

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CIVIL APPEAL NO 26 OF 2021

(Originating from Civil Case No. 15 of 2021 in the District Court of Tarime at Tarime)

WAMBURA S/O KINYAMAHOAPPELLANT

VERSUS

TATU D/O WAKIBARA RESPONDENT

JUDGMENT

28th February 2022 & 18th March 2022

F.H. MAHIMBALI, J.:

The appellant in this case one Wambura Kinyamaho unsuccessfully sued the respondent Tatu Wakibara for malicious prosecution at the trial court.

The brief background facts of the case go this way. That the respondent mounted criminal prosecutions against the appellant where at the end of the day, the appellant was acquitted for want of proof beyond reasonable doubt. As a matter of revenge, the appellant thought of disciplining the respondent for a civil claim on malicious prosecution. He claimed a total of 100,000,000/= being specific damages he suffered during the prosecution of the said criminal cases.

The evidence of the case at the trial court was this, the appellant was arrested and prosecuted at Tarime Urban Primary court in criminal case no. 354 of 2020. Though he was acquitted, yet the respondent filed the similar case at Nyabilongo Primary Court where after he had complained before the District Resident Magistrate of Tarime District Court, the subsequent case was dismissed for being *autrofois* acquit. That as he so respectable person at the said society of Baraki, the prosecution of that case lowered his personality before that society. That he had spent much time before the primary court in the prosecution to the extent that he missed time to attend his herds of cattle and farms which then caused hunger trouble with his family and three herds of his cattle died. With this, he suffered specific damages (not established) and general damages at the estimate of the court.

On the other hand, the respondent's case at the trial court on these claims of malicious prosecution established that in the course of discharge of her ward tribunal duties as chairperson, they once dealt with one land dispute between Iranga Kinyamaho and the appellant Wambura Kinyamaho where they visited the locus in quo. In efforts of establishing the truth of the case, they contacted the mother of the parties where they met the appellant. Being furious of them, he chased

them and threatened to kill them by matchet. It was just the intervention of his wife which rescued them. This was thus the testimony of DW2, DW3, DW4 and DW5 who all testified the same story being tribunal members, how they were abusively insulted, threatened to be killed. So, the steps taken by the respondent to the institution of the said criminal case had a legal justification despite the fact that the appellant was acquitted.

Upon hearing of the suit, the trial court dismissed it with costs on the basis that the claims before the court were not established on the required legal standard on balance of probabilities as the respondent's evidence was weightier than that adduced by the appellant.

Aggrieved by the decision of the trial court, the appellant has approached this court armed with a total of three grounds of appeal, namely: -

- 1. That, the Honourable trial Magistrate erred both in law and fact for failure to award compensation to the appellant in the circumstances where the appellant suffered loss due to the unlawful acts of the respondent.*
- 2. That, the Hon, Trial court erred both in law and fact for holding that the appellant did not prove his case to the balance of probability.*

3. That, the Hon. Trial Magistrate erred both in law and fact for failure to assess the evidence tendered by the appellant.

During the hearing of appeal, both parties appeared in person and unrepresented.

On his part, the appellant during the hearing of the appeal prayed that his grounds of appeal be adopted to form part of his submission. He added that in essence, he was wrongly prosecuted by the respondent at the Primary court of Tarime District. As he suffered damages, he prayed that he be compensated as per law. He further urged this Court to go through the whole trial court's records, evaluate evidence and give a proper verdict as per law. He concluded his submission by praying that this appeal be allowed with costs.

On the other side, the respondent argued that all grounds of appeal are of no merit. As the trial court rightly ruled that she did not prosecute him wrongly, the argument that he suffered damages is baseless as it has not been established as per law. She therefore humbly prayed that this appeal be dismissed with costs.

Having heard the submission of both parties, the vital question here is whether this appeal is of any merit. In answering this question, the issues to guide the Court are whether there has been malicious

prosecution against the appellant before the Primary Court of Tarime District and whether the appellant suffered damages (if the answer in question one is in affirmative).

It is settled law that for a party suing on malicious prosecution must prove the following ingredients:

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
4. That the proceedings terminated in the plaintiff's favour. [see the case of **North Mara Gold Mine Limited v. Joseph Weroma Dominic**, Civil Appeal No. 299 of 2020 that was persuaded by the case **Yonah Ngassa v. Makowe Ngasa** [2006] T.L.R 123].

Also in the case of Wilbard Lemunge (supra), cited the case of **Paul Valentine Mtui and Another v. Bonite Bottlers Limited**, Civil Appeal No. 109 of 2014 (unreported) where they referred to the previous decision in **Yonah Ngassa (supra)** that held for a claim of malicious damage to stand , there must exist five elements cumulatively which are;

- a) That the plaintiff must have been prosecuted,*
- b) The prosecution must have ended in the favour of the plaintiff,*

- c) *The defendant must have instituted the proceedings against the plaintiff without reasonable and probable cause,*
- d) *The defendant must have instituted the proceedings against the plaintiff maliciously and*
- e) *The plaintiff must have suffered damages as a result of the prosecution.*

In the present case it is undisputed that the appellant was charged, prosecuted and later acquitted by the Tarime Primary court. From it, it is evident that the first and, second elements above did exist.

The next ingredient to be determined is whether the respondent acted without reasonable and probable cause, which is the third element. The case of **Wilbard Lemunge** (supra) at page 12 provided for four factors to be established in order for the defense of reasonable and probable cause to be established which are; *an honest belief of the accuser in the guilt of the accused (plaintiff) , such belief must be based on an honest conviction of the existence of circumstances which led the accuser to that conclusion , 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 and the circumstance 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.*

From the foregoing, it is evident that the respondent had a reasonable and probable cause to institute the case against the appellant.

Regarding the issue of the appellant acting maliciously, it is the view of this court that there was no any malice established.

The acquittal outcome not perse a conclusive proof that the respondent had malice against the prosecution of the appellant. On the strength of the testimonies of DW1, DW2, DW3, DW4, DW5 and DW6, at the District Court, I find no any malice in the said prosecution as alleged. The reason why the appellant was acquitted is because of a mere legal technicality which raised doubt to the trial magistrate. Considering the fact that in criminal cases any reasonable doubt must be resolved in favour of the accused person, that was the basis of benefit to the appellant in the prosecution of his case at the trial court (Tarime Primary Court) when facing Criminal Case No.354 of 2020. In consideration of the testimony in the criminal trial at the Primary Court via SM1 SM2, SM3, and SM4 it is legally clear that there was no any malicious prosecution. I have gone through Exhibit PE1 at the District Court which is the judgment of the Primary Court. At page 3 of the Primary Court judgment says the following:

"Kwa kuanza na hoja ya kwanza, ni kwamba pande zote mbili zimethibitisha kuwa mlalamikaji na Mshtakiwa walionana siku ya tukio katika eneo la tukio. Kuhusu hoja ya pili, ni kwamba Ushahidi wa Mashitaka unaonesha kuwa Mlalamikaji na Wajumbe wote wa Baraza la Kata Pamoja na Mwenyekiti wa Kijiji walitishiwa kuuawa kwa panga na Mshtakiwa.."

The respondent in my candid view as per this evidence and findings of the Primary Court Magistrate was justified to mount the said criminal prosecution as she rightly did in filing criminal case no. 354 of 2020.

Considering the fact that a mere acquittal of criminal prosecution is not a guarantee that the prosecution was malicious, I find this appeal unmeritorious as there has been proof by the Respondent at the trial court that the prosecution against the appellant was not malicious. For it to have been malicious, the appellant ought amongst other things to have established that the respondent had ill motive against him. I find none. Basing his argument on acquittal of a prosecution charge, has not been the only legal requirement as per law establishing the claim on malicious prosecution. What I gather from the prosecution case on the facts and evidence on record is the fact that there has been clear evidence by the prosecution against the appellant in the prosecution of that criminal case.

In essence, there has not been established any malice by the respondent against the appellant in the prosecution of the criminal case. That said, the decision of the trial court is upheld by reaching the proper findings that the appellant failed to prove the case on malicious prosecution as per law. The trial court in my candid view analyzed properly the whole evidence and applied legal principles rightly. The decision of the trial court is thus upheld.

In fine, the appeal is dismissed with costs.

It is so ordered.

DATED at MUSOMA this 18th day of March, 2022.




F.H. Mahimbali

Judge

Court: Judgment delivered this 18th day of March, 2022 in the presence of the both parties and Mr. Gidion Mugo RMA
Right of appeal is explained.


F.H. Mahimbali

Judge

18/03/2022