IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

RM. CIVIL APPEAL NO. 11 OF 2020

(C/O RM Civil Case No. 1 of 2019 Sumbawanga Resident Magistrate Court)

KILANGALA MISSION..... 1st APPELLANT

CRISPIN SAANANE ..... 2nd APPELLANT

VERSUS

JOSEPH KAFAIYA ..... RESPONDENT

Date: 27/07/2021 & 27/08/2021

JUDGMENT

Nkwabi, J.:

The respondent, namely, Joseph Kafaiya was successful in his claim for general damages at the tune of T.shs 100,000,000/=. He was also awarded interest at Court rate of 12 per annum on decretal sum from the date of the judgment to date of full payment and costs were ordered to follow the event. The Respondent sued the Appellants in the Resident Magistrates Court of Sumbawanga for damages for malicious prosecution. Among other reliefs he prayed for are; aggravated damages, special damages and any other reliefs the court may deem fit and just to grant, which however he was denied.

At the hearing date, issues were framed by the court as follows:

1. Whether defendants prosecuted the plaintiff.
2. Whether the prosecution ended in favour of the plaintiff.
3. Whether the prosecution was prompted by malice, and
4. What reliefs are parties entitled to?

According to the respondent, in his testimony in the trial court, he was arrested on 24/08/2018 by a police officer alleging he had damaged water infrastructure at Kilangala Mission, the property of the mission. He was locked up in police cell at the police station for about five days and then charged in Nkasi District Court with malicious damage to property worth more than T.shs 9,000,000/=. He was discharged for failure to proceed with hearing and recharged. He was re-arrested and locked up for 3 days. He was acquitted on 21/03/2019. He suffered psychologically and his reputation destroyed. He claimed for damages for malicious prosecution.

On the appellants, the 2nd appellant testified he is a Human Resources Officer at the Mission. On 14/08/2018 the water tank, the property of the 1st appellant was destroyed by unknown person. He reported to the police on

the recommendation of the executive committee. In his statement he named the respondent as a suspect due to land dispute, respondent once cut the water infrastructure and connected his pipes without the consent of the 1st appellant. He denied to have instituted the criminal case against the respondent maliciously. He said the police investigated the matter and were fully satisfied that the respondent committed the offence. He reported the offence as a good and responsible citizen.

The trial court decided in favour of the respondent. Affronted with the decision of the trial court, the appellants appealed to this court. The appellants lodged a petition of appeal to this court which has six reasons of appeal as itemized hereunder:

1. *That the trial court erred in law and fact in holding that there was proof of malice on part of the appellants in institution of criminal case No.118 and 184 of 2018 in the District Court of Nkasi.*
2. *That the trial court erred in law and fact in holding that there was no probable cause on part of the appellant to suspect the respondent and report him to police station for malicious damage to property.*

3. *That the Honourable trial Magistrate erred in law and to rely on exhibits which its contents were not read out upon its admission in court.*
4. *The trial court erred in law and fact to relay on charge sheet which had no any evidential value.*
5. *The trial court erroneously estimated damages hence awarded the respondent general damages* which are not justifiable.
6. *That the trial court erroneously ordered the 2nd appellant to be condemned for general damages for the acts which were done in course of his employer's (1st appellant) employment.*

Then the appellants prayed for orders as follows:

(i) *The appeal be allowed.*

(ii) *The judgment of the trial Court be quashed and all its orders be set aside.*

(iii) *Costs of this appeal be borne by the respondent.*

(iv) *Any other order that this Court deems proper and just to grant.*

The appeal was argued by way of written submissions. Mr. Mathias Budodi, learned advocate adeptly drew and file the written submissions in favour of the appeal. Mr. B.S. Chambi, learned counsel proficiently drew and filed the reply to the written submission opposing the appeal. I will deliberate the grounds of appeal as per the submissions of both counsel.

I take off with the 1st grievance of appeal which is *that the trial court erred in law and fact in holding that there was proof of malice on part of the appellant in institution of criminal case No.118 and 184 of 2018 in the District Court of Nkasi.*

In support of this ground of appeal, Mr. Budodi argued that in criminal cases, the victim is merely a witness. It was the police who re-instituted the case. The appellant having reported the matter ceased to have control over the criminal case but the public prosecution machinery. It was wrong in law to gauge this as a ground of ill-will on part of appellants, he argued.

He elaborated, merely mentioning the respondent as a suspect can neither be a ground for malice, let alone the truth that the crime was done against an institution, thus reporting the matter was necessary. He further argued

that liability does not extend even in the circumstances where there is negligence in prosecuting the matter as it was in the matter at hand.

That the appellant reported what was in his knowledge, the appellant is duty bound in law to do so and must enjoy the privilege against criminal and civil damages citing **Tanesco v Jumanne Masanja (as administrator of the estate of the late Juma Masanja DC Civil Appeal No.3/2011** HC Sumbawanga, (Unreported) which quoted with approval **Rwekanika v Binamungu [1974]1 EA 388** that if a person merely states to police only what he knows, and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the alleged suspect is after all not guilty of crime. The foundation of the decision being section 7 of the Criminal Procedure Act, 1985 Mr. Budodi, observed.

According to Mr. Budodi, exhibit DE1, the reasons stated therein made the 2nd appellant suspect the respondent, established a probable cause to suspect. The reasons are a long land dispute between the parties, previously the respondent disconnected/cut the appellants' pipes and connected his water pipe without the consent of the appellants, the ambition of the

respondent to be a dominant supplier of the water in the village than the appellant and respondent's boasting that Mr. President would shortly come to hand over the land dispute to the respondent. Mr. Budodi then prayed the appeal to be allowed.

Mr. Chambi was not amused with the submissions of Mr. Budodi on the first grievance against the judgment of the trial court. He argued the trial magistrate was right to decide as he did as there was evidence. He said exemption under section 7 of the Criminal Procedure Act Cap 20 RE 2019 depends on genuineness of the reporting. He distinguished the case of **Masanja** cited by the counsel for the appellants with the present one. He insisted that the raised complaints leading to that prosecution were false. He cited **Ally R. Mhando vs The Attorney General** and another cited with approval the case of **Commonwealth Life Assurance Society Ltd vs Bran [1935] 53 CLR 343 at page 382** that, *"the probability of the accused's guilty is such that upon general grounds of justice a charge against him is warranted."* In this case he submitted no evidence to prove someone damaged the appellants' property.

Mr. Chambi beefed up, all the complaints have turned to be a mere false and avengeful to the previous conduct of the respondent and prolonged claim of his land, which Mr. Chambi argues prove that the appellants initiated criminal proceedings against the respondent maliciously and without any reasonable or probable cause.

In my view, no one can be privileged for maliciously reporting someone to the police that they committed an offence without probable cause. In cases where the reporter has grudges with the alleged culprit of an offence, then a high standard of caution ought to have been exercised by the one who reports. In the present case, the 2nd appellant neither saw the respondent committing the offence nor did any person tell him he saw the respondent committing the offence he was charged with. No caution was exercised by the 2nd appellant. He merely mentioned the respondent. It would appear out of spite and ill will. The alleged previous disputes and alleged threats are the basis of ill will. The decision of the trial court cannot therefore be faulted. My decision, I hope, is backed by the case of **Jeremiah Kamama v Bugomola Mayandi [1983] TLR 123** (HC) Chipeta J.

Held: (i) 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;

(ii) for purposes of malicious prosecution, a person becomes a prosecutor when he takes steps with a view to setting in motion legal processes for the eventual prosecution of the plaintiff;

(iii) malice exists where the prosecution is actuated by spite or ill-will or indirect or improper motives.

I confess that another decision that influenced by way of analogy in my decision is in respect where there are previous quarrels, consistence ought to be of high standard to dispel bias or ill will See **Michael Haishi vs. R. [1992] TLR 92** (CA)

Held: *Since all the witnesses hailed from a village which was hostile to that of the appellant a high degree of consistency than the one displayed is essential to dispel fears of bias.*

I endorse Mr. Chambi's view that the 1st ground is wanting in merits. I hold that the trial court correctly evaluated the evidence before it and reached at a correct conclusion. It also properly applied the law to the facts of the case. Further, the trial magistrate heard the witnesses and believed them, I have no reason to think and decide otherwise. I further, do not see if the 2nd appellant was actuated by a genuine desire to bring to justice the respondent, rather, it was ill will. The 1st and 2nd grounds of appeal Mr. Budodi observed that they are related and submitted on them collectively, and properly so, the same deserve to be dismissed and I proceed to dismiss them for lacks cogency.

The subsequent grounds of appeal for my examination are the 3rd and 4th grounds of appeal which Mr. Budodi was of the view that they are related and submitted on them collectively, that the Honourable trial Magistrate erred in law and to rely on exhibits (PE1, PE2, PE3 and PE4 which their

contents were not read out upon its admission in court. Further, the trial court erred in law and fact to relay on charge sheet which had no any evidential value, that the same was not endorsed by the court for admission nor signed to prove that the same is the one which was filed in court. To bolster his argument, Mr. Budodi cited **Hatari Masharubu v Republic Criminal Appeal No. 590/2017** CAT DSM (Unreported). He further argued that under section 100(1) of the Law of Evidence Act the contents of a document cannot be proved otherwise than by the document itself, he prayed the 3rd and 4th grounds of appeal be allowed.

Mr. Chambi was annoyed with the above submission by Mr. Budodi, he quickly observed that the argument is not true and is geared at misleading the court. He added, the exhibits were supplied to the counsel of the appellants during the hearing and examined them and finally were admitted. Further it was not disputed that the respondent was prosecuted in criminal cases in Nkasi district court. The grounds of appeal are unreasonable and an afterthought. He urged, the case of **Hatari** (Supra) is distinguishable.

I reject the argument by Mr. Budodi, even the authority he cited, thus the case of **Hatari** is distinguishable in the present case, that is a criminal case where, the charge sheet is not attached with copies of documentary exhibits which is not the case in civil suits, intended exhibits are attached to the plaint or a list of additional exhibits is filed in court and supplied to the defence so that the defence is not caught by surprise. Mr. Budodi has not claimed that such documents were not attached to the plaint and that they were not supplied during the hearing for their perusal and comment. As such, these grounds of appeal are weak and hence they crumble to the ground.

The upcoming provocation of this appeal to talk about is that the trial court erroneously estimated damages hence awarded the respondent general damages for which are not justifiable. Referring this court to the case of **The Cooper Motor Corporation Ltd v Moshi/Arusha Occupational Health Services [1990] TLR 96** for the principles that appellate court can only interfere with assessment of the trial court's award of damages where it is satisfied either a). Assessment wrong principle has been applied, b). taking into account irrelevant facts or failure to take into account the relevant facts, and c). where amount awarded is in ordinarily low or high.

He urged this court to interfere with the general damages awarded at T.shs 100,000,000/= since all the three conditions are reflected in the trial court's decision on assessment of the alleged general damages. He added, T.shs 100,000,000/= is a huge amount of compensation, the amount would enrich the respondent contrary to the law. He urged compensation in tort is ordered to reinstitute the party to his position would the tort not committed, citing **Lim Poh Coo v Camden and Islington Area Health Authority [1980] AC 187** quoted in the book of Torts 3rd edn. Alastair Mullis & Ken Oliphant, Palgrave McMillan, 2003:

> *In contrast to the law of contract, where damages are generally awarded to put the injured party in the position, he would have been had the contract been performed, the general principle applicable to both pecuniary and non-pecuniary loss in tort the court should award as damages a sum that will put the person who has suffered the loss in the position in which he would have been had the tort not occurred. As lord Scarman said in* ***Lim Poh Choo v Camden And Islington Area Health Authority [1980] AC 174, 187,*** *"the principle of the law is that*

compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong."

Would the court take into account the facts and principles above, it would come to a conclusion that monetary compensation was not necessary in the circumstances in that criminal cases terminated on no case to answer. The appellants would be ordered to clean the name of the respondent in their village or their church as they worship together. In any case monetary compensation would have not supposed to exceed T.shs 500,000/= as reasonable solatium, Mr. Budodi elaborated.

In counter-argument, Mr. Chambi stated the cited case of Cooper Motors (supra) is highly distinguishable to this case. This is irrelevant as the matter at hand does not relate to business, but general damages for his being falsely and maliciously humiliated by the appellants. The respondent was religious Evangelist highly respected by people the humiliation deserves a redress.

I agree, the humiliation and mental agony of the charge the respondent suffered deserves commensurate redress. The amount that was assessed by the trial court is however on the high side. Tshs. 50,000,000/= would have served the purpose and the circumstances of this case. I therefore reduce the general damages awarded to the tune of Tshs. 50,000,000/= as indicated above. The 5th ground of appeal partly succeeds to that extent. The argument that 500,000/= T.shs would have served the purpose in my view, with respect to Mr. Budodi, that amount is very low.

The final ground of appeal for my deliberation in this appeal is to the effect that the trial court erroneously ordered the 2nd appellant to be condemned for general damages for the acts which were done in course of his employer's (1st appellant) employment.

On this ground of appeal, Mr. Budodi contended that the appellant was the employee of the 1st appellant. His reporting the matter was acting under the instructions of his employer not in his personal capacity, any liability if any ought to have been shouldered to the employer under the principle of vicarious liability, citing **Theodelina Alphax Monor S/t Next Friend v**

The Medical Officer i/c Nkinga Hospital [1992] TLR 235. He prayed the appeal be allowed on this ground of appeal.

On the 6th ground of appeal, the vying view of Mr. Chambi was that Mr. Budodi had misconceived gravely the principle enunciated in the **Theodelina's** case. He argued, the principle does not provide that it is wrong to join the employee. In this case, both employer and employee were jointly sued, in the above case, only the employer was sued.

This ground is marred since it is wanting in justification. There is nothing wrong in finding both appellants liable to pay the respondent general damages. The appellants, in my view, are jointly and severally liable for the malicious prosecution of the respondent. The 6th ground of appeal succumbs and I dismiss it.

The culmination of the above deliberation, the respondent proved his case on the balance of probabilities. The trial court was justified in reaching at the decision it reached at. This appeal, only partly succeeds in respect of general damages which I reduce to T.shs 50,000,000/= which I am of the

view, justice is served. In the circumstances of this case, each party to bear their own costs.

It is so ordered.

DATED and Signed at SUMBAWANGA this 27th day of August, 2021

J. F. Nkwabi
JUDGE

Court: Judgment delivered in chambers this 24th day of August 2021 in the presence of Mr. Deogratius Sanga, learned counsel for the appellants and in the presence of the Respondent in person.

J.F. Nkwabi
JUDGE

Court: Right of appeal is explained.

J.F. Nkwabi
JUDGE
27/08/2021