

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 319 OF 2021

KNAUF GYPSUM TANZANIA LTD APPELLANT

VERSUS

GEOFREY KIVUNGE RESPONDENT

JUDGMENT

26th September & 03rd October, 2022.

MWANGA, J.

The Appellant, **KHAUF GYPSUM TANZANIA LTD** was sued for malicious prosecution by the respondent in the District Court of Mkuranga and the respondent was awarded general damages to the tune of Tshs. 30,000,000/= . The appellant was dissatisfied with the decision of the trial court, hence appealed to this court. He filed a memorandum of appeal containing three grounds namely; -

1. That, the trial Magistrate erred in law and fact by holding that there was malicious prosecution based on hearsay testimonies.
2. That, the trial magistrate erred in law and fact in awarding excessive and unqualified general damages of Tshs. 30,000,000/= without reasonable justification.



3. That, the trial magistrate erred in law and fact by improperly considering evidence adduced.

The facts giving rise to the suit are that, on 14th day of January, 2018 the security officer of the appellant had reported to the Police at Mkuranga District incident of stealing two pieces of copper wire valued at 7,200,000/= . As expected of law enforcers, the respondent was arrested and arraigned in the District Court of Mkuranga in Criminal Case No. 14 of 2018. He was then charged with the offence of stealing contrary to Section 265 of the Penal Code, Cap.16 [R.E 2019], and subsequently he was acquitted.

In submitting to the 1st ground of appeal, the learned counsel submitted that the respondent failed to prove that the appellant had malice or ill motive. In support of his submission he made reference in the case of **Shendrack Balinago V. R Fikiri Mohamed @ Hamza & two Others**, Criminal Appeal No. 223 of 2017 when it was held that for a malice to exist, it is necessary to prove that the legal action was used improperly and for a wrong motive and that the respondent is bound to prove that motive. He also cited the case **of Ally R. Mohamed V AG & Another, Civil Case No. 61 of 2003**, where the suit on malicious prosecution did not succeed because the respondent failed to show existence of reasonable and probable cause and that the defendant acted



maliciously. Tirelessly, he again cited the case of **Yonah Ngasa V Makoye Ngasa, [2006] TLR 123**, where the court directed that it is not sufficient to prove that the prosecution case ended in favour of the defendant but rather that the defendant acted maliciously and without reasonable cause. He argued that mere reporting of the incident of theft to the police does not constitute the charge of malicious prosecution. He cogently further stated the reporting of incidence by the appellant to the police was one of his duties under the Criminal Procedure Act.

He advanced the point in relation to Exhibit P2, which is the judgment of the trial court, that the trial magistrate stated at page 5 that there was no probable cause. He also cited the case of **Madulu Yegele V. Daniel Lutaga** a HCT decision, where Ismail, J. stated that reporting of theft incident is not ill motive based on the failure of prosecution to prove the case beyond reasonable doubt. It was also alluded to the fact that the appellant had no power of control over the prosecution case in the criminal proceedings at the trial court. He referred the case of **Chela James Ghanai & Pact Tanzania V. Deogratius Ndanu**, Civil Appeal No. 1 of 2019, the High Court noted that a mere acquittal does not justify the trial on malicious prosecution. In the course of analysing the evidence, he chimes to the effect that testimonies of PW1 and PW2 were hearsay and not corroborated by any witness.



By way of reply, the learned counsel submitted that there was malicious prosecution. He referred the uncontradicted testimony of PW2 during Cross examination, which were to the effect that the Ahmard Cable alleged to have been stolen could only be lifted by a crane, while in the examination in chief the same PW2 stated that the respondent was arrested and charged with stealing of two pieces of copper wire which were found in the bag of the respondent. He therefore argued that, failure by the appellant to contradict such evidence was a clear testimony that the facts were admitted. He concluded that on the basis of that fact, it is factual that the case against the respondent was staged and prompted by malice and that there was no reasonable and probable cause. He added that, as per records (PW2), the alleged stolen wire was too heavy to be carried by the respondent alone.

On the other hand, the learned counsel submitted that the rationale of reporting the respondent to the police was that he was arrested with a copper wire in his bag.

I have, with great respect, considered the submission of both counsels in this appeal. From the cited authorities, no doubts that for a person to succeed in a suit for malicious prosecution has to prove, all at once, that; **One**, he was prosecuted by the respondent. **Two**, that the prosecution was terminated in favour of the defendant. **Three**, that the



prosecution was instituted against him without reasonable and probable cause. **Four**, that it was due to malicious intention of the defendant, and not with a mere intention of carrying the law into effect. **Five**, that the respondent suffered damage as a result of the criminal proceedings.

In the appeal at hand, there is no doubt that the respondent was prosecuted in the criminal proceedings and it ended in his favour. The critical and contentious issue is whether the respondent successfully proved third and fourth ingredients. It is correctly observed that the institution of criminal proceedings against the respondent was a result of the allegation of stealing two pieces of copper wire. The learned counsel for the respondent was of the view that the charge was malicious because the appellant reported a different matter from the reality i.e the appellant was found with pieces of copper wire in the bag and at the same time, witness stated to the contrary that such items could only be carried by a crane.

With reference to the above submission, the issue now is whether there was malice on the part of the appellant. At the trial court the respondent adduced evidence to the effect that:-

"On 14/01/2018 at day time, I was on patrol, I saw Geoffrey Kivunge (the respondent) throwing something outside of the company's fence, I made a



follow up, Kivunge got out of the company via the main gate, I followed him and saw him picking something, I stopped him and searched his bag, he had a wire which was the property of Knauf Gypsum Ltd. I arrested him and took him at the company gate, I informed the Deputy Manager one MNYASI NYAMOKO who informed the police.”

The fact that respondent was arrested by a security guard (PW2) of the company and found him in possession of pieces of copper wire in his bag, and that the same belonged to the appellant, I find it reasonable on the part of the appellant to take such further action like reporting to the police. In fact, the respondent was fulfilling his noble duty as per Section 7 of the Criminal Procedure Act.

I therefore hold that there was no malice on the part of the appellant. Section 7 of the Criminal Procedure Act requires that, every person who becomes aware of the commission of the offence is duty bound to report the same to the appropriate authority. Therefore, the appellant was fulfilling his statutory duty. The contention by the learned counsel that what was reported to have been stolen and the evidence differs substantially does not, in my view, exonerate the appellant from the duty of reporting the matter to the Police.



On the aspect of hearsay evidence, I would like to stress that a suit for malicious prosecution is an independent suit in its own, it do not depend on the evidence in the criminal proceedings to be proved except where, the defendant does protest on the results as per the judgment in the criminal proceedings. So, the witnesses in the suit for malicious prosecution must instil confidence and be creditworthy like any other suit. On the same way, the evidence that was relied by the trial court had a lot of contradictions.

Since ground No. 1 and 3 of the appeal have been answered in the affirmative, it is of no relevance to argue ground No. 2 which is in respect of the general damages.

Having said all that, the circumstances demand that judgement and decree passed by the District Court of Mkuranga is liable to be set aside. Therefore, Appeal allowed.

It so ordered.


H.R. MWANGA

JUDGE

03/10/2022

ORDER:

Judgement delivered in Chambers this 3rd day of October, 2022 in the absence of the learned counsel for the appellant and presence of the respondent in person.



A handwritten signature in blue ink, appearing to read "H.R. Mwangi", is written over the printed name.

H.R. MWANGA

JUDGE

03/10/2022