

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CIVIL CASE NO. 17 OF 2023

(Original Jurisdiction)

ERICK OSENA PLAINTIFF

VERSUS

JAMBO FOOD PRODUCTS CO.LTD.....DEFENDANT

RULING

21/9/2023 & 13/10/2023

F.H. MAHIMBALI, J

The plaintiff herein was originally charged before Shinyanga District Court for the offence of stealing by agent C/S 273 (b) of the Penal Code Cap 16 RE 2019. Whereby it was alleged that on 17th November 2021 at Ibadakuli area within Shinyanga Municipality being a sale agent of Jambo Products Co. Ltd (defendant here in) did steal products valued at Tshs 95,828,000/= which were entrusted to him by the director of Jambo Food Products for sale purpose instead he used the said goods for his own benefit. After a full trial, the trial court found him guilty with the offence charged and consequently convicted and then sentenced him to five years' imprisonment and ordered payment of compensation to the complainant amounting Tshs 95,828,000/=.

The appellant was aggrieved by the decision by the trial court and ultimately, he successfully appealed before this court, vide Criminal Appeal No.87 of 2022 as this court found out that the appeal by the appellant was merited and consequently reversed the decision by the trial court by quashing conviction and sentence meted against the plaintiff.

Being the case, the plaintiff then filed the instant civil case for malicious prosecution claiming for payment of Tshs 500,000,000/= being compensation for malicious prosecution. The defendant in her written statement of defence while resisting the plaintiff's claims, amongst others raised a preliminary objection on point of law based on the following grounds:

- 1. That, this honourable court has no pecuniary jurisdiction to try and determine the matter*
- 2. That, the plaintiff has no any cause of action against the Defendant*
- 3. That, the defendant hereinabove improperly joined into the suit.*

During the hearing of the preliminary objection, the defendant had legal representation of Mr. John Palamagamba Kabudi, learned advocate and on the side of the Defendant, Mr. Emmanuel Paul learned advocate appeared on his behalf.

Arguing for the grounds of preliminary objection, the 2nd and 3rd grounds were argued jointly.

On the first preliminary objection, Mr. Kabudi averred that since the plaintiff prays for general damages of 500,000,000/=, in law, the general damage does not ascertain the pecuniary jurisdiction of this Court.

He persuaded this Court by refereeing to the case of the case of **Tanzania China Friendship Textile Company Ltd vs. Our Lady for Usambara Sisters** (2006) TLR 70:

"It is specific damage and not pecuniary damage which determines the pecuniary jurisdiction of the court"

He propounded that this being a malicious prosecution, it is a tortious liability (see s. 13 of the CPC and the case of **Usambara Sisters**, the case of **Seleman Ramadhan vs Ally Juma** (1984) TLR 49).

He added that general damage does not vest court's jurisdiction. He also cited the case of **Alberth Mlilo vs. Sudi Mwakalikomo vs. William Jeremiah Kasege, Civil Appeal No. 1 of 2015, High Court Mbeya.**

On the 2nd and 3rd points of Preliminary Objections, Mr. John Palamagamba Kabudi averred that the plaintiff was convicted by the trial court but acquitted by the High Court on some legal irregularities. In a thorough reading of the two judgments there is nowhere malice is established. Since the plaintiff was legally prosecuted that means there

was a genuine claim as per investigation. Therefore, there was no any malice in it. Otherwise, the OC-CID, NPS ought to have been prosecuted for negligence as well.

Mr. Kabudi referred this court to the case of **Geita Gold Mine Limited vs. Edwin Peter Mgogo, John Masige, Samuel Paul, civil Appeal No. 67 of 2020, Court of Appeal of Tanzania at Mwanza, at page 10 and 11**, where it was held that it does not matter whether accused persons were acquitted.

Mr. Kabudi then concluded that the plaintiff has no cause of action against the defendant. He therefore prayed for the suit to be dismissed with costs.

On the side of the plaintiff, Mr. Emmanuel Paul, opposed the preliminary objections raised by the defendant arguing that with the first Preliminary Objection, he finds it misplaced. The said claims of 500,000,000/= is nowhere stated that it is a general damage. Thus, it is defendant's counsel own construction. He referred this Court to the case of **Anselm Tryphon Ngaiza @ Dogidogi Hunter and Another vs. Home Box office INT, Civil case No. 162 of 2021**, High Court Dsm, at page 7, para 1. Thus, a mere wording that the plaintiff claims 500,000,000/= for malicious prosecution is not by itself a basis that it is general damage. That is a misconception.

He added that the cited case by the defendant's counsel of Our Lady of Usambara Sisters, he agreed with the principle stated there in but is distinguishable with the current case on the manner his claims have been worded. It is not a general damage. With section 13 of CPC, Mr. Emmanuel argued that the defendant's counsel has not cited it in full and therefore prayed for the court to read it thoroughly to reach a proper conclusion. In his opinion, this objection is baseless.

On the 2nd and 3rd grounds P.O, Mr. Emmanuel stated that the same is misplaced. He contended that what has been alleged by the defendant's counsel needs evidence, and therefore by itself does not qualify to be a legal objection.

That, the High court in its verdict while allowing the appeal clearly stated that for all that transpired, the Republic failed to discharge their task of proof beyond reasonable doubt. Mr. Emmanuel added that in malicious prosecution, what matters is a nature of the complaint and not the investigative or prosecution machinery. Since the relationship between the plaintiff and the defendant was contractual, breach of it, ought to be dealt civilly and not criminally as done. Thus, the defendant's option of applying the state's criminal machinery was by itself ill motive against the plaintiff. He added that under Order I Rule 3 of the CPC, the plaintiff is at liberty to sue a party from whom, the said reliefs can be

recovered. Thus, the plaintiff believes so, that the defendant is the right party to be sued.

Moreover, Mr. Emmanuel argued that the cited cases though their principles are appreciated, but their circumstances are distinguishable from the current case.

He then pressed for dismissal of the preliminary objections raised by the defendant.

In rejoinder Mr. Kabudi, reiterated what he submitted in chief. He also added that on the 2nd and 3rd grounds of P.O, it is clear that where there is public prosecution, it is unlike private prosecution where then an individual gears the prosecution. He clarified that an ill motive is not established by a mere reporting of criminal complaint at police, but only where the report made is frivolous and false one.

In the current case, for High court to rule that the matter ought to have been done civilly is not an establishment of ill motive but only a legal directive by the trial judge. And that Mr. Kabudi prayed for the dismissal of the suit.

After I have heard both parties, I have now to determine this preliminary objection. I have scanned the submission by both parties and antecedents of judgement of this Court in Criminal Appeal No.87 of 2022 and Criminal Case No.2 of 2022 before District Court. In fact it draws my

attention to determine the question as to whether a person convicted in criminal case by the lower courts once is released by the superior court in appeal is entitled for claims for malicious prosecution against the complainant who reported the criminal incidence at police.

On the first ground of preliminary objection that this honorable court has no pecuniary jurisdiction to determine the matter. Mr. Kabudi has averred that, jurisdiction of the court is only determined by looking on specific claims to be proved which enable to determine jurisdiction of the court. But in the instant case, the plaintiff's claims for general damages cannot determine jurisdiction of this court. He was therefore of the view that this court lacks pecuniary jurisdiction to try the matter.

Mr. Emmanuel opposed such argument and grounded that there is nowhere stated that the claimed amount is general damages rather it is the defendant counsel's words. He also added that this Court enjoys inherent powers to determine the matter and the cited section 13 of CPC empowers this court in adjudication of the case.

I have done a thorough looking on the plaint specifically on regards to reliefs sought;

2. " *That, the plaintiff's against the defendant is payment of five Hundred Million Shillings (TZS 500,000,000/=) being compensation for malicious prosecution, costs of this suit, interest at court rate from the*

date of judgement to full satisfaction of Decree and any other reliefs this honorable court shall deem fit and just to grant "

It is true that nowhere is titled to have claimed general damages as contended by the defendant's counsel.

However, it is common cause that the question of jurisdiction is so fundamental that courts must as a matter of practice, be certain and assured of their jurisdictional position at the commencement of the trial otherwise the whole trial will be a nullity. Section 7 (1) of the Civil Procedure Code, provides that the High Court has jurisdiction to try all suits of a civil nature unless expressly or impliedly barred.

However, section 13 of the same Code is clear that every suit shall be instituted in the court of the lowest grade competent to try it and that Court of Resident Magistrates and District Courts shall be deemed to be courts of the same grade. The pecuniary jurisdiction to the District Court under Section 40 (2) (a) (b) of the Magistrates' Courts Act as by the Written Laws (Miscellaneous Amendments) Act, No. 25 of 2002 was respectively 150 million and 100 million but a recent amendment brought by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 the pecuniary jurisdiction of the said court has risen to, respectively, 300 million shillings and 200 million shillings. As far as the pecuniary jurisdiction of the court is concerned, the position of the law has been

that it is the substantive claim and not the general claim which determined the pecuniary jurisdiction. This position was echoed by the Court of Appeal in the case of **Ms China Friendship Textile Company Limited v. Our Lady of the Usambara Sisters, Civil Appeal No. 84 of 2002** (CAT) (unreported).

However, section 9 of the Written Laws (Misc. Amendment) Act No. 2 of 2016, which amended section 13 of the Code by introducing a proviso to the effect that the provision of section 13 is not construed to oust the general jurisdiction of this court. After the amendment, this provision now reads as follows:

"Every suit shall be instituted in the court of the lowest grade competent to try it provided that, the provisions of this section shall not be construed to oust the general jurisdiction of the High Court"

It must be remembered the texts in the proviso was inserted in section 13 of the Code after a long battle in our courts. It was the Parliament which sat in Dodoma to intervene and settle the matter by amending section 13 of the Code in 2016. It is unfortunate, the same matter is brought back again to this court.

From this statement, it is certain that the position in the precedent in **Shyam Thanko & Others v. New Palace Hotel (1972) HCD** is now adjusted after insertion of the proviso in section 13, insertion of section

3A & 3B of the Code; and precedent in **Abdu M. Kipoto v. Chief Arthur Mtoi**, (supra).

Guided with the above principles it is therefore certain that, this Court has jurisdiction to determine the instant case. See also the case of: **Frank Gaspar Tarimo versus The Global Link General Contractors Ltd and 30 Others, Civil Case No.22 of 2017**, and the case of : **Charles Mushatshi versus Nyamiaga Village Council and Another, Land Case No.8 of 2016**. However it is not clear as to how the claim of 500,000,000/= being not general damages covers what type of damages. The pleading is silent.

On the second and third grounds of objection, it has been argued that the plaintiff has no cause of action against the defendant. The facts that he was arraigned for criminal case instead of civil case does not warrant him to institute malicious prosecution case. However, it was argued that as the matter involved criminal machinery that is NPs, OC CID and thus the claims would have been against these institutions and not the defendant who was just a mere complainant. Therefore, the defendant has been improperly joined in the case, it was argued.

However, it was also alluded that the acquittal of the plaintiff by this Court during appeal and directives given by this court that the plaintiff was supposed to be sued for civil wrongs and not criminal wrongs as it

was done, the same does not confer the legitimacy for the plaintiff to sue the defendant.

The plaintiff's counsel has pounded that his client was maliciously prosecuted to meet the interest of the defendant. The defendant with ill motives used criminal machinery to mount criminal case contrary to the reality. And so, the decision of this Court in Criminal Appeal No.87 of 2022, signifies that the plaintiff was wrongly prosecuted and thus his claims against the defendant are correctly instituted.

I have keenly scanned the submissions and looked at section 9 of Criminal Procedure Act, Cap 20 R:E 2022,

The section reads; 9.

(1).. "Information relating to the commission of an offence may be given orally or in writing to a police officer or to any other person in authority in the locality concerned.

(2) Any information under subsection (1) shall be recorded in the manner provided in subsection (3) of section 10.

(3) Where in pursuance of any information given under this section, proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and of any statement made

by him under subsection (3) of section 10, to be furnished to the accused forthwith.

(4) Any information given under this section by any person may be used in evidence in accordance with the provisions of the law for the time being in force relating to the procedure for the admission and reception of evidence in relation to the proceedings in respect of the offence concerned. Investigation by police officer Act No. 9 of 2002 Sch. Cap. 4 s. 8 10.-(1) Where, from the information received or in any other way, a police officer has reason to suspect the commission of an offence or to apprehend a breach of the peace he shall, where necessary, proceed in person to the place to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender where the offence is one for which he may arrest without warrant "

From the proviso cited, it is clear that any person suspecting the commission of any offence has a burden to report such incidence. And that the investigation machinery shall take its responsibility to investigate the matter. And if the investigation organ finds the likely hood of the commission of the offence shall cause the matter be filed before the court of law.

I think the enshrined principle is our general legal jurisprudence in criminal system. It will be injustice and unworth of credit if any person reporting the criminal incidence to the police once the arraigned offender is acquitted then the reporter of the incidence shall be liable for malicious prosecution. This is bad trend intended to be induced in our legal system, and for sure I will not be the person to apprehend such a practice in our legal system.

The court of law under Article 107 (2) of the Constitution of the land are burdened with the task of dispensation of justice through interpretation of the statutes.

It is true that the plaintiff was criminally charged following the information reported by the defendant. But the information about the commission of the offence was investigated by independent machinery which later led for filing of criminal case to the trial court. And the trial court after had heard the matter found the plaintiff guilty with the offence.

In my view the trial court exercised judicial independence in dispensation of justice. The acquittal of the plaintiff by this court similarly proves the good legal system we have in our country that a superior court can watch and correct mistakes done by lower courts, but all these procedures are done judicially and not for the wishes from anyone else.

However, our law of torts derives its foundation from the English common law. That law forms the bedrock of our law of torts, by virtue of the provisions of section 2 (2) of the Judicature and Application of Laws Act, Cap. 358. Fortunately, our courts have already shown the way on how this particular subject of the English law of torts applies in Tanzania.

In **Jeremiah Kamama v Bugomola Mayandi [1983] TLR 123**, the late Chipeta J, laid down the elements that need to be proved for the plaintiff to succeed in a case of malicious prosecution. I can do no better than to follow the same footsteps as done by the distinguished Judge, who elaborately discussed the principles applicable in these cases. He held, inter alia, as follows:

(1) For a suit for 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;

The first question that arises, therefore, is when is one said to be a "prosecutor" for the purpose of a suit for damages for malicious

prosecution? As per law, a person becomes a prosecutor in this regard when he takes steps with a view to setting in motion legal processes for the eventual prosecution of a person whom he alleges has committed a crime. For instance, in this case Jambo tells the police that Erick has stolen her goods and as a result of that, Erick was arrested and charged with the offence of theft. Jambo will be said to have rightly set in motion Erick's prosecution. Jambo therefore, will be said to be a prosecutor in a suit for damages for malicious prosecution (See **Jeremiah Kamama v Bugomola Mayandi – supra, North Mara Gold Mine Limited v. Joseph Weroma Dominic, Civil Appeal No. 299 of 2020** that was persuaded by the case **Yonah Ngassa v. Makowe Ngasa [2006] T.L.R 123, the case of Paul Valentine Mtui and Another v. Bonite Bottlers Limited, Civil Appeal No. 109 of 2014 (unreported)**).

That is not all for a suit of malicious prosecution to stand. The prosecution, however, must have been established as made or done maliciously. What amounts to "malice" in this regard is not easy to define. Chipeta J. in **Jeremiah Kamama** (supra) conceded with the definition given in the English case of **Brown v Hawkes [1891] 2 Q.B. 718**, at page 723, Cave, J. in which he defined malice as some other motive than a desire to bring to justice a person whom he (the accuser) honestly

believes to be guilty. In Halsbury's Laws of England, the term malice is defined 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).

For my part, I prefer the latter definition, qualified to this extent, that the accuser, in addition to spite or ill-will or indirect or improper motives, was not actuated by a genuine desire to bring to justice the person he alleges to be guilty of a crime.

Hence, the legal position according to Chipeta, J, which position I accept as representing the correct position of our law, is that the accuser must have been actuated by spite or ill-will and not by a genuine desire to bring to justice the person he alleges to be guilty of a crime. That is a question of fact, ought to have been well pleaded how apart from a mere acquittal and at appellate level that the defendant's action of mounting his prosecution at the trial court was nothing but actuated with spite or ill-will or indirect or improper motives, not actuated by a genuine desire to bring to justice the person he alleges to be guilty of a crime.

For a criminal case not ending in conviction or conviction quashed by appellate court is not by itself a justification for malicious prosecution. This is because in criminal cases, a charge must be established beyond reasonable doubt. If there are some reasonable doubts then, will benefit the accused person. Thus, being acquitted in a criminal charge perse and at appellate level, unless the full elements of spite or ill-will or indirect or improper motives, not actuated by a genuine desire to bring to justice the person he alleges to be guilty of a crime are clearly pleaded, cannot form basis for the filing of a suit founded on malicious prosecution.

In addition to proving that he was prosecuted and the proceedings ended in his favour, the claimant must also plead establishing that the defendant had no reasonable and probable cause for such prosecution. Hence, the law assumes that not every prosecution which ends in an accused's favour exposes the accuser to a suit for damages for malicious prosecution. The rationale for this position is to protect complainants, police informers and/or (as in this case), public prosecutors and Police investigators from countless suits based on malicious prosecution. This is why, in **Tumaniel v Aisa Issai [1969] H.C.D. n. 280**, Georges CJ (as he then was), found it necessary to explain the reason for the position taken by the law. He put this way:

" When there is reasonable suspicion that an offence has been committed and good grounds for thinking that a particular person is responsible, it is the duty of every citizen to pass on such information... to the police to help them to find the offender. If the police act on such information and arrest anyone then the person who has given the information should not be liable for damages for defamation unless it is plain that he had no good grounds for suspecting the person named and that he was acting spitefully...Similarly there will be cases where the Police take a person into custody for investigation which seems quite reasonable and no steps are taken. Again in such a case the accuser should not be charged unless it can be shown that he deliberately made a false report....(Where) a report to the Police (is) intended to lead to the investigation of a crime...there should be no compensation payable in such case unless the report is shown to be false and prompted by malice "

In the case of **Wilbard Lemunge versus Father Komu and The Registered Trustees of The Diocese of Moshi**, Civil Appeal No. 8 3 of 2016 where the Court of Appeal was persuaded by the decision in the case of **Yonnah Ngasaversus MakoyeNgassa** (supra) that provides

the five elements for malicious prosecution to be established, namely the plaintiff must have been prosecuted, the prosecution must have ended in the favour of the plaintiff, the defendant must have instituted the proceedings against the plaintiff without a reasonable and probable cause, the defendant must have instituted the proceedings against the plaintiff maliciously and the plaintiff must have suffered damages as a result of the prosecution. In addition at page 12 of the said case of **Wilbard Lemunge** provided four factors to be established in order for the defense of reasonable and probable cause to be established which are; *an honest belief of the accuser in the guilt of the accused (plaintiff), such belief must be based on an honest conviction of the existence of circumstances which led the accuser to that conclusion, the belief as to the existence of the circumstance by the accuser, must be based upon reasonable grounds that, such grounds would lead to any fairly cautious person in the accuser's situation to believe so and the circumstance so believed and relied on by the accuser, must be such as to amount to a reasonable ground for belief in the guilt of the accused person.*

Therefore, the fact that the appellant was subsequently acquitted does not necessarily establish that the original complaint was false and malicious: See **Bhoke Chacha v Daniel Misenya [1983] TLR 329 (per Mushi J).**

It must be clearly pleaded establishing that accuser had no reasonable cause and probable cause to mount the said prosecution. He being sales agent of the defendant, was entrusted with the sale of goods in return of money, having defaulted its return, his prosecution is hardly unreasonable or without probable cause.

Since the reason for his appeal being allowed by this court was mainly based on technical ground that the matter ought first to be civilly dealt with and not criminally, cannot be the good basis for the establishment of ill motive as considered by the plaintiff.

As rightly submitted by Mr. John Palamagamba Kabudi counsel for the defendant while making reference to the case of **Geita Gold Mining Limited vs Edwin Peter Mgoo & Others** (Civil Appeal No.67 of 2020) [2023] TZCA 17398 (11 July 2023) 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. See also the case of **Audiface Kibala V. Adili Elipenda and Two Others, Civil Appeal No. 107 of 2012.**

I must therefore conclude that, the 2nd and 3 grounds of preliminary objections hold water and consequently are sustained as the plaintiff's complaint has not disclosed particulars of the said spite or ill-will or indirect or improper motives, not actuated by a genuine desire to bring to justice the

plaintiff, thus cannot form basis for the filing of a suit founded on malicious prosecution. An ill motive in a malicious prosecution case is not established by a mere reporting of criminal complaint at police, but only where the report made is frivolous and false one. None has been clearly pleaded so. Therefore, this case is dismissed with costs for being misconceived and frivolously filed.

It is so ordered.

Right to appeal to any aggrieved party is hereby explained.

DATED at **SHINYANGA** this 13th day of October, 2023.




F. H. MAHIMBALI
JUDGE