IN THE HIGH COURT OF TANZANIA

DAR-ES-SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 222 OF 2020

ROBERT MAPESI..... APPELLANT

VERSUS

MICHAEL NYARUBA.....RESPONDENT

(Arising from the decision of the District Court of Ilala)

(Nassary, Esq- SRM)

Dated 25th February 2020

in

Civil Case No. 162 of 2018

JUDGEMENT

21st April & 13th July 2021

Rwizile, J.

This appeal arises from a decision of the District based on a tort of malicious prosecution. It wound seem, parties to the appeal are neighbours at Karakata Mji Mpya, Ilala within Dar-Es Salaam. For sometime now, they have been locked in a boundary dispute surrounding their plots of land. This conflict has resulted in land disputes in the land courts. As if that was not enough, the same has escalated in criminal trial leading to this case.

Early in the morning on 9th August 2016, it was alleged, the appellant was at his home.

Within the boundaries of his plot of land he saw people cutting trees. It was the respondent and his workmen. While he held the gun, his workmen held pangas falling down trees. In the same transaction, the respondent was heard saying "atajuta". When the dust settled, the matter was reported to the police station. Later a criminal case No. 1716 of 2016 was instituted against the respondent at the Ukonga Primary court. He was accused of threatening to kill by using the gun. This was contrary to section 89 of the Penal Code.

After a full trial, the court acquitted him for want of evidence. In retaliation, the respondent commenced a civil action against the appellant at the District court of Ilala. He claimed payment of 70,000,000/= being special damages, the sum of 60,000,000/= and 10,000,000/= as general damages caused by malicious prosecution. He was successfully awarded the sum of 10,000,000/= as general damages after failure to prove specific damages. The appellant was aggrieved by the judgement, hence this appeal by advancing three grounds of appeal namely;

1. That the honourable trial Magistrate erred both in law and facts in holding as she did, that the appellant unlawfully instituted criminal case No. 1716 of 2016 against the respondent without proof and in total disregard of the evidence adduced by the appellant.
2. That the honourable trial Magistrate erred both in law and facts in holding as she did that the respondent was maliciously prosecuted by the appellant without any proof and in total disregard of the appellant's evidence
3. That the honourable trial Magistrate erred both in law and facts in ordering the appellant to pay the respondent a sum

of 10,000,000/= as general damages without any lawful base.

A prayer was therefore made, that the appeal be allowed and the judgement and decree of the trial court be quashed and set aside.

Before this court, the appellant was represented by Mr. Andrew Miraa, while the respondent was represented by Mr. Danstan Goshoko Nyakamo of (MN Law Chambers) learned advocates. The case was heard by written submission.

Before, I deal with merits of the appeal as raised in the submissions, I have first to agree with the respondent's counter-submissions that the appellant filed his submission out of time scheduled by this court. As far as the record shows, the appellant was required to file his submission by 22nd March 2021 as directed on 8th March 2021. The same was filed on 23rd March a day after the time scheduled.

In his rejoinder, it has been so admitted, but with the defence that the 22nd day of March was declared a public holiday mourning the death of the later President John Magufuli. It was stated, then Vice president declared so, on 17th March 2021.

To cure the problems, he said, section 60(1) (h) of the Interpretation of Laws Act, provides the answer. According to the learned counsel for appellant, the 22nd days was an excluded day and the law directs that the next working day should be taken use of. I have meditated the submission by the appellant on this party and I agree with him that the law cures it. Since the same were filed on the next working day, it cannot be taken that the same was filed out of time.

Even assuming, though for the sake of argument that the appellants submission was found time barred, could the only remedy be to dismiss the appeal for failure to prosecute it? In my considered opinion, I would hold a different view. In the case cited, **Harold Mareko vs Harry Mwasanjala,** PC Civil Appeal No. 16 of 2000. The submission was not filed and the appeal was dismissed for want of prosecution. But before doing so, the court considered two cases, Olam Tanzania limited vs Halawa Kwilabya, (Dc) Civil Appeal No.17 of 199, (HC), where the court did not act on the submission filed out of time without leave of the court, and the case of Godfrey Chawe vs Nathanael Chawe, Misc. Civil Appeal No. 22 of 1998 (HC), where failure to file written submission amounted to failure to prosecute the case thereby leading to its dismissal. In **Harold**, the court chose to dismiss the appeal for want of prosecution and the reasons were simple that the there was not submission filed.

I think, submissions in many respects have been held as words from the bar. Words from the bar do not form evidence to be considered. They only serve the purpose of elaborating points already in the record. They are therefore meant to assist the court discover important things to be considered. Some may be important and key to the case but sometimes they appear irrelevant to the just determination of the case.

In appeals, courts determine grounds of appeal. That is what is important for the court to consider. In a situation for instance, where the appellant categorically says, has nothing to add in the advanced grounds of appeal can it also be said, he or she has failed to prosecute the case? My answer is definitely in the negative.

The rationale is simple that in appeals there is evidence on record that needs courts attention and the same is brought to it by memos of appeal, while in applications preceded by the chamber summons with an affidavit there is evidence of the affidavit that the court can consider. The affidavit is evidence and it has weight compared to submissions which are words from the bar because they are not made under oath. Therefore, I think and so hold that I would have disregarded the submission of the appellant if the same would have been found filed out of time. I would have therefore proceeded to deal with the submissions of the respondent in the instance of filed grounds of appeal.

That done and said, will not waste time on the fact raised by the respondent on delaying to serve the summons. The submissions by the appellant served the purpose. That is to say, failure to serve the party as directed by the court may have an impact of either striking out the case for failure of service or order some other reservice.

Have cleared what was considered to be issues not touching on the merits of the submissions of the parties, in this case, I will albeit briefs describe key questions I think the court has to go by when determining a case of malicious prosecution. In order that a suit for damages for malicious prosecution to succeed, principally the following has to be proved as consistently applied by courts and as submitted by the parties:

(i) that he/she was prosecuted;

(ii) that the proceedings complained of were terminated in his favour;

(iii) that the defendant instituted or carried out the prosecution maliciously;

(iv) that there was no reasonable and probable cause for such prosecution; and

(v) that the plaintiff suffered damage as a result of such prosecution.

As in the court of appeal in the case of **Paul Valentine Mtui and Andrea Yakobo vs Bonite Bottlers Limited,** Civil Appeal No. 109 of 2014 (unreported)

The first question that arises is therefore, when is one said to be a "prosecutor" for the purpose of a suit for damages for malicious prosecution?

In my opinion, a person becomes a prosecutor in this regard when he takes steps with a view to setting wheels of legal machinery into motion for the eventual prosecution of a person who he/she alleges has committed a crime. For instance, if A tells the police that B has stolen A's shirt and as a result of that B is arrested and charged with prosecution. A, therefore, will be said to be a prosecutor in a suit for damages for malicious prosecution, it was so held in **Jeremiah Kamama vs Bugomora Mayandi** [1983] TLR 123

The prosecution, however, must have been made or done maliciously. What amounts to "malice" in this regard it is not easy to define. In the English case of **Brown v. Hawkes [1891] 2Q.B718**, at ***page 723, Cave, J.*** defined malice as some other motive than a desire to bring to justice a person whom he (the accuser) honestly believes to be guilty.

In ***Halsbury's Laws of England, 3rd ed. vol. 25, at pg 356***, the term malice is defined as follows:

> *The malice which a plaintiff in an action for damages for malicious prosecution…. Has to prove is not malice in*

> *its legal sense, that is, such as may be assumed from a wrongful act done intentionally, without just cause or excuse, but malice in* ***fact-malus animus****-indicating that the defendant was actuated either by spite or ill-will against the plaintiff, or by indirect or improper motives.*

I think the latter definition, qualified to this extent, that the accuser, in addition to spite or ill-will or indirect or improper motives, was not actuated by a genuine desire to bring to justice the person he alleges to be guilty of a crime.

Having proved that he was prosecuted maliciously and the proceedings in question ended in his favour, the plaintiff must go on to prove that the defendant or accuser has no reasonable and probable cause for such prosecution. This is an important element of the action because it is not every prosecution which ends in an accused's favour that exposes an accuser to a suit for damages for malicious prosecution. If that were so, scores of complainants or police informers would be sued. As ***Georges, C.J.*** (as he then was) stated, in case of ***Tumaniel v. Aisa Issai [1969] HCD n.280.***

> *When there is reasonable suspicion that an offence has been committed and good grounds for thinking that a particular person is responsible it is the duty of every citizen to pass on such information…. To the police help them to find the offender. If the police act on such information and arrest anyone then the person who has given the information should not be liable for damages for defamation unless it is plain that he had no good grounds for suspecting the person named and that he was acting spitefully… Similarly there will be cases where the police take a person into custody for investigation which seems quite reasonable and no*

steps are taken. Again in such a case the accuser should not be charged unless it can be shown that he deliberately made a false report… (where) a report to the police (is) intended to lead to the investigation of a crime… there should be no compensation payable in such case unless the report is shown to be false and prompted by malice.

In that case the learned Court was referring to suits for defamation, but in my view, the principle applies with equal force to suits for damages for malicious prosecuting.

What, then, amounts to "reasonable and probable cause"? In the case of ***Hicks v. Faulkner, [1881] 8 Q.B.167,*** *it was held by* ***Hawkins, J.*** at page 171:

> *I should define reasonable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any reasonable and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.*

This holding was quoted with approval in ***Herniman v. Smith, [1938] 1 All E.R. 1,*** *decision by the House of Lords at page 8*. The question whether or not an accuser acted maliciously and without reasonable and probable cause is a question of fact to be decided on the basis of the circumstances revealed by the evidence in each particular case. I am inclined therefore, to dispose of this appeal along the principles so laid down herein.

From the above, it is now opportune to delve into grounds of appeal. having gone through the first and second grounds of appeal, I think I have to determine them together because they are dealing with whether the case was proved. As complained, the appellant was found liable for having maliciously prosecuted the respondent. Indeed, the trial court was right in holding that the appellant was prosecuted by the respondent. This is so because, he reported the matter at the police station that led to his arrest. That in itself proved that he was the one who prosecuted the respondent.

Second it is true that the prosecution ended in the acquittal of the respondent. I have gone through exhibit P10 which is the judgement of the Ukonga Primary Court stating the reasons why the respondent was acquitted. It therefore goes without saying that there is no way the appellant cannot say is not the cause of this on the respondent. I agree with the trial court for having held so.

As to whether there was evidence that the appellant had no malice, this can be solved by the evidence on record. The plaint instituted at the trial states clearly; at paragraph 4, 5 and 6 respectively

> 4. *That at mid-night of 9th August 2016, the police officers from Stakishari police station arrived to arrest the plaintiff at his Karakata, Mji Mpya residency after the defendant made false allegation that the plaintiff did threaten to shoot and kill the defendant using the firearm (gun) and claimed to posses it illegally contrary to the country law. then at the same police station legal proceedings proceeded against the plaintiff*

whereby his gun was also confiscated and kept under further police investigation from the month of August to December 2016

5. *That, later the plaintiff was prosecuted at the primary court of Ukonga via Criminal case no. 1716 of 2016 in which the defendant herein was complainant and the plaintiff was the accused which amounted to put the law in motion of a criminal charge of that the plaintiff did not threaten to shoot and kill the defendant using the firearm (gun) contrary to section 89 of the penal code [Cap 16 R.E 2002]*
6. *That the defendant had no reasonable and justifiable cause upon which to base his report of criminal investigation to the police and thereby insisted the same to be prosecuted relying on the false information he gave himself to the police. That the matter was called upon for several times but the plaintiff was discharged under section 37(1) of the Magistrates court Act [Cap 11, R. E 2002] on the ground that the defendant failed to prove the case beyond reasonable doubt.*

From the paragraphs mentioned above, it is shown that the centre of the respondent's case rests here. This means he brought evidence to prove the allegations stated therein. At page 16 to 17 of the typed proceeding of the trial court, the respondent testified that;

"…Your honour, the defendant had complained that I threatened to kill him by using a short gun which is owned by my company ***BUZAHYA****, and I own it under legal authority for the security company which is valid… I believe that the defendant intended to lower my reputation in the society because before he sued me in*

the criminal case, we were in a civil case dispute concerning land dispute and he saw that he was about to lose his case, he fabricated that I possessed fire arm contrary to the law and complained that I was threatening his life, which in the result, the police came and detained my house early in the morning.

His evidence supports his plaint. But exhibit P10 speaks a different thing. According to exhibit P10, the respondent was charged on events that took place on 9th August 2016 at 5.00 am. Here, the case for threatening to kill the respondent was alleged took precedent. The appellant testified so at the Primary Court as he did at the district court when he was prosecuted. There is nowhere, where, it is recorded in his evidence as in exhibit P10 that he was arrested by mid night after his house was surrounded by the police officer. It may be said with certainty that what is stated in paras 4 to 6 of the plaint is not what is reflected in the exhibit P10. As well, exh P10 does not match his statement before the trial court. It should be recorded that what the appellant complained of at the police on 9th August 2016, formed the basis of prosecution in exhibit P10 and this is what is reflected in the impugned judgement. The appellant in actual fact called witnesses to prove that he was threatened by the respondent at his home.

It should be also noted that the respondent did not call evidence to prove that it was not true. He admitted to have been owned the short gun even though he does not admit to have used it to threaten the appellant. The fact that the appellant was consistent in what he testified at the primary court and as in exhibit P10 and what he testified at the district court impresses me that he was not telling lies. The evidence that the appellant told the police that the respondent owns the gun illegally is not backed by

evidence. There is no proof to that effect. I have therefore no reason to believe that the respondent told the truth about what real happened. The fact is clear that there was proof that the respondent committed the offence. As I have shown before, it is not enough to prove malice by acquittal because not all acquittals reflect the truth about the case.

Some cases are lost on technicality or are poorly prosecuted. That being the case, I am not in line with the trial court that there was proof that the appellant was malicious and had no reasonable cause to believe that the respondent committed the offence. He showed that on 9th August the respondent appeared at his home premises at a place where they have a conflict. He was having a gun which he indeed said has one and his workmen cut the trees on the boundaries and was saying "atajuta". By all sense, if one appears with the gun, and with a force of boys, does that not amount to such threat? In my view, the case was not proved therefore the first two grounds of appeal have merit.

On the last ground of appeal, I have shown before that there cannot be an award of damages without proving that there were such damages caused. It was therefore the duty of the respondent to prove he suffered damages. That is why he was not awarded any of such damages. As to general damages, the same are awarded upon proof that the plaintiff/ respondent suffered generally as to be fairly compensated. There is no proof that he was indeed entitled to any of the claims. It is therefore true that even the amount granted as general damages was unworthy. This makes it clear that the third ground of appeal has merit as well. Having found as herein, I allow the appeal. the decision of the trial court is quashed and orders therefrom set aside. Costs to follow the event

AK Rwizile
JUDGE
13.07.2021

Recoverable Signature

X

Signed by: A.K.RWIZILE