

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

BUKOPA DISTRICT REGISTRY

CIVIL APPEAL NO. 20 OF 2020

(Originating from Civil Appeal No.16 of 2013 of the Resident Magistrate's Court of Bukoba at Bukoba (C. S. Uiso -RM)

GODWIN KASHAIGILI1ST APPELLANT

WINIFRIDA KASHAIGILI.....2ND APPELLANT

VERONICA KASHAIGILI.....3RD APPELLANT

VERSUS

JOHN M.NCHWENDE.....RESPONDENT

JUDGMENT

*31/08/2022 & 31/10/2022
E. L. NGIGWANA, J.*

This appeal emanates from the decision of the Resident Magistrate's court of Bukoba at Bukoba in Civil Case No. 16 of 2013 in which the appellants herein sued the respondent herein claiming a sum of **Tshs. 80,000,000/=** being general damages for malicious prosecution, false imprisonment and defamation, Tshs. 2,000,000/= being specific damages, interest of the damages at the rate 30% decretal sum at the rate of 12% from the date of judgment until final payment, costs of the suit and any other relief at the discretion of the court.

The material background to the dispute is not difficult to comprehend. In the Primary Court of Katerero within Bukoba District, the respondent initiated Criminal Case No. 92 of 2011 in which appellants were charged with the

offence of Criminal Trespass contrary to Section 299 of the penal Code Cap 16 R:E 2002, now R:E 2022.

Later on, the appellants through the services of advocate Alex Nathan successfully filed Criminal Application No.60 of 2011 before the District Court of Bukoba for transfer of the Criminal Case No. 92 of 2011 to the District Court. Having allowed the application, the respondent was advised to lodge his complaint before the police for investigation purposes. Upon such advice, the respondent, on 13/05/2012 reported the same matter to the police and as a result, the appellants were arrested and detained in the police custody, and on the following day, they were taken to the primary court of Bukoba Urban but the charge of Criminal trespass was not admitted on the ground that it was against the order which transferred the case from Katero Primary Court to the District Court. Thereafter, no other criminal charges, were filed against the appellants.

In turn, the appellants decided to file a suit of malicious prosecution, false imprisonment and defamation in the Resident Magistrate's court of Bukoba. After a full trial, the trial court was satisfied that the appellants had failed to prove their claim of malicious prosecution.

The decision of the Resident Magistrate Court provoked the appellants, therefore, they knocked the doors of this court armed with a memorandum of appeal containing seven (7) grounds of appeal which were coached as follows;

1. *That, the trial court erred in law and facts by pronouncing that the judgment tendered by the appellants did not establish claims for false imprisonment, defamation and malicious prosecution.*

2. *That, the learned trial Magistrate erred in law and facts for failure to evaluate evidence by the appellants which full established that the respondent maliciously and without any justifiable cause initiated and prosecuted the appellants.*
3. *That, the trial court grossly erred in law and by deciding that the appellants failed to establish their claims against the respondent*
4. *That, the trial court failed to note that the evidence by the appellants established the elements of the tort of malicious prosecution.*
5. *That, the trial Magistrate erred in law and facts for failure to note that the Respondent admitted that he maliciously prosecuted the appellants.*
6. *That, the trial Magistrate erred in law to decide the case against the weight of evidence.*
7. *That, in totality, the proceedings of the Resident Magistrate's court are a nullity and tainted with irregularities*

Wherefore, the appellants are praying to this court to allow the appeal with costs by reversing the trial court judgment and orders, and order payment of **Tshs. 80,000,000/=** being general damages, Tshs 3,000,000/ being specific damages, interest at the rate of 30% of both general and specific

damages and payment of decretal sum at rate of 12% from the date of judgment until final payment.

When this matter came for hearing, the appellants appeared in person, unrepresented while Mr. Abel Rugambwa, learned advocate appeared for the respondent.

Upon reading all seven grounds of appeal, it is my considered view that the 7th ground of appeal will suffice to dispose of this appeal. In that premise, I find no compelling reasons to address the rests of the grounds of appeal.

In this appeal, the appellants and the respondent's learned counsel agree that the issues which were framed by the trial court were on the tort of Malicious Prosecution only. Issues in respect the tort of defamation and false imprisonment were not framed and that was an irregularity, but also agree that there was change of magistrates without reasons being assigned. For easy reference as what transpired in court on the date fixed for framing of the issue, let the record speak for itself;

" Date: 08/07/2015

Coram: D. J. Mpelembwa-RM

Plaintiff:

Defendant:

B/C Bijabika

J. S. Rweyemamu, Advocate for the Defendant.

Zeddy Ally, Advocate for the Plaintiff

J.S. Rweyemamu: *The case is coming for framing of issues and I am ready.*

Zeddy Ally: *We are ready*

Rweyemamu: I propose the following;

- *Whether the defendant maliciously and without any justifiable cause initiated and prosecuted the plaintiffs*
- *Whether the plaintiffs suffered any damage*
- *What are the reliefs"*

Order: *Hearing on 2nd September, 2015*

Parties to attend

Sgd D.J Mpelembwa-RM

08/07/2015."

Though, the trial court record is silent as to what issues were proposed by Zedy Ally who was the plaintiffs learned counsel, advocate now appellants respondent and whether the proposed issues proposed by J.S. Rweyemamu were adopted and agreed upon for determination by the court, it appeared that those were the issues which were considered by the trial court in its judgment. For easy reference let page 1 of the trial court judgment speak for itself;

"Both parties agreed in some issues in this case and such issues were:-

- (i) *Whether the defendant maliciously and without any justifiable cause initiated and prosecuted the plaintiffs*
- (ii) *Whether the plaintiffs suffered any damage*
- (iii) *What are the reliefs."*

In page 19 of the trial court judgment, the trial Magistrate is seen blaming the learned advocates for not raising the issues in respect of the tort of false

imprisonment and defamation and at page 20 he ended up dismissing the claim on the ground that the claim of malicious defamation had not been proved. Let the record speak for itself;

"During the framing of issues before this court neither counsel for the parties raised the issue in regards to the claim of the false imprisonment and defamation."

"Therefore in the final analysis, I find that the plaintiffs have failed to come even close in proving this suit of malicious of prosecution, and leaves me with no choice but to dismiss this suit in its entirety, which I hereby do with costs. Judgment for the defendant."

Now, the question before me is whether the omission to frame issues in respect of the tort of defamation and false imprisonment renders the trial court proceedings a nullity.

It is common knowledge that one of the important steps in a civil trial is framing of issues, and it is the duty of the trial Magistrate or Judge to frame issues. It should be noted that although it is the duty of the judge or Magistrate to frame issues, he/she cannot do so without involving the parties or their advocates who have both the duty to assist the court on the process. Framing of issues is very important as it defines and narrows down the scope of the contention and thereby making the trial more focused and short-lived. **See Barclays Bank Tanzania Limited versus Sharaf Shipping Agency (T) Limited and Habibu African Bank Limited vesus Sharaf Shipping Agency (T) Limited and Barclays Bank Tanzania Limited , Consolidated Civil Appeal No.117/16 of 2018 and 199 of 2019, CAT (Unreported).**

Explaining the importance of framing issues properly, my learned brother, Ismail J in the case of **Letshego Bank (T) LTD versus Sarah Maginga and Another** , Civil Appeal No.23 of 2020 HC –Mwanza (Unreported) had this to say;

"The noteworthy point is that, trial proceedings in civil matters are guided by the framed issues before commencement of the hearing. Issues help in guiding the parties and the court in identifying areas of contention and resolve them. They also guard the proceedings against going astray and avoid arriving at a conclusion which was not desired."

The duty to frame issues is provided for under rule 40 (1) of Order VII and Rule 1 (5) of Order XIV of the Civil Procedure Code Cap 33 R.E 2019. Rule 1 (5) of Order XIV makes mandatory for the court to frame issues at the first hearing after reading the Plaintiff and the Written Statement of Defence. The same provides that;

" At the first hearing of the suit the court shall, after reading the plaintiff and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."

However, it should be noted that the court is not required to frame issues where the defendant at the first hearing makes no defence. It is also worth noting that, failure to frame issues is a procedural irregularity which **is fatal only when it occasioned miscarriage of justice or affect the merits of the judgment.**

In the case of **Norman versus Overseas Motor Transport (Tanganyika) Limited** [1959] E.A 131 that; where the defunct East Africa Court of Appeal had this to say;

"If, no issue framed on the fact, the parties adduced evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed, ... in the instant case it would seem that the failure of the court to frame issues was to some extent the fault the counsel on both sides. Nevertheless, the failure to frame the issues is an irregularity and the question is whether, notwithstanding the failure to frame the issues, the parties at the trial knew what was the real question between them was, that the evidence on the question had been taken and the court duly considered it."

In the instant case, the Magistrate (**D. J. Mpelebwa- RM**) who presided over the matter during the exercise of framing issues, did left his duty to frame issues to the advocates and finally, the successor Magistrate (**C. S. Uiso-RM**) in his judgment ended up blaming them for not framing or raising issues in relation to the tort of false imprisonment and defamation. Indeed, the procedure adopted by the trial court was very wrong and deserves to be rebuked. It was also wrong for the Magistrate to blame the learned advocates for not framing issues.

It was upon the trial Magistrate to carefully read the Complaint and the Written Statement of defence under the assistance of the learned advocates for the parties for the purpose of framing issues in relation to malicious prosecution, false imprisonment and defamation. Since the pleaded tortious liabilities are tortious liabilities under common law principles and each has its own distinct

elements to prove, at the time of framing issues, the Magistrate ought to have those elements in mind because they are helpful in the exercise of framing issues. For instance, in order to succeed in a suit for malicious prosecution, the plaintiff must prove the following elements cumulatively:- (a) That, he was prosecuted by the defendant; (b) That, the prosecution ended in his favor; (c) That, the prosecution was conducted without reasonable and probable cause; (d) That, in bringing the prosecution the defendant was actuated by malice and (d) That, the plaintiff must have suffered damages as a result of the prosecution.

For the plaintiff to succeed in claim of defamation, he must prove cumulatively that; (a) The statement complained of was defamatory, (b) It was published, (c) It was false (d) It was injurious to the plaintiff's reputation and (e) The statement was unprivileged, and for the plaintiff to succeed in the claim of false imprisonment must prove that; (a) The plaintiff enjoyed his liberty, (b) That, he/she was deprived of his liberty for any length of time, (c) That, there was total restraint and (d) That, there was no lawful cause for the restraint.

Taking into account that decision was given only on malicious prosecution, it is my view that the failure to frame issues in respect of the tort of false imprisonment and defamation occasioned a miscarriage of justice, and it cannot be cured by stepping into the shoes of the trial and determine the question of false imprisonment and defamation basing on the evidence on record because the parties were not heard on unframed issues. Fair trial demands that, parties to the case be afforded the right to be heard, and no one should be condemned unheard.

I have also considered the fact that, there was change of Magistrates without reasons being assigned by the Successor Magistrate. There is no doubt that, the hearing of the case begins immediately after framing of the issues before the trial Magistrate or Judge. In the instant case, the exercise of framing issues was done on 08/07/2015 before **D. J. Mpelembwa-RM**. When the case came for hearing on 22/11/2016 it was presided over by C. S. Uiso- RM to its finality but no reasons assigned by the Successor Magistrate for the taking over a case. Failure to state the reasons suggest that the case file had never been re- assigned to any other Magistrate and therefore, Uiso- RM had no jurisdiction to adjudicate the case for want of proper assignment. The two anomalies render the proceedings and the judgment of the trial court a nullity. See **Kinondoni Municipal Council versus Q Consult Limited**, Civil Appeal No. 70 of 2016 CAT at Dsm (Unreported).

In the event, I quash the proceedings of the trial court from page 12 dated 08/07/2015 up to page 63 of the typed proceedings for being a nullity and set aside the judgment and decree of the trial court. I remit the case file to the trial court for an expeditious trial *denovo* before another Magistrate. Since no party is to blame for errors occasioned a re-trial, I make no order as to costs. It is so ordered.

Dated at Bukoba this 31st day of October, 2022.



E. L. NGIGWANA

JUDGE

31/10/2022

Judgment delivered this 31st day of October, 2022 in the presence of the appellants and respondent in person, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Sophia Fimbo B/C.




E. L. NGIGWANA

JUDGE

31/10/2022