IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO.52 OF 2019

(Arising from the Judgment of the District Court of Nyamagana at Mwanza in Civil Case No.16 of 2018)

STEVEN BULIMILE ..... APPELLANT

VERSUS

1. JUMA ISSA

2. RAMADHANI ISSA } **..... RESPONDENTS**

JUDGMENT

Last order: 18.06.2020

Judgment date: 25.06.2020

A.Z.MGEYEKWA, J

At the centre of the dispute in this matter is the claims of the respondents against the appellant whereas, the District Court of Nyamagana decided in favour of the respondents. Aggrieved, the appellant filed the instant appeal before this court.

To appreciate the contested issues in this dispute, I find it indispensable to preface this judgment with shortened facts of the case as follows:- The respondents instituted a suit before the District Court of Nyamagana. Accordingly, the respondents sought, among others, the following reliefs from the District Court: firstly, the trial court to order the defendant to pay the plaintiff a total sum of Tshs. 50,000,000/= being compensation for malicious prosecution, loss of reputation, psychological trauma. Secondly, a loss incurred when attending the court session, interest at the court rate from the date of judgment to the date of payment in full. Thirdly; the cost of the suit and any other reliefs as the court deems fit.

The District Court framed three issues for trial: one, whether the plaintiffs were maliciously prosecuted first. Two, whether the plaintiffs suffered damage as claimed and finally if the 1st and 2nd issues are answered in affirmative, to what reliefs are the parties entitled to. The District Court determined the case and in its findings, it found that the malicious prosecution was proved thus the appellant was ordered to pay the respondents a total sum of Tshs. 20,000,000/= and the costs of the case. Aggrieved by the decision of the trial court the appellant filed an appeal before this court with the following grounds:-

1. *That the trial court erred in iaw and fact for holding that the ingredients in proving malicious prosecution were all proved with the respondents.*
2. *That the trial court erred in law and fact for holding that the appellant did not have probable cause to institute a criminal proceeding against the respondents.*
3. *That the trial court erred in law and fact for holding that the appellant denied Exhibit P1 hence shows evil motive towards the institution.*
4. *That the trial court erred in law and fact to order the appellant to pay the respondent a total of Tshs. 20,000,000/= without any proof of the same as the damage suffered.*
5. *That the trial court erred in law and fact for failure to analyse evidence adduced by parties during trial.*

The hearing was done by way of written submission whereas, the applicant filed the written submission as early as 5th June, 2020 and the respondent filed a reply as early as 12th June, 2020. Both parties complied with the court order.

Submitting on the first ground of appeal, the appellant's Advocate faulted the trial court findings that the ingredients in proving malicious prosecution were all proved by the respondent. He argued that a person to prove and succeed in malicious prosecution must prove cumulatively

five elements. To fortify his submission he cited the case of **Wilbard Lemunge v Father Komu and another** Civil Appeal No. 8 of 2016.

As to the second ground of appeal, the learned counsel for the appellant faulted the trial court for holding that the appellant did not have a probable cause to institute a criminal proceeding against the respondents. He referred this court to page 4 of the typed proceeding that the trial court holds that all four elements in law of malicious prosecution have been established including the element of probable and reasonable cause. He went on to argue that the trial court did not hold that the respondents proved that they were prosecuted without probable and reasonable cause. He lamented that the trial court based its reasoning on Exhibit P1 while the same was had no weigh to be considered as evidence since there was no medical practitioner remarks.

It was Mr. Akram's further argument that the reasons for the trial court do not suffice to prove that there was no probable or reasonable cause by the appellant when instituting the criminal case. He referred this court to the cited case of **Wilbard Lemunge** (supra) whereas the Court held that for a person to prove that there was an absence of probable or reasonable cause must prove the four factors; one an honest belief of the accuser in the guilt of the accused. Two such belief must be based on an

honest conviction of the existence of circumstances which led the accuser to that conclusion; Three; the belief as to the existence of the circumstance by the accuser, must be based upon reasonable grounds that such grounds would lead to a fairly cautious person in the accuser's situation to believe so. Four; the circumstance do believe and relied on by the accuser must be such as to amount and believed and relied on by the accuser, must be such as to amount to a reasonable ground for belief in the quilt of the accused person.

Mr. Akram further argued that the appellant instituted the criminal proceeding while meeting the said element as reflected in the proceedings of the trial court that the appellant incident led unknown person to report the matter to the police and the respondents were arrested and charged as per the duty of the police, they investigated the matter and arraigned the respondents before the court.

As for the third ground of appeal, Mr. Akram submitted that the trial court erred in law and fact for holding that the appellant denied Exhibit P1 hence shows evil motive towards the institution of criminal proceedings against the respondents. Mr. Akram referred this court to page 3 of the typed judgment. He argued that the appellant never denied the PF3 as it is availed in the judgment as PF3 was objected as evidence by t and it

was not part of the attached document to the plaint of the respondents. He went on to argue that the respondent did not even provide any list of documents to rely upon. He added that thus the objection on point of law by the appellant's counsel was not disputed by the respondents as evil intention.

Concerning the fourth and fifth grounds of appeal, the learned counsel for the appellant argued that there was no concrete proof of the award of damages to the respondents. He went on to argue that the court never showed on which base the said damages of Tshs. 20,000,000/= arose from which damage suffered by the respondents. He added that the respondents during trial pleaded that their attendance to court rendered to suffer damages and never tendered any evidence as to what financial or socio-economic loss suffered by the respondents due to the attending over a criminal proceeding at Primary Court. To support his submission he cited the case of **Rosleen Kombe v AG** [2003] TLR 347 whereas the court held that it was clearly stated that the plaintiff has to prove his case for the relief though. He added that the respondents did not prove their case and they did not tender any document on their income suffered due to the prosecution in a criminal case at the primary court to suggest that they were entitled to the award of damages of Tshs. 20.000,000/=.

Mr. Akram continued to argue that the trial court never considered the evidence of the appellant as the whole judgment does not reflect any analysis of evidence adduced by the appellant as a and its rejection to consider tendered the trial court to reach the final verdict in favour of the respondents.

In conclusion, Mr. Akram urged this court to find that the appellant appeal has merit and allow the same with costs.

In reply, the learned counsel for the respondents argued that the appellant's Advocate submission base is predicated on the argument that the five elements required for the proof of malicious prosecution were not proved cumulatively as per the requirement of the law. Mr. Kashepa referred this court to the trial court records which reveals that the appellant did not dispute that there was no malicious prosecution and that he did not prove sufficient evidence to disprove the same. He went on to argue that the appellant adduces sufficient evidence to disprove the claim that he instituted the claim at Primary Court maliciously or without probable cause.

It was the learned counsel for the respondents' further submission that the appellant did not tender any sufficient evidence to disprove the

fact that the respondents attended the court's sessions when the matter was heard at the Primary Court.

Submitting on the first ground of appeal, the respondents' Advocate argued that the trial court was right to reach its decision in favour of the respondents. He went on to argue that the trial court decided on what it observed after diligently analysed and weighed the evidences tendered before it by both parties. He referred this court to paragraph 3 and 4 of the trial judgment and argued that it was clearly established through the records of the court that the respondents properly executed their duties of proving the case according to the provision of section 110 (1) (2) of the Evidence Act, Cap.6 [R.E 2019]. He went on to argue that the respondents proved their case to the standard required in civil cases

Arguing for the second ground of appeal, the learned counsel for the respondents argued that the trial court decision was right as what was tendered by the respondents, (Exh.PE1) and (Exh.PE2) proved that the criminal proceedings initiated by the appellant had no merit or probable cause in law and that there is no evidence in the record which was tendered by the appellant to disprove the same.

On the third ground of appeal, the learned counsel for the respondents argued that the trial court was is in a good position of understanding the conduct and demeanour of the parties to the case. Thus the decision on whether to believe a witness or any party to the case is based on his demeanour and the same was correctly observed. To buttress his position he cited the case of **Ibrahim Ahamed v Halima Guleti** [1968] HCD No.76. He urged this court to disregard this ground of appeal.

Arguing for the fourth ground of appeal, Mr. Kashepa argued that the trial court relied heavily on the evidence that was tendered before the court and it answered the issue raised by the parties correctly and with reasons. He went on to argue that the 1st and 2nd issues were answered affirmatively. He added that in the 3rd issue the trial court found that the respondents proved their case to the standard required in civil cases on the evidence adduced at the trial court thus the trial court proceeded to order the appellant to compensate the respondents Tshs. 20,000,000/= and the costs of the case.

With respect to the 5th ground of appeal, Mr. Kashepa argued that the trial court correctly and diligently analysed the evidence on record. He argued that the appellant adduced insufficient evidence and the

respondents on their side adduced in relation to the prima facie evidence thus their evidence justified a finding in their favour. .He argued that the five grounds of appeal as a baseless since the appellant during trial adduced insufficient evidence that did not justify a finding in his favour.

In conclusion, he prays this court to dismiss the appeal and uphold the decision of the lower court and declare that the respondents are entitled to be awarded Tshs.20,000,000/= and the costs of the case.

I have painstakingly gone through the rival submissions from both learned counsels as well as the record of the trial court in connection with the appeal at hand the cardinal issue for determination at this juncture is *whether the appeal is meritorious*. The appeal before me is cantered in the Civil Case No. 16 of 2018 which was before the District Court of Nyamagana, it was delivered on the 8th day of October, 2019.

Concerning the first and second grounds of appeal which related to elements of malicious prosecution. The learned counsel for the appellant lamented that the four ingredients of malicious prosecution were not cumulatively proved as required by the law. The principles governing malicious prosecution are settled in the celebrated case of **Hosia Lalata v Gibson Zumba Mwasote (1980) TLR 154** which laid down the

essential elements of malicious prosecution. In the said case, Hon. Samatta, J (as he then was) held that to succeed in a suit for malicious prosecution, the plaintiff must prove the following elements:-

(a) That he was prosecuted by the defendant;

(b) That the prosecution ended in his favour;

(c) That, the prosecution was conducted without reasonable or probable cause;

(d) That in bringing the prosecution the defendant was actuated by malice..."

In the instant appeal, the appellant's Advocate has stated that the elements of malicious prosecution need to be proved cumulatively. He faulted the trial court for holding that there was no sufficient evidence to prove that there was probable or reasonable cause. The law requires a plaintiff in an action for malicious prosecution to prove a lack of reasonable and probable cause to initiate, instigate or continue the prosecution on the part of the prosecutor or instigator is one of the four elements of that cause of action. It is a vital link between the lawfulness of the prosecution and the state of mind of the defendant. Whether the prosecution is wrongful or lawful depends on whether there was a reasonable and probable cause coupled with a *animus iniuriandi* of the defendant on instigating, initiating, or continuing it.

The definition of the concept of a reasonable and probable cause was defined in the case of **Commonwealth Life Assurance Society Ltd v Brain** (1935) XLR 343 at 382, His Lordship was of the view that the prosecution must believe that the probability of the accused's guilt is such upon general grounds of justice a charge against him is warranted. I had to peruse the Primary Court records in Criminal Case No.588 of 2017 to find out what transpired during trial. The respondents were charged for unlawfully wounding another person contrary to section 228 of Cap.16 [2002].

The respondents in the case before the District Court of Nyamagana asserted that they were wrongly arrested and they did not commit the offence charged. To prove that they were discharged and acquitted they tendered the Primary Court decision dated 27th September, 2017 which was admitted as Exh.P1. The trial court decided in favour of the respondents (original defendants) for the reason that the appellant (plaintiff) did not prove his case. The matter ended in favour of the respondents, but it should be known that mere innocence is proof of want of probable and reasonable cause.

Now, I had to determine whether innocence was accompanied by circumstances to raise the presumption that there was a want of reasonable and probable cause. The respondents claimed that on 15th January 2017 while seating at their house they saw the appellant and other people raising an alarm when they saw the appellant restricting children not to play around his premise and one child disobeyed then the appellant started to chase him but the appellant fall down. The respondents stated that no one beat the appellant.

In the matter before the District Court of Nyamagana in Civil Case No.16 of 2018, the 1st respondent testified that the appellant was accompanied by Police Officer they arrived at his place and he was arrested and when he was cross-examined by Mr. Akram, the learned counsel the 1st respondent replied that the appellant is the one who informed the police. PW3, Ally Juma also testified that on 15th January, 2017 the appellant arrived at their house accompanied by a Police Officer and arrested the respondents.

On his side, the appellant testified that the respondents invaded him in his house they beat and injured him. DW2 further testified that the Police Officer arrived at the scene of the incident. It is in the record that the appellant claims that the respondents are the one who injured him

and DW2 testified that he heard an alarm and headed to the scene of the incident and saw the respondents and asked them if they beat the appellant, they denied. In my view, there is no dispute that the matter was reported to the police but accordingly to the evidence on record each party is telling a different story, it is not clear as to who reported the matter to the police station.

Additionally, the records shows that, the appellant was moved to institute a case after being invaded and wounded. Notwithstanding the fact that, the respondents were acquitted but as I have stated early, it does not mean that there was no probable cause. The appellant proved that he was injured and he tendered a PF3 at the Primary Court and the same was admitted as Exhibit P1 that means the appellant proved that he was injured. Hence, he had a reasonable cause to institute the case and he intended to prove that the respondents are the one who wounded him. Consequently, the evidence on record proves that the prosecution was conducted with a reasonable and probable cause. Thus, the first and second grounds of appeal are answered in affirmative.

Guided by the above findings, I find no reason to discuss the remaining grounds of appeal raised by the learned counsel for the appellant since it will not reverse the decision made above.

From the foregoing, it is crystal clear that the evidence on record shows that the third element that, there was a reasonable or probable cause for the appellant was proved therefore, the action for malicious prosecution fails.

In the upshot, I quash the decision of the District Court of Nyamagana with respect to Civil Case No.16 of 2018 and set aside the order of Tshs. 2,000,000/= as malicious prosecution damage. I allow the appeal without costs.

Order accordingly.

DATED at Mwanza this 25th day of June, 2020.

A.Z.MGEYEKWA

JUDGE

25.06.2020

Judgment delivered on 25th day of June, 2020 via audio teleconference and both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

25.06.2020

Right to appeal is fully explained.