

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC CIVIL APPEAL NO. 63 OF 2020

(Originating from the Judgment Decree of the District court of Magu in civil Case No. 1 of 2011 dated 22/07/2020)

JANES SAMWEL OTIENO APPELLANT

VERSUS

KHAMIS IBRAHIM ZEPHANIA RESPONDENT

JUDGMENT

03/03/2021 & 08/04/2021

W. R. MASHAURI, J;

Aggrieved with the decision of the District Court of Magu at Magu in Civil Case No. 01 of 2020, delivered on 2nd day of July, 2020 Hon. E. P. Kente, the appellant Jonas Samwel Otieno has now come to this court with three grounds of Appeal to the effect that.

1. That, after finding that the plaintiff was not maliciously prosecuted, the trial court erred in law and fact in awarding the plaintiff general damages.
2. Alternatively, the award of general damages to the plaintiff was not justified.

3. That the quantum of general damages of Tshs 1,000,000/= was not justified. Therefore, the appellant's prayed are that: -
 - (a) This appear be allowed.
 - (b) The order of general damages be quashed and set aside.
 - (c) Costs of the appeal be provided for and any other reliefs that the court may deem just to grant.

The appellant in this appeal is represented by Miss Ester Tubade and upon prayer by learned counsel for both parties, the matter was argued by filing written submissions.

In her written submission in support of the appeal, Miss Esther Tubade learned counsel for the Appellant submitted that, the appellant in this appeal was dissatisfied with part of judgment and decree of the District court of Magu. She has therefore lodged in this court three grounds of appeal as follows: -

1. That, after finding that the plaintiff was not maliciously prosecuted, the trial court erred in law and fact in awarding the plaintiff general damages.
2. That, alternatively, the award of general damages was not justified.

3. That, the quantum of general damages of Tshs. 1,000,000/= was not justified.

And since the three grounds of appeal are related, the learned counsel argued them in consolidation. She submitted that, the assertion by the trial court that, the prosecution's case was dismissed for want of jurisdiction did not end in favour of the respondent. The matter was dismissed for want of jurisdiction as disclosed at page 10 paragraph 3 and 4 of the trial court where the trial court found that: -

"Generally, if the original case was criminal, then the prosecution must have been dismissed by the trial court or abandoned by the prosecutor or decided in favour of the plaintiff/accused at trial or an appeal."

That, in this case what the learned counsel noted is that, the matter was dismissed for want of jurisdiction by the trial court. That, generally, would this matter been a criminal case would have been dismissed by the trial court or abandoned in favour of the plaintiff and/or the accused at trial or on appeal. Since the matter was dismissed by the trial court for want of jurisdiction.

It was clear that the matter was not heard on merits so as to justify the allegation by respondent. By so doing, there was no need for the award of general damages.

To back up her submission, the learned counsel for the appellant referred this court to the case of **Mrs. Huba Hashim Kasim v/s Tonda Express Ltd and 2 others** Civil Case No. 77 of 2016 court of Tanzania Dar es Salaam Registry (unreported) in which the plaintiff had claimed general damages for malicious prosecution and false imprisonment to the prosecutor, or decided in favour in favour of the plaintiff/accused, at trial or on appeal.

That, in this case what the learned counsel for the appellant has been noted is that, the matter was dismissed for want of jurisdiction by the trial court. That, had this matter been a criminal case would have been dismissed by the trial court or abandoned by the prosecutor or decided in favour of the plaintiff/accused, at trial or on appeal. Since the matter was dismissed for want of jurisdiction, it is therefore clear that, the matter was not heard on merits.

That, it was held in the case of Mrs. Huba Hashim Kasim v/s M/s Tonda Express Hc of Tanzania DSM Registry (unreported that): -

"It is the principle of law that, General damages are awarded by the court after consideration and deliberation on the evidence on record able to justify the award."

That, even in the case of Edmund Sylvester Mgeni v/s Mjanja Nagagwa H/c of Tanzania (unreported was held that:

"The plaintiff's prayer for payment for general damages was of no consequence and cannot be granted to the court."

The issue is whether in this matter the plaintiff was maliciously prosecuted.

There are favour ingredients to be established by the plaintiff in a case of malicious prosecution to wit: -

1. The plaintiff was prosecuted.
2. The proceedings ended in his favour.
3. The respondent instituted the proceedings against the plaintiff without reasonable and probable cause and

4. The appellant suffered damages as a result, this was said in the case of **Jeremiah Kamama v/s Bugobola Mayand** (1983 TLR)123

In the Jeremiah Kamama's case (supra) the appellant was charged with a criminal case at Rhombo District in Kilimanjaro Region in Criminal Case No. 212 of 2004 for the offence of receiving stolen property contrary to section 311(I) of the Penal code and the trial court acquitted the appellant of the offence of received stole property. The appellant successfully instituted civil Proceedings in the same court in a judgment delivered on 27/06/2012 that the appellant had managed to establish his claim on the balance of probabilities and he was awarded Shs 7,000,000/= out of 10,000,000/=.

In his efforts to persuade the High court to join hands, with view of the first appellate judge, the learned counsel referred the court to writings of Indian authors in a book titled.

The law of torts by **Ratantal and Dhirajlah** 24th Edition 2002, at page 317; where the meaning of reasonable and probable cause was defined

as contained in the High court of Tanzania in Amina Mpimbi v/s Ramadhani Kiwe (1990) TCR in which the court held that: -

"The dismissal of Criminal prosecution or acquittal of an accused does not great any presumption of absence of reasonable and probable course in that case the appellant's appeal was dismissed with costs for want of jurisdiction."

In this case however, as properly found by the trial court, 1. The suit was over a house rent claim and the trial court dismissed 2. The matter was dismissed for want of jurisdiction as of now the matter under another law of land. 3. There was no probable and reasonable cause established by the plaintiff and the 4. The matter was not reported to the police as it is a civil claim.

On that basis, I find the appellant's appeal is meritorious, the same is allowed with costs.




W. R. MASHAURI

JUDGE

08/04/2021

Date: 08/04/2021

Coram: Hon. W. R. Mashauri, J


Appellant: Present

Respondent: Present

B/c: Elizabeth Kayamba

Court: Judgment delivered in court in presence of Ester Tuvare, counsel for the appellant and Mr. Madukwa, Advocate for the respondent this 08/04/2021. Right of appeal explained.




W. R. MASHAURI
JUDGE
08/04/2021