



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO.316 OF 2000**  
**DAVID MWANGI MUKORA .....PLAINTIFF**  
**V E R S U S**  
**STANDARD CHARTERED BANK (K) LTD.....DEFENDANT**  
**J U D G M E N T**

The plaintiff filed this suit on 13th May 1999 claiming damages for wrongful dismissal from his employment the defendant and wrongful arrest or malicious prosecution. In his evidence the plaintiff said that he was employed by the bank as a Clerk on 17th October 1990 at a salary of KShs.4,453/= per month but that on 11th November 1994 his services were terminated but by them his salary per month had increased to Kshs.14,000/- per month.

That letter of termination read:-

***TERMINATION FROM BANK SERVICE***

***You are no doubt aware of the banks investigations in conn ection with fraudulent withdrawal of KShs.400,000/= from customers account in the Branch.***

***Investigations have revealed that in your capacity as a teller you negligently handled the formalities pertaining to this transaction which facilitated the loss.***

***This is contrary to the Provision of Clause A5(b)iii of the Collective Bargaining Agreement.***

***In the circumstances your services are therefore terminated with immediate effect. You will be paid one month`s salary in lieu of notice.***

***All your dues upto and i ncluding the date of this letter will be paid to you upon computation. Kindly acknowledge receipt of this letter by signing on the attached copy and return the same to us.***

***Yours sincerely***

***BRANCH MANAGER***

He said his relationship with the bank had been good.

About the alleged transaction the plaintiff said that the procedure was that they would pay up to KShs.50,000 as tellers on their own authority but would get manager's signature on any enhanced payment above that amount which he obtained, in this instance and he also obtained the customer's Identity Card number, but he was arrested on 23th November 1994 and charged on 28th November 1994 before the Chief Magistrate's Court Criminal Case No.4484/94 but was acquitted on 13th May 1998. He had paid KShs.100,000/= as fees for representation.

In his cross examination he says it was proper for the bank to investigate and that it was I.P. Kalumo from the CENTRAL BANK INVESTIGATIONS BUREAU who made the decision to charge him after the bank had complained against him.

The defence denied liability and called one witness DW1 CHARLES NYAGISO who still works with the defendant's bank. He said that in 1994 where they worked together with plaintiff and that when the loss was discovered several people including him were investigated. He also corroborated what plaintiff said about the procedures of payment.

The issues arising from this case to my mind are first whether there was a case of malicious prosecution against the defendant and whether the dismissal was wrongful and if so if there is any further damages to be paid.

To sustain a case of malicious prosecution the plaintiff must show that there had been prosecution of the plaintiff by the defendant. Here defendant says it was the police who preferred the arrest. However, the law would make a complainant prosecutor if he is the one who investigated the prosecution. It is usually a case of causation. Normally it is the person who puts the law into motion that is the instigator. He does not have even to be a party to the proceedings. Sometimes even an agent who hold himself as the prosecutor or allowing himself to be considered as such becomes a prosecutor. Here the bank reported the loss to the Fraud Squad at the Central Bank. I think the Bank must be held to be the prosecutor.

Secondly plaintiff must prove that the defendant acted without reasonable and probable cause that means that he acted without genuine belief based on reasonable ground. It must be an honest belief that accused is guilty on the prima facie facts as they are known by the accuser objectively as a reasonable man under such circumstances.

Charges laid against the plaintiff were 5 counts of stealing by Clerk contrary to S.281 of the Penal Code, Fraudulent False Accounting Contrary to Section 330 (b) of the penal code and 6 counts of Fraudulent False Accounting and they were amounts that were within his authority to pay. Hence it is not pertinent to say as he did that the amount in issue was payment of KShs.400,000/- and that he did so with authority of the Manager. Again the case was heard fully and was dismissed under Section 215 of the Civil Procedure Code Salmond on the Law of Torts 15th Ed. Pp 553 says:-

***“This (reasonable and probable cause) is a difficult part of the law and two points must be noted at the outset. First the burden of proving absence of probable and reasonable cause is on the plaintiff, who thus undertakes the notoriously difficult task of proving a negative. Secondly, the existence of a reasonable and probable cause is a question for the Judge.”***

In my view where a prosecution is not determined at the stage of NO case to answer S.210 of the Criminal Procedure Code but proceeds to full hearing with defence evidence being considered it is almost impossible to hold that such prosecution was started without reasonable and probable cause because it means there was prima facie case for accused to answer.

In this case the acquittal was under S.215 of the Criminal Procedure Code which says:-

***“The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”***

I feel that burden here was not discharged by the plaintiff that Defendant acted without reasonable and probable cause.

The plaintiff must thirdly show that defendant acted with malice meaning that he acted under some improper and wrongful motive. Plaintiff should show that prosecution was actuated by malice, or spite, or some indirect and improper motive. It is a question of fact although where there is no reasonable and probable cause it can be inferred. I think motive based on gender ethnicity or race being used as a vehicle through avenue of legal process can be proof of malice. Here there was no proof of malice.

Lastly the plaintiff should show damage or injury suffered by him as a result. Normally this is presumed in any Criminal prosecution and as in this case expenses incurred in defending the suit is enough proof.

So looking at the finding, I find that defendant instituted these proceedings against the plaintiff but it had reasonable and probable cause and the action was devoid of malice and although there was damage. The claim under malicious prosecution is not proved and cannot be sustained and is therefore dismissed.

As for wrongful dismissal, the letter of appointment Ex.1 allowed summary termination on payment of 1 months salary in lieu of notice.

The letter of dismissal alleged negligence by Plaintiff in payment to the customer but did not particularize how the negligence arose. Besides the amounts complained about in the Criminal case and which forms the basis of the charge do not seem to be the basis upon which the termination was based. At the trial, the defendant seems to have decided not to contradict the evidence of the plaintiff on wrongful dismissal. In these circumstances I accept the evidence of the plaintiff that he was not negligent and therefore his dismissal wrongful and I so find.

As for damages:-

The letter of employment Ex.1 the defendant could terminate plaintiff's employment without giving any reason on payment of one month's salary in lieu of notice. Here they gave a reason which was not proved to exist at the trial. In the case of ALFRED J. GITHINJI vs MUMIAS SUGAR CO. LTD C.A. NO.194 of 1991 the court of appeal said:-

***"...Where the contract of service contains specific provisions for Notice for termination of services .....he was only entitled to all that was due to him under and in accordance with his contract of service."***

But the notice of termination only comes into consideration after reason for termination is shown.

In that case the Honourable court quoted with approval and followed their previous judgment in RIFT VALLEY TEXTILE LTD v. EDWARD ONYANGO OGANDA Civil appeal No.17 of 1992 where they said:-

***".....In our view even though the respondent's dismissal was unlawful he has been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant."***

My brother Justice Aganyanya in his eloquent decision in HCCC NO.2603 of 1994 JOSEPH M. NJAU v BARCLAYS BANK OF KENYA LTD said that where dismissal was actuated by malice then the court of appeal decision does not apply.

Here it was not however proved that it was actuated by malice but what there is, is that there is no evidence to prove that plaintiff was negligent a reason cited by the defendant as the cause of dismissal. Should not the employer be expected to give a truthful reason on which he truthfully relies for dismissal?

It would appear to me that if the employer is to be held at his word then his word here should be like

shylocks bond in Merchant of Venice that he can dismiss summarily for some given reasons or without staying any reasons. That is provided but where he gives a reason I believe that must be a truthful reason and not anything merely from nowhere. That would be tantamount to abusing a legal right.

The court of appeal said in the Rift Valley case that a person be dismissed and compensated according to what is provided in agreement of employment. Now here it is not provided in agreement of employment that he will dismiss for any false reasons. If he is dismissing for a reason, it must be the one stated if not then he keeps silent about it.

This court is bound by the decision of the court of appeal. In this case however I respectfully think the highest court`s decision did not direct that so long as he is dismissed even by false reasons he should be bound by the same agreement which the employer has falsified on his side. The balance of equity would not favour where employer even falsifies a reason and acts against the agreement yet employees held as to it. So paying one month salary in lieu of notice in accordance with the letter of appointment but giving a false or none expected reason is not in my mind, equitable and proper.

I find dismissal was wrongful and one months salary is not adequate compensation. I award the plaintiff 6 months gross salary.

There will be judgment for the plaintiff for Kshs.14,269 x 6 =Kshs.85,614/- less (1) month`s salary in lieu Kshs.85,614 – Kshs.14,269.

In a similar case this court, Aganyanya J in HCCC NO.2603 of 1994 JOSEPH MWAURA NJAU vs BARCLAYS BANK OF KENYA LTD awarded plaintiff 12 months gross salary as due compensation. I would likewise award the plaintiff 6 months salary at gross rate.

There will be judgment for plaintiff for KShs.14,269/= (monthly income) x 6 =kShs.85,614/= Less (1) month`s salary in lieu of notice Kshs.85614 – 14,269 =Kshs.71,345/- subject to statutory deductions, with costs of the suit and interest.

**Delivered this 7th day of March 2002**

**A. I. HAYANGA**

**J U D G E**

Read to Miss Ndugi for Defendant

No appearance for Plaintiff.