



**Namale v I & M Bank Limited & 2 others (Cause 752 of 2016)
[2024] KEELRC 21 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 21 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 752 OF 2016
JK GAKERI, J
JANUARY 24, 2024**

BETWEEN

HILLARY OKUNE NAMALE CLAIMANT

AND

I & M BANK LIMITED 1ST RESPONDENT

SECUREX AGENCIES (K) LIMITED 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. Hillary Okune Namale commenced this suit by a Statement of Claim on 4th November, 2016 which was subsequently amended on 7th February, 2022, almost 6 years later.
2. The Claimant alleges that the 1st and 2nd Respondents caused his arrest by the police and being charged without just cause or justifiable reasons and was remanded in police and prison cells for 240 days and the trial lasted 3 years.
3. It is the Claimant’s case that the arrest, detention and prosecution at the behest of the 1st and 2nd Respondents was malicious, false and illegal as the report of bank breaking by the 1st Respondent had no basis as there was nothing to connect the Claimant with the alleged theft.
4. The Claimant prays for;
 - i. A declaration that the arrest, detention and prosecution was malicious, false and illegal.
 - ii. General damages for the malicious, false and illegal arrest, detention and prosecution.
 - iii. Damages on account of loss of earnings for the duration of the 36 months Kshs.288,000/=.



A declaration that the Claimant's dismissal by the Respondent was wrongful, unfair and unlawful and entitlement to terminal dues and compensatory damages.

- iv. Terminal dues amounting to Kshs.106,000.00.
- v. Costs of this suit.
- vi. Interest.

Cause No. 753 Of 2016

5. The Claimant, Nebert Okwemba Ndege filed the Statement of Claim on 4th May, 2016 and amended the same on 14th July, 2022.
6. The Claimant makes allegations similar to those of Hillary Namale and prays for;
 - i. Declaration that the arrest, detention and prosecution was malicious, false and illegal.
 - ii. General damages for the malicious, false and illegal arrest, detention and prosecution.
 - iii. Damages for loss of earnings Kshs.653,832/=.
 - iv. Declaration that dismissal by the Respondent was unfair/wrongful and unlawful and entitlement to terminal dues and compensatory damages namely; salary in lieu of notice Kshs.18,162/= and 12 months compensation Kshs.217,944/=.
 - v. Compensatory damages and terminal dues, Kshs.236,106/=.
 - vi. Costs of this suit.
 - vii. Interest on the awards above.

Cause No. 867 Of 2016

7. Mr. Emilio Njeru Njiru commenced this suit on 16th May, 2016 by a Statement of Claim which was subsequently amended on 23rd May, 2022.
8. The Claimant avers that he was maliciously, illegally and falsely arrested, detained and prosecuted by the 3rd Respondent at the behest of the 1st and 2nd Respondents as no bank breaking was proved and there was no evidence connecting him with the offence.
9. The Claimant prays for reliefs similar to those of Hillary Namale and Nebert Okwemba but for the amount of loss of earning for 36 months at Kshs.810,000/=, terminal dues and compensatory damages comprising pay in lieu of notice Kshs.22,500/= and compensation for 12 months Kshs.270,000/= total Kshs.292,500/=.
10. At the hearing, counsels agreed that ELRCC No. 752 of 2016 proceeds as a test suit and only Mr. Hillary Okune Namale testified.

1st Respondent's case

11. The 1st Respondent avers that the Claimants had no case against it and the claim was an abuse of the court process.



12. That it merely reported the break-in to the Parklands Police Station as cash was stolen and was unaware of the suspects and the police were supposed to investigate and did so without directions or instructions of the 1st Respondent.
13. That after investigation, a decision was made to arrest the Claimants and charge them and the 1st Respondent was not involved.
14. It is the Claimant's case that the arrest and prosecution was solely a police affair and/or the Director of Public Prosecutions in exercise of his constitutional powers and the 1st Respondent's employees participated in the criminal proceedings as witnesses only.
15. The 1st Respondent denies that the Claimants are entitled to any award and prays for dismissal of the suit with costs.

2nd Respondent's case

16. In its Amended Reply dated 14th March, 2022, the 2nd Respondent avers that the 3rd Claimant, Mr. Emilio Njeru Njiru was a driver and was not in charge of the Mobile Response Team or was employed on 22nd February, 2002 or his salary was as alleged.
17. The 2nd Respondent denies having been privy to the arrest and prosecution of the Claimants or their incarceration, trial or acquittal.
18. That it did not lodge a complaint against the Claimants.
19. The 2nd Respondent denies that the Claimant was entitled to the amount claimed as the Claimants absconded duty for more than 14 days and it issued a show cause letter which was not responded to.
20. It denies having terminated the Claimants employment.
21. The 2nd Respondent prays for the dismissal of the suit with costs.

3rd Respondent's case

22. In its amended defence, the 3rd Respondent denies having instigated any of the alleged malicious, false or illegal activities and avers that the Kenya Police was discharging its mandate and authority after the complaint was raised by the 1st Respondent and the Claimants' acquittal does not amount to malicious prosecution.
23. It is the 3rd Respondent's case that it had no relationship with the Claimants and the arrest and detention were procedurally undertaken.
24. That the prayers made by the Claimants are not available against the 3rd Respondent for want of an employer/employee relationship and the court had no jurisdiction to determine a malicious prosecution case against the 3rd Respondent.
25. The 3rd Respondent prays for dismissal of the suit with costs.

Claimant's evidence

26. Mr. Hillary Okunne Namale testified that the case before the court related to the unlawful arrest, detention and prosecution of the Claimants by the Respondents.



27. It was testimony that he was an employee of the 2nd Respondent from 21st February, 2013 and was part of the mobile response team at Kshs.8,000/= per month but had no evidence to prove the salary he was earning.
28. It was his testimony that the team was dispatched from site to respond to an alarm at Giro Bank Ltd where they found a guard named Wycliffe manning the compound, not the bank. That the gate and doors and windows were closed and there was nothing suspicious and they were dispatched to another site.
29. That he was arrested, charged with bank-breaking and lost employment.
30. On cross-examination, the witness confirmed that his employment was terminated by the 2nd Respondent and the alleged break-in took place on the night of 22/23rd April, 2013 at Parklands and the bank reported the same to the police through one Mr. Shaqfuta and the bank named Mr. Namale in the complaint, yet he testified that he was unable to obtain it and did not make a request and had no evidence to prove that the bank named him as a suspect.
31. The witness admitted that witnesses were summoned to testify and the witnesses of the bank testified.
32. That a report was made to the Gigiri Police Station by one Mr. Ogotu, an employee of the 2nd Respondent and the Claimants were arrested on 8th May, 2013 under OB No. 0380/05/2013 and charged on 9th May, 2013.
33. That the 2nd Respondent identified the Claimants before they were arrested by the police and he did not know the police officers prior to the arrest.
34. The witness confirmed that the duties of the police included maintenance of law and order and arrest of suspects.
35. The witness stated that the arrest was malicious as the police did not conduct investigations in a proper manner.
36. He admitted that police only arrest suspects after a complaint is lodged.
37. The Claimant states that he was released on Bond after satisfying the terms on 19th November, 2013 and was acquitted in 2016 and sued the same year.
38. The witness confirmed that he had no evidence to prove the special damages prayed for.
39. Strangely, the witness testified that postal address 389 Nairobi, belonged to the Shaqfuta as opposed to the 2nd Respondent but was unaware whether or not Mr. Shaqfuta was an employee of the 2nd Respondent.
40. It was his testimony that he was the 3rd accused and 6 witnesses testified in the Criminal Case yet the court ruling states 14 witnesses testified.
41. The witnesses denied having filed incomplete court records but confirmed that he was acquitted for lack of evidence and had been in remand for nearly 6 months and was not working and did not notify the employer as he was in police custody but saw the notice to show cause at the counsel's office after leaving the remand in December 2013 and the letter had the Postal address he had given to the employer.
42. That the letter dated 15th March, 2016 was received by his counsel on 16th March, 2016.
43. The witness confirmed that his dues were not paid nor was he given a certificate of service.



44. On re-examination, the Claimant testified that the complainant was Giro Bank Ltd, the 1st Respondent and the 2nd Respondent played a huge role in the arrest of the Claimants as Mr. Ogutu called them to his office where they found police who arrested them.
45. That he was unaware of any attempt to serve him with a notice to show cause while in remand.
46. The witness denied having deserted duty. It was his evidence that the Respondent was aware of the arrest, incarceration and no proceedings were conducted and no dismissal letter was issued.

Respondents' evidence

47. The Respondents had three witnesses namely; Jackline Mutungu, Dorothy Kaane and Robinson Cherenje.
48. RWI, Mrs. Jackline Mutungu confirmed that she was an employee of the 1st Respondent and a break-in took place at the Respondents bank at Parklands on the night of 22nd/23rd April, 2013. That there was an alarm system but no internal security officer as one Patrick Gwaya Ahuyo was an employee of MARS Security was manning the main gate.
49. That the alarm belonged to the 2nd Respondent and signals were sent to its control room and the alarm was activated at night but there were no guards.
50. That the alarm activation on the material date occurred several times and the 2nd Respondent made a report dated 24th April, 2013 to the 1st Respondent.
51. The witness confirmed that one Mr. Ahmed Jaber, the Branch Manager reported the break-in at the Parklands Police Station.
52. That the witness were invited and testified in the criminal case.
53. On re-examination, the witness testified that the 1st Respondent lost Kshs.4,637,238.91 and neither the bank nor the 2nd Respondent identified the perpetrators.
54. That she was bonded by the police and testified as an employee of the bank.
55. RWII, Dorothy Kaane confirmed that the 1st Respondent had contracted the 2nd Respondent to provide an alarm system and it did not inform the bank who the perpetrators were.
56. The witness testified that she was unaware that the Claimants sought re-employment with the company.
57. That the MARS Security guard did not allow the Response Team access into the Premises and the Crew Commander was Nebert Okwemba, Hillary was part of the crew and Emilio Njeru the driver.
58. That the witness had no investigation report as to whether the team entered the compound or the bank and had no information on how the vehicle moved on that night.
59. The witness confirmed that the 2nd Respondent did not reach a conclusion that the Claimants were involved in the break-in and were heard on 2nd May, 2013 and a warning letter was to issue for failing to report the incident.
60. The witness confirmed that she was unaware of how the Claimants were arrested.
61. That the criminal proceedings availed by the Claimants were incomplete and the notice to show cause was issued when the Claimants absconded duty and they did not respond but no dismissal letters were issued.



62. That none of the Claimants wrote a letter for re-employment by the 2nd Respondent.
63. RWIII, Mr. Robinson Cherenje confirmed that he was a police officer of about 33 years.
64. That the 1st Respondent reported the break-in to the police but did not indicate who did so and the police came to the conclusion that the Claimants were involved.
65. According to the witness, the Investigating Officer must have had cogent evidence to charge the Claimants and was aware of their acquittal owing to insufficient evidence.
66. On re-examination, the witness testified that there was no malice in charging the Claimants as the police conducted investigations before charges were preferred and the prosecution had reasonable and probable cause.
67. It was his testimony that the 1st and 2nd Respondent provided witnesses and the 3rd Respondent did not participate in the criminal case.
68. The witness sought the dismissal of the suit against the 3rd Respondent.

Claimant's submissions

69. Counsel for the Claimant isolated no specific issues but submitted on the evidence availed by the parties as well as liability of the Respondents.
70. Counsel maintained that the evidence on record revealed that the Claimant did not enter into the compound and as such ought not to have been suspects in the break-in and were in remand for 193 days, 119 days and 98 days respectively, the case took 2 years and 29 days and the Claimants were acquitted under Section 210 of the Criminal Procedure Code.
71. According to the Claimant's counsel, the 1st Respondent triggered the other actions and there was no evidence that there that there was a break-in at the Respondent's bank. That the bank contact did not respond to the calls made at night and was thus negligent.
72. Counsel submitted that CCTV cameras would have identified the perpetrators.
73. Counsel submitted that the 1st Respondent was negligent and tendered evidence against the Claimants.
74. Counsel urged that the 2nd Respondent knew that its employees were not involved in the break-in but did not avail the information to the police and their Operations Manager arrested the Claimants and took them to the police station and alleged desertion and dismissed them from employment.
75. That the 2nd Respondent and the police had sufficient information to exculpate the Claimants.
76. That the 2nd Respondent was not summoned to the police station.
77. According to counsel, the arrest and charging of the Claimants was a direct action of the 2nd Respondent.
78. As regards liability of the 3rd Respondent, counsel submitted that in this case, no investigation took place and the evidence was not analysed by the Office of the Director of Public Prosecutions, movement of the vehicle was not disclosed and the CCTV footage was clear and the Claimants suffered due to the 3rd Respondent's negligence.
79. Counsel relied on the decisions in *Naqvi Syed Qmar V Paramount Bank Ltd & another* (2015) eKLR and *G.B.M Kariuki V Attorney General* (2016) eKLR to urge that the Claimants were entitled to damages for defamation, trauma, arrest, detention and prosecution, amounting to Kshs.5,000,000/=.



80. Counsel submitted that the issuance of the notice to show cause by the 2nd Respondent was not in compliance with the law as it was aware of their arrest and was thus malicious and dishonest as it did not allow them to resume duty as they had not been dismissed.
81. That the Claimant is entitled to the lost salaries for 24 months Kshs.192,000/= and the dismissal was without justification and due process.

1st Respondent's submission

82. Counsel isolated 3 issues for determination, namely; whether the court has jurisdiction to entertain the malicious prosecution case against the 1st Respondent, elements of malicious prosecution and termination.
83. On the 1st issue, counsel urged that the court had no jurisdiction to determine the malicious prosecution case against the 1st Respondent by virtue of Article 162 (2) of *the Constitution* of Kenya, 2010 and Sections 4 and 12 of the *Employment and Labour Relations Court Act*, 2011 as the Claimant was not an employee of the 1st Respondent.
84. On the elements of malicious prosecution, counsel submitted that the Claimant had failed to satisfy them.
85. Reliance was made on the sentiments of the court in *Barclays Bank of Kenya Ltd V Julius Kiema Kenga & another* (2019) eKLR on the burden of proof.
86. Counsel urged that the 1st Respondent neither prosecuted the Claimant nor set in motion the criminal charges against him as evidence on record revealed. The 1st Respondent merely reported the break-in to the police at the Parkland Police Station.
87. That the 2nd Respondent's investigations revealed that there had been a break-in at the bank and the judgment in *CMCC No. 551 of 2013 Republic V Patrick Gwaya Akhuyo* confirmed the break-in.
88. Counsel submitted that the Claimants' submission that the 1st Respondent was negligent as its contact person was inaccessible and the CCTV was not functioning could not camouflage the truth on the CCTV motion sensors and smoke detectors.
89. Counsel urged that the 1st Respondent reported the break-in as expected of a person who is a victim of crime and provided no evidence as to whom it knew or thought was responsible.
90. That the 1st Respondent had reasonable and probable cause to report the break-in to the police who investigated the complaint, forwarded the file to the Office of the Director of Public Prosecutions and charges were preferred against the Claimants and the 1st Respondent did not occasion the Claimants' arrest.
91. Counsel cited the sentiments of the court in *Socfinaf Kenya Ltd V Peter Guchu Kuria & another* (2002) eKLR on the role of the police after a complaint is reported.
92. Counsel submitted that contrary to the Claimant's submission that the 1st Respondent availed witnesses for the criminal case, the Claimant provided no evidence and the witnesses stated that he had broken the law.
93. It was submitted that the fact that the criminal case terminated in the Claimant's favour does not of itself establish malicious prosecution as held in *Barclays Bank of Kenya Ltd V Julius Kiema Kenga & another* (2019) eKLR.



94. Finally, counsel submitted that the Claimant adduced no evidence of malice by the 1st Respondent.

2nd Respondent's submissions

95. Counsel isolated two issues;

- i. Whether the Claimant deserted duty or was lawfully terminated.
- ii. Whether the Claimant is entitled to the reliefs sought.

96. On desertion, counsel submitted that the Claimant did not notify the 2nd Respondent about his being charged in criminal case and it issued a notice to show cause dated 31st May, 2013.

97. That the Claimants provided no evidence of having informed the 2nd Respondent that they were ready to continue working after they satisfied the terms of the bond.

98. Counsel urged that the fact that the Claimant was arrested at the instigation of the 1st Respondent, it did not terminate the employment relationship with the 2nd Respondent and he was bound to report to the work place.

99. Counsel urged the court to find that the Claimant deserted the work place.

100. As regards the reliefs sought, counsel submitted that since the Claimant failed to prove malice and other elements in the criminal prosecution, the remedy of damages for malicious prosecution is unavailable.

101. Counsel urged that by failing to file complete proceedings in the criminal court, the Claimant had demonstrated that the omitted pages would not have been in his best interests, pages 2-97.

102. According to counsel, the proceedings would have demonstrated the facts of the case and the alleged malicious prosecution.

103. It was submitted that the Claimant had not proven that his prosecution was actuated by malice which was exacerbated by the absence of proceedings.

3rd Respondent's submissions

104. Counsel for the 3rd Respondent relied on the sentiments of the courts in *Radford V Stewart*, *Kasana Produce Store V Kato*, *Chopra V T. Eaton Co.* and *James Karuga Kiiru V Joseph Mwamburi & 3 others* NRB CA No. 171 of 2000 to submit that the Claimant had not demonstrated that this prosecution was motivated by malice. Counsel further submitted that the Claimant also failed to particularise the essentials of malice.

105. Reliance was also made on the sentiments of *Radido J. in Kagane V Attorney General* (1969) EA 643 and *Samba V Wampari* (1987) KLR 601 on the meaning of reasonable and probable cause.

106. Counsel submitted that after the complaint was made, the police commenced investigations and the police treated the report as genuine and the Director of Public prosecutions (ODPP) preferred the charges as mandated by Article 157 of *the Constitution* of Kenya, 2010 and the Office of Director of Public Prosecutions Act, 2013.

107. That the prosecution was based on reasonable and probable cause and the learned trial Magistrate did not find evidence of malice.

108. Counsel submitted that the 3rd Respondent was not involved in the fixing the terms of the bond as it is the courts discretion.



109. Reliance was also made on the sentiments of the court in *Stephen Bachau Githaiga & another V Attorney General* (2015) eKLR to urge that the Claimant had not proved his case and the same ought to fail.

Findings and determination

110. It is not in contest that the Claimant was an employee of the Respondent as a crew member in the Mobile Response Team, effective 21st February, 2013.

111. It is also common ground that the Claimant and 2 of his colleagues Nebert Okwemba and Emilio Njeru Njiru were arrested on 8th May, 2013 and charged on 9th May, 2013 with the offence of bank breaking and committing a felony contrary to Section 306 (a) of the Penal Code and were acquitted under Section 210 of the Civil Procedure Code on 7th July, 2015, after about 2 years and 2 months.

112. The learned trial Magistrate found the evidence adduced by the Prosecution not sufficient.

113. The issues for determination are;

- i. Whether the court has jurisdiction to hear and determine the malicious prosecution case against the 1st Respondent.
- ii. Whether there was a break-in at the 1st Respondent's branch at Parklands on the night of 22nd/23rd April, 2013.
- iii. Whether the Claimant absconded/deserted or his employment was terminated by the 2nd Respondent.
- iv. Whether the Claimant has demonstrated that the arrest, charge and prosecution in Criminal Case No. 551 of 2013 was malicious and illegal.
- v. Whether the Claimant is entitled to the reliefs sought.

114. Counsel for the 1st Respondent urged that the court lacked jurisdiction to hear and determine a case of malicious prosecution against the 1st Respondent. The Claimant's counsel did not respond to the issue.

115. It is common ground that this court derives its jurisdiction from Article 162(2)(a) of *the Constitution* of Kenya, 2010 read with Section 12 of the *Employment and Labour Relations Court Act*, 2011.

116. Section 12(1) of the Act provides that;

"The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act, or any other written law which extends jurisdiction to the court relating to employment and labour relations including . . ."

117. In addition, Section 12(1) enumerates ten (10) circumstances or categories of disputes over which the court has jurisdiction.

118. The jurisdiction of this court has been interpreted in legions of decisions such as *United States International University (USIU) V Attorney General* (2012) eKLR as affirmed by the Court of Appeal in *Mugendi V Kenyatta University* (2013) eKLR and other decisions.

119. As aptly captured by the Supreme Court in *Samuel Kamau Macharia V Kenya Commercial Bank & 2 others*, a court's jurisdiction flows from *the Constitution* or legislation or both.



120. As exquisitely captured by the Court of Appeal in celebrated decision in Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (1989) eKLR,
- “Jurisdiction is everything. Without it, a court has no power to make one more step . . .”
121. It requires no emphasis that the jurisdiction of the Employment and Labour Relations Court is circumscribed by *the Constitution* of Kenya, 2010 and the provisions of Section 12 of the *Employment and Labour Relations Court Act*, 2011 to disputes or matters relating to employment and labour relations and matters incidental thereto.
122. In the instant suit, the Claimant’s suit is grounded on allegations of unlawful arrest, detention and prosecution which to all intents and purposes are tortious claims, which may be litigated by an employee against an employer within the employer/employee relationship.
123. In the court’s view, although Section 12(1) of the Employment and *Labour Relations Act*, 2011 is inexhaustive by reason of the word “including”, the unidentified categories or matters over which the court has jurisdiction can only be deciphered through the application of the ejus dem generis rule of statutory construction and an action grounded on unlawful arrest, confinement, prosecution and defamation does not, in the court’s view fall under Section 12(1) of the Act unless there is an employer/employee relationship.
124. As it is common ground that the Claimant had no employment relationship with the 1st and 3rd Respondents, it is the finding of this court that it has no jurisdiction to hear and determine the Claimant’s tortious claims against the 1st and 3rd Respondents.
125. The foregoing notwithstanding since the Respondents are jointly sued and the facts of the case touch on the three of them, the three will feature in this judgement for purposes of analysis.
126. As regards the 1st issue, counsel for the parties have adopted opposing arguments with the Claimant’s counsel maintaining that the 1st Respondent availed no evidence of a break-in at their branch at Parklands. Counsel for the Respondents on the other hand submitted that there was evidence that a break-in had taken place.
127. Counsel for the Claimant further submitted that no exhaustive investigation took place before the Claimant and his colleagues were arrested and charged. That there was no fingerprint report or movement of the Claimants and their vehicle that night so as to place them at the scene and the CCTV footage was unhelpful.
128. It is common ground that the 1st Respondent reported a break-in at their Parklands branch on the night of 22nd/23rd April, 2013. The complaint was filed by one Ahmed Jaber, the Branch Manager, a fact acknowledged by the Claimant on cross-examination.
129. Similarly not in dispute is the fact that the 2nd Respondent prepared a report on the alleged incident dated 24th April, 2013.
130. The report signed by one John Ogutu on behalf of the 2nd Respondent is addressed to the 1st Respondent’s Parklands branch for the attention of Ahmed Jabin and the same was received.
131. The report written without prejudice recounts the events of the night of 22nd/23rd April, 2013 and is explicit that “it later emerged that Giro bank had been broken into”.
132. The uncontested report details that intruders had forcefully opened the access door by cutting the padlock, removed the entire grill reinforcing the sliding window and accessed the bank.



133. That they tilted the CCTV camera near the window upwards to conceal access to the strong room and covered motion sensors with clothes and paper and also vandalised a smoke detector at the back office.
134. The report is explicit that the intruders accessed the strong room by making a hole in the door using gas fire and oxygen and profane gas cylinders were recovered inside the bank.
135. Finally, the report states that at each time the alarm activated and a signal was sent to the 2nd Respondent's centre, the Mobile Response Team was dispatched but according to the report, they could not access the compound as Mr. Patrick Gwaya of Mars Security manning the main gate did not allow them.
136. That the police and C.I.D visited the scene and dusted the scene for prints. The report, however does not indicate when the police and C.I.D did so
137. Contents of the 2nd Respondent's report to the 1st Respondent are corroborated and embellished and contradicted in at least one respect by the evidence adduced before the trial Magistrate.
138. In a judgment dated 25th August, 2017 in Criminal Case No. 551 of 2013, Republic V Patrick Gwaya Akhuyo, prosecution witnesses laid bare the happenings on the night of 22nd/23rd April, 2013 and thereafter.
139. RWI Mr. Shaqfuta Jamin Ahmed testified that when he was notified of the break-in, he notified the Respondent's General Manager and proceeded to the bank where he found police and other people and took pictures of the vandalism, gas cylinder, break-in items, broken grill, camera and fire detector and produced the same in court.
140. He testified that the vault was broken and 5 safety deposit boxes had been broken into and contents emptied. It was his testimony that once the bank was locked up, it could not be entered into and it had internal and external cameras and the break-in was from the back. The CCTV cameras captured shadows of people and thus unclear.
141. That it was unclear as to who was manning the gate.
142. PW2, Jacline Mutungu testified that she was stationed at the Parklands branch and it had been broken into on 23rd April, 2013 and had recorded a statement with the police. PW3, Salma Ashif was also an employee and confirmed the break-in. PW4, Mr. Robert Situma Wanyonyi, a Securex guard confirmed that he saw that the bank had been broken into.
143. PW6, Mr. John Ogutu confirmed the break-in too. According to the witness the vehicle that was driven to the scene was an A128.
144. PW7, Mr. Francis Luyali confirmed that on the night of 22nd/23rd April, 2013, he dispatched vehicle A128 at 1.12 am to the scene.
145. That they called him at 1.15 am and informed him that they were trying to access the premises.
146. PWII No. 233432 confirmed that he is a Scene of Crime Officer with 5 years' experience and visited the scene on 23rd April, 2013 and the entry was through a window grill at the back entrance, found cables hanging in the bank and the door was closed and the strongroom had a hole which he used to go in, that 5 out of 47 compartments were broken as was a small cabinet. He also found blood stains near the strong room and took swabs of the same.



147. Finally, the witness testified that he saw as crew driver, 2 gas cylinders, 2 blankets, croppers, 2 sacks amongst other items and all were photographed and look finger prints. That 2 out of 4 cameras had been interfered with. He was alone in the bank at the time.
148. Other reliable witnesses testified that the Respondent's branch at Parklands was broken into of the night of 22nd and 23rd April, 2013.
149. The evidence adduced before the trial court is Criminal Case No. 551 of 2013 overwhelmingly shows that there was a bank break in.
150. The court did not discredit the testimony of any of the witnesses on this issue.
151. More significantly, the Claimant admitted the same in his evidence in chief in court.
152. According to the Claimant, a Mr. Wycliff of MARs Security was manning the main gate, yet it was Patrick Gwaya Akhuyo.
153. Strangely, and as adverted elsewhere in this judgement, the Claimant produced 7 out of 103 pages of the proceedings of the criminal case.
154. The evidence adduced by the witnesses was not availed. Only the 2 paged ruling was.
155. It is not for this court to speculate the reason for the selectivity but the decision in the case reveals part of the evidence which may not have been in favour of the Claimant's case herein.
156. As to whether the Claimant's employment was terminated or he absconded or deserted the workplace, the homeport is the concept of desertion.
157. According to Black's Law Dictionary (10th Edition), desertion means;

“The wilful and unjustified abandonment of a person's duties or obligations”.
158. In the often cited South Africa case of *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court sought to distinguish desertion from unauthorised absence from the work place as follows;

“... desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”
159. See also *Ndolo J. in Ronald Nyambu Daudi V Tornado Carriers Ltd* (2019) eKLR on the gravity of desertion.
160. While the Claimant's counsel submitted that the Claimant's employment was terminated by the 2nd Respondent, the 2nd Respondent maintained that the Claimant deserted the workplace. Counsel for the 2nd Respondent submitted that after the Claimant was arrested on 8th May, 2013, he did not return to the work place and at its initiative, the 2nd Respondent contacted his next of kin and was informed that he was in police custody and other processes followed.
161. The emerging jurisprudence on the defense of desertion is that the employer is required to demonstrate the efforts made to contact the employee to resume duty including making the employee aware that termination of employment on the ground of desertion was being considered as held in *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR as well as *Simon Mbithi Mbane V Inter Security Services Limited* (2018) eKLR and *Joseph Nzioki V Smart Coatings Ltd* (2017) eKLR.



162. The 2nd Respondent produced a copy of a notice to show cause dated 31st May, 2013 addressed to the Claimant to an address in Nakuru which the Claimant did not disown.
163. He admitted that the postal address used was the one he had given the 2nd Respondent.
164. In his examination in chief, the Claimant testified that the arrest and charge led to loss of employment and on cross-examination he confirmed that 2nd Respondent terminated his employment but did not tender any evidence as to when and how the termination took place.
165. The foregoing is consistent with the provisions of Section 47(5) of the *Employment Act*, 2007 that;
- “For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
166. The Claimant tendered no evidence of an unfair termination of employment.
167. Similarly, the Claimant confirmed on cross-examination that he was released on bond on 19th November, 2013 when he satisfied the terms of the bond and could not have been released earlier.
168. The Claimant further confirmed that he was given bond on 9th May, 2013 but was unable to satisfy the terms immediately, was not working for the duration and did not inform the employer.
169. In a nutshell, the Claimant admitted that he was not working for the Respondent for 6 months and 10 days and further confirmed that after he was released on bond, he neither reclaimed his employment nor sue until 4th May, 2016.
170. Relatedly, Dorothy Kaane testified that the 2nd Respondent did not issue a dismissal letter and the Claimant did not write to the 2nd Respondent for redeployment.
171. The foregoing is consistent with the Claimant’s evidence in chief that the instant case is about unlawful arrest, detention and presentation.
172. The foregoing is also decipherable from the framing of the Claimant’s suit as originally and as amended.
173. The totality of the evidence before this court is that the Claimant absented himself from the workplace from 9th May, 2013 and did not report back thereafter, which in the court’s view is a clear case of desertion or absconding duty.
174. From the foregoing, it is the finding of the court that the evidence on record leaves little doubt that the Claimant absconded duty.
175. The 3rd issue is a mixed grill owing to the Claimant’s lack of specificity as to the tort for which he is claiming general damages.
176. The Claimant seeks a declaration and general damages for malicious, false, illegal arrest, detention and prosecution.
177. It is unclear as to whether the Claimant’s claim is based on false imprisonment, unlawful arrest or false imprisonment or all of them.

Was the Claimant’s arrest and detention, illegal or unlawful?

178. It is common ground that the Claimant and his two colleagues were arrested on 8th May, 2013.



179. The Claimant alleged that the arrest was at the behest of the 1st and 2nd Respondents and urges that the Respondents ought to be held jointly liable.
180. Puzzlingly, the Claimant testified that the 1st Respondent named him in its report to the police at Parklands Police Station but had neither seen the report nor requested for it yet the report on record makes no reference to him and neither the 1st nor the 2nd Respondent identified the Claimant as a suspect in the bank break-in.
181. The 2nd Respondent's report dated 24th April, 2013 makes no reference to the identity of the intruders.
182. Equally, the Claimant could not explain the contents of the report made by Mr. John Ogutu at the Gigiri Police Station.
183. Although the Claimant testified on re-examination that the 2nd Respondent played a big role in his arrest, Mr. Ogutu only called them to his office when police came to arrest them. After all, the Claimant confirmed that one of the principal duties of the police is to effect arrest if they are satisfied that there was a case against the person being arrested.
184. The Claimant also admitted that complaints of a criminal nature are reported to the police who conduct investigations and act accordingly.
185. The Claimant also faults the manners of arrest that they were in trousers only and the police did not conduct investigation.
186. That the 2nd Respondent identified the Claimants to the police.
187. Noteworthy, RWII testified that the 2nd Respondent did not find the Claimant and his colleagues culpable but recommended that they be issued with warning letters.
188. Having so found, it is improbable that the 2nd Respondent could a few days later call the police to arrest the Claimant as he alleged.
189. Undoubtedly, if the 2nd Respondent wanted the Claimant arrested and charged, it did not have to wait for about 16 days or await police action.
190. From the evidence on record, it is discernible that the 1st Respondent played no role in the arrest of the Claimant and the 2nd Respondent was peripherally involved as the Claimant was arrested while at the workplace.
191. Significantly, RW10, 62665, Mr. Moses Marete testified that he was informed of the suspects on 6th May, 2013 and proceeded to the 2nd Respondent's premises and arrested the Claimant with others and escorted them to the Gigiri Police Station for interrogation. That he was the arresting officer.
192. From the foregoing, it is the finding of the court that the Claimant has failed to establish that the 1st or the 2nd Respondent arrested him.
193. Needless to belabour, the police acted on the evidence at their disposal.
194. Other than reporting the break-in to the police, neither the 1st nor the 2nd Respondent did anything more or demonstrate any enthusiasm in having the Claimant arrested or any malicious intent.
195. Contrary to the Claimant's allegation that the police arrested and charged him and his colleagues without having conducted any investigations, evidence adduced by the prosecution in CMCC No. 551 of 2013 shows otherwise.



196. PW11 No. 233432 Inspector Shavila Mameti, a Gazetted Scenes of Crime Officer testified that on 23rd April, 2013 he visited the Giro Bank in Parklands and narrated what he found including a hole in the bank's strong room, broken compartments, blood stains as well as the implements used in the break-in. The witness confirmed that two CCTV cameras had been tampered with and he took the fingerprints. He prepared a report which he produced in court.
197. PW14 No. 487000, Corporal Fredrick Warutere also testified that he went to the bank on 23rd April, 2013 and found PW10. These two witnesses confirmed in court that the police investigated the break-in at the Giro Bank.
198. RWIII testified on re-examination that the police conducted investigations.
199. Based on the evidence adduced in the criminal case against Patrick Bwaya Akhuyo, it is evident that the police investigated the break-in and arrived at their own conclusion.
200. The Claimant rendered no scintilla of evidence to prove that the 1st and the 2nd Respondents were the principal actors in the arrest and the decision to charge him and his colleagues.
201. Similarly, the Human Resource Manager of the 2nd Respondent confirmed on cross-examination that 2nd Respondent had not arrived at the conclusion that the Claimant and his colleagues were involved in the break-in.
202. Before concluding this issue, it is elemental to lay bare the principles governing malicious prosecution which the Claimant appears to be relying upon in this claim, without expressly stating so.
203. This is simply because the Claimant is claiming general damages for malicious, false, illegal arrest, detention and prosecution. In essence, the Claimant is seeking compensation for unlawful arrest, false imprisonment and malicious prosecution.
204. In addition, in his submissions, the Claimant alleged that he was defamed as he was subjected to public ridicule.
205. The principles governing malicious prosecution are well settled and the decisions cited by the Respondents lay them bare as follows;
 - i. The criminal case must have been initiated by the Respondent or a person(s) whose acts the Respondent is responsible for.
 - ii. Absence or lack of reasonable or probable cause for the initiation of the criminal case.
 - iii. The prosecution was actuated by malice.
 - iv. The criminal case ended in the Claimant/plaintiffs favour.
206. These requirements were aptly captured by Duffus V.P. in *Kasana Produce Stores V Kato* as well as the Canadian case of *Radford V Stewart* as well as *Barclays Bank of Kenya Ltd V Julius Kiema Kenga & another* among others.
207. The four elements have been discussed in legions of decisions.
208. The onus of establishing these elements lies on the Claimant.
209. On initiation of a criminal case, the complainant's duty is to report the suspected/criminal act or omission to the police who are duty bound to take the necessary steps to ascertain whether a crime has been committed and proceed to arrest and charge the suspects a fact the Claimant admitted on cross-examination.



210. The 1st and 2nd Respondents cannot be faulted for having reported a suspected criminal act to the police.
211. Both the 1st and 2nd Respondent reported the break-in to the police and none of them implicated the Claimant in their reports, a fact the Claimant admitted having alleged otherwise in his evidence in chief.
212. The 1st and 2nd Respondents merely set the process in motion.
213. No doubt the prosecution ended in the Claimant's favour as he was acquitted under Section 210 of the Criminal Procedure Code.
214. However, case law is emphatic that an acquittal on a criminal charge is not of itself a sufficient foundation for an action on malicious prosecution. (See *Nzoia Sugar Company Ltd V Fungututi* (1988) KLR 399).
215. The critical elements of malicious prosecution are the presence of malice and absence of reasonable and probable cause.
216. In *Kagane V Attorney General* (1969) EA 643 Rudd J. set out the test for reasonable and probable cause as follows:

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would lead to 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.”
217. The Claimant is accusing the Respondents for having set the law in motion without reasonable and probable cause. It is his case that they did not act reasonably in the circumstances.
218. However, other than alleging that the 1st and 2nd Respondents identified him in their report to the police, a fact he failed to prove and admitted they did not, coupled with the allegation that the 2nd Respondent called the police to arrest them, another allegation he failed to establish, and evidence on record shows the contrary, the Claimant adduced no evidence to implicate the 1st and 2nd Respondents in the arrest and subsequent prosecution and the court so finds.

Did the police have reasonable and probable cause to arrest and charge the Claimant?

219. Simply not, other than the allegation that the police acted before they conducted any investigations, the Claimant adduced no tangible evidence to prove want of reasonable and probable cause on the part of the police.
220. On cross-examination, the Claimant confirmed that the break-in occurred on the night of 22nd and 3rd April, 2013 and he was arrested on 8th May, 2013, more than two weeks later and as adverted to elsewhere in this judgement, the prosecution adduced evidence of the investigation the police carried out prior to the arrest and charge of the Claimant and his colleagues.
221. In the courts view, the Claimant has failed to show that the police had no reasonable and probable cause to arrest and charge him for the break-in.
222. Evidence on record show that the police investigated the break-in and a decision to charge was made by the Office of the Director of Public Prosecutions.



Finally, did any of the Respondents act out of malice or dishonesty?

223. As correctly submitted by the 2nd Respondent, it was the Claimant's duty to prove that the prosecution was actuated by a malicious intent by the police.
224. The Claimant admitted that he neither knew the police who arrested nor had he any grudge against them.
225. He further admitted that he was aware that police arrest suspects after a complaint is made.
226. In sum the Claimant adduced no evidence to prove that the police officers were motivated by malice.
227. In a nutshell, the Claimant has failed to prove on a preponderance of probabilities that he was maliciously prosecuted.
228. The foregoing equally addresses the allegation of unlawful or illegal arrest.
229. As regards unlawful detention, the Claimant confirmed on cross – examination that he was released on bond on 9th May, 2013 but did not satisfy the bond terms until 19th November, 2013 and thus remained in confinement.

Were the Respondents to blame for the Claimant's failure to satisfy the bond terms?

230. The court is not persuaded that the Claimant has evidentiary established a nexus between his failure to meet bond terms and the 1st and 2nd Respondents' report of the break-in to the police.
231. Relatedly, although the Claimant's submissions suggest that he was subjected to "public ridicule and defamation" neither the written statement dated 21st April, 2022 nor the oral testimony adduced in court make reference to the alleged defamation or particulars thereof.
232. Simply put, defamation is the publication of a representation which reflects on a person's reputation and which tends to lower the person in the estimation of right thinking members of society generally or tends to make them shun or avoid him. (See Winfield and Jolowicz on Tort (13th Edition 1989) at page 294).
233. Put in the alternative, a defamatory representation subjects a person to hatred, ridicule and contempt. (See *Tournier V National Bank of England* (1924) 1 KB 461).
234. Finally, defamation is either libel or slander.
235. It is unclear to the court as to whom among the Respondents defamed the Claimant, when and in what manner.
236. In the absence of particulars of defamation and supportive evidence, the claim for defamation is patently unsustainable.
237. Flowing from the foregoing, it is discernible that the Claimant's case is for dismissal and it is accordingly dismissed.

Relief

238. I will now proceed to determine whether the Claimant has made a case for any of the reliefs prayed for.

i. Declaration that the arrest, detention and prosecution was malicious, false and illegal

239. Having found as above this prayer is unmerited and is declined.



ii. General damages for malicious, false and illegal arrest, detention and prosecution

240. Having found that the Claimant has failed to prove that the Respondents were liable for malicious prosecution, illegal arrest or detention, the prayers for general damages for the tortious claims is dismissed.

iii. Damages for loss of earnings for 36 months, Kshs.288,000/=

241. This prayer lacks particulars and supportive evidence and is unsustainable. It is accordingly dismissed.

iv. Declaration that the Claimant's dismissal by the Respondent was unfair/wrongful and unlawful and entitlement to terminal dues and compensatory damages

242. Having found that the Claimant absconded or deserted the workplace, the declaration sought is unmerited and is declined.

v. Compensatory damages and terminal dues Kshs.106,000/=

243. Under this prayer, the Claimant is claiming pay in lieu of notice, pro rata leave and 12 months compensation.

244. Having found that the Claimant deserted the workplace, the prayer for pay in lieu of notice and compensatory damages are unsustainable and are dismissed.

245. On pro rata leave, the Claimant's written statement make no reference to pending leave days.

246. However, bearing in mind the manner in which the Claimant left employment, he is entitled to pay for any pending leave days, if unpaid.

247. However, the 2nd Respondent shall pay the Claimant for any unpaid outstanding leave days.

248. In the circumstances, parties shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI



JUDGE

