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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 61 OF 2003

ALLY R. MHANDO . . . . . PLAINTIFF

VERSUS

1. **ATTORNEY GENERAL**
2. **INSPECTOR GENERAL OF POLICE . . DEFENDANTS**

Date of last order – 15/5/2007
Date of Judgement – 4/7/2007

JUDGMENT

Mlay, J.

The plaintiff filed a suit against the ATTORNEY GENERAL and the INSPECTOR GENERAL OF POLICE, alleging that he was wrongfully arrested, detained and prosecuted by the police. As a consequence the plaintiff is claiming specific and general damages, plus costs of the suit. The defendants filed a Written Statement of Defence which was subsequently replaced by an amended Written Statement of Defence, which was accompanied by a Notice of Preliminary Objecion. At some stage the Defendants also wrote a written to the Registrar, to abandon the preliminary objection that the suit was time barred.

The following issues were framed.

1. *Whether the plaintiff was unlawfully arrested and detained.*

2. *Whether the plaintiff was maliciously prosecuted.*

3. *Whether the prosecution was without reasonable and probable cause.*

4. *Whether prosecution terminated in the plaintiff favour.*

5. *Whether the plaintiff suffered any loss by reason of the detention and prosecution.*

6. *What reliefs the parties are entitled to.*

The plaintiff was represented by Mr. Koga learned Advocate and at the actual hearing, the defendants were represented by Mr. Senguji, learned State Attorney. Initially, Mr. Koga had proposed to call three witnesses but when the hearing took place, Mr. Koga closed the plaintiffs case after the testimony of the plaintiff as the sole witness.

The plaintiff ALI RAMADHANI, MHANDO led by Mr. Koga told this court as follows:

I live at Kijitonyama Kisiwani kwa Ali Maua. I am self employed in making brooms. I know the Defendants. The 1st is the Attorney General and the 2nd is the Inspector General of Police. I am claiming from the Defendants the sum of shs.18 million on account of the loss which I suffered while I was in prison. I am also claiming the sum of shs.20 million from the suffering which I sustained from the time I was arrested to the time I was imprisoned. I had not committed any offence. When I was arrested at home I was not told anything but when I got to the police station I was informed that I was a robber. They told me that I had stolen a motor vehicle while using weapons. I was arrested on 1/7/1999. I was detained in custody for 8 days and on the 9th day I was sent to court. After being arrested I was sent to the police station. I stayed for 8 days and I was photographed and finger prints taken. In court I was charged in Temeke District Court Criminal Case No. 302 of 1999. The case was not heard. The case was dismissed under section 225 of the Criminal Procedure Act 1984. I was discharged and later arrested again. I

was arrested on the same day as I was leaving the court. I was sent again to Chang'ombe Police Station. On the following day I was again sent to Temeke District Court. I was charged in Criminal Case No. 516 of 1999. I was charged with stealing a motor vehicle using a pistol. The case was heard and I was discharged on a ruling of no case to answer. I have records of the court to prove what I have said. The records which I have are the charge sheet of Criminal Case No. 302 of 1999, the charge sheet of Criminal Case No. 516 of 1999 and the ruling.

After an adjournment to enable the plaintiff to obtain the documents, the plaintiff produced the charge sheet in Criminal Case No. 302 of 1999 as exhibit P1. Exibit P1 shows that three accused persons including ALLY RAMADHANI MHANDO as the 3rd accused, were charged with Robbery contrary to sections 285 and 286 of the Penal Code. The particulars of the offence state as follows:

> *"SALUM SENA MILANGO @ SAKABETI, HAMADA SAID MAKELA @ HAMADA and ALLY RAMADHANI MHANDO are jointly and together charged that on 9th day of May, 1999*

at about 19.00 hours along Tazara area within Temeke District in Dar es Salaam region did rob one motor vehicle Reg. No. TZG 7262 chaser valued at Tshs.4,000,000/= the property of one OMARY MAGENI and immediately before such stealing did threaten to shoot with pistol one OMARY MAGENI in order to obtain the said property.

The charge sheet is dated 9/7/1999. The plaintiff also produced a copy of certified proceedings of Criminal Case No. 303 which took place on 6/10/1999 as exhibit P2. the record of proceedings is as follows:

"6/10/1999

Coram: Nzota – DM

P.P. Insp. Chambu

C.C. Mposi

Acc.

Dr. Safari for 3rd accused.

Pros: *I have no witness.*

Dr. Safari: *I submit that the case is under section 225 (5) of CPA. If no court is filed then the matter be dismissed.*

Pros: *No do not have court of adjourned (sic).*

Court: *60 days has elapsed since 9/9/1999 and no court has been filed (sic). I have no alternative only to dismiss the charge under section 225 (5) of CPA. Accused discharged".*

The plaintiff further produced the charge sheet for Criminal Case No. 516 of 1999 in which five (5) accused persons, including the Appellant ALLY s/o RAMADHANI @ MHANDO as 3rd accused, are charged within the offence of Armed Robbery c/s 285 and 286 of the Penal Code, Cap. 16. the particulars of the offence allege as follows:

"Salum s/o Sena Miland @ Sakabert, Hamadi s/o Saidi @ Makela @ Hamada, ***Ally s/o Ramadhani @ Mhando,*** *Tomalau s/o Hassan @ Mshane and Anthony s/o angelus @ Daluwesh @ Abdallah s/o Angelus @ Saluwesh are jointly charged that on the 9th*

day of May, 1999 at about 19.00 hrs along TAZARA area within Temeke District in Dar es Salaam region did rob one motor vehicle reg. No. TZG 7262 chassen valued at Tshs.4,000,000/= the property of one OMARY s/o MGENI and immediately before standing did threaten to shoot with a pistol one OMARY s/o MBENI in order to obtain the said property".

The charge sheet is dated 7/10/1999. Finally the plaintiff produced a certified copy of the ruling in Criminal Case No. 516 of 1999, as exhibit P4. In the ruling which is dated 11/4/2000 the trial magistrate stated:

"RULING

This is ruling whether the prosecution has made their case against the accused persons, sufficiently to make them make their defence.

The evidence adduced by four prosecution witnesses has established a prima facie case against 1, 2, 4 and 5 accused person, are therefore called to (illegible) their defence, ***3rd accused*** *has no case to answer is (illegible) u/s 230 of CPA"*

The ruling relates to five accused persons who are those charged in exhibit P.3 and the 3rd accused who was apparently acquitted under section 230 of the Criminal Procedure Act, is ALLY s/o RAMADHANI @ MHANDO, the plaintiff in this case.

The plaintiff was cross examined by Mr. Senguji ad also re-examined by Mr. Koga. Mr. Koga then decided to close the case for the plaintiff and the defence hearing was set to take place on 15/5/2007. On the date set for hearing the defence evidence, the defendants did not enter appearance while being well aware of the hearing date, which was set in the presence of Mr. Senguji, learned State Attorney. Mr. koga told this court that the defendants were absent without any communication to the court. He prayed for a

date of judgment based on the evidence on record. Order XVII rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2002 provides as follows:

> *" 3. While any party to a suit to whom time has been granted puts to produce his evidence, or to cause the attendance of his witnesses, or to perform other act necessary to further progress of this suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith"*

Mr. Senguji learned State Attorney had prayed for a date for defence hearing and the hearing had been fixed to take place on 15/5/2007. Since the defence had been given time to bring their witnesses and had not done so, this court granted Mr. Kogas prayer and proceeded to fix this date of judgment.

As stated earlier on in this judgment, the plaintiffs suit is based on alleged wrongful arrest, detention and prosecution. The matters complained of constitute in the law of tort, "false imprisonment" and "malicious prosecution" I propose to begin with the tort of malicious

prosecution which arises from the prosecution of the plaintiff in Temeke District Court Criminal Case No. 302 of 1999 as shown in exhibit P1 and P2 and in Criminal Case No. 516 of 1999, as shown in exhibits P3 and P4.

In order to succeed, the plaintiff has to prove not only that he suffered damage, but also that:

(a) the defendants prosecuted him

(b) the prosecution ended in the plaintiffs favour

(c) the prosecution lacks reasonable and probable cause and

(d) that the defendant acted maliciously.

It is trite law that damage to the plaintiffs fame, is sufficient to constitute damage for the purpose of the tort of malicious prosecution and "a moral **stigma will mentally attach where the law visits** an offence with imprisonment" [See WNFIELD and JOLOWICZ ON TORT 13th Edition Page 544]. Since the plaintiff was charged with Armed Robbery which is punishable by a long term of

imprisonment, an inference of damage to the fame of the plaintiff, can be made. It remains to show if the four ingredients of malicious prosecution have been proved.

On the basis of the charge sheets exhibit P1 and P3, there is no dispute that the plaintiff was prosecuted by the police in Temeke District Court, first, in Criminal Case No. 302 of 1999 and subsequently in Criminal Case No. 516 of 1999. the first ingredient that the plaintiff was prosecuted by the Defendants has therefore been proved. Whether the prosecution terminated in favour of the plaintiff, has also been proved by exhibit P2 and P3 which are orders of discharge under section 225 (5) and of acquittal under section 230, all of the Criminal Procedure Act, Cap. 20 R.E. 2002, respectively.

We are left with two ingredients.

One is whether the prosecution lacked reasonable and probable cause.

The concept of a reasonable and probable cause, is not without difficulty to define but I think the definition given by Dixon J, as he

then was, in Commonwealth Life Assurance Society Ltd Vs. Brain (1935) 53 CLR 343 at 382 is the most helpful. His Lordship was of the view that, the prosecution must believed that **"the probability of the accuseds guilt is such that upon general grounds of justice a charge against him is warranted"**. The plaintiff has to show that the defendants did not have such a belief. In the evidence adduced by the plaintiff, he has asserted that he was arrested at home and that he had not committed the offence charged and he produced two orders of the trial court in each of the two criminal cases, to show that he was discharged in one and acquitted in the other. This evidence does not prove that in arresting and charging the plaintiff with the offence of armed robbery, the police did not believe the probability of the accused's guilty to be such that **"in general grounds of justice a charge against him is warranted"**. The mere fact that the plaintiff was discharged in the first case is not such proof. At any rate, in that case the plaintiff was discharged under section 225 (5) of the Criminal Procedure Act, because sixty days had lapsed without a certificate being filed to warrant a further adjournment. The provisions of section 225 (5) allow the police to recharge the plaintiff with the same offence, which

is what the police did in Criminal Case No. 516 of 1999. As for the evidence that the plaintiff was acquitted on a ruling of no case to answer under section 230 of the Criminal Procedure Act, it is not also proof that the police acted without reasonable and probable cause. On the basis of the evidence offered by he plaintiff on whom the burden of proof on the balance of probability lies, he has failed to prove that the defendant prosecuted him without a reasonable and probable cause. The proceedings containing the evidence in Criminal Case No. 516 of 1999, could have assisted the plaintiff's case and also to the court to determine the matter, but the plaintiff did not produce the same. All the same, one ingredient of the tort of malicious prosecution was not proved.

The last ingredient of the tort of malicious prosecution, is whether the defendants acted maliciously. Like the concept of lack of reasonable and probable cause, the concept of malice is not easy to define but it has been suggested that **"malice exists unless the predominant wish of the accuser is to vindicate the law"** [See STEVENS VS. MIDLAND COUNTIES/RY (1854) 10 Ex. 352, 356 quoted in Winfield and Jollowic on Tort P.350]. The question is

whether there is any evidence by the plaintiff to show that the police acted or prosecuted him for reasons other than to enforce the law of robbery. No such evidence has been offered. Infact when being cross examined on this subject by Mr. Senguji learned State Attorney, the plaintiff stated:

> *"I had no quarrel with the police. The police had no evil intention on me. I do not know why the police arrested me."*

Since there was no evidence that the police acted maliciously in prosecuting the plaintiff and the plaintiff conceded that the police ***"had no evil intention"*** on him, the fourth ingredient of the tort of malicious prosecution relating to malice, has not been proved. As the result, two important ingredients of the tort of malicious prosecution which are, the lack of a reasonable and probable cause and the existence of malice, having not been proved, the action for malicious prosecution fails.

Coming back to the claim relating to false imprisonment, the plaintiffs evidence is that he was at Chang'ombe police station for 8 days and charged in court in Criminal Case No. 302 of 1999. The

powers of arrest and detention have been conferred upon the police under sections 14 and 32 respectively, of the Criminal Procedure Act, Cap. 20 R.E. 2002. Section 32 (1) provides in part, as follows:

> *32 – (1) when any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which he is brought may in any case, and shall if it does not appear practicable to bring him before an appropriate court within twenty four hours after he was so taken into custody, inquire into the case and,* ***unless the offence appears to that officer to be a serious nature,*** *release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a court at a time and place to be named in that bond, but* ***where he is retained in custody he***

shall be brought before a court as soon as possible".

The plaintiff was arrested on a charge of armed robbery, which is a serious offence and in terms of section 32 (1) quoted above, the police have powers to retain the suspect in custody and to bring him to court as soon as is practicable. In addition, section 148 (5) of the Criminal Procedure Act prevents the granting of bail by the police and also by the courts of law, to suspects and accused persons in case of the offence of armed robbery. In the circumstances of this case this is no evidence to prove that the plaintiff was wrongfully arrested or falsely imprisoned in circumstances under constitute the tort of false imprisonment.

In the circumstances and for reasons given above issues no 1, 2 and 3 are answered in the negative and as the result, although the criminal proceedings terminated in the plaintiffs favour, since the other ingredients of the tort of malicious prosecution were not proved, as well as the tort of false imprisonment, the suit is dismissed in its entirety.

Each party to bear own costs.

J.I. Mlay

JUDGE

Delivered in the absence of both parties, the plaintiffs counsel Mr. Koga being aware of the date of judgment, this 4th day of July, 2007.

J.I. Mlay

JUDGE

04/07/2007