



Arn Security & Training Services & another v Cooperative Bank of Kenya & 3 others (Civil Suit 30 of 2015) [2024] KEHC 6106 (KLR) (20 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL SUIT 30 OF 2015
RM MWONGO, J
MAY 20, 2024**

BETWEEN

ARN SECURITY & TRAINING SERVICES 1ST PLAINTIFF

ANTHONY REBO NGURE 2ND PLAINTIFF

AND

COOPERATIVE BANK OF KENYA 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

THE INSPECTOR GENERAL OF POLICE 3RD DEFENDANT

THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH DEFENDANT

JUDGMENT

Background

1. The 1st plaintiff is a limited liability company incorporated on 7th December 2006, and, inter alia, offering security consultancy and training services, The 2nd plaintiff is the managing director and main shareholder of the 1st plaintiff. He first filed suit in this case by a plaint dated 14th December, 2015 but subsequently filed amended plaints. The last amended plaint was filed on 25th February 2019.
2. In this suit the plaintiff claims compensation for malicious prosecution and false imprisonment, and damages emanating thereon on his business. He states that he was prosecuted in Naivasha CR Case No 2259 of 2014, from 17th December, 2014 and was finally acquitted of the criminal charges on 28th February, 2018. He claims that both his business and personal life were turned upside down resulting in severe loss and damage following his arrest, incarceration, arraignment and prosecution on false and malicious criminal charges of conspiracy to defraud, stealing, and handling stolen property.



3. The plaintiffs pray for general damages, aggravated damages, compensation for loss of profits for the period 2014-2018, future loss of income, unconditional apology and compensation for loss of business following the ordeal.
4. In summary, the damages sought by the plaintiffs as quantified in the plaint are:
 - a) Special damages of 750,000/- as legal fees;
 - b) Compensation for actual loss of income for 2014-2018 of Kshs 64,186,597/-;
 - c) Compensation for projected loss of income of Kshs 2,931,036,558/-;
 - d) General damages as quantified in their submissions in the amount of Kshs 10,000,000/- to each plaintiff.

The plaintiffs also claim the costs of the suit and interest thereon.

5. The plaintiffs' case was made out by eight (8) witnesses for the plaintiffs; and the defendants together availed three (3) witnesses.

Preliminary Objection

6. The 2nd- 4th Defendants filed a preliminary objection dated 24th February 2021, to the effect that the claim for damages offends the mandatory provisions of the Limitations Act, Cap 22.
7. It was agreed by the parties that the objection would be dealt with in submissions to be filed together with the final submissions in the suit. If the court upheld the objection that would be the end of the matter. If not, then the claim for damages would be determined. Parties filed submissions on the objection as directed.
8. The Preliminary objection is premised on Section 4(2) of the *Limitation of Actions Act* which provides as follows:

“ An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued; Provided that an action for libel or slander may not be brought after the end of twelve months from such date. ”
9. The defendants submit that a tort for defamation must be lodged within twelve months after the alleged defamation as was held in *Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & Another* (2016) eKLR where the court pronounced itself as follows:

“ Concerning the claim for damages for defamation of character, I must from the onset make it dear that that claim is not available to the plaintiff as against all the defendants for reasons that to succeed in a claim for defamation, such claim must be brought within 12 months from the date when the cause of action arose. It is not a claim that is necessarily hinged on the outcome of the prosecution of the plaintiff. This is pursuant to Section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya. ”
10. The defendants submit that the claim for defamation has been brought late in the day after the lapse of the statutory period. The doctrines of equity are still alive and equity does not aid the indolent. According to the plaintiffs, the alleged defamatory remarks were made on 29th June 2016 through Facebook. In essence therefore, the plaintiffs claim was supposed to be on or before 29th June 2017. This suit was filed on 15th February 2018 outside the statutory limitation period.



11. Further, they submit that in any case, the damage to the plaintiff's credit and reputation, if at all, has not be particularized with certainty and there is no nexus between the purported defamatory publication to the 2nd – 4th defendants. This is because the social media screenshots produced by the plaintiffs as indicate that whoever made the purported defamatory remarks was neither an officer of the 3rd nor the 4th defendants and hence neither the 3rd nor 4th defendant should be answerable to the claims of defamation based on screenshots.
12. The defendants argue that in Hon. Nicholas Kipyator Kiprono Biwott v Hon. Paul Kibugi Muite & Another Nairobi HCCC No. 1369 of 2003 it was held that the then Order 6 Rule 6A (1) required the actual words used to be set out whether it is a newspaper report or a TV interview and without it a cause of action cannot be established. They submit that the plaintiffs have not stated any particulars of the actual conduct of the 2nd and 3rd defendants that allegedly defamed them. They also urge that the plaintiffs have also not proved the extent of damage suffered as a result of the criminal prosecution.
13. On their part, the plaintiffs submit that the objection cannot stand. They argue that the Preliminary Objection is misconceived and arises from a misapprehension of the Plaintiffs claim. That, while the Preliminary Objection speaks of a claim of defamation, the plaintiff's suit is not premised on the tort of defamation. Instead, it is predicated on the following torts:
 - a. Malicious prosecution; b) Malicious complaint, and c) False imprisonment/ false arrest
14. The plaintiff argues that according to the *Defamation Act*, Cap. 36, defamation includes libel and slander while a claim for malicious prosecution arises from the conduct of a prosecution against the plaintiff followed by a determination of the criminal case in favour of the accused person by way of acquittal by the trial court or on appeal.
15. In *Mbowa v East Meno District Administration* [1972] EA 352 it was held that:

“The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property... The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or if there is an appeal, when his conviction is quashed or set aside. In other -words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, xor proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action. would not take him very far. He must prove that the court has found him not guilty of the offence charged...”
16. The plaintiffs submit that actions against the State lapse after a period of 12 months. The 2nd plaintiff was acquitted on 28/02/18 and the Second Amended Plaintiff was filed on 25/02/2019. This was four days before the lapse of the of the 12-month period.
17. In the case of *Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Anor* (2005) eKLR Ojwang J (as he then was) held that:

“A condition for succeeding in such a suit is that the Plaintiff was acquitted of the charge in question. I will hold that where acquittal comes through an appeal, then so long as the tort of malicious prosecution retains its conventional character at common law, the limitation period must be taken to start running only from the date of acquittal. This principle leads



me to reject the Attorney-General's submissions that the plaintiff's claim herein is time-barred."

18. The plaintiffs therefore urge the court to hold that the Attorney General's Preliminary Objection has no merit and proceed to dismiss it.
19. I have carefully considered the preliminary objection and the parties' arguments thereto.
20. The kernel issue to be adjudicated here is whether what the plaintiff here has filed is a case for defamation or malicious prosecution. If it is a defamation suit, then the proviso to section 4(2) of the *Limitation of Actions Act* applies, if the suit was brought after the lapse of twelve months.
21. Defamation consists of libel and slander. Libel is defined simply as an untrue defamatory statement made in writing; whilst slander is such a defamatory statement made orally or through other non-written media.
22. In the Amended Plaintiff the prayers sought are as follows:
 - a) General damages for malicious prosecution, false arrest, false imprisonment and abuse of legal process;
 - aa) General damages for false and malicious complaint;
 - b. Aggravated damages against all defendants for damage to the plaintiff's respective credit and reputation
 - c. Unconditional and unequivocal apology to the 2nd plaintiff published prominently by the 1st defendant in a local newspaper with wide circulation
 - d. Compensation for loss of income/profits for the period 2014-2018
 - e. Compensation for future loss of income
 - f. Special damages for legal fees incurred by the 2nd plaintiff to defend the criminal case
 - g. Costs of the suit, and
 - h. Interest on the amounts found above
23. Further from my reading of the plaint, I do not see here a suit in defamation. Indeed, in the prior plaint, there was a prayer for "damages for defaming the 2nd defendant", but that prayer was cancelled and amended to read as is stated in 22(a) above.
24. Whilst it is possible that prayer b) could be construed to lean towards defamation since credit and reputation – usually referred to in defamation cases – are indicated as having been damaged, I do believe that such injuries may occur in malicious prosecution cases, and damages can be claimed for them.
25. As was held in the Uganda case of Dr. Willy Kaberuka v Attorney General Kampala HCCS No. 160 of 1993:

"The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence... There are no hard and fast rules to prove that the plaintiff's



feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible". (Emphasis added).

26. Accordingly, I am unable to find, as suggested by the defendants in this objection, that the suit is for defamation, or that it is time barred. I therefore dismiss the preliminary objection.

27. I now move to the main suit herein, and the evidence tendered.

Plaintiffs' case

28. PW1, Professor Kenneth Kairu Ngure testified as the 2nd Plaintiff's brother. He stated that on 15th December, 2014 he received a call from a friend informing him that his brother, the 2nd Plaintiff, had been arrested by Banking Fraud Investigations (BFI) and Naivasha Police station for having defrauded the bank. He immediately called the 2nd plaintiff who was very distressed, and broke down. He denied the allegations.

29. The following day the 2nd plaintiff was charged before the Chief Magistrate's court. The family was deeply disappointed with the 2nd plaintiff as he had brought shame and dishonor to the family. From that time and during the entire trial, he was unable to relate well with the 2nd plaintiff.

30. In cross-examination, he testified that he had doubts about his brother and believed the version of the 1st defendant. On re-examination, he testified that the 2nd plaintiff had a good reputation and had never been prosecuted before. He testified on the impact that the prosecution of the 2nd Plaintiff had on his family, and on PW2.

31. Anthony Kiiru Marubu testified as PW 2. He stated that he lives in Naivasha and works as a businessman. He relied on his statement dated 7th May, 2019 as his evidence in chief. He testified that he had been a friend of the 2nd plaintiff for twenty years.

32. He testified that on 15th December, 2014, rumours started spreading around in Naivasha that the 2nd plaintiff had been arrested by the police, and that the reason was because he had stolen money from the bank (Cooperative Bank). PW2 was surprised because he had never perceived the 2nd plaintiff as capable of committing such a crime. The 2nd plaintiff was then charged in court the following week and PW2 wondered whether the person he knew so well had changed and become dishonest. His image was heavily dented amongst his peers, friends, and family.

33. PW 3- Augustine Ngethe Thuo stated that he is an IT expert residing in Naivasha. He produced his witness statement dated 10th June, 2019 as his evidence in chief. He testified that he had known the 2nd plaintiff (Rebo) since 2005, and that the 2nd plaintiff had contracted him to work with ARN, the 1st Plaintiff. He said he managed the 2nd plaintiff's social media platform in the 2017 political season, known on Facebook as "Muhesh Rebo".

34. PW3 stated that he came across numerous negative and derogatory comments after the 2nd plaintiff was charged. They were to the effect that Rebo was: a thief; a bank robber; corrupt; likely to steal CDF money if elected; and was campaigning using money corruptly acquired. These negative comments affected their campaign for the election of Rebo.



35. PW4-David Njuguna Mungai, an accountant with Njuguna Kioi & Associates Accountants testified that he received instructions from the Director of ARN to assess loss of business for ARN. The period in question was from 1st January, 2015 to 31st December, 2017. He analysed and assessed the company books and prepared his Report dated 17/7/2018 which he produced (Pg 156-162, Plaintiff's Bundle - PB1). He found that the total loss came to Kshs 64,186,597.
36. He stated that this was the direct and actual loss that the 1st Plaintiff suffered during the period 2015 to 2017 as a result of the adverse effects of the case facing the company's managing director.
37. He also assessed the company and found their projected loss for the period 2018 – 2022. The projection indicated that it would take the 1st Plaintiff 5 years to shed off the impact of the negative publicity.
38. According to PW4, the total projected loss for 5 years is Kshs 2.931 billion. This was caused by the criminal case against the 2nd Plaintiff. In cross-examination he stated that the company needs 5 years for the business to stabilize.
39. PW 5 – Timothy Kamua Githogori works as a dog trainer and breeder. He lives in Naivasha. He testified that he had known the 2nd Plaintiff for more than 15 years and was his chief campaigner for 2012 and 2017 for Member of Parliament. He relied on his witness statement dated 10th June, 2019.
40. He testified that the allegations of the 2nd plaintiff being a thief came three days before the 2017 elections. Despite strenuous denials of the allegations, many people said they would not vote for the 2nd plaintiff. In cross-examination, he stated that people refused to vote for the 2nd plaintiff due to the court case.
41. PW6- James Mwangi Kimani stated that he is a businessman from Kiambu. In 2014, he worked at Co-operative Bank, Naivasha Branch as the Branch Manager. He was the 2nd Plaintiff's co-accused in the Lower Court, CR Case No. 2259 of 2014. He produced his witness statements dated 7th May 2019 and 27th December, 2019 as his evidence in chief.
42. He testified that the 1st plaintiff applied for a Kshs 2,500,000/- loan facility, and he advised them to take a Kshs 2,000,000/- temporary access facility payable within fourteen days, which they processed. On the strength of this temporary facility, the 1st plaintiff drew down monies for staff salaries pending the approval of the loan. After two weeks the 1st plaintiff was required to regularize the temporary facility as the two-week loan approval period had lapsed and the loan had not been approved.
43. However, the 2nd plaintiff travelled out of the country and the funds for regularization were delayed. As such the bank debited the client's account by way of overdraft to recover the said amount in the sum of Kshs 1,981,256.85. On the 2nd plaintiff's return to the country, the full sum was repaid.
44. In November, 2014, the bank asked PW6 to explain the transactions as there were queries concerning the 1st plaintiff's account, among others. He gave an explanation. He was not aware of any internal or external audit of the said impugned transactions.
45. In December 2014 the 1st Plaintiff was arrested and a criminal case commenced against him alleging stealing, conspiracy to defraud and handling stolen property. He too was arrested and arraigned as the co-accused.
46. In cross examination, it emanated that there were irregular transactions involving ARN, 1st plaintiff, which the Security Department of the bank was required to investigate. The officer to investigate was one Wycliff Kamau. PW6 did not get a report of any investigations done. Afterwards, PW6 was



- arraigned in court, but he felt that the bank ought to have done more investigations before taking the case to court.
47. In further cross examination, he stated that the bank had a Temporary Excess facility for repeat customers like the 1st plaintiff, to tide them over whilst they awaited loan approvals; that the customer mostly kept within his overdraft facility limit except in the case of the Temporary Excess; that he recommended to investigators that he be allowed to re-confirm all transactions involved and institute recovery measures; that he did not recommend investigations by Banking Fraud Investigation department; that as after the criminal case commenced in 2014 there was still evidence trickling in as late as March 2015.
 48. PW 7- Anthony Rebo Ngure adopted the contents of his Written Statement dated 7/5/2019. He testified that he is the Managing Director and the majority shareholder of the 1st Plaintiff. He stated that the company has about 610 employees and has its main account with Co-operative Bank. He stated that he is also a community leader and was an aspirant for Parliament.
 49. He recalled that he had applied for a loan of Kshs 2.5 million with the Bank, and was advised to apply for a temporary excess sum of Kshs 2.0 million whilst he awaited the loan approval. The excess was granted.
 50. On 10/12/2014 Police Officers attached to BFIU, under the instigation of the 1st Defendant through its Head of Security and acting on false and malicious information pursuant to a complaint letter of the same date commenced investigations against the 2nd Plaintiff as a result of which he was arrested on 15/12/14 at the Naivasha Branch of the 1st Defendant.
 51. He was detained at the Naivasha Police Station but later released on police cash bail and on 16/12/14 arraigned in court and charged with various charges ranging from conspiracy to defraud, stealing and handling stolen property in Criminal Case No. 2259 of 2014-Naivasha. He further testified that between 16/12/14 and 28/2/18 he stood trial in the said Criminal Case. As a result of the said charges he underwent a lengthy, arduous, agonizing and stressful criminal trial for a period of 1,128 days. He was however acquitted under Section 210 of the CPC.
 52. As a result of his arrest and prosecution, PW7 stated that his company suffered a substantial decline in business; that it became difficult to market his company and attract new clients; that during the subsistence of the from 2014 to 2018 the company lost earnings of Kshs 64,186,597/-. Further, he stated that and profits of about for the period 2018-2022 the company was likely to lose Kshs 2,931,036,558/- in profits were it not for the negative publicity it suffered. According to him these figures were calculated by an accountant.
 53. PW7 testified that he received a call from the Bank's operations manager, Domitila Cheron. On going there he was introduced to a man by name Mr Kamau, who said he was a security manager for the Bank. Shortly thereafter another man came, namely, Chief Inspector Tobias, who informed PW7 that he was under arrest, as a suspect in a case involving theft of money belonging to the Bank.
 54. The 2nd Plaintiff concluded by stating that the Criminal justice process was wrongfully used by the Police and the same was malicious and was the culmination of shoddy and botched up investigations leading to trumped up charges. He testified that the Police also did not act diligently and failed to properly investigate the offence. He stated that he was wrongfully incarcerated and prosecuted and was thus injured in his credit, character and reputation. He testified that he has suffered mental anguish and anxiety during the entire arrest and prosecution process. He further stated that the 1st Plaintiff business suffered financial loss and continues to suffer. The Plaintiffs further produced in evidence the documents contained in PB1 (Exb1-26 and PB2 (EXbs 27-31).



55. PW 8- Fridah Mwiti, the 1st Plaintiff in-house accountant, held a BSc degree and a CPA Section 2 qualification. She was led in evidence in chief and produced her statement dated 7th May, 2019. Her duties included preparation of invoices, conducting debtor and creditor reconciliations, bank reconciliations, preparing estimates of expenditure and maintaining budgetary and inventory controls, and coordinating statutory obligations.
56. She testified that the company regularly obtained overdraft facilities to enable them pay requisite monthly salaries, and that the account was very active. She said the company used to have over 1,000 employees, but these had reduced to about 610 after the prosecution of the 2nd plaintiff.
57. She testified that the case against the 2nd Plaintiff had led to reduced revenue for the 1st Plaintiff, particularly once the rumour mills started doing the rounds after the Managing Director's arrest.

Defence Case

58. The 1st defendant's case was made out by DW1 Wycliffe Mwangi and DW2 Domitillah Cheron Bolyol. The 1st defendant also filed documents in Defence Bundles DB1, DB2 and DB3.
59. DW 1- Wycliffe Mwangi Kamau was the first defence witness. At the time of testifying, he worked with Housing Finance in its Risk department. At the material time of the criminal case he worked at Co-operative Bank in the security department, and left in October, 2015. He testified that the bank received complaints from customers about funds debited from their accounts without their authority. He conducted investigations into the said accounts and established a case of fraud in that the accounts had been debited, and the funds moved to the plaintiff's account.
60. This occurred between the period 16th July 2014 and 14th November 2014, where the Branch Manager together with an officer with the knowledge of the plaintiffs carried out the various illegal or irregular transactions. He set out the various transactions referring to bank statements. He noted that after the 1st plaintiff's account was credited the 2nd plaintiff would draw from it and make payments.
61. Based on their investigations, DW1 stated, the Bank reported to the Banking Fraud Investigation Unit in a letter of 10th December 2014, and the police carried out independent investigations. According to him the investigations they conducted were reasonable and not malicious or based on ill will.
62. As a result of his investigations, he testified that the 2nd Plaintiff was charged for fraud in criminal case No. 2259 of 2014. In that case, DW1 was a prosecution witness on behalf of the 1st Defendant bank. The case ended in an acquittal.
63. In cross-examination, he testified that he did initial investigations before calling in the Bank Fraud Investigating Unit. He stated that he had no formal fraud investigation qualifications but had experience in investigating fraud.
64. He stated that the plaintiff had an overdraft. He was familiar with "temporary Excess" but stated that he could not give the "nitty gritty" of who received it. He did not confirm who gave the said excess to the plaintiff
65. there was no complainant who complained that their cheque was stolen or forged. He admitted that the 2nd Plaintiff was arrested before investigations could be completed.
66. When shown his own evidence from the proceedings of the criminal case in PB1 pg 63 he admitted that he had stated that no audit had been conducted by the time of the trial; that the plaintiff company was within its overdraft limits. When shown the Defence Bundl DB1 page 1-11 containing the recommendations, he stated that it does not mention that investigations had been carried out.



67. He admitted that by the time the letter dated 10th December 2014 to BBFIU was written, the bank's internal first report was out but no fraud had been affirmed. He said the bank could not direct BFIU, and what they did was to request investigations.
68. DW2 Domittilah Cheron Bolyol is a banker, currently at Co-operative Bank as the Service Manager Kiserian Branch. At the time of the incident, she was the Operations Manager at Naivasha branch responsible for supervision. She produced her witness statement dated 4th November, 2019 as her evidence in chief.
69. She testified that as a branch manager she received a complaint from a customer, and other complaints followed. She raised the issue with her boss PW6 who directed her to report to the bank security department.
70. She set out the various irregular and unauthorized transactions revealed by investigations. She pointed out that the complaining customers' accounts would be debited and almost immediately the plaintiffs would withdraw from their accounts. She identified the various transactions through various accounts and stated that the bank was entitled to conclude that there were irregularities occurring.
71. DW2 stated that the bank's position was emboldened when the Bank manager, Mr Kimani, PW6, admitted that there were some irregular transactions. The bank, she stated was simply acting out of utmost good faith and abundance of caution.
72. She called the 2nd Plaintiff to meet the investigator and did not remember the actual arrest incident. She testified that through the 2nd Plaintiff's fraud the bank lost money as the bank paid defrauded customers. The same was not captured in her witness statement.
73. In cross examination she stated that the plaintiff was arrested on 15th December 2014; that three of the customer complaints came after his arrest; that she was not involved in investigations. She admitted that the Suspense Accounts/ Transitory Account were managed by her as the Operations manager or by the Branch Manager, and that in 2014 she was the Operations Manager at Naivasha. She stated that by November 2014 she had not picked any irregularities as the Manager had confirmed and authorized the transactions
74. She denied that she was the one who solicited the customers' complaints. She testified that she heard later of the plaintiff's arrest; that the only unsuccessful transaction in the transitory account was for Kshs 1.9 million; that the bank had lost money because it had to repay customers.
75. The 2nd to 4th Defendants case was made out through the statement of Evans Tobias Obondo, and its bundle of documents DB4.
76. DW3 – Evans Tobias Abondo testifying on behalf of the 2nd -4th defendants, stated that he is an Assistant Superintendent of Police working for the DCIO and attached to the Banking Fraud Investigating Unit (BFIU). He was the officer who investigated the case after it was reported. He testified in the lower court.
77. He produced his witness statement dated 14th October, 2019 which was admitted as his evidence in chief. He stated that in the December 2014 the 2nd plaintiff together with four others were charged with conspiracy to defraud the Cooperative Bank. The other accused included two officers from the bank.
78. He stated that the two officials of the bank would navigate into the banks' customers accounts and debit them, and then credit the account of the 1st plaintiff. The customers whose accounts had been debited wrote letters of complaint. His investigations showed that the 1st plaintiffs account had an



overdraft of Kshs 2,000,000/-, and the anomaly occurred when the bank officials colluded to advance the 1st plaintiff funds in excess of its overdraft facility.

79. This action of the bank officials debiting the customer accounts was irregular, and hence charges were framed about their actions and those suspected of having colluded.
80. He testified that they analyzed the evidence that they had gathered before the 2nd Plaintiff took plea. The criminal case was dismissed after close of prosecution case.
81. In cross examination, he stated that they were not under pressure to investigate and charge; that the plaintiff was arrested on 15th December 2014, and brought to court five days later; that they did substantive investigations; he said they interviewed the suspects but did not take a charge and caution statement or record the interrogation; that the customers files were not availed.
82. Further, when shown PB1 page 88, he said he did not give focus to the reversed statements or inquire what those transactions meant; that he was not biased; that he did not interrogate Kenbrid, a complaining customer; that no audit was tendered as this was not a complex matter to warrant an audit, although an audit would have revealed missing links; that he relied on vouchers given to him by the bank; that he recalled the Transitory Account which was operated by Domittilah Cherono (DW1); and that the hardest fraud to identify was that which was engineered by the head.
83. In further cross examination, he stated that he was not availed with all vouchers by the Bank on transactions under investigation; He admitted that the complaint to BFIU was for an amount of Kshs 1,981,234/-, and that they did not receive any other complaint as BFIU. Shown Pg 90 PB1, he stated that it shows that charge in the criminal case included a count of stealing of Kshs 4,881,994.05.
84. DW3 also stated in cross examination when shown PB 1 pg 89 that in the lower court he had said an audit was not necessary.
85. The parties filed written submissions as directed by the court.

Plaintiffs' Submissions

86. The plaintiffs submitted that in a claim concerning malicious prosecution, the grounds that must be proved are as follows:
87. The initiation of proceedings by the defendants: That the 2nd Plaintiff was prosecuted at the behest of the 1st 3rd and 4th Defendants. Whereas the role of the 3rd and 4th Defendants in prosecuting the 2nd Plaintiff is direct it was contended by the 1st Defendant that it is not liable to the Plaintiffs as it did not strictly speaking prosecute the 2nd Plaintiff and that being a corporate entity no malice or ill will can be imputed against it.
88. The plaintiffs submitted that the Defendants instigated, procured, set in motion and were actively instrumental in putting the law in force and was hence commenced a prosecution as prosecutors. They refer on the case of *Zablon Kadori v NCPB (Mbsa H.C.C.C. NO. 152 of 1997)* where Maraga J. held:

“It is enough if it can be shown that the officers of a company were actively instrumental in putting the law in force.”
89. Lack of reasonable and probable cause: The plaintiffs submit that a prosecution which is commenced in the absence of a proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which



the prosecution can say with certainty that they have a prosecutable case. In this case, the plaintiffs assert that there was no foundation or probable cause for prosecution.

90. Malice: The plaintiff submitted that the criminal case was commenced by malice. The plaintiff stated that it was held in *G.B.M Kariuki v AG (2016) eKLR* at page 20 that in a situation where the Police deliberately decide not to take account of the version of the suspect or proceed without carrying out thorough investigations, malice will be inferred.
91. Results of the prosecution: The plaintiffs argue that there is no doubt that the criminal proceedings were terminated in favour the Plaintiff. He was acquitted under Section 210 of the criminal procedure code for lack of evidence and had no case to answer.
92. Thus, according to the plaintiff, all the grounds necessary to prove malicious prosecution are made out for the plaintiffs.
93. Additionally, the plaintiffs submitted Eleven points as follows with regard to the actual merits of the case.
94. First, that there was lack of independence on the part of the police: The plaintiffs submitted that the decision to prosecute was not independent and was the product of influence. In the 1st Defendant's Letter dated 10/12/14 (see Page 46-47 DBI) the author clearly identified the 2nd Plaintiff as one of the alleged fraudsters and gave the conclusion that fraud had been established and requested for investigations "with a view of arresting and prosecuting the staff and the customers who received the fraudulent credits." In its said letter the 1st Defendant then complainant had already given the Police the direction which to take and in particular who to arrest and who io prosecute and unfortunately the state simply complied with these directions.
95. Second, that there was deliberate failure to disclose exculpatory facts: According to the internal memo dated 08/12/14 (see Page 12 PB1) the 2nd Plaintiff was being investigated for the following impugned transactions; Kshs. 1,981,234 - on 16/7/14, Kshs. 990,000 - on 23/8/14 and Kshs. 996,173.85 - on 4/9/14. These transactions can be seen from the Bank Statement produced as P.EXH.15-(Page 113-126 PB1).
96. Before commencement of the investigations, these transactions had either been reversed on their maturity and the credits subsequently debited or settled by other direct deposits. Most of the transactions that were in issue had a common characteristic to wit that the funds hitting the 1st Plaintiffs account came from the 1st Defendant's transitory account which was described by DW2 as an internal account. There was nothing from the 1st Plaintiffs bank statement to show that any monies were coming from any of the alleged third-party customers. The 1st Plaintiff enjoyed a bank facility known as temporary excess as was confirmed by PW6 and the 2nd Plaintiff and neither of the Plaintiffs was obligated to inquire as to the source of the funds. The funds were credited directly from the bank and were similarly debited in favour of the said bank.
97. Thus, the 2nd Plaintiff was being investigated for transactions in which the 1st Plaintiff had already been debited pursuant to the facility it was enjoying or for which there was clear evidence that all sums advanced were repaid by either direct debit or deposits being made into the relevant account.
98. There were numerous other credit entries with subsequent corresponding debit entries but the Defendants deliberately focused on the credit entries and ignored the debit entries or ignored these transactions all together. The trial court rightly observed that the complainant had deliberately withheld to adduce evidence about these reversals.



99. Thirdly, the investigations were incomplete at time of arraignment which was rushed: DW3 (then PW12 in the Lower Court) admitted that when he arraigned the 2nd Plaintiff in court, investigations were incomplete (see Page 90 of PB1). A reasonable, prudent and cautious person would not have been satisfied that there was a proper case to put before the Court as against the 2nd Plaintiff. The investigating officer did not even believe in the completeness of his investigations. Indeed DW1 (then PW6) conceded that he had not recommended the arrest of the 2nd Plaintiff- (see Page 63PB1) yet he never took the initiative to suggest to the prosecution that the 2nd Plaintiff be considered as a likely witness for the state. In allowing the prosecution to proceed under these circumstances the bank was acting maliciously.
100. Fourthly, that there was failure to seriously interview the 2nd plaintiff before charging: The plaintiffs submit that there was no evidence to suggest that the 2nd Plaintiff was an obvious suspect. The fact that both Plaintiffs had a long-standing relationship with the 1st Defendant enjoying numerous credit facilities was sufficient to necessitate both the 1st and 3rd Defendants to first make an inquiry from the 1st Plaintiff's Directors about the alleged impugned transactions. There is no inquiry made by either 1st or 3rd Defendant from the 2nd Plaintiff.
101. Fifthly, that there was selective charging of the 2nd Plaintiff leaving out other director.
102. Sixthly, that there was failure to produce vouchers relating to the impugned transactions and producing edited documents.
103. Seventhly, that no evidence of loss of money was tabled in court: The defendants failed to produce an audit report to support the allegations that the bank lost money. Hence, no basis for the allegation of theft.
104. Eighthly, that there was no evidence of conspiracy: The plaintiffs submit that the defendants failed to produce any bank statements of the bank officials arraigned to ascertain whether they had received kickbacks from either of the plaintiffs.
105. Ninthly, that there was a pitiful failure to produce the customer's loan file: The 2nd plaintiff testified that the 1st defendant maintained the 1st Plaintiff's loan file which contained all applications for the facilities enjoyed by the 1st plaintiff. However, the 1st Defendant failed to produce this file during hearing.
106. Tenthly, that Propagating a bad police record: The Certificate of Good Conduct for the year 2019 turned positive for a bad record and it can only be inferred that even after the acquittal, the investigating officer still bore a grudge and had a bone to pick with the 2nd Plaintiff and was keen on continuing to persecute him.
107. Eleventh, that the prosecution was carried out for improper and ulterior motives: The 2nd Plaintiff testified that the motive and intent to charge were not proper and were aimed at employing the legal process for ulterior motives and for some other purposes. The intention was purely to embarrass him and use him as collateral damage in the bank's efforts to get rid of its branch manager (PW6). There was no evidence to maintain the claim for the offences.
108. With regard to Quantum of damages, the plaintiffs urge the court to award them as follows:
 - a. Special damages Kshs 750,000: The plaintiff claims the sum of Kshs 750,000 on account of legal fees incurred in the said Criminal Case. Three receipts totaling Kshs 750,000 were produced as evidence PExb.4-PB1.



- b. Loss of business: The 1st Plaintiff suffered direct financial loss in the business due to loss of reputation. The 2nd plaintiff testified that the 1st plaintiff had an annual turnover of Kshs 200 million and hence prayed for a sum of Kshs 64 million for actual loss and
- c. Kshs 2.9 billion for projected loss for five years.
- d. General damages for malicious prosecution: The plaintiffs prayed for Kshs 10 million each for loss of reputation and credibility.

Submissions by the 1st defendant

- 109. The 1st Defendant's submission, in a nutshell, is that the Bank received complaints, interviewed its own bank staff and conducted internal investigations which revealed that there were irregularities in various transactions. The gist of the matter was that the Branch Manager had authorized those irregular transactions. He admitted that he was aware of the transactions, that he authorized them, and that he regretted having authorized them. His statement to that effect was on record.
- 110. The Bank's investigations revealed that the Branch Manager PW6, deliberately carried out the transactions; that he was friends with the 2nd plaintiff and had exchanged some mpesa transactions that the debits in the complainant customer accounts demonstrated their friendship; that the plaintiffs benefitted from the Transactions; and that the Bank concluded its responsibility by reporting to BFIU to follow up the case and "investigate the fraud".
- 111. The Bank submitted that BFIU was required to conduct independent investigations and that they shared their investigative material with Tobias Abondo. It was the police who made the decision to charge. This was after they made an independent investigation based on their expert opinion.
- 112. The 1st defendant did not dispute that the criminal case terminated with the acquittal of the accused persons. However, they take issue with the assertion that the 1st defendant officer made a false, reckless or malicious complaint. They say that the person who actively makes the charge and prosecutes is the prosecutor, even if he did not in fact initiate the prosecution.
- 113. The 1st defendant urges that it is for the plaintiff to demonstrate any falsity or malice on the part of the 1st defendant. According to the 1st Defendant, the fact is that the bank did not falsify any fact, that the complaint they filed simply narrated the facts and the Bank's honest belief that an offence had been committed. The claims of malice are therefore unproved.
- 114. As to whether there was a reasonable or probable basis to make the complaint, the 1st defendant urges that they had an honest belief and full conviction in the accused's guilt founded upon reasonable grounds. It is the state of mind of the one commencing the prosecution that matters, and not the actual guilt or innocence of the accused that is in issue. The investigations revealed findings which an ordinary, cautious and prudent person, placed in the position of the bank, would find reasonable to enable the bank to report the suspicious transactions to BFIU.
- 115. Finally, the 1st defendant submitted that the claims by the plaintiffs for Kshs 64, 186,597/- and Kshs 2,931,036,558/- were claims in special damages and that these were not proved. Further, that even if the court found that malicious prosecution had been proved, damages were not payable because the evidence showed that the 2nd defendant's negative political image was discovered on the day just before the election.
- 116. The 1st defendant cited the following authorities which I have perused and taken into account:
 - 1. Robert Okeri Ombeka v Central Bank of Kenya [2015] eKLR.



2. Caltex Oil (Kenya) v Evanson Njiiri Wanjihia [2017] eKLR.
3. Kenya Power & Lighting Co. v Justus Musumba Omukongo & Anor [2020] eKLR.
4. Ruthaka Farmers Co-op Society & 2 Ors v Francis Mwangi Gathitu & 5 Ors [2017] eKLR.
5. Martin v Watson [1995] All ER
6. Co-op Bank of Kenya Limited v Sylvester Baraza Ojiambo & Anor [2019] eKLR
7. Tobias Moinde Kengere v Postal Corporation of Kenya & 2 Ors [2019] eKLR.
8. Kunhutty Sahib v Veeramkutty AIR 1960 Ker 264
9. Chinnamuthu Ambalam v Jagannatha Chariar AIR 1959 Mad 89

Submissions by the AG on behalf of the 2nd, 3rd and 4th Defendants

117. The Attorney General proposed the following as the main issues for determination:
 - i. Whether the tort of malicious prosecution and confinement has been proven by the plaintiffs.
 - ii. Whether the plaintiffs are entitled to the reliefs sought.
118. The 2nd plaintiff was prosecuted in Criminal Case No. 2259 of 2074 and it is also not in doubt that the 2nd plaintiff was acquitted under section 210 of the Criminal Procedure Code.
119. The sequence of events leading to the arrest and prosecution of the 2nd plaintiff are well captured in the police file (DB4) filed in court by the 2nd - 4th Defendants. On 10th December, 2014 the 1st defendant reported at Naivasha Police Station vide OB No. 38/16/12/14 the commission of an offence of stealing, fraud among other offences against the 2nd Plaintiff and other accused persons including employees of the 1st defendant, Ezekiel Maina Wachira and James Mwangi Kimani. On the same date the 1st Defendant wrote a letter to the Banking Fraud Investigation Unit (BFIU) requesting for investigations into the alleged fraudulent transactions.
120. On 16th December, 2014 the 2nd Plaintiff together with four other accused persons were arraigned in court where they were charged with among others offences, stealing, Fraudulent False Accounting, Conspiracy to Defraud and Handling Stolen Property. The main accusation against the 2nd Plaintiff and the other four accused persons was to the effect that they were working in cahoots to navigate into the Banks's customers' accounts especially those of saccos and cooperatives and debit the said accounts to credit the account of the 1st Plaintiff irregularly.
121. During the prosecution hearing, the prosecution called 13 witnesses. Later, at the close of the prosecution case the court returned a verdict that the accused persons had no case to answer and the 2nd plaintiff and the other accused persons were consequently acquitted on 28/2/2018 under section 210 of the CPC.
122. It will be seen from the police file that investigations were carried out and statements by the accused and other witnesses were taken.
123. On the issues for determination

Whether the tort of malicious prosecution and false confinement has been proven by the plaintiffs.



124. Whether the tort of malicious prosecution has been proven by the plaintiff. What constitutes malicious prosecution is now well settled and, in this regard, we shall rely on the cases of *Dr Lucas Ndungu Munyua v Royal Media Services Limited & another* [2014] eKLR, *James Karuga Kiiru v Joseph Mwamburi & Others* Nrb C.A No. 171 of 2000 [2001] eKLR and *George Masinde Murunga v Attorney General* 1997 KLR 138.
125. The court is faced with the task of determining whether the arrest and prosecution of the 2nd plaintiff was instituted without reasonable and probable cause and whether it was actuated by malice.
126. Whether there was reasonable and probable cause for the prosecution is a matter of fact and the evidence as was held in *Kagane & Others v Attorney General & Another* [1969] EA 643 and in *Murunga v the Attorney General* (supra).
127. On the issue of malice, the defendants place reliance on the cases of *James Karuga Kiiru v Joseph Mwamburi & 3 others*, Nrb C.A No. 171 of 2000 and *Robert Okeri Ombeka tz Central Bank of Kenya*, Civil Appeal No. 105 of 2007[2015] eKLR.
128. The defendants submit that the chain of events preceding the 2nd plaintiff acquittal. The arrest and prosecution of the 2nd plaintiff were invoked at the instigation of the 1st defendant who made a report to BFIU vide letter dated 10th December, 2014 (at DB4, Page 5 g-h). The 1st Defendant's report to the BFIU was necessitated by complaints from the 1st defendant's customers inter alia *Holidee in Africa*, *Oserian Sacco*, *Manila Sacco*, *Marurumi Sacco* and *Townace Sacco* who complained that their money was missing from their respective accounts. The 1st defendant's letter also confirmed that internal investigations into the fraudulent transactions had been undertaken by the time the matter was escalated to BFIU.
129. The BFIU did not investigate the claim as evidenced from the *Crime & Incidents Report and Covering Report*. The lower court also confirmed that investigations were started by officers based at *Co-operative Bank headquarters*.
130. The plaintiffs alleged that the 2nd plaintiff was arrested and arraigned in court before investigations were concluded. The defendants submit that at the time of reporting the fraudulent transactions to BFIU, the 1st defendant had carried out internal investigations into the alleged transactions implicating the plaintiffs among others. This was confirmed by the *Operations Officer* at the 1st Defendant. In his testimony, DW3 confirmed that upon receiving the complaint and internal investigation report from the 1st defendant and scrutinizing the same together with preliminary evidence, it was established that an offence (s) had been disclosed.
131. The defendants submit that a perusal of the criminal proceedings will show that the prosecution tendered exhibits in court and availed 13 witnesses in court in support of their case. These witnesses included the *operations manager* of the 1st defendant who testified in respect to the anomalies noted in respect to the transactions in question. She averred that the 1st plaintiff was entitled to an overdraft facility of Kshs, 2,000,000 an amount the 2nd plaintiff had already exhausted by the time the fraudulent transactions took place. In her statement, the 1st defendant *Operations Manager* averred that as at 16th July, 2014 the plaintiff's account had been overdrawn by a sum of Kshs 1, 970, 738.82 which means that the 1st plaintiff could only access a further Kshs. 29, 261.18 noting that its overdraft limit was Kshs 2 million shillings.
132. On the same day Kshs 1,981,234 was debited from the internal transitory account and credited into the 1st plaintiff's account regularizing it to overdraw the account again. further, on subsequent dates of 19th



August, 2014, 4th September, 2014 and 20th September, 2014 the 1st plaintiff's account was credited with monies obtained from Oserian Sacco and Marurumi Sacco without their consent/knowledge.

133. The defendants submit that coupled up with an admission of the then Bank Manager of the 1st defendant that the transactions were irregular, it was abundantly clear from the face value of these transactions were irregular and fraudulent and thus the perpetrators and the beneficiaries were all a party to a fraudulent scheme and ought to have been investigated and charged for it.
134. The defendants submit that the claim advanced by the plaintiffs that the 2nd plaintiff was arraigned in court before proper investigations were carried out is off the mark. We say so because, before making a report to BFIU, the 1st Defendant had conducted intensive internal investigations into the fraudulent transaction which even from a cursory look of the same it was abundantly clear that an offence(s) known to the law had been disclosed. At the time of arrest 3rd and 4th defendants were satisfied that a cognizable offence(s) had been committed and that it was proper for the accused to be arraigned in court.
135. The defendants submit that the fact that the 2nd plaintiff was acquitted under section 210 of the Criminal Procedure Code does not automatically lace the criminal proceedings with malice. It was incumbent upon the plaintiff to prove that the prosecution was actuated by malice and that it was initiated without reasonable and probable cause. According to the defendants, the burden of proof has not been discharged by the plaintiff apart from the plaintiff making sweeping allegations that there was malice on the part of the defendants. In this regard the defendants rely on the case of Nzoia Sugar Company Limited v Collins Fungututi Civil Appeal No. 7 of 1988 [1988] KLR 399.

Whether the plaintiffs are entitled to the reliefs sought

136. The defendants submit that the plaintiffs' claim for cumulative special damages of Kshs. 2,995,223.155 purportedly being compensation for loss of profits and future income is grossly exaggerated and completely unfounded. It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit as was held in the case of National Social Security Fund Board of Trustees v Sifa International Limited (2016) eKLR, Macharia & Waiguru v Murang'a Municipal Council Another (2014) eKLR and Provincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (UR).
137. The defendants submit that the plaintiffs have thrown the claim for special damages without particularizing the damages suffered. Further, the allegation that the 1st plaintiff was making profits during that period is a factual issue which ought to have been supported by tangible evidence. To the contrary, all evidence adduced in court shows the 1st plaintiff barely made any profits and was in fact operating on credit and bank overdrafts at all material times. The purported accounts tendered in court by the plaintiffs in support of their claim were not actual accounts but merely projections and therefore largely speculative and theoretical and therefore without cogent empirical or probative value. The authenticity of the accounts is also in doubt as the same were not signed.
138. In conclusion, the defendants submit that the claim for special damages is baseless, obnoxious, vexatious and unsupported.

Issues for Determination

139. The issues which in my view arise for determination are as follows:
 1. Whether the tort of malicious prosecution and confinement has been proved by the plaintiffs.



2. Whether the 1st and 2nd plaintiffs suffered any injury loss or damage as a result of the said prosecution.
3. Whether the plaintiffs are entitled to the reliefs sought.

Analysis and determination

Whether the tort of malicious prosecution has been proved by the plaintiffs

140. The law guiding the tort of malicious prosecution is well settled. In *Mbowa vs. East Mengo District Administration* [1972] EA 352, the East African Court of Appeal expressed itself as follows:

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained



an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal.” (Emphasis added).

141. In *Gitau v Attorney General* [1990] KLR 13, Trainor, J had this to say:

“To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge.

142. Similarly in the case of *Nzoia Sugar Company v Fungututu* (1988) KLR, 399, the Court of Appeal, Apaloo JA (as he then was) observed as follows at page 404:-

“But in my opinion, the case of malicious prosecution must founder on the absence of proof of malice or ill-will. The only reason why the respondent claimed he was maliciously prosecuted, was because the prosecution terminated in his acquittal. As he put it in evidence:

“I was acquitted under section 210 of the Criminal Procedure Code and in view of this, I am claiming damages from the defendant company because since my acquittal, I have not been employed because I have been treated as a thief as a result of this case.”

It is trite learning that acquittal, per se, on a criminal case 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. The respondent gave no evidence from which it can be reasonably inferred that the Security Officer made this report to the police on account of hatred or spite that he had for him.”

143. It is not disputed that on 16th December, 2014 the 2nd Plaintiff together with four other accused persons were arraigned in court in Criminal Case No. 2259 of 2074. They were charged with the offences of: Stealing; Fraudulent False Accounting; Conspiracy to Defraud; and Handling Stolen Property. The main accusation against the 2nd Plaintiff and the other accused persons was to the effect that they were working in cahoots to navigate into the Banks' customers' accounts, especially those of saccos and cooperatives, and making debits in the said accounts and crediting the account of the 1st Plaintiff company irregularly.

144. The evidence availed in court shows that a report was made to the police on 10th December, 2014, by the 1st Defendant bank through DW1 Wycliffe Kamau. The the 2nd plaintiff was prosecuted and was acquitted under section 210 of the Criminal Procedure Code.

145. The plaintiffs moved this honourable court through their amended plaint dated 18th February, 2019 seeking the damages for malicious prosecution, false arrest, false imprisonment and abuse of legal process.

146. It was submitted that that the chain of events preceding the 2nd plaintiff's arrest, prosecution and subsequent acquittal were invoked at the instigation of the 1st defendant who made a report to BFIU vide letter dated 10th December, 2014 (at DB4, Page 5 g-h). According to the evidence, the 1st Defendant's report to the BFIU was necessitated by complaints from the 1st defendant's customers.



147. The plaintiffs alleged that the 2nd plaintiff was arrested and arraigned in court before investigations were concluded, and that the decision to prosecute was not independent but was instead the product of influence and malice. In the 1st Defendant's Letter dated 10th December, 2014 (see Page 46-47 DBI) the author clearly identified the 2nd Plaintiff as one of the alleged fraudsters and gave the conclusion that fraud had been established and requested for investigations:

“with a view of arresting and prosecuting the staff and the customers who received the fraudulent credits.”

148. It must be recalled from the evidence, that at this time the Bank had not conducted any audit according to the evidence of Wycliffe Mwangi DW 1 in the criminal case; that he also stated in the criminal trial that some money had been returned and that at the time of trial he did

“not know how much money was missing”

Further, although DW1 denied recommending the arrest of the 2nd plaintiff, the letter to BFIU made the recommendation. DW1 also admitted in the trial court in the criminal case that:

“3rd accused (Anthony Rebo – 2nd Plaintiff herein) was arrested on 15/12/2014 before I completed investigations”

149. Thus, the 2nd Plaintiff was being investigated for transactions in which the 1st Plaintiff had already been debited pursuant to the facility it was enjoying or for which there was clear evidence that all sums advanced were repaid by either direct debit or deposits being made into the relevant account. Further, it is clear that the 1st Defendant was calling for the arrest of the customers who received the fraudulent credits, yet investigations were incomplete.

150. PW 7 in his testimony concluded by stating that the Criminal justice process was wrongfully used by the Police and the same was malicious and was the culmination of shoddy and botched up investigations leading to trumped up charges. He testified that the Police also did not act diligently and failed to properly investigate the offence.

151. DW3 the Bank Fraud investigating Officer testified that they analyzed the evidence that they had gathered before the 2nd Plaintiff took plea. The criminal case was dismissed after close of prosecution case.

152. The prosecution of the 2nd Plaintiff was instigated and set in motion by the defendants. The 2nd Plaintiff was prosecuted and later acquitted for lack of evidence to sustain the charge of fraud.

153. As to whether the prosecution was instituted without reasonable and/or probable cause, it is clear from the evidence that although the 1st defendant was itself convinced that there had been fraudulent transactions, it did not conduct reasonable investigations to assert such position, but instead left it to BFIU to make that determination. There is no evidence that after the bank made the report to BFIU they engaged assiduously with the BFIU to ascertain that a prosecution was warranted. Indeed, their first reporting letter to BFIU sought the prosecution of the 2nd plaintiff.



154. In a determination of whether there was any probable and/or reasonable cause, the reasonable man's standard applies. In the case of *Hicks v Faulkner* (1878) 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause:

“An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

155. 45. The test for whether a case was instituted with a reasonable and probable cause was also laid out by 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.”

156. In deciding whether there was also false imprisonment, the Ugandan case of *Mugwanya Patrick VS Attorney General High Court Civil Suit No. 154 of 2009 [2012] UGHC 293* the court indicated the ingredients of false imprisonment as follows:

“The civil tort of false imprisonment consists of unlawful detention of the plaintiff for any length of time whereby he is deprived of his personal liberty. It must be total restraint...where an arrest is made on a valid warrant it is not false imprisonment; but where the warrant or imprisonment is proved to have been effected in bad faith then it is false imprisonment.”

157. Locally, the law on the tort of wrongful detention was also pointed to by Maraga, J. (as he then was) in *John Ndeto Kyalo v Kenya Tea Development Authority And The Hon. Attorney General [2005] eKLR* at Paragraphs 4 and 5 where the learned Judge observed:

“Claims for false imprisonment (wrongful detention) and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities;

As regards a claim for false imprisonment (wrongful detention), the cause of action would arise on the last day of the period of the alleged imprisonment;

By dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment (wrongful detention) would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment...”



158. In John Ndeto Kyalo, the court found there was no wrongful arrest. According to the facts of that case, the plaintiff worked for the 1st defendant, who reported to the Anti Banking Fraud Unit a case of fraud involving one of its employees, Rosabella Sogoh. When the accused later implicated the plaintiff during her interrogation, the Deputy OCS Kileleshwa Police Station arrested him when he visited his colleague in police custody.
159. In the present case, the Bank reported the matter to BFIU on 10th December 2014. They then called the 2nd plaintiff for a meeting on 15th December, 2014, and according to DW2, Domittillah, she introduced him to the investigators. He was then arrested willy-nilly on the basis of the report by the Bank and the request that the bank staff involved including those to whom funds were transferred be arrested.
160. It should not be lost on the court that the beneficiary of the credited monies was the 1st plaintiff company. No investigation of the company was conducted at all before the arrest of its Managing Director.
161. In the case of Gitau –V- East African Power And Lighting Co. Ltd, (1986), Schofield J (as he then was) held inter alia:-
- “In order for a claim of malicious prosecution to succeed the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendants and that there existed malice and which malice he must prove. In this instance the plaintiff failed to prove malice.”
162. It is clear to me that with regard to the 1st plaintiff company, there was no evidence of prosecution at all or of acquittal. Thus, the claim of malicious prosecution does not arise and does not lie.
163. With regard to the 2nd plaintiff Anthony Rebo Nguere, I find that all the elements of malicious prosecution were proved by the evidence availed.

Whether the plaintiffs are entitled to the reliefs sought

164. The Plaintiffs’ claim is both for special and general damages suffered.
165. Special damages: The plaintiff claims the sum of Kshs 750,000/- on account of legal fees incurred in the said Criminal Case. Three receipts totaling Kshs 750,000 were produced as evidence as PExb.4-DB1.
166. The defendants submit that the claim for special damages is baseless, obnoxious, vexatious and unsupported.
167. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
168. In Stephen Wasike Wakho & another v Security Express Limited [2006] eKLR, it was held that:
- “ 13. A party seeking justice must place before the court all material facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum he who alleges must prove.”



169. In the case of *Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya* CA 69 of 2005 the Court of Appeal held that loss of business must be specifically pleaded and proven.

“ 14. In this case, the plaintiff apart from producing a business record book, did not tender any evidence of having lost sales as pleaded. It is my view that she ought to have done more. Evidence from an accountant was necessary so as to explain the variance in the figures as shown in the said book.”

170. Here the plaintiffs availed an accountant but the foundational basis of his calculations was not availed in evidence. In *David Irungu Mwangi v Attorney General* [2018] eKLR, the court in finding that the petitioner did not prove loss of business held that;

“ 55. Secondly, the petitioner did not produce audited accounts for the business. What he produced were hand written document he said proved that the company was doing well businesswise. There was no profit and loss account or balance sheet to show how much the company or the business made in terms of profit and loss to justify the claim that the business was doing as well as the petitioner put it. That would enable the court determine whether the company or business really made profit or loss. Independently audited accounts would have been necessary as proof of the company’s financial muscle for purposes of considering compensation if any. The petitioner did not even produce records of the state of the business when he was finally released.....

57. It must be appreciated that a claim for loss of business is akin to special damages for it is intended to show that the claimant did suffer actual and not perceived loss. Compensation is to return the party to as nearly the same level he was before as possible. This requires proof of the actual loss suffered. From the evidence on record on this claim, I am not satisfied that the petitioner did enough to assist the court come to a reasonable and justifiable conclusion.”

171. In *Ndishu & another v Muriungi (Civil Appeal 3 of 2020)* [2022] KEHC 2 (KLR) (21 January 2022) (Judgment) Mativo J (as he then was) stated:

“ Similarly, the Court of Appeal in *Hahn v Singh* held in Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721, Kneller, Nyarangi JJA, and Chesoni Ag. J.A. that: “Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

28. Our decisional law is in agreement that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury or prove of income in case of business loss. (See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited; Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2015] eKLR [2006] eKLR”



172. I think the 1st Plaintiff company suffered from the same defect in of lack of provision of evidence to substantiate its profits and losses, upon which a discussion could ensue about earnings and loss of earnings.
173. General damages: The 1st Plaintiff suffered direct financial loss in the business due to loss of reputation. The 2nd plaintiff testified that the 1st plaintiff had an annual turnover of Kshs 200 million and hence prayed for a sum of Kshs 64 million for actual loss and Kshs 2.9 billion for projected loss for five years.
174. The defendants submit that all evidence adduced in court show the 1st plaintiff barely made any profits and was in fact operating on credit and bank overdrafts at all material times. The purported accounts tendered in court by the plaintiffs in support of their claim were not actual accounts but merely projections.

Conclusions and Disposition

175. In light of all the foregoing, I find and hold as follows.
176. The preliminary objection was dismissed, essentially, as being misconceived in respect of the tort of defamation, whilst the suit clearly invoked the tort of malicious prosecution.
177. On issue 1: as to whether the tort of malicious prosecution and confinement has been proved by the plaintiffs.
178. With regard to the 1st plaintiff, this issue did not arise. The 1st plaintiff company was never prosecuted arrested confined or acquitted. No such evidence was availed.
179. With regard to the 2nd plaintiff, Anthony, Rebo Ngure, all the elements of malicious prosecution were proved
180. On issue 2 as to whether the 1st and 2nd plaintiffs suffered any injury loss or damage as a result of the said prosecution I find and hold as follows.
181. With regard to the 2nd plaintiff, the evidence clearly demonstrates that he suffered direct injury loss and damage on account of being maliciously prosecuted. The pleaded particulars of recklessness and malice as against the 1st 3rd and 4th defendants are instructive as to the nature of the loss and injuries suffered.
182. With regard to the 1st plaintiff, the injuries loss and damage particularized were not specifically proved through audited accounts and based on real reported returns as to income which could be compared for the period before the arrest and the periods after the arrest of the 2nd plaintiff, the company's managing director.
183. The 1st plaintiff did not demonstrate or make a clear connection between the prosecution of the managing director and the company's alleged losses and projected losses
184. On issue 3 as to whether the plaintiffs are entitled to the reliefs sought.
185. The 1st plaintiff is not entitled to any damages.
186. The 2nd plaintiff is entitled to damages as follows:
- a. General damages for malicious prosecution, false arrest and false imprisonment in the amount of Kshs 4,000,000/=.
 - b. Damages for loss of credit and reputation in the amount of Kshs 1,000,000/-



c. Special Damages in the amount of Kshs 750,000/= in respect of legal fees incurred in his defence in the trial court.

187. The aforesaid amounts are payable by the defendants jointly and severally. Interest shall accrue thereon at court rates from the date of this judgment.

188. Orders accordingly

DATED AT KERUGOYA THIS 20TH DAY OF MAY 2024

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R. MWONGO

JUDGE

Delivered virtually in the presence of:

1. Wachira, for the Plaintiffs
2. Abdullahi for the 1st Defendant
- 3.No Representation for the 2-4th Defendants
4. Murage, Court Assistant

