

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

CIVIL APPEAL NO 14 OF 2021

(Arising from the decision of Bunda District Court in Civil Case No 22 of 2015)

BUNDA DISTRICT COUNCIL APPELLANT

VERSUS

CHRISTOPHER MSAFIRI NYANDIGA RESPONDENT

JUDGMENT

10th Jan and 7th February, 2022

F. H. MAHIMBALI, J.:

This appeal emanates from Civil Case No. 22 of 2015 in which the respondent successfully sued the appellant at the trial court on claims of malicious prosecution. Bunda District Court (trial court) upon hearing the suit eventually ruled in favour of the respondent by awarding him fifty million as general damages. This decision did not amuse the appellant, hence the present appeal.

The background facts leading to this appeal are as follows; Bunda District Council entered into a contractual agreement with M/S Mbully Enterprises so as they can procure, install and test windmill for

Kasuguti village. The respondent was among the operators of Mbully Enterprises. The appellant later on prosecuted the respondent accusing him he had misbehaved or abused the contractual process by lodging Economic Case No. 38 of 2012. The court eventually held that Mr. Christopher had no case to answer Criminal charges preferred against him and he was therefore acquitted from the charges. In turn Mr. Christopher Msafiri Nyandiga (the respondent) decided to file a suit on malicious prosecution against the appellant at Bunda District Court in Civil Case No. 22 of 2015 in which he claimed the following reliefs; court orders that the appellant pays the respondent TZS. 25.2 million as refund monies for supply of the windmill machine and transport costs from Dodoma, general damages at the tune of TZS 100,000,000/=, costs of the suit, commercial rate interest from date of receipt of money to date of refund , interests at court's rate from date of judgment to date of decree and any other relief the court deems fit and just to grant.

The appellant contested the respondent's claims. At the end of the trial and after considering the evidence of both parties the trial magistrate at Bunda District ruled in favour of the respondent. To be precise he awarded the respondent Tshs. 50,000,000/= as general damages.

This decision provoked the appellant, thus he approached this court armed with a memorandum of appeal containing three grounds of appeal that needs to be determined by this court. The grounds of appeal in verbatim are as follows;

1. That, the trial magistrate erred in law and fact by not taking into account and analyzed (sic) all elements of malicious prosecution.
2. That the trial magistrate erred in law for not addressing all agreed facts.
3. That, the trial magistrate erred in law and facts in holding favour of respondent while there is no sufficient evidence.

When this matter came for hearing the appellant enjoyed the legal services of Mr. Michael Haule, Solicitor while the respondent was represented by Mr. Baraka Makowe learned advocate. This appeal was heard by way of written submissions.

Submitting in support of the first ground of appeal the appellant stated that the trial magistrate did not take into account and analyze all the elements of malicious prosecution. In support of his assertion, he referred this Court to the case of **Wilbard Lemunge versus Father Komu and The Registered Trustees of The Diocese of Moshi**, Civil Appeal No. 8

of 2016 where the Court of Appeal was persuaded by the decision in the case of **YonnahNgasaversus MakoyeNgassa** [2006] TLR 2006 that provides the five elements for malicious prosecution to be established, namely the plaintiff must have been prosecuted,the prosecution must have ended in the favour of the plaintiff, the defendant must have instituted the proceedings against the plaintiff without a reasonable and probable cause, the defendant must have instituted the proceedings against the plaintiff maliciously and the plaintiff must have suffered damages as a result of the prosecution. It was their submission that the trial magistrate in Civil Case no. 22 of 2015 failed to address the element that defendant instituted the proceedings against the plaintiff without a reasonable and probable cause. They submitted further that in order for reasonable and probable cause to be availed , the defendant has to establish four elements which are ; an honest belief of the accuser in the guilty of the accused, such belief must be based on an honest conviction of the existence of circumstance which led the accuser to that conclusion, the belief as to the existence of the circumstance by the accuser must be based upon reasonable grounds that, such grounds that, would lead to any fairly cautious person in the accuser's situation to believe so and the circumstance so believed and relied on by

the accuser must be such as to amount to a reasonable ground for belief in the guilt of the accused person.

The appellant stated further that the appellant had a reasonable and probable cause to institute the suit against the respondent. Also, the appellant stated further that the acquittal of an accused in criminal proceedings cannot be the basis to institute civil proceedings for malicious prosecution. To bolster this, he provided the case of **Edward Celestine and others vs. Deogratias Paulo** [1982] TLR 347.

It was also the submission of the appellant that the trial magistrate failed to show how the appellant acted maliciously against the respondent as it was defined in the case of **Wilbard Lemunge** (supra).

Responding to the appellant's first ground, the respondent stated that the appellant was prosecuted because the trial court found that he played an active role. The issue that there was no malice is not on record as he failed to fulfil the contract. The respondent submitted further that the case of Wilbard Lemunge(supra) is distinguishable in the instant case as per facts provided.

Regarding the second ground of appeal the appellant complaint is that the trial magistrate failed to address all the agreed issues framed during the hearing hence contravening the settled position in the case of **Africarriers Limited vs Millennium Logistics Limited** at page 10 where it was held

"We are aware of the settled position that the court is obliged to decide on each and every issue framed in making its decision"

It was the appellant's submission that the trial magistrate only addressed issue No. 1 and 3. The respondent rebutted this ground by submitting that all issues framed were discussed and this is per page 2,3 and 4 of the typed copy of judgement . The first issue was answered in affirmative, on the second issue the trial magistrate awarded the respondent general damages , the third issue was answered in negative . The respondent submitted further that there is leverage for the court to determine one or more issues and leave others as per Order XX Rule 2019 (sic) It was also the submission of the respondent that the case of **AfricarriersLtd vsMillenium** (Supra) is distinguishable from the current case.

On the third ground of appeal , the appellant's grief is that there was no sufficient evidence on record for the trial magistrate to rule in favour of the respondent. On this it was responded that the trial court evaluated the evidence. He prayed for the appeal to be dismissed.

Having heard the parties and gone through the court's records and their submission, the court is now left with the task of determining if this appeal has merits.

The first appellant's complaint is that the trial magistrate did not take into account all the elements of malicious prosecution. It is settled law by the court in the case of **North Mara Gold Mine Limited v. Joseph Weroma Dominic**, Civil Appeal No. 299 of 2020 that was persuaded by the case **Yonah Ngassa v. Makowe Ngasa** [2006] T.L.R 123 that held 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
4. That the proceedings terminated in the plaintiff's favour.

Also in the case of Wilbard Lemunge (*supra*), cited the case of **Paul Valentine Mtui and Another v. Bonite Bottlers Limited**, Civil Appeal No. 109 of 2014 (unreported) where they referred to the previous decision in **Yonnah Ngassa (*supra*)** that held for a claim of malicious damage to stand , there must exist five elements cumulatively which are;

- (i) That the plaintiff must have been prosecuted,
- (ii) The prosecution must have ended in the favour of the plaintiff,
- (iii) The defendant must have instituted the proceedings against the plaintiff without reasonable and probable cause,
- (iv) The defendant must have instituted the proceedings against the plaintiff maliciously and
- (v) the plaintiff must have suffered damages as a result of the prosecution.

In the present case, originally the respondent was charged, prosecuted and later the court found him with a no case to answer and hence acquitted him. From it, is evident that the first, second and fifth elements above did exist.

The next ingredient to be determined is whether the defendant acted without reasonable and probable cause, which is the third element. The

case of **Wilbard Lemunge** (supra) at page 12 provided for four factors to be established in order for the defense of reasonable and probable cause to be established which are; *an honest belief of the accuser in the guilt of the accused (plaintiff) , such belief must be based on an honest conviction of the existence of circumstances which led the accuser to that conclusion , the belief as to the existence of the circumstance by the accuser , must be based upon reasonable grounds that, such grounds would lead to any fairly cautious person in the accuser's situation to believe so and the circumstance so believed and relied on by the accuser , must be such as to amount to a reasonable ground for belief in the guilt of the accused person.*

In the case at hand, the appellant had entered into a contract with Mbully Enterprises, where the respondent was one of the directors of that enterprise. The respondent was required to supply the appellant with a wind mill according to the specifications they had agreed on but the respondent supplied them with a windmill which was not as per their specifications and it could not be assembled and it was alleged that he had used forged documents to mislead the appellant. From the foregoing, it is evident that the appellant had a reasonable and probable cause to institute

the case against the respondent on the belief of what has been misbehaved by the respondent.

Regarding the issue of the appellant acting maliciously, it is the view of this court that there was no any malicious act established. As the respondent failed to comply, the DED decided to start the legal remedies for the appellant hence he had no any ill will. From the foregoing it is safe to state that the malicious prosecution was not proved at the trial court in the set legal standards.

Now reverting to the second ground of appeal that the magistrate failed to address all the agreed issues. Going through the court's records, it is evident that the framed issues were;

1. Whether there was malicious prosecution against the plaintiff by the defendant
2. Whether the plaintiff suffered any damages as a result of being prosecuted
3. Whether the plaintiff is entitled to be paid Tsh. 25,200,000/= as a purchase price for the windmill and transport costs.
4. Whether the parties are entitled to any reliefs.

The first and second issues were determined and the court held that the respondent was maliciously prosecuted and awarded him tshs. 50,000,000/= as general damages. The third issue was also determined at page 4 of the typed judgement and the court held that the respondent was not entitled to be paid tshs. 25,200,000/=

Hence it is now safe to state that the appellant's second ground of appeal is baseless as it lacks merits. All issues framed were determined.

Last but not least regarding the third ground of appeal , this court also finds this ground lacks merits as the issue before the trial court was whether the respondent was maliciously prosecuted and it held that he was. And this court is at variance with the trial court that he was not maliciously prosecuted as there was reasonable cause to warrant the prosecution. The reasons for acquittal (no on case to answer) perse is not a conclusive proof that the appellant had malice in prosecution of the respondent. On the strength of the testimonies of PW1, PW2, PW3 and PW4, I find no any malice in the mind of the appellant as alleged. The reason why the respondent was acquitted is because of the contradictory evidence of PW5 and PW6 against that of PW1, PW2, PW3 and PW4. Considering the fact that in criminal cases a proof of the fact must be

beyond reasonable doubt, any reasonable doubt must be resolved in favour of the accused person. That was the basis of benefit of the respondent in the prosecution of his case at the trial court (Bunda District Court) when facing Economic Case No. 38 of 2012. While making his verdict, the trial magistrate Hon. J.C Tiganga – SRM (a.h.w), remarked:

"in this case, evidence of PW5 and PW6 contradicts with that of PW1, PW2, PW3 and PW4. Evidence of PW5 and PW6 was in favour of the accused person while the rest were against the accused person."

In my consideration what has been unreasonable and unprobable cause in the prosecution of the respondent at the District Court (in Economic Case) has not been established. This is because the central allegation was purchase of the substandard Windmill machine different from the specifications given by the employer (PW1) who is the Appellant. The same ought to have been of POLDAW make, 8.2 meters. Relying on P2 exhibit, the appellant believed that the purchased Windmill machine by the Respondent was not POLDAW make but Southern Cross Windmill, the latter being substandard. The appellant in my candid view was justified to raise the suspicion he did as the purchase appeared not in conformity with

the terms of the contract (see page 30 of the ruling of Hon J.C. Tiganga, trial magistrate as he then was in Economic case no. 38 of 2012).

Considering the fact that a mere acquittal of criminal prosecution is not a guarantee that the prosecution was malicious, I find this appeal meritorious as there has not been proof by the Respondent that the trial against him was malicious. For it to have been malicious, the Respondent ought amongst other things to have established that the appellant had ill motive against him. I find none. Basing his argument on acquittal of a prosecution charge (on no case to answer) has not been the only legal requirement as per law establishing the claim on malicious prosecution. What I gather from the prosecution case on the facts and evidence on record is the fact that there has been conflicting evidence by the prosecution against the Respondent in the prosecution of that criminal case. Should it be taken that every acquittal in a criminal charge amounts to malicious prosecution, then Courts of law would have been flooded with malicious prosecution claims. That is not the law and it should be discharged unless legally, established so.

In essence, there has not been established any malice by the respondent against the appellant in the prosecution of the said criminal

case. That said, the decision of the trial court is faulted by reaching to an erroneous decision following failure to analyze the evidence and legal principles rightly. The decision of the trial court is thus quashed and set aside.

In fine, the appeal is allowed. As per nature of this case, each party shall bear its own costs.

It is so ordered.

DATED at MUSOMA this 7th day of February, 2022.



F. H. Mahimbali

Judge

07/02/2022

Court: Judgment delivered in this 7th day of February, 2022 in the presence of Baraka Makowe, advocate for the respondent, Mr. Gidion Mugo, RMA and Appellant being absent.

Right of appeal is explained.



F. H. Mahimbali

Judge

07/02/2022