



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 269 of 1999**

**KENNETH ONYANGO ODHIAMBO.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**BACLAYS BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**JAMES OYAMO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff was a temporary employee of the 2<sup>nd</sup> defendant from March 1995 upto 21<sup>st</sup> July 1997.

Being a University Graduate to write to the management through the Chief Shop Steward for consideration for permanent employment as per Section A3 (b) of the Collective Bargaining Agreement (CBA) between the Bank and the Trade Union. The Chief Manager respondent vide his letter dated 18<sup>th</sup> August 1997 in which he stated thus “..... ***We are gathering further information on the subject matter and will address you more conclusively.***”

The plaintiff testified that the bank was jittery with the issue of employing him on permanent terms.

A meeting was arranged between the management and the plaintiff. In that meeting the plaintiff was asked if he was aware that a fraud had been committed at Pioneer House Branch Savings Department wherein Shs.500,000/= was lost. The management further informed him that there were strong indications that the plaintiff was involved in that fraud.

The plaintiff denied any involvement in the fraud and stated that he was working in the current Account Department and not in the Savings Account where the alleged fraud took place.

The management started investigating the plaintiff. The matter was handed over to the 3<sup>rd</sup> defendant who was the Chief Security Officer of the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant reported the matter to Anti-Banking Fraud Police Unit. When the police arrived at the office of the 3<sup>rd</sup> defendant, the plaintiff was handed over to the police by the 3<sup>rd</sup> defendant with a remark.

*“This is the thief who had stolen our money”*

The plaintiff was arrested and taken to Keleleshwa Police Station where he was charged in two counts.

**Count 1:**

Obtaining money by false pretends contrary to Section 313 as read with Section 389 of the Penal Code. In that on the 10<sup>th</sup> July 1997 at Barclays Bank of Kenya Pioneer House Branch in Nairobi, jointly with others not before the court with intent to defraud obtained Shs.530,000/= from Barclays Bank of Kenya Pioneer House Branch by falsely pretending that a certain inter branch debit voucher was good and valid for payment of Shs.530,000/= to Charles Wanjohi Nderitu.

**Count II:**

Attempt to obtain money by false pretences contrary to Section 313 as read with Section 389 of the Penal Code.

In that on 17<sup>th</sup> July 1997 at Barclays Bank of Kenya Pioneer House Branch in Nairobi with intent to defraud jointly with others not before the court attempted to obtain Shs.590,000/= from Barclays

Bank of Kenya Pioneer House Branch by falsely pretending that a certain Inter Bank voucher dated 17<sup>th</sup> July 1997 was good and valid order for payment of Shs.590,000 to David Kariuki Njuguna.

At the end of the prosecution case the trial magistrate found that the plaintiff had no case to answer. In his short ruling the magistrate said this:

*“The prosecution in this case has totally failed to establish any nexus between the accused person and the commission of the two offences charged. The closest evidence to his complicity is an allegation that he took part in the opening of the two accounts involved. That the frauds took place so soon thereafter is a matter of very strong suspicion.*

***But suspicion no matter how strong is not a basis for convicting in a criminal trial Evidence has been given of individuals who obtained and attempted to obtain money from the bank, none of whom is the accused person. The prosecution did not call any evidence as to whether or not the account holders were interrogated and those gentlemen were not called as witnesses either. To my mind the prosecution has totally failed to establish prima facie case against the accused on either charge. I dismiss both charges and acquit the accused under Section 210 of the Criminal Procedure Code.”***

In this suit the plaintiff claims damages for unlawful arrest, false imprisonment and malicious prosecution against the Attorney General by virtue of the Government Proceedings Act. It is not in dispute that the plaintiff was arrested by police as servants of the Government and were acting in the cause of their employment. According to the plaintiff he was summoned to the office of the 3<sup>rd</sup> defendant who was the Chief Security Officer of the 2<sup>nd</sup> defendant for questioning while there police were called and on arrival the 3<sup>rd</sup> defendant told them: ***“This is the thief who has stolen our money take him away.”*** He was taken to the police station where he was charged with the two offences and taken to court. The case was never investigated and during the trial of the plaintiff, the investigating officer was never called to testify.

The first defendant and second defendant did not call any evidence in their defence. The 3<sup>rd</sup> defendant in his defence stated that as the Chief Security Officer of the 2<sup>nd</sup> defendant all that he did when the theft was reported to him was to call the police to carry out their independent investigation to establish whether or not the plaintiff had committed any offence.

He was not involved in the further investigations and the decision to charge the plaintiff was arrived at by the police. From the evidence above I do not find the 3<sup>rd</sup> defendant liable as the decision to arrest and

charge the plaintiff was made by the police and the 3<sup>rd</sup> defendant did not direct them of what to do.

I hold that the imprisonment of the plaintiff was unjustified false and unlawful and that the Government is vicariously liable for it on account of having been committed by their servants.

As to malicious prosecution the plaintiff must prove four things:

- (1) That the prosecution was instituted by the police (there is no dispute as to this).
- (2) That the prosecution was terminated in the plaintiff's favour (there is also no dispute as to this).
- (3) That the prosecution was instituted without reasonable and probable cause and
- (4) That it was actuated by malice.

The test whether the prosecution was instituted without reasonable or probable cause is whether the material known to the prosecution would have justified a prudent and cautious man that the plaintiff was probably guilty of the offence. I have no doubt in answering this question in the negative. The offence was never investigated. All that the police did when they were called to the office of the 3<sup>rd</sup> defendant was to arrest the plaintiff and take him away after the 3<sup>rd</sup> defendant told them:

*"This is the thief who has stolen our money, take him away"*. The police never carried out their independent investigations to establish whether or not the offence had been committed before they decided to charge the plaintiff. With regard to them 4. I ask myself whether or not the arrest of the plaintiff was actuated by malice. The answer to this is also in the affirmative. The plaintiff was arrested on dubious grounds while the names of the people who defrauded or attempted to defraud the bank were known to the bank and their accounts too. The bank was motivated by something more than a sincere desire to vindicate justice.

For all these reasons, I hold that the plaintiff has proved that his prosecution for defrauding and attempting to defraud the bank by false pretences was a malicious prosecution.

Damages are always a difficult matter in cases such as this. I must consider the plaintiff's position and what he went through during the whole period. He is trained as a graduate teacher and taught for sometime before he joined banking. He spent 1½ weeks in police cells which must have been (to say the least) a most unpleasant experience. Although he was on bail until acquitted on 8<sup>th</sup> October 1998 the charge was hanging over his head for over one year. Having regard to all these circumstances I would award a total sum of Shs.450,000/= in general damages. There is also a claim of Shs.50,000/= as special damages for legal expenses involved in defending the prosecution.

Accordingly there will be judgment for the plaintiff against both the first and second defendants jointly and severally for

Shs.500,000/= plus interest and costs.

Dated and delivered at Nairobi this 20<sup>th</sup> day of March, 2006.

**J.L.A. OSIEMO**

JUDGE