IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL CASE NO. 28 OF 2011

CHRISTIAN MAKONDORO .....PLAINTIFF

Versus

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

JUDGMENT

18th Oct & 10th Dec 2021

RUMANYIKA, J.:

As against the IGP and the AG (the 1st and 2nd defendants) respectively, Christian Makondoro (the plaintiff) essentially he claimed for shs. 150,000,000/= (One hundred fifty thousand million only) being general damages for torts of wrongful confinement and malicious prosecution.

The 3 legal issues, according to records framed by the parties and adopted by court on 21/04/2016 they read thus: -

1. Whether or not the plaintiff was wounded before being his unlawfully confined.

2. Whether there was malicious prosecution.

3. Reliefs if any, the parties are entitled to.

Given its historical back ground I think there would be no harm also at this stage to state that just as the backlog case, according to records filed on 03/11/2011 and this court (De Mello, J) delivered judgment on 06/04/2017, for some reasons the Court of Appeal of Tanzania set it aside on 22/2/2021. On the issue of pecuniary jurisdiction, but having had heard the prosecution and defence evidence in their back suo motu raised and determined by my sister, with immediate dispatch the highest fountain of justice having had directed this court to hear the parties and compose a judgment all over again.

Pw1 Christian Makondoro, a Christian at the time (63) is on record having had sworn and stated that as he guarded at Masalu Guest House Mabatini area, Mwanza city and he was at work on 26/1/2008 6:00 am a guest in Room 16 claimed robbed of assortment of items and for that reasons raised alarms. That shortly on arrival from the central station, from two suspects policemen recovered some property subject of the incident but also now arrested on 5/2/2008 they beat him up and injured him on the way to station and for that reason later on he was taken to hospital (as

per copy of Pf3) and was detained until 12/08/2008 (8 days later). That he issued them a statutory 90 days demand notice on 30/4/2010 as following the incident his contract of services was terminated but later on the Director of Public Prosecutions withdrew the criminal charges and case then was discharged.

Pw2 Alex Odiero (46) stated that the plaintiff was his cousin brother who got missing on 5/8/2008 and he did not until 6/8/2008 learn that the plaintiff was in police lock up detained for charges of stealing. Some attempts were made but no relatives were allowed to bail him out or provided him food until 12/08/2008 when he was just discharged and warned.

Dw1 Marwa Chacha (43) a police officer, CID Nyamagana stated that as, together with fellows they were on ordinary patrol on 26/1/2008, the local OCD just informed him of the incident. That at the scene of crime he met one Musa (the complainant) who named the plaintiff and 2 others whom he apprehended and safely drove to police station. That the plaintiff was released on police bail on 27/01/2008 but arraigned in court the same day but required to report back on 05/02/2008. That for the reason of nonappearance of the victim therefore want of prosecution, at the request

of the OCCID for the charges and case of armed robbery was withdrawn and the plaintiff discharged.

Dw2 Michael Elias Mmari (59) since 2014 retired police officer of CID Nyamagana district, he stated that following the incident, but in ordinary course of business and was duly assigned, he took up the matter on 26/01/2008 that the plaintiff was released on bail on 27/1/2008 but arraigned in court on 05/02/2008. That he recorded a statement of Musa Severine the complainant and that of the plaintiff on 27/1/2008 but the former never resurfaced and for that reasons end of the accused the plaintiff was acquitted. That is all.

When, with a view to hearing the parties on the issue of jurisdiction the learned attorneys were now invited, they made my task so easier that however small monetary claims might be, or, like it was the case here only general damages, so long as the government was, pursuant to Section 7 of the Government Proceeding Act Cap 5 RE. 2019 involved, only the High Court of Tanzania was court of the lowest grade competent to try the case (Section 13 of the Civil Procedure Code Cap 33 RE. 2019) refers.

Then on the merit part of the case at least the parties agreed; **(a)** that in capacity of a guard the plaintiff was at work/ on duty at the scene

of crime at the material time **(b)** that the complainant, at the time the plaintiff's customer he reported robbed thereat **(c)** the plaintiff may have not been identified by the complainant but was suspected, arrested and for that matter arraigned in court **(d)** with respect to the complainant and such property the plaintiff had a duty of care **(e)** like any other guests in lodges, therefore the complainant, it appears on transit, he put it in the legal machinery but then abandoned the criminal case. For reasons known to him he never resurfaced **(f)** it was, for the reason of the complainant's nonappearance that the criminal case was withdrawn, and for that matter the plaintiff discharged.

In other words not only from the start the suit was bad for no joinder of the proper party (the complainant), but also contrary to the long established rules against the tort of malicious prosecution. If anything, the plaintiff was only suspected and arraigned in court leave alone police arresting officers whom in the course may have had beat him up and wrongly confined him but he was, in the real sense of it not prosecuted per se. The issue of malicious prosecution therefore it was neither here nor there. If anything the point was prematurely raised and the case wasn't on the merit part of it decided in favour of the plaintiff much as the latter was

not acquitted but, as said simply discharged. I think the rule in the famous cases of **James Funke Ngwagilo v. The AG** (2004) TLR and **Hick v.Fulkner** [1878] QBD 167 did not intend to block probable and reasonable criminal charges or, for that matter unnecessary dragging the government in courts of law for vicarious liability. The plaintiff did not even on balance of probabilities demonstrate malice on the part of the defendants or, remotely on the victim one Mussa Severin. Whether or not for a couple of days the plaintiff had been unreasonably detained by police before he was arraigned in court, the latter should have only applied for order of habeas corpus. The issue of wrongful confinement therefore it should not have raised under the circumstances.

In the upshot, the devoid of merits application is dismissed with costs. It is so ordered.

Right of appeal explained.

S. M. RUMANYIKA
JUDGE
23/11/2021

The judgment delivered under my hand and seal of the court in chamber this 10/12/2021 in the presence of Paschal Joseph learned advocate holding brief of Elias Ezron learned advocate for the plaintiff and in the absence of defendants.

A.W. MMBANDO

DEPUTY REGISTRAR

10/12/2021