

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL CASE No. 147 of 2016

CHEGELE MWITA CHACHA.....PLAINTIFF

Versus

E.1994 C/CPL JUMA.....1st DEFENDANT

**PERMANENT SECRETARY, MINISTRY OF HOME
AFFAIRS.....2nd DEFFENDANT**

THE ATTORNEY GENERAL.....3rd DEFENDANT

JUDGMENT

13th December, 28th February, 5th May, 2020

J. A. DE-MELLO J;

It is a claim of **thirty millions (TShs. 30,000,000/=)**, being **compensation** for **physical and, economic loss** incurred by the Plaintiff after being **shot** by the **1st Defendant**, allegedly in course of his official duty, as well as for **malicious prosecution**. The Plaintiff also claims for **general damages, interest** and, **costs** of the suit. The genesis of this matter is discerned from the **Plaint** as well as testimonies adduced during hearing, of the happenings of the **18th April, 2014**, when the Plaintiff and, his colleague where riding in a motorcycle along **Mandela road** at **Tabata** when suddenly the **1st Defendant** fired his gun towards his right leg, on a/suspicion of them being criminals. On his arrest, he was driven in a **Nissan Patrol Police** van to **Buguruni Police**

station and, later charged with the offence that of abstracting Police Officer in due course of executing his duty, contrary to **section 243 (b)** of the **Penal Code, Cap.16 R.E 2002**. As days passed on and with no prosecution, the case was dismissed for **want of prosecution** leading to this suit.

I however inherited this matter which had stalled since 18th July 2018... while passing several Judges to include; Arufani J;, Luvanda J; in which mediation was record 5th July, 2018 before Teemba J;

It is until the 8th of October 2018 ... that Final Pre-Trial conference parties adopted three issues for determination by this this Court.

1. Was the Plaintiff maliciously prosecuted by the Defendants?

2. If the 1st issue is answered in the affirmative, whether the 2nd and 3rd Defendant are vicariously liable for the acts of the 1st defendant?

3. To what relief are parties entitled to?

Following persistence absence of the **2nd** and **3rd Defendants** the Plaintiff prayed, the matter be heard in their absence and, it being a backlog case and in the interest of justice, having satisfied itself that summons were duly served and in line with the law, the Court granted the prayers and proceeded with hearing on **26th September, 2019**. No exhibit was tendered all along during hearing by both.

It was **PW1's**, testimony that, he was shot by the **1st Defendant** on **18th April, 2014** while heading to **Buguruni** at the back of a motorcycle, reasons alleged of over speeding. He was taken to **Buguruni Police Station** where he was issued with **Police Form No. 3**, and, hospitalized.

Surprisingly, while at the Hospital he was interrogated by the Police and, arrested. Upon his discharge, he found himself at the Police remand and charged with attempted robbery. This case never took effect for failure of the Police to prosecute and District Court dismissed it for **want of prosecution**. On cross examination by the **1st Defendant**, he testified the shooting was from the backside and, the bullet littered the flesh of his right leg, leading to his disability now. As all this had happened he claimed not to know the **1st Defendant** before disregarding the allegation that the shooting was as a result of obstructing arrest. It is his prayers that and, following his disability be considered for damages but more even for malicious prosecution. **PW2, Salvatory Nicodemas Miley**, testified that on that same particular day, while going to his working place at **Tabata Dampo**, he found the Plaintiff surrounded by other people and, his left leg was profusely bleeding. At the scene there was three (3) Policemen but, these never knew them before. The allegations surrounding the gathering uttering that the robber has been shot (**kuna jambazi kapigwa risasi**). Then the plaintiff was sent by police officers to **Tabata Police station**. He however confirmed to be knowing the Plaintiff as he is the friend of his friend. **PW3**, one **Ramadhani Mwya**, who closed the door of the Plaintiff's evidence in this matter, testified that, he knows the Plaintiff as friend, **since 2012**, but he don't know his business. He even said to know the 1st Defendant, as one of the team that is stationed at **Police Patrol at Tabata** and, on that material date he was in Police uniform. Further that, on that material date, he heard a gunshot from a distance and, shortly he saw people gathering fast and on arrival he saw both the **1st Defendant** lying down in pain as well as the Plaintiff, the one who allegedly shot him. Strangely he could hear people

alleging the Plaintiff was a thief. What followed was stowing of the Plaintiff to Tabata Police station together with the motorcycle on the Nissan Patrol van. That was a full mouth from the Plaintiff, as he closed his case.

Next for the defense was **DWI, Juma Sigori**, who without haste admitted to have shot the Plaintiff who obstructed him from arrest following suspicion of robbery close to the Bank. In so doing, the only way was to shoot his leg to stop him escaping and, ultimately drag him to Police station at Buguruni. Preliminary statements were recorded, accused sent to hospital and, later charged and, brought before the Court. When cross examination he admitted to have left it over for investigators to accomplish and prosecute the case. **DW2, D/Cpl Khalid**, testified that, the **1st Defendant** is his co-worker at **Tabata Police station**. That, on the material date they were in Patrol as they noticed a motorcycle packed in a suspicious manner near the **Access Bank**. As they approached both the Plaintiff with another person drove off in fast away. The then too refuge in a hiding place and, only to witness them returning and, a scuffled commenced in which the **1st Defendant** was overpowered and, opted for his gun which he managed to shot the Plaintiff on his leg, as the other culprit suspect escaped. He corroborated **DW1's** evidence that their work is limited and, confined to patrol and arrest only but investigation is upon the investigators based at Police stations.

Now the ball is on this Court and to start with the 1st issue, as to whether the Plaintiff was maliciously prosecuted by the Defendant, I am guide by the celebrated case of **Jeremia Kamama vs. Bugomola Mayandi (1983) TLR 123** which laid down four principles for a suit for damages for malicious prosecution to succeed as follows;

(a) That he was prosecuted

(b) That the proceedings complained of ended in his favour

(c) That the Defendant instituted or carried out the prosecution maliciously

(d) That there was no reasonable and probable cause for such prosecution.

The same principles were reproduced by this Court in the case of **Wilson Bernad vs. Salumu Hamisi Nasoro, Civil Appeal No. 169 of 2017 (Unreported)** which also quoted with approval the case of **Paul Valentine Mtui & Another vs. Bonite Bottlers Limited, Civil Appeal No. 109 of 2014 (Unreported)** which also quoted the case of **Yona Ngasa vs. Makoye Ngasa [2006] TRL 213** which provided that;

"A party suing for Malicious Prosecution must prove the following ingredients;

1. That, the proceedings were instituted or continued by the defendant;

2. That, the defendant acted without reasonable and probable cause; 3. That the defendant acted maliciously;

4. That, the proceedings terminated in the plaintiff's favour.

It is evident from both parties that, the Plaintiff was shot on allegations of suspicious attempt robbery. Neither of the managed to tender in Court the charges that were levied against the Plaintiff but all even admitted statements were recorded and matter lodged in Court. Sad no further and

better particulars for the case was even shared in Court. For the purpose of a suit for **damages for malicious prosecution**, a person becomes a **prosecutor** in this regard when he takes steps with a view to **setting in motion legal processes** for the eventual prosecution of a person whom **he alleges has committed** a crime. Until when arrested and, sent to Police Station, the **1st Defendant** had set in motion the legal process which however he had no mandate to proceed thereafter. Therefore, the **1st precondition** for malicious prosecution is met. With regard to the 2nd condition that, **that the proceedings complained of ended in his favour**, true that is as the matter ended up being dismissed, hence the discharged under section **225(5)** of the **Criminal Procedure Act. Cap 20 R.E 2002**. However, the discharge at that stage, meant the matter was not heard on merits but, rather acquitting the Plaintiff paving the way for re-institution if ready, under section **255 (6)** of **Cap. 20 R.E** whose outcome is unknown. This was observed in the case of **Ahmed Chilambo vs. Murray & Roberts Contractors (T) Ltd., HC. Civil Case No. 44 of 2005 (unreported)** in which the Court observed;

"Therefore lack of an acquittal of the Plaintiff, he cannot successfully urge that he was maliciously prosecuted. For a 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 the information to be said to be false, it must lead to an acquittal of the Plaintiff".

Spinning from the **Ahmedi Chilambo (supra)** above, it is evident that, the case was not heard at all for the Plaintiff to state firmly so that it was in his favour. Undoubtedly, this condition fails, as it is not met. **On** the 3rd condition and, to prove that, the Defendant instituted or carried out the prosecution maliciously; it draws us to define what amounts to "malice". In the English case of **Brown vs. Hawkes [1891] 2 Q.B. 718**, at page **723, Cave, J**; defined **malice as some other motive than a desire to bring to justice a person whom he (the accuser) honestly believes to be guilty.**

In **Halsbury's Laws of England Vol. 25 .3rd Edition page 356**, the term malice is defined as follows:

"The malice which a Plaintiff in an action for damages for malicious prosecution...has to prove is not malice in its legal sense, that is, such as may be assumed from a wrongful act done intentionally, without just cause or excuse, but malice in fact - malus animus - indicating that the defendant was actuated, either by spite or ill-will against the Plaintiff, or by indirect or improper motives".

The latter sounds more relevant to the situation at hand considering the accuser, in addition to spite or ill-will or indirect or improper motives, was not actuated by a genuine desire to bring to justice the person he alleges to be guilty of a crime. Much as the two didn't know each other before the material date, but encountered each during this episode, it is difficult to establish ill motive. It is even all suspicion which the Defendants and, following attempt to oppose arrest while the other escaped that, the **1st Defendant** used force by shooting and, on the Plaintiff's leg. In exercise

of duty and following obstruction, even people around lamented the plaintiff to be a robberer. Even **PW2**, testified while corroborating to these utterings. If not for a forceful obstruction and the escape of the other, may be it could have not ended so. This then brings us to the third condition not met. The 4th condition demands for **reasonable and probable cause for such prosecution**. What, then, amounts to "reasonable and probable cause"? In the English case of **Hick vs. Faulkner, (1878) 8 Q.B. 167, Hawkins, J.**, said at page 171;

"I should define reasonable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of I circumstances, which, assuming them to be true, would reasonably lead any reasonable and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed". This passage was quoted with approval by the House of Lords in **Herniman vs. Smith, [1938] 1 All E .R. 1**, at **page 8** and, the case of **Ally Mhando vs. Attorney General & Another, HC Civil Case No. 51 of 2003**, and that of **Commonwealth Life Assurance Society Ltd. vs. Brain (1935) 53 CLR343 at 382'**

I myself cannot improve upon that definition of **"reasonable and probable cause"**, and so I would respectfully adopt it as it is.

The question as to whether or not an accuser acted maliciously and without reasonable and probable cause, are of facts and, which is to be decided on the basis of the circumstances revealed by the evidence in each particular case. This is an important element of the action because

it is not every prosecution which ends in an accused's favour that, exposes an accuser to a suit for damages for malicious prosecution. If that, were so, scores of complainants or police informers would be sued as what the case of **Tumaniel vs. Aisa Issai [1969] H.C.D. n. 280, Georges, C. J.** (as he then was) stated that, I quote;

"When there is reasonable suspicion that an offence has been committed and good grounds for thinking that a particular person is responsible it is the duty of every citizen to pass on such information... to the police to help them to find the offender. If the police act on such information and arrest anyone then the person who has given the information should not be liable for damages for defamation unless it is plain that he had no good grounds for suspecting the person named and that he was acting spitefully...Similarly there will be cases where the Police take a person into custody for investigation which seems quite reasonable and no steps are taken. Again in such a case the accuser should not be charged unless it can be shown that he deliberately made a false report.... (Where) a report to the Police (is) intended to lead to the investigation of a crime...there should be no compensation payable in such case unless the report is shown to be false and prompted by malice. (emphasis is mine)

In that case the learned Chief Justice was referring to suits for defamation, but in my view, **the principle applies with equal force to suits for damages for malicious prosecution.** In the present matter the 1st Defendant believed that the probability of the Plaintiff's guilt is such that, upon general grounds of justice, a charge against the plaintiff was

warranted. The Plaintiff has however and, based on the three other principles, failed to prove that, the Defendants did have such a belief. Even driving in over speed as asserted by the Plaintiff by itself constitute a reasonable ground to warrant a charge against the Plaintiff. And the offence which the plaintiff was charged was committed on the face of the 1st Defendant believing it to be true as opposed to false information.

In the circumstance, the three preconditions/ ingredients of the Tort of **malicious prosecution were not proved** by the Plaintiff, which trickles down to the rest being baseless.

I sincerely feel for the Plaintiff, as I witness his disability but, which is not supported as required in Civil suits, that of **Proof on Balance of Probability**. I therefore, hesitantly dismiss it in its entirety, without cost, considering it being a long pending matter but, more even, the state of the Plaintiff's health and status which I find worrying before my plain eyes.

It is so ordered.



J. A DE-MELLO

JUDGE

5/05/2020