

IN THE HIGH COURT OF TANZANIA

AT TABORA

CIVIL APPEAL No. 1 OF 2019

(Arising from the Judgment and Decree of the Resident Magistrate's Court of Tabora at Tabora dated 29/11/2016 in Civil Case No. 5 of 2016)

CHELA JAMES GHANAI ----- 1ST APPELLANT

PACT TANZANIA ----- 2ND APPELLANT

VERSUS

DEOGRATIUS NDANU ----- RESPONDENT

JUDGEMENT

22/11 & 13/12/2019

BONGOLE J.

The above named appellants were sued by the respondent for Malicious Prosecution in the Resident Magistrate's Court of Tabora, after a full trial the Resident Magistrate's Court decided in favour of the Respondent and ordered the appellants to pay the respondent Tsh: 150,000,000/= as General Damage, Specific damage to the tune of 15,000,000/= and costs of the suit.

The appellants levelled nine grounds memorandum of appeal which goes as follows:-

- 1. The honorable trial Magistrate had no territorial jurisdiction to entertain and determine the suit as filed;**

- 2. The honorable trial Magistrate erred in law for not considering and determining the issue as to whether the criminal prosecution was litigated with malice as framed at the final pre-trial conference**
- 3. The honorable trial Magistrate erred in law and in fact for confusing malice and absence of reasonable and probable cause as the same thing.**
- 4. The honorable trial Magistrate erred in law and in fact for failing to hold that the appellants did not act with malice.**
- 5. The honorable trial Magistrate erred in law and in fact for failing to hold that the appellants had reasonable and probable cause for reporting the matter to police.**
- 6. The honorable trial Magistrate erred in law and in fact for awarding special damages to the respondent.**
- 7. The honorable trial Magistrate erred in law and in fact for awarding general damages to the respondent in absence of evidence justifying the said award.**
- 8. The honorable trial Magistrate erred in law and in fact in taking into account irrelevant factors is (sic) assessing general damages;**
- 9. The honorable trial Magistrate erred in law and in fact in awarding Tsh: 150,000,000 as general damages which is extremely excessive**
- 10. The evidence on record does not support the finding of the trial court.**

It is based on the above listed grounds the appellants prayed for orders that, the judgment and decree of the Resident Magistrate Court of Tabora be reversed and set aside, the respondent be ordered to pay costs in the Resident Magistrate's Court and in this court and any other orders that this court deems just and proper to grant.

A brief history giving rise to the case is that, the respondent was once an employee of the 2nd appellant and co-employee of the 1st appellant, the respondent was arrested in Dar es Salaam and transferred to Tabora to answer criminal charges in criminal cases no. 32/2013 and 15/2015 and then to Musoma to answer criminal charge in criminal case no. 16/2015. All criminal charges at Musoma and Tabora ended in respondent's favour, thereafter he instituted a suit against the appellants claiming damages arising out of malicious prosecution. It is the foregoing background which prompted him to institute the afore-stated suit.

At the hearing of the appeal both appellants were represented by the learned advocate Mr. Faustine Malango and the respondent had the service of Mr. Frank Mtuta, both advocates agreed to argue by way of written submission.

Mr. Malango submitted that the honorable trial magistrate had no territorial jurisdiction to entertain and determine the suit as filed since the the respondent's claims was based on the fact that he was maliciously prosecuted in Tabora and Musoma Resident Magistrate's Courts one case being outside the jurisdiction of trial court; in his judgement the trial magistrate appreciated that the court's jurisdiction is not extended to cover matters appeared in Musoma.

He submitted further that, there were two causes of action, one at Musoma and the other at Tabora, that being the case in terms of section 18 (c) of the Civil Procedure Code (Cap 33 R.E 2002) the cause of action that arose at Musoma ought to have been tried at Musoma not at Tabora so the respondent wanted to avoid filing two suits and the trial magistrate was aware of the legal position but ignored it, he only applied it in determining special damages not in other issues.

That, as per page 2 and 3 of the typed proceedings the trial court framed six (6) issues and the fourth issue being "**whether the prosecution was instigated with malice**" but in his judgment the trial magistrate considered and determined five (5) issues only. The judgment is clear that the trial magistrate omitted to consider and determine the 4th issue which is whether the prosecution was instigated with malice.

While citing the case of ***Katerrega v, Attorney General* [1973] E.A 287** the case which stated five essentials to be proved in tort of malicious prosecution he submitted that the trial court did not consider and determine the said crucial issue of malice and in absence of determination of the said issue the trial court was not justified in holding that the tort of malicious prosecution was proved against the appellants.

That the respondent did not discharge the burden placed on him to prove that the appellants had no reasonable and probable cause since no credible evidence was adduced by the respondent to prove lack of reasonable and probable cause. He added that the argument by the respondent that the presence of certificate of service which praised him is a proof that the appellants had no reasonable and probable cause is not

tenable because the matter was reported to police following an audit which detected fraudulent misuse of funds and the certificate of service which was issued to respondent before the audit report revealed fraud.

That, the honorable trial Magistrate erred in law and in fact for awarding special damages to the respondent contrary to the settled principle that damages must be pleaded and be proved.

He added that at the hearing the respondent testified that he incurred costs in purchasing flight tickets and he tried to tender the tickets but they were not admitted. He did not allege to have used any other means of transport and he did not bring any evidence to prove that but the court assumed that he incurred such costs and awarded him Tsh: 2,000,000/=.

In reply Mr. Frank Mtuta admitted that the trial Magistrate had no territorial jurisdiction to entertain and determine the matters that occurred at Musoma. To put nail on that he quoted a part of trial court judgement which states that.

"I am of the firm view that this court's jurisdiction is not extended to cover the matter appeared in Musoma but only those appeared in the boundaries of Tabora Region. My focus wiii only be confined to costs incurred as the result of Tabora Case No. 32 of 2013 and 15 of 2015".

He added that the matters that occurred at Musoma lacks materiality to this appeal as it was dropped suo motto by the trial Magistrate for lack of jurisdiction. He also confirmed that in terms of section 18 (c) of the Civil

Procedure Code (Cap 33 R.E 2002) the cause of action that arose in Musoma ought to have been tried at Musoma not in Tabora.

Explaining to that dropout made by court *suo motto* Mr. Frank Mtuta submitted that he knew that there is a misjoinder of cause of actions that is why he decided to drop out the cause of action that arose in Musoma and proceeded with the cause of action that arose in Tabora where the court had jurisdiction.

Concerning the issue on whether criminal prosecution was instigated with malice the respondent insisted that the trial magistrate gave four reasons to prove that the criminal prosecution was litigated with malice, first, the 2nd appellant through certificate of service certified that the plaintiff was a person of high integrity, diligence and hard worker, second the audit report which the defendants allege to have taken to police did not mention any name, third, auditors who made the alleged report restricted its usage to third party and forth the said audit report was neither tendered nor admitted in criminal cases instituted against the plaintiff.

As to the respondent was responsible for alleged fraud Mr. Frank Mtuta submitted that the audit report which alleged misuse of fund has no qualification to be called a report as it has been tendered in court without authorization of the author.

As to whether the appellant had reasonable and probable cause for reporting the matter to police the respondent submitted that since the case in Tabora ended in favour of the respondent that is a justification that there were no sufficient grounds on the part of the appellants to believe that the respondent was guilty of the offence imputed.

I will start with the first ground as to whether the trial court had jurisdiction to entertain the matter, I would like to refer to two provisions of the Civil Procedure Code Cap 33 R.E 2002 so as to know whether the trial court acted within its powers.

Section 17 of the Civil Procedure Code Cap 33 R.E 2002 states that,

“Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts”.

The above quoted section of law makes it clear that the court within the local limits of whose jurisdiction that wrong was done and the court within the limits where defendant personally works for gain or carries business will have jurisdiction to entertain the suit for malicious prosecution.

As to the case at hand the trial magistrate in his judgment admitted that the trial court had no jurisdiction to entertain matters that arose at Musoma instead he continued to adjudicate only on matters that arose in the local limits of trial court’s jurisdiction.

The counsel for the appellants submitted that, since the trial magistrate had no jurisdiction to entertain the matters that arose in Musoma it makes the whole pleadings a misjoinder of causes of action and thus it ought to be rejected by the court in the very beginning for lack of jurisdiction to entertain some of the matters that were pleaded.

Order II rule 7 of the Civil Procedure Code (Cap 33 R.E 2002) states that;

"All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and in all case where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived".

The law states it with bold ink that if the objection of misjoinder of causes of action is not raised at the earliest possible opportunity it stands waived. In that sense I agree with the respondent that the appellants never raised the objection on ground of misjoinder of causes of action at any stage that is why the trial court magistrate confined his findings to the matters that arose in Tabora.

Basing on the above stated positions of law and the facts giving rise to the ground of jurisdiction of the trial court I see no other reason than to believe that the trial court acted within its powers as provided by the law.

Another task that I hold in this appeal is to decide on whether the essential ingredients that forms the tort of malicious prosecution were proved before the trial court.

Under the English Common Law, a tort of Malicious Prosecution is in essence abuse of process, it is an action initiated where one uses legal process against another primarily to accomplish a purpose for which it is not designed, anyone who causes that wrong to another is subject to liability to the other for harm caused by the abuse of process.

In ***Jeremiah Kamama vs Bugomola Mayandi*** [1983] TLR 123 the court listed out five elements that forms tort of Malicious Prosecution of which all the elements must be proved for one to succeed in a suit for malicious prosecution and that are:-

1. The respondent was prosecuted.
2. Proceedings ended in favor of the respondent
3. That the appellants instated the proceedings against the respondent maliciously
4. The appellants instituted the proceedings against the respondent without reasonable and probable cause
5. The respondent suffered damages as a result

It was held by the trial magistrate in a judgement delivered on 29th day of November 2018 that the respondent had managed to prove all the essential elements.

The basis of contention before this court is whether or not the above 3rd and 4th elements were proved in the suit by the respondent, I will examine the existence of each element from the available evidence as contained in trial court's record.

In ***Wilberd Lemunge vs Father Komu & The Registered Trustees of the diocese of Moshi*** Civil Appeal No. 08 of 2016 CAT at Moshi (Unreported) the court stated that

"the malice referred to in malicious prosecution that, is not malice in the legal sense, that is, such as may be assumed from a wrongful act done intentionally. To the

contrary, it is malu anlmus meaning being actuated by ill spite or ill-will"

The question that comes into my mind is whether the appellant's act of reporting the matter to police and hence arrest and prosecution of the respondent was actuated by malice. The facts shows that the appellant reported the matter to police in compliance with the legal duty to report any crime that they become aware of as provided for under section 7 of the Criminal Procedure Act (Cap 20 R.E 2002) and later put the suspect of crime into machinery of justice.

Also the record of the trial court shows that the process was actuated by an audit report that revealed fraudulent misuse of 1st appellant's fund in an office that was previously held by the respondent.

The law requires any person who becomes aware of any crime to report the matter to police and if it finds reason to suspect commission of an offence investigate the matter and take necessary actions. By that reason will say that the prosecution was actuated by a desire to bring to justice the respondent.

In regard to absence of reasonable and probable cause I will say that, No one has challenged the fact that the matter ended in favour of the respondent but it is not true that mere innocence is proof of want of probable and reasonable cause, it must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause.

I am very conscious with the act that was done by the appellants to put the respondent into justice, it is bad to believe that if the appellants

issued a certificate of service that praises the respondent was a proof of his innocence. What the respondent tried to tell this court is that if someone's contract of employment ends he becomes not liable to any subsequent audit done by his employer. I abide with appellants submissions that they prosecuted the respondent with reasonable and probable cause.

That been said and done, I find no reason to discuss other grounds raised by the appellants because the absence of the above two elements makes a failure in a suit for Malicious prosecution, the consequence of which, is to dismiss the appeal with costs.

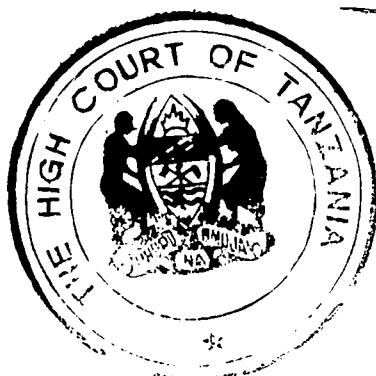
Order accordingly


S. B. BONGOLE
JUDGE
28/02/2020

Judgement delivered under my hand and seal of the court in chambers, this 28/02/2020 in the presence of Ms. Maryamu Masandika for the Appellants and in the absence of the Respondent.


S.B. BONGOLE
JUDGE
28/02/2020

Right of Appeal is explained.




S.B. BONGOLE
JUDGE
28/02/2020