THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, J.A.;
HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE, J.A; AN

HON. MR. JUSTICE S.G. ENGWAU, J.A.

CIVIL APPEAL NO.29 OF 1997

BETWEEN

DR. BISHOP N. OKILLE:::APPELLANT

AND

[1] MESUSERA ELIOT]:::RESPONDENTS

[2] JACOB OSITO

(Appeal arising from the decision of the High Court (Kania, J.) at Kampala dated 16/5/1997 in HCCS No.182 of 1994).

JUDGEMENT OF G.M.OKELLO. J.A .

This is an appeal against the Judgment and orders of the High Court (Kania J.) dated 16/5/97 at Kampala in High Court Civil Suit No. 182 of 1994.

The back ground facts are necessary to appreciate the appeal. They are briefly that Messrs Mesusera Eloit (PW1) and Jacob Osito (PW2), the respondents are uncle and nephew. They were both employed in Kampala. On 9/9/90, they travelled to Tororo to the Residence of Dr. Okille, the appellant, to discuss with him about a piece of land at Kasipodo which the respondents claimed to belong to them and that it was allegedly wrongly sold to the appellant by one Ijoyat. On arrival, the respondents did not find the appellant at his residence. Being a Sunday, they proceeded to the Local Church where they expected to find him. At the Church, the 2nd respondent sent to the appellant a written note through the Church Warden seeking an appointment to meet him, stating the purpose of the meeting. The appellant replied the note agreeing to meet the respondents on 10/9/90 at 9.30 a.m. The respondents who found that time inconvenient to them as they would be on duty in Kampala, decided to seek audience with the appellant at his home after church service. They therefore returned to the appellant's residence to wait for him.

After church service, the appellant returned to his residence and found the respondents waiting at the entrance. He allegedly led them into the living room where he offered them seats. Thereafter, the first respondent introduced himself and the 2nd respondent. It was when the first respondent introduced the subject of the land, that the appellant showed unwillingness to discuss the issue. Then the respondents left the appellant's residence and returned to Kampala. The discussion was conducted in the English Language.

The following day, the appellant made to Tororo Police Station a complaint of Criminal trespass and threatened violence against the respondents. The police arrested the respondents and charged them with the two of fences. They were prosecuted before the Magistrate's court of Tororo under Cr. Case No. MT.408/1990.

They were both acquitted on both charges. Subsequently, the respondents instituted in the High Court a suit against the appellant claiming General and Special Damages for malicious prosecution. The appellant filed a Written Statement of Defence which included a counter claim.

The case was heard by Kania J. He gave judgment for the respondents in the main suit and dismissed the counter claim with costs. He made the following awards:

[1] General Damages of Ug.Shs 2,300,000/= for each respondent.

[2] Special Damages of Ug.Shs.866,000/= for the first respondent.

[3] Special Damages of Ug. Shs.926, 732/= for the second respondent.
[4] Interest on 2 and 3 above at the rate of 20% per annum from the date of filing the suit till payment in full.

[51 Interest on 1 above at the rate of 20% per annum from the date of judgment till payment in full.

[6] Costs of the suit and on the counter claim. Hence this appeal.

There are five grounds of appeal, namely:

[1] Because the learned trial Judge misdirected himself on the main issue which was whether the appellant was vicariously liable for the prosecution of the respondents by the Uganda Police who are not the appellant's servants or agents.

[2] Because the learned trial Judge's holding that the prosecution of the respondents was instigated by malice on the part of the appellant is not supported by the evidence on record.

[3] Because the learned trial Judge formed an unbalanced view of the evidence and reached a decision which was in supportable if the appellant's defence and counter-claim were duly considered.

[4] Because the learned trial Judge erred in law when he held that the respondents were in the circumstances justified in violating the appellant's constitutional right to privacy of person, home and property.

[5] Because the learned trial Judge erred in law when he held that the appellant's counter-claim

lacked adequate proof.
These grounds were argued before us in blocs of grounds 1 and 2; 3; and of 4 and 5.

The complaint raised in the bloc of grounds 1 and 2 was that the prosecution of the respondents was instituted by the Uganda Police who are neither servants nor agents of the appellant and that as there was no supporting evidence that the appellant was instrumental in the prosecution, the learned trial Judge was wrong in finding that the appellant instituted the prosecution. Mr. Owori, learned Counsel for the appellant, criticized the trial Judge for believing the evidence of Jacob Osito (PW2) who testified to the effect that when the OC, CID proposed at a meeting attended by the parties at the Police Station Tororo to set the respondents free the appellant insisted that the respondents must be prosecuted, to find that the appellant was instrumental in the prosecution of the respondents when the witness is un reliable and his evidence was not supported by any other independent evidence. He argued that the trial Judge should have compared the evidence of that witness before the Magistrate in the criminal prosecution proceedings (Exh.P4) with the evidence he gave before the trial Judge to determine the credibility of the witness. Counsel submitted that had the trial Judge done so, he would have found that the evidence of that witness in the two proceedings were contradictory. He did not testify in the criminal proceedings to the fact that the OC C.I.D made the suggestion to set them free but that the appellant insisted on their prosecution. In Counsel's view, that piece of evidence was an after thought aimed at influencing the court that the appellant was instrumental in the prosecution of the respondents whereas not. Counsel concluded that the contradiction in the evidence of the witness showed that he is not a credible witness and that his evidence needed corroboration.
On the other hand, Mr. Ayigihugu, learned counsel for the respondents contended that counsel for the appellant had objected before the trial Judge to the admissibility of that piece of evidence on the ground that it should have been given by the OC C.I.D who had chaired that meeting. But that the trial Judge overruled the objection. Mr. Ayigihugu said that thereafter, counsel for the appellant neither challenged the witness on that piece of evidence in cross-examination nor called the OC C.I.D to rebut the evidence. He submitted that in view of that failure, the trial Judge rightly believed the evidence **as** he was entitled to presume that its truthfulness was admitted. Counsel cited **Uganda Vs Dusman Sabuni [1981] HCB 1** for the principle that omission or neglect to challenge evidence in chief on a material or essential point by cross-

examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or palpably untrue.

Mr. Owori replied that if he had cross-examined the witness on that evidence, his subsequent challenge to the same would have been difficult.

Essential ingredients constituting the tort of malicious prosecution have been highlighted by the Court of Appeal for Eastern Africa (Lutta J.A.) in **Mbowa Vs East Mengo Administration [19721 EA 352 at 354** to be the following:

[1] That Criminal proceedings must have been instituted by the defendant, that is he was instrumental in setting the law in motion against the plaintiff.

[2] The defendant must have acted without reasonable or probable cause. Thus must exist facts which on reasonable grounds, the defendant genuinely believes that the criminal proceedings are justified.

13] The defendant must have acted maliciously. In other words the defendant must have acted in instituting criminal proceedings with an improper and wrongful motive, that is, he must have had "an intent to use the legal process in question for some other than its legally appointed and appropriate purpose" **Pike Vs Waldrum [19521 1 LLOYD's Rep. 431 at 452**.

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[4] The criminal proceedings must have terminated in the Plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.

I agree. As the learned author has stated in his book **"SALMOND ON TORTS" 17th Edition p.415.**

”...in the case of malicious prosecution by way of indictment in the name of the Queen, the person liable is the prosecutor to whose instigation the proceedings are due.”

In a prosecution in the name of the state, the person liable is therefore the complainant in whose instigation the proceedings **are due.**

Mr. Owori criticised the trial Judge:-

[1] for accepting in evidence the testimony of PW2 which tended to show that the appellant was instrumental in the prosecution of the respondents. His reason was that the evidence should have been given by the OC C.I.D who chaired the meeting at which the words were allegedly uttered. The evidence is to the effect that at a meeting between the CC C.I.D, appellant and the witness at the police station Tororo when the CC C.I.D proposed a settlement of the matter out of court, the appellant insisted that the respondents must be prosecuted.

[2] for believing and relying on that evidence when PW2 is not credible and the evidence lacked corroboration. His reason was that the evidence of PW2 in the criminal proceeding before the Magistrate (Exh.P4) and his evidence before the trial Judge are contradictory. In the criminal proceedings PW2 did not testify on the alleged meeting at the Police station.

With respect, I am unable to fault the trial Judge in (1) above for accepting that evidence of PW2 since the witness was testifying on what he heard spoken at a meeting which he attended. This is in line with Section 58 (b) of the Evidence Act. The evidence refers to a fact which could be heard and PW2 said that he heard it. I find no merit in that criticism.

- As regards to (2) above, that is a challenge to the matter of exercise of discretion of the trial Judge. The law on this point is well settled. Matters of exercise of discretion of the trial Judge will not be interfered with on appeal save in very exceptional circumstances, for example where there is an error in law or facts in his judgment. (See ***Zarina Shariff***

Vs Noshir** P. Sethna **[1963] EA 239 at 249; British** FAME **Vs** MACGKEGOR **11943] 1 ALIER. 33 at 36

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Mr. Owori strongly argued that the trial Judge should have compared the evidence of PW2 in the criminal proceedings (Exh. P4) with that before him to determine the credibility of the witness. I am unable to agree with that argument. The purpose of Exh.P4 was to prove that the criminal proceedings terminated in favour of the respondents. The trial of the Civil case was on evidence adduced before the trial Judge. It could not have been proper for the trial Judge to compare the evidence of the witness in the two proceedings as he was not sitting on appeal over the criminal proceedings.

However, if the appellant wanted to challenge the credibility of the witness, he was free to cross-examine him on his evidence in Exh. P4 to show that he was not consistent on the point of the meeting at the Police Station. Another way would be to call the evidence of the OC C.I.D to contradict the witness on that issue. But none of the above courses was taken. I find no merit in this criticism as well. In the result, grounds 1 and 2 must fail.

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The next is ground 3. The complaint raised in this ground is that the trial Judge did not give a balanced consideration of the evidence before him. the reason advanced for this complaint was that the trial Judge disbelieved the evidence of the appellant's sole witness because:

- [1] the witness did not have the command of the English language.

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[2] the appellant did not himself testify.

Mr. Owori argued that the evidence of Steven Onyami (DW1) in the criminal proceedings (Exh.P4) and that before the trial Judge was consistent. In counsel's view, that shows that the

witness was credible. On the English language, Mr. Owori pointed out that the witness stated in his evidence that he understood the English that was spoken.

Mr. Ayigihugu submitted that the trial Judge was entitled to believe any of the witnesses who testified before him in preference to another provided that he gives reasons for doing so. Counsel contended that the trial Judge did just that.

The trial Judge dealt with the matter in his judgment in this way:

> ”The Defendant chose not to testify in his defence to show that he put the law in motion against the Plaintiffs with reasonable and probable cause and the onus was upon him to do so. The testimony of the Plaintiffs was very consistent and I believe it in preference to that of the sole witness for the defendant. DW1 in cross- examination stated that the exchange between the defendant and the Plaintiffs was conducted in English a language he confessed to have very little command of. It is very unlikely he really followed the discussion between the parties. Mr. Owori tried to fill in this gap by the evidence for the prosecution in the record of proceedings in the criminal case No. MT/408/90 which was Exhibited as P4. This suit is being tried on the evidence adduced in this court, and in any case the Plaintiffs were acquitted in the criminal court meaning the prosecution evidence Mr. Owori is relying on was not believed.”

Clearly, the trial Judge gave reasons for his believing one witness in preference to the other. I cannot fault him on that. That is a matter of exercise of his discretion and there is nothing to show that he acted contrary to any principle of the law in the exercise of that discretion nor that he erred on the facts. This ground too must fail.

Finally, there are grounds 4 and 5. They were argued together. The questions raised here are:

[1] Whether or not the respondents were admitted into the appellant’s residence.

[2] Counter-claim.

The evidence of the respondents and that of the sole witness of the appellant are divergent on (1) above. The respondents, (PW1 and PW2) testified that when the appellant found them waiting at the entrance, he led them into the living room where he offered them seats. DW1 on the other hand testified that when the appellant found the respondents waiting at the entrance, he opened the door and the respondents forced themselves into the living room.

The trial Judge believed the respondent's story in this way:

> "Having believed the Plaintiffs I find that
> the Plaintiffs did not enter the defendant's residence forcibly. After having insisted to reschedule the appointment for 10/9/90 for good reasons that they have travelled from Kampala and were due on duty that date, I believe that the Defendant agreed to see them. The Plaintiffs showed their good intentions by identifying themselves. It was only that they touched the subject of the land that the defendant became
> uncomfortable and upset."

Mr. Owori submitted that there was no urgency in the matter but that the respondents only went to the appellant's residence to annoy him when PW1 stated that he would take the land by all means.

I find no merit in these grounds as the trial Judge was entitled to believe the respondents in preference to DW1 as this is a question of discretion. He saw the witnesses as they testified before him. He is therefore the best Judge on their credibility. There is nothing on the record to justify interference with exercise of the trial Judge's discretion on this point.

On (2) above, the counter claim depended on the evidence of DW1 whom the trial Judge did not believe for the reasons he gave. In my view the counter-claim was properly dismissed as there was no credible evidence to support it once the evidence of DW1 was not believed. These grounds therefore must also fail.

In the result, I would dismiss the appeal with costs here and in the court below. As Engwau J.A. and Kitumba J.A. both agree, the appeal is dismissed on the above terms.

Dated at Kampala this 23rd day of December 1998.

G.M. OKELLO
JUSTICE OF APPEAL.

JUDGMENT OF ENGWAU J.A.

I have had the benefit of reading the judgment of Okello, J.A. in draft and I agree with it. In the circumstances, I would dismiss this appeal with costs here and in the court below to the respondents.

Dated at Kampala this 23rd day of December 1998.

JUDGMENT OF JUSTICE A.E. MPAGI BAHIGEINE, J.A.

I agree and have nothing to add to what My Lord Okello, J.A. has said.

Dated at Kampala this 23rd day of December 1998

A.E Mpagi Bahigeine

JUSTICE OF APPEAL