

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**CIVIL APPEAL No. 192 OF 2018**

*(Originating from Civil Case No. 14 of 2016 of Kinondoni District Court  
before Hon. I. KUPPA, R. M)*

**HAPPINESS FRANK..... 1<sup>st</sup> APPELLANT**  
**HAPPINESS TESHA.....2<sup>nd</sup> APPELLANT**

**VERSUS**

**AHMAD SAID.....1<sup>st</sup> RESPONDENT**  
**SECURITY GROUP.....2<sup>nd</sup> RESPONDENT**  
**MOHANS OYSTERBAY DRINKS LTD.....3<sup>rd</sup> RESPONDENT**  
**RAJESH DAVIDA.....4<sup>th</sup> RESPONDENT**

**JUDGMENT**

28/05/- 23/10/2019

**J. A. DE-MELLO, J.**

The Appellants, **Happiness Frank** and **Happiness Tesha** being aggrieved with the decision of **Kinondoni District Court on Civil Case No. 14 of 2016** delivered on **4<sup>th</sup> day of July 2018**, appealed to this Court on the following grounds;

- 1. That, the Trial Court erred in law by reaching into its decision without analyzing and considering the evidence adduced by the Appellants during the hearing.**

**2. That, the Trial Court erred in facts by stating that the Respondents did not instigate criminal case against the Appellants while the Criminal Case No. 410 of 2015 before Kinondoni Primary Court the complaint was the 4<sup>th</sup> Respondent and other Respondents were used to assist the 4<sup>th</sup> Respondent in instigating the said Criminal case.**

**3. That, the Trial Court erred in facts by failure to consider that the act of the 4<sup>th</sup> Respondent for not enter appearance in respect of the Criminal Case No. 410 of 2015 before Kinondoni Primary Court constitutes Malicious Prosecution.**

The Appellants appeared in person, un-represented, whereas; **Counsel Judith Kyambo** represented the **2<sup>nd</sup> Respondent** and **Counsel Gilbert Mushi** represented the **3<sup>rd</sup> and 4<sup>th</sup> Respondents**. With the leave of this Court, the Appeal was disposed of by way of written submissions in absence of the **1<sup>st</sup> Respondent**.

In support of the **1<sup>st</sup> ground of Appeal, the Appellants** submitted that, had the trial Magistrate summarized evidence adduced by the Appellants as opposed to that from the Respondents, notwithstanding the duty lies with the ones moving the Court. Further that the 4<sup>th</sup> Respondent indirectly engineered instigations leveled against the Appellants as he was basically the complainant of the properties alleged to have been stolen and he was the one who directed the **1<sup>st</sup> Respondent** to arrest the Appellants and

arraigned at the **Oysterbay Police Station**. The Appellants further stated that, considering the fact that, the **2<sup>nd</sup> Respondent** was not responsible for security inside of the building, for the **1<sup>st</sup> Respondent** to know what was transpiring inside the building without being told or directed by the **4<sup>th</sup> Respondent**. On the **2<sup>nd</sup> ground of Appeal**, it was argued that, all the Respondents participated in instigating the said Criminal case, hence it was wrong for the Trial Magistrate to hold that the Respondents did not instigate Criminal case against the Appellants. With regards to the **3<sup>rd</sup> ground of Appeal**, the Appellants averred that, the act of the Respondents for not entering appearance in respect of the said Criminal case, constitutes **Malicious Prosecution**. They were of the view that, the said criminal case was actuated by malice as the Respondents opted not to enter appearance before **Kinondoni Primary Court** hence the said criminal case was without reasonable and probable cause as the alleged theft was not committed. The Appellants further submitted that, the said Criminal case was terminated in their favour hence entitled to be granted reliefs. Lastly, it is their prayer for the Appeal be allowed, with costs.

In rebuttable, **Counsel Gilbert Mushi** submitted that, the Trial Court reached his decision after careful consideration of the evidence and

testimonies adduced during hearing of the case by both parties with the relevant law. On the **2<sup>nd</sup> ground of Appeal, Counsel Gilbert Mushi** for the **3<sup>rd</sup>** and **4<sup>th</sup>** averred that, the Respondents never instigated any Criminal proceeding against the Appellants. They stated that it was the **1<sup>st</sup> Respondent** and **Police** themselves who initiated the proceeding against the Appellants. That, according to **DW3** testimony, the **3<sup>rd</sup>** and, **4<sup>th</sup> Respondents** neither reported the theft incident to the Police nor conducted any criminal investigation to determine who the perpetrators of the said theft are. They averred that, the Appellants produced mere allegations a speculations, with no legal basis. With reference to the last ground of Appeal, it was stated that the **3<sup>rd</sup>** and **4<sup>th</sup>** Respondents were neither party in **Criminal case No. 280** of **2015** before **Kinondoni Primary Court** nor received any summons to appeal before it. Counsels was of the firm view that, the fact that the names of the **3<sup>rd</sup>** and **4<sup>th</sup> Respondents** did not appeared in the **Criminal Proceeding No. 410** of **2015** against the Appellants, is enough to guarantee or prove that the Criminal proceeding was not initiated by the **3<sup>rd</sup>** and **4<sup>th</sup> Respondent**.

**Counsel Mushi** for the **3<sup>rd</sup>** and **4<sup>th</sup>** Respondents, further submitted that, the Appellants during the entire hearing at the Trial Court failed to prove

that they deserve to be paid **TShs. 50 million** as Specific Damages and 20 million as General Damages. He therefore prayed for the Appeal to be dismissed with costs.

Submissions by **Counsel Mushi** was also joined hands, with **Counsel Floraa** Jacob for the **2<sup>nd</sup> Respondent**. Nothing much was in Appellants' rejoinder other than reiterating their earlier submissions in chief.

Having carefully gone through the grounds of Appeal, as well as the rival arguments from both parties, the main issue for consideration by this Court is whether the Trial Magistrate properly evaluated the evidence on record before reaching into its decision.

Upon perusal of the grounds of Appeal it seems that, the Appellants are challenging the whole decision of the **Trial District Court** on the ground that the **Trial District Court** failed to observe that there was a malicious prosecution against the Appellants, rendering the Appeal, criminal.

In their submissions, the Appellants alleged that, all the Respondents cannot avoid the fact that they participated in instigating the said criminal case against the Appellants. The Appellants argued that the **2<sup>nd</sup> Respondent** being a company hired by the ~~the~~ **3<sup>rd</sup> Respondent** for security purposes over

the third Respondent's premises and, being the employer of the **1<sup>st</sup> Respondent** in which her car and her employee, the 1<sup>st</sup> Respondent were used to escort the Appellants to the Police Station for the institution of the said criminal case. They further submitted that, the **3<sup>rd</sup> Respondent** being a Company it cannot act on its own sue, hence the **4<sup>th</sup> Respondent** step in as a **Manager** of the **3<sup>rd</sup> Respondent** who directed the **1<sup>st</sup> Respondent** to escort them to the Police Station for purpose of instituting the said Criminal case.

It was from the above scenario that, the Appellants contended the Respondents to be the ones who instigated the criminal case at the **Kinondoni Primary Court in Jinai No. 410 of 2015.**

It is a principle of the law that **one who alleges must prove.** It is vivid clear that the Appellants merely alleged those above facts to exist, without proving the same. Courts can not make its decision basing on the mere allegations, unless proof is established within the law guiding suits, that is Balance of Probabilities in this case. More so, the allegations by the Appellants that, the Respondents maliciously prosecuted them in **Kinondoni Primary Court** is baseless basing on the fact that, the complainant in the said Criminal case was the **1<sup>st</sup> Respondent** and not the **2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup>**

**Respondents.** The Court record shows that, the said Criminal case was Withdrawn for **Non Appearance** of the 1<sup>st</sup> Respondent. Though the said criminal case was withdrawn under **section 23 (1) of PCCPC 3<sup>rd</sup> Schedule of Cap. 11 R.E. 2002**, this Court observes that, the same ought to have been dismissed for **Want of Prosecution under section 26 of PCCPC 3<sup>rd</sup> Schedule of MCA CAP. 11 R.E.2002** instead of withdrawn. Since the matter was withdrawn, the Appellants can not claim that, the case was determined in their favour as the same was not fully heard into merits to prove whether they were guilty of the offence or not.

It is even trite law that, in order for a person to prove **Malicious Prosecution**, there must be the following ingredients, namely;-


- (i) **That he was prosecuted**
- (ii) **That the proceedings complained of ended in his favour**
- (iii) **That the Defendant instituted or carried out the prosecution maliciously**
- (iv) **That they was no reasonable and probable cause for such prosecution, and**

**That the Appellant suffered damage as a result of such prosecution.**

**Since** there was none of the above ingredients proved by the Appellants before the **Trial District Court**, it was proper to decide in favour of the Respondents. See the case of **Jeremiah Kamana vs. Mayandi [1983] TLR 123.**

Having said so, I find no reasons to disturb the findings of the lower Court. The decision of **Kinondoni District Court in Civil Case No. 14 of 2016** is upheld. The Appeal is accordingly dismissed with costs.

It is so ordered.

  
**J. A. DE-MELLO**  
**JUDGE**  
**23/10/2019.**