



REPUBLIC OF KENYA



KENYA LAW
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**Diamond Trust Bank (K) Ltd v Fadhil & another (Civil Appeal
E053 of 2023) [2025] KEHC 3221 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E053 OF 2023
JK NG'ARNG'AR, J
FEBRUARY 20, 2025**

BETWEEN

DIAMOND TRUST BANK (K) LTD APPELLANT

AND

SUAAD SALIM FADHIL 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal against the Judgment of Hon. J. B. Kyalo (CM) delivered on 16th February 2023 in Mombasa Chief Magistrate's Court Civil Suit No. 809 of 2019, Suaad Salim Fadhil v Diamond Trust Bank (K) Ltd & The Hon. Attorney General)

JUDGMENT

1. The background of the appeal is that the Plaintiff/1st Respondent vide a Plaint dated 29th May 2018 averred that at all material times to this claim, the Plaintiff was employed by Ms. Habib Bank Limited, effectively from 11th April 1988, initially as a clerk and typist but rose through the ranks to the position of Branch Operations Manager. That by an understanding of transfer of assets and liabilities between the said Habib Bank Limited and Diamond Trust Bank (K) Ltd with Diamond Trust Bank (K) Ltd being the receiving institution. That the said acquisition was approved by Central Bank of Kenya and published vide Press Release dated 28th July 2017.
2. The Plaintiff/1st Respondent averred that during pendency of the said acquisition, Habib Bank Ltd on 11th May 2017 maliciously and without probable cause caused the Plaintiff/1st Respondent to be charged before Mombasa Chief Magistrates Court, Criminal Case No. 741 of 2017, Republic v Abdul Kadir Mohamed Ali, Suaad Salim Fadhil and Alex Tsuma Tsanga with two criminal counts namely conspiracy to effect unlawful purpose contrary to Section 395 (f) of the *Penal Code*, and stealing by servant contrary to Section 268 (1) as read with Section 268 of the *Penal Code*. That between 11th May 2017 and 13th June 2018 at Mombasa Chief Magistrates Court, the Plaintiff stood her trial and was



acquitted of the said charges under Section 210 of the *Penal Code*. The Plaintiff/1st Respondent avers that the said prosecution was actuated by malice and was only meant to harass, embarrass, frustrate, malign, subject her to public ridicule and to use the same as a subterfuge to terminate her services and get rid of her before the final acquisition.

3. The Plaintiff/1st Respondent prayed for judgment against the Defendants jointly and severally for special damages in the sum of Kshs. 4,000,000, general damages for malicious prosecution, exemplary damages, and interest on special damages and general damages at court rates.
4. This suit was heard in the trial court and judgment delivered on 16th February 2023 where the court found liability at 100%, an award for general damages for malicious prosecution for Kshs. 3,000,000, costs of the suit, and interest on general damages and costs at court rates from the date of the judgment until payment in full.
5. Being dissatisfied, the Appellant appealed against the judgment through the Memorandum of Appeal dated 1st March 2023 on grounds that the learned trial magistrate erred in law and in fact when he failed to appreciate that the 1st Respondent was acquitted in the criminal proceedings on the basis of bungled investigations by the police, an exercise that the Appellant did not take part in, that the learned trial magistrate erred in fact in arriving at a finding that the 1st Respondent was maliciously prosecuted, that the learned trial magistrate in his judgment went to the merits of the decision of the trial court in the criminal proceedings thereby sitting on appeal in the said proceedings, that the trial magistrate erred in fact and in law when he found that the Plaintiff had proven that the Defendants (jointly) had wrongfully arrested, detained and maliciously prosecuted the 1st Respondent, all of which the Appellant is not capable, and that the learned trial magistrate erred in law and in fact in reaching a decision that is entirely against the weight of the evidence and testimony presented by the Appellant in court.
6. The Appellant prayed for orders that the judgment of the learned trial magistrate delivered on 16th February 2023 be set aside, that consequent to the setting aside of the said judgment, an order be issued by this court dismissing the Plaintiff's suit before the trial court, and that costs of this appeal and the claim be met by the 1st Respondent.
7. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 12th October 2023 stated that to sustain an action for malicious prosecution, the Plaintiff must satisfy the court that the prosecution was instituted by the Defendant or by someone for whose acts he is responsible for, that the prosecution terminated in his favour, that the prosecution was instituted without reasonable and probable cause, and whether the acquittal rendered the prosecution malicious.
8. The Appellant submitted that following promulgation of *the Constitution* in 2010, prosecutorial powers were vested in the Director of Public Prosecutions pursuant to Article 157. That as such, to sustain such an action, the proper party to enjoin ought to have been the Director of Public Prosecutions. That whereas prosecution of the 1st Respondent terminated in her favour, the court must not shut its eyes on the reasons that led to termination of the prosecution. That in its ruling, the criminal court took issues with the manner in which the police conducted the investigations leading to the arrest and prosecution of the accused persons. That the said court further proceeded to note that with respect to the first charge of conspiracy, there was no evidence that the accused persons worked or conspired to commit the offence. That this led to the finding that the accused persons had no cause to answer and as such they were acquitted.
9. The Appellant submitted that during preliminary investigations before lodging a complaint with the police, the 1st Respondent admitted to the HBKL that she had released the signed import



documents without receiving payments contrary to what the law requires. That this was further confirmed by the 1st Respondent during cross examination where she admitted that indeed she had made the said statements. That the complaint to the police was only made after the confession and the written statement that were issued by the 1st Respondent at the time HBKL was conducting internal investigations. That at this point, it had legitimate reasons, predicated on its own internal investigations and the confession by the 1st Respondent, to lodge a complaint with the police for further investigations. That upon lodging the complaint, it is trite that the police were required to carry out independent investigations to ascertain and gather sufficient evidence to sustain prosecution. The Appellant relied on the holding in the cases of Socfinaf Kenya Ltd v Peter Guchu Kuria & Another, Civil Appeal No. 595 of 2000 (2002) eKLR and Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another, Civil Case No. 52 of 2008 (2014) eKLR. That in any event, the DPP reviews the evidence placed before him and if satisfied prefer charges.

10. The Appellant submitted that the Court of Appeal in the case of Robert Okeri Ombeki v Central Bank of Kenya, Civil Appeal No. 105 of 2007 (2015) eKLR which cited with authority in the case of Jedio Nyaga v Silas Mucheke, (*CA No. 59 of 1987* Nyeri UR) which held that the fact that an accused person has been acquitted does not in itself mean that the accused can sustain an action for malicious prosecution. The Appellant in their concluding remarks submitted that evidence from the record shows that the Appellant had all reasonable ground to file a report before the police. That not only did the 1st Respondent make a statement with respect to this suit but also during cross examination, she admitted that she released the documents in contention to Mr. Adawe. That the Appellant had all reasonable grounds to lodge the complaint, that the same was not actuated by malice but by confessions and admissions by the 1st Respondent.
11. The 1st Respondent in their submissions dated 21st October 2023 urged the court to consider their submissions together with authorities in the trial court. The 1st Respondent submitted on ground 1 that the criminal case preferred against the 1st Respondent was not properly investigated and that the Appellant is to blame for availing witnesses in court in a case where investigations had been bungled. That since it is the 2nd Respondent who investigated the matter, it should be held solely and not jointly.
12. The 1st Respondent submitted on ground 2 that it is because of the bungled investigations that the 1st Respondent was sacked while her colleague Mr. Alex Tsuma, who was charged with her was never sacked. That the 1st Respondent averred in her plaint, witness statement and at the hearing that her arrest and subsequent prosecution was meant to get rid of her and the proceedings show that the trial was actuated by malice. That the 1st Respondent was accused of releasing some documents unprocedurally and that the bank retained their copies which were produced in court as exhibits. That it became apparent not to be documents which were allegedly released by the 1st Respondent. That the Appellant produced completely different documents. That in cross examination, Mr. Aurangazab Quadsy Ahasm, the Country's Operations Manager confirmed that he did not know those documents, and that they are documents which were not meant for Kenya. That the documents did not belong to Mr. Adawe. That the companies named as consignees therein were companies he did not know. That the 2nd witness one Grishon Kyalo Materu, an employee of the Appellant said in his cross examination that Habib Bank did not lose any cash. The 1st Respondent relied on the holding in the case of Murunga v Attorney General that the test whether prosecution was instituted without any probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty.
13. The 1st Respondent submitted on ground 3 that the trial court did not reconsider and evaluate the evidence tendered in the said criminal case. That the learned magistrate did not give a verdict on



whether the judicial officer who handled the said criminal case arrived at the right decision or not but on what amounted to malicious prosecution. The 1st Respondent in her submissions on ground 4 that the Appellant cannot run away from malice as it is evident the Appellant was only after her. On ground 5, the 1st Respondent stated that the sum total of the Appellant's evidence could not under any circumstance outweigh her evidence.

14. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) E.A 123 as follows: -
 - “ ... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
15. I have considered the Record of Appeal dated 2nd August 2023 and submissions by the Appellant and the 1st Respondent. The issues for determination are: -
 - a. Whether the trial court ought to have considered that the 1st Respondent was acquitted on the basis of bungled proceedings
 - b. Whether the trial court sat on appeal in its judgment by going into the merits of the decision in the criminal proceedings
 - c. Whether the Defendants wrongfully arrested, detained and maliciously prosecuted the 1st Respondent
 - d. Whether the trial court made a determination on the basis of the evidence and testimony presented by the Appellant
16. On whether the trial court ought to have considered that the 1st Respondent was acquitted on the basis of bungled proceedings, the Appellant submitted that whereas prosecution of the 1st Respondent terminated in her favour, the court ought not to have shut its eyes on the reasons that led to the said termination. That the criminal court took issues with the manner in which the police conducted investigations leading to the arrest and prosecution of the accused persons. That the court further noted there was no evidence that the accused persons worked or conspired to commit the offence which led to the finding that the accused persons had no case to answer and as such they were acquitted.
17. The 1st Respondent submitted that the criminal case against her was not properly investigated and that the Appellant was to blame for availing witnesses in court in a case where investigations had been bungled. That since it was the 2nd Respondent who investigated the matter, it ought to have been held solely and not jointly.
18. Article 157 of *the Constitution* provides: -
 4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
 6. The Director of Public Prosecutions shall exercise State powers of prosecution and may: -
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;



- b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
 - 10. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
 - 11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
 - 12. Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
- 19. This court finds that the Director of Public Prosecutions and the Inspector General of the National Police Service have the constitutional mandate to undertake investigations and commence criminal proceedings. The court then with its discretion makes a determination on the basis of the evidence presented.
- 20. On whether the trial court sat on appeal in its judgment by going into the merits of the decision in the criminal proceedings, the 1st Respondent submitted that the trial did not reconsider and evaluate the evidence tendered in the said criminal case but made a determination on what amounted to malicious prosecution.
- 21. This court has perused judgment of the trial court and established that the trial court made remarks on the decision in the criminal proceedings but the same was as a guide in determining what amounted to malicious prosecution. This court is therefore inclined to agree with the position that the trial court did not reconsider and reevaluate the evidence tendered in the criminal case.
- 22. On whether the Defendants wrongfully arrested, detained and maliciously prosecuted the 1st Respondent, the Appellant submitted that during preliminary investigations before lodging a complaint with the police, the 1st Respondent admitted to Habib Bank that she had released the signed import documents without receiving payments contrary to what the law requires. That this was further confirmed by the 1st Respondent during cross examination where she admitted that indeed she had made the said statements. That the complaint to the police was only made after the confession and the written statement that were issued by the 1st Respondent at the time Habib Bank was conducting internal investigations. That at this point, it had legitimate reasons, predicated on its own internal investigations and the confession by the 1st Respondent, to lodge a complaint with the police for further investigations.
- 23. The 1st Respondent submitted that the Appellant cannot run away from malice as it is evident the Appellant was only after her. That she was sacked while her colleague, Alex Tsuma, who was charged with her continued working. That she was accused of releasing some documents unprocedurally and that the bank retained their copies which were produced in court as exhibits. That it became apparent the documents were not the ones allegedly released by the 1st Respondent. That in cross examination, the country's operations manager confirmed he did not know the documents, that they were not



meant for Kenya, that the documents did not belong to Mr. Adawe, and that companies named therein as consignees were companies he did not know. The 1st Respondent stated that the 2nd witness, an employee of the bank, said in cross examination that Habib Bank did not lose any cash.

24. The elements of the tort of malicious prosecution were set out in the case of *Murunga v The Attorney General* (1976-1980) KLR 1251 as follows: -
- i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 - ii. That the prosecution terminated in the Plaintiff's favour.
 - iii. That the prosecution was instituted without reasonable and/or probable cause.
 - iv. That the prosecution was actuated by malice.
25. It is not in dispute that the 1st Respondent was arrested and detained at Mombasa Central Police Station, and charged with a criminal offence in Mombasa CM Criminal Case No. 741 of 2017. It is also not in dispute that the 1st Respondent was acquitted in the criminal case under Section 210 of the [*Criminal Procedure Code*](#).
26. On the element of whether the prosecution was actuated by malice, the court in *Nzoia Sugar Company Ltd v Fungututi* (1988) KLR 399 held as follows: -
- “ Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”
27. The trial court in its findings stated that had the police professionally investigated the complaint by the bank, they would have made an informed decision not to charge the 1st Respondent. That prosecution of the 1st Respondent should not have been undertaken without proper investigations and that there was no reasonable and probable cause upon which the bank made a report to the police. This court is therefore satisfied that malice was proven.
28. On whether the trial court made a determination on the basis of the evidence and testimony presented by the Appellant, it was submitted by the Appellant that upon lodging the complaint, it is trite that the police were required to carry out independent investigations to ascertain and gather sufficient evidence to sustain prosecution. That the DPP reviews the evidence placed before it and if satisfied prefers charges, and that evidence from the record shows that the Appellant had all reasonable ground to file a report before the police. The 1st Respondent however submitted that the sum total of the Appellant's evidence could not under any circumstances outweigh her evidence.
29. The court in *Samson John Nderitu v The Attorney General* (2010) eKLR held as follows: -
- “ It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”
30. The trial court examined remarks of the criminal court and pointed out that investigations were shoddily conducted by the police. That the prosecution did not establish that the documents allegedly



stolen from Habib Bank were sent to it by CIMB Bank. That had the bank conducted due diligence expected, it would not have made the erroneous report to the police regarding loss of the documents and/or money. This court is of the opinion that the trial court made the said observations against the evidence presented by the parties to establish that there was malicious prosecution.

31. Accordingly, the appeal herein lacks merit and is dismissed with costs to the 1st Respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellant

..... Advocate for the 1st Respondent

..... Advocate for the 2nd Respondent

Court Assistant – Shitemi

