

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CIVIL APPEAL NO. 17 OF 2020

*(Arising from the Judgment of the District Court of Musoma
at Musoma in Civil Case No. 22 of 2019)*

FELICIAN MUHERE MGUYO APPELLANT

VERSUS

DAVID JOSEPH MLAY..... RESPONDENT

JUDGEMENT

30th October and 21st December, 2020

KISANYA, J.:

Felician Muhere Mguyo, unsuccessful sued David Joseph Mlay on a claim of Tshs. 60,000,000 being compensation for damages arising from the tort of malicious prosecution. The said suit for malicious prosecution was predicated on Criminal Case No. 172 of 2016 filed in the District Court of Musoma at Musoma at the instigation of David Joseph Mlay.

Briefly, Felician was arraigned for criminal trespass contrary to section 299(a) of the Penal Code [Cap. 16, R.E. 2002] and common nuisance contrary to section 171A of the Penal Code (supra). It was alleged in the first count that, on 19/06/2016, Felician did unlawfully enter into Plot No. 16, Block A, owned by Anil s/o Kumar Shah with intended to annoy the tenant, David Joseph Mlay. In relation to the second count, it was alleged

that, Felician offloaded a trailer of stones thereby causing annoyance and inconvenience to the business of garage therein.

The criminal case ended in favour of Felician. It was held that, the first count was not proved on the reason that, Felician had a title deed in respect of Plot No. 16, Block A, Nyakato, Industrial Area in Musoma Municipality and the particulars of offence did not specify the exact location of the land subject to the offence. As regards the second, the court found it defective due wrong citation of provision of the law.

Upon being discharged, Felician filed the suit for malicious claiming for the above damages. He alleged to have suffered physical and mental pain, lowered his estimation, loss of business and incurred expenses in defending the criminal case. His case was dismissed for want of merit on the reason that, two elements of malicious prosecution namely, malice in instituting the criminal case and lack of reasonable probable cause on the part of the respondent were not proved.

Dissatisfied, Felician has filed the instant appeal and raised the following grounds, in verbatim:

- 1. That, the trial court erred in law and facts to hold that I (the plaintiff by then) failed to establish the two elements of the tort of malicious prosecution namely reasonable and probable cause by the defendant to institute a criminal case against me, and instituting the same maliciously.*
- 2. The trial court wrongly disregarded my evidence adduced before the court.*
- 3. That mediation was improperly conducted as the same on record does not reflect how it was conducted.*

4. The trial court magistrate did not exercise judiciously the discretionary power vested to the Court to award costs.

During the hearing of the appeal, the appellant appeared in person to prosecute his appeal. On his part, the respondent who was also present, he enjoyed the legal services of Mr. Baraka Makowe, learned advocate.

It was submitted by the appellant that the trial court erred in law in holding that he did not prove his case. He contended that there was sufficient evidence to prove that Criminal Case No. 172 of 2016 before the District Court of Musoma was instituted maliciously and without probable cause. The appellant submitted further that, evidence to prove that the said offence ended in his favour was adduced before the trial court.

On the second ground of appeal, the appellant succumbed that the trial court did not consider his evidence. When asked as to whether he tendered the relevant evidence to substantiate the costs and loss suffered due to the said criminal case, the appellant replied and requested to tender the relevant documents before the Court.

On the third ground of appeal, the appellant acquiesced that the record does not show what transpired during mediation. Therefore, he was of the view that, mediation was improperly conducted.

In relation to the fourth ground, the appellant faulted the trial court for granting costs in favour of the respondent while it was proved that he (the respondent) is the one who instigated the criminal case which ended in his (the appellant) favour. The appellant submitted that, he was entitled to the costs. That said, he urged the Court to quash and set aside the decision of the trial court.

Replying to the first and second grounds of appeal, Mr. Makowe argued that pursuant to section 110 and 111 of the Evidence Act, Cap. 6, R.E. 2002, the appellant had the burden of proving his case. He went on to submit that, this being a case on malicious prosecution, the appellant was required to prove all elements of malicious prosecution. The learned counsel contended that, the appellant did not prove malice and lack of probable and reasonable cause on the part of the respondent at the time of instituting the criminal case.

According to Mr. Makowe, malice was due to the fact that the appellant put the stones in the land which the respondent was a tenant. He went on to submit that the respondent had reasonable and probable cause of reporting the matter to the police because he had the copies of judgments which had been issued by the courts of competent jurisdiction to the effect that the land where the appellant put the stones belonged to one, Anil Kumar Shah, his landlord. For that reason, Mr. Makowe of the firm view that first and the second ground of appeal were devoid of merit because the appellant had failed to prove his case on the required standards.

Replying to third ground, Mr. Makowe stated that the mediation was conducted according to the law. And on the fourth ground of appeal, the learned advocate submitted that costs are awarded to a person who succeeds in a civil case. Therefore, he contended that the respondent deserved the costs he was granted after winning the case filed by the appellant.

In view of the above, Mr. Makowe prayed that this appeal be dismissed with costs.

I have dispassionately considered the rival arguments advanced by both parties. The matter for determination before this court is whether or not the tort of malicious prosecution was proved before the trial court.

However, I prefer to start with the third ground of appeal. Was the mediation conducted in contravention of the law? In terms of the appellant's submission, this ground is based on the reason that the proceedings do not show how the mediation was conducted. It is my considered view that this ground should not detain us. The law does not require the mediator to record in the case file what transpired during the mediation. The rationale is to ensure that, the presiding magistrate or judge is not influenced by what was transpired during the mediation. It is on record that the mediator in the case at hand recorded that, the mediation had failed. From the foregoing, the third ground is devoid of merit.

Now, as regards the first and second ground of appeal, the issue is whether the appellant proved his case on the balance of probabilities. As rightly held by the trial court, tort of malicious prosecution is proved by establishing the following ingredients which were also stated in **Wilbard Lemunge vs Father Komu and The Registered Trustees of The Diocese of Moshi**, and **Yonnah Ngassa vs Makoye Ngassa [2006] TLR 2006**.

- (a) The plaintiff must have been prosecuted;
- (b) The prosecution must have ended in favour of the plaintiff;
- (c) The defendant must have instituted the proceedings against the plaintiff with reasonable and probable cause;
- (d) The defendant must have instituted the proceedings against the

plaintiff maliciously; and

(e) The plaintiff must have suffered damages as a result of the prosecution.

It is settled law that all of the above ingredients must be proved by the plaintiff.

The trial court was satisfied that the two elements of malicious prosecution namely, malice and lack of reasonable and probable cause on the part of the appellant who instituted the criminal case. It is that finding which is subject to the first and second grounds.

In order to prove malice on the part of the respondent, the appellant was required to establish and give evidence on how the prosecution of criminal case was actuated by spite or ill-will or indirect or improper motive. I have examined the evidence adduced before the trial court. Nothing was adduced by the appellant to prove that the respondent instituted Criminal Case No. 172 of 2016 with ill-will or indirect or improper motive. The fact that the said criminal case ended in favour of the appellant was not sufficient to prove the tort of malicious prosecution.

On the issue whether the respondent had reasonable and probable cause to institute Criminal Case no. 172 of 2016 against the appellant, this Court is guided by the decision of the Court of Appeal **in Wilbard Lemunge Vs Father Komu and the Registered Trustees of the Diocese OMoshi**, Civil Appeal No. 8 of 2016. In that case, the Court Appeal adopted the following defence of reasonable and probable cause wrote in a book titled **The Law of Torts by Ratantal and Dhirajlal 24th Edition 2002, at page 317:-**

One; an honest belief of the accuser in the guilty of the accused (plaintiff);

Two; such belief must be based on an honest conviction of the existence of circumstances which led the accuser to the 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 any fairly cautious person in the accuser's situation to believe so.

Four; the circumstances so believed and relied on by the accuser, must be such as to amount to a reasonable ground for belief in the guilt of the accused person.

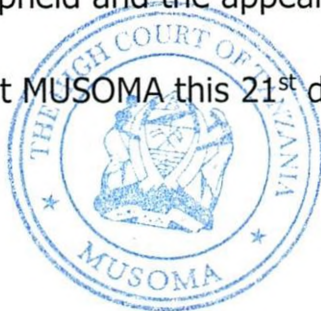
In the case at hand, the appellant was alleged to have trespassed and caused nuisance into the land of Anil Kumar Shah. The respondent deposed how the said land was leased to him by Anil Kumar Shah from year 1999. His oral testimony was supplemented by judgments of the District Land Housing Tribunal for Mara at Musoma in Land Application No. 11 of 2007 (Exhibit D1) and the High Court of Tanzania at Mwanza in Land Appeal no. 75 of 2011 (Exhibit D2). Both judgments dismissed the appellant's claim that the respondent was his tenant. In its decision which was upheld by the High Court, the District Land Housing held that Plot No. 16, Block A, Nyakato was leased to the respondent by Anil Khumar Shah. Therefore, being a lawful tenant to the said land, the respondent was justified to report the matter to the police. Such act could have been done by a reasonable tenant in a similar circumstance.

All said, the Court finds that the tort of malicious prosecution was not proved by the appellant due to want of evidence to prove malice and lack of reasonable and probable cause on the part of the respondent at the time of instituting the criminal case. Thus, the first and second grounds fail.

The appellant complained in the fourth ground that he was not awarded costs. According to section 30 of the Civil Procedure Code, Cap. 33. R.E.2019 costs are granted at the discretion of the Court. Generally, costs are awarded to a successfully party. Since the appellants did not prove his case, the respondent was entitled to costs awarded by the trial court. Thus, the fourth ground is unfounded.

In the upshot, I find no merit in the present of appeal. Consequently, the decision of the District Court of Musoma in Civil Case No. 22 of 2019 is hereby upheld and the appeal dismissed with costs.


DATED at MUSOMA this 21st day of December, 2020.




E.S. Kisanya
JUDGE

Court: Judgment delivered this 21st December, 2020 in the absence of the appellant and in the presence of the respondent. B/C Mr. Maiga-SRMA present.

Right to appeal to the Court of Appeal is well explained.


E. S. Kisanya
JUDGE
21/12/2020