IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC. CIVIL APPEAL NO.54 OF 2020

PETER MAGESA KIGINGA ..... APPELLANT

VERSUS

MRAGA MKAMA SELEMAN ..... RESPONDENT

JUDGMENT

16th February, & 6th April, 2021

ISMAIL, J.

The proceedings which bred the instant appeal were commenced by the respondent in the Urban Primary Court of Musoma at Musoma. In these proceedings, the respondent lodged a claim of damages to the tune of TZS. 29,110,435/- allegedly arising out of the appellant's act of arresting the respondent on an allegation of tax evasion. The incident allegedly occurred on 2nd August, 2017, at his cereals shop located in Bukima village. The respondent allegedly left his shop open as he was dragged to the police station. He was subsequently arraigned in the Primary Court at Bukima. The contention by the respondent is that, following the incident, his assorted

possessions, including 30 bags of maize, 10 empty bags, a note book, receipts and a cash sum were stolen. These brought the aggregate loss of TZS. 29,110,435/-.

The appellant denied any wrong doing, or that any of the respondent's property was lost. He argued that after the arrest, the respondent closed his shop and that police officers confirmed that there was no loss of money as there was none in the shop.

After the hearing, the trial Court whittled down the claim of TZS. 29,110,435/- to TZS. 14,803,000/- on the ground the rest of the claims were unsupported by any semblance of evidence. Further to that, the appellant was condemned to payment of costs to the tune of TZS. 300,000/-.

This decision bemused the appellant. Feeling hard done, he instituted an appeal to the District Court at Musoma (1st appellate court). Six grounds of appeal were raised. The appellate magistrate dismissed the appeal with costs. In dismissing the appeal, the first appellate court made the following observation:

> *".... there was no reasonable and probable cause for the appellant to charge the respondent since he had no any evidence to prove the said criminal case and worse enough he charged the respondent in his own name which was wrong in law as he had no that power*

in his personal capacity, clearly the respondent was maliciously prosecuted and as shown on record he suffered financial loss, disturbances as well as mental tortures and the act of being charged for evading to pay tariffs is likely to spoil is image as a business person. So the evidence adduced at the trial court was capable of proving the tort of malicious prosecution under the balance of probabilities both in customary and in common law."

This finding has caused a serious disquiet on the part of the appellant, culminating in his decision to take a ladder up, through the instant appeal which has listed five grounds of dissatisfaction, reproduced with all their grammatical challenges as follows:

1. *That, the first appellate court erred in law and fact to uphold decision of the trial court while the respondent failed to prove that the appellant instituted the prosecution maliciously.*

2. *That, the first appellate court erred in law and fact to uphold decision of the trial court which awarded Tshs 14,803,000/- fourteen millions, eight hundred and three thousands only to the respondent on malicious prosecution while the case of malicious prosecution was not proved and it is too excessive.*
3. *That, the first appellate court erred in law and fact to uphold decision of the trial court while the prosecution of criminal case No 541 of 2017 was made with reasonable or probable cause.*

4. *That, the first appellate court erred in law and fact to uphold decision of the trial court while the appellant was wrongly sued on malicious prosecution instead of his employer.*

5. *That, the first appellate court erred in law and fact confirming that the trial court had jurisdiction at entertaining the case of malicious prosecution which is a pure tort in nature, while the court had no jurisdiction as the tort in nature does not arise from customary law.*

Noting that the respondent was unrepresented and lay, it was decided that the appeal be disposed of by way of written submissions whose filing creditably conformed to the schedule of hearing.

The appellant's submission has considerably dwelt on the 1st appellate court's finding that purportedly upheld the decision of the trial court to the effect that a claim of malicious prosecution had been proved against the appellant, hence the decision to award damages to the tune of TZS. 14,803,000/-. The appellant's view is premised on the contention that PC Civil Case No. 845 of 2017 was in respect of a claim for malicious prosecution that arose from the criminal proceedings which were terminated in the respondent's favour. The appellant went ahead and quoted an excerpt of the trial court's decision at page 1 which stated as follows:

"Mdai katika shauri hili ameiomba mahakama iweze kumuamuru mdaiwa kumlipa Tsh 29,200,000/= ambayo ni madai ya fidia kwa hasara alioipata baada ya mdaiwa kumfungia biashara yake bila kufuata utaratibu, pia kumweka sello hatimaye kumfungulia kesi ya jinai ambapo alishinda."

The appellant's impression that, this was a claim for malicious prosecution, was emboldened by the decision of the 1st appellate court which took the view that that was an appeal which originated from a claim of malicious prosecution.

This view is in sharp contrast with the respondent's thinking. He takes the view that the starting point ought to be at the point the case was lodged in the trial court. This was done vide a document known as "HATI YA MADAI" in which the respondent's claim and cause of action against the appellant have been disclosed. The position in the claim, the respondent contends, is validated by decision of the trial court which held at page 2 as follows:

"Mahakama iliweza kupitia kwa kina Ushahidi wa madai na kuweza kujiridhisha kwamba mdai ana haki ya kufungua madai haya ya fidia kutokana na hasara ambayo aliipata baada ya vitendo vilivyofanywa na mdaiwa ambavyo ni kinyume cha sheria na utaratibu kama ilivyo thibitika katika kesi ya jinai 541/2017 iliyosikilizwa katika Mahakama hii. Imeelezwa tarehe 2/8/2018 mdaiwa alifika kwenye

stoo/duka inayomilikiwa na mdai akiwa na mgambo kisha kumkamata mdai na kuondoka naye kituo cha polisi na kuacha mali zake bila ulinzi wowote mdaiwa hakuishia hapo pia alifunga duka/stoo ya mdai ambamo alikuwa akifanyia biashara ya kuuza mahindi bila kufanya makabidhiano yeyote."

The respondent maintained that evidence is ample and clear that what was before the trial court was not a claim of malicious prosecution. He argued that the base of his claims against the appellant was the holding in Criminal Case No. 541 of 2017, which was to the effect that the respondent was not afforded an opportunity to handover his merchandise and proceeds of the sale to his family. He took the view that the damages awarded had nothing to do with malicious prosecution. He held the view that the appeal is misconceived and liable to dismissal with costs.

As rightly alluded to by the respondent, the starting point in the journey of establishing if the 1st appellate court addressed what was decided by the trial court, begins with what were the appellant's points of consternation before it. These are established by looking at the petition of appeal in respect of Civil Appeal No. 94 of 2018. This petition of appeal had six grounds of appeal which, for purposes of clarity, are reproduced in verbatim as follows:

1. *That the Trial magistrate with ulterior motive acted ultra-vire by entertaining, prosecuting and determined the matter without proper jurisdiction on the matter rising out of Tort which is outside the purview and the competence of the Primary Court. Tortious liability of whatever nature sits in District Court and the Courts of the higher rank.*

2. *That the Trial magistrate grossly misdirected himself by holding that the respondent has a claim against the appellant ignoring the fact that there is no any civil suit that can arise against the appellant who was PW1 in criminal case upon the acquittal of the respondent in criminal case. Further that the only avenue available to the respondent is to prove malicious prosecution in tort (if any) in District Courts and the courts of the higher rank.*

3. *That the trial magistrate misdirected himself in awarding the excessive and global figure Tshs 14,803,000/= and Tshs 300,000/= to be paid to the respondent suffered general or specific damages.*

4. *That the trial magistrate erred in law and fact by admitting contemplated hearsay and narration statement of the responded as evidence which is contrary to the law of evidence. That there could have been an independent witness which could have seconded the narrated stories of the respondent and the purported tendered exhibits before admitted as evidence as required by the law of evidence.*

5. *That the trial magistrate erred in law and fact in basing his finding in guess work without giving proper reasons of his verdict. In page 4 of the typed judgment, the trial magistrate states and I quote* ***"Mahakama inakadiria angeuza wastani wa gunia 63 kwa siku 1 aliuza gunia 9"****. This state of affairs creates a lot of doubts that the trial magistrate had an ill motive in his judgment.*

6. *That the trial magistrate erred in law and fact and was biased when he turned advocate for the respondent and made a case on him without considering the fact that any who claims in civil case must prove his case in the probable standard that is required by the law.*

None of these grounds brought up an issue of malicious prosecution as the basis for dissatisfaction with the trial court's decision. The closest it got to touching that subject is when the appellant dropped a sentence in ground two of the petition of appeal. In that sentence, the appellant was putting a proposal that the respondent had the option of pursuing a claim of malicious prosecution which could only be pursued in the district court or a court superior thereto. This did not, in any way, insinuate that the proceedings in the trial court were founded on malicious prosecution.

This contention tallies with what the respondent has argued in his submission. It reveals what was at stake in the trial court as confirmed by the statement of claim (Hati ya Madai) which was lodged in the trial court

on 27th November, 2017, in which the respondent's complaint was stated in the following words:

> *"Kesi hii inatokana na kesi ya Jinai No. 541/2017 aliyonifungulia/kunishitaki katika Mahakama hii KUKWEPA KULIPA USHURU na kunivunjia Biashara yangu, DUKA kwa muda kadhaa na kusababisha hasara ikiwa ni pamoja na upungufu wa mali baada ya Mahakama kumuamuru kufungua. Hivyo naiomba Mahakama yako inikubalie kufungua madai ya TSH. MILIONI ISHIRINI NA TISA NA RAKI MBILI. Natanguliza shukurani."*

It is from this decision that the trial court delivered the decision which bred the grounds of appeal quoted above. Clearly, the issue of malicious prosecution which featured prominently in the 1st appellate court's decision was not a subject for discussion in the trial court and certainly not a ground of appeal. This means, therefore, that the 1st appellate court's decision was nothing but a wayward indulgence of having to grant what was not prayed or addressed by any of the parties, least of all, the appellant.

As the 1st appellate court did that, it ignored other issues which were raised through the grounds of appeal contained in the petition of appeal, charting, instead, his own shorter route which he found to be expedient and less tedious, thereby making the entire decision shrouded in the wanton infraction of the law. The consequences of this sloppiness have been stated

in numerous court decisions. In ***Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid*** [2005] TLR 61, it was held as follows:

> *"It is an elementary principle of pleading that each issue framed should be definitely resolved one way or the other. It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect."*

The incisive reasoning in the just cited decision of the upper Bench was reiterated in ***Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji***, CAT- Civil Appeal No. 25 of 2006 (unreported), in which the following guidance was accentuated:

> *"One of the basic principles is the duty of the court to determine one way or another an issue brought before it. This is the principle which finds expression in rule 4 of Order XX of the Civil Procedure Code, 1966. The rule states as follows with regard to contents of a judgment:*
>
> > *"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."*
>
> *Though the rule refers to judgments, the principle therein is applicable in any type of decision in a court following the hearing of a matter. Among the cases cited by counsel for the appellant is the case of* ***Kukal Properties Development Ltd v. Maloo and others*** *– (1990-1994) E. A. 281which we find to be relevant to the case before us.*

The Court of Appeal of Kenya in this case had an opportunity to discuss the effect of failure by a judge to decide on issues framed. The Court's holding, with which we are in complete agreement, was to the following effect:

> *"A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure."*

In the present case the matter before the High Court was a petition for extension of time within which to file an application to set aside the Award of the Sole arbitrator. The question that the trial judge was obliged to resolve is whether there was sufficient ground for granting the extension of time sought. ***With due respect to the learned judge, we think that he abandoned what was before him and embarked on something that had not, as yet, been asked of him."*** [Emphasis added]

From the quoted excerpt, it quite clear that embarking on something that the 1st appellate court had not been asked to do is as erroneous and devastating as abandoning what was at stake before it. In this case, embarking on malicious prosecution which was not a ground for consideration constituted a horrendous misstep of an intolerable proportion. I take the view that the court's erroneous conduct occasioned a serious miscarriage of justice and has placed the decision from which the instant appeal arose facing a credibility crisis.

In consequence of all this, I quash the discrepant appeal proceedings in the 1st appellate court, set aside the 1st appellate court's judgment, and order that the matter be remitted back for fresh hearing of the appeal before another magistrate. I make no order as to costs since this was no fault of the parties.

It is so ordered.

Right of appeal in duly explained.

DATED at **MWANZA** this 6th day of April, 2021.

M.K. ISMAIL

JUDGE