

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MBEYA)**

**AT MBEYA**

**CIVIL APPEAL NO. 03 OF 2021**

(From the District Court of Mbozi at Vwawa (Hon. N. L. Chami, RM), in Civil  
Case No. 05 of 2019.)

**LEONARD MWAIPASI.....APPELLANT**

**VERSUS**

**HARISON NDEMBO MBUGHI.....RESPONDENT**

**JUDGMENT**

Date of Last Order: 02/12/2022  
Date of Judgment: 22/02/2023

**MONGELLA, J.**

The dispute between the parties herein stems from Criminal Case No. 156 of 2018 instituted in Ruanda primary court by the appellant against the respondent. In that case, the appellant prosecuted the respondent for the offence of theft contrary to section 265 of the Penal Code, Cap 16 R.E. 2002. He claimed that the respondent had stolen music instruments, being: one big speaker make "Candy," one power mixer, and one decoder, properties of Tanzania Calvary Tabernacle Church (TCTC), which were under his care. The primary court acquitted the respondent who then decided to file civil proceedings against the appellant on malicious prosecution. The same were filed in the District Court of Mbozi



vide Civil Case No. 05 of 2019. He claimed, among other things, specific damages to the tune of T.shs. 55,000,000/- and T.shs. 90,000,000/- as general damages. The district court ruled in favour of the respondent awarding him a sum of T.shs. 25,000,000/- as general damages for loss of opportunity to attend his farms, church and children; for his detention, sickness developed out of the prosecution, and for loss of his reputation as a church leader.

The above decision aggrieved the appellant, hence the appeal at hand on three grounds, to wit:

1. *That the trial court erred both in law and fact to the effect that, the ingredients of malicious prosecution were not proved to warrant the decision reached. (sic)*
2. *That, the trial court erred in law and in facts for failure to distinguish between defamation and malicious prosecution, and reaching to unjust prosecution. (sic)*
3. *The trial court erred both in law and facts for mistaking the reporter of the criminal case, who was not the defendant. (sic)*

The appeal was argued by written submissions following a prayer by both parties, who appeared in person. The submissions were filed in Court in adherence to the scheduled dates.



In his submission, the appellant abandoned the 2<sup>nd</sup> and 3<sup>rd</sup> grounds. Addressing the 1<sup>st</sup> ground, he started by providing the background to the dispute between the parties. He said that the dispute started in the year 2018 whereby the Tanzania Calvary Tabernacle Church complained to the District Commissioner for Mbozi district that the respondent had taken music instruments belonging to the Church. That the District Commissioner attended the dispute whereby he ordered the respondent to handover the music items to the Church. The respondent however, declined to honour the District Commissioner's orders leading him to be taken to the police station and criminal charges on the offence of theft instituted forthwith at Ruanda primary court. That the respondent was acquitted of the charges on the ground that none of the parties had proved ownership of the music instruments and that the complainant had no *locus standi* to sue as he was not authorised to do so by the Church. That, the primary court advised for a civil suit to be filed by the true owner of the instruments.

Arguing as to whether the tort of malicious prosecution was established by the respondent he first referred to an English case, **Brown vs. Hawkes** (1981) 2 QB 718, in which "malicious prosecution" was explained to be "*some other motive than a desire to bring justice a person whom he (the accused) honestly believes to be guilty.*" He further referred to **Halsbury Law of England, 3<sup>rd</sup> Ed. Vol. 25 at page 356** where it is stated: "*The malice which the plaintiff in an action for damages for malicious prosecution ... has to prove is not malice in its legal sense, that is, such as may be assumed from a wrongful act done intentionally, without just cause or excuse but in fact "malus animus" indicating that the defendant was*





*actuated either by spite or ill will against the plaintiff or by indirect or improper motives."*

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Considering the above position, he further argued that it is not that every prosecution which ends in accused's favour can entitle an accused person to institute a suit for damages for malicious prosecution. To further buttress his point he referred the case of **Tumaniel vs. Aisa Issai** (1969) HCD No. 280; and that of **Yonah Ngassa vs. Makoye Ngassa** [2006] TLR 213. He further referred the case of **Lwitiko Mwakabuta vs. Nineme Mwakang'ata**, Civil Appeal No. 18 of 2020, which explains the ingredients of malicious prosecution to include prosecution maliciously and without reasonable and probable cause resulting in damage to the plaintiff's reputation, person, freedom and property.

Referring to page 4 and 5 of the primary court decision in the criminal case, he vehemently disputed existence of malice in the proceedings he instituted against the respondent. The proceedings show that there was a dispute regarding handing over of the music instruments whereby the respondent refused to hand them over. To be clear, the passage referred to reads:

*"Mshitakiwa Alison Ndembo alinunua vyombo vy (sic) injili kama mhubiri. Vilevile SU1 alielez (sic) Mahakam (sic) kwamba mnamo tarehe 19/07/2018 alifuatwa na afisa tarafa wa Vwawa akiwa na jopo la watu wa tatu kutoka katika ofisi ya mkuu wa wilaya na watu wengine kutoka Mbeya. Aidha SU1 alieleza mahakama ya kwamba alikataa kukabidhi mali kwa SM1 kwakuwa mali ni ya wake. Pia SU1 alieleza mahakama ya kwamba vyombo hivyo vya muziki vililetwa katika kituo cha polisi na askari polisi. Na*



*kutokana na SU1 kukataa kukabidhi vyombo ndivyo alifunguliwa jalada la kosa la wizi."*

From the above passage he had the firm view that the respondent's prosecution resulted from the dispute in which he refused to hand over the music instruments despite being told to do so by government officials. He added that there is nowhere in the judgment indicating that it was the appellant who reported the matter to the police station and that the police acted upon the information given by him. That, it was the Division Officer who reported the matter to the police station following the respondent denying to honour the District Commissioner's orders to hand over the music instruments. That, he was taken to be the claimant as he was the one to receive the music instruments from the respondent.

Addressing the question as to whether he had probable cause in prosecuting the respondent, he argued that him being a member of the Board of Trustees of Tanzania Calvary Tabernacle Church, had a belief that the music instruments belonged to the Church, had knowledge of how the instruments were obtained and was sent by the church to receive the said instruments from the respondent following a meeting convened by the Division (sic) Commissioner. He had the stance that given the scenario and the fact the respondent refused to hand over the instruments, he had probable cause to prosecute the respondent.

Lastly, he contended that the mere fact that the criminal case ended in favour of the respondent does not mean that the appellant had malice against him. He argued that the primary court found that the music instruments were not properties of either party as both of them failed to



prove ownership thereto before the court and the court further advised that the owner had to file a civil suit to claim for the said instruments from the respondent.

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The respondent opposed the appeal. He maintained his stance that the criminal case filed by the appellant in the primary court was actuated by malice. He supported the trial court decision on the ground that he successfully proved all the ingredients of malicious prosecution against the appellant. He as well referred the case of **Jeremiah Kamama vs. Bugomola Mayandi** [1983] TLR 123; and that of **Yonah Ngassa vs. Makoye Ngassa** (supra), which list five ingredients in malicious prosecution as being: (1) that, the respondent was prosecuted by the appellant; (2) that, proceedings ended in favour of the respondent; (3) that, the appellant initiated the proceedings against the respondent maliciously; (4) that the appellant instituted the proceedings against the respondent without reasonable and probable cause; and (5) that, the respondent suffered damages as a result. He had the stance that all these elements were proved by him warranting the trial court reaching its decision correctly.

Referring to Criminal Case No. 156 of 2018 in Ruanda primary court between the parties, he argued that it is vividly clear that the respondent was actively prosecuted by the appellant. That the complainant in that case was the appellant and he was the one who set the motion in prosecuting him. Further, referring to the primary court decision in the criminal case, he argued that he was acquitted from the charges rendering the case to end in his favour. That, the appellant failed to prove the charges on theft he leveled against him.





Establishing that the appellant acted with malice, he contended that he was a Pastor in the TCTC Church and later decided to leave to start his own church. He said that this led to the accusations by the appellant which culminated into the criminal case on theft charges. That, while the criminal proceedings were pending in court, the appellant administered the closure of his new church thereby denying his worshipers access to the church services until when he was acquitted by the primary court of the charges. He thus had the stance that the appellant had bad motive against him.

He contended further that the appellant had no reasonable and probable cause in instituting the criminal charges. He said that before taking the respondent to the police, the respondent informed the appellant that the alleged stolen instruments belonged to him and not the church. In the premises he contended that the appellant ought to have instituted civil proceedings against him. He further considered the appellant's act of instituting the criminal proceedings in his personal capacity as lack of reasonable and probable cause.

With regard to damage suffered he contended that he suffered damage out of the arrest and prosecution. That, he was shocked to the extent of being admitted at hospital whereby he was discovered to have suffered from high blood pressure, a disease he never suffered from prior to the arrest. He added that his assertions were proved in the trial court and the appellant never disputed the allegations. Considering his position in society, to wit, a church Pastor, he further contended that the arrest and subsequent criminal proceedings against him, defamed him and



damaged his reputation. He added that he failed to attend to his various economic activities, such as farming and keeping livestock due to the fact that he spent more time in prison custody and following up on the criminal case. Further, he failed to attend to his children who are still schooling and to his church congregation for a period of 8 months where the church had to remain closed. He maintained his stance that he proved all his claims leading the trial court in reaching its decision which is correct. He thus prayed for the appeal to be dismissed with costs.

After considering the ground of appeal and the arguments advanced by both parties in their submissions, my task is to determine as to whether the tort of malicious prosecution was proved by the respondent against the appellant.

Malicious prosecution is explained to be a prosecution on some charge of crime which is willful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy. See: **Masenga Ntandu vs. Shabani Munjori**, DC Civil Appeal No. 20 of 2018 (HC at Dodoma, unreported). "Malice" is said to exist where the prosecution is actuated by spite or ill-will or indirect or improper motives. See: **Jeremiah Kamana v. Bugomola Mayandi** (supra).

I am at one with both parties that there are conditions to be met for the tort of malicious prosecution to stand. The conditions were explained in the case of **Edward Celestine and Others v. Deogratius Paulo** [1982] TLR 347 in which it was held:





*"Malicious prosecution is committed where there is unity of four elements, namely (a) that the plaintiff was prosecuted by the defendant; (b) that the prosecution terminated in the plaintiff's favour; (c) that it was without reasonable and probable cause; and (d) that it was malicious."*

In the case of **Amina Mpimbi v. Ramadhani Kiwe** [1990] TLR 6 it was held:

*"For the appellant to have succeeded in her action against the respondent, she should have proved in court below that there was "Malice" on the part of the respondent in that he had prosecuted her in the "Primary Court" without just cause or excuse" or that the respondent had no reasonable and probable cause."*

Further in **Jeremiah Kamana v. Bugomola Mayandi** (supra) the above elements in the tort were settled with an additional element on damage suffered as a result of the prosecution. The Court listed the elements to be:

*"(a) He was prosecuted; (b) that the proceedings complained of ended in his favour; (c) that the defendant instituted the prosecution maliciously; (d) that there was no reasonable and probable cause for such prosecution; and (e) that damage was occasioned to the plaintiff."*

All the elements in malicious prosecution have to be proved cumulatively for the claimant to succeed. This was held in the case of **Wilbard Lemunge v. Father Komu and The Registered Trustees of the Diocese of Moshi**, Civil Appeal No. 8 of 2016 (CAT at Arusha, unreported) whereby it was held:

*"In view of the foregoing account, we hold that, the third and fourth elements required in establishing the prosecution for malicious prosecution, were not met. And the fact that,*

*the prosecution would only stand if all elements had cumulatively been established, we are of the settled mind that, the learned first Appellate Judge was correct and justified to reverse the decision of the trial court, which has awarded damages to the appellant against the respondents."*

See also: **Felician Muhere Mguyo vs. David Joseph Mlay**, Civil Appeal No. 17 of 2020. Having settled the legal base in this matter, I wish to scrutinize the respondent's case to ascertain whether all the elements were established. It not in dispute that the respondent was prosecuted for the offence of theft in Ruanda primary court and that it was the appellant who prosecuted the case in person. It is further not in dispute that the case ended in favour of the respondent as he was acquitted of the theft charges. The respondent claimed to have suffered injuries following being locked in custody for eight months. That, he developed high blood pressure, his church had to be closed as he was not present to attend to it, and that his children who are still schooling suffered as he was not around to take care of them. This assertion was never contested by the appellant leading me to believe in what the respondent asserted.

To this point, I find the controversy laying on proof of "malice" in institution of the criminal proceedings by the appellant. In his defence and submission in this appeal, the appellant vehemently denied to have acted with malice. He claimed to have believed that the music instruments belonged to the TCTC church as they were claimed by the church, the dispute was reported to the District Commissioner who ordered the respondent to return the same, and that it was him who was sent to receive the instruments from the respondent. On the other hand,



the respondent's main arguments were that he had told the appellant that the instruments belonged to him through purchase; that the appellant engineered the closure of his church while he was in custody, proving that he had ill-motive; and that he was acquitted of the theft charges by the primary court.

In malicious prosecution claims, the fact that the plaintiff was acquitted of the criminal charges does not render it that he was maliciously prosecuted. Therefore, proving that the defendant maliciously prosecuted the plaintiff is imperative. The plaintiff must in fact prove that the defendant had no actual belief that the plaintiff was guilty or liable in the original case. See also: ***Ally R. Mhando v. Attorney General & Inspector General of Police***, Civil Case No. 61 of 2003 (HC at DSM, unreported).

Considering the evidence on record, I am of the considered view that since there was a dispute over the music instruments with each party claiming ownership, it cannot be established that the appellant acted on malice. The fact that the respondent stated that the music instruments belonged to him does not conclusively render the charges malicious. This is because the appellant, the TCTC church and the government leaders who intervened believed the instruments belonged to the TCTC church and ordered for their return to the church.

The fact that the appellant ought to have instituted a civil case instead of criminal case does not either render the charges malicious. Actual malice had to be proved by the respondent and I am of the view that he failed to discharge his duty in proving actual malice. In that respect, I find the





trial court's decision at fault and quash it. Considering the nature of the case and the fact that the respondent still suffered by being kept under custody, I make no orders as to costs.

Dated at Mbeya on this 22<sup>nd</sup> day of February 2023.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Judgment delivered in Mbeya in Chambers on this 22<sup>nd</sup> day of February 2023 in the presence of both parties appearing in person.



  
**L. M. MONGELLA**

**JUDGE**