

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL CASE NO. 34 OF 2020**

**MATHAYO MZIBA.....1<sup>ST</sup> PLAINTIFF**  
**AMINA MUSSA.....2<sup>ND</sup> PLAINTIFF**  
**JONATHN MNDOLWA.....3<sup>RD</sup> PLAINTIFF**  
**NANCY MZAVA.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**GAMING AFRICA (T) LIMITED T/A MERIDIAN BET.....DEFENDANT**

**JUDGMENT**

*Date of last Order: 28<sup>th</sup> March, 2023*

*Date of Judgment: 28<sup>th</sup> April, 2023*

**E.E. KAKOLAKI, J.**

The plaintiffs herein who were employees of the above-named defendant instituted the instant suit against her for payment of Tshs. 600,000,000/ being compensation for the damage suffered by them as a result of being maliciously prosecuted on false and unfounded criminal charges maliciously instigated by her, payment of Tshs. 200,000,000/ being punitive damages for defendant's act of instigating unfounded charges against them without just and probable cause, costs of the suit and any other reliefs this Court any deem fit and just to grant.

Briefly as deciphered from the pleadings, it is plaintiffs' claims that sometimes in June, 2016 the defendant through her officers while knowing that were deceiving, reported and instigated criminal charges against them, before they were arrested, deprived of their liberty for being kept under custody for days before and after were charged with the offence of Stealing by Servant; Contrary to section 258 and 271 of the Penal Code, [Cap. 16 R.E 2002], before the District Court of Kinondoni in Criminal Case No. 3 of 2016. It is their averment that, upon testing the veracity, truthfulness of their accusations and reliability of the adduced evidence in Court, the trial court found out the said accusation was a mere concoction actuated with malice, ill will and spite on the defendant's part towards them, aiming at character assassination in order to further her unwarranted and illegal intention of expelling and terminating their employments, as they were finally found not guilty and acquitted of the charges facing them. They further contend that, out of that defendant's malicious act accompanied with termination of their employment, they suffered mental anguish, distress and panic attacks, loss of their outstanding image, trust and reputation in the society resulting into failure to obtain new jobs from other companies or institution and incurred expenses in defending the maliciously instigated criminal charges against

them. It is out of afore stated claims the plaintiffs preferred this suit for the reliefs described above.

When served with the plaint the defendant a company incorporated and licenced to trade sports betting, in her written statement of defence vehemently resisted the plaintiffs' claims contending that, she is protected from criminal and civil proceedings for damages resulting from the information furnished to the police as her duty was to report the crime once she became aware of it. It was her averment that, she had reasonable and probable cause to report the plaintiffs at police as in January 2016, the defendant's fraud department noticed credit balances that were added to online customer accounts which were processed on the defendant's online sports betting system, the balance crediting which after internal investigation was unveiled to have been perpetrated through the MeridianBet Online Training system at the head office as per the CCTV footage, since there was online deposits of Tshs. 81,630,000/ without receipt of physical cash or evidence of the corresponding bank deposits from the findings of ABA Alliance Advisory Limited, an independent forensic auditing company. It was the defendant's further contention that, having reported the crime at a police the mandate of arrest of suspects, investigation and decision to prosecute

rests on the Police Force and the office of Director of Public Prosecutions in which she had no control of the process for being a mere witness to testify in court. She averred that, in the preferred criminal proceedings as per the judgment of the trial court, the reasons for their acquittal was not because of their innocence but rather poor investigated and prosecution of the case as even the charges of Stealing by Servant preferred under the Penal Code against the plaintiffs was contrary to the crime report of online theft made at police, which is a cyber-crime preferred under different and separate law. So to her acquittal of the plaintiffs was on technical grounds and not based on their innocence. As regard to the contention that, the criminal proceedings were preferred by the defendant with ill intent to terminate them from their employment she countered, at no point of time the defendant formed any opinion to terminate them from employment as it was them who imputed the same following institution of criminal case against them. She added that, the labour dispute instituted by the plaintiffs at the CMA, was settled in March 2018 and the plaintiffs paid hence relinquished the defendant from any sort of claim arising from the said labour dispute or in connection thereto. In light of the above defence it was the defendant's prayer that, this suit be dismissed with costs.

Before hearing could take off it became evident to the Court and both parties were at one that, the plaintiffs were once employees of the defendant before were terminated after being charged with offence of Stealing by Servant vide Criminal Case No. 3 of 2016 following the report of crime by the defendant, the charge which they were acquitted, filed labour dispute with CMA and paid all their labour related claims after signing the settlement deed. What remained in dispute is that, the plaintiffs alleged the criminal proceedings were instigated by the defendant with malice while the defendant resists the accusation in that she had reasonable and probable cause to report the crime committed and that, the case was poorly investigated and prosecuted hence it is wrong to impute malice on her side. To disentangle parties on this tag of war upon their consultation this Court framed and adopted three issues for its determination going thus:

1. Whether the instigation of criminal proceedings against the Plaintiffs by the Defendant was actuated with malice?
2. Whether the Plaintiffs suffered damage?
3. To what reliefs are the parties entitled to?

It is settled principle of law promulgated under section 110(1) and (2) and section 111 of the Evidence Act, [Cap. 6 R.E 2019] that, he who alleges must

prove his allegations. It is further a well-known principle that, a party seeking to obtain judgment in his favour basing on certain facts bears evidential burden of proving their existence and the standard of proof is that of balance of probabilities or preponderance of probabilities. See the case of **Anthoni M. Masanga Vs. Penina (Mama Ngesi and Another** civil Appeal No 118 of 2014 CAT (unreported) and the case of **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 as well as section 3(2)(b) of the Law of Evidence Act.

In a bid to address the above framed issue and discharge the noble duty of proving their case, plaintiffs presented three (3) witnesses before the Court being Mathayo K. Maziba (PW1), Jonathan Mndolwa (PW2) and Amina Mussa (PW3) while relying on one exhibit, the Judgment of the District Court of Kinondoni in Criminal Case No. 3 of 2016 (Exhibit PE1). On her side the defendant called one witness, Amani S. Maeda (DW1) and tendered in Court one flash disc and six (6) sheets of printouts from defendant's online betting system as exhibit DE1 collectively. Throughout the trial the plaintiffs had representation of Mr. Denice Tumaini while the defendant enjoying the services of Mr. Hezron Jasson, both learned counsel.

Before I delve into determination of the issues raised above I find it apposite albeit briefly to narrate the evidence adduced by the parties. To start with PW1 who was working as call center operator responsible for receiving internal from staff when on site and external calls from clients with difficulties in betting, supervision of cashier in small gaming stations and their equipment and preparation of report of all vehicles going out on site, was reporting to his boss junior manager. He said in his daily duties he used a programmed computer with username and password and forward his work to the junior who could forward it to the senior manager for approval of payments. This witness told the Court that, on 15/01/2016 together with his three colleagues were accused of Stealing of Tshs. 81,630,000/ allegedly perpetrated through online transaction after the report was made to police by the Senior Manager one Chetan Chudama, the allegations which according to him were false. He testified that, during arrest was incarcerated at Oysterbay police station for three days before he was bailed out and later on indicted before the District Court of Kinondoni with his fellows on the charges of Stealing by Servant; Contrary to section 258 and 271 of the Penal Code, the case in which they were acquitted. He stated that, during the trial the alleged collection account in which money is claimed to be stolen from

was not mentioned nor were the names of the persons who collected the payments resembling their names save for the name of Nancy Mzava, the trainer who had her account opened for the purposes of training of new staff. According to him this was the account allowing her to access the system with information such as phone numbers, names and password, but the account had no any connection to the collection account as it was meant for training purposes only. He added during the trial they said stolen money was through M-Pesa accounts though the agents who paid the money were never disclosed. It is this witness who told the Court that, preference of their charges by the defendant was actuated with malice as she wanted to terminate their employment and this is traced from her act of ceasing their salaries out rightly and in contravention of labour laws, something which suffered them psychological damages for loss of reputation in the society leave alone spending their resources in defending the criminal case. He further informed the Court that, due to the false charges preferred against the other employers lost trust on them hence could not get new jobs after being terminated by the defendant. He therefore prayed the Court to grant them with reliefs claimed of Tshs. 600,000,000/ as damages for malicious prosecution and Tshs. 200,000,000/ as punitive damages for defendant's act



of setting in motion criminal charges against them as well as serving as a lesson to other employers who are using criminal proceedings as means of terminating employment of their staff.

When subjected to cross examination as to whether the employer was right to report the crime he said, she was right to report them as employees in the office since the crime occurred in the office and that he was at work when the crime was reported. As to whether cyber-crimes and the offence of theft are similar he confessed that the two crimes were different. And on whether there was bad blood between them and the employer before the reporting the said crime, he responded there was none. When PW1 was referred to exhibit PE1 (the Judgment in their criminal case) he admitted that, as per that judgment online theft was not the basis of accusation and was not sure whether if preferred the verdict of the court could be different. He also confessed that, their labour dispute was settled at CMA and the same has no connection with this case. As what amount to psychological effect to justify compensation of Tshs. 600,000,000/ claimed, PW1 seemed to be unaware of as his demeanor was also shaking on that part.

Next in testimony was PW2 the IT technician who gave similar account to that of PW1 on their arrest, indictment and acquittal in the case allegedly

instigated by the defendant and cessation of their salaries in pendency of their criminal charges in Court before they were terminated on 12/08/2016 by letter from employment from the defendant on the reason of being involved in theft. He added that, as IT technician was not responsible for payments made by the company and has never requested any online payment. Like PW1 he implored the Court to grant them the sought reliefs. When cross-examined on what was their reported accusation at police he said it was online theft which is cyber-crime committed through mobile phones and computers. And admitted that, he was present in the office when the said theft was committed and that senior manager Chudasama was right to report the incident of the said theft at police as he was discharging his duty as head of finance. On further cross-examination he confessed that, their labour claims were settled and were satisfied.

Lastly was PW3 the cashier and call center operator responsible for receiving clients calls from sports bet shops, assign online clients' deposit to their accounts when betting and authorization of payments when the client is successful or wins. She gave a detailed account on the procedure to be followed before the client is paid in which approval has to be made by the junior and senior managers respectively, and how were they arrested,

charged and ended up acquitted before the trial court the case which lasted for three (3) years, and how were they terminated from employment. Like PW1 and PW2 she complained to the Court on how they suffered the consequences of the said preferred charges for spending much time in court and loss of public trust for being considered as thieves hence could not be employed anymore. She also prayed the Court to award them the sought reliefs. When cross-examined like PW1 and PW3, this witness confessed that when the offence was committed she was in office and that Chudasama was discharging his duty when reported the incident of theft as senior officer. On further cross-examination she admitted there was no evidence to prove denial of job because of the case preferred against her.

In defence DW1, who was employed by the defendant as Deputy operation officer when the alleged crime was committed having explained his duties including supervision of all company operations inside and outside the office related to security issues, gave a detailed account on how the online betting system is operating. He also informed the Court that in that transaction the company was maintaining two accounts which are deposit and withdrawal accounts in which the winner could withdraw the money from. According to him, upon deposit of money by client for betting the defendant's staff were

mandated to channel the same into clients' accounts which are also opened online, before the client is allowed to proceed betting online from any place in the world. He said apart from online betting the defendant was also running sports betting shops in which clients could deposit and withdraw money from cashier stationed in those shops and that the other mode of betting was through slot machines (hardware transactions) in which clients were also served through the cashier after purchasing the token. Regarding involvement of plaintiffs in this matter he said the same were employed by the defendant and that there was online theft which was detected by the fraud department after investigation that, the fraudulent transactions originated from the computers installed in the training center room which was used to train new staff, in which the plaintiffs were involved and Tshs. 81,638,000/ stolen. It is this witness who told the Court that, it is the said computer in the training centre that were used by the plaintiffs to commit the offence by diverting the funds, as Nancy Mzava went further to open online accounts disclosing her credentials and deposited some money therein in contravention of the staff regulations. According to this witness the investigation revealed that, the plaintiffs logged in the said computer in the same period the fraudulent transaction were noted to have been transacted,

hence a proof that the fraudulent transaction was perpetrated from the headquarters as there was also CCTV footage (in flash disc) and printout showing the fraudulent transaction maneuvered by the plaintiffs which he tendered as exhibit DE1 collectively. DW1 played the CCTV footage and demonstrated to the Court on how the same correspond to the transaction indicated in the printout.

DW1 went on testifying that, after noting that tampering of the system and fraudulent transaction the company reported the matter at police for further investigation of cyber theft. He insisted the reported crime was cyber offence due to plaintiffs' fraudulent acts and in furtherance of investigation the company engaged the ABA Alliance a forensic audit company. DW1 testified that, after several months of report of incident at police the company was informed by the police that investigation was complete and evidence gathered was sufficient to institute a case against the plaintiffs, so were required to testify before the Court, but came to note later on that the case instituted against them was different to the one reported against the plaintiffs. According to him they were charged of Stealing by Servant instead of cyber-crimes reported against them hence acquitted as the evidence adduced did not support the charge laid against them. He concluded, that

the case preferred against the defendant has no merit hence should be dismissed with costs as the reported complaints at police was on cyber offences which were not worked on.

When cross examined on the payment mode to the clients DW1 explained that, after requisition of payment by the client the cashier has to print out the ticket/receipt and submit it to the junior manager who will verify the payment before it is approved by the senior manager then the payment is released into client's account. He confessed that, for the payments to be effected into client's account junior and senior managers must be involved and said the issue as to whether the plaintiffs held those positions was not proved in the criminal case as there was no room for him to mention involvement of cashier, junior and senior managers since that was not the charge before the court. When referred to DE1, DW1 was categorical that, the same does not contain the withdrawal transactions and that whatever is transacted during the training is done in dummy system. And when asked further whether he submitted any regulation showing how plaintiffs were to conduct themselves he said none was tendered. As to the date of extraction of exhibit DE1, he confessed that the same does not indicate the time and date of its extraction. On why ceasing their salaries DW1 explained that, they

had to do so after the charges were preferred against them and that they did not appeal against their acquittal nor did they institute another case on cyber-crimes.

Having closed defence case, both parties sought leave of the court which was cordially granted for them to file final submissions, in which I am appreciative as the same were filed in time. I have taken considerable time to peruse and consider the said fighting submission as well as the evidence adduced by both parties and now it is opportune for me to address the plaintiffs' claims which are based on tort of malicious prosecution. The law on tort of malicious prosecution though drive from common law is now settled in Tanzania. There are five (5) elements that need to be proved simultaneously for the plaintiff to successfully establish the case based on tort of malicious prosecution. This Court in the case of **Jeremiah Kamama Vs. Bugomola Mayandi** [1983] TLR 123, speaking through the late Chipeta J laid down the said five (5) elements to be that:

***(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;***

*(ii)... [not relevant]*

*(iii) malice exists where the prosecution is actuated by spite or ill-will or indirect or improper motives. (Emphasis added).*

The elements were recapitulated in the Court of Appeal decisions in **Hosia Lalata Vs. Gibson Zumba Mwasote** (1980) TLR 154; **Yonah Ngassa Vs. Makoye Ngassa**, [2006] TLR 213 which was cited with approval in **Shadrack Balinago Vs. Fikiri Mohamed @ Hamza & 2 Others** (Civil Appeal No.223 of 2017) [2018] TZCA 215; (08 October 2018 TANZLII).

In this case there is no dispute as alluded to above that the plaintiffs were charged of the offence of Stealing by Servant; Contrary to section 258 and 271 of the Penal Code, before the District Court of Kinondoni in Criminal Case No. 3 of 2016, the charges instigated by the defendant and finally found not guilty and acquitted hence existence of the first and second element. As to whether the defendant instituted the prosecution malicious and without reasonable and probable cause, I am convinced that, the third and fourth elements cited above can be addressed when responding to the first issue herein which goes thus, whether the instigation of the criminal proceedings against the plaintiffs by the defendant was actuated with malice? It is Mr.



Tumaini's submission in response to this issue that, there is no theft that actually happened on the material date or any other dates thereafter prompting the defendant to instigate criminal proceedings against the plaintiff as shown by PW1, PW2 and PW3, apart from defendant's ill intent aimed at terminating plaintiffs employment in which she succeeded. Mr. Jasson is of the contrary view arguing that, basing on the CCTV footage and printouts from the online betting system and the internal investigation conducted that revealed theft of Tshs. 81,638,000/ and implicated the plaintiffs, there was reasonable and probable cause for the defendant to report the cyber-crimes at police, though the offence preferred against them by the prosecution was not connected to the reported cyber-crimes as per the judgment of the trial court in Criminal Case No. 3 of 2016. Hence it is wrong to impute malice on the defendant as the offence reported by her was not the one which the plaintiffs were charged with and acquitted.

It is true and I agree with Mr. Jasson that the offence reported at police by the defendant as per the evidence of DW1 is online theft which no doubt constitute one of the cyber-crimes. This fact is also confirmed by the plaintiffs' testimonies when stated that, what was reported at police and instigated their criminal proceedings was theft of Tshs. 81,638,000/ from

defendant's online betting system. When cross examine as to whether the offence of Stealing by Servant in which were charged with and acquitted and the online theft reported by the defendant were the same all plaintiffs confessed that the two were different.

I further shoulder up with Mr. Jasson in his proposition that, under the circumstances of this case it will be wrong to impute malice upon the defendant simply because the case reported ended up in acquittal as when reporting the said offence at police she had reasonable and probable cause to believe that, it is the plaintiffs who had committed the offence online theft reported. I so find as malice is not easily defined. This Court in the case of **Rashid Said Geuza Vs. The Regional Police Commander and AG**, Civil Case No. 2 of 2012 (HC-unreported) when making reference to the case of **Jeremiah Kamama** (supra) that drew the definition of malice from English case of **Brown Vs. Hawkes** (1891) 2 QB, held that, for malice to be imputed to a party, *the accuser must have been actuated by spite or ill-will and not by a genuine desire to bring to justice the person alleges to be guilty of crime*. And on what amount to reasonable and probable cause there is no fast and hard rule as in establishing it objective test has to be applied. This Court in the case of **Alex Suta Vs. Naomi J. Makulusa**, Civil Appeal No.

25 of 2021 (HC-unreported) borrowed the wisdoms of **Byamugisha J**, from Uganda High Court decision in **Dr. Willy Kaberuka Vs. Attorney General**, Civil Suit No. 160 of 1993 [1994] II KALR 64, where the Court when considering the test to be applied in establishing whether reasonable and probable cause for prosecution existed or not had this to say:

*"The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and that is to say, **to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty**"[Emphasis is added]*

I find the above cited persuasive authority to be good law and therefor adopt the same. It is evident to me therefore that, to constitute reasonable and probable cause, a party reporting the crime or prosecutor must have in his knowledge the materials/evidence or information collected sufficient enough to satisfy a cautious, prudent and I would add a reasonable man, to believe that that the accused or suspect is probably guilty of the offence accused or

suspected of committing. In this case it was DW1's evidence relying on exhibit DE1 collectively that, the defendant upon noticing fraudulent transaction and upon internal investigation was satisfied that the same was perpetrated at the head-quarters in the computer training room. There is also evidence from the CCTV footage which was played in court and the printouts retrieved from the computers that, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were identified to have transacting in the computer room where some money were allegedly diverted into other accounts. As regard to Nancy Mzava the Court was denied with an opportunity to hear his story. From the above evidence which was not controverted by the plaintiffs during the trial this Court is made to believe that, there defendant was justified to believe the plaintiffs were involved in the online betting fraudulent transactions, hence there was reasonable and probable cause for her to report the crime committed as she has that duty under section 7(1) of the Criminal Procedure Act, [Cap. 20 R.E 2022].

It is the law that the onus of proving absence of reasonable and probable cause in the prosecution lies on the shoulder of the plaintiff. See the case of **Shadrack Balinago Vs. Fikiri Mohamed @ Hamza & 2 Others**, (Civil Appeal No. 223 of 2017) [2018] TZCA 215; (08 OCTOBER 2018) when the

Court of Appeal relied on the case of **James Funke Gwagilo** (supra). In the present matter plaintiffs are claiming that the instigation of criminal case by the defendant was aimed at full filling his ill intent of terminating them from their employment, as there was no proof that online theft was committed by the defendant. I do not buy this proposition by Mr Tumaini for two good reasons. **One**, when cross examined as to whether there was bad blood between the plaintiffs and defendant before the reported crime of online fraudulent transactions, PW1 confirmed to the court that, there was none. Thus to me there was no reasons for the defendant to frame up them with criminal charges as alleged for the purposes of terminating their employment as she had mandate to so do even without exposing them to criminal proceedings. Second, there is no dispute that the crime reported at police was online theft which is cyber-crime but the offence preferred by the prosecution (DPP) is Stealing by Servant which PW1, PW2 and PW3 when cross examined during their testimonies confessed that the two offences were different. Since the plaintiffs were charged and acquitted of the offence of Stealing by Servant and cyber-crime which was reported by the defendant, I am unable to find that the plaintiffs have proved to the court's satisfaction that, there was no reasonable and probable cause for the defendant to

instigate the charge of online theft against them in which they have never been charged and acquitted of. It is my findings therefore that defendant's act was not actuated with malice. Thus the first issue is answered in negative.

As determination of the 2<sup>nd</sup> and 3<sup>rd</sup> issues are depending on the positive response to the 1<sup>st</sup> issue, the same are dying natural death in which the final results it to hold the suit is devoid of merit. I therefore proceed to dismiss it in its entirety.

Given the nature of the case and the fact that, the plaintiffs have no employment at the moment, I refrain from awarding costs. Each party has to bear it his/her own.

It is so ordered.

DATED at Dar es salaam this 28<sup>th</sup> April, 2023.



E. E. KAKOLAKI

**JUDGE**

28/04/2023.

The Judgment has been delivered at Dar es Salaam today 28<sup>th</sup> day of April, 2023 in the presence of Mr. Michael Mihayo, advocate for the plaintiffs,

the 3<sup>rd</sup> plaintiff in person, Mr. Hezron Jasson, advocate for the defendant and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI  
**JUDGE**  
28/04/2023.

