

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

APPELLATE JURISDICTION

(DC) CIVIL APPEAL NO.25 OF 2016

*(Originated Civil Case No.9 of 2012 in the District Court of **BARIADI** at **BARIADI**
Before **J. F. NKWABI, RM**)*

MASUNGA SAGUDAAPPELLANT

VERSUS

BARIADI DISTRICT COUNCILRESPONDENT

JUDGMENT

Date of last order: 14/11/2018

Date of Judgment: 09/01/2019

KIBELLA, J.

The appellant, MASUNGA SAGUDA under the services of Mr. Ng'wigulila, learned Advocate, instituted a suit against the BARIADI DISTRICT COUNCIL, hereinafter referred as the Respondent, for malicious prosecution and prayed for:-

- (i) TShs.60,000,000/= as compensation to general damages
- (ii) Any other reliefs the court may deem fit

It was vide Civil Case No.09/2012 before the District Court of Bariadi at Bariadi.

Before the case went on full trial, the defendant raised a preliminary point of Law which the same was heard by way of written submission as both parties agreed and a scheduling order was made and complied with by both parties, the suit was struck out with costs for want of cause of action.

It is upon that decision, the appellant has decided to appeal before this court advocated by Mr. Ng'wigulila, learned counsel.

In the memorandum of appeal the appellant advanced three grounds of appeal as follows:-

1. The District Court erred in Law and fact in holding that the plaintiff/appellant had no cause of action against the defendant/respondent as he was not acquitted but the case was just withdrawn.
2. That, the District Court misconceived the Tanzania Breweries Limited in Charles Msuku and Yahaya Mtete case (No.18/2000 CAT case).
3. That, the District Court failed to observe the doctrine of precedent case in respect of interpretation the case of Tanzania Breweries Limited. V. Charles Msuku and Yahaya Mtete visa vis the Ahmed Chilambo v. Murrays and Roberts Contractors (T) Limited Case No.44/2005.

When the respondent was served with the above memorandum of appeal by the appellant, filed a reply as follows:-

1. That, the contents of paragraph 1 of the memorandum of appeal are disputed. The District Court was right to rule that the appellant had

no cause of action against the defendant because the appellant was not acquitted in Criminal Case No.158/1998 as it was also decided in the case of Ahmed Chilambo v. Murrays Roberts Contractors (T) Limited, Civil Case No.44 of 2005.

2. That, the contents of paragraph 2 of the memorandum of appeal are disputed. District Court did not misconceive the case of Tanzania Breweries Limited Versus Charles Msuku and Yahaya Mtete Civil Appeal No.18/2000 (CAT) case as the case is distinguishable with case at hand. Bariadi District Court follows the relevant precedent in the case of Ahmed Chilambo V. Murrays and Roberts.
3. That, the contents of paragraph 3 of the memorandum of appeal are disputed. The District Court observed the doctrine of precedent and it follows the case of Ahmed Chilambo V. Murrays & Roberts Contractors (T) Limited case No.44/2005 which is relevant in the case at hand. The District Court did not follow the case of Tanzania Breweries Limited as it is distinguishable with the case at hand.

At the hearing of the appeal, the appellant was represented by Mr. Ng'wigulila, learned advocate whereby the respondent was under the services of Mr. Kibasi, learned advocate.

Mr. Ng'wigulila, learned advocate decided to argue the three grounds of appeal cumulatively that the District Court was guided by the case of AHMED CHILAMBO V. MURRAYS AND ROBERTS CONTRACTORS (T) LIMITED CIVIL CASE NO.44/2005 where his Lordship Manento, JK (as he

then was) ruled that, so long as the accused was not convicted therefore there was no cause of action.

But, before the trial court and in their written submissions, they countered the respondent's submissions and cited the case of TANZANIA MSUKU AND YAHAYA MTETE, CIVIL APPEAL NO.18/2000 (CAT). In this appeal there was a Criminal Case instituted by the appellants suspecting the respondent that they committed theft by Public Servant of the employer's property. This was an Economic Case. Through court proceedings the appellant through the DPP, entered Nolle Prosequi and the respondents were set free.

Having been set free the respondent filed a civil suit against their former employer and the High Court of Tanzania entered judgment in their favour that the appellant acted without probable cause, thus the respondent were granted damages.

Mr. Ng'wigulila went on that the above cited case is similar to the present case where Mr. Masunga was arrested and charged in the District Court for a charge of stealing by servant but eventually in the course of trial the PP withdrew the case under section 98 (a) of the Criminal Procedure Act (Cap.20 R.E. 2002) and the accused/appellant was set free for failure by the prosecution to tender evidence against him.

Hence, instituted a civil case against his employer for malicious prosecution because he was arrested without any probable cause.

However, the civil case was struck out by the District Court because the respondent raised a preliminary objection on point of Law that there was no cause of action because the accused was not convicted.

Mr. Ng'wigulila, learned counsel, upon that decision was of the contention that, being convicted after someone had been charged is not an ingredient in cases of malicious prosecution. But in malicious prosecution it is enough for the plaintiff to show that the defendant arrested the plaintiff without probable cause and a verdict by the court which resulted in favour of the plaintiff.

To support his contention cited the case of JEREMIA KAMANA V. BUGOMOLA KAYANDA (1983) TLR 123, where the defendant alleged that the plaintiff had committed arson. The plaintiff was arrested and charged with the offence of arson which was later withdrawn for lack of evidence where it was held that, the accusation was to the defendant's knowledge false. There was nothing upon which a credible and cautious man placed in the position of the defendant let alone a full conviction that the plaintiff was probably guilty.

Thus, he submitted that for failure to prove the arson offence the court found that the defendant did so without caution that the plaintiff will be in problems.

Finally, Mr. Ng'wigulila, charged that the District Court went wrong when failed to consider the decision by the Court of Appeal of Tanzania thus failed to adhere with the doctrine of precedent that the decision of the Court of Appeal of Tanzania binds not only the High Court but all Courts

subordinate to it and other tribunals inclusive as the same was so in the case of JUMUIYA YA WAFANYAKAZI TANZANIA V. KIWANDA CHA UCHAPISHAJI CHA TAIFA (1998) TLR 146 where it was held that:-

"All Courts and Tribunals below the Court of Appeal are bound by the decisions of the court regardless of their correctness."

From the above therefore, prayed for the appeal to be allowed, quash the decision of the District Court and allow the court proceedings to proceed from where it ended and they be paid costs and any other equitable remedies this court will find just.

In response to the above, Mr. Kibasi, learned advocate, submitted that, malicious prosecution to be proved, the following ingredients to be observed:-

- (i) That, the plaintiff was prosecuted
- (ii) That, the prosecution ended in his favour
- (iii) The defendant acted maliciously
- (iv) The, defendant acted without reasonable and probable cause.

And upon the criminal case against the appellant before the Bariadi District Court, argued that he was prosecuted, according to the Labour Laws together with his colleagues ought to be interdicted. However, he was declared redundant and paid his all terminal benefits.

Therefore, he instituted a civil suit for malicious prosecution.

Mr. Kibasi, learned advocate was of a contention that, did the case ended in his favour? That is did he win the case? Answering to the above questions, Mr. Kibasi stated that it is evident from the record that the appellant was discharged pending further investigation whereby even today, if the same evidence is obtained he will be again charged and prosecuted.

Therefore, he submitted that the trial court was right when struck out his civil suit as failed to show cause of action.

However, upon the cited case of CHARLES MSUKU V. YAHAYA MTETE (supra), Mr. Kibasi, stated that at 2nd page of the ruling by the trial court magistrate stated that the case was distinguishable in the sense that, in the Tanzania Breweries case, the defendant admitted had maliciously prosecuted the plaintiff while that is not the position in the present case.

Therefore, Mr. Kibasi, learned advocate submitted that, the decision of the trial court based on the decision in the case of AHMED CHILAMBO V. MURRAYS & ROBERTS CONTRACTORS (T) (supra) where at its page 4 of its ruling stated that, that was the proper authority as stated:-

"Lack of an acquittal of the plaintiff he cannot successfully urge that he was maliciously prosecuted. For tort of malicious prosecution to stand, there must be facts showing that the prosecution ended in favour of the plaintiff and short of those facts like in this case, it is difficult to say that there are facts constituting a tort of malicious prosecution. Likewise,

in order for the information to be said to be false, it must lead to an acquittal of the plaintiff."

From the above cited case, Mr. Kibasi, submitted that certainly there was no malicious prosecution and the appellant's appeal lacks legs to stand on. Thus prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Ng'wigulila, learned advocate reiterated all what had been submitted in their submissions in chief, therefore there is no need to repeat them here.

Having thoroughly gone through the records, the grounds of appeal and reply thereto and the submissions in support and rival to the appeal, the central issue for determination is whether the appellant's appeal has merits.

To start with answering the above issue, it is trite Law that in order for a suit for damages for malicious prosecution to succeed, the plaintiff has to prove the following ingredients as to some extent rightly mentioned by Mr. Kibasi, learned counsel i.e:-

- (i) That, the defendant prosecuted the plaintiff
- (ii) That the criminal prosecution has been terminated in the plaintiff's favour
- (iii) That the defendant acted maliciously without reasonable and probable.

- (iv) That the defendant acted maliciously without proper motive or that the prosecution of the defendant was actuated by malice.
- (v) That, the plaintiff has suffered some damages recognized by Law.

In determination of this appeal, I wish to deal with the 2nd and 3rd ingredients as whether, the criminal prosecution had been terminated in favour of the plaintiff and as that the defendant acted without reasonable and probable case.

To start with the 2nd ingredient is whether the criminal prosecution had been terminated in favour of the plaintiff.

I will start with the definition of the word "prosecution." Black's Law Dictionary 10th Edn and at page 1416, defined prosecution to mean:-

"(2) A criminal proceedings in which an accused person is tried."

And what is a trial:-

Under the same Black's Law Dictionary, (supra) at page 1735, defined trial to mean:-

"A formal judicial examination of evidence and determination of legal claims in an adversary proceedings."

From the above definitions of the words "prosecution and trial," it is my interpretation that for the prosecution to be said ended in favour of the

plaintiff, means that, there was a formal judicial examination of evidence and determination of legal claims in an adversary proceedings (criminal proceedings in this case). That is to say in other words the criminal case must be tried to its finality and not otherwise.

And where the case is/was withdrawn under section 98 (a) of the Criminal Procedure Act, (Cap.20 R.E. 2002), certainly this provision is used to remove from the court a charge that is defective with a view of instituting a proper charge but which must be invoked before the accused is given an opportunity to defend his case.

From the above therefore, as the case against the accused was withdrawn under 98 (a) of the Criminal Procedure Act (supra) as rightly admitted by both sides and the trial records reveal the same, thus, the prosecution of the accused/appellant was not heard and finally decided by the trial court as there had been no examination of evidence and determination of legal claims reached.

Albeit the accused was discharged, however, as rightly submitted by Mr. Kibasi, learned advocate, the appellant may be charged any time for the same charge which had been withdrawn under section 98 (a) of the Criminal Procedure Act, which is not a bar to further prosecution upon the same charge.

It could be different if the appellant's charge was withdrawn under section 98 (b) of the Criminal Procedure Act, (supra) as that could be the end and no further prosecution upon the same charge is allowed. And thus the accused shall have been acquitted.

For the case of JEREMIA KAMANA V. BUGOMOLA KAYANDA (supra) it was clearly stated that the case was withdrawn for lack of evidence.

Therefore, under the circumstances, I differ with Mr. Ng'wigulila, learned counsel that for a case to be withdrawn under section 98 (a) of the Criminal Procedure Act, (supra) and the accused discharged, then the criminal prosecution did not end in favour of the plaintiff. This is because the prosecution is still open and never ended as no judicial examination of evidence and determination of legal claims was done as well as no acquittal or conviction was reached.

Thus, to some extent, I am at one with Mr. Kibasi, as well as the cited case of AHMED CHILAMBO (supra), where it was held that "for lack of an acquittal of the plaintiff, he cannot successfully urge that he was maliciously prosecuted. And upon the 3rd ingredient that is whether the defendant acted without reasonable and probable cause, since the case was not tried to its finality, no evidence could have proved that the defendant acted without reasonable and probable cause or its action was actuated by malice.

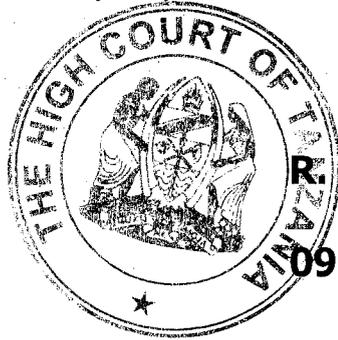
For the foregone reasons and what I have endeavoured to discuss, I answer the central issue in this appeal in negative that the appellant's appeal has no merits.

In the upshot, I find that the decision reached by the trial District Court was correct hereby upheld, and the appellant's appeal is hereby dismissed with costs. Order accordingly

R. M. Kibella
R. M. Kibella
Judge
09/01/2019

Order: Judgment delivered in chambers this 09th day of January, 2019 in the presence of the appellant in person and in the absence of his advocate Mr. Ng'wigulila as well as in the absence of the Respondent.

Right of Appeal fully explained.



R. M. Kibella
R. M. Kibella
JUDGE
09/01/2019