IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO.82 OF 2004
(Original D.C. Civil Case No. 141 of 2001 at Kinondoni
(A.F. Ngwala, PRM)

SHABANI MBOGO t/a
MWANGAZA DISPENSARY.....APPELLANT

VERSUS

ZAKAYO MARK.....RESPONDENT

JUDGMENT

SHANGWA, J:

This is an appeal against the decision of the District Court of Kinondoni made by A.F. Ngwala, PRM who entered judgment and decree in favour of the plaintiff now respondent as against the 1st defendant DR. Ally Fungo who died before hearing of the suit and the 2nd defendant now appellant and awarded him general damages for malicious prosecution and defamation amounting to Shs.10,000,000 and costs of the suit.

Four grounds of appeal have been raised by the appellant. The fourth ground is in the alternative to the rest of the grounds. The first ground is that the learned PRM misdirected herself in law in proceeding with the case of defamation against both defendants following the death of the 1st defendant. The Second one is that having regard to the fact that the respondent had blocked the toilet which is in itself a Criminal offence, the learned PRM misdirected herself in failing to find that there was a reasonable and probable cause for the appellant to report the matter to the police and in failing to hold that the prosecution was not actuated by malice. The third one is that having regard to the evidence on record and the circumstances of the case, the learned PRM misdirected herself in law and in fact in holding that the respondent had established his case on the required standard. The fourth one is that the learned PRM, having regard to the fact that the respondent was the cause for his own prosecution, misdirected herself in law and in fact in assessing the quantum of damages

to be paid to the respondent. I will consider these grounds one after the other.

On the first ground of appeal, I straight-away agree with learned Counsel for the appellant Mr. R.K. Rweyongeza and Company Advocates that after being informed that the 1st defendant Ally Fungo had passed away, the learned PRM was not supposed to proceed with the case of defamation as she did against both defendants and enter judgment against both of them. The PRM was supposed to make an order before hearing of the case to the effect that in view of the death of the 1st defendant, the case will proceed against the 2nd defendant alone. Although, the first ground of appeal does not go to the merit of this appeal, I find that there is substance in it and it succeeds.

I now come to the Second ground of appeal. This is a core ground in which the court is called upon to decide as to whether

it was correct or not for the trial PRM to find that there was no reasonable and probable cause for the appellant to report the matter to the Police and that the prosecution was actuated by malice. In order to determine this question, it is very important to examine first the underlying facts which led the appellant to report the respondent to the Police and the reasons for the PRM's decision. These are as follows:

Since 1994, the appellant and the respondent were tenant and landlord respectively. The appellant was renting the respondent's house from where he used to run a dispensary together with his friend the late DR. Ally Fungo. This house is located at Kagera area, Makurumla ward within Kinondoni District.

In the course of their tenancy, the respondent developed some misunderstanding with the appellant whom he accused of operating business without a licence at his premises and

carrying out abortions from there. Sometimes in July, 2000, the respondent blocked the toilet at the said premises following a dispute over the rent increase. The appellant went to the Police Station at Magomeni and reported the matter.

Following the said report, the respondent was arrested by the Police on 17.7.2000 and locked up for ten hours but he was released on bail on the same day. After two days, he was charged in the Primary Court of Magomeni with the offence of causing disturbance C/S 89 (2) (b) of the Penal Code. His case was No.1035 of 2000. He was tried and acquitted on 17.10.2000.

After his acquittal, he wrote a letter to the appellant dated 25.11.2000 demanding for payment of general damages of Shs.10,000,000 within ninety days from that date for having been defamed and maliciously prosecuted by him. In his letter, he threatened to sue the appellant in case he does not pay him

the said amount within the said period. The appellant did not pay as demanded by the respondent.

On 10.7.2001, the respondent filed Civil Case No.141 of 2001 in the District Court of Kinondoni for defamation and malicious prosecution. He claimed for general damages of Shs.10,000,000 and costs of the suit which he was granted.

The reasons which were given by the learned PRM in deciding in favour of the respondent are that the act of his arrest by the police and being charged with the Criminal offence in the Primary Court of Magomeni namely causing disturbance of which he was acquitted lowered his dignity as a Senior Citizen with good reputation and that as the prosecution ended in his favour, he should be paid damages. This is what she said and I quote:

> *"As the plaintiff has so far proved his reputation and his position in the Society this court agrees that the act by the*

defendants had tarnished his image as such he is entitled to general damages".

According to the facts of this case, there is no doubt that the appellant and his friend the late DR Ally Fungo are the ones who initiated the Criminal Prosecution against the respondent. They are the ones who reported him to the Police at Magomeni who arrested him and charged him in the Primary Court of Magomeni with the offence of causing disturbance C/S 89 (2) (b) of the Penal Code. There is no dispute that the said court acquitted him of that offence.

This means that the prosecution ended in his favour. However, despite the fact that the prosecution ended in his favour, upon the facts on record, I do not think that the prosecution against him was conducted without reasonable or probable cause, and I do not think that the appellant was actuated by malice when he initiated his prosecution. The reason why the appellant reported the respondent to the police

for legal action is that he blocked the toilet which was being used by the appellant and his visitors at his Dispensary premises. In my view, the appellant acted with reason when he reported the respondent to the police so that they may take legal action against him. It is clear therefore that the respondent's prosecution was not actuated by malice.

Learned Counsel for the appellant submitted that the respondent's act amounted to an offence under S.33 (1) of the Rent Restriction Act No.17 of 1984 which Prohibits deprivation of a tenant by the landlord of any service without the consent of the Housing Tribunal and that it is punishable under S.33 (2) of the same Act. It was further submitted that had the police been well conversant with the provisions of the Rent Restriction Act, 1984 in a similar way as those of the Penal Code, they would have charged the respondent with an offence under that Act and he could have been convicted; but as they were not so conversant, they charged him with the offence of causing disturbance under the Penal Code of which he was acquitted.

I think the above submission by learned Counsel for the appellant is correct, but I also think that the respondent's act of

Learned Counsel for the respondent M/S Hosea & Co. Advocates argued that taking into consideration the animosity and acrimonious relationship that prevailed between the Parties, the Criminal charges were maliciously instigated. I am of a different view. This kind of relationship was the major reason behind the respondent's act of blocking the toilet used by the appellant and his visitors. This intolerable and ignoble act is the one which led to his arrest and his Criminal charge. For this reason, I uphold the second ground of appeal.

I now proceed to the third ground of appeal. It is true as submitted by learned Counsel for the appellant that the learned PRM found that the torts of defamation and malicious prosecution have well been founded and proved. In reality, there was no such proof by the respondent before the District Court of Kinondoni. Apart from stating that he is a man of good reputation and dignity and that he was acquitted by the Primary Court of Magomeni, he did not prove anything defamatory

against him either in speech or in writing by the appellant. It was also not proved by him that in real fact, he was prosecuted without reasonable and probable cause and that his prosecution was actuated by malice. It has to be remembered that matters like good reputation, dignity and honour in ones life are not elements of the tort of defamation or malicious prosecution which need be proved in order to establish the same. These are mere matters to be taken into consideration during the assessment of general damages to be awarded to a claimant. This disposes the third ground of appeal which I uphold.

As the fourth ground of appeal was raised in the alternative to the rest of the grounds of appeal which have all been upheld, it is of no use for me to dwell on it. Suffice it to say here that the respondent is not entitled to any damages be it general or specific. Finally, I set aside the decree for general

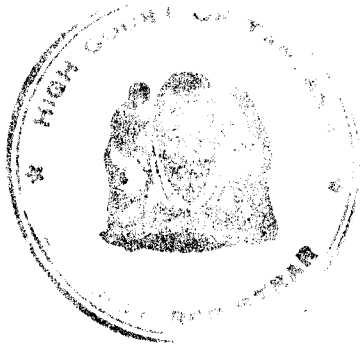
damages of Shs.10,000,000 issued by A. F. Ngwala PRM in favour of the respondent and I allow this appeal with Costs.

A. Shangwa

JUDGE

17.2.2005

Delivered in open Court at Dar es Salaam this 17th day of February, 2005.



A. Shangwa

JUDGE

17.2.2005.