



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 196 OF 2011**

**ANTONY CHEGE NGUGI.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LTD.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**Outline of facts**

1. As pleaded, the plaintiff, a bank customer of the 1<sup>st</sup> defendant did approach the 1<sup>st</sup> defendant and applied for a loan in the sum of Kshs.105, 000/= payable within a period of 6 months to enable the plaintiff in his disclosed business.
2. As part of requirements for the loan appraisal, the plaintiff was asked to provide a bank statement to demonstrate his financial affairs. The plaintiff provided a bank statement apparently from K-Rep Bank Ltd covering the period between 1<sup>st</sup> August 2006 to 3<sup>rd</sup> December 2008. That statement when put to scrutiny by the bank, was suspected not to be authentic hence the 1<sup>st</sup> defendant made inquiries from K-Rep bank ltd and that bank denounced the statements as not genuine. As a result of that development, a report was made to the police who then had the plaintiff arrested, charged and prosecuted with the offences of making a false document, uttering a false document and attempting to obtain credit by false presence.
3. The plaintiff stood his trial and was acquitted of all the courts on the 30/7/2010. Having been acquitted the plaintiff was aggrieved and felt wronged hence he filed this suit seeking, special damages as well as general and exemplary damages for malicious prosecution.
4. By the plaint dated 8/7/2011, the plaintiff blamed the 1<sup>st</sup> defendant for falsely and without any reasonable cause lodging a complaint to the police and as against the defendant for maliciously and without any probable or reasonable cause, charging and prosecuting him with the criminal offences in Mombasa Criminal Case No. 2842 of 2008.
5. The plaintiff pleaded that the report by the 1<sup>st</sup> defendant and subsequent prosecution by the said defendant was actuated by malice with the purpose to harass, embarrass, frustrate, malign and subject him to public ridicule. The plaintiff then gave the particular against each of the defendants. One of the strongest particular of malice pleaded against the 1<sup>st</sup> defendant is that its staffer one Ngoda Haji Ibrahim had a personal grudge against the plaintiff and was using the 1<sup>st</sup> defendant to push the plaintiff for his own happiness. The plant was accompanied by a witness statement and documents which were relied upon and produced at trial.
6. Upon service, both defendants filed statements of defence. The statement of defence by the 1<sup>st</sup> defendant besides denying the allegations of malice and bad faith pleaded in the alternative and without prejudice that it had a reasonable and probable cause to lodge the complaint leading to the prosecution which was done in good faith. The defence then gave particulars justifying their complaint to the police and denied that the plaintiff has suffered any damage or that he had a reasonable claim against the defendant and strict proof was invited. That defence was then accompanied by two witness statements; by Charity Mwakeshi, the then Branch Manager of the 1<sup>st</sup> defendant, and another statement by Haji Ibrahim Ngoda, the then credit officer of the 1<sup>st</sup> defendant.
7. In addition there was a list of documents and copies thereof being the bank statements from K-Rep Bank Ltd, loan application form, forensic document examiners report and a letter from K-Rep Bank ltd dated 15/9/2008 denying the authenticity of the statement given to the 1<sup>st</sup> defendant by the plaintiff in support of the loan application.

8. For the 2<sup>nd</sup> defendant, a statement of defence was filed which denied that the report received by the police and acted upon resulting in the ensuing prosecution were not actuated by malice or ill-will but propelled by reasonable and probable cause and belief that the plaintiff had committed the offences preferred against him hence all allegations of impropriety together with particulars thereof were denied and strict proof invited. It was also pleaded that the plaintiff never served a statutory notice and the right was reserved that an application would be made to have the suit struck out. The defence was accompanied by a document called defendants list of documents which in reality were but four statements from the criminal case file including a statement by the plaintiff admitting to have been given the bank statement by a person he met on the queue at equity bank. There was also a covering report from the criminal case file.

### **Evidence led at trial**

9. At trial, the plaintiff relied on his witness statement and produced the documents filed. For the 1<sup>st</sup> defendant, it was reported that the Branch Manager who had filed the witness statement had died and it was agreed that an officer by the name MICHAEL AKANGA be called to give evidence by adopting the statements filed as his evidence in chief and was then cross examined. For the second defendant, its list of documents dated 30/9/2013 was by consent produced as **DExhibit 2 (a-e)** without the makers of the statement being called for cross examination.

10. The testimony by the plaintiff largely adopted the written statement with a little departure that when he went to K-Rep Bank to get the bank statements required, the systems were down hence he left without collecting the statements which were then collected by his friend and delivered to the 1<sup>st</sup> defendant. A few days later he was called with the words that the loan was ready for disbursement only to be arrested by police from the anti-banking fraud. He was charged and reminded at Shimo La Tewa prison initially but upon conclusion of the trial he was acquitted. He maintained that the statement he was charged with was not the one he had provided to the 1<sup>st</sup> defendant because it did not have his signature. He said that he was framed by Mr. Ngoda Haji who had a personal grudge with him because the said Mr. Haji had asked him to guarantee one Mr. Kaiga for a loan from Equity bank and when the said Mr. Kaiga defaulted, Mr. Haji insisted that the plaintiff pays the loan but he flatly refused.

11. On special damages, he said he paid lawyer's fees of Kshs.92,000/= but only pleaded a sum of Kshs.25,000/=. He then produced the list and copies of documents filed as PExh. 1a – 6.

12. On cross examination, he repeated that the statements were picked from K-Rep Bank by his friend called Kibonge and handed to 1<sup>st</sup> defendant by the same Kibonge. He said that he only got the document from the trial court file. After arrest he went to K-Rep bank and was given a set of bank statement which however he did not exhibit in court.

13. On his differences with Mr. Haji, the plaintiff said that he reported the matter to the Branch Manager who had promised to resolve it. He confirmed that at trial K-Rep Bank produced statement which were materially different from the ones he was charged with but he did not see those statements. He denied seeing the allegedly forged bank statements until he was charged in court.

14. When cross examined by Mr. Makuto the witness said that prior to his arrest, he had never met the investigating officer and that a witness from K-Rep bank indeed attended court and termed the statement subject of the charge as fraudulent. He however maintained that the charge and prosecution were malicious because he was arrested in the afternoon and arraigned in court the next morning without being given a chance to talk to his people. When shown the bank statement produced by witness from K-Rep Bank, he confirmed that there were no transactions between 5<sup>th</sup> December 2007 and December 2008. He admitted that K-Rep was entitled to denounce the bank statement forming the basis of the prosecution as fraudulent however he contended that there was no letter from K-Rep Bank forwarding the statement to the 1<sup>st</sup> defendant. On his own he admitted that the account quoted in the statement subject of the charge was his but the transactions captured in it were not his. With that evidence the plaintiff's case was closed.

### **Evidence by the 1<sup>st</sup> defendant**

15. Even though the 1<sup>st</sup> defendant had filed two witness statements, at trial only one witness was called. That witness was also not one of the two who had filed statement neither was we one of the four witness listed in the list of witness. He was Michael Okanga, the operations manager at Equity Bank. He was so called without any protestation parties having agreed that he be called to adopt a statement of a witness who had died. The witness however confirmed being conversant with the facts of the case having worked in the branch since 2015. He confirmed that the two officers who had filed statements which statements he sought to adopt worked for the bank and in the branch. He then referred to the statements and pinpointed what the makers thereof viewed as inconsistencies to lead to the conclusion that the same were unauthentic. He then said there was communication with K-Rep bank and a confirmation that the statement given to the 1<sup>st</sup> defendant was not from K-Rep bank and that an authentic bank statement from K-Rep Bank was not in tandem with what had been given to his bank. He then produced the copies of documents marked exhibits D1- (i) to (v) and maintained that the bank was justified to make a report to the police after the statement was established to be ingenuine. He said it is normal for a bank to verify the authenticity of a statement from another bank from the alleged source bank. Where the bank is not proximate to the inquiring bank, a letter is written but where both are proximate it can be done informally.

16. In cross examination, the witness said that he joined the 1<sup>st</sup> defendant's Digo Road Branch after the incident had taken place but had adopted the statement of the persons who were there then. He denied the suggestion that the plaintiff signed a copy of the statement of account left with the bank in support of his application. He equally denied the suggestion that the plaintiff would have been asked to sign copies of the identity card he left with the bank.

17. On re-examination, the witness reiterated that the inauthenticity of the bank statement was confirmed by K-Rep Bank which was the alleged source.

18. For the second defendant no witness was called to testify because on the date set, counsel Mr. Makuto told the court that he had agreed

with the other counsel that the documents he had filed, being statements from the criminal case file be produced as exhibits and the same were thus so produced by consent and marked DEXH D2 (a) to (e). I understood that consent between counsel to mean and drive home the fact that witness statement and what they contained were admitted as evidence and the opposing counsel did not wish to test their veracity by cross examination. I will therefore take all as evidence on behalf of the 2<sup>nd</sup> defendant. Of interest in the statements is the statement attributed to the plaintiff and dated 18/9/2008 at 9.15am. That statement contradicts the plaintiff's account how the bank statement giving rise to the criminal proceedings came to the bank. In it he says that it was procured on his behalf by a person he met on a queue at K-Rep Bank and a cost of Kshs.500, and that he took it to the 1<sup>st</sup> defendant confident that it came direct from the bank till he was arrested by the police. That is the entire corpus of the evidence availed and which this court must employ to determine the dispute between the parties.

19. Parties did not agree on issues for determination but both the plaintiff and 1<sup>st</sup> defendant filed separate statement of issues. The plaintiffs list has listed eight issues while the defendant has a list of 14. Having perused the pleadings filed, the evidence tendered and the issues crafted by parties separately, I have isolated the following five issues to be sufficient to determine the dispute between the parties:-

- i. Was the plaintiffs prosecution propelled by and improper motive?*
- ii. Was there reasonable and probable cause on the 1<sup>st</sup> defendant to have lodged the complaint and for the 2<sup>nd</sup> defendant to prefer criminal charges?*
- iii. Has the plaintiff proved to the requisite standards the tort of malicious prosecution against the defendants or any of them?*
- iv. What is the nature and quantum of damages would be due and awardable to the plaintiff in the event of success?*
- v. What order should be made as to costs?*

20. In coming up with the above issues, I have avoided admitted facts which are common to both sides because admitted facts are not in contention and that the court has no business seeking to make a determination on non-issues. The fact I prove to be common to both sides include;

- The application for a loan by the plaintiff and tender of the documents requested including the bank statement for K-Rep Bank Ltd.
- A report by the 1<sup>st</sup> defendant to the police of suspected criminal conduct by the plaintiff.
- Arrest and detention overnight of the plaintiff by the police and subsequent charge and prosecution in Mombasa CMCC Cr Case No. 2842 of 2008.
- The termination of that case in the acquittal of the plaintiff.

### **Analysis and determination**

21. For a plaintiff to succeed on a claim for malicious prosecution there are four pre-requisites to be proved by evidence. The four are that:-

- the prosecution was initiated by the defendant or at the defendants behest
- the proceedings terminated in the plaintiff's favour
- the initiation of prosecution was bereft of reasonable or probable cause but out of malice or bad faith.

22. As said before, here the initiation of the proceedings is admitted to have been by a report by the 1<sup>st</sup> defendant's employees to the police. It is also conceded that the prosecution ended with an acquittal, hence in favour of the plaintiff.

23. Accordingly, to determine the plaintiffs suit my task would to a very large extent dwell on establishing if on the materials presented to the prosecutor would have satisfied a prudent and cautious man that the plaintiff had probably committed an offence and was therefore liable to be prosecuted.

24. While the plaintiff said in his evidence in chief and upon cross-examination that he did not personally present the subject bank statement to the 1<sup>st</sup> defendant, the fact that the said statement was presented for the purposes of supporting the loan application has not been denied but has been accepted. It is to me a central question whether a person looking at the statement would say that it was probably not genuine and authentic. In his own words in re-examination by his advocate, the plaintiff said:-

**“The statement is of my account but the transactions are not mine”.**

25. I understand the plaintiff to confirm that there was some incorrect statement in the bank statement that was inconsistent with his operation of the account. If that was the case as said by the DW 1 and the statements filed by the defendant that the bank statement availed at the behest of the plaintiff had entries that were not true then any reasonable person looking at the bank statement would be perfectly right to say that the person who had presented the statement had probably committed a criminal offence and was thus liable for prosecution to

establish whether or not indeed an offence was committed. That suspicion however must remain at the level of suspicion provided it is reasonably grounded. It must not be a proof beyond preponderance. And it matters not that a trial is initiated and ends with an acquittal. It is sufficient that a reasonable man would have formed the honest opinion that a criminal act had been probably committed.

26. In this case, I do find that the 1<sup>st</sup> defendant's employees while acting in the cause and within the scope of employment and as good citizens had the duty and obligation to verify with the K-Rep bank the authenticity of the statement given to them and once K-Rep bank confirmed that the statement was not from them but presented to have been from them, the said employees of the 1<sup>st</sup> defendant were entitled to make the report to the police the way they did. I find that they had reasonable and probable grounds to lodge the complaint and even attend court and give evidence in support of the prosecution's case.

27. The second reason, I find that the defendant cannot be faulted for the prosecution is the plaintiff's own words in his statement to police dated the 18/8/2008 which was filed and admitted as evidence by consent of the plaintiff's counsel. In that statement the plaintiff said:-

**“I meet somebody in the queue at Equity bank and told me that he works with K-rep bank and because I have an account there he will produce me with bank statement for only five hundred shillings and because I have been meeting him away at the Equity banking I agreed with him and give him my account details for K-rep.**

**He called me after one day and brought the statement which I take to equity having confident that direct to the bank. Until the time I was told the document was fake I and was held by police.**

**That's what I did.**

**Account details**

**Name Antony Chege Ngugi**

**Box 40430 MSA**

**ACC No. xxxxxxxxxxxx**

**The person gave the details. I have seen him several times in K-Rep bank and I am able to identify him if I see him again”.**

28. That document says without equivocation that indeed the plaintiff himself took the bank statement to the 1<sup>st</sup> defendant even though he says he was given to him by a person he had paid Kshs.500/= to procure it. That statement says it all that the plaintiff procured the bank statement and intended it for use to his benefit

29. Whichever way one looks at it, a questioned and confirmed to be false, bank statement was taken to the 1<sup>st</sup> defendant to support a loan application. Any questions as to its origin and authenticity could only be asked of the person in whose favour it was presented. The plaintiff could not escape being so asked and when asked he owned up. I do find that instead of being accused of malice and bad faith there was every reason and probability for any reasonable man to suspect that the plaintiff had a hand in the preparation and use of the bank statement to obtain credit from the 1<sup>st</sup> defendant[1].

30. For those reasons the plaintiff's suit cannot succeed but must fail. I therefore dismiss it with costs.

31. Having so dismissed it however, the law mandates me as a trial court to assess damages that I would award had I found for the plaintiff. The plaintiff prayed for both special and general damages for malicious prosecution as well as exemplary damages.

### **Special damages**

32. In compliance with the law, the plaintiff pleaded the particulars of special damages and at trial produced receipts for legal fees for his defence at trial all totaling Kshs.23,000/=. That is the sum the plaintiff would have been entitled to in special damages had the suit succeeded.

### **General damages**

33. General damages for injury to the person including injury to reputation like in this case is at the discretion of the court, the only caveat being that comparable damage should attract comparable awards and that damages should not be too high as to be incapable of accommodation by the economy.[2]

34. Having considered the disclosed stature and status of the plaintiff in society, I would have awarded for him a sum of Kshs.500,000/= in general damages.

35. For exemplary damages to be awarded, the plaintiff is under duty to prove aggravating circumstances that persuade the court that it ought to punish the defendant by an award of punitive damages. The factors to be considered are the malevolence ill-will or just pettiness of the person setting the prosecution in motion.

36. Here I have found that no aggravating circumstances existed and I would not have awarded exemplary damages even if the suit had succeeded.

37. It is so ordered.

**Dated and delivered at Mombasa on this 29th day of January 2019.**

**P.J.O. OTIENO**

**JUDGE**

---

[\[1\]](#) James Kiruga Kiiru vs Joseph Mwaburi & Other

[\[2\]](#) Stephen Gachau Githaiga vs AG [2015] eKLR