

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

**AT KIGOMA**

**(DC) CIVIL APPEAL NO. 03 OF 2022**

(Arising from Civil Case No. 10 of 2020 in the District Court of Kigoma before G.E.  
Mariki - PRM)

**SHUMBU FILIPO SOGOMBA ..... APPELLANT**

**VERSUS**

**NTIBAGIRAMVANO TITO KARIM..... RESPONDENT**

**JUDGMENT**

8/9/2022 & 4/10/2022

**L.M. Mlacha,J**

The appellant Shumbu Filipo Sogomba was the plaintiff at district court of Kigoma in Civil Case No. 10 of 2020 against the respondent Ntibagiramvo Tito Karimu. It was a case for malicious prosecution. That, the respondent reported the appellant to the police on criminal allegations leading to his arrest and prosecution at the primary court of Kigoma District at Ujiji in Criminal case No. 438 of 2017. He was found guilty and convicted. He was later released by the district court on appeal in Criminal Appeal No. 109 of 2017. He prayed for general damages, interests and costs. The district court (G.E. Mariki PRM) found the claim as baseless and dismissed it hence the appeal.

The grounds upon which the appeal is based read as under:

1. That, the trial magistrate erred in dismissing the appellant's claim
2. That, the trial magistrate erred in law and fact by failure to consider, analyze and evaluate carefully the pleadings, evidence and testimonies of the appellant herein hence ended up delivering an erroneous and contradicting judgment.
3. The trial Magistrate erred in law in finding that the appellant did not prove the damages suffered.

Before going to examine the grounds of appeal and submissions, this being a first appeal which amount to a rehearing, as per **Nzwelele Lugaila v. The Republic**, (CAT), Criminal Appeal No. 140 of 2020, the evidence adduced at the lower court is reproduced in a nutshell as follows. PW1 Shumbu Philipo Sogomba told the court that the respondent and his colleagues invaded him on 20/10/2017 at 10:00 hours and put him under arrest. They sent him to central police Kigoma accused of obtaining Tshs 19,000,000/= by false pretence. He was sent to Ujiji Primary Court in criminal case No. 438 of 2017 charged of obtaining money by false pretence. He was found guilty, convicted and sentenced to serve six (6) months in jail. He appealed to the district court in criminal appeal No. 109 of 2017 and was set free. The respondent

filed civil case No. 1 of 2018 at the district Court and succeeded. The award was set aside by this court sitting at Tabora in (DC) Civil Appeal No. 15 of 2018. He went on to say that the criminal charges were filed maliciously. The arrest humiliated him. He was arrested and tied ropes at the market. He prayed for general damages Tshs 200,000,000/= due to hardships and failure to proceed with his business. A copy of the judgment of the district court made in Criminal Appeal No. 109 of 2017 and that of this court made in (DC) Civil Appeal No. 15 of 2018 were received as exhibits P1 and P2 respectively.

During cross examination PW1 told the court that the respondent was introduced to him by Nduwabike Onesmo of Burundi. They had a business relationship of cassava. The respondent gave him Tshs 15,000,000/= to collect cassava for him. He returned to Burundi and directed his colleagues to collect the consignment for him. He gave them but could not go with them to the respondent. He had a contact with him but did not see him receiving the consignment. He said that if he was in the position of the respondent, he could go to the police to complain. He added that those who arrested him were not policemen. He was arrested by the respondent and his friends. He

went on to say that it is the police who filed the charges. The respondent was the complainant.

PW2 E8152 D/CPL Elias (47) told the court that on 20/10/2017 at about 17:00hrs, while at Kigoma central police station he saw the appellant being brought by two militiamen and another person. He was tied with ropes on his hands. He heard the complainant who said that he had obtained Tshs 19,000,000/= by false pretence. He recorded his statement and sent him to the remand.

DW1 Bahati Zuberi (48) told the court that the appellant and the respondent were doing the business of cassava. On 25/11/2017 the respondent required him to collect his money at Sido area. He brought the money Tshs 11,000,000/= which was given to the appellant for purposes of purchasing cassava. It was given in his presence. He signed as a witness for the respondent. He went on to say that the respondent fell sick and went to Burundi. He came back for his cassava but could not get the cassava. He had an argument with the appellant at Kigoma Mwanga area. He advised them to go to Mzee Anzori. They agreed that the appellant should give the respondent his cassava but he could not do so. He moved to the police to

complain. The matter was referred to the primary court. He denied the accusations.

DW2 Ntibagiramvano Tito (58), a businessman from Burundi told the court that the appellant was connected to him by Mr. Onesmo. He was introduced as a cassava agent (broker). He took him to Asante Nyerere, his place of business. He paid him a total of Tshs 19,300,000/= on different installments for purchase of cassava. He purchased the cassava but when he sent a car to pick them he refused and gave them to other people. He complained to Asante Nyerere village chairman. The matter was referred to the police and Ujiji primary court. He was accused of stealing cassava in criminal case No. 438 of 2017. He was convicted and sentenced to serve six (6) months in jail and pay back Tshs 15,000,000/=. He then saw him out of prison. He denied the claims. He added that he sent him to the police after refusing to handle the cassava.

Next for consideration is the submissions. It was the submission of the appellant that the district court neglected his evidence and exhibits. He said that he received 4,000,000/= and 11,000,000/= total Tshs 15,000,000/= not 19,000,000/= as alleged. The magistrate did not consider this fact. He also neglected 182 bags of cassava already delivered between 6<sup>th</sup> and 7<sup>th</sup>



August 2017. The bags worthy Tshs 11,840,000/= were loaded in his car Benzi Lorry No. A 5422A. A month later he broke his store at Kwiriba Mrembera B Kasulu and took 139 bags worthy 9,035,000/=. He reported this matter and got an RB No. KAS/IR/3079 of 2017. He also tendered copies of the criminal cases but were not given attention. He also neglected his letters to the village leaders. He went on to say that the respondent paid boys who picked him at Kwiriba Market. They tied him using goat ropes as if he was a thief or bandit. He added that he did all this after receiving his cassava and breaking his store. He was transported from Kwiriba to Kigoma market, approximately 200 kilometers on ropes. He argued the court to allow the appeal.

Ms. Victoria Nyambea submitted that both parties were heard. The court found that the respondent had better evidence and gave judgment for him. She went on to reiterate principles applicable in a case for malicious prosecution. She went on to say that there was a business transaction between the parties which could not materialize. The respondent filed the criminal case to get his right. He reported the matter to the police after seeing a criminal mind on the part of the appellant. There was no malicious prosecution, she said.

Mr. Thomas added that there was no evidence showing that he tied him with ropes. What he did was just to report the crime. He argued the court to dismiss the appeal.

I will now move to examine the grounds of appeal. The appellant has three grounds which essentially challenge the way the pleadings and evidence were evaluated. He has the view that the trial magistrate failed to evaluate the evidence thereby leading to an erroneous decision. That, had he done so, he could come out with a finding that there was good evidence to prove the case.

My look at the decision of the district court has shown me that the trial magistrate made reference to principles governing malicious prosecution correctly. He named and applied them. The principles based on case law are as follows; i) that the proceedings must have been instituted or concluded by the defendant, ii) the defendant must have acted without reasonable and probable cause, iii) the defendant must have acted maliciously and iv) the proceedings must have been terminated in favour of the plaintiff.

Applying the principles, the magistrate made reference to the case of **James Funke Ngwagilo v. Attorney General** [2004] TLR 161 where it was

stated that malice in the context of malicious prosecution is an intent to use the legal process for some other purpose other than its legally appointed and appropriate purpose. A person can prove malice by showing that the prosecution did not honestly believe in the case which they framed and that there was no evidence at all upon which a reasonable tribunal could convict and that the prosecution was mounted for a wrong motive. The party must also show the wrong motive. The magistrate made further reference to two other cases namely **Yohana Ngasa v. Makoye Ngasa** [2006] TLR 213 and **Bhoke Chacha v. Daniel Misenya** [1983] TLR 329. In *Yohana Ngasa* (supra) the magistrate quoted and followed the principle that it is not sufficient to say that the plaintiff was acquitted in the criminal case, he must show that the defendant acted maliciously and without reasonable and probable cause. **Bhoke Chacha** (supra) carry the same message that, the fact that the appellant was subsequently acquitted does not establish that the original complaint was false and malicious. The plaintiff must prove that the defendant's report to the police was done maliciously without any reasonable and probable cause. Lead by the principles, the magistrate concluded that the plaintiff failed to prove the case on the balance of probabilities and dismissed the suit with costs.



Case on malicious prosecution are many some of which were mentioned by the trial magistrate above. The principles are those mentioned above and I need not repeat them. I should perhaps add more cases for reference and guidance. See **Jeremiah v Nyanda** (1983) TLR 123 (Chipeta J. rtd, deceased), **Masound Issa Sungura and 10 Others v. Security Group (T) Ltd and Another** (CAT) Civil Appeal No. 176 of 2018 and **Edward Celestine and Others v. Deogratias Paulo** (1982) TLR 347. The issue now is whether the trial magistrate applied the principles correctly.

I had ample time to read the record and the decision repeatedly. It is sad to say that much of what was said by the appellant in his submission is not in the evidence on record. It is good to remember that submissions are made to expound the grounds of appeal using the evidence and facts already on records. It is not allowed to bring new facts or evidence during submissions. That is not allowed and it is a waste of time for the court will not use the new facts or evidence in the course of making its decision. See **Barclays Bank (T) Ltd v. Jacob Muro**, (CAT), Civil Appeal No. 357 of 2019 and **Reni International Company Limited v. Geita Gold Mining Limited**, (CAT), Civil Appeal No. 453 of 2020.

Looking at the evidence on record one can see that it is agreed fully that the appellant was an agent of the respondent for purposes of collecting cassava. The respondent being a foreigner needed a go between, a person who could go to the farmers and interior markets to collect cassava for him. He then gave him cash in advance so that he could use it to buy cassava. The respondent say that he gave him a total of 19,300,000/= in various installments. His witness Bahati Zuberi said that he witnessed Tshs 11,000,000/= being given to the appellant. The appellant said that he received Tshs 15,000,000/= not 19,300,000/=. He was quoted in evidence saying the following during cross examination at pages 11-12 of the proceeding:-

***"Tito gave me Tshs 15,000,000/= so that I collect cassava on his behalf. He returned to Burundi and directed his colleagues to collect the consignment. After loading the consignment, I did not go with those people to Tito. I was just contacting Tito but did not see him receiving the consignment"*** (Emphasis added)

On further cross examination he said: -

*"If it were me in Tito position I could go to law enforcement agencies. **Tito was right to have go to the police and court.***

*Those who arrested me were not police officers.*

*It is Tito and his friends who arrested me. **It is the police who filed the charge at Ujiji primary court.** Tito was a complainant in the said cases, not a mere witness" (Emphasis added)*

The respondent said the following at page 18:

*"He purchased the said cassava. **I sent a van to carry it but he refused to give to me and sold to other people.***

***I decided to complain** to leaders at Asante Nyerere (village chairman). We went to police Mnarani who sent us to Ujiji Primary Court" (Emphasis added)*

The evidence is clear that there was a problem between the parties calling the intervention of the police and the court to solve it. The respondent was in a position that he had to complain. He gave his money but could not get the cassava. The appellant agree that he never dealt with him directly. He gave them to other people and was not sure if he got them. The respondent had a right to report the matter to the police in an effort to get what he

believed to be his right. There is no any element of malice in the matter. And if there was any, the appellant failed to prove its existence and in law he who allege must prove. See section 110 of the Evidence Act.

I therefore I agree with the district court that the case was filed without legal base and correctly dismissed. The appeal fails and it is dismissed with costs. It is ordered so.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha".

**L.M. Mlacha**

**Judge**

**4/10/2022**

Court: Judgment delivered. Right of Appeal Explained.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha".

**L.M. Mlacha**

**Judge**

**4/10/2022**