

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(CIVIL DIVISION)  
CIVIL SUIT NO. 269 OF 2017**

**OPII BOB JAMES:.....PLAINTIFF**

**VERSUS**

- 1. DECO TILES (U) LTD (FORMERLY CTM (U) LTD)**
- 2. ATTORNEY GENERAL:.....DEFENDANTS**

**BEFORE: HON. MR. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The Plaintiff brought this suit against the defendants jointly and severally for a declaration and orders that his prosecution at the Anti-corruption court was malicious, general damages, interest and costs of the suit.

The plaintiff was employed as manager of the 1<sup>st</sup> defendant formerly CTM (U) Ltd at its Jinja Branch. On 19<sup>th</sup> day of October 2011, the 1<sup>st</sup> defendant company filed a complaint against the plaintiff at Jinja Police Station on allegations of embezzlement of Ugx 25,642,629/=.

The plaintiff was consequently arrested and remanded to Luzira Prison for a period of 3 weeks and acquitted on the 22<sup>nd</sup> day of August 2016 on the ground that the prosecution failed to prove its case.

The 1<sup>st</sup> defendant disputed the claim of malicious prosecution and contends that the defendant's complaint was justifiable and that the plaintiff's arrest was lawfully done with probable and reasonable cause.

The 1<sup>st</sup> defendant denied any malice or ill will against the plaintiff and further contended that the charge and prosecution was not malicious but rather the 2<sup>nd</sup> defendant agent ODPP who was charged with prosecution considered the evidence available at the time which evidence justified the charge and prosecution for embezzlement.

The parties filed a joint scheduling memorandum with agreed facts and issues:

### ***Agreed Facts***

1. *The plaintiff was employed by the 1<sup>st</sup> defendant.*
2. *The 1<sup>st</sup> defendant filed a complaint at Jinja Central Police Station against the plaintiff.*
3. *The defendant was prosecuted. The prosecution by the plaintiff was conducted by the 2<sup>nd</sup> defendant's servants in the course of their employment.*
4. *The 2<sup>nd</sup> defendant's prosecution of the plaintiff was continued with the full knowledge and participation of the 1<sup>st</sup> defendant.*
5. *The proceedings were terminated in favour of the plaintiff.*

### ***Agreed Issues***

1. Whether prosecution was malicious or not?
2. If, so whether the plaintiff is entitled to the remedies sought?

The Plaintiff was represented by *Counsel Luke Kasakya* whereas the 1<sup>st</sup> Defendant was represented by *Counsel Ojambo Robert* and the 2<sup>nd</sup> defendant was represented by *Counsel Nabaasa Charity*.

### **DETERMINATION**

#### ***Whether the prosecution was malicious or not?***

In his submissions, counsel for the Plaintiff submitted that according to the testimony of PW1, at the time of the prosecution of the plaintiff, there was no audit or any other financial statement showing loss of stock in the company worth UGX 25,642,629/=. The audit was conducted on the 29<sup>th</sup> day of October 2011 in absence of the plaintiff whereupon he was later unlawfully terminated from employment even before the criminal investigations could be concluded.

It was the evidence of DW1 the 1<sup>st</sup> defendant's Managing Director that after reporting the matter to police they engaged the services of an External Audit firm which firm audit resulted in discovery of a loss of UGX 25,642,629/=

The plaintiff's counsel submitted that the 1<sup>st</sup> defendant proceeded to institute criminal proceedings against the plaintiff in spite of all the lack of evidence and this amounted to malice as far as the case was concerned. Citing the case of *Gwagilo v Attorney General* [2002] EA 381, malice in the context of malicious prosecution is an intent to use legal process for some other purpose than its legally appointed and appropriate purpose and the appellant could prove malice by showing for instance that the prosecution did not honestly believe in the case which they are making that there was no evidence upon which a reasonable tribunal could convict that the prosecution was mounted on a wrong motive.

The 1<sup>st</sup> defendant counsel submitted that the plaintiff as the branch manager was responsible for all stocks and assets of the company at the branch and was under an obligation to report daily, weekly and monthly on the status of sales and stocks at the branch.

DW1 testified that in June 2011 the company established anomalies/discrepancies in the sales vis a vis the stocks at Jinja Branch. The plaintiff did not deny the anomalies but explained them to have arisen due to over packing and undertaking to make good of the same through salary payments/reductions.

The plaintiff was found to have a case to answer and it was only after his defence that he was acquitted or the charges against him were dismissed not because there was no loss but because prosecution failed to prove the case against the plaintiff beyond reasonable doubt.

### *Analysis*

The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. The plaintiff will succeed in an action of malicious prosecution and false

imprisonment if the defendant's allegations resulting in the arrest and detention or if preferring of the charge is reckless.

Similarly, the tort of malicious prosecution is aimed at or is concerned with protecting the interest in freedom from unjustifiable litigation. Malicious prosecution presupposes that the proper procedural formalities have been carried out, and is concerned with the purposes for which they were used. It is therefore a tort to maliciously and without any reasonable and probable cause to initiate against any judicial proceedings which terminate in favour of that other and which result in damage to his/her reputation, person, freedom or property. See *John Akorlie v Golden Tulip Hotel [2011] 39 GMJ C.A 97*

According to *Odunga's Digest on Civil Case Law and Procedure page 5276*, the essential ingredients to prove malicious prosecution are as follows:

1. The criminal proceedings must have been instituted by the defendant
2. The defendant must have acted without reasonable or probable cause
3. The defendant must have acted maliciously
4. The criminal proceedings must have been terminated in the plaintiff's favor.

In this case, there is no doubt that the 1<sup>st</sup> defendant instituted criminal proceedings against the plaintiff which proceedings were terminated in the plaintiff's favor hence proving two of the essential ingredients of malicious prosecution. However, liability does not attach to a private citizen who merely names a suspect. Similarly the act of indicating to the police a person whom one suspects of having committed a criminal offence is not itself sufficient to make one liable, should the police on its initiative decide to arrest that person.

The court should now determine whether the defendant acted without reasonable or probable cause.

According to *Dr. Willy Kaberuka v Attorney General Civil Suit No. 160 of 1993 [1994] II KALR 64*, Byamugisha J (RIP) as she then was stated that:

*" The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and that is to say, to constitute*

*reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty."*

In the present case, the 1<sup>st</sup> defendant through DW1 adduced evidence that they discovered some anomalies/discrepancies in the sales and stock at Jinja branch and the plaintiff failed to give a satisfactory response to the discrepancies which triggered the suspicion and later an audit. The audit discovered a loss of 25,642,629/= which the plaintiff failed to satisfactorily respond to in the emails to the supervisors.

On that basis I find that the defendants acted with reasonable or probable cause. The 2<sup>nd</sup> defendant's officials acted within the law when they arrested the plaintiff upon a report made by the 1<sup>st</sup> defendant.

With regard to the defendants having acted maliciously, counsel for the plaintiff failed to submit that malice had been established as inferred from the failure of the defendants to consult the law and or act prudently and cautiously as not to arrest detain and charge the plaintiff who had no case.

This court agrees with the case of *Kindi Eria. Zizinga Albert -vs- Makerere University Kampala [1977] HCB 180*, where court held that;

*"In any event, where prosecution is instituted by the Police or other investigative or prosecutorial agency after investigations, the person giving information is not liable for malicious prosecution unless the information was given with malice."*

The plaintiff in cross examination stated that the police or the Director of Public Prosecution did not act with malice because the sanction of a file for prosecution is based on the evidence in the file.

According to *Gwagilo v Attorney General [2002] 2 EA 381 (CAT)*, malice in the context of malicious prosecution is an intent to use the legal process for some other purpose than its legally appointed and appropriate purpose and the appellant could prove malice by showing for instance that the prosecution did not honestly believe in the case which they were making that there was no

evidence at all upon which a reasonable tribunal could convict that the prosecution was mounted a wrong motive and show that motive.

Hon. Mr. Justice Bashaija K. Andrew in *Mugabi v Attorney General Civil Suit No. 133 of 2002* held that:

*“It is my view that malice has been established as can be inferred from the Police’ failure to consult the law and/ or to act as a prudent and cautious person would do, and also in acting without reasonable cause. The Police officers at Lugazi Police Station failed even in the simplest of the investigative tasks of retaining copies of the sale agreement Exhibit P III, which would have helped in ascertaining from the witnesses thereto the ownership of the motorcycle. Instead, they kept the Plaintiff reporting to Police for over twelve times without bothering to investigate until when they eventually arrested, detained and subsequently had him prosecuted. This is a manifestation of malice as it was a reckless disregard of the law and the Plaintiff’s legal rights.”*

Relating that to the present circumstances, the 1<sup>st</sup> defendant adduced evidence showing the basis of the report made to the Police and the 2<sup>nd</sup> defendant acted in conformity of the law to arrest, imprison and prosecute the plaintiff. The plaintiff was acquitted upon his own defence after the court found a case to answer. The charges were dismissed on errors or incomplete audit at the company which left many unanswered questions. Therefore, the prosecution was not malicious.

I therefore dismiss the suit with no order as to costs.

I so order.

**SSEKAANA MUSA**  
**JUDGE**  
**16<sup>th</sup> June 2023**