IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A., And KAIJAGE, J.A.)

CIVIL APPEAL NO. 107 OF 2012

AUDIFACE KIBALA..APPELLANT

VERSUS

1. **ADILI ELIPENDA... 1ST RESPONDENT**
2. **DIRECTOR GENERAL PREVENTION AND COMBATING OF CORRUPTION BEREAU..................2ND RESPONDENT**
3. **THE HON. ATTORNEY GENERAL............................3RD RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Tabora)

(H.T. Songoro, J.)

Dated the 28th day of June, 2012

In

Civil Case No. 5 of 2008

JUDGMENT OF THE COURT

29th April & 7th May, 2013

KIMARO, J.A.:

The High Court of Tanzania sitting at Tabora dismissed a suit for malicious prosecution filed by Audifice Kibala. He was claiming for damages amounting to five hundred millions shillings (500,000,000/=) for injured reputation, trouble, inconvenience, anxiety, expenses and loss suffered because he was charged in a criminal case maliciously and without reasonable cause.

The appellant was initially employed as a Primary Court Magistrate and he rose up to the rank of a Senior Primary Court Magistrate. On 14th October, 2004 he was arrested on allegation of corruption. The appellant who was the plaintiff in the trial Court was presiding over Isaka Primary Court Criminal Case No. 183 of 2004 in which Mabula Magili was charged with the offence of intentionally injuring cattle contrary to section 325 of the Penal Code. The charge was first read to the said Mabula on 22nd September, 2004. Mariam Hussein, the wife of Mabula Magili had complained to the second defendant/respondent in this appeal, at its Shinyanga Office that the appellant had asked for a bribe of shillings 300,000/= for the release of her husband on bail. The first respondent/defendant in the trial Court was the officer in charge of the second respondent at its Shinyanga Office. The first respondent arranged for a trap of shillings 50,000/= which was paid to one Ernest Shitegwa, an office attendant at the same Court who was said to have received the money on behalf of the appellant. This was part payment of the shillings 300,000/= demanded by the appellant. The second respondent was sued on the doctrine of vicarious liability. The third respondent was joined in the suit as a necessary party.

The appellant was subsequently prosecuted jointly with Ernest Shitegwa with corruption offences under the Prevention of Corruption Act, No. 16 of 1971 as amended from time to time in Kahama District Court Criminal Case No.198 of 2005. At the end of the trial the appellant and Ernest Shitegwa were acquitted. Following his acquittal, the appellant then filed the suit in the High Court. The particulars of malice and lack of probable cause are listed in paragraph 8 of his plaint.

> *"(i) The defendant knew that the plaintiff did not solicit or receive part payment of the said bribe.*
>
> *(ii) Arresting the plaintiff without informing him of reasons of his arrest and charges on which he was being arrested.*
>
> *(iii) Detaining the plaintiff for 6 hours without preferring any charges against him.*
>
> *(iv) Instituting criminal proceedings against the Plaintiff without making a thorough investigation despite a request by the Plaintiff as per Annexture "A" hereto."*

The appellant further averred in the plaint that, following the criminal prosecution, he was injured in his reputation and was put in considerable trouble and suffered loss and damage. Despite being acquitted in the criminal prosecution, he was retired in public interest. The appellant attributed his retirement to the criminal charges that he went through.

In proving his case against the respondents, the main focus of the appellant was failure to call Mariam Hussein to testify. He said that made her statement be hearsay evidence. The statement of Mariam Hussein made when she lodged her complaint to the 1st respondent about the demand of the bribe from the appellant was admitted in the trial Court as exhibit D5. She was not called to testify. The trial Court was informed that she and her husband moved to another unknown place. In dismissing the suit, the learned trial judge held that the statement of Mariam Hussein explained how the appellant solicited bribe from the appellant. Evidence was also led by the respondents to show that Ernest Shitegwa was found with the trap money, shillings 50,000/=. On that evidence, the learned trial judge was satisfied that the appellant who had the obligation to prove

his case on a balance of probabilities under section 110(1) and (2) failed to discharge that burden. He said:-

> *"Now bearing in mind what is contained in the caution statement of Mariam Hussein which in my view implicated the plaintiff with the alleged two offences of receiving bribe, the sequences of events which led to the arrest of PW2 with trap money, and the investigation which was conducted, like the defendants, it is my finding that, there was reasonable and probable cause of charging the plaintiff."*

The appellant was aggrieved and he filed three grounds of appeal challenging the finding of the trial Court. His grounds of appeal are:-

(i) The learned trial judge erred in relying on the statement of MARRIAM HUSSEIN, exh. D5 reaching a conclusion that the appellant was not prosecuted without reasonable and probable cause.

(ii) That in the absence of testimony of MARIAM HUSSEIN from whom the appellant is alleged to have solicited a bribe, the learned trial Judge was not justified in dismissing the Appellant's case.

(iii) *That since the Appellant proved his case on a balance of probabilities, the judgement of the High Court is against the evidence on record."*

During the hearing of the appeal, the appellant appeared in person. He was not represented. Mr. Edward Mokiwa, learned State Attorney represented the three respondents. In compliance with rule 106(1) and 106(8) of the Court of Appeal Rules, 2009, the parties to the appeal filed written submissions to support their respective positions in the appeal.

In his written submission in support of the appeal, the appellant faulted the learned Judge for relying on the evidence of the statement of Mariam Hussein because she did not give evidence in Court. He said in recording her statement, an interpreter had to be used because Mariam Husein was not literate in Kiswahili. She could only speak Kisukuma, her

vernacular. The interpreter was not called as a witness, and even his/her name was not revealed. Given the above shortfall, the appellant contended, it was not safe to rely on the statement of Mariam Hussein to determine the appellant's case. The appellant cited the cases of **Oduol and another V R** [1969]1 E.A. 369 [HCK] and **Desai V R** [1971]1E.A.416 [CAD] where the Court held that where an interpreter is used, the name should be disclosed and he/she be called as prosecution witness. The appellant further submitted that as Mariam Hussein shifted from the place she used to reside while she made the statement, and she could not be found, the best thing the respondents had to do was to abandon the charges against him. The appellant was of the opinion that, after seeing that the statement was of little value in prosecuting the appellant, the learned trial judge should not have used it at all.

Another concern raised by the appellant was failure of the learned trial judge to see that all the other witnesses for the respondents did not give independent evidence. They relied on the evidence in the statement of Mariam Hussein.

The written submission to support the respondents position, prepared by Ildephone Mukandara, learned State Attorney says that the statement of Mariam Hussein, exhibit D1(this must be inadvertence on the part of the learned State Attorney as the record of appeal at page 139 shows that it was admitted as exhibit D5 and it was tendered in the trial Court by Abel Ndaga, DW2, who recorded it) shows that the complaint by Mariam Hussein implicated the appellant with the offences of soliciting and receiving bribe. He said the sequence which followed the complaint, and the arrest of PW2 with the trap money was proof that there was reasonable cause for charging the appellant with the criminal offences in the District Court of Kahama. He said the fact that the appellant was found to have case to answer makes the appellant's complaint mere allegation. He said even the appellant's acquittal in Criminal Case No. 198 of 2005 does not automatically justify his allegations that the respondents had malice during prosecution of the case. The learned State Attorney cited the case of **Bhoke Chacha V Daniel Misenya** [1983] TLR 329 , a decision of the High Court where Mushi J. held that:-

"The fact that the appellant was subsequently acquitted does not establish that the original complaint was false and malicious."

The learned State Attorney said what the appellant had to prove is that the respondents report was malicious and that it was made without any reasonable or probable cause. He also had an option of suing Mariam Hussein for the malicious prosecution as the Court held in the case of **Hosia Lalata Vs Gibson Zumba Mwasote** (1980) T.L.R. 154.

This is a first appeal. In first appeal the appellant is entitled to have evaluation of the evidence by first appellate Court. See the cases of **Pandya V R** (1957) EA 336 cited with approval in the case of **Maramo Slaa Hofu V R and Others** Criminal Appeal No.46 of 2011 and **Deemay Daati and two others V R** Criminal Appeal No.80 of 1994 (unreported). This is a civil case but the decision of the Court in the criminal cases cited equally applies in civil cases. The issue on this ground is whether the learned trial judge decided the matter rightly. With respect, we must say that the learned trial judge addressed the issue correctly. Starting with the burden of proof, the learned judge at pages 214 to 215 of the record of

appeal said that the burden lay on the appellant to prove the case as required by section 110(1) and (2) of the Law of Evidence Act, [CAP 6 R.E.2002] and the standard is on balance of probability. He also addressed the four ingredients of the tort of malicious prosecution at page 219. He was satisfied that the appellant managed to prove that he was prosecuted by the respondents, and the prosecution ended in his favour. We have indicated the finding of the learned trial judge at page 5 of this judgment. The question we have to answer is whether he was wrong in his decision.

The statement of Mariam Hussein, exhibit D5 explains the circumstances under which an amount on shillings 50, 000/= was received by PW2, Ernest Shitegwa, on behalf of the appellant. There is no dispute that the appellant was presiding over Criminal Case No. 183 of 2004 in which Mabula Magili was the accused facing a charge of unlawful injury to domestic animals. The case file was produced in Court as exhibit D2. Mariam Hussein said in exhibit D5 that she was asked by the appellant to give shillings 300,000/= for the release of her husband on bail. She could not raise that amount and so she complained to the second respondent. The first respondent was the officer in charge at the office then. He made

investigations and was satisfied that Mabula Magili was the accused in Criminal Case 183 of 2004. The charge Mabula Magili faced entitled him the right to bail but he had not been granted bail. Mariam Hussein said the date that was arranged for the payment of the bribe was 13th October, 2004 but DW1 , Adili Elipenda, arranged for a trap on 7th October, 2004 and the trap money , an amount of shillings 50, 000/= in notes of 5000/=(8 of them) and 1000/- (10 of them) was paid to Ernest Shitegwa. PW2 received the money and acknowledged receipt of the same. He gave a document to Mariam Hussein. It was admitted as exhibit P6 showing that Mariam Hussein paid shillings 50,000/= to PW2. PW2 was arrested after receiving the money. He admitted receipt of the money but said it was for payment of compensation in Criminal Case No 183 of 2004. According to the first respondent who was DW1 in the trial Court the numbers on the trap money received by PW2 were counterchecked and they tallied with the list that had been prepared earlier before Mariam was given the money. It was then the PW2 was arrested.

Criminal Case file No. 183 of 2004 was admitted in court as exhibit D2. Exhibit D2 shows that the accused, Mabula Magili was first brought to

court on 10th September, 2004. He was not granted bail. On 20th and 21st September, he was brought to Court but there was no order given in respect of bail. The case file is silent on the reasons which prompted his appearance in Court on that day. The order for bail was made on 22nd September, 2004. The order for bail reads:

> "Amri: Shauri lije tarehe 18/10/2004 Mshtakiwa apate dhamana ya shs 500.000/-ahadi au aende kukaa mahabusu. N'gombe waletwe.
>
> A.R.M.Kibala
> Hakimu
> 22/9/2004.

Following the events which led to the arrest and the prosecution of the appellant, a reasonable person well directed by his sense of duty cannot say that the appellant was prosecuted without reasonable and probable cause. An important question which arises from exhibit D2 is why the order for bail was not made on 10th September, 2004 when the accused, Mabula Magili, was first brought to Court to answer the charges? What made the appellant give an order which is vague? The words "**Mshakiwa apate dhamana** instead of **mshtakiwa amepewa**

dhamana" are definitely vague. Who was to give the accused bail if not the appellant who was conferred with that jurisdiction? It was after that vague order for bail that Mariam Hussein went to complain to the first respondent on 23rd September, 2004. The trap was then arranged and paid to PW2. Another aspect which raises an eye brow is what was the purpose for bringing the accused Mabula Magili to Court on 20th and 21st September, 2004? Why should the record of the proceedings in Criminal Case No. 183 of 2004 be silent? A properly directed magistrate should have shown in the case file why the accused person was brought to Court. It is the failure of the appellant to properly discharge his duties which justified the first and second respondents to believe that the complaint by Mariam Hussein had substance. Moreover the case file had no order for compensation. The appellant himself admitted so. Even PW2 admitted that as an office attendant he had no jurisdiction to make an order for compensation. The accused in Criminal Case No. 183 of 2004, Mabula Magili, denied in his statement, admitted in Court as exhibit D4, that he made any agreement to pay compensation of shs. 300,000/=. Given the analysis made by the learned trial judge before reaching a conclusion that the first and second respondents had reasonable and probable cause to

prosecute the appellant, and our observation from the proceedings in the case file that led to his arrest, we have no reason to fault his finding.

Regarding the cases cited by the appellant, they are not relevant in the circumstances of this case. It is true the law requires an interpreter to be sworn, but that covers a situation where the interpreter gives evidence in Court. As for the case of **Bhoke Chacha** (supra), cited by the learned State Attorney it is a decision of the High Court which does not bind this Court. However, the principle set in that case is a good law that the acquittal of an accused person may not necessary mean that the accused was prosecuted maliciously or without good and probable cause. What we should emphasize here is efficiency and good sense of duty on all persons involved in the administration of justice in performing their responsibilities. For the reasons shown, we find the first ground of appeal lacking in merit.

As for the second ground of appeal there is no reason for us to dwell much on it as it was covered in the first ground. The complaint by the appellant is the same; failure to have Mariam Hussein stand at the witness box to give evidence and be cross examined on her credibility. The

appellant said because of this omission, the learned judge should not have dismissed his case.

The response by the learned State Attorney is that this ground is also baseless. He said the whereabout of Mariam Hussein were not known and that is the only reason she was not called to testify. However, contended the learned State Attorney, the chronology of events as narrated by DW1 and DW2 showed justification for accepting the evidence of Mariam Hussein as put in her statement. Moreover, said the learned State Attorney, in Criminal Case No. 198 of 2005 the appellant did not raise any objection to the admissibility of the statement of Mariam Hussein.

As said, this ground is bound to fail for an obvious reason. The statement of Mariam Hussein was not the sole evidence used to prosecute the appellant. The statement of Mariam Hussein was used by DW1 and DW2 to ascertain the truth of her complaint; that is to say whether it was true that the appellant had demanded for a bribe for the release on bail of Mabula Magili. In the course of so doing, the complaint was found to have substance. The several questions we raised in connection with the proceedings in Criminal Case No.183 of 2004, coupled with the other

events that followed after the complaint by Mariam Hussein justified the prosecution of the appellant. In this respect we agree with the learned State Attorney that this ground is baseless.

In answer to the appellant's complaint that the respondent did not lodge any appeal against his acquittal, our considered view is that it does not mean that they prosecuted him maliciously and without reasonable and probable cause. DW1 said he did not take that action because by then the appellant had been retired on public interest. The judgment in Criminal Case No.195 of 2005, admitted in Court as exhibit P1, was delivered on 11th July, 2007. The appellant said he was retired before the criminal case he was facing was completed. The respondents had a right to take a correct decision. If they saw it was useless to lodge an appeal against the appellant, they cannot be held responsible in any way against the appellant's prosecution.

The last ground of appeal carries no substance after the Court has clearly shown that the circumstances of this case as they were, justified the respondents to investigate on the truth of the complaint made by Mariam

Hussein. Fortunately, the respondents found that the complaint had basis. In making a follow up, the appellant was caught in the trap, although that was done through PW2. The proceedings in Exhibit D2 substantiated the complaint that was made against him, hence our emphasis on the importance of efficiency on every person in the performance of his/her duties

We find the appeal has no merit. It is dismissed with costs.

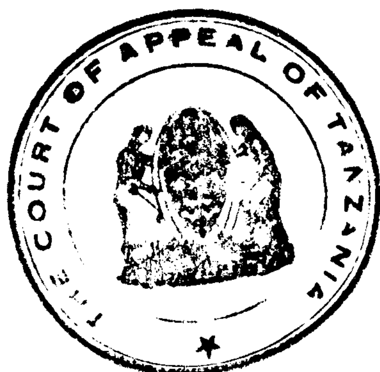
DATED at **TABORA**, this 3rd day of May, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL