



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1684 OF 2016**

**(Formerly Nakuru ELRC Cause No. 637 of 2014)**

**Before Hon. Lady Justice Maureen Onyango**

**MICHAEL NJOROGE**

**CLAIMANT**

**VERSUS**

**BARCLAYS BANK LIMITED**

**1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL**

**2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The suit herein was instituted by a plaint dated 3<sup>rd</sup> and filed on 8<sup>th</sup> December 2014. In the plaint the Plaintiff (hereinafter referred to as the Claimant) alleges that the 1<sup>st</sup> Respondent, a bank duly registered in Kenya, and who was his employer, caused the 2<sup>nd</sup> Respondent, the Attorney General who is the Chief Legal Adviser of the Government of Kenya, to arrest him through the police, by making malicious and false statements accusing the Claimant of conspiracy to rob the 1<sup>st</sup> Respondent.

2. The Claimant avers that he was arraigned in **Nakuru CM**

**Criminal Case No. 3759 of 2012.** That upon hearing the Claimant was discharged under Section 210 of the Criminal Procedure Act with no case to answer.

3. It is the Claimant's case that on the basis of the false, malicious and trumped up charges framed against him the 1<sup>st</sup> Respondent dismissed him from employment, which dismissal was unfair as there was no valid reason thereof.

4. The Claimant avers that he had worked for the Respondent for 5 years as a bank teller and was earning a salary of Kshs.52,000/=.

5. The Claimant seeks the following remedies –

*(a) General damages for malicious prosecution*

*(b) Damages equivalent to salary for a period of 12 months at the rate of Kshs.52,000 per month.*

*(c) All the benefit that the plaintiff is entitled to under the contract of employment and the Employment Act.*

*(d) Certificate of service.*

*(e) Special damages in the nature of the advocates costs in defending criminal case number 3759 of 2012.*

*(f) Costs of the suit*

6. The 1<sup>st</sup> Respondent filed a statement of defence in which it admits employing the Claimant as a Clerk on 14<sup>th</sup> April 2008. At the time of termination the Claimant was a Cashier earning a salary of Kshs.441,096 per annum and house allowance of Kshs.44,000 per annum.

7. It is the Respondent's case that on 21<sup>st</sup> October 2011, the Physical Security Department received information of a possible bank robbery at the Respondent's Nakuru East Branch which was to take place on 22<sup>nd</sup> October 2012. That a gang had insider information that there was going to be repatriation of monies amounting to Kshs.120,000,000 from branches within the hub.

8. That one of the guards had been approached on 11<sup>th</sup> October 2012 by one of the gang members and requested to recruit a night guard to be part of the syndicate which included bank staff, who were to avail duplicate keys and cash repatriation details.

9. That on 22<sup>nd</sup> October 2012 at between 7.30 and 8.00 pm, the armed robbers accessed the branch. However, the police who had been informed of the robbery ambushed the gangsters and shot three of them dead.

10. That investigation that followed the attempted robbery established that the Claimant was introduced to the gang around 18<sup>th</sup> October 2012 with other bank employees who helped in leaking information to the gang. That the officers who had been tipped started monitoring the Claimant's movements on 19<sup>th</sup> October 2012 and he was seen in meetings with the gang at Midland Hotel within Nakuru Town to plot the robbery. That the police identified the Claimant and two other bank employees at the meetings.

11. It is the 1<sup>st</sup> Respondent's case that the Claimant was suspended from duty for 30 days on 26<sup>th</sup> October 2012 in accordance with the Bank's Disciplinary procedure to facilitate investigations. The suspension was extended twice while awaiting finalization of the investigations.

12. On 26<sup>th</sup> April 2013, the Claimant was invited to appear before the 1<sup>st</sup> Respondent's disciplinary committee at 2<sup>nd</sup> floor East End Building, Nakuru. He attended accompanied by a fellow employee as his representative, and denied all charges against him.

13. After the hearing, the disciplinary committee recommended the termination of the Claimant's employment and on 7<sup>th</sup> May 2013 the 1<sup>st</sup> Respondent terminated the Claimant's employment.

14. The Claimant appealed against the termination on 14<sup>th</sup> May 2013 and was heard on 22<sup>nd</sup> May 2013 without a representative after he told the appeals committee that he was conformable to appear alone.

15. By letter dated 23<sup>rd</sup> May 2013 the Respondent informed the Claimant that his appeal was not successful.

16. It is the 1<sup>st</sup> Respondent's case that the termination was for valid reason and in compliance with the 1<sup>st</sup> Respondent's disciplinary procedure and therefore valid.

17. The 2<sup>nd</sup> Respondent filed a response to the claim on 3<sup>rd</sup> March 2015 in which it denied the averments of malicious prosecution, stating that the charges against the Claimant were instituted after investigations in line with the laid down procedures.

18. At the hearing, the Claimant testified on his behalf. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents each called one witness. The parties thereafter filed written submissions.

### **Analysis and Determination**

19. The issues for determination are whether the Claimant has proved unfair termination and malicious prosecution against the Respondents and whether he is entitled to the orders sought.

### **Unfair Termination**

20. It is the Claimant's case that he was never invited to the disciplinary hearing. That he was notified by the Manager one Mr. Mwaura that he was needed at the Head office to offer an explanation on the attempted robbery on 26<sup>th</sup> April 2013 and he was free to go with a representative.

21. That when he attended the meeting, it turned out to be a disciplinary meeting. That he was never invited to the disciplinary hearing or issued with a show cause letter, thus the procedure was obviously wrong. The Claimant's Counsel points out that no letter of invitation was produced by the 1<sup>st</sup> Respondent.

22. It is further submitted that both at the disciplinary hearing and appeal hearing, the Claimant was taken through a question and answer session and at no time was he asked to make any representations. That there was no reference to a show cause letter or the charges leveled against him.

23. It is further submitted for the Claimant that the reason for the termination is given as loss of confidence yet no evidence was adduced to support the same.

24. It is submitted that the termination was therefore both procedurally and substantively unfair.

25. The 1<sup>st</sup> Respondent submits that the Claimant was notified of the charges against him as is evident from the letter inviting him to the disciplinary hearing and the minutes of the disciplinary hearing.

26. Further, that the termination was based on reasons that the employer genuinely believed to exist at the time of termination in compliance with Section 43(2) of the Employment Act.

27. For emphasis, the Respondent relied on the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** where the Court of Appeal observed

*“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.*

*Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons. There were.”*

28. As correctly observed by the Claimant’s Counsel, there is no copy of the letter inviting the Claimant for disciplinary hearing. However, the proceedings of the disciplinary hearing disclosed that the Claimant received a letter inviting him to the disciplinary hearing. In the second last paragraph of the disciplinary proceedings at page 41 of the 1<sup>st</sup> Respondent’s bundle, the Claimant stated *“I would like to point out that I have never written a statement with anyone at the location of the incident or even with the police yet the invitation letter to this DCG indicated that I have.”*

[Emphasis added]

29. Further, the minutes disclose that the Claimant was asked questions like –

Q *“I want to believe you know why our are here”*

To which he responded *“YES”*

Q *“Was the notice sufficient”*

To which he responded

*“Aah. Taken quite long ... I have actually been waiting for this ...”*

Q *“You know why you are here ...”*

Q *“... You know the case. Tell us what you know.*

Q *“Ideally this panel is here to hear what you have to say about the attempted robbery. It is you telling us what you know.”*

30. This excerpt clearly shows that the Claimant was given an opportunity to defend himself against the allegations as contained in the letter of notification of suspension which reads –

*“Friday, 26<sup>th</sup> October 2012*

*Michael Njoroge Mbugua,*

*Staff: 14667,*

*C/O Nakuru East Business Centre*

*Dear Michael,*

***Notification of Suspension***

*In accordance with the disciplinary procedure, I write to confirm the decision to suspend you from today's date pending investigations regarding the attempted robbery at Nakuru East Branch on 22<sup>nd</sup> October 2012.*

You are therefore hereby suspended from employment under clause A 5 c i) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical and Subordinate staff for a period of thirty (30) days with effect from today's date.

During the period of suspension, you will receive salary at half your basic pay. You are also entitled to your normal contractual benefits. You are also required to report to the branch once a week on Tuesdays' to sign the attendance register.

The Bank reserves the right to change or add to these allegations as appropriate in the light of the investigation. Your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of any misconduct. The Bank will keep the matter under review and will aim to make the period of suspension no longer than is necessary. The Bank will write to you periodically to keep you updated about the progress of the investigation.

You will continue to be employed by the Bank throughout your suspension and you remain bound by your terms and conditions of employment. You are required to co-operate in the investigation and may be required to attend the workplace for investigative interviews or disciplinary hearings. However, you are not otherwise required to carry out any of your duties and you should not attend the workplace unless authorized by Isaac Mwaura to do so. You must not communicate with any employees, contractors or customers unless authorized by Isaac Mwaura. However, you are required to be available to answer any work-related queries.

At the conclusion of the investigation, the Bank will write to inform you whether it intends to hold a disciplinary hearing. If it considers that there are grounds for disciplinary action it will inform you of those grounds in writing and you will have the opportunity to state your case at a disciplinary meeting, in accordance with the Disciplinary Procedure.

If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible. If you require access to the premises or computer network for this purpose please let me know as we may agree to arrange this under supervision.

If you have any queries about this matter or the terms of your suspension please feel free to contact me.

Yours sincerely,

SIGNED

Isaac Mwaura

Area Manager – Nakuru Hub”

31. On the reason for termination, the investigation report which is at page 29 of the 1<sup>st</sup> Respondent's bundle gives an account of the security guard employed by Bob Morgan Security who was recruited by the gang and who attended the meetings at Midland Hotel Nakuru

32. Part of the investigation report states –

2.1 investigations established that on the 11th of October 2012, the day guard ..... while in the Banking hall, was approached by a customer and asked whether he was willing to assist in an exercise that they were about to embark on. Although the purported customer was not willing to discuss the issue in the Banking hall, the guard was curious and he accepted. Cell phone numbers were exchanged and a meeting arranged.

2.2 On the 12<sup>th</sup> October 2012, the guard was invited for a meeting at Midland Hotel Nakuru. In that particular meeting, the purported customer brought in a gentleman and two ladies. The details of the intended raid were discussed and his role was to allow them access through the Cash in-transit lobby. A further meeting was scheduled on 13<sup>th</sup> October 2012 on the same venue. During this meeting, the gang requested to recruit the night guard ..... As the planning progressed, the gang provided the two guards with new cell phones for ease of communication.

2.3 On the 18<sup>th</sup> October 2012, at 2.30 pm, the gang organized a meeting to introduce names of other syndicate members in the intended robbery. The names given were: - Mohammed Jaffer a cleaner, James Gitau Kimani retail support and Michael Mbugua Njoroge a cashier in the Branch. In the meeting, was a former BBK employee Jimmy Kamande. In their discussion, Kamande confessed to have been involved in a robbery case where 34 million shillings disappeared at BBK JKIA branch. He had resigned after he was transferred to Nakuru East Branch.

2.4 On the 19<sup>th</sup> of October 2012, while on duty, the gang alerted ..... that the indented raid would not take place as initially planned as the expected repatriation from Nakuru West, Nyahururu and Kericho had been postponed. They therefore requested for a brief meeting the following day Saturday 20<sup>th</sup> October 2012. During the meeting, ..... was handed over five Keys being CIT main door (1), Man trap doors grill (1) & wooden (1) and the cash counting area door (2) and was requested to test them and confirm whether all could open successfully the respective doors. He ultimately executed as requested and confirmed all was well. Mock robberies were later done in the presence of one of the informers on a number of occasions where the last one was done on Sunday the 20th October 2012. It should be noted that the police were continuously being briefed on the progress of this matter and on many occasions would keep vigil as the meetings were going on.

2.5 On the 22<sup>nd</sup> October 2012 at around 7 30 – 8.00 pm the armed robbers were facilitated access to the branch by ..... the night guard. During this time the police had already taken cover of the branch. In the process, the robbers suspected the Police

ambush where ultimately shot out ensued and the three were gunned down. Recovered from the scene was a fire arm, the duplicate keys, 30 ATM cards and a Kes 11,500,000.00 deposit slip. Two vehicles registration numbers, KBR 156T and KBM 775H were also impounded.

33. The report which is marked “strictly confidential and restricted circulation” cautions at paragraph 4.3 at page 31 that –

4.1 This report contains very high confidential information that should be restricted as police investigations are still ongoing and the matter pending before Court. The identity of the informers MUST not be revealed and should remain privileged and protected otherwise this would expose them to personal insecurity.

34. This is the information that the 1<sup>st</sup> Respondent used to suspend, and later terminate the employment of the Claimant.

35. It is my view that based on the foregoing, the Respondent which is a commercial bank, had valid reason to lose faith in the Claimant.

36. In view of the fact that a bank handles lots of money which belong to its clients, a higher level of integrity is demanded of bank employees. A bank cannot be expected to leave in its employment any staff whose integrity it doubts on valid and reasonable grounds. Refer to **Civil Appeal No. 295 of 2016 Violet Kadala Shifsukane v Kenya Post Office Savings Bank; Cause 141 of 2018 Silas Nthiga Njeru v Kenya Workmen Finance Trust and Cause No. 495 of 2016 Dorcas Nyambura Njuguna v Spire Bank.**

37. In this particular case, the information volunteered by the informer had been proved to be accurate as the robbery he had reported actually took place, and the robbers were apprehended after gaining access into the Bank. The Respondent therefore had no reason to doubt the information of the informer and to believe the Claimant’s version of the story.

38. I find that the Respondent had valid reason to terminate the Claimant’s employment and that the procedure was fair.

### **Malicious Prosecution**

39. The elements to be proved in an action for malicious prosecution are today well settled. In **Mbowa v East Menjo District Administration [1972] EA 352**, the East African Court of Appeal summarized the law 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 a 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 Lloyd's Rep. 431 at p. 452; and***

*(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...*

40. The 1<sup>st</sup> Respondent submits that it genuinely thought that the Claimant was involved in commission of a crime and only did the reasonable and logical thing by reporting the suspected crime to the police. The 1<sup>st</sup> Respondent submitted that it had no reason to be spiteful towards the Claimant. There was no malice in reporting the suspected theft to the police. It submits that the Claimant has not met the threshold required to prove a case of malicious prosecution against the 1<sup>st</sup> Respondent.

41. In **Paramount Bank Limited v Vaqvi Syed Qamara & another [2017] eKLR**, the Court of Appeal held thus;

*“It was reasonable to link the theft with the 1<sup>st</sup> respondent on those grounds and in our own view, therefore the appellant genuinely thought that a crime had been committed and reasonably suspected the 1<sup>st</sup> respondent to warrant making a complaint to the police for investigations. There was no evidence that the appellant was actuated by improper and malicious motives in pursuing the charge against the 1<sup>st</sup> Respondent. No evidence of spite or ill-will on the part of the appellant was presented at the trial. See **Nzoia Sugar Company Ltd v. Fungututi [1988] KLR 399**. We are persuaded that on the material presented to the prosecutor, any prudent and cautious man in the position of Nzuki, the investigating officer, would have come to the same conclusion that the respondent was probably involved in the commission of the offence.”*

42. The 2<sup>nd</sup> Respondent submits that on the claim of malicious prosecution, the case of **Kagane and others v The Attorney General (1969) E.A 643** by Rudd J. laid down the principles that the Claimant must prove to succeed in a claim of malicious prosecution proceedings

as follows:-

- a) That the prosecution was instituted by a police officer;
- b) That the prosecution terminated in the plaintiff's favour;
- c) That the prosecution was instituted without reasonable and probable cause;
- d) That the prosecution was actuated by malice; malice means that the prosecution was motivated by something more than a desire to vindicate justice.

43. On the issue of the prosecution being instituted by the police officer, the Court in the case of **Abobo v Kenya Commercial Bank Ltd & 2 others [2005] 1 KLR** held that the fact that a citizen of Kenya is charged in a Court of law for a criminal offence does not per se portray anything but rather the accused is being given an opportunity to defend himself before an impartial tribunal which will determine his guilt or innocence. That the police were only discharging their duty by arraigning and charging the Claimant in Court.

44. That although the prosecution was terminated in the Claimant's favour, it is a well settled principle that acquittal per se is not sufficient basis for a claim of malicious prosecution. The 2<sup>nd</sup> Respondent relied on the Court of Appeal decision in **Nzoia Sugar Co. Ltd v Fungututi [1988] KLR**, where the Court in dismissing the suit and emphasizing the aforesaid, held that the fact that someone is acquitted does not mean that he has established a cause of action for malicious prosecution as against the Respondent and the Claimant must in fact prove malice, ill-will or spite. The 2<sup>nd</sup> Respondent submitted that the Claimant's acquittal does not in any way mean that the initial complaint was unfounded and false.

45. With regard to whether the police acted without reasonable or probable cause, the 2<sup>nd</sup> Respondent relied on the case of **Kagane v Attorney General (1969) E.A 643**; where the Court stated that reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.

46. The police in this matter had reasonable and probable cause to believe that the Claimant had committed the offence. This is evidenced by the fact that there was a tip off and complaint made to the police by the 1<sup>st</sup> Respondent that the Claimant was involved in conspiracy meetings of planning to rob the bank and it was upon this information that the police proceeded to the scene, ascertained the truth of the complaint and acted by arresting the Claimant and arraigning him in Court as required by law. The 1<sup>st</sup> Respondent employees also recorded statements at the police station to that effect.

47. Further, an investigation by the 1<sup>st</sup> Respondent pinned the Claimant at the heart of the crime. The police thus acted honestly and reasonably in discharging their statutory duty to the public and the Claimant has failed to prove that the police acted dishonestly and without cause.

48. The lack of reasonable and probable cause cannot be relied upon by itself and the Claimant must prove malice, ill-will or spite on the part of the Respondents. The Court in the case of **Katerrega v Attorney General (1973) E.A 289** observed that: -

*“It is well established that in a claim for damages for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives”.*

49. The Claimant must prove malice in fact. In this case, there is no evidence by the Claimant from which malice either by spite or ill-will or by indirect or improper motive can be inferred. The Claimant testified that he did not know the police before the case and malice cannot arise between two people who did not know each other and had no prior grudge. The prosecution had no motivation or reason more than a desire to vindicate justice.

50. I find that the Claimant has not proved the element of malicious prosecution. There is no evidence of malice by either the 1<sup>st</sup> of 2<sup>nd</sup> Respondent's officers who were involved in the case.

## **Conclusion**

51. From the foregoing, I find that the Claimant has not proved that the termination of his employment was unfair. He has further not proved that the prosecution was malicious.

52. **The result is that the entire claim fails and is accordingly dismissed.**

53. **There shall be no orders for costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF NOVEMBER 2021**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**MAUREEN ONYANGO**

**JUDGE**