IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 78 OF 2023

DEUSDEDITH CHACHA.....APPELLANT

VERSUS

EXIM BANK TANZANIA LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

Date of Last Order: 28/11/2023

Date of Judgment: 11/12/2023

KAFANABO, J.:

This appeal is preferred from the judgment and decree of the district court of Kinondoni (Hon. H.S. Msongo, SRM) dated 29 March 2023 in Civil Case No. 261 of 2021. This appeal was, initially, before my learned brother Hon. Mwanga, J., but was reassigned to me for judgment writing because of the special clearance session programme undertaken by this court.

The facts of the case are straightforward. The appellant was an employee of the respondent as a customer care officer at the respondent's Arusha branch from 2010 to July 2012 when he dropped his employment for personal business. On 20th September 2015, he was arrested by a police officer and later taken to Arusha Central Police where he realized that the respondent

had instituted a complaint accusing him of fraudulent accounting by clerk and stealing by servant an amount of USD 270,000.00 the money which belonged to Ngorongoro Conservation Authority. The appellant was arraigned in the district court of Arusha, charged and prosecuted with various offences. He was, later, convicted and sentenced to imprisonment. The appellant was aggrieved by the decision of the district court and thus appealed to this court, at Arusha, where his Lordship Mwenempazi, J., allowed the appeal, quashed the conviction, and set aside the judgment.

Following the decision setting aside the judgment of the district court of Arusha, the appellant instituted Civil Case No. 261 of 2021 between the parties herein in the district court of Kinondoni. The appellant was claiming for general damages of Tanzania Shillings 500,000,000/=, payment of court interest(sic) of 12% per annum from the date of judgment until full payment of the decretal sum, costs of the suit and any other relief the court may deem fit to grant. The respondent, on his part, disputed the whole claim and prayed for the dismissal of the suit with costs.

The case was heard, and on 29th March 2023, the same was determined by dismissing the appellant's suit with no order as to costs. The appellant was aggrieved by the said decision and thus appealed to this court praying for

orders that; the judgment and decree of the trial court be quashed and set aside, the respondent be ordered to pay general damages as shall be determined by this court, costs of the appeal and the suit in the court below and any other relief as the court may deem fit.

The appellant's memorandum of appeal contains four grounds of appeal as follows:

1. The trial court erred in law and in facts in holding that there was reasonable and probable cause which culminated(sic) the respondent to institute criminal proceedings against the appellant.
2. That the trial court erred in law and in facts to hold in favour of the respondent despite the fact that the respondent failed to call a material witness.
3. That the trial court erred in law and fact for failure to evaluate evidence tendered before it.
4. That the trial magistrate erred in law and fact for denying the appellant general damages despite the fact that there were material facts and testimony which warranted the grant of the general damages.

On 25th September 2023 this court ordered that the appeal be disposed of by way of written submissions. The submissions were duly filed by the

parties, and the parties were duly represented. The appellant was represented by Mr. Dickson Paulo Sanga, learned counsel and the respondent was represented by Messrs Wilson Mukebezi and Caster Lufungulo learned counsels.

As regards 1st ground of appeal, the appellant submitted that for one to succeed in the suit of malicious prosecution he must prove, among other things, that the institution of the criminal proceedings was without reasonable and probable cause. The trial court was satisfied that the criminal proceedings against the appellant were with reasonable and probable cause because the respondent reported the matter to the police after receiving complaints (exhibit D1) from the Ngorongoro Conservation Area Authority (hereinafter referred to as the NCAA).

The appellant submitted that the trial court failed to consider whether the letters of complaint (exhibit D1) were communicated to and received by the respondent. It was the appellant's submission that there was no proof that the respondent received the exhibit D1 and thus it was difficult to conclude that the respondent reported the matter to the police based on exhibit D1. The appellant argued that, since there is no name and signature of the receiver, there is no stamp, and no dispatch attached to exhibit D1, the

respondent reported the matter to the police maliciously. It was also the appellant's view that the respondent's actions in reporting the matter to the police were not prompted by the complaints from the NCAA. Further, the said exhibit D1 did not feature in Criminal Case No. 1258 of 2015.

The appellant also submitted that the trial court was wrong in ruling that there was reasonable and probable cause in reporting the matter to the police based on exhibit D4 (the respondent's internal audit report) which revealed that there were fraudulent activities on the account of NCAA and other accounts. The reason is that the authenticity of the said exhibit D4 is questionable given that it does not bear the name of the author and thus could not be relied upon. The case of **Prucheria John v. Wilbard Wilson and William Wilson, Land Appeal No. 64 of 2019** was cited in support of the submission.

The appellant also submitted that the trial court was wrong in holding that there was reasonable and probable cause based on exhibit D5 (a police investigation report). It was submitted that the police investigation report came as a result of the respondent reporting the matter to the police and thus could not be relied upon by the trial court to rule that there was reasonable and probable cause in reporting the matter to the police.

The appellant also was of the view that since there was no CAG report tendered as evidence and proving loss to the NCAA, and given that the NCAA is a government institution, then there was no justification for the alleged loss of the NCAA. The appellant is of the view that in the absence of the CAG report the respondent was not justified to report the matter to the police.

The respondent, in response to the appellant's submissions, started by submitting, generally, that she identified inconsistencies in the accounts of its banking customers which were caused by unauthorized debits of money from its customers' bank accounts. The inconsistencies were followed by numerous claims from respondent's customers including the NCAA. Thereafter, the respondent conducted an internal investigation which revealed that the complaints by customers were true. The respondent reported the fraud and theft incident to the police who investigated the matter and identified the culprits including the appellant which led to the criminal proceedings against the appellant and others.

In response to the submissions in support of the 1st ground of appeal, the respondent submitted that it was important to establish the key ingredients for the claim of malicious prosecution to stand. As per the law, there are five elements which the appellant must prove cumulatively and the court must

be satisfied that they have been established. The case of **Wilbard Lemunge vs Father Komu & Another (Civil Appeal 8 of 2016) [2018] TZCA 195** (9 October 2018) was cited in support of the submission.

In response to the appellant's specific submissions, the respondent submitted that the respondent did not prosecute the appellant, rather they reported the fraud incident to the police as a matter of law, that is reporting crimes to the police. Further, the report was not made to the police at leisure, it was because the NCAA and other customers complained regarding uncredited amounts to their accounts. The complaints turned out to be true and, initially, it was observed that for the NCAA alone, an amount of USD 270,000.00 had not been credited to the NCAA account.

The police carried out their investigation and pinpointed thirteen persons including the appellant herein, exhibit D5 is relevant. The police and the DPP instituted criminal case No. 1258 of 2015 at the Arusha district court. The respondent was not a party in all criminal proceedings. The respondent submitted that she did not institute any criminal proceedings against the appellant.

The respondent also submitted that reporting a fraud incidence is not wrong under the law and the respondent was duty bound to report the matter. The

case of **Sugar Board of Tanzania vs Ayubu Nyimbi & Others (Civil Appeal 53 of 2013) [2016] TZCA 841** (28 September 2016) was cited in support of the submission.

The respondent submitted that when reporting the fraud incident, she did not mention the name of the appellant, it was the police who carried out the investigation and came up with thirteen names including that of the appellant. Moreover, the respondent was not part of the investigation process and the respondent did not institute criminal proceedings through private prosecution machinery, thus the appellant's complaint is completely flawed. The case of **Mafumba Jilawaji vs Budu Mnyagolya [1992] TLR 310** was cited in support of the submission.

In addition, the respondent submitted that it was the duty of the appellant to prove that the prosecution and/or institution of criminal proceedings against him were undertaken without reasonable and probable cause; citing the case of **Geita Gold Mining Limited vs Edwin Peter Mgoo & Others (Civil Appeal No.67 of 2020) [2023] TZCA 17398** (11 July 2023).

The respondent also submitted that the issue of whether exhibit D1 was received or not is irrelevant at the moment because the fraud incident was

supposed to be reported to the police by the appellant even without a complaint from the NCAA.

The respondent submitted that the appellant failed to prove that the respondent reported the issue of fraud to the police maliciously, or that had no reasonable and probable cause in reporting the matter. The cases of **Edwin Peter Mgoo (supra) and Issa Kasim Issa vs Thabit Bianga (Civil Appeal 164 of 2019) [2022] TZHC 978** (8 April 2022) were cited in support of the submission.

The court was also referred to section 110(1) of the **Evidence Act, Cap. 6. R.E. 2019** on the argument that the appellant failed to prove that the respondent reported the matter maliciously. The respondent also argued that the way the appellant argued this appeal, it is clear that he had shifted the burden of proving the case to the respondent instead of proving his case. Cases of **Geita Gold Mining Limited vs Twalib Ismail & Others (Civil Appeal 103 of 2019) [2021] TZCA 3526** (3 December 2021), **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama (Civil Appeal 305 of 2020) [2021] TZCA 699**, (29 November 2021) and **Registered Trustees of Joy in The Harvest vs Hamza K. Sungura (Civil Appeal**

149 of 2017) [2021] TZCA 139 (28 April 2021) were cited by the respondent supporting his submission.

Furthermore, the respondent submitted that the trial court was entitled to rely on exhibit D5 because it is the document that proves that criminal proceedings were instituted after the police investigation had been conducted lawfully and the appellant did not question its veracity in the trial court.

As regards the second ground of appeal, the appellant submitted that exhibits D1 and D2 were tendered by persons who did not make them, and the authors were not called as witnesses. The appellant considered the makers of the said documents as material witnesses and the trial court should have drawn adverse inference against the respondent for failure to call them. The case of **Hemed Said v. Mohamed Mbilu [1984] T.L.R. 113** was cited in support of the submission.

The respondent on her part made it clear that exhibits D1 and D2 were tendered by DW1 and DW2 who were competent witnesses as they were responsible for the reconciliation of the NCAA accounts, they discovered the fraud and reported the same to the respondent. The makers of the documents simply signed the same because of their positions and rules in

the NCAA. The court was referred to section 127(1) of the **Evidence Act, Cap. 6 R.E. 2019,** and the case of **DPP v. Mirzai Pirbakhshi @Hadji &3 Others, Criminal Appeal No. 293 of 2016**.

As regards the third ground of appeal, the appellant submitted that the court has to evaluate the evidence before it, citing the case of **Bugumisa and Others v. Tibebaga [2004] 2 E.A. 17**. It was the appellant's submission that the court had misconstrued material evidence which made the court reach a wrong conclusion that the respondent had a reasonable and probable cause in instituting criminal proceedings.

The respondent reiterated her submissions made in respect of the 1st ground of appeal. Moreover, the respondent submitted that the trial court did not misconstrue the evidence before it. It was submitted that exhibits D1, D2, D3, D4, and D5 were properly tendered, admitted, and considered by the trial court.

In respect of the fourth ground of appeal, the appellant submitted that general damages are awarded at the discretion of the court and the court is required to act judiciously in awarding the same. The case of **Alfred Fundi vs Geled Mango & Others (Civil Appeal 49 of 2017) [2019] TZCA 50** (5 April 2019) was cited in support of the submission. The appellant

submitted further that, he lost opportunities whilst in jail, and he suffered humiliation and suppression. His reputation and credibility were affected. The court was referred to exhibits P1 and P2 as evidence of the appellant's imprisonment.

The respondent submitted that the appellant did not prove the claim of malicious prosecution to be entitled to the award of damages. It was also submitted that the appellant did not itemize or prove the loss suffered to justify entitlement of damages.

The parties have made their submissions for and against the appeal, it is this court's turn to determine the merits of the relevant grounds of appeal in the light of the submissions made. Since ground one of the appeal cannot be determined without analyzing evidence on record, and given that grounds two and three of the appeal are touching evidence, the said grounds will be considered and determined together.

In respect of the first ground of appeal, the appellant faults the decision of the trial court in holding that there was reasonable and probable cause for the respondent to institute criminal proceedings against the appellant. The appellant submitted that the trial court failed to consider whether the letters of complaint (exhibit D1) were communicated to and received by the

respondent from NCAA. It was the appellant's view that since there is no proof that exhibit D1 was received by the respondent then her report to the police was malicious. The respondent was of the opposite view that whether exhibit D1 was received or not is irrelevant because the fraud incident was supposed to be reported to the police by the appellant even without a complaint from the NCAA.

Another concern was expressed as regards exhibit D4, which the appellant questioned its authenticity because it does not bear the name of the maker or author and thus the appellant was of the view that it was wrong for the trial court to rely upon the said exhibit D4 in finding that the respondent had a reasonable and probable cause in reporting the matter to the police.

The trial court was also faulted in relying on exhibit D5 because it was an investigation report that came after the fraud report was made to the police, and thus it is irrelevant with regards to the institution of criminal proceedings. The respondent was of the view that the appellant's submission is a misconception because the criminal proceedings were instituted after the completion of the investigation whose report came up with names of the suspects.

According to the evidence on record, the complaints were presented by the NCAA (exhibits D1 and D2) and other customers. This compelled the respondent to initiate an internal investigation conducted by the respondent's internal audit department as per exhibit D4. The findings in exhibit D4 revealed that there was fraud involving the NCAA account and accounts of other customers (see attachments 1 and 2 to exhibit D4).

Given the situation, the respondent had no choice but to report the matter to the police. The police conducted their investigation and prepared an investigation report, exhibit D5. It is from this police investigation report it was determined who were the suspects, and criminal proceedings were instituted based on the said report.

This court, therefore, agrees with the respondent that the report regarding fraud laid bare by their internal investigation had to be made to the police, one way or the other. That is whether there was a complaint from the NCAA or any other customer, or where there was no complaint at all from any customer. Therefore, the proof of receipt of exhibit D1 by the respondent, as demanded by the appellant, is of no value insofar as proving reasonable and probable cause in reporting fraud or theft.

Further, exhibits D1 and D2 were tendered by the respondent and admitted by the court without any objection by the appellant who was duly represented by an advocate.

As regards the said exhibit D4, this court, with respect, finds the submission of the appellant that exhibit D4 has not been signed and the author is unknown and misleading. This is because, exhibit D4 is a letter dated 13/12/2014 signed by George Binde, the respondent's chief internal auditor. The letter had three attachments including 'Attachment 1', a report on the NCAA claims, and the author of the same had expressed readiness to provide additional evidence and clarifications as would be required. The court also does not find merits in the appellant's argument in this aspect.

This court also will not fault the trial court for relying on exhibit D5 in finding that there was reasonable and probable cause in instituting criminal proceedings. It should be noted that what the respondent did was simply report the fraud to the police who investigated the matter and came up with their findings. If the police finding were that there was no fraud, then criminal proceedings would not have been instituted by the republic. In the case of **Sugar Board of Tanzania vs Ayubu Nyimbi & Others (Civil Appeal 53 of 2013) [2016] TZCA 841** the Court of Appeal held that:

> *"The* ***appellant is implicated merely because she reported the loss of sugar at SUDECO godowns to police****. The police then carried out 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****.'*

Since the respondent simply reported the matter to the police regarding fraud committed and the investigation was conducted by the relevant authority no malice can be imputed on the respondent. It is also important to point out that after the fraud incident was reported to the police, the investigation was, then, conducted. The investigation report revealed that thirteen staff and/or former employees of the respondent, including the appellant herein, together with other persons, were implicated in the commission of various offences.

It is this court's view that the situation would have been different, and malice could be inferred against the respondent, if the appellant were the only party prosecuted, arbitrarily and without good reason, amongst the thirteen

identified staff of the respondent. However, the evidence is to the effect that the investigation was indiscriminately conducted, and, as earlier stated, thirteen employees and two other persons were implicated and all were arraigned in court and prosecuted. Therefore, the institution of criminal proceedings was done innocently with reasonable and probable cause.

Moreover, the court agrees with the respondent that, in establishing a claim of malicious prosecution there are five elements which the claimant, the appellant herein, must establish to prove the claim of malicious prosecution. In the case of **Wilbard Lemunge vs Father Komu & Another (Civil Appeal 8 of 2016) [2018] TZCA 195** (9 October 2018) the court of appeal held that:

> *"... for the claim of damages arising from malicious prosecution to stand,* ***there must exist cumulatively five elements namely,*** *one, that the* ***plaintiff must have been prosecuted****; two, the* ***prosecution must have ended in the favour of the plaintiff****; three, the* ***defendant must have instituted the proceedings against the plaintiff without reasonable and probable cause****; four,* ***the defendant must have instituted the proceedings against the plaintiff maliciously****; and five;* ***the plaintiff must have suffered damages as a result of the prosecution****."*

This court is bound to follow the above directive unambiguously given by the Court of Appeal. In the present case, it is noted that the appellant was prosecuted and the prosecution ended in his favour on the appeal stage; that is the first and second elements are met. However, there is neither proof that the respondent instituted proceedings without reasonable and probable cause, nor that the proceedings were instituted maliciously as alleged by the appellant.

Given the incidence of fraud in the respondent's business, she was duty-bound to give information to the relevant authority as required by law. Section 7 of the **Criminal Procedure Act, Cap. 20 R.E. 2019** provides that:

> *7.— (1)* ***Every person who is or becomes aware-***
>
> ***(a) of the commission of or the intention of any other person to commit any offence punishable under the Penal Code;*** *or*
>
> *(b) of any sudden or unnatural death or death by violence or of any death under suspicious circumstances or of the body of any person being found dead without it being known how that person died,*

shall forthwith give information to a police officer or to a person in authority in the locality who shall convey the information to the officer in charge of the nearest police station.

(2) ***No criminal or civil proceedings shall be entertained by any court against any person for damages resulting from any information given by him in pursuance of subsection (1).***

Therefore, in the light of the above provision, the respondent, by giving information to the police, was implementing a statutory duty of giving information to the police regarding the commission of the crime. The law requires information to be given on becoming aware of the commission of the offence or intention to commit the offence.

Moreover, under section 3 of the **Anti-Money Laundering Act [CAP. 423 R.E 2019]** the respondent is recognized by the law as a reporting person. Additionally, under section 17(1) of the said Act, the respondent is required to report to the **Financial Intelligence Unit** where she suspects or has grounds to suspect that, funds or property are proceeds of crime, or are related or linked to or are to be used for commission or continuation of a predicate offence or has knowledge of a fact or an activity that may be an

indication of money laundering or predicate offence. Therefore, the respondent reported the matter as per the requirement of the law and not driven by ill will or motive.

In the case of **Sugar Board of Tanzania vs Ayubu Nyimbi & Others (Civil Appeal 53 of 2013) [2016] TZCA 841** (supra) the Court of Appeal made the following observation:

> *"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 to report 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."*

It is thus clear that the respondent had an obligation to report the crime within her knowledge. The respondent could not mute and pretend that nothing has happened in the customers' accounts simply because there is

no complaint made by the customer as the appellant would want this court to believe.

Also under subsection 2 of section 7 of the **Criminal Procedure Act** (supra), the law prohibits criminal or civil proceedings to be entertained by courts on claims of damages because of the information given in compliance with section 7(1).

In the said case of **Wilbard Lemunge** (supra), it was held that:

> *'We are alive as to who becomes a prosecutor, when the issue of malicious prosecution comes in as it was held in Jeremiah Kamana's case (supra) that, is a person who takes steps with a view of setting in motion legal processes for the eventual prosecution of the plaintiff.* ***While the first respondent was indeed the one who set in motion the machinery of law enforcement leading to the arrest and prosecution of the appellant, we note from the scenario indicated above that, the act which was done by the first respondent, would have been done by any other ordinary person in the ordinary course of life. In that regard, we hold that the first respondent had all the reasons to do what he did. There was no way in which under the circumstances, it could be said that, in doing what he did, the first respondent had no***

> ***reasonable and probable cause***. *To that end we hold that the third element did not exist in the appellant's suit.*

Therefore, for purposes of reporting the crime to the relevant authorities, this court is of the view that the respondent acted within the realm of the law. Exhibits D1, D2, D4, and D5 claimed to have been relied upon by the respondent in reporting the fraud to the police are simply a result of the fraud incidence committed on the respondent's customers' accounts. The said exhibits did not create fraud or inconsistencies in the relevant accounts, exhibits D1 and D2 (all of which are letters of complaint) could only sound an alarm that the fraudsters have stricken. Likewise, the fraud and inconsistencies in the customers' accounts could only be verified and confirmed by auditing the respondent's financial and business systems which was, undoubtedly, done by the respondent as indicated in exhibits D3, D4, and D6.

Farther, exhibits D3 and D6 demonstrate that the respondent's report to the police was not a mere whim or impulse, as the respondent was compelled to comply with the requirements of **the Bank of Tanzania (Financial Consumer Protection) Regulations, 2019**. Regulation 35 of the said regulations provides that:

'Every financial service provider shall-

(a) ***be liable for the consumers' loss incurred through fraud, misappropriation, or misuse involving consumers' assets held, administered, or controlled by the financial service provider;***

(b) take disciplinary action against employees involved in fraud, misappropriation, and misuse of consumers' assets and report to the Bank;

(c) ***promptly refund a consumer for the actual amount lost due to fraud, misappropriation, and misuse of consumers' assets****, unless proved that the loss occurred due to consumer's negligence or fraudulent behavior;*

Exhibits D3 and D6 show that the respondent took responsibility for the loss suffered by the customer and the customer was refunded the amount not remitted to her account and/or unlawfully debited from the said account. This, albeit came after the report had been made to the police, buttresses the respondent's argument that the report, to the police, was made with reasonable and probable cause.

It follows that, since the appellant is the one claiming that there was no reasonable and probable cause in reporting the matter to the police, he is the one required to prove the allegation in terms of section 110(1) of the **Evidence Act, Cap. 6 R.E. 2019**.

Besides, in the case of **Geita Gold Mining Limited vs Edwin Peter Mgoo & Others (Civil Appeal No.67 of 2020) [2023] TZCA 17398** the Court of Appeal held that:

> *'In the case of **James Funke Ngwagilo v. The Attorney General [2004] T.L.R. 161**, this Court is on record as having held that, **in 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**. In that case, we also reminded the legal fraternity of the requirement that, in such an action, **the plaintiff is saddled with a burden to prove the absence of reasonable and probable cause for the prosecution** which is a difficult task as the plaintiff has to prove a negative."*

Given the evidence on record, the appellant has failed to prove that the criminal proceedings were initiated maliciously. The appellant does not dispute the fact that fraud had occurred when he was an employee of the

respondent. After the investigation, the appellant was earmarked as one of the persons involved in the commission of the offences. All these make it clear that the police were justified in considering the appellant a suspect.

It is also clear that the acquittal of the appellant in a criminal case is not sufficient to prove that the proceedings were instituted without reasonable and probable cause, taking into account that the standard of proof in criminal cases is beyond reasonable doubt. In the case of **Geita Gold Mining Limited vs Edwin Peter Mgoo** (supra), it was held that:

> *'Similarly, it does not matter that the respondents were acquitted of all the three offences with which they were charged. In this connection, we again wish to state as we did in the unreported case of* ***Audiface Kibala v. Adili Elipenda and Two Others, Civil Appeal No. 107 of 2012*** *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.'***

The same position was taken by this court in the case of **Issa Kasim Issa vs Thabit Bianga (Civil Appeal 164 of 2019) [2022] TZHC 978** (8 April 2022) where it held that:

> ".....the fact that the **criminal proceedings ended in the respondent's favour** and that the appellant's failure to exhibit his grievances against the said decision is not enough to conclude that the appellant acted maliciously.".

Given the authorities above, in the present case, the appellant was supposed to prove the fact that the respondent instituted proceedings with malice, and without reasonable and probable cause as he alleged. However, the appellant, as rightly argued by the respondent, has shifted the burden to the respondent requiring proof that she instituted proceedings with reasonable and probable cause, instead of the appellant proving the alleged respondent's malice first.

For instance, the appellant suggested that the CAG report on the NCAA's financial affairs should have been part of the respondent's evidence whilst the money in question was lost in the respondent's custody. This was the depth of the applicant's craving hounding the respondent to prove that her report to the police was not driven by malice. This is deplorable in our jurisdiction.

Moreover, the appellant seemed to have forgotten that the CAG report is a public document. Section 39 (1) of the **Public Audit Act, Cap. 418 R.E. 2021** provides that:

> ***'All audit reports issued by the Controller and Auditor General shall be public documents after being tabled in the National Assembly.'***

In light of the above provision, if the appellant had a firm view that the CAG's report on NCAA's accounts was key in his case, he was at liberty to produce the same before the trial court as evidence to prove his allegation that there was no loss of money in the NCAA's accounts. However, he did not walk the talk, instead, he kept asking why the respondent did not tender the same in proving loss.

In the case of **Geita Gold Mining Limited vs Twalib Ismail & Others (Civil Appeal 103 of 2019) [2021] TZCA 3526** (3 December 2021) the Court of Appeal held that:

> *'There was no attempt by the appellant to prove that the said Compound street is within the area in the Special Mining Licence, instead in his submissions earlier reproduced, Dr. Mwaisondola has blamed the respondents for not leading evidence to prove that they were outside the area.* ***This is a suggestion to twist the burdens***

of proof, which we have consistently held unacceptable. *For instance, in* ***Paulina Samson Ndawavya vs Theresia Thomas Madaha, Civil Appeal No. 45 of 2017*** *(unreported) we said: -*

> ***"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case"***

In the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal 45 of 2017) [2019] TZCA 453** (11 December 2019) the Court of Appeal held that:

> *"...**the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.** It is an ancient rule founded on the consideration of good sense and should not be departed from without strong reason.... **Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine whether the person upon whom the burden lies has been able to discharge his burden.** Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party.... "*

It was further held that:

> **In our view, since the burden of proof was on the appellant rather than the respondent, unless and until the former had discharged hers, the credibility of the respondent was irrelevant.**

In light of the above, it is this court's view that the report to the police which was made by the respondent, and the initiation of criminal proceedings was done with reasonable and probable cause. The appellant has failed to prove that the same was actuated by malice as alleged or at all. The court has also found that the evidence was properly tendered and evaluated by the trial court. Therefore, grounds one, two, and three of the appeal have no merits.

Since the fourth ground of appeal depends on proving that the criminal proceedings were instituted maliciously, which the appellant has failed to prove, the same has no legs upon which to stand and thus crumbles.

Under the circumstances, this appeal is dismissed for want of merits. The appellant shall bear the costs of this appeal.

It is so ordered.

Dated, signed, and sealed at Dar es Salaam this 11th day of December, 2023.

K. I. KAFANABO

JUDGE

Judgment delivered in the presence of Ms. Caster Lufungulo, Advocate holding brief of Mr. Dickson Sanga, Advocate for the appellant, and in the presence of Ms. Caster Lufungulo Advocate for the respondent.

K. I. KAFANABO

JUDGE

11/12/2023