



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA)

CIVIL APPEAL NO. 94 OF 2018

BETWEEN

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

AND

JULIUS KIEMA KENGA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment of the Employment & Labour Relations Court

at Mombasa (Makau, J.) delivered on 4th December 2015 in ELRCC No. 138 of 2015)

JUDGMENT OF THE COURT

1. Julius Kiema Kenga, (Kenga), the 1st respondent was an employee of Barclays Bank of Kenya Limited, (the Bank), the appellant, at its Moi Avenue Branch, Mombasa between October 1988 and April 1996 where he performed clerical duties in various departments, and ultimately as a cashier in the foreign exchange department.

2. On 14th February 1996, Kenga was arrested and charged before the Chief Magistrates' Court in Mombasa with four counts of the offence of fraudulent false accounting following a complaint made by the Bank. On the same date, he was suspended from employment. Subsequently, his employment was terminated by the Bank, by letter dated 23rd May 1996, with effect from that date.

3. Kenga was later acquitted on all four counts by the Magistrates' court in a ruling delivered on 11th December 1998 on the basis that the prosecution had not established a prima facie case against him. He then filed suit against the Bank and the 2nd respondent, the Attorney General, before the High Court at Mombasa, being Civil Suit No. 558 of 1999, in which he sought relief by way of "*general damages for false imprisonment and malicious prosecution, breach of contract and wrongful dismissal*" as particularized in his plaint as follows:

PARTICULARS OF DAMAGES

- a) One month's salary in lieu of Notice - Kshs. 19,687.00
- b) Profit sharing for the year 1995 - Kshs. 21,261.00
- c) Medical Allowance for 1996 - Kshs. 18,000.00
- d) Legal costs for Cr. Case No. 812/96 - Kshs. 100,000.00
- e) Salary upto retirement age of 60 years (Plaintiff aged 31 years at the time of Dismissal - Kshs. 6,851,076.00

- f) Medical Cover for 31 years - Kshs. 522,000.00
- g) House allowance for 30 years - Kshs. 480,000.00
- h) Pension contribution
- i) General damages for breach of contract and malicious prosecution, wrongful dismissal.
- j) General damages for false imprisonment and/or malicious prosecution

4. In its statement of defence, the Bank denied Kenga's claims. It averred that it did not make false, malicious or unfounded allegations against Kenga; and that it only lodged a complaint with the police, who, after carrying out investigations, decided to arrest and charge him with the offence.

5. The hearing of the suit commenced before the High Court where it was partly heard successively before *Njagi, J.* and *Kasango, J.*, before whom the plaintiff's case was substantially heard. On 10th March 2015, after consultation with counsel, *Kasango, J.* ordered:

“Although this matter is part heard...on further consideration of the issues herein I do make a determination that this is a matter that should be heard by Employment and Labour Relations Court.”

6. *Makau, J.*, of the Employment and Labour Relations Court (ELRC) proceeded with the hearing of the matter from where it had reached and after considering the evidence and the submissions, delivered the impugned judgement on 4th December 2015. In that judgement, the Judge identified three issues. First, whether the termination of Kenga's employment by the Bank constituted a breach of his employment contract; second, whether Kenga was falsely imprisoned and maliciously prosecuted; and third, whether Kenga was entitled to the reliefs that he sought.

7. On the first issue, the Judge found that the Bank did not breach Kenga's employment contract; that the Bank merely exercised its “*right to freedom of contract*” under the collective bargaining agreement and that his employment was terminated in accordance with the terms of engagement; and that the one-month salary *in lieu* of notice to which Kenga was entitled was properly applied towards offsetting his outstanding loan with the Bank.

8. As to whether Kenga was falsely imprisoned, the Judge found that the Bank had no control over the police in relation to detaining Kenga while under investigation and that the police had the sole mandate of deciding whether or not to release him on bond. The Judge concluded that on a balance of probability the Bank was not liable for false imprisonment. In as far as the second respondent was concerned, the Judge found the claim for false imprisonment as against it was time barred.

9. As for the claim for malicious prosecution, the court held that the ingredients of that tort were established and that the Bank and the second respondent were jointly liable.

10. In the end, the court awarded Kenga as against the Bank “Kshs.84,462.00 under the employment contract” made up of Kshs.63,201.00 being salary for February to May 1996 and Kshs.21,261.00 for ‘*profit sharing for the year 1995*’. As against the Bank and the 2nd respondent, the court awarded Kenga, Kshs.1,000,000.00 “*as general damages for malicious prosecution*” and Kshs.100,000.00 “*being special damages in respect of legal fees paid during the malicious prosecution*” and directed that payment for the total of Kshs.1,100,000.00 was payable paid by the Bank and the 2nd respondent jointly and severally.

11. Dissatisfied, the Bank lodged the present appeal. Urging the appeal before us, *Mr. S. Khagram*, learned counsel for the Bank, referred to the amended memorandum of appeal and his written submissions and submitted that, contrary to the finding by the trial Judge, and having regard to the evidence, the ingredients of the tort of malicious prosecution were not established. As to what must be established in such a claim, counsel referred to the case of *Kenya Flourspaar Company Limited vs. William Mutua Maseve & anor [2014] eKLR*.

12. It was submitted that merely because Kenga was acquitted of the criminal charges was not sufficient basis to find that malicious prosecution was established. The case of *Nzoia Sugar Company Ltd vs. Fungututi [1988] KLR 399* was cited. It was urged that based on the evidence, the Bank had reasonable cause for apprehension in so far as Kenga's conduct was concerned; that Kenga was found in possession of the Bank's foreign currency transaction receipts in his home and there was therefore a basis for investigations; that considering the Bank had reasonable and probable cause, the cause of action for the tort of malicious prosecution was not maintainable. In that regard, reference was made to the case of *Kenya Power & Lighting Co. Ltd vs. Maurice Otieno Odeyo & 2 others [2017] eKLR*.

13. Regarding the award of Kshs.84,462.00, *Mr. Khagram* submitted that the Judge misconstrued the evidence; that in relation to the profit-sharing award of Kshs.21,261.00, only staff who were on the payroll on 2nd January 1996 and who continued in service until 31st December 1996 were eligible; that under the scheme rules, staff who were terminated or dismissed were not eligible; that considering that Kenga's employment was terminated on 23rd May 1996, he was not entitled to any profit share. Furthermore, counsel urged, no evidence was produced to support the claim.

14. Counsel also faulted the Judge for awarding Kenga Kshs.63,201.00 salary for February to May 1996 considering that the Judge dismissed his contention that his termination was wrongful quite apart from the fact that Kenga had not made any such claim. In support of the submission that a court cannot grant relief on the basis of matters that are not pleaded, reference was made to the decision of this Court in *Evans Gundo vs. Naftali Sule [2002] eKLR*.

15. The Bank also took issue with the jurisdiction of the ELRC in entertaining a claim for malicious prosecution. It was submitted that under Sections 4 and 12 of the ELRC Act established pursuant to Article 162(2) of the Constitution, that court can only handle disputes relating to employment and labour relations. Counsel referred to the decision of this Court in **Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 others [2017] eKLR**.

16. Counsel concluded by urging that the award of interest on general damages from the date of filing suit instead of from the date of judgment was also erroneous. The case of **Nyamogo & Nyamogo Advocates vs. Barclays Bank of Kenya [2015] eKLR** was cited in support.

17. Supporting the appeal, learned State Counsel **Mr. N. Wachira** for the 2nd respondent, submitted that the essential elements to prove the tort of malicious prosecution, as pronounced by the predecessor to this Court in **Mbowa vs. East Mingo District Administration [1972] E.A 352**, were not established. It was submitted that when the Bank lodged a complaint and investigations carried out, there was reasonable cause to arrest and charge Kenga and that the malice, a necessary ingredient of the tort, should have been proved in order to sustain the claim.

18. Opposing the appeal, **Mr. K. Maundu**, learned counsel for Kenga, began by responding to the complaints regarding the award of damages. He submitted that the award of Kshs.21,261.00 for profit-sharing was pleaded and evidence in support was led; and that the award related to the year 1995 though payable in 1996 and the same was properly granted by the trial court. The award of Kshs.63,201.00 for the salary for February to May 1996 was also pleaded under paragraph 8(e) of the amended plaint and properly granted, counsel argued. Furthermore, it was submitted that under Section 12(3)(viii) of the ELRC Act, the court was at liberty to grant any other appropriate relief as it deemed fit.

19. With regard to the jurisdiction of the court to deal with the claim for malicious prosecution, counsel submitted that the cause of action in that regard arose out of the employer-employee relationship and on the strength of the decision of this Court in **Paramount Bank Limited vs. Vagvi Syed Qamara & another [2017] eKLR**, the ELRC had jurisdiction as it arose directly from the employment relationship. Also cited was the decision in support are **Celina Atieno Ogutu vs. Undugu Society of Kenya [2019] eKLR**, among others.

20. As to whether the claim for malicious prosecution was proved on a balance of probabilities, counsel submitted that Kenga proved that it was the Bank that set the prosecution in motion by involving the police in its investigations; the prosecution ended up being against Kenga, that considering Kenga's supervisor authorized all transactions in respect of which the complaints against him were made, the prosecution was instituted without reasonable and probable cause; that the prosecution was also actuated by malice because the initial complaint was that some money had been lost but Kenga was arrested for a different offence and the charges instituted against him were baseless. According to counsel, all ingredients of the tort of malicious prosecution as pronounced by this Court in **National oil Corporation vs. John Mwangi Kaguenyu & 2 others [2019] eKLR** were established.

21. Regarding the award of interest on general damages, it was submitted that this involves exercise of judicial discretion and a basis, in accordance with the principles in **Mbogo & another vs. Shah [1968] EA98**, has to be laid for this Court to interfere with such decision. It was submitted that the Bank has not demonstrated that the trial court exercised its discretion in a wrong manner.

22. We have considered the appeal and the submissions by counsel. Three issues emerge for consideration. First, is the question whether the Employment and Labour Relations Court had the requisite jurisdiction to deal with the claim for malicious prosecution. Second, is whether the claim for malicious prosecution was proved to the required standard. Third, is whether the reliefs awarded were justified.

23. In addressing those issues, we are conscious of our duty on a first appeal as decided by the Court in the often-cited case of **Selle vs. Associated Motor Boat Company [1968] E.A. 123** that:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. We begin with the question of jurisdiction of the ELRC in relation to the claim for malicious prosecution. As pointed out by counsel, the ELRC is established under Section 4 of the ELRC Act. Its jurisdiction is spelt out under Section 12 of the Act which confers exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to the ELRC relating to employment and labour relations, including, among others, disputes relating to or arising out of employment between an employer and an employee. The question therefore is whether Kenga's claim for malicious prosecution falls under that genus.

25. It is not in dispute that the Bank and Kenga had an employer and employee relationship until his employment was terminated on 23rd May 1996. The circumstances that led to the termination of his employment, namely the claim that he removed bank receipts from the Bank premises without management authority and made false entries in the foreign transaction journal, are the basis upon which he was charged with four counts of fraudulent false accounting and subsequently acquitted by the Magistrates' court.

26. There are parallels in the circumstances of this case with those in **Paramount Bank Limited vs. Vagvi Syed Qamara & another** (above) where a dispute between an employee and an employer was presented as a dispute arising from an employee/employer relationship, and where the employer accused an employee of theft followed by a criminal charge of stealing by servant followed by suspension and dismissal from employment. In upholding that the ELRC had jurisdiction in those circumstances to entertain a claim for malicious prosecution and defamation, the Court expressed that:

“There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general

damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court.”

27. A similar view was expressed by the Court in Anthony Shiveka Alielo vs. Kenya Post Office Savings Bank & another [2019] eKLR though in the context of whether the High Court, as opposed to ELRC, had jurisdiction where several causes of action including wrongful arrest and confinement, malicious prosecution and wrongful termination were involved. The Court in that case held that:

“In our view the claim for damages for unfair termination, the claim relating to general damages for malicious prosecution and defamation, flowed directly from the dismissal, was within the jurisdiction of the High Court. In the exercise of its powers under Article 165 of the Constitution the High Court had jurisdiction to entertain the dispute in all its aspects and award damages appropriately.”

28. We are equally satisfied that in the present case, given the circumstances we have alluded to, it was within the mandate of the ELRC to deal with malicious prosecution aspect of the claim alongside the claim for wrongful termination. There is therefore no merit in this ground of appeal.

29. Satisfied, as we are, that the ELRC had, in the circumstances of this case, jurisdiction to entertain the claim for malicious prosecution, the next question is whether Kenga proved the same to the required standard. In Robert Okeri Ombeka vs. Central Bank of Kenya [2015] eKLR, this Court reiterated that in an action of malicious prosecution, the claimant must show that he was prosecuted by the defendant, in the sense that the law was set in motion against him on a criminal charge; that the prosecution was determined in his favour; that the prosecution was without reasonable or probable cause; and that the prosecution was malicious. The onus of proving those elements lies squarely on the claimant.

30. Recently, in National Oil Corporation vs. John Mwangi Kaguenyu & 2 others [2019] eKLR, the Court stated that,

“...case law is replete on the issue of malicious prosecution. Of critical importance is that a litigant must establish malice. It is not sufficient to find one liable on the basis that he/she is the one who made the complaint. In the often-cited case of MURUNGA VS. ATTORNEY GENERAL [1979] KLR 138, the principles of the tort of malicious prosecution were spelt out. These are:-

“i) The defendant instituted the prosecution against the plaintiff.

ii) The prosecution ended in plaintiff's favour.

iii) The prosecution was instituted without reasonable and probable cause.

iv) The prosecution was actuated by malice.”

31. In concluding that Kenga had “proved all ingredients of the tort of malicious prosecution” the trial Judge stated that the Bank and the 2nd respondent knew that the vouchers that were recovered from Kenga’s house were lawfully deleted; that the prosecution witnesses in the criminal case who led the investigations into the matter interviewed officers of the Bank who admitted deleting the transactions despite which they went ahead to press charges against Kenga but did not secure a conviction; that the prosecution was without reasonable and probable cause as the deletion of the transactions at the heart of the charges of fraudulent false accounting had been authorized; that malice was also established because, in spite of the knowledge on the part of the Bank and the 2nd respondent that Kenga could not delete any transaction in the system, they went ahead to charge him with offences as aforesaid instead of charging the officers who authorized the deletion of the transactions. The trial Judge stated,

“...no reasonable prosecutor [would] have charged the claimant alone for deleting the transactions from the computer system when in deed his supervisors have confessed to having deleted the transactions themselves using their own pass words.”

32. In effect, in reaching the conclusion that the ingredients of the tort of malicious prosecution had been proved, the learned Judge considered that the prosecution did not result in a conviction; that Kenga’s supervisors at the Bank who are said to have authorized the deletion of the transactions should also have been charged; and that Kenga should not have been charged alone.

33. In our view, it was a misdirection on the part of the Judge to proceed on the basis, as he did, that because the prosecution did not result in a conviction, there was absence of reasonable and probable cause for the prosecution. It was also a misdirection that reasonable and probable cause was negated and the prosecution was actuated by malice because Kenga was charged alone. As held by this Court in Nzoia Sugar Company Ltd vs. Fungututi [1988] KLR 399, acquittal on a criminal charge, in itself, is not sufficient basis to ground a suit for malicious prosecution.

34. The evidence was that an amount of Kshs.45,000.00 ‘went missing’ from the Bank. Kenga was suspected. When investigations were conducted, Bank receipts were, quite uncharacteristically, found in Kenga’s home on the basis of which he was subsequently charged but acquitted. It was incumbent upon Kenga to establish that the report to the police and the prosecution was actuated by malice. It is not manifest from the evidence that the Bank and the 2nd respondent were intent on using the criminal process with an improper and wrongful motive considering, as we have said, bank receipts were found in Kenga’s possession in his house without the Bank’s authority.

35. We therefore uphold the complaint by the Bank that the Judge erred in holding that Kenga had proved all the necessary ingredients of the tort of malicious prosecution. We hold that Kenga did not establish that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice.

36. What remains is to consider whether the reliefs granted by the trial court were justified. As already noted, the Judge awarded Kenga Kshs.1,000,000.00 as general damages for malicious prosecution. In addition, an amount of Kshs.100,000.00 was awarded as special damages “in respect of legal fees paid during the said malicious prosecution...”.

37. Having concluded that the tort of malicious prosecution was not established, the total award of Kshs.1,100,000.00 cannot be sustained and is hereby set aside.

38. As regards the amount of Kshs.21,261.00 awarded for profit share, the appellant rightly complains that no evidence was adduced to support this claim. Although the same was pleaded under the particulars in paragraph 8 of the amended plaint where it is indicated that it relates to the year 1995, the respondent sought to prove the same before the trial court by producing a copy of a circular. Following objection by counsel for the appellant, the circular was marked for identification as “*Plaintiff Exhibit MFI-1*” but was ultimately never produced. There is therefore merit in the complaint by the appellant that the award by the trial court in that regard was not supported.

39. As regards the claim for Kshs.63,201.00 it is clear from the termination letter of 23rd May 1996 that any money that was due to Kenga was applied to off-set part of his loan with the bank.

40. In conclusion therefore, the appeal succeeds and is hereby allowed with the result that judgment of Employment and Labour Relations Court in Cause No. 138 of 2015 is hereby set aside and substituted with an order dismissing the 1st respondent’s claim before the Employment and Labour Relations Court with costs to the appellant. The appellant will also have the costs of this appeal.

Dated and delivered at Malindi this 14th day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR