

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL CASE NO. 550 OF 2022

ALEX JOSHUA NAIRO.....PLAINTIFF

VERSUS

EXIM BANK TANZANIA LIMITED.....DEFENDANT

JUDGEMENT

Mansoor, J:

Date of JUDGEMENT- 31/10/2023

The plaintiff, Alex Joshua Nairo was the employee of Exim Bank Tanzania Limited, herein shall be referred to as "the Bank". He was employed on 25th June 2013 as the Branch Manager, and promoted to a Cluster Head for Southern Zone on 25th January 2015. He was overseeing several branches including the Tanga, Ubungu and Samora Branches. At Tanga Branch, an unscrupulous dealing happened. The money kept in the accounts of one customer in the name of Alesandro Caldarone was allegedly illegally cashed out at Ubungu and Samora



branches by one Aziza Salum Caldarone. Aziza Salum Caldarone misrepresented herself to the Bank to be the wife of Alesandro Caldarone, and managed to withdraw from the account of Alesandro Caldarone, kept at Tanga Branch USD 11,000 and Euros 46,000. The customer Alesandro Calderon complained about an unauthorised withdrawal of money from his account, the matter was reported to the police, the bank reported to police the commission of the criminal offences (i.e. forgery and theft) on Alesandro Caldarone's Account kept at Exim Bank, Tanga Branch. After the investigation, the plaintiff and other staff of the Bank, and Aziza Caldarone were prosecuted in Court facing criminal charges of theft and forgery. The plaintiff and others were acquitted by the Court on the ground that they had no case to answer as the prosecution could not prove beyond reasonable doubt the plaintiff's participation in the offences charged. Following the acquittal, the plaintiff filed this case in Court claiming for TZS 1,000,000,000 as damages suffered due to wrongful arrest, detention, lock up, malicious prosecution, intentionally causing loss of employment, loss of reputation, psychological trauma and emotional distress. He also claimed for payment of TZS 25,000,000 as punitive



damages, he claimed for interests on the decretal sum, costs of the suit and any other relief the court shall deem fit and just to grant.

The defence filed by the defendant was to the effect that, yes there was theft and forgery committed on the account of a customer namely Alesandro Caldarone, and that USD 11,000 and Euro 46,000 was fraudulently cashed out from the account, and that they reported the theft and forgery to police. The Bank, however denies to have prosecuted the plaintiff, they said they simply reported the crime to police, and also they cooperated during the investigation, and it was the Director of Public Prosecution (DPP) who initiated the criminal case in court after they were satisfied that there was probable and reasonable cause to believe that the plaintiff and others were involved in the commission of the offence. The defendant prayed for the dismissal of the case with costs.

The case went for trial, and the following issues were recorded:

1. Whether the plaintiff was prosecuted by the defendant;



2. Whether the proceedings complained of were terminated in favour of the plaintiff;
3. Whether the prosecution instituted against the plaintiff was without any reasonable and probable cause;
4. Whether the defendant was malicious or had malicious intent in the plaintiff's prosecution, and
5. What reliefs are the parties entitled to.

Alex Joshua Nairo testifying as Pw1 said, he was the cluster head for all the branches in the Southern Zone, and he was assigned to this position via a letter dated 21st January 2015 (Ehx P2). He said he only worked for six months as the Cluster Head, before he was prosecuted by the Bank for theft and forgery in Criminal Case No. 161 of 2015 at Kisumu RM's Court, he produced in Court the Charge Sheet which was received as evidence and marked as Exhibit P4. He said, before he was prosecuted, he was suspended from work, and he was handed over to the police as a suspect of the crime by the Bank, he was then taken to police and he was kept in the lockup at Slender Bridge Police Post and then at the Central Police, Dar es Salaam. He was later bailed out, he



was summoned for disciplinary proceedings for being involved in theft and forgery of a customer account, he was later terminated for gross negligence. The letter of termination was received as Exh P5. The police investigation continued, and he was reporting at Kamata Police Post, Fraud Section, he was taken to Kisumu RM Court where he was charged, the charge was read over to him on 14 August 2015 in Criminal Case No 161 of 2015. He said, while the case was going on in court, he saw in the Guardian Newspaper of August 2016 that Alesandro Calderon has instituted a case against the Bank demanding for refund of the money stolen from his account, and he learnt that the Bank had said that no money was stolen from the account of this customer, the account of Alesandro Calderon. The Guardian Newspaper of 5th August 2016 was admitted in Court as Exh P7. The Criminal Case continued in court for Seven Years, and on 29th April 2022, the plaintiff and several others charged for the offences of forgery and stealing were acquitted as the court found that they had no case to answer, meaning that the offence charged were not proved by the prosecution wanting of the plaintiff to be put to his defence.



The Ruling of the Court dated 29th April 2022 was admitted in court as exh P8.

He said he suffered a lot of damages, he lost his job, he could not have employed by any other bank for his reputation was lowered. He said he suffered psychologically, and his family was torn apart. He also said his profession and career as a banker was destroyed as he could not get any employment from the banking industry, and that he was shun away by his colleagues who regarded him as a thief and a fraudster. He thus urged the Court to order the Bank to compensate him in money to the tune of TZS 1000,000,000, and also punitive damages of TZS 25,000,000, and costs of the suit.

The defence produced only one witness with the name of Ramadhani Hango Monko who works at the Bank as the Crime Investigator. He told the Court that it is true that while the plaintiff was the Cluster Head for Southern Zone, the money was stolen from the Account of a Customer with the name of Alesandro Calderon who had an account in Tanga Branch. That the money was cashed out by one Aziza Salum



Calderon who misrepresented herself to the bank as the wife of Alesandro Calderon, and managed to withdraw USD 11,000 and Euro 46,000 from the Account of Alesandro Calderon kept in Tanga Branch. The Branch Manager of Tanga Branch had written an email in which he was copied informing the headquarter of the Bank regarding the theft. The email was received in Court as exh D1. Dw1 after receiving the email, he took the preliminary steps, he checked the account of the client and confirmed that there was a withdrawal of USD 11,000 and Euro 46,000, and that the money was withdrawn from Ubungo and Samora Branch by a person known as Aziza Salum Calderon, the account holder denied to have known Aziza Salum Calderon or authorising her to cash the money from his account. Then, Dw1 composed a team which went to Tanga to see the customer/client. The plaintiff was also in the team which went to Tanga. Since they found out that the money was withdrawn without the authorisation of the customer or the account holder, this was theft, and Dw1 reported the theft to police. The police initiated the investigations, and on 22 May 2015 the police sent a letter to the Bank requesting for some documents relating to the account. They also requested to interrogate



those who attended Aziza Salum Calderon from Ubungo and Samora Branch. This letter was received in Court as Exh D2. Apparently, Aziza Salum Calderon was joined as the signatory in the account of Alesandro by the staff from Tanga Branch. On 26 June 2015 and 29th June 2015, the police requested for staff they would like to interrogate, these were the staff from Tanga, Ubungo and Samora Branch. The Letter from the police dated 29th June 2015 was admitted in court as evidence and marked as Exh D3. This witness said, there was theft on the account of the client, they reported the theft to police, the police initiated the investigations and the Bank cooperated in providing information required by the police. The plaintiff and other staff were charged for theft and forgery by the Republic, and when they were summoned to give testimony in court, the Bank staff went to court to give evidence. The case at Kisutu Court was instituted by the Director of Public Prosecution and not the Bank.

That was all from the plaintiff's case, and the defense.

Now, to answer the first issue, whether the plaintiff was prosecuted by the defendant Bank. In a suit for malicious prosecution, the plaintiff



must prove three things: one, that the plaintiff was prosecuted by the defendant and that the prosecution terminated in plaintiff's favor. Two, that the defendant was actuated by malice, and, three, that the defendant acted without reasonable and probable cause. Unless the plaintiff succeeds in proving all the above three points, he cannot succeed in a case for malicious prosecution. If he fails in establishing any of the points, no decree can be passed in his favor and Each of the point is independent of the other.

Whether the plaintiff was prosecuted by the defendant, in this case the complainant is the bank and the customer Alesandro Calderon. Firstly, it was Alesandro Calderon who notified the Bank that the money was cashed out from his account, and he did not authorize the transaction. The Bank initiated its own internal investigations, and after being satisfied that there was theft and forgery committed from the customer's account, the bank reported the matter to police. This makes the Bank the Complainant. Cases for malicious prosecution can be instituted against those who initiates the criminal investigations and criminal prosecution, as malicious prosecution is also known as malicious use of process, thus to answer issue No 1, the Bank in this



matter was the initiator of the process for the prosecution of the plaintiff in police and in court, the plaintiff was prosecuted by the defendant.

To answer issue No. 2 whether the plaintiff's criminal proceedings terminated in his favor, this is obvious as Exh P8 produced in Court shows that the prosecution 'case against the defendant failed, and that the Court found that the prosecution failed to establish the case against the plaintiff, and that there was no prima facie case established against the plaintiff to require him to be put to his defense. It is therefore true that the proceedings complained of were terminated in the plaintiff's favor.

Issue No 3 whether there was probable or reasonable cause for the institution of criminal proceedings again the plaintiff, it is the fact that the plaintiff was acquitted or discharged in criminal proceedings and was held to be innocent, he produced in Court a Ruling which was received as Exhp P8. He is however still required to prove that there was no probable or reasonable cause for his prosecution. An acquittal is not tantamount to want of reasonable and probable cause and the



plaintiff was needed to prove it. I understand that a Criminal Court have acquitted the plaintiff for he had no case to answer, he was acquitted because the prosecution could not prove his involvement in the offences which would have required his defense, but it does not mean that the offence was not committed as there was in evidence that some of his co accused in particular Aziza Salum Calderon was found with the case to answer and she was put to her defense, and the case continued against her. There was no, in the opinion of the Criminal Court, enough evidence to prove the participation of the plaintiff in the commission of the offence. Or probably the evidence of the prosecution was not relied upon for some reason by the Criminal Court. Or maybe there was some other technical defects, which has resulted in his acquittal or discharge. In this case, the Director of Public Prosecution had a good reason to launch the prosecution, and the defendant had a good reason to report the theft to police. There is no doubt that theft has been committed in the account of a customer, but who has committed the theft or who has assisted or corroborated with the thief in joining her name in the account of a customer as a co signatory, that issue needed to be answered by the Court in a criminal



action. In the circumstances, the rule of common law is that the plaintiff is bound to give some evidence, which may prima facie suggest absence of reasonable and probable cause. If he does, the onus then shifts to the defendant to rebut it. The burden of proving absence of reasonable and probable cause is on the plaintiff, the plaintiff needed to prove this ingredient of malicious prosecution and production of a Ruling for his acquittal was not proof of the absence of probable and reasonable cause and, that innocence pronounced by a Criminal Court does not relieve the plaintiff from the necessity of adducing evidence of want of reasonable and probable cause.

To succeed in an action for damages for malicious prosecution a plaintiff must prove:

- (i) That there was prosecution by the defendant of a criminal charge against the plaintiff;
- (ii) (ii) that the proceedings complained of terminated in his favor;
- (iii) (iii) that there was an absence of reasonable and probable cause for such proceedings;



- (iv) that the defendant instituted or carried on such proceedings maliciously; and
- (v) (v) that the plaintiff has suffered damages

It is not sufficient for the plaintiff to prove that he was innocent of the crime for which he was prosecuted by the defendant by proving that the prosecution terminated in his favor. He must also show that the defendant acted maliciously and without reasonable and probable cause. Reasonable and probable cause is "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable ground, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinarily 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."

Per Hawkins, J. in Hicks v. Faulkner, (1881) 8 QBD 167 (172).

The House of Lords approved this definition in **Herniman v. Smith, (1938) AC 305**. There must be first an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conviction; thirdly, such secondly mentioned belief

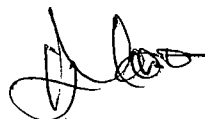
must be based upon reasonable ground, that is to say, such grounds as would lead any fairly cautious man and the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused". Again, the case decided by the Court of Appeal sitting at Arusha, the case of **Paul Valentine Mtui and another vs Bonite Bottlers Limited, Civil Appeal No. 109 of 2014 (unreported)**, the court held that the prosecution of the appellant who was charged for theft of a crate of soda was reasonable since the respondent's crate of soda was stolen, and the respondent was entitled to report the matter to police.

The question to be tackled is, has the plaintiff proved that the defendant invented and instigated the whole proceeding for prosecution. The plaintiff ought to have given evidence showing the absence of probable cause. The plaintiff was the Cluster Head for the branches in which the theft has occurred. He never said that there was no theft in the account of the customer for which he was responsible to supervise. He did not deny this fact even during cross examination of DW1. The Guardian Newspaper produced in Court reporting that



Alesandro Caldrone instituted a case against the Bank for refund his stolen money is also proof that the money was unscrupulously taken from his account, and the plaintiff ought to have proved that the case existed and there was a court Judgement which declared that there was no money stolen from the accounts of the customer of the Bank. There was theft committed either by Aziza Salum Calderon alone or with the help and assistance of the bank workers, but this fact is not denied even by the plaintiff himself. Whenever there is theft, there is a duty of every citizen to report the theft to police for investigation and eventually prosecution of the perpetrators. This proves that there was reasonable and probable cause for putting the criminal machinery in process. This also shows that the prosecution was without malice.

Whether there was malicious/or whether the defendant had malicious intent, as held herein above, the defendant was duty bound to report the theft to police, the plaintiff failed to prove that the defendant had any other ill motive in reporting the theft to police other than its legal and appropriate purpose of making sure that the perpetrators of theft are apprehended and taken to court. This was held in the case of **Shadrack Balinago v Fikirini Mohamed @Hamza and 2 others,**



Civil Appeal No. 223 of 2017, Court of Appeal sitting at Mwanza. In the instant case, the plaintiff could not prove that the defendant was actuated by malice. In fact, it was established by the plaintiff himself that there was theft committed in the account of Alesandro Calderon, and that the reporting of theft to police is and cannot be malicious

I agree that the judgments of the Criminal Courts are conclusive for the purposes of showing that the prosecution terminated in favor of the plaintiff, but the findings of the Criminal Courts by themselves are not evidence of malice or want of reasonable and probable cause or malicious intent. It is for the civil court to go into all the evidence and decide for itself whether such malice or cause existed. From the evidence adduced in court by both parties, I find no element of malice on the part of the defendant, and again the plaintiff failed to prove that there was no probable and reasonable cause for reporting the theft to police, and the defendant has not invented and instigated the proceedings maliciously and without any reasonable or probable cause.

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Since the plaintiff failed to prove his case on the required standards,
the suit is dismissed, with costs

**DATED and DELIVERED at DAR ES SALAAM this 31st day of
OCTOBER, 2023**



A handwritten signature in black ink, appearing to read "L. Mansoor".

**L. MANSOOR
JUDGE**

31st OCTOBER 2023