

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOB A

CIVIL APPEAL NO. 4 OF 2021

(Arising from Civil Case No. 9 of 2014 of Karagwe District Court A.E Katemana-RM)

JUSTINIAN NOVATAPPELLANT

VERSUS

JOAS BYERAZO.....RESPONDENT

JUDGMENT

29/07/2022 & 26/08/2022

E. L. NGIGWANA, J.

This appeal emanates from the decision of the District Court of Karagwe in Civil Case No. 09 of 2014 in which the respondent, Joas Byerazo sued the appellant, Justinian Novat, claiming a sum of Tshs. **20,000,000/=** being compensation for malicious prosecution.

The material background to the dispute is not difficult to comprehend. In the Primary Court of Kayunga at Karagwe, in Criminal Case No. 931 of 2013, the respondent and one Deus Dedan who is not a party of this case, were charged with the offence of Robbery with violence contrary to Section 286 (1) and (2) of the penal Code Cap 16 R:E 2002, now R:E 2022.

It was alleged that on 2/9/2013 at 1.00 hours (night hours) at Nsheshe Hamlet within Karagwe District in Kagera Region, Joas Byerazo and another did violently steal Tshs. 300,000/= from Justinian Novat (appellant).

After a full trial, the respondent and Dues Dedan were acquitted on the ground that the charge of Robbery with violence had not been proved beyond reasonable doubt.

In turn, the respondent Joas Byerazo decided to file a suit of malicious prosecution in the District Court of Karagwe. After a full trial, the respondent was awarded costs of the suit and the sum of **Tshs. 20,000,000/=** being general damages because the trial court was satisfied that, at the time of arrest, the respondent was tortured by the appellant and other persons.

The decision of the District Court provoked the appellant therefore, he knocked the doors of this court armed with a memorandum of appeal containing two grounds of appeal which were coached as follows;

- 1. That, after having been satisfied with the undisputed facts on records regarding the prior theft occasions and the apprehension of the respondent by the village local leaders after being mentioned by the accomplice one Deus Dedan, the trial court misdirected itself in condemning the appellant to pay for the claimed general damages grounding its reasons on unreliable and contradicting prosecution testimony.*
- 2. That, even if the appellant could have been proved to have assaulted the respondent, the lower court failed to assess the awards of the purported general damages at the tune of the **Tshs. 20,000,000/=** albeit its reached finding of absence of malicious prosecution and the entire occasion that had transpired.*

Wherefore, the appellant is praying to this court to allow the appeal with costs by reversing the trial court judgment and orders. When this matter came for hearing, the appellant enjoyed the legal service of Mr. Lameck Erasto, learned Advocate while Mr. Samwel Kiula, learned advocate, appeared for the respondent.

Submitting in support of the first ground of appeal, Mr. Lameck Erastor, made reference to page 20 of the typed proceeding of the District Court where the appellant gave his evidence that on 02/9/2013 around 1:00 hours, he was invaded by three persons who covered their faces with clothes, they assaulted him, and finally robbed from him a sum of **Tshs. 300,000/=**. He added that, it is on record that the appellant reported the matter to the Police where he was issued police form No. 3 (PF3) and went for treatment, but also reported to the Hamlet leader. He added that, the evidence of the respondent and that of PW2, PW3 and PW4 that the respondent was assaulted during the time of arrest is contradictory and unreliable. According to him, the trial court failed to evaluate and analyze the evidence presented before it. He further stated that the 1st appellate court has power to interfere the finding of the trial court. He made reference to the case of **Mbogo and Another versus Shar (1968) 1 E.A. 93** where it was emphasized that a court of appeal should not interfere with the exercise of the discretion of the Judge/Magistrate unless it is satisfied that he has misdirected himself in some matters and as such, he has arrived at a wrong decision.

The learned counsel also attacked the PF3 which was tendered in court and admitted as Exh.P1 that not tendered by an expert.

Arguing the 2nd ground, Mr. Lameck submitted that even if the appellant could have been proved to have assaulted the respondent, still the amount of **Tshs. 20,000,000/=** awarded as damages was so exaggerated. He added that, according to law, the court cannot just award damages; there are factors to be considered such as the extent **the extent of injuries, loss occurred and financial position of the parties.** The learned counsel referred this court to the case of **Nasibu Sungura versus Peter Machumu** (1998) TLR 497 at page 502 and the case **of Cooper Motors Cooperative versus Moshi/Arusha Occupation Health Services** (1990) TLR 96 where it was held that;

"Ordering for payment of general damages, is the discretion of the court, but the amount ordered to be paid as general damages should not be either inordinate low or high."

Opposing the 1st ground of appeal, Mr. Kiula submitted that there is evidence that the respondent was tortured by the appellant and other persons under the instructions of the appellant. He added that, the appellant was not a stranger to the respondent as they were village mates living in the same Hamlet. Kiula added that, the witnesses who testified in the trial court were credible witnesses and their evidence was corroborated by the PF3. Reacting on the argument that the PF3 was not tendered by an expert, Mr. Kiula submitted that the PF3 is expert evidence, thus there was no need to call the expert to tender it. He also said the argument is baseless owing to the reason that during the time of admission, the appellant raised no objection.

Arguing the second ground of appeal Mr. Kiula admitted that, the issue of damages is within the discretion of the court, but added that, reasons have to be assigned. He made reference to the case of **Alfred Fundi versus Geled Mango and 2 others**, Civil Appeal No.49 of 2017 where the court held that;

"The Judge has discretion in awarding general damages although the judge has to assign reasons when awarding the same."

Mr. Kiula added that, in the matter at hand, the trial Magistrate gave sufficient reasons for awarding damages at the tune of **Tshs. 20,000,000/=** to the respondent, thus urged the court not to interfere with the same.

In his rejoinder, Mr. Lameck Erasto reiterated that in the present case, general damages were wrongly assessed. He made reference to the case of **Alfred Fundi versus geled Mango and Two others** (Supra) where the appellant who suffered injuries of hips, mouth and teeth was awarded general damages at the tune of **Tshs. 500,000/=** out **Tshs. 87,000,000/=** claimed.

Having carefully gone through the grounds of appeal, reply thereto and submission by both learned advocates for the parties, my task in relation to the first ground of appeal is to decide whether the tort of malicious prosecution was proved as required by the law.

Circumstances under which the tort of malicious prosecution is committed were stated by the defunct East Africa Court of Appeal in the case **Mbowa vs. East Mengo Administration** [1972] EA 352, as follows;

"The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings ... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth."

The Court went on to enumerate essential ingredients of the tort of malicious prosecution, namely;

- 1. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;*
- 2. The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;*
- 3. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and*

4. *The criminal proceedings must have been terminated in the plaintiff's favor, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.*

At page 353, the Court held that;

"The plaintiff in order to succeed, all the four essentials or requirement of malicious prosecution; as set out above, have to be fulfilled and that he has suffered damage. In other words; the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his action"

In our jurisdiction, the principles guiding the tort of malicious prosecution were settled in the celebrated case of **Hosia Lalata v Gibson Zumba Mwasote** (1980) TLR 154. In the said case, Hon. Samatta, J (as he then was) held that to succeed in a suit for malicious prosecution, the plaintiff must prove the following elements:-

- (a) That, he was prosecuted by the defendant;*
- (b) That, the prosecution ended in his favor;*
- (c) That, the prosecution was conducted without reasonable and probable cause;*
- (d) That, in bringing the prosecution, the defendant was actuated by malice*

The herein above four elements were re-stated in the case of **Jeremiah Kamama versus Bugomola Mayandi** [1983] TLR 123 with an addition of the 5th element;

(e) That, the plaintiff must have suffered damages as a result of the prosecution.

As stated in the case of **Mbowa versus East Mango Administration** (Supra), all elements must be proved cumulatively. In other words, if a person fails to prove any of the listed elements, he can never succeed in the tort of malicious prosecution. The Court of Appeal in **North Mara Gold Mine limited versus Joseph Weroma Dominic**, Civil Appeal No. 299 of 2020 held that, *"it is settled each ingredient must be proved to entitle a party to succeed for malicious prosecution"*. In the instant matter, the issues which were framed and agreed upon for determination were only two;

- (i) Whether the defendant maliciously prosecuted the plaintiff at Kayanga Primary court.*
- (ii) Whether the defendant maliciously assaulted the plaintiff and caused him bodily injuries.*

The first issue was resolved by the trial court in the negative. Page five (5) of the typed judgment reads;

"According to the facts on records, sometimes in 2013 the defendant was invaded by unidentified robbers and managed to walk away with some items from his shop and Tshs. 300,000/= which they took from his pair of trousers. And that following the incidents, efforts to trace the culprits got underway and eventually, one Deus Dedan was arrested and that upon the arrest of the said Deus Dedan, he mentioned the plaintiff as his accomplice in the commission of the alleged crime. And further that, efforts were made to trace the plaintiff and arrest him and that the plaintiff was indeed

arrested and taken to police and later to Kayanga Primary Court where the two were prosecuted and got acquitted.

Now, can the conduct of the defendant to report and eventually prosecute the plaintiff before Kayanga Primary Court be deemed malicious? The simple answer is no, because the defendant as a citizen deserves some protection and redress by law whenever is offended and the redress one cannot get it anywhere else except the court because there is no dispute that he was invaded and robbed on 01/09/2013, there was no way he could get justice for those suspected apart from reporting them to the law enforcement organs that is the police and the court. Thus as already indicated, it is not just to deem the conduct of the defendant as malicious prosecution, and accordingly, the issue is answered in the negative."

Reading the evidence adduced by PW1, PW2, PW3, PW4 and the defence evidence by DW1 and DW2 together with the quoted part of judgment it is apparent that the trial court was properly satisfied that the respondent was prosecuted by the defendant; that the prosecution ended in his favor; that, the prosecution was conducted on reasonable and probable cause, and that the prosecution was not actuated by malice, the findings which were not objected or challenged by the respondent. In that premise, the claim arising out malicious prosecution ought to have been dismissed entirely.

It is unfortunate that it was not dismissed. The trial Magistrate went on to award compensation to the respondent at the tune of **Tshs. 20,000,000/=** after being convinced by the evidence adduced by the respondent who testified as PW1, that during the time of arrest, he was tortured by the appellant and his team. The respondent tendered the PF3 to

prove that he was tortured and finally treated at Kayanga Health Centre. The PF3 was tendered as Exhibit P1 without objection from the appellant. The trial Magistrate also considered the evidence of PW2, PW3 and PW4 who all claimed to have witnessed the respondent being tortured by the appellant and other persons. In my view, the approach adopted by the trial Magistrate was wrong. He would have advised the respondent to institute separate claim for damages arising out of torture inflicted on him during his arrest.

Even if we assume just for the sake of argument that, that was a right approach, still the evidence on record is very weak to prove the claim. The evidence adduced by the respondent (PW1) in the trial court is to the effect that he was tortured on **09/09/2013 between 2:00 hours and 5:30 hours** by the appellant and other six persons under the instruction of the Rwambale Hamlet leader. The respondent tendered PF3 (Exhibit P1) to prove that he was tortured at treated at Kayanga Health center.

However, the same revealed that it was issued to the respondent on 09/09/2013 and the respondent was attended on the same date. The medical doctor stated clearly that **the approximate age of the injuries was two (2) days**. Now, if the age of the injuries was two (2) days, it means that the respondent did not sustain the injuries on 09/09/2013. The argument that the respondent was not competent to tender the PF3 in court is baseless because he had knowledge of the document as the same was issued to him by the police and it relates to him.

It is a settled principle that he who wants the court to give verdict in his favor on a certain right or liability depending on the existence of certain

facts must prove that the same do exist. Thus, the burden of proof lies on that person who alleges. This principle of law is sourced under section 110 (1) and (2) of the Evidence Act, Cap. 6 R: E 2019 which provides that;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The evidence of PW2, PW3 and PW4 is to the effect that on 09/09/2013, they made follow-up of the respondent and found him under torture of the appellant, the Hamlet leader and other six unknown persons, but they did not tell how they identified them and what measures they took. Again, in Criminal Case No. 913 of 2013, the respondent told the court that he was tortured on 06/09/2013 the date which had no connection with the date mentioned by PW2, PW3 and PW4. It should be noted that respondent's allegations the he was tortured by the appellant and other persons were disputed by the appellant.

Be as it may, looking at paragraph 3 of the plaint which was filed in the trial court, the sum of Tshs. 20,000,000/= was claimed as compensation for malicious prosecution and not assault. The same read;

*"The plaintiff claims a sum of **Tshs 20,000,000/=** being compensation for malicious prosecution made by the defendant to the plaintiff maliciously in the Criminal Case No.931 of 2013 at Kayanga Primary Court*

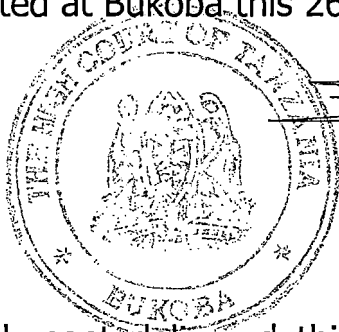
and this case caused the plaintiff to be jailed in prison for about three weeks without bail until the plaintiff was released by the court”

It is a well-established principle that general damages are awarded at the discretion of the court, but such discretion must be exercised judiciously. In the instant matter, it cannot be said that such discretion was judiciously exercised.

In the upshot, appeal is found meritorious, hence allowed. The judgment and orders of the trial court are hereby quashed and set aside. Given the nature of the suit, each party shall bear its own costs.

It is so ordered.

Dated at Bukoba this 26th day of August, 2022.



E. L. NGIGWANA

JUDGE

26/08/2022

Judgment delivered this 26th day of August 2022 in the presence of the appellant and his advocate Mr. Samwel Kiula, respondent and his advocate Ms. Erieth Barnabas, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

26/08/2022