IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CIVIL APPEAL NO. 21 OF 2023

JUMA SAFARI..... APPELLANT

VERSUS

HAPPINESS BENJAMIN LYIMO .....1ST RESPONDENT

MARY MSANGI (sued as the Guardian of

Mary Yohana Kamate(minor).....2ND RESPONDENT

JUDGMENT

18th & 20th June 2024

MKWIZU, J:-

Before the Resident Court of Arusha at Arusha, the appellant had sued the respondents herein for malicious prosecution following his acquittal in respect of an attempted rape case registered as Criminal case No 392 of 2017 instigated by the respondents herein. Pleased by the decision but irritated by the said proceedings, the accused, now appellant filed a civil case, subject to this appeal before the Resident Magistrate Court of Arusha at Arusha, Civil Case No. 21 of 2021 for malicious prosecution, claiming compensation of Tsh 12,615,000/= salaries for the 29 months, general damages, interest and costs of the suit.

Parties were heard and at the end, the trial court was convinced that the plaintiff was unable to establish his case. The suit was thus dismissed with

costs. Still disgruntled, the appellant has filed this appeal parading three grounds of appeal as follows:

1. That the trial court erred in law and in fact when it held that the plaintiff's prosecution in criminal case No 392 of 2017 before the resident Magistrates Court of Arusha at Arusha was reasonable with probable cause
2. That the trial magistrate erred in law and fact when held that the Appellant's acquittal in Criminal case No 392 /2017 before the resident Magistrates' Court of Arusha at Arusha did not connote that he was maliciously prosecuted
3. That the trial magistrate erred in law and fact by failing to evaluate and consider the evidence adduced by the appellant during the trial and hence reached into erroneous decision.

The 2nd respondent could not be located for service and therefore this appeal proceeded *ex parte* against her. The appellant was in court without legal representation while the 1st respondent was represented by Mr. George Mroso learned advocate.

The appellant faults the trial court's conclusions that the charges in Criminal Case No. 392 of 2017 were reasonable, supported by probable cause, with no malicious intent. The appellant believes that the entire prosecution was maliciously done without any probable and reasonable

cause. He held the respondents accountable for their insistence on going to court even after the medical examination had revealed no evidence of sodomy. After receiving the doctor's report, he insisted, the respondents ought to have closed the file and returned to school, but they persisted in dragging him into court on unfounded charges. He supported his argument with the case of **Daudi Kayongoya and other V FK Motors**, Civil case No 94 of 2008 where the suit was found in favour of the respondent only because theft was committed To him, the respondents acted maliciously.

He thus prayed for the appeal to be allowed, the trial court decision to be quashed and set aside and the respondents to be held liable for malicious prosecution with an order for payment of general damages, interest and costs of the suit

Mr Geoge Mroso vehemently opposed the appeal on behalf of the first respondent. In addition to endorsing the trial court's ruling, he asserted that the first respondent, as a matron, had a responsibility to protect all students at the school, including the second respondent. He said, in her evidence on page 34 of the typed proceedings, the first respondent provided a detailed explanation of the facts surrounding her decision to report the situation to the police. Sister Fabiola was the one who first gave her the knowledge of the second respondent's altered behaviour, that she

is no longer paying attention in class, plus the alleged sodomy by the appellant and his friend. Given the stated facts, the counsel insisted, any sane person would have under the circumstances reported the matter to the police as bluntly admitted by the appellant during cross-examination. He went further charging that the reporting of the incident to the police by the respondents was reasonable with probable cause. 1st respondent had no ill intention against the appellant, she just acted in the normal cause of her employment done in the best interest of the wellbeing of the children she was entrusted to care for. He contended that the respondent's actions are consonant with the provisions of Article 26 b (2) of the Constitution of The United Republic of Tanzania. He relied on **Tumaininel V Aisa Issay** (1969) HCD 280 in support of his arguments and **Wilberd Lemunge v. Father Komu and Another**, Civil Appeal No. 8 of 2016 (unreported), pages 11 and 12 stressing that, the trial court conclusion that the appellant's acquittal in Criminal Case No. 392 of 2017 could not inevitably mean that he was maliciously prosecuted and that the accused's mere acquittal in the absence of proof of the remaining elements does not entitle him to relief in the malicious prosecution case.

He lastly prayed for the dismissal of the appeal with costs.

I have determinedly considered the records, the grounds of appeal and the parties' submissions. The appeal centres on the malicious prosecution component of the tort law. The three grounds by the appellant are intertwined, I will thus for convenience determine them collectively. And being the first appeal, I will resort to re-evaluation of evidence adduced at the trial court.

Chiefly, malicious prosecution is a premeditated "dignitary" tort. A dignitary tort is one in which the plaintiff claims injury to their human dignity where a claim lies on the infliction of emotional distress, abuse of process and the resultant injuries. To prove malicious prosecution, it is settled that, the plaintiff needs to prove five key elements that he was prosecuted; the proceedings complained of ended in his favour; that the defendant instituted or carried out the prosecution maliciously; that there was no reasonable and probable cause for such prosecution; and that he suffered damage as a result of such prosecution. See **Jeremiah Kamama Vs. Bugomola Mayandi** [1983] TLR 123 and **Mbowa Vs. East Mengo Administration** [1972] 1 EA 352 at 354 to mention just a few.

The evidence on the records accepted by the trial court shows that the plaintiff, a teacher at Imani Primary School was on 5th December 2017 arrested, detained at the police station before he was charged with an

attempted rape. The charges went along with an unnatural offence levelled at another person.

The details of the incident collected from the record reveal that the 2nd defendant's change in behaviour was reported to the school matron, the 1st respondent. She in response thereto called and interrogated the 2nd respondent on the raised issues, it was at this moment that the 2nd respondent opened up, disclosing the orderly to her matron. The matter was then reported to the head teacher and the police resulting in the arrest of the appellant and his accused fellow.

The issue here would be whether the reporting of the incident by the 1st and 2nd respondents to the police and the resultant prosecution was without any reasonable cause. The trial court was of the view that such a report to the police was justified because being a matron, 1st respondent could not have ignored the unnatural offences allegation reported to her by a student. And that the acquittal by itself is not conclusive proof of malice. I support the findings. A close examination of the records does not at all show any signs of malice by the respondents. As stated, the report made to the police was from the genuine source that being students' concierge, 1st respondent could not have been ignored. It was to me, reasonable for the matron to report the allegation to the appropriate authority for investigation.

The main complaint here is that the report was fascinated by malice and without reasonable cause. The test of reasonability was well elaborated in **Seif Mohamed Maungu v Wendum Lameck Sawe t/a W.L. Sawe Garage**, Civil Appeal No. 102/2013 (CAT unreported) where quoting the definition in **Hicks v. Faulkner** (1878) 8 QBD 161 at 171 the Court held –

> *"Reasonable and probable cause is* ***an honest belief*** *in the guilt of the accused* ***based on a full conviction founded upon reasonable grounds, of the existence of circumstances,*** *which assuming them to be true, would reasonably* ***lead any ordinary prudent man and the cautious man placed in the position of the accuse to the conclusion that the person charged was probably guilty of the crime imputed..****"(Emphasis added)*

I am strongly convinced that any reasonable man would not have overlooked the information/ allegation of sodomy by a student.

The next question would be, was it necessary for the respondent to report the matter to the police? The answer is definitely, yes. Section 7 (1) of the CPA Cap 20 RE 2019 is specific to the point. it says.

"7(1) Every person who is or becomes aware-

(a) of the commission of or the intention of any other person to commit any offence punishable under the Penal Code;

(b) N/A

shall forthwith give information to a police officer or to a person in authority in the locality who shall convey the information to the officer in charge of the nearest police station."

The 1st respondent had no option. Having received the information on the commission of the criminal offence, she was obliged by the law to report the same to the police. This conclusion is also supported by the case of **Rashid Said Geuza Vs. The Regional Police Commander and AG**, Civil Case No. 2 of 2012 (unreported) where it was 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 the crime. And the duty is always on the plaintiff to prove that the respondent acted maliciously which is missing in this case.

Respondents were also blamed for testifying in court even after a medical report had shown no sodomy committed. I think this complaint is also a misconception. The duty of the respondent ended after they had reported the matter to the police. The choice to either prosecute the appellant or

not rested with law enforcers, the prosecution and not the respondent. In fact, after the report to the police, the respondent had no control over the matter. The law enforcers had a duty to investigate and decide whether to initiate legal proceedings against the suspected persons or not. Respondents would only come to court as witnesses if called. And they had no option on whether to respect the summons or not. They were mandatorily bound to respond to the prosecution's summons and appear in court as they did.

I find nothing to faulty the trial court's magistrate. The appellant failed to establish his case to the required standard to warrant the grant of his claims in the plaint. I thus find the appeal unmeritorious and proceed to dismiss it with costs. Order accordingly.

DATED at **Dar es Salaam** this **20th June** 2024

HIGH COURT OF TANZANIA

E.Y. Mkwizu

JUDGE

20/6/2024

COURT: Right of Appeal explained

E.Y. Mkwizu

JUDGE