



REPUBLIC OF KENYA



KENYA LAW

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**Mburu v Co-operative Bank of Kenya Ltd & another (Cause 972 of 2015)
[2023] KEELRC 454 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 454 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 972 OF 2015
JK GAKERI, J
FEBRUARY 23, 2023**

BETWEEN

RUTH NJERI MBURU CLAIMANT

AND

CO-OPERATIVE BANK OF KENYA LTD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. This case has had a long and chequered history dating October, 2013.
2. By a Plaint dated 29th October, 2013, and filed on 29th October 2013, the Claimant sued the 1st and 2nd Respondents at the High Court alleging unfair termination of employment, malicious prosecution and defamation. The suit was subsequently transferred to the Employment and Labour Relations Court where it ought to have been filed in the first instance.
3. On 24th April, 2019, the Claimant's counsel applied for leave to amend the Plaint and the court granted leave.

The Claimant's case is pleaded as follows;

4. The Claimant avers that on 21st August, 2012 while working as a teller with the 1st Respondent, she had a cash shortage of Kshs.500,000/= and was unable to balance her accounts and reported the same to her seniors but the amount was not recovered on that or succeeding days.
5. That before necessary procedures were finalised, the 1st Respondent unreasonably, maliciously and unjustifiably reported the loss to the Anti Bank Fraud Unit of the Kenya Police on 28th August, 2012 and was charged for theft in the Chief Magistrates, Criminal Case No. 1324 of 2012 where she was displayed on television screens among criminals at the courts dock.



6. It is the Claimant's case that the 1st Respondent acted maliciously by reporting the loss of cash before investigations had been finalised, gave the Claimant's name to the police blaming the Claimant for the theft, giving the police false and misleading information, failing to carry out all requisite steps before placing blame on the Claimant and causing her arrest and prosecution.
7. The 2nd Respondent is accused of acting maliciously and illegally in that it arrested and charged the Claimant; acting on false information and carrying out shoddy or no investigation before charging the Claimant.
8. The Claimant further avers that after being granted bail and resumed duty on 30th August, 2012, she was suspended from duty in accordance with Clause A5C of the Collective Bargaining Agreement (CBA) to facilitate investigations and remained on suspension until 1st October, 2012 when she was unfairly dismissed from employment and the criminal case was concluded in June 2013.
9. The Claimant avers that she suffered pain, shame and a ruined reputation due to the criminal charges and being reported to the Credit Reference Bureau Africa Ltd for failure to service the loan she had with the 1st Respondent ruining her credit worthiness.
10. The Claimant prays for;
 - i. General damages, aggravated and exemplary damages for unlawful arrest, confinement, malicious prosecution, defamation and unreasonably, irregularly or unlawfully terminating the Claimant's employment and all the consequences thereof thereby ruining her banking, working and business careers.
 - ii. Special damages in the sum of Kshs.100,000/= spent on defending the criminal case.
 - iii. A declaration that the Claimant's summary dismissal from her employment with the 1st Respondent was unfair both substantively and procedurally, irregular and/or unlawful.
 - iv. Spent.
 - v. Unpaid salary and allowances from the date of suspension to dismissal at the rate of Kshs.92,523/=.
 - vi. Withheld half salary for the month of September 2012.
 - vii. 12 months salary compensation for unfair termination of her employment.
 - viii. General damages for being unreasonably and unprocedurally referred to Credit Reference Bureau.
 - ix. Unpaid leave days.
 - x. Costs of and incidental to this suit
 - xi. Interest on (i), (ii), (iv), (v), (vi), (vii) and (viii).

1st Respondent's case

11. The 1st Respondent avers that the Claimant was arrested on 28th August, 2012 and charged at the Chief Magistrates Court for stealing by servant for failure to account for Kshs.500,000/= which was in her custody.



12. It denies having acted maliciously in reporting the loss of Kshs.500,000/= as a thorough and exhaustive search was unsuccessful and the 1st Respondent had no option but report the loss to the police as the cash was in her custody.
13. That the 1st Respondent reported the loss to the police for the police to investigate and charge her, if circumstances justified such action.
14. It is the 1st Respondent's case that the Claimant authored her tribulations as she was duty bound to account in full for all monies received and held on behalf of the 1st Respondent as per the operating manual.
15. That the Claimant was dismissed from employment on 1st October, 2012 before the criminal case was concluded.
16. The 1st Respondent states that the Claimant's employment was based on trust and integrity and failure to account for the cash broke down the trust irretrievably and the 1st Respondent has no option but dismiss her from employment.
17. It is the Respondent's Case that although the Claimant was acquitted in the criminal case, the court had made a finding that the prosecution had established a prima facie case against her and was put on her defence and the acquittal could not be the basis of a claim.
18. That the finding of the Criminal Court vindicated the 1st Respondent's complaint to the police.
19. The 1st Respondent further avers that even if the Claimant suffered pain, shame and her reputation was lowered in the estimation of right thinking members of society as a result of the criminal case, and eventual dismissal from employment, she authored her tribulations by failing to discharge her duties diligently and with due care and as a consequence caused the loss of Kshs.500,000/=.
20. That the Claimant's suit was untenable as pleaded.
21. The 1st Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's Evidence

22. In her evidence-in-chief, the Claimant testified that she and four (4) other tellers worked in an open area and each had a box next to them for cash and none of the tellers left the Bank on the material day.
23. That one Dorcas Odidi, a personal banker had been called to assist. It was her testimony that money exchanged hands physically was passed through the system. That the Kshs.500,000/= could not be traced in the system and a physical search of four (4) tellers yielded nothing and continued the following day.
24. That thereafter, the Claimant together with the System Administrator and the Cash Officer recorded statements with the security person and the search continued for a week and the cash had not been recovered by 28th August, 2012 when she was arrested and charged and suspended on 30th August, 2012.
25. On cross-examination, the Claimant admitted that she started with the balance and had a shortage of Kshs.500,000/= and her seniors assisted in tracking the cash up to the time she was suspended and was being looked for at the time she was arrested.



26. It was her testimony that her cashbox constituted her work station and had to ensure that the cash and rubber stamps were locked away in the cashbox. That she was accountable for the cash handled by her and all cash exchanges had to reflect in the system.
27. The witness confirmed that the Teller giving out cash must record the transaction and all other Tellers balanced their journals on that day.
28. The Claimant denied having received the show cause letter on record and did not appeal the dismissal.
29. The witness admitted that she owed the 1st Respondent Kshs.3,363,800.00 and serviced the loan for 2 months only and went into arrears. The witness confirmed that the show cause letter may have been posted. That she did not collect the certificate of service as it was of no use after the prosecution.
30. That she was aware that any money lost in a bank must be reported to the police to secure a claim for insurance.
31. It was her testimony that once a report was made to the police, the police carried out their own independent investigations.
32. That she blamed the 1st Respondent for failure to secure employment as it referred her name to the Credit Reference Bureau, but admitted that she still owed monies to the 1st Respondent.
33. On re-examination, the witness testified that she was governed by the CBA and the police did not conduct investigations before she was arrested and charged.

Respondent's evidence

34. RWI, Mr. Samuel Magati, testified that he conducted investigations in relation to the shortage occasioned by the Claimant. He testified that the Claimant's closing balance was Kshs.762,473/= but had cash amounting to Kshs.262,473.50cts, Kshs.500,000/= was missing.
35. That the investigation concluded that the shortfall could not be explained as there was no misposting and all transfers were reflected and it was recommended that the Branch Manager should debit the Claimant's fraud and forgeries with Kshs.500,000.00.
36. That the matter was reported to the police after internal investigations were concluded as cash was unaccounted for.
37. The witness testified that failure to account for monies received or held on behalf of the bank justified summary dismissal and the bank suffered loss.
38. The witness further testified that police had to be involved as it was a requirement for insurance and the 1st Respondent only reported the loss and the circumstances in which it took place and gave the Claimant's name. That the bank acted procedurally and without malice.
39. On cross-examination, the witness stated that he had worked in the bank from 2007 to date and was a Manager in 2012, with investigators and reviewed the investigations report in this case.
40. It was his testimony that only the Claimant had a shortfall on the material day. He maintained that it was the duty of the teller to secure the cash under his/her control in the till and the Claimant had a lock.
41. That the bank could dismiss the Claimant before the criminal case was concluded since it was guided by the manual and failure to account for cash amounted to gross misconduct.



42. That the investigation report was dated 27th August, 2012 and was handed over to the Director, Human Resource.
43. The witness further testified that the bank had no control over the processes undertaken by the police.
44. RWI further testified that shortage or shortfall was not necessarily a criminal offence but depended on how it came about as the money was sometimes recoverable.
45. It was his testimony that the investigation failed to unravel how the loss occurred.
46. On re-examination, the witness stated that each teller had a counter as her/his workplace and a movable till with a lock and had to be locked whenever the teller left the counter.
47. It was his testimony that bank disciplinary processes and criminal proceedings were distinct processes.
48. That staff had access to the CCTV recordings and the Claimant was involved in the investigations.
49. RWII, Leah Kerich, testified that she was the Head of Employee Relations and Welfare. It was her testimony that the show cause letter dated 3rd September, 2012 was dispatched to the Claimant but she did not respond and the 1st Respondent progressed the matter.
50. It was her testimony that the bank was obligated to report the loss to the Bank Fraud Investigation Unit (BFIU) and there was no malice and no false or misleading information was given to the police and the loss took place on 21st August, 2012.
51. That the news clip was not televised at the behest of the 1st Respondent.
52. The witness confirmed that the Claimant was still indebted to the bank.
53. On cross-examination, the witness testified that the Claimant was unionisable and thus subject to the CBA in force. It was her testimony the criminal case had nothing to do with the bank's internal disciplinary processes and the bank had completed its investigations.
54. The witness admitted that the notice to show cause had not been acknowledged by the Claimant and the summary dismissal letter was posted to the Claimant's postal address P.O Box 1637 – 00100, Nairobi. That the bank employed Clause 5C to dismiss the Claimant from employment.
55. Finally, on re-examination, the witness maintained that it was the Claimant's duty to ensure safety of the cash given to her.

Claimant's Submissions

56. The Claimant's counsel identified two issues for determination, namely;
 - i. Whether the Claimant was unreasonably, irregularly, wrongfully and unlawfully treated by the 1st Respondent culminating in her summary dismissal.
 - ii. Whether the Claimant is entitled to the reliefs sought.
57. As regards the 1st issue, counsel submitted that the Claimant was unfairly treated in relation to the shortage of Kshs.500,000/= as her work station was not well secured, akin to that of a person handling cash.
58. That it was a common area with other tellers, that another person could access the Claimant's cash box since it was behind her and she had no cubicle by herself and the CCTV cameras were not functional.



59. It was submitted that the 1st Respondent failed in its obligation of securing the working conditions of the Claimant and the money she was expected to handle as the Claimant did not leave her work station or the bank while other tellers had left by the time the Claimant discovered the shortage.
60. Counsel further submitted that the Claimant was summarily dismissed before a disciplinary hearing. That the Claimant received the suspension and dismissal letters while facing criminal charges and the money was recoverable from the system as was the case at the Agakhan and Industrial Area Branches. No particulars were furnished of how the lost cash was recovered.
61. It was counsel's submission that the Claimant was charged before investigations were concluded. That the police were not called to investigate the matter but merely arrested the Claimant and charged her in court. The court was invited to consider the Respondent's evidence that it was not bound by the outcome of the criminal case or investigations by the police in taking the actions it took.
62. Finally, it was submitted that the 1st Respondent did not serve the notice to show cause as service was not demonstrated by evidence and the Claimant denied having received the letter and was condemned unheard.
63. As regards entitlement to the reliefs sought, counsel submitted that the reason for the summary dismissal was not in the operative CBA and did not follow the reason in the suspension letter.
64. That paragraph A5(c) of the CBA provided for reinstatement after the Claimant was absolved by the criminal case and was thus entitled to the reliefs sought.
65. Reliance was made on the decisions in *Patrick Njuguna Kariuki V Delmonte (K) limited* ELRCC No. 953 of 2011, as well as *Mathew Kipchumba Koskei v Baringo Teachers Sacco* HCCC No. 11 of 2012 and *Grace Gacheri Muriithi v Kenya Literature Bureau* ELRCC No. 44 of 2011 to urge that Respondent dismissed the Claimant from employment before according her due process and thus unfairly and should be paid throughout the period of suspension till judgment.
66. Counsel further submitted that the Respondent caused the malicious prosecution of the Claimant and relied on the decision in *Naqvi Syad Omar v Paramount Bank Limited & The Attorney General* where Rika J. awarded Kshs.2,500,000/= for malicious prosecution payable by the Respondents. The Claimant had prayed for Kshs.3,500,000/= in that case.
67. It was urged that the Claimant's employability had been diminished by the 1st Respondent's act of reporting the Claimant to the Credit Reference Bureau yet it occasioned her inability to pay the loan in question and the Claimant had a clean record and good appraisals.
68. Reliance was made on the decision in *Dr. Ezekiel Nyangoya Okemwa v Kenya Marine Fisheries Research Institute* where Rika J. awarded the Claimant Kshs.33,455,592/= in salary arrears and Kshs.20,000,000/= in damages for unfair termination and diminished employability.
69. The court was invited to award damages to the Claimant for diminished employability.
70. Reliance was also made on the decision in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union* to reinforce the submission.
71. Finally, the court was urged to award the Claimant Kshs.11,565,375/= in general damages for 125 months and Kshs.20,000,000/= for the reference to the Credit Reference Bureau for loss of employability.



1st Respondent's submissions

72. Counsel for the 1st Respondent identified three issues for determination;
- i. Whether termination of the Claimant's employment was procedural and fair.
 - ii. Whether the claim of malicious prosecution has any basis.
 - iii. Whether the Claimant is entitled to the reliefs sought.
73. On the 1st issue, reliance was made on the Court of Appeal decision in *National Bank of Kenya v Anthony Njue John* (2019) eKLR and the decisions in *Nugi Kabiga v Access Kenya Group Limited* (2022) eKLR and *John Jaoko Othino v Intrabealth International* (2022) eKLR to urge that termination of the Claimant's employment was fair and procedural as the Respondent issued a notice to show cause and the Claimant refused to disclose the same to the court or respond to it.
74. That after the shortage was reported to the Human Resource Department, the Security Department investigated the same and prepared a report which recommended the issuance of a notice to show cause to the Claimant and was subsequently suspended to facilitate further investigation. That the 1st Respondent had reasonable cause to terminate the Claimant's employment.
75. Counsel argued that if the Claimant had not been issued with the notice to show cause dated 3rd September, 2012 a alleged, she could have used the same as a ground for appeal against the dismissal. That the Claimant was dismissed after she failed to respond to the notice to show cause and did not appeal the decision.
76. It was urged that all the procedural requirements were complied with. The decision in *Phoeby Aloo Inyanga v Stock well one Homes Management Ltd & another* (2022) eKLR was cited to urge that the Claimant was accorded an opportunity to be heard through the notice to show cause.
77. Reliance was also made on the decisions in *Charles Fundi Njiru v Board of Management Baricho High School* (2020) eKLR and *Patrick Onchoke Nyabuto v Rainforest Farmlands (K) Ltd* (2020) eKLR where the Claimant had refused to attend a disciplinary meeting.
78. Counsel submitted that termination of the Claimant's employment was fair and procedural.
79. As regards the claim for malicious prosecution, it was submitted that the 1st Respondent carried out an internal investigation on the missing funds and the Claimant was found culpable and the matter was reported to the police for further action. Counsel urged that the Claimant's assertion that she was charged before investigation was not attributable to the 1st Respondent and the decision to charge her was made by the police.
80. That in addition, the criminal court ruled that the Claimant had a case to answer and neither the 1st Respondent nor the police was to blame for charging the Claimant as the court vindicated them.
81. Counsel relied on the decision in *Chrispine Otieno Caleb v Attorney General* (2014) eKLR where the court relied on the Court of Appeal decision in *Mbowa v East Menjo District Administration* (1972) EA 352 where the East African Court of Appeal set out the four requirement or ingredients of the tort of malicious prosecution namely; institution of proceedings, termination in favour of the Plaintiff, absence of reasonable and probable cause and malice.
82. Counsel submitted that whereas the Claimant's case satisfied elements 1 and 2 above, it did not establish elements 3 and 4 as regarded reasonable and probable cause and malice as the Claimant admitted that the 1st Respondent was justified in reporting the matter to the police as the cash had not



been traced and did not prove malice as the claim that the Claimant was displayed among other accused persons was not attributable to the 1st Respondent.

83. The Court of Appeal decision in *Nzoia Sugar Co. Ltd v Fungututi* (1988) KLR 399 was relied upon to underscore the essence of the element of malice in a suit founded on malicious prosecution.
84. It was urged that no evidence of malice or ill-will or improper motive was adduced against the 1st Respondent.
85. On the last issue, it was submitted that the 1st Respondent investigated the shortage occasioned by the Claimant who refused to participate in the disciplinary hearing which led to her dismissal from employment.
86. That the 1st Respondent had a valid reason to commence disciplinary action against the Claimant and complied with the provisions of Section 45 of the *Employment Act*, 2007.
87. The decision in *Thomas Sila Nzivo v Bamburi Cement Ltd* (2014) eKLR was cited to urge that the Claimant was not entitled to the reliefs sought as the summary dismissal was fair in substance and procedure.
88. As regards special damages, counsel submitted the amount expended by the Claimant in the Criminal case was irrecoverable as the prosecution was not malicious and the Claimant led no evidence to prove the claim for the Kshs.100,000/=.
89. As regards the Kshs.20,000,000/= sought for reference to the Credit Reference Bureau, it was submitted that the Claimant admitted having been indebted to the 1st Respondent to the tune of Kshs.3,363,800/= on dismissal from employment and her inability to service the loan after 2 months and fell into arrears and could not therefore blame the bank for reporting her to the Credit Reference Bureau.
90. On the claim for Kshs.11,565,375/= for 125 months, counsel submitted that the prayer had no legal basis as the *Employment Act* had an upper limit of the compensation payable to an employee for unlawful dismissal or termination of employment.
91. Finally, the court was invited not to find in favour of the Claimant and if it did, the compensation be equivalent to 2 month's salary.
92. The 2nd Respondent did not respond to the Claim or file any document nor participate in the proceedings in any way.

Analysis and determination

93. After careful consideration of the pleadings, evidence, submissions by counsel and the law, the issues for determination are;
 - i. Whether the Claimant was maliciously prosecuted and defamed by or at the behest of the Respondent.
 - ii. Whether termination of the Claimant's employment by the Respondent was unfair and unlawful.
 - iii. Whether the Claimant is entitled to the reliefs sought.
94. As to whether the Claimant was maliciously prosecuted and defamed, parties have adopted contrasting positions. While the Claimant maintains that she was maliciously prosecuted and defamed by the



- Respondent as she was reported to the police and charged before investigations were concluded, and was displayed among other accused persons, the 1st Respondent urged that the 1st Respondent had good reasons for reporting the matter to the police who made the decision to charge her and had no control over the media.
95. As regards defamation, the starting point is the definition of the tort of defamation.
96. In *Parmitter v Coupland* (1840) 6M & W 105 at p. 108, Parker B defined a defamatory statement as one “which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule.”
97. In *Sim V Stretch* (1936) 2 ALL ER 1237 at 1240, Lord Atkin added the test “would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?”
98. According to *Winfield and Jolowicz on Torts* 13th Edition, at page 294,
- Defamation is the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him.
99. Needless to emphasize, defamation is either libel or slander and the statement or representation
- i. must have been defamatory in the ordinary sense or by innuendo
 - ii. referred to the Plaintiff
 - iii. was published by the defendant and
 - iv. maliciously.
100. In this case, the Claimant alleges that she was displayed among other accused persons by a media house, but did not furnish any particulars of the alleged defamation. Neither the defamatory footage nor the statements or words were availed to the court as evidence.
101. The purported defamation by juxtaposition remained an unproven allegation.
102. Relatedly, the Claimant furnished no evidence on how the Respondents facilitated or actuated the alleged defamation. Finally, the alleged media house was not joined in the proceedings. The court is in agreement with the Respondent counsel’s submission that the Claimant failed to establish a nexus between the alleged defamation and the Respondents generally.
103. This finding is consistent with the holding of the Court of Appeal in *Paramount Bank Ltd V Naqvi Syad Camara & another* (2017) eKLR as follows;
- “ . . . First, without joining in the proceedings the media house concerned, the source of the news report could not be established. There was no evidence linking it with the Appellant. Secondly, were the words complained of defamatory . . . ”
104. In the instant case, the Claimant neither pleaded the particulars of the alleged defamation nor proved it.
105. Regrettably, the award of Kshs.2,500,000/= as general damages awarded in *Naqvi Syad Omar v Paramount Bank Ltd & another* (Supra) relied upon by the Claimant’s counsel to urge an award of Kshs.3,500,000/=, was set aside by the Court of Appeal in *Paramount Bank Ltd v Naqvi Syad Camara & another* (supra) and is thus of no persuasive value.



106. In the circumstances, it is the finding of the court that any relief associated with the tort of defamation is unsustainable.

107. As regards malicious prosecution, according to Harrey Street on the *Law of Torts*, 5th Edition at page 391;

“It is a tort maliciously and without reasonable and probable cause to initiate against another judicial proceedings which terminate in favour of that other and which result in damage to his reputation, person, freedom or property.”

108. The ingredients of malicious prosecution were aptly captured by the East African Court of Appeal in *Mbowa v East Mengo District Administration* (Supra) reproduced on [Paramount Bank Ltd v Nagvi Syad Qamara & another](#) (Supra) as follows;

“The action for damages for malicious prosecution is part of the common law of England . . . The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit . . . It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are;

1. The Criminal proceedings must have been instituted by the defendant, that is he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues warrant for the arrest of the Plaintiff or a person arrests the Plaintiff and takes him before a judicial authority.
2. The defendant must have acted without reasonable or probable cause i.e there must have been no facts which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified.
3. The defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings with an improper and wrongful motive, that is he must have had “an intent to use legal process in question for some other than its legally appointed and appropriate purpose” *Pike v Waldrum* (1952) 1 Llyods Rep. 431 at P 452.
4. The criminal proceedings must have been terminated in the Plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge . . .

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 . . .”

109. The court guided accordingly.

110. On the first element, it is common ground that the 1st Respondent was “actively instrumental” in instigating the proceedings (see Lopes J. in *Danby v Beardsley* (1880) 43 L.T 603 at P. 604) leading to the arrest of the Claimant.



111. As the Court of Appeal explained in *Paramount Bank Ltd v Naqvi Syad Qamara & another* (Supra),
- “It was explained in the case of *Gitau V Attorney General* (1990) KLR 13 that if a person making a complaint or the police officer to whom the complaint is made, genuinely believed the facts and acted upon them being satisfied that a probable crime had been established, then the arrest and subsequent prosecution would be justified . . .”
112. As regards probable or reasonable cause, in *Kagame & others v Attorney General & another* (1969) EA 643, stated as follows;
- “Reasonable and probable cause is an honest believe 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 . . . That is to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution . . .”
113. In this case, the Claimant maintained that the shortage of cash was reported to the police before investigations were concluded and all possible leads ruled out. This submission was not entirely correct as the chronology of events reveal.
114. It is common ground that the shortage occurred on 21st August, 2012 and the process of tracing the loss commenced in earnest after it was reported to those concerned and continued on the following days and was subsequently reported to the Human Resource Department which reported it to the security department which investigated the loss and prepared a report dated 27th August, 2012 which was submitted to the Human Resource Division, by which date the loss had not been traced. The Head of Security Mr. Edwin Karuri recommended that;
- i. The Manager, Kimathi Branch should debit the Claimant’s frauds and forgeries with Kshs.500,000/=, the cash shortage and credit their cash differences account.
 - ii. The Claimant should show cause why disciplinary action should not be taken against her for failure to account for the Kshs.500,000/= on 21st August, 2012 while working as a teller at the Kimathi Branch as per Clause 9.3.5 of the 1st Respondent’s Human Resource Staff Manual.
115. On cross-examination, the Claimant testified that her seniors assisted in tracing the cash and the process was still ongoing even by the 28th August, 2012 when she was arrested.
116. Although the Claimant testified that the objectives of the investigation by the 1st Respondent were not exhaustive, she did not explain what was not included but added that it was unclear whether other tellers were investigated. Admittedly, the Claimant was aware that other tellers had no shortages and the Claimant had not informed the employer that she suspected any of her co-tellers.
117. Similarly, the Claimant confirmed that she was unaware whether the cash was recovered.



118. The witness confirmed that she was aware that any loss of money in a bank had to be reported to the police to secure a claim from the insurer and she was acquitted by the court in the criminal case.
119. Contrary to the Claimant’s counsel’s submission on the implication of an acquittal, the effect of an acquittal in a criminal case was explained by the Court of Appeal in *Attorney General & another v Andrew Maina Githinji & another* (2016) eKLR as follows;
- “An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard on proof requirements. While an employer may rely of the outcome of a criminal trial against an employee to make its decision on that employee going against the outcome, does not in itself render the employer’s decision wrongful or unfair.”
120. Similar sentiments were expressed by the Court of Appeal in *Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital* (2019) eKLR as follows;
- “ . . . The discharge of the Appellant in itself was not proof of his innocence and could not operate as a bar to subsequent proceedings against him on account of the same facts.”
121. In other words, the outcome of a criminal case is not necessarily binding upon the employer.
122. Similarly, and as submitted by the Respondent’s counsel, the criminal court in Case No. 1324 of 2012 found that the Claimant had a case to answer and had to defend herself. This finding by the criminal trial court appear to vindicate the 1st Respondent that it had probable and reasonable cause when it reported the shortage to the police as required. At any rate, its effort to trace the cash from 21st August, 2012 had not borne fruit.
123. Finally, it is common ground that the 1st Respondent had entrusted the Claimant with cash in the course of her duties as a Bank Teller and she failed to account for Kshs.500,000/= on 21st August, 2012 and there is no evidence on record that the cash was recovered.
124. In the courts view, nothing turns on the fact that one Dorcas Onditi, a Teller who had left before the shortage was discovered was not checked as the Claimant adduced no evidence that she suspected she had taken the cash or that she was the one stationed closest to her.
125. For the foregoing reasons, the court is satisfied and finds that the Claimant has failed to establish that the 1st Respondent had no reasonable or probable cause when it reported the shortage to the police who arrested and charged the Claimant.
126. As regards malice, the Claimant confirmed she had a good working relationship with the Respondent and her seniors assisted her and received co-operation from colleagues in tracing the shortage and could not fault her colleagues for reporting the shortage to Human Resource.
127. In the context of the tort of malicious prosecution, malice denotes “any motive than that of simply instituting a prosecution for the purpose of bringing a person to justice” See Alderson B in *Stevens v Midland counties Ryco* (1854) 10 Exch 352.



128. According to *Winfield and Jolowicz on Tort*, 13th Edition at P. 550.

“Perhaps we are nearer the mark if we suggest that malice exists unless the predominant wish of the accuser is to vindicate the law.” See H. Stephen *Malicious Prosecution* (1888) page 37. These explanations show that for the plaintiff to succeed on this requirement, he/she must prove that the Respondent, by instituting the case had some other motive other than the desire to ensure justice was administered in relation to a person the defendant believed was guilty.

129. Even in circumstances in which motives are mixed, the Plaintiff must establish that the dominant motive was one other than ensuring the ends of justice.

130. In *Nelles v Ontario* (1989) 2 SCR 170 cited in *Hassan Magiya Kiage V Attorney General & another* the Supreme Court of Canada held as follows;

“ . . . Malicious prosecution as the label implies is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain . . . ”

131. Intriguingly, none of the particulars of malice outlined under paragraph 5 of the Amended Plaint suggest that the 1st Respondent had a motive other than bringing Claimant to justice for the loss of Kshs.500,000/=. The Claimant did not fault the 1st Respondent or any of its officers for having acted under improper motives.

132. The court is not persuaded that the 1st Respondent acted recklessly and indifferently but acted genuinely on the information at its disposal in reporting the matter to the police.

133. Having searched for the cash for over 6 days and investigated the loss and satisfied itself that cash was not in the system, the 1st Respondent had reasonable ground to belief that escalating the shortage to a higher authority was in the best interest of the Bank.

134. The court is not satisfied that it was unreasonable for the 1st Respondent to suspect the Claimant. The allegation that the Claimant did not leave the bank on that day does not necessarily mean that she did not leave her work station at any point during the day.

135. In sum, other than itemising the particulars of malice in the plaint, the Claimant failed to establish that the criminal proceedings against her were actuated by malice on the part of the Respondents. The 1st Respondent investigated the case.

136. Finally, as regards termination of the proceedings, the plaintiff must establish that the criminal proceedings terminated in his favour and terminated by way of an acquittal, discharge or withdrawal, as explained in *Egbema v West Nile Administration* (1972) EA 60,

“For the purposes of proof that the criminal proceedings have been determined in the Appellant’s favour, it is enough that the criminal proceedings have been terminated without being brought to a formal end . . . ”

137. In this case, it is common ground that the criminal case against the Claimant came to a formal end and terminated in an acquittal of the Claimant and is conceded by the Respondent.



138. Ultimately, and as submitted by the 1st Respondent’s counsel, the court is satisfied that although the Claimant has established that the 1st Respondent was “actively instrumental” in instigating the proceedings and the case terminated in the Claimant’s favour, the Claimant failed to establish that the Respondent acted without reasonable or probable cause and acted maliciously.
139. In the end, the action for damages for malicious prosecution is unsustainable and consequently fails.
140. As to whether termination of the Claimant’s employment was unfair and unlawful, parties have adopted contrasting positions. While the Claimant’s counsel submitted that it was unfair, the Respondent’s counsel urged that it was substantively and procedurally fair as ordained by the provisions of the *Employment Act* and elaborated by case law.
141. The provisions of Sections 41, 43, 44, 45 and 47 (5) of the *Employment Act* provides the bullwark on termination of employment. They provide for the procedure to be complied with, reason(s) for termination, summary dismissal and justification for termination.
142. As aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair.
143. These requirements were elaborated upon by the Court of Appeal in *Naima Khamis v Oxford University Press (E.A) Ltd* (2017) eKLR, where the court held as follows;
- “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43 (1) of the *Employment Act* which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45 (2)(c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally fair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”
144. The court is guided by these sentiments.
145. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reasons for termination

146. As explained in *Nugi Kabiga v Access Kenya Group Ltd* (Supra), substantive justification entails prove of reasons for termination of employment as provided by Section 43 and 45 (2) (a) and (b) of the *Employment Act*.
147. The Suspension letter dated 30th August, 2012 stated that the Claimant’s suspension was to facilitate investigation of the cash shortage of Kshs.500,000/=.
148. Similarly, the Summary dismissal letter dated 1st October, 2012 under reference: Summary Dismissal – Cash Shortage of Kshs.500,000 stated inter alia;

“We refer to previous correspondence relating to the above subject matter and note with concern that you have adamantly refused to respond to the disciplinary inquiry. Further



investigations carried out on the above matter have confirmed that you failed to account for loss of Kshs. 500,000 in your custody.

Consequently, the bank has decided to terminate your services due to lack of trust with immediate effect in accordance with the provisions of clause A5 of the Collective Bargaining Agreement . . .”

149. It is common ground that on 21st August, 2012, the Claimant’s journal could not balance owing to a cash shortage of Kshs.500,000/=, the basis on which she was suspended and eventually dismissed summarily for lack of trust.
150. Instructively, the Claimant had been on suspension from 30th August, 2012 until 1st October, 2012, when she was summarily dismissed during which time the missing cash had not been recovered, a fact the Claimant confirmed on cross-examination.
151. According to the Claimant, her summary dismissal was premature as investigations had not been concluded, a matter adverted to in the submissions. It was submitted that some tellers had left before the shortage was discovered and were never searched or investigated about the loss. However, according to the Claimant’s evidence on record, only one Dorcas Onditi had left and a physical search was conducted on 4 Tellers.
152. Relatedly, the Investigation Report dated 27th August, 2012 indicates that the investigator interviewed staff at the Kimathi Branch. The report found that the loss was not occasioned by misposting by the Claimant or system failure.
153. Finally, the Claimant’s evidence that there were chances that the cash would be traced as had happened at the Aga Khan and Industrial Area branches was not supported by any particulars as to how cash was traced in the two cases and within what timelines as the cash in the instant case had not been recovered by the date of summary dismissal.
154. Equally, the Claimant’s counsel’s submission that she was dismissed when the criminal case was on-going as the Claimant’s employment with the Respondent was not dependent of the criminal case. Moreover, Clause 5 (c) (iii) of the CBA makes no reference to criminal proceedings or internal processes and would appear to encompass both processes as criminal prosecutions are seldom in termination of employment and as adverted to elsewhere in this judgement, the two processes have different procedures and standard of proof.
155. For the foregoing reasons, the court is satisfied and finds that the 1st Respondent had a valid reason to terminate the Claimant’s employment.

Procedure

156. Section 41 of the *Employment Act*, 2007 prescribes the procedural requirements to be complied with prior to termination of employment and courts have elaborated on these requirements as was the case in *National Bank of Kenya v Antony Njue John* (Supra).
157. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Court of Appeal explained the provisions of Section 41 of the *Employment Act* as follows;

“Four elements must be discernible to pass muster, namely;

- i. an explanation of the grounds of termination in a language understood by the employee;



- ii. the reasons for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

158. Applying the foregoing principles to the fact of the instant case, it is clear that the summary dismissal of the Claimant in the manner in which it was conducted did not meet the threshold prescribed by the provisions of the *Employment Act*.
159. First, although the 1st Respondent submitted that it issued a notice to show cause dated 3rd September, 2012, the Claimant confirmed on cross-examination that she neither received the show cause letter nor refused to acknowledge receipt.
160. More significantly, the 1st Respondent adduced no evidence that it handed over the letter to the Claimant physically or posted it or dispatched the same via email. In the courts view, since the Claimant was under suspension, it was incumbent upon the 1st Respondent to ensure that the Claimant received the notice to show cause as it was part of the requirement of affording the Claimant an opportunity to respond to the allegations made against her. The 1st Respondent should have telephoned the Claimant to ascertain whether she had received the letter. Proceeding with the dismissal before confirmation that the Claimant had in fact received the show cause letter was unfair.
161. Similarly, the Claimant’s non-responsiveness to the notice to show case should have triggered the next cause of action i.e invitation for a disciplinary meeting.
162. The 1st Respondent adduced no evidence of an invitation to the Claimant for a disciplinary hearing including the right to be accompanied by another employee or shop floor representative.
163. Finally, the 1st Respondent availed no evidence of the minutes of the disciplinary hearing.
164. In the absence of evidence that the Claimant was taken through a disciplinary process as ordained by the provisions of the *Employment Act*, it is the finding of the court that termination of the Claimant’s employment by the 1st Respondent was unfair within the meaning of Section 45 of the *Employment Act* for want of procedural propriety.
165. As regards the reliefs sought, the court proceeds as follows;

i. General damages, aggravated and exemplary damages for unlawful arrest confinement, malicious prosecution etc.

166. Having found that the case for malicious prosecution and defamation was unsustainable for want of proof while unlawful arrest and confinement were neither specifically pleaded nor proved by evidence, the prayer for general aggravated and exemplary damages is unsubstantiated and is accordingly dismissed.

ii. Special damages, Kshs.100,000/=

167. Having found that the 1st Respondent had reasonable and probable cause to report the shortage of Kshs.500,000/= occasioned by the Claimant to the police, which culminated in her arrest and prosecution, the amount spent in defending the criminal case is unrecoverable. The prayer is declined.



iii. Declaration

168. Having found that the summary dismissal of the Claimant from employment was unfair, a declaration to that effect is hereby issued.

iv. Salaries and allowances from date of suspension and dismissal to the date of judgement at the rate of Kshs.92,523/=.

169. The Claimant adduced no evidence of the alleged loss. The prayer is disallowed for want of justification and necessary particulars.

v. Withheld half salary for the month of September 2012

170. Having found that termination of the Claimant's employment by the 1st Respondent was unfair, the half salary for September 2012 is awarded.

vi. 12 months salary compensation

171. Having found that the summary dismissal of the Claimant from employment was unfair for want of procedural propriety, the Claimant is entitled to compensation pursuant to the provisions of Section 49 (1) (c) of the *Employment Act*, 2007.

172. In consonance with the provisions of Section 49 (4) of the *Employment Act*, the court has taken the following into consideration.

- i. The Claimant was an employee of the 1st Respondent for about 4 years and 3 months.
- ii. The Claimant was a good worker and had no previous record of misconduct, warning letter or disciplinary matters, a fact she confirmed on cross-examination.
- iii. The Claimant had reasonable expectation of remaining in the employment of the 1st Respondent for a long time as evidenced by the loans she had taken from the employer.
- iv. Owing to the employer's business, the Claimant's position and circumstances in which dismissal from employment took place, the chances of the Claimant securing comparable or suitable employment were significantly diminished.
- v. The Claimant did not appeal the 1st Respondent's decision to dismiss her from employment or express her wish to continue in the 1st Respondent's employment.

The Claimant confirmed that she did not collect the certificate of service as according to her, it was of no use after the prosecution.

173. In the circumstances, the equivalent of 5 months gross salary is fair.

vii. General damages for being referred to the Credit Reference Bureau.

174. It is common ground that the 1st Respondent referred the Claimant to the Credit Reference Bureau when she defaulted on the amount owed to the bank. On cross-examination, the Claimant confirmed that she owed the 1st Respondent Kshs.3,363,800/= as at the date of termination and was unable to service the loan after 2 months.

175. In the circumstances, the court is in agreement with the 1st Respondent counsel's submission that the bank had no option but to report the Claimant's loan as non-performing as required by the *Banking*



Act which culminated in her being listed by the Credit Reference Bureau which impacted negatively on her credit worthiness.

176. Finally, the Claimant adduced no evidence that the report by the employer that the loan was non-performing was unreasonable and unprocedural. In the circumstance, this prayer lacks a factual and legal basis and is declined.

viii. Unpaid leave days

177. Neither the written statement nor the oral evidence adduced in court make reference to outstanding or untaken leave days and how many they were. In the absence of the requisite particulars, the prayer is declined.

178. In conclusion, judgement is entered for the Claimant against the 1st Respondent in the following terms;

- a. Declaration that the summary dismissal of the Claimant by the Respondent was unfair.
- b. Withheld half salary for September 2012, Kshs.46,261.50.
- c. Equivalent of 5 months gross salary, Kshs.462,615/=.
- d. Costs of this suit.
- e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2023

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

