

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

CIVIL APPEAL NO. 25 OF 2022

(Arising from Ilemela District Court in civil case No. 02 of 2021)

PRISCA LABAN MGENDI-----APPELLANT

VERSUS

SAMSON MUSA MHELA -----RESPONDENT

JUDGMENT

*Last Order: 23.09.2022
Judgement Date: 29.09.2022*

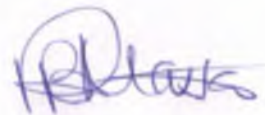
MASSAM, J.

The appellant is appealing against the decision of Ilemela District court in civil case No. 02 of 2021 which was decided in favour of the respondent. It briefly facts go that at the genesis of the matter parties were husband and wife respectively whereas the husband who is now the respondent was prosecuted before Ilemela District Court in criminal case No. 140 of 2020 where it was alleged that the respondent sexually harassed his wife, the appellant c/s 138D (1) of the Penal code cap 16 RE: 2019 and the case was decided in favour of the respondent. After the decision, the accused who is now the respondent was aggrieved claiming that he was maliciously prosecuted following allegations by his wife the



appellant. He filed the Civil Case No. 02 of 2021 before Ilemela District court against the appellant alleging to have been maliciously prosecuted and claims the damage of Tshs. 48,000,000/=. The matter was determined and the respondent was awarded Tshs. 15,000,000/= and costs. The defendant [appellant] aggrieved to the decision and she filed this instant appeal with four grounds of appeal that: -

1. That the Learned Trial Resident Magistrate erred in law and in fact by failing to evaluate evidence tendered by the Appellant on the ingredients forming malicious prosecution.
2. That the act of the Appellant to report the matter or incident to the police station does not indicate that the defendant had no probable cause therefore the trial magistrate erred in law and in fact to reach its decision in favour of the plaintiff.
3. That the Learned Trial Resident Magistrate erred in law and in fact, to quantify damages suffered by the Respondent while the same ought to be brought in the bill of cost.



4. That the trial magistrate erred in law by awarding general damages of Tshs. 15,000,000/= while there was no evidence to support such kind of damages.

At the hearing, the appellant afforded the service of Mr. Paschal Joseph learned Advocate while the respondent was represented by Mr. Renatus Malecha learned advocate.

Mr. Paschal Joseph submitting on the 1st ground of appeal, avers that the trial magistrate erred in evaluating the ingredients of the malicious prosecution. He went on that, the appellant had a reasonable cause against the respondent whereas she reported the matter to the police station and the accused was charged and arraigned before the court. He went on that, parties had a marriage disputes where the respondent accused the appellant for having a love affair with another man outside of their marriage union after he saw text messages in her mobile phone when she was asked who was that she said was her friend from Facebook, where the respondent started to abuse the appellant by dragging her inside the house, forceful undressed her and took off her sanitary pads. He went on that in the quarrel the appellant falls and sustained wounds where she reported the matter to the police and she was given a PF3 which was also tendered before the trial court as exhibit



P DO1. Referring to pages 15, 25, 27 and 41 of the trial proceedings, he insisted that the appellant had no malice against the respondent rather she followed a just cause to report the respondent cruel acts against her.

Submitting on the second ground, he avers that the law is very clear that any person has a duty to report a crime as provided for under section 7(1) A of the CPA and the appellant was right to report the respondent to the police station after the abuse. He went on citing section 7(2) of the Criminal Procedure Act Cap 20 RE: 2019 insisting that the law discourages cases for compensation from cases filed by the police after they received a claim.

On the 3rd ground of appeal, Mr. Pascal Joseph learned counsel submitted that the trial court erred in quantifying the damages suffered by the respondent for the same was supposed to be filed in the bill of costs. Referring to page 12 para 2 of the court proceedings, he insisted that transport costs and the advocate fees were to be filed in the bill of costs.

On the fourth ground, the appellant learned counsel claims that the trial court erred awarding general damages at a tune of 15,000,000/= without support of evidence on records. He insisted that the respondent claim that he was seen as a barbaric in his office was not proved and since



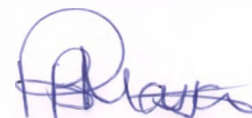
the trial court was aware that parties were couples and they had a marriage dispute which were reported to the police station, the court ought to find out that the appellant had no malice against the respondent. He therefore prays this appeal to be allowed with costs.

Responding, Mr. Renatus Malecha the respondent learned counsel opposed the appeal. On the first ground of appeal, he avers that the trial court properly evaluated the evidence on record to include the ingredients of the tort of Malicious Prosecution. Insisting he cited the case of **Yona Ngasa vs Makoye Ngasa** [2006] TLR 213. He went on that, the appellant had no probable cause against the respondent for the act claimed that the respondent took off the appellant sanitary pad was done inside the house and there was no reason for the appellant to report the respondent as they are husband and wife[couples]Referring to pages 19 and 20 of the trial court proceedings, he went on that when the matter was reported to police station and the respondent arrested some relative insisted appellant to drop the case and reconcile with her husband but she refused to reconcile. Citing the case of **Sudi Kapasa vs Paul Futakamba**, Land Appeal N.15 of 2022, he insisted that the trial court well evaluated the evidence and the case was proved against the appellant in the balance of probabilities.



On the second ground of appeal, he submitted that the appellant went to file complains in the police station and was not giving information therefore that was not covered under section 7(1) and (2) of the Criminal Procedure Act Cap. 20 RE: 2019 (Now RE: 2022). Mr. Renatus Malecha insisted that a tort of malicious prosecution can be instituted to any person who set a legal machinery against another person without a probable cause and suffers damages. Referring to the cited case of **Yona Ngasa**(supra) he insisted that this ground has no merit so to be dismissed.

Replying on the third ground of appeal, he avers that the appellant learned counsel misdirected himself on the issue of quantification of damages by the trial court. he went on claiming that the damages quantified were of the criminal case which the respondent was maliciously prosecuted. To support his argument, He cited the case of this court of **Finca Microfinance bank vs Mohammed Omary Magayu** Civil Appeal No. 23 of 2020 which held that general damages do not need to be specifically claimed or proved to have been sustained for are compensatory in character intended to take care of the loss of reputation as well to act as solarium for mental pain. He insisted that the respondent



suffered psychologically as he was seen in his office as a barbaric and he was a leader

On the 4th ground of appeal, he submitted that the court need no evidence in awarding general damages for the aim if the general damages is a compensatory for loss of reputation or psychological pain. He retires prays this court to dismiss the appeal with costs.

Re-joining, Mr. Pascal Joseph reiterates his submissions in chief and went on insisting that the court quantify the damages alleged to have suffered by the respondent without evidence on record. Referring to page 25 of the trial court proceedings, he insisted that the respondent testified that he suffered both psychological and loss of his reputation but failed to bring witness to prove his allegations. Reacting on the cited case of **Finca microfinance**(supra) he claims that the case is not relevant to the circumstance of this case.

From what has been submitted above for and against the parties, what is tasking me ahead is to determine **whether the appeal has merit.**

Going to the records, the cause of action where this appeal is founded is a malicious prosecution, and to find whether the same is



merited, I have to determine whether elements of malicious prosecution were proved before the trial tribunal.

On the first ground of appeal, the appellant learned counsel claims that the trial court erred to evaluate evidence tendered by the Appellant on the ingredients forming malicious prosecution. While the appellant learned counsel insisted that the offence of malicious prosecution was not proved, the respondent learned counsel objected insisting that all the requirements were proved to the standard required in favour of the respondent at a trial court.

To find the answer between the argument by both parties, I made a reference to the Court of Appeal decision in **North Mara Gold Mine Limited Vs Joseph Weroma Dominic**, Civil Appeal No. 299 Of 2020, quoted with authority the case of **Yonah Ngassa v. Makoye Ngasa** [2006] T.L.R. 123 where reference was made to a book by **Salmond and Heuston on the Law of Torts**, 21 Edition at page 393 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; and*



4. *That the proceedings terminated in the plaintiff's favour.*

In the ingredients of the tort of malicious prosecution above, there was no dispute that there was a proceedings instituted and continued by the appellant and the same was terminated in favour of the respondent. The point of argument before this court was that the appellant acted maliciously and without reasonable and probable cause.

Mr. Pascal Joseph for the appellant claims that the appellant had a probable cause to report the abuse by the respondent whereas the appellant was assaulted and sustained wounds where she reported the matter to the police and she was given a PF3 which was also tendered before the trial court as exhibit P DO1. Referring to pages 15, 25, 27 and 41 of the trial proceedings, he insisted that the appellant had no malice against the respondent rather she followed a just cause to report the respondent cruel acts against her to the police station. Mr. Renatus Malecha the respondent learned counsel insisted that the appellant had no probable cause against the respondent for the act claimed was done inside the house and there was no reason for the appellant to report the respondent. Referring to pages 19 and 20 of the trial court proceedings, he insisted that the appellant had malice for the reason that when the matter was reported to police station the appellant refused to reconcile.



Having heard the parties, proceed to ascertain exactly what is meant by '**reasonable and probable cause**'. Referring to page 21 of the **Black's Law Dictionary** (9th Edition, it is defined as: -

"An accusation against another for an improper purpose and without probable cause".

To test whether a Plaintiff in a particular case has a claim of malicious prosecution against the defendant, the test is either objective or subjective. In the objective approach, the question would be whether a reasonable person in possession of all the facts, would conclude that there was sufficient evidence to cause the police to think that the accused was probably guilty and should face trial while the subjective approach the question would be whether the police actually believed in the particular case that the accused was probably guilty and should face trial. In this appeal at hand, the appellant claimed to be assaulted by the respondent who was her husband and reported the matter to the police station. Going to the records, the charge against the respondent were "sexual harassment c/s 138 of the Penal Code Cap. 16 RE: 2019". For the court to form opinion that the appellant had no proper cause, first, the court should be able to ascertain and rule out that there was no any act of harassment to the appellant which and the accusation against the



respondent were a mere assertion and never happens. Going to the records, the appellant was able to show that the claim reported to the police were justifiable even though the charge of sexual harassment against the respondent was not proved. I ruled that for the reasons that,

First, it is a constitutional right for any person who finds that his/her rights are violated to report to the competent authorities. The constitution of the united republic of Tanzania under Article 16 stipulates that: -

16.-(1) Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.

(2) For the purpose of preserving the person's right in accordance with this Article, the state authority shall lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be encroached upon without prejudice to the provisions of this Article.

In terms of the provision of the above cited Article of our constitution, the appellant exercised her constitutional rights when she was aware that they were breached.

Secondly, it is the police officers who determine the report and determine whether a charge can be levied to the accused and which



charge is to be levied. In tandem with the common law, the House of Lords in **Martin vs Watson** (1996) 3 ALL ER held that: -

"what is required here is for the defendant to have been actively instrumental in the instigation of proceedings, and that merely giving information to a police officer, who then goes on to make an independent judgement on the matter, will not be sufficient to form the basis of an action for malicious prosecution".

As it is the principle of law, the appellant had her duty discharged as required and the decision to charge the accused and under what charges it was not the duty of the appellant and it was not proper for the trial court to hold that the appellant acted without reasonable and probable cause.

In **Mbowa v. East Mingo Administration** [1972] EA 353 the defunct East Africa Court of Appeal stated 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 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."

Since I find that the Appellant acted with reasonable and probable cause, in the light of what I have deliberated above with regard to the first ground of appeal, I respectfully differ with the findings of the trial court

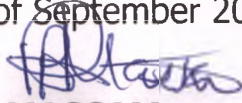


that the appellant maliciously prosecuted the respondent in Criminal Case No.140 of 2020. Consequently, in the light of what is stated in **Mbowe vs East Mingo Administration** (Supra), this appeal is hereby allowed. Based on the relationship of the parties that are couples, I give no order as to costs.

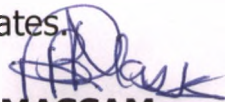
It is so ordered.

Dated at Mwanza this 29th day of September 2022.




R.B. MASSAM
JUDGE
29/09/2022

COURT: Judgment delivered on 29th day of September 2022 in the presence of parties learned advocates.


R.B. MASSAM
JUDGE
29/09/2022