



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 209 OF 2017**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT**

**VERSUS**

**PATRICK MUTUKU.....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the decision of *Hon. D. O Mbeja* dated 18<sup>th</sup> April 2017 in which the respondent herein, then the plaintiff, was awarded KShs.900,000 as general damages for malicious prosecution. The respondent had sued the appellant jointly with the Hon. Attorney General seeking general damages for malicious prosecution together with costs of the suit and interest.

2. The respondent's claim was enumerated in a plaint dated 18<sup>th</sup> May 2015. He averred that he had been employed by the appellant as a teller and on 31<sup>st</sup> July 2012, he was arrested and charged in Criminal Case No. 1142 of 2012 with the offence of stealing by servant contrary to *Section 281* of the *Penal Code* following a complaint lodged by the appellant through its agents to the police to the effect that he had stolen KShs.2,220,000 in the course of his employment; that he pleaded not guilty to the charges and after going through the trial, the prosecution case was dismissed and he was acquitted on 20<sup>th</sup> May 2014. He claimed that in initiating and mounting his prosecution, the appellant and the Hon. Attorney General were actuated by malice. The particulars of the alleged malice by the defendants were pleaded in paragraph 8 of the plaint.

3. The appellant filed its statement of defence on 6<sup>th</sup> July 2015. It did not dispute the arrest and prosecution of the respondent but it denied that the said prosecution was malicious and put the respondent to strict proof thereof. From the record, it is not clear whether the Hon. Attorney General filed a defence to the respondent's claim since I did not come across any either in the record of appeal or in the original record of the trial court. I found this difficult to understand since the record does not show that interlocutory judgment was ever entered against the Hon. Attorney General which is what would be expected if the 2<sup>nd</sup> defendant did not file a defence and both the trial court and the advocates on record did not make any reference to a defence having been filed by the 2<sup>nd</sup> defendant.

4. The record of the trial court reveals that the respondent testified in support of his case but did not call any other witness. Two witnesses testified in support of the appellant (1<sup>st</sup> defendant) but the 2<sup>nd</sup> defendant (Hon. Attorney General) did not call any witness.

5. In his evidence, the respondent testified that at the time he was arrested, he was employed by the appellant as an executive teller. He was an ATM, vault custodian and was also offering forex moneygram services. There were three computers enabled to offer the said services and two of them were in the executive section where he worked and one at the forex section. He admitted that on the dates alleged, the appellant lost a total sum of KShs.2,200,000 which was paid out but was not reflected in the bank's system. He denied any involvement in the said loss saying that the moneygram status report showed that the fraudulent transactions were made by the teller assigned user number 2 while he was user number 3.

6. He maintained that his arrest and prosecution was not based on good and probable cause and was actuated by malice mainly because in his view, the defendants did not have any evidence to link him to the fraudulent transactions; the teller who had made the transactions was user number 2 one *Paul Nyandika* who was not summoned by the police to record a statement and he did not testify in the criminal trial; that his work station had been under CCTV surveillance but the CCTV footage was not produced in evidence in the criminal trial; that the criminal trial took two years after which he was acquitted of the charges. He produced the charge sheet, the proceedings in his criminal trial and judgment of the court in evidence in support of his case.

7. The appellant's witnesses testified as DW1 and DW2. They countered the respondent's case by asserting that there was nothing malicious about his arrest and prosecution. They both stated that of the two computers enabled to do moneygram transactions, the one which was being used by the respondent identified as No. 4895688603 was the source of the fraudulent transactions; that though the moneygram status report showed that the transactions had been effected by user number 2, the teller who had been assigned that number one *Paul Nyandika* was at the material time not working at the executive section on the ground floor where the computers enabled to do that work were located; that he had been deployed to the 1<sup>st</sup> floor as a co-operative officer.

8. DW1 who was the operations manager recalled that on the day the money was lost, the respondent was the only one who had used the computer from which the fraudulent transactions were processed and other transactions effected by user No. 3 who was the respondent had been effected from the same computer at almost the same time. The witnesses claimed that since the bank had lost money, they had no choice but to report the matter to the police for further investigations.

9. As noted earlier, the learned trial magistrate after conclusion of the hearing rendered his decision on 18<sup>th</sup> April 2017 and found for the respondent against both defendants jointly and severally. The appellant was aggrieved by the trial court's decision hence this appeal.

10. In its memorandum of appeal, the appellant basically complained that the trial court erred by failing to consider and to apply the principles of law that set out the ingredients of the tort of malicious prosecution and by considering extraneous matters as a result of which he wrongly found that the respondent had established his claim against the appellant and the 2<sup>nd</sup> defendant. The trial court was also faulted for failing to adequately consider the appellant's evidence and submissions and for awarding the respondent damages in the sum of KShs.900,000 when the evidence on record was insufficient to prove the respondent's claim.

11. By consent of the parties, the appeal was prosecuted by way of written submissions which were duly filed by each of the parties.

12. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am aware that as the first appellate court, I am enjoined to revisit and to re-evaluate the evidence tendered before the trial court and make my independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses and give due allowance to that disadvantage - See: **Selle & Another V Associated Motor Boat Company Limited & Others, [1968] EA 123; Peters V Sunday Post Limited [195] EA 424.**

13. It is however important to state at the outset that as a general rule, an appellate court should be slow to interfere with the findings of fact made by the trial court. The law is that an appellate court will only interfere with findings of fact made by the trial court if it is satisfied that the findings were not based on any evidence or were based on a misrepresentation of the evidence or that in making the finding, the trial court acted on wrong legal principles. See – **Kiruga V Kiruga & Another [1988] KLR 348;** and **Sumaria & Another V Allied Industrial Limited (2007) 2 KLR 1.**

14. With the above principles in mind, I have considered the grounds of appeal, the evidence on record, the parties' rival written submissions and the authorities cited. I find that the key issue that arises for my determination is whether or not the learned trial magistrate erred in finding that the respondent had successfully proved the tort of malicious prosecution against the appellant to the required standard of proof.

15. The tort of malicious prosecution is designed to provide redress to a person who suffers loss or damage as a result of a baseless and unjustified prosecution. The ingredients of the aforesaid tort which a plaintiff must prove in order to succeed in his/ her claim have been settled by several authorities which includes **Murunga V Attorney General, [1979] KLR 138; Mbowe V East Menjo District Administration, [1972] EA 352; Kagane & Others V Attorney General, [1973] EALR 287; Stephen Gachau Githaiga V Margaret Wambui Weru & Another, Nyeri Civil Appeal No. 27 of 2014, [2015] eKLR; Kima International School of Theology V Peter Ontino Atich & 2 Others, [2016] eKLR** among others.

16. The above authorities establish that for a plaintiff to sustain a claim for malicious prosecution, he must prove the following;

- i) *That the prosecution was initiated and instituted by the defendant or his agents ;*
- ii) *That the prosecution was instituted without reasonable and probable cause;*
- iii) *That the prosecution was activated by malice; and*
- iv) *That the prosecution terminated in the plaintiff's favour.*

As stated by the East African Court of Appeal in **Mbowe V East Menjo District Administration, (supra)** the above four essential elements must be proved together before a plaintiff can establish a claim for malicious prosecution. Proof of one or some of the ingredients is not sufficient. In buttressing this principle, the court stated as follows:

***“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. ...”***

17. Regarding the first element stated above, it is not disputed that following a complaint made to the police by the appellant, the respondent was charged in two counts with the offence of stealing by servant contrary to *section 268 (1)* as read with *section 281* of the *Penal Code* in the Chief Magistrate's court at Nairobi in Criminal Case No. 1142 of 2012. It is also not contested that the prosecution terminated in his favour. What was strongly contested is the respondent's claim that the said prosecution was malicious.

18. The question that this court must now answer is whether the respondent proved on a balance of probabilities that his prosecution was instituted without reasonable and probable cause and that in instituting the prosecution, the defendants were motivated by malice.

In **Kagane V Attorney General [1969] EA 643,** the court defined what constituted reasonable and probable cause as follows:

***“Reasonable and probable cause is 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 an***

***ordinary 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. ...”***

In other words, reasonable and probable cause would be established if there is evidence to demonstrate that the facts upon which the impugned prosecution was based were sufficient to convince a reasonable man that the prosecution was justified. The test is therefore objective as opposed to subjective.

19. In this case, it is not disputed that the appellant lost KShs.2,200,000 through fraudulent moneygram transactions at a time when the respondent was working as an executive teller offering forex moneygram services. The respondent admitted this fact in his evidence before the trial court.

DW1 and DW2 stated in their evidence that in the course of their internal investigations within the bank, they established that the fraudulent transactions had all been made using a computer device identified as No. 4895688603 which was being operated exclusively by the respondent. The respondent did not expressly dispute this fact.

20. In his evidence under cross examination, the respondent admitted that he was on duty on 26<sup>th</sup> and 28<sup>th</sup> July 2012 when the transactions that led to the loss of the aforesaid money were made and that on those dates, he was not sharing his work station with anybody else. He again admitted that the appellant’s complaint to the police was justified since it had lost the money in question.

21. In view of the foregoing facts, it is clear that there were good and reasonable grounds to believe that the respondent was involved in the theft of a total of KShs.2,200,000 from the bank by paying out money to external customers which had not been received by the bank. The fact that the moneygram status report showed that the transactions were processed by user number 2 and not user number 3 which was allocated to the respondent does not negate the existence of other facts which were availed to the lower court in the form of evidence by DW1 and DW2 which clearly proved that there was reasonable and probable cause to cause the prosecution of the respondent. He was an obvious suspect.

22. In his judgment, the learned trial magistrate stated as follows:

***“The bank in the instant case acted upon reasonable belief it held perhaps in good faith that the plaintiff was culpable for the loss of monies arising in this case given the circumstances of this case, however the criminal court found otherwise that he was not culpable. Holding an honest belief in the guilt of an accused person and finding him guilty are factors that should be construed in tandem, consistent with the prevailing facts of and circumstances in a particular case.”***

23. Having found that the appellant’s complaint to the police could have been made in good faith based on a reasonable belief that the respondent was culpable for the loss of the money, the learned trial magistrate erred when he proceeded to hold the appellant liable merely because the respondent had been acquitted in the criminal trial. The learned trial magistrate also erred when he failed to appreciate that the respondent had been put on his defence and that he was only acquitted under section 215 of the *Criminal Procedure Code*.

24. In *Murunga V Attorney General (supra)*, the Court of Appeal held that:

***“The fact that the appellant was put on his defence was proof enough that there was reasonable and probable cause for prosecuting the appellant and that the prosecution was commenced after reasonable suspicion.”***

I need not say more on this point save to add that in view of what I have stated above, I have come to the conclusion that in this case, there was good and probable cause to arrest and prosecute the respondent with the offence of theft by servant.

25. With respect to the requirement of proof of malice, the law is clear that the fact that a person was acquitted of criminal charges does not necessarily connote malice on the part of the prosecutor. The Court of Appeal in *Nzoia Sugar Company v Fungututi, [1988] KLR 399* reinforced this point when it stated that:

***“Acquittal per se on a criminal 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 on 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. ...”***

26. In the instant case, the appellant who was sued as the 1<sup>st</sup> defendant is an artificial person while the 2<sup>nd</sup> defendant was the Hon. Attorney General who had been sued on behalf of the Inspector General of Police. The respondent in his evidence did not point to anything that the appellant’s agents or the police officers involved in his prosecution did that would have constituted malice or ill will. In his evidence under cross examination, the respondent confirmed the absence of malice on the part of any of the defendants when he admitted that the appellant was justified in making a complaint to the police regarding the loss of its money. He in addition testified as follows:

***“I was charged by the police officer from information they got from Co-operative Bank. Witnesses testified against me. I did not have a grudge against police officers. The police were just investigators.”***

From this statement, it is apparent that the respondent had no reason to doubt that the police officers who arrested and made the decision to prosecute him were not motivated by any malice or ulterior motive but were just doing their work.

27. Given the foregoing, I find and hold that the respondent failed to prove that his prosecution was actuated by malice. This finding and my

earlier finding that there was evidence to demonstrate in this case that there was reasonable and probable cause to prosecute the respondent means that the respondent failed to prove two of the four essential ingredients of the tort of malicious prosecution and the suit ought to have been dismissed.

I therefore find merit in this appeal and it is hereby allowed. The judgment of the trial court is consequently set aside. It is substituted with a judgment of this court dismissing the respondent's suit with costs.

**28.** On costs of the appeal, the order that best commends itself to me is that each party shall bear its / his own costs.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI** this 8<sup>th</sup> day of November, 2018.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Mbichire holding brief for Mr. Kimondo Mubea for the appellant

No appearance for the respondent

Mr. Fidel: Court Assistant