

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO. 20 OF 2018

LUPA JACOB 1ST PLAINTIFF

ABDUL CHIMILILA 2ND PLAINTIFF

VERSUS

DAVID MAPUNDA 1ST DEFENDANT

PERMANENT SECRETARY FOR

MINISTRY OF HOME AFFAIRS..... 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

27th June & 8th July, 2022

KISANYA, J.:

The plaintiffs, Lupa Jacob and Abdul Chimilila were arraigned before the District Court of Kinondoni in Criminal Case No. 354 of 2013 for two counts namely, conspiracy to commit of an offence contrary to section 384 of the Penal Code, Cap. 16, R.E. 2002 and unlawful possession of firearm contrary to section 4(1) and 34(1) and (2) of the Arms and Ammunition Act

It was the prosecution case on the first count that, on 18th September, 2013, at Masaki Area within Kinondoni District in Dar es Salaam Region, the plaintiffs conspired to commit the offence of stealing. As regards the second count, the particulars of the offence were to the effect that on the foresaid dates and place, the plaintiffs were found in

possession of a pistol make BROWNING with scratched serial number, without having an arm's licence.

At the end of the trial, the trial court was satisfied that the prosecution had not proved its case beyond all reasonable doubts. It went on finding the plaintiffs not guilty of both counts and acquitted them from the said offences.

The trial court's decision prompted the plaintiffs to institute the instant suit for malicious prosecution. In terms of the plaint, the plaintiff prays for judgment and decree against the defendants jointly and severally as follows: -

- a) Payment of Tshs 1,270,746,340/= being the general damages.*
- b) Commission banks interests of 25 % per annum from the date of filing this suit until judgment.*
- c) Court's interests of 12% per annum from date of judgment until full payment.*
- d) Costs of this suit be provided.*
- e) Any other relief this honourable court may deem think fit and just to grant.*

It is the plaintiffs' case that their arrest, detention and prosecution was instigated by the 1st defendant. They also claim to have been tortured by the police officers at the time of their arrest and that they sustained

injuries and thus, admitted to Muhimbili National Hospital. It is further averred that the plaintiffs' arrest was accompanied by inhuman treatment and torture that resulted into physical and permanent disabilities and damaged their reputation. The plaintiffs claim that the disabilities caused them to sustain loss of income to the tune of Tshs 714,250,343 for the 1st plaintiff and Tshs. 566,495,995/= for the 2nd plaintiff. It is also the plaintiffs' case that their respective injuries were done maliciously by the 1st and 2nd defendants thereby leading the present suit.

The defendants filed a joint written statement of defence in which they contested the plaintiffs' claims. It was deposed that, prior to the plaintiffs' arrest, the police officers had received an intelligence information on the crime that was going to be committed at GAPCO Petrol Station, Masaki. That the 1st defendant was instructed to lead a team of police officers to the crime scene where the plaintiff were arrested and found in possession of a pistol and four ammunition. The defendants admitted that the plaintiffs sustained bullets injuries in the process of arrest. At the end, they asked the Court to dismiss this suit in its entirety with costs.

On the foregoing pleadings, the issues agreed for this Court's determination were as follows:

- 1. Whether the plaintiffs were maliciously prosecuted by the defendants.*
- 2. Whether the plaintiff suffered damage as the result of malicious prosecution.*
- 3. To what reliefs are the parties entitled to.*

At the hearing of this case, the plaintiff enjoyed the legal service of Mr. Ngassa Ganja, learned advocate, while Mr. Erigh Rumisha, learned State Attorney represented all defendants.

The plaintiffs called four witnesses namely, PW1 Lupa Jacob (1st plaintiff), PW2 Abdul Chimilila (2nd plaintiff), PW3 Lightness Isaya Munisi (1st plaintiff's wife) and PW4 Magreth Lucas Ibobo (2nd plaintiff's wife). In addition to their testimonies, PW1 and PW2 tendered a total of 14 exhibits (documentary evidence) to wit, Business Licence in the name of Lupakisyo Jacob (**Exhibit P1**), Marriage Certificate (**Exhibit P2**), Copy of Judgment of the District Court of Kinondoni in Criminal Case No. 354 of 2013 (**Exhibit P3**), Admission Sheet in the name of the 1st plaintiff (Exhibit P6), Assessment Report in the name of the 1st plaintiff (**Exhibit P5**), Medical Report and Disability Assessment (**Exhibit P7**), Business Licence in 2nd plaintiff (**Exhibit P8**), Medical Report from Muhimbili National Hospital in the name of the 1st plaintiff (**Exhibit P9**), Medical Report from

Muhimbili National Hospital in the name of the 2nd plaintiff (**Exhibit P10**), Appointment Clinic Card in the name of the 2nd plaintiff (**Exhibit P11**), Assessment report in the name of the 2nd plaintiff (**Exhibit P12**), Annual Assessment Report in the name of the 2nd plaintiff (**Exhibit P13**) Admission Sheet in the name of the 1st plaintiff (**Exhibit P14**).

On the other side, the defence case was premised on the evidence adduced by DW1 David Mapunda (1st defendant) who introduced himself as the Officer Commanding In-charge (OCCID) for Mwanga District.

It is worth noting here that the witnesses' evidence in chief was given by way of witness statements filed under Order VIII, Rule 2 of the Civil Procedure Code, Cap. 33. R.E. 2019 (the CPC) as amended by GN No. 760 of 2021. All witness statements were duly admitted to form part of record.

Upon closure of the defence case, the learned counsel proceeded to make their respective final submissions in writing. The ball is now on the court to examine the evidence adduced before it and consider the submissions made on the above stated issues.

Before looking at the framed issues, I wish to address two issues raised by the learned counsel for the parties in respect of the witness statements. Starting with Mr. Ganja, he moved this Court to expunge or

disregard the the witness statement of DW1 on the account that it was made before a commissioner for oath who had no valid licence. His contention was based on the information from the judiciary system for advocates. This is should not detain me because it is based on the evidence which was not produced before the Court. That aside, upon going through the judiciary system relied upon by the learned counsel, it indicated that the said Ayou Spinat Sanga had renewed his licence from 1st January to December, 2022. Thus, I find no merit on the complaint fronted by Mr. Ganja.

The second issue was raised by Mr. Rumisha who moved me not to consider that the witness statements of PW3 and PW4 who admitted to have not appeared before Mboransia John to whom the oath was taken. I have considered that the witness statements of PW3 and PW4 were stated to have been taken under oath. It is also clear that the irregularity pointed out by Mr. Rumisha is on the manner in which the oath was taken. In that regard, I am guided section 9 of the Oaths Judicial Proceedings Act, [Cap 34, R. E. 2019] which provides that:

"Where in any judicial proceedings an oath or affirmation has been administered and taken, such oath or affirmation shall be deemed to have been properly administered or taken, notwithstanding any irregularity in the

administration or the taking thereof, or any substitution of an oath for an affirmation, or of an affirmation for an oath, or of one form of affirmation for another.”(Emphasis is supplied)

In view of the above position, I am of the view that the witness statements of PW3 and PW4 are deemed to have been properly administered.

Reverting to the agreed issues, I agree with Mr. Ganja that, one of the ingredients of malicious prosecution is to the effect that the plaintiff must have suffered damages as a result of the prosecution. Although Mr. Rumisha did not state about the said ingredient, he cited the case of **Wilbard Lemunge vs Father Komu and Another**, Civil Appeal No. 8 of 2016 (unreported) in which it was held that existence of damages arising from the prosecution was stated as one of the ingredients of malicious prosecution. That being the position, the first and second issues can be addressed by considering whether the plaintiffs have proved the claim of malicious prosecution against the defendants.

Proof of the claim of malicious prosecution is governed by the settled law. Apart from proving the damages suffered as a result of the prosecution, the plaintiff is also required to demonstrate the following four ingredients; *one*, the plaintiff was prosecuted; *two*, the prosecution ended

in favour of the plaintiff; *three*, the defendant had no reasonable and probable cause of instituting criminal proceedings against the plaintiff; *four*, that the defendant instituted the criminal case against the plaintiff maliciously. See the cases of **Yonah Ngasa vs Makouye Ngasa** [2006] TLR 213, **Paul Velentine Mtui vs Bonite Brothers Limited**, Civil Appeal No. 109 of 2019 (unreported), **Wilbard Lemunge** (supra). I also agree with Mr. Rumisha that in order for the claim for malicious prosecution to succeed, all elements must cumulatively exist. Thus, the claim cannot stand if one or two ingredients remain unproved.

Having gone through the plaint, written statement of defence, evidence adduced by both parties and submissions by the learned counsel for the plaintiffs and defendant, I have noticed that the following facts and evidence are not disputed: *First*, that the plaintiff were charged with the offence of conspiracy to commit of an offence and unlawful possession of firearm. *Second*, that the criminal prosecution was instigated by the 1st defendant in the course of executing his duties as a police officer and under supervision of the 2nd defendant. *Third*, that the criminal proceedings were terminated in favour of the plaintiffs.

I have also considered Mr. Rumisha's argument that the first ingredient was not proved because the 1st and 2nd defendants worked on

the intelligence information conveyed to the police. Indeed, the fact that the police had received the intelligence information is reflected in the judgment of the trial court (Exhibit P3). However, considering that it was not deposed whether the alleged intelligence named the plaintiffs, I am of the view that the 1st defendant is the one who set the law in motion. This is when it is considered that, DW1 admitted that he led a team of police officer who arrested the plaintiffs at the scene of crime. Further to this, DW1 testified that the plaintiffs were suspected of committing the crime after failing to comply with the order which required them to surrender and that they were shooting at the police. That being the case, it is the findings of this Court that the first and second ingredients of malicious prosecution exist.

Next for determination is whether the defendants had no reasonable and probable cause of instituting the criminal proceedings against the plaintiffs. Luckily, what amount to reasonable and probable cause has been discussed in a number of cases. In summary, the phrase reasonable and probable cause entails, among others, an honest belief that the accused is guilty, basing on existence of the circumstances which are assumed to be true or facts which lead to the conclusion that he was probably guilty of the crime imputed. In the case of **Benedict Rusagasala vs Inspector General of Police and Others**, Civil Case No. 11 of 2011 (unreported)

referred to this Court, my learned sister cited the case of **Hicks vs Faulkner** (1878) 8 QBD 167 where it was observed the said phrase was defined as follows: -

"...an honest belief in the guilt of the accused person 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 ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

That position was also stated in the case of **Wilbard Lemunge** (supra), when the Court of Appeal cited with approval the writing of **Ratantal and Dhirajlah in Law of Torts** page 317 that the defence of reasonable and probable cause are: -

"One; *an honest belief of the accuser in the guilty of the accused (plaintiff);*

Two; *such belief must be based on an honest conviction of the existence of circumstances which led the accuser to the conclusion;*

Three; *the belief as to the existence of the circumstance by the accuser , must be based upon reasonable grounds that , such grounds would lead to any fairly cautious person in the accuser's situation to believe so.*

Four; the circumstances so believed and relied on by the accuser, must be such as to amount to a reasonable ground for belief in the guilt of the accused person.”

Reading from the plaint of the instant case, it is clear the plaintiffs did aver that the 1st defendant had no probable and reasonable cause. They pleaded that they were “brutality (sic), inhuman and harshly tortured by police officer” during their arrest. Submitting on the issue under consideration, Mr. Ganja contended that PW1, PW2, PW3 and PW4 had demonstrated that the plaintiffs were arrested on 18th September, 2013 after gun shot. However, the learned counsel did not address at all whether the PW1, PW2, PW3 and PW4 proved that the 1st defendant had no probable and reasonable cause. In lieu thereof, he submitted that the defendants had testified on the incident of 18th March, 2013 and not 19th September, 2013.

I was then inclined to go through the testimonies of PW1, PW2, PW3 and PW4. The same show that PW3 and PW4 were not at the crime scene. Thus, their evidence did not cover on what actually happened at the scene of crime on the material day. As to the plaintiff (PW1 and PW2), they testified to have been attacked by four men who shot them with the gun when the duo went to fuel their motor vehicle at GAPCO petrol station, Masaki Dar es Salaam. The plaintiffs went on testifying that they were

attacked, arrested and detained by the first defendant. However, PW1 and PW2 stated on oath that their arrest was actuated by mistaken identity of the intelligence information. This is reflected in paragraphs 8 of the witness statements of PW1 and PW2. For instance, PW1's evidence in chief went as follows:

"I state that me and 2nd plaintiff were attacked, arrested and detained by Tanzania Police Force under instruction of the 1st Defendant and that such attacking and shooting by gun were done under mistaken identity of the intelligence information."

It was also adduced by PW1 and PW2 that their prosecution was done without reasonable and probable cause due to the prevailing circumstances of the case where the prosecution was conducted maliciously. Their evidence was based on the grounds that they were prosecuted while the anti-robbery task force had confirmed that the plaintiffs were not robbers and that it was confirmed that the plaintiffs' motor vehicle had no fuel.

In terms of evidence parties are at one that the plaintiffs were at scene of crime (Gapco Petrol Station at Masaki). DW1 testified that the police had received an intelligence information in respect of the offence which was going to be committed at the scene of crime. PW1 and PW2

admit that there were gunshots between the police and bandits who fled. It was also PW1 and PW2's evidence that they were in a vehicle with Registration Number No. T231 BUU. According to DW1, the intelligence information was to the effect that the persons in the said vehicle were the suspect. He went on testifying that the plaintiff was ordered to surrender but kept on approaching their vehicle and that when arrested, they were found in possession of a firearm (pistol) thereby leading to the offence which was laid against them. It was DW1's testimony that the police had a probable cause to believe that the plaintiff and the suspects who fled from the scene of crime were together.

DW1 was not cross-examined on his evidence that the plaintiff was found in possession of the firearm. Therefore, in view of the settled position, they are taken to have admitted that they were found with the firearm at the crime scene. It is also on record that, the evidence of DW1 is corroborated by the copy of judgment (Exhibit P3) of the criminal case which gave rise to this suit for malicious prosecution. The relevant passage as per page 1 and 2 reads: -

"The case for the prosecution was that on 19th March, 2013, Assistant Superintended of Police (ASP) received intelligence information that bandits were planning a robbery incident at GAPCO GAS STATION at MASAKI.

To him (PW3), as an in charge of the operation, prepared detectives and deployed them at the vicinity of the Gas Station so that they go rescue the situation. The intelligent information was to the effect that the bandit will come with both motor vehicle and motorcycle. In no time the motor vehicle with Registration number T231 BUU appeared and according to the information, the person therein were the suspect. After a time, motorcycle which was seen earlier before the drama day appeared as well. The said is to have two people who upon noticing the presence of police fired a gun on the direction of the police where police fired back hence the said people ran. PW3 decided to follow DW1 and DW2 who were ordered to surrender but kept on approaching their vehicle. Shots were fired and both DW1 and DW2 were injured but still managed to approach their vehicle and gun shot in, hence easily nabbed.

Emergency search was prepared in the presence of the pump attendants of the Gas Station (PW4 and PW5) where they discovered a pistol make Browning with a scratched serial number, magazine with four rounds of ammunition and a motor vehicle registration card displaying DW1 as owner”

Exhibit P3 displays further that the fact that the plaintiff were found in possession of a pistol was adduced by the pump attendant. This is found at page 7 of Exhibit P3 as reproduced hereunder:-

"PW5 was like his fellow that he saw police searching the motor vehicle and came out with a Pistol, but when answered learned counsel for the defence he said that he was not called to witness the search but rather called to see what have been found after the search."

In the absence sufficient evidence to disapprove the above evidence on the plaintiffs were implicated in the charges laid against them, this Court find no basis of holding that the plaintiffs were prosecuted without probable and reasonable cause. Considering further that the plaintiffs were found at the crime scene and alleged to have been found in possession of the pistol which formed the basis of the second count, I am of the view that the act done by the 1st defendant as in-charge of the operation would have been taken by any other police officer executing the same duties. The fact that the prosecution side did not prove its case beyond all reasonable doubt does not necessarily mean that the prosecution had no probable and reasonable cause. At this juncture, it is the finding of this Court that the third ingredient of malicious prosecution does not exist.

As regard the ingredient of malice on the part of the prosecution, the issue for consideration is whether at the time of arresting and prosecuting the plaintiff, the 1st defendant had the genuine desire to bring the plaintiff to justice. This issue is based on position stated in the case of **Wilbard Lemunge** (supra) that:-

*"...malice referred to in malicious prosecution that, it is not malice in the legal sense, that, is such as may be assumed from a wrongful act done intentionally. To the contrary, it is **malu animus**, is as to whether in reporting the incident leading to the arrest and prosecution of the appellant, the first respondent was actuated by genuine desire to bring to justice the appellant."*

In the case at hand, the 1st and 2nd defendants were stated to have malice due to the following reasons pleaded in the plaint:-

- (i) *The 1st defendant at the material time owes the plaintiff a duty of care since there was a relationship of proximity between them and thus it was reasonably foreseeable that act of shouting and detaining by the 1st Defendant might cause harm to the plaintiff*
- (ii) *That the act of the 1st defendant has breached the very duty of care to the plaintiff and thus directly*

resulted into loss and damage to the plaintiff as described above

(iii) That the loss is not too remote both in its nature and its causation. Further, the Plaintiffs has not been contributory negligent and thus has not failed reasonably to mitigate his loss.

In their respective evidence, PW1 and PW2 testified that their arrest, detention and prosecution were actuated by malice due to the sustained permanent disabilities and injured reputation. See for instance PW2 who stated as follows in paragraph 11 of his witness statement: -

"I state that our arrest, detention and prosecution incident were maliciously made since they have caused permanent disabilities on my lung, liver and chest, diabetic and hypertension complication,—frequent internal bleedings, pollution of good reputation to my family, friend and business community since I was branded and named as robber."

Being guided by the foresaid position on malice in the suit of malicious prosecution, it is clear that neither the plaint nor the evidence of PW1 and PW2 established that the plaintiff prosecution was triggered by malice in malicious prosecution. It was not stated whether the 1st defendant had ill motive rather than ensuring that the plaintiffs are charged in accordance with the law.

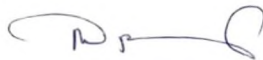
Given the evidence of DW1 and Exhibit P3, I agree with Mr. Rumisha that the plaintiffs have failed to prove that the 1st defendant was not moved by the desire to have them (plaintiffs) prosecuted in accordance with the law. I hold so due to the following reasons. *One*, the 1st defendant went to the crime scene basing on the information reported to the police and after being assigned by his superior. *Two*, the plaintiffs were found at the crime scene where there was gunshot between the police and bandits. *Three*, the plaintiffs were alleged to have been found in possession of a pistol. *Four*, the plaintiffs have not tendered evidence which implies that the 1st defendant had ill-motive to involve them in the offences preferred against them.

There comes the issue on existence of damages suffered as a result of the prosecution. I have stated earlier on that all ingredients of malicious prosecution must be established altogether. Having decided that the plaintiffs have not established that they were prosecuted maliciously and without reasonable and probable cause, I am of the considered view that the issue of damages cannot arise. Thus, I find it not necessary to consider whether the plaintiff suffered damages.

On the foregoing decision, the next issue on the reliefs to which the parties are entitled cannot stand. This is because the plaintiff has failed to prove that they are entitled to the reliefs sought in the plaint.

To this end, this case is hereby dismissed for want of merits. Considering the stated health conditions of the plaintiffs, I order each party to bear its own costs.

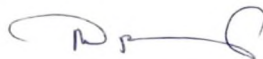
DATED at DAR ES SALAAM this 8th day of July, 2022.



E. S. Kisanya
JUDGE

COURT: Judgment delivered this 8th day of July, 2022 in the presence of the 1st plaintiff and in the absence of the 2nd plaintiff and all defendants.

Right of appeal explained.



S.E. Kisanya
JUDGE
08/07/2022