IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC. CIVIL LAND APPEAL NO. 20 OF 2018

(From the decision of the District Court of Singida at Singida Appeal No. 8 of 2017)

MASENGA NTANDU .....APPELLANT

VERSUS

SHABANI MUNJORI ..... RESPONDENT

JUDGMENT

Date of last Order: 13/08/2021

Date of Judgment: 18/08/2021

Dr. A.J. Mambi, J.

This appeal originates from an appeal filed by the respondent (SHABANI MUNJORI) successfully sued the appellant namely MASENGA NTANDU for malicious prosecution. This means that that the trial District Court made the decision in favour of the respondent who was the plaintiff. The curt awarded the respondent the sum of tshs 3,000,000 as general damages to be paid by the

appellant who was the defendant. IT APPEARS, before the respondent filed his suit at the District Court, the appellant filed a criminal case against the respondent at Sepuk Primary Court. The Primary Court acquitted the respondent. The respondent thereafter filed a civil case basing on malicious prosecution against the appellant. The District court the decision in favour of the respondent by ordering the appellant to pay the respondent the sum of tshs 3,000,000 as general damages.

Aggrieved by the decision of the District Court, the appellant appealed basing on three grounds of appeal. His main ground was based on the fact that the District Court erred in its decision since the respondent failed to prove malicious prosecution.

During hearing of this appeal, the appellant appeared under the service of the Learned Counsel Mr Mr Mcharo while the respondent appeared unrepresented.

The Learned Counsels for the respondent briefly argued that the District Court erred in law and fact by making the decision in favour of the respondent while the claims on the malicious prosecution were not proved.

The learned Counsel contended that the respondent failed to prove the ingredients of the malicious prosecution. He averred that the Magistrate on his judgment did not give reasons apart from just merely saying at page 4 that malicious prosecution was proved. The learned Counsel this court to the decisions of **Amina vs Ramadhan TLR 1990** and **James vs A.G TLR 2004 at page 162**.

In response, the respondent briefly incited that the District court was right in its decision since the malicious prosecution was clearly proved.

I have carefully gone through the grounds of appeal, submissions of both parties, and the records from the trial District court. The complaint in the first ground of appeal is centred on the main issue as to whether the respondent proved the malicious prosecution was proved or not. The court will also determine if the trial court Magistrate properly considered analyzed and evaluated the evidence of both parties with reasons before making the decision.

Starting with the issue of malicious prosecution, I wish to briefly highly the concept of malicious prosecution and how one can prove this tort claim. "**Malicious Prosecution**" can be briefly explained as

a **prosecution** on some charge of crime which is willful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or its bound to know are wrong and against the dictates of public policy. In **malici**ous **prosecution** there are two essential elements, namely, that no probable cause existed for instituting the **prosecution** or suit complained of, and that such **prosecution** or suit terminated in some way favorably to the defendant therein. See also one of the persuasive decision from India in ***West Bengal State Electricity ... vs Dilip Kumar Ray on 24 November, 2006***. In other words malicious prosecution may be referred as an act to institute an unsuccessful criminal proceeding maliciously and without reasonable and probable cause. This menus that where such prosecution cause such damage to the party prosecuted it is a tort for which he can bring an action. In dealing with the claim of malicious prosecution, the court is required to adhere to the guiding principles conditions of liability for such claim. It is trite law that for one to be found liable for an action for damages for malicious prosecution based upon criminal proceedings, the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as

prosecution; but rather the test is whether such proceedings have reached a stage at which damage to the plaintiff results. In this regard, in order to succeed in claims for malicious prosecution the plaintiff must prove that there was a prosecution without reasonable and just cause, initiated by malice and the case was resolved in the plaintiff's favor. Additionally, it also is necessary to prove that damage that was suffered as a result of the prosecution. Indeed the key ingredients for success in the claim for malicious prosecution have been by various court cases and articles or writings by various authors. In other words, in order to succeed, the plaintiff has to prove not only that he suffered damage, but also show and prove to the court that:

(a) the defendants prosecuted him

(b) the prosecution ended in the plaintiffs

(c) the prosecution lacks reasonable and probable cause and

(d) that the defendant acted maliciously.

In order to succeed the plaintiff must prove that there was a prosecution without reasonable and just cause, initiated by malice

and the case was resolved in the plaintiff's favor. It is necessary to prove that damage was suffered as a result of the prosecution

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(c) the prosecution lacks reasonable and probable cause and

(d) that the defendant acted maliciously.

The question is, did the respondent prove the above ingredients of malicious prosecution at the District Court or not?. Similarly, did the court considered those guiding principles and ingredients for the claim in malicious prosecution?. It remains to show if the four ingredients of malicious prosecution were been proved at the trial District Court. The other issue as an ingredient of the tort of malicious prosecution, is whether the appellant at the Primary Court acted maliciously. This court will in the due course answer those questions. It should be noted that like the concept of lack of

reasonable and probable cause, the concept of malicious is not easy to define but it has been suggested that "malice exists unless the predominant wish of the accuser is to vindicate the law" [See ***STEVENS VS. MIDLAND COUNTIESJRY*** (1854) 10 Ex. 352, 356 quoted in Winfield and Jollowizc on Tort P.350]. The question is whether there was any evidence by the respondent who was the plaintiff at the District Court to show that the appellant acted or prosecuted him maliciously.

My through perusal from the trail District Court reveals that the claim on malicious prosecution by the respondent who was the plaintiff was not proved on the balance of probabilities. If one look at the trial court Judgment at page 5 and 6 it appears the trial magistrate did not analyze and evaluate the evidence apart from just summarizing that evidence. His was conclusion and decision merely based on the fact that since the appellant prosecuted the respondent at the primary court then there was proof of malicious prosecution. In my view this was not proper reasoning for the decision of the court as the magistrates was required to be guided by the principles and all ingredients of proving malicious

prosecution before making his decision. It is not enough to prove malicious prosecution by merely basing the decision on the fact that the defendant prosecuted the plaintiff, it must be proved that defendant acted maliciously. On top of that the court must satisfy itself that the plaintiff proved that the prosecution by the defended lacked reasonable and probable cause.

I must say and it is a common ground that to prove the malicious prosecution, the plaintiff is duty bound to show on the balance of probabilities that the defendant actually maliciously prosecuted the plaintiff. The court must apply all tests of malicious prosecution before making its decision. This means that a plaintiff must prove that the defendant malicious acted in prosecuting the plaintiff.

In other words, the plaintiff must prove that apart from prosecution, the plaintiff must prove that such prosecution was done maliciously.

Under the common law, a prima facie case of malicious prosecution required the defendant to intentional and maliciously prosecute the plaintiff and such prosecution must have harmed the reputation of the plaintiff, thus causing damage to the plaintiff. This means that

to prove prima facie malicious prosecution, a plaintiff must show all four ingredients I have explained above namely;

(a) the plaintiff was criminally prosecuted.

(b) the charges were actuated with malice and no reasonable or probable cause.

(c) the prosecution ended in the plaintiff's favor.

(d) as a result of prosecution, the plaintiff suffered damage

Keeping in view, therefore, the above principles governing an action for malicious prosecution, I will now proceed to consider the argument created by the respondent, to find out if he proved, which he must have, in the first instance proved, in order to succeed in an action for malicious prosecution, two things: (1) that the prosecution was malicious, and (2) that the defendant had acted without reasonable and probable cause. In the totality of the evidence herein this Court finds that the plaintiff/respondent failed to prove his claim that he was malicious prosecuted there being reasonable and probable cause for his prosecution herein. As the result, two important ingredients of the tort of malicious prosecution which are, the lack of a reasonable and probable cause

and the existence of malice, having not been proved at the trial court, I find the action for malicious prosecution at the District failed.

It is for the respondent to prove that the appellant's acts at the primary court was malicious and it was made without any reasonable or probable cause. This can only be done by adducing evidence which will lead the court to make a finding whether the respondent acted maliciously and without reasonable and probable cause. Indeed, there was no evidence at all on which the trial magistrate could have come to that conclusion. Even if there had been some evidence to satisfy the court that the respondent was malicious and acted without reasonable and probable cause, the respondent/defendant would still be required to establish that he suffered some injury for which he was entitled to some amount of damages. The respondent cannot expect the court to grant what he has requested without proving to the satisfaction of the law that he is entitled to it. On the other hand, it is a cardinal principle of the law that in civil cases, the burden of proof lies on the plaintiff and the standard of proof is on the balance of probabilities. This simply

means that he who alleges must prove as indicated under section 112 of the Law of Evidence Act, Cap 6 [R.E2019], which provides that:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person".*

This means that the whole suit at the trial court was not proved to the required standard as per Section 110 and 111 of the Evidence Act Cap 6 [R.E. 2019]. More specifically section 110 provides that:

> *"The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side".*

Similarly section 110 of the Evidence Act provides that:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person"*

The above provision of the law clearly implies that the plaintiff who is now the respondent was duty bound to prove that the defendant (appellant now) actually maliciously prosecuted him and he suffered from the plaintiff's acts. The court in ***NATIONAL BANK OF COMMERCE LTD Vs DESIREE &***

YVONNE TANZANIA & 4 OTHERS, Comm. CASE NO 59 OF 2003( ) HC DSM, observed that:-

> *"The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side".*

The importance and extent of proof in Civil Cases was well underscored by the court in ***MCLVER V. POWER [1998] PFIJ No 4, Prince Edward Island Supreme Court,*** Trial Division where Moc Donald C.J. TD started that:

> *"In any Civil Case the plaintiff* ***must prove their case on a balance of probabilities if they are to succeed.*** *This means that the plaintiff must prove that his facts tip the scale in his favour even if it is only 51% probability that he is correct"* [emphasis is mine].

Various authorities have clarified the meaning of balance of probability. A good example is the remarkable decision of the court (a persuasive decision) in ***RE H (MINORS) [1996] AC 563,*** where Lord Nichollas observed that:

> *"The balance of probability standard means that the Court is satisfied an event occurred if the Court considers that on the evidence the occurrence of the event was more likely than no"*

From what I have observed from my perusal of the documents and findings, I agree with appellant that as he rightly contended that the respondent's claims at the trial court were not proved to the required standard set by law.

As noted earlier, that the records such as the Judgment that the trial District Magistrate did not properly analyse and evaluate the evidence and he made his decision without reasoning.Indeed, my perusal from the records have also revealed that the trial court neither considered the evidence of the appellant nor evaluated the evidence in its entirety. The judgment of the trial court at pages ,4, 5, 6 and 7 shows that the Magistrate mainly focused on summarizing and narrating the evidence of the respondent who was the plaintiff and without properly making analysis and evaluation the evidence of both parties. This is bad in law is as it can lead to injustice to the other party that the appellant in our case. Such omission had in many occasions been found fatal by the court of appeal as seen in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania observed and held that:

"It was a serious misdirection on the part of the trial Judge ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

Reference can also be made to the decision of the Court of Appeal in ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015,*** the court at Page 16 which highlighted on the importance of the court to consider the defence evidence. It is also imperative to refer the decision of the court in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned that considering the defence was not about summarising it because:

"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."

The Court in Leonard Mwanashoka (supra) went on by holding that:

"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too.*** *It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added]

It is trait law that very judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the **point or points for determination, the decision thereon and the reasons for the decision ,** dated and signed. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. See ***Jeremiah Shemweta versus Republic [1985] TLR 228***

The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. This is found under Order XXXIX Rule 31 of the Civil Procedure Code, Cap 33 which provides for the Contents, date and signature of judgment. The provision states that:

> *"The judgment of the Court shall be in writing and shall state–*
>
> *(a)* ***the points for determination****;*
>
> *(b) the decision thereon;*
>
> *(c)* ***the reasons*** *for the decisions; and*
>
> *(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the judge or by the judges concurring therein".*

Under that section the word **"shall"** according to the law of Interpretation Act, Cap1 [R.E.2019] implies mandatory and not option. This means that any judgment must contain point or points for determination, the decision thereon and the reasons for the decision.

The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment. I am of the settled view that the trial Court did not subject the evidence of both parties to any evaluation to determine its credibility and cogency. The court in ***Jeremiah Shemweta versus Republic (supra) 228,*** observed and held that:-

> *"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of the laws ... which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".*

Reference can also be made to the authorities from other jurisdiction. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524***) at page 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

I have gone through the judgment of the Trial Court and found that the trial magistrate neither made analysis of evidence nor gave reasons on his decision. On top of that my findings have revealed that there was no clear evidence at the trial court to make the appellant liable for any damages alleged to have been suffered by the respondent that were o even proved.

Indeed even if the respondent would have proved the appellant responsible for malicious prosecution if any and any damages that he (respondent) would have suffered, still the trial magistrate did not give his reasons on how he reached to award such excessive and unproved damages by the appellant then the trial court had no any basis to order the appellant to pay any money.

In the final event this appeal is meritorious and it is accordingly allowed. The decision and any order of the trial District Court is set aside. No order as to the costs.'

Dr. A.J. MAMBI

JUDGE

18/08/2021

Judgment delivered this **18th** day of **August, 2021** in presence of both parties.

Dr. A.J. MAMBI

JUDGE

18/08/2021

Right of Appeal to the Court of Appeal fully explained.

Dr. A.J. MAMBI

JUDGE

18/08/2021