IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CIVIL APEAL NO. 28263 OF 2023

(Arising from the Civil Case No. 7 of 2022 of the District Court of Simanjiro at Orkesumet)

1. NAYEKU SAMET .....
2. NDIITAL SAMET ..... APPELLANTS
3. LEMAL SAMET .....

VERSUS

LOSERIAN NDIPOYA (suing through power of attorney given to Zakaria Loserian) ..... RESPONDENT

JUDGMENT

18th April and 30th May 2024

MIRINDO, J:

The appellants, Nayeku Samet, Ndiital Samet and Lemal Samet, were apparently parties in a land dispute before Simanjiro District Land and Housing Tribunal in which an interim order of temporary injunction was issued. A criminal charge of disobedience of a lawful order contrary to section 124 of the Penal Code [Cap 16 RE 2019] was filed against the respondent, Loserian Ndipoya, who was also a party to the same land dispute.

When the criminal case came for preliminary hearing, the trial District Court of Simanjiro upheld the defence objection that as the order emanated from a suit, a complaint of disobedience of the order should have been lodged before the same civil court under Order 37 Rule 2 (2) of the Civil Procedure Code. The trial District Court held that the complaint should have been lodged before Simanjiro District Land and Housing Tribunal, declared that it lacked jurisdiction to determine the criminal case and dismissed it for want of jurisdiction.

Subsequently, Loserian Ndipoya brought an action for malicious prosecution through his appointed attorney, Zakaria Loserian claiming special damages to the tune of 10,000,000/= TZS; damages for seventy heads of cattle which died from hunger while the plaintiff was facing the criminal charge to the tune of 20,000,000 TZS; general damages to the tune of 20,000,000 TZS for psychological, mental and injury of reputation. He also prayed for costs and any other relief that the Court deemed fit to grant. He was successful before the trial court and Nayeku Samet, Ndiital Samet and Lemal Samet has appealed to this Court.

There is however an oversight in the judgment of the trial court. At the trial the respondent (plaintiff) granted power of attorney to his son Zakaria Loserian to prosecute his case and the pleadings were amended to reflect the changes. However, the amendment is not reflected in the judgment and decree

of the trial court and even on appeal to this Court. As the oversight was not a ground of appeal and I do not find it to be a serious omission, it is hereby ordered that this judgment will be titled to reflect that the respondent sued through a power of attorney.

At the commencement of the hearing of the appeal, the respondent's counsel, Mr Godfrey Mlingi challenged the competency of the appeal for the reason that it was accompanied by a defective decree. He observed that the decree does not agree with the judgment. He argued that the trial court awarded general damages to the tune of 10,000,000 Tanzanian Shillings but in its decree, there are four awards, namely: (1) payment of 10,000,000/= TZS as special damages; (2) general damages to the tune of 10,000,000/=TZS; (3) 20,000,000/= TZS as damages for seventy heads of cattle; and (4) costs. The first and third relief were not awarded by the trial court. In any case, the judgment and decree do not agree. The learned counsel argued that before appealing, the appellant should have satisfied themselves on the correctness of the decree before appealing to this Court. He urged this Court to strike out the appeal with costs.

The appellants' counsel, Mr Leserian Nelson, argued that the complaint has no merit. He contended that a decree is not defective simply because it includes awards that are not stated in the judgment. Although in the main judgment, the

trial court rejected some reliefs, towards the end all the reliefs were granted. The learned counsel observed that this was a faulty reasoning constituting a ground of appeal and not a mere defect the decree.

A close reading of the trial court's judgment shows that there was only a finding on seventy heads of cattle which it rejected for lack of proof and general damages to the tune of 10,000,000/= TZS which it granted. There was no finding on special damages to the tune of 10,000,000/=TZS. However, at the end of its judgment, the trial court declared that all the reliefs were granted with costs. Under these circumstances, I am of the view that this was a problematic judgment whose decree could not be remedied by way of an amendment. For this reason, I dismiss the preliminary objection.

Having dismissed the preliminary objection, I turn to the five grounds of appeal lodged by the appellants. All these grounds of appeal boil down to the following question: Was the claim of malicious prosecution proved on the preponderance of probabilities? Mr Nelson, learned counsel, contended that there was no evidence that the respondent was prosecuted by the appellants.

It was a misdirection, the learned counsel argued, to hold that the claim was proved by relying on the ruling dismissing the criminal case for want of jurisdiction to hold that the claim was proved. The learned counsel observed that

the ruling does not mention the appellants as persons who prosecuted the respondent. He supported his arguments with a decision of this Court and Court of Appeal. In opposition, the learned counsel for the respondent, Mr Mlingi argued that it was the appellants who reported the incident to the police station and since the appellants were present in court when the appeal was dismissed on a point of law, it is clear that they reported the incident to the police.

In an action for malicious prosecution the plaintiff must prove (a) being prosecuted by the defendant, (b) the prosecution ended in the plaintiff's favour, (c) there was no reasonable and probable cause for the prosecution, (d) the prosecution was malicious. These elements have been reaffirmed by the Court of Appeal in **Yonah Ngassa v Makoye Ngassa** [2006] TLR 213 at 217 and **Paul Valentine Mtui and Another v Bonite Bottlers Limited** (Civil Appeal 109 of 2014) [2015] TZCA 285 and many decisions of this Court.

In the instant appeal, there is no doubt that Loserian Ndipoya was prosecuted. The criminal case was conducted by a public prosecutor and evidence on both sides indicate that a complaint was lodged to a police station. Was the criminal prosecution instigated at the instance of the appellants?

A plaintiff is taken to have been prosecuted where the defendant played an active role in instigating or setting the criminal law in motion. As was held by

the Privy Council in **Mohamed Amin v Jogendra Kumar Bannerjee** [1947] AC 322 at 330, malicious prosecution:

> lies in abuse of the process of the court by wrongfully setting the law in motion, and is designed to discourage the perversion of the machinery of justice for an improper purpose.

A private prosecutor in a Primary Court or District Court is no doubt a prosecutor. However, malicious prosecution is not restricted to private prosecution and extends to a prosecutor in public prosecution. In cases of public prosecution, the question is who is a prosecutor? This question was answered by Samatta J in the famous case of **Hosia Lalata v Gibson Zumba Mwasote** [1980] TLR 154. In this case, a primary court magistrate was arrested and charged for receiving a bribe from the defendant so that he could acquit the defendant's father. He was convicted and sentenced by the trial court but successful appealed to the High Court. He successfully sued the defendant for malicious prosecution. On appeal to the High Court, it was contended for the defendant that as this was a public prosecution and the defendant was only a witness, the action should have been against the police. Samatta J dismissed the argument and went on to explore the essence of a prosecutor in malicious prosecution [at 156]:

> ...For the purpose of the tort of malicious prosecution a prosecutor has been said to be a man who is "actively instrumental in putting the law in force".

> Applying that definition in the present case, I ...cannot see how the appellant can be heard to say that he was not the prosecutor in the criminal case. He had falsely informed the police that the respondent had demanded a bribe from him. It is upon the strength of that information that the bounds of justice laid a trap which ended in the arrest of the respondent. The passengers of the UDA omnibus would be justified to regard the law as an ass if Mr. Haule's argument were given countenance by a court of justice. As everyone who is sufficiently familiar with it will readily admit, the law is not an ass.

The determination of this question depends primarily on the nature of the information furnished by the defendant to the prosecuting authority and the defendant's role in the prosecution. The nature of the information provided that may constitute malicious prosecution was considered by the House of Lords in **Martin v Watson** [1995] 3 ALL ER 559. In this case, the plaintiff and the defendant were neighbours who lived next door to each other with a long history of misunderstandings. Later on, the defendant, Mrs Watson started accusing him the plaintiff of indecently exposing himself to her. One day she called a police officer whom and stated that the plaintiff had appeared over the garden fence at about 5 in the evening, standing behind the fence, was naked and shook his private parts at her. The Police officer reported the incident and the next day a second police officer was sent to investigate the incident. The defendant gave a

similar account. The second police officer recorded the defendant's statement and that the defendant was willing to testify about the contents of the statement. The plaintiff was arrested but nothing else took place. The defendant summoned a third police officer and complained that the plaintiff had again indecently exposed himself to her. The third police officer took no action as he considered the defendant's allegation to be preposterous. Again, the defendant called the police and alleged indecent exposure. The plaintiff was arrested on the same day and taken to a police station, interviewed, and released on bail. The next day he was charged with intent to insult, contrary to section 4 of the Vagrancy Act 1824 but as the prosecution offered no evidence, the charge was dismissed. The plaintiff sued the defendant for malicious prosecution. The trial court found in favour of the plaintiff but the defendant successfully appealed to the Court of Appeal. The plaintiff appealed to the House of Lords. After reviewing various authorities from Commonwealth countries, the House of Lords allowed the appeal (All ER at pages 567–568):

> ...Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was

> the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant.

The information provided must preclude independent judgment of the prosecuting authority.

The determination of the defendant's instrumental role in prosecution depends on a variety of factors as was restated by Mmilla J in **Kibo March Group LTD v Cosmas Ungelle** (Civil Appeal No 6 of 2008) [2009] TZHC 257:

> It should be pointed out however, that on whether or not the person being alleged to have set the law in motion is liable, the court has to look for evidence tending to establish, among other elements, that in giving the information which is the subject of complaint, the defendant was actuated by spite or ill will also called malice, similarly that he had no reasonable and probable cause in furnishing such information to the police...

The defendant's instrumental role in malicious prosecution was the subject of appeal in a 1995 case of **Peter Ng'homango v Gerson MK Mwangwa and Attorney General**, Civil Appeal No 1 of 1994. The first defendant, the Principal of Mpwapwa Teachers' Training College had ill-feelings towards the appellant who was a tutor to that College. The first respondent suspended the appellant for the reason that he conducted the school choir in a way that disappointed

him. The misconduct was reported to the ministry responsible for education. The Ministry conducted an inquiry, cleared the appellant and the appellant was reinstated.

Unfortunately, during the suspension, the appellant ceased to be the head of the English department and was forbidden from appearing within the College premises. Further, the first respondent denied the appellant permission to KCMC Hospital in Moshi for his usual consultations or visits to bereaved relatives. This necessitated the appellant to travel to Dar es Salaam to seek permission from the Ministry. On one such visit to Dar es Salaam; the Examination Council gave him examination results to take to the Principal Mpwapwa Teachers' College. He returned to Mpwapwa on Friday. He handed over the examination results to the first respondent as well as a letter from the Ministry directing the first respondent to pay him his subsistence allowance during the trip to KCMC for treatment.

The first respondent refused to make the payment. The appellant then asked to be given his personal properties that he had left in the office but the first respondent refused. He told him to wait for the transfer letter from the Ministry.

The appellant reported the matter to the Police and the first respondent agreed to effect the handing over on the agreed date. On the agreed date the first respondent reported the appellant to Police. He informed the police that the

appellant stole 10,000/= TZS from students and students were demonstrating against him with the intention of beating him. He asked for his arrest for his own safety. Upon this report the appellant was arrested and charged with stealing contrary to section 265 of the Penal Code before Mpwapwa District Court. He was acquitted. He brought an action for malicious prosecution. In his defence, the first respondent stated he reported to the police about appellant's acts of revealing examination results and for charging students some money for examination results. The High Court dismissed the action and the appellant appealed to the Court of Appeal.

In examining the substance of the report given to the police, the Court of Appeal took note of the first respondent's efforts to obtain falsified report from the police by requesting a report after the institution of the suit for malicious prosecution. In a judgment delivered by Mfalila JA, the Court of Appeal held that the first respondent made a false report:

> In our view, this letter reflects accurately the substance of what the 1st respondent had reported against the appellant at the Mpwapwa Police Station. If the substance of the 1st respondent's report at the police station was as reflected in Exhibit O, and he had merely reported the contravention of Section 23 (1) (a) of the National Examination Council of Tanzania Act 1973, on what basis would the police have charged the appellant with stealing a specific sum of money from the students? Whereas in paragraph 5 of his

written statement of defence he cites the specific offence which the appellant had committed, the 1st respondent stated in his evidence in court that he never knew exactly what offence the appellant had committed and that he expected the police to investigate, and if they found any law contravened, they should charge him. Police frame charges in accordance with either the reported offence or one which is allied to the offence alleged to have been committed. If you report that the suspect has contravened the National Examination Council Act by disclosing examination results before they are officially published, or that someone divulged the results at a fee contrary to the provisions of the Act, then the police could not out of the blue frame a charge of theft under the Penal Code as they did in this case, to the effect that on 30/8/91 at about 5 P.m. at Mpwapwa Teachers' College within Mpwapwa District, the appellant did steal Shs. 10,000/= the property of students. What sort of investigation on the reported offence of breaching Examination Regulations could have revealed the offence of theft?...

The Court of Appeal held that not only did the first respondent made a false report but took efforts to ensure that the appellant remained in custody for some time. Other factors which the Court took into account include the police refusal to supply the appellant with the report made by the first respondent and the first respondent's refusal to take the police advice to deal with the matter administratively.

The information provided to the prosecuting authority is a continuous thread in an action for malicious prosecution. In **Daudi Kayongoya and Four Others v FK Motors** (Civil Case 94 of 2008) [2011] TZHC 2086, the defendant, reported to Buguruni Police Station that one of its stores along Nyerere Road in Dar es Salaam was broken and various items were stolen. As a result, the plaintiffs who were among the defendant's employees were taken to Buguruni Police Station and recorded statements. Later, they were charged before Ilala District Court with conspiracy, store breaking and neglect to prevent commission of an offence contrary to sections 384, 296, and 383, respectively, of the Penal Code, Cap 16. The District Court ruled that they had no case to answer and acquitted them. Upon their acquittal, the plaintiffs sued the defendant for false and malicious complaint that led to their prosecution before the District Court. In dismissing their claim, this Court (Juma J) held that the plaintiffs had not discharged their burden of proof in showing that the report was maliciously done:

> Plaintiffs were supposed to show that the complaint which the defendant filed with the Buguruni Police Station was not so much designed to report any theft that had occurred at their store, but was for the purpose of using the legal process through the police to punish the plaintiffs for ulterior motives. To succeed in their tort of malicious prosecution, the intention of the defendant in lodging their complaint to the police must have been so actuated with

> malice as to cause wrongful harm to the plaintiffs, and not merely to report the incident of theft that had actually taken place. It was not enough for the plaintiffs to merely contend in their evidence that they were innocent and did not steal anything from the store. To succeed in the tort of malicious prosecution the plaintiffs were required to lead evidence to show that the criminal prosecution was instituted against them by the defendant without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, defendant was not reporting the theft to invite the police to investigate and punish the culprits, but the defendants had own malicious intention against the plaintiffs.

In order that the defendant may be held liable for instigating malicious prosecution, there must be evidence of either the report made by the defendant or otherwise the defendant's role. In **Abdul-Karim Haji v Raymond Nchimbi Alois and Another** [2006] TLR 419, the appellant's shop was broken and some amount of money was stolen. He reported the theft to the police who subsequently arrested the respondents. He was requested to take the respondents to the police station in his motor vehicle. The respondents were charged with shop-breaking and theft. The trial aborted when the police informed the trial court that investigation was incomplete as witnesses were uncooperative. The charges were withdrawn. The respondents sued the appellant for malicious prosecution in the High Court of Zanzibar. They won. On appeal to the Court of Appeal, it was held that there was no evidence that the

appellant reported the incident to the police or revealed the names of the respondents to the police. The appeal was allowed. Mroso JA delivering the judgment of the Court of Appeal stated that (at 425- 426]:

> It will be noted that no policeman was called as a witness by either party to tell the Trial Court how they got to know that the respondents were suspects in the theft case and the appellant's statement to the police was not put in evidence in order to establish if he had named the appellants as suspects or had named any person at all as a suspect.

In the present appeal, it was upon the respondent to prove that the appellants made a complaint before the Police, to testify on the substance of the information they provided and to prove that the Police acted on that information to prosecute the respondent. The donee of the power of attorney, who accompanied the respondent to a police station, the first plaintiff's witness, testified about the plaintiff's arrest and stated that it was the appellants who lodged the complaint. In general, the power of attorney does not extend to testify on matters within the donor's knowledge. Assuming that the evidence given by the donee was within his knowledge, was the evidence sufficient? In examination in-chief, he stated:

> The complainants who caused the plaintiff to be arrested are Nayeku, Sarmet and Ndiital Sarmet. The plaintiff to the case surrendered at the police station....

In re-examination, he stated:

> Those who laid a criminal complaint against the plaintiff are those whom I have mentioned.

The second plaintiff's witness testified in chief that:

> Nayeku, Lemal and Ndiital instituted the criminal charge against the plaintiff.

These were the only pieces of evidence before the trial court attempting to show that the appellants instigated the respondent's prosecution. Like in **Abdul-Karim Haji** cited above, no evidence of the appellant's statement was produced at the trial. Not even the charge itself. In their defence, the appellants, protested prosecuting the appellant. Nor was the order of interim injunction availed to the trial court. They stated that it was the respondent who reported them to the Police and after investigation, the Police found that they did nothing wrong. The burden of proof was on the plaintiff to prove that the appellants were instrumental in the bringing of the charge against him before the District Court. There was no such evidence. As the first element of malicious prosecution was not proved, the action for malicious prosecution cannot stand.

For the reasons I have given above, I set aside the judgment and decree of the Simanjiro District Court and allow the appeal. The appellants shall have their costs in this appeal and the trial court.

DATED at BABATI this 26th day of May, 2024

F.M. MIRINDO

JUDGE

Court: Judgment delivered this 30th day of May, 2024, in the presence of Advocate Filemon Lameck Maige holding brief for Advocates Leserian Nelson and Godfrey Mlingi for the appellants and respondents respectively.

F.M. MIRINDO

JUDGE