

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC CIVIL APPEAL No. 44 OF 2020

(Originating from the judgment of the District Court of Misungwi in Civil Case No. 01
of 2020 dated 03/06/2020)

MATHIAS PETRO.....APPELLANT

VERSUS

RENATUS LUBINZA.....RESPONDENT

JUDGMENT

16th March, 2021 & 23rd April, 2021.

TIGANGA, J.

This appeal arises from the judgment of the District Court of Misungwi in Civil Case No.01 of 2020, where the respondent herein sued the appellant for malicious prosecution and claimed against the appellant payment of Tshs 30,000,000/= being general damages for loss of income and travelling expenses, the costs of the suit and any other relief the court would feel just and fit to grant.

The brief background of the case at hand are that, on 05/09/2019, the appellant Mathias Petro made false and malicious allegations against the respondent to a police station that the respondent threatened him.

That allegation was acted upon and a criminal case of threatening to kill contrary to section 89(2) of the Penal Code Cap 16 R.E 2019] was commenced against him. Following that report, the respondents who were two Machima Lunemya and Renatusi Lubinza, the current respondent, were charged in Criminal Case No 167 of 2019, before the Primary Court of Misungwi. The two accused persons were found not guilty of the offence; they were consequently acquitted from the charge. The appellant, was aggrieved by the decision, he appealed to the District court in Criminal Appeal No. 22 of 2019 which appeal was dismissed for want of merits.

Following that dismissal, the respondent filed Civil Case No. 01 of 2020 claiming for payment of general damages, for loss of income and travelling expenses, costs of the suit and any other or further relief as the court, may deem fit and just to grant.

The claim was partly successful as the trial District Court only awarded the plaintiff, now respondent a total sum of Tshs 300,000/= which was for travelling expenses. Aggrieved by the said decision, the appellant is now before this court armed with four grounds of appeal challenging the decision as follows;

1. That, the trial Resident Magistrate erred in law and fact for ruling that the case was proved on the balance of probabilities,
2. That, the trial Resident Magistrate erred in law and facts for awarding compensation to the plaintiff without any justification,
3. That, the trial Resident Magistrate erred in law and facts for failure to consider the evidence adduced by the defendant's witness which was sufficient to determine the matter justly,
4. That, the trial Resident Magistrate erred in law and facts for delivering an ambiguous judgment.

On the date set for hearing, the appellant was represented by the learned counsel Mr. Makayi whereas the respondent fended for himself, unrepresented. Submitting on the raised grounds of appeal, the counsel for the appellant argued with regard to the first ground of appeal that the standard of proof is on the balance of probabilities as provided under section 3(2)(b) of the Evidence Act [Cap 6 R.E 2019], thus the respondent was duty bound to prove the case at that standard. To buttress his argument, the counsel cited the case of **Yukos Enterprises (ES Limited) vs Katibu Tawala wa Mkoa wa Geita and The Attorney General**, Civil Case No.14 of 2019 HC-Mwanza (unreported).

He submitted further that the awarded 300,000/= was not proved by the respondent as he failed to prove the loss alleged and the psychological torture he went through. According to him, that is evidenced by the trial court's decision at page 5 where the trial magistrate indicated that the respondent failed to prove his claims but he decided to award him Tshs 300,000/=. He insisted that the court has powers but the same have to be exercised judiciously.

On the second ground of appeal counsel insisted that the trial magistrate had no valid reasons for granting Tshs 300,000/= since the respondent failed to prove what he suffered.

Submitting on the third ground of appeal, counsel stated that at the 15th page of the proceedings, the witness testified that the respondent was a subsistence farmer and not a commercial farmer therefore the claims that he incurred loss had no base.

Regarding the fourth ground of appeal, the learned counsel submitted that, the judgment was ambiguous as there was no issues framed and therefore no valid reasons for the decision were given. He submitted that Order XX Rule 4 of the Civil Procedure Code [Cap 33 R.E 2019] requires the judgment to have facts, grounds for the decision, decision and the reasons thereof. However, according to him, upon

perusal of the records he has seen no grounds for the decision and the reasons for the decision. He then prayed that the appeal be allowed and the decision and decree be reversed.

On his part, the respondent did not submit one ground after the other, his submission was general. In his reply, the respondent insisted that, he proved his claim that, his daily duties were affected by the case. He prayed to be paid what he was awarded by the court.

Counsel for the appellant made a short rejoinder in which he insisted on what he submitted in the submission in chief and prayed that the appeal be allowed.

Having summarised the submission by the appellant and respondent for and against this appeal, I will in disposing this appeal, deal with one ground after the other in the manner they were presented.

Starting with the first ground of appeal which raises a complaint that the trial Resident Magistrate erred in law and fact for ruling that the case was proved on the balance of probabilities. The appellant claimed that the respondent was duty bound to prove his case, but he did not. The respondent however stated that he proved his claims.

As earlier on submitted that the claim before the trial court was rooted on the tort of malicious prosecution, which for the same to be proved, the case of **Shadrack Balinago versus Fikiri Mohamed @ Hamza & Others**, Civil Appeal No. 223 of 2017 gave the following ingredient to be proved as follows;

*"As reiterated by this Court in **Yonah Ngassa v. Makoye Ngassa**, [2006] TLR 213, it is settled that when suing for malicious prosecution a party must prove the four ingredients: **one**, that the proceedings were instituted or continued by the defendant; **two**, that the defendant acted without reasonable and probable cause; **three**, that the defendant acted maliciously; and **finally**, that the proceedings terminated in the plaintiffs favour.*

This means for the claim to be taken to be proved, the plaintiff needs to prove the four elements pointed out above. Now the issue is whether the plaintiff before the trial court proved the said elements? As earlier on pointed out the appellant made a complaint against the respondents, and following that complaint, the police charged the respondent, before the primary court where they were prosecuted, and consequently acquitted. The issue is whether the defendant acted without reasonable and probable cause; and acted maliciously? In

James Funke Gwagilo v. Attorney General, [2004] TLR 161, it was held that;

"it is enough if the defendant believes that there is reasonable and probable cause for the prosecution" for one to prove that there was justification for the prosecution. Certainly, the burden lay with the appellant to prove the absence of reasonable and probable cause in the prosecution"

It is trite law that a mere fact that the defendant in the original case was acquitted does not necessarily prove that the defendant acted maliciously and without any reasonable and probable cause. In the case of **Bhoke Chacha versus Daniel Musenya** (1993) TLR 329 it was stated inter alia that;

"the fact that the appellant was subsequently acquitted does not establish that the original complaint 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 cause"

First and foremost, I would like to state that I am fully aware of the fact that being the first appellate court, this court has powers to step into the shoes of the trial court and re evaluate evidence and reach to a

just decision if need be. See **Adamson Mwaitembe vs Republic**, Criminal Appeal No. 28 of 2015 (unreported).

In so doing I need to resolve the issue whether the respondent before the trial court proved **first**, that he was maliciously and without reasonable cause prosecuted, and suffered loss, psychological torture, bodily pain and anguish to entitle him the general damages he claimed as against the appellant.

I have passed through the proceedings of the trial court, specifically the respondent's testimony; I find that the respondent herein did not adduce any evidence to prove that he was maliciously prosecuted by the appellant. Instead he merely explained on how the appellant complained accusing him of Criminal offences, how he was called at the police station, put in lock up, taken to the Misungwi Primary Court where he was acquitted and thereafter to the District Court of Misungwi where he won the appeal. From the content of paragraph 8 of his plaint the respondent relied on the fact that since the appeal was dismissed then his prosecution was malicious. The paragraph partly reads that;

"..... thus, the fact that the defendant's appeal was dismissed confirms that he was in bad intention against the plaintiff....."

With due respect to the appellant, that is not the position of the law, as pointed out earlier, the plaintiff is supposed to prove the loss, injury and torture suffered. In this case before the trial court, that was not done by the respondent therefore malicious prosecution was not proved.

Looking at the award Tshs, 300,000/= this was awarded as the transport costs; therefore it is in the nature of specific or special damages which in law needs to be specifically pleaded and strictly proved. See, **Director Moshi Municipal Council versus Stanlenard Mnesi and Another**, Civil Appeal No. 246 of 2017 CAT-Arusha (unreported), **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 173; and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (unreported). It is not general damage which is normally assessed and granted at the discretion of the court. That said, I am in agreement with the appellant that the case was not proved as required by law as the respondent failed to prove malicious intent by the appellant herein, which would have entitled him

to the general damages he claimed. This ground is found to be meritorious and it is upheld.

Now having found that the case in the trial court was not proved to the required standard, then it suffices to say that even the awarding of Tshs 300,000/= had no base. Since this ground suffices to dispose the appeal in its entirety, I will not waste this courts time to discuss the remaining grounds of appeal, as doing so will be just an academic exercise. That said, the appeal is allowed, the judgment and decree of the trial court are hereby quashed and set aside.

It is so ordered.

DATED at MWANZA, this 23rd day of April, 2021


J. C. Tiganga

Judge

Judgment delivered in open chambers, in the presence of the parties online. Right of Appeal explained and guaranteed.




J. C. TIGANGA

JUDGE

23/04/2021