THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CIVIL APPEAL No. 18 OF 2020

(Originating from Civil Case No. 1 of 2020, in the District Court of Rungwe District, at Tukuyu).

LWITIKO MWAKABUTA.....APPELLANT

Versus;

NINEME MWAKANG'ATA.....RESPONDENT

JUDGMENT

17/02 & 29/04/2021.

Utamwa, J.

In this first appeal, the appellant LWITIKO MWAKABUTA challenged the judgment (impugned judgment) of the District Court of Rungwe District, at Tukuyu (henceforth the District Court) in Civil Case No. 1 of 2020 (the Civil Case). The impugned judgment was in favour of the respondent, NINEME MWAKANG'ATA following a claim against her for damages based on the tort of malicious prosecution.

According to the record and the arguments by the parties, the undisputed background of the matter goes thus: some years back, the appellant and the respondent got into an agreement that, the later would excavate sand, as building materials from the former's land for some consideration. The respondent thus, paid to the appellant Tanzanian shillings (Tshs.) 750, 000/= and a bundle of corrugated iron sheets. Thereafter, a misunderstanding occurred between the two. The appellant claimed that the respondent had exceeded the agreed boundaries of the area for the excavation of sand. The efforts to settle the matter through various authorizes failed. The appellant then charged the respondent before the Primary Court of Rungwe District, at Kiwira (the primary court) with the offence of criminal trespass contrary to section 299(a) of the Penal Code, Cap. 16 R. E. 2002 (currently R. E. 2019). Upon a full trial in Criminal Case No. 148 of 2019 (the Criminal Case) before the primary court, the respondent was convicted and accordingly sentenced to serve three months in prison.

The respondent was not contended by the conviction mentioned above. She appealed to the District Court, at Tukuyum (the District Court). The District Court in turn, through Criminal Appeal No. 14 of 2019 (hereinafter called the Criminal Appeal), quashed the conviction of the primary court and set aside the sentence it had imposed against the respondent. The appellant did not appeal against the decision of the District Court in the Criminal Appeal.

Following the quashing of the conviction and setting aside of the sentence against her, the respondent instituted a suit against the appellant for malicious prosecution claiming damages at the sum of Tshs. 55, 000,

000/=. The suit was registered as Civil Case No. 1 of 2020 (the Civil Case). The appellant did not admit any claim. Upon a full trial, and through the impugned judgment, the District Court found that the respondent had proved the claim. It however, awarded her general damages at the tune of Tshs. 3, 000, 000/= (Three Million) only. The appellant was aggrieved by that award, hence the appeal at hand.

In his memorandum of appeal, the appellant preferred the following four grounds of appeal:

1. That, the trial court erred in law and facts in holding that the appellant was actuated by malice to prosecute the criminal case against the respondent.
2. That, the trial court failed to evaluate the evidence on record and as a result it arrived at erroneous findings.
3. That, the trial court erred in law and facts in awarding the respondent the sum of Tshs.3, 000,000/= as general damages.
4. That, the trial court erred in law and fact by holding that the appellant had no locus in respect of the disputed land as he is not a member of Mwaijele's family.

Actually, the above four grounds of appeal can be smoothly condensed to the following two grounds:

1. That, the District Court erred in law and facts in finding that, the respondent had proved the tort of malicious prosecution against the appellant though there was no evidence proving the element of malice.

2. That, the trial court erred in law and facts in awarding the respondent the sum of Tshs.3, 000,000/= as a general damages.

I will thus, proceed to decide the appeal at hand by considering the above two improvised grounds of appeal.

Owing to these grounds of appeal, the appellant urged this court to allow this appeal with costs and quash the impugned judgment of the District Court. The respondent resisted the appeal.

The appeal at hand was argued by way of written submissions. The appellant herein was represented by Mr. Felix Kapinga, learned counsel. On her part, the respondent defended herself without any legal representation.

I will now test the first improvised ground of appeal. The major issue here is *whether or not the District Court was justified to hold in the impugned judgment that the respondent had proved all the ingredients of the tort of malicious prosecution including the element of malice.* In my settled opinion, the circumstances of the case do not attract answering the major issue affirmatively due to the following reasons; it is our law that, for proving the tort of malicious prosecution, a plaintiff has to prove five ingredients or elements. He does so cumulatively and not alternatively. The ingredients of the tort have been underscored in various decisions of the Court of Appeal of Tanzania (the CAT) and this court. In the case of **Bugarama Kazunzu v. Lubeja Kumalija (PC) Civil Appeal No. 42 of 2002, High Court of Tanzania, at Mwanza** (unreported) for example, the court listed the elements of malicious prosecution as follows:

a. That, the defendant prosecuted the plaintiff,
b. That, the criminal proceedings were terminated in the plaintiff/claimant's favour,
c. That, the prosecution was instigated without reasonable and probable cause,
d. That, it (prosecution) was actuated by malice, and
e. That, the plaintiff/claimant suffered some damages recognised by law.

The elements were also underscored in the case of **Festo v. Mwakabana (1971) HCD, n. 417**.

Again, for purposes of the tort of malicious prosecution, a defendant is taken to have prosecuted the plaintiff if he is only proved to have been instrumental in putting the law into force; see the cases of **Hosea Lalata v. Gibson Zumba Mwasote [1980] TLR. 154** and **Jeremia Kamama v. Bugomola Mayandi [1983] TLR. 123**.

The tort of malicious prosecution is therefore, a tort resulting from the act of maliciously and without reasonable and probable cause, initiating against another person, judicial (criminal) proceedings which terminate in favour of that other person and which result in damages to his reputation, person, freedom and or property; see the definition by Brazier, Magaret the author of the book titled the Law of Torts 8th Edition, Butterworths, London 1988 at Page 433. That definition was also approved by the CAT in the case of **Tanzania Breweries Limited v. Charles Msuku and another, CAT Civil Appeal No. 18 of 2000, at Dar es Salaam** (Unreported).

In the case under discussion, the District Court considered the evidence adduced by the parties before it and found that, all the five ingredients had been proved. It based its decision on the cases of **Herniman v. Smith [1938] AC 305, Hicks v. Faulkener [1881] 8 Q.B 167** (at 171), the **Festo Case** (supra), the **Hosea Case** (supra) and the **Jeremia Case** (supra).

Indeed, according to the evidence on record, which said evidence supports the background narrated above, I am of the view that, all the ingredients of the tort were proved save for the element of malice which is listed as paragraph **d)** herein above basing on the **Bugarama case** (supra). It is also clear that, the friction by the parties in this appeal, and according to the grounds of appeal is mainly centred on this element.

The sub-issue at this junction is therefore *whether or not the respondent in this appeal had also proved (in the Civil Case before the District Court) the ingredient of malice on the required balance of probabilities.* In testing this element of the tort, the District Court relied on the definition of the word "malice" in the Oxford Student Dictionary of Current English. The same defines the term as "*active hatred or desire to hart others*". The District Court then imputed malice on the part of the appellant due to the fact that, there was a grudge caused by the misunderstanding between him and the respondent. This followed the appellant's claim that the respondent had exceeded the boundaries of the agreed land for the excavation of sand. She had also made a road for ferrying the excavated sand. The grudge was also caused by the respondent's act of demanding back the consideration she had paid to the

appellant upon the occurrence of their misunderstanding. The District Court also found that, the fact that appellant had no locus on the land trespassed, implied malice on his part.

Through his submissions in chief supporting the appeal, the learned counsel for the appellant contented that, malice regarding the tort of malicious prosecution means an intent to use the legal process for some other than its legally appointed and appropriate purpose. He based this definition on the case of **James Funke Gwagilo v. Attorney General [2004] TLR. 161.** He further argued that, trespass can be a criminal or civil wrong. The appellant thus, opted to take it as a criminal act, hence the prosecution against the respondent. He also submitted that, according to page 12 of the proceedings of the District Court (in the Civil Case) it is shown that, the respondent imputed malice to the appellant only because he did not appeal against the decision of the District Court in the Criminal Appeal. That was not however, a sign of malice.

In the respondent's replying submissions which had all the signs of being drafted by a legally skilled mind thought she appeared unrepresented, she supported the decision of the District Court (in the impugned judgment) that the appellant was actuated by malice in prosecuting her. She based this stance on the decision of the District Court in the Criminal Appeal. That decision essentially maintained that, *actus reus* regarding the offence of criminal trespass was not proved against the respondent and the matter could be settled in a land court as a civil matter and not as a criminal matter. The District Court in the Criminal Appeal thus, found the decision of the primary court in the criminal case irregular, unfair and decided with bias.

Furthermore, the respondent argued that, the fact that the appellant did not pursue the matter through civil courts, implied malice. She also contended that, the fact that the appellant did not appeal against the decision of the District Court in the Criminal Appeal showed malice.

In my view, the legal definition of the term "malice" underlined in the **James Funke case** (supra) is viable regarding the tort of malicious prosecution. The definition is also substantially supported by the Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, at page, at page 1042. It defines "malice" as the intent, without justification or excuse, to commit a wrongful act or a reckless disregard of the law or of a person's legal rights or ill will or wickedness of heart. The Dictionary supplements the definition of "malice" thus, and I quote it for a readymade reference:

> "Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious,..."

In my further view, malice in relation to the tort under discussion must be proved by evidence and not by mere submissions of the parties to the court. As rightly argued by the learned counsel for the appellant, the respondent in the matter under discussion tried to impute malice to the appellant in her evidence recorded at page 12 of the proceedings of the District Court in the Civil Case. In such evidence she only showed that, the appellant had evil intention of falsely imprisoning him because he did not appeal against the decision of the District Court in the Criminal Appeal.

On my part, I agree with the learned counsel for the appellant that, the mere fact that the appellant did not appeal against the decision of the

District Court in the Criminal Appeal did not alone, show that he had been actuated by malice in prosecution her before the primary court. Parties to proceedings may in fact, surrender the battle for various reasons apart from malice. Taking that course does not thus, necessarily mean a party who so surrenders in a case had acted maliciously in instituting the proceedings.

Again, the circumstances of the case before the appellant prosecuted the respondent do not really support the contention that the appellant was actuated by malice in doing so. This is because, in the first place, there is evidence according to the judgment of the primary court in the criminal case, that, following the misunderstanding between the two, the appellant did not directly rush for the prosecution against the respondent. He firstly resorted to local leaders for conciliatory measures. He started with the community leader (*mjumbe* in Kiswahili) where the matter was not reconciled. He then went to the chairman of their hamlet (*Mwenyekiti* in Kiswahili) where there was also no fruitful meeting. The appellant then resorted to the District Commissioner, but the matter remained un-resolved. Thereafter, the appellant reported the matter to police. There is also evidence in his defence before the District Court (in the Civil Case under discussion) that, upon reporting the matter to police, the police advised him to file the criminal charge against the respondent before the primary court, hence her prosecution.

In my view therefore, the appellant's conduct demonstrated demonstrated above did not indicate that he was malicious. The same only shows that, he was eager in seeking a solution, but he was later advised wrongly by the police. The malice on the part of the appellant could not also

be deduced from other pieces of evidence for the circumstances shown above.

In my further view, it would have been a different case had it been that the police advised the appellant not to file the criminal charge and to pursue the matter through other means, but that he still filed the criminal charge against the respondent. That would have at least shown that the appellant acted maliciously. But, that was not the case. In the **Tanzania Breweries Limited** case (supra), **the CAT** cited with approval the case **Ng'homango v. Mwangwa and Another, Civil Appeal No. 1 of 1994, CAT at Dodoma** (unreported). In the said **Ng'homango case,** the CAT had held that, the first defendant had prosecuted the plaintiff maliciously because, despite the fact that the police had advised that the dispute be resolved administratively, the first defendant pressurized the police to conduct criminal proceedings. The malice of the first defendant in that case thus, was imputed from his refusal to accept the advice given to him by the police.

Now, in the case at hand, the advice given by the police to the appellant in instituting a criminal case in the primary court, exonerated him from the blameworthiness that he did so maliciously. It is more so since it is common ground that, members of the police force are taken as acquainted with skills in dealing with criminal matters according to the law. This view is supported by section 7 of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). Section 7(1)(2) of the CPA for example, guides *inter alia* that, every person who is aware of the commission of or the intention of any other person to commit any offence punishable under the Penal Code, shall forthwith give

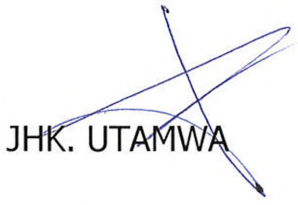
information to a police officer or to a person in authority in the locality who shall convey the information to the officer in charge of the nearest police station. I also underlined these statutory provisions in the case of **The National Microfinance Bank v. Beatrice Mbasha, Civil Appeal No. 25 of 2012, High Court of Tanzania, at Dar es Salaam** (unreported) where I also discussed the elements of this same tort of malicious prosecution. Furthermore, section 7(2) of the same CPA provides that, no criminal or civil proceedings shall be entertained by any court against any person for damages resulting from any information given by him in pursuance of subsection (1). Owing to these statutory provisions and the circumstances of the matter at hand, the appellant could not be blamed for seeking redress from various authorities mentioned above, reporting the matter to police and instituting criminal proceedings against the respondent upon being advised by the police. This is more so because, he is taken to have done so in good faith as hinted earlier, believing that the act committed by the respondent was criminal, though his belief might have been wrong.

Having observed as above, I answer the sub-issue posed above negatively that, the respondent in the case under discussion did not prove the ingredient of malice on the required balance of probabilities. Owing to this finding, I also find that, since the element of malice was not proved in the case under discussion, and since the law guides that all the ingredients of the tort of malicious prosecution must be proved cumulatively and not alternatively as I observed earlier, I cannot avoid answering the major issue negatively. The same is thus, negatively answered that, the District Court was not justified to hold in the impugned judgment that the respondent had

proved all the ingredients of the tort of malicious prosecution including the element of malice. Owing to the reasons shown above, I uphold the first improvised ground of appeal.

Regarding the second ground of appeal, I am of the view that, since the first ground has been upheld, it cannot be argued that the District Court correctly awarded the said Tshs. 3, 000,000/= as general damages to the respondent. I thus, find that it erred in so doing, I uphold the second ground of appeal.

Due to the above reasons, I allow the appeal and set aside the impugned judgment of the District Court. I however, order each party to bear his own costs. This is because, the District Court also contributed to the filing of this appeal for not giving due consideration to the conciliatory measure taken by appellant prior to the filing of the criminal case before the primary court. It did not also consider the legal effect of the above cited provisions of the CPA in relation to the advice given to the appellant by the police. The appellant's counsel did not also address himself to those measures taken by the appellant and the above statutory provisions of the CPA in his written submissions. Rather, the court considered them and they have substantially contributed to the decision in this appeal. It is so ordered.



JHK. UTAMWA

JUDGE

29/04/2021

29/04/2021.
CORAM; JHK. Utamwa, J.
Appellant: Mr. Felix Kapinga, advocate.
Respondent: present.
BC; Ms. Patrick Nundwe, RMA.

Court: Judgment delivered in the presence of Mr. Felix Kapinga, learned counsel for the appellant, in court, this 29th April, 2021.

JHK. UTAMWA.
JUDGE.
29/04/2021.