

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**DC CIVIL APPEAL NO. 12 OF 2023**

(Originating from Civil Case No. 02 of 2022 of Hai District Court)

**FINAN PETER RITE ..... APPELLANT**

VERSUS

**RICHARD PETER TARIMO ..... RESPONDENT**

**JUDGMENT**

26/09/2023 & 27/10/2023

**SIMFUKWE, J.**

Before the District Court of Hai at Hai (the trial Court) the respondent herein, the original plaintiff, claimed special and general damages from the appellant for malicious prosecution to the tune of Tshs 58,000,000/= in total.

The genesis of this appeal is that, before the Primary Court of Bomang'ombe, vide criminal case No. 195 of 2018 the respondent was charged with an offence of threatening to kill the appellant contrary to **section 89(2)(a) of the Penal Code, Cap 16 R.E.** He was convicted

and sentenced to pay a fine to the tune of Tshs 100,000/=or in default to serve three months imprisonment.

The respondent unsuccessfully appealed to the District Court of Hai vide Criminal Appeal No. 16 of 2018. Still aggrieved, the respondent further appealed to this court vide Criminal Appeal No. 6 of 2019. Fortunately, this court allowed his appeal whereas it quashed the concurrent decisions of the lower courts.

Believing that he was maliciously prosecuted, the respondent filed civil case at the district Court for malicious prosecution which was decided in his favour. The trial court ordered the appellant herein to pay the respondent Tshs 30,000,000/= as general damages for malicious prosecution.

The appellant was aggrieved with the findings of the trial court, hence this appeal. Through Mr. Charles Mwanganyi, learned counsel, the appellant submitted seven grounds of appeal as reproduced hereunder:

- 1. That Trial Magistrate erred in law and fact when decided in favour of the Respondent and erred when held that the prosecution in Criminal case. No. 195 of 2018 was instituted by the Appellant against the Defendant without justifiable cause, if could not so erred, could have decided in favour of the Appellant. (sic)*
- 2. That Trial Magistrate erred in law and fact when decided in favour of the Respondent and erred when held that the*

*Prosecution in Criminal case No. 195 of 2018 was instituted maliciously by the Appellant against the Defendant, if could not so erred, could have decided in favour of the Appellant. (sic)*

- 3. That the Trial Court erred in law and fact when decided in favour of the Respondent while failed to note that there was no malu animus. The defendant failed to prove to the satisfaction of the Court that the Appellant had another motive other than bringing the offender to justice.*
- 4. That the Trial Court erred in law and fact when awarded to the defendant the payment of General damage of Tshs 30,000,000/= without justifiable cause and he failed to exercise his discretional (sic) judiciously and erred without the established principles of general damages, if could not so erred could not have awarded such amount of general damages. (sic)*
- 5. That the Trial Magistrate erred in law and fact when overrule (sic) preliminary objection on admissibility of Exhibit P-1 and in fact he relied on such exhibit while the same not cleared before admission and read over before the Court as required under the law.*
- 6. That Trial Magistrate erred in law and facts when held in favour of the Respondent while he failed to properly analyze the Evidences adduced before the Court.*

*7. That the Trial Magistrate erred in law and facts when held in favour of the Respondent based on inconsistencies, contradictory and implausible evidence, in fact he failed note that the defendant failed to prove his case on balance of probability.*

Mr. Mwanganyi commenced his submission by addressing the court on the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal jointly. He argued that, for the respondent to succeed in proving malicious prosecution, all elements of malicious prosecution must be proved. That, one of the elements is that the penal case must have been instituted against the plaintiff without justifiable cause. He cited the cases of **North Mara Gold Mine Limited vs Joseph Werema Dominick**, Civil Appeal No. 299 of 2020 (CAT) at page 26 and **Mbowa vs East Mengo Administration [1972] EA 353** to buttress his submission.

Elaborating on whether criminal case No. 195 of 2018 before Bomang'ombe Primary Court was instituted by the appellant without justifiable cause, Mr. Mwanganyi resorted to the book by **Hawkins** titled **Law of Torts by Ratantal and Dhirajal, 24<sup>th</sup> Edition at page 317** which explained the defence of probable cause as follows:

*"Before charging a prisoner, a police officer must have a honest belief in the guilty of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of state of circumstances, which assuming them to be true, would reasonably lead any ordinary and prudent*

*and cautious man, placed in the position of the accuser to the conclusion that the person was probably guilty of the crime imputed. Once the plaintiff has established his imprisonment, the onus lies to the defendant to plead and prove the existence of reasonable cause.”*

Also, the learned advocate cited the case of **Wilbard Lemunge vs Father Komu and Registered Trustees of Diocese of Moshi**, Civil Appeal No. 8 of 2016 which held that:

*“Malice referred to in malicious prosecution cases, is not malice in the legal sense, that is, such as may be assumed from a wrongful act done intentionally. Rather it is **malu animus** meaning being actuated by ill spite or ill-will. It follows therefore that, in an action for malicious prosecution, **the plaintiff is saddled with a duty to prove to the satisfaction of the court, among other things, that the defendant had another motive other than bringing the offender to justice.”***

[Emphasis added]

Having established the above cited authorities, Mr. Mwanganyi continued to scrutinize the issue on whether in reporting the threatening words to kill which led the respondent to be prosecuted, the appellant had no reasonable and probable cause. It was his opinion that the appellant had probable cause since the centre of dispute was ownership of 9 acres situated at Zarau Village. Whereas on the fateful day, the appellant hired

a tractor to prepare the Shamba for cultivation. That, the respondent stopped the driver and threatened to kill by uttering the words **"Mkiendelea kulima damu itamwagika."** When the appellant reached at the scene, he evidenced that the respondent had stopped his driver and had machete on his hand. He eventually reported the matter to the police officer. The learned advocate was of the view that failure by the appellant to prove allegation which was set aside by the High Court was merely that there was no direct evidence which linked the respondent but the appellant had probable cause.

Mr. Mwanganyi went on to argue that, it seemed the dispute was likely to escalates into violence, thus the appellant needed not to wait for some more time to report the incident to the police Officer. That, any prudent and cautious man would have quickly reported the incident to the police. He supported his contention with the case of **Massoud Issa Sungura and 10 Others vs Security Group(T) Ltd**, Civil Appeal No. 176 of 2018, (CAT at Arusha), at page 15 where it was held that:

*"If the victims of crimes who lodge complaints with the police were subjected to an action for malicious prosecution, the repression of crime would be incubus."*

The appellant's advocate maintained that, the appellant had probable and justifiable cause to report the incident. Thus, the case before the trial court was devoid of any merit and was instituted to punish the appellant, which was not noted by the trial magistrate.

Also, the learned counsel challenged evidence of PW5 Charles Steven Tarimo by stating that when cross examined, his credibility raised a lot of questions as he admitted to have lied before the court because he came to testify for the respondent, in order to suffice his evil and hostile motive to the appellant. He referred to the case of **Yasin Ramadhan Chang'a vs R [1999] TLR 489** which states that:

*"Demeanour is exclusively for the trial Court; however, demeanour is important in situation where from the totality of the evidence adduced an inference or inferences can be made which would appear to contradict the spoken words."*

It was Mr. Mwanganyi's argument that from the respondent's own witness, his credibility shows that the instituted case at the trial court was devoid and it was brought out of hostile. He insisted that the appellant had probable cause in Criminal Case No. 195 of 2018.

With regard to the second ground of appeal, Mr. Mwanganyi questioned the findings of the trial court that the prosecution in Criminal case No. 195 of 2018 was instituted maliciously by the appellant. To support this ground, the learned counsel submitted to the effect that one of the elements to prove *malu animus* in malicious prosecution is existence of evil malice. He referred to the case of **Wilbard Lemunge** (supra) and argued that the respondent totally failed to prove that the Appellant had malice and had no probable cause in prosecuting the plaintiff in criminal case No. 195 of 2018.

Mr. Mwanganyi observed further that, evidence adduced by the respondent was on existence of defamation which is a separate cause of action. From the cited cases above, Mr. Mwanganyi formed an opinion that, it was difficult to establish that the appellant had malice and without probable cause since evidence of the appellant categorically stated that he was acting under the umbrella of the administrator of the late Caranti Peter Rite who legally owned the disputed plot. He was of the view that there was no malice, rather, there was a probable cause. Thus, the trial court erred when held that there was malice without clearly analysing evidence adduced before it.

On the fourth ground of appeal which faults the trial magistrate for awarding general damages to the tune of Tshs 30,000,000/=, Mr. Mwanganyi referred to the cases of **Vidoba Freight Co. Limited vs Emirates Shipping Agencies T. Ltd and Another** (Civil Appeal No. 12 of 2019) TZCA and the case of **Reni International Company Ltd vs Geita Gold Mine Limited** (Civil Appeal No. 453 of 2019) (CAT). He contended that, general damages are awarded at the discretion of the court, but such discretion must be exercised judiciously. That, for the appellate court to intervene and re-assess the general damages, it must be satisfied with two factors. First, the trial magistrate in assessing general damages must have applied wrong principles. Second, the trial court awarded amount which is inordinately low or so inordinately high, that is, it erroneously estimated the damages. He referred to the case of **Mussa Mwalugala vs Ndeshe Hota [1998] TLR 4** to cement his argument.



In the present matter, Mr. Mwanganyi was of the view that the trial magistrate erroneously awarded the general damages to the tune of Tshs 30,000,000/= after he established that the respondent failed to prove specific damages. Also, he awarded the general damages while the same were not pleaded by the respondent in his plaint.

Mr. Mwanganyi explained that it is trite law that the court cannot grant the reliefs that were neither pleaded nor prayed in pleadings as held in plethora of authorities. Also, he challenged the awarded general damages on the reason that the same was excessive and there was no evidence to support that the respondent suffered mental anguish and physical torture as held by the trial court.

On the 5<sup>th</sup> ground of appeal, the appellant's advocate faulted the trial magistrate for overruling preliminary objection on admissibility of exhibit P1 and later on relied on it while the same was not cleared for admission and read over before the court as required by the law. Elaborating this ground, Mr. Mwanganyi submitted that, for the exhibit to be tendered, a witness must lay foundation before it is admitted. The same must be read loudly before the court. The learned counsel asserted that, the trial magistrate erred to overrule the objection and consequently, relied on it for the reason of it being judicial notice. He prayed the court to expunge such exhibit from the record.

Submitting on the 6<sup>th</sup> and 7<sup>th</sup> grounds of appeal jointly, Mr. Mwanganyi told this court that if the trial court could have properly analysed the evidence adduced before the trial court, it would have noted that the

respondent failed to prove malicious prosecution and indeed, he failed to prove all the established elements of malicious prosecution. He added that if the trial magistrate could have considered the evidence before it, he could have discovered that the evidence relied upon was based on inconsistent, contradictory, and implausible evidence. He insisted that the defendant failed to prove his case on balance of probability.

In his conclusion, Mr. Mwanganyi for the appellant implored this court to allow the appeal with costs by setting aside the judgment and decree of the trial court.

In reply, Mr. Materu opted to submit against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> grounds of appeal jointly. He commenced his submission by citing the case of **Jeremiah Kamama Vs Bugomola Mayandi [1983] T.L.R 123** which held that:

*"(i) For a suit tor 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) For purposes of malicious prosecution, a person becomes a prosecutor when he takes steps with a view to setting in motion legal processes for the eventual prosecution of the plaintiff."*

Mr. Materu informed this court that at the trial Court the plaintiff's evidence (PW1) particularly the evidence of his co-accused in the primary court Ali Shaban Ali (PW2) proved that he was prosecuted and the proceedings ended in his favour. He fortified his submission, by quoting page 11 of this court's judgment in DC Criminal Appeal No. 6/2019 (exhibit P1) and concluded that before the trial court, the plaintiff proved requirements (a) and (b) above.

Submitting on whether the defendant instituted the prosecution maliciously; Mr. Materu referred the Court to **Halsbury's Law of England**, which defines the term malice as follows:

*"The malice which a plaintiff in an action for damages for malicious prosecution has to prove is not malice in its legal sense, that is such as may be assumed from a wrongful act done intentionally, without just cause or excuse, but malice in fact - malus animus- indicating that the defendant was actuated either by spite or ill - will against the plaintiff, or by indirect or improper motives. (See vol. 25, at page 356 - 3rd Edition)."*

Moreover, the respondent's advocate cited the case of **Jeremiah Kamama** (supra) and supported the findings of the trial court that the defendant did accuse the plaintiff falsely whereas the proceedings ended in plaintiff's favour. He continued to narrate evidence adduced by the plaintiff (PW1) and his witnesses to wit Ali Shaban Ali (PW2) and Peter Anton Tarimo (PW3) on what transpired on 1<sup>st</sup> September 2018 up to 17<sup>th</sup>

September 2018 when the police went to arrest the plaintiff in the presence of Erick Elisante (PW4) and Charles Stephano (PW5). He emphasised that all the plaintiff's witnesses denied the fact that the plaintiff threatened to kill the defendant and they didn't hear the respondent herein uttering those words let alone threatening the defendant.

Also, Mr. Materu noted that the appellant herein delayed to report the offence which was alleged to have been committed on the 1<sup>st</sup> September 2018, until on 17<sup>th</sup> September when the plaintiff was arrested and remanded in custody up to 20<sup>th</sup> September when he and his co-accused Ali Shaban Ali (PW2) were granted police bail.

It was explained further that the plaintiff's evidence before the trial court was clear that the maize, he was harvesting was his property, and that is the reason the defendant did not prefer the offence of criminal trespass since he knew the accusation was false. Thus, there was nothing on which a reasonable and cautious man placed in the position of the defendant, could base suspicion that the plaintiff was probably guilty of the offence of threatening to kill the defendant contrary to **section 89 (2) of the Penal Code**. The learned advocate insisted that the prosecution of the plaintiff by the defendant was malicious as correctly held by the trial court at page 11 to 12 of the typed judgment. He was of the view that there was no reasonable and probable cause for the prosecution of the respondent by the appellant as clearly shown through the plaintiff's evidence before the trial court.

Submitting further, Mr. Materu argued that on 02/09/2018 the respondent and 4 Others filed Application No.128 of 2018 before the District Land and Housing Tribunal at Moshi against the appellant which is still pending. That, since the appellant filed his written statement of defence on 26<sup>th</sup> of September 2018 then the appellant had no reason whatsoever to do what he did to the respondent on 01/09/2018 by maliciously reporting to the police on 17/09/2018 that the respondent had threatened him by using words on 01/09/2018.

Mr. Materu observed that the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> grounds of appeal have no merit at all and he asserted that the trial magistrate was right to hold as he did after properly analysing the evidence before him.

Responding to the 4<sup>th</sup> ground of appeal which concerns the awarded general damages, Mr. Materu supported the findings of the trial court as found at page 13-14 of the typed judgment. He cited the case of **Vidoba Freight Co. Limited vs Emirates Shipping Agencies T. Ltd & Another** (Civil Appeal 12 of 2019) (2022] TZCA 740 which held that:

*"Now what remains is the general damages that the plaintiff suffered due to unlawful arrest, detention and prosecution. The evidence shows that the plaintiff was arrested and remanded in police custody in a single cell crowded with more than ten people.....In the above circumstances, I find the plaintiff is entitled to compensation."*

On the 7<sup>th</sup> ground of appeal, the learned advocate blamed the appellant's advocate for failure to show in his submission the alleged inconsistency,

contradictory and implausible evidence which the trial magistrate failed to address in his judgment. He believed that the respondent succeeded in proving his case on balance of probabilities.

It was Mr. Materu's prayer that the appeal should be dismissed with costs.

In his rejoinder, Mr. Mwanganyi reiterated his submission in chief. In so far as the existence of malice is concerned, Mr. Mwanganyi added that Mr. Materu's averment alone cannot suffice to constitute existence of the malice and justify the fact that the appellant has no probable cause to report the matter. He reiterated the authorities cited in the submission in chief.

I have given due consideration of the trial court's records and the arguments advanced by both counsels in support and opposition to the grounds of appeal. I am grateful for the authorities cited by the learned advocates in respect of malicious prosecution. As rightly submitted by the learned advocates, for the tort of malicious prosecution to stand, the following elements must exist:

- i. That, the proceedings were instituted by the defendant.*
- ii. That, the defendant acted maliciously.*
- iii. That, the defendant acted without reasonable and probable cause.*
- iv. The proceedings were decided in favour of the plaintiff.*

See; **Shadrack Balinago vs Fikiri Mohamed @ Hamza & Others (Civil Appeal 223 of 2017) [2018] TZCA 215**, Tanzlii.

It is the observation of this court that the parties are not disputing the fact that the respondent was successfully prosecuted and convicted before Bomang'ombe Primary Court in Criminal Case No. 195 of 2018 with an offence of threatening to kill by words. Also, it is undisputed fact that the respondent unsuccessfully appealed to the District Court of Hai. Again, it is not the contentious issue that on the second appeal before this court, this Court vide Criminal Appeal No. 6 of 2019 acquitted the respondent herein. The remaining central issue for consideration which will cover the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> grounds of appeal is *whether the respondent/plaintiff was maliciously prosecuted by the appellant/defendant with malice, without reasonable and probable cause*. The rest of the grounds will be determined separately if the circumstances will so require.

To prove malice or absence of reasonable and probable cause is a very difficult task placed to the plaintiff. This was stated by the Court of Appeal recently in the case of **Geita Gold Mine Limited vs Edwin Peter Mgoo & Others (Civil Appeal No.67 of 2020) [2023] TZCA 17398** at page 9 that:

*"...In that case, we also reminded the legal fraternity of the requirement that, in such an action, the plaintiff is saddled with a burden to prove absence of reasonable and probable cause for the prosecution which is a difficult task as the plaintiff has to prove a negative..."*

The above observation of the Court of Appeal, is supported by the findings in the case of **Massoud Issa Sungura and 10 Others** (supra) in which it was stated that:

*"If the victims of crimes who lodge complaints with the police were subjected to an action for malicious prosecution, the repression of crime would be incubus."*

Therefore, in determining whether the appellant action to initiate prosecution of the respondent was justifiable and without ill motive, I will confine myself to the above observations of the Court of Appeal. At the same time, this being the court of record, I am cautious to open a Pandora box to the victims of crimes to lodge the complaint of malicious prosecution in case of acquittal.

Mr. Mwanganyi implored this court to believe that the appellant had probable cause since the parties had a dispute over ownership of land. That, the driver who was hired by the appellant herein told the appellant that the respondent had threatened to kill him by stating that: *"mkiendelea kulima damu itamwagika."* Thereafter, the appellant went at the scene and found the respondent holding a machete in his hand.

Mr. Materu to the contrary explained that, the action of prosecuting the respondent was associated with ill motive. That, there was no probable cause for initiating the case against the respondent. He contended that the plaintiff's witnesses denied the fact that the plaintiff threatened the defendant. Also, he said delay to report the case proves ill motive. In other words, Mr. Materu was supporting the findings of the trial court.



I have considered the findings of the trial court from page 9 to 12 of the typed judgment. With due respect, I don't subscribe to the findings thereto that there was no probable cause and that the respondent was maliciously prosecuted by the appellant herein on the following reasons:

First, there was every reason to believe that the appellant had threatened to kill since the driver who was employed by the appellant told him so. After being informed by his driver about the threat, the appellant went at the scene and found the respondent holding a machete. It is undisputed fact that there was a land dispute between the parties and the said driver was ploughing the disputed land. The available evidence reveals that the appellant was informed by the driver one **SM2 Ernest Izack** who was employed to plough the land of the words alleged to have been uttered by the respondent that "*akiendelea kulima katika shamba damu itamwagika*". I am of considered opinion that those words prompted the appellant herein to report to the police. Also, I am of settled mind that any prudent and thoughtful person would have reported the incident to the police which is the organ responsible to maintain peace in the community.

Therefore, since the appellant herein was informed of the incident by the driver whom he hired to plough the land and due to the fact that there was a land dispute between the parties; and considering the fact that it is not disputed by the respondent herein that he was at the scene on the fateful date and even the appellant met him there, then the only option for the appellant was to report the incidence to the police. Therefore, the appellant herein cannot be condemned to have maliciously prosecuted the

respondent herein as there was plausible cause which prompted him to do so.

Malicious prosecution cannot stand where reasonably there are factors which prompted the defendant to initiate the case against the plaintiff. In the instant matter the root cause of prosecuting the respondent herein before the primary Court of Bomang'ombe was established on balance of probabilities. An acquittal is not the only element to prove malicious prosecution. All elements must exist for malicious prosecution to stand. In the case of **Geita Gold Mine Limited** (supra) it was stated that:

*"In this connection, we again wish to state as we did in the unreported case of [Audiface Kibala V. Adili Elipenda and Two Others, Civil Appeal No. 107 of 2012](#) that, the **acquittal of an accused person in a criminal case may not necessarily mean that he was prosecuted maliciously or without good and probable cause.**"*

[Emphasis added]

The trial magistrate was of the opinion that the act of the appellant to delay in reporting the crime proved his ill motive. With due respect to the trial magistrate, delaying to report the matter to the police is not the only reason to establish malice or ill motive. Also, the trial magistrate's findings that the appellant was not around when the respondent was uttering threatening words is not sufficient to establish ill motive. Such reason is enough to acquit the respondent with the criminal offence and not to

establish ill motive. Therefore, I agree with Mr. Mwanganyi's observation that there was justifiable cause to prosecute the respondent herein.

Having found that the respondent herein was prosecuted reasonably, on probable cause and without malice, this court is satisfied that the trial court erred in fact and in law to find otherwise as lamented by the appellant under the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal. In the circumstances that the three grounds of appeal are answered in the affirmative, I find no reason to exercise the academic exercise of discussing the rest of the grounds since the three grounds suffice to dispose of this appeal. In the upshot this appeal is allowed with costs.

It is so ordered.

DATED and DELIVERED at Moshi this 27<sup>th</sup> day of October, 2023.



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S. H. SIMFUKWE  
JUDGE  
Signed by: S. H. SIMFUKWE

**27/10/2023**