



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 24 OF 2004**

**JWM.....PLAINTIFF**

**VERSUS**

**MULI MUTUA.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. **JWM**, (hereafter the Plaintiff) had by his plaint dated 16<sup>th</sup> January 2004 and amended on 17<sup>th</sup> March, 2009 raised a claim against **Muli Mutua** (hereafter the 1<sup>st</sup> Defendant) and **The Hon. Attorney General** (hereafter the 2<sup>nd</sup> Defendant), for general damages for unlawful arrest and confinement, false imprisonment and malicious prosecution and for severe physical, psychological and mental torture and for sexual dysfunction.

2. He also sought aggravated and exemplary damages and a declaration that the Defendants were bound to repay the bank loan that the Plaintiff owed the Industrial and Commercial Development Corporation. He also sought an order to compel the Defendants to repay the said loan; future medical expenses at the rate of Kshs. 6,400 per month from August, 2003 and damages for loss of business at the rate of Kshs. 35,000 per month from 20<sup>th</sup> August 1997.

3. It was averred that on or about August 1997, the 1<sup>st</sup> Defendant maliciously and without reasonable and/or probable cause laid a false complaint at **Machakos Police Station** to the effect that the Plaintiff had violently robbed him of motor vehicle registration number **KAJ 663A** and other valuables; that pursuant to the 1<sup>st</sup> Defendant's false and malicious report the 2<sup>nd</sup> Defendant's agents and/or police officers maliciously and without any reasonable and probable cause preferred a charge against the Plaintiff for robbery with violence contrary to Section 296 (2) of the Penal Code in **Machakos Criminal Case No. 3539 of 1997** as a consequence of which the Plaintiff was remanded in prison custody.

4. Further, the Plaintiff averred that on 24<sup>th</sup> June, 1998 he was convicted and sentenced to death, but he filed an appeal, namely **Nairobi Criminal Appeal No. 738 of 1998** which was allowed and the conviction and sentence were quashed and that he was released on 24<sup>th</sup> March, 2003. That by reason of the actions of the 2<sup>nd</sup> Defendant's agents the Plaintiff was wrongfully imprisoned and deprived of his liberty, greatly injured in his credit, character, reputation, and he suffered considerable mental and bodily pain, anxiety, expense, injury to business and thereby suffered loss and damages.

5. Interlocutory default judgment was entered against the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant filed an amended statement of defence denying the key averments and the Plaintiff's claim in the plaint. Thereafter, the suit proceeded to full hearing before **Sergon J.** In his judgment delivered on 27<sup>th</sup> May 2016, the learned Judge found no merit in the Plaintiff's suit and dismissed it with costs to the 2<sup>nd</sup> Defendant. Aggrieved by the said judgment the Plaintiff moved the Court of Appeal through **Civil Appeal No. 234 of 2016**. In the judgment delivered on 21<sup>st</sup> February, 2020, the Court of Appeal allowed the Plaintiff's appeal and made the following orders:

**“In conclusion, we have found that the prosecution of the Appellant by the police was not malicious. We have however found that the torture he was subjected to was unlawful. We therefore think that the Appellant is entitled to the following:**

**(a) general damages for physical, psychological, and mental torture**

(b) exemplary damages

(c) a reasonable award to enable the Appellant to procure sexual enhancing drugs to deal with sexual dysfunction.

**In the premise where the parties before us did not make any submission on quantum of damages, we think that the correct course to take in this appeal is to remit the case to the High Court to assess the damages we have identified in this appeal. The assessment shall be done by any judge in the Civil Division other than Serگون. J.”**

6. Thus, the matter is before this court for assessment of the damages identified by the Court of Appeal. This court directed, and the respective parties duly filed their submissions in that regard. Counsel for the Plaintiff while citing the decisions in **CM (a minor suing through the mother and next of friend) MN v Joseph Mwangi Maina (2018) eKLR** and **Nairobi Civil Case No. 205 of 2013 George Ngige v Attorney General** submitted that as compensation for the Plaintiff’s physical injuries, this court ought to make an award of Kshs 5,000,000/-. With respect to damages for psychological torture counsel citing **High Court Civil Appeal No. 365 of 2017 International HIV/AIDS Alliance v MM** and **High Court Civil Appeal No. 517 of 2017 Kenya Hospital Association v DNN** submitted that an award of Kshs. 2,000,000/- would suffice under the said head. Submitting on the award for damages for mental torture the Plaintiff urged an award of Kshs. 15,000,000/- relying on the Court of Appeal judgment in **Civil Appeal (Nairobi) No. 86 of 2013 Koigi Wamwere v Attorney General**.

7. Concerning exemplary damages, counsel relied on the decision in **Petition No. 94 of 2014 Kenneth Stanley Njindo Matiba v Attorney General** to urge an award of Kshs. 15,000,000/- for torture, cruel and inhuman treatment. Finally, it was asserted that to procure sex enhancing drugs to deal with his sexual dysfunction, the Plaintiff would require Kshs. 6,400/- per month, and as the average man is sexually active until 70 years, he ought to be awarded **Kshs 2,073,600/-** calculated w.e.f 1997 as Kshs. 6,400/- x12 x 28. Thus, in total the Plaintiff asked this court to make an award of **Kshs. 39,073,600/-** in damages.

8. On the part of the 2<sup>nd</sup> Defendant, counsel anchored her submissions on dicta in **Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR** concerning the cardinal principles guiding the assessment of damages. Also citing the decision in **John Machoka v Kenya Power & Lighting Co. Ltd [2004] eKLR**, counsel contended that the Plaintiff’s computation of damages was exorbitantly high, pointing out that the Plaintiff did not sustain injuries that rendered him incapacitated from engaging in his regular daily activities.

9. On damages for physical, psychological, and mental torture, counsel cited **High Court Misc. Application No. 494 of 2003 Dominic Arony Amolo v Attorney General, Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR** and **Geoffrey Githiri Kamau v Attorney General [2015] eKLR** to submit that damages awarded ought to be comparable with awards made in respect of similar injuries. That an award of Kshs. 250,000/- would be a sufficient compensation for physical, psychological, and mental torture. Submitting on exemplary damages, counsel relied on **Rookes v Barnard [1964] AC 1129** as to instances where exemplary damages may be awarded and hence asserted an award of Kshs. 200,000/- to be sufficient under this head. Finally, concerning future medical expenses, counsel relied on the decision in **John Machoka** (supra) and urged this court to make an award of Kshs. 800,000/- under this head, reiterating that the Plaintiff was not incapacitated from performing other daily activities.

10. The court has considered the evidence on the record, the decision of the Court of Appeal and directions to this court as well as submissions filed by the respective parties. It is pertinent to clarify at this stage that pursuant to the directions of the Court of Appeal, and to the prayers (bb) of the amended plaint, general damages for physical, psychological, and mental torture are to be assessed under one head. Despite this, counsel for the Plaintiff in his submissions severed the three related injuries and proceeded to urge separate awards whose total came to **Kshs. 15,000,000/-**. This court will consider the said injuries under one head, as pleaded and in accordance with the directions of the Court of Appeal.

11. No doubt the Plaintiff was subjected to unlawful acts of torture that occasioned him physical injuries and mental torture. It is however useful to bear in mind the applicable principles in the assessment of damages, and the exhortation by the English court in **Lim Poh Choo v Health Authority (1978) 1 ALLER 332** quoting dicta by **Lord Morris Borth-y-Gest in West (H) v Sheperd (1964) AC 326**, as echoed by **Potter JA** (as he then was) in **Tayab v Kinany (1983) KLR14**, at page 345 as follows:

**“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”** (Emphasis added)

See also **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd. (2013) eKLR**.

12. Onto the evidence in the instant case, the Plaintiff produced two medical reports and a clinical summary from Kenyatta National Hospital dated 8<sup>th</sup> September 1997. The latter is among the documents in the Plaintiff’s supplementary list of documents dated 16<sup>th</sup> June 2011 and is the earliest record of the Plaintiff’s injuries. Although it appears that a diagnosis relating to a sexually transmitted infection was made by **Professor Ogola Etal** who treated the Plaintiff for the same, the summary also indicates that the Plaintiff complained to have been assaulted and of pain in the lower limbs, and while walking. The summary lists the following injuries:

**“Testicles bruised**

**Swollen knees**

## Limbs -oedemas

### Bruised swollen back”.

13. As for the medical reports, the first, by **Dr. Baraza**, is dated 22nd September 2003 and that by **Dr. Khan** is dated 25/08/2004. Both reports confirmed the presence of multiple scars especially in the area between the scapulae and distal hand. No other scars are specifically identified in the two reports which bear an uncanny similarity in most respects. The key difference between the reports is the nature of complaints made to **Dr. Baraza** by the Plaintiff on his examination on 3/09/2003 (per the medical report) and to **Dr. Khan** about a month later or 13/10/2003.

14. According to **Dr. Baraza**'s report, the Plaintiff complained of pain in the thoracic spine and muscles in between the scapulae that had allegedly persisted in the preceding 6 years. The omission of the complaint by the Plaintiff regarding impotence to **Dr. Baraza** during examination on 3<sup>rd</sup> September 2003 is surprising, given that by his written statement dated 2<sup>nd</sup> August 2003, the Plaintiff asserted to have already been diagnosed as impotent and put on sexual enhancement drugs. **Dr Baraza**'s report also contains what appears to be a narration by the Plaintiff to the doctor concerning manner in which he had been tortured. To **Dr. Khan** however, the complaints recorded were back pain “*for the last 7 years and impotence*”. (The Plaintiff's written statement however indicates that he made the “discovery” of his impotence in 2003). Thus, in addition to the extensive scarring referred to earlier, **Dr. Khan**'s report indicates in the opinion segment that:

**“His backache is not bothering him so much. His impotence is really disturbing him mentally and he will require drugs for impotence for the rest of his life.”**

15. As the impotence was neither included in **Dr. Baraza**'s report, nor degree indicated in **Dr. Khan**'s report, it is difficult to estimate the date of the onset of the alleged impotence, the severity thereof or whether it was chronic.

16. From the foregoing, it appears that the Plaintiff's physical injuries were confined to bruises on the testicles and back, and swelling of knees and oedmas of the limbs, which had evidently resolved by 2003 when he was seen by **Dr Baraza** and **Dr. Khan**, save for some minor back pains, and residual scarring on the shoulders and distal hand. Undoubtedly, the three episodes of torture described by the Plaintiff in his written statement must have been harrowing and of adverse psychological impact, the most enduring sequela being the impotence diagnosed by **Dr. Khan**. That said the sum of **Kshs. 15,000,000/=** proposed by the Plaintiff's advocate as total general damages in respect of physical, psychological, and mental torture appears patently excessive, and arises in part from the erroneous severing of the three types of suffering into three distinct heads.

17. Equally, the authorities relied on are distinguishable from the facts of this case. In the case of **CM (A minor)**, the minor plaintiff suffered a crash injury of the right leg, which was subsequently amputated at the knee, a trauma that exacerbated his known epileptic condition, affected his self-esteem and education prospects at an early age, and hence his future opportunities for employment. The facts in **International HIV/AIDS Alliance** and **Kenya Hospital Association** cases distinguish them from this case, although relating to emotional trauma and psychological suffering.

18. The case of **Koigi Wamwere** may have some bearing on this case even though the Plaintiff therein was subjected to extended periods of torture at the infamous Nyayo House and at Kamiti Maximum Prison while in detention. In **George Ngige Njoroge**'s case, the Plaintiff suffered severe injuries to the back that rendered him incapable of performing heavy duties or walking or standing for long thus becoming a dependent. He also developed severe loss of libido and permanent disability was assessed at 40%. I therefore agree with the 2<sup>nd</sup> Defendant that these injuries are more severe. The Plaintiff herein has on the face of it recovered adequately from his physical injuries save for the physical and psychological scarring and impotence. The degree of impotence was not assessed.

19. On the part of the 2nd Defendants, they urge an award of Kshs. 200,000/= relying on **Dick Joel Omondi V. Attorney General** which principally involved psychological torture and some physical assault. A global sum of Kshs. 250,000/= was awarded as general damages in 2013. This court agrees with the learned Judge in that case that a global award is best suited for damages made in respect of violation of rights, resulting from the same transaction, in this case through torture.

20. However, in this instance, the court feels that the award of Kshs. 250,000/= as proposed by the **2nd Defendants** may be on the lower side. The case of **John Machoka**, cited by the 2nd Defendant in respect of future medical expenses though not arising from torture, may have more relevance in the instant matter. Subject to caveats that the injuries of the plaintiff in that case were a lot more severe, and that due to injuries to the testicular tissue and penile shaft of the said plaintiff, he suffered severe loss of libido and depression. He was awarded Kshs. 800,000/= as general damages. There seems to be a dearth of appropriate authorities to aid the assessment of general damages but doing my best on the facts of this case, I am satisfied that an award of **Kshs. 400,000/=** (Four Hundred Thousand) would be adequate as general damages for physical, psychological, and mental torture in this case.

21. Concerning the award in respect of exemplary damages, there can be no doubt that the Plaintiff was subjected to cruel and degrading treatment by the police officers whose motivation was to intimidate him to confess to the commission of an offence of robbery with violence. This arbitrary and oppressive conduct was unjustified, and occurred not once, but on three consecutive days. I do not however agree with the Plaintiff that the facts of his case compare with the case of **Kenneth Stanley Njindo Matiba**. That case involved the deliberate deprivation of medical treatment to the plaintiff who had a known pre-existing medical condition, and resulted in the said plaintiff suffering a stroke, paralysis, and loss of significant faculties. The said plaintiff was a political detainee at the time.

22. Exemplary damages as the name suggests, are not intended as compensation for the victim, but to punish and serve as an example to the perpetrator of the arbitrary, illegal, and malevolent actions causing suffering, and as deterrent for any such future conduct. See **Standard Newspapers Ltd & Another V. Attorney General & 4 Others [2013] eKLR**. An award of Kshs. 20,000,000/= to the present plaintiff as proposed by his advocate appears excessive, therefore. This court will award the sum of **Kshs. 200,000/=** [Two Hundred Thousand] as exemplary damages.

23. As regards future medical expenses, the Court of Appeal observed in this judgment in this matter that:

**“The Appellant testified that as a result of torture his sexual life has been affected and he was forced to buy sex enhancing drugs at kshs. 6,400/= per month from August 2003. Dr. Khan in evidence before the judge testified that he had prescribed Viagra drugs for the appellant to assist him to deal with impotence and that the drugs cost Kshs. 6,400/= per month.**

**Upon our own consideration, this was a specific claim and enough material was placed before the judge that the Appellant had bought sex enhancing drugs which he would require for a period which the doctor did not specify, only stating that the appellant would require the drugs for the rest of his life. It did not however come out of the Appellants evidence or that of Dr. Khan how often he would use or need such drugs.**

**On our consideration we think that the appellant was entitled to a reasonable award under this head.....**

**We therefore think that the appellant is entitled to the following:-**

- a) .....
- b) .....
- c) **a reasonable award to enable him to procure sexual enhancing drugs to deal with sexual dysfunction.”**

24. Indeed, it is inconceivable that the Plaintiff would need to consume sex enhancement drugs twice weekly for every month for the remainder of his life, as purported in his written statement dated 2<sup>nd</sup> August 2003 and the 4 receipts covering September 2010 to January 2011 from **DAN Pharmacie**, included in the Plaintiff's supplementary list of documents dated 16/06/211. Despite **Dr. Khan** asserting that he had in November 2003 prescribed the drug, **Viagra**, for dealing with the Plaintiff's impotence, there is no evidence whatsoever that between 2003 and September 2010, the date of the earliest receipts above, or in subsequent years, that the Plaintiff had purchased any such drugs or consulted a medical professional concerning the sexual dysfunction.

25. In his oral evidence on 18<sup>th</sup> January 2016, the Plaintiff relied on his written statement dated 2<sup>nd</sup> August 2003 and did not give any indication that the impotence had persisted since 2003. If indeed it had, nothing prevented the Plaintiff from producing at the trial a more recent medical report. The medical report by **Dr. Khan** was 13 years old at the time the case got off to hearing in 2016. The Court cannot conclude in the absence of proof, as suggested by the Plaintiff, that the Plaintiff's medical state was frozen in time since 2003 and that he had continued the twice weekly use of sex enhancing medication as asserted in his witness statement. All things being equal, it is a fact of general notoriety that sexual dysfunction, like other medical conditions, may go into temporary remission, be transient, seasonal, or chronic, depending on multiple factors. The onus was on the Plaintiff to prove that the sexual dysfunction had persisted since 2003, necessitating use of sex enhancing drugs, and frequency thereof in the said period and into the future. He appeared content to rely on the 2003 medical report in this regard.

26. Evidence in the form of historical records of consistent purchase and use of the sex enhancement drugs by the Plaintiff since 2003 would have been helpful in the assessment of future medical expenses. This is missing from the Plaintiff's evidence, and the Court cannot rely on the tendered 4 receipts of purchase from **DAN Pharmacie** between September 2010 and January 2011 to conclude, firstly, that since 2003, and into the distant future, the Plaintiff required or will require sex enhancing drugs worth KShs. 6400/- per month.

27. Despite the foregoing, the Plaintiff's advocate proceeded to compute future medical expenses at a monthly rate of kshs. 6,400/= for 28 years since 1997 (the correct date found in the amended plaint is August 2003), hence urging a total sum of Kshs. 2,073,600/=. First, the self and professional diagnosis of impotence according to the Plaintiff's witness statement was made in 2003, and not in 1997 when he still was incarcerated in prison. Secondly, as the Court of Appeal already observed, the claim for future medical expenses being one in the nature of a special damage claim, there was no conclusive proof of the frequency of the need for the Plaintiff to use sex enhancing drugs.

28. In my considered view, the award cannot be computed in the linear fashion proposed by the Plaintiff's advocate. On their part, the 2<sup>nd</sup> Defendant's relying on **John Machoka's** case offered Kshs. 800,000/= awarded in that case, not as future medical expenses, but as general damages for pain and suffering, hence inapplicable for the award under consideration. There seems to be a dearth of evidence and appropriate authorities that compare well with this case, making difficult the court's task of assessing a reasonable sum as future medical expenses in this instance. Evidently, a global award would be more appropriate, and given the age of the Plaintiff in 2003 (about 46 years) the court is of the view that an award of Kshs. 150,000/= [One Hundred and Fifty Thousand] would be reasonable and adequate as future medical expenses.

29. Judgment will therefore be entered for the Plaintiff against the Defendants jointly and severally as follows:

- a) General damages for physical, psychological, and mental torture - **Kshs. 400,000/= [Four Hundred Thousand]**.
- b) Exemplary damages –  
**Kshs. 200,000/= [Two hundred Thousand]**.
- c) Future Medical expenses –  
**Kshs. 150,000/- [One Hundred and Fifty Thousand]**.

**Total Kshs. 750,000/- [ Seven Hundred and Fifty Thousand]**

The Plaintiff is awarded the costs of the suit and interest.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF MARCH 2022.**

**C. MEOLI**

**JUDGE**

**IN THE PRESENCE OF:**

**FOR THE PLAINTIFF: MISS KIMUYU H/B FOR MR NJUGI**

**FOR THE 2ND DEFENDANT: N/A**

**COURT ASSISTANT: CAROL**