IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 67 OF 2001

BETWEEN

JAMES FUNKE GWAGILO ..... APPELLANT

AND

THE ATTORNEY GENERAL .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Kyando, J.)

dated 25th April, 2000

in

HC Civil Case No. 307 of 1999

J U D G M E N T

LUGAKINGIRA, J.A.:

The appellant, a one-time Principal Secretary and also Regional Development Director for Tabora Region during the 1980s, was retired by the President in the public interest with effect from 15.5.90 by a letter dated 29.12.90. At the time of his retirement he was under interdiction from service, facing criminal charges in Economic Crimes Case No. 3 of 1989 before the High Court at Tabora. He was acquitted on the charges in August, 1991. In July, 1993, he brought action against the Government alleging unlawful retirement and malicious prosecution. The retirement was alleged to be unlawful for being effected during the interdiction and was said to be in contravention of Regulation 46 (1) (a) of the Civil Service Regulations, 1970, and the prosecution was said to be malicious on account of the acquittal.

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The appellant was claiming in all Shs. 211,916,485.38 made up of various items of entitlements and damages. The action was dismissed in its entirety, hence this appeal.

The major dispute in the appeal is in connection with the retirement and it may be traced to the fact that the trial was handled by two judges. We will dispose of this first. The suit first came before Mwalusanya J. who steered it through the pleadings, disposed of a preliminary objection, framed the issues and heard evidence from the appellant/plaintiff, the only witness on his side, as well as evidence of the first witness for the defence. The judge then went into premature retirement on personal grounds. The trial was continued before the late Kyando J. who heard evidence from two more defence witnesses, received counsel's final submissions and wrote and delivered the judgment now appealed against. The dispute may further be traced to the fact that after the decision in the preliminary objection, the case put forward by the appellant in his evidence was a radical departure from his pleadings. The pleaded case was that his retirement was wrongful for being effected while he was under interdiction, and the written statement of defence addressed that issue. A preliminary objection was taken by the defence to the effect that the trial court had no jurisdiction to inquire into the exercise of presidential powers under section 19 (3) of the Civil Service Act read with section 23 (2) (a) thereof. Mwalusanya J. overruled the objection but in doing so he went on a fishing expedition and decided on what other irregularities would render the exercise of presidential powers unlawful, citing failure to give reasons and failure to give a

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hearing. That gave an idea to the appellant's side. When the appellant gave evidence, and without amending the pleadings and issues, he charged that his retirement was wrongful because it was retrospective, because he was given no reasons, and because he was not given a hearing; only lastly did he mention the interdiction, but even this was not pursued by his counsel in his final submissions.

In his judgment, Kyando, J. considered the departure from the pleadings and refused to consider the new grounds, stating thus:

> What do the rules of pleading say in relation to the situation revealed here? The general rule is that a party is bound by his pleadings and should not be allowed to succeed on a case not made out in his pleadings ... In HEMCHAND v. PEAREYLAL, A. 1942 P.C. 64, an Indian case, the Privy Council characterized as irregular the procedure of the trial court in allowing evidence to be adduced on points not raised in the pleadings or issues and held that this should not have been allowed without amendment of the pleadings and issues. I see no grounds in the instant case for departing from these general rules of pleading. This is because the parties had an opportunity to amend their respective pleadings and include the points that were later raised but did not utilize that opportunity. They are now therefore bound by their pleadings and the additional grounds or points raised are hereby rejected for having not been pleaded.

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The judge proceeded to dispose of the matter on the ground of retirement during interdiction which he decided against the appellant. The appeal as it relates to retirement does not challenge that decision but is confined to the unpleaded case.

Learned counsel for the appellant Mr. Z. E. Njulumi, who also partly appeared for the appellant at the trial, argued three grounds of appeal in relation to the retirement. They all revolve around failure to give reasons and failure to give a hearing and will be taken together. Mr. Njulumi's central argument is that since Mwalusanya J. had in the preliminary objection decided that those failures rendered the exercise of presidential powers wrongful, Kyando J. had simply to follow suit and enter judgment for the appellant. He further argued that although the two grounds were not pleaded, evidence was adduced on them by both sides and ought therefore to have been considered. He cited Article 107A (2) (e) of the Constitution for the argument that technicalities should not be allowed to defeat substantive justice. State Attorney Donald Chidowu submitted that the matters raised by Mwalusanya J. were not necessary for the determination of the preliminary objection but were obiter. He said a judge cannot create pleadings for the parties.

It seems necessary to restate certain principles regarding pleadings. The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise.

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It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate to determine the matters in dispute. If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend his pleadings for that purpose. The need to do so may arise at any stage in the trial and if the amendment is one the court can lawfully and conveniently accommodate, it would be obliged to consider the same even though not initially pleaded. In other words, in order for an issue to be decided it ought to be brought on record and appear from the conduct of the suit to have been left to the court for decision. In Blay v. Pollard and Morris [1930] 1 KB 628, 634, Scrutton LJ said:

> Cases must be decided on the issue on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided the case was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.

This decision was applied by the Court of Appeal for Eastern Africa in Gandy v. Caspar Air Charters Ltd (1956) 23 EACA 139.

It is worth repeating that in the case before us the unpleaded issues were raised by the first judge; it should also go on record that he achieved this by giving a new face to the preliminary objection. Whereas the preliminary objection stated that "the

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courts have no jurisdiction to inquire into the exercise of presidential powers under section 19 (3) of the Civil Service Act," the judge rendered it as "The question is does the President have the authority to remove someone in the public service in public interest without disclosing what that public interest is?" Even when he felt like paying attention to the substance of the objection, he treated it as subsidiary and could not face up to its true terms. He said: "There is another question as to whether this court has jurisdiction to inquire whether the President complied with section 23 (2) (a) of the Civil Service Act No. 16/89." By these tactics, albeit with some assistance from the appellant's first counsel, he was able to create for himself the desired opportunity to embark on a long and combative essay on public law which was largely irrelevant to the subject at hand.

The dangers of departing from the pleaded case were manifest in this instance; the respondent's side virtually failed to marshal evidence in defence. DW1 testified on whether the appellant was entitled to the various heads of ministerial claims; DW2 tried to introduce the appellant's Personal Particulars Form completed on first appointment in order to show that he had reached retirement age when he was retired. This was in an endeavour to prove that there were reasons for the appellant's retirement while the issue was whether any reasons had been given for the retirement. The court refused to admit the form since the defence was being raised for the first time and would, if accepted, throw the trial into confusion as the appellant had denied its authorship. But the court went on to waste valuable time hearing oral evidence from

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DW2 on what was essentially the content of the rejected document, for that was hearsay. Finally, DW3's evidence was about the criminal prosecution. A careful examination of the record thus establishes that the defence adduced no evidence on the retrospective nature of the retirement, the failure to give reasons or the failure to give a hearing to the appellant. Careful examination again establishes that learned counsel for the appellant never submitted at the trial on any of those grounds because, according to him, they had already been decided by Mwalusanya J. in the appellant's favour. He merely invited the court to declare the appellant an employee of the Government still and as entitled to the various claims. We think, with respect, the approach taken at the trial does not support the argument that the new grounds were left to the court for decision. There was a great deal of presumption on the subject which, unfortunately, was encouraged by the gratuitous posturing in the first judge.

In Nkulabo v. Kibirige [1973] EA 102, Spry VP. observed that while the general rule is that a relief not founded on pleadings will not be given, a court may allow evidence to be called, and may base its decision on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision. He then added:

> I accept that as a general statement but I do not think it can be invoked to allow the introduction of what amounts to a new cause of action ... If, [in a defamation case], a suit were founded on the allegation that certain words were used and then, without

> any amendment of the pleadings, the plaintiff was awarded damages on evidence that substantially different words were used, no defendant would know how to prepare his case and injustice rather than justice would result.

We agree and find the instant case a typical example of what the learned Vice-President had in mind. The respondent was taken by surprise by the new grounds and this can be seen in the failure to call evidence on those grounds and the clumsy attempt to prove an irrelevance. We think in such a situation the justice of the case demands that the unpleaded grounds should be ignored and that is not subordinating justice to technicalities. Kyando J. also need not have made further reference, as he did, to the attempt to prove the appellant's age for, as already observed, the evidence on that score was hearsay following the rejection of the Personal Particulars Form.

We pass on to malicious prosecution. It should be first observed that this tort was based on a distinct cause of action which arose on a different date and at a different place. The written statement of defence gave notice of a preliminary objection to the misjoinder but it was not pursued. The appellant's retirement had absolutely no connection with his arrest, detention and prosecution which ought to have been the basis of a separate suit. The procedure permitted at the commencement of the suit was overly ambitious and a strain on the rules which we are unable to approve.

The appellant's prosecution arose this way: On the night of 23.5.88, he and one Dr. Limbo of Kitete Government Hospital at Tabora, reported at the Tabora police station that they had been

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robbed of a Landrover they had been using visiting villages during the day. The following morning the same Landrover was used in a bank robbery at Sikonge. Investigations established that some of the robbers had during the previous day been moving around with the appellant and Dr. Limbu in that vehicle. In fact one of those subsequently convicted, a Capt. Limbu, was a relative of Dr. Limbu. It was surmised that the appellant and Dr. Limbu may have had a hand in the bank robbery and that their report was faked as a cover up. They were therefore arrested and prosecuted for conspiracy, giving false information and robbery with violence, but were acquitted.

As rightly observed by Kyande J., in order to maintain an action for malicious prosecution a plaintiff has to prove, among other things, that the prosecution was undertaken without reasonable and probable cause and was actuated by malice. The judge held that the appellant had failed to prove these elements having regard to the facts giving rise to the prosecution and the failure to identify the police officer with whom to impute malice. The three grounds of appeal devoted to this subject contend in their totality that the judge erred in holding as he did. Mr. Njulumi submitted that the prosecution was without reasonable and probable cause because when the robbery was taking place at Sikonge the appellant was at Tabora; that it was not necessary to point out individual tort-feasors for the purpose of proving malice; and that malice was proved by the fact that the appellant had previously been cleared on a disciplinary charge and a criminal charge based on the same facts.

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The burden was on the appellant to prove absence of a reasonable and probable cause for the prosecution, a difficult task as he had to prove a negative. In Hicks v. Faulkner (1878) 8 QBD 167, cited by Kyando J., reasonable and probable cause was defined as an honest belief in the guilt of the accused, but current thinking is that it is enough if the defendant believes there is reasonable and probable cause for the prosecution: see Tempest v. Snowden [1952] 1 KB 130. Considering the established association between the appellant and the actual robbers so shortly before the robbery and the appellant's apparent faking of robbery of the Landrover used in that episode, any reasonable and objective man could be excused for thinking that there was reasonable and probable cause for prosecuting. It matters not, really, that the appellant was at the material time not at the scene of crime; there are principles of aiding and abetting in the criminal law which would constitute one a principal offender along with the actual perpetrators of the crime without being at the scene. On the facts available at the laying of the criminal information it was not unreasonable to believe that the appellant and Dr. Limbu had permitted the use of the Landrover in the robbery. We are satisfied that the appellant was unable to discharge the burden cast upon him by the law.

We agree with Mr. Njulumi, however, that it was not necessary to identify the primary tortfeasor for the purpose of proving malice. By virtue of section 3 (1) of the Government Proceedings Act, 1967, the Government is subject to all those liabilities in tort to which it would be subject if it were a private person of full age and capacity, and this liability is not conditioned upon the identification

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of the primary tortfeasor. In a case like the present where the state was both complainant and prosecutor many players must have been involved in the making of the prosecution. It is sufficient in such a difficult situation to sue the Attorney General as the appellant did. And even without identifying the primary tortfeasor it is still possible to prove malice. Malice in the context of malicious prosecution is an intent to use the legal process for some other than its legally appointed and appropriate purpose. The appellant could prove malice by showing, for instance, that the prosecution did not honestly believe in the case which they were making, that there was no evidence at all upon which a reasonable tribunal could convict, that the prosecution was mounted for a wrong motive and show that motive, etc. It was contended for the appellant that malice was manifest in the fact that the appellant had previously been cleared of similar allegations and we desire to look at this briefly.

First, it is true that during 1987/88 the appellant had faced a disciplinary charge on which he was upon inquiry cleared by Mwaikasu J. That charge, however, alleged, inter alia, that the appellant had scandalized government by borrowing money from a businessman at Nzega knowing that he would have official dealings with the businessman. It is plainly clear that the charge had no relationship whatsoever with the subsequent prosecution. It is also true that before being prosecuted for the economic offence, the appellant was initially charged on the same facts before the District Court in Criminal Case No. 265/88. However, he was discharged therefrom under section 225 (4) of the Criminal Procedure

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Act 1985 for the failure of the prosecution to file a certificate asking for further adjournment after the expiration of 60 days. As learned counsel for the appellant well knows, the discharge was not a bar to further proceedings being instituted on the same facts. The two events cannot, therefore, be evidence of malice. There were claims at the trial of the appellant being loathed by the senior leadership in government at Tabora and it may well be that he had, indeed, become unlikable and an embarrassment and any opportunity to be rid of him was considered godsend. However, malice is in general never evidence of want of reasonable and probable cause, for a prosecutor may be inspired by malice and yet have a genuine and reasonable belief in the truth of his accusation: Glinski v. McIver [1962] AC 726 at 782. In the instant case the High Court found that the police acted honestly and on reasonable grounds to prosecute the appellant and in the circumstances set out before, we have no cause to differ.

In the final analysis, the entire appeal is destitute of merits and stands dismissed with costs.

DATED at DAR ES SALAAM this 04 day of February, 2003.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
DEPUTY REGISTRAR