THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 128 OF 2018

UGANDA REVENUE AUTHOTITY ..... APPELLANT

VERSUS

MURISA AMOS ..... RESPONDENT

(An appeal from the Judgment of Honourable Lady Justice Margaret C. Oguli Oumo in High Court Civil Suit No. 225 of 2016 Murisa Amos Versus Uganda Revenue Authority Delivered on 16th day of October 2017)

CORAM: Hon. Mr. Justice Owiny-Dollo, DCJ

Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF THE COURT

This appeal arises from the dccision of IIon. Oguli Oumo, J in High Court Civil Suit No. 225 of 2016 dated 16th October 2017 in which the respondent who was the plaintiff was the successful party.

Background

As far as we could ascertain from the record, the respondent brought a suit against the appellant seeking for general, special and punitive damages for malicious prosecution against the appellant who was his former employer.

The respondent had been prosecuted in March 2006, *vide* Nakawa Chief Magistrate's Court No.530 of 2006 following a complaint from the appellant on four counts of causing finance loss and abuse of office contrary to Sections 269 & 87 of the Penal Code Act.

He was also prosecuted with fraudulent evasion of customs duty contrary to Section 203 (e) of East African Community Customs Management Act, 2004 *vide* Criminal Case No. 509 of 2016. The prosecution in respect of Criminal Case No. 509 of 2006 was dismissed in the final judgement. In respect of Criminal Case No. 530 of 2006, the case was dismissed following a ruling on no case to answer.

Following the dismissal of the criminal cases above, the respondent brought a suit against the appellant. His claim was upheld by the High Court following a finding that he had been maliciously prosecuted by the appellant. He was awarded shs. 200,000,000/= as general damages, shs. 21,000,000/= as punitive damages with interests at 27 percent per annum. The appellant was also condemned to costs of the suit.

Being aggrieved, the appellant filed this appeal on the following grounds:-

1. *The learned trial Judge erred in law and fact when she held that the Plaintiff was arrested and prosecuted without reasonable cause and that he was maliciously prosecuted.*
2. *The learned trial Judge failed to properly evaluate evidence on record hence coming to a wrong conclusion.*
3. *The learned trial Judge erred in law and fact when she awarded damages to the plaintiff without following the law and proper principles.*

Representation

When this appeal came up for hearing *Mr. Haruna Mbeta* and *Mr. George Okello* learned Counsel appeared jointly for the appellant whereas *Mr. Gerald Nuwagira* learned Counsel appeared for the respondent.

The Appellant case

It was submitted for the appellant that:- The burden of proving that the respondent had been maliciously prosecuted fell on the respondent himself as a plaintiff at the trial. In so doing he had a duty to prove on a balance of probabilities that the appellant acted without probable cause when it instigated criminal prosecution against him. Further, that the appellant in so doing acted maliciously.

It was further submitted that, the appellant had acted on and had reasonable cause for causing arrest and prosecution of the respondent on the particular offences he was charged with. He referred us to the definition of reasonable cause as expounded upon by *Lord Devlin in Glinski vs McIver* [1962] *1 All E.R. 696* that, reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty or not that the prosecution necessarily believes in the probability of conviction.

He also referred to the definition of 'malice' the Black's Law dictionary as 'the intent without justification on excuse to commit a wrong act, reckless disregard of the law or persons legal rights'. In this regard, Counsel submitted that, during the hearing at the High Court the appellant through the evidence of DW1 Sara Kashaka and DW2 Robert Ogwanga clearly proved that the prosecution of the respondent was not malicious as it was premised on reasonable and probable cause.

In respect of ground 2 Counsel submitted that, the learned trial Judge failed to apply the law to the facts before her and in the result arrived at the wrong conclusion, that the respondent had been maliciously prosecuted.

Lastly Counsel submitted that, the damages awarded to the respondent were manifestly too high in the circumstances of the case and amounted to an injustice. Further that, there was no justification for the award of punitive damages the Judge having failed to properly apply the principles in their award.

He asked this Court to allow the appeal and set aside the Judgment and order of the High Court.

The Respondent's reply

It was the respondent's submission that, the two criminal cases instituted against him by the appellant were both dismissed. His duty as a cashier with the appellant was to issue receipts based on taxes already paid in the Bank. He did not receive cash from the tax payers. The amount of taxes payable was determined by someone else, the valuer who would forward the entry to the assessing officer.

The assessing officer would issue bank advance form upon which the tax payer or his /her agent would pay to bank in favour of the respondent the amount set out in that bank advance form. The role of the cashier, the respondent would be to issue receipts reflecting the money received at the bank.

It was the respondent's submission that as a result of the established procedure set out above, the respondent as a cashier could not issue a receipt without correspondence details from the Bank.

Secondly, that the respondent could not print a receipt outside, without using details on bank advance form.

Thirdly that, the respondent as cashier, could not determine the tax payable to the bank.

Fourthly, other officers in the chain would have been the principal suspects and not the respondent.

The arrest and prosecution therefore was malicious and without reasonable cause. He referred us to the Judgment of *Lord Denning in Glinski vs McIver* (Supra) for the definition of reasonable cause.

Counsel further asked us to consider the evidence on trial Court record which points to the fact. There was no reason given as to why the respondent had been prosecuted. Further that, the officer from the Bank at which the tax payment was made did not testify, the officer working with the Ministry of water in respect of which a receipt indicating thereon a lesser amount was issued was not called as witness.

The tax payer Hussein, who was stated to have evaded the tax and benefited from the fraud, was never called to testify. The appellant used forged documents as a basis of the prosecution. The witnesses who testified in favour of the appellant were untruthful and dishonest specifically DW1 Sara Mwesigye.

In the result the learned trial Judge was justified when she found that, the appellant had maliciously and without reasonable cause, caused the prosecution of the respondent.

In respect of the second ground it was submitted that, the learned trial Judge properly evaluated the evidence before her and came to the correct decisions.

Further that, she awarded damages that were justified and reasonable in the circumstances of the case.

Counsel prayed Court to dismiss this appeal.

The appellant filed written submissions in rejoinder. We have found no reason to reproduce them here. We shall where necessary refer to them in the resolution of the grounds of appeal.

Resolution

This being a first appeal this Court has a duty to re-evaluate the evidence at the trial and to come up with its own decision, after having made its own inferences on all questions of law and fact. *See: Rule 30(1)* of the Rules of this Court, *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.*

It is the appellant's case that the learned trial Judge erred when she found that the appellant had maliciously and without reasonable cause prosecuted the respondent in two criminal cases at Nakawa Chief Magistrates Court at Nakawa Criminal Case No. 530 of 2006 and 509 of 2009 both cases having been dismissed.

We must state from the onset that in respect of criminal case number 509 of 2009 the respondent was charged with two counts of fraudulent evasion of payment of customs duty contrary to Section 203(e) of the East African Community Customs Management Act of 2004 on the first count and with making a false entry in respect of customs duty contrary to Section 203(a) of the same act.

It was the prosecution's case, at Nakawa Chief Magistrates Court that, on 14th March 2006 at Entebbe customs, Entebbe Municipality the accused now respondent knowingly caused the fraudulent evasion of payment of customs duty in the amount of UGX 5,442,120/= being due on a consignment of imports *vide* customs bill entry No.C04533. Further that on the same day and at the same place, the accused now the respondent made false entries in URA customs receipt and customs bill of entry No. C04533 to facilitate the fraudulent evasion of

payment of customs duty. Judgement in this case was rendered by Flavia Nassuna Matovu, Chief Magistrate on 29th April 2015 in which after a full trial, the respondent was acquitted of the two counts set out above.

The Chief Magistrate, having proceeded with the full trial must have determined, after the closure of the prosecution case that a *prima facie* case had been made out sufficiently for the accused now respondent to be put on his defence. This fact alone would dispose of ground one in favour of the appellant in respect of criminal case No. 506 of 2006.

What constitutes a *prima facie* case is now well established law, following the *locus classicus Bhatt Vs. R.*(1957) *E.A. 332*, in which Sir Newham Worley gave the definition as follows:-

> *"It may not be easy to define what is meant by a prima facie case, but at least it must mean on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence"*

This principle has been excessively expounded upon in *Uganda vs Kato Kajuba Godfrey, Court of Appeal Criminal No. 39 of 2010.* Suffice it to state here where a Court of law has determined that an accused person has a case to answer, the prosecution having adduced sufficient evidence as to require him/her to be put on his defence, as civil suit is for malicious prosecution cannot be sustained thereafter.

We find that the learned trial Judge erred to have found in favour of the respondent on a civil suit for malicious prosecution in respect of a criminal case in which it was determined that he had a case to answer.

Simply put, the trial Chief Magistrate having found that, the respondent had a case to answer in *Criminal Case No. 508 of 2006,* the learned trial Judge in the

subsequent civil suit from which this appeal arises could not have found that he had been maliciously prosecuted. We find so. That leaves with the determination of whether the prosecution of the respondent by the appellant in respect of Nakawa, Chief Magistrate Criminal case No. 530 of 2006.

In this particular case, the respondent was acquitted on no case to answer. In her Ruling the trial Chief Magistrates stated and held as follows:-

> *"I inherited this case under Section 14 (1) of MCA. The prosecution evidence was partly recorded by my predecessors. I only recorded the* evidence *of PW7 whereby URA closed its case with the said PW7. At the close of the prosecution case, Mr. Bwengye for the accused persons filed a submission of no case to answer which submissions were not replied to by URA. I did not have an opportunity to conduct the entire trial. I did not have an opportunity to observe the demeanor of all six (6) prosecution witness apart from PW7. The case was handled by different trial magistrates and they were various prosecution exhibits which were tendered in court on behalf of the prosecution.*
>
> *In his submission on no case to answer counsel for the accused person pointed out that according to the evidence adduced by PW3 that was always one receipt serial number for each transaction and the receipts contain some details. He further pointed out that the evidence of the prosecution witnesses recorded that the receipts were always electronically generated and that is only the cashier's signature that is hand written. He further argued that the prosecution had not led any evidence to show that the accused in any way manipulated the system so as to print electronically generated forms with the same serial number and yet containing different transaction details.*
>
> *Having perused, the evidence on the court record recorded by my predecessors and having perused the exhibits tendered in by prosecution and having read the*

submission by counsel for the accused person on CASE TO ANSWER, I totally agree with counsel for the accused person that prosecution has not established prima facie case against accused. Considering the burden of proof in criminal cases which is always beyond reasonable doubt, an accused cannot be put on his defence on just shaky evidence. Any slightest doubt is always decide in the favour of the accused Prosecution has not proved the ingredients of all offence causing financial loss all count 1, 2, 3 and 4 and abuse of office on Count 5.

In the premises, the accused is acquitted on the 5 counts which were alleged against him this in accordance with Section 127 MCA. I also noted that the case was committed Entebbe Airport so it should have been filed in Entebbe Court."

In *Uganda vs Kato Kajubi* (supra) this Court, in relation to the law on the finding of 'No case to answer' stated as follows:-

"A submission of no case can only be properly made and upheld,

(a) When there has been no evidence to prove an essential element in the alleged offence.

(b) When the evidence adduced by the prosecution has been so badly discredited as a result of cross-examination or is manifestly unreliable that no reasonable tribunal could safely convict on it."

In *Criminal Case No. 530 of 2006,* the Nakawa Chief Magistrate did not bother at all to properly evaluate the evidence on record and determine for self whether the prosecution had made out *a prima facie* case against the appellant. She set out the reason why she could not evaluate the evidence and make such as determination. She choose instead to rely on submissions of Counsel alone. Submissions do not constitute evidence. Court is not bound by submissions of Counsel. Even in the absence of submissions in reply by the state, in the case, the learned trial Chief Magistrate ought to have proceeded to evaluate meticulously

the evidence of each witness and the exhibits on record before coming to the conclusion that she did.

Be that as it may, having determined that she was not in position to determine the case having only seen one out of seven witnesses testify and being unable to comprehend the evidence recorded by her predecessors, she ought to have proceeded with a re-trial. She appears to have been in no mood to do so. In the process she erred when she dismissed the case without having followed the law.

The prosecution should have considered an appeal. They did not.

In the suit from which this appeal arises the learned trial Judge evaluated the evidence of the witnesses who appeared before her. No mention is made in her Judgment of the Court record in respect of the two criminal cases that were dismissed by the Magistrate Court. It is the record at the Magistrates Court that would have revealed whether or not the prosecution had brought frivolous changes. The civil suit was not a re-trial. The duty of the learned trial was to examine the police files, the lower Courts files and determine there from whether or not the prosecution in each of these cases was malicious and without reasonable cause.

She faults the appellant for having failed to call witnesses and to produce documents before her. No inquiry was made as to whether those particular documents were on the police record or the trial Court record. Indeed, the record of appeal does not contain any of the police records. It does not contain the Chief Magistrates Court record. It was difficult in those circumstances for the learned trial Judge to determine whether or not the prosecution was malicious and unreasonable.The burden was on the plaintiff to produce all relevant documents.

We would on that account we would allow the appeal.

However, we shall proceed to determine whether on this basis of the evidence available on record the Judge was justified to find the way she did. In her Judgment the learned trial Judge evaluated the evidence and concluded as follows:-

> *"In the instant case PW1 plaintiff testified that it was his duty to issue receipts based on the returns of the taxes paid in the bank.*
> *That evidence was confirmed by the evidence of DW1 & DW2 who stated that at no point did the Plaintiff receive cash from tax payers.*
> *The process started with an assessment which would be forwarded for entry for the assessment officer.*
> *The assessing officer would issue a bank advance form (BAF) to the tax payer or clearing agent who would pay the money assessed to the bank.*
> *The bank would then prepare and deliver returns of money paid in the bank.*
> *The Role of the cashier commences when the bank has delivered returns against which the cashier issues receipts.*
> *The cashier then forwards the documents to the releasing officer who upon ascertaining the correctness of the documents releases the goods to the tax payer or clearing agent.*
> *All the witnesses on both sides, the Plaintiff and defense confirmed the process through which the goods are cleared.*
> *They were also all in agreement that in that whole process, the cashier does not hold any cash at any time.*
> *In order to issue a receipt, the cashier can only do it with corresponding details of a return paid in the bank.*

The cashier can't also issue a receipt unless there is an assessment in the system as he uses the BAF to generate a receipt.

It is not also the cashier who determines how much a taxpayer is to pay.

In addition to the assessment officer, the values, the bank cashier and the releasing officer, there is also a supervisor of the station involved to ensure that the whole process is passed through before the goods are finally released.

All those office in the chain that is the assessment officer/valuer, cashier, banking officer, release officer form part of the chain in the assessment, payment and release of goods, it is not only the cashier who is in the chain and he does not even handle the cash in the chain and any of them or all could have acted as indicated.

The above facts were overlooked by DW1 who instead chose to pick the cashier when an of the above persons or all could have been complicit in denying the Respondent the necessary revenue however they chose to prosecute the Plaintiff.

In view of the above, I am in no doubt that the Plaintiff was arrested and prosecuted without reasonable cause."

In view of the definition of reasonable cause in *Glinski v McIver* (Supra) the learned trial Judge placed a much higher burden on a complainant in a criminal case, than the law requires. The question here is whether or not a reasonable person acting on the evidence available to the appellant at the time would have commenced criminal prosecution against him.

There was a set procedure from start to end, in clearing goods entering the Country at customs and boarder points. It was ably set out by the learned trial Judge in the excerpt reproduced above.

The process ended with the cashier issuing a receipt on the basis returns from the bank. The respondent was the cashier. In respect of the same consignment of goods, two receipts had been issued, in the name of the respondent. The one that was used to clear the goods indicated that the tax payer had banked shs. 5,442,120. It was receipt No.2250967, yellow copy dated 14th March 2006. The cashier ordinarily issued 3 receipts, according to DW1. This is not disputed. But there was also another 'copy'. It was a pink copy, it was also No. 2250967 issued on the same day 14th March 2006. This particular receipt was in respect of a different tax payer the Ministry of Water, Lands and Natural Resources. The tax paid was only Ugx 20,000/= .

The net result of the above is that, only shs. 20,000/= was received by the respondent in the Bank. That receipt was used to clear the consignment of Muhammad Hussein whose tax had been assessed at Ugx 5,442,120/=. Therefore, the appellant had lost over 5.4 million in tax revenue.

Both receipts were issued by or suspected to have been issued by the respondent the only cashier. There was no requirement for him to hold cash. It was sufficient to cause loss if he issued a false receipt. He had a duty to explain why Muhammad Hussein's consignment was cleared with a receipt indicating he had paid 5.4 milling in the bank whereas only shs. 20,000/= had been recorded. Hussein's consignment was only released by DW2 after he had received a receipt issued by the respondent.

Faced with the above evidence, it cannot be stated that the appellant aveted unreasonably and without probable cause when it initiated criminal proceedings against the respondent.

It was the duty of the respondent as the cashier to ascertain that the receipt he issued correspondent with the amount of money already received by the

appellant. It turned out that, the goods in issue were cleared on the basis of a forged receipt and resulting in loss of revenue to the respondent in the high court, the burden was on the respondent to produce the evidence of deposits he relied on to issue all the p questioned receipts . If such evidence exists , there would have been no probable or measurable cause to prosecute him without the false receipt the loss would have been averted. The respondent had probable cause to conclude that a respondent was involved in the scam and we find so.

We therefore find merit in ground one of the appeal.

Our finding on ground one sufficiently determines this appeal.

We now make the following orders:-

1. This appeal has merit and is hereby allowed.
2. The Judgment of the High Court is hereby set side and there orders therein are hereby substituted with an order dismissing the suit with costs.
3. The respondent shall pay costs at this Court and High Court with interest at Court rate.

It so ordered.

The Hon the DCJ,(as he then was) who participated in the hearing of this appeal was unable to sign this judgment as at the time it was ready he had been elevated to the office of the CJ and ceased to be a member of this court.

Dated at **Kampala** this ..... 3rd ..... day of ..... Feb 2021

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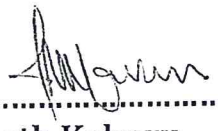
Alfonse Owiny- Dollo

DEPUTY CHIEF JUSTICE



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Kenneth Kakuru
JUSTICE OF APPEAL

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Christopher Madrama
JUSTICE OF APPEAL