

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CONSOLIDATED CIVIL APPEAL NO 24 AND 22 OF 2021

(Originated from Civil Case No 28 of 020 at the Resident Magistrate Court of Musoma)

ELIAKIM OWINO APPELLANT

VERSUS

ABAA RAMOGI 1ST RESPONDENT

ABAA LUKA 2ND RESPONDENT

JUDGMENT

20th July & 25th August, 2022

F. H. MAHIMBALI, J.

This is a cross appeal case in which both parties (the plaintiffs and the defendant) at the subordinate court were dissatisfied by the decision of the trial court. The respondents who were plaintiffs at the trial court, filed a tortious suit on malicious prosecution claiming a total of 80,000,000/= as general damages for the injuries occasioned.

Upon hearing of the suit, the trial court considered that there was a tortious act by the respondent against the appellants. However, the trial court just awarded general damages of 2,000,000/=. This aggrieved

both parties. Whereas the appellants claim the award is so minimal, the respondent claims that the tortious suit on malicious prosecution was not established as per law, thus the award is baseless and legally unfounded.

During the hearing of the appeal, as both appeals were assigned to me, I ordered them to be consolidated so as to ease hearing and determination of the both appeals as they emanate from the same judgment and proceedings of the trial court. Mr. Wambura learned advocate represented the appellant Eliakimu Owino and whereas Mr. Machere Mkaruka learned advocate on the other hand represented the respondents. For easy of reference, the proceedings of the consolidated appeal were recorded in appeal number 22 of 2021.

In arguing the appeal, Mr. Wambura on behalf of his client, on the first ground of appeal submitted that the elements of malicious prosecution were not proved. He contended that in the course of making his judgment, the trial magistrate (at page 12) dealt with three things. As per exhibit DE2, he was first satisfied that the respondents had knowledge of stop order by Ward Tribunal and on that basis, they were arrested for disobedience of the stop order. In the second reason relying on exhibit DE2, he was satisfied that the service was proper. In the third

reason, he dealt with demeanour. That as per character and demeanour of the respondents, the trial magistrate was satisfied that there was forgery. With these reasons, the trial magistrate was satisfied that their arrest and subsequent prosecution of the respondents was actuated with malice. Thus, Malicious prosecution was established. On that basis, he awarded them a total damage of 2,000,000/=.

He challenged the findings of the trial court as it is contrary with the law. For malicious prosecution to stand, the all elements must be proved. The legal elements are: **the plaintiff must have been prosecuted, the prosecution ended in favour of the plaintiff, the defendant must have instituted the proceedings without reasonable and probable cause, that the institution of the proceedings were actuated with malice and lastly, that the plaintiff must have suffered damages by the result of the malicious prosecution.** His main concern is on elements no 3 and 4.

That

Exhibit DE2 is stop order of the Ward Tribunal in which both parties were prohibited from doing anything at the Suitland. That despite the prohibition by stop order, the respondents (plaintiffs) had gone to the said farm (Suitland) and worked on it. The appellant then

reported the matter to the local authority (village) against the respondents for that breach where they were advised to go to primary court where then the said Primary Court ruled in favour of the appellant and the respondents were convicted for defaulting the tribunal order. The said decision was then reversed by the District Court on illegality. His interest is, whether in the given circumstances, the filing of the said case at the Primary Court had been actuated by any malice. It is his contention that, there were probable and reasonable grounds for reporting the said incident to the local leaders and later to court. It is his concern that the reporting was reasonable and probable and thus not actuated by any malice.

Whether the reporting was reasonable and probable, there must be elements such as honest belief of the accuser. As there was court order by Ward Tribunal, then the appellant being the reporter had honest belief of reporting the said incident. Apart of honest belief, it must be based on honest conviction on the existence of circumstances and that the existence of circumstances must be of reasonable grounds and that the reasonable grounds must be of guilty of the accused person. In the circumstance of this case, there was honest belief and that the best way was to report to the legal machineries. In the case of

Felician Muhere Mguyo vs David Joseph Mlay, Civil Appeal no 17

of 2020 it was held that all elements of malicious prosecution must exist. Thus in the current case, grounds three and four were not complied with as per law. In that sense, the awarded damages were unlawfully granted.

On the second ground of appeal, he submitted that the trial court erred in law in considering exhibit DE2 as forgery without itself being fully scrutinized that if was forgery. As to how it was forgery, there are no any legal findings but only the remarks by the trial magistrate. Had it been forgery, the trial court ought not to have admitted it unless it was first forwarded at police for that finding and its report be a proof of it. As he treated it as forgery, he did not consider at all. At page 12 of the typed judgment one of the reasoning was this that the said exhibit DE2 was forgery. As it was pre-maturely adjudged without report of it, the trial magistrate misdirected himself. As the genesis of malicious prosecution in this case centres on this exhibit DE2, then it was an error by the trial magistrate. That, it is obvious that for there to be substantive justice, the procedural law must be well complied with.

With these submissions he prayed that this appeal be allowed with costs.

On his part, Mr. Machere Mkaruka learned advocate for the respondents he first countered the submissions by Mr. Wambura that as proof of malicious prosecution is on balance of probabilities, he is confident that the claim on malicious prosecution was proved as per law.

The allegation that some elements were not established is not founded. There ought to be proof by affidavit. In the absence of it, it is malicious. On element no 4, he submitted it is baseless as it is well established. Arresting, detaining and prosecuting the respondents tarnished their personality. It is true that probable cause must be honest. In the circumstances of this case, there is no that honest belief as alleged but malice. He was of the firm view that all elements of malicious prosecution were established.

With the second ground of appeal, the exhibit DE2 it is not true that the court ruled that it was forgery but only the opinion of the trial magistrate. All in all, what was considered is the fact that there was malicious prosecution. On this counter submission, he prayed that the decision in Civil Case No 28 of 2020 by the trial court be upheld and the appellant's appeal be dismissed with costs.

In arguing the grounds of appeal for appeal no 24 of 2021, he submitted that in the first ground of appeal, the damages of 2,000,000/= awarded is so low instead of 80,000,000/=. As at the trial court malicious prosecution was established, he challenged the awarded sum of 2,000,000/= is so low. As there was humiliation, mental anguish loss of income, the award of 2,000,000/= was not commensurate with the torture occasioned.

In support of his argument, he cited the case of **Coper Motor Cooperation vs Moshi/Arusha Occupational Health service (1990) TLR 96**, in which the court cited with approval the case of **Nance vs British Colombia electric Rally Co. ltd (1951) AC 601** at 613 which held that:

"Before the appellate court can properly intervene, it must be satisfied either that the judge in assessing damages applied a wrong principle of law such as taking into account of irrelevant factors"

It was his submission that what was awarded by the trial court upon establishment of malicious prosecution, was so low that this court has to intervene.

On the second ground of appeal he submitted that, the trial court did not substantiate reasons as to why it awarded that very minimum amount upon proof of the malicious prosecution. At page 13 of the typed judgment of the trial court, the trial magistrate only considered the economic ground of the respondents without considering the amount of anguish the appellants suffered.

In the absence of proof of economic position of a party, a court cannot have good basis to award low damages. In the circumstances, he prayed that the award of 2,000,000/= be varied and enhanced to 80,000,000/= prayed for in the plaint.

In replying to the arguments of Mr. Machere Mkaruka, Mr. Wambura first made a rejoinder submission that with the number of 12 days the respondents were detained, is irrelevant. The issue is whether there was malicious prosecution. The facts and evidence have not established the proof of malicious prosecution. On the issue that DE2 exhibit is forgery is just the opinion of the trial magistrate, he differed with that assertion even if it is was his opinion, it formed the basis of reaching that decision. The trial judge or magistrate's opinion is what is the judgment itself. The two cannot be separated.

In opposing the appeal by the respondent (Cross appeal), he submitted that:

First the document commencing civil appeal for a matter originating from original jurisdiction of the District Court or Resident Magistrate Court is not petition of appeal but memorandum of appeal. As per order **XXXIX rule 1 of CPC, Cap 33 R. E. 2019**, states that every appeal shall be in the form of memorandum of appeal. Thus, this court is not properly moved with a proper document as it is not a proper document. On that stance, he prayed that this court to expunge it from the court record. In alternative if this court finds this document can still initiate appeal before the High Court, he made the following submissions:

In the first ground of his appeal, he argued that the malicious prosecution was not proved. As per page 13 of the typed judgment of the trial court, the trial magistrate admits himself that "the malicious prosecution was partly proved. His point is, for malicious prosecution to stand, there must be proof of all elements as per law. As it was partly proved that is the reason of the award of 2,000,000/=, nevertheless, that was not the law. As it was partly proved, suggests that there are

things that were not proved. As those elements must exist cumulatively, so are their proof.

With Economic status, the trial magistrate as a general rule on the award of general damages has discretion. That is the reason why it awarded only 2,000,000/= the amount which he also disputes its award.

As per cited case of Coper motor, by his fellow he challenged it as he failed to tell the court which matter was not considered in this award for him to rely this case. As there is no principle mentioned that it was misapplied, then the averment by the learned counsel is uncalled for. With this he prayed that this appeal No 24 of 2021 be dismissed with costs and in its place, Civil Appeal No 22 of 2021 be allowed with costs. In addition, the judgment and orders of the trial court be quashed and set aside.

In his rejoinder submission for his appeal, Mr. Machere Mkarule reiterated his submission in chief. With regard to the document initiating the appeal being petition of appeal and not memorandum of appeal, he argued that it ought to have been attacked by preliminary objection as it is a legal issue. As he failed to do so, he is precluded from arguing it now.

With the award of 2,000,000/=, he reiterated that it was so minimal. As the malicious prosecution was proved as per law on balance of probabilities, though the award of general damages is court's discretionary power, it ought to be reasonably exercised.

On the cited case, he attempted to clarify that it sufficiently stated that what was awarded by the trial court was not commensurate as per law. As there was imprisonment, the general damage of 80,000,000/= was proper in the circumstances of this case. He concluded that the decision of the trial court be upheld with enhancement on the quantum of damages and that Civil Appeal no 22 of 2021 be dismissed with costs.

I have critically digested the submissions by both sides in respect of this appeal. The main controversy for this court's resolution is whether the appeal is meritorious or not. In reaching that end, the interesting question is whether the claims on malicious prosecution have been established.

Having heard the parties and gone through the court's records and their submissions, the court is now left with the task of determining if this appeal has merits.

The first appellant's complaint is that the trial magistrate did not take into account all the elements of malicious prosecution. It is settled law as held in 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 which held that a party suing for 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.

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 **Yonnah Ngassa (supra)** that held for a claim of malicious damage to stand , there must exist five elements cumulatively which are;

- (i) That the plaintiff must have been prosecuted,

- (ii) The prosecution must have ended in the favour of the plaintiff,
- (iii) The defendant must have instituted the proceedings against the plaintiff without reasonable and probable cause ,
- (iv) The defendant must have instituted the proceedings against the plaintiff maliciously and
- (v) The plaintiff must have suffered damages as a result of the prosecution.

In the current case, the respondents were charged, prosecuted, convicted, sentenced by the trial court but later acquitted by the first appellate court on reason of illegality. From this, it is evident that the first, second and fifth elements above did exist.

The next ingredient to be determined is whether the defendant acted without reasonable and probable cause, which is the third element. The case of **Wilbard Lemunge versus Father Komu and The Registered Trustees of The Diocese of Moshi**, Civil Appeal No. 8 of 2016 where the Court of Appeal was persuaded by the decision in the case of **Yonnah Ngasa versus Makoye Ngassa** [2006] TLR 2006 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.

In the case at hand, the appellant had a land claim against the respondents at the trial ward tribunal in which the trial tribunal issued a prohibitory order against the respondents from using the said suit land. The respondents seemed to have disobeyed the order. The appellant reported the disobedient claims against the respondents at the trial court in which then executed the stop order of the trial ward tribunal and accordingly convicted them. As per illegality fact, the respondents were eventually acquitted by the District Court on appeal. From the foregoing, it is evident that the appellant had a reasonable and probable cause to institute the case against the respondents for failure to abide by the stop order.

Regarding the issue of the appellant acting maliciously, it is the view of this court that there was no any malice established. As the respondents failed to comply with the stop order by the trial tribunal, the appellant had a legal justification to execute it though the primary court was not the proper court in executing land suit decrees emanating from the Ward Tribunal but the DLHT. It cannot thus be ruled that filing of the genuine claim to a wrong registry/court amounts to malice.

From the foregoing, I agree with Mr. Wambura learned advocate that for a claim of malicious prosecution to stand, all the five elements must cumulatively be established. The averment by the trial magistrate that malicious prosecution was partly established is not the requirement of law, but it must be fully established. It is safe to state that the malicious prosecution was not proved at the trial court.

On the second ground of appeal, that the trial court erred in law in considering exhibit DE2 as forgery. As to how it was forgery, there are no any legal findings but only the remarks by the trial magistrate. I agree with Mr. Wambura that had it been forgery, the trial court ought not to have admitted it unless it was first forwarded to police for that finding and its report be a proof of it. As he treated it as forgery, he did not consider it at all. At page 12 of the typed judgment, one of the

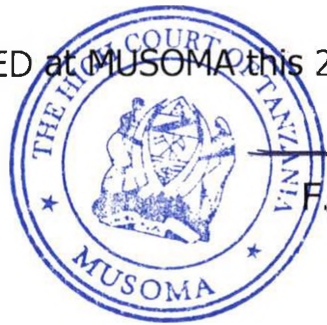
reasoning's was this, that the said exhibit DE2 was forgery. As it was pre-maturely adjudged without report of it, the trial magistrate misdirected himself. As the genesis of malicious prosecution in this case centres on this exhibit DE2, then it was an error by the trial magistrate. It is true that for there to be substantive justice, the procedural law must as well be strictly complied with.

In responding to these two grounds of appeal in affirmative, suggests that the cross appeal by the respondents on the quantum of damages awarded, is of no significance because in the first place there was no malicious prosecution established as per law.

Before I pen off, under order **XXXIX, Rule 1 of the CPC, Cap 33 R. E. 2019**, I agree with Mr. Wambura's concern that every appeal to High Court for matters originating from District or Resident Magistrate Court shall be in the form of memorandum of appeal and not petition of appeal as done in this court by Mr. Machera Mkaruka learned advocate. Thus, this court was not properly moved with a proper document as the one preferred is not a proper legal document to mount appeal to High Court for matters originating from District or Resident Magistrate Court.

All this said and considered, whereas appeal by Eliakim Owino succeeds, the cross appeal by the respondents fails and is hereby dismissed with costs.

DATED at MUSOMA this 25th day of August, 2022.



F. H. Mahimbali

JUDGE

Court: Judgment delivered this 25th day of August, 2022 in the presence of respondent, Mr. Wambura advocate for the appellant and Gidiomn Mugo, RMA.

F. H. Mahimbali

JUDGE