

IN THE HIGH COURT OF TANZANIA
AT IRINGA

CIVIL CASE REVISION NO. 4 OF 2011

PAULO SIMON MNKANDE PLAINTIFF

VERSUS

1. INSPECTOR GENERAL OF POLICE
2. THE ATTORNEY GENERAL - IRINGA
3. THE OFFICER COMMANDING
DISTRICT - NJOMBE

} DEFENDANT

27/10/2014 & 06/11/2014

JUDGEMENT

P. F. KIHWELO, J.

In this case the plaintiff, who lives and works in Makambako in Njombe Region was on 12th April, 2006 arrested by the police and then taken to Njombe Police Station where he was detained for six consecutive days before he was taken to Mpechi Prison where he spent twenty four (24) hours and was released on court bail the following day.

One week later after his release on court bail the plaintiff was brought before the court and charged along with three others for forgery in Criminal Case No. 99 of 2006.

On 25/06/2008 the Plaintiff and other co-accused were discharged under Section 225(5) of the Criminal Procedure Act. The Plaintiff was aggrieved by his arrest and prosecution in Criminal Case No. 99 of 2006. He brought this action against the defendants, therefore, seeking the following reliefs;

- (i) A declaration that the defendants are vicariously liable for false imprisonment and malicious prosecution.
- (ii) An order for the defants, jointly and severally make payment of the said general damages at the rate of TShs. 20,000,000/=.
- (iii) Costs of this suit.
- (iv) Any other relief this honourable court may deem just and equitable to grant.

During the trial the plaintiff represented himself while the defendants were represented by Mr. Hangi Chang'a, learned State Attorney. The Plaintiff had one witness and the defendants as well had one witness only.

The court formulated the following issues for determination:

1. Whether the plaintiff was maliciously prosecuted and forcefully imprisoned.
2. Whether Criminal Case No. 99 of 2006 before Njombe District Court was finally determined and judgement was pronounced in favour of the Plaintiff.
3. Whether the 3rd defendant by arresting the plaintiff was discharging his duties, and
4. Whether the plaintiff is entitled to general damages of Tshs. 20,000,000/=.

Briefly the testimony of PW1 Mr. Paul Simon Mnkande was that the officer from the third defendant's office arrested him at his residence under the orders of the third defendant and took him to Njombe Police Station where he was put under custody for six days before he was taken to Mpechi Prison for one night and the following day a removal order was sent to Mpechi Prison and he was taken to court and released on bail upon his friend Alphonse Kayuni coming for his rescue as a surety.

PW1 testified further that he was later charged in Criminal Case No. 99 of 2006 but on 25/06/2008 they were all discharged. He tendered before the court Exhibit P1 an order of Njombe District

Court which discharged the Plaintiff and other three co-accused under Section 225(5) of CPA.

PW1 testified further that he claims TShs. 20 Million being costs related to the case and any other relief.

On the other hand DW1 ASP Hassan Okello testified that he is aware of Exhibit P1 and remembers that the Plaintiff were charged with a criminal offence and later on discharged but in the event that the witness or further evidence is sought the plaintiff and his co-accused may be charged in a fresh case. DW1 noted also that the prosecution may as well wish not to continue with the prosecution of the said case anymore.

DW 1 further testified that the case against the Plaintiff was not instituted maliciously but rather based upon credible information that an offence of forgery was committed hence the Plaintiff was arrested as a suspect.

Finally DW1 testified that the Plaintiff was not entitled to any amount claimed as police officers who arrested him were discharging their duties upon receiving information that an offence was committed and the plaintiff was a suspect.

Now I turn to address the issues proposed and in so doing I am of the opinion that issue No. 1 and 2 should be dealt together in view of the fact that in determining malicious prosecution automatically issue No. 2 will be considered. The first issue deals with the torts of malicious prosecution and false imprisonment which have been fully expounded by Kyando J. (as he then was) in the case of **James Funke Gwagilo V. Attorney General** [2001] TLR 455 citing Samatta J. (as he then was) in the cases, respectively of **Moris A. Sasawata V. Mathias Maleko** [1980] TLR 158 and **Hosia Lalata V. Gibson Mwasite** [1980] TLR 154. In addressing the two issues I will therefore start with malicious prosecution.

It is trite law that for one to succeed in a suit for damages in a tort of malicious prosecution one has to prove simultaneously that:

- (a) he was prosecuted;
- (b) that the proceedings complained of ended in his favour;
- (c) that the defendant instituted the prosecution maliciously;
- (d) that there was no reasonable and probable cause for such prosecution; and
- (e) that damage was occasioned to the Plaintiff.

Now starting with the first element, there is no dispute that the Plaintiff was prosecuted in Criminal Case No. 99 of 2006. However the second element is disputed as there was no final determination of the Criminal Case No. 99 of 2006 hence the question of prosecution ending in favour of the plaintiff is non existence. This is also proved by the plaint at paragraph 7 as well as Exhibit "P2". Since the Plaintiff has to prove all the elements simultaneously (see **Jeremiah Kamama V. Bugomala Mayandi** [1983] TLR 123 then I don't wish to waste my energy, time and paper addressing the other elements since one has to prove all the elements and not one of them or just few of them. In the circumstances I find that claim for malicious prosecution has failed.

As for false imprisonment. This is defined to mean the total unlawful restriction of a person's freedom of movement. It includes unlawful arrest. **Black's Law Dictionary, 9th edition** defines false imprisonment to mean a restraint of a person in a bonded area without justification or consent. It goes without saying that one must prove the following in order to establish false imprisonment;

1. Restraint of the Plaintiff
2. The restraint must be unlawful
3. The act of restraint must be done maliciously, and
4. The restraint must be against the plaintiff's will.

It must be noted that unlike malicious prosecution false imprisonment is actionable *per se*, i.e without proof of actual damage.

There is no dispute that the plaintiff was arrested by the police in relation to forgery of birth certificate and that he was detained for six days before the police then taken to Mpechi Prison before he was released on bail. So imprisonment or restraint has been proved. The question is was the arrest justified and hence lawful? Kyando J. (as he then was) in **James Gwagilo** (Supra) in answering the above question he pointed out that, this is for the defence to establish for as it has been stated in **Halsbury's Laws of England**, Volume 38 (3rd edition), page 765, paragraph 1266:

The gist of false imprisonment is the mere imprisonment; the Plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving justification.

In order for one to establish justification the question which has to be addressed is, was there a reasonable and probable cause in prosecuting the plaintiff in this case?

This court in the case of **Amina Mpimbi V. Ramadhani Kiwe** [1990] TLR 6 had this to observe quoting the case of **Herniman V. Smith** (1938] AC 305:

It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is defence, but whether there is reasonable and probable cause for prosecution.

In that case the House of Lords approved a definition of reasonable and probable cause, by Hawking J. in **Hick V. Faulkner** (1878) 8 Q.B D 167, 171 as:

An honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably quilt of the offence imputed.

In his evidence, the plaintiff says very little, if anything at all, about his arrest and prosecution being without reasonable or probable cause. Otherwise the defendant has indicated that the plaintiff was charged along with other co-accused. I therefore hold that there was reasonable and probable cause in the plaintiff's arrest and subsequent prosecution.

Turning to whether the act of restraint was done maliciously, I am compelled to refer to the settled principles on how to establish malice in the tort of malicious prosecution.

Kyando J. in the case of **James Gwagilo** (Supra) while citing **Stevens V. Midland Countries Railway** (1854) 10 EX 352 at page 356, Alderson B put thus;

Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is malicious motive on the part of the person who acts in that way

In his evidence the plaintiff has failed to establish that his arrest and subsequent prosecution by the police was actuated by malice. Malice exists in particular individual who either puts in

motion the investigation as complainant or a specific police officer who prosecute. It does not exist in inanimate bodies such as the police force generally. It would have done more justice if the plaintiff would have provided more particulars in the plaint to indicate malice on the part of the third defendant and/or particular individual who bore malice towards him which actuated his arrest and prosecution. Malice therefore has not been proved in this case.

I have no doubt that the restraint of the plaintiff was against his will but since the other two elements have not been proved I am in no doubt that there was no false imprisonment.

This disposes of issue No. 1 and 2 of the suit. It is decided in the negative against the plaintiff.

I pass now to consider issue No. 3. There is no dispute that the duty of the third defendant is among other things to investigate crimes, receive information and arrest suspects. DW1 testified that they arrested the plaintiff and charged him along with other three accused persons and this was upon receipt of complaint that an offence was committed, DW1 testified further that in doing so the police were discharging their duties. Since the police acted honestly and on reasonable ground to arrest and prosecute the plaintiff I find out that they were duly discharging their duties.

This disposes issue No. 3. It is decided in the affirmative against the plaintiff.

Finally, turning to issue No. 4 since the claims in paragraphs 5 and 8 of the Plaintiff hinges on issue No. 1, 2 and 3 and because all the three issues have been determined against the Plaintiff, those claims fail too.

In the final analysis, having determined all the issues of the case against the plaintiff, the suit fails and it is dismissed.

Considering the circumstances of the case each party shall bear its own costs.

P. F. KIHWELO

JUDGE

06/11/2014

Right of appeal explained.

P.F. KIHWELO

JUDGE

06/11/2014

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