



**NCBA Bank Kenya PLC (Formerly Commercial Bank of Africa Limited) v Nyaribo & another
(Civil Appeal E623 of 2022) [2024] KEHC 8071 (KLR) (Civ) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E623 OF 2022

DAS MAJANJA, J

JULY 5, 2024

BETWEEN

NCBA BANK KENYA PLC (FORMERLY COMMERCIAL BANK OF AFRICA LIMITED) APPELLANT

AND

VICTOR MAINA NYARIBO 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G. Sogomo, PM dated 22nd July 2022 at the Magistrates Court at Nairobi in Civil Case No. E919 of 2020)

JUDGMENT

Introduction and Background

1. Before the Subordinate Court, the 1st Respondent filed suit against the Appellant and the 2nd Respondent claiming that on or about 20.12.2013, they falsely, maliciously and without any reasonable cause caused him to be charged in Nairobi Milimani Chief Magistrates Court vide CMCCR Case No. 2071 of 2013 for one count that on 17.12.2013 he caused a fraudulent transfer into an account number 65****16. The 1st Respondent denied the charge. On 15.12.2017, the court discharged the 1st Respondent under section 210 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya). The 1st Respondent claimed general, exemplary and punitive damages for wrongful arrest, false imprisonment, malicious prosecution, mental anguish, injured reputation and loss of earnings, special damages, interest and costs.
2. In its defence, the Appellant stated that the 1st Respondent was employed at its Mama Ngina Branch. That on 17.12.2013, it discovered that the 1st Respondent's IP address was used to facilitate the



fraudulent withdrawal of Kshs. 923,000.00 from A/c KES 1 01-08-01 belonging DOO in favour of A/c 650****16 belonging to MKM. The Appellant commenced investigation into the suspected fraud. Upon conclusion of the investigations on 17.01.2014, the Appellant lodged a complaint with the Banking Fraud Investigation Unit. After the Unit concluded investigations, the 1st Respondent was subsequently charged in CMCCR Case No. 2071 of 2013 with the offence of stealing by servant contrary to section 281 of the Penal Code (Chapter 63 of the Laws of Kenya). Further, that he was summarily dismissed from the Appellant's employment on 27.01.2014 on the ground of gross misconduct.

3. The Appellant contended that neither itself nor its employees were malicious in the filing of the complaint or in the giving of evidence in the criminal case and that there was probable/reasonable cause in filing the complaint. The Appellant stated that it did not have a right of appeal against the ruling of the Subordinate Court delivered on 15.12.2017. It further stated that the claim of defamation was statutorily time barred and that the 1st Respondent had not provided the particulars of the alleged defamatory words the Appellant was alleged to have uttered against him, hence contravening the express provisions of Order 2 Rule 7(1) of the Civil Procedure Rules, 2010. The Appellant thus sought that the suit against it be dismissed. The 1st Respondent withdrew his case against the 2nd Respondent.
4. When the matter was set down for hearing, the 1st Respondent (PW 1) testified on his own behalf while the Appellant called its Legal Officer, Angela Njoroge (DW 1). The parties thereafter filed written submissions and the subordinate court then rendered a judgment on 22.07.2022. The Subordinate Court held that the report alluded to by the Appellant as having found the 1st Respondent culpable for the fraud complained of and having informed its decision to terminate his services and press criminal charges against him was not produced in evidence. That to compound the foregoing, the 1st Respondent was absolved of the malfeasance complained of when he was acquitted under section 210 of the Criminal Procedure Code, the trial court having made the finding that the evidence proffered by his accusers was so underwhelming that it was not worth the court's while to hear his defence. It therefore found the Appellant liable for the torts the subject of the 1st Respondent's claim and awarded him a global sum of Kshs. 500,000.00, costs and interest.
5. The Appellant now appeals to this court against the judgment grounded on its memorandum of appeal dated 08.08.2022. The appeal has been canvassed by way of written submissions where the parties restate the positions I have already highlighted above and therefore, I will not summarize the same but make relevant references to them in my analysis and determination below.

Analysis and Determination

6. Since this is the first appeal, this court is mandated to re-evaluate the evidence before the subordinate court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (See *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123).
7. From its submissions, the Appellant urges the court to interrogate whether the trial magistrate erred in law and in fact in failing to find that a claim for malicious prosecution can only be maintained against the office of the Director of Public Prosecution, whether the learned magistrate erred in law and in fact by making a finding of liability against the Appellant for the torts of false wrongful arrest, unlawful detention, false imprisonment and malicious prosecution when none was proved by the



- 1st Respondent and whether the Learned Magistrate erred in law in failing to adhere to the legal requirements for drafting a judgment pursuant to Order 21 Rule 4 and 5 of the Civil Procedure Rules.
8. I agree with the parties' submissions that the principles governing a claim founded on malicious prosecution was set out in the cases of *Kagane and Others v Attorney General and Another* [1969] EALR 643 and *Mbowa v East Menngo District Administration* [1972] EA 352 as follows;
 - a. The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;
 - b. The Plaintiff must show that the prosecution terminated in his favour;
 - c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;
 - d. He must also show that the prosecution was actuated by malice.
 9. In *Mbowa* (Supra), the court stated that "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."
 10. It is not in dispute that the Appellant lodged a complaint to the police about the alleged fraudulent transaction involving the 1st Respondent. However, the Appellant submits that it is the instigators of criminal proceedings, that is the office of the Director of Public Prosecution in conjunction with the National Police Service, who can be held responsible for commencing criminal cases without a reasonable and probable cause. The Appellant submits that it did not play any part in framing charges and arraigning the 1st Respondent in court to respond to the framed charges as that was the work of the office of the Director of Public Prosecution and the Police. The Appellant further submits that nothing would have stopped the office of the Director of Public Prosecution from declining to commence the criminal case, if it believed that there was no reasonable and probable cause to proceed against the 1st Respondent, as under Article 157 of *the Constitution*, the Director of Public Prosecution in discharging his functions shall not be under the direction or control of any person or authority.
 11. In *Ruli v Republic* [1985] KLR 373 it was held "we must state from the onset that we are satisfied that the term "complainant" in section 201 (current Section 204 of the CPC includes the prosecution as well as the person described in the particulars of the charge". Further in the case of *Gitau v Attorney General* [1990] KLR 13 it was stated "To succeed in a claim for malicious prosecution the plaintiff must establish that the defendant or his Agent set the law in motion against him on a criminal charge". Recently, this court, in *Airtel Network Kenya Ltd v Alakonya & 3 others* [2024] KEHC 6497 (KLR) stated that the phrase "setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action such as effecting arrest but means "being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate".
 12. The Appellant is the one who set the law in motion that led to the 1st Respondent's arrest and eventual prosecution and therefore fits the bill of the person who instituted his prosecution. In short, I am saying that a claim founded on malicious prosecution does not only lie with the Office of the Director of Public Prosecutions as advanced by the Appellant but all persons described in the particulars of the charge including the complainant. This ground of appeal by the Appellant therefore fails and I find that the 1st Respondent thus satisfied the first element for his claim to succeed. He also satisfied the second element as the prosecution was terminated in his favour.



13. On whether the prosecution was instituted without reasonable or probable cause, I note that the prosecution was terminated by dint of section 210 of the Criminal Procedure Code. An acquittal under this provision happens after the court has heard the prosecution and it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence. In any event, it should not be lost that for one to be arrested, all the police have to establish is reasonable suspicion and the rest is left to the trial court (see *Hassan Ali Joho v Inspector General of Police & 3 others* [2017] eKLR and *Republic vs. Commissioner of Police ex- and another ex-parte Michael Monari & Another* [2012] eKLR).
14. In the criminal case against the 1st Respondent, two witnesses testified and the prosecution closed its case having failed to secure the attendance of the investigating officer. The question is thus whether the prosecution had reasonable cause to charge the 1st Respondent for stealing Kshs. 923,000.00 on 17.12.2013 as per the charge sheet. From the record of proceedings in the criminal case, one of the witnesses stated that the 1st Respondent had intimated to him that he (the 1st Respondent) wanted to steal money from the Appellant and that he sought the witness's cooperation which the witness declined. The other witness stated that the 1st Respondent showed him how to authorize transactions done by tellers and that he told him that he knew of some gentlemen who had sophisticated software which was capable of deleting such transactions undertaken from the system without reversing the same. From the foregoing, there was no prima facie evidence linking the 1st Respondent to the loss of Kshs. 923,000.00 other than his conversations to colleagues about his intention to steal from the bank and how the same can be done. The record does not have the witness statement of the investigation officer on what more he had on the 1st Respondent that linked him to the theft. This could only mean that there was no probable or reasonable cause to charge the 1st Respondent.
15. Therefore, whereas I agree with the Appellant that an acquittal under section 210 of the Criminal Procedure Code does not necessarily mean that there was no probable cause to charge someone, there was no reasonable or probable cause to charge the 1st Respondent in this case as there was no evidence linking him to the theft of Kshs. 923,000.00. Further, whereas in establishing probable cause to arrest or prosecute, the prosecution need not to demonstrate that it has evidence beyond reasonable doubt that will lead to a suspect's conviction, it should have at least prima facie evidence for the prosecution to be deemed reasonable. There was no reasonable and probable cause to arrest, charge and prosecute the 1st Respondent as the prosecution had no prima facie evidence or case against him just as was held by the criminal court. Curiously, I note that the 1st Respondent was arrested and charged on 20.12.2013 but that investigations against him were concluded on 17.01.2014, meaning that the 1st Respondent was arrested and charged before investigations were completed which fortifies the position that the Appellant did not have any evidence against the 1st Respondent at the time of his arrest, arraignment and charging. My finding above is that the 1st Respondent proved the third element that the prosecution against him was instituted without probable cause.
16. The next element the 1st Respondent was required satisfy was whether the prosecution was actuated by malice. Malice means spite or ill will and it must be proved in order for a claimant to succeed. In *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd and 5 Others* [2004]eKLR, Onyango Otieno JA., observed as follows:

Where the complainant reports a commission of crime to the police and police upon independent investigations initiate a prosecution the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously.



17. Where the defendant is a corporate person, there must be malice on the part of its agent from which the company can be held liable. Moreover, the fact of an acquittal is not sufficient to establish malice. In *Nzoia Sugar Company Limited v Fungututi* [1988] KLR 399, the Court of Appeal had this to say;

Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence in one of its servants that can be attributed to the company.

18. While malice may be implied from the lack of a reasonable and probable cause, malice is a different element that must be proved. As I understand, the law is that the 1st Respondent had to show that the Appellant through its agents was actuated by ill-will or spite against him or that there was an improper motive. The Appellant was adamant that the 1st Respondent was responsible for the theft and reported it to the police. The police took up the matter, carried out investigations and felt that it had a case against the Respondent to which they sustained the prosecution. I fail to find any inference of malice or abuse of the criminal justice system by the Appellant from this chronology of events. Failure by the prosecution to avail all witnesses such as the investigation officer is not evidence of malice to be laid at the door of the Appellant who had no control over the investigation and prosecution. I therefore find that this element of malice was satisfied by the 1st Respondent

Disposition

19. The Appellant's appeal succeeds and the 1st Respondent's claim for damages for malicious prosecution is hereby dismissed and the award on general damages of Kshs. 500,000.00 by the trial court is hereby set aside. The 1st Respondent shall pay the Appellant costs of this appeal assessed at Kshs. 25,000.00.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2024.

D. S. MAJANJA

JUDGE

