can no basis upon which the Plaintiff can be said to have suffered damages. The third issue is accordingly answered against the Plaintiff.

Lastly, as regards reliefs, having failed to prove his case on the issues framed, the Plaintiff is not entitled to any of the reliefs claimed in the plaint. In consequence, the suit is dismissed with costs. Order accordingly.

**L.J.S MWANDAMBO**

**JUDGE**

**26/08/2016**