

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
SHINYANGA SUB REGISTRY**

**AT SHINYANGA**

**CIVIL APPEAL REFERENCE NO. 20240208000024210**

***(Arising from Civil Case No.21 of 2023 before Kahama District Court)***

**GETRUDA DAVID .....APPELLANT**

**VERSUS**

**JONATHAN MAZIKU .....RESPONDENT**

**JUDGMENT**

***12<sup>th</sup> March & 19<sup>th</sup> April 2024***

**F.H. MAHIMBALI, J**

The respondent herein filed a civil suit for the claims of Tshs 60,000,000/= being general damages suffered by him due to malicious prosecution by the appellant.

Initially the respondent was arraigned before Lunguya primary Court, faced with criminal charge of threatening to kill the appellant; criminal Case No.346 of 2022 worse enough, the charge was not proved against him, thus acquitted. Being the case he decided to file for malicious prosecution against the appellant. The trial Court after had heard the matter on merit, awarded the respondent special damages of Tshs

7,500,000/=, medical expenses Tshs 10,000,000/= and Tshs 5,500,000/= being general damages.

Aggrieved by such decision, the appellant had approached this Court with limbs of four grounds of appeal to wit;

- 1. That, the learned resident Magistrate erred both in law and in facts when he condemned the appellant to pay the respondent Tshs 5,500,000/= being compensation for malicious prosecution, whilst the ingredients for malicious prosecution were not proved, all at once.*
- 2. That, the learned resident magistrate erred both in law and in facts by not considering that the respondent failed to show clearly existence of reasonable and probable cause and that the plaintiff/the appellant acted maliciously.*
- 3. That, the learned Resident Magistrate erred both in law and in facts in her verdicts that the respondent suffered loss of business profit, whilst there is no proof of the alleged business or profit.*
- 4. That the judgement and decree passed by the learned Resident Magistrate of Kahama District Court is otherwise contrary to law, against the weight of evidence, against the principles of justice, equity and good conscience.*

During the hearing of this appeal, both parties appeared in person and unrepresented. Arguing for the appeal, the appellant prayed for her grounds of appeal to be adopted by this court and form party of her submission. She further added that originally, they had a land case. As they were going on, the respondent unlawfully intervened her into her shamba after the DLHT's findings. Working on the advice she got on what is the way forward, she had to file the criminal case as he was threatened to be killed. It was unfortunate that the trial court didn't convict him for lack of sufficient evidence. Having got verdict of acquittal, the respondent filed a suit against her at the District Court of Kahama for a tort of malicious prosecution. The trial Court erroneously, ruled against her as all that the respondent had claimed were falsity and with no any colour of rights.

On the side of the respondent prayed for his reply to the petition of appeal to be adopted and be party of his submission. He added that in essence, he disputes all the claims by the appellant. He thus prayed for dismissal of the appeal and that the trial court's judgment be upheld as it reached a proper finding as per law. He was arrested by police and prosecuted and later discharged as he was insane and that the charge was not established against him beyond reasonable doubt as per law.



In rejoinder the appellant maintained what she had submitted in chief. She had no more to add.

Upon scanning the trial Court records, petition of appeal and the submission of the parties, I have now to determine this appeal and the issue for consideration is whether this appeal is merited.

From the trial court records it is vivid that the respondent was awarded various damages due to malicious persecution against him which were initiated by the appellant. Notably, upon the failure of criminal case against the respondent.

Having laid down the above background, I find it pertinent to discuss the principles upon which the tort of malicious prosecution is based.

Our law of torts derives its foundation from the English common law. That law forms the bedrock of our law of torts, by virtue of the provisions of section 2 (2) of the Judicature and Application of Laws Act, Cap. 358.

Fortunately, courts have already shown the way on how this particular subject of the English law of torts applies in Tanzania. **In Jeremiah Kamama v Bugomola Mayandi [1983] TLR 123**, the late Chipeta J laid down the elements that need to be proved for the plaintiff to succeed in a case of malicious prosecution. I can do no better than to follow the

same footsteps as done by the distinguished Judge, who elaborately discussed the principles applicable in these cases. He held, inter alia, as follows:

*(1) For a suit for malicious prosecution to succeed the plaintiff must 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;***

*(ii) ... [not relevant]*

*(iii) **malice exists where the prosecution is actuated by spite or ill-will or indirect or improper motion. (emphasis added)***

Now, guided by the above enshrined principles, there is no doubt that the respondent was prosecuted and that the proceedings complained of ended in his favour.

The only issues that remain to be determined in this case relate to whether the appellant was malicious in her decision to prosecute the respondent actuated by spite, ill-will, indirect or improper motives and that there was no reasonable and probable cause for such prosecution.

Viewed against the principles applicable in cases involving malicious prosecution as discussed earlier, I am unable to conclude that the appellant had no reasonable justification, to place charges against him. I also see nothing to show that the trial Court decision in criminal case was actuated by spite, ill-will, indirect or improper motives or that there was no reasonable or probable cause for such prosecution. In the context, the burden lay on the respondent to prove that the prosecution was instituted without reasonable and probable cause. **In Herniman v Smith, [1938] 1 All E .R. 1**, the House of Lords passage quoted with approval the definition of the term "Reasonable and probable cause given by Hawkins, J. in **Hick v Faulkner (1878) 8 Q.B. 167**. Hawkins, J. put it this way (at p. 171):



*"I should define reasonable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any reasonable and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."*

Nevertheless, can one say that the prosecution in Criminal Case No. 346 of 2022 was actuated by malice? Does the evidence of the respondent adduced in relation to that facts, considered against the defence evidence, capable, on a balance of probabilities, to have run fault of the cardinal rule, **as Hawkins put in Hick v Faulkner**, that upon a full conviction founded upon reasonable grounds of the existence of the state of circumstances as he narrated to the court, assuming them to be true, would have led to the decision to prosecute the appellant?

With respect, I am unable to give an affirmative answer to the question posed. On the contrary, I am of the considered view that the circumstances were such that the decision was a sound one, and that any reasonable and cautious person in that position would have decided to place charges against the respondent as the appellant did. As earlier

stated, the fact that the prosecution ended in the respondent's favour, though a relevant factor, does not necessarily mean that the original complaint was false and/or malicious.

The question as to whether any accused person in a criminal case is guilty of the offence charged depends on a lot of factors, and a civil court cannot take the failure of that prosecution, ipso facto, as evidence of malice. Hence, my position is that the respondent's prosecution in Criminal case No. 346 of 2022 was not malicious within the meaning the term "malicious prosecution" represents in tort law. See also the case of: **Issa Juma Magono and Another vs Athwal's Transport and Timber Ltd and Another, Civil Appeal No. 22 of 2018** (unreported)

The other complaint was on verdict entered by the trial Court. The respondent (plaintiff) at the trial Court prayed for three reliefs; compensation for general damages at a tune of Tshs 60,000,000/=, costs of the suit and any other reliefs. But when the trial Court had made its findings, it awarded the respondent special damages Tshs 7,500,000/= medical expenses Tshs 10,000,000/= and Tshs 5,500,000/= being general damages.

*Now, the question to ask where do special damages and medical expenses came from?*



I hesitate to conclude that the reliefs awarded by the trial Magistrate resulted from his only formed view and not from the pleadings by the parties as claimed. It is also important to note that parties are bound by their pleadings. See, **Aspetro Investment Company Limited vs Jawinga Company Limited, Civil Appeal No.8/2015** and **Peter Ng'omango vs The Attorney General, Civil Appeal No. 214 of 2011** as well as **James Funga Gwagilo vs The Attorney General [2004] TLR 161.**

That said, I find the award of special damages, medical expenses were new issues in the impugned judgment which were not pleaded in the plaint untenable in law, and thus disregarded.

In subsequent therefore, this appeal is allowed for being brought with sufficient cause and consequently the decision of the trial court is quashed and set aside with costs to the appellant.

Right of further appeal is explained.

DATED at Shinyanga this 19<sup>th</sup> day of April, 2024.



  
**F.H. Mahimbali**

**Judge**