

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO. 147 OF 2019

BETWEEN

KHAMIS SAID MBENDE @ MONGOMONGO.....PLAINTIF

VERSUS

MS NAS HAULIERS LIMITED.....1st DEFENDANT

ALLI HEMED ABDALLAH SAID.....2nd DEFENDANT

AHMED HEMED ABDALLAH.....3rd DEFENDANT

BAHMAN SALIM HEMED.....4th DEFENDANT

JUDGMENT

MRUMA, J.

The Plaintiff Khamis Said Mbende @ Mongomongo brought this suit against the Defendants for General damages of Shs. 800,000,000/= being damages for malicious prosecution on false and unfounded criminal charges which was maliciously instigated by the Defendants. The suit was initially brought against the 1st Defendant only, however an application

was later made to add the 2nd to 4th Defendants who are directors of the 1st Defendants.

The facts of this case are that the Plaintiff alleges that the 1st Defendant sometimes in the year 2015, through her officers while fully aware that they were deceiving made a false report at Osterbay Police Station against him that he had stolen a spare tyre, spare parts and 300 litres of diesel. That it was on the basis of this report that the Police arrested the Plaintiff on 3rd October 2015 charged and subsequently produced him in the District Court of Kinondoni at Kinondoni and charged him in criminal case No 421 of 2015 and he was later convicted as charged and was sentenced to serve four years imprisonment. However the Plaintiff preferred an Appeal against the Republic which was allowed on 4th July 2018.

The Plaintiff avers that he was arrested unlawfully and without reasonable cause that he had committed a criminal offence and he contends that he was unlawfully imprisoned.

On the other hand, the Defendant admitted to have made the report to the Police and states that the arraignment of the Plaintiff was not the outcome of fabricated false information from the Defendants, but rather

was from genuine evidence adduced during the trial and as a result the plaintiff was found guilty of the offence charged and was convicted and sentenced accordingly. The Defendants deny all allegations of malicious prosecution and states that the Plaintiff's acquittal at the High court level doesn't mean that he was maliciously prosecuted. The Defendants aver that the Plaintiff was convicted on the evidence adduced after the trial court was satisfied of ingredients of the offence committed as per Penal Code and that it would have been different if the Plaintiff was acquitted by the trial court.

The Plaintiff was represented by Counsel Denis Tumaini of Lexmicus Attorneys whereas the Defendants were represented by Counsel Titus Aaron of Lexicon Attorneys.

At the final pre-trial and scheduling conference the following issues were framed by the court for determination:

1. *Whether the Plaintiff was maliciously prosecuted by the Defendants?*
2. *Whether the Plaintiff suffered any damages and;*
3. *What remedies are available to the parties?*

Initially this case was being heard by my brother in bench, his Lordship Rwizile J, but following his transfer to another working station, it was assigned to me.

As stated herein above, the first issue ***is Whether the Plaintiff was maliciously prosecuted by the Defendants?***

In his evidence, the Plaintiff stated that he was an employee of the Defendants' company as a truck driver for a couple of years. He recalled that on 13.9.2015 he arrived Dar Es Salaam from Burundi where he had taken a cement cargo. He reported to his office at Mwenge area and he surrendered all documents relating to the cement cargo he had delivered to a customer in Burundi. From Burundi he came with bottle scrappers as ordered by his boss Bahman Salim Hemed (4th Defendant) which he safely delivered to him.

As he had not being paid his salaries for three months he asked the 4th Defendant about his salaries. One Idrisa, who is working under the 4th Defendant informed him that there were no money. He was directed to load a cargo which was to be transported to Rwanda but he demanded to be paid his salary first. He left and went back home. On the following day he went to the office as usual but to his surprise he found that the truck

he was driving had been given to another driver. Meanwhile while still in office he received a phone call and was informed that his mother was sick at Katavi. He asked for permission to go and see his sick mother which permission was given but when he demanded to be paid his salaries, he was informed that the company had no money. That notwithstanding he travelled to Mpanda and found his mother in a critical condition. He took her to hospital where she was admitted. On 3.10.2015 while at his home village of Mchaka Mchaka, he was arrested by the police and taken to Mpanda Police Station and On 5.10. 2015 he was transported to Dar Es Salaam and was locked up at Osterbay Police station where he was informed about the charge against him for the first time. He was consequently charged convicted and sentenced to 4 years imprisonment. When he was in prison he came to know that his mother Zuhura Hamis Ismail had passed away.

The Plaintiff also stated that he was neither dismissed nor terminated from his employment but the Defendants didn't pay him his entitlements. He said that the Defendants set the law in motion by instituting criminal charges against him which were terminated in his favour as evidenced by Judgment of the High court (Exhibit P2) and that the proceedings were brought without reasonable or probable cause.

The Plaintiff was one of the witnesses and at the trial to prove his case he testified that upon his arrest, detention and subsequent prosecution, The Plaintiff testified that in the event of the malicious prosecution, he was deprived of his liberty, that his image as a person of repute and integrity was tainted as many people began shunning him as had been labelled a thief.

In his evidence 4th Defendant who introduced himself as one of the Directors and owner of the first Defendant was the sole witness for the Defendants. He testified that his company had its headquarters at Tabata area in Dar Es Salaam and that the Plaintiff was his employee for about three years. He said that the Plaintiff is no longer working with the company because he stole some spare parts, fuel and other things and left the truck he was driving outside the country at Burundi.

He said that following the said theft which occurred at Burundi they reported the incident at Oysterbay Police station. The police investigated the case and pursued the Plaintiff who was at Kigoma. He was arrested brought to Dar Es Salaam charged and was convicted.

In cross-examination DW1 conceded that the offence with which the Plaintiff was charged was committed at Burundi but they reported at

Oysterbay Police Station in Dar Es Salaam Tanzania and the case was prosecuted at the District Court of Kinondoni District at Kinondoni. He said that although they reported the said theft to police authorities in Burundi but they were advised to report it to police in Dar Es Salaam. He further testified that following the Plaintiff's theft they had to buy new spares and tyres but the documents showing that they did so got lost

The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. According to Odunga's Digest on Civil Case Law and Procedure page 5276, the essential ingredients to prove malicious prosecution are as follows:

1. The criminal proceedings must have been instituted by the defendant
2. The defendant must have acted without reasonable or probable cause
3. The defendant must have acted maliciously
4. The criminal proceedings must have been terminated in the plaintiff's favour.

In this case, there is no doubt that the defendant instituted criminal proceedings against the plaintiff which proceedings were terminated in the plaintiff's favour hence proving two of the essential ingredients of malicious prosecution. This is so because criminal proceedings is said to be initiated when the legal machineries are put in motion upon receiving a complaint from the Defendant. The legal machineries include the Police, the National Prosecution Services office (NPS) and the Court. The Defendant has admitted that he is the one who put the legal machinery in motion by lodging a complaint at oysterbay Police station.

The court should now determine whether the defendant acted without reasonable or probable cause. 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.

In the present case, the 4th Defendant adduced evidence to the effect that the alleged theft occurred outside the country in Burundi. He said that they reported to the Police authorities in Burundi but were advised to report it to police authorities in Dar Es Salaam Tanzania. These assertions were not substantiated. Thus, there is no evidence that the incident was reported to Police authorities in Burundi as alleged. The 4th Defendant testified that the prosecution of the plaintiff was done based on the fact that the plaintiff had stolen fuel and spare parts from the truck he was driving and therefore there was reasonable and probable cause to have the Plaintiff prosecuted because there existed an employee/employer relationship in which the Plaintiff was entrusted with a truck with its trailer, fuel and spare parts.

On that basis I find that the Defendants may have not acted with reasonable or probable cause. Had the 1st Defendant's officials and legal machineries acted within the law in the arrest and prosecution of the Plaintiff this case would have been reported and prosecuted in Burundi where the offence is said to have been committed.

It is not only that there is no evidence that the Defendants made any report to any authority in Burundi where the offence was committed, even here in Tanzania something fishy transpired. According to DW1 the

headquarters of the first Defendant's company is located at Tabata, in Ilala District but the incident was reported at Osterbay Police Station which is within Kinondoni District and the case was tried by the Kindondoni District Court which had no territorial jurisdiction to try the case for the crime which was committed outside the country and against a person (company) which is not a resident within its territorial jurisdiction. In the case of **Sharma V Republic 20 EACA, 310** where the territorial jurisdiction was in issue, the court held that proof of place of commission of an offence is essential to the prosecution's case and that although it is not always capable of exact proof, evidence should be led on which the necessary inference could be drawn. The court went on to hold that it is for this reason that a charge must always state in particulars as to where the alleged offence was committed. It from that particulars that the trial magistrate will be able to know whether or not he has territorial jurisdiction to try the case.

In the present case, for reasons which are not clear from the records and the evidence adduced, a crime committed in Burundi against a company which has its headquarters at Tabata in Ilala District was reported at Oysterbay Police Station which is located within Kinondoni District and was tried by the District Court of Kinondoni at Kinondoni. In

such circumstances court can draw an inference that all that was done with knowledge and intent probably with the view of forum shopping the acts which impute malice on the part of the Defendants.

Thus, I find that malice has been established as it can be inferred from the conduct of the Defendants and their failure to consult the law and or act prudently and cautiously as not to cause the arrest detain and charge the Plaintiff who had a case in another jurisdiction.

In any event, where the case is reported to the Police and the prosecution is instituted by them or other investigative or prosecutorial agency after investigations, the person giving information is liable for malicious prosecution if it appears that he or she had abused the minds of judicial authorities. Here the abuse is evident on the fact that instead of reporting the incident in Burundi where the crime is said to have been committed, the Defendant deliberately reported it in Dar es Salaam Tanzania and instead of reporting at Tabata Police Station where she has its headquarters the Defendants chose to report it at Oysterbay Police station. The abuse of the minds of the judicial authorities can also be inferred from the fact that instead of instituting the case at Ilala District court, where the Defendants had its headquarters the case was instituted at Kinondoni District Court which had no territorial jurisdiction over the

matter. These could not have occurred accidentally. It was by design only that some of the necessary players in this scam had not been joined in this case.

Malice in the context of malicious prosecution is an intent to use the legal process for some other purpose than its legally appointed and appropriate purpose and the Plaintiff 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 with a wrong motive and show that motive. In the present case there legal process was abused from the time of reporting, investigations and prosecution.

Thus, it is my view that malice has been established from the Police's failure to consult the law and/ or to act as a prudent and cautious person would do, and also in acting without reasonable cause. The Police officers at Osterbay Police Station failed even in the simplest of the investigative tasks of investigating the place of the commission of the alleged offence which would have helped in ascertaining whether the trial court had jurisdiction over the matter. Instead, they kept the Plaintiff in their custody for a couple of days without bothering to investigate until

when they eventually had him prosecuted. This is a manifestation of malice as it was a reckless disregard of the law and the Plaintiff's legal rights.

The 4th Defendant adduced evidence showing the basis of the report made to the Police and stated that the judicial authorities acted in conformity of the law to arrest, imprison and prosecute the Plaintiff. I have found as a matter of fact that they didn't act in conformity with the requirement of the law. Section 180 of the Criminal Procedure Act requires every offence to be inquired into and tried by a court within the local limits of whose jurisdiction it was committed or within the local limits of whose jurisdiction the accused person was apprehended. As stated herein before, the offence was said to be committed in Burundi and the Plaintiff was apprehended at Kigoma but was tried at Kinondoni in Dar Es Salaam.

Basing on all the above findings, I find that the plaintiff has clearly fulfilled all the essential ingredients to prove malicious prosecution.

The second issue is whether the Plaintiff has suffered any damages. From the evidence adduced, there is no doubt that the Plaintiff is a truck driver. This professional like many other professional depends mainly on the public trust in general. I have no doubt that the act of arresting,

prosecuting and convicting the Plaintiff has greatly injured his professional carrier. He can no longer be trusted by truck owners and even the business community whose cargoes are transported by trucks. These are damages suffered by the Plaintiff. He can no longer be trusted by truck owners and their customers.

Secondly he must have also suffered for wrongful arrest, imprisonment malicious prosecution and intentional causing distress. He was sentenced to four years in jail and he spent over a half of his jail term. He must have suffered distress and mental anguish.

Finally on the damages, there is evidence to the effect that at the time the Plaintiff was arrested he was claiming three months unpaid salaries. That salaries were never paid to him and in cross-examination DW1 testified that the Plaintiff's had not been terminated to date which means he may have some claims against the 1st Defendants under the labour laws. All these are sufferings which must have caused damages to the Plaintiff. I therefore answer the second issue in the affirmative. That is to say the Plaintiff suffered damages for the Defendants acts.

The last issue is about reliefs. The Plaintiff pleaded for general damages of Shillings 800,000,000/= and costs for wrongful arrest,

imprisonment, malicious prosecution and intentionally causing emotional distress.

The Defendants opposed the same in their written statement of defence and prayed for the same to be dismissed with costs.

Since I have ruled on issue one in the affirmative, the plaintiff is entitled to general damages. The plaintiff failed, however to explain how the amount he is claiming was reached at. However, his prosecution must have affected his profession as a truck driver because he was no longer working and he must have lost some prospective potential employer as a result. But there was a failure to elucidate how the loss of potential employers would affect his future earnings.

With regard to general damages, it is trite law that general damages are awarded at the discretion of the court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Defendants. Clearly the plaintiff proved that he was inconvenienced by the malicious prosecution by the Defendants hence I will allow the prayer for general damages pleaded by the plaintiff. As the assessment payable, taking into consideration the Plaintiff's class in the society as a truck driver who travels widely within and outside the

country and class of people he interacts with who may be aware of the ordeal he has passed through I find that the amount claimed is on the very high side of the scale. Taking all that into account, the period he spent in prison I asses the payable damages at shillings 50,000,000 (Say Fifty Million) only. This amount is fair in the circumstances and will send a message to the employers or any person from abstaining from using their economic muscular to influence, direct and/or misdirect judicial authorities who are responsible to administer criminal justice. They should work without being influenced anyhow.

As to the prayer for costs, **Section 30th of the Civil Procedure Code** provides that costs shall be at the discretion of the court and that costs shall follow the events unless the court has some good reasons otherwise to order. I, therefore, allow the suit with costs to the Plaintiff.

I so order.


A.R. Mruma,

Judge.

Dated at Dar Es Salaam this 10th day of May, 2022.