IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APPEAL NO. 44/2016

(Arising from Civil Case No. 11/2014 of the District Court of Karagwe)

1. **OLIVA JASTON**
2. **GABRIEL BITAMA** ---------- **APPELLANTS**
3. **NGUVUMALI FARMERS CO. LTD**

VERSUS

MICHAEL PETER MPABAGOMBA ---------- RESPONDENT

JUDGMENT

30/5/2018 & 17/8/2018

Kairo, J.

At the District court of Karagwe, the Respondent successfully sued the Appellants for malicious prosecution in Civil Case No. 11/2014. The Appellants were aggrieved by the said decision and decided to lodge this appeal to challenge the said decision on the following grounds:-

1. That, the trial Court grossly erred in law and facts by deciding that the Respondent established and proved his case against the Appellants;
2. That, the trial court grossly erred in law and facts for failure to pronounce that evidence tendered by the Respondent did not establish full elements of tort of *malicious prosecution*;
3. That, the learned trial Magistrate erred in law and facts for failure to evaluate evidence before him and thereby come into conclusion that the Respondent did not prove the case on the balance of probabilities;
4. That, the trial Magistrate erred in law and facts for failure to note that the Respondent admitted and he is the one who instituted criminal case;
5. That, the trial learned Magistrate erred in law for failure to address and resolve issues;
6. That, the trial Magistrate erred in law and facts to decide the case against the weight of evidence;

Briefly the genesis of this dispute is that, the Respondent instituted a suit against the Appellants jointly praying to be paid Tshs. 50 million as general damages for malicious prosecution, cost of the suit and any other relief the court would deem just to grant.

Together with the WSD, the Appellants on the other hand lodged a counter claim of Tshs. 53 million, interest and exemplary damages of Tshs 10 million among other reliefs. The trial court decided in favor of the Respondent by awarding him a total of Tshs. 25 million on 26/10/2016. The court however

dismissed the counter claim with cost for failure to prove it. Dissatisfied, the Appellants decided to lodge this appeal on the grounds above listed. The Appellants were being represented by Advocate Zeddy Ally, the Learned Counsel while the Respondent is self represented.

When the matter was scheduled for hearing, Advocate Zeddy Ally informed the court that he will argue on all of the grounds of appeal jointly save for the 5th ground which will be argued separately. He submitted that the Respondent has failed to prove his claim on the required standard. He went on that, the Respondent sued the Appellants for malicious prosecution alleging that the 2nd Appellant has instructed the 1st Appellant to go and report a theft incidence which occurred at the godown where the Respondent's company was guarding, the action which resulted to the Respondent's arrest and that he was detained at police custody for 24 hours.

The Appellant's Advocate argued that, the cause of action which was malicious prosecution was not proved at the trial court by the Respondent. The Advocate further submitted that the required elements to prove the tort of malicious prosecution were stipulated in the case of *Amina Mpimbi vrs Ramadhani Kilie [1990] TLR 6-8.* He went on that for the Plaintiff to succeed; there must be malice on the part of the Defendant, further that the prosecution was without reasonable and probable cause. In the matter at hand therefore the Respondent was required to show that he was prosecuted by the Appellants with no just cause at the trial court. He went

on that however in the matter at hand the parties were Republic against the Respondent. He further contended that, in the case of *Mafumba vrs Budu Mnyagalya [1992] TLR 310* the court observed that in the prosecution conducted by the Public Prosecutor and the State Attorney, it is difficult to prove the tort of Malicious Prosecution. Further that to sue the person who reported the matter to the police who later prosecuted the Plaintiff is frivolous, the court thus dismissed the claim in the cited case. He also contended that the Respondent was prosecuted by the Republic which took that action after getting the information, conducted investigation and satisfied itself that an offence has been committed. He thus concluded that it wasn't correct to sue the Appellants. In the same veins it is disputed that the Appellants had malice.

Advocate Zeddy Ally also submitted that the 3rd Appellant had a contract with the Respondent's company which was hired to guard the coffee godown. Besides, the 2nd and 1st Appellants being employees of the 3rd Appellant had a duty to report to the police when the theft of 211 bags of coffee occurred. The Advocate submitted that according to evidence adduced, their contract was from 3/11/2011 up to 4/4/ 2011 and the contract document was admitted in court as exhibit D1. That the theft occurred on the night of 3/4/2011, thus within the contract period as per the letter written by the Respondent tendered by DW3 as exhibit D3. In the said letter the Respondent promised to pay the stolen coffee.

Advocate Zeddy Ally further attacked the finding of the trial court that the guarding contract lapsed on 2/4/2011 arguing that neither party mentioned the said date. He added that the Respondent testified the lapsing date to be 3/4/2011 but didn't bring any evidence to that effect. He also submitted that since the contract was still subsisting, the 1st and 2nd Appellants were justified to report on the theft to the police. However according to Dw4 evidence, the Respondent was the first to report the incidence to the police on 3/4/2014, as such it was an error for the District court to conclude that there was malice in prosecuting the Respondent. The Advocate went further that according to the testimony of Dw4, the Respondent was arrested following his failure to give the particulars of his employees who were on duty on the incident date; as such the reason for his arrest was therefore not theft report. He concluded that the cause of action the Respondent sued on was not substantiated on the balance of probability as legally required.

With regards to the 5th ground, the Advocate contended that the trial court failed to resolve the raised issues one after another, instead lumped them together, as a result failed to evaluate them pointing specifically on the first issue which he argued other grounds hinge on. He concluded that the said failure has the effect of nullifying the proceedings. He went on that, the finding of a *"no case to answer"* doesn't prove malice on the part of the Appellants. He argued that there was probable cause as theft has occurred and it was the Respondent's company which was on guard when the incidence occurred. Further to that he submitted that even if the contract

would have lapsed, experience shows that there was a tendency of an implied renewal as the Respondent's company would still provide the services while the renewal process continues. The Advocate thus prayed the court to allow the appeal with cost and further quashes and set aside the judgment and decree of the trial court.

In his reply the Respondent generally disputed the submission by the Appellant's Advocate. He dismissed the argument that the Appellants didn't prosecute the case of the coffee theft against him, but the Republic.

The Respondent argued that the 1st and 2nd Appellants were the general owners while the 3rd Appellant was a special owner of the stolen coffee and not the Republic. He contended that the Republic wouldn't have instituted the case against him if the matter wouldn't have been reported to them. He added that he can't blame the Republic as it received the complaint from the 1st and 2nd Appellants on behalf of the 3rd Appellant. He submitted that for the cause of action of malicious prosecution to be proved, the Plaintiff (Respondent herein) has to prove that the Defendants (Appellants herein) lied or had a reason to know that they were lying. He went on that Exhibit 'D1' was forged by altering the last date of the contract so that the Appellants could fulfill their motive to prosecute the Respondent maliciously. He further submitted that, according to exhibit D1, they didn't hand over the stolen coffee to him that's why the court cleared him by finding that he had no case to answer in Criminal Case No. 198/2011. He

added that the Appellants mentioned his name at the Police that's why he was apprehended.

In refuting the argument that he was the first to report to the Police, he argued that Dw4 didn't tender any document to prove that contention, as such what has been stated by Dw4 was a mere allegation. He also dismissed to be mere allegation the argument that their contract with the 3rd Appellant would normally continue even after the lapse of the time indicated, arguing that no proof to that effect was tendered, otherwise the contract (Exhibit D1) would have contained such a clause. He insisted that on the day when the coffee was stolen the guarding contract had already lapsed.

The Respondent went on to argue that the District court decided to look at the effective date so as to reach to a conclusion as to when the contract was to lapse after noting the alteration made in the said contract and thus the court's finding that the same lapsed on 2/4/2011 was correct. He added that exhibit D2 (subsequent contract) was irrelevant to this court as its effective date shows to be two days later after the theft. He wondered how comes a person who was involved in theft can still be trusted and given a subsequent contract to start on 5/4/2011.

With regards to the letter dated 8/4/2011 which was alleged to have been written and signed by him, the Respondent stated that he found the letter already typed and he was tortured and forced to sign it. He went on that he

informed the OCCID on the incident but didn't take up the matter adding that he was given a police bail after signing it. He thus prayed the court to dismiss this appeal for want of merit and affirm the decision of the District court.

In his rejoinder, Advocate Zeddy Ally contended that the explanation by the Respondent concerns defamation which he argued to be different from what has been the cause of action at the District court thus he is mixing up the offences. He insisted that the Respondent was prosecuted by the Republic which wasn't joined as a party in the case. He refuted the argument that exhibit D1 was forged otherwise the same wouldn't have been admitted as an exhibit.

He termed the argument by the Respondent that he was not handed over the coffee to be surprising as he was guarding the godown which contained coffee. The Advocate thus wondered what other hand-over did the Respondent wanted.

He further insisted on the automatic renewal arguing that the contract at issue was to lapse on 4/4/2011 (D1) and in anticipation; the parties signed in advance the contract admitted as D2 which was to start on 5/4/2011. With regards to the argument that he was tortured and forced to sign the letter (exhibit D3), Advocate Zeddy Ally dismissed and argued the same be an afterthought. He argued that exhibit D3 verifies that the 3rd Appellant and the Respondent were still in contract that's why he wrote and signed it.

On the argument that Dw4 didn't prove that he reported first as he didn't produce any document to that effect, Advocate Zeddy Ally submitted that, the Respondent being the Plaintiff at the trial court was the one to prove that allegation, arguing that is why the Appellants argued that he has failed to prove his case. He went on to submit that to report to the police is a duty of any citizen when the need to do so arises. That the police would then investigate and upon satisfaction that the report is genuine and an offence has been committed, the investigation report would be taken to the Public Prosecutor to prosecute the case.

As to whether the contract expired on 3/4/2011, the Advocate contended that, even if that would have been the case, but a day ends in the midnight (12:00 midnight). Naturally the Respondent couldn't handed over the premise (lindo) at midnight rather the handing over would have been in the morning of 4/4/2011 which confirms that the Respondent was on guard when the offence was committed. The Advocate insisted his prayer to have this appeal allowed with cost.

Having gone through the grounds of appeal, reply there to and oral submission by both parties, the main issue for determination in this court is whether or not the Appeal is based on founded grounds. However I should state from the onset that thorough scrutiny to the grounds of appeal I observed that all of them are centered to answer an issue as to whether or not the tort of malicious prosecution has been proved by the Respondent. I will thus consider the said grounds collectively. Further to that I also wish to

point out that I found the 3rd ground contradictory to the rest of the grounds as the same faulted the trial court for what was alleged to be failure to evaluate evidence thus concluded that the Respondent did not prove the case, while in the rest of the grounds, the Appellants allege that it was wrong for the trial court to find that the Respondent proved the case.

The law is settled that for the tort of malicious prosecution to succeed, the claimant (the Respondent herein) has to prove some ingredients which have been echoed in various cases, among them is the case of **Jeremiah Kamama vrs Bligomola Mayondi [1983] TLR 123 wherein** it was held that for a suit of malicious prosecution to succeed, the Plaintiff must prove simultaneously that he was prosecuted by the defendant, that the proceedings complained of ended in his favor, the defendant instituted the prosecution maliciously, without reasonable and probable cause for such prosecution and that the damage was occasioned to the Plaintiff.

Again in the case of J**ames Funke Ngwagilo vrs AG [2004] TLR 161** it was observed that in an action for malicious prosecution, a Plaintiff has to prove among other things, the prosecution was undertaken without reasonable and probable cause and was actuated by malice. The Advocate for the Appellants argued that the Respondent was prosecuted by the Republic through the Public Prosecutor in Criminal Case No. 198/2011 complained of by the Respondent. He argued that the 1st and 2nd Appellants went to report the theft incident at the police being the employees of the 3rd Appellant. The police investigated and after satisfying itself that the commission of the

offence occurred, the matter was taken to the court by the Public Prosecutor. Thus it is not correct to conclude that the Respondent was prosecuted by the Appellants. However the Respondent argues that the Public Prosecutor wouldn't have prosecuted him if the Appellants wouldn't have gone to report the said theft incidence to the police mentioning his name. In other words, the Respondent contends that it was the Appellants who set the law in motion.

I went through the Criminal Case No. 198/2011 and observed the parties to be;

Republic: Versus. **1. Alfred Kwajaba**
2. Michael Peter **Accused.**

Looking on the face of it, it is true that the complainant is the Republic and not the Appellants. But it is equally true that a report or rather a complaint must have taken to the authority (the police) for them to act on and eventually proceeded to prosecute the accused. It means, someone must have set the law in motion by reporting the theft incidence to the police which report triggered their action. The wanting question is who set the law into motion in this matter.

The Respondent points an accusing finger to the Appellants while the Appellants argued that the Respondent was the first to report the incidence. Dw1 testified that when she went to report to the Police around 9:00am. She found the Police in preparation to go to the incidence and was further

told that they got the information on the theft incidence from the Respondent at night. (page 15 -16 of the trial court proceedings). Dw2 testified that he was told by the Respondent himself that he was the one who reported the incidence to the police (page 18 proceedings). Dw4 testified that on 3/4/2011 at 6:00am, the Plaintiff went to the police to report that the godown guarded by his company was broken and he wrote the Plaintiff's statement. According to the testimonies of Dw1, Dw2 and Dw4, I am convinced that the Respondent had also reported the theft incidence at the police and to be precise, he was the first to report the incidence, which action I consider it prudent and correct being the first to know about it. Besides, every citizen has a duty to report such an incident at the police so that they can investigate on it as correctly argued by Advocate Zeddy Ally. I further thus consider the reporting to police by 1st and 2nd Appellants to be proper even if there would have been no reporting by the Respondent in the circumstances of this case. However the prosecution would only be initiated after being satisfied that the offence was committed and suspect(s) identified. I am aware that the Respondent is accusing the Appellants arguing that it is because of their report, he was arrested and later prosecuted, probably lamenting that the Appellants mentioned him to be the suspect. Put it in other way; that the Appellants when reporting mentioned him to be their suspect. Thus the prosecution though conducted by the Public Prosecutor was done at the instance of the Appellants. This can be fortified by the conduct of the Appellants (1st and 2nd) during the trial

whereby the Respondent stated that they went to testify against him (page 8 of the proceedings). It matters not in my view if the prosecution was done by the Public Prosecutor provided the ones who set the law into motion were the Appellants. After-all that is the procedure for offences which are criminal in nature. I am thus inclined to agree with the Respondent that it wasn't, but for the Appellant's report to the police which resulted to the Respondent's prosecution.

I wouldn't want to be detained by the second ingredient as it was not disputed that the proceedings ended in Respondent's favor following his acquittal of the offence charged with.

Another ingredient to be looked at in proving malicious prosecution is whether the prosecution against the Respondent was unreasonable and with no probable cause and further the same was done maliciously. I will consider all of them collectively. It is not disputed that the godown of the 3rd Appellant was broken on the nigh of 3/4/2011 and 211 sacks of coffee worth Tshs. 53 million were stolen. The contention however is whether on the incidence date the guarding contract was still subsisting. It was a common understanding that the contract was of 3 months effective 3/1/201. The Respondent has testified that the same was to expire on 3/4/2011 thus he wasn't responsible to guard on the incident date while the Appellants stated the contract was to expire on 4/4/2011, thus the Respondent was still responsible to guard the godown.

The contract document was admitted as exhibit D1 – and on the expiry date the number was originally written 3/4/2011 but later seem to be overwritten to read 4/4/2011 which action the Respondent imputed it with malice on the part of the Appellants so as to prosecute him. Further to this there is also another version or conclusion reached by the trial magistrate through which he grounded his conclusion that on the night of 3/4/2011 when the incidence occurred, the parties' contract had already expired, as such the Respondent's company was not responsible to guard the godown. The trial magistrate so stated arguing that the three months contract was to lapse on 2/4/2011 when counting from effective date of 3/4/2011.

According to record, the incidence occurred at 3:00 am of 3/4/2011, and we should have in mind that a day ends at 12:00 midnight.

It was submitted by the Respondent that the contract was to end on 3/4/2011 which is according to what exhibit D1 originally showed. Thus if the godown was broken at 3:00am of 3/4/2011 it means it was towards the wake of 4/4/2011. Definitely by that time the Respondent's company was still providing the guarding services to the 3rd Appellant. But further, even if we take the analysis of the trial magistrate to be correct in the sense that the contract expired on 2/4/2011. Again the said date ended at 12:00 midnight while the theft incidence occurred a 3:00 which was already 3/4/2011 (early morning hours), which means the Respondent has not handed over the *guard ship* yet as he couldn't have done so in the midnight. Thus either date, the analysis reveals that the Respondent was still

answerable with the godown guarding, as such he can't exonerate himself from that responsibility. His argument that there was no contract when the incidence occurred is not correct with due respect. Besides it was further testified that even after the lapse of the contract, the subsequent one would take place even before executing the same. Though the Respondent refuted this contention, but I am inclined to agree to it since exhibit D2 which is a subsequent contract was signed on 1/4/2011 by both parties and was to take effect on 5/4/2011 which facts also is in tandem with the Appellants' explanation that the lapsing day of the previous contract was 4/4/2011.

On top of that exhibit D3; a letter of 8/4/2011 wrote by the Respondent confirmed that his company was on guard as per the contract entered as he wrote;

"...tunasikitika kukujulisha kuwa mnamo tarehe 3/4/2011 kama saa tisa usiku ghala tunalolinda Bugene lilivamiwa na majambazi wenye bunduki ambako kulikuwa na alinzi wa Kampuni yetu SSCL Ltd .....".

The Respondent in his submission told the court that he found the said letter already written and he was tortured in a move to force him sign it. With much respect, I don't subscribe to the said contention. Such a detailed letter explaining what happed can not be written by a person who doesn't know the said details. Beside, the letter was in headed paper of the Respondent's company. I wonder who else can possess the headed paper apart from the Respondent himself. But on top of that, the letter is of

8/4/2011 and Respondent was taken to police on 31/5/2011. Where and how was he forced to sign before being arrested? In the circumstance I join hands with Advocate Zeddy ally that the allegation of being tortured to sign is an afterthought.

All in all the analysis of the facts shows that the contract was still subsisting when the incident occurred, thus I beg to differ with the findings of the magistrate with much respect. Having so found, I wouldn't think that the Appellant's action to report the incidence to the police or even mentioning the Respondent to be their suspect of the theft incidence was unreasonable or with no probable cause. Further to that, the fact that the Respondent's Company was responsible to provide Security guard for the godown on the incident day, and theft occurred, yet the Respondent failed to produce or avail the necessary document to the Police concerning the guards who were on duty were enough to prove reasonable and probable cause for his prosecution. Thus in my candid view, the Respondent was prosecuted to vindicate the law [Refer the case of **Stevens vrs Madland country [1854] Eng. R 661.**

The Respondent argued that the prosecution was malicious as the Appellants altered the date of the lapse of the contract to read 4/3/2011 instead of 3/4/2011 so as to foster their bad motive. The word malice has been defined case of **James Funke Ngwagilo vrs (supra) wherein the Court of Appeal** observed that *"malice in the context of malicious prosecution is*

intent to use legal process for other that its legally appointed and appropriate purpose".

However in my view, the above analysis is inconsistence with the presence of malice. Despite the above analysis which I see no need of repeating, suffice to state that it is the finding of this court that the guarding contract between the parties was still subsisting. Further there was also reasonable and probable cause to prosecute the Respondent. But leaving that aside, the Respondent was left to proceed with a subsequent contract which was effective 5/4/2011 even after the theft incidence as testified by Dw3 (page 24 proceedings), the fact which also negates the element of malice on the Appellants' part.

All having done and said, I agree with the Appellants that the Respondent has failed to prove his claims of being maliciously prosecuted against the Appellants. I therefore set aside the Judgment and decree of the trial court and accordingly allow this appeal with cost.

It is so ordered.

R/A explained.

L.G. Kairo

Judge

At Bukoba

17/08/2018

Date: 17/8/2018

Coram: Hon. L.G. Kairo, J.

1st Appellant: Reported sick

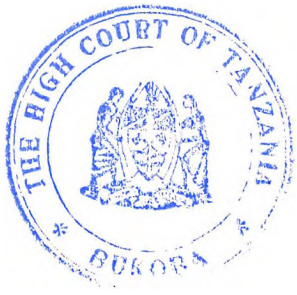
2nd Appellant: Absent

3rd Appellant: Dioniz Kiza – Board member

Respondent: Represented by Mujungu Cleophas

B/C: A. Kithama

Court: The matter is scheduled for judgment. The same is ready and is read over before the parties as per today's coram.



L.G. Kairo

Judge

17/8/2018