



**Atieno v Attorney General & another (Civil Case 279 of 2015)
[2024] KEHC 12746 (KLR) (Civ) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12746 (KLR)

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

**CIVIL
CIVIL CASE 279 OF 2015**

**AN ONGERI, J
OCTOBER 8, 2024**

BETWEEN

MARY ATIENO PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

G4S KENYA LIMITED 2ND DEFENDANT

JUDGMENT

1. The plaintiff herein, Mary Atieno (hereafter referred to as the plaintiff only) filed this suit vide plaint dated 1/8/2015 seeking the following remedies against the Attorney General and G4s Kenya Ltd (hereafter referred to as the 1st and 2nd defendant respectively)
 - i. General damages for loss and suffering.
 - ii. Aggravated damages.
 - iii. Special damages of ksh.200,000.
 - iv. Costs of the suit.
 - v. Interest on the above at court rates;
 - vi. Any other relief the honourable court deems appropriate.
2. The plaintiff averred as follows in the said plaint;
3. The 2nd Defendant is a Company registered under the *Companies Act* and engages in inter alia, the business of providing guarding and cash in transit services. (Service upon the Defendant was to be effected through the Plaintiffs advocates offices.)



4. At all material times to this suit, the Plaintiff was the Support Supervisor and Acting Operations Manager at the Standard Chartered Bank Limited, Harambee Avenue Branch.
5. On the 26th January 2011 or thereabouts, the Plaintiff while in the course of her duties at the said branch, received instructions from the 2nd Defendant to release Kshs.24,181,657 to an account specified by the 2nd Defendant.
6. The Plaintiff followed the laid down procedures for clearance of monies and made a call to the 2nd Defendant offices and was given the authorization to release the said funds to the specified account.
7. The Plaintiff in releasing the said funds adhered to the guidelines, practices and customs established by the Standard Chartered Bank Limited with the 2nd Defendant for clearance and release of funds from the 2nd Defendant's accounts
8. The 2nd Defendant thereafter maliciously accused the Plaintiff of jointly with others, of stealing the said sum of Kshs.24,181,657 without any basis whatsoever.

Particulars of Malice

- a. Falsely accusing the Plaintiff of stealing the said sum when the 2nd Defendant knew very well that the Plaintiff had followed the laid down procedures in authorizing the release of funds to the 2nd Defendant's officers;
- b. Instigating the prosecution of the Plaintiff for the offence of stealing in Criminal Case No. 221 of 2011 without any legal basis;
- c. Instigating the prosecution of the Plaintiff for the offence of stealing when the 2nd Defendant knew that it was its officers who may have stolen the said sum after lawful release by Standard Chartered Bank Limited;
- d. Instigating the prosecution of the Plaintiff in order to form a basis of claiming a refund of the said sum from its insurers since the 2nd Defendant's insurance policy at the time did not cover theft by staff;
 1. The 2nd Defendant's accusations against the Plaintiff were accentuated by the need to claim a refund of the said sum from its insurers since the 2nd Defendant could not claim the lost sum in the event that the theft was solely by its own staff.
 2. The Plaintiff's employer, the Standard Chartered Bank Limited upon conducting its own internal investigations and inquiries on the loss of the said monies determined that the Plaintiff had done everything according to instructions issued by the 2nd Defendant and that the Plaintiff was not in any way culpable for the loss of the said funds and that the loss was purely attributable to officers of the 2nd Defendant.
 3. That the 2nd Defendant, even on the strength of such impartial and credible advice and information persisted with its false accusations against the Plaintiff and instigated her prosecution by the State.
 4. The Kenyan State instituted the prosecution of the Plaintiff at the behest of the 2nd Defendant when it was clear from the outset that there was no legal basis upon which such a prosecution could be pursued.
 5. The Plaintiff was arraigned in court in the year 2011 and was acquitted in August 2014 when the Honourable Trial Court found that the Plaintiff did not have a case to answer.



6. The Plaintiff has since suffered loss and damage to her reputation as a banker entrusted with the responsibility of managing billions of shillings in trust of her employer's Clients.
7. The malicious prosecution of the Plaintiff was extensively covered in the media thereby contributing to the loss and damage to her reputation as a banker and the Plaintiff claims general damages.
8. The 2nd Defendant instigated the prosecution of the Plaintiff for the sole purpose of benefitting from its insurers through repayment of the lost sums and not on reasonable and genuine grounds and the Plaintiff claims aggravated damages.
9. The Plaintiff was forced to incur costs in attending to court and defending her malicious prosecution as instigated by the 2nd Defendant.

Particulars of Special Damages

- a) Travelling and Subsistence Kshs.200,000
Total Kshs.200,000

And the Plaintiff claims special damages.

18. Despite demand being made and notice of intention to sue being given, the Defendants have refused, neglected and/or ignored to make good the Plaintiff's claim.
19. The Plaintiff avers that there have been no previous proceedings instituted against the Defendants by the Plaintiff herein grounded on the same cause of action before this court or any other court or Tribunal.
20. This Honorable court has jurisdiction to hear and determine this suit.
21. The 2nd defendant filed a statement of defence dated 21/3/2016 denying the plaintiff's suit.
22. The 2nd defendant averred as follows in the said statement of defence.
23. The 2nd Defendant states that it issued a cheque for the sum of Kshs.24,181,657/-made payable to the Commissioner of VAT being payment of VAT for December 2010. The payment was to be effected by telegraphic transfer through Barclays Bank of Kenya Limited. No instructions were issued to be effected through Standard Chartered Bank Limited and any payment made through that Bank were therefore without authority.
24. Upon establishing that a fraud had been committed upon it, the 2nd Defendant reported the matter to the police who then undertook their investigations and identified various persons as suspects in the fraud. The report to the police was neither false nor malicious and was predicated upon a reasonable and probable cause that a criminal offence had taken place.
25. The 2nd Defendant being a private person gave information to the police who in exercise of their powers and absolute discretion initiated investigations and criminal proceedings. The Plaintiff was not personally known to the 2nd Defendant and such information as was given to the investigating officers did not in any manner identify the Plaintiff as the person to be charged for the offence. The Plaintiff was charged with several other individuals equally not known to the 2nd Defendant.
26. Paragraph 8 of the Plaint is denied. The particulars of malice set out therein are denied as if the same were herein set out and traversed seriatim. The 2nd Defendant further states as follows:



- a. The 2nd Defendant did not falsely accuse the Plaintiff as alleged or at all. In its report to the police, it stated that the payment of Kshs.24,181,657 which it was aware of was to have been effected through Barclays Bank limited and that as such no authority was issued to the Plaintiff by an authorised officer of the 2nd Defendant for the payment to an unknown third party through any other bank.
 - b. The 2nd Defendant did not instigate the prosecution of the Plaintiff nor was it capable of so doing. The mandate to investigate vests in the Police Service while that to prosecute vests in the office of the Director of Public Prosecution and/or the A-G.
 - c. At the time of making the report to the police, the 2nd Defendant had no knowledge of who had committed the fraud or how it had been committed. The allegation that the 2nd Defendant knew that its officers may have stolen the money is denied and the Plaintiff put to strict proof.
 - d. The 2nd Defendant at all times had insurance to cover potential losses and duly reported the loss immediately it arose. Such report was not conditional upon the Plaintiff's arrest, an act that the 2nd Defendant in fact had no control over.
27. The plaintiff testified as PW 1. She adopted her written witness statement dated 1/8/2015 as her evidence in chief.
- She was subjected to prosecution in Criminal Case No. 221 of 2015, which was initiated by the Second Defendant. The Second Defendant was unable to recover the amount lost from the insurers in relation to the theft. As a direct consequence of the prosecution, the declarant suffered damage to her reputation and incurred legal expenses, along with other associated costs, in order to attend court proceedings.
28. The 1st and 2nd defendants called one witness each. The 2nd defendant called Eric Manyara Githogo (DW 1) who adopted his written witness statement dated 26/8/2022 as his evidence in chief.
29. In his statement he said that on 14/1/2011 he raised a cheque of Kshs. 24,181,657 payable to the Kenya Revenue Authority as payment for Value Added Tax for December 2010. He took the cheque to the Financial Controller of the 2nd defendant Ephantus Githinji for authorization. As the payment was over Kshs. 10,000,000, it was to be effected by electronic funds transfer through Barclays Bank of Kenya Limited.
30. On or about 11/2/2011 the financial controller reported to the 2nd defendant Risk and Security Department that the cheque had been processed through Barclays Bank Account but that KRA were demanding payment and were threatening to impose penalties for payment. When investigations were undertaken it was revealed that the payment had in fact been diverted and effected through Standard Chartered Bank limited. The Risk and Security Department suspected that a fraud had been committed and consequently reported the matter to the police which commenced investigations leading to the identification of various persons as suspects in the fraud.
31. He subsequently made a report to the police which was neither false or malicious. At the time of making the report the 2nd defendant had no knowledge of who had committed the fraud and how it had been committed. The 2nd defendant was not personally known to the 2nd defendant a such information was given to the investigation officers did not in any manner identify the plaintiff as the person to be charged for the offence.
32. The 2nd defendant also called one witness No. 56274 Sergeant Jairus Mbondo who testified as DW 2.
33. DW 2 adopted his written witness statement dated 7/5/2024 as his evidence in chief.



34. The witness stated as follows in the said witness statement. In it he stated that a report was made by one Joseph Yegon of the Complainant Company G4S on 11/2/2011 in Nairobi from Industrial Area police station that Kshs. 24,181,657 which was meant to be transferred to Kenya Revenue Authority as VAT was directed and transferred to account no. 2555914 Barclays Bank, Enterprise Road, Account name Kwanja enterprise ltd.
35. The matter was being investigated by Mr. Nangulu, Chief Inspector Shegu and himself. He accompanied the chief inspector and arrested the plaintiff on 13/2/2011 along with several other suspects. The plaintiff was later released on 13/2/2011 on cash bail to report to court on 3/3/2011.
36. The parties filed written submissions as follows; the plaintiff submitted that indeed the criminal proceedings was instituted by the defendants. The prosecution of the plaintiff in the lower court was at the instigation of the 2nd defendant without reasonable justification or probable cause. The plaintiff's purported participation in the commission of the alleged offence was ostensibly because no call back was made to the 2nd defendant before the payment was released to its employees. The 2nd defendants however failed to present its call logs in proof of the same.
37. The plaintiff further submitted that the 2nd defendant by its own admission in court and supported by the record from the trial court conducted its own internal investigations and identified the persons who were responsible for the theft.
38. The plaintiff on malice argued that she would have never been prosecuted without the assertion of the 2nd defendant. The 2nd defendant maliciously accused the plaintiff of the theft and refused to provide the evidence which was in their possession to demonstrate that the call back from Standard Chartered was made before the cheque was cleared and payment made. The criminal proceeding against the plaintiff in the aforementioned case were terminated on 15/8/2014 when the trial court in a ruling found that the plaintiff had no case to answer.
39. On damages the plaintiff proposed a sum of Kshs. 4,500,000 as general damages and relied on the case of Antony Murimi Waigwe v. Attorney General & 4 Others [2020] eKLR, in which the court awarded a global sum of Kshs. 4,500,000 to a supermarket attendant who had been arrested and prosecuted, and who awaited the hearing of his case for a duration of 23 months, during which the hearing never took place.
40. The 1st Defendant, in its submissions, contended that the criminal proceedings against the Plaintiff were withdrawn pursuant to Section 210 of the Criminal Procedure Code. The 1st Defendant argued that this withdrawal does not constitute sufficient grounds to establish a claim of malicious prosecution. The prosecution was instituted on the need to enforce criminal law.
41. A report was made to the industrial area police station vide OB 55/11/2/2011 that a G4S office had received a complaint from KRA that the VAT tax for the month of January 2011 had not been remitted to their accounts. Investigations were done and it was revealed that the transaction was effected using forged documents and signatures prepared by the G4S treasury accountant.
42. The police were neither provided with the call logs from Standard Chartered Bank nor G4S in order to make a conclusive report. The level of inconsistency would therefore be reasonable enough to bring the persons before a court of law to exonerate themselves. The police arrested the plaintiff together with others and charged them with the offence of forgery contrary to section 349 of the penal code.
43. The 1st Defendant submitted that the procedures and processes employed by the police during the investigations were in accordance with the established guidelines, and as such, the Plaintiff has failed



to prove any malice. Consequently, the Plaintiff was not defamed and is therefore not entitled to seek damages on that basis.

44. The 2nd defendant reiterated what was argued by the 1st defendant in its submissions and added that it was its duty to report a crime against its property as enshrined in Article 40 of *the Constitution* of Kenya. That in reporting a crime, the 2nd defendant cannot be held liable as to the outcome of its investigations.
45. The 2nd Defendant further argued that it was the Plaintiff's responsibility to demonstrate that, at the time of making the report to the police, the 2nd Defendant lacked reasonable cause or belief that a crime had been committed. The Second Defendant contended that the Plaintiff has failed to meet this burden of proof.
46. It is the duty of the plaintiff to prove her case to the required standard in civil cases which is on a balance of probabilities.
47. The issues for determination in this case are as follows;
 - i. Whether the plaintiff has proved her case to the required standard.
 - ii. Whether the defendants have a valid defence against the plaintiff's suit.
 - iii. Whether the plaintiff is entitled to the remedies she is seeking against the defendants.
 - iv. Who pays the costs of this suit?
48. On the issue as to whether the plaintiff has proved her case to the required standard, I find that it is not in dispute that the 2nd defendant issued cheque for ksh.24,181,657 on 26/1/2011 payable to Kenya Revenue Authority (KRA).
49. It is not in dispute that the said cheque was diverted and paid to a different party altogether.
50. The cheque was authorized by the plaintiff. The plaintiff said she made a call to the 2nd defendant before she cleared the cheque but the 2nd defendant concealed this fact.
51. There is evidence that the 2nd defendant subsequently accused the plaintiff of the theft and refused to provide the evidence which was in their possession to demonstrate that the call back from Standard Chartered was made before the cheque was cleared and payment made.
52. There is also evidence that the criminal proceedings against the plaintiff in the aforementioned case were terminated on 15/8/2014 when the trial court in a ruling found that the plaintiff had no case to answer.
53. There is evidence that the cheque was handled by other employees of the bank who were not charged.
54. There is evidence that the plaintiff was charged alongside the employees of the 2nd defendant before she was acquitted by the court.
55. In the case of Stephen Gachau Githaiga & Another v Attorney General[2015] eKLR, Justice Mativo discussed the tort of malicious prosecution as follows;

“Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution.

Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper



target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.

The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.

The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."

56. I find that the plaintiff has proved that she was prosecuted maliciously by the 2nd defendant.
57. This was a high conspiracy by employees of the 2nd defendant to steal from their employer and there is no evidence that the plaintiff was involved in the alleged theft of the colossal sums.
58. I find that the 2nd defendant has no defence against the plaintiff's claim.
59. The 1st defendant as the body responsible for investigations and charging wrong doers did the right thing to prefer charges, based on the facts disclosed by the 2nd defendant.
60. I find that the complaint made by the 2nd defendant warranted investigations and action which the 1st defendant did.
61. However, the 2nd Defendant did not disclose the full facts to the 1st Defendant.
62. The 1st defendant would not have charged the plaintiff had it been disclosed that the plaintiff made calls to the 2nd defendant before clearing the cheque for payment and for that reason, I exonerate the 1st defendant from liability.
63. I find that the plaintiff is entitled to the remedies she is seeking from the 2nd defendant.
64. I award her damages as follows;
General damages for malicious
Prosecution and false imprisonment ksh.4,000,000
Special damages ksh.200,000



Total Ksh.4,200,000

65. The plaintiff is not entitled to aggravated damages since the general damages are sufficient.
66. I enter judgment in favour of the plaintiff against the 2nd defendant in the sum of ksh.4,200,000 plus costs and interest on the special damages from the date of filing suit and the general damages from the date of this judgment until payment in full.
67. The 2nd defendant to pay the plaintiff's costs and the 1st defendants costs of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

