IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

DC. CIVIL APPEAL NO. 11 OF 2023

(Appeal originating from the decision of the District Court of Songea at Songea in Civil Case No. 2 of 2023)

ADAM MKILIMA ..... APPELLANT

VERSUS

AVIV CO. LTD ..... RESPONDENT

JUDGEMENT

Dated: 19th March & 16th April, 2024

KARAYEMAHA, J.

This appeal traces its origin in a suit founded on the tort of malicious prosecution which the appellant unsuccessfully instituted before the District Court of Songea.

The facts giving rise to the appeal discerned from the record of the trial court, show that the appellant (plaintiff before the trial court) stood charged in the Primary Court of Maposeni at Songea for the offence of theft contrary to section 258(1) and 265 of the Penal Code, [Cap. 16 RE 2022] at the instance of the respondent (defendant before the trial Court) who reported the incident at Peramiho police station. He was

arrested on 2/6/2022. In the sequence of events, the complainant never appeared in court. The Primary Court dismissed the charge and discharged the appellant.

Subsequently, the appellant instituted a suit the subject of this appeal before the District Court of Songea in Civil Case No. 2 of 2023 for malicious prosecution. In his plaint (at para 5) the appellant alleged that the Primary Court acquitted him in Criminal Case No. 103 of 2022. He did annex a copy of the typed proceedings. He alleged in the plaint (para 6) that the respondent's complaint was based on absolutely false allegations, unfounded instigation of complaint and acted maliciously and without reasonable and probable cause in instituting the same. The appellant contended further under para 7 of the plaint that theft allegations mounted against him, stained his reputation, trust and many relatives stopped trading with him. Consequently, he suffered considerable and substantial monetary loss. The appellant had alleged that as a result of the said damage, he should be awarded the following reliefs:

(a) *A declaration that the act of the defendant amount (sic) to malicious prosecution.*

(b) *An order that the defendant pays TZS. 55,000,000/= being damages for malicious prosecution.*

(c) *General damages*

(d) *Interest on costs at the court rate of 7%.*

(e) *Costs; and*

(f) *Any other relief as the Court may deem fit, just and equitable to grant.*

The respondent vehemently denied that the proceedings instituted against the appellant were frivolous. Whilst admitting that there was a theft charge filed at Maposeni Primary Court against the appellant, the respondent opposed fervently that the appellant was acquitted but he was discharged because the case was not heard on merit.

At the end of the trial, the District Court dismissed the appellant's suit upon being satisfied that he had not proved the essential ingredients in a suit founded on malicious prosecution particularly, proof that the respondent acted without reasonable and probable cause.

Believing that the District Court erred in its decision, the appellant preferred the instant appeal faulting it for dismissing his suit on two grounds of appeal namely; **one,** failure to take into account and make

analysis all elements of malicious prosecution; **two,** erroneous holding in favour of the respondent without sufficient evidence.

When the parties appeared before me on 22/1/2024, I ordered that disposal of the appeal should be by way of written submissions, to be filed consistent with the schedule that was drawn by the Court. Credit to the parties, this scheduled was conformed to. Whereas the appellant fended for himself (unrepresented), Mr. Makame Sengo, learned advocate represented the respondent.

Arguing the first ground of appeal, the appellant contended that he proved the elements of malicious prosecution to the balance of probabilities as stated fittingly in the case of **Yonah Ngassa v Makoye Ngassa** [2006] TLR 213. It was his firm conviction that the respondent's act of instituting criminal charges against him and failing or neglecting to prosecute it demonstrated that she had no strong reasons to charge him. He therefore, urged this Court to find the respondent to have no probable cause to institute and prosecute the case.

With respect to the second ground, the appellant's complaint is that the trial Court stumbled to enter judgment in favour of the respondent while there is strong evidence that the latter did not appear

in court to prosecute her case as a result it was dismissed. This result, entitled him to the award of reliefs he sought at the trial Court, he remarked.

Having submitted as such he implored this Court to allow the appeal with costs.

Mr. Sengo stood firm resisting the appeal urging this Court to uphold the judgment of the trial Court which dismissed the appellant's suit. The essence of the learned advocate's submission was that the appellant failed miserably to prove the five elements of malicious prosecution on the strength of decided cases. The learned advocate invited me to dismiss the appeal because there is no evidence that the charge, after being instituted against the appellant, there was a trial to prove the same as exhibited by a document marked P1 (the Primary Court's proceedings). With all this in his mind, the learned advocate argued that the appellant failed to prove that the criminal prosecution ended in his favour.

On the element of probable cause, Mr. Sengo found nothing faulty in the trial Court's findings. Assessing DW1's evidence, the learned counsel submitted that, after realising that the respondent's store was broken in, he reported the incident to Peramiho police station. The

investigation mounted by police officers, led to the arrest of the appellant. The Mr. Sengo's argument is that the respondent could not be held responsible because it was not her who mentioned the appellant to police and when her officers including DW1 (Daniel Gwimo) was called and shown the thief he (DW1) categorically intimated not to know him. His conviction was that the respondent had a probable and reasonable cause to report the incident for the purpose of finding a right culprit who stole the pesticides form his store as any ordinary civilian. Mr. Sengo invited me to read the case of **Tumaniel v. Aisa Issai** [1969] HCD 280 which held:

> *"When there is reasonable suspicion that an offence has been committed and good ground for thinking that a particular person is responsible it is the duty of every citizen to pass on such information... to the police help them to find the offender. If the police act on such information and arrest anyone then the person who has given the information should not be liable for damages for defamation unless it is plain that he had no good grounds for suspecting the person named and that he was acting spitefully.... Similarly, there will be cases where the police take a person into custody for investigation which seems quite reasonable and no steps are taken. Again, in such a case the accuser should not be charged unless it can be shown that he deliberately made a false report... (where) a report to the police (is) intended to lead to the investigation of a crime... there should be no*

compensation payable in such case unless the report is shown to be false and prompted by malice."

Guided by the foregoing authority, Mr. Sengo held the view that the appellant failed to prove that the respondent had no probable and/or reasonable cause or that it was the respondent who mentioned him to the police with ill will.

He rested his submission by urging this court to dismiss the appeal with costs.

Having examined the grounds of appeal and heard both the appellant and the respondent's learned advocate resisting the appeal, I now turn to consider the merits or demerits of the appeal in the light of the submissions, facts and evidence gleaned from the record of the trial Court. However, before doing that I find it relevant to preface the discussion with the obvious principles which will guide me in determining the appeal.

The first relates to the extent to which this Court sitting on a first appeal such as this one can go. It is settled law that a first appellate court has powers to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusion on the evidence without overlooking the conclusion of the trial court (see **Pendo**

Fulgence Nkwenge v Dr. Wahida Shangali, Civil Appeal No. 368 of 2020 (unreported) and **Moses Mwakasindile v. Republic,** Criminal Appeal No. 15 of 2017 [2019] TZCA 275 (30 August 2019) at page 13, TanzLII.

The second principle relates to what it takes to succeed in a case founded on the tort of malicious prosecution. Settled law has it that to succeed in the suit, the plaintiff has to prove the existence of four elements constituting his course of action cumulatively. **One,** that he was prosecuted by the defendant in criminal proceedings, **two,** the defendant acted without reasonable and probable cause in initiating, prosecuting and/or continuing criminal proceedings, **three,** the defendant acted with malice and **four,** the criminal proceedings terminated in the plaintiff's favour. See for instance: **Yohana Ngasa** (supra), **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161 cited in **Shadrack Balinago v. Fikiri Mohamed @ Hamza @ 2 others,** Civil Appeal No. 223 of 2017 (unreported). These are among the cases appearing in the parties' list of authorities and which Mr. Sengo relied on inviting me to apply in dismissing the appeal.

Having regard to the foregoing, let me now turn my attention to the grounds of appeal which can be conveniently determined together, as they appear in the memorandum of appeal. My examination of the record shows that the trial Court was alive to the law as it relates to malicious prosecution. It answered the first issue, *whether the act of defendant prosecuting the plaintiff amounted to malicious prosecution*, negatively and found that the respondent prosecuted, the appellant in Criminal Case No. 103 of 2022. However, it found no evidence proving that Criminal Case No. 103 of 2022 was heard and determined on merit because it was dismissed for non-appearance of the respondent. In addition, the trial Court was satisfied that the appellant was discharged on technical ground which lured it to believe that the criminal case was not terminated in the appellant's favour. Applying the principle in **Robert Mapesi v. Michael Nyaruba,** Civil Appeal No. 222 of 2020, [2021] TZHC 4079 (13 July2021) TanzLII the trial court, correctly in my view, held that it is not enough to prove malice by acquittal because not all acquittals reflect the truth about the case, some cases are lost on technicality or are poorly prosecuted.

In relation to whether the respondent had probable and reasonable cause in initiating criminal prosecution against the appellant again, the trial Court answered it affirmatively relying on the uncontroverted evidence from the respondent who testified as DW1 corroborated by one other witness. According to the trial Court there was ample evidence from the respondent proving that her store was broken in on 11/3/2022 and pesticides stolen. Subsequently, the respondent reported the matter to police and on 2/6/2022 the appellant was arrested. Again, it said there was ample evidence proving that on 3/6/2022 the respondent was called at police station shown the pesticides, to wit, Nord ox/red copper 25kg and capably identified them. Soon after the appellant was shown to the respondent but did not know him. The accumulation of all these, made the trial Court to rule out that the respondent had reasonable and probable cause to initiate and continue the prosecution in Criminal Case. Having held that the respondent was justified in initiating criminal proceedings against the appellant, the trial Court found no reason to determine other issues relating to existence of malice, rightly so in my view.

On my part, I concur with the findings of the trial Court and hold the appeal is destitute of merit. The reason behind is easy to grasp. My starting point is on the law regarding burden of proof which characterises the discussion in this appeal. The law under section 110(1) of the Evidence Act is that he who alleges must prove his allegation to succeed in a suit. It is equally the law that, unlike in criminal trials, the burden of proof in civil cases is not static. This rule is long settled as can be seen from the decision of the defunct Court of Appeal for East Africa in **Henry Hidaya Ilanga v. Manyama Manyoka** [1961] EA 705 referred in **Co-operative and Rural Development Bank (1966) Ltd v. M/s Desai and Company Limited,** Civil Appeal No. 51 of 1995 (unreported) and **Bright Technical Systems & General Supplies Limited v. Institute of Finance Management,** (Civil Appeal No. 12 of 2020) [2023] TZCA 17284 (30 May 2023, Tanzlii), amongst others.

It is also trite that, a party who has the burden of proof must discharge his burden on balance of probabilities regardless of the weakness in the case of his opponent. For this proposition, the Court of Appeal's decision in **Paulina Samson Ndawavya v. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017, **Charles Christopher**

Humphrey Richard Kombe t/a Humphrey Building Materials v. Kinondoni Municipal Council, Civil Appeal No. 125 of 2016 and **African Banking Corporation (T) LTD v T-Better Holdings Co. Ltd,** Civil Appeal No. 207 of 2017 [judgment delivered on 6th March, 2024] (all unreported) amongst others are instructive on this principle. It is significant that, in **Paulina Samson Ndawavya**, the Court of Appeal drew inspiration from the distinguished authors of commentaries in the works of Sarkar's Laws of Evidence, 18th Edition, **M.C. Sarkar, S.C. Sarkar and P. C. Sarkar**, published by Lexis Nexis and extracted an excerpt to the effect that, the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it for a negative is incapable of proof.

In this case, therefore, I agree with the trial Court that the appellant, who alleged malicious prosecution, failed entirely to adduce satisfactory evidence proving unity of four elements required to be proved in a case for malicious prosecution. See the decision in **Edward Celestine & Others v. Deogratias Paulo** [1982] TLR 347. The only evidence on record is that the appellant was arrested on 2/6/2022 and stayed in police custody till 8/6/2022 without bail. On being arraigned to

Maposeni Primary Court, the respondent failed or neglected to prosecute the Criminal Case. Hence, the same was dismissed for want of prosecution. I am fully satisfied in view of exhibit P1 that the charge was instituted yes! But no evidence that trial was conducted, evidence heard and finally determined in the appellant's favour. What is categorical is that the case was determined in preliminaries whereby parties' rights were not determined on merit.

In my view, even assuming there was evidence proving that the criminal proceedings were terminated in his favour, the appellant's case could not have succeeded because he failed to prove that the prosecution by him was without reasonable and probable cause which negated the existence of any malice. There is satisfying evidence on record revealing that the respondent reported to the police the incident of her store being broken in and pesticides stolen on 2/3/2022. The appellant did not prove that the respondent knew who broke in her store or that there was nothing like that. No evidence proving that she made deliberately made false report to the police intending to lead to the investigation of a crime.

In my assessment of the trial Court's judgment, I hold the view that it was alive to and correctly applied the law as it relates to suits founded on malicious prosecution. As hinted earlier, there was no evidence proving that the respondent acted without reasonable and probable cause in initiating criminal prosecution against the appellant.

Notwithstanding his general assertion, the appellant did not go further justifying in what way the trial Court failed to take into account and analyse all ingredients of malicious prosecution or even that it misinterpreted the principles governing suits founded on malicious prosecution. Quite the reverse, as rightly submitted by Mr. Sengo, the trial Court correctly applied the principles established through case law to the facts. The case of **Tumaniel** (supra) cited by Mr. Sengo is the good compass to this court which fits squarely to the facts of this case. Applying the holding to the facts of this, I am convinced that having detected that the store was broken in, the respondent reported to police without naming anybody as a suspect. Upon investigation, the police arrested the appellant. Even though Criminal Case No. 103 of 2022 was not prosecuted, there is no evidence from the appellant intimating that the respondent relayed a false information to police officers.

Generally, I have not found anything in this case suggesting that the trial Court applied a wrong principle or misinterpreted the established principles in dismissing the appellant's suit before it. On why she did not dwell on all ingredients, the trial Magistrate found it not necessary because the main ingredient was answered. I concomitantly agree with her because my strong view is that the appellant failed entirely to adduce satisfactory evidence proving unity of four elements required to be proved in a case for malicious prosecution. I think, therefore it would be pretentiously academic to deal with the rest of the elements. I hold the same view in this appeal. The upshot of the foregoing is that grounds of appeal are devoid of merit.

The above said, the appeal stands dismissed. The respondent shall have her costs both in this Court and the trial Court.

It is so ordered.

DATED at **SONGEA** this 16th day of April, 2024

J. M. KARAYEMAHA
JUDGE