

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

**AT ARUSHA
CIVIL APPEAL NO. 11 OF 2020**

(Originating from Civil Case No. 101 of 2018 Resident Magistrate's Court of Arusha at Arusha)

LOTHA MERENDEYIAPPELLANT

VERSUS

ALLEN LOISHOOKI1ST RESPONDENT

OLAIS LOSHILAARI2ND RESPONDENT

HERMAN LONGOINE3RD RESPONDENT

JUDGMENT

25/9/2020& 24/11/2020

GWAE, J

The respondents, Allen Loishooki, Olais Loshilaari and Herman Longoine hereinafter to be referred to as 1st, 2nd and 3rd respondents respectively found a legal justification of filing a civil suit based on a tort of malicious prosecution against the appellant, **Lotha Merendeyi** after they had been acquitted in a criminal case filed in the Resident magistrate's Court of Arusha at Arusha ("trial court") vide Criminal Case No. 489 of 2016 where the appellant was a principal witness.

Initially, the respondents were vividly charged with an offence of armed robbery c/s 287A of then Penal Code Cap 16 R.E, 2002 as amended by section

10A of the Written Laws (Miscellaneous Amendments) Act, No.3/2010). Following the respondents' acquittal by the RMs Court, the DPP appealed to this court through an appeal registered as Criminal Appeal No. 85 of 2017. This court (**Maghimbi, J**) finally directed re-composition of judgment by the trial court and that the right to appeal for an aggrieved party would accrue on the date of delivery of such judgment (re-composed judgment).

The respondents' claims were as follows; payment of Tshs. 150,000,000/= being a claim on malicious prosecution, general damages costs, interests on the decretal sum and other reliefs. The trial court found the claim of Tshs. 150,000,000/= to have not been proved to the required standard especially specific damages however the learned trial magistrate proceeded awarding respondents Tshs. 10,000,000/= each being for damaging their reputation in the community.

Aggrieved by the trial court decision, the appellant has opted to filing of this appeal being armed with five grounds of appeal, to wit;

1. That, trial court erred in fact and law by holding that the appellant maliciously prosecuted the respondents
2. That, trial court erred in fact and law by considering the facts which were not at issue before the trial
3. That, the trial court erred in law and in fact by awarding damage for defamation while it was not the issue before it
4. That, the trial court erred in law and in fact by considering the issues already determined by the competent court.

5. That, the trial court judgment is bad in law for contravening provisions of order xx rule 4 of the CPC

With consensus of the parties' advocates namely; **Ms. Joyce Samwel** and **Mr. Lugakingira** for the applicant and respondent respectively, this appeal was disposed of by way of written submission. I shall appositively consider the parties' written submissions while determining each ground of appeal.

In the **1st** ground of appeal which reads 'trial court erred in fact and law by holding that, the appellant maliciously prosecuted the respondents', the appellant's counsel is of the opinion that, the tort of the malicious prosecution alleged by the respondents was not proved as contrary to the finding of the trial court. She referred this court to a judicial decision in the case of **Jeremiah Kamama v. Bugimole Myandi** (1983) TLR 123 where four elements namely; that, plaintiff was prosecuted by the defendant, that, the plaintiff was evidently acquitted of the criminal case leveled against him and not mere assertions, that, the prosecution was instituted without any reasonable and probable cause and that, the plaintiff suffered some damages. On the other hand, it is the assertion of the respondents' advocate that the tort of malicious prosecution was proved, therefore, the trial court was justified in holding so.

In order one to3 prove the tort of malicious prosecution, to my decided view, it is usually required a proof on the standard required by the law short of

that civilians would be indirectly barred from instituting criminal complainants to the responsible authorities. Hence a requirement of proof comes into play in order to prevent abuse of this kind of institution of civil cases on the tort of malicious prosecution, the proof should on the following elements; that a plaintiff was prosecuted, was eventually acquitted and that institution of criminal proceedings was tainted with malice that is without reasonable and probable cause and that the plaintiff suffered damages. This position has consistently been stressed by our courts for instance in **Bhoke Chacha v. Daniel Musenya** (1983) TLR 329 where it was among other things stated that:

“The fact that the appellant was subsequently acquitted does not establish the original complainant was false and malicious. It was for the appellant to prove that the respondent’s report was malicious and that it was made without any reasonable and probable”

Acquittal of an accused person in a criminal proceeding, according to the above quoted decision, does not by itself suffice to hold a defendant liable for the tort of malicious prosecution unless it is proved by the plaintiff that such prosecution was done in the absence of reasonable and probable cause on the part of the defendant and not merely because the plaintiff was acquitted after close of the evidence by both sides or plaintiff being acquitted on a ruling of no case to answer.

Going through the evidence adduced by the respondents, I find no scintilla of evidence that the appellant prosecuted the respondents without reasonable and probable cause. Mere assertions by the respondents that they were detained, charged, prosecuted but that they were finally acquitted by the trial court does not suffice to hold the appellant liable for claims on malicious prosecution. More so I have made some efforts to look at the trial court judgment and found none save this court's judgment when exercising its criminal appellate jurisdiction as earlier explained. The 1st ground is thus allowed.

As regards the appellant's complaint on the 2nd ground that, the trial court erred in law and fact for considering issues which were not at issue during trial. Having carefully gone through the record of the trial court, I have observed as complained by the appellant, I say so simply because there were three issues that were framed for proof or otherwise by the parties namely;

firstly, whether the defendant maliciously prosecuted the plaintiffs,
secondly, if the above issue is answered in affirmative, whether the plaintiffs suffered any damage and

thirdly, to what relief (s) are parties entitled.

The judgment of the trial court plainly indicates that, the learned trial magistrate when determining the 2nd issue herein, miserably misdirected himself by equating the 2nd issue with torts of defamation after the respondents being detained and prosecuted.

More so the respondents' plaint was not aimed at defamation rather to the tort of malicious prosecution (See the respondent' reliefs in their plaint). That was wrong on the part of the trial court as well the respondents as there was a legal requirement to confine to the framed issues and if was desired to include the torts of defamation that was to be done by the respondents before commencement of the trial and the same ought to be reflected in the record as opposed to what is revealed in the trial court typed proceedings. I would borrow the wisdom of the foreign decision In **Blay vs. Polland & Morris** (1930) 1 KB 311 at page 634, in **Scrutton**, J held as follows;

"Cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleading and in my opinion was not entitled to take such course"


The same position was judicially deliberated by the Court of Appeal in the case of: **Scan Tan Tours Ltd vs. the Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No.78 of 2012 (unreported) where it was held that the trial court is duty bound to decide on the issues on record and not otherwise. The 3rd ground of appeal is also allowed. The finding in the 2nd ground also answers the 3rd ground of appeal.

In the 4th ground of appeal as herein above, considering the testimonies of PW4, **Elirehema Soori** and that Eliziri Israel not PW5 who testified that the source of the appellant's institution of the offence of armed robbery against the respondents was the appellant's acts of being in dispute with his brother (disabled person) which led to appellant's desire to sell the cows of that disabled person, to my firm view, in itself would not justify the trial court's holding that there was sufficient evidence that the respondents were maliciously prosecuted taking into account that piece of evidence was not even introduced by the respondents.

In the last ground of appellant's appeal, looking at the judgment from outset, I am of the considered view that the trial magistrate composed the impugned judgment and gave reasons for his findings as required by the law. Hence this ground of appeal lacks merit,

For the foregoing reasons, the appellant's appeal is allowed. The trial court decision is quashed and set aside. The appellant shall have his costs of this appeal borne by the respondents.

Ordered accordingly


M. R. GWAE
JUDGE
24/11/2020

Right of appeal explained fully to the parties



M. R. GWAE
JUDGE
24/11/2020