IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MROSO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CIVIL APPEAL NO. 99 OF 2004

ABDUL-KARIM HAJI ..... APPELLANT

VERSUS

1. RAYMOND NCHIMBI ALOIS
2. JOSEPH SITA JOSEPH } ..... RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Zanzibar at Vuga)

(Kihio, J.)

dated the 25th day of March, 2004
in
Civil Case No. 33 of 2003

JUDGMENT OF THE COURT

15 & 17 November 2006

MROSO, J.A.:

This is an appeal in a case of malicious prosecution which had been filed in the High Court of Zanzibar. The respondents were the plaintiffs at the trial and the appellant, the defendant. The trial High Court gave judgment in favour of the respondents. The appellant was dissatisfied and has appealed to this Court.

At the hearing of this appeal the appellant was represented by the Zanzibar M.M. Chambers, Advocates and the second respondent appeared in person. The first respondent who could not be traced for normal service had to be served by a substituted procedure in which, by order of this Court, a notice of hearing had to be published both in newspapers and on the radio. Brief facts of the case which led to this appeal may be helpful.

The appellant owned a shop in Mlandege area of Zanzibar. Among other things he stocked bicycles and bicycle parts. During the night of 14th August, 2002 the shop was broken into and shillings 3,600,000/= cash was stolen from therein. He reported the theft to the police. Subsequently the police arrested the respondents. The police requested the appellant to take the respondents in his motor vehicle to the police station. The respondents were then taken to court where they were charged with shop-breaking and theft.

After several adjournments for the reason that investigations were incomplete, the police finally informed the court that

investigations were "incompleted, (sic) yet witnesses are not cooperative. We pray for withdrawal u/s 81 (a) Cap. 14". The court recorded as follows –

"Court: (1) Prayal (sic) (s) granted.

(2) Withdrawn u/s 81 (a) Cap. 14.

(3) Accuseds (3) befell (sic) a tribert foithruth.

- Sgd: H.Sh. Pandu, DM
4/2/2003."

The trial court set free the respondents because witnesses were not cooperating with the police.

After being set free the respondents filed a case of malicious prosecution against the appellant in the High Court. They claimed a total of shillings 15,000,000/= as damages. Paragraphs 4 and 5 of the plaint which was in Kiswahili read as follows –

"4. Kwamba, mnamo tarehe 14.8.2002, Mdaiwa ambaye anaishi jirani na Wadai alipeleka katika Kituo cha Polisi Madema taarifa zisizo sahihi za kuwa Wadai wamevunja duka lake lililopo hapo Mlandege na kumuibia fedha taslim Shs. Milioni tatu laki sita (T.Shs. 3,600,000/=) jambo ambalo halikuwa na ukweli wowote

4. ----

5. Kwamba, Mdaiwa bila kufanya utafiti wowote ambapo moja kwa moja aliwatuhumu Wadai, hivyo kwa kutumia gari lake akiwa amefuatana na askari Polisi aliwachukua wadai hadi kituo cha Polisi Madema ambapo waliwekwa huko na baada ya wiki moja walifikishwa Mahakamani Mwanakwerekwe na kushitakiwa katika Mahakama ya Wilaya kwa kesi ya jinai Nam.1599/2002 kwa kosa la kuvunja duka na kuiba, na baadae kupelekwa Rumande ----"

It was further alleged that because the appellant did not have evidence against the respondents and had failed to cooperate with

the police the charge was withdrawn. The appellant in his written statement of defence denied all those allegations.

At the trial two of the framed issues are pertinent. Issue No. 1 as framed read –

> "1. Whether the defendant was the one who reported at the police station Madema that the plaintiffs did break into his (defendant's) shop situated at Mlandege and steal TShs. 3,600,000/="

Issue No. 3 read –

> "3. Whether the charge against the plaintiffs was withdrawn at Mwanakwerekwe District Court on grounds that the defendant has no evidence which connected the plaintiffs with the alleged criminalities and further that he has no cooperation with the police."

In dealing with those issues the learned trial judge said of the first issue –

> "The evidence of the defendant (DW1) to the effect that he did not report at the police station that the Plaintiffs were the ones who broke into the shop and stole his money is not corroborated by any evidence from independent witness. In view of the evidence of PW1, PW2 and PW3, I am of the opinion that the evidence on the Plaintiffs side is stronger than the evidence on the defendants side in this issue. It is also important to mention that even in the defendant's defence the defendant admitted that he was the one who reported at the police station Madema that the plaintiffs did break into his shop situated at Mlandege and stole Tshs. 3,600,000/= and so this issue was framed by oversight (sic)."

The High Court then proceeded to find that on a balance of probabilities the defendant (now appellant) reported to the police at Madema that it was the respondents who broke into the shop and stole T.Shs. 3,600,000/=.

Regarding the third issue the trial court said –

> "--- in the absence of any evidence challenging the evidence of PW1 and PW2 I find no reason for disbelieving PW1 and PW2 to the effect that the prosecution withdrew the Criminal Case --- because the defendant was not cooperating with the police to ensure that investigation was complete. In my considered views, the defendant did not cooperate with the police to ensure that investigation was completed and the case finally determined because the defendant had no evidence which connected the plaintiffs with the alleged criminality."

The third issue, therefore, was answered in the affirmative.

The appellant has filed five grounds of appeal and since they are not very lengthy, we have taken the liberty to quote them in full. They read as follows:-

1. That the learned Judge erred in law in entering judgment in favour of the

respondents without the required evidence in support thereof.

2. That the Learned Judge erred in law in treating English criminal case procedure as analogous to our own.

3. That the learned Judge erred in law in not holding that the prosecution here is controlled by the Director of Public Prosecution or through his juniors and the appellant is not one of them.

4. That the learned Judge erred in law in shifting the burden of proof by requiring the appellant to disprove the suit.

5. Generally the judgment and decree is against the weight of the evidence.

The very first question to consider is whether the appellant initiated the prosecution of the respondents and we think we will not need to go further than that in deciding this appeal. That is to say, we will essentially dispose of this appeal on the facts. The learned trial

judge either misconstrued the facts or allowed his imagination to take the better of him.

There was absolutely no credible evidence that the appellant reported to the police that the appellants broke into his shop and stole money from it. There was also no credible evidence that the criminal case in the District Court was withdrawn under Section 81 (a) of Cap. 14 because the appellant failed or refused to cooperate with the police who were investigating the offence. Therefore, the findings of fact by the Judge on issues (1) and (3) as indicated above were unfounded.

Five witnesses gave evidence for the respondents. The first respondent gave evidence as PW1. He said in his evidence that he was arrested by the police 12 days after the day the appellant's shop was broken into. He was taken to the police station in a car belonging to the appellant and which was being driven by the appellant. The appellant was then talking to a cell phone. Two days later the police recorded his statement. He alleged that the police

informed him that the appellant had reported to the police that he (the first respondent) and others stole the money from the shop. He also said in his evidence that on a later date, after he had been charged in court, the prosecution withdrew the case because it had dragged on for a long time and that the appellant was not cooperating with the police to ensure that investigations were completed.

The second respondent as PW2 at the trial was arrested by the police who had been talking with the appellant at 8.00 a.m. on the same day of the theft. The police told him that he (2nd respondent) had stolen money at appellant's shop.

PW3 – Martha Kayanda merely testified that the police who were accompanied by the appellant came to where she lived and inquired about the first respondent. But as the first respondent was not present the police came for him on two other occasions and finally met him and arrested him. They took him away in appellant's motor vehicle and that the appellant was talking to a cell phone. We

are being made to believe that each time either of the respondents was being arrested, the appellant would be found talking to a cell phone!

PW4 – Mohamed Suleiman simply told the trial court that he knew the first respondent. Thomas Bakari was the fifth witness for the respondents. He testified that he saw the police arresting the second respondent and they took him away in a black car. He did not say that the car belonged to the appellant although he knew him, or that the appellant was present at the scene.

That was all the substantive evidence which was given with a view to proving the case for the respondents and against the appellant.

For his part the appellant said in his evidence that after he found out that money had been stolen from his shop he reported to the police and took his watchman to the police station. The police also recorded his statement and he did not tell the police he

suspected the respondents. On another day the police asked him for transport as they had arrested suspects. He handed his motor vehicle to his driver who drove away with the policemen. After the suspects had been arrested he went to the police station to make a follow-up and the police told him they would call him when they needed him. They never called him thereafter and he did not even know that the police had charged the respondents in court. He did not help the police in their investigation of the case against the respondents. He did not know the person who gave the names of the respondents to the police and he was not present when the police arrested the respondents nor was he talking to a cell phone at the time of their arrest.

It will be noted that no policeman was called as a witness by either party to tell the trial court how they got to know that the respondents were suspects in the theft case and the appellant's statement to the police was not put in evidence in order to establish if he had named the appellants as suspects or had named any person at all as a suspect.

The District Court record we quoted earlier in this judgment regarding the withdrawal of the charge against the respondents did not show that it was the appellant who had caused the delay in the finalization of the investigations in the criminal case. The prosecutor who made the application to withdraw the charge was not called by the respondents to elaborate on his application, whether the appellant had been requested by the investigating officers to assist in furthering the police investigations but refused to cooperate. The policemen who allegedly told the first respondent that it was the appellant who gave to the police the names of the respondents as suspects was not called to confirm the allegations of the first respondent.

It will be seen from the discussion of the evidence which was given at the trial in the High Court that there is not a scintilla of truth in the claims that the appellant caused the prosecution of the respondents even by giving their names to the police as possible suspects in the breaking and stealing from his shop. What can be

deduced is that the police, in the course of their investigations, arrested the respondents as suspects. Possible witnesses did not help the police to marshall relevant evidence and they gave up the attempt to prosecute the respondents.

The respondents having failed to adduce threshold evidence in their case in the High Court it is difficult for us to understand how the High Court could reach the conclusions it did, that the respondents had established their case against the appellant. It is an elementary principle that he who alleges is the one responsible to prove his allegations.

What we have said so far is enough for us to end this judgment and it is a waste of time, energy and paper to discuss the other grounds of appeal. We quash the High Court judgment and allow the appeal with costs.

GIVEN at ZANZIBAR this 17th day of November, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

(S.M. RUMANYIKA)
DEPUTY REGISTRAR