



**Kamau v Bank of India & another (Civil Suit 588 of 2012)
[2023] KEHC 22988 (KLR) (Civ) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22988 (KLR)

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

**CIVIL
CIVIL SUIT 588 OF 2012**

**JN MULWA, J
SEPTEMBER 29, 2023**

BETWEEN

FREDERICK KARIUKI KAMAU PLAINTIFF

AND

BANK OF INDIA 1ST DEFENDANT

**THE HON ATTORNEY GENERAL ON BEHALF OF THE COMMISSIONER OF
POLICE 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff's claim is for damages for malicious prosecution. Through the Plaintiff dated 10/12/2012, he seeks judgment against the Defendants jointly and severally for:-
 - a. Special damages - Kshs. 250,000/-
 - b. General damages
 - c. Exemplary damages
 - d. Costs of the suit
 - e. Any other relief this court may deem fit and just to grant.
2. The claim was triggered by an acquittal of the plaintiff in Nairobi Chief Magistrates Criminal Case No. 891 of 2010 – *Republic v Fredrick Kariuki Kamau & Another*. In the matter, the Plaintiff was charged with conspiracy to defraud contrary to Section 317 of the *Penal Code*, making a false document contrary to Section 357(a) of the *Penal Code* and 3 counts of stealing contrary to Section 275 of the *Penal Code*. The 1st Defendant was the complainant in the case. After a full trial, the Plaintiff and his co-accused were found innocent and were acquitted under Section 215 of the *Criminal Procedure Code*.



3. Only the 1st Defendant filed a Defence dated 29/1/2013 denying this claim. It contended that it acted on reasonable and probable cause when it reported, to the Banking Fraud Investigations Department of the Central Bank of Kenya, fraudulent transactions that involved the cashing of fake cheques amounting to Kshs. 6,519,049/- from one of its customers account at its Industrial Area Branch between 26th January 2010 and 1st February 2010. The 1st Defendant contended that in any event, the Banking Fraud Unit conducted its own independent investigations into the matters complained of and made an independent decision to charge the Plaintiff. Further, the 1st Defendant asserted that since the subordinate court in the criminal case found that the Plaintiff had a case to answer, the report it made could not be regarded as malicious.

The Plaintiff's Evidence

4. The Plaintiff testified in support of his case as PW1. He adopted his witness statement dated 10/12/2012 as his evidence in chief and adduced his list and bundle of documents dated 10/12/2013 as exhibits in support thereof.
5. It was the Plaintiff's testimony that he was employed by the 1st Defendant in 1983 as a Clerical Officer and had risen through the ranks to the position of an Assistant Manager at the Bank's Industrial Area Branch by the year 2010. He testified that on 26/1/2010, six cheques numbers 027xxx, 027xxx, 027xxx, 02xxx, 027xxx and 027xxx were cashed out of Alpha-rama Limited's account number 2270xxxxxx at Industrial Area Branch. The cheques were taken to him after for verification. He used ultraviolet (UV) light to compare the signatures thereon as was required by the Bank and they looked alright to him. As such, he cancelled the cheques, which were then sent to the branch manager for second cancellation. It was his further testimony that three more cheques numbers 027xxx, 027xxx and 027xxx were cashed from for the same customer's account on 28/1/2010 and taken through a similar approval process.
6. Further, the Plaintiff testified that on 1/2/2010, the concerned customer came with a cheque number 027xxx for Kshs. 118,119/- to be transferred to an account in Mombasa. The system rejected the cheque as having already been paid and revealed that a similar cheque for Kshs. 775,350/- had been cashed on 26/1/2010. PW1 asserted that it was at that point that they discovered that there were other fraudulent cheque transactions involving the said client's account. PW1 averred that the 1st Defendant reported the matter to the banking fraud investigations department who arrested him on 14/5/2010 and took him to Court on 17/5/2010 to answer to the 5 charges indicated hereinabove. He states that he engaged a lawyer to represent him in the criminal case and paid Kshs. 250,000/- in legal fees and was acquitted after a full trial.
7. According to the Plaintiff, the bank acted maliciously by hastily triggering his arrest without conducting proper investigations and by failing to do the same with his colleagues Subodh Kumar and Mr. Mishra, being the manager and the Chief Manager, who also signed and cleared some of the cheques in the course of their duty. In his view, the Bank wanted to malign his name and to find a way of terminating his services without giving him his dues as he had worked for almost 27 years. He testified that as a result he suffered mental torture and anguish.
8. In cross-examination, the Plaintiff stated that checking and approving cheques was part of his duties as the Assistant Manager and that the signatures on the cheques matched that of the Chief Executive Officer of Alpharama Ltd. Further, he averred that Subodh Kumar, the branch manager and PW1 in the criminal case, confirmed that all the cheques were paid as per the bank's procedures. He admitted that the bank gave him an opportunity to explain himself and that he wrote a statement in this regard. He reiterated that his arrest was malicious because two other employees who passed the same cheques were not prosecuted. In addition, the Plaintiff contended that there was malice on the part of the 2nd



Defendant as investigations were incomplete at the time of his arrest, and further that those who cashed the cheques were not arrested.

The 1st Defendant's Evidence

9. The 1st Defendant's witness DW1, Etter Riany, was the Bank's Assistant Manager, Advances – Industrial Area Branch. She adopted her witness statement dated 27/1/2020 as her evidence in chief and adduced the 1st Defendant List and Bundle of Documents dated 26/1/2015 in support thereof. She testified that she was employed by the 1st Defendant on 2/2/2008 and had worked with the Plaintiff at the Industrial Area branch. It was her testimony that on 1st February 2010, the bank's client, M/s Alpharama Limited discovered that a total of Kshs. 6,519,049/- had been fraudulently withdrawn from its account number 2270xxxxxx. The customer wrote a letter dated 1/2/2010 complaining of the fraud and asking for a refund. DW1 averred that on receipt of the customer's complaint, the Bank wrote to the Banking Fraud Investigation Department on 8/2/2010 seeking for assistance in investigating the matter.
10. DW1 further asserted that officers from the Central Bank's Banking Fraud Investigation Division visited the Bank's Industrial Area Branch where they interrogated and recorded statements from the bank's employees. She averred that Banking Fraud Investigation Division conducted independent investigations before the Plaintiff and a Ms. Rebecca Osogo were arrested. Furthermore, DW1 stated that she did not observe any different treatment towards the Plaintiff after the incident and that the Plaintiff in fact continued to hold his position as Assistant Manager until 14/5/2010 when he was arrested and charged in Criminal Case No. 891 of 2010. It was her further testimony that the Bank also conducted internal investigations to tighten its internal controls and check for similar frauds, and the Plaintiff recorded a statement in this respect on 21/4/2010.
11. On cross-examination, DW1 admitted that she handled some of the fraudulent cheques but did not approve any of them for payment. She reiterated that the investigators decided who to charge based on the outcome of their investigations. She asserted that ten cheques were found to be fraudulent and the bank lost some money as a result.
12. The 2nd Defendant closed its case without calling any evidence or producing any documents.

Analysis and Determination

13. The court has carefully considered the evidence adduced and the parties' respective submissions. The issues that fall for determination are:
 - a. Whether the Plaintiff proved the ingredients of the tort of malicious prosecution against the Defendants and
 - b. Whether the Plaintiff is entitled to the damages pleaded in the Plaint.
14. In *Mbowa v East Mengo District Administration* (1972) EA 352, the East African Court of Appeal outlined the ingredients of the tort of malicious prosecution follows:

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of



the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. It's essential ingredients are:

- (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;
- (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;
- (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and
- (4) the criminal proceedings must have been 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...the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not..." [My emphasis]

15. Cotran J. in the case of *Murunga v Attorney General*, [1979] KLR, 138 summarized the ingredients as follows:

- a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.
- b) The Plaintiff must show that the prosecution terminated in his favour.
- c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.
- d) He must also show that the prosecution was actuated by malice."

16. Further, the authors of *Clerk and Lindsell on Torts*, 18th Edition at page 823, state as follows:

"The onus of proving every one of this is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort."

17. From the evidence on record, there is no doubt that the prosecution of the Plaintiff in Nairobi Chief Magistrates Criminal Case No. 891 of 2010 was instigated and set in motion by a report made by D. P Mishra, the 1st Defendant's agent, the Chief Executive Officer, to the Banking Fraud Investigation Division. DW1 testified that this was done through a letter dated 8/2/2010. The fraud



was independently investigated by agents of the 2nd Defendant and this culminated in the arrest and subsequent arraignment of the Plaintiff in court to answer to the charges that were formulated by the said agents. In addition, it is not in question that the criminal proceedings in Nairobi Chief Magistrates Criminal Case No. 891 of 2010 terminated in favour of the Plaintiff who was acquitted of the charges through a judgment delivered on 23/8/2012.

18. The next question therefore is whether there was any reasonable and justifiable cause for the 1st Defendant to report the fraud to the police and whether same was done maliciously. In *James Kabindi Simba v Director of Public Prosecution & 2 others* [2020] eKLR, Nyakundi J. cited the case of *Hicks v Faulkner* (1878) 8 QBD 167, 171 where Hawkins J. defined reasonable and probable cause in the following terms:

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

19. The term "reasonable and probable cause" was further defined in the case of *Glinsk v McIver* [1962] AC 726 by Lord Devlin as follows;

“Reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction...”

20. From the above definition, it can be said that reasonable and probable cause exists if it is shown that any reasonable man placed in the position of the person who instigated the criminal proceedings would be of the same view that an offence had been committed. In the instant case, it is not disputed that there were fraudulent transactions at the Bank's Industrial Area branch which involved the use of fake cheques to draw a substantial amount of Kshs. 6,519,049/- from one of its customer's account. The 1st Defendant made a report to the Police based on a complaint lodged by the concerned customer through a letter dated 1/2/2010. The Plaintiff admitted as much and further admitted that he was one of the people that handled and/or approved the ten (10) cheques that turned out to be fraudulent, albeit without knowing that they were not genuine. DW1 testified that the Bank had to refund the customer the amount drawn. In the circumstances, the court holds the view that the fraud constituted reasonable and probable grounds to make the report. The 1st Defendant was entitled to lodge a complaint of the fraud to the relevant authority to facilitate investigations which it did to the relevant investigation division, the Banking Fraud Unit.

21. Did the 1st Defendant act maliciously in making the report? From the 1st Defendant's letter dated 8/2/2010 to the Banking Fraud Unit, it is evident that the 1st Defendant did not target the Plaintiff alone when it complained of the loss of Kshs. 6,519,049/- through fraud. The Plaintiff himself admitted on cross-examination that the bank accorded him an opportunity to explain himself, which he did through a statement dated 21/4/2010. Further, the Plaintiff did not controvert DW1's testimony that other employees of the bank were also interrogated and recorded statements concerning the fraud. The court further notes that the Plaintiff cannot impute malice on the part of the 1st Defendant from the fact that some of the top employees who approved the cheques were not arrested and charged because that was a decision that was independently made by the 2nd Defendants agents upon conducting its own independent investigations into the fraud. Moreover, there is uncontroverted evidence that the Plaintiff continued to hold his position as an Assistant Manager at Industrial Area



Branch from the time the fraud was discovered in February 2010 until 14th May 2010 when he was arrested. In the circumstances, the court finds that the complaint by the 1st Defendant which led to the arrest and prosecution of the Plaintiff was not actuated by malice.

22. The next question is whether the police, in charging and prosecuting the Plaintiff, acted with improper motive and/or maliciously. The answer to this in my view is in the negative. A crime was committed and the 2nd Defendant was well within its statutory duty to decide to charge the Plaintiff as one of the people who approved the fraudulent cheques. The Plaintiff has not shown this court that the Defendant applied any extraneous considerations in making this decision. The 2nd Defendant had reasonable cause to suspect that the Plaintiff had committed the offences alleged in view of his role in the payment of the cheques. In the court's considered view, the mere fact that the Plaintiff was acquitted on the basis that the prosecution failed to prove its case against him cannot sustain a claim for malicious prosecution when no iota of malice or ill motive has been established on the part of the prosecution.
23. In view of the foregoing, the court finds that the Plaintiff has not proved the tort of malicious prosecution against the Defendants to the required standard. Having found so, it follows that the Defendants are not liable to compensate the Plaintiff in damages for the tort of malicious prosecution.

Conclusion

24. Accordingly, this suit is hereby dismissed, with each party to bear own costs of the suit.
Orders accordingly.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

JANET MULWA

JUDGE

