



**Consolidated Bank of Kenya v Muthee (Civil Appeal E063 of 2022)  
[2024] KEHC 5423 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5423 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL E063 OF 2022**

**JR KARANJA, J**

**MAY 2, 2024**

**BETWEEN**

**CONSOLIDATED BANK OF KENYA ..... APPELLANT**

**AND**

**DENNIS MWANGI MUTHEE ..... RESPONDENT**

**JUDGMENT**

1. The appeal is against the Judgment of the Principal Magistrate delivered on the 9<sup>th</sup> November 2022 in Kericho CMCC No.318 of 2018, in which the appellant, Consolidated Bank of Kenya, and the Attorney General were sued by the respondent, Dennis Mwangi Muthee, for a declaratory order that their action of arresting and prosecuting the respondent was without probable and reasonable cause and therefore malicious compensation orders for loss of income/earnings, legal expenses and psychological and mental suffering and damages for malicious prosecution.
2. Briefly, it was pleaded by the plaintiff/respondent that on or about the 10<sup>th</sup> March 2015 at about 9:30am he was leaving the Milimani Law Courts in Nairobi when he was arrested and dragged into the court's basement cells after which he was taken to Kabete Police Station from where he was transferred to Litein Police Station and eventually arraigned in court at Kericho for the offences of stealing, conspiracy to defraud and forgery of documents. He was however, later acquitted of all the charges in accordance with Section 210 of the Criminal Procedure Code.
3. The respondent/plaintiff further pleaded and contended that the appellant's action resulted in his inability to secure another job, his family disintegrating with his wife running away from home after the resulting embarrassment and hardships became unbearable to her. He contended that the appellant's actions were actuated by malice as there was no reasonable and probable cause for his arrest and subsequent prosecution.

The respondent therefore prayed for Judgement against the appellant as sought in the amended plaint dated 27<sup>th</sup> September 2021.



4. The appellant's defence was a denial of the allegations made against itself by the plaintiff/respondent and a contention that all it did was to make a complaint based on reasonable cause thereby forming a basis for the police to carry out their own independent investigations and thereafter made a decision on whether or not to charge the respondent in court.
5. The appellant further contended that it never arrested, charged or prosecuted the plaintiff/respondent as that was the preserve of the police the Attorney General pursuant to their constitutional mandate and duty. That, the plaintiff's acquittal by the court did not connote proof of malicious prosecution. The appellant contended that the plaintiff/respondent was not entitled to the prayers sought and prayed for the dismissal of the case with costs.
6. After having considered the pleadings and the evidence led by both the plaintiff and the defendants in support thereof, the trial court concluded in its final judgment that the appellant was liable to the respondent for malicious prosecution and awarded damages in the sum of Kshs five (5) million to the respondent.
7. Being aggrieved, the appellant preferred the present appeal on the basis of the eleven (11) grounds of appeal set out in the memorandum of appeal dated 7<sup>th</sup> December 2022, in which the appellant generally complains that the trial court erred in law and in facts in arriving at its findings for which the appellant was found liable and in awarding an excessive amount of Ksh. Five (5) million in general damages.
8. The respondent opposed the appeal which was canvassed by written submissions filed on behalf of both sides by Mbaluka & Co. Advocates and Chege & Sang Advocates respectively. The rival submissions were given due consideration by this court against the ground of appeal. Being a first appeal, the duty of this court was to reconsider the evidence and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, Sielle v Associated Motor Boat Co. Ltd [1968] EA 123).
9. In that regard, the plaintiff/respondents case was highlighted in his testimony in court where he testified as PW1 and adopted his witness statement dated 30<sup>th</sup> July 2018, as his evidence.  
Briefly, the respondent narrated the circumstances under which he was arrested and arraigned in court at Kericho together with persons who were strangers to him for offences which he was not aware of. He implied that within the period from the time of his arrest in Nairobi upto the time of his arraignment in court at Kericho he underwent an embarrassing and harrowing experience at the hands of the appellant through its security officer and the police.
10. The respondent also implied that there was no good or reasonable cause for his arrest and prosecution and his acquittal by the court signified that the appellant's action against were unlawfully and actuated malice. He contended that the unlawful actions occasioned him loss of earning as a career banker as well as mental or psychological torture and suffering.
11. The respondent further contended that he was exonerated by the court as the witnesses in the criminal case saw no wrong on his part or the need to prosecute him. That, being a credit officer with the appellant, no money was lost through a loan allegedly processed by him, but was in fact processed by his colleagues. That, he was wronged by the appellant by being charged and prosecuted for crimes not committed by himself.
12. The plaintiff/respondent closed his case without calling any other witness and this paved the way for the appellant to lead evidence through its Nakuru branch manager, Joshua Kinyangi Ombaso (DW 1) whose entire testimony was an indication that in the year 2013, being a credit assistant with the appellant's bank Nakuru branch, the respondent was suspected of involvement in suspected



fraudulent transactions involving loans given to the banks clients and the collateral property held in respect thereof. Internal investigations revealed that the respondent was culpable for falsifying documents. He was then reported to the police who arrested and investigated the allegations made against him before he was charged in court.

13. The appellant contended that the charges against the respondent/plaintiff were not malicious but based on reasonable suspicion and evidence. That, the charges preferred against the respondent related to falsified title documents. He was suspected of having been responsible for making the false documents.
14. All the foregoing evidence, in the opinion of this court, clearly indicated that the plaintiff's claim was essentially for damages for malicious prosecution, the genesis of which was the complaint made to the police against the plaintiff by the appellant bank after its internal investigations revealed the plaintiff's culpability in falsification of documents.
15. The plaintiff implied that the appellant had no justification in making the complaint and the fact that the complaint led the police to arrest, charge and prosecute him for offences which he never committed and for which he was acquitted by the court meant that the appellants actions were perpetuated or actuated by malice.

The appellant on the other hand implied and contended that the complaint against the plaintiff was not actuated by malice, but was made in good faith.

16. There was no particular dispute with regard to the fact that the plaintiff/respondent was arrested, charged and prosecuted at the instigation of the appellant bank which was the first defendant at the trial. The second defendant was the Attorney General under whom the police acted on the first defendants complaint by arresting, charging and prosecuting the plaintiff. All that action turned into an exercise in futility after the plaintiff was found by the court to have no case to answer and acquitted of all the charges facing him.
17. The basic issue which arose for determination was whether the appellant acted maliciously when it made the complaint against the plaintiff/respondent thereby causing his arrest, arraignment and prosecution in court.
18. A malicious prosecution claim such as the present one is a claim in tort intended to provide redress to a person who suffers loss or damage as a result of a baseless and unjustified prosecution. The trial court being very much alive to the essential ingredient of the tort of malicious prosecution as set out by the Eastern Africa Court of Appeal in *Mbowa v East Meno District Administration* [1972]EA 352, found in favour of the plaintiff/respondent by holding that the appellants action against the plaintiff were unlawful and actuated by malice.
19. In arriving at that finding the trial court rendered itself thus: -

“Applying the above principles to the present case, it is not disputed that following a complaint to the police by the 1<sup>st</sup> defendant, the plaintiff was arrested and charged with the offence of stealing by servant in Criminal Case No.194 of 2016. It is also not disputed that the prosecution was terminated in the plaintiff's favour and acquitted for lack of evidence under section 210 of the Criminal Procedure Code.....” For avoidance of doubt, it's the top management who finally approved the loan that led to the loss of money in issue, the security title was not a forged one but existent and finally, both the bank and the investigating officer knew or ought to know if the title was forged or by exercising due diligence before triggering arrests or prosecution. These 2 were also clearly selective as against the plaintiff



herein, having never bothered about the known agents of the bank who revisited the same loan application after rejection, and had it finally approved. The consequences of which was loss of funds in issue.”

20. The trial court went on to state that: -

“.....the Defence witness simply agreed with the plaintiff’s case. This renders the prosecution as meted out against the plaintiff then, unreasonable, without probable cause and evidently actuated by malice. The fact that the plaintiff was selectively picked and prosecuted albeit recklessly and without cause or good evidence against him sufficient and reasonable enough, under the collusion of the Defendants is cemented in the record.”

In the Mbowa case (supra), the four vital elements or ingredients of the tort of malicious prosecutions were said to be the following:

- i. That the prosecution was initiated or instituted by the defendant or his agents.
- ii. That the prosecution was instituted without reasonable and probable cause.
- iii. That the prosecution was actuated by malice and
- iv. That the prosecution terminated in the plaintiffs favour and that he has consequently suffered damages.

21. It was held in the same case that in order for a plaintiff to succeed in a malicious prosecution claim, all the four ingredients of malicious prosecution must be proved. That, the four elements must be united in order to create or establish a cause of action if the plaintiff does not prove them, he would fail in his action.

The evidence in this case raised no dispute that the factors which led to the plaintiff’s prosecution were initiated or instituted by the appellant. As indicated by its witness (DW1) the complainant was made in good faith. Also not disputed was the fact that despite being charged and prosecuted by the police on the basis of the appellant’s complaint, the plaintiff ended up being acquitted of all the charges levelled against him.

22. As to whether the prosecution of the plaintiff was instituted without reasonable and probable cause or was actuated by malice, the opinion of this court would be in the negative rather than positive as opined by the trial court. This is because the evidence by the plaintiff attributed or read malice to or in the manner the plaintiff was arrested within the glare of the public and dragged by his trousers into the basement cells of the Milimani Law Courts in Nairobi before being denied food and pushed into a public motor vehicle (matatu) being driven to Litein in Kericho County where he was arraigned in court. He was in the process embarrassed and emotionally tortured. His ego was undoubtedly seriously bruised and deflated. But all that, was a demonstration of how the police should not do things in such uncivil manner.

23. The manner of the plaintiff’s arrest and treatment even if done at the instance of the appellant could not and did not prove that the appellants action against the plaintiff were actuated by malice or were undertaken without reasonable and probable cause. It was undisputed that prior to making the impugned complaint to the police, the appellant conducted its own internal investigations which revealed the plaintiff’s involvement in some suspected fraudulent transaction.

24. This was a demonstration that the decision to file a complaint with the police against the plaintiff for something the appellant believed and found to be a fraudulent criminal transaction was not made in



a huff or whimsically but after clear thought and diligence and most importantly, in fulfillment of the appellant's civic duty to report a crime.

25. In that way, the appellant was able to demonstrate the absence of malice and the presence of reasonable and probable cause in the actions or action it took against the plaintiff/respondent which led to him being prosecuted for offences which he was eventually acquitted.

The acquittal was one of the elements to be proved for a successful claim of malicious prosecution. The two crucial elements of malice and absence of reasonable and probable cause were not herein established and proved even on a balance of probabilities. In the circumstances the finding by the trial court that the two crucial elements were established and proved was manifestly erroneous in as much as it was not borne by any tangible evidence.

26. With regard to the question of damages and/or compensation for loss and damage accruing from the plaintiff's arrest, arraignment and prosecution in court, there was no proof that the plaintiff suffered any loss of earning or earning capacity and at what rate. He never provided any documentary evidence to establish and prove the expenses incurred by him. In any event, he was not awarded any special damages and did not plead such. He was awarded only general damages in the sum of Kshs. Five (5) million.

27. General damages would be awardable in malicious prosecution claim. However, there must be a basis for such awards and extent thereof. In this case, this court did not find any basis for the award of Kshs. Five (5) million which was too excessive in the circumstances.

If the plaintiff had established and proved his claim, and award of Kshs.1.5 million would have, in the opinion of this court, been reasonable and adequate compensation in terms of general damages.

28. All in all, and for reasons foregoing this appeal is well merited and is hereby allowed to the extent that the Judgment delivered by the trial court on 9<sup>th</sup> November 2022 be and is hereby set aside and substituted for a judgment dismissing the respondents case against the appellant with costs. The appellant shall also have the costs of the appeal.

Ordered accordingly

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 2ND DAY OF MAY, 2024.**

**J. R KARANJAH**

**JUDGE**

