



REPUBLIC OF KENYA



**KENYA LAW**

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**Mwangi v Diamond Trust Bank Limited & 2 others (Civil Suit  
151 of 2016) [2023] KEHC 2866 (KLR) (Civ) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2866 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 151 OF 2016**

**JK SERGON, J**

**MARCH 28, 2023**

**BETWEEN**

**JOSEPHINE WARUGURU MWANGI ..... PLAINTIFF**

**AND**

**DIAMOND TRUST BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NASIM DEVJI ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff in the present instance filed the plaint dated 8<sup>th</sup> June, 2016 and sought for judgment against the defendants in the following manner:
  - i. Special damages of Kshs.457,000/=
  - ii. Damages for false and malicious arrest.
  - iii. Damages for wrongful and unlawful detention.
  - iv. Damages for malicious prosecution
  - v. Punitive damages.
  - vi. Costs of this suit plus interest thereon at Court rates; and
  - vii. Any other relief this Honourable Court may deem fit to grant.
2. The plaintiff pleaded in her plaint that at all material times the 1<sup>st</sup> defendant worked in the capacity of an assistant Manager of Step 4 and 3 at the 1<sup>st</sup> defendant's Westgate Branch and her duties included,



- among others, customer service ,authorization of work input in the Bank’s system by the front Office Staff, vault custodian and she further reported to the Bank’s Branch Manager.
3. The plaintiff further pleaded in her plaint on 16<sup>th</sup> June 2010 or thereabout a customer by the name Mansoor Daya opened a fixed deposit account with the Bank (1<sup>st</sup> defendant) wherein he deposited a sum of Kshs.69,000,000/= and maturity date for the said account and/or deposit was June 2011 and at all material times the Bank had a duty to place proper systems and measures to safeguard funds and monies for its customers.
  4. It was pleaded in the plaint by the plaintiff that sometimes between September and November 2010 there was an alert of an alleged fraud at the Bank’s Westgate Branch involving and/or on the account for Mansoor when the said customer queried a transaction and/or transactions on his account, that had allegedly been done without his prior knowledge or authorization.
  5. It was further pleaded in the plaint by the plaintiff that in the course of the 1<sup>st</sup> defendant in house investigation on the complaint by Mansoor Daya, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant maliciously contorted written statement from some of the 1<sup>st</sup> defendant staff with the sole intention of implicating the plaintiff herein amongst other fellow staff who were all of African race.
  6. The plaintiff avers that at the relevant time, the plaintiff and three other employees of the 1<sup>st</sup> defendant were the targets of a police complaint made by the representatives of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. This complaint was intended to have employees of a particular race arrested and charged with forgery and theft while shielding employees of another race.
  7. The plaintiff avers that her arrest by the Police and/or individuals posing as Police officers was malicious, done in bad faith, and resulted from cooperation between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the police. The presiding court also cleared the plaintiff of all charges after concluding that the accused didn’t have anything to say in the matter.
  8. The plaintiff avers that the 2<sup>nd</sup> defendant changed statements made by a staff bank at all relevant times in an effort to protect employees of a specific race, and the aforementioned complaint, arrest, harassment, humiliation in public, incarceration, and initiation of prosecution against the plaintiff were based on bad faith, ulterior motives, fraud, and corruption, as well as malice and a calculated plan to harm, malign, and discredit her, as stated in paragraph 18 of the plaint.
  9. The plaintiff further avers that she was unfairly imprisoned in detention, deprived of her liberty, severely wounded in her credit, character, and reputation, endured significant mental agony, inconvenience, expense, and career injury, all of which resulted in loss and damages.
  10. The 1<sup>st</sup> and 2<sup>nd</sup> defendants entered appearance upon service of summons and filed their statement of defence on 29<sup>th</sup> July, 2016 while the 3<sup>rd</sup> defendant filed theirs on 4<sup>th</sup> August 2016 to deny the allegations brought out in the plaint.
  11. At the hearing, the plaintiff testified while the defendants called one (1) witness to support its case.
  12. The plaintiff adopted his executed witness statement as evidence and produced his list and bundle of documents as P.  
Exhibit 1.
  13. On cross-examination, the witness stated that she was an employee of DTB from January 2009 and that she was assistant manager stage 3 at DTB.



14. She stated that she recalls a Tanzanian client named Mansoor Daya who complained that an account had been opened in his name despite the fact that he had presented a cheque from the sale of a property and the profits had been deposited in a fixed deposit account that she had not been engaged in setting.
15. She further stated that since the client was claiming that he hadn't given orders for the aforementioned account to be opened, she was aware that he had been complaining about a savings account.
16. It is the testimony of the plaintiff that indeed there was a fraud at the bank and that the inputting for the opening of the savings account was done at the head office but the instructions to open the account was done at Westgate branch.
17. The witness further testified that she was only involved in the money transfer to the UAE, and it was her responsibility to ensure that the head office had been informed and that all necessary checks had been made. That although she did not see the customer, there was a procedure in place to confirm the issuing of instruments for the instructions and transactions.
18. The witness stated that the client denied coming to the branch to give the instructions, so the bank reported banking fraud to the police, who then arrested her and other people and made them make statements. They were taken into police custody and then subsequently appeared in court.
19. On cross-examination by Mr. Munene, the plaintiff stated that in the criminal case the client testified that he never gave instructions in the opening of the savings account and that the police arrested her before conducting investigations and that there was malice in the prosecution.
20. In re-examination, the witness stated that she was not to deal with the client directly, that she was not involved in the transfer of 167,000 dollars, that her duty was to cross check relevant information including call bank clients and if the client was in the banking hall she was not supposed to call.
21. The witness stated that they were all acquitted from the charges of Fraud and stealing.
22. Peter Kimani Kanyiri who was DW1 adopted his signed witness statement as evidence and produced the defendant's list and bundle of documents as exhibits.
23. Upon close of the trial, only the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendant had filed their submissions but at the time of writing this judgment the 3<sup>rd</sup> defendant had not filed its submissions.
24. I have also considered the written submissions for the parties and found out that the parties had raised two set of issues that is being the preliminary issues, before we delve into the substantive issues, I will dispose of the two preliminary issue being :
  - a) Whether the certificate of Electronic Record dated 4<sup>th</sup> February, 2021 is fatally defective
  - b) What is the consequence of failure by the 3<sup>rd</sup> defendant to call evidence in support of this case?
25. The plaintiff submitted that according to Section 106B of the *Evidence Act* Cap 80 Laws of Kenya, Peter Kimani is not competent to sign the Certificate to produce the CCTV footage, so the Certificate is fatally flawed. She had also indicated that she would be objecting to the production of the CCTV footage in a Compact Disk on the basis of the Certificate of the Electronic Record dated 4th February 2021 signed by Peter Kimani.
26. On the other hand, the defendant submitted the position of the person who created the Certificate of Electronic Record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who is the 1<sup>st</sup> Defendant's Head of Audit, the



computer output from which the information was retrieved, and how the CCTV information was extracted from the Bank's CCTV server, copied into his computer, and copied to the CD.

27. I am in agreement with the plaintiff that indeed Peter Kimani is not competent to sign the certificate to produce the CCTV footage as he was not responsible position in relation to the operation of the recording device or the management surrounding the recording and extraction.
28. In the case of *Republic v Barisa Wayu Matuguda was followed in William Odhiambo Oduol v IEBC & 2 Others* [2013] eKLR.

The issue was admissibility of a video recording done on a Nokia phone, which was then taken to Nairobi and the video recording was then developed to CD. The court noted that the video was recorded, saved in the internal memory of the phone, the phone was connected to a computer using a micro-USB data cable, the file was copied to an empty hard disk, an empty CD was then inserted into the computer CD WRITE RAM, the video file was then written on the CD or VCD using a CD writing application. It was emphasized that it was important to trace the devices for audit purposes. It was held that the certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, whichever was appropriate.

29. Accordingly, the Certificate of Electronic Record dated 4<sup>th</sup> February 2021 signed by Peter Kimani is fatally defective and as such the 1<sup>st</sup> and 2<sup>nd</sup> defendants will not be allowed to rely on the CCTV footage.
30. I have also considered the rival written submissions and was able to identify four main issues falling for determination to be as follows;
  - i. Whether the plaintiff has made a case for malicious prosecution against the defendant; and
  - ii. Whether the plaintiff is entitled to the reliefs sought; and
  - iii. Who should be made to bear the costs of the suit.
31. It is incumbent upon the plaintiff to establish all the above elements in order for his claim to succeed.
32. On the first principle, it is not in dispute that the arrest and prosecution of the plaintiff were instigated by the police and the prosecution who represented the State in the criminal process. Furthermore, the law sets out that the Attorney General, who is the defendant in this instance, shall represent the State in civil proceedings. Resultantly, the first principle has been established.
33. Concerning the second principle, upon my perusal of the criminal court judgment, it is evident that the criminal proceedings terminated in favour of the plaintiff acquitted under section 210 of the [Criminal Procedure Code](#).
34. The third principle touches on the subject of probable/ reasonable cause.
35. I appreciate that the burden of proving the absence of probable cause ultimately lies with the plaintiff. In the case of *Kagane v Attorney General* (supra) the court sought to define what constitutes reasonable or probable cause:

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...”



36. Upon my examination of the evidence tendered, I note that the plaintiff and other persons not before this court were charged in relation to stealing contrary to Section 275 of the Penal code and Forgery contrary to section 349 of the *Penal Code*.
37. It is also noted from the criminal proceedings that while it is apparent that the criminal court found that the prosecution had not established the charge against the parties, the court found there to be prima facie evidence of forgery and stealing and that they had no case to answer and therefore they were acquitted of all charges under section 210 of the Criminal Procedure Code.
38. Furthermore, the criminal court found there to be overwhelming evidence relating to the purported forgeries but concluded that the prosecution had brought wrong charges against the plaintiff and her co-accusers and hence the acquittal.
39. In my examination of the evidence, I observed that the purported irregularities are said to have taken place in the bank being the area where the plaintiff worked as an assistant manager of stage 3 and which could explain the decision by the police and prosecution to charge the plaintiff.
40. In view of the foregoing, I am convinced that there was presence of malice in the prosecution of the plaintiff.
41. Consequently, I find that the plaintiff has proved her case for malicious prosecution and/or wrongful arrest and detention on a balance of probabilities.
42. The third ingredient touches on the subject of probable/reasonable cause.
43. I appreciate that the burden of proving the absence of probable cause ultimately lies with the plaintiffs. In the case of *Kagane v Attorney General* (supra) the court sought to define what constitutes reasonable or probable cause:

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...”
44. It therefore follows that relevant material and facts ought to be clearly set out prior to the institution of a criminal case and which material and facts would lead any prudent person; including the police and subsequently, the prosecution; to the belief that the person charged is guilty of the offence.
45. Upon my examination of the evidence tendered, I note that while it is not in dispute that the police arrested and subsequently instigated the prosecution of the plaintiff subsequent to the complaint lodged by the 2<sup>nd</sup> defendant, no credible evidence was tendered to demonstrate the manner in which the investigations were carried out or to show how the decision to arrest and prosecute the plaintiff was arrived at, especially considering the fact that the criminal trial magistrate indicated in her ruling that no evidence at all had been established to prove the guilt of the plaintiff.
46. In view of the foregoing circumstances, I am satisfied that the plaintiff have shown the absence of reasonable and probable cause for their prosecution.
47. In close reference to the above is the ingredient of malice. Honourable Mr. Justice Mativo in the case of *Stephen Gachau Gitthaiga & another v Attorney General* [2015] eKLR correctly articulated that an acquittal in a criminal case does not automatically connote malice; he went further to reason that malice



- can be determined from the circumstances of the case. The judge ultimately held that in the absence of evidence as to the facts relied upon in the prosecution thereof, there was presence of malice.
48. Upon my examination of the pleadings and evidence on record, I wish to restate my findings above that in the absence of evidence by the 1<sup>st</sup> defendant to indicate probable cause in prosecuting the plaintiff, I am duty bound to conclude that such prosecution was actuated by ill-will and hence, malice.
49. Being satisfied that a case for malicious prosecution has been made by the plaintiff as against the defendants, I now wish to address the second issue on whether or not the plaintiffs are entitled to the reliefs sought as hereunder.
- a. General damages for malicious prosecution, arrest and detention:
50. Under this head, I considered the proposal made by the plaintiff while noting that the defendants did not offer any suggestions.
51. Upon taking into consideration the proposition made by the plaintiffs coupled with the authorities relied upon and which I find to be comparable in the circumstances, I also considered the award of Kshs.2,000,000/= made on general damages for malicious prosecution in the case of *Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & another* [2016] eKLR and the case of *Joseph Wamoto Karani v C. Dorman Limited & another* [2018] eKLR respectively.
52. Taking the above into account as well as the circumstances of the present case and inflation, I find the sum of Kshs.3,500,000/= to be a reasonable award under this head for the plaintiff.
- b. Punitive damages
53. Punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant's action was calculated to procure him some benefit not necessarily financial, at the expense of the plaintiff. (See the Court of appeal exposition in *Obongo & another v Municipal Council of Kisumu* [1971] EA 91)
54. With regard to aggravated damages, as encapsulated in *Francis Xavier Ole Kaparo v the Standard & 3 others* HCCC No. 1230 of 2004 (UR) where it was stated:
- “Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant's improper motive.”
55. In the case at hand, the plaintiff was employed at the material time as an Assistant Manager of step 4 and 3 of the 1<sup>st</sup> defendant. Her uncontroverted evidence was that she lost her employment following her arrest and prosecution. The plaintiff's trial took about 4 years.
56. In the case at hand, I am of the view that an award of Ksh.3,500,000/= general damages and a composite figure Ksh.500,000/= as exemplary, aggravated and punitive damages is reasonable. Special damages claimed and proved is Ksh.457,000/=. The total comes to Ksh.4,457,000/=.
57. In the end therefore, I hereby enter judgment for the plaintiff and against the defendants in the following manner:
- i. General damages for malicious



prosecution, arrest and detention Kshs.3,500,000/=

ii. Punitive damages Kshs. 500,000/=

iii. Special damages Kshs. 457,000/=

Total Kshs.4,457,000/=

iv. The plaintiff shall also have the costs of the suit, interest on the general damages at court rates from the date of judgment until payment in full and interest on special at court rates from the date of filing suit until the date of full payment.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant

