CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 20TH JULY, 2023

SUIT NO. C11/2/22

SADAT ADONOO - PETITIONER

VRS

TROPICAL CABLE AND CONDUCTOR LTD - RESPONDENT

JUDGMENT

In his writ of summons and statement of claim which he took out against the defendant on the 6th day of September, 2021, the plaintiff claimed for;

A. An order directed at defendant company to pay an amount of one hundred and fifty thousand Ghana cedis (ghs 150,000) to the plaintiff as damages and compensation to cover all expenses, cost of litigation, pains and trauma suffered by the plaintiff as a result of the malicious prosecution
B. An order for the payment to the plaintiff of all salaries, benefits, bonuses, allowances and all other payments/emoluments to which the plaintiff is entitled together with interest at the prevailing bank rate from the 10th day of October, 2017 till the final date of payment
C. An order directed at the defendant to pay an amount of fifty thousand Ghana cedis (Ghs 50,000) to the plaintiff as compensation for unlawful dismissal.

The plaintiff in his statement of claim particularized malicious prosecution and made a claim for damages based on the said malicious prosecution.

The defendant entered appearance and filed a statement of defence in which it contended that the plaintiff is not entitled to his claim.

At the application for directions stage, the following five issues were set down for trial;

- Whether or not the plaintiff was dismissed unlawfully and retrospectively by the defendant.
- Whether or not the defendant company failed to pay all entitlements due to the plaintiff after the dismissal.
- Whether or not the plaintiff was criminally prosecuted by the state based on a malicious complaint made against him by the defendant company.
- Whether or not the plaintiff suffered any hardship, trauma, inconvenience and or damage to his reputation as a result of the dismissal and criminal prosecution.
- Any other relevant issues raised by the pleadings.

THE UNDISPUTED FACTS

Both plaintiff and defendant agree on these facts. The plaintiff used to work with the defendant company as an assistant stores manager until the 16th day of November when he was dismissed by a dismissal letter.

The facts leading to plaintiff's dismissal are that on the 9th day of October, 2017, the plaintiff together with six other employees of defendant company were accused of attempting to steal a coiled copper rod which belongs to the defendant company.

Plaintiff and the others were detained in a room in the company's premises and handed over to the police on the same date after the defendant invited the police to the company premises.

The defendant proceeded to suspend the plaintiff on the 10th day of October, 2017 and also summoned him by a letter dated the 12th day of October, 2019 to face disciplinary proceedings before the disciplinary committee of defendant company.

The defendant served the plaintiff with a letter of dismissal on the 16th day of November, 2017 indicating that the committee had found him culpable of attempted theft and plaintiff was dismissed effective from 10th October, 2017.

Based on the same facts, the plaintiff and others were arraigned before this very court differently constituted on the 17th day of January, 2018 for the offence of attempt to commit the crime of stealing. There were five witnesses for the prosecution, the defendant company provided four of the witnesses.

On the 2nd day of September, 2020, the court determined that prosecution had failed to establish a prima facie case against the accused person and the others and proceeded to acquit and discharge them. This is as far as the parties are willing to agree on the facts.

THE EVIDENCE OF THE PLAINTIFF

In his evidence in chief, the plaintiff tendered in evidence EXHIBIT A which is a copy of an offer of employment to him by the defendant as well as his acceptance letter. He also tendered in evidence EXHIBIT B as a copy of his suspension letter.

He also tendered in evidence EXHIBIT C and D as a copy of a disciplinary committee hearing notice which was served on him by defendant company and a dismissal letter. That the defendant company failed to pay him all the entitlements due him at the time.

His evidence is that the defendant's company's act of dismissing him retrospectively based on the frivolous claim of attempted stealing has caused him great hardship. That his trial for attempted stealing lasted for two years and six months before the court upheld a submission of no case after the close of prosecution's case. He tendered in evidence a copy of the ruling of the court as EXHIBIT E.

That his prosecution was malicious and as a result of same, he has suffered psychological trauma, distress, inconvenience and hardship for the past three years. That owing to the frequent court attendance, he lost the prospect of securing certain jobs. That the criminal charge also made it difficult for him to secure a job until recently.

Also that he spent huge sums of money in engaging a lawyer to defend him and also in transporting himself to court and other related expenses. That his reputation has been completely damaged as the members of his community began to tag him as a thief and continue to see him as such even after his acquittal.

Further that prior to his dismissal, he was entitled to a basic salary of Ghs 3,627. He tendered in evidence EXHIBIT F as a copy of his appraisal letter. That he was entitled to a yearly bonus equivalent to 100% of his bonus salary but he was not given any severance package.

THE CASE OF THE DEFENDANT

The evidence of defendant is that the circumstances of its interception of the copper rod made it clear that the plaintiff and the others had made an attempt to steal same. That it was whilst a board meeting was on going that the plaintiff and others conspired to steal the item.

That plaintiff was in charge at the time and took stock without recording any shortage. That plaintiff also prepared a way bill for the disposal of scrap broken woods and personally sent it to the production manager in the board room for same to be signed in the course of the meeting.

That plaintiff then assigned one Joseph Adongo who was in charge of supervising the loading of scrap to another job. That when the incident was found out, the plaintiff and other employees were suspended and it also reported to the police.

That defendant conducted a disciplinary enquiry in accordance with the collective bargaining agreement which it tendered in evidence as EXHIBIT 1. It tendered in as EXHIBIT 2, the letter requesting the plaintiff to respond to allegations of conniving and attempting to steal company property.

Defendant further tendered in evidence the letter inviting the plaintiff to attend a disciplinary committee hearing as EXHIBIT 3. That the committee in its findings and recommendations found that the plaintiff had played a role in the attempted theft and grossly derelicted in his duties with intent. It tendered in evidence a copy of the disciplinary committee report as EXHIBIT 4.

It further contended that the prosecution of the plaintiff was reached by the prosecution upon reasonable grounds and the plaintiff was lawfully dismissed by the defendant company. That he has been paid his basic salary.

CONSIDERATION BY COURT

As this is a civil suit, the burden of proof lays on he who asserts. It is the plaintiff who is asserting. The defendant has denied its claims and thus the plaintiff bears the legal burden of leading cogent, credible and relevant evidence in proof of his claim. If he is to succeed on his claims, he must lead evidence on a balance of probabilities, to establish the existence of his claims in my mind.

In the case of ***Gifty Avadzinu v. Theresa Nioone [2010] 26 MLRG 105 @ 108,*** their lordships held *"It is trite that the standard of proof in all civil actions without exception is proof by preponderance of probabilities, having regard to section 11 (4) and 12 of the Evidence Act. This means that a successful party must show that his claim is more probable than the other."*

The requirements of what would constitute cogent and credible evidence that would meet the test of a balance of probabilities is succinctly contained in the case of ***Emmanuel Osei Amoako v. Standford Edward Osei [2016] DLSC 2830.*** The erudite Appau JSC speaking for the Supreme Court held: *"It is trite learning that a bare assertion by a party of his pleadings in the witness box without more is no proof. Proof in law has been authoritatively defined as the establishment of facts by proper legal means. As the celebrated Ollenu, J (as he then was) stated in his judgment in the case of Khoury and Another v Richter, which he delivered on 8th December 1958 (unreported), on the question of proof, which he repeated in the case of* ***Majolagbe v Larbi & Anor [1959] GLR 190 at 192****; "where a party makes an averment capable of proof in some positive way, e.g. by producing documents,*

description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true …". See also the case of ***Ackah vrs Pergah Transport Ltd [2010] SCGLR 728*** as well as the case of ***Re B [2008] UKHL 3 where Lord Hoffman*** aptly stated the requirement of proof mathematically.

Plaintiff relied on both oral and documentary evidence to prove its claim. The law is settled that where documentary evidence exists, the courts prefer same over inconsistent oral testimony. Pwamang JSC held in the case of ***Nana Asiamah Aboagye v. Abusuapanyin Kwaku Apau Asiam [2018] DLSC 2486*** *'' the settled principle of the law of evidence is that where oral evidence conflicts with documentary evidence which is authentic, then the documentary evidence ought to be preferred over and above the oral evidence*." See also the cases ***Ofori Agyekum v. Madam Akua Bio [2016] DLSC 2858 per Benin JSC.***

- Whether or not the plaintiff was dismissed unlawfully and retrospectively by the defendant.

The claim of the plaintiff is that he was dismissed unlawfully and with retrospective effect by the defendant. The defendant denies this and insists that the plaintiff's dismissal was lawful. It is a legal known that an action for unlawful dismissal is grounded at common law.

The plaintiff's EXHIBIT A is an offer of employment from the defendant company dated the 11th of October, 2013. The defendant company has never been in denial that the plaintiff was its employee at all material times prior to his dismissal.

EXHIBIT B is addressed to the plaintiff and dated the 10th of October, 2017 and is headed suspension. In same, the defendant company suspended the plaintiff pending his response and not withstanding any criminal actions that may follow for ''as an assistant manager you sought permission to load the truck with old wooden planks but you included the above mentioned raw materials. This amounts to conniving and attempting to steal company property which is punishable by summary dismissal.

EXHIBIT C is dated the 12th day of October, 2017 and addressed to plaintiff. In same, he was summoned to a disciplinary committee hearing on the 17th day of October, 2017. EXHIBIT D is a letter of dismissal addressed to the plaintiff by defendant company and dated the 16th day of November, 2017. It is headed letter of dismissal and it proceeds to inform the plaintiff that he has ''been found culpable of attempted theft of the copper rod material and neglect of duty with proven intent''. The next paragraph reads ''further checks over the ten months period, have also revealed additional loss of 20MT copper rod''. He was then dismissed with effect from the 10th of October, 2017

The evidence of defendant is that the defendant company has a collective bargaining agreement (hereinafter referred to as CBA) with its employees and it complied with the terms of the said CBA before dismissing the plaintiff. The collective bargaining agreement is evidenced by defendant's EXHIBIT 1.

Ordinarily, it is the agreement that should govern the defendant company in its relationship with the plaintiff and other employees. I say ordinarily because in the circumstances of EXHIBIT 1, it was executed on the 19th day of September, 2020. At the time, the plaintiff had been dismissed for more almost three years by the defendant company. Attached to EXHIBIT 1 is an unsigned and undated constitution, rules and

bye laws of the defendant company and its employees. It indicated the month of January, 2015 but has no date and no signatures. Nowhere in exhibit 1 is there an indication that the CBA has retrospective effect and if so to which particular date. It can thus not be argued that the processes culminating in the dismissal of the plaintiff was based on EXHIBIT 1.Upon these basis, I cannot rely on the CBA as a basis for determining the lawfulness or otherwise of plaintiff's dismissal.

Traditionally, an action for unlawful dismissal has been one grounded in common law. The principles of natural justice; specifically the audi alteram partem rule and the nemo iudex in causa sua rule have always been applied as basic principles to be observed by adjudicating bodies in their proceedings which lead to decisions being made about individuals.

This is a constitutional provision enshrined in Article 23 of the 1992 Constitution.

'' Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.'

Both lawyers in their well researched and written addresses (I highly commend them for their sheer industry) referred me to the case of ***Aboagye v Ghana Commercial Bank [2001-2002] SCGLR 797.*** In the said case Bamford Addo JSC in reading the decision of the apex court held that ''

In the case of ***Serbeh-Yiadom v Stanbic Bank (Gh) Ltd [2003-2005] 1 GLR 86*** the Supreme Court stated that:-

> ***"It is a salutary and well-known principle of law that a person should be given the opportunity of being heard when he is accused of any wrong doing before any action is taken against him".***

I would thus look to the evidence by plaintiff as the observance or otherwise of this timeless principles in his dismissal. The undisputed evidence before this court is that the plaintiff was given a hearing before a disciplinary committee on the 17th day of October, 2017 prior to his dismissal on the 16th day of November, 2017.

In the case of ***Republic vs Ghana Railway corporation, Ex parte Appiah and Annor [1981] GLR 752***, the Court in defining disciplinary proceedings held that

"*Disciplinary procedure in administrative law simply meant that a party ought to have reasonable notice of the case he has to meet and ought to be given the opportunity to make his statement in explanation of any question or to answer any arguments put forward against him''.*

Flowing from this case, the question here would be, what was the basis upon which the plaintiff was given a hearing by the disciplinary committee after it was summoned to appear before it? From the documentary evidence, particularly EXHIBIT C, the plaintiff was given notice of a claim of conniving and attempting to steal company property and asked to appear before the committee. That means his hearing was to be restricted to the said claim because that was the case he was called upon to meet.

The minutes of the disciplinary committee hearing are not before this court. Its production in evidence may have assisted the court to determine whether the plaintiff was given notice of the said claims when he appeared before the committee and given

an opportunity to offer a statement or explanation even though he was not given prior notice before his appearance before the committee. However, the findings and recommendations of the committee was tendered in evidence by the defendant as EXHIBIT 4.

The disciplinary committee per EXHIBIT 4 (d) made findings of gross dereliction of duty. It then proceeded to make a recommendation of attempted stealing and gross dereliction of duty. Then in the dismissal letter EXHIBIT D, the defendant company proceeds to add ''further findings of loss of 20 MT copper rod.

At page 27 of the record of proceedings, defendant's witness had answered under cross examination by learned counsel for the plaintiff

Q: You have attached exhibit 2 which is a letter suspending the plaintiff and also requesting him to respond to the allegation of conniving to steal company property. Is that correct?

A: Yes my lord.

Q: So the plaintiff was to respond to the offences of conniving and attempting to steal company property as stated in exhibit 2 and nothing else.

A: My lord, if I can refresh my memory.

BY COURT: Very well. Exhibit 2 handed to DW1.

A: There is also another point, it says as an assistant manager you sought permission to load the truck……

Q: So from exhibit 2, you would agree with me that based on the facts mentioned in paragraph 1 and 2, the plaintiff was to answer to paragraph 3 and that was the only charge that he was to answer to. (emphasis mine)

A: Yes my lord.

Defendant's witness had further admitted at page 31 of the record of proceedings that the offence of gross dereliction of duty was never stated in EXHIBIT B.

Cross examination amongst others, serves the purpose of putting across one's case. To this end, learned counsel for the defendant in cross examining the plaintiff had put forth the case that the plaintiff's dismissal was based entirely on the findings of the disciplinary committee.

At page 17 and 18 of the record of proceedings, this is what transpired;

Q: *And the disciplinary committee found you culpable of attempted stealing and gross dereliction of duty with prove intent.*

A: That is correct my lord but I have disagreed with such report.

Q: And the disciplinary committee provides reasons for your dismissal. Is that correct?

A: That is correct my lord, but I have disagreed with that as well.

Q: I put it to you that you were summarily dismissed based on findings and observations of the disciplinary committee.

A: My lord, I disagree with the dismissal.

Q: You may disagree with the decision of the disciplinary committee but you were dismissed based on their findings and observations. Is that so?

A: That is so my lord.

To the extent that the committee made findings of neglect of duty with proven intent, a claim which was not made known to the plaintiff for him to have an opportunity to respond and the company also included further findings of loss of 20 MT copper rod in its dismissal letter without given the plaintiff prior notice and the opportunity to make a statement and/or respond, and then proceeded to dismiss plaintiff based on these, it cannot be said that he was given a fair hearing by the defendant company prior to his dismissal.

It is a legal known that where an adjudicating body fails to observe any of the rules of natural justice, their failure would be fatal to the validity of any decision that they made. In the case of ***The Republic V. High Court, Accra Ex-Parte Salloum (Senyo Coker (interested party) [2011] 1 SCGLR 574*** where the Supreme Court stated thus:-

> *"Equally so, if a party is denied the right to be heard as in this case, it should constitute a fundamental error for the proceedings to be declared a nullity. The courts in Ghana and elsewhere seriously frown upon breaches of the audi alteram partem rule to the extent that no matter the merits of the case, its denial is seen as a basic fundamental error which should nullify proceedings made pursuant to the denial."*

It appears from the tone of EXHIBIT B and C that the defendant company had already made up its mind. In paragraph 3 of EXHIBIT B which is the letter suspended the plaintiff, defendant company states that ''this amounts to conniving and attempting to steal company property which is punishable by summary dismissal''.

The fact that EXHIBIT B was written to the plaintiff a day after the incidence is not lost on me. The question that any reasonable man would ask is what preliminary findings did the defendant company make and by which process did it make those findings prior to suspending the plaintiff a day after the incident.

Again, in EXHIBIT C which is the letter summoning the plaintiff to the disciplinary committee hearing, paragraph 3, the defendant company repeats the very same '' 'this amounts to conniving and attempting to steal company property which is punishable by summary dismissal. Then in EXHIBIT D, the defendant company proceeds to dismiss the plaintiff for attempted theft of the copper rod material and neglect of duty with proven intent''.

The next paragraph reads ''further checks over the ten months period, have also revealed additional loss of 20MT copper rod''. Here again, the wording of the dismissal letter provides in paragraph 2 what the plaintiff has been found culpable of and then paragraph 3 goes on to make insinuations of theft against him for 20MT copper rod and paragraph 4 then proceeds to dismiss him.

A reading of the said dismissal letter leaves one with the impression that the plaintiff was being dismissed on these three grounds; attempted theft of the copper rod material on the 9th of October, 2017, neglect of duty with proven intent and loss of 20 MT copper rod over a ten month period.

The defendant on the face of its own letters, appeared to have been biased against the plaintiff and cannot be said to have acted in good faith. It appeared that its mind was already made up and it was only going through the process of a disciplinary committee hearing as a matter of course and not necessarily to provide the plaintiff with a fair hearing.

Given this background, an argument that the plaintiff was put on notice on one of the claims for which he was dismissed and given a fair hearing and so the fact that he was

not put on notice on the two other claims should not invalidate the process leading to his dismissal would not find merit in the eyes of the law.

This is because it has been long held by the oft quoted aphorism stated in the case of ***Rex v Sussex Justices, ex parte McMarthy[1924]1 KB. 256*** "Not *only must justice be done; it must also be seen to be done*". A half of justice is no justice at all.

In any case, it is the defendant company that had invited the police into the matter on the very day of occurrence which is the 9th of October, 2017. By making a complaint to the police, it is deemed to have invited the state security apparatus to investigate the matter and make its findings as the offence of stealing is proscribed by Statute; specifically section 124(1) of the Criminal Offences Act, 1960 (Act 29).

Since it had invited the police into the matter, one would expect it and rightly so to wait till the matter has been properly investigated and prosecuted in a competent court of jurisdiction before making any definite pronouncement of criminality against the plaintiff. That is the position of the law as espoused by the Court of Appeal in the case **Thompson Vrs Total Ghana Ltd. (H1/124/2008) [2008] GHACA 34 (31 July 2008).**

The court held in that case that "Exhibit 1 was a report from Police investigation into allegations made to them. The report perse does not prove the guilt or culpability of the suspects. If adverse findings were made against any suspect or a person against whom an allegation of misconduct had been made, those finding remain undetermined unless or until the suspect had *been charged and successfully prosecuted in a court of law properly constituted.(emphasis mine)* It would be a dangerous precedent to conclude that once adverse findings had been made against a person who was suspected of criminal behaviour, then it means that that person's guilt had been proven. With respect, our

criminal law system presumes every one, including persons against whom criminal charges had been preferred, innocent until their guilt had been finally established, leading to their conviction. Until that level had been attained, after due process of the criminal procedure, it would, to put it mildly, not accord with jurisprudence to say that a person's guilt had been established or proven.

Based upon my analysis of the law and evidence, I find that the defendant had acted unlawfully and retrospectively in respect of its dismissal of the plaintiff.

- *2. Whether or not the defendant company failed to pay all entitlements due to the plaintiff after the dismissal.*

It is the claim of the plaintiff that he was not paid all his entitlements due him after his dismissal. As he was the one asserting, the burden of proof laid on him. His evidence in support of this claim per paragraph 18 of his evidence in chief is that prior to his dismissal, he was entitled to a basic salary of Ghs 4,627 per his appraisal letter. That he was further entitled to a yearly bonus equivalent to 100% of his basic salary but he was not given any severance money.

The defendant denied this and insisted that the plaintiff was paid his salary and provident fund at the time of his dismissal and he was not entitled to a further yearly bonus of 100% of his salary or any severance money.

Plaintiff by way of evidence tendered in EXHIBIT F. It is a memo titled year 2016-2017 appraisal and it is dated the 4th day of September, 2017. Its contents inform the plaintiff of an increment in salary from Ghs 3,454 to Ghs 3,627 with effect from 1st September, 2017.

It does not provide proof of the payment of a 100% basic salary as a yearly bonus. As plaintiff is asserting the negative and defendant is asserting the positive, the burden of proof would shift unto the defendant.

Here, it is worthy of note ***that section 14 of the Evidence Act, 1975 (Act 323),*** provides for instances where the burden of proof would shift from the person making the assertion to the one who is denying. This is in instances where the plaintiff asserts the negative and the defendant asserts the positive.

Section 14 of Act 323 provides

Allocation of burden of persuasion

''Except as otherwise provided by law, *unless it is shifted (emphasis mine)*, a party has the burden of persuasion as to each fact the existence or non existence of which is essential to the claim or defence the that party is asserting.

The Supreme Court recognized this shift in the burden of proof in its majority decision in the case *of* ***George Akpass vrs Ghana Commercial Bank Ltd. (CIVIL APPEAL NO. J4/08/2021 delivered on 16th June, 2021*** In the Akpass case (supra) Amegatcher JSC in delivering the majority opinion had this to say ***''Section 14 of the Evidence Act 1975 NRCD 323*** contemplates situations where the evidential burden may shift. One such situation is where, as a rule, the plaintiff who is the party on whom the burden rest asserts the negative and the defendant who is required to disprove asserts the positive.''

The court relied on the case of ***Boakye v Asamoah & Anor. [1974] 1 GLR 38***, in which Osei-Hwere J (as he then was) held that "if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers

the negative". See also the decision of ***Benin J. in Salifu v Mahama & Ors [1989-90] 1 GLR 431.***

On this premises, the fact that the plaintiff asserted a negative ''that he had not been paid and the defendant asserted a positive 'that plaintiff had been paid'' means the burden of proof would shift unto the defendant to prove its positive assertion.

The defendant under cross examination provided proof of the plaintiff's entitlements per EXHIBIT F and G. The said exhibits show that the amount of Ghs 6,882.84 was paid to the plaintiff. A cheque in plaintiff's name dated the 20th day of March, 2023 also shows the payment of this sum to plaintiff. Again, per EXHIBIT G, the plaintiff applied for a loan of Ghs 15,000 on the 12th of September, 2017 and Ghs 10,000 was approved on the 15th of September, 2017 payable over 24 months. There is no indication that the plaintiff has paid off any part of that loan after his dismissal from the company.

Despite the production of these documents by defendant, plaintiff through his learned counsel in the course of cross examination of defendant representative had put it to him that there is an outstanding balance to be paid to the plaintiff after the payment of Ghs 6, 882.84. That claim moved the plaintiff from a negative to a positive assertion.

Without any evidence as to what the plaintiff was entitled to, I can only fail to agree with the contention that he was entitled to anything which was not paid by the defendant.

Consequently, on issue two, I find that the plaintiff has failed to prove that he was entitled to more than the Ghs 6,882.84 that he was paid as entitlements.

3. *Whether or not the plaintiff was criminally prosecuted by the state based on a malicious complaint made against him by the defendant company.*

For this issue both counsel for the plaintiff and defendant refer me to the case of ***Musa v. Limo –Wulana [1975] 2 GLR 290***

As the name of the game is evidence, the onus laid on plaintiff to prove first that he was entitled to all these entitlements and secondly that the defendant had not paid same to him. Based on the strong denials of the defendant, merely repeating his assertions on oath without further proof would not be sufficient in satisfying the evidential burden on the plaintiff.

The Supreme Court held in the case of Kobi v Manganese Co. Ltd. [2007-2008] SCGLR 771 at 786, that in an action for wrongful dismissal, the plaintiff assumes the burden of proving the terms of his employment; that the determination was in breach of the terms of agreement and in contravention of statutory provisions for the time being regulating to employment. See also the cases of ***Morgan v Parknson Howard Ltd. [1961] GLR 68 at 70,*** *held* ***Oduro v Graphic Communications Group Ltd. [2017-2018] 2 SCGLR 112 Holding (2).*** In order for the claim of a plaintiff to succeed, he must satisfy the court on these three grounds.

It is elementary that in an action for malicious prosecution, the plaintiff must establish each one of these elements if he is to be successful on his claim.

(a) The prosecution must have been instituted by the defendant

(b) The prosecution terminated in plaintiff's favour

(c) The prosecution was without reasonable or probable cause

(d) The defendant acted maliciously

On the first element, it is a legal known that it is the Attorney General who prosecutes all criminal matters. Thus the requirement that the prosecution must have been instituted by the defendant is in essence a requirement that the law was set in motion by the defendant against the plaintiff on a criminal charge. See the decision of Korsah CJ in the case of ***Aubin v. Ehunaku [1960] GLR 167.***

There is no dispute on the fact that on the 9th day of October, 2017 the defendant company after ''realizing the attempted stealing, called in the police to arrest the plaintiff and others. The evidence of defendant representative at pages 38-39 of the record of proceedings is quite instructive and I would reproduce same here.

Q: It was after the plaintiff and the other persons had been put in a room by the defendant company that the police were called. Is that correct?

A: My lord, I cannot confirm the sequence of events but the police were called.

Q: In fact the plaintiff and the other persons were arrested by the police in the room where they were being kept. Is that not the case?

A: Yes, once we made a case to the police, they came for those we suspected were involved in the crime.

Q: And it was after they had been arrested and taken to the police station by the police that the company officially made a complaint against the plaintiff and the other persons involved.

A: That is not correct.

Q: Can you tell the curt the time the defendant made official complaint at the police station?

A: I do not have the exact time, however, we made a complaint and the police responded to come and take the suspects.

Q: I put it to you that it was after their arrest that the company made an official complaint against the plaintiff and the other persons.

A: That is not correct my lord.

Twumasi J in the case of Nkrumah vrs. Foli and Anor [1982-83] GLR 1046 had this to say on the said element '' A person could not be held liable for the criminal prosecution of another person against whom he had lodged a complaint of commission of a criminal offence unless that person had played such a preponderant and over-bearing role in setting the machinery of the law in motion against the alleged offender that a reasonable man who was appraised of the facts would unhesitatingly conclude that the law enforcement agents were used by that person as mere robots to serve his personal interest''.

From the evidence of defendant itself, it did not simply make a complaint to the police and allow the law to take its course. It falsely imprisoned the plaintiff and others whilst waiting for the police to arrive and arrest them. As to whether at the time it called in the police, it had made an official complaint or not, the defendant representative is unable to tell.

What he could tell was that the company ensured that all exits were locked and the plaintiff and others held in a common room until the police arrived and arrested them. That act alone shows that the defendant did not act as a mere complainant of a commission of a crime.

By its actions, it appeared to have concluded on the guilt of the plaintiff and the others and simply invited the police to make an arrest of the plaintiff. It did not as is expected of a complainant, make a complaint to the police and leave them to conduct their investigations and arrest independently.

I find that the defendant by its actions authorized and directed the police to arrest the plaintiff and thus played a 'preponderant and overbearing role in setting the machinery of the law in motion against'' the plaintiff.

On the second element, there is no dispute that the prosecution terminated in plaintiff's favour. That is evidenced by EXHIBIT E, a ruling of this court differently constituted on the 2nd day of September, 2020. The court acquitted and discharged the plaintiff on the basis that the allegations made against the plaintiff were mere speculations. That satisfied the second element that the proceedings terminated in favour of the plaintiff.

The third element that the plaintiff must prove is that defendant undertook or instigated or procured the prosecution with no reasonable or probable cause. Here again, Twumasi J. in the Nkrumah case (supra) further held that '' A member of the public whether he has been offended by crime or not, is not supposed to be actively instrumental in criminal prosecution. The discretion to prosecute is entirely that of the law enforcement agents. But this does not prevent the person lodging the complaint from assisting in the process under the guidance of the law enforcement agents. Once he acts under the directions of these agents he cannot be held liable for the prosecution. Mere information to the police of a crime must be distinguished from instigating the police to prosecute the offender*: see* ***Danby v. Beardsley (1880) 43 L.T. 603; Tewari v. Singh (1908) 24 T.L.R. 884, P.C.; Watters v. Pacific Delivery Services Ltd., Sandover and***

Cotter (1964) 42 D.L.R. (2d.) 661; Fitzjohn v. Mackinder (1860) 8 C.B. (N.S.) 78; Alhadi v. Allie (1951) 13 W.A.C.A. 323; Aubin v. Ehunaku [1960] G.L.R. 167, C.A. and Soadwah alias Sondura v. Obeng [1966] G.L.R. 338, S.C.

From the evidence of defendant representative under cross examination by learned counsel for the plaintiff,, it becomes manifestly evident that the defendant company was actively instrumental in the prosecution of the plaintiff.

Q: During the prosecution of the plaintiff in the criminal matter, the defendant company called 4 witnesses to aid the prosecution of the plaintiff and the other persons. Is that correct?

A: My lord, I may have to refer to the document to know the exact number.

Q: Please take a look at Exhibit E, the ruling of the court on the application for submission of no case.

BY COURT: Exhibit E shown to witness.

A: My lord, I see a fifth witness.

Q: Out of the 5 that you see, 4 of them were at the time employees of the defendant company.

A: Yes please.

Q: And all those witnesses were transported to court by the defendant company. Is that not the case?

A: I cannot confirm that but I can firmly assure that that would be the case. Either in the company's car or private vehicles.

Q: And they were all to testify against the plaintiff and in support of the prosecution's case in an attempt to get the plaintiff convicted and sentenced. Is that not the case?

A: No my lord.

Q: So can you tell the court why those four employees of the defendant company were in court?

A: One of them was the person who discovered the truck that the coil had been loaded on, one of them was plaintiff's boss, one of them was the production manager who uses the copper coil for production. They were all called to give their version of events as they all saw it and got to lead evidence in our favour to get the plaintiff convicted.

Q: So are you saying that the said witnesses did not believe in the guilt of the plaintiff at the time they were called to testify against him.

A: As a company, we had reasonable grounds to believe that an attempted theft had occurred and so we presented witnesses who could give evidence as to what had happened.

Q: So those witnesses were in court to prove that indeed the plaintiff had committed a crime. Is that not the case?

A: From what I know, that is not the preserve of the witness.

Q: Those witnesses were in court to help establish the fact that the plaintiff had attempted to steal a property belonging to the defendant company. Is that correct?

A: Yes, please.

Q: And that is why the defendant company spent resources on those witnesses to appear in court to testify.

A: Yes, my lord.

From EXHIBIT E, it appears that the evidence led at the trial by the four prosecution witnesses was on all fours as the defendant's basis for setting up the disciplinary committee. The question then would be, what independent investigation did the police carry out to determine the veracity of the complaint?

In the case of Republic vrs. Iddrisu Iddi @Mbadugu and 14 ORS, Suit No B.O.I 14/2010 Justice Ayebi J.A. sitting as an additional High Court judge had this to say about what constitutes an investigation into a criminal matter ''investigation does not mean taking statements from suspects and charging them before the Court. True investigations involve following clues and leads gathered from the statement of suspects and witnesses. In his book Criminal Procedure in Ghana, AN.E. Amissah at page 31 wrote on the objective of investigations as follows ''at the initial stages, the object of the investigation is not to prove a case against any particular person but to find out whether or not the complaint lodged can be substantiated and if so, how. Consequently, it is advisable that the police pursue all openings, leads and clues brought to their notice. Every person mentioned as having relevant information has to be checked. The aim should be to build up a complete case which cannot be upset by material within the possession of the police. If the investigation leads to a conclusion that no offence was committed or that an offence has been committed but not by the person suspected, the investigator should be bold enough to say so. The fact should not be forced to fit a preconceived notion''.

In EXHIBIT E, the evidence of PW5, the investigator is quite revealing. According to him, he was led to the premises of defendant company after the complaint. That upon reaching there, he expected to see the truck with the item at the gate as that is what he had earlier been told. However, he was informed that the truck had been moved to the

warehouse for security reasons. He was led to other sectors where some of the rods were being kept. That he was led to the administration where all accused persons were being kept and he arrested them. He later took statements from plaintiff and the others and charged them after his enquiry.

From his own evidence, he had been led by the defendant company in his investigations rather than he making an independent investigation. From his evidence, it appears the answer to the question ''what independent investigations were carried out would be noneIt appears based on EXHIBIT 4 which are the findings and recommendations of the disciplinary committee that the police had prosecuted the matter on the basis of the evidence that it believed the defendant company to have after they were called by defendant company rather than any independent investigations carried out by the police themselves.

Also, it appears that the basis of defendant's complaint cannot be said to be from a reasonable or probable cause. *In the case of* ***Onogen vrs. Leventis & Co. Ltd. [1959] GLR 105,*** *Adumua Bossman* J (as he then was) held that '' reasonable and probable cause" involves 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 any 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;

Defendant company appeared to have put 2*2 together and arrived at 5. It had operated on a multitude of suspicions rather than any reasonable grounds against the plaintiff. I would not foray much into this because it is evident per the ruling of the Court in

EXHIBIT E. The law has always been that mere suspicion would not suffice. ***See the case of Meering v. Grahame & White Aviation Co., Ltd. (1919) 122 L.T. 44, C.A.***

It appears that even after a court of competent jurisdiction had acquitted and discharged the plaintiff of the charge of attempt to steal, the defendant is still insistent that accused person is guilty. This is evidenced by the line of cross examination adopted in these proceedings by defendant's learned counsel.

d) the defendant acted maliciously

Bayley J. in the case of ***Bromage & anor. v. Prosser ((1825) 4 B. & C. 247) defined malice*** as meaning in common acceptation ill-will against a person, but in its legal sense as meaning a wrongful act done intentionally without just cause or excuse.

Then Parker J. held in the case of ***Mitchell v. Jenkins ((1833) 5 D. & Ad. 588; 110 E.R. 908*** that malice was not to be considered in the sense of spite or hatred against an individual, but of malus animus and as denoting that the party is actuated by improper and indirect motives."

In the circumstances of this case, it appears that the defendant company was bent on ensuring the guilt of plaintiff and the others. In its own EXHIBT 4, it is indicated that its union begged management to withdraw the criminal case against the suspected employee.

Although the defendant is not bound to act on a plea, I avert my mind to the fact that whereas its union rightly regarded the plaintiff and others as suspected employees, the defendant company was certain as early as in its suspension letter and summons to

attend disciplinary hearing that the action of plaintiff amounted to conniving and attempting to steal company property.

It had taken a stance on the guilt of plaintiff and was ready to ensure that he was arrested and prosecuted in order to vindicate its early stance of guilt. In so doing, the defendant company went beyond giving what it believed to be correct information to the police. "see the case of ***Tewari v. Singh and anor. (1908) 24 T.L.R. 884.*** I find that the plaintiff had established that the defendant acted with malice. The defendant had arrived at a hastily drawn conclusion based on its own suspicions and interpretation

I find that the plaintiff has led evidence in satisfaction of all the elements of the claim of malicious prosecution. Accordingly, I hereby hold that the plaintiff was criminally prosecuted by the state based on a malicious complaint made against him by the defendant company.

4. *Whether or not the plaintiff suffered any hardship, trauma, inconvenience and or damage to his reputation as a result of the dismissal and criminal prosecution.*

The evidence of plaintiff on this is that as a result of his malicious prosecution, he has suffered psychological trauma, distress, inconvenience and hardship for the past three years. That owing to the frequent court attendance, he lost the prospect of securing certain jobs. That the criminal charge also made it difficult for him to secure a job until recently.

Also that he spent huge sums of money in engaging a lawyer to defend him and also in transporting himself to court and other related expenses. That his reputation has been completely damaged as the members of his community began to tag him as a thief and continue to see him as such even after his acquittal.

The evidence on record established that the trial of the plaintiff lasted for well over two years. As he was an accused person, he was obligated to be present in court on all adjourned dates at his own cost upon sufferance of a bench warrant were he to default in appearance. Again, a criminal trial is not a walk in the park. An accused person during trial stands on a bridge between retaining his liberty and losing same. The mind of an accused person cannot be expected to be at rest during such a trial. That mind would suffer mentally and as plaintiff testified, he suffered from psychological distress and trauma.

There is no challenge to the claim of plaintiff that he engaged the services of a lawyer to defend him in the criminal matter. Lawyers charge fees for their services and the Ghana Bar Association scale of fees provide an easy reference as to the fees charged by lawyers.

The defendant does not deny any of this. Indeed, learned counsel for the defendant did not challenge the evidence of the plaintiff as to his prosecution, the financial costs he incurred, the trauma that same caused to him as well how it dented his prospects of securing another job. Defendant also failed to cross examine the plaintiff on his evidence that this had caused damage to his reputation in the eyes of the members of his community.

I accept the principle of law that where a party leads evidence and same is not challenged under cross examination, the opposing side is deemed to have admitted the claim.

In the case of **In Re Presidential Election Petition: Akufo-Addo & 2 Ors. (No. 4) v. Mahama & 2 Ors. (No. 4) [2013] SCGLR (Special Edition) 73,** Anin Yeboah JSC (as he

then was) held at page 425: *"I accept the proposition of law that when evidence led against a party is unchallenged under cross-examination, the court is bound to accept that evidence".* See the cases of ***Takoradi Flour Mills v. Samir Faris [2005-2006] SCGLR 882 at page 890 and Agnes Tuffour alias Serwaa v. Akwasi Adu & Yaa Konadu [2018] DLCA 4432.***

Upon these considerations, I hereby find that the plaintiff suffered hardship, trauma, inconvenience and or damage to his reputation as a result of the dismissal and criminal prosecution.

Based on my findings and holdings on the issues, I hereby hold that the plaintiff is entitled to his claim a and c although I would comment on the quantum. His claim B not having been proven, same is accordingly dismissed.

For his claim a, the plaintiff seeks an order directed at defendant company to pay an amount of one hundred and fifty thousand Ghana cedis (Ghs 150,000) to the plaintiff as damages and compensation to cover all expenses, cost of litigation, pains and trauma suffered by the plaintiff as a result of the malicious prosecution.

In the case of ***Mansour vrs. El Nasr Export and Import Co Ltd [1963] 2 GLR 316,*** Prempeh J. held that a ''court should consider, in addition to the restraint of the plaintiff's liberty and the serious damage to his credit and reputation, the question whether or not the defendants acted bona fide, although quite wrongly''. I find from the manner in which the defendant company acted, particularly in keeping the plaintiff and others in a room and ensuring that all exits were locked after they called the police to come and cause their arrest, is such that they cannot be deemed to have acted bona fide.

I would not proceed to award damages. For the costs involved in a trial that lasted for over two years by way of transportation and engaging the services of counsel to defend him, I award general damages of forty thousand Ghana cedis. For the pains and trauma he suffered as a result of the malicious prosecution as well as the damage to his image in the eyes of members of his community, I hereby award him general damages of forty thousand Ghana cedis (Ghs 40,000). In all, on his claim a, the plaintiff is awarded general damages of eighty thousand Ghana cedis (Ghs 80,000) against the defendant.

For relief C, the plaintiff prays for an order directed at the defendant to pay an amount of fifty thousand Ghana cedis (Ghs 50,000) to the plaintiff as compensation for unlawful dismissal. The remedy for unlawful dismissal lies in compensation. In arriving at appropriate compensation, the court must take into account the money the plaintiff would have earned were he not unlawfully dismissed.

The plaintiff earned a monthly salary of Ghs 3, 627 as at the time of his dismissal. His evidence is that he could not take advantage of employment opportunities that came his way due to the trial. He was dismissed on 10th October, 2017 and his trial ended in September, 2020. That he has since gained employment. Even if he gained employment in the same month of September, 2020 that would bring the period to 36 months. A simple mathematical calculation calculation of his salary over the said months is far more than the Ghs 50,000 that he is claiming. Consequently, I hereby find his claim of Ghs 50,000 to be reasonable. He is awarded compensation of fifty thousand Ghana cedis for his unlawful dismissal.

Costs of ten thousand Ghana cedis is awarded to the plaintiff against the defendant.

(SGD)

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

FOR EDWIN KUSI APPIAH FOR THE PLAINTIFF

ABIGAIL ABENA OCKLING FOR KWAKU OSEI ASARE FOR THE DEFENDANT PRESENT