IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No HBC 160 of 2019

BETWEEN

KITIONE KULAVERE of Vunisinu Road, Off Khalsa Road, Tacirua East.
Retired Police Officer.

PLAINTIFF

AND

THE LAND TRANSPORT AUTHORITY of Lot 1 Daniva Road, Valelevu, Nasinu.

DEFENDANT

Counsel	-	Mr. K. Maisamoa for Plaintiff Mr. A. Prasad for Defendant
Date of Hearing	-	06th April 2023
Judgment delivered	-	09th August 2023

JUDGMENT

1. Plaintiff in his Writ of Summons states that there is a cause of action against the Defendant for malicious prosecution. In the Statement of Claim the Plaintiff therefore claims special damages, general damages, exemplary damages, aggravated damages, costs on indemnity basis and interest on damages.

2. The Plaintiff was issued with a Traffic Infringement Notice [hereinafter mentioned as TIN] No 1694534 on 05th June 2014 by an employee of the Defendant. Later the Plaintiff wrote a letter to the Chief Executive Officer of the Defendant notifying that the TIN was defective therefore it should be withdrawn.

3. The Plaintiff discussed about the defective TIN with Jiujiua Bera who issued him with the TIN. After discussing with the legal section he has informed the Plaintiff that the TIN has been filed in Court therefore to inform Court. The Plaintiff thereafter appeared in Nasinu Court on seven separate occasions. On the eighth occasion on 05th January 2016 the Court dismissed the charge.

4. The Defendant in their Statement of Defence state that the TIN required the Plaintiff to pay a fine of $40. Due to the failure to pay the fine the Defendant was mandated by the Land Transport Act 1998 to lodge the TIN at the Magistrate Court. The Defendant denies that they received a letter from the Plaintiff informing the defectiveness of the TIN. The Defendant denies that there is any cause of action available for the Plaintiff. Hence seek a dismissal of the Writ of Summons and cost in favour of the Defendant.

5. The only fact agreed by the parties at the pre-trial conference was that the Plaintiff was issued with TIN 1694534 by the Defendant.

6. At the trial the Plaintiff gave evidence and the Defendant called Mr. Jiujiua Bera as a witness.

7. Plaintiff in his evidence stated that he has now retired from Police Force. He has served the Police Force for 35 years and progressed through the ranks to be an Inspector of Police. He referred to exhibit 01 a letter issued by the Officer in Charge of Nasinu Magistrate's Court to explain the number of occasions he attended Court. The second exhibit referred by him was the certificate of court proceedings issued by the Senior Court Officer of the Nasinu Magistrate's Court. It states that the accused of the Traffic Case No. 4429/14 for failure to wear seat belt, was discharged under section 171 of the Criminal Procedure Decree due to non-appearance of the LTA prosecutor. The subject matter of the Magistrate's Court proceedings was the TIN issued to him, was tendered to Court marked as exhibit 4.

8. He further states that on 07.07.2014 he approached the LTA legal section and later he met with the officer who booked him, Mr. Bera. The Plaintiff has informed him that the TIN issued to him was while he was driving at Usher Street Suva and not Kanace

Road, Valelevu as stated in the TIN. Plaintiff states that Mr. Bera came back to inform him that he needs to go to Court.

9. During cross examination Plaintiff stated that he saw two LTA officers at Usher Street, he never did anything wrong and was wearing his seat belt. Mr. Bera requested him Drivers Licence and came back with a TIN. Plaintiff received the TIN and went as there was traffic on the road. The learned counsel for the Defendant put to the witness that he was not wearing the seat belt, hence it was not mentioned in the letter he later wrote to LTA.

10. Further the Plaintiff stated that he attended Court on all occasions and requested the Court to conclude the case as it was a simple matter. It was then fixed for hearing and dismissed due to non-appearance of the prosecutor on 05.01.2016. That was the evidence provided by the Plaintiff.

11. The Defendant called Mr. Jiujiua Bera as their only witness to this action. He currently works as an Enforcement Officer at the Land Transport Authority. He recalled the events of this case which took place in 2014. He was a Road Safety Officer back then. His duties involved looking after the safety of the roads. If anything not in order, he had the authority to issue TINs.

12. He stated that the TIN subjected to this case was issued by him at Kanace Road in Valelevu. According to the witness he has seen the Plaintiff not wearing his seat belt and subsequently issued a TIN. Witness provided a document to establish the outcome of the Court case and marked as Defendant's exhibit 1. The witness stated that he knew Plaintiff very well and the issuing of TIN was done as he was a police officer and he should be an example to the public. He further stated that once a TIN has been issued, he does not play any other role expect as a witness in the event of a Court case. They are unable to withdraw a TIN once issued and the matter needs to go before the Court for any decision.

13. During cross examination the witness rejected the proposition that the incident happened in Usher street. The Plaintiff's cross examination did not touch on the issue of whether he was wearing a seat belt at the time of the incident.

14. The law on malicious prosecution is clear. There are four elements which a Plaintiff must establish;

    (i) that proceedings of the kind to which the tort applies (generally criminal proceedings) were initiated against the Plaintiff by the Defendant,
    (ii) that the proceedings terminated in favour of the Plaintiff,
    (iii) that the Defendant, in initiating or maintaining the proceedings acted maliciously,
    (iv) that the Defendant acted without reasonable and probable cause.

15. The very first question before me is whether a Traffic Infringement Notice which later converted into a traffic charge can be considered as proceedings which the tort would be applied.

16. A similar issue has been discussed by Hon. Justice Tuilevuka in **Khan v Khan [2016]** FJHC 344; HBC037.2011 and the issue was whether a report made under Domestic Violence Act can be considered for an action of malicious prosecution.

17. In the said case His Lordship has stated "the kind of proceedings to which the tort applies are mostly of the kind which are initiated by the filing of a criminal charge". As **Clerk & Lindsell on Torts** (15th ed):
In an action for malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge. Having said that, under common law, an action for malicious prosecution may lie also out of certain types of falsely and maliciously prosecuted civil proceedings. These instances however, are a rarity.
...the word 'prosecution' in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company **Quartz Hill Consolidated Gold Mining Co. v. Eyre** [1883] 11 QBD 674

Thereason why an action for malicious prosecution will not lie ordinarily with regards to a falsely and maliciously prosecuted civil action was explained thus by the Privy Council in **Mohammed Amin v Jogendra Kumar Bannerjee** [1947] AC 322
The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, ..., that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing ... But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage, and in such a case damage to reputation will be presumed.'

18. The legal literature identifies that there are three heads of damage which will support an action for malicious prosecution. Take away a man's liberty is a damage which the law will take note. Secondly to cause a man to be put to expense is also a damage. And thirdly where a man's fame and credit are injured. In my view a traffic offence could result second and third mentioned damage to a person depending on the circumstances. Therefore I am of the view that the tort is applicable to a traffic case.

19. Moving on to the other ingredients I find the judgment of the House of Lords in **Glinski v McIver** (1962) AC 726 would be useful, where Lord Devlin said at p.765:

'My Lords it is a commonplace that in order to succeed in an action for malicious prosecution the plaintiff must prove both that the defendant was actuated by malice and that he had no reasonable and probable cause for prosecuting.' and, in

highlighting the difference between 'malice' and want of 'reasonable and probable cause', Lord Denning said at p.759:

'we all know that malice or improper motive is never a ground for saying there is no reasonable or proper cause. In the words of Lord Mansfield: 'from the most express malice, the want of probable cause cannot be implied': See: **Johnstone v. Sutton**.'

20. In **Herniman v. Smith** (1938) AC 305 the House of Lords in upholding an appeal quashing a suit for malicious prosecution for no absence of 'reasonable and probable cause', affirmed the definition of 'reasonable and probable cause' enunciated by Hawkins J. in **Hicks v. Faulkner** [1878] 8 QBD 167,171 and held:
'It is not required of any prosecutor (in an action claiming malicious prosecution) that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for the prosecution. Circumstances may exist in which it is right, before charging a man with misconduct, to ask him for an explanation; but no general rule can be laid down, and where a person is satisfied, or has apparently sufficient evidence, that he has in fact been cheated, there is no obligation to call on the cheat and ask for an explanation, in as much as to ask for this may only have the effect of causing material evidence to disappear or be manufactured.'

21. The evidence of the Plaintiff is that he was stopped by Mr. Bera on the date of the incident and he requested for Plaintiff's Drivers licence. Several minutes later Mr. Bera came back to the Plaintiff to handover his licence and the TIN. The Plaintiff states that he kept it on the dashboard of the vehicle and drove off. The Plaintiff did not refer to any other evidence to show that Mr. Bera's actions on the date of the incident motivated by malice. The other question is whether there has been a defect in the charge and the incident happened in Usher street as the Plaintiff claims.

22. I note that Plaintiff did not successfully challenge Mr. Bera's evidence in this regard during the cross examination. The Plaintiff being a police officer who also had served in the traffic division of the police, did not question the witness at the site when he received a TIN. According to Plaintiff he did not do anything that could cause a breach of traffic regulations. The prudent behaviour of a reasonable person would have been to question the authority before giving his details to issue the TIN. However, Plaintiff's explanation is that he moved his vehicle because of the traffic.

23. On the other hand Mr. Bera's evidence was that he knew the Plaintiff and issued the TIN for not wearing his seat belt as he must adhere to the law as a police officer. That in my view does not amount to prove an ulterior motive. I am also guided by legal precedents of **Tuilole v Attorney General of Fiji** [2003] HBC 229/2002 where the accused was charged under a repealed law, and the Court struck out the action on ground that the Plaintiff failed to show absence of reasonable and probable cause. In **Percy v Hail** [1997] QB 924 [1996] 4 AER 523 the Court of Appeal held that in an action for false imprisonment or wrongful arrest, the defendant can rely on the defence of lawful authority even though the by-law under which he acted is declared invalid.

24. The Court also noted that there was no evidence led by the Plaintiff at the trial on the damages he suffered as a result of the actions by the Defendant.

25. I have sufficient reasons as stated above to make a determination in this matter. However before the conclusion I would like to address whether a dismissal under 171 of the Criminal Procedure Decree (as stated in the letter Plaintiff's Exhibit 2) can be considered as termination of proceedings in favour of the Plaintiff.

26. Section 171 (1) *(b)* states in a matter where the Court has adjourned the hearing or further hearing, 'if the complainant does not appear the court may dismiss the charge with or without costs'. Unlike in the earlier sections of the Decree, here the statute has not given the mandate to acquit an accused person. It is therefore any dismissal under section 171 would amount to a discharge of an accused person. A discharge on a technical ground is not the same as an acquittal based on facts of the case.

27. If the Court is minded to give a broader interpretation to the words of 'termination of proceedings in favour of Plaintiff' then a 171 discharge could be included. However, I think a dismissal of a charge under a technical point should not have the same effect of an acquittal which in my view mandatory to institute civil proceedings for malicious prosecution.

28. In conclusion I take the view that the Plaintiff has not successfully discharged his burden of proof on the balance of probabilities to establish malice and the Defendant acted without a reasonable and probable cause.

29. Accordingly Court makes following orders.

ORDERS

1) Plaintiff's action is hereby dismissed.
2) Parties to bear cost.

Yohan Liyanage

JUDGE

At Suva on 09th August 2023