

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DISTRICT REGISTRY AT TABORA**

DC. CIVIL APPEAL NO. 9 OF 2019

*(Original Civil Case No. 3 of 2019 from District Court of Tabora
at Tabora)*

DAVID SAMSON BUTEMBA.....APPELLANT

VERSUS

COSTANTINE COSMAS KIHALIYE.....RESPONDENT

JUDGMENT

Date: 06/7/2021&27/08/2021

BAHATI, J.:

The appellant filed Civil Case No.3/2019 in the District Court of Tabora claiming that, psychologically, his reputation and above his dignity was lowered. Further, his children failed to attend school because of confusion by their father's imprisonment and his health deteriorated, a situation that caused him to attend treatment at Njinga laboratory on 21 March, 2019 wherefore the appellant prayed for the following orders;

- i. The judgment and decree against the defendant*
- ii. General damages to the tune of TZS 40,000,000/=*
- iii. Specific damage to the tune of TZS 10,000/=*

- iv. *Payment of TZS 20,000,000/= for the missing tables, stools, and other properties.*
- v. *Any other relief as this honourable court may deem fit.*

Briefly, the background of this matter is a criminal charge, where the appellant **David Samson Butemba** was charged at Tabora Urban Primary Court for the offence of criminal trespass contrary to section 299 of the Penal Code, Cap.16 [R. E. 2019]. He was convicted and sentenced to three months in jail. He appealed to the District Court where he was set aside and sentence quashed and released from jail.

Following that incarceration, the appellant lost business and instituted a civil case in the District Court of Tabora claiming for damages. However, he lost his case through the decision of Millanzi, A.T RM delivered on 25th September, 2019.

The District Court dismissed his suit for failure to prove the case on the balance of probability, therefore; the appellant instituted his appeal in the High Court namely DC Civil Appeal, No. 9 of 2019 against the respondent.

The grounds of appeal by the appellant are premised on five grounds that;

- 1. *That, the trial resident Magistrate erred in law and fact for failure to consider documentary evidence adduced by the appellant, hence occasioned a failure of justice.*

- II. *That, the trial resident magistrate erred in law and fact to use legal technicalities to defeat apparent justice of the appellant as opposed to the constitution of the United Republic of Tanzania 1977 as amended from time to time, hence occasioned a failure of justice on part of the appellant.*
- III. *That, the trial resident Magistrate erred in law and fact for failure to know that, the appellant was maliciously prosecuted by the respondent and later on exonerated by the District Court due to the act of the Respondent to misuse the state organs, hence deserved damages to vindicate his image, reputation, and sufferings caused by the Respondent.*

Therefore the Appellant is seeking the following orders that:-

- i. *The trial judgment and decree be quashed and set aside.*
- ii. *Costs of this suit be provided for.*

When the matter was called upon for hearing, the appellant was unrepresented while the respondent had the services of Mr.Musa Khasim, learned counsel.

In his submission, the appellant objected to the judgment of the lower court. He submitted that the court failed to consider his evidence and no sufficient reasons were adduced. He submitted that his evidence relied on documents that were received by the court and he brought one witness namely Joseph Nyabutongo who testified before the court

that the respondent was a businessman and the said witness went to prison to visit the appellant when he was serving the sentence of the trial court.

On the second ground of appeal, he contended that the court denied him justice because the District Court stated that the appellant has submitted photocopies of the original receipt book, TIN, license; photograph of the business, where he had original documents while he was using the original ones doing his business.

On the 3rd ground of appeal, he submitted that in respect of the said allegation he was not the one responsible since the respondent went to his shop with policemen who arrested him. He prayed to this court that the decision on the Civil Case No. 3/2019 be quashed.

In response, the counsel for the respondent, Mr. Mussa Khasim submitted that the appeal has no merit and be dismissed with costs. He submitted that according to paragraph 3 of the plaint; the plaintiff claims against the defendant TZS 70,000,000/= for the sake of false imprisonment and malicious prosecution. The counsel submitted collectively that; section 100 (1), (2) and (3) of the Evidence Act, Cap.6 [R. E 2019] provides that he who alleges must prove.

He submitted that according to the proceedings of the trial court, the evidence of PW1, now the appellant submitted that,

“When I was in my business on 20/11/2019 the defendant came at my shop situated at Madaraka road with three policemen. He found me with customers who were taking receipts from me.”

He submitted that there is nowhere on record been reported as false imprisonment and there is no evidence that the respondent maliciously prosecuted the appellant.

He further contended that there is nowhere in the record shown respondent or three policemen arrested him. Further, he contended that even PW2, Edward Joseph Nyatongo never corroborated that he was falsely imprisoned or maliciously prosecuted. He thus submitted that since there is no evidence to support his case, the appellant did not prove on the balance of probabilities.

The counsel for the respondent further submitted that; for the malicious prosecution to be sustained, the court has laid principles in the case of **Jeremiah Kamama Vs Bugomola Mayandi, High Court of Tabora Civil Appeal 4 of 1981** where Chipeta, J. as he then was held that; for a suit of malicious prosecution to succeed the plaintiff must prove simultaneously that;

- i. He was prosecuted ;*
- ii. The proceedings complained of ended in his favour;*
- iii. The defendant instituted the prosecution maliciously;*

- iv. *There was no reasonable and probable cause for such prosecution; and*
- v. *Damage was occasioned to the plaintiff.*

He further submitted that according to his evidence, there is no proof apart from mentioning him. He submitted that the allegation by the appellant that he presented original documents is a serious allegation that cannot be taken lightly. He then contended that even though the documents were received by the court, malicious prosecution was not proved. He prayed to this court to dismiss the appeal with costs.

In his rejoinder, the appellant reiterated his submission in chief and contended that the counsel for the respondent has failed to evaluate the Primary Court's decision. He averred that he has proved beyond the balance of probabilities the amount of TZS. 70 million. He then prayed to this court to allow the appeal with costs.

Having heard submissions on the grounds of appeal from both parties and traversed on the records, I now turn to consider the merits and demerits of the appeal in respect of submissions, facts and evidence gleaned from the records.

Before evaluation, I find it appropriate to preface this matter with the principles which will guide the court in determining this case.

It is a settled principle of law that to succeed in a suit for malicious prosecution, the plaintiff must prove four elements. As

submitted by the learned counsel citing the case of **Jeremiah Kamama Vs Bugomola Mayandi (supra)**.

Guided by the preceding principles, in the case at hand, it is not in dispute that the appellant, David Butemba was sued by Constantine Kihaliye, the respondent in the criminal case at the Primary Court, the case which ended in the appellant's favour on appeal. Thus the first two elements have been proved.

Nevertheless, in the case of **Bhoke Chacha v Daniel Misenya [1983] TLR 329** the Court held that;

*“The fact that the appellant was subsequently acquitted does not establish that the original complaint by the respondent was false and malicious. No amount of tearful or eloquent complaints will change this position. It is for the appellant to prove that the respondent’s **report was maliciously and without reasonable or probable cause**. This can only be done by adducing evidence that will lead the court to make a finding whether the respondent acted maliciously and without reasonable and probable cause. Even if there had been some evidence to satisfy the court that the respondent was malicious and acted without reasonable and probable cause, the appellant would still be required to establish that he suffered some injury for which he is entitled to some amount of damages. For the appellant to be entitled to general*

damages, he would have to prove that he suffered mental or physical pain as a result of being sent to prison.”

Therefore, the mere fact that the appellant was imprisoned did not by itself justify the grant of damages.

The challenging argument is on the remaining elements; starting with *whether the respondent instituted the prosecution maliciously*. As submitted by the counsel for the respondent that there was no evidence the appellant testified that the respondent filed the case maliciously. Either PW2, Edward Joseph Nyatongo never corroborated that the appellant was falsely imprisoned or maliciously prosecuted.

Applying the case of **Mhando V.AG & Another Civil Case No. 61/2003 [2007] Tanzania High Court 11** (unreported). The wanting question, therefore, is whether the Respondent prosecuted the appellant for reason other than enforcing the law. The Court in the case of **Amina Mpimbi V Ramadhani Kiwe [1990] TLR 6** has expounded in detail the meaning of reasonable and probable cause, in the case of **Herniman V Smith [1938] DA C 305** quoting;

“It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but there is a reasonable and probable cause for prosecution. In that case, the house of

lords approved a definition of reasonable and probable cause, by
Hawking, J in Hick V Faulkner (1881) 8 QBD 167,171 as;

"An honest belief in the guilty of the accused based on a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinarily prudent and cautious man, placed in a position of the accuser, to the conclusion that the person charged was probably guilty of the offence imputed."

According to the given definition, the appellant has to show that the respondent when prosecuting did not have such a belief. Upon perusal of the court records, the evidence adduced shows that the respondent went with three policemen and arrested the appellant.

Therefore in this regard as stated earlier since there was no record of malicious prosecution, the appellant has failed to prove apart from mentioning him.

This court having crossed on the records and documents submitted by the appellant noted that even though the documents would have been received, there is no proof of malicious prosecution ingredients. The appellant when cross-examined by the defence he said that for ease of reference that ;

" Exhibit P1 is a laboratory report. I was tested malaria and urine. Malaria was seen in the Urine no germs were seen. I did check up

after getting out of prison. Exhibit P3 is a photograph "2". It does not show if the place is my shop. Exhibit P2 is photograph "1" which shows my business because my picture is there on the photograph. Exhibit P5 is TIN. TIN shows the type of business I am doing. Exhibit P4 is a business licence."

For the appellant to have succeeded in his action against the respondent, he should have proved to the court that there was "malice" on the part of the respondent in that he had prosecuted him in the said Primary Court "*without just cause or excuse* " or that the respondent had no "reasonable and probable cause" when he prosecuted over there. Therefore in my view, the court is not convinced that the respondent had the wrong motive to prosecute the appellant in the circumstances of this case. I find no reason to determine that the respondent had malice.

In view of the foregoing reasons, I hold that the third *element that is there was no reasonable and probable cause for such prosecution, and the fourth element that damage was occasioned to the plaintiff required* in establishing the prosecution for malicious prosecution was not met. The appellant's case cannot succeed because he has failed to prove that the prosecution against him was without reasonable or probable cause which negated the existence of any malice and thus the action for malicious prosecution is bound to fail. In the same vein, the

issue of damages cannot arise. Consequently, this appeal has no merit and I accordingly dismiss it with costs.

Order accordingly.



A. A. BAHATI

JUDGE

27/8/2021

Judgment delivered under my hand and seal of the court in Chamber, this 27th day August, 2021 in the presence of both parties.



A. A. BAHATI

JUDGE

27/8/2021

Right of appeal fully explained.



A. A. BAHATI

JUDGE

27/8/2021

