BRIEFS ON ESSENTIALS OF LAW OF TORTS

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INTRODUCTION TO LAW OF TORTS

Tort is a civil wrong independent from breach of contract or trust resulting from breach of duty primarily fixed by the law to all person generally and is normally redressed for an action of unliquidated damages\(^1\).

Torts are informal occurrences that deal with wrongs or injuries inflicted upon one party by another, outside of the context of a formal relationship or contract. Therefore, the liability does not come from an agreed upon set of rights and responsibilities such as those defined in a contract, but rather from the law itself. In torts, the parties involved are strangers according to the law. The only reason they are brought together is the misfortune which resulted in the tort action. For example, I may not have very much to do with my neighbor until I assault him or her.

Misfortune happens and when it does the defendant will be held responsible to pay compensation for causing such misfortunes. It thus follows that all the misfortunes in torts are actionable for a common remedy of unliquidated damages since because the damages are not know unless and until an action for damages arose in the court is where now the court may quantify the damages basing on the merit of the claim and the prevailing circumstances of the case. Damages is the most important remedy for a tort. After happening of the misfortune it is not possible to undo the misfortune which has already been caused but it is the monetary compensation which can be awarded to the injured party.

The law of Torts covers several misfortune and basically their consequences in the event where they occur to a person, such misfortunes includes but not limited to the followings:-

**Trespass to person:** the essence of trespass to the person is that it provides a claimant’s protection against direct invasion of his bodily integrity. Trespass to the person relates to direct and forcible injury to the person, Direct means that the injury must follow so closely on the act that it can be seen as part of the act. However, injuries caused by a car accident are not direct but are regarded as consequential. Actual physical harm is however not an essential ingredient of trespass to the person since the tort is actionable per se. Trespass to the person, has three components which may either occur together or separately: **assault, battery and false imprisonment.** In their definitions,

these components incorporate the words intentional and direct.

**Battery:** According to Salmond and Heuston (p125) battery is the application of force to the person of another without lawful justification. Gold LJ in *Collins v Wilcock*\(^2\) states that battery is the actual infliction of unlawful force on another person. He states that touching will only amount to a battery where it does not fall within the category of physical contact generally acceptable in the ordinary conduct of general life. In *R. v. Rev. Father John Rwechungura*, Kisanga J stated that in order to establish a battery it is necessary to prove two ingredients, (a) beating or touching of another person and (b) that the beating or touching was done in an angry, revengeful, rude, insolent or hostile manner, which adjectives can note an evil mind.

**Assault:** According to Winfield and Jolowicz at pg. 71, assault is defined as an act of the defendant which causes the claimant reasonable apprehension of the infliction of battery on him by the defendant. Gold LJ in *Collins v Wilcock*\(^4\), defines assault as an act which causes another person to apprehend infliction of immediate, unlawful force on his person. An obvious example can be A pointing a loaded gun at B. In such a case by virtue of pointing the gun the claimant reasonably apprehends the infliction of an immediate battery.

**Trespass to land:** is the unlawful intrusion of an individual to another’s land voluntarily. Involuntary intrusion does not amount to trespass. Maxim “*cui us est solum, eius est usque ad coelum et ad infernos*” which means whoever owns the land, owns it all the way to the heavens and to hell. Trespass to land can also be defined as any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient to establish a claim. It is therefore trespass to drive a nail into the wall of a neighbour, to grow creeper up another person’s wall or to dump rubbish on someone else’s land. Trespass to land is normally a civil wrong but it may give rise to criminal proceedings in some cases as trespasser can be prosecuted criminally if he enters on somebody’s land with the intent to steal goods or commit any other offence\(^5\).

\(^2\)[1984]3 All ER 374  
\(^3\)[1972] HCD 168  
\(^4\)[1984]3 All ER 374  
Trespass to chattels: This tort may simply be defined as every direct and unlawful interference with the chattel of another person (usually the possessor/plaintiff). Or in other words, Trespass to chattel is the intentional and wrongful interference of another person’s personal property. Such interference could either be intentional or negligent. This tort was made or aims to protect the; The plaintiff’s interest in retaining possession of the chattel. His interest in physical condition of the chattel, and to prevent unlawful intermeddling with chattel of a person. The tort of trespass to chattels is actionable per se; this is to mean that without proof of actual damage, thus the mere wrongful moving or touching of someone’s chattel without any harm is actionable per se. For example it is a trespass to chattel were someone parks his car and another person leans on it or even touch it.

It can thus be construed that, there is no doubt that the law of Torts is all about the misfortunes and their consequences as the law itself establishes several kinds of misfortunes that once committed by one person to another, the tortfeasor will be compelled to remedy such misfortunes by paying compensation to that other who suffered such misfortune.

TORT OF NEGLIGENCE

Negligence may be defined as an act or omission which constitutes a breach of a duty of care owed by another person by the person who acts or fails to act and which causes that other person to suffer harm. In any tort of negligence the plaintiff must prove certain elements to held the defendant liable for his negligent act or acts.

ELEMENTS NECESSARY FOR THE PLAINTIFF TO PROVE IN TORT OF NEGLIGENCE

1) THAT, the defendant owes the plaintiff a duty of care

One of the crucial thing that the plaintiff needs to prove is that the defendant owes him a duty of care. This requirement is espoused by Atkin in Donoghue v Stevenson, who views a duty of care as arising out of some relationship between the two parties, rather than by reference to a specific act or damage.

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8[1932] AC 562
Lord Esher MR in *Le Lievre v Gould*\(^9\), remarked that a man is entitled to be negligent as he pleases towards the whole world if he owes no duty to them then to fulfill the requirements of the question above it has to be proved by the plaintiff that the relationship between the victim and the alleged tortfeasor had a proximate relationship and that damage caused to the victim was foreseeable.

That is the defendant must have foreseen some defects to the plaintiff at the time of the negligent conduct or omission.\(^10\) Lord Porter repeated his words in the case of *Bourhill v Young*\(^11\). “The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty.”

Also in the case of *Caparo v. Dickman*\(^12\), the court of law introduced a 'threefold test' for a duty of care that harm must be (1) reasonably foreseeable (2) there must be a relationship of proximity between the plaintiff and defendant and (3) it must be fair, just and reasonable to impose liability. However, these act as guidelines for the courts in establishing a duty of care; much of the principle is still at the discretion of judges\(^13\).

The doctor owes a duty of care to his patients as was seen in the case of *Theodoclina Alphaxad v Medical Officer in Charge of Nkinga Hospital*\(^14\). In this case Nkinga hospital was held liable for causing amputation of the minor’s hand due to the negligence of the doctor on duty. The court of Appeal of Tanzania on this case established the following factors that the doctors instructions to the patient’s father was sufficiently to prove there was a relationships and the doctor owes a duty of care to the minor and the father was not properly informed of the serious risk to his daughter.

2) **THAT, the defendant breached a duty of care**

The second ingredient to establish negligence requires a plaintiff to show that the defendant was in breach of duty, here the judge or magistrate will consider defendant’s conduct fell bellow the

\(^9\)[1891] 1QB 491 at 497


\(^11\)[1943] 92 AC 113

\(^12\)[1990] HL 587

\(^13\)Retrieved from http://www.austlii.edu.au/au/cases/cth/HCA/1999/36.html on 23rd Jan 2018 at 10:00PM

\(^14\)[1992] TLR 235
required standard which can be determined by invoking reasonable man test. The defendant will only be liable if the reasonable man would have foreseen damage in the circumstances prevailing at the time of the alleged breach of duty\textsuperscript{15}.

In the case of \textbf{Dickson v Bell}\textsuperscript{16}, in this case Bell stayed in an area where robbery was rampant. Because of this situation he kept his gun loaded, he stayed in a house which was not his, it belonged to another person, while the servant was playing with the gun pointing it to Dickson’s son, the bullet went off and caused injury to the young boy. When the matter went to court it was argued in defense that enough precautions were taken by removing the priming.

However the court held that it was not enough precaution of a reasonable man in the circumstances. That it was a duty of the defendant to render precautions to the gun completely safe. The court also went ahead saying that, it has to be borne in mind that the legal standard of a reasonable man” is not of the defendant himself but that of a “man of ordinary prudence” a man using ordinary care and skill.

3) \textbf{THAT, the plaintiff occasioned a damage as the results of defendant breach of duty}

The plaintiff does not succeed in negligence simply because duty and breach of duty have been established. Success is achieved when it is shown that breach of duty resulted into injury recognized by the law that means there is causal relationship between the damage suffered and the duty breached\textsuperscript{17}.

In negligence, a particular injury is recognized as one arising from breach of a particular duty when it is shown that in fact a particular injury resulted and that such an injury is not too remote. For instance, where one suffers a psychiatric damage resulting from shouts and acclamations of people who are witnessing a pedestrian being knocked down by a car such a person is not likely to recover in tort because of remoteness from the cause of the problem\textsuperscript{18}.

\textbf{For a tort of negligent misstatements the plaintiff must establish the following factors:-}

(a) \textbf{THAT, the plaintiff must prove that the defendant possessed of a special skill.}

\textsuperscript{15}Braizer M, (1951). \textit{Street on Torts} (18\textsuperscript{th} Ed) London: Butterworths at p. 204-205

\textsuperscript{16}[1816] 5 M & S 198

\textsuperscript{17}Binamungu C.S. (2004). \textit{The Law of torts in Tanzania}, Mzumbe; Research and Publications Department at p. 50

\textsuperscript{18}Ibid at pp. 49-50
This means that the maker has to give advice while knowing that the receiver will rely on the same information to do some subsequent activities as was seen in the case of Francis Ngaire v National Insurance Corporation (N.I.C)\(^{19}\), where the defendant knew that the advice they gave was to be followed to claim for compensation. Because the advice was given negligently the plaintiff was unable to claim from the true insurance company (British Insurance Company) since he was already time barred.

(b) **THAT, the plaintiff must reasonably rely on the defendant’s advice**

The plaintiff must prove that he relied on the advice. It must be foreseeable that the plaintiff will rely on the advice as was seen in Hedley Byrne v Heller & Partners Ltd\(^{20}\), that the appellant relied on banker’s advice to book time for advertisement for their clients which led sustaining financial loss of about 17000 pounds.

(c) **THAT, the plaintiff must have some knowledge of the type of transaction for which the advice is required.**

This limb emphasizes one crucial point which consolidates the proximity rule. The claimant is duty bound to show in clear terms that the giver of an advice knew the transaction for which an advice was given\(^{21}\). In Francis Ngaire’s case (supra), Mwaikambo knew very well the next move which the plaintiffs were going to take. That is why the very person advised the plaintiffs to produce a police report and other documents.

The law also afford some defense to the part of the defendant and once the defense stands it may exonerate him or her from liability. The defense includes the followings:- Voluntary assumption of risks (volenti non fit Injuria), as was evidenced in the case of Khimji v Tanga Mombasa Transport Co. Ltd\(^{22}\), an action for negligence failed both in the trial court and on appeal because the courts were satisfied that the deceased consented to the risk. Contributory negligence as evidenced in the case of Davies v Swam Motor Co. Ltd\(^{23}\), Where the court regarded the plaintiff to have contributed to his peril by 90%, and inevitable accident as evidenced in the case of Msuri

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\(^{19}\)[1972] HCD 134
\(^{20}\)[1964] AC 464
\(^{22}\)[1962] E.A 419
\(^{23}\)[1946] 2 KB 291
Muhhiddin v Nazzor Bin Seif\textsuperscript{24}, where an accident of a overturned bus was held to be inevitable accident and not negligence to the part of defendant.

Generally as pointed out that to establish negligence there must be three elements namely, duty of care, breach of duty and damage. The damage required in this context which must flow from the breach of the duty to take care must be proximate that is there must be a nexus between the two like cause and effect.

**THE CONCEPT OF DUTY OF CARE IN TORTS**

In tort law, caring for others is a legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. It thus follows that basing on this idea of caring for others in tort an individual may owe a duty of care to another, to ensure that they do not suffer any unreasonable harm or loss. If such a duty is found to be breached, a legal liability is imposed upon the tortfeasor to compensate the victim for any losses they incur\textsuperscript{25}.

The principle of caring for others (expressed in neighborhood principle) was enunciated in the landmark case of *Donoghue v. Stevenson*\textsuperscript{26}, where Lord Atkin remarked as follows:-

\textit{“The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer question, Who is my neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplations as being so affected when I am directing my mind to the acts or omissions which are called in question”}.

Basing on this concept of caring for others, for example I am under a legal duty not to trespass on my neighbour property. This is a duty primarily fixed by law on me. Similarly, by the same

\textsuperscript{24} [1960] E.A 201
\textsuperscript{26} [1932] AC 562
principle my neighbour cannot trespass into my property. Am also under the obligation not to assault you, to slander you and this is what meant by caring for others in law of Torts.

The relevancy of the concept of caring for others as applied in torts can be seen in different kinds of relationships as follows:

**Doctor and Patient relationship**

A doctor owes a duty of care to his patients as was seen in the case of *Theodoclina Alphaxad v Medical Officer in Charge of Nkinga Hospital*[^27]. In this case Nkinga hospital was held liable for causing amputation of the minor’s hand due to the negligence of the doctor on duty. the court of Appeal of Tanzania on this case established the following factors that the doctors instructions to the patient’s father was sufficiently to prove there was a relationships and the doctor owes a duty of care to the minor and the father was not properly informed of the serious risk to his daughter.

**Seller and purchaser relationship**

The law imposes a duty to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure persons so closely and affected by your act. This was seen in the case of *B.A Minga v Mwananchi Total Service Station*[^28]. In this case Mwananchi Total Service Station was a seller of fuel generally and kerosene in particular. During that time there was scarcity of fuel, because of this seller of fuel were used to mix diesel with kerosene in order to increase the quantity of fuel in the market. On the material day the appellant sent his child to the fuel station to buy kerosene, the kerosene sold to the child was mixed with petrol. When the fuel was taken home it was funneled in the small lamp. When fire was lit it exploded burning a substantial part of the appellant’s property. EL-Kindy J. held that the nature of the duty varies according to whether or not the act involves a thing dangerous in itself hence the liability does not depend on whether the defendants were manufacturers or distributors or both but on whether they had put themselves in direct relationship with the customer[^29].

**Fiduciary relationships (lawyer & client)**

[^27]: [1992] TLR 235
[^28]: [1972] HCD NO. 241
[^29]: Jackson Mussetti v Blue Star Services Station [1997] TLR 114
Similarly, in legal malpractice an attorney’s duty of care is to act as a reasonable attorney would in that same situation that is caring for his client. This is seen in the case of Norton v. Lord Ashburton\textsuperscript{30}, where Lord Ashburton claimed damages from Nocton, a Solicitor on the basis that he had suffered loss as a result of improper advise given to him by Nocton which he acted upon. The advice had been that Lord Ashburton should release a part of a mortgaged security. As a result of acting on that advice the security had become insufficient and Lord Ashburton claimed that the advice had been given by Nocton knowingly that the security would be rendered insufficient and that it had been given in Nocton’s interest and not in his client’s interest. It was held the plaintiff was to succeed on the basis of a breach of duty which arises out of fiduciary relationship with the defendant and which the defendant suffered loss.

The said concept of caring for others in tort is said to be breached if one’s conduct fell bellow the required standard which can be determined by invoking reasonable man test. The defendant will only be liable if the reasonable man would have foreseen damage in the circumstances prevailing at the time of the alleged breach of duty. Example of a reasonable man in various cases; In case of blind and deaf people is that a man has a distinct defect of such a nature making him or her impossible to take certain precautions then they cannot be held answerable for not taking such precautions.\textsuperscript{31} On the case of children it is that infant have been held guilty of contributory negligence where adults would on similar facts have been deemed to be liable for contributory negligence\textsuperscript{32}.

Generally, the concept of caring for others is relevant in law of Torts as it is applied to impose a legal duty to all person generally to avoid any acts or omissions that are likely to injure their neighbors. As stated above due to this legal obligation I am under a legal duty not to trespass on my neighbour property. This is a duty primarily fixed by law on me. Similarly, by the same principle my neighbour cannot trespass into my property. Am also under the obligation not to assault, to slander anybody and this is what meant by caring for others in law of Torts.

**BRIEFS ON TREPASS TO PERSON**

**A) MALICIOUS PROSECUTION**

\textsuperscript{30}[1914] AC 932
\textsuperscript{31}Binamungu C.M( 2002) Law of Torts in Tanzania at pg 48
\textsuperscript{32}Cassidy v Ministry of Health [1951] 2KB 343
Malicious prosecution is an institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause. In other words malicious prosecution may refer to institution of unsuccessful criminal proceeding maliciously and without reasonable and probable cause\textsuperscript{33}.

Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. This tort balances competing principles, namely freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons\textsuperscript{34}.

In order to succeed the plaintiff must prove that there was a prosecution without reasonable and just cause, initiated by malice and the case was resolved in the plaintiff’s favor. It is necessary to prove that damage was suffered as a result of the prosecution\textsuperscript{35}.

The basic elements of malicious prosecution was set out in the case of \textit{Hosia Lalata v. Bibson Sumba Mwasota}\textsuperscript{36}, That the plaintiff was prosecuted; That the prosecution ended in his favour; That the prosecution was conducted without reasonable and probable cause; That in bringing the prosecution the defendant was actuated by malice.

In the case of \textit{Jeremiah Kamama v. Bligomola Mayandi}\textsuperscript{37}, it was held that:- For a suit of malicious prosecution to succeed the plaintiff must prove simultaneously that:- He was prosecuted; That the proceedings complained of ended in his favour; That the defendant instituted the prosecution maliciously; That there was no reasonable and probable cause for such prosecution; and That damage was occasioned to the plaintiff.

\textbf{ELEMENTS NECESSARY TO PROVE MALICIOUS PROSECUTION}

From the above presented cases five basic elements can be deduced that the plaintiff must prove for his claim to stand. It thus follows that in an action of malicious prosecution the plaintiff must prove:-

1) \textbf{THAT, the plaintiff was prosecuted by the defendant}

\textsuperscript{34}Retrieved from \url{https://www.scribd.com/document/322365231/Malicious-Prosecution-Under-Law-of-Tort} on 23rd January 2018 at 11:00PM
\textsuperscript{36}[1980] TLR 154
\textsuperscript{37}[1983] TLR 123
In this aspect evidence has to be led to show that the plaintiff was actually prosecuted by defendant and the suit was this terminated in his favour. This is sufficiently discussed in the case of Amadi Juma v. Tanzania Police Force\textsuperscript{38}, In this case it was not disputed that plaintiff was prosecuted. The State Attorney in her final submissions argued that there were no exhibits tendered to that effect. The plaintiff annexed with a copy of judgment as annexure A4 vide Criminal Case No. 852/2005 in the District Court of Ilala whereby accused Hamad Juma and the plaintiff who was charged with the offence of armed robbery c/s 287 A of the Penal code and was acquitted. In the course of trial this fact was not disputed and I therefore find that plaintiff in this suit was prosecuted and the proceedings complained off ended in his favour.

2) THAT, the proceeding complained was terminated in favour of the plaintiff

The plaintiff must prove that the prosecution ended in his favour. He has no right to sue before it is terminated and while it is pending. The termination may be by an acquittal on the merits and a finding of his innocence or by a dismissal of the complaint for technical defects or for non-prosecution. This requirement is sufficiently stated in the case of Abdul Javer Heghji v. Alibhai Mitha\textsuperscript{39}, where it was stated that the element of malice is essential and in an action for malicious prosecution, it must be averred that “in as far as the proceedings on which (plaintiff) sues could have terminated in his favor.

In the case of Festo v. Mwakabana\textsuperscript{40}, the appellant having a dispute over ownership of land with his neighbour, harvested maize growing on the land. The respondent preferred a criminal complaint against the former. The appellant was tried and convicted by the trial magistrate but acquitted on appeal. It was thus stated that “It is now, I think settled law that in an action for malicious prosecution the plaintiff to succeed must establish first, that the defendant acted without reasonable and probable cause, secondly that the defendant acted maliciously, thirdly the proceeding was terminated in his favour and lastly, that he has suffered some damage recognized by law.

\textsuperscript{38}Civil Appeal No. 51 of 2011, High Court of Dar es salaam [Unreported]
\textsuperscript{39}[1967] HCD 235
\textsuperscript{40}[1971] HCD 417
In another case of **Yohana s/o Miyuni v. Isaya s/o Bakobi**\(^{41}\), The plaintiff sued the defendant for spoiling his reputation, maliciously imprisoning him and uprooting his crops. The parties were neighbor and had numerous disputes over the right of each in relation to the hand of the other. In the cause of one dispute the defendant made a report to the police that the plaintiff had threatened him and the plaintiff was arrested and remanded for two days. The criminal proceeding was terminated on the plaintiff’s favor.

3) **THAT, the prosecution was instituted against without any just or reasonable cause.**

Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed\(^{42}\).

In **James Funke Gwagilo v. The Attorney General**\(^{43}\), where it is said, on page 10, that “the current thinking is that it is enough if the defendant believes there is reasonable and probable cause for the prosecution”

**Amadi Juma v. Tanzania Police Force** (*supra*), in determining on whether there was any reasonable and probable cause in plaintiff’s prosecution. The court stated that plaintiff was prosecuted on allegations by DW1 that he has robbed him. According to DW1’s statement that after plaintiff has robbed him with other they all managed to run away but plaintiff was caught by people who come for help and they assaulted him by various weapons. There is evidence of 3 different people who come for help and they are testifying that it was DW1 who was cutting plaintiff with a matched when they arrived at the scene. Even a copy of PF 3 attached in the plaint reveals that the wounds which plaintiff had were caused by a matched. Now the question is what evidence or facts which made the prosecution to arrive at a decision that plaintiff was the one who robbed DW1 and prosecute him? By simple delinquency the evidence of DW1 does not real suggest that it was plaintiff who robbed him. He claims that as plaintiff was running he was caught by people who come to help and they assaulted him. But there evidence of those people who are

\(^{41}[1969]\) HCD 25  
\(^{43}\)Civil Appeal No. 67 of 2001 [unreported]
saying they found DW1 cutting plaintiff with a matched and they rescued him. It is therefore my finding that the prosecution had no reasonable and probable cause to prosecute plaintiff as they did. I therefore come to conclusion that malice prosecution has been proved and defendants are liable.

4) **THAT, the defendant acted maliciously**

A Claimant in a claim for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact indicating that the defendant was actuated either by spite or ill-will against the claimant, or by indirect or improper motives. However, there is no malice merely because the claimant’s conviction was a necessary step towards the defendant’s fulfilment of some ulterior objective. The claimant has the burden of proving malice. A claimant who proves malice but not want of reasonable and probable cause still fails. Malice may be inferred from want of reasonable and probable cause but lack of reasonable and probable cause is not to be inferred from malice.\(^{44}\)

In **Peter Ng’homango v. Gerson M.K Mwanga and Another**\(^{45}\), in this case the appellant plaintiff, a teacher at Mpwapwa Teacher Training College at that time, sued the first respondent, the Principal of the College and the Attorney General, representing the government, their employer, for Sh. 2,201,762/= general damages for malicious prosecution. In that case the first respondent had instigated the police to arrest and prosecute the appellant for stealing Shs. 10,000/= from students. The charges were terminated in favour of the appellant in that he was acquitted. He then filed an action claiming general damages for malicious imprisonment from the respondents. The High Court, before Mwalusanya, J., dismissed the action for want of proof on the balance of probabilities.

The decision of the High Court was reversed on appeal to this Court which held that a) the first defendant had prosecuted the plaintiff maliciously because despite police advice that the dispute be resolved administratively, the first defendant pressurized the police to conduct criminal proceedings. b) The plaintiff was entitled to damages for malicious prosecution because he was


\(^{45}\)Civil Appeal No. 1 of 1994, Court of Appeal of Tanzania at Dodoma [unreported]

\(^{46}\)[1985] TLR 125
charged without a reasonable or probable cause. c) The defendants were jointly and severally liable for damages.

5) THAT, the plaintiff suffered some damage

It has to be proved that the plaintiff has suffered damages as a result of the prosecution complaint of. Even though the proceedings terminate in favour of the plaintiff, he may suffer damage as a result of the prosecution. The damages may not necessarily be pecuniary. In Sunflag (T) Ltd v. Yerome Wambura & 4 others, where the court stated that plaintiffs suffered loss of employment and income due to the malicious prosecution. Further the court awarded Tshs. 2,000,000/= for each of the respondents to meet the justice of the case.

It can thus be construed that, it’s a trite law that for a suit of malicious prosecution to succeed the plaintiff must prove simultaneously that: He was prosecuted; That the proceedings complained of ended in his favour; That the defendant instituted the prosecution maliciously; That there was no reasonable and probable cause for such prosecution; and That damage was occasioned to the plaintiff.

B) FALSE IMPRISONMENT

False imprisonment is any direct and intentional act of defendant, causing a total restraint on the freedom of movement of the plaintiff, with limits sets by the defendant, without the plaintiff’s consent or any lawful justification.

False imprisonment occurs when a person is unlawfully restrained, whether by arrest or confinement, or prevented from leaving any place. The gist of false imprisonment is not mere imprisonment the plaintiff needs to prove that was unlawful or malicious, but establishes a “prima facie” case if he proves that he was imprisoned by the defendant of proving justification."

In Moris A. Sasawata v Mathias Maleko, The respondent successfully sued the plaintiff for damages for false imprisonment. The plaintiff appealed against the Order of the trial court ordering him to pay damages to the respondent on the ground that he was not responsible for the arrest and

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47 Civil Appeal No. 89 of 2005, Court of Appeal of Tanzania at Arusha, [Unreported]
50 [1980] TLR 158
subsequent imprisonment of the respondent. Sammatta, J. (as he then was) held that to constitute false imprisonment there must be restrain of plaintiff’s liberty. In the case of Kasama Produce Store v. Kato\textsuperscript{51}, it was held an action for false imprisonment lies when there has been an imprisonment without any order of the court.

In Mipawa v R\textsuperscript{52}, the plaintiff was a teacher in Mwanza. There was an unexplained death and the plaintiff was arrested in connection with it. He was detained and released several times. He was in custody for a total of 16 months. After his complete discharge he sued the government for FI. Mapigano J. held that the government was liable. Condemning the police behavior in Mwanza the judge said: “This is a textbook example of how the powerful can, with total scorn for the Civil Rights and with singleness of purpose cause the machinery of criminal law to operate against a completely innocent subject.” The arrests of the plaintiff and the detentions were without reasonable and probable cause and they were in fact activated by Malice.

**ELEMENTS NECESSARY IN PROVING FALSE IMPRISONMENT**

1) **THAT, there was a total restraint**

A total restraint is required to constitute false imprisonment. The total restraint here amounts to the plaintiff must be totally under the defendant’s control against his own will. In Bird v Jones\textsuperscript{53}, Patteson J said that false imprisonment ‘…is a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will…’.

The case also illustrates what constitutes a total restraint, Coleridge J said that: “A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed; but a boundary it must have; and that boundary the party imprisonment must be prevented from passing, he must be prevented from leaving that place, within the ambit of which the party imprisonment would confine him, except by prison-breach.”

\textsuperscript{51}[1973] EA 190  
\textsuperscript{53}[1845] 7 QB 742.
The restraint may not be total if there is reasonable means of escape. As can be seen from *Bird v Jones*, there was no false imprisonment where the plaintiff could conveniently take another route.

2) **That the defendant intended to do an act which substantially effect the confinement.**

Normally the tort of false imprisonment must be intentional. A person is not liable for false imprisonment unless his or her act is done for the purpose of imposing a confinement or with knowledge that such a confinement, to a substantial certainty will result from it. Malice is irrelevant to this tort. It is ordinarily for the court to determine from the evidence, as a question of fact, the intention of the defendant in an action for false imprisonment. Even negligent acts can qualify as false imprisonment. For example, if a person locks someone inside a room without unaware of the fact that there is someone in the room than he is held liable for false imprisonment.

In *R v Governor of Brockhill Prison*, in this case a prisoner governor who calculated the claimant’s day of release in accordance with the law as understood at the time of her conviction was held liable when a subsequent change of the law meant that the prisoner should have been released 59 days earlier. An honest mistake whether negligently made or not as to the right to continue detention does not excuse a trespass to the person.

3) **Knowledge of the Plaintiff**

There is no requirement that the plaintiff alleging false imprisonment was aware of the restraint on his freedom at the time of his confinement. If the person is confined in a room, with one of the entries known to the plaintiff closed, and the room has more than one entry-exit door, but the plaintiff has no knowledge about the same, the defendant will still be held liable. Thus, the person confined does not have to be aware of the confinement or be harmed by it as it is actionable per se.

In the case of *Merring v. Grahame-white aviation co ltd*, the claimant was brought to his employer’s office to be interviewed in connection with theft. Two guards had been stationed...
outside to prevent him from leaving and when the claimant found out, he brought an action for false imprisonment.

Lord Atkin remarked that, “it appears to me that a person could be imprisoned without his , is quite unnecessary to go on to show that in fact the man knew that he was imprisoned” the defendants were therefore held liable for false imprisonment. However, if a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to cover not more than nominal damages.

4) **Period of Confinement**

The tort of false imprisonment arises whatever may be the period of confinement. But the time period is of essence while determining the amount of compensation to be awarded to the injured party. An otherwise lawful detention may become unlawful if the detention is prolonged for an unreasonable period of time.\(^{59}\)

5) **Place of Confinement**

To constitute the wrong, there may be no actual imprisonment in the ordinary sense. Any confinement in the ordinary sense whether be it prison or any place used temporarily for the purpose of confinement constitutes false imprisonment. An unlawful arrest too amounts to false imprisonment. It is enough that the plaintiff in any manner has been completely deprived of his liberty, for any time, however short.

To constitute imprisonment the deprivation of the plaintiffs liberty should be complete that is there must be on every side of him a boundary drawn beyond which he cannot pass. It is not imprisonment to prevent the plaintiff from going in certain directions if he is free to go in other directions and thus there will be no action for false imprisonment. However the law affords the defendant several defenses such as lawful arrest and detention for medical purposes.

**TRESPASS TO LAND IN DIFFERENT SITUATIONS**

Before dealing with any issue in merit as raised above it should be noted that since both parties that is Chakachua and Potepote claim ownership of the same land then it is imperative that the

issue of ownership of the land to be resolved first and thus be in a pole position to determine who was a trespasser and who was not. In case the farm will appear to be the property of Potepote then Chakachua will be in trouble for committing an offence of malicious damage to property. However if the farm actually belongs to Chakachua and Potepote was a trespasser, the law affords him some rights.

In determining the two issues raised that is on whether Chakachua have any rights over the land and Whether Chakachua had a right to destroy the crops planted in his farm by Potepote, as stated above if the land actually belongs to Chakachua then the law affords him some rights against the trespasser among of those rights is the right to remove any object brought by the trespasser upon his land during the trespass and in this regard Chakachua have a right of destroying the crops planted in his farm. This view is chiefly supported in the case of Said Mohamed Geshi v. Hamadi R. The respondents destroyed a house built on their land by appellant. Their conviction of malicious property damage was quashed by the District Court, and the compensation order was set aside. It was thus held that the respondents were at law entitled to eject Saidi who was trespassing on their own land in their presence, and ….. they were further entitled to remove any object Saidi had brought thereon during the trespass.” The complainant’s appeal was summarily rejected.

This was clearly the view held by the Central Court of Appeal in Mtumbo d/o Sekwande v. Maina-Hela d/o Semkini, where the Court said:- “A person who cultivates another person’s land after having been refused permission by the latter to use the land does so at his own risk. If the lawful occupier subsequently discovers the action of the trespasser, such trespasser can have no claim to the crops which he has planted or other unexhausted improvements which he has effected on that land.”

However, the right of Chakachua to remove any object brought by trespasser thereon in his land only avail if he demonstrated by word or action that he disapproved of the trespasser’s intrusion into his land but if he did not do so, Chakachua will be liable to pay compensation for improvements carried out on the land that is for the crops planted by Potepote [Emphasis is Mine].

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60[1967] HCD 73
61Appeal No. 5 of 1955
The case of Regina v. Mohamed\textsuperscript{62}, fully embrace the above propositions where in this case the appellant claimed damages from the respondent for destroying crops she planted on land she alleged was allocated to her by one Omari Athumani. Both the primary and district magistrate courts found that the land allocated to the appellant was not the disputed land and that the appellant had trespassed on the respondent’s land. They, therefore, concluded that she was not entitled to compensation for the crops destroyed by the respondent.

It was held that, “Now while in principle it is true that a person who trespasses on another man’s land does so at his own risk. I do not think this rule can be used as a vehicle of oppression or of willfully injuring another person. Before an occupier can take advantage of the operation of the rule he must have demonstrated by word or action that he disapproved of the trespasser’s intrusion into his land. There must be an open protest and disapproval of the trespasser’s actions before the occupier of the land can deprive the trespasser of his entitlement to compensation for improvements carried out on the land.

With respect, the principle enunciated here is sound and, in my opinion, a correct view of the law. And applying this principle to the facts of the present case there can be little doubt that the right of Chakachua to remove any object brought upon his land will largely depends on whether or not he protested the use of land by the trespasser, shot of that Potepote will be entitled to some compensation for the crops she had planted on the land in dispute and thus denying Potepote rightful entitlement to compensation would in my view amount to countenancing Chakachua's reprehensible and destructive acts.[**Emphasis supplied**].

Basing on the above legal opinion, Chakachua is advised to bring the matter to the court of law for redress under the name of trespass to land only if he thinks his hands are clean that is the land actually belongs to him not to Potepote who also claim ownership of the same land. Chakachua should also be cautious here, as pointed above if the land actually belongs to Potepote he will be both civilly and criminally liable for malicious damage to property. If it’s satisfied that he could have stopped Potepote cultivating the piece of land in question but he did not do anything about it until very late, the question will be would such a person who has clearly acquiesced in the trespass be justified in willfully destroying the trespasser’s crops? I do not think he should be allowed to

\textsuperscript{62}[1971] HCD 332
do so. If he does as the Chakachua did in the instant case, he shall in equity be made to compensate the injured party for the damage caused.

**APPLICABILITY OF LAW OF LIMITATIONS IN TORTS**

Further according to Section 6 (e) of the Law of Limitation Act\(^{63}\), the right of action to a suit for compensation for an act or wrong which results into specific injury accrues on the date when an injury arises from such wrong and that under Part 1 of the 1st Schedule to the Law of Limitation Act 1971, item 6, suits founded on tort must be instituted within three years of the occurrence of the wrong complained of but that the plaintiff’s suit was instituted more than four years after the accident.

According to Halsbury Laws of England the purpose and effect of Statutes of Limitation is to protect defendants there being three reasons that support the existence of Statutes of Limitation, namely: (a) that a plaintiff with good causes of actions should pursue them with reasonable diligence; (b) that a defendant might have lost evidence to disprove a stale claim; and (c) that long dormant claims have more cruelty than justice in them.

In *Mohammed B Kasasa v. Jasphar Buyonga Sirasi Bwogi*\(^{64}\), The court of appeal in that case went ahead to hold that:- “Statutes of Limitations are in their nature strict and inflexible enactments. Their overriding purpose is interest *reipublical ut sit finis litum* meaning that litigation shall be automatically stifled after a fixed length of time, irrespective of the merits of a particular case ........the statute of limitation is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitations is entitled, of course, to insist on his strict rights.”

At this juncture, I wonder why the spent all those years from the date of the accident took place without taking legal action against the defendant whose driver's negligent acts caused the accident. I think therefore that the plaintiff slept on his rights. It is trite law that courts have always refused to allow a party or cause of action to be added where if it were allowed the defence of the statute of limitations would be defeated.

\(^{63}\)[Cap 89 R.E 2002]

\(^{64}\)Civil Appeal No. 42 of 2008.
However, **Section 44 Law of Limitation Act**⁶⁵, of this law allows the Minister to extend the time frame by another one and a half years for you and states “where the Minister is of the opinion that in view of the circumstances in any case, it is just and equitable so to do, he may, after consultation with the Attorney-General, by order under his hand, extend the period of limitation in respect of any suit by a period not exceeding one-half of the period of limitation prescribed by this Act for such suit.” However this does not help the as his claim is about four years old.

Also the provision of **section 16 of the law of Limitation Act**⁶⁶, may come to the rescue where it states that “where, after the right of action for a suit or an application for the execution of a decree has accrued and before the period of limitation prescribed for such suit or application expires, the person to whom such right has accrued suffers a disability, in computing the period of limitation prescribed for such suit or application, the time during which such person is under disability shall be excluded.”

**REFERENCES**

**BOOKS**


⁶⁵[Cap 89 R.E 2002]
⁶⁶[Cap 89 R.E 2002]


Srivastava, D.K (2005). *The Law of Tort In Hong Kong (2nd Ed)*. Hong Kong: Sweet and Maxwell

**STATUTE**

The Law of Limitation Act [Cap 89 R.E 2002]

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