

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CIVIL APPEAL NO. 18 OF 2023

*(Arising from Civil Appeal No. 37/2022 at Muleba District Court, Originating from Kashasha Primary Court
in Civil Case No. 13/2022)*

LEVINA DOMINICK..... APPELLANT

VERSUS

WILSON SIMON..... RESPONDENT

JUDGMENT

1st and 9th August, 2023

BANZI, J.:

Levina Dominick, the appellant herein, has appealed to this Court against the judgment of Muleba District Court which quashed the decision of Kashasha Primary Court (the trial court) where the respondent was ordered to pay the appellant Tshs.1,004,000/= as compensation for malicious prosecution.

Briefly, the genesis of this dispute traces its root from Criminal Case No. 19 of 2022 before the trial court where the respondent instituted a criminal case against the appellant who is his niece on a charge of use of abusive language contrary to section 89 (1) (a) of the Penal Code. However, it appears that, after instituting the case, the respondent failed to appear and the same was dismissed for non-appearance. After dismissal, the appellant sued the respondent before the same court claiming compensation

of Tshs.1,004,000/= for malicious prosecution alleging that, she lost her job in Dar es Salaam causing her to lose the income of Tshs.120,000/= per month for a contract of seven months. After filing the complaint, on 02/06/2022, the trial court ordered the summons to be issued to the respondent and the parties were to appear before the trial court on 13/06/2022. However, the respondent did not appear on that date, and the court ordered the case to be heard *ex-parte*. On 20/06/2022 the respondent wrote a letter requesting the trial magistrate to recuse himself on allegation that, he would not do justice to him due to another probate case which he showed to be on the appellant's side. The trial magistrate ruled out that, there was no tangible reason for recusal and he ordered *ex-parte* hearing to proceed. Upon hearing, the trial court was satisfied that the appellant was defamed and due to Haya custom, it is not a normal thing for the girl to be arrested and taken to police and prosecuted criminally. On that reason, the respondent was ordered to pay her the above stated amount.

Dissatisfied with that decision, the respondent appealed to Muleba District Court complaining that, the claim of the appellant was not proved, and the trial court had no jurisdiction to entertain that matter. The District Court quashed that decision on the reason that, the claim of malicious prosecution against the respondent was not proved as the case was not

determined to its finality and also, the trial court usurped jurisdiction to entertain that matter.

The decision of the District Court did not please the appellant who appealed to this Court with three grounds, thus:

- 1. That the District court erred in law and facts by ignoring application of customary Laws in Primary Courts, which were applied by Kashasha Primary Court. When determining matters falling under customary law torts and not common law torts which is commonly known.*
- 2. That, the District court of Muleba District erred in Law and fact by not considering the trial Court Decision which were based on ingredients of customary law torts where some aspects differs from customary Law torts.*
- 3. That, the District court of Muleba erred in Law and fact by delivering judgment basing on bias and unfair when it granted the appeal with costs.*

At the hearing, both parties appeared in person and unrepresented. Submitting in support of the appeal, the appellant contended that, the District Court erred when it relied on tort of malicious prosecution under common law while the applicable law was customary law which was used by the trial court. She further contended that, after the respondent had failed to appear before the trial court to prosecute his case, the trial court was satisfied that he had no probable cause to institute that case. She insisted that, by instituting that case against her, she quitted her job in Dar es Salaam

and returned to Muleba to defend the complaints against her. It was also her submission that, she was injured and embarrassed by the respondent's action who had full knowledge that, she did not insult him. According to her, the District Court erred to decide contrary to what was decided by the trial court which based its decision on customary law instead of common law. She concluded her submission by challenging the District Court for being bias because, it did not consider the exhibits she tendered at the trial court. Also, there was no justification for ordering costs. She therefore prayed for her appeal to be allowed with costs by quashing the judgment and orders of the District Court.

In response, the respondent contended that, the trial court had no jurisdiction to determine the case basing on customary law while malicious prosecution is not within the customary law. It was his submission that, he had probable cause to institute the criminal case against the appellant but failed to appear because he was out of his duty station attending official training. He insisted that, the appellant failed to prove her claim and the District Court was not biased against the appellant. Eventually, he prayed for the appeal to be dismissed with costs.

In a brief rejoinder, the appellant argued that, the respondent did not inform the court about his absenteeism on the criminal case. She also insisted that, the trial court used customary law and not common law.

Having considered the rival submissions of parties and after perusing the records of the lower courts, I find it pertinent to begin with the first two grounds which touch the issue of jurisdiction that was relied upon by the District Court to form its decision.

It is settled principle that, in any adjudication, the initial question to be determined is whether or not the court is vested with requisite jurisdiction because the question of jurisdiction goes to the root of the authority of the court to adjudicate upon cases of different nature. See the case of **Ramadhani Omary Mtiula v. Republic** (Criminal Appeal No. 62 of 2019) [2020] TZCA 1734 TanzLII. Also, in the case of **Patrick William Magubo v. Lilian Peter Kitali** (Civil Appeal No. 41 of 2019) [2022] TZCA 441 TanzLII it was stated that:

"Jurisdiction of courts is conferred and prescribed by law, it is therefore a primary duty of every court, before venturing into a determination of any matter before it, to first satisfy itself that it is vested with the requisite jurisdiction to do so."

In the matter at hand, the trial court in its findings, relied on the case of **Charles Lala v. Abdallah Mangi** [1992] TLR 336 and satisfied itself that, it had jurisdiction to determine the case of malicious prosecution filed by the appellant on the reason that, it fell under customary law torts on malicious prosecution. After hearing the case *ex-parte*, it was satisfied that,

the case against the respondent was proved to the required standards. However, on appeal, the District Court held that, the trial court had no jurisdiction to entertain cases on malicious prosecution and even if it would have jurisdiction, the ingredients of malicious prosecution were not proved because the criminal case which was instituted by the respondent was not heard to its finality after being dismissed for non-appearance.

I had an opportunity of perusing the case of **Charles Lala v. Abdallah Mangi** (*supra*) whereby, this Court (Hon. Mwalusanya, Judge as he then was) held that, the primary court has jurisdiction to entertain malicious prosecution based on customary laws. Upon reading critically the decision of **Charles Lala** (*supra*), I have realised that, what was held and reasoned by the learned judge is quite different with what the trial magistrate in our case stated in justifying his jurisdiction to entertain this matter. In that judgment, the learned judge despite making the general statement of jurisdiction of primary court in customary law torts of malicious prosecution, defamation, destruction of crops by cattle and negligence, he went further and put two conditions to be inquired before determining the suits of that nature by stating that:

"since the parties belonged to the same customary law community of the Wanyaturu the trial magistrate should have inquired into two matters:

(a) Whether among the Wanyaturu there are rules of customary law regarding malicious prosecution which are established and accepted;

(b) Whether from the nature of the wrong of malicious prosecution, it was apparent to the parties that they would not be governed by customary law of the Wanyaturu;"

What I gathered from the extract above is that, for primary court to have jurisdiction to entertain the suit under customary law of torts of malicious prosecution, it should inquire into two matters; one, whether there are rules of customary law regarding malicious prosecution which are established and accepted by the respective tribe and two, whether or not from the nature of the wrong of malicious prosecution, it was apparent to the parties that they would be governed by customary law of the particular tribe. According to that case, failure to make an inquiry on these two matters was held to be fatal.

Reverting to the instant case, the trial magistrate did not inquire whether in the first instance, there are rules of customary law regarding malicious prosecution which are established and accepted by the Haya tribe. He further failed to inquire whether or not from the nature of the wrong of malicious prosecution, it was apparent to the appellant and the respondent

that they would be governed by customary law of the Haya tribe. In his concluding remarks, the trial magistrate stated that:

"...kwa mujibu wa Kanuni na Mila za Kihaya ambazo sio jambo la kawaida na heshima kwa mila hizo, mtoto wa kike kukamatwa na polisi na kupelekwa Kituo cha Polisi na kushtakiwa kwa makosa ya jinaí..."

This conclusion ought to be preceded by the inquiry over existence of established and accepted customary law of malicious prosecution by Haya tribe. Failure to inquire into that, vitiated the trial court's jurisdiction to determine the matter before it. With that regard, I have failed to comprehend the finding of the trial magistrate that, it is defamation in Haya custom for a woman to be arrested and charged with criminal offences, because being arrested and charged for criminal offence is a normal thing which any person can face regardless of his or her gender. Apart from that, the trial magistrate did not back up his finding with any of the so called "*Kanuni za Mila za Kihaya*" to justify his position. Besides, I have thoroughly perused authoritative book concerning customary law of the Haya tribe titled *Customary Law of the Haya Tribe Tanganyika Territory*, authored by Hans Cory and M.M. Hartnoll and published by Percy Lund, Humphries & Co. Ltd (1945). The book compiled all customary laws of Haya tribe from inheritance, bride price, marriage, divorce to law of property. Unfortunately, I have not come across with tort of malicious prosecution. Apart from that, so far as

damages are concerned, at page 253 of the said book, it is clearly stated that, no compensation is payable in the cases of witchcraft, slander and insult. With that regard, although on different reasons, I join hands the reasoning of the first appellate court that the trial court had no jurisdiction to entertain disputes pertaining to malicious prosecution between the appellant and the respondent who belonged to the same customary law community of the Haya tribe.

Even if we would have assumed that, in the particular circumstances of the case, the trial court had jurisdiction to entertain the suit on Haya customary law of malicious prosecution, yet still, the evidence adduced by the appellant failed to prove malicious prosecution on customary law because, the two important ingredients namely; the criminal proceedings have been terminated in the plaintiff's favour and the defendant acted without reasonable and probable cause were not proved to the required standard. Despite the fact that, the criminal proceedings were terminated in the appellant's favour, but the matter was not decided on merit to its finality. The criminal case was dismissed for non-appearance of parties whereby, as a matter of law, the respondent still had a room of resurrecting the proceedings against the appellant. Moreover, the appellant failed to prove the absence of reasonable and probable cause in the prosecution. The appellant in her testimony, she just explained how she was arrested and

arraigned to court but, she made no attempt to explain to the trial court whether the prosecution was without any probable justification. The fact that, the respondent failed to appear to prosecute his case, in itself, cannot be used to prove that, the prosecution was without reasonable and probable cause. Thus, I find no merit in the first two grounds.

So far as the last ground is concerned, it is common knowledge that, the District Court had discretion to order payment of any costs and expenses incurred by a successful party. However, according to the records, it is undisputed that, the parties are related. Thus, in order to maintain peace and good relationship between them, an order of costs would not be necessary in the particular circumstances of this case.

Having said so, I find the appeal without merit and it is hereby dismissed save for the order of costs made by the District Court which is hereby set aside. Owing to the nature of the case, each party shall bear its own costs.



I. K. BANZI
JUDGE
09/08/2023

Delivered this 9th August, 2023 in the presence of the appellant and the respondent both in persons. Right of appeal duly explained.



A handwritten signature in blue ink, appearing to be "I. K. Banzi", written in a cursive style.

I. K. BANZI
JUDGE
09/08/2023