EDWARD CELESTINE AND OTHERS v. DEOGRATIAS PAULO
[HIGH COURT OF TANZANIA AT DAR ES SALAAM (Lugakingira, J.)]
CIVIL APPEAL 41 OF 1975

Tort — Malicious prosecution—Allegation that plaintiffs had committed a crime— Plaintiffs arrested, prosecuted but acquitted — Whether the tort established.

The defendant complained to the police and at a village meeting that the plaintiffs had set his house on fire and had stolen some of his property. The plaintiffs were arrested and prosecuted but acquitted. They sued the defendant for malicious prosecution. On appeal the plaintiffs sought to establish that the fact of their acquittal was relevant to prove the existence of malice.

Held: (i) malicious prosecution is committed where there is unity of the four elements, namely (a) that the plaintiff was prosecuted by the defendant; (b) that the prosecution terminated in plaintiff's favour; (c) that it was without reasonable and probable cause; and (d) that it was malicious.

(ii) a final judgment in a previous criminal proceeding is relevant where it declares any person to be guilty of a criminal offence, but where there is an acquittal the judgment in a criminal proceeding is not, in a civil suit, evidence of innocence.

Appeal dismissed.

Cases referred to:

(i) *Hicks* v. *Faulkner* [1878] 1 Q.B.D. 167

(2) *Osman* v. *Hill* [1954]2 T.L.R. (R) 180

(3) *Hollington* v. *Hewthorne Co. Ltd.* [1943]2 All E.R. 35

(4) *Ramadhar* v. *Janki,* A.I.R. 1956 Pat. 49

(5) *Kondo* v. *Mwajabu Juma* [1972] H.C.D. n. 236.

28 January, 1984. LUGAKINGIRA, J.: This is an old case. It was a suit for malicious prosecution and defamation and was determined in the District Court of Bukoba on 20th June, 1975. It arose substantially from Criminal Case No. 473/73 of the same court wherein the five appellants had been charged with arson and stealing following a report by the respondent but were acquitted. At the hearing of the suit the second appellant had tendered as exhibit A the judgement in the criminal proceedings but took it away at the conclusion, then claiming that he did not intend to appeal. But subsequently all the plaintiffs appealed to the High Court at Mwanza. I heard the appeal there on 18th October, 1977, reserving judgment and, in the absence of exhibit A, I asked the District Registrar to send for the criminal record. Never did I realise or foresee that this would give rise to a saga. The District Registrar wrote to the Resident Magistrate at Bukoba on 8th November, 1977, 11th February, 1980 and 22nd April, 1983 calling for the record but neither was the record sent nor was there a reply to any of his letters. In the end he dispatched me the civil record only at Dodoma and I am writing the judgment without seeing exhibit A or its original counterpart. Perhaps my desire to see the criminal judgment was inessential, yet it remains unfortunate for letters to issue at intervals of two and three years as it is indeed curious that they drew no reply. The parties have waited anxiously for all these years, and although they do not seem ever to have enquired, I personally regret the incident.

The facts of the case were simple. Around 11.30 p.m. on 1st July, 1973 the respondent's house was set on fire. He rushed out and in the glare of the inferno he saw five persons impassively standing there whom he recognised as the appellants. Since they were showing no concern, but threatened him instead, he suspected them for the arsonists. The following day he reported them at Bukoba Police Station. A search at the homestead also revealed the disappearance of the respondent's four door frames. The fifth appellant was arrested in the evening of that day. The rest were arrested on 3rd July when they and a crowd of fellow villagers thronged at the Police Station in apparent solidarity with the fifth appellant. They were then charged as aforesaid. Upon their acquittal they instituted this suit. Their plaint alleged a double cause of action: first, that the respondent falsely stated at the village that the appellants were the arsonists and thieves; secondly, that he falsely and maliciously repeated the same accusations at the Police Station whereupon they were arrested and prosecuted but acquitted. They lost and appealed. From the memorandum of appeal I could extract three grounds which I will rephrase and renumber as follows:-

2. That the trial Resident Magistrate refused to hear witnesses who would have testified on the respondent's utterances at the village;
2. That he erred in finding that the report to the Police was not maliciously made; and
3. That his decision was against the weight of evidence.

I will proceed and consider these grounds in that order.

Allegations of magistrates refusing to hear witnesses, be it in civil or criminal proceedings, are a common indulgence but this court takes them seriously. More often than not, however, they turn out to be unfounded. That seems to be the position in the instant case. On 3rd April, 1975 the trial magistrate fixed 15th April for hearing the suit and made an order for the parties "to summon their own witnesses or by court if so desired". Yet, at the hearing, not only did the first appellant bring no witnesses, he was himself absent and gave no evidence at all. The hearing thus procceeded in accordance with the provisions of 0.9, r. 10 of the Civil Procedure Code by which the courts are empowered to proceed as if all the plaintiffs had appeared. The second appellant was present but it was only in the course of cross-examination that he claimed to have brought one witness from the village. However, there is no indication that he thereafter offered the alleged witness or that he was prevented from doing so. I am bound to presume the accuracy of the record, there having been no attempt to challenge this fact. It seems to me, therefore, that the second appellant had no witness either. It is equally relevant to recall that this second appellant had initially expressed his desire not to appeal, and had even asked for and taken away exhibit A, only to change his mind later. I think, with respect, that such a person cannot be taken seriously. The remaining appellants were also present. Once again, there is no indication that any of them had a witness to offer or that they were prevented from doing so. The accuracy of the record is again not in question. In the final result, I find that the first ground is without faundation and I reject it. Admittedly, perhaps by inadvertence, the learned Resident Magistrate did not in his judgment address himself to the alleged publication at the village, concentrating exclusively on the report to the Police. But in the absence of any witness from the village and bearing in mind the respondent's denial, it is certain that if he had done so he would have dismissed the allegation.

I come to the second ground. In this the appellants take issue with the trial magistrate's finding that the report to the Police was not maliciously made. He did find, in fact, that the report was true and, therefore, that the prosecution was for reasonable and probable cause. He did so in the following terms:-

> As regards malice I can see no reason, and there was no evidence to support the finding that when the defendant made the report to the Police he did so maliciously in that he knew it to be false and did not believe in its truth.

> As soon as he saw the arsonists he went to report to the Police. The Police investigated the case and found enough evidence to bring the plaintiffs to court. Under these circumstances I can see no reason for alleging that the report was malicious.

In order for a plaintiff to succeed in an action for malicious prosecution he had to establish unity of four elements; first, that he was prosecuted by the defendant; second, that the prosecution terminated in his favour; third, that it was without reasonable and probable cause; fourth, that it was malicious. To prosecute is to set the law in motion by laying information before a judicial authority such as a magistrate who then issues a warrant of arrest and it is not prosecution by the defendant if he merely furnishes information to a police officer who then acts on his own discretion as a result of his investigations. But as observed in SALMOND ON TORTS (13th Edn.), at p. 720, the distinction may be a fine one in particular cases. It is not intended in this judgment to dwell on that distinction for, whichever way one looks at the matter, we still have to determine whether the respondent had reasonable and probable cause for reporting to the Police.

Looking at the extract from the judgment of the trial magistrate it is evident that he found as a fact that the respondent saw the appellants at the scene of crime. In other words, he rejected the appellants' purported alibis. This was then a question of credibility and in this he was certainly the better judge. There is nothing in the record upon which I could feel called upon to doubt his finding. On the contrary, and considering the standard of proof in these matters, I think he was entitled to believe the respondent, the appellants' alibis being bare assertions. There was also the fact that the appellants were well known to the respondent, fellow villagers and neighbours in fact, and there was abundant light from the blazing house. Then according to the respondent, the appellants were standing there, impassively watching the fire, and when they saw him they became aggressive, forcing him to flee to the bush. "Reasonable and probable cause" was defined in *Hicks* v. *Faulkner* [1878] 1Q.B.D. 167 as —

> an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, of existence of a state of circumstances, which, assuming them to be true, would lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed

This definition has on a number of occasions been cited by this court with approval including in *Osman* v. *Hill* [1954] 2 T.L.R.(R) 180. I am satisfied that in the circumstances of this case any ordinary prudent and cautions man, placed in the position of the respondent, would have come to the conclusion that the appellants were the arsonists. And since the door frames also disappeared in the wake of the arson, the circumstances similarly pointed to the arsonists. I am therefore unable to fault the trial magistrate in the finding he reached. I reject the second ground as well.

The appellants argue in their memorandum — they had nothing more to add at the hearing fo the appeal - that the trial magistrate should have followed the judgment in Criminal Case No. 473/73, and state that their acquittal proved their innocence, adding. "nothing can be done to weaken (that) judgment". With all respect, that view is erroneous; but one appreciates the circumstances in which it is founded, namely, that the appellants are laymen who prosecuted their case throughout. Nevertheless, the argument provides the opportunity to revert to an important matter, that is, the relevance of an existing judgment in a previous criminal proceeding. The law as it stands today, thanks to the Judicial System Review Commission, is that a final judgment in a criminal proceeding is relevant where it declares any person to be guilty of a criminal offence and in that respect it is conclusive evidence that the person so convicted was guilty of that offence. But where there is an acquittal, as the case was herein, the judgment in a criminal proceeding is not, in a civil suit, evidence of innocence. That is a question which the civil court has to determine independently. Such a judgment in an action for malicious prosecution may be evidence only for resolving the question, if it arises, whether the plaintiff was prosecuted by the defendant and whether the prosecution terminated in his favour. These are factors for founding a cause of action, but the acquittal as such is treated as a mere opinion. The reasons for this state of affairs are not difficult to find. I need do no more that refer to decided cases. In *Hollington* v. *Hewthorn & Co. Ltd.* [1943] 2 All E.R. 35, the Court of Appeal in England had this to say (at p. 40):

> The court which has to try the claim for damages knows nothing of the evidence that (was) before the criminal court: It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages.

It was also said in the Indian case of *Ramadhar* v. *Janki* A.I.R. 1956 Pat. 49, at p. 52:

> ... we find that a judgment of a criminal court is admissible to prove only who the parties to the dispute were and what order was passed. Facts therein stated, or the statements of the evidence of the witnesses examined in the case, or the findings given by the court are not admissible at all ... such judgments are inadmissible ... substantially because the issues in a civil and criminal proceeding are not the same, and the burden of proof rests in each on the different shoulders. Even an admission cannot be proved by a recital in such a judgment. Therefore, a proceeding of a criminal court is not admissible as evidence; a civil court is bound to find the facts for itself.

And here at home, Mnzavas, J. (as he then was), had this to say in *Kondo* v. *Mwajabu Juma* [1972] H.C.D. n. 236:

> ... the fact that the appellant was acquitted on the charge of assault does not necessarily mean that he did not assault the respondent. He may have done so but there may have been no sufficient evidence to prove beyond reasonable doubt that he did it; and hence the acquittal. The appellant cannot, therefore, rely on the acquittal as a basis of his argument in this civil case because the burden of proof in a criminal case is totally different from that in a civil case. Evidence that may fail to support a criminal charge may be quite adequate to prove a civil action.

That, then, is the position, perplexing. It might probably assist them more if it were pointed out that that criminal judgment to which they so fervently cling does not in fact appear to have declared them innocent. What transpired is that there was insufficient evidence conclusively to establish their guilt. In an extract cited by the trial magistrate, the criminal court said:

> These contradictions plus the accused's defences raise doubts whether accused are the ones who committed these offences.

The question was therefore left open, the appellants being given the benefit of the doubt. It is this phenomenon, the inconclusive nature of an acquittal, that not only entitles but obliges the civil court to find the fact for itself. Almost invariably, acquittals proceed on doubts rather than on a finding of innocence. The obligation of the civil court to make its own finding is therefore ever present.

In view of the conclusion I have reached on the second ground, it becomes unnecessary to consider the third ground. I find no merit in the appeal which I dismiss with costs.

Appeal dismissed.