

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

HC.CIVIL APPEAL NO. 38 OF 2017

(Originating Resident Magistrate's Court Musoma Civil Case No. 51 of 2016)

THE DIRECTOR ACCASIA GOLD MINE..... APPELLANT

VERSUS

ROBERT MAYENGA KUNJU RESPONDENT

JUDGMENT

19/09/2018 &15/01/2019

RUMANYIKA, J.:

Appeal is against judgment and decree of 30/03/2017 of the Resident Magistrate's Court of Musoma at Mara (the trial court). Which, without costs awarded Robert MayengaKunju (the respondent) Shs. 150,000,000/= being general damages for the tort of malicious prosecution committed by The Director Accasia Gold Mine (the appellants). The latter are not happy. Here they are.

The 4 grounds of appeal are rephrased as under:-

1. The trial magistrate erred in law having failed to consider essential elements constituting a tort of malicious prosecution.

2. The trial magistrate erred in awarding general damages of Tshs. 150,000,000/= basing on respondent's allegations of being unlawfully terminated from his employment.
3. The trial magistrate acted ultra vires by usurping jurisdiction and decided the case basing on an unfair termination.
4. The trial magistrate erred in law by entertaining the case against a non-existing defendant.

Mr. Galati and Kassim Gilla learned counsel appeared for the appellants and respondent respectively.

Mr. Galati, but in a nutshell submitted that had the trial magistrate considered the clear evidence that having, by police been found in possession of stones with gold contents, but just threw it away before, the policemen arrested and, unsuccessfully though prosecuted the respondent (at the time appellants' employee), the appellants should not have been found and held liable for the tort of malicious prosecution. Much as the 5 essentials (1) the plaintiff was prosecuted (2) the proceedings ended in his favor. (3) there was no reasonable or probable cause (4) the plaintiff suffered damage (5) prosecution was malicious.

That the ingredients should have been, but were cumulatively not proved (case of **Jeremiah Kamama V. Bugomola Mayandi** (1983 (TLR 123.

That only the policemen had initiated the criminal proceedings. That if anything, appellants reasonably and with probable cause had reported the respondent (as per section 7 (1) of the Criminal Procedure Act Cap 20 RE 2002). That no subsequent legal proceedings against appellants could

be instituted (section 7 (2) of the Act). That the respondent may have been acquitted but alone, that one proved no malicious prosecution. (case of **Bhoke Chacha V. Daniel Misenya** (1983) TLR 329.

That the order of shs. 150.0 M general damages for unlawful termination of contract of employment was, without jurisdiction made by the trial court.

Last but not least I suppose, Mr. Galati submitted that as there was no individual person in the name of the Director Accassia Gold Mine, the respondent actually sued no body. Instead, only the company should have been sued (case of **South Reight & Export Copy Limited V. Branch Manager CRDB Tanga** HC. at Tanga, Civil Case No. 50 of 2002. Whereby it was held that as the Brach Manager wasn't a legal person, the trial court's proceedings were a nullity.

Mr. Gilla learned counsel submitted that the tort of malicious prosecution was, on the balance of probabilities proved and therefore case properly determined. The criminal proceedings having been unreasonable and without probable course initiated by non-other than appellant, and, out of it though properly acquitted, the respondent suffered some damage. Much as also, during pendency of the criminal case, the appellants terminated contract of service of the respondent therefore one could not run life smoothly any further. That general damages were natural results of the defendant's wrongful act (case of **Abdallah Ally Seleman t/a Otawa Enterprises (1997) Gapco Tanzania Limited** (2016) TLS 187.

That now that it wasn't the case that the trial court acted on wrong principles, this appeal court could not interfere the damages awarded (case of **Mbaraka William V. Adamu Kisute & Another** (1983) TLR 358.

As for the issue of unfair termination of the contract of employment, Mr. Gilla submitted that it wasn't basis of award of the damages, but the point was raised only during apportionment of damages.

As for the appellant's legal personality, counsel submitted that the High court decision in the CRDB case (supra) wasn't binding. That being a corporate body, the name remained. Strictly no individual was sued. The issue of non-existent party could not arise. We pray that the appeal be dismissed with cost. Submitted Mr. Kassim Gilla.

The central issue is whether a tort of malicious prosecution was, on the balance of probabilities proved by the respondent. The answer is no! Reasons:- the respondent may have had been found in possession or not at all in possession of any gold content stolen stones property of employers, and the latter accordingly reported him (the appellant) yes! But the most important fact that remained is who arrested and prosecuted him. It is the police to whom case was reported. I should make it clearer here that a person who reports Criminal acts or commission enjoys immunity under section 7 (1) of the CPA. Unless reporting was, by way of evidence proved not probable and reasonable. Whereby the court showing that it was actuated with malice. I did not, from the record even detect respondents' efforts showing how malicious was the reporting. At times reported to police, some cases might be strong enough or hopeless and

unfounded. All this happening, it was incumbent upon them to sort out and accordingly pursue them in courts of law or straight away dismiss the charges as the case may be. Should the respondent be of the considered view that the police did it, but wrongly and or maliciously, appellants were "home and dry". The latter had nothing to do with it. It follows therefore either the respondent had sued a wrong party or case was bad for non-joinder of the parties. Ground ONE of appeal is allowed.

Even only for the sake of it the tort was sufficiently established, the shs. 150,000,000/= general damages awarded was, in terms of approach awarded and quantification bad. It is not clear if it was based on malicious prosecution or unlawful termination of contract of employment or both. At times on this one, findings of the trial magistrate speak louder and clearer:

..... The reasons for being terminated from the employment are also to be **under unfair termination as the procedures were not adhered by the defendant there is no good cause for the termination which also increased frustration to the plaintiff** **It is from the said reasons that this court finds that the plaintiff has established his claim of maliciousand is entitled the same for damages**

Leave alone the would be confusing cause of action, and like Mr. Galati argued, the trial court had no jurisdiction on determining whether or

not the respondent's contract of service was unfairly terminated. Only the labor court could. Both the order and award cannot survive any more. Grounds 2 and 3 of appeal succeed.

With regard to the issue whether appellants was a position or in law a person, I would hold that it was both. After all it wasn't their complaint that the name confused them. So much so that one could not know and appreciate nature of the claims against them. It is only substance of the claim not procedural requirements that counts. This, in my considered opinion were dictates of the principle of overriding objective. Ground 4 is dismissed.


Appeal is, in the upshot allowed with costs. Decision and orders of the trial court are, for avoidance of doubts quashed and set aside respectively. Ordered accordingly.

Right of appeal explained.



S.M. RUMANYIKA
JUDGE
08/01/2019

Delivered under my hand and seal of the court in chambers this 15/01/2019 in the presence of Mr. Mwaiondola and Kasim Gilla advocates for the appellant and respondent respectively.



O.H.KINGWELE
DR
15/01/019