IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 02 OF 2020

(Appeal from the judgment and decree of the District Court of Sengerema at Sengerema (Hon. Salehe, RM) in Civil Case No.4 of 2019, dated 30th of December, 2019)

MADUHU YEGELA ..... APPELLANT

VERSUS

DAUD LUTAGA ..... RESPONDENT

JUDGMENT

6th May, & 22nd July, 2021

ISMAIL, J.

This appeal arises from the decision of the of the District Court of Sengerema (Salehe, RM) sitting in Sengerema, in which the appellant's claims of damages for malicious prosecution were dismissed. The view held by the trial court is that the appellant, the plaintiff then, failed to prove that the criminal proceedings determined in the Primary Court of Sengerema at Nyakarilo had been instituted maliciously. This decision was greeted with an outrage from the appellant, hence the decision to prefer the instant appeal

which has five grounds of appeal, reproduced with all their grammatical challenges as follows:

1. *The trial Magistrate erred in law and in fact for failure to admit into evidence the decision in Criminal Case No. 43 of 2016 of Nyakarilo Primary Court hence basing his decision in favour of the Defendant herein Respondent on a mere assertions and wrong premises of the law.*

2. *The trial Magistrate erred in law erred in holding that there was nowhere in evidence of the plaintiff (now appellant) showing the damages he suffered enough to award the Appellant general damages of Sh. Seventy Million [TShs. 70,000,000/-] as claimed.*

3. *The trial Magistrate erred both in law and fact for failure to properly assess and appreciates the evidence and pleadings on record.*

4. *The trial Magistrate erred in law for holding that there was probable or justifiable cause for the (Defendant) herein Respondent to prosecute the Plaintiff (herein Appellant) on a mere and unsupported assertions or illusions.*

5. *That the decision of the trial court is otherwise incomprehensible for failure to heed to the requirements of.*

The brief account of the facts that bred the instant appeal is as follows. In 2016, the respondent instituted criminal proceedings in the Primary Court of Sengerema at Nyakarilo (Criminal Case No. 43 of 2016), against the

appellant, accusing him of house breaking and theft. The allegation was that, at around 11.00 pm on 6th November, 2015, the appellant willfully broke into the respondent's premises and stole a bed valued TZS. 400,000/-, belonging to the respondent. The trial proceedings ended in the appellant's acquittal, as the court was convinced that the bed he allegedly stole was his own property that the respondent was entrusted with by a carpenter who had been hired by the appellant to make it. On account of the carpenter's absence, the said bed and other furniture were placed in the care of the respondent, and that the appellant's action had been sanctioned by the carpenter and on prior information of the village chairperson. This ruled out the allegation of theft levelled against the appellant. The appellant was finally acquitted of the charges he faced.

The appellant's acquittal triggered a new battle. He instituted Civil Case No. 4 of 2019 in which he imputed malice and lack of probable cause in the institution of the criminal proceedings. He moved the court to award him general damages to the tune of TZS. 70,000,000/-, plus interest thereon, to redress him for the damage and psychological torture he suffered as a result of the allegations levelled by the respondent. The respondent vehemently denied the allegation. He held the view that the criminal proceedings against the appellant were genuinely commenced in the belief that the appellant had

illegally broken into his house and taken away the properties that belong to him.

The tort proceedings were concluded in the respondent's favour. The trial magistrate read no malice in the respondent's conduct of the criminal proceedings. Consequent thereto, the claims by the appellant were dismissed. The appellant would hear none of it. Feeling hard done by the decision, he decided to prefer the instant appeal.

When the matter came up for orders, it was unanimously agreed that the appeal be disposed of written submissions. The counsel for the parties filed their submissions in full compliance with the schedule.

In his submission in chief, the appellant chose to follow the sequence in which the grounds of appeal were preferred. With respect to ground one, the argument is that establishment of the claim for malicious prosecution required that a copy of the decision in Criminal Case No. 43 of 2016 be admitted as evidence. In this case, however, the same was not admitted despite the appellant's plea for its admissibility. The appellant contended that the trial magistrate, who was duty bound to assist the appellant, a lay person, abdicated that duty. At the very least, the counsel argued, the trial court ought to have taken a judicial notice of the existence of the said decision and make a finding in respect thereof.

Submitting on ground two of the appeal, the contention by the appellant is that the trial magistrate failed to appreciate the fact that in claims of general damages, the duty of the court is to assess the quantum of general damages suffered due to malicious prosecution.

With regards to ground three, the appellant's argument is that the decision arrived at was erroneous, and was caused by the trial court's misapprehension of the evidence adduced by him. The appellant contended that a proper assessment of the evidence would have brought a conclusion that the appellant was maliciously prosecuted.

Regarding ground four, the appellant's take is that failure to admit a copy of the criminal proceedings in Criminal Case No. 43 of 2016 was erroneous, and that there is no way the trial court would hold that institution of the criminal proceedings was without any probable cause if the said testimony had been admitted.

In the fifth ground of appeal, the appellant's contention is that the trial magistrate did not give reasons for the decision he made. Quoting an excerpt from The Law of Torts, Brazier, Margareth, 8th edition, Butterworths, London, 1988, the appellant argued he suffered a humiliation, mental anguish and subjected to a serious disrepute. These justified the claim for damages and the trial court ought to have awarded the said damages. The appellant

argued that his case was akin to the case of ***Ng'homango v. Mwangwa & Another***, CAT-Civil Appeal No. 1 of 1994 (unreported); and ***Martin v. Watson*** [1996] 3 All E.R. 559. In the former, false theft allegations bred a claim in a suit for malicious prosecution that culminated in the award of damages to the tune of TZS. 1,100,000/-. The appellant contended that in the cited decision, the plaintiff's stay in custody was 24 hours whereas his lasted for two days. In ***Martin v. Watson*** (supra) the Court of Appeal of England held:

> *"To deny a remedy to a person whose liberty has been interfered with as a result of unfounded and malicious accusations in such circumstances would constitute a serious denial of justice."*

In his rebuttal submission, Mr. Eric Katemi, the respondent's counsel, argued, in respect of ground one of the appeal, that failure to admit the copy of the judgment in the criminal trial was of no consequence, since the findings of the court in that case were known and the court had already taken judicial notice thereof. He argued that proof of malice, lack of probable cause or the extent of damages to be paid did not depend on the said decision.

With regards to ground two, the respondent argued that the appellant's loss in the trial proceedings was due to his failure to prove the

required ingredients for malicious prosecution. He argued that, in terms of the holding in ***Jeremiah Kamama v. Bugomola Mayandi*** [1982] TLR 10, success in a suit for malicious prosecution is dependent on proof of five elements. These are: that the plaintiff was prosecuted; that the proceedings ended in his favour; that the defendant instituted or carried out the prosecution maliciously; that there was no probable or reasonable cause for the prosecution; and that the plaintiff suffered damage as a result. The counsel argued that in the trial proceedings, the last two elements went missing, as there was evidence that there was a dispute that arose as a result of the appellant's act of breaking into the house, and the appellant's refusal to return the bed he had taken from the respondent. These, the counsel contended, took away any possibility of malice against the appellant. The respondent further relied on section 7 (1) (a) (b) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 which bars a criminal or civil action against a party that gives information in pursuance to sub-section (1).

With regards to damages, the respondent submitted that there was no proof of any damage allegedly suffered by the appellant to deserve payment of TZS. 70,000,000/-. He argued that the respondent acted under the impression that the appellant had committed a crime and that he, the

respondent, had a duty to report. He prayed that the appeal be dismissed with costs for lacking merit.

The parties' rival submissions bring out one singular issue. This is as to whether the appeal presents any meritorious position to justify the appellant's prayer for allowing it. Disposal of the appeal will follow the sequence in which the grounds of appeal were preferred.

The gravamen of the respondent's complaint in ground one is that the trial court failed to admit a copy or take judicial notice of the judgment in Criminal Case No. 43 of 2016. In his view, admission of the said decision would go a long way in making inroads in his claim for damages for malicious prosecution. The view held by the respondent is that such failure was caused by the appellant himself, as the proceedings do not indicate that such document was tendered in evidence. He argued that the court had already taken judicial notice of the said decision. The contending positions by the parties take me to page 15 of the typed proceedings in which the appellant's sole evidence is found. Nowhere in these proceedings did the appellant indicate that he wished to tender any documentary evidence, let alone the judgment in Criminal Case No. 43 of 2016. It is irresponsible to peddle an unfounded allegation while the trial court was not treated to any such document.

The appellant has contended that the trial court ought to have guided the appellant and allow him to tender the document, noting that he is a lay person. I am not persuaded by this contention and I find it specious. As it was held in ***Khalfan Abdallah Hemed v. Juma Mahende Wang'anyi***, HC-Civil Case No. 25 of 2017 (MZA-unreported), it is not the court's duty to plug the gaps or stitch torn cases to a party's interest. Its only duty is to evaluate and make sense of what is presented before it. The foregoing position is a leaf borrowed from the splendid reasoning in ***Haji v. New Building Society Bank*** [2008] MWHC 36, in which the High Court of Malawi held as follows:

> *"It is never the duty of the Court to create a case for the parties and, specifically in this case, for the plaintiff by contradicting the defendant's case.* ***Where the plaintiff has no evidence on the matter in issue the Court has to analyse the evidence of the defendant and make a finding one way or the other, and then decide the case on the merit of the evidence available."***
> [Emphasis is added]

But even assuming that the trial court was charged with that responsibility, the more critical question is whether the failure by the trial court occasioned any miscarriage of justice. Looking at what the said document would bring to the table, the unflustered answer to this question

is that, the document would not be of any assistance as far proving the appellant's case is concerned. This is especially on account of the fact that there was no dispute on the existence of the criminal proceedings or termination thereof in the appellant's favour. It is doubtful, if not unlikely, that such document would help the appellant surmount two other hurdles that lied in his way i.e. malice and lack of reasonable or probable cause. This, then, justifies my conclusion that this ground of appeal is hollow deserving nothing better than a dismissal.

The second ground of appeal punches holes in the trial court's finding on the claim of damages. The argument by the appellant is that the court erred in dismissing the claims on account of failure to produce a supporting evidence. While the propriety or otherwise of awarding damages will be sufficiently covered in ground four of the appeal, I feel obliged to state a thing or two about the award of general damages. One relates to the definition of general damages. The most concise definition of what general damages was propounded in ***Stroms v. Hutchison*** [1905] A.C. 515, in which Lord Macnaghten stated as hereunder:

> *"General damages "are such as the law will presume to be the direct natural or probable consequence of the act complained of."*

The second issue relates to circumstances under which such damages may be awarded. While it is a cherished position that award of general damages is discretionary, such award must be preceded by the court's satisfaction that the defendant's alleged wrong doing has been proved and confirmed by the court. It requires a thorough evaluation of evidence on the alleged wrong doing that brought about the injury for which damages are sought. This position was accentuated by the Court of Appeal in ***Anthony Ngoo & Another v. Kitinda Kimaro***, CAT-Civil Appeal No. 25 of 2014 (unreported). It was held:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason ...."*

Thus, while I agree with the appellant that the trial court's demand of evidence that justifies award of the quantum claimed represents a faulty position, the question of adequacy or otherwise of the testimony shall be resolved in due course.

The appellant's contention in ground three is that the trial court failed properly assess and appreciate the evidence and pleadings on record. Let me begin by appreciating the duty that is bestowed on a trial court to

evaluate the evidence of each witness and his credibility with a view to making a finding on facts in issue. This has been underscored in many a decision, including ***Stanslaus Rugaba Kasusura & Another v. Phares Kabuye*** [1982] TLR 338; and ***Paulina Samson Ndawavya v. Theresia Thomasi Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported).

Turning on to the case at hand, the question is whether the alleged failure is evident in this case. My hastened answer to this question is NO. This is in view of the fact that success of the appellant's claim hinged on his ability to prove all the ingredients constituting the claim of malicious prosecution. The trial court was convinced that, from the available evidence, proof that the criminal charges were preferred without any reasonable or probable cause was missing. In my view, this was a fair analysis, taking into account that nowhere in the pleadings or the available evidence has the appellant shown that the criminal proceedings were instituted out of malice or without any reasonable or probable cause. Such inability constituted a failure, by the appellant, to discharge his burden of proof of his case, and this cannot be blamed on the trial court. It was simply a case of the appellant failing to meet his duty of proving the case as cast upon him by law. In ***Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama***

Anna), CAT-Civil Appeal No. 118 of 2014 (unreported), it was held as follows:

> *"... Let's begin by re-emphasizing the ever cherished principle of the law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2002."*

See also: ***Geita Gold Mining Ltd & Another v. Ignas Athanas***, CAT-Civil Appeal No. 227 of 2017 (unreported). In turn, I find nothing blemished about the trial magistrates' conduct, and this ground of appeal is dismissed for lacking the requisite merit.

As I move on to ground four, let me preface my analysis by stating that, the established position is that, a suit founded on malicious prosecution can only succeed if the plaintiff is able to prove that the institution of the proceedings, be they criminal or civil, was improper. This is possible if he proves that:

(1) *There was initiation or continuation of court proceedings*;
(2) *The original case was terminated in favour of the plaintiff or appellant;*
(3) *The defendant did not have probable cause or reasonable grounds to support the original case; and*
(4) *The defendant's actions were actuated by malice.*

The settled position is that damage to the plaintiff's fame is sufficient to constitute a damage for purposes of the tort of malicious prosecution and ***"a moral stigma will mentally attach where the law visits an offence of imprisonment"*** [See WINFIELD and JOLOWICZ ON TORT 13the Edition Page 544].

What is uncontroverted in this case is that criminal proceedings were initiated and that such initiation was at the instance of the respondent. Undisputed, as well, is the fact that such proceedings were eventually terminated in the appellant's favour. This means that two of the four key ingredients that found the claim of malicious prosecution are apparent or certain. This leaves two equally crucial ingredients. These are whether the prosecution was without any reasonable or probable cause; and whether the respondent's actions were actuated by any malice.

As we address the absence or otherwise of the probable or reasonable cause, need arises for attempting to expound what it entails. Jurisprudence has not been able to come up with a definite definition of what is a reasonable and probable. The most proximate is the holding given by Dixon, J., in ***Commonwealth Life Assurance Society Ltd v. Brain*** (1935) 53 CLR 343. He held at p. 382 that the prosecution must believe that ***"the probability of the accuseds guilt is such that upon general grounds***

of justice a charge against him is warranted." This means that the plaintiff has to prove that the defendant did not have such belief when the wheel of justice was put in motion.

The testimony adduced by the appellant during the trial proceedings, and even in defence in the criminal proceedings, showed how the respondent reported the alleged theft incident and all other subsequent actions which include arrest and incarceration, prosecution and the eventual acquittal on account of failure by the prosecution to prove the appellant's culpability. This has been repeated in the submission filed in this Court. What is glaringly missing, however, is that the totality of the said evidence does little (if any) or nothing to prove that, in lodging the complaint leading to the charges, the respondent or the police and prosecutors did not believe the probability of the accused's guilty to be such that ***"in general grounds of justice a charge against him is warranted."*** Mere acquittal in the case neither suffices nor is it such proof (See: ***Ally R. Mhando v. Attorney General & Another***, HC-Civil Case No. 61 of 2003 (DSM-unreported). It is my humble contention that the appellant failed to discharge his burden of proving that the criminal trial was devoid of any reasonable or probable cause.

Connected to this, is the other limb which requires proof by the plaintiff, if institution of the criminal proceedings was actuated by malice. In ***Stevens v. Midland Counties/ry*** (1854) 10 Ex. 352, 356, it was held that:

> *"malice exists unless the predominant wish of the accuser is to vindicate the law."*

This means that the defendant in a malicious prosecution case must have acted and initiated the prosecution for reasons other than to enforce the law. In this case, the appellant has not led any such evidence to prove that the respondent acted with malice in instituting the criminal proceedings that constitute the basis for the appellant's claims.

In ***Paul Valentine Mtui & Another v. Bonite Bottlers Limited,*** CAT-Civil Appeal No. 109 of 2014 (unreported), the Court of Appeal of Tanzania was confronted with a similar case. It held:

> *".... On the question of malice we have noted, as submitted by Mr. Ngalo that there is nowhere in the testimonies of the appellants that suggest that the respondent was actuated by malice in reporting the theft to the police. Neither can malice be inferred from the circumstances of this case. The ingredient that the respondent acted with malice naturally goes down the drain."*

Inspired by the foregoing, and since the appellant has spectacularly failed in the ominous duty of proving malice or that institution of the

proceedings was without any probable or reasonable cause, the contention in ground four is hollow. I hold that this ground is baseless and I dismiss it.

Ground five of the appeal is incomplete and has failed to convey the meaning that was intended by the appellant. In view thereof, I find it difficult to delve into, lest I arrive at a conclusion which is at variance with what the appellant sought the Court's intervention for. In any case, the findings in this ground would not change the outcome of the appeal.

In the upshot of all this, I hold that the appeal is barren of fruits, and the same is dismissed with costs.

Order accordingly.

DATED at **MWANZA** this 22nd day of July, 2021.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

M.K. ISMAIL

JUDGE

Date: 22/07/2021

Coram: Hon. C. Tingwa, DR

Appellant: Maduhu Yehela

Respondent: Mr. Katemi, Advocate

B/C: J. Mhina

Court:

Judgment delivered today in the presence of both parties.

C. Tingwa

DR

At Mwanza

22nd July, 2021