

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 73 OF 2020**

**SAMSON AWITI MAJWALA ..... PLAINTIFF**

**VERSUS**

**HUAWEI TECHNOLOGIES TANZANIA CO. LTD ..... DEFENDANT**

**JUDGMENT**

17/03 & 06/04/2023

**NKWABI, J.:**

The plaintiff was an employee of the defendant since 15<sup>th</sup> January, 2015 in the position of sales and marketing director who had the responsibility to report to the country director of the defendant. The plaintiff terminated the employment contract by issuance of 24 hours' notice dated 4<sup>th</sup> July 2016. Then he filled in a clearance form and was cleared by the defendant official.

Thereafter, the plaintiff was arrested and prosecuted by the defendant in the District Court of Kinondoni in Criminal Case No 371 of 2017. That criminal trial ended in his favour as he was found to have no case to answer, thus he was acquitted. The plaintiff maintained, in her defence, that there was malice in prosecuting him as the defendant had no reasonable and probable cause

for prosecuting him. After being acquitted, the plaintiff applied for different posts of employment to Amotel and Tanga Cement but he was not employed after background check from the defendant.

The defence of the defendant is that though the defendant reported the matter to the police, she did not prosecute the plaintiff. Even if it will be taken that the defendant prosecuted the plaintiff, there was probable cause and there was no any malice. The plaintiff was reported to the defendant by her devices distributors that the plaintiff had taken 116 devices and had not paid for. To prove that allegation, a forensic report was tendered as exhibit D-1.

Nevertheless, the plaintiff is claiming for the following reliefs:

- (a) Payment of T. 450,000,000/= being a total damage for malicious prosecution which the plaintiff has suffered from the acts of malicious prosecution made by the defendant thereof.
- (b) Payment of general damages for the psychological injuries suffered from maliciously prosecution resulted from maliciously prosecution made by defendant to be assessed by the Court.
- (c) Costs of this suit.

- (d) General damages to be assessed by this honourable Court.
- (e) Interest on the total amount at the Court rate from the date of judgment to the date of full settlement hereof.
- (f) Any other relief (s) that this honourable Court shall deem fit to grant.

On the first hearing date, the Court framed the issues as agreed by parties as follows:

1. Whether the arrest and subsequent prosecution of the plaintiff was actuated by malice of the defendant.
2. If the 1<sup>st</sup> issue is answered in the affirmative what damages did the plaintiff suffer and to what extent.
3. To what reliefs are parties entitled to.

If one looks at the evidence and the issues proposed and drawn by the Court one will see that there is no dispute that the plaintiff was prosecuted in Criminal Case No. 371 of 2017 and that that prosecution ended in favour of the plaintiff. What is disputed is the claim that the defendant was actuated by malice in prosecuting the plaintiff.

I have to start dealing with the 1<sup>st</sup> issue which is whether the arrest and subsequent prosecution of the plaintiff was actuated by malice of the defendant.

On the first issue, the counsel of the plaintiff insisted that the defendant acted without reasonable and probable cause in arresting and prosecuting the plaintiff in criminal case No. 371 of 2017. That is because even the defendant had already cleared the plaintiff to resign. There is no any evidence to show that the plaintiff took the alleged 116 devices from the partners of HUAWEI, the defendant.

On the side of the defendant in the first place, contended that the discretion to prosecute the plaintiff was in the hand of the Republic, which I think is misplaced. My view is supported by the position in the case of **Wilbard Lemunge v. Father Komu & The Registered Trustees of Diocese of Moshi**, Civil Appeal No. 8 of 2016. Because it is the one who sets the law in motion who is to be held accountable for where malicious prosecution is proved.

In this case, the defendant did not tender any documents (delivery note) that the devices were received by the plaintiff. In the circumstances, the

defendant was actuated by ill-will in reporting to the police. That ill-will amounts to malice. I therefore hold that the defendant was actuated by malice in reporting to the police that the plaintiff had stolen the alleged devices.

The defendant claims to be obliged to report an offence under section 7(1) (a) of the CPA and is protected under section 7(2) of the CPA. However, the law on malicious prosecution requires the defendant to have acted cautiously. With the absence of the delivery notes being tendered in this Court where as the Court is entitled to have adverse inference that the defendant had no any delivery note to prove that the plaintiff actually received such devices, then the defence of probable cause cannot be available to the defendant. Afterall the devices were in the custody of another person, why the defendant reported the matter? In addition, the allegations may have amounted to civil suit against the plaintiff as opposed to criminal case. Afterall even exhibit D. 1, the forensic report, was prepared by their employee, he should have prepared to favour his employer.

I also think that the defendant acted without any probable cause in reporting the alleged offence while she had no any delivery notes which prove that the plaintiff received the devices from the defendant's partners. It is difficult to

determine whether the delivery notes were issued by the defendant or the partners in order to determine who was in control of the alleged devices between the defendant or the alleged partners. Failure to tender the delivery note which would prove that the plaintiff received the alleged devices entitles this Court to have adverse inference against the defendant that defendant had no such delivery notes, thus the defendant had no probable cause to prosecute the plaintiff as per **Emmanuel Senyagwa v Republic**, Criminal appeal no 22/2004 (CAT) at Dar-es-Salaam (Unreported) at P. 7

*"We think we are entitled to make an adverse inference from the failure to produce PF3 even after it was said that it was going to be tendered. That raises the question whether or not there was really sexual intercourse. If no, then there was no rape."*

The counsel for the defendant cited **Wilbard Lemunge v. Father Komu & The Registered Trustees of Diocese of Moshi**, Civil Appeal No. 8 of 2016 CAT (unreported) where it was stated:

*"We are strongly persuaded by the writing of the learned authors Ratantal and Dhirajlal in the Law of Torts (supra) at*

*page 317, which we adopt that, the defence of reasonable and probable cause, can be availed by an accuser (defendant), upon establishment of four factors; **One;** an honest belief of the accuser in the guilt of the accused (plaintiff); **Two;** Such belief must be based on an honest conviction of the existence of circumstances which led the accuser to that conclusion; **Three;** the belief as to the existence of the circumstance by the accuser, must be based upon reasonable grounds that, such grounds would lead to any fairly cautious person in the accuser's situation to believe so. **Four;** the circumstance so believed and relied on by the accuser, must be such as to amount to a reasonable ground for belief in the guilt of the accused person."*

*"We are aware that, the malice referred to in malicious prosecution that, is not malice in the legal sense, that is, such as may be assumed from a wrongful act done intentionally. To the contrary, it is malu animus meaning, being actuated by ill spite or ill-will ... there was no any testimony by the appellant to suggest as to how the first*

*respondent was actuated by ill will or motive, to involve the appellant in the incident of the stolen bags of maize”*

The above case law cited by the Counsel for the defendant actually supports the position of the plaintiff in this case. In circumstances, the first issue is answered in the affirmative.

Next, I discuss the 2<sup>nd</sup> issue which is if the 1<sup>st</sup> issue is answered in the affirmative what damages did the plaintiff suffer and to what extent.

The counsel for the plaintiff claimed that when the plaintiff resigned, he was going to a higher payment to the big companies rather than the defendant but the whole move was paralyzed by the criminal case against the plaintiff. Exhibit P.1, P.3 P.4 and P.5 demonstrate the damages suffered by the plaintiff. Since his prosecution on 18<sup>th</sup> September 2017 has not been able to get employment due to employment background check which mention the criminal case.

The counsel for the defendant, however, argued that throughout his testimony, PW1 was not able to establish that he suffered any damage as a result of the proceedings in criminal case No. 371 of 2017. He added the



plaintiff did not suffer any damage so the issue should be answered in the negative.

I have considered the evidence and the submissions of both parties, I do not see that the plaintiff suffered specific damages because he had resigned from his position. As to the posts in other companies, that is exhibited by for instance exhibit P4 which is the termination letter from Amotel, that cannot amount to proof of specific damages as the plaintiff did not prove by the salary slips of payment of salary if any. In any case, the plaintiff did not specifically plead the specific damages and did not specifically prove the alleged specific damages. In this approach, I am guided by **Ren International Co. Ltd v. Geita Gold Mining Ltd**, Civil Appeal No. 453 of 2019 CAT:

*"... though pleaded as specific damages, the claim as to loss of expectation earnings was nothing but a claim for general damages which was within the discretion of the trial court. As the law requires therefore, we would be reluctant to disturb the exercise of civil discretion by the trial court ... Having found the claim falls in under general damages, the extent of award was entirely in the discretion of the court."*

Also, another authority which fortifies my view is the case of **Karangirangi v, Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (CAT) at pg. 7 & 8 where it was stated:

*"... we think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove. ... It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities."*

The damages that the plaintiff suffered are merely general damages. I will indicate the quantum when I will be discussing the issue as to what reliefs parties are entitled to.

Onto what reliefs parties are entitled to, the counsel for the plaintiff maintained that the suit be granted, declaring the plaintiff was maliciously prosecuted by the defendant and therefore entitled to payment of damages to the tune of T.shs 450,000,000/= and costs of the suit be paid by the defendant.

For the defendant it was argued for the defendant that in malicious prosecution, there is no specific damage. He insisted that specific damages

must be specifically pleaded and strictly proven. He cited **Vidoba Freight Co. Ltd v Emirates Shipping Agencies (T) Ltd & Another**, Civil Appeal No. 12 of 2019, CAT (unreported) which cited with approval **Bolag v. Hutchson** [1095] AC 515 at p 525 thus:

*"It is a trite principle of law that specific damages must be specifically pleaded ad strictly proved."*

*"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly ... The evidence on record is wanting, as it was not strictly proved that the appellant suffered the alleged loss."*

He concluded that the plaintiff failed to prove the specific damages. The claim of specific damages therefore fails.

In respect of the general damages, it was argued that general damages should be founded on strong reasons and evidence. He cited **Anthony Ngoo & Another v. Kitunda Kimaro**, Civil Appeal No. 25 of 2014 CAT (unreported) where it was stated:

*"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same."*

The counsel for the defendant insisted that there is no any evidence on record that the plaintiff suffered any damage so as to be entitled to the award of general damages as prayed. He urged I dismiss the suit with costs.

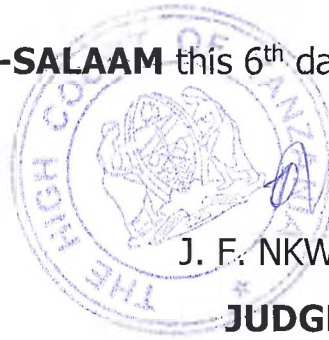
I am not impressed with the view of the counsel for the defendant. Actually, the plaintiff suffered general damages for loss of expected job, elsewhere from the defendant just as I have already indicated above. I also do not doubt that, due to malicious prosecution by the defendant, the plaintiff suffered psychological injuries suffered from maliciously prosecution, therefore he is entitled to general damages. In the circumstances of this case, I assess the general damages at T.shs 20,000,000/= because damages are not for enriching a party.

Consequently, I find that the suit is merited and succeeds to the extent I have explained above. The defendant has to pay the plaintiff general

damages at T.shs 20,000,000/=. The plaintiff has to be reimbursed his costs by the defendant.

It is so ordered.

**DATED** at **DAR-ES-SALAAM** this 6<sup>th</sup> day of April 2023.



*J. F. Nkwabi*

J. F. NKWABI

**JUDGE**