

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 164 OF 2019

ISSA KASIM ISSA APPELLANT

VERSUS

THABIT BIANGA RESPONDENT

***(Appeal against the judgment and decree of the District Court of Ilala at
Kinyerezi in Civil Case No.21 of 2018)***

JUDGMENT

21st December 2021 & 8th April, 2022

KISANYA, J.:

This appeal originates from a case of malicious prosecution which was filed in the District Court of Ilala at Kinyerezi (trial court) in Civil Case No. 21 of 2018. The respondent was the plaintiff at the trial court while the appellant was the defendant.

The brief facts giving rise to the case before the trial court were that: The respondent owned a mobile phones accessories' shop at Kariakoo, Dar es Salaam. His claim in the case at trial court was based on the judgment of the Kariakoo Primary Court in Criminal Case No. 825 of 2017 in which he was acquitted of the charges of intimidation and malicious injury to the property. The said charges were laid against the respondent following a complaint lodged to the police and court that he

had intimidated the appellant and damaged his property to wit, the shop's gate.

Upon hearing and final disposal of the suit, the trial court ordered the appellant to pay a sum of Tshs.45,000,000/= being specific damages for loss of income and Tshs. 5,000,000/= being general damages for humiliation, mental torture, harassment and physiatry.

Dissatisfied with the decision of the trial court, the appellant lodged this appeal with the following grounds:

- 1. That the trial court erred in law and facts to held(sic) that the respondent was maliciously prosecuted.*
- 2. That the trial court erred both in law and facts to award specific damages to the respondent which was not specifically pleaded and proved.*
- 3. That the trial court erred in law to exercise discretionary power to award general damages to the respondent.*

With leave of this Court, the appeal was heard by way of a written submissions. Mr. Buruhani Mussa and Ms. Theresia Simon, learned advocates filed their respective submissions for and against the appeal.

Submitting in respect of the first ground of appeal, Mr. Mussa referred this Court to Exhibit P-5, which is the judgment of the Kariakoo Primary Court in Criminal Case No.825 of 2017. He went on to fault the

District Court in holding that the respondent was maliciously prosecuted by the appellant. Elaborating, he submitted that the fact that the criminal proceedings had ended in the respondent's favour and the appellant did not challenge the said decision was not sufficient to conclude that the respondent was maliciously prosecuted. Mr. Mussa fortified his argument by citing the case of **Minza Barbanas vs Lucia Patrick** [2017] ~~TLS-LR.~~

The learned counsel submitted further that it was proved that the appellant and the respondent had exchanged words on the material day. Therefore, he was of the view that acquittal or termination of the proceedings in the respondent's favour does not justify that the respondent was maliciously prosecuted. He also contended that the appellant believed that the respondent had committed the offence. The learned counsel submitted further that the respondent failed to demonstrate how the appellant acted maliciously without reasonable and probable cause which is an essential ingredient for the claim of malicious prosecution.

Arguing on the second ground of appeal, Mr. Mussa submitted that the respondent failed to prove the specific damages of Tshs.70,000,000/= claimed in the plaint. His submission was based on the contention that no evidence was produced to prove that the respondent suffered the specific

damages. Referring to Exhibit P-4, he argued it does not specifically prove any loss of income from the respondent's business as required by the law. To support his argument, the learned counsel cited the cases of **Bamprass Star Service Station Ltd vs Mrs. Fatuma Mwale** [2000] TLR 390 and **Masosele General Agencies vs African Inland Church Tanzania** [1994] TLR 192. Therefore, Mr. Mussa was of the view that the trial court had no discretion to award specific damages of Tshs.45,000,000/= which was not proved by the respondent.

Addressing the last ground, Mr. Mussa submitted that general damages are awarded at the discretion of the court. He went on to content that the said relief was wrongly awarded in favour of the respondent because that he was not maliciously prosecuted by the appellant.

In the light of the foregoing submission, Mr. Mussa asked this Court to allow the appeal, quash and set aside the decision of the District Court.

On her part, Ms. Simon firmly opposed the appeal. On the first ground of appeal, she submitted that the criminal case instituted by the appellant was unreasonable and malicious. Her submission was premised on the ground that the appellant failed to prove the criminal case against the respondent and that the appellant had instituted a civil case which was also terminated in favour of the respondent.

As regards the second ground of appeal, Ms. Simon contented that the respondent proved that his monthly income from his business ranged from Tshs.12,000,000/= to Tsh.15,000,000/= and that said income was interrupted by the institution of the criminal case at the primary court as it required the respondent to attend at the court for three months. In that regard, Ms Simon submitted that the specific damages of 45,000,000/= resulted from the monthly income lost during the three months in which the criminal case stayed in the primary court.

On the third ground of appeal, Ms. Simon was in agreement with Mr. Mussa that general damages are awarded at the discretion of the court. However, she held the view that the District Court was justified to award general damages to the tune of Tsh.5,000,000/= because the respondent claimed to have been maliciously prosecuted.

That said, Ms. Simon invited this Court to dismiss the appeal for being devoid of merit.

I have examined the record and keenly considered the contending learned submissions. The vexing question is whether the appeal is meritorious or otherwise.

The first ground of appeal raises the issue whether the respondent proved that he was maliciously prosecuted. In terms of the settled

position, that is one of the ingredients of the tort of malicious prosecution. Other ingredients are: *two*, that the plaintiff was been prosecuted; *three*, the prosecution ended in favour of the plaintiff; *four*, the defendant instigated the proceedings against the plaintiff without reasonable and probable cause; *five*, the defendants suffered damages as a result of the prosecution. There is a list of authorities on that stance. See for instance, the cases of **Wilbard Lemunge vs Father Komu and The Registered Trustees of The Diocese of Moshi**, Civil Appeal No. 8 of 2015 (unreported) and **Yonnah Ngassa vs Makoye Ngassa** [2006] TLR 2006. The law is also settled that all ingredients must be proved cumulatively.

It follows that the first ground of appeal is limited on the whether the ingredient of malice was proved. In the case of **Wilbard Lemunge** (supra), the Court of Appeal elaborated on the malice referred to in malicious prosecution. It held as follows:-

"It is not malice in the legal sense, that is such as may be assumed from a wrongful act done intentionally. To contrary, it is malu animus meaning, being actuated by ill spite or ill-will."

Guided by the above position, the first ground is tackled by considering whether the appellant was actuated by a genuine desire to

bring justice when he reported the matter that led to the arrest and prosecution of the respondent.

As rightly submitted by Mr. Mussa, the District Court resolved that issue in affirmative. That was after considering that, the criminal case had ended in favour of the respondent; the appellant acted without reasonable cause because he failed to take proper step against the decision; and the appellant failed to prove a civil suit instituted against the respondent. Therefore, it is clear the District Court did not address the issue whether the respondent proved that reporting of the matter which led to the arrest and prosecution of the respondent was not actuated by a genuine desire.

I am in agreement with Mr. Mussa that the fact that the criminal proceedings ended in the respondent's favour and that the appellant's failure to exhibit his grievances against the said decision is not enough to conclude that the appellant acted maliciously.

This being the first appeal, I am inclined to examine and assess the evidence adduced before the trial court. Having done so, I have observed that, the dispute between the parties was first triggered by exchange of words between them when the respondent closed the appellant's shop with an iron bar. It was deposed further that when the police officers arrived at the scene, both parties were arrested on the allegation of

fighting in public. Thereafter, the appellant instituted a criminal case against the respondent for the charges of intimidation and malicious injury to the property. In view of the foregoing, nothing suggest that the appellant had an ill motive. The fact that the criminal case ended in favour of the respondent does not imply that the appellant had an ill motive. Thus, I find merit in the first ground of appeal.

The second ground will not detain this Court. It is trite law that special damages must be specifically pleaded and proved. In the case at hand, the respondent claimed for special damages of Tshs. 70,000,000 being loss of income and capital business. The District Court considered that the criminal case stayed in court for three months. Upon considering further that, the respondent monthly income from his business was Tshs.12,000,000/= to 15,000,000/=, the District Court went on to award special damages of Tshs. 45,000,000/= as loss of income and capital business.

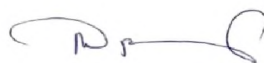
I have gone through Exhibit P-4 relied upon by the District Court. It does not disclose that the respondent suffered the special damages due to the following reasons. *First*, the respondent claimed that his monthly profit was Tshs.12,000,000/= to 15,000,000 without showing the actual profit after deduction of taxes and expenditure. *Second*, it was not proved

that the amount appearing in the invoices was duly paid. *Third*, it is also not clear whether the respondent was not admitted on bail or he was required to attend the hearing consecutively for the period of three months as claimed or barred from conducting his business. In my considered view, the respondent proved that he was conducting business when the criminal case was instituted against him. However, he did not prove special damages claimed at the trial court or special damages awarded by the trial court. Therefore, I find this ground of appeal with merit.

Having found the first and second grounds of appeal to be meritorious, the third ground on general damages has merit. General damages cannot be granted because it was not proved that the respondent was maliciously prosecuted.

In the end result, I allow the appeal. I further quash the judgment of the District Court of Ilala and set aside the decree thereon. As it was before the trial court, each party will bear its own costs.

DATED at DAR ES SALAAM this 8th day of April, 2022.



S.E. Kisanya.
JUDGE

