



**Barclays Bank of Kenya v Keya & 3 others (Civil Appeal  
E044 of 2023) [2025] KEHC 12153 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 12153 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E044 OF 2023**

**F WANGARI, J**

**JUNE 9, 2025**

**BETWEEN**

**BARCLAYS BANK OF KENYA ..... APPELLANT**

**AND**

**RICHARD PHILIP KEYA ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE BENARD OLUOCH ..... 2<sup>ND</sup> RESPONDENT**

**SULEKHA MOHAMED ROBLE ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Hon. J.B. Kalo,  
CM delivered on 09/02/2023 in Mombasa No. CMCC No. 1524 of 2018)*

**JUDGMENT**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (herein after referred to as the Respondents) who were the Plaintiffs in the lower court suit through a Plaint dated 26/06/2018 sued the Appellant and 4<sup>th</sup> Respondent (the 1<sup>st</sup> and 2<sup>nd</sup> Defendant) for General, Special Damages and Aggravated and Exemplary Damages for wrongful arrest, detention and malicious prosecution.
2. The Respondents stated that on 30/10/2010, the Appellant bank, who was their employer, made a malicious complaint against them to the Central Bank Anti-Fraud Unit, that they had stolen Kshs. 2,000,000/= from the said bank. They were eventually arraigned in court on 01/11/2010 and charged by the 4<sup>th</sup> Respondent in Mombasa Criminal Case No. 3337 of 2010 for the offence of Stealing by Servant.
3. The trial lasted for 7 years and on 20/12/2017, they were eventually acquitted under section 210 of the [Criminal Procedure Code](#). They stated that the Appellant and 4<sup>th</sup> Respondent's actions were meant to



- humiliate and defame the Respondents in the eyes of their families, friends and the society. They also incurred expenses in defending themselves in the criminal case thus suffering material loss.
4. The 1<sup>st</sup> Defendant/ Appellant filed a Statement of Defence dated 22/08/2018. It was denied that the complaint against the Respondents was malicious as the Appellant was in the bona fide belief that it was discharging a public duty by reporting the loss of the bank money to the authorities for investigations.
  5. The Appellant further stated that the prosecution of the Respondents was carried on by or on behalf of the Director of Public Prosecutions. The role of the Appellant was just to report the loss of the money. It was prayed that the suit be dismissed with costs.
  6. After hearing both parties in the suit, and considering the submissions filed by both parties, judgment was entered in favour of the Plaintiffs/ Respondents against the Defendants/Appellant and 4<sup>th</sup> Respondent awarding Kshs. 3,000,000/= to each Respondent as General Damages for wrongful arrest, detention and malicious prosecution, costs of the suit and interest from date of judgment. Claim for Special Damages was not proved.
  7. The Appellant filed this Appeal *vide* the Memorandum of Appeal dated 23/02/2023. The Appellant preferred the following grounds based on the Magistrate's err in law and fact summarized as hereunder;
    - a. That the Appellant was not responsible for the arrest, investigations and prosecution of the Respondent.
    - b. The General Damages awarded were inordinately high and excessive.
    - c. Failing to hold the Appellant's Statement of Defence and submissions.
    - d. Presuming malice and ill will on the part of the Appellant by dismissing the Respondents from employment and reporting the incidence of theft to the authorities.
    - e. Relying on the findings of the criminal case in arriving at the judgment of the court.
  8. The Appellant prayed that the appeal be allowed, the Judgment of the trial court dated 09/02/2023 be set aside and substituted with the Judgment of this court dismissing the suit with costs to the Respondent.
  9. The appeal was canvassed by way of written submissions. Only the Appellant complied by filing submissions dated 26/11/2024.

### **Submissions**

10. The Appellant submitted that the Respondents having handled the money before it was lost, there was reasonable suspicion to report the matter to the authorities.
11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent being the then Branch Operations Manager and the 2<sup>nd</sup> Respondent collected the Kshs. 2,000,000/= from the main vault and escorted it to the 3<sup>rd</sup> Respondent who was the cashier who failed to feed the money to the system. The custodian of the main vault noticed that there was the shortage which had remained undetected. The Respondents failed to discharge their duties as expected leading to the loss.
12. The Appellant had to report the incidence as the Respondents were responsible for the Appellant's property and the same was lost/ stolen under their watch. The trial court was faulted for using the standard of proof in criminal cases in the suit.



13. It was further submitted that the Appellant having not arrested the Respondents, investigated the matter or prosecuted the Respondents, they were not liable for the tort of malicious prosecution. The above acts were done by independent bodies. In support of its position, the Appellant cited a number of authorities annexed to the submissions.

### **Analysis**

14. This Court has considered the pleadings, evidence, submissions and authorities relied on. The issues that falls for this Court's determination are;
  - a. Whether the appeal has merits
  - b. Who bears the costs
15. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. (See *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123)
16. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred its finding. On the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled.
17. The East African Court of Appeal in *Mbowa v East Mengo District Administration* [1972] EA 352 summarized the ingredients/ requirements that must be proved to establish a cause of action in malicious prosecution as follows:
  - a. the criminal proceedings must have been instituted by the defendant
  - b. the defendant must have acted without probable cause
  - c. the defendant acted maliciously
  - d. the criminal proceedings must have been terminated in the plaintiff's favor,
18. It is not in dispute that the Appellant reported the theft to the anti-fraud unit. The Bank had found fault on the procedures followed by the Respondents that led to the loss of the money. The Respondents were charged with the offence of Stealing by servant contrary to section 281 of the [Penal Code](#).
19. Section 268 of the [Penal Code](#) defines the offence of stealing. In order for a person to be accused of stealing, he must meet the following;
  - a. must take anything capable of being stolen fraudulently and without claim of right
  - b. the stolen item must be fraudulently converted to the use of the person
  - c. the person is not the special or general owner.
20. Under section 281 of the [Penal Code](#), for the offence of stealing by servant to be committed;
  - a. the offender must be an employee,
  - b. the stolen item must belong to the employer



21. The Appellant ought to have conducted internal investigations and established a probable cause that it was the Respondents who had stolen the money. The fact that they were alleged not to have followed the bank procedures, does not necessarily mean they took possession of the money.
22. On whether there was a reasonable cause, the Court of Appeal in *Kagane & Other v The Attorney General & Another* [1969] EA 643, where Rudd J held as follows;

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”
23. The fact that the Appellant allowed the Respondents to be charged with the offence of stealing by servant, yet it is on record from the Appellants witnesses that they do not know who stole the money was an act of malice on their part. The Investigating Officer did not testify. I do agree with the trial court that the process of charging the Respondents was rushed, and if proper internal investigations would have been carried out, it would have been established that the Respondents did not steal from their employer as alleged.
24. On whether the trial was terminated in favour of the Respondents, the Trial Court acquitted them under section 210 of the [Criminal Procedure Code](#) which provides as hereunder;

“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”
25. Whether the termination of the prosecution under the above stated Section 210 of the Criminal Procedure Code amounted to a determination in favour of the Appellant, in the case of [Stephen Gachau Gitbaiga & another v Attorney General](#) [2015] eKLR Mativo J (as he then was), stated that a termination of a prosecution would be favourable to a party regardless of the route taken, be it an acquittal, a discharge, a withdrawal or a stay.
26. On award of damages, the Respondents lost their employment with the Appellant bank, they had the tag of ‘criminals’ after being charged with the offence, and they had to endure 7 years in the ‘corridors of justice’ before the criminal matter was terminated in their favour. Considering the positions, they held in the bank, loss of employment, they are entitled to an award of General Damages.
27. The trial court arrived at an award of Kshs. 3,000,000/= each. Based on the circumstances as per the above paragraph, I find no reason to disturb the award as compensation for the 7 years they were subjected to the criminal proceedings, and the emotional damage.
28. Each party to bear its own costs.



**Determination**

29. In the upshot, I make the following orders: -

- a. The Appeal has no merits and is hereby dismissed.
- b. Each party to bear its own costs

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 9<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Appellant

N/A by the Respondent

Ms. Getrude, Court Assistant

NB: Judgment released to the registry. Parties be notified.

