



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE NO. 1792 OF 1999**

**CATHERINE WANJIKU KARIUKI .....PLAINTIFF**

**VERSUS**

**1. THE ATTORNEY GENERAL**

**2. BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

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

The Plaintiff claims damages for malicious prosecution and false imprisonment. She also seeks damages for what she calls **unfair dismissal** from employment.

The Plaintiff's case as set out in the **amended plaint dated 23<sup>rd</sup> June 2004** (the original plaint is dated 13<sup>th</sup> September 1999) is that, upon a complaint made to the police by her employer, the 2<sup>nd</sup> Defendant, she was arrested and charged vide **Nairobi CM Criminal Case No. 3599 of 1994**. She faced two counts, the first one being forgery contrary to section 349 of the Penal Code. The 2<sup>nd</sup> count was stealing contrary to section 275 of the same Code. The Plaintiff pleads that the prosecution was actuated by malice. Particulars of malice are pleaded.

The Plaintiff further pleads that upon close of the prosecution case she was acquitted upon the trial court finding that she had no case to answer.

The Plaintiff's further case is that without waiting for the criminal case to end, and after suspending her from duty pending conclusion of the criminal case, the 2<sup>nd</sup> Defendant "unfairly" dismissed her from employment.

Both Defendants filed defence. They denied the Plaintiff's claim.

At the trial the Plaintiff testified but called no other witness. The 1<sup>st</sup> Defendant did not call any witness nor offer any evidence. The 2<sup>nd</sup> Defendant called one witness.

At the start of the trial, all the documents in the Plaintiff's **undated list of documents filed on 22<sup>nd</sup> February 2001** were by consent admitted in evidence. The bundle was marked as **Exhibit A**. Two further documents contained in the Plaintiff's **supplementary list of documents dated 28<sup>th</sup> January 2005 and filed on 1<sup>st</sup> February 2005** were similarly admitted in evidence and marked as follows:-

- **Exhibit P1:** a letter dated 12<sup>th</sup> January 1995 from the 2<sup>nd</sup> Defendant to the Plaintiff.
- **Exhibit P2:** receipts for Advocate's fees.

The documents in the 2<sup>nd</sup> Defendant's **list of documents dated 27<sup>th</sup> September 2001** were also by consent admitted in evidence and marked as **Exhibit B**.

An **agreed statement of issues dated 16<sup>th</sup> February 2000** was filed on 7<sup>th</sup> April 2008.

I will now examine the Plaintiff's claims in turns.

### **Malicious prosecution**

A claimant in malicious prosecution, in order to succeed, must establish the following on a balance of probabilities:-

- (i) That he was prosecuted by the defendant.
- (ii) That the prosecution was determined in his favour.
- (iii) That the defendant in prosecuting him acted without reasonable and proper cause.
- (iv) That the prosecution was actuated by malice.

Regarding the first point, there is no dispute that the Plaintiff was prosecuted by the 1<sup>st</sup> Defendant through police officers. But regarding the 2<sup>nd</sup> Defendant, there is a dispute. The Plaintiff was the 2<sup>nd</sup> Defendant's employee. Following the loss of some money, and after some internal investigation, a report was made to the police. The police carried out their own independent investigations and subsequently charged the Plaintiff and another person.

It is the duty of every citizen to report to the police any crime suspected, upon reasonable ground, to have been committed, or being committed, or about to be committed. Once that civic duty is done, it is the business of the police to independently investigate the matter and arrive at their own conclusion whether any crime has been committed, is being committed or is about to be committed, and whether to charge anyone with such crime. The further role of any person making the initial report or complaint to the police can only be that of a witness.

In their investigations, the police will not be under the control or direction of the person reporting the

crime or the complainant. Whether to charge or prosecute anyone with any reported crime will be the independent decision of the police investigating the matter. It will not be the decision of the complainant. See the case of **Nyaga –vs- Muccheke 1987 [LLR 271] (CAK)**. In that case the Court of Appeal stated:

**“The appellant having reported to the police about the respondent’s action of damaging his crops, the police took over the matter to investigate the respondent for a possible offence ....Once the appellant gave the report, he ceased to have anything to do with the matter....”**

But courts have had occasion to hold that the person who sets in motion, without reasonable and proper cause, the legal machinery that ultimately leads to prosecution of the complainant, can be deemed to have prosecuted him. See the cases of **Gitau –vs- East African Power & Lighting Limited [1996] KLR 365** and **Kariuki –vs- East Africa Limited & Another [1996] KRL 683**.

In the present case, on discovering the theft and carrying out internal investigations, the 2<sup>nd</sup> Defendant reported the theft to the Criminal Investigation Department (CID) of the police who independently investigated the matter, and who then decided to charge the Plaintiff. The 2<sup>nd</sup> Defendant’s internal investigation was carried out by a retired police officer then in the employment of the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant thus indeed set in motion the legal machinery that culminated in the prosecution of the Plaintiff. But was this without reasonable and proper cause? We shall see shortly if that was so.

There is no dispute that the prosecution was determined in favour of the Plaintiff. She was acquitted without being found to have a case to answer.

Let us now examine whether or not the Plaintiff’s prosecution was without reasonable and proper cause.

There does not seem to be any dispute that the 2<sup>nd</sup> Defendant lost some KShs. 2.1 million through issuance of a banker’s cheque that was not paid for. The documentation (vouchers, etc) showed that the cheque was to be paid for by cash. No cash was ever paid for it. It turned out that some three forged cheques issued upon a bank in Kakamega were given in exchange for the banker’s cheques. Naturally the Kakamega bank declined to honour them, and that was how the theft was discovered.

DW1, ARAKA JAMES OYAMO, testified in the present case for the 2<sup>nd</sup> Defendant. At the material time he was the 2<sup>nd</sup> Defendant’s Manager of Security Investigations and Fraud Management. He was a retired Superintendent of Police who had worked for 16½ years in the Banking Fraud Investigations Squad attached to the Central Bank of Kenya. After retiring in May 1990 he was employed by the 2<sup>nd</sup> Defendant.

In his testimony he recalled an incident on 13<sup>th</sup> May 1994 involving alleged fraudulent issuance of a banker’s cheque for KShs. 2.1 million at the 2<sup>nd</sup> Defendant’s Enterprise Road branch, Nairobi. He identified the cheque from **Exhibit B**. He investigated the matter.

His further testimony was that the cheque was indicated to have been issued against a cash payment over the counter, but no cash was paid. The cheque had in fact been issued against three forged cheques for amounts totaling KShs. 2.1 million. The cheques were drawn on Standard Chartered Bank, Kakamega branch. The three cheques were unpaid as they were forged. The net effect was that the 2<sup>nd</sup> Defendant lost KShs. 2.1 million.

DW1 further testified that the voucher for the banker’s cheque was indicated to have been issued through the counter of the Plaintiff, then a cashier at the 2<sup>nd</sup> Defendant’s Enterprise Road branch. Her rubber-stamp was used on the banker’s cheque. The Plaintiff never reported loss of her cashier’s rubber stamp. She had sole custody of the stamp on the day in question. Nobody else could have used the stamp.

Upon investigation, DW1 further testified, he concluded that the issuance of the banker’s cheque was a

fraud as no money had been paid for it. He so reported to the police for further investigation as was the standard procedure.

DW1 also testified that he knew that the police carried out their own independent investigations and prosecuted the Plaintiff and another person. He never himself arrested the Plaintiff, nor did he prosecute her. There was no malice on his part in investigating the matter as it was his duty to do so.

In cross-examination DW1 stated that in his investigation of the matter he interviewed many members of staff. He followed the audit trail of the banker's cheque and interviewed everyone connected with the process of issuance of the banker's cheque. He also collected all relevant documents, including the banker's cheque itself, the three forged cheques from Kakamega and other documents.

DW1 never testified at the Plaintiff's criminal trial, perhaps rightly so, as his investigation of the matter could not have replaced the investigation by the CID. But he did record a statement with the police. He said that he did not give his own opinion of the matter to the police as he expected them to independently investigate the matter.

As already noted, the Plaintiff was acquitted of the criminal charges. The trial court found that she had no case to answer. The court noted in its judgement –

**“.....It is clear from the evidence on record that there was so much negligence and laxity among the officials in the bank who handled the transaction to the extent that none of the officers, even the cashier who supposedly received this customer and commenced the transaction, saw this customer  
.....  
.....**

**“.....She (2<sup>nd</sup> accused - Plaintiff) was the cashier whom it was alleged received the cash from this person and this was based upon a stamp imprint on the alleged deposit slip. However, the prosecution could not establish her complicity. Needless to say, the laxity in that branch with respect to the instant transaction was something that should have caused those responsible to blame the senior managers .....**  
.....

**“.....I would like to reiterate that the laxity shown at the said bank with respect to the issue of this cheque when the bank had such elaborate procedures with respect to the same was, to say the least, amazing. What was even more surprising (was) that all the officers who were involved in the issue of this cheque were to blame equally for their laxity at what they each did and what made this laxity even more puzzling is that this cheque was passed for payment to days later after it was presented by the accused person (1<sup>st</sup> Accused – who was convicted) in his account.....”**

In convicting the 1<sup>st</sup> accused the trial court was satisfied beyond reasonable doubt, having considered all the evidence on record, that he stole the KShs. 2.1 million represented by the banker's cheque.

The criminal court was satisfied that the bank (2<sup>nd</sup> Defendant herein) had indeed lost KShs. 2.1 million by way of a banker's cheque that was fraudulently issued against some three forged cheques. The court blamed the loss upon the laxity and negligence of the senior officers of the bank at the branch concerned. The court could not understand how the theft escaped detection at all the check-points manned by those senior officers.

It appears that the trial court acquitted the Plaintiff because she was, in the court's view, one of the

smaller links in a long chain of negligence.

So, there having undoubtedly been theft of KShs. 2.1 million from the 2<sup>nd</sup> Defendant, it was only right that the matter be reported to the police. After carrying out their own independent investigations, the police found that the banker's cheque for KShs. 2.1 million had been issued through the Plaintiff who was a cashier. The voucher upon which the banker's was issued indicated that the cheque was issued against a cash payment. The voucher and the cheque were stamped with the Plaintiff's rubber stamp which she had exclusive possession of on the day in question. She had not reported missing the stamp at any time on that day.

In these circumstances, the Plaintiff was a major suspect in the theft of the KShs 2.1 million. It is therefore not surprising that she was criminally charged and prosecuted as she was. She was prosecuted upon reasonable and proper grounds.

Again, given the same circumstances, it cannot be said that the prosecution was actuated by malice. I find that the prosecution of the Plaintiff was not actuated by malice.

The Plaintiff has thus failed to prove all the ingredients of malicious prosecution upon a balance of probabilities. Her claim in that regard must fail. It is hereby dismissed.

### **Unlawful Dismissal**

The Plaintiff has also sought damages for what she calls "unfair dismissal" from employment. I will take unfair dismissal to mean "unlawful dismissal".

The Plaintiff was dismissed upon the ground of gross misconduct. Before she was dismissed she had been suspended by a letter dated 6<sup>th</sup> September, 1994. The suspension was on account of the ongoing investigations by the 2<sup>nd</sup> Defendant into the fraud leading to the loss of KShs. 2.1 million.

The letter of dismissal was dated 4<sup>th</sup> August, 1995. That letter stated in part:-

**"...After due investigations, and having considered what you have stated in that respect, I am satisfied that you were grossly negligent in the manner...(in which) you handled the above transaction. You failed to collect the said funds from the purchaser of the above BP Cheque, when the entries relevant to the transaction were referred to you by the cash items clerk. As a result of this, the Bank released a BP Cheque without receiving the required funds.**

**The above offence is in contravention of Clause A5 (a) (i) of the Collective Agreement and the Bank is justified to summarily dismiss you from its employment.**

**In view of this, the Bank is not prepared to have you continue in its services and with effect from today's date, your services are terminated in accordance with the provisions of Clause A5 (d) of the Collective Agreement covering Section Heads, Clerical, Technical and Subordinate Staff, by the**

**payment of one months' salary in lieu of notice.....”**

**Clause A5 (a) (1)** of the collective Agreement provides as follows:-

**“ DISMISSAL**

**Any of the following acts on the part of an employer shall constitute Gross Misconduct and/or serious neglect and shall justify instant dismissal-**

**(i) If he/she is guilty of misappropriating any funds or property belonging to the employer or belonging to any person having business dealings with the employer;**

**(ii) .....**”

And paragraph (d) of the same clause provides as follows-

**“Notice of Termination of Employment**

**(d) The notice period shall be one month's notice on either side in writing or the payment of one month's salary in lieu thereof by either party, subject to the reasons for the termination being included in the letter in question.”**

The first thing to consider is whether the Plaintiff was guilty of misappropriating any funds or property belonging to her employer, or belonging to any person having business dealings with the employer.

The Plaintiff having been acquitted of the criminal charge, she was never proved to have misappropriated the KShs. 2.1 million represented by the banker's cheque. But the circumstances of the issuance of the cheque which led to her being criminally charged were such that her employer suspected her on reasonable grounds of having been involved in the theft.

At any rate, termination of her employment was as provided for in her contract of employment. She was summarily dismissed without notice upon payment to her of one month's salary in lieu of notice, and for reasons given in the letter of termination, as provided by the contract.

No employee is ever beholden to his or her employer forever. Likewise, no employer has obligation to retain any employee forever. All contracts of employment will normally provide for termination of such employment, and either party will be at liberty to terminate the employment as provided for in the contract.

The 2<sup>nd</sup> Defendant was thus not required to wait until conclusion of the criminal case before terminating the Plaintiff's employment. The 2<sup>nd</sup> Defendant found it inappropriate, on reasonable and proper grounds, I must add, to retain the Plaintiff in its employment. The employment was terminated as provided for in the contract of service.

The Plaintiff's claim for unlawful termination of her employment is thus without merit and must also be refused.

In the circumstances the plaintiff has failed to prove her entire claim on a balance of probabilities. The same is hereby dismissed with costs to the Defendant.

In the event that I am overturned on liability on appeal, I must assess the damages that I would have awarded the Plaintiff if she had succeeded before me.

I have considered the little that has been stated regarding general damages in the written submissions filed on behalf of the Plaintiff. There was no mention at all in this regard in the submissions filed on behalf of the Defendant.

I will first look at damages for malicious prosecution. I note from the proceedings of the criminal court that the Plaintiff's trial took quite a long time to complete. I am mindful of the mental anguish that she must have undergone during the trial, not to mention the attrition of attending court repeatedly as and when required to do so. She may also have been in custody at some point after she was arrested and charged and before being released on bail by the trial court.

I have also considered the effect of the criminal charge and trial upon her reputation and good name in the eyes of her family, friends and the society in general.

Doing the best that I can, I would have awarded the Plaintiff KShs. 600,000/00 as general damages for malicious prosecution had she succeeded before me.

As for wrongful dismissal, it appears that the Plaintiff was paid all her dues upon dismissal as provided for in the contract of employment. I thus would not have awarded her anything for this claim even if I had found for her on liability.

As it is, the Plaintiff's suit is dismissed with costs to the Defendants. It is so ordered.

There has been delay in the preparation and delivery of this judgment. The same was occasioned by my poor state of health the last few years, exacerbated as it was by my transfer to Machakos, a very, very busy station, in early 2010. The delay is regretted.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 8<sup>TH</sup> DAY OF APRIL, 2011.**

**H.P.G. WAWERU**

**JUDGE.**