

IN THE HIGH COURT OF TANZANIA

AT MWANZA

HC. CIVIL APPEAL NO. 41 OF 2017

(Originating from Resident Magistrate Court Mwanza Civil Case No. 23/2014)

MOSHI JUMA MZUNGU.....APPELLANT

VERSUS

SELEMANI MABUBA.....RESPONDENT

JUDGMENT

17/10/2018 & 28/01/2019

Gwae, J

The appellant, **Moshi Juma Mzungu** was a Principal witness (complainant) before Resident Magistrate's Court of Mwanza at Mwanza where the respondent, by then known by names of **Shida Manyama @ Seleman Mabuba** was charged with, prosecuted, and convicted of two offences namely; forgery c/s 333, 335 (a) and (d) and 337 of the Penal Code (1st count) and Obtaining Property by False Pretences vide Criminal Case No. 81 of 2011.

Dissatisfied with the trial court convictions and sentences, the respondent preferred an appeal to this court where his appeal was allowed by quashing conviction and setting aside the imposed sentences of six years imprisonment on each count. Following the decision of this court

(**Sumari, J**) dated 27th November 2012 vide Criminal Appeal No. 81 of 2012, the Director of Public Prosecution (DPP) unsuccessfully filed an appeal (Criminal Appeal No. 285 of 2012) to the Court of Appeal.

Due to outcomes of the decision of this court and Court of Appeal in the appeals aforementioned, the respondent opined to institute a civil suit based on the tort of malicious prosecution in the Resident Magistrate's Court which was registered as Civil Case No. 23 of 2014. At the final analysis, the RM's Court found the appellant liable of malicious prosecution and awarded the respondent a sum of Tshs. 7,500,000/=, interest on the decretal sum at the court rate from the date of judgment to the date of full payment.

Aggrieved by the trial court decision, the appellant filed his Memorandum of Appeal containing four grounds of appeal, notably;

1. That, the Resident Magistrate erred in law and fact by awarding the respondent special damages which were not specifically proved
2. the Resident Magistrate erred in law and fact by failing to analyze and evaluate the evidence adduced

3. That, the Resident Magistrate erred in law and fact in failing to make a finding that the appellant had a probable and reasonable cause to report the matter to police station
4. That, the learned Resident Magistrate erred in law and fact by giving judgment in favour of the respondent without assigning sufficient reasons for the decision.

When this appeal was called on for the scheduled hearing, the appellant and respondent were duly represented by **Mr. Duttu** and **Mr. Makwega** respective, both parties' representatives are learned advocates.

Mr. Duttu argued ground 1 and 2 together, equally ground 3 and ground 4. The learned advocate for the appellant questioned the award of special damages for the reason that the respondent did not produce any document to support his claim except mere assertion, in support of his submission, Mr. Duttu urged this to make a reference to a judicial decision in **Masolele v. African Inland Church** (1994) TLR 192 where it was held that once a claim for a special item is made that claim must be strictly proved.

Regarding ground no. 3 and 4, the appellant's counsel confidently submitted that the respondent was not entitled to any award as he did not establish that there was no reasonable and probable cause on the part of

the appellant for initiating criminal proceeding adding that the mere facts that the respondent was prosecuted and acquitted do not establish the claims of malicious prosecution unless absence of probable and reasonable cause and presence of malice are proved, in the stance of his submission on the requirement of proof of absence of reasonable and probable cause on the part defendant/ the appellant, Mr. Duttu cited a judicial precedent in **James Gwagilo v. AG** (2004) TLR 162, where it was held enter alia;

“In order to maintain a cause of action on tort of malicious prosecution it must be established that the defendant acted without reasonable and probable cause...actuated with malice”.

Finally, Mr. Duttu argues that the acquittal be it by an appellate court or by a trial court does not suffice to hold a person who initiated a criminal proceeding liable of a tort of malicious prosecution, bolstering his submission, he cited a decision in **Yona Ngasa v. Makowe Ngasa** (2006) TLR 213)

To Mr. Makwega, there was a proof of specific damages since throughout the trial, 1st appeal before the High Court and 2nd appeal before Court Appeal, the appellant was being duly represented by advocates who must have been paid by the respondent, he thus distinguished the facts in

the case of **Masolele v. African Inland Church** (supra) from the facts in the present case.

As to the 3rd and 4th ground on the complained failure to analyze evidence on record, the learned counsel for the respondent submitted that the trial court properly evaluated evidence before as depicted in the page 6 and 7 of the typed proceedings.

Mr. Makwega was also of the view that presence of probable and reasonable cause as well as presence of malice on the part of the appellant was reasonably implied as the respondent adhered to necessary and stipulated procedures of obtaining a certificate of title.

Rejoining to the submission of the respondent's advocate, Mr. Duttu had these to state, that specific claim ought to be strictly pleaded and strictly proved as opposed to the present matter where the respondent only produced copies of judgments of this court and that of the Court of Appeal (**PE1 &PE2**), that, there is no evidence establishing existence of malice on the part of the appellant

Having briefly summarized what transpired in criminal proceedings in the RMS' Court and two appellate courts as well as in civil proceedings before the trial court and this appeal, I now turn to the determination of the grounds of appeal.

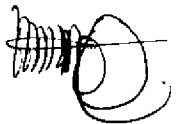
It is apposite, to my considered view, if this court starts considering 3rd and 4th ground as the same are complaints on fundamental principle or basis for tort of malicious prosecution before dwelling on whether the respondent was entitled to special damages or not.

It is trite law that in order for a defendant to be held liable of malicious prosecution, the following essential elements must be established by the plaintiff:

1. That there was a prosecution of the plaintiff by the defendant
2. The prosecution must have ended in favour of the plaintiff
3. There was no reasonable and probable cause on for the prosecution
4. The defendant must have acted maliciously, with improper motive not in the furtherance of justice
5. That the plaintiff has suffered damage resulting from prosecution

According to the evidence on record I am absolutely persuaded that element no.1, and no.2 above have clearly been established by decisions of this court and that of the Court of Appeal (PE1 and PE2) as intimated herein.

It was therefore the duty of the trial court to closely examine the evidence adduced by the parties as it is now for the court, being the 1st



appellate court, to determine if there was reasonable and probable cause on the part of the defendant now respondent and if the respondent acted maliciously.

In our case, the respondent was charged, tried and ultimately found guilty by the trial court however he was acquitted by the two appellate courts as explained herein above. I think there must be sufficient grounds for thinking, on the part of complainant/initiator of criminal accusation, that a suspect/ accused was probably guilty of a crime, thus there must be reasonable grounds for instituting criminal proceedings against the accused/ plaintiff.

In order for a malicious prosecution to succeed in a suit, one /plaintiff has to establish that there was an absence of reasonable and probable cause and that the institution of a criminal proceeding against the plaintiff was actuated with malice. In **Hicks v. Faulkner, 1878 QBD 167**, Approved and adopted by the House of Lords in **Hermimam v. Smith 1938 AC 305**, **Hawkins**, J defined reasonable and probable cause as:

"an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man placed in

the position of the accused, to the conclusion that the person charged was guilty”.

In our case, I have carefully examined the trial court judgment and the respondent’s evidence (PW1) and that of his witness, Athuman Faraji (PW2) none has suggested that the appellant acted without reasonable and probable cause in instituting a criminal proceeding against the respondent, for the sake of clarity, parts of the evidence adduced by the PW1 and PW2 are quoted;

PW1 “The source of complaints was that I forged a letter of offer on Plot No. 410 Block L.....investigation proceeded... the case was heard and the judgment was pronounced and I was sentenced to six years imprisonment

PW2 “The plaintiff remaining (sic) in the lock up for six days during the interrogations asked I who was the complainant? The police said that, he was Moshi Juma Mzungu. The source of complaints was the forgery by the plaintiff; it was Plot No. 410....”

For interest part of the appellant’s evidence is reproduced herein;

“I knew Seleman Mabuga, he is my neighbor, he took my plot, it is true that I took him to the police for forgery. I complained because he took my Plot, he was arrested and District Court found the plaintiff guilty, the plaintiff not (sic) granted an order of the court (sic) for pray (sic) because he forged the document”.

Keenly looking at the pieces of evidence adduced before the trial court, it is glaringly clear that the respondent did not allege and establish that the appellant acted without reasonable and probable cause and that his act of reporting the matter to police for forgery offence and obtaining money by false pretences was actuated by malice while on the appellant's side, his testimony clearly indicates that he honestly believed that the respondent committed the offence of forgery. In **Bhoke Chacha v. Daniel Musenya** (1983) TLR 329 where it was among other things stated that:

"The fact that the appellant was subsequently acquitted does not establish the original complainant was false and malicious

It was for the appellant to prove that the respondent's report was malicious and that it was made without any reasonable and probable cause"

See also a judicial decision in **James Gwagilo v. Attorney General** (2004) TLR 162 and **Amina Mpimbi vs. Ramadhani Kiwe** (1990) TLR.6

In our instant case the respondent in his action against the appellant should have proved in the court below that there was malice on the part of appellant in that he had prosecuted him in the RMS Court without just cause or excuse or that the respondent had no reasonable and probable when he put legal machinery into motion cause. This position was equally stressed in **Sunflag (T) and 3 others v. Jerome Wambura and 4**

others Civil Appeal No. 39 of 2005 (unreported) where the Court of Appeal stated inter alia that:

“Reasonable and probate cause means that there must be a cause that is sufficient for thinking that the plaintiff was probably guilty of the crime.....this does not mean the prosecutor has to believe in the probability of conviction.

The appellant, to my considered view, was sufficiently able to establish that he lodged complaints against the respondent with honest belief that the respondent could be found guilty of the offence of forgery.


The learned counsel for the respondent humbly asked this court to look at the decisions of this court and that of Court of Appeal; I have looked at the same and observed that both appellate courts apprehended doubts as to the guilt of the respondent due to insufficient evidence, questionable PE5 and absence of the letter dated 18th June 2014, that alone does not establish absence of reasonable and probable cause on the part of the respondent taking into account that the respondent was initially convicted by the trial court.

Before I conclude determining the 3rd and 4th ground of appeal, I find it necessary to call upon the public that, persons who have reasonable and probable cause for prosecution should not be unreasonably deterred from


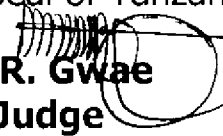
setting the criminal law in motion against those whom they honestly believe to have committed offence (s).

Regarding, the 1st and 2nd ground of appeal, having held as herein above, I think I would not be detained much determining these grounds of appeal since I have unhesitatingly found that the respondent had failed to establish that the appellant initiated the prosecution against him without reasonable and probable cause. Now, therefore it suffices to state that the special damages must be specifically pleaded and strictly proved as rightly submitted by the appellant's counsel, in our present case, the respondent lucidly pleaded specific damages but failed to strictly prove the same unless certain fact is notorious (see **Zuberi v. Mugabe** (1992) TLR 1317. Nevertheless looking at the judgment of the learned Resident Magistrate, it is not clear if the award of Tshs. 7,500,000/= was awarded for general damages or special damages. Hence it was not fair for the appellant to assert that the same amount awarded in favour of the respondent was for special damages

In the final results, therefore, the appellant's appeal is meritorious the trial court decision is quashed and its subsequent awards are set aside. The respondent is to bear the costs of appeal


M. R. Gwae
Judge
28/01/2019

Right of Appeal to the Court of Appeal of Tanzania fully explained



M. R. Gwae
Judge
28/01/2019