



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil 369 of 1994

NABEA C. MBAE PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

The plaintiff, *Nabea C. Mbae* was employed by the Kenya Commercial Bank where he had worked for a period of about six years prior to the matters complained about in this suit. On or about the month of April 1995, the plaintiff was arrested and charged with **Criminal Case number 2224 of 1986 in Nakuru** which was later transferred to Nairobi as **Criminal Case number 1651 of 1991**.

The plaintiff was charged with two others with various counts of conspiracy to defraud and attempt to steal. The full records of the criminal case are not available. What was produced as an exhibit was a ruling by a Senior Resident Magistrate – *S. O. Odak* of 9th July 1993. There is also an order by the High Court in **Miscellaneous Application number 811 of 1991** issue on 24th June 1993 in which a prohibitory order was issued against the Senior Resident Magistrate from proceeding with **Criminal case number 1651 of 1991**.

The learned Senior Resident Magistrate terminated the criminal case against the accused persons under **Section 210 of the Criminal Procedure Code**.

On 24th February 1994, the plaintiff applied for leave under **Section 31 of the Limitation of Action Act** to file this suit against Kenya Commercial Bank out of time. By an order 10th May 1995, the plaintiff was given leave to file suit out of time within fourteen days. The plaintiff thus instituted this suit against ***Kenya Commercial Bank*** and the ***Attorney General***, 1st and 2nd defendants respectively on 24th May 1994. The plaintiff has prayed for judgment against the defendants for;

- (a) **A declaration that the said dismissal by the 1st defendant was unlawful.**
- (b) **Terminal benefits from the 1st defendant.**
- (c) **Salary from date of termination to date of acquittal from the 1st defendant.**
- (d) **Damages for wrongful dismissal against the 1st defendant.**

Both the 1st and 2nd defendants filed their statements of defence and the following issues were agreed upon for determination:

1. Was the 1st defendant entitled to terminate the contract of employment it had with the plaintiff?
2. If not, is the plaintiff entitled to damages from the 1st defendant?
3. Is the plaintiff estopped from challenging the termination of his employment?
4. Is the plaintiff entitled to any employment benefits from the 1st defendant and if so, in what amounts?
5. Did the 1st defendant cause the arrest of the plaintiff or did the police arrest the plaintiff after carrying out their own independent investigations in the matter?
6. Is the plaintiff entitled to any damages against the 1st defendant for malicious prosecution?
7. Did the 2nd defendant after receiving the complaint from the 1st defendant against the plaintiff have justification in confirming the plaintiff?
8. Did the 2nd defendant prosecute the plaintiff in good faith and expeditiously?
9. Is the plaintiff entitled to any damages against both defendants and if so, in what proportions?
10. What is the order for costs and interest?

The hearing of this matter started on 9th October 2006. The plaintiff gave evidence of how he was arrested and arraigned in court where he was charged in Nakuru **Criminal case number 2224 of 1986.**

According to the plaintiff, he was working in the Advances Department and his duties included; appraisal of loan applications and preparation of monthly returns. Within that time there was a problem with one of the customers account called ***Mburu Kinyanjui*** where cheques were deposited but they were not payable to that customer.

The plaintiff testified that the procedure was that a customer would complete a deposit slip which is presented to the counter clerk. It is the counter clerk who would check and verify the name on the cheque and the account of the customer and then countersign. The cheques are authorized by the section heads for payment and if the amount is large, it is authorized by the accountant.

The plaintiff contended that he was not involved as a counter clerk, he however used to deal with the customer by the name of ***Mburu Kinyanjui*** whom he described as a privileged customer who used to go to his office but at that particular time, he was following up an overdraft. The plaintiff said that he was called by the manager who asked him to give an explanatory why he had handled cheques for the customers. The plaintiff said he denied having had anything to do with the cheques and the following day he was arrested by the police officers and taken to the CID offices where he was interrogated about the cheques. He was charged before the Chief Magistrate's court in Nakuru. The original case was terminated but he was re-arrested and charged with another case of conspiracy to steal.

But after three witnesses gave evidence, the prosecution entered a ***nolle prosequere***, the plaintiff was re-arrested again and charged in Nairobi but he sought for a prohibitory order in the High Court which he served upon the trial magistrate and the plaintiff was acquitted of the charges under **Section 210 of the CPC.**

While the case was pending, on the 6th of May 1985, the manager of the 1st defendant terminated the services of the plaintiff and in the letter of termination it stated that

“After due investigation I am satisfied that between January and April 25th 1985, you engaged yourself in activities injurious to your employer’s business.

In view of this the Bank is not prepared to have you continue in its service and with effect from 25th April, 1985 – the last day you worked for us – your services are terminated in accordance with the provisions of Clause 5(d) of the Collective Agreement covering Section Heads, Check Clerks, Clerical, Technical and Subordinate Staff by the payment of one month’s salary in lieu of notice.

All money due to you upto and including 25th May 1985 will be paid to you immediately this has been calculated.”

That is the basis of the plaintiff’s claim for unlawful dismissal and for malicious prosecution.

On the part of the defendant, *Sammy Kongo Gichumu*, who was working with the plaintiff at the time, as his Section Head, gave evidence. It was the defence evidence that the plaintiff attempted to present a wrong cheque to the posting clerk which was substituted. It was found out that it was the plaintiff who had substituted where by money was supposed to be paid from another client’s account fraudulently. The Manager therefore asked the plaintiff to write an explanation on how he was involved with the cheques.

The plaintiff denied any involvement with the cheques and the matter was reported to the police. The plaintiff was charged with two others and he was subsequently suspended and his services were terminated. The plaintiff was paid his terminal dues in accordance with **Clause 5(d) of the Collective Agreement** which required that he be paid one month’s salary in lieu of notice.

During cross-examination, *Mr. Gichumo* confirmed that although the plaintiff was at the time supposed to be dealing with advances, he had a role to play in this case where the cheques were misposted it was the plaintiff who substituted them. He also said that according to the investigations, it was found that the plaintiff was involved in the substitution of the cheques and that is why the matter was reported to the police. The plaintiff was charged with the criminal offences after police carried out their own investigations.

This witness said that he went to court several times as a witness but he was not called to give evidence. He further stated that the 1st defendant was entitled to terminate the services of an employee if satisfied that an employee has been involved in fraud. In that case the bank did not need to wait for the outcome of the case. He said that the plaintiff was duly paid his terminal dues as per the Collective Agreement. He was not entitled to pension because he had not worked for ten years.

Both Counsel for the plaintiff and 1st defendant filed detailed written submissions and authorities which clearly shows they conducted research in this matter. I must register my gratitude for their industry. I will refer to some of the authorities in the course of the analysis of the evidence before me.

Right from the on set, no leave was obtained to file this suit against the 2nd defendant. The leave that was obtained in **Miscellaneous Application number 40 of 1994** was in respect of the 1st defendant. As such the suit against the 2nd defendant is statutorily time barred both under the Limitation of Actions Act Cap 22 and Cap 39 of the Laws of Kenya

ctively. The claim against the 2nd defendant is therefore incompetent and is dismissed.

The suit against the 1st defendant was also challenged on the grounds that the claim for wrongful termination ought to have been filed within six years of the termination. The plaintiff was terminated from his employment in May 1985 and the suit herein was filed in 1995 after the period allowed by the

law. Although the plaintiff was granted leave of the court prior to the filing of this suit, that leave which was granted *ex parte* leave has been faulted.

Considering the reasons advanced by the plaintiff that he was awaiting the outcome of the criminal cases up to July 1993 in order to institute the suit for wrongful dismissal, I am prepared to accept that explanation as a plausible reason for the delay in filing this suit out of time.

This now leads me to the fundamental issue of whether the plaintiff's services with the 1st defendant were, wrongfully terminated. The plaintiff's contract of employment was governed by the **Collective Agreement** between the **Kenya Bankers (employers) Association and Kenya Union of Commercial Food and Allied Workers [1981/1983] Clause 5** deals with the *provisions for termination of Section Heads, Check Clerks, Clerical Technical and Subordinate Staff*.

“(d) Notice of Termination of Employment

With regard to the question of a notice period it is agreed that the existing provisions shall continue, namely 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 termination being included in the letter in question.”

The plaintiff's evidence, was that, he denied having been involved in the substitution of the cheques, he claimed that he was working at the advances section. The evidence of the defence witness **Sammy Kongo** who was the Section Head at the time was the effect that although the plaintiff was working at the Advances Section after investigations, it was found that he was involved in the substitution of the cheques after which he was given an opportunity to give an explanation in writing. It is that after the explanation that the 1st defendant reported the matter to the police and the police took over the investigations. On whether the plaintiff was involved in this attempt or conspiracy to substitute cheques remains the plaintiff's word against the defence, however the defence went further to involve the police in the investigations.

According to Counsel for the plaintiff, the plaintiff ought not to have been dismissed before the conclusion of the trial. And in this respect he quoted the case of **Kenya Commercial Bank –Vs- Jackson Omabia Civil Appeal Number 166 of 1991 at page 6** where the Court of Appeal held

“The Manager did not appear to have caused exhaustive investigation as was required of him under Clause 5(b) of the Collective Agreement. He appears to have acted hastily with the sole purpose of accomplishing his wish to get rid of the respondent from his employment. This is very clear from his abrupt action to dismiss the respondent summarily by his letter dated 18th March, 1987, while the criminal case was pending in court. Having caused the respondent's arrest and the charge of the criminal offence his subsequent action to dismiss the respondent summarily was clearly an after thought. Had he waited for the outcome of the criminal charge, he would most probably have acted differently. There was no evidence to suggest that the respondent was guilty of neglecting to perform his duty or to have performed carelessly or improperly as was alleged. The author of the mischief was the Manager himself who failed to return the vital voucher to the respondent to enable him to balance his accounts and to eliminate the cash overage. To dismiss the respondent for a different offence with different particulars of the offence put the respondent in double jeopardy.”

I agree with Counsel for the plaintiff that **Clause 5** in the case of **Omabia (Supra)** is similar to the present **Clause 5** of the collective agreement. But in this case, the 1st defendant opted to suspend the plaintiff and terminate the services before the completion of the criminal case which is in accordance with **Clause 5 (c)** which provides that;

“While an employee is awaiting trial involving moral turpitude he may be suspended for thirty (30) days and if the suspension is not followed by a dismissal within the period of thirty (30) days, the employee would be reinstated in his employment and paid the full salary for the period of suspension.”

In the case of the plaintiff, the suspension was followed by a termination. The plaintiff was paid the terminal dues according to the Collective Agreement. In any event, the plaintiff claim is for general damages, special damages have not been pleaded. It is trite law that special damages must be pleaded and a claim for terminal benefits which refers to past entitlement and loss of earnings ought to have been quantified and pleaded.

In the case of **Alfred J. Githinji Vs Mumias Sugar Co. Civil Appeal No. 194 of 1991** the Court of Appeal while retaliating the decision and the common law principles in the case of **Rift Valley Textiles Ltd Vs Edward Onyango Ogada Civil Appeal No. 27 of 1992** held as follows: -

“We have no doubt whatsoever that the law did not entitle the judge to do any of these things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. In our view, even though the respondent’s dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant.”

It is clear that the plaintiff’s contract of employment was regulated by the Collective Agreement which was duly followed and the plaintiff was paid one month’s salary in lieu of notice.

The other issue to determine is whether the plaintiff’s prosecution was malicious. In establishing whether the prosecution was malicious, the test to be applied as been set out in several decisions among them, the case of **Kagane and Others Vs Attorney General and Another [1967] E.A page 643**. The test to be applied is whether there was reasonable and probable cause for prosecution and whether on the facts a reasonable person would honestly have believed that the prosecution was likely to succeed. The principles were further expounded in the case of **Katerega Vs Attorney General [1973] E.A 287** where it was held that

- (i) “A person instituting legal proceedings is not responsible for imprisonment which is the result of an order of the court;***
- (ii) The plaintiff has to prove that the person instituting the proceedings was actuated by spite, ill-will or improper motives;***
- (iii) Lack of reasonable and probable cause cannot be relied upon by itself to show malice.”***

The Court of Appeal in a recent decision **Standard Chartered Bank Kenya Ltd Vs Intercom Services Ltd and 5 others Civil Appeal No. 37 of 2003 page 46** it was held that

“Where the complainant reports a commission of crime to the police and police upon independent investigations initiate a prosecution the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously.”

According to the 1st defendant’s witness, there was a case of fraudulent endorsement of cheques which were endorsed for the payment of an account of ***Johnson Kinyanjui***. If there was an attempt to divert one client’s account to another, this is tantamount to a crime of conversion and the 1st defendant had reasonable and probable cause to make a report to the police. The decision to arrest the plaintiff was made by the police after their own independent investigations where the plaintiff was charged with others who were suspected to have conspired. It is the 2nd defendant the Attorney General who is in charge of the prosecution the defence witness testified that he went to court several times both in Nairobi and Nakuru although he was never called to testify. It is the 2nd defendant who transferred the case to Nairobi and later withdrew the charges.

The documentary evidence before this court does not show that history except for the ruling of 9th July 1993 where the trial magistrate was dealing with the order of prohibition. It is in that ruling that the court

was of the opinion that the prosecution of the plaintiff was an abuse of the court process.

Am not persuaded, that the 1st defendant is liable for this prosecution which was controlled and conducted by the ***Attorney General*** following their own investigations. It is correct the initial report was made by the 1st defendant about the alleged offence however the decision to prosecute was by the 2nd defendant and from the defence evidence it is clear there was a probable cause on the part of 1st defendant to make a report to the police.

The upshot of the above analysis is an inevitable conclusion that the plaintiff has not been able to prove that he is entitled to general damages for unlawful dismissal or malicious prosecution. This claim is therefore dismissed with costs to the 1st defendant.

It is so ordered.

Judgment read and delivered on 9th day of March 2007.

MARTHA KOOME

JUDGE