

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MANYARA
AT BABATI**

CIVIL APPEAL NO. 18 OF 2023

(Originating from Civil Case No. 4 of 2022 of District Court of Simanjiro)

NAYEKU SARMETAPPELLANT

VERSUS

JAMES LOSERIAN1ST RESPONDENT

ZAKAYO LOSERIAN (Attorney of

LOSERIAN NDIPOYA)2ND RESPONDENT

JUDGMENT

22nd May & 13th June, 2024

D. C. KAMUZORA, J.

Before the district court of Simanjiro (hereinafter referred to as the trial court), the Respondents sued the Appellant for malicious prosecution and claimed for TZS 200 million as compensation for malicious prosecution and loss of properties, general damages to be assessed by the court, costs of the suit and any other relief the trial court deemed fit to grant.

A brief factual background underlying the instant appeal as could be gathered from the record is that, the Appellant prosecuted the Respondents in Criminal Case No. 6 of 2021 before Engasmet primary court (hereinafter referred to as the primary court) for an offence of threatening to kill contrary to section 89(2)(c) of the Penal Code [CAP 16

RE 2019]. It was alleged that Respondents went to the Appellant's home and threatened to kill her if she did not vacate from her land. At the end the Respondents were found guilty and were sentenced to pay fine at the sum of TZS 100,000/= or serve 4 months imprisonment in default. The Respondents were aggrieved with the conviction and sentence meted out against them by the primary court hence, they appealed to the district court. After hearing the parties, the district court quashed and did set aside the Respondents' conviction and sentence.

The Respondents therefore believing that they were maliciously prosecuted by the Appellant filed a civil suit before the trial court claiming for the reliefs stated above. After hearing the parties, the learned trial magistrate decided in favour of the Respondents and awarded them a sum of TZS 10 million as general damages for the loss suffered.

The Appellant was aggrieved with the trial court's decision and preferred the instant appeal on six grounds as follows;

- 1. That, the trial court erred in law and in fact for making a finding that the Respondents suffered loss of reputation, mental torture and suffering from the time of arrest, investigation and proceedings of criminal case in the absence of proof in that regard.*
- 2. That, the honourable trial court magistrate erred in law and in fact when he held that the contradiction in the evidence of the*

Appellant and her witness is the indication that the Respondents' arraignment for criminal charge was actuated by malice without reasonable and probable cause.

- 3. That, the trial court magistrate erred in not making a finding that the Appellant had reasonable and probable cause to report the Respondent to the police.*
- 4. That, the trial court magistrate erred in fact and law to decide on tort of defamation when it made a finding that the Respondents suffered loss of reputation while the claim was for tort of malicious prosecution.*
- 5. That, the trial court magistrate failed to properly evaluate the evidence on record hence, reaching to unjust decision.*
- 6. That, the trial court magistrate erred in not appreciating that, on evidence on record the Respondents failed to prove their case on balance of probabilities.*

This appeal was disposed of by way of written submissions. The Appellant was represented by Mr. Loserian Nelson, learned advocate while the Respondents were represented by Mr. Godfrey Mlingi, learned advocate.

In his submission in support of the appeal, Mr. Loserian abandoned the 4th ground of appeal and he consolidated the 2nd and 3rd grounds, the 5th and 6th grounds were also consolidated while the 1st ground was argued separately.

In his submission in support of the 2nd and 3rd grounds, the learned advocate for the Appellant faulted the trial court for holding that the contradiction in evidence of the Appellant and her witness is an indication that the Respondents' arraignment for criminal charge was actuated by malice and without reasonable and probable cause. He submitted that, such contradiction in evidence is not a conclusive proof that the Respondents' prosecution was actuated by malice or without reasonable and probable cause. To buttress his argument, the learned advocate referred the decision of this court in the case of **Bunda District Council Vs Christopher Msafiri Nyandiga** Civil Appeal No. 14 of 2021) 2022 TZHC 258 Tanzlii. He argued that, had the learned trial magistrate considered the evidence on record, he would have arrived to the conclusion that the Appellant had reasonable and probable cause to report the Respondents at the police and subsequently arraignment before the court.

On further submission the learned advocate argued that there is no evidence adduced by the Respondents to prove malice on the side of the Appellant when she prosecuted the Respondents. He prayed for this court to find merits in the 2nd and 3rd grounds of appeal.

In his submission in support of the 5th and 6th grounds of appeal, the learned advocate for the Appellant faulted the trial court for not

properly evaluating and analyzing the evidence on record thus reaching to unjust decision. He argued that the learned trial magistrate erred in relying on exhibit P1 to prove that the Respondents were maliciously prosecuted. That the trial court erred in holding that the contradiction in the evidence adduced by the Appellant and her witness proved that the Respondents were maliciously prosecuted. He was of the view that had the trial court properly analyzed the evidence on record it would have arrived to the conclusion that there was reasonable and probable cause for the Appellant to report the matter to the police. He prayed for this court to find merits in the 5th and 6th grounds of appeal.

Submitting on the 1st ground the learned advocate for the Appellant argued that there was no evidence adduced by the Respondents to establish that they suffered any kind of damage. That, there was no justification for trial court to award them a sum of TZS 10 million. Reference was made to the case of **Bhoke Chacha v Daniel Misenya** [1983] TLR 329 and **Robert Mapesi vs Michael Nyaruba** (Civil Appeal No. 222 of 2020) 2021 TZHC 4079 Tanzlii. He urged this court to allow the appeal by quashing and setting aside the trial court's decision.

In reply to the 2nd and 3rd grounds of appeal, Mr. Mlingi referred the Kenyan decision in the case of **Lawrence Onyango Oduori v The Attorney General & another** Civil Suit No. 168 of 2011 which was cited

in a book titled **Bullen and Leake and Jacob's Precedents of pleadings, 14th Edition** paragraph 2-5 which expounded the essential elements for claim of malicious prosecution. The learned advocate submitted that the Appellant is the one who instituted the proceedings before the primary court and the Respondents were convicted but later acquitted. That, it is not true that the trial court's decision was based on the contradiction of the evidence adduced by the Appellant and her witness but the said contradictions were considered along with other evidence. He was of the view that, the trial magistrate properly evaluated the evidence on record and the inference was made that the Respondents were maliciously prosecuted.

In reply to the 5th and 6th grounds of appeal the learned advocate for the Respondents argued there was a land dispute between the parties but the arguments that the Appellant was beaten are not true.

On the 1st ground of appeal, the learned advocate for the Respondents argued that the Respondents were arrested and put under police custody and the evidence shows that second Respondent fell sick and got mental problem. Referring to Black's law dictionary 7th edition, and the case of **P. M. Jonathan v Athuman Khalfan** [1980] TLR 175, the learned advocate argued that, general damages must not be

specifically pleaded and proved rather it is court's discretion to award them.

Having carefully considered the grounds of appeal and parties' rival submissions, there are two issues for determination; the first issue is whether the Respondents proved the claim for malicious prosecution and the second issue is whether the trial court was justified in awarding the Respondents a sum of TZS 10 million.

Starting with the first issue, as clearly stipulated by the Court of Appeal in the case of **Yonah Ngassa v. Makoye Ngasa** [2006] T.L.R. 123, in order to succeed in the suit of malicious prosecution the plaintiff must prove following: -

- 1. That the proceedings were instituted or continued by the defendant;*
- 2. That the defendant acted without reasonable and probable cause;*
- 3. That the defendant acted maliciously; and*
- 4. That the proceedings terminated in the plaintiff's favour.*

See also, **Jeremia Kamama v Bugomola Mayandi** [1983] TLR 123 and the case of **Mbowa v. East Mengo Administration** [1972] EA 353 where the East African Court of Appeal stated that: -

"The plaintiff in order to succeed, all the four essentials or requirement of malicious prosecution; as set out above, have to be fulfilled and that he has suffered damage. In other words, the four

requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action."

The issue is whether the Respondents were able to prove all the elements. Having gone through the record, it is not in dispute that the Respondents were prosecuted and convicted before the primary court before such decision was overturned on appeal by the district court. In that regard, two elements were proved that the Respondents were prosecuted and the proceedings ended in their favour.

As to the second and third elements, the learned trial magistrate was satisfied that the Respondents were maliciously prosecuted because there were contradictions in the Appellant's evidence adduced before the primary court. At page 9 of the typed judgment, the learned trial magistrate had this to say;

"...In my carefully scrutiny on the evidence on record it is my firm view that the contradictions which still persisting in the evidence of DW1 and (DW2) clearly indicates that the arraignment of the plaintiffs was actuated by malice without reasonable and probable cause."

In his submission the learned advocate for the Appellant argued that the learned trial magistrate considered the contradictions pointed above to establish that the Appellant had malice when she prosecuted the

Respondents. On the other hand, the learned advocate for the Respondents argued the trial court did not consider the contradiction alone to establish malice since the said contradictions were considered alongside with other evidence.

I have gone through the proceedings and of the trial court and discovered that apart from the alleged contradictions in evidence of the Appellant, there is no evidence suggesting that the Appellant acted with malice. Parties agree that there was land dispute between them and subject to exhibit P1 which is the judgment of the district court in criminal appeal originating from the criminal case to which the Respondents were charged, the Respondents were charged and prosecuted for threatening to kill the Appellant. At the primary court the Respondents were found guilty but acquitted on appeal before the district court. The question is whether, being acquitted justify that the prosecution was with malice.

In the case of **Jumane Kagoro vs John Shija** Civil Appeal No. 34 of 2022 (unreported) this court observed that;

"...one of many ways of proving malice is by proving things like previously stains relations, unreasonable or improper conduct like advertising of the charge or getting up false evidence..."

In **Bhoke Chacha v Daniel Misenya** (supra), it was held that-

"It is for the Appellant to prove that the Respondent's report was malicious... This can be done by adducing evidence which will lead to the Court to make finding whether the Respondent acted maliciously."

In considering the position in the above authorities, it was necessary for the Respondents to prove that the Appellant reported them out of malice for there was nothing that could move the Appellant to report at the police station. I have gone through the Respondents' evidence and I could not find any evidence suggesting malice on the part of the Appellant. As to the claim that the Appellant had no reasonable and probable cause to prosecute the Respondents, the Court of Appeal defined the term reasonable and probable cause in **Seif Mohamed Maungu v Wendum Lameck Sawe t/a W.L. Sawe Garage** Civil Appeal No. 102 of 2013 (unreported) by quoting the definition in **Hicks v. Faulkner** (1878) 8 QBD 161 at 171 as follows-

"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 a circumstances, which assuming them to be true, would reasonably lead any ordinary prudent man and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

I have gone through the evidence on record, the Appellant testified that she was invaded by James and Loserian and started chasing her. She reported the matter at the police and Loserian was locked up for six days. She testified further that James and Zakayo informed her if she did not vacate she would be killed. On cross examination, the Appellant testified that she was threatened to be killed by James, Loserian and Lazaro. I find that there was reasonable and probable cause for the Appellant to prosecute the Respondents before the primary court. Mere contradictions in evidence as to whether the Appellant was beaten or not does not lead to the conclusion that there was no reasonable and probable cause for reporting the matter to the police station.

It is important to note that, failure to prove a criminal case beyond reasonable doubt or an acquittal of the accused on appeal in itself, cannot be the basis for concluding that the accused was maliciously prosecuted. A party alleging malicious prosecution must prove that there was no any probable cause suggesting that there was an offence committed or an attempt to commit the offence. That, the complaint falsified the information on the existence of the offence against the accused intending for them to be prosecuted. Thus, where there is reasonable cause to believe that a person has committed an offence and that person is prosecuted, the complainant will not be subjected to malicious

prosecution merely because the evidence was not strong enough to prove criminal charges beyond reasonable doubt.

In this matter, as well argued by the Appellant, the trial court decision was based on contradiction in evidence which according to the trial court, indicated that the arraignment of the Respondents was actuated by malice. Exhibit P1 shows that the Respondents were acquitted because of variance and inconsistencies between the charge sheet and prosecution witnesses. That in itself, does not suggest that there was no probable cause for the Appellant to report the matter at the police station which upon investigation, found that there was a prima facie case to forward to the primary court.

In that regard, I do not find any proof on two elements; that the defendant (Appellant herein) acted without reasonable and probable cause and that the defendant (Appellant herein) acted maliciously. Thus, the argument that the Respondents' reputation was lowered and they suffered mental torture as a result of arrest, investigation and prosecution in the criminal case is unfounded for there is no proof that there were maliciously prosecuted. It was therefore wrong for the trial court to hold that the Respondents had proved their claims for malicious prosecution while there was no proof that the Appellant acted without reasonable and probable cause and or, acted maliciously. I therefore find the 1st issue in


negative for there was no proof of the claim for malicious prosecution by the Respondents.

As to the second issue on whether the trial court was justified in awarding the Respondents a sum of TZS 10 million, the same is defeated by the conclusion on the first issue. Having determined the first issue in negative that there was no proof for malicious prosecution, any award resulting from malicious prosecution cannot stand.

In the final analysis, I find the appeal to have merits and the same is allowed with costs. The trial court's decision, decree and any order arising therefrom are hereby quashed and set aside.

DATED at **BABATI** this 13th Day of June, 2024.




D. C. KAMUZORA
JUDGE