IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CIVIL APPEAL NO. 1 OF 2022

(Originates from Civil Case No. 02/2021, Resident Magistrate's Court of Songwe – Hon. V.D. Changwe - RM)

AMOS NGELEJA .....APPELLANT

VERSUS

1. JACKOB SENGELEMA
2. KANZWIKALULU JILATU .....RESPONDENT

JUDGEMENT

Date of last Order: 05.10.2022

Date of Judgment: .11.11.2022

Ebrahim, J.

The appellant had instituted a civil suit in the Resident Magistrates' Court of Songwe at Vwawa claiming special damages at the tune of Tshs. 60,000,000/-; general damages at the tune of Tshs. 40,000,000/-; interest and costs of the suit. The basis of his claim was compensation for negligence and malicious prosecution from the acts done by the 1st and 2nd respondents in 2020 of interfering into the appellant's land which caused him to successfully institute

a land case no 02/2020 at the Ward Tribunal. In the process of prosecuting a case against the respondents, he was terminated from employment for failure to attend work. He thus pinned his termination to the respondents and sued them for having caused him loss of income.

After hearing the evidence from both sides, the trial magistrate found out that both claims of malicious prosecution and negligence are untenable especially in considering that it was the appellant who instituted a case against the defendants. He dismissed the appellant's case with costs.

Aggrieved by the decision of the trial court, the appellant preferred the instant appeal raising four grounds of appeal as follows;

1. That, the Trial Court erred in law and fact when it held that on failing to prove the cause of action on malicious prosecution; the cause of action on negligence should also fail.
2. That, the Trial court did not address the 3rd framed issue.

3. That, the trial court erred for not holding that the Respondents committed the negligent acts to the appellants while the case was proved to the required standards.
4. That, the trial court failed to grant the relief prayed by the appellant contrary to the admission done by the respondents in the pleadings.

In this appeal the appellant was represented by advocate Angolwisye, whilst the respondents preferred the service of advocate Rukamilwa.

The appeal was argued by way of written submission as per the schedule set by the court.

The appellant's counsel submission mainly focused in differentiating between the elements of malicious prosecution and negligence. He faulted the trial magistrate for deciding that failure to prove malicious prosecution causes the claim for negligence to equally fail. To cement his argument on what amounts to negligence, he cited the case of **Starbag International (GMBH) Vs Adinan Sabuni**, Civil Appeal No. 241 of 2018 (CAT-Tanga) which stated that one has to take

reasonable care to avoid acts or omissions that are likely to injure a person who is directly affected by one's acts.

The appellant's counsel submitted in respect of the 2nd and 4th grounds together that the trial court failed to evaluate evidence pertaining to the prayer of relief and failed to grant relief to the appellant whilst the respondent admitted in their pleadings. He stated that though the appellant did not pray for an order of admission, but the respondents admitted the occurrence of events hence the court ought to have found that negligence was proved.

He finally prayed for this court to remit the file to the trial court to assess the reliefs. He sought inspiration from the case of **Imani Omari Madega Vs Yusuf Mehboob Manji and 3 Others**, Civil Appeal No. 135/2019 where the Court of Appeal (DSM-Unreported) remitted the file to the High Court to assess the amount payable on general damages.

Responding to the submissions by the counsel for the appellant, counsel for the respondent argued the 1st and 3rd grounds of appeal together and did the same to the 2nd and 4th grounds of appeal.

He contended that the appellant on a trial failed to establish the prima facie case of malicious prosecution and negligence. He listed down the four ingredients to be prove to establish a prima facie case of malicious prosecution and argued that all elements must be met successfully contrary to the evidence of the appellant on record. Counsel for the respondent further listed down three ingredients to be proved when negligence is alleged which are duty of care, breach of such duty and the occasioned loss. She submitted on the point that the appellant could not show at the trial either by evidence or witnesses the presence of those three ingredients hence failed to prove negligence. In a nutshell she argued that the appellant failed to prove his case on the balance of probabilities as per **section 3(2)(b) of the Evidence Act, Cap 6 RE 2022**; and that the respondents case was heavier than that of the appellant as per the position stated in the case of **Hemedi Saidi Vs Mohamed Mbilu** (1984) TLR 113.

As for the issue of relief, she said the trial court answered the issue accordingly. Nevertheless, this court being the first appellate court has jurisdiction to evaluate evidence on record

as per the position stated in the case of **Shah Vs Aguto** (1970) 1 EA 263 citing with authority the case of **Peter Vs Sunday Post** (1958) EA 424 where it was held at page 492 that:

> *"It is a strong for an appellate Court to differ from the finding on a question of fact of a judge who tried the case and who has had the advantage of seeing and hearing the witness. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence on records and find out whether the appellant's defence can stand or otherwise".*

She concluded therefore that, as the trial court judgement dismissed the case for being untenable, the appellant was not entitled damages or reliefs to obtain.

I have dispassionately followed the rival submissions of both parties' counsels. From the raised arguments and the grounds of appeal, it is obvious that the bone of contention is whether the trial court failed to consider the fact that the respondents had a duty of care to the appellant.

In this appeal, reading from the grounds of appeal and the submission thereof, it is certain that the appellant is not complaining on the trial court's findings that he failed to prove malicious prosecution. He is complaining that the trial court erred

in making a finding that once the cause of action in malicious prosecution could not be established, the cause of action on negligence must fail.

Evidently, as counsels from both sides have observed, the main elements to be proved when the tort of negligence is alleged are duty of care, breach of such duty and loss. Since one of the main requirement is the existence of duty of care. Thus, as per the cardinal principle of the law the duty of care is not only a duty not to act carelessly, but also the duty not to inflict damage carelessly – **page 220 - Clerk and Lindsell on Torts, Sweet and Maxwell, 17th Edition (1995).** That being said therefore, negligence is mainly a question of fact.

The concept can be well inferred from the excerpt in the book titled **"The Principles in Tort Law", 4th Edition, Vivienne Harpwood, Cavendish Publishing Limited 2000 at page 25** where it was stated that:

> *"The first matter to be proved is that the defendant owed a duty of care to the claimant unless it is possible to establish this in the particular circumstance of the case, there will be no point in considering whether a*

particular act or omission which had resulted in harm was negligent; the existence of a duty of care depends upon oversight, proximity and other complex factors. It should be noted that in the vast majority of negligence cases there is no dispute about the existence of duty of care"

From the above, it is clear that in order for the complainant to claim redress under the tort of negligence, he/she must give full particulars of such negligence and prove duty of care that the defendant owed him/her. This position has also been cited with approval by the Court of Appeal in the cited case of **Starbag International (GMBH) Vs Adinan Sabuni, (supra).**

That being the position therefore, and being the first appeal, I shall have to visit the evidence on record in seeing as to whether the appellant gave the full particulars of such negligence and the said duty of care was proved for him to be entitled to claim the redress- See the cited case of **Shah Vs Aguto (1970).**

Going through the evidence of the appellant during the trial who testified as PW1, in essence, he said that he was terminated from his employment which he is claiming compensation from the respondents because he did not return to work on time.

According to his evidence on record, the same happened because the respondent invaded his farm hence he had to institute and attend proceedings at the Ward Tribunal which took long time. He tendered a copy of judgement from the Ward Tribunal which was admitted as "**exhibit P-A.**" Responding to cross examination questions, the appellant admitted to have written a letter asking for permission without indicating specific days for the leave. The appellant called **PW2 – John Marungu** as an employment officer at Fundi Smart. In essence he said the appellant was terminated on 10.10.2020 and that the appellant left without permission. **PW3** testified to have typed the termination letter and later gave it to Human Resources.

In his defence, the 1st respondent **(DW1)** denied to have sued the appellant and that he was a mere witness when the 2nd respondent (appellant's father) handed the farm to one Ngasa Mipawa. He denied to know the issue of the case that cause the appellant to be terminated from the employment. **DW2** testified that on 02/10/2020 DW1 went to him as a suburb chairman to complain that he was being prosecuted by the appellant and he reconciled the issue between them. Both **DW3** and **DW4** denied

that the farm issue caused the appellant to lose his job. Mr. Kanzikalulu Jilatu testified as **DW2**. He disassociated himself from the issue of land and said he was forcibly taken to sign so that the land could be handed over to Jacob.

From the above testimonies, the question now comes as to whether the appellant managed to prove the particulars of negligence as alleged.

In my scrutiny of the evidence and the plaint filed by the appellant, he listed the particulars of negligence being the fact that the respondent did not admit the wrong which could have allowed him to attend the work; careless publication that the appellant was a trespasser; and failure to take any steps to know who is the lawful owner.

The complaint by the appellant made me raise a concern as to whether the said land dispute has any nexus with the fact that the appellant could not attend work? In other words, I asked myself what is the proximity between the land issue and the fact that the appellant himself absconded from work? I hastily respond that there is none as for the reasons that shall be apparent soon.

I am inspired by the explanation issued at the book **The Clerk and Lindsell on Torts, Sweet and Maxwell, 20th Edition at page 415,** where the passage explained on the existence of duty of care situation in law that:

> *" ...it has to be shown that the* ***courts recognise as actionable the careless infliction of the kind of damage of which the claimant complains****"*

From the above, it is clear that the kind of damage complained of has to have proximity with the act or omission.

It is undisputed that proximity forges a broader relationship between parties. In a persuasive case of **Sutherland Shire Council V Heyman**, (1985) 60 A.L.R, at 55-56, Deane J, described the requirement of proximity as follows;

> *"It involves the* ***notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the claimant and the person or property of the defendant,*** *circumstantial proximity such as overriding relationship... of professional man and client and what might (perhaps loosely) be referred to* ***causal proximity in the sense of the closeness or directness of the casual***

connection or relationship between the particular course of conduct and the loss or injury sustained..."

Discerning from the above quotation therefore, proximity among other things calls for the closeness or directness of the relationship between particular course of conduct and the loss sustained.

Coming to our present case, it is conspicuous that the appellant is claiming damages because he lost his job. He is trying so hard to connect his termination and loss of income with the land dispute he instituted against the respondent. However, the evidence is clear that the reason for his termination is the fact that he did not attend to work. Would the fact that he decided not to attend to his work be because of the case caused by the respondent?. The answer is no PW2 testified before the court that the appellant was terminated because he left without permission. Furthermore, from his testimony, the appellant said that he did not ask for specific period of leave. More so, he has not tendered any document to prove that indeed he asked for the said leave. Therefore, it is incomprehensible that the appellant's own irresponsible act of not attending work would be caused by the fact that the respondents had land issue with him. I cannot fathom that one would justify as

an excuse for a person having a matter in court to stop going to work all together or not to seek permission from his or her employer for that reason. All in all, I find the ***relationship between the termination of job of the appellant for his own careless act and the loss he is trying to justify is*** **so remote**. As such, I see no causal proximity on the appellant loss of job and the assumption of responsibility by the respondents that they had a duty of care to ensure that he attends his work.

Therefore, the act alleged by the appellant as being actionable is not ***recognised by this court as a careless infliction of damage as claimed by the appellant.***

That being the position therefore, I find that the respondents had no duty of care towards the appellant to ensure that he attend work irrespective of the case at the Ward Tribunal; but rather his own irresponsible act.

Having found that the respondents had no duty of care towards the appellant, the fourth ground of appeal need not detain me much. It follows therefore that the appellant is not entitled to any compensation or damages from the respondents.

In the whole and for the above reasons, I agree with the counsel for the respondents that the appellant failed to establish his case against the respondents. The appeal is therefore dismissed in its entirety with costs.

Ordered accordingly

R.A. Ebrahim
Judge

Mbeya
11.11.2022