

[IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MZIRAY, J.A., And LILA, J.A.)

CIVIL APPEAL NO. 53 OF 2013

SUGAR BOARD OF TANZANIA APPELLANT

VERSUS

AYUBU NYIMBI AND &2 OTHERS RESPONDENTS

**(Appeal from the Judgment and Decree of the High Court
of Tanzania at Dar es salaam)**

(Mruma, J.)

Dated the 2nd day of February, 2009

In

Civil Case No. 185 of 2006

JUDGMENT OF THE COURT

2nd& 28th September, 2016

MZIRAY, J.A.:

The appellant herein, Sugar Board of Tanzania, being dissatisfied with the judgment and Decree of the High Court of Tanzania at Dar es salaam (Mruma, J.) delivered on 2nd February, 2009 in Civil Case No. 185 of 2006 appeals to this Court on the grounds:-

- 1) That the learned honourable trial judge erred in law and fact in holding that the Respondents' prosecution in Kinondoni Criminal Case No. 95 of 1997 was initiated by the Appellant.

- 2) That the learned honourable trial judge erred on the law and fact in holding that the respondents' prosecution in Criminal Case No. 95 of 1997 was actuated by malice.
- 3) That the learned trial judge erred in law and fact in making a finding that Appolinary Lazaro Kisanga initiated criminal proceedings against the respondents, and that he did so with malice against the respondents and for his own personal benefit.
- 4) That the learned trial judge erred in law and fact in holding the appellant liable for her employees' malice (if any).
- 5) That the learned trial judge erred in law in applying a wrong principle of the law in assessing general damages as a result of which, he awarded the same in excess.

It is prayed that the appeal be allowed, the judgment and decree be quashed and set aside and that the appellant be awarded costs of the appeal and the court below.

From the pleadings and evidence on record, the respondents sued the appellant herein and claimed for special and general damage to the

tune of Tshs370 million arising out of torts of malicious prosecution and false imprisonment allegedly committed by the appellant.

It was the respondents' case as stated in paragraph 4 and 5 of the plaint filed before the trial court that on or about the year 1997 the appellant by then known as SUDECO, falsely and maliciously and without probable cause, reported to the police that the respondents while in the employment of the appellant did steal several tons of Kilombero and Mtibwa Sugar worth millions of shillings and that on the basis of the said information they were arrested, beaten, searched at their places of residence and then sent to Central Police station where they were detained for four days and subsequently charged in the Resident Magistrate's Court of Dar es salaam at Kinondoni with the offence of Stealing by Person in Public Service c/s 258 and 270 of the Penal Code , Cap 16 of the Laws of Tanzania. They were eventually acquitted of the said offence after the said case had dragged on in court for about six years, i.e. from 1997 to 31st December, 2003. It is on this ground that they instituted Civil Case No. 185 of 2006 at the High Court seeking remedies as stated in the plaint arising from the alleged false imprisonment and malicious prosecution.

On the other hand the appellant who was the defendant in the original suit filed its written statement of defence wherein it denied the respondents' claim. She averred that the arrests, beatings and search, if at all, were done by police against whom could take issue. The appellant contended that she merely discharged her legal duty to report the commission of a crime.

At the trial, four issues were raised for determination, that is;

- (i) Whether or not the defendant instituted the proceedings against the plaintiffs maliciously.
- (ii) Whether there were probable and reasonable cause for such proceedings.
- (iii) Whether the plaintiffs suffered damages.
- (iv) To what relief(s) are the parties entitled.

In his judgment, the trial judge found in favour of the respondents and reached a conclusion that their arrest was maliciously instigated by DW1, Appolinary Lazaro Kisanga who was by then the Chief Advisor to the Director of Finance in the appellant's firm. The trial judge was of the view that since DW1 instigated the arrest and on behalf of his Principal i.e the

appellant, then the latter was liable for the illegal confinement and the malicious prosecution of the respondents. In the final analysis, the respondents were accordingly awarded each Tshs 25,000,000/= as general damages and costs of the suit for the torts committed.

In this appeal the appellant through the services of Mr. Egid Mkoba, learned Advocate has filed a memorandum of appeal containing five grounds which basically challenges on one hand the findings of the trial judge in holding that the appellant is liable for the alleged torts and on the other hand awarding undeserving damages to the respondents without showing the criteria for the assessment.

In support to the five grounds of appeal, Mr. Mkoba argued that what the appellant did was a mere discharge of her obligation of reporting the loss of sugar at SUDECO and left the entire issue on the hands of the police who upon investigation, apprehended the respondents as suspects and on completing all the formalities, initiated criminal proceedings against them. It is the contention of the learned counsel that the appellant was not instrumental to the alleged torts and the ultimate criminal proceedings. He concluded by disputing presence of malice on the part of the appellant.

On the awarded damages, the learned Counsel pointed out that it cannot arise without first establishing tortious liability. Additionally, he criticized the principles used in assessing the damages and the failure on the part of the trial judge to take into consideration pertinent issues like how the respondents were affected by the detention, their criminal trial and the publication made in the newspapers. In a nutshell he submitted that the award had no backing whatsoever.

Responding to the submission, Mr. Rutagatana, learned counsel for the respondents supported the findings of the trial court and firmly stated that it was the appellant who initiated the criminal proceedings. To buttress his position he took us back to the evidence of DW1 Appolinary Lazaro Kisanga at page 66 of the record and went ahead to page 131 of the trial court's judgment where it is stated:-

"In other words he (DW1) initiated and continued the prosecution of the plaintiffs and he personally benefited as he was promoted to the post of Director of Finance and Administration. Nevertheless because he was doing all this on

behalf of his principal, the employer, the Defendant is liable."

The learned counsel made also reference to page 130 of the record on which the judgment of the trial court had pointed out failure on the part of the appellant to tender the reconciliation and audit report which had shown that sugar worth Tshs 2.1 billion was missing from the defendants godown. He asserted that this was a clear indication that the appellant had no reasonable and probable cause to initiate the criminal proceedings against the respondents.

On the damages awarded to the respondents, the learned counsel is of the view that it was reasonable and considerate regard being to the reputation tarnished after the incident was reported in the media. He prayed the awarded sum be upheld by this court.

We must at the very outset point out here that from the filed grounds of appeal, written submissions and the oral submissions made by the learned counsel, the appeal before us essentially is on the tort of malicious prosecution and the other tort of false imprisonment which was discussed in the trial court was not argued at all in the course of hearing this appeal

and even in the memorandum of appeal there is no ground raised in respect of the tort of false imprisonment. On that shortfall, our decision will therefore focus only on the tort of malicious prosecution.

That said, we now proceed to determine the merit of the appeal. On deeply going through the five grounds of appeal, we find that they are centred on two main points. One, that the prosecution of the respondents in the criminal charge before the Resident Magistrate's Court was maliciously initiated by the appellant. Two, that the trial judge applied wrong principles in assessing general damages as a result the award made was excessive. We will therefore combine the five grounds and confine our decision on the above two points.

The tort of malicious prosecution is fully expounded in the case of **Hosia Lalata V. Gibson Mwasote** (1980) TLR 154. This case has established that in order to succeed in a suit for malicious prosecution the plaintiff must prove:-

- 1. That he was prosecuted by the defendant.*
- 2. That the prosecution ended in his favour.*
- 3. That the prosecution was conducted without reasonable or probable cause.*

4. That in bringing the prosecution the defendant was actuated by malice.

In the case at hand, there is no dispute that the respondents were arrested and subsequently charged criminally. There is no dispute, too, that they were acquitted of the charged offence. The respondents strongly believe that the appellant, acting without reasonable and probable cause, initiated the arrest and the charge against them and in doing so she was actuated by malice. The appellant on the other hand has strongly denied the accusation by stating that upon discovering the immense loss of sugar in her godowns, without naming anyone as suspect, reported the incident to police. The arrest and prosecution of the respondents was done by the police. The respondents were not the only victims, as even some other staff in the top management of SUDECO including the Managing Director were prosecuted in different cases.

In its decisions, the trial court arrived at the conclusion that the respondents' prosecution in Kinondoni Criminal Case No. 95 of 1997 was maliciously initiated by the appellant through its officer one Appolinary Lazaro Kisanga (DW1) and he did so for his own personal benefit. In

discussing the evidence of DW1 at page 131 of the record, the trial court has this say:-

"..... he initiated and continued the prosecution of the plaintiffs, and he personally benefited as he was promoted to the post of Director of Finance and Administration. This demonstrates malice."

From the above facts and the extract of the judgment of the trial court we fail to see how the appellant is connected with the prosecution of the respondents. Under normal circumstances the appellant could not turn a blind eye and remain quiet after detecting the loss of sugar in her firm. Just like any other good law abiding citizen, she had an obligation of reporting the theft to the police. There was therefore no ill motive nor can it be said that the appellant was driven by malice. Likewise, on the part of the police, we find that upon receiving the complaint of theft from the appellant, it had a duty to investigate and bring the suspects to justice. This is exactly what they did.

The respondents believe that because they were acquitted in the Criminal charges then there was malice on the part of the appellant. They

are of the view that there was no probable and reasonable cause to initiate the criminal proceedings. It is in their evidence that they left the employment of the appellant with good record hence by initiating the criminal charges after quitting employment is a clear sign of malice on the part of the appellant.

To establish malice it must be proved that the appellant showed animosity towards the prosecution of the respondents. We pause here now to consider the element of malice. It is now well established that by malice in the tort of malicious prosecution it does not mean spite or hatred; what it means is merely **wrong motive**. (see **James Funke Gwagilo v Attorney General** (2001) TLR 457. (Emphasis supplied).

The appellant is implicated merely because she reported the loss of sugar at SUDECO godowns to police. The police then carried the investigations and netted the respondents. DW1 Appolinary Lazaro Kisanga gave evidence on how the loss was detected through the audit conducted. However, there is no evidence proving that in reporting loss of sugar to the police, Appolinary (DW1) did mention the appellants as suspects and neither is it established that he was instrumental to the arrest and prosecution of the appellants. Coincidentally, he was promoted during this

time when the investigations were in process but there is no nexus on his promotion and the prosecution of the respondents. We are of firm view that the finding of the trial court was speculative and not supported by evidence. In view of that we find that there was no wrong motive on either DW1 or the appellant hence malice has not been established on their part.

It should be recalled that initial investigation of loss did not only implicate respondents but also other staffs particularly of the management side, including also the Managing Director who apparently were also arraigned. If for instance the respondents were the only party prosecuted there is when malice could be inferred but as the evidence suggests the investigation indiscriminatedly touched employees of different cadres within SUDECO. It was therefore an exercise done innocently without presence of malice.

That said, and on the basis of the evidence on record, we are convinced that the prosecution of the respondents was not done at the instance of the appellant and for the reasons stated above, grounds No. 1, 2, 3 and 4 of appeal succeeds.

Having resolved the grounds in relation to malicious prosecution in favour of the appellants, we are of settled view that to discuss on general damages is without essence and justification. As liability is not established the issue of damages, both special and general cannot arise. Ground five of appeal also fails and is dismissed.

In the final result, the appeal succeeds with costs. The judgment and decree of the trial court is hereby set aside.

Ordered accordingly.

DATED at DAR ES SALAAM this 19th day of September, 2016.

B.M.LUANDA
JUSTICE OF APPEAL

R.E.S.MZIRAY
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

I certify that is a true copy of the original


B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL