



**Kalei v Ecobank Kenya Limited & 2 others (Civil Appeal E049 of 2021)  
[2024] KEHC 9617 (KLR) (22 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 9617 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E049 OF 2021  
DO CHEPKWONY, J  
JANUARY 22, 2024**

**BETWEEN**

**JUSTUS KYALO KALEI ..... APPELLANT**

**AND**

**ECOBANK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**OFFICER COMMANDING, KENYATTA INTERNATIONAL CONFERENCE  
CENTRE (KICC) POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This Appeal emanates from the Judgment of Hon. V. A. Ogutu RM delivered on 3<sup>rd</sup> August, 2020 in Thika CMCC No. 26 of 2019 “ the trial court” whereupon the Trial court dismissed the Appellant’s suit (then referred to as ‘the Plaintiff’) with no orders on costs.
2. So as to provide context, the background of this case is that the Appellant was an employee of the 1<sup>st</sup> Respondent at its Thika branch. That on 19<sup>th</sup> May, 2013, the 1<sup>st</sup> Respondent maliciously and without reasonable cause laid claim to KICC Police Station, the 2<sup>nd</sup> Respondent herein against the Appellant for the offence of stealing by servant contrary to Section 281 of the Penal Code whereby it was alleged that he had stolen Kshs 1,000,000/=, being the property of the 1<sup>st</sup> Respondent.
3. The Appellant was arrested and charged with the offence in Thika law courts on 3<sup>rd</sup> June, 2013 which was prosecuted until 31<sup>st</sup> October, 2018 when the Appellant was acquitted under Section 215 of the Criminal Procedure Code after the court made a finding that there was no sufficient cause to justify a conviction.
4. In the claim before the trial court, the Appellant blamed the Respondents for malicious prosecution , being wrongly imprisoned, being humiliated, loss of his employment, damage to his reputation and



character, mental anguish and pain as well as expenses used in legal fees to defend himself. In the end, the Appellant sought the following orders:

- a. General damages for illegal arrest and false imprisonment.
  - b. Exemplary damages for illegal arrest and imprisonment.
  - c. General damages for malicious prosecution and loss of earning ability.
  - d. Exemplary damages for malicious prosecution.
  - e. General damages for loss of employment and breach of the Plaintiff's right to fair hearing and presumption of innocence.
  - f. Special damages as pleaded.
  - g. Costs of the suit and interest thereon at court rates from the date of judgment.
  - h. Such other , further relief as this honourable court may deem fit and just to grant.
5. The 1<sup>st</sup> Respondent filed its Defence dated 14<sup>th</sup> February, 2019 whereas the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed theirs dated 11<sup>th</sup> February, 2019 wherein both denied the contents of the Plaint in toto.
6. The matter was then set down for hearing whereby the trial court heard the evidence of the Appellant and Joel Karatu Kiarie as the Plaintiff and Defence witnesses respectively. At the close of their respective cases, the parties filed their submissions.
7. In its determination, the trial court formulated the following issues for determination;-
- a. Whether the criminal proceedings were instituted by the Defendant.
  - b. Whether the criminal proceedings terminated in the Plaintiff's favour.
  - c. Whether there was a reasonable cause and/or justification to make the complaint to the police.
  - d. Whether the said prosecution was actuated by malice.
  - e. Whether the Plaintiff is entitled to an award of damages.
  - f. Who should bear the costs of the suit.
8. In the end, upon analysis of the parties evidence, the trial court held that the Appellant had not proven illegal arrest and false imprisonment and as such did not award the damages sought under that head. On the issue of false imprisonment, the court held that having been arrested on a Friday, the Appellant was arraigned in court on the next Monday as required by law and therefore the issue of false imprisonment did not arise. The court did not also make an award of general damages for loss of employment, breach to right to fair hearing and presumption of innocence as it stated that the same had not been proven. This decision prompted the lodging of the Appeal.
9. Being dissatisfied, the Appellant filed the Memorandum of Appeal on seven grounds:-
- a. That the Learned Magistrate erred in law and in fact finding that there was reasonable and justifiable cause for the Plaintiff to be prosecuted.
  - b. The Learned Magistrate erred in law and in fact holding that the Plaintiffs prosecution was not actuated by malice.
  - c. The Learned Magistrate erred in law in finding that where the prosecution have established a prima facie case then a claim for malicious prosecution cannot stand.



- d. The Learned Magistrate erred in law and in fact in making a failing to consider the failure of the 2<sup>nd</sup> Defendant to grant the Plaintiff police bond at the police station as constituting false imprisonment.
  - e. The Learned Magistrate erred in finding that the Plaintiff was not entitled to damages for illegal arrest and false imprisonment, loss of employment, breach of right to fair hearing and presumption of innocence.
  - f. The Learned Magistrate erred in law in failing to consider in totality the material placed before her by the Appellant and thus was plainly and clearly wrong in her findings of fact and law.
  - g. The Learned Magistrate erred in law in failing assess damages and compensation for the Plaintiff even after making the Plaintiffs claim was unmerited.
10. This appeal was admitted for hearing on 23<sup>rd</sup> June, 2021 and this Court directed it to be dispensed with by way of written Submissions. The Appellant filed his on 3<sup>rd</sup> December, 2021, while the 1<sup>st</sup> Respondent filed theirs on 29<sup>th</sup> October, 2021 and the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents filed theirs on 7<sup>th</sup> December, 2021.

### **The Appellant's Submissions**

11. The Appellant has submitted that this court being the first Appellate court, it has the jurisdiction to analyse the evidence and review the same afresh. The Appellant submits that his prosecution was not justified and stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not adduce any evidence to show that the arrest and prosecution were justified and reasonable since they closed their case without calling any witness and therefore his case remained unchallenged. He holds that they ought to have used all available mechanisms to ensure all evidence incriminating him was brought to court to justify the prosecution.
12. According to the Appellant, his prosecution was marred with malice since the evidence of the 1<sup>st</sup> Respondent before the trial court was that it conducted internal investigations which were done by Joel Karatu Kiarie, DW1. He stated that DW1 testified that it was the Appellant who reported the loss of Kshs 1,000,000/= and he recorded statements and reviewed the CCTV footage, then reported the matter to the police for action. That the 1<sup>st</sup> Respondent's witness, DW1 stated that from the investigations it was concluded that the sum of Kshs 1,000,000/= was stolen from the vault on 14<sup>th</sup> May, 2013. The Appellant contends that the said CCTV footage was not availed in court both in the civil or criminal proceedings. The Appellant further holds that in the criminal proceedings, the trial court relied on the lack of CCTV footage to acquit him and therefore submits that the reason why the cctv footage was not availed shows the malicious intent to prosecute him and terminate his employment.
13. The Appellant holds that the 1<sup>st</sup> Respondent did not produce or avail the investigator's report as listed in its list of documents before both the criminal court and civil court. He stated that the investigations were rushed and has relied on the case of National Bank of Kenya Limited –vs- Alfred Owino Balla 2017[eKLR] and Teresia Wanjiku Njoroge –vs- Standard Chartered Bank Kenya limited [2015]eKLR, where the courts faulted the internal investigations of the bank which were done in a rush to infer malice.
14. The Appellant also submits that there was malice on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent who failed to provide sufficient evidence to sustain a conviction against him. The Appellant contends that due to the actions of the Respondents, he was subjected to false imprisonment for a period of 4 days without police bond before being arraigned in court. The Appellant holds that owing to the malicious



prosecution he lost his earning ability and he struggled to get a job until 2018, when he got one at Bank of Baroda but was forced to resign when the bank found out that he had a pending criminal case.

15. The Appellant has urged the court to award him Kshs 5,000,000/= for malicious prosecution and loss of future earning ability. He has relied on the case of Naqvi Syed Omar –vs- Paramount Bank Limited & another [2015]eKLR where the Plaintiff who was a banker was awarded Kshs 6,800,000/= for malicious prosecution and summary dismissal.
16. The Appellant has further urged the court to award him Kshs. 1,000,000/= for false imprisonment for four days and he has relied on the case of Chrispine Otieno Caleb –vs- Attorney General [2014]eKLR, where the court awarded Kshs 800,000/= for a similar period of incarceration.
17. In the end, the Appellant has urged the court to:
  - a. Allow the present appeal and set aside the findings of the trial court.
  - b. Judgment be entered in favour of the Appellant.
  - c. That the Appellant be awarded the sum of Kshs 5,000,000/= in general damages for malicious prosecution.
  - d. That the Appellant be awarded the sum of Kshs 1,000,000/= general damages for false imprisonment.
  - e. That The Appellant be awarded costs of the Appeal and the proceedings in the trial court.
  - f. Since there is no cross appeal the Appellant prays that in the event the Appeal is not successful, the Honourable court does consider public interest aspect of these proceedings and like the court below order that each party bears their own costs.

### **The 1<sup>st</sup> Respondent's Submissions**

18. In its submissions, the 1<sup>st</sup> Respondent began by giving the factual background of the case until its conclusion both in the criminal proceedings and civil proceedings. It stated that the Director of Public prosecution correctly used the evidentiary test and found that there was sufficient evidence to charge the Appellant herein for the offence.
19. It stated that there was reasonable and probable cause for the ODPP prosecuting the Appellant which the Appellant has not proved otherwise. It refuted the claim that the prosecution of the Appellant was actuated by malice and stated that the ODPP exercised its independent authority under Article 157 (10) of *the Constitution* and reached a decision to charge the Appellant based on the evidence gathered which duty also passed the public interest test.
20. The 1<sup>st</sup> Respondent stated that a claim for malicious prosecution could not lie in the case as the trial court found that there was a prima facie case against the accused. On the issue of false imprisonment, the 1<sup>st</sup> Respondent stated that the Appellant ought to have shown that he was detained in bad faith or under unlawful custody for a period longer than 48 hours. It stated that the Appellant was arrested on a Friday and was arraigned in court on Monday in accordance with he law and therefore the period of 4 days was not unlawful and a claim for false imprisonment cannot arise.
21. On the award of damages, the 1<sup>st</sup> Respondent held that the Appellant failed to prove the remedies claimed and hence the court was right in not granting them. The 1<sup>st</sup> Respondent further stated that the Appellant did not provide any proof for lack of employment or breach of right to fair hearing. On



the issue of costs, the 1<sup>st</sup> Respondent held that the same should follow the event. The 1<sup>st</sup> Respondent has urged the court to dismiss the Appeal with costs to it.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Submissions**

22. As for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their submission, their position is that there was reasonable and probable cause for the Appellant to be prosecuted. They hold that the Appellant was arrested and arraigned in court within the constitutional timelines and thus their actions which were based on independent opinion and not on malice since the trial court found that the prosecution had established a prima facie case and therefore a claim for malicious prosecution could not succeed.
23. On the false imprisonment, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that having been arrested on a Friday, the Appellant could only be arraigned in court on the following Monday which was done and therefore he was not falsely imprisoned.
24. In respect to damages for loss of employment, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that they cannot be held liable for the same as there was no contractual agreement of employment between them as they only offer public services and not private employment. They hold that the claim for loss of employment can only be dealt with by the Appellants' employer who is the 1<sup>st</sup> Respondent herein.
25. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contend that although the Appellant was acquitted of the offence, it did not serve as a plea of innocence. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have urged the court to find that the decision of the trial court was not irregular as the same was based on the evidence availed and the submissions filed in arriving at the detailed judgment. They hold that since the Appellant did not provide evidence for his remedies and he is not entitled to the said awarded. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions are that their failure to call witnesses was not fatal since the Appellant was required to convince the court on a balance of probabilities that he has a claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents which he failed to do. In the end, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have urged the court to find that the Appeal lacks merits and the same be dismissed with costs.

### **Analysis and Determination**

26. In consideration of the grounds raised on the appeal herein, the court has read through the record of proceedings of the trial court alongside the respective submission filed by either party and finds the main issue for determination being whether the Appeal herein has merit to warrant the orders sought.
27. This being the first appellate court it is mandated to re-analyse and re-evaluate the evidence that was adduced before the trial court as well as the judgment therefrom and arrive at its own independent judgment on whether or not to allow the appeal. This duty was stated by the Court of Appeal in the case of Peter M. Kariuki –vs- Attorney-General [2014] eKLR where the Court stated that:-

“ We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui v Republic*, (1984) KLR 729 and *Susan Munyi v Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”
28. The suit subject of the appeal herein is based on the tort of malicious prosecution, where the elements required to be proved were discussed in various authorities including, the case of *Murunga –vs- The Attorney General* (1976-1980) KLR 1251 where Cotran J. listed them as follows: -



- a. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
  - b. That the prosecution terminated in the Plaintiff's favour.
  - c. That the prosecution was instituted without reasonable and/or probable cause.
  - d. That the prosecution was actuated by malice.
29. This court shall therefore examine these elements to determine whether the appeal herein is merited.
30. With regard to whether the prosecution was instituted by the Defendant or by someone whose acts he is responsible, it is common ground as stated by the parties that the 1<sup>st</sup> Respondent reported the loss of the sum of Kshs 1,000,000/= from its vault to the 2<sup>nd</sup> Respondent who conducted investigations and charged the Appellant, a Customer Service Manager, for the offence of Stealing by Servant contrary to Section 281 of the Penal Code in Thika Chief Magistrate's Court, Criminal Case No. 1629 of 2013. Therefore, in this case, the 1<sup>st</sup> Respondent investigated the matter initially, reported the matter to 2<sup>nd</sup> Respondent who then set the process of prosecution of the Appellant in motion and the charge sheet confirmed the complaint.
31. As for whether the prosecution terminated in the Plaintiff's favour, it is clear that trial proceeded before the Chief Magistrate's Court in Thika whereby upon hearing the parties and evaluating the evidence availed before it, the court found that the prosecution had not proved its case against the Appellant beyond reasonable doubt and acquitted him under Section 215 of the Criminal Procedure Code, a confirmation that the criminal proceedings were terminated in his favour.
32. On the element of whether the prosecution was instituted without reasonable and/or probable cause, it is the Appellant's case that his prosecution before the criminal case was unjustified, unreasonable and without probable cause since material evidence such as the CCTV footage and others leads were never produced in court for consideration and was given for this making him believe his prosecution was tainted with malice.
33. The 1<sup>st</sup> Respondent on the other hand submitted that a report was made and investigations conducted which led to the decision by them to charge the Appellant. It is the 1<sup>st</sup> Respondent's submission that the 2<sup>nd</sup> Respondent had reasonable and probable course to charge the Appellant with the offence and is for the trial court to test the accuracy and correctness of their evidence. In the Petition No316 of 2011, Hon. Jones Odicho Gesoni –vs- The Attorney General & Others, the court held that:-
- “...the DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges”.
34. In the case of Reuben Mwangi –vs- director of Public Prosecution & 2 Others, UAP Insurance & Another (Interested Parties) [2021] eKLR, the court has this to say:-
- “... reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecution necessarily believes in the probability of conviction”.



35. The definition of reasonable and probable cause was defined in the case of Simba –vs- Wambari (1987) KLR 601 as:-

“... The Plaintiff must prove that the setting of the law in motion by the Inspector was without reasonable and probable cause.... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not demonstrated that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not...”

36. It is not denied by the Appellant that the sum alleged to have been stolen was found missing in the vault and he reported the same, having the investigations conducted before the matter was reported to the 2<sup>nd</sup> Respondent by 1<sup>st</sup> Respondent. He even proposed the money could have disappeared through and for the systems to confirm if the case could be hanging. The court finds that there was every reasonable and probable cause that led to the arrest, confinement and prosecution of the Appellant., which actions were taken or conducted in public interest since the Appellant was suspected of having committed the offence of stealing by servant.

37. The other element for consideration is whether the prosecution was actuated by malice. According to the footage he also submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to conduct thorough investigations on the report, hence did not avail sufficient evidence against him to have him convicted. He goes on to submit that by finding that since a prima facie case was established and the Appellant placed on defence, then the suit for malicious prosecution could not stand, the trial court had applied a wrong principle.

38. The 1<sup>st</sup> Respondent arguments is that once the criminal court establishes a prima facie case against the Appellant, he had no basis for bringing a claim for malicious prosecution.

39. In the case of Nairobi High Court Civil Appeal NO.595 of 2000, Socfinaf Kenya Ltd –vs- Peter Guchu Kamau, Aganyanya, J. (as he then was) stated:-

“That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite ill-will, lack of reasonable and probable cause must be established”.

40. This was the position in the case of Nzoia sugar Company Ltd –vs- Fungututi [1988]1 KLR 399 where the Court of Appeal held that:-

“ Acquittal of a person on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill- will must be proved against he prosecution...”

41. Having gone through the proceedings, and Judgment, from which this appeal emanated, this court agrees with the trial Magistrate that the 1<sup>st</sup> Respondent had reasonable cause and or justification to make a complaint to the police after finding there was a loss of money at its facility, which complaint was analysed and investigated by the police, who then made a decision to arrest and prefer charges against the Appellant. The evidence was presented before court. However, whether or not the court found the Appellant guilty of the offence or not, it is not reason to find that the charges against him were actuated by malice or ill-will. The standard of proof test can only be determined by the court and not by the police or prosecution.

42. On the issue of false imprisonment, it is the Appellant’s submissions that he was arrested and detained in custody for a period of four (4) days without being given police bail before the was arraigned in



court, which amounts to false imprisonment. The Respondent on the other hand submitted that the Appellant was arrested upon reasonable and probable offence on 31<sup>st</sup> May, 2013, which was a Friday and was arraigned in court on Monday. That then was in line with the power donated to the police under Section 58 of the National Police Service Act as read with Section 29 of the Criminal

Procedure Code to effect arrest for persons suspected of a criminal offence. Upon going through the record of proceedings, this court agrees with the trial court that the Appellant was not unlawfully detained because having been arraigned in court on Monday which was legally done as provided for under Article 49(1) of the Constitution. In view of this, this claim fails.

43. On the issue of award of damages, the Appellant has submitted that the trial court ought to have assessed quantum of damages irrespective of whether the claims were meritorious or not. The Respondents submissions are aht the trial Magistrate was within the law in refusing to assess the damages sicne the Appellant had not proved his claim. Having found the Appellant failed to prove the claim not entitled to damages. It is also either from the proceedings, that the Appellant did not provide an iota of evidence to confirm.
44. In view of the foregoing, this court finds that the trial court did not err in principal or in law to warrant the interference of this court. Therefore, this court finds that the Appeal lacks in merit and the same is dismissed. Further, the court refutes the claim that this is a public interest matter and proceeds to order that the Appellant bears the costs of the Appeal.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 22<sup>ND</sup> DAY OF JANUARY, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Kembo holding brief for Mr. Mwinzi counsel for the Appellant

Mr. Amasa holding brief for Mr. Njalo counsel for 1<sup>st</sup> Respondent

No appearance for and by 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

Court Assistant - Martin

