

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**CIVIL APPEAL NO. 32 OF 2020**

(C/F Civil Case No. 4 of 2018 in the District Court of Hanang' at Katesh)

**MARIKIORI MARTINE ..... APPELLANT**

**VERSUS**

**DANIEL AKONAAY..... RESPONDENT**

**JUDGMENT**

13/9/2021 & 10/12/2021

**ROBERT, J:-**

The appellant, Marikiori Martine, sued the respondent Daniel Akonaay at the District Court of Hanang' at Katesh alleging that the respondent filed malicious criminal proceedings against him at Endasak Primary Court. The court entered judgment in favour of the Respondent and dismissed the claims of malicious prosecution. Aggrieved, the appellant preferred an appeal to this court armed with two grounds of appeal which I take the liberty to reproduce as follows:

- 1. That, the trial court erred in law and fact by holding that the criminal prosecution was not done maliciously by the defendant in the Endasak primary Court while on the face of the record of the Primary Court Judgement there is clear evidence of malice hence reached unfair decision.*
- 2. That, the trial Court erred in law and fact by Holding that on the criminal prosecution initiated by the Defendant in the Endasak Primary Court there was a reasonable and probable cause while on face of the record of the Primary Court Judgment there is no clear evidence of any reasonable and probable cause for the Defendant to prosecute the plaintiff hence reached unfair.*

At the hearing of this appeal, the Appellant was represented by Mr. Paschal Peter, learned counsel whereas Mr. Joseph G. A. Masanja, learned Counsel represented the Respondent. The appeal was argued by way of written submissions.

Submitting on the first ground of appeal, Mr. Peter argued that, the respondent while knowing that the appellant's cattle and the children who were grazing them were not found on the scene, he decided to institute and prosecute a criminal case against the appellant with ill intention. Further to that, the respondent unsuccessfully appealed to the District Court of Hanang' were his appeal was dismissed for want of merit.

He argued that, on the case of malicious prosecution, the appellant managed to prove that the respondent had ill motive of sending the appellant to jail, however, the said bad motive was rejected by Endasak primary Court as well as Hanang' District Court and decided to favour the respondent. He submitted that there is merit in this ground of appeal.

Coming to the second ground of appeal, Mr. Peter argued that, the claim of tortuous liability at the trial court was proved on the balance of probabilities since the respondent failed to prove his claim of destruction of property at Endasak Primary Court as well as at the District Court of Hanang. Based on the grounds stated, he prayed for this Court to allow the appeal with costs.

Before responding on the grounds of appeal, Mr. Masanja raised an objection against this appeal arguing that, the appellant's petition of appeal is argumentative and narrative one contrary to Order XXIX Rule 1 sub rule (2) of the Civil Procedure Code, Cap. 33 (R.E 2019). Thus, he prayed for the court to dismiss the appeal with costs.

In the alternative, replying to the first ground of appeal, Mr. Masanja submitted that, the appellant was not prosecuted maliciously, the respondent had a probable cause to do so. He maintained that, at the trial court, it was decided in affirmative that the appellant's cows did enter into

the respondent's farm and that the appellant was right to prosecute the respondent. He referred this court to the case of **Minza Baranabas cs Lucia Patrick** [2017] TLS LR 8 and **Babu Sumat Prasad vs Ram Sarup Stary** A.I.R 1946, ALL 204 to cement his arguments.

Further to that, he argued that, at the trial court the appellant failed to prove the elements of malicious prosecution as they were listed in the case of **Yonah Ngassa vs Makoye Ngassa** [2006] TLR 213. He maintained that, the respondent was exercising his right of bringing criminals to justice. Thus, he argued that the first ground of appeal lacks merit.

Responding to the second ground, counsel for the respondent submitted that, the trial court reached its verdict after hearing both parties and satisfying itself that the plaintiff failed to prove his case on the balance of probabilities. The respondent did not prosecute the appellant with ill motive and without reasonable cause. The act of the court to decide in his favour alone does not prove that he was prosecuted maliciously (See the case of **Stapelay vs Annatis** (1969) 2ALL E.R 1514).

In a brief rejoinder, he faulted the manner in which the respondent raised his objection against the appeal. He maintained that, if the respondent intended to raise an objection, he ought to have done so in

his reply to the petition of appeal and not at the stage of filing written submissions. Thus, he prayed for the raised objection to be disregarded. Further to this, he reiterated the arguments raised in his submissions in chief.

Having considered the arguments by both parties and the records of this matter, the main issue for determination in light of the grounds appeal is whether the appellant proved the claim of malicious prosecution or not.

It is trite law that for one to be found liable in an action for damages for malicious prosecution, the test is not whether the criminal proceedings reached a stage at which they may be correctly described as prosecution; but whether such proceedings have reached a stage at which damage to the plaintiff results. In this regard, in order to succeed in claims for malicious prosecution the plaintiff must prove that there was prosecution without reasonable and just cause, initiated by malice and the case was resolved in the plaintiff's favor.

In other words, in order to succeed, the plaintiff has to prove not only that he suffered damage, but also show and prove to the court that:

*(a) the defendants prosecuted him*

*(b) the prosecution ended in the plaintiffs favour*

*(c) the prosecution lacks reasonable and probable cause and*

*(d) that the defendant acted maliciously.*

In the present case, it is undisputed that the respondent did prosecute a criminal case against the appellant herein. however, as well elaborated by the trial court the respondent did not prosecute the said case maliciously. At page 5 of the trial court judgment part of it reads as follows;

*"The question is whether there is any evidence adduced by the plaintiff to show that the defendant filed the complaint which instigated prosecution for reasons other than to enforce the law of destruction of property. No such evidence was offered, as I said the plaintiff was duty bound to prove that the defendant prosecuted him with a desire not to bring him to justice but for ill will or spit against him. The evidence produced by the plaintiff is just narration of what transpired and his arrest, prosecution and acquittal."*

As explained by the trial court magistrate, there must have be other direct evidence proving other motive than a desire to bring the appellant to justice. Having revisited the proceedings of the trial court particularly

the evidence adduced by the parties, the respondent did have a reason to adjudicate a case against the appellant as his cattle did enter into his farm though they did not cause any damage. Yet, it is not always when the appellant loses his case means the case was filed maliciously. See the case of **Jeremiah Kamama vs Bugomola Mayandi** (1983) TLR 123 and **Yona Ngassa vs Makoye Ngassa** (2006) 213.

In view thereof, it is the finding of this court that the appellant failed to prove his claim before the trial court on the standard required. Consequently, the appeal is devoid of merit and is hereby dismissed with costs.

It is so ordered.

  
K.N. ROBERT  
JUDGE  
10/12/2021



