



Case Number:	Cause 346 of 2014
Date Delivered:	09 Dec 2015
Case Class:	Civil
Court:	Employment and Labour Relations Court at Mombasa
Case Action:	Award
Judge:	James Rika
Citation:	Naqvi Syed Qmar v Paramount Bank Limited & another [2015] eKLR
Advocates:	Mr. Oloo Advocate instructed by Oloo & Chatur Advocates for the Claimant Mr. Nyanga Advocate instructed by Mwaniki Gachoka & Company Advocates for the 1st Respondent Ms. Kiti State Counsel, instructed by the Attorney General
Case Summary:	<p style="text-align: center;"><u>Employment and Labour Relations Court had Jurisdiction to determine claims for Defamation and Malicious Prosecution</u></p> <p style="text-align: center;">Naqvi Syed Qmar v Paramount Bank Limited & another</p> <p style="text-align: center;">Cause Number 346 of 2014</p> <p style="text-align: center;">Industrial Court at Mombasa</p> <p style="text-align: center;">J Rika J</p> <p style="text-align: center;">December 9, 2015</p> <p>Brief facts</p> <p>Banker Mr. Naqvi Syed Qmar filed his Statement</p>

of Claim and stated that the 1st Respondent Bank as its Chief Manager employed him. He earned a monthly salary of Kshs. 300,000. He was confirmed in the position upon a favourable performance appraisal. He was arrested after the 1st Respondent's Internal Auditor, reported to the Police that the Claimant had stolen Kshs. 9,000,127, from the 1st Respondent's Mombasa Branch, in which he was Chief Manager. Mr. Qmar was suspended pending finalization of the investigation and there after was summarily dismissed. The Claimant was charged with the offence of stealing by servant in the Chief Magistrate's Court at Mombasa Criminal Case Number 3199 of 2012. It was reported in the Daily Nation Newspaper on November 9,2012, and the Nation TV News of November 8,2012, that the Claimant had been charged with stealing. The Director of Public Prosecutions advised the case against the Claimant be dropped and it was withdrawn on the July 30, 2013. The Claimant stated that the 1st Respondent unfairly and unlawfully dismissed him. He also claimed that he was maliciously prosecuted and defamed by the Respondents thus the suit

Issues

- i. Whether the Claimant was unfairly and unlawfully dismissed under the Employment Act, 2007 and whether there was probable and reasonable cause for the 1st Respondent to act the way it did
- ii. Whether the Claimant was maliciously prosecuted and defamed when criminal charges were preferred against him without proper investigations being carried out
- iii. Whether the Respondents were jointly and severally liable to pay to the Claimant damages that arose on the unfair and unlawful dismissal and the malicious prosecution claims
- iv. Whether the Claimant could merit an unpaid salary claim in damages as he was already employed elsewhere

v. Whether the jurisdiction of the Court extended to all disputes relating to employment and labour relations

Employment Law – termination of employment – unfair & summary dismissal – claim for unfair & summary dismissal against a bank – where an employer suspected the employee of stealing; or where the employee carelessly and improperly performed his role- whether the claimant was unfairly and summarily dismissed – whether the Claimant merited compensation for unfair termination – Employment Act section 41,42,45

Employment Law – Employer & employee relationship – suspension and dismissal of employee from service – circumstances in which employment disciplinary mechanisms may amount to malicious prosecution – whether a claim for malicious prosecution is a ground for defamation.

Criminal law - Malicious prosecution- proof of malicious prosecution-where criminal charges were preferred against the claimant without investigations being carried out- whether it amounted to malicious prosecution in the circumstances- Penal Code, section 23.

Tort- Defamation – libel – damages – rationale for awarding damages in defamation – principle of restitution, vindication and consolation – whether the trial judge applied the principles while giving the award.

Jurisdiction- jurisdiction of the Employment&Labour Relations Court- whether the court had jurisdiction to determine matters of defamation and malicious prosecution

Held

1. Sections 41, 43 and 45 of the Employment Act 2007 required the employer to justify the decision to terminate, and show fair

procedure was followed in arriving at the decision. Where an employer suspected the employee of stealing; or where the employee carelessly and improperly performed his role; the employer had the right to summarily dismiss the employee under section 44 [4] of the Employment Act 2007. The 1st Respondent was a Bank, and the industry correctly demanded employees of the Banks, to be imbued with a high degree of trust and confidence and thus it was justified in its decision.

2. The evidence by the Claimant that he tipped the Head Office that the money was missing, opening the way for the Internal Auditor to make his confirmatory findings, was persuasive. The fact that the Claimant left his key with the Chief Cashier on the day the money was missing and this was within the routine practice, known to the employer. Secondly, it was the Claimant who reported to the Head Office that money was missing. These actions by the Claimant could not be taken to amount to careless and improper performance of his duty, warranting summary dismissal under section 44 [4] of the Employment Act 2007.
3. The testimony of the Claimant did not suggest the presence of any common intent between the prime suspect Lawrence and the Claimant to steal. The employer did not pursue the fugitive with alacrity, but zeroed in on the Claimant, causing his quick arrest and premature arraignment in court. Tellingly, the Internal Auditor conceded on cross-examination that, somebody had to be charged, for the Claim to fall through. He was referring the charging of the Claimant with the criminal offence, and the insurance claim lodged by the 1st Respondent with its Insurance Company, for compensation for the lost cash.
4. The Claimant's suspension was on November 3, 2012 and summary dismissal followed on November 12, 2012. There was absolutely no record of a disciplinary hearing availed to the Claimant before dismissal. He was just suspended, and dismissed upon arraignment in Court.

There was adequate evidence to conclude the summary dismissal of the Claimant was not based on valid and fair ground, under sections 43 and 45 of the Employment Act 2007. Procedure was in fundamental departure from the minimum statutory procedure prescribed under section 41 of the Act. The Claimant merited compensation for unfair termination, under sections 12&49 of the Employment and Labour Relations Court Act. This was an aspect of the dispute that involved the employer and the employee, and the remedy granted was enforceable solely against the employer.

5. In assessing the level of compensation, the court took into account that the Claimant was denied substantive as well as procedural justice. It had also been taken into account that he immediately got a better paying job in Uganda, which he had been interviewed for, even before the exit from the 1st Respondent Bank. This made his claim for unpaid salary up to March 2016 calculated at Kshs. 12 million, groundless. The Claimant got an alternative job immediately he was dismissed. To allow him the prayer for anticipated salary would be to place in his hands unjust enrichment. He could be earning salaries from two sources, while rendering no service to the former employer. Such payment would not fit the description of fair remuneration, which presupposed an employee was paid for work performed.
6. The retirement date given by the Claimant as March 2016 was in any case, not in his contract of employment. He did not rely on any law in fixing his date of retirement. Summary dismissal was nonetheless unfair and compensation was due to the Claimant.
7. The Constitution of Kenya, and the Employment and Labour Relations Court Act, broaden the jurisdiction of the court. Article 162 [2] [a] of the Constitution contemplated the creation of the court, defined the material jurisdiction of the court to include all disputes relating to

employment and labour relations. The article did not say contractual disputes, between Employers and Employees; it stated all disputes relating to employment and labour relations. Section 12 of the Employment and Labour Relations Court Act referred to article 162 [2] [a] of the Constitution and the provisions of the Act, or any other written law that extended jurisdiction to the court relating to employment and labour relations. Section 12 was inclusive. It was not an exclusive list of the dos and don'ts of the court. The court had assumed jurisdiction and determined claims for employment related defamation and malicious prosecution.

8. The jurisdiction of the court extended to all disputes relating to employment and labour relations. Personal jurisdiction was no longer confined to employers and employees as was the case under the Trade Dispute Act, but to all persons implicated in an employment and labour relations dispute.
9. In employment law, defamation took place when the employer publicized or caused to be publicized, statements that stigmatized the employee. The manner of dismissal and the negative publicity attached to the Claimant had the potential to damage his employability. Potential employers in the industry in which the Claimant was a long-time servant, would find his attractiveness diminished. Employment related defamation was based on the old tort of defamation but given a new spin: the employee's injured or damaged employability, and not merely the personal stigmatization, was to be compensated.
10. It could still be difficult for the Claimant to find employment in the banking industry in Kenya granted the bad press he was subjected to through the actions of the 1st Respondent. The Claimant merited general damages for defamation occasioned to him by the employer. He was clearly libelled and damned as a bank thief. Even after the charges were dropped, the 1st Respondent did nothing in making amends, and had instead opted to argue that investigations

were still on, and the Claimant was still a suspect. General damages for defamation were merited.

11. A Claimant under malicious prosecution must show:-

- a. The Respondent prosecuted him.
- b. Prosecution was determined in his favour.
- c. Prosecution was without reasonable and probable cause.
- d. Prosecution was malicious

12. The second element was positively established through the letter of the DPP withdrawing the charges against the Claimant. Determination of prosecution in favour of the Claimant, meant, either the Claimant was absolved upon trial by the Criminal Court, or the Prosecuting Authority made a decision not to prosecute. The DPP in this case made a decision not to prosecute. It was not relevant that the decision was made under a procedural law that permitted the Claimant to be re-arrested and arraigned in court. The first two elements were shown to be present in the claim for malicious prosecution.

13. The question whether there was probable and reasonable cause required the court to examine whether the material known to the Prosecutor, would have satisfied a prudent and cautious man, that the Claimant was probably guilty of the offence. The court was similarly to be satisfied that the Respondent verified facts through an enquiry, with the level of scrutiny of the facts commensurate with the seriousness of the charges against the Claimant.

14. There was no material available to the Prosecutor to show any prudent man to believe the Claimant was guilty of the offence. It was the wrong approach to presume that because Kshs. 9 million was incontestably stolen from the Bank, the Chief Manager had to be a suspect. The Respondents failed to verify facts, with the

level of scrutiny commensurate with the seriousness of the charges against the Claimant.

15. In establishing the last element, the Claimant was supposed to show the Respondents had an improper frame of mind. The improper frame of mind was revealed in the evidence of the Internal Auditor, when he conceded that for the 1st Respondent's insurance claim to fall through, somebody had to be charged. The police process was manipulated to achieve a business end. Malice was present in a prosecution when criminal charges were preferred against a Person for other purposes, other than carrying the law into effect. Traditionally Police Officers enjoyed protection from civil liability for the manner in which they conducted criminal investigations and prosecuted offenders.

16. The law had changed. Common law positions had to be aligned to the demands of the Constitution. Commonwealth jurisdictions such as Canada had developed the tort of negligent investigation, where Police Officers were deemed to owe a duty of care to suspects under investigation. Malicious prosecution involved wrongful assault on the dignity of the Person, Name and Privacy. These were values that enjoy protection under the Constitution. The Police become liable when sufficiently connected with the laying of the charges, or carriage of the prosecution once started. Both Respondents were liable for damages to the Claimant Employee for malicious prosecution.

Application allowed. Claimant awarded: -

i. Damages at Kshs. 2,500,000/= payable solely by the employer for unfair and unlawful summary dismissal

ii. Respondents to pay jointly and severally, the sum of Kshs. 2,500,000/= as general damages for malicious prosecution.

iii. 6 months' salary in compensation

	<i>for unfair termination, at Kshs. 300,000 x 6 = Kshs. 1,800,000, to be paid by the 1st Respondent.</i>
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claim Allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Kshs.6,800,000
The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.	

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 346 OF 2014

BETWEEN

NAQVI SYED QMAR CLAIMANT

VERSUS

1. PARAMOUNT BANK LIMITED

2. ATTORNEY GENERALRESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Mr. Oloo Advocate instructed by Oloo & Chatur Advocates for the Claimant

Mr. Nyanga Advocate instructed by Mwaniki Gachoka & Company Advocates for the 1st Respondent

Ms. Kiti State Counsel, instructed by the Attorney General

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Banker Mr. Naqvi Syed Qmar filed his Statement of Claim on 28th July 2014. He states he was employed by the 1st Respondent Bank on 1st September 2008 as its Chief Manager. He earned a monthly salary of Kshs. 300,000. He was confirmed in the position on 3rd March 2012 upon favourable performance appraisal. He was arrested on 2nd November 2012, after the 1st Respondent's Internal Auditor, reported to the Police that the Claimant had stolen Kshs. 9,000,127, from the 1st Respondent's Mombasa Branch, in which he was Chief Manager. Mr. Qmar was suspended on 3rd November 2012 pending finalization of the investigation. He was summarily dismissed on the 12th November 2012. The Claimant was charged with the offence of stealing by servant in the Chief Magistrate's Court at

Mombasa Criminal Case Number 3199 of 2012. It was reported in the Daily Nation Newspaper on 9th November 2012, and the Nation TV News of 8th November 2012, that the Claimant had been charged with stealing. On 30th July 2013, the Director of Public Prosecutions advised the case against the Claimant be dropped. It was withdrawn on the 30th July 2013.

2. The Claimant considers he was unfairly and unlawfully dismissed by the 1st Respondent. He states he was maliciously prosecuted and defamed by the Respondents. He seeks from the Court against the Respondents, the following orders:-

- a. Unpaid salary for the remainder of his contract ending March 2016, at Kshs. 12,070,000.
- b. General damages for malicious prosecution, unlawful termination of employment, injurious falsehoods, defamation and for pain and suffering and loss of amenities.
- c. Costs.
- d. Any other relief.

3. The 1st Respondent filed its Statement of Response on 1st September 2014, while the 2nd Respondent did so on the 21st November 2014. Both do not deny the fact that the Claimant was employed as Chief Manager of the 1st Respondent Bank; that he was charged for the offence of stealing; and that the Director of Public Prosecutions advised the charges against the Claimant be withdrawn. The 1st Respondent states the Claimant and his Assistant, one Lawrence Amboro Atieno, were the exclusive custodians of the strong room from where Kshs. 9,000, 127 was stolen. The 1st Respondent reported the crime to the Police and had no say in the investigations, charging of the Suspects and the withdrawal of the charges. The 1st Respondent fairly and lawfully terminated the Claimant's contract of employment. It lost trust and confidence in him. It paid to him, all his terminal benefits.

4. The 2nd Respondent's position is that Police arrested and arraigned the Claimant in Court upon a complaint against the Claimant, lodged by the 1st Respondent with the Police. Police acted honestly in their actions against the Claimant. They acted legally in their duty of prevention and detection of crime. They were not motivated by malice or bad faith. The Attorney General denies occasioning the Claimant any loss and damage in malicious prosecution and defamation. The Respondents pray for dismissal of the Claim.

Claimant's Evidence

5. Naqvi Syed Qmar testified, and closed his case, on the 13th May 2015. The 1st Respondent called its Internal Auditor Mr. Kapil Deo Sharma, and closed its case on the same date as did the Claimant. The State called Police Corporal Eliud Njuki who investigated the reported theft of Kshs. 9 million. He gave evidence on the 13th July 2015, bringing the curtain down on the hearing. Parties confirmed the filing of their Closing Submissions at the last Mention in Court, on the 30th September 2015.

6. The Claimant testified he was employed on 1st September 2008, and placed on probation of 6 months. His performance was excellent. He was paid bonus for this while still on probation. He was confirmed on 3rd March 2012. He had at the time of termination enjoyed a flawless 40 year banking career.

7. On 2nd November 2012, he discovered there was a cash shortage of Kshs. 2.5 million. Kshs. 1.25 million had wrongly been posted. This was reversed, and accounts balanced. He left for a field visit to Malindi the following day. He left the Chief Cashier Mr. Ayaz in charge. He was not able to return the same day from Malindi. He kept in communication with Ayaz and the Internal Auditor Kapil Sharma. He asked Ayaz to check if the cash in the strong room was okay. Ayaz assured him all was okay.

8. When he returned from Malindi, the Claimant realized Kshs. 9 million was missing. He alerted the Head Office. Kapil Sharma confirmed the money was missing. The Claimant was arrested on 7th November 2011, and charged in the Chief Magistrate's Court with the offence of stealing. He was defamed through news circulated in the Daily Nation and the Nation TV; that he had been charged with stealing. The Claimant learnt Police Officers were looking for the Claimant's Assistant, who served as the Operations Manager, Mr. Lawrence Atieno. Naqvi kept texting Atieno, advising Atieno to report to the Police. The Assistant did not show up.

9. The Claimant was suspended without salary and dismissed on the 12th November 2012. He returned his Credit Card to the Bank. He had a credit balance of Kshs. 104,000. He issued a cheque for rent of Kshs. 60,000. The cheque was dishonoured. The charges against the Claimant were subsequently dropped on the advice of the Director of Public Prosecutions. Naqvi testified he has never stolen in his life. He was defamed.

10. Questioned by Counsel for the 1st Respondent, the Claimant stated he joined the Bank on 1st September 2011. He worked for about 13 months. He enjoyed good working relationship with the Employer. There was a cash shortage confirmed through auditing on 31st October 2012, of Kshs. 9 million. As Chief Manager, he oversaw the Bank. The keys to the strong-room were kept by the Claimant and the Operations Manager. Both Officers had to be involved to open the strong-room. The cash went missing when the Claimant was in Malindi. The Claimant would check the cash in the safe manually. The manual ran from page 103. The next page shown was page 112. There were pages missing. The Teller made the entries. The Claimant signed on the entries, but failed to confirm the money reflected was in the safe. It was always good to confirm.

11. The money was stolen from the safe. Naqvi handed the key to the Chief Teller before he went to Malindi. The Claimant realized the Manual Register had been glued together when he returned from Malindi. He went to Malindi on the 23rd October 2012. In his statement to the Police, he stated the pages were glued together on 24th October 2012. The Claimant and his Assistant Atieno had the keys to the vault. It was possible Atieno stole the money with the Person the Claimant entrusted his key to. The Claimant agreed the Bank had the right to report the crime. He maintained he was defamed. Police Officers were brought in correctly. They interrogated the Claimant. Atieno absconded, and sent the Claimant threatening texts.

12. Naqvi testified he has secured another job in Uganda. He got the offer on 16th January 2013. The salary was good, much better than that offered by the 1st Respondent. The Claimant explained he wished to be paid by the 1st Respondent salaries he would have enjoyed right up to the date of retirement. His life was messed. The bank stated it could only be compensated for the loss by its insurance by drawing in the Claimant as a Suspect. The DPP stated withdrawal of the charges against Naqvi was on the ground that the prime Suspect Atieno was at large.

13. In answer to questions from the State Counsel, Naqvi testified he did not know the Officers who arrested him, before the date of arrest. He was told the reason for the arrest. Sharma must have made the report to the Police. Police Officers were wrong in arresting the Claimant. He was bonded to appear in Court. His name was soiled.

14. Redirected, the Claimant testified he was the one who tipped the Management about theft of its cash. The offence was not unearthed through audit. He was a joint-custodian of the Cash Register. He reported pages were missing. It was normal for the Claimant to leave the key with Ayaz when he was out in the field. The Management was aware of this arrangement. Naqvi explained this to the Police. He thought he was going to the Police Station as a Witness. Ayaz had the backing of the Management. The Claimant was taken into custody at Shimo La Tewa Prison. It was broadcast in a national television and circulated in a national newspaper, that the Claimant was a thief. He had a banking career spanning over 40 years at the time. He was to retire at the age of 65 years. He did not know if Police recorded the statement of Ayaz and Atieno. The DPP letter states Atieno was the architect of the crime. The Claimant expected to enjoy trust, professionalism and good customer- relationships. He was humiliated, and his family was humiliated. He cannot even enter a Bank today. He prays the Court to allow the Claim.

1st Respondent's Evidence

15. Kapil Deo Sharma is the Head of Internal Audit Paramount Bank. He carried out a surprise audit of the Bank's Mombasa Branch on the 31st October 2012. He realized Lawrence Atieno the Claimant's Assistant was not at the Bank. The two were the vault custodians. There was a deficit of about Kshs. 9 million. There were no mis-postings. 82 % of the cash in the vault was missing. The Auditor prepared his Report and forwarded it to Nairobi.

16. He testified on cross-examination that he was employed on 14th January 2008. The Bank has about 6 Branches. He had carried out another surprise audit of the Branch 2 or 3 months before. Ayaz was a Teller. The main Tellers were Atieno and the Claimant. There was no position of Chief Teller. The Claimant explained to Deo that he had travelled on 24th October 2012, leaving the key with Ayaz. He told the Witness this on 31st October 2012. It was not true that the Claimant reported the incident to the Head Office. There were anomalies uncovered by previous audits. Vouchers had been allegedly taken from the Bank without registering them. There was another fraud reported involving Kshs. 1.8 million, uncovered by Deo, 2-3 months before the incident over which the Claimant was dismissed. The Management did not tell Deo about the glued Cash Register. The Auditor could not identify the date the cash went missing, but reverse audit indicated it was 9th to 19th October 2012. The Management lodged insurance claim and received compensation of about Kshs. 6 million. In this case, somebody had to be charged, for the Claim to fall through. Payment in the circumstances depends on the particular policy. Deo did not recall when payment was made. He did not see the Claimant in the Media. Trust and confidence are crucial in banking. It is not likely the Bank would retain in employment a theft suspect. Deo closed his evidence redirected by 1st Respondent's Advocate, stating that the Claimant did not dispute Kshs. 9 million was stolen. He did not think someone had to be charged, for the insurance to pay. Insurance Company investigates before paying.

2nd Respondent's Evidence

17. No. 61496, Corporal Eliud Njuki of the CID Mombasa, told the Court he investigated the bank theft. The crime was reported to his Station on the 2nd November 2012 under OB number 18. Money in the region of Kshs. 9 million was reported to be missing. The Internal Auditor reported the incident. Njuki summoned the Branch Manager Naqvi, who confirmed the discrepancy. The Manager could not explain the discrepancy. Naqvi and his Assistant Lawrence, kept the keys to the strong-room. The Claimant was charged with the offence of stealing. His Assistant Lawrence remained at large, and the Director of Public Prosecutions advised the charges against the Claimant be withdrawn. Njuki testified he did not know the Claimant before. He was not driven by malice in arresting and charging the Claimant with the offence; he testified he did what he was supposed to do. The offence was committed, and the Government could not be blamed for the action taken.

19. Cross-examined, the Police Officer testified the complaint was lodged by the Bank through its Internal Auditor. The Claimant presented himself to the Police on being summoned, and gave his version of the events, in the presence of his Advocate. There were separate charges which were later consolidated. The Officer explained he could not delay charging the Claimant until his Assistant Lawrence was arrested and charged alongside the Claimant. The Claimant was bonded and gave security for his appearance. There was no malice.

20. In his statement to the Police the Claimant stated he left his strong-room key with another Employee. He alleged the Manual Register had been tampered with. The pages had been glued together. He said he had reported this to the General Manager. He informed the CEO of the shortfall of approximately Kshs. 10 million. The Claimant stated he had entrusted his strong-room key to another Employee. His key was supposed to be handled only by him. Njuki did not take the statement of Ayaz. He did not visit the Claimant's house; he did not obtain a search warrant; he checked the Claimant's drawers. He did not think it was necessary to view CCTV footage. He did not recall the Claimant mentioning that Sharma was involved in the offence.

21. The matter was taken to Court. The Police Officer stated he had a strong case. The Claimant was held at Shimo La Tewa Prison. He did not know if the Claimant was reported as having stolen in the Media. Njuki testified he had about 2 Witnesses lined up against the Claimant in the criminal prosecution. There was the Internal Auditor, and another Witness whose statement was to be recorded in Nairobi. In every investigation, the Witness explained, investigation closes only after the hearing has closed. He had not completed investigation at the time he arraigned the Claimant before the Court. The Police forwarded the file to the DPP. It was intended to have the DPP confirm the charges. There was nothing wrong in seeking the DPP's advice after charging the Claimant, rather than before charging him. DPP states that Lawrence was the Architect of the crime. The Witness denied that he failed to protect the Claimant's fundamental rights under the Constitution. The Claimant was arrested for an offence which he had committed. He was not defamed. The charges were dropped in 2013. The Police are still hunting down the fugitive Lawrence. It was not true that Police arrested and charged the Claimant to assist the Respondent in lodging its claim for insurance compensation.

22. Prompted by the 2nd Respondent's Counsel, the Claimant testified he came to know the Claimant when theft was reported to the Police. He recorded the Claimant's Statement. The complaint was genuine. The Bank lost Kshs. 9 million. The Claimant was the Bank Manager and kept custody of the key to the strong-room. The vault required a combination of the keys retained by the Claimant and his Assistant to open. The Claimant did not report that the Register pages had been glued together, until the matter was reported. There was nothing untrue in the report. DPP recommended withdrawal of the charges against the Claimant, under Section 87 of the Criminal Procedure Code. The Claimant can still be rearrested. Dropping of the charges does not mean the allegations against him were untrue. Redirected, the Witness testified that the Police acted on a complaint. It was confirmed an offence was committed. Withdrawal of the charges did not absolve the Claimant. He would not have allowed the Claimant bond if he was driven by malice. The Officer only did what he was supposed to do. The Respondents pray the Court to disallow the Claim.

Parties' Submissions:-

[a] *Claimant*: He submits that under Section 12 of the Employment and Labour Relations Court Act, the Court has the power to make an award of compensation and damages, in circumstances contemplated under the Act, or any other written law. Relying **on Industrial Court at Nairobi Cause Number 665 of 2011 between Beatrice Achieng Osir v. Teleposta Pension Scheme**, he argues that the Court has wide jurisdiction and is not limited to the contract of employment. Section 49 [1] [b] grants the Claimant

all salaries due for the remainder of his contract. He is entitled to damages at large, for the torts of malicious prosecution and defamation. Under this head the Claimant seeks damages assessed at Kshs. 15 million, urging the Court to find persuasion in the **Nairobi High Court case of Machira v. Mwangi & Another [2001]** where the Court awarded the Plaintiff therein, Kshs. 8 million in compensatory damages and Kshs. 2 million in aggravated damages and Kshs. 200,000 in lieu of an apology. The Claimant states he was summarily dismissed without the benefit of a disciplinary hearing, contrary to the Employment Act 2007.

[b] 1st Respondent: The 1st Respondent submits the Claimant mishandled his docket, leading to loss of Kshs.9 million to the 1st Respondent. He was grossly negligent. He did not have a contract which was to expire in March 2016, and his claim for salaries up to that date is speculative. All claims for damages, except for damages under unlawful termination of employment, have no relevance to the Claimant's contract of employment. Other prayers are based on tort, which the Claimant should pursue elsewhere. The Court has no jurisdiction to deal with malicious prosecution and defamation under Section 12 of the Employment and Labour Relations Court Act. The Court adjudicates disputes between an Employer and an Employee. The Claim for defamation should include the Media Houses alleged to have broadcast and / or printed the news on the incident. Summary dismissal was justified under Section 44 [4] of the Employment Act 2007.

[c] 2nd Respondent: The Attorney General submits the Claimant confirmed the Kshs. 9 million was stolen, and only he and the Operations Manager Lawrence Atieno, held the keys to the strong-room. Malicious prosecution refers to the preferring of an unreasonable criminal charge. The Claimant must show he was prosecuted by the Respondent; prosecution was determined in his favour; and thirdly, that prosecution was without reasonable and probable cause. The onus of proving these elements is on the Claimant **[see Lindsell on Torts 16th Edition [1989] Sweet & Maxwell paragraph 19-04-19-05]**. 'Reasonable and probable' cause was explained in **High Court decisions of Murunga v. the Attorney- General [1983] KLR 138** and **Gichanga v. BAT Kenya Limited [1989] KLR** to comprise the test whether, the material known to the prosecutor would have satisfied a prudent and cautious man that the Claimant was probably guilty of the offence. The 2nd Respondent did not instigate the criminal prosecution; this was instigated by the 1st Respondent's Internal Auditor. The prosecution did not terminate in the Claimant's favour. Prosecution can always be restarted once the Claimant's Co-accused is arrested. The Claimant was overall in charge of the Bank Branch where theft took place. He was guilty on a preponderance of probability. He was lucky to have escaped conviction and sentencing. The Claimant did not demonstrate *manus animus*, denoting improper motive on the part of the 2nd Respondent. The Claimant only showed the charges against him were withdrawn; he did not show the other elements to establish malicious prosecution.

23. The issues in dispute, as the Court understands them, are:-

- a. Whether the Claimant was unfairly and unlawfully dismissed"
- b. Whether he was maliciously prosecuted and defamed"
- c. Whether the Respondents are jointly and severally liable to pay to the Claimant damages arising under [a] and [b] together with costs and interest"

The Court Finds:-

24. These facts are not contested:

- The Claimant was employed by the Respondent Bank as its Chief Manager Mombasa, on a gross salary of Kshs. 300,000 per month, starting 1st September 2008. He was confirmed 3rd March 2012, upon a favourable performance appraisal.
- It is not denied he received bonus within the first year of employment. It is undisputed that on 2nd November 2012, the Claimant was arrested pursuant to a complaint lodged by the Internal Auditor Deo, that Kshs. 9 million was stolen from the 1st Respondent's strong-room.
- The fact that the Claimant was charged with the offence of stealing in Mombasa Chief Magistrate's Court Criminal Case Number 3199 of 2012, and that the charges were subsequently dropped, on the advice of the Director of Public Prosecutions, are not denied.
- The Claimant was suspended by the 1st Respondent on 3rd November 2012, and summarily dismissed on the 12th November 2012

25. There was a report in the Daily Nation of 9th November 2012, stating " *A Bank Manager yesterday denied stealing Kshs. 9 million from the Moi Avenue Branch of Paramount Bank, between October 2 and 23. Mr. Naqvi Syed was released on a Kshs. 3 million bond until December 10th when the matter will be heard.*" This news item is captured in a newspaper cutting attached to the Claim. The Court accepts the report as having been made as captured in the cutting. Secondly there is no reason from the evidence given by the 3 Parties, to doubt the report was circulated in Nation Television, on 8th November 2012. These events were established through the evidence of the Claimant.

26. ***Unfair and unlawful termination:*** The Claimant was suspended on 3rd November 2012, "*pending finalization of the on-going investigations...*" Summary dismissal followed on the 12th November 2012. The 1st Respondent justified its decision on the ground of "*the incident wherein you have been charged in Court together with a former Colleague, for theft of cash which resulted in the Bank incurring loss...*"

27. Section 41, 43 and 45 of the Employment Act 2007 require the Employer to justify the decision to terminate, and show fair procedure was followed in arriving at the decision. Where an Employer suspects the Employee of stealing; or where the Employee carelessly and improperly performs his role; the Employer has the right to summarily dismiss the Employee under Section 44 [4] of the Employment Act 2007. The 1st Respondent is a Bank, and the industry correctly demands Employees of the Banks, are imbued with a high degree of trust and confidence.

28. Did the 1st Respondent have a fair and valid reason in summarily dismissing the Claimant? It is true the Claimant was the Chief Manager overseeing the Mombasa Branch. He was in a position of responsibility, demanding he upholds always, the values of trust and confidence, which are the cornerstone of an Employer-Employee relationship, particularly in the banking industry. He was entrusted the key to the strong-room. It is accepted Kshs. 9 million was stolen from there. On the face of it, these facts would tend to show there was justification in dismissing the Claimant. The Court should however look at the actions of the Claimant and the Bank, the circumstances surrounding this theft, before making a pronouncement on the fairness and validity of the summary dismissal.

29. The Claimant explained that on the date the money was probably taken from the vaults, he was absent having travelled to Malindi on a market visit. He left his key to the strong-room with Chief Cashier Ayaz. This arrangement was made known to the Bank. The Claimant called Ayaz while in Malindi, and Ayaz assured him all was well. This evidence was not contradicted by the Respondents. Deo confirmed the Claimant told him he was in Malindi, and had left his key with Ayaz, when the money was stolen. The act of leaving the key to the strong-room with the Chief Cashier Ayaz was not shown by the 1st Respondent to infringe its regulations. The Claimant testified this was an arrangement he had made

known to his Employer.

30. The evidence by the Claimant that he tipped the Head Office that the money was missing, opening the way for the Internal Auditor to make his confirmatory findings, was persuasive. The Internal Auditor did not persuade the Court that it was him, who uncovered the money was missing, on a routine audit. Deo most likely came to Mombasa upon the Claimant's tip-off to the Head Office that money was missing. Deo testified he opened the vault with the Claimant on 31st October 2012, and found the money missing. This according to Deo was how theft was discovered. The Auditor however testified that the Claimant told the Auditor the Claimant had travelled to Malindi on 24th October 2012 and left the key with Ayaz. On return he realized the Cash Register pages were glued together. The Auditor did not come to Mombasa on a surprise audit; he came on the back of reports made to the Head Office by the Claimant about the missing cash. It is surprising that the Employer did not deem it necessary to question Ayaz on the veracity of the Claimant's position, or even present Ayaz to Court to contradict the Claimant. Ayaz was not pursued as a suspect in the criminal process. The Court is satisfied that the Claimant left his key with Ayaz, and this was within the routine practice, known to the Employer. Secondly, it was the Claimant who reported to the Head Office that money was missing. These actions by the Claimant cannot be taken to amount to careless and improper performance of his duty, warranting summary dismissal under Section 44 [4] of the Employment Act 2007.

31. The Claimant testified that his Assistant Lawrence Atieno, who served as the Operations Manager, went missing when the cash was lost. The Claimant sent messages to Lawrence asking him to report to the Office. Lawrence sent the Claimant threatening texts. This would not suggest the presence of any common intent between the prime suspect Lawrence and the Claimant to steal. The Employer did not pursue the fugitive with alacrity, but zeroed in on its Chief Manager, causing his quick arrest and premature arraignment in Court. Tellingly, the Internal Auditor conceded on cross-examination that, "*in this case, somebody had to be charged, for the Claim to fall through.*" He was referring the charging of the Claimant with the criminal offence, and the insurance claim lodged by the 1st Respondent with its Insurance Company, for compensation for the lost cash.

32. Suspension was on 3rd November 2012. Summary dismissal followed on 12th November 2012. The only reason given by the 1st Respondent for its decision was that the Claimant had been charged with a former Colleague for theft of cash. The suspension letter stated the Claimant was suspended pending finalization of investigation. It was not made clear to the Court if investigation came to finalization with the arraignment of the Claimant in Court, justifying summary dismissal on 12th November 2012. The joint position of the Respondents in their evidence before the Court was that the charging of the Claimant did not finalize investigation. It was told to the Court that investigation is open, and remains open until hearing of the criminal case closes. The Claimant was eventually set free after the DPP advised dropping of the charges. The Respondents argue the dropping of the charges did not result in the closure of the investigation, and the Claimant could be rearrested and charged afresh. The 1st Respondent did not have independent investigation outside the Police process. If the Claimant was suspended pending finalization of investigation, and that process has not been finalized, what was the basis for summarily dismissing him on 12th November 2012? There is absolutely no record of a disciplinary hearing availed to the Claimant before dismissal. He was just suspended, and dismissed upon arraignment in Court.

33. There is adequate evidence to conclude the summary dismissal of the Claimant was not based on valid and fair ground, under Section 43 and 45 of the Employment Act 2007. Procedure was in fundamental departure from the minimum statutory procedure prescribed under Section 41 of the Act. The Claimant merits compensation for unfair termination, under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act. This is an aspect of the dispute that

involves the Employer and the Employee, and the remedy granted is enforceable solely against the Employer. In assessing the level of compensation, the Court has taken into account that the Claimant was denied substantive as well as procedural justice. It has also been taken into account that he immediately got a better paying job in Uganda, which he had been interviewed for, even before the exit from the 1st Respondent Bank. This makes his claim for unpaid salary up to March 2016 calculated at Kshs. 12 million, groundless. The Claimant got an alternative job immediately he was dismissed. To allow him the prayer for anticipated salary would be to place in his hands unjust enrichment. He would be earning salaries from two sources, while rendering no service to the Former Employer. Such payment would not fit the description of fair remuneration, which presupposes an Employee is paid for work performed. The retirement date given by the Claimant as March 2016 is in any case, not in his contract of employment. He does not rely on any law in fixing his date of retirement. Summary dismissal was nonetheless unfair. Compensation is due to the Claimant. Taking these factors into account, **he is granted 6 months' salary in compensation for unfair termination, at Kshs. 300,000 x 6 = Kshs. 1,800,000, to be paid by the 1st Respondent.**

34. **Jurisdiction:** The 2nd Respondent admits the jurisdiction of the Employment and Labour Relations Court, to hear and determine all the aspects of the dispute. The 1st Respondent concedes the jurisdiction of the Court in dealing with the claim for unfair and unlawful termination, but denies that the Court has jurisdiction to deal with defamation and malicious prosecution. This argument is based on Section 12 of the Employment and Labour Relations Court Act. The 1st Respondent's view is that Section 12 restricts the Court to disputes between Employers and Employees. Such disputes are confined to the contract of employment. Torts of defamation and malicious prosecution cannot be dealt with by this Court.

35. The 1st Respondent's view narrows the jurisdiction of the Court while both the Constitution of Kenya, and the Employment and Labour Relations Court Act, broaden the jurisdiction. Article 162 [2] [a] of the Constitution which contemplates the creation of this Court, defines the material jurisdiction of the Court to include all disputes **relating to employment and labour relations**. The Article does not say contractual disputes, between Employers and Employees; it states all disputes relating to employment and labour relations. Section 12 of the Employment and Labour Relations Court Act refers to Article 162 [2] [a] 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.....*" In the case of **Hakika Transporters Services Limited v. Kenya Long Distance Truck Drivers and Allied Workers Union [2015] e-KLR**, the Court held the view that Section 12 is inclusive. It is not an exclusive list of the dos and don'ts of this Court. The Court has assumed jurisdiction and determined claims for employment related defamation and malicious prosecution in **Beatrice Achieng Osir v. Board of Trustees Teleposta Pension Scheme** [see Claimant's Submissions for citation], **George Onyango Akuti v. G4S Security Services Limited [2013] e-KLR** and **Stanley Mungai Muchai v. National Oil Corporation [2012] e-KLR**. The jurisdiction of this Court extends to all disputes relating to employment and labour relations. Personal jurisdiction is no longer confined to Employers and Employees as was the case under the Trade Dispute Act Cap 234, but to all persons implicated in an employment and labour relations dispute.

36. **Defamation:** The report that the Claimant had been charged with theft was made in both the print and television media. This fact is not disputed. The Claimant states this seriously damaged his standing and association in the community. He no longer is able to walk freely into a bank here in Kenya. He had a banking career spanning 40 years. In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Claimant had the potential to damage his employability. Potential Employers in the industry in which the Claimant was a longtime servant, would find his attractiveness diminished. His stock in the market dipped. Employment related defamation is

based on the old tort of defamation but given a new spin: the Employee's injured or damaged employability, and not merely the personal stigmatization, must be compensated. The Claimant was employed in Uganda after the theft incident. He explained he had interviewed for the job before the allegations in Kenya were leveled against him. The Claimant disclosed his problems in Kenya to the new Employer, who did not decline to employ the Claimant, the criminal case notwithstanding. This was perhaps a saving grace. It was not a sign that the Claimant's employability was unaffected. It would still be difficult for the Claimant to find employment in the banking industry in Kenya granted the bad press he was subjected to through the actions of the 1st Respondent. The Claimant merits general damages for defamation occasioned to him by the Employer. He was clearly libeled and damned as a bank thief. Even after the charges were dropped, the 1st Respondent did nothing in making amends, and has instead opted to argue that investigations are still on, and the Claimant is still a suspect. General damages for defamation are merited. **The Court assesses and grants these at Kshs. 2,500,000 again payable solely by the Employer.**

37. **Malicious Prosecution:** This in the view of the Court is where the Attorney General comes in. The Attorney General citing Lindsell on Torts 16th Edition [see 2nd Respondent's Submissions] and the High Court Cases of **Murunga v. the Attorney- General** and **Gichanga v. BAT Kenya Limited**, submits a Claimant under malicious prosecution must show:-

- He was prosecuted by the Respondent.
- Prosecution was determined in his favour.
- Prosecution was without reasonable and probable cause.
- Prosecution was malicious

The Respondents submit the Claimant did not establish these elements in his evidence.

38. The Claimant demonstrated he was prosecuted by the Respondents. The report on theft was made by the 1st Respondent's Internal Auditor, and promptly acted upon by PC Njuki. The second element was positively established through the letter of the DPP withdrawing the charges against the Claimant. Determination of prosecution in favour of the Claimant, means, either the Claimant was absolved upon trial by the Criminal Court, or the Prosecuting Authority made a decision not to prosecute. The DPP in this case made a decision not to prosecute. It is not relevant that the decision is made under a procedural law which permits the Claimant to be re-arrested and arraigned in Court. The first two elements were shown to be present in the claim for malicious prosecution.

39. Was there reasonable and probable cause" The question whether there was 'probable and reasonable cause' requires the Court to examine whether the material known to the Prosecutor, would have satisfied a prudent and cautious man, that the Claimant was probably guilty of the offence. This is the test laid out in the **Murunga** decision. The Court must similarly be satisfied that the Respondent verified facts through an enquiry, with the level of scrutiny of the facts commensurate with the seriousness of the charges against the Claimant.

40. The Claimant was charged with theft of Kshs. 9 million. The 1st Respondent, beyond verifying that the money was missing through the confirmatory audit carried out by Deo, made no other independent enquiry to link the Claimant to the offence. There is no internal investigation of the offence, no report before the Police was called in. PC Njuki himself carried out shoddy investigations before charging the Claimant. He only had the Statement of the Internal Auditor. He testified he expected to have one more Statement from an un-identified Witness in Nairobi. He did not visit and search the Claimant's home; he did not obtain any search warrant; he did not recall viewing the CCTV Camera at the Bank; and did not take the Statement of Ayaz. There was nothing in the evidence of PC Njuki to show he considered any of

the leads given by the Claimant, in establishing the true anatomy of the crime. The Claimant was away when the money was stolen. He had given his key regularly to Ayaz. What material available to the Prosecutor would have made a prudent man believe the Claimant was guilty of the offence" It was the wrong approach to presume that because Kshs. 9 million was incontestably stolen from the Bank, the Chief Manager had to be a suspect. The Court finds there was no material linking the Claimant to the offence. The Respondents failed to verify facts, with the level of scrutiny commensurate with the seriousness of the charges against the Claimant.

41. In establishing the last element, the Claimant is supposed to show the Respondents had an improper frame of mind. This improper frame of mind was revealed in the evidence of the Internal Auditor Deo, when he conceded that for the 1st Respondent's insurance claim to fall through, somebody had to be charged. The police process was manipulated to achieve a business end. Malice is present in a prosecution when criminal charges are preferred against a Person for other purposes, other than carrying the law into effect. Traditionally Police Officers enjoyed protection from civil liability for the manner in which they conducted criminal investigations and prosecuted offenders. The law has changed. Common law positions have to be aligned to the demands of the Constitution. Commonwealth jurisdictions such as Canada have developed the tort of negligent investigation, where Police Officers are deemed to owe a duty of care to suspects under investigation. Malicious prosecution involves wrongful assault on the dignity of the Person, Name and Privacy. These are values which enjoy protection under the Constitution. The Police become liable when sufficiently connected with the laying of the charges, or carriage of the prosecution once started.

42. PC Njuki arrested the Claimant, arraigned him in Court, and charged him without a proper basis. He went by the 1st Respondent's wish: to have somebody charged in order to process an insurance claim. He showed little or no regard to the Claimant's version of events surrounding the crime. He was not sure about how to proceed with the charges, initially bringing separate charge sheets against the Claimant and the fugitive Lawrence Atieno, before consolidating the charges. Eventually the advice of the DPP was sought and given in favour of the Claimant, but only after the Claimant had been dragged through the mud. The Court is satisfied that both Respondents are liable for damages to the Claimant Employee for malicious prosecution. ***They shall pay to the Claimant, jointly and severally, the sum of Kshs. 2,500,000 as general damages for malicious prosecution.***

43. The Court finally orders that Parties shall meet their costs of the litigation.

In sum the Court Orders:-

- a. ***Termination of the Claimant's contract was unfair and unlawful.***

- b. ***He shall be paid by the 1st Respondent 6 months' salary in compensation for unfair termination at Kshs. 1,800,000 and general damages for employment related defamation at Kshs. 2,500,000.***

c. ***The 2 Respondents to jointly and severally pay to the Claimant damages for malicious prosecution at Kshs. 2,500,000.***

d. ***In total the Respondents to pay to the Claimant Kshs.6,800,000, as apportioned above, within 30 days of the delivery of this Award, with an interest of 14% p.a. if the sum is not paid within the given period***

e. ***Parties to meet their costs of the Claim.***

Dated and delivered at Mombasa this 9th day of December 2015

James Rika

Judge



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