IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 27 OF 2020

(Arising from the Ruling of Chato District Court Civil Case No. 15 of 2019 dated 20/03/2020 Honourable D. D. MLASHANI RM.)

AMOS LUKINDA.....APPELLANT

VERSUS

ESTER PETRO.....RESPONDENT

JUDGMENT

Date of last order: 07/09/2021

Date of Judgment: 30/09/2021

F. K. MANYANDA, J.

Upon sustaining a preliminary objection on point of law the District Court of Chato (trial Court) struck out a plaint lodged by the Appellant in Civil Case No 15 of 2019. In that Civil Case the Appellant, Amos Lukinda sued the Respondent, Ester Petro, for compensation to the tune of Tshs 72, 000,000/= as general damages for malicious prosecution and false imprisonment.

The Respondent filed a preliminary objection in the trial Court on four (4) points of law that:-

(i) The plaint does not disclose a cause of action.

(ii) *The suit is incompetent for lack of jurisdiction.*

(iii) *The suit is incompetent.*

(iv) *The plaint is incompetent for non- joinder of parties.*

The trial court overruled the objection in respect of points one and two of the preliminary objection. However, it sustained the objection in point of the preliminary objection that the suit was incompetent before it. The reason it gave is that the criminal prosecution was not determined in favour of the Appellant who was prosecuted by the Respondent for criminal charges in the District Court but the criminal case was dismissed under section 225(5) of the Criminal Procedure Act, [Cap. 20 R. E 2019] (the CPA) and the Appellant (accused) discharged. It was the reasoning of the trial Court that since the Appellant could be re-indicted with the same facts, then it cannot be said that the criminal prosecution was terminated in his favour; therefore, the suit was incompetent. The trial Court did not make any finding on the fourth point on the preliminary objection because the third point sufficed to dispose it of.

The Appellant got dissatisfied by the ruling of the trial Court, hence the instant appeal which built on four (04) grounds of appeal as follows:-

1. *That the Honourable Magistrate erred in law and in fact to admit the respondent's written statement of defence as the respondent's preliminary objection which drawn (sic) by the person whom is not an advocate contrary with the law.*

2. *That he Honourable magistrate erred in law and in fact for nor (sic) declaring that the respondent filed the written statement of defence out of time of 21 days without leave of the court.*

3. *That Honourable magistrate erred in law and in fact in holding that the accused person has no right to claim the malicious prosecution or false imprisonment if the criminal case was dismissed for non-appearance of the Republic witness.*

4. *That the Honourable magistrate erred in law and fact to decide the matter in favour of the respondent without putting into consideration the ruing of the High Court of Tanzania at Mwanza in the case of Ruth Langeni Mfanga vs Ilemela Municipal Council*

Labour Revision No. 66 of 2019 which was adduced by the Appellant in that case the Honourable S. M. Rumanyika, J. prohibited to admit any pleading which is drawn by a person whom is not an advocate.

At the hearing, the parties argued their case personally unrepresented.

The Appellant argued in support of his appeal that the trial court erred in law and facts for dismissing the civil case he had lodged on reason that the prosecution of the criminal case against him was not finally decided in his favour because it was discharged under section 225(5) of the CPA. His argument is that the case was dismissed for want of prosecution. According to him, the prosecution had no evidence. He added that what is needed to be proved is malice and incarceration, it is not necessary that the case comes to an end.

He cited the case of **Tanzania Breweries Ltd vs Charles Msuku and Another,** Civil Appeal No. 18 of 2000 (unreported) Court of Appeal of Tanzania (CAT) at Dar es Salaam.

He also cited the case of **Albert Mlilo and Another vs William Jeremia Kasege,** Civil Case No. 01 of 2015 (unreported) High Court Mbeya, he didn't supply a copy.

On the other point of appeal, he argued that it was wrong for the Chato District Court to reject the plaint on reason that it was not drawn by a qualified person. He argued that he hired an advocate to draw the plaint, but he filed it himself. To the contrary he argued, it was the Written Statement of Defence which was drawn by an unqualified person, he objected against it but his objection was overruled. It was his views that the trial court was biased. He prayed the appeal to be heard *de novo*

On her side, Ester Petro had nothing useful to assit the Court, she simply said as follows:-

> " *sina mambo mengi, majibu yako mbele yako ninaomba shauri litupiliwe mbali kwa gharama."*

Literally means she had no many things as the answer are before this court and prayed the appeal to be dismissed with costs.

Let me start with ground three of the appeal. The issue in this ground of the appeal is whether the District Court was justified in law to strike out the plaint on preliminary objection basing on ground that the prosecution of the criminal case was not terminated in his favour.

I have gone through the ruling of the District Court of Chato in Civil Case No. 15 of 2019 dated 20/03/2020 and found that it struck out the plaint. The reason for taking this decision is stated at page 7 of the typed ruling as follows: -

> *"On my humber option (sic) I think, malicious prosecution to stand as a cause of action, the plaintiff should be prosecuted in criminal trials, case full determined on merits and accused declared innocent and acquitted, a case dismissed under section 225(5) of the CPA, Cap. 20, for want of prosecution cannot be basis of malicious prosecutions. I say so because a person can be re-arrested at any time after being (sic) discharged under section 225(5) of the CPA. This means the plaint who (sic) has no judgment in his favour, has no locus to sue for malicious prosecution."*

In the plaint the Appellant averred in paragraph 3 that:-

> *"The Defendant on or about 14/03/2017 unlawfully reported to the Chato Police Station false information*

against the Plaintiff that on 13/03/2017 at about 20.00 hours at Chato Village within Chato District in Geita Region the plaintiff did threaten to kill Esther Petro (Defendant)."

In paragraph 6 of the plaint it was averred as follows:-

"6. That, the defendant false information to the Chato Police Station caused the plaintiff to be arrested and taken to the Chato District Court and prohibited to be bailed and to be thrown into prison custody since on 21/03/2017 up to 17/05/2017(56 days in imprisonment."

Similarly in paragraph 8 of the Plaint it was stated as follows:-

"That, on 27/07/2018, the Hon. Magistrate of Chato District Court discharged the Appellant for non-appearance of prosecution witnesses and held that this is the second time, Public Prosecutor claims not to have witnesses, that trend in my views shows that the prosecution is no longer interested with their case on that ground I hereby discharge the accused the prosecution is no longer interested with their case. On that ground I hereby discharge the accused."

I have reproduced in extension the relevant paragraphs in the plaint in order to reveal what was averred to by the Plaintiff. As it can

be gleaned from the quoted paragraphs of the plaint, it is obvious that the criminal charge was dismissed and the plaintiff discharged.

Paragraph 8 of the plaint did not mention the provisions of the law under which the charge was so dismissed. However, annexure to the same paragraph 8 marked 'F' which is the proceedings in the criminal case concerned reveal that the charge was dismissed under section 225(5) of the Criminal Procedure Act, [Cap. 20 R. E. 2019]. That provision of the law provides powers to a trial court to dismiss a charge and discharge the accused where the prosecution is unable to proceed with the hearing the case where the case is adjourned for aggregate of 60 days and no certificate for adjournment by the prosecution is filed in Court.

However, the same provision provides that such discharge is not a bar to a subsequent charge being brought against the accused for the same offence. Therefore, it goes without saying that pleadings sufficiently revealed that the prosecution was terminated under section 225(5) of the CPA.

The Appellant argued that the dismissal of the charges and ultimately his discharge under section 225(5) of the CPA amounted to termination of the criminal prosecution is his favour. I have read the case of **Tanzania Breweries Ltd vs. Charles Msuku and Another** (supra) Civil Appeal No. 18 of 2000 (unreported), CAT at DSM and found that the same is distinguishable with the current matter. In that case, the appellant who was the defendant, accepted liability in a consent judgement, therefore, there was no issue of re-indictment. In that case, the appellant who was the defendant, accepted liability in a consent judgement, therefore, there was no issue of re-indictment.

Similarly, the case of **Albert Mlilo and Another vs. William Jeremia Kasege** (supra) decided by this Court at Mbeya, is distinguishable in that the plaintiff was arrested and detained in police custody but not prosecuted in a court of law, the tort wrong was that of false imprisonment where termination of the criminal proceedings in favour of the accused (plaintiff) was not among the required element.

In the circumstances of this matter and the law, can it be said that the prosecution of the criminal case, for purposes of a tort for malicious prosecution, was terminated in favour of the Plaintiff, in the instant

matter, the Appellant? The answer to this question is in negative as I demonstrate hereunder.

First, termination of the criminal prosecution under section 225(5) is when the court is ready to proceed with hearing of the case but the prosecution, in absence of any certificate for adjournment, fails. It follows therefore, the case becomes terminated before it is decided to its merits. Second, the prosecution still retains its right to re-indict the Plaintiff (Appellant) and there is no time limit.

The word 'prosecution' is defined in the dictionary called **Black's Law Dictionary** 8th Edition, by Bryan Garner, and at page 1416, to mean: -

"Criminal proceedings in which an accused person is tried."

The word 'trial' under the same **Black's Law Dictionary**, (supra) at page 1735, is defined to mean: -

"A formal judicial examination of evidence and determination of legal claims in an adversary proceeding."

From the above definitions of the words "prosecution" and "trial," in my considered opinion, for the prosecution to have finally terminated in favour of the Plaintiff, there must be a formal judicial examination of evidence and determination of legal claims in an adversary proceeding. In other words, the criminal case must be tried to its finality.

I am not alone on this position of the law, my Brother, Hon. Kibela, J. as he then was, when he was confronted with a situation akin to this one but dealing with section 98(a) of the CPA which provides for termination of criminal proceedings with option to re-indictment of the accused in the case of **Masunga Saguda vs Bariadi District Council (DC)** Civil Appeal No. 25 of 2016 (unreported) stated as follows: -

> *"And where the case is/was withdrawn under section 98(a) of the Criminal Procedure Act, (Cap. 20 R. E. 2002), certainly this provision is used to remove from the court a charge that is defective with a view of instituting a proper charge but which must be invoked before the accused is given an opportunity to defend his case. From the above therefore, as the case against the accused was withdrawn under 98(a) of the Criminal Procedure Act (supra) as rightly admitted by both sides and the trial records reveal the same, thus, the prosecution of the accused/appellant was not heard and finally decided by the trial court as there had been no examination of evidence and determination of legal*

claims reached. Albeit the accused was discharged, however, as rightly submitted by Mr. Kibasi, learned advocate, the appellant may be charged any time for the same charge which had been withdrawn under section 98 (a) of the Criminal Procedure Act, which is not a bar to further prosecution upon the same charge..... ***Therefore, under the circumstances, I differ with Mr. Ng'wigulila, learned counsel that for a case to be withdrawn under section 98 (a) of the Criminal Procedure Act, (supra) and the accused discharged, then the criminal prosecution did end in favour of the plaintiff. This is because the prosecution is still open*** *and never ended as no judicial examination of evidence and determination of legal claims was done as well as no acquittal or conviction was reached." [Emphasis added]*

In the result this Court finds that the trial court was legally justified to hold that a discharge under section 225(5) of the CPA which does not bar further prosecution on the same facts, did not amount to termination of the criminal prosecution in favour of the Appellant's favour.

It is trite law that for the torts of malicious prosecutions to succeed five elements have to be cumulatively proved namely: -

(i) That, the plaintiff was prosecuted

(ii) That, the prosecution ended in his favour

(iii) The defendant acted maliciously

(iv) The, defendant acted without reasonable and probable cause; and

(v) The Plaintiff suffered damages.

There is a plethora of authorities on this position of the law. See for example the cases of **Hosea Lalata v. Gibson Zumba Mwasote** [1980] TLR 154 which was followed with approval by the Court of Appeal in many other cases including the recent case of **Shadrack Balinago vs Fikiri Mohamed @ Hamza and 2 Others,** Civil Appeal No. 223 of 2017 (unreported), Others are: - **Jeremia Kamana vs. Bugomola Kayanda** (1983) TLR 123, **Masunga Saguda vs. Bariadi District Council,** (DC) Civil Appeal No. 25 of 2016, **Yonah Ngassa vs. Makoye Ngassa,** [2006] TLR 213, and the case of **Ahmed Chilambo vs. Murrays & Roberts Contractors (T) Ltd,** Civil Case No.44 of 2005 (unreported), to mention a few.

In the latter case, it was stated as follows: -

"In the lack of an acquittal of the plaintiff he cannot successfully urge that he was maliciously prosecuted. For

tort of malicious prosecution to stand, there must be facts showing that the prosecution ended in favour of the plaintiff and short of those facts like in this case, it is difficult to say that there are facts constituting a tort of malicious prosecution. Likewise, in order for the information to be said to be false, it must lead to an acquittal of the plaintiff."

It follows therefore, that lack of the element of termination of the criminal prosecution in favour of the plaintiff, been one of the vital elements of the tort of malicious prosecution, rendered the suit by the Plaintiff against the Respondent unmaintainable, been filed prematurely.

This ground disposes of the appeal, I don't see any need of going into the nitty gritty of the other grounds of appeal.

In the upshot, I do hereby dismiss the appeal in its entirety with costs.

It is so ordered.

F. K. MANYANDA
JUDGE
30/09/2021