IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL 35 OF 2021

ALEX SUTA ..... APPELLANT

VERSUS

NAOMI J. MAKULUSA ..... RESPONDENT

(Appeal form the decision of the District Court of Kilombero District at Ifakara (Hon. T.A. Kaniki, RM1.))

dated the 23rd day of March, 2021

in

Civil Case No. 35 of 2019

JUDGMENT

Date of Last Order: 17/11/2021 &
Date of Judgement: 10/12/2021

S.M. KALUNDE, J.:

The present appeal traces its origin in **Civil Case No. 35 of 2019** ("the suit") which was a civil suit founded on a tort of malicious prosecution. The suit terminated in favour of the respondent whereof the appellant was ordered to pay the respondent Tshs. 1,000,000.00 for being compensation for illegal arrest and detention. The respondent is aggrieved by the decision and hence this appeal predicated on two grounds of appeal.

The suit for malicious prosecution arose from incidents that took place 31st August, 2019. The facts as may be discerned from the records are that: on the fateful day, the respondent went to clear her farm ready for an incoming agricultural season. In the process of clearance, she set the farm ablaze. A group of people, allegedly on the directives of the appellant, approached her alleging that she had set alight some paddy, the properties of the appellant. The next day, on 01st September, 2019, she was notified to report at Mngeta Police Post. On arrive at the police post she informed of the respondent's complaint that she had set alight his paddy. She was asked to pay Tshs. 500,000.00 being compensation for the seven (7) bags of paddy destroyed. She refused the allegation and as well as paying the proposed amount set by the police. She remained into police custody until around 13:00hrs on 03rd September, 2019 when she was released on bail.

Upon her release, as a bail condition, she had to report several times before the Mngeta Police Post. At the station, she maintained on her innocence and denied demands to pay the compensation. Her claim was that the matter be determined by a court of law. As a result of her persistence denial of the charges her husband withdrew

his suretyship leading to her detention for the second time. This time her brother came to her rescue. On 02nd October, 2019 she was notified that the appellant had opted to withdrew the complaint against her.

With the criminal charges out of sight, the respondent filed Civil Case No. 35 of 2019 before the District Court of Kilombero District at Ifakara **("the trial court")**. In her plaint, the respondent alleged that since her detention she has suffered from a "SENSE OF WRONG" which is "SOLATIUM". In addition to that, she contended that during the period of her detention she has her lost dignity and personality to her surrounding community and was subjected to loss of income, by leaving her legal and only means income in the shamba works to attend an appear to the police station frequently. She prayed for compensation to the tune of Tshs. 2,000,000.00 and costs of the case. against the above allegations, the appellant filed a written statement of defense denying all the allegation with a prayer that the suit be dismissed with costs. Upon full trial, the trial court was satisfied that, on the balance of probabilities, the respondent had proved her case. She was thus awarded Tshs. 1,000,000.00 in compensation.

Believing that the trial court erred in its decision, the appellant preferred the instant appeal on the following complaints: **one**, that the trial court erred in deciding in favour of the respondent whose evidence before the trial court was not sufficient to proof of her claim; and **two**, that the trial court failed to properly evaluate the evidence before it and arrive at an erroneous conclusion. **WHEREFORE**, the appellant prayed that this Court allows the appeal by quashing the proceedings and setting aside the whole judgment of the trial court.

It was ordered that the appeal be disposed by way of written submissions. Unrepresented, both parties prepared and filed their respective submissions in accordance with the orders scheduled by the Court hence the present judgment.

Submitting in support of the appeal the appellant cited the case of **Jeremiah Kamama vs Bugomola Mayandi** [1983] TLR. 123 where this Court (**Hon. Chipeta, J** as he then was) stated that in order that a suit for damages for malicious prosecution to succeed, a plaintiff has to prove the following;: (a) that he was prosecuted; (b) that the proceedings complained of ended in his favour; (c) that the

defendant instituted or carried out the prosecution maliciously; (d) that there was no reasonable and probable cause for such prosecution; and (e) that the plaintiff suffered damage as a result of such prosecution. Considering the above authority, the appellant contented that the respondent's evidence and witness testimony before the trial court failed to meet the threshold required to prove a tort of malicious prosecution or false imprisonment.

In dismissing the respondent case, the appellant argued that he was not the one who set in motion the wheels for the arrested of the respondent. He said that he reported the matter to the police who went and investigated the area set alight and resolved that the complaint was genuine leading to the arrest of the respondent. On the question whether the proceedings ended in the respondents' favour, the appellant contended that the police advised that the matter be settled amicably between the parties through a resolution of a land ownership dispute between the parties. He also contended that the respondent failed to prove whether she suffered any damages from the alleged prosecution by the appellant.

Replying to the above arguments the respondent was brief, he insisted that the records are clear that the appellant was responsible for reporting the matter to the police resulting to her arrest and detention. In her view the report to the police was intended to allure her to pay money and defame her. In addition to that she argued that as a result of the arrest she suffered psychological defects as well as loss of income. Relying on the above arguments, the respondent prayed that the appeal be dismissed with costs.

In his equally brief rejoinder the appellant submitted that, before the trial court, the respondent failed to provide any proof of evidence she was falsely imprisoned or maliciously prosecuted by the appellant. He also argued that there was no evidence or proof that there were any criminal charges against her or that the proceedings terminated in her favour. Reminding of his earlier position, the appellant argued that the respondent failed to stablish all the ingredients of the tort of malicious prosecution. In the end the appellant prayed that the appeal be allowed with costs to be awarded in his favour.

Having carefully examined the records as well as the written submissions and authorities filed by the parties, I think the issue for my determination is whether appeal is merited. However, in resolving the present appeal I propose to approach the grounds of appeal generally and respond to the common question whether the available records support the trial court findings that malicious prosecution was sufficiently established.

It is now settled that when suing for malicious prosecution a party must prove all the four ingredients which are: one,

1. *That the proceedings were instituted or continued by the defendant;*
2. *That the defendant acted without reasonable and probable cause;*
3. *That the defendant acted maliciously; and*
4. *That the proceedings terminated in the plaintiff's favour.*

This view was held by the Court of Appeal in **Hosia Lalata vs. Gibson Zumba Mwasote** (1980) TLR 154; **Yonah Ngassa v. Makoye Ngassa**, [2006] TLR 213 which was cited with approval in **Shadrack Balinago vs Fikiri Mohamed @ Hamza & 2 Others**

(Civil Appeal No.223 of 2017) [2018] TZCA 215; (08 October 2018 TANZLII). Mindful of the above guiding principles I will examine the available records versus the grounds of appeal raised and the submissions made for and against the appeal.

It is common ground that the events leading up to the arrest and detention of the respondent were commenced by the appellant. For that, there is, at least, consensus that it was the appellant who reported the matter to the police resulting to the arrest and detention of the respondent. However, in his submissions the appellant appeared to suggest that he was not the one who set the legal machinery in motion, he said he only reported the matter to the police, and they are the one who set the matter in motion. I do not think that is a true and correct position of the law. In my view, where an individual reports or gives information to a police officer indicating that some person is guilty of a criminal offence and relying on that information that person states that he is willing to testify and give evidence before the court or tribunal on the matter in question; it is should be concluded that he desires and intends that the reported person or persons should be prosecuted. The person so reporting should be deemed to have actively set the legal machinery

in motion. The appellant cannot, therefore, shun away from the fact that he was the one who reported the matter from the police and out of his information the respondent was arrested and detained. I am thus satisfied that he was the one who instituted the information leading up to the arrest and subsequent detention of the respondent.

It is, however, undoubtedly that parties at loggerheads on whether the trial court was correct in its findings on the remaining ingredients of malicious prosecution.

Mindful of the divergent views, the next question for my determination would be whether the appellant acted without reasonable or probable cause in reporting the matter to the police. As to what amounts to reasonable and probable cause, the position of the law in our jurisdiction was stated in **James Funke Ngwagilo vs. Attorney General**, [2004] TLR 161 where the Court of Appeal held that it is enough if the defendant believes that there is reasonable and probable cause for the prosecution for one to prove that there was justification for the prosecution. In addition to that, I am persuaded by the wisdom from Uganda by **Byamugisha, J** in

Dr. Willy Kaberuka v Attorney General, Civil Suit No. 160 of 1993 [1994] II KALR 64, where he stated thus:

> *"The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and that is to say,* ***to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty.***"
> [Emphasis is mine]

In the present case, it is the uncontroverted evidence of the respondent that the appellant's actions in reporting the matter to the police and demanding compensation were unjustifiable and illegal. The respondent said she refused to pay any compensation despite repeatedly threats and demands from the police. She also insisted that the appellants actions resulted to her mental suffering and loss of reputation from the public. Conversely, in his defence, the appellant (DW1), during his defence contended that the paddy destroyed on the farm belonged to him as he had bought the farm

which was set alight from the respondent's husband. He added that the husband had obtained consent from his wife (the respondent). Part of his testimony reads:

> *"On 30th August, 2019 I was harvesting paddy in my farm and started to clean the farm for purpose to plant maize. In which I bought the said farm from Mr. Mweji, in which I asked for the consent from his wife. The member of the suburb and the Chairperson came to that for the purpose of sell agreement on such farm."*

This testimony was not substantially shaken or rebutted in cross-examination. The appellant testified that the agreement to purchase the farm was executed before the suburb chairperson. From the above piece of evidence, it is clear that the appellant reported the matter to the police honestly believing that the paddy farm set alight was his, having bought the farm from the respondent's husband.

Further to that, a negative inference may be drawn from the respondent's testimony when she testified that her husband withdrew his suretyship after she (the respondent) had refused to agree on an amicable settlement. The withdrawal of the husband as a surety connotes of his support of the appellants claim that he was

the lawful owner of the suit property. In the circumstances it cannot, therefore, be safely concluded that the appellants actions were without reasonable and probable cause. His belief that the property was his signifies that he had reasonable and probable cause in reporting the matter to the police when the paddy in the farm were set alight.

I am also alive of the position recently enunciated by the Court Appeal in **Shadrack Balinago vs Fikiri Mohamed @ Hamza & 2 Others** where the Court of Appeal (**Ndika. J.A.)** relying on **James Funke Ngwagilo vs. Attorney General** (supra) held that the burden lay with the respondent (plaintiff) to prove the absence of reasonable and probable cause in the prosecution. Upon examination of the available records, I am not convinced that the respondent discharged the above obligation at the trial court.

In similar vein, I am satisfied that, had the learned trial magistrate properly directed his mind to the above piece of testimony he would not have held that the appellant acted maliciously in reporting the matter to the police. I find support in the

case of **James Funke Ngwagilo v. Attorney General**, [2004] TLR 161 where the Court held that:

> *"Malice in the context of malicious prosecution is* ***an intent to use the legal process for some other than its legally appointed and appropriate purpose****. The appellant could prove malice by showing for instance, that the prosecution did not honestly believe in the case which they were making, that there was no evidence at all upon which a reasonable tribunal could convict, that the prosecution was mounted for a wrong motive and show that motive."* [Emphasis is mine]

In addition, DW2 also testified that when he saw that the paddy had been destroyed, he advised the appellant to report the matter to the suburb chairperson and then to the police. This testimony also cements an observation that the appellant honestly believed in the case which he had filed with the police. There was no evidence proving that the prosecution was mounted with ill will or wrong motive.

Further to that, the fact that the appellant agreed to withdraw his complaint and resort to an amicable settlement was a clear indication that he had no ill motive. It would have been different if, for example, the appellant refused the advice from the police and

insisted to proceed with the complaint. In such circumstances, the respondent would have an arguable case against the appellant. In the case of **Ng'homango v Mwangwa and Another** (Civil Application No. 33 of 2002) [1970] 1; (27 October 2020 TANZLII) the Court of Appeal reversed the decision of this Court in dismissing the appeal and one of the grounds was the fact that the first defendant pressurized the police to conduct criminal proceedings against the plaintiff despite police advice that the dispute be resolved administratively. Considering all the circumstances of this case I am satisfied that the respondent failed to provide evidence that the appellant's report to the police was actuated with malice.

I will now turn on the question whether the proceedings terminated in the respondent's favour. It is on record that no criminal charges were preferred against the respondent. The record show that after several days parties were advised to resolve the matter amicably. In his testimony, DW1 said the police advise them to reconcile over the matter. PW1 testimony on this matter was to the effect that the police officers informed him that the appellant had decided to withdraw the matter. In light of the above evidence, I am

not convinced that the respondent was able to establish that the proceedings terminated in her favour. The fact that the complaint was withdrawn, and no criminal charges were preferred is in no way a suggestion that the proceedings terminated in the respondent's favour, particularly in the circumstances of this case.

In any event, I am of the view that, where a police officer or any other investigative officer arrests and detain a person upon receipt of a complaint or information from another person, and subsequently releases the person or terminates investigation or advise an amicable settlement over the complaint, as the case may be, the person so giving information is not liable for malicious prosecution unless it is established in evidence that the information was given with malice.

My review of the evidence on record points to an irrefutable fact that there was no proof that the appellant set the legal machinery against the respondent without reasonable and probable cause or that his actions were actuated by malice. There was also no evidence that the proceedings terminated in the respondent's favour. Correspondingly, I do not agree with the trial courts' finding that the

claim for malicious prosecution was with merit and so, I find merit in the first and second grounds of appeal.

Basing on all the above, the plaintiff failed to clearly establish unit of all the four essential ingredients to prove malicious prosecution. In the final analysis, I find merit in the appeal. I thus allow.

In the event, the proceedings of the District Court are hereby quashed, and the resulting judgment and decree are set aside. The appellant shall have his costs.

It is so ordered.

DATED at **MOROGORO** this **10th** day of **DECEMBER, 2021**.

S.M. KALUNDE

JUDGE