



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL PETITION 3 OF 2015**

**KENNEDY MWANGI MURIITHI.....PETITIONER**

***VERSUS***

**THE ATTORNEY GENERAL**

**COMMISSIONER OF PRISONS.....RESPONDENTS**

**RULING**

**INTRODUCTION**

1. The petitioner seeks a declaratory order that his fundamental rights and freedoms were violated by prison officers, who are servants and /or employees of the Kenyan Government due to the harsh, inhuman and/or degrading treatment, which was occasioned by the agents of the 2nd respondent. Additionally, he also seeks a declaratory order that his bright future as a law abiding and able bodied citizen was cut short and irretrievably damaged by the respondent's illegal actions against him and as a result of which he suffered loss of earnings due to a permanent disability. Finally, he seeks compensatory, aggravated and exemplary/punitive damages together with costs and interests of the petition.

2. The respondents have opposed his petition in respect of which they filed 5 grounds of opposition. They did not lead any evidence in opposition to the petitioner's prayers.

**THE PETITIONER'S UNOPPOSED AFFIDAVIT EVIDENCE**

3. The petitioner supported his petition by an 18 paragraph supporting affidavit dated 28<sup>th</sup> May 2015. He has deponed to the following major matters. He has deponed that he is a Kenyan citizen aged 34 years and is registered with the National Council for Persons with Disabilities, and his registration No is NCPWD/P/171318. He has further deponed that on 27<sup>th</sup> February 2003, he was charged together with 6 other persons with the offence of robbery with violence with an alternative charge of handling stolen properties in the court of the Senior Principal Magistrate at Kerugoya in criminal case No. 404 of 2003 and that at the end of the trial, he was sentenced to death. Following his conviction and sentence, he was imprisoned in Embu Government Prison. He has also deponed that during his period of incarceration from 18<sup>th</sup> July 2005 to 10<sup>th</sup> January 2013, he had been held in several prisons namely King'ong'o, Kamiti, Naivasha and Embu.

4. He has further deponed that he then filed an appeal in the High Court of Kenya at Kerugoya registry being criminal appeal No. 71 of 2012. He has also deponed that during the pendency of his appeal, he took steps to ascertain its status with a view to have it finally heard and determined. He has also deponed that on 2<sup>nd</sup> June 2008 while still following his appeal with the prison authorities at Embu, he was ambushed by prison warders who ordered him out of his cell to be transferred from Embu to Kamiti

prison. He has further deponed that he tried to explain to the prison authorities that his proposed transfer as at that time would jeopardize his appeal taking into consideration that his file had been misplaced by the prison authorities. Additionally, he has deponed that he tried to explain to the prison warders that it would be prudent and fair, if the proposed transfer would be done later, after he had successfully lodged his appeal.

5. Furthermore, he has deponed that the prison warders took his objection to the transfer as mere resistance and that as a result they went to his cell, attacked him in a bid to force him out of that cell. He has further deponed that they beat him mercilessly and brutally until he became unconscious and as a result he was forcefully transferred to Kamiti maximum prison. He also deponed that after regaining consciousness at Kamiti prison, he was unable to move his lower limbs. He was then transferred to Naivasha prison where he remained in poor medical condition until again he was transferred back to Kamiti prison. He has further deponed that his medical condition continued to deteriorate substantially and as a result he was taken to Kenyatta National Hospital for further treatment on 30th December 2009.

6. He has also deponed that due to the brutal beating by the prison warders he suffered loss of mobility, a torn left ear drum in respect of which he continued to receive medical treatment in various medical institutions.

7. The petitioner has further deponed that he was acquitted by the High Court sitting at Kerugoya on 9th January 2013 following his appeal which was successful. He has also deponed that following his acquittal he approached the Independent Medical Legal Unit for assistance, who then took him through counselling sessions because he was traumatized. That unit then prepared a medical report which is annexure "KMM 9" to his supporting affidavit. He has also deponed that as a result of the unlawful and brutal beating by the prison warders, he has lost his normal use of the lower limbs and subsequently cannot work efficiently as before, which makes it difficult for him to cater for himself. Due to that changed status, he sought assistance from the National Fund for the Disabled of Kenya on 27<sup>th</sup> March 2013. And because of that disability, his economic status has diminished substantially because he is unable to fend for himself and has been forced to rely on menial jobs and relatives for subsistence.

8. Finally, he has deponed that he believes the advice of his counsel that the prison warders who assaulted him acted in clear violation of section 12 of the Prisons Act (Cap 90) Laws of Kenya and that if he had committed any prison offences, he should have been punished in accordance with sections 50, 51 and 52 of the Prisons Act.

### **THE MEDICAL EVIDENCE**

9. The petitioner attached 3 medical reports as part of his affidavit evidence. The 1<sup>st</sup> report dated 20<sup>th</sup> March 2011 was prepared by Dr Julius Kiiru of Westlands Medical Centre. The report shows that the petitioner complained of joint pains, urethral discharge, pain on void, pain on defecation and skin rashes. The report also shows that the petitioner presented a history of being assaulted while in prison, which led to his inability to use his lower limbs. It also indicates that due to the medical intervention in different medical centres his condition has improved. Upon examination, the doctor found that he was a young man in fair general condition, febrile and other vital organs were within normal range.

10. The 2<sup>nd</sup> report dated 25<sup>th</sup> February 2013 was prepared by Dr Christine Chabeda of The Aga Khan University Hospital, Nairobi. This doctor found as follows. "*vertebral body height and alignment are normal. L3 superior end plate degenerative changes and schmoris node is seen. Intervertebral disc are normal in size and signal intensity. L4/L5 has a diffuse intervertebral disc bulge congesting the lateral recess and causing bilateral neuroforaminal encroachment. L5/S1 intervertebral disc has diffuse intervertebral disc bulge congesting the lateral recess and causing bilateral neuroforaminal encroachment. Spinal canal dimentison are 1.35 cm at L4/L5 and 1.4 cm at L5/S1. Sppinal cord is normal in course and signal intensity and terminates at L1. Conus medullaris and filum terminale appear normal.*" In conclusion, the doctor observed that the features were suggestive of L4/L5 and L5/S1 intervertebral disc bulges causing bilateral neuroforaminal encroachment at these levels.

11. The 3<sup>rd</sup> report dated 22nd January 2013 was prepared by Dr Isaack Gikandi Mungai, who in summary found that the petitioner's inability to walk was as a result of nerve compression from an intervertebral disc prolapse. He also found that this was as a result of the trauma to the lower back. The doctor further found urinary retention and overflow urinary incontinence, which are salient features due to the injuries sustained by the petitioner. He also found that the petitioner is suffering from post traumatic epilepsy as evidenced by the new evidence of seizures after the alleged beatings at Embu prison. Following his findings, the doctor recommended that the petitioner be put on analgesics for neuropathic pain. He also recommended evaluation of his back injury in the lower back.

12. Furthermore, the doctor recommended physiotherapy in respect of his lower limbs to strengthen his muscles and prevent stiffness. Additionally, the doctor also recommended his ambulation which is likely to be improved by use of a walker to get him out of the wheel chair. Finally, the doctor recommended counselling to enable him reintegrate with the society following his incarceration for ten years in order to enable him cope with his anger.

13. In response to the affidavit evidence of the petitioner and the 3 medical reports, the respondent filed 5 grounds in opposition to his petition. Those **grounds are as follows:**

**1. THAT** the transfer of a prisoner is sanctioned by section 37 of the Prisons Act and cannot therefore be unconstitutional.

**2. THAT** issues raised herein arising from the petitioner's criminal case are res judicata as they were or ought to have been raised on appeal.

**3. THAT** the petitioner was a prisoner at the material times and therefore not entitled to all fundamental rights and freedoms.

**4. THAT** the fundamental rights and freedoms under the Bill of Rights allegedly breached are not retrospective.

**5. THAT** the suit fails to cite with precision the provisions of the Constitution allegedly contravened, provide particulars of the complaints, the manner of infringement and the jurisdictional basis of the action before the court.

14. I have considered the affidavit evidence including the medical reports and the grounds of opposition filed by the two respondents. I find that the issues for determination in this petition are as follows. First, whether the grounds of opposition bar the petitioner from the reliefs he seeks from this court. Second, whether the petitioner is entitled to the declaratory orders in which he seeks that his rights were violated following his assault at Embu Prison. Third, whether the petitioner is entitled to compensatory, aggravated and exemplary/punitive damages together with costs and interest of this petition.

### **CONSIDERATION AND FINDINGS IN RESPECT OF THE GROUNDS OF OPPOSITION**

15. In view of the issues raised for determination, it is important to consider each of the 5 grounds of opposition raised by the respondents. The 1<sup>st</sup> ground is that the transfer of the petitioner from Embu to Kamiti prison is authorized by section 37 of the Prisons Act and therefore the said transfer cannot be said to be unconstitutional. The short answer to this ground is that the transfer of prisoners within the prison system is authorized by the Prisons Act. This did not authorize the prison warders to inflict the injuries that have been outlined in the three medical reports in the foregoing paragraphs. The prison warders in effecting the transfer of the petitioner to Kamiti Prison used excessive force in the circumstances of this case. This is so because the petitioner was in their lawful custody and was not armed. It therefore follows that the statutory provisions of section 37 of the Prisons Act does not exempt the prison warders from liability. It also follows that the two respondents are vicariously liable for the acts and omissions of the prison warders. This ground of opposition is without merit and is hereby dismissed.

16. In ground 2, the respondents have stated that the issues raised by the petitioner in the criminal case

and the appeal are *res judicata* as they ought to have been raised in the criminal appeal hearing at the High Court in Kerugoya. In this regard, it is important to point out that the doctrine of *res judicata* only applies to civil cases in terms of section 7 of the Civil Procedure Act (Cap 21) Laws of Kenya. The equivalent of the doctrine of *res judicata* in criminal matters is that of *autrefois* acquit or *autrefois* convict which are recognized as a bar to subsequent criminal charges being filed in respect of the same offence in regard to which an accused person has either been convicted or acquitted as set out in sections 138 and 139 of the Criminal Procedure Code (Cap 75) Laws of Kenya. It is therefore clear that the doctrine of *res judicata* is inapplicable in this petition because the criminal appeal hearing of the appellant was concerned with the issue of whether his conviction was proper or not. The High Court in this regard found that the conviction recorded against the appellant for the offence of capital robbery in respect of which he was sentenced to death was not supported by evidence and for that reason his appeal was allowed. During the appeal hearings, the appellant would not have been allowed to raise the issue of the assault in support of having his conviction quashed because the assault was not relevant to the issues being considered by the High Court at that stage.

17. In ground 3, the respondents have stated that the petitioner was a prisoner at the material time and was therefore not entitled to all his fundamental rights and freedoms. In this regard, it is important to point out that a prisoner does not lose his fundamental rights and freedoms by virtue of being imprisoned following an order of the court. In other words, the assault committed on the petitioner is not authorized by the Prisons Act or any other law for that matter. The Prisons Act has clear provisions for dealing with those who are in breach of the prison regulations and rules which are to be followed. In this regard, they were not followed and that is the essence of the complaint of the petitioner. I find in the circumstances that this ground of opposition is without merit and I hereby dismiss it.

18. In ground 4, the respondents have stated that the fundamental rights and freedoms under the bill of rights allegedly breached are not retrospective. My understanding of this ground of opposition is that the respondents have in mind the bill of rights that are set out in the 2010 Constitution of Kenya. It is true that the provisions of the bill of rights in the 2010 Constitution of Kenya cannot operate retrospectively. It is to be remembered that the petitioner enjoyed the basic rights and freedoms as enshrined in the 1963 Independence Constitution in terms of **sections 70 to 84** inclusive of that repealed Constitution. He enjoyed similar rights under the provisions of the Prisons Act. The bill of rights as set out in the Independence Constitution of 1963 has been continued in the 2010 Constitution of Kenya in an expanded form. It is therefore clear that the fundamental rights and freedoms of the petitioner have been preserved by virtue of their being continued in the 2010 Constitution. This ground of opposition is therefore without merit and is hereby refused.

19. In ground 5, the respondents have stated that this suit is bound to fail for failing to cite with precision the provisions of the constitution allegedly contravened with particulars of complaints, the manner of infringement and the jurisdictional basis of the action of the court. In this regard, there is the affidavit evidence of the petitioner that he was assaulted by the prison warders to the extent that he is now in a wheel chair. This affidavit evidence has not been controverted by any evidence by the respondents. The particulars of his complaint are therefore very clear that he was assaulted and the injuries sustained are also equally clear from those medical reports. I take judicial notice of the fundamental rights and freedoms of the individual as set out in sections 70 to 84 of the 1963 Independent Constitution of Kenya. For example, section 74 of that constitution clearly states that “*No person shall be subject to torture or to inhuman or degrading punishment or other treatment.*”

20. In the instant petition, the petitioner was assaulted by the prison warders. It is my finding that the petitioner was subjected to inhuman and degrading punishment which was forbidden by the 1963 Independence Constitution. Furthermore, in terms of section 84 (1) of that Independence Constitution, the petitioner was entitled to invoke the enforcement of the protective provisions of that section to seek redress in the High Court. In particular, section 84 (2) of that constitution gave the High Court original jurisdiction to hear and determine any violations of the bill of rights in sections 70 to 83 inclusive. It is for this reason that the petitioner approached the High Court to enforce his rights which were violated by the two respondents and that is the jurisdictional basis of this petition. In the circumstances, this ground of opposition is without merit and is hereby dismissed.

## THE RELIEFS SOUGHT BY THE PETITIONER

21. It is clear from the affidavit evidence that the petitioner sustained injuries as described in the medical reports in particular he sustained a major injury at the back which appears to be a permanent disability. As a result of this disability, he is now in a wheel chair and is not able to cater for himself because of this disability. In the circumstances, I find that the petitioner is entitled to the declaration that his fundamental rights and freedoms were violated by the prison warders in Embu prison following his being assaulted by the respondents. He is also entitled to a declaration that following the assault, he has suffered loss of earnings due to the permanent disability arising from the back injury that he sustained which has forced him to use a wheel chair. In other words, he suffered a paraplegic injury. Furthermore, I find that the petitioner is entitled to compensatory damages which include general and aggravated damages which I assess at Kshs 1,500,000/- after taking into account the nature of the injuries and the resultant disability together with the authorities cited by his counsel.

## ASSESSMENT OF EXEMPLARY/PUNITIVE DAMAGES

22. The assessment of exemplary/punitive damages is saddled with both constitutional and legal challenges. According to ***Obongo & Another v. Municipal Council of Kisumu (1971) EA 91***, punitive damages are awarded to punish the defendant tortfeasor as well as to deter him from committing similar tortious acts. It also serves as a deterrent to other potential tortfeasors. Unfortunately, the defendant tortfeasor (wrong doer) is not accorded the same safeguards that are enjoyed by an accused person in a criminal trial. In a criminal trial, the accused can only be convicted if the prosecution have proved their case against him beyond reasonable doubt. This safeguard is not accorded to a defendant tortfeasor because the standard of prove in civil cases is one of on a balance of probabilities. Furthermore, a defendant tortfeasor against whom an award is made does not enjoy the safeguards accorded to an accused who has been convicted and is being sentenced. In sentencing a convict, there are many statutory provisions that set mandatory guidelines in terms of imprisonment terms and the amount of money to be paid as a fine. This clear from ***section 28 of the Penal Code (Cap 63) Laws of Kenya***. For example, before a convict is ordered to pay a fine, the court is bound to enquire as to his ability to pay the fine. These safeguards are lacking in respect of defendant tortfeasors against whom punitive awards are made.

23. Furthermore, the ***Court of Appeal in Obongo & Another v. Municipal Council of Kisumu, supra***, approved the principles set out by the ***House of Lords in Rookes v. Barnard (1964) AC 1129*** in respect of making awards of exemplary damages by restricting them to those tortfeasors, who are servants/employees of the government. By doing so, other tortfeasors who are equally blame worthy are exempted from punitive awards being made against them. That aspect of the principles in ***Rookes v. Barnard***, cannot be justified in principle. By excluding other individuals including private coporations from the operations of punitive damages, the ***House of Lords in Rookes v. Barnard*** created a class of individuals against whom punitive damages cannot be awarded. This impunity is unacceptable in principle and to that extent it presents a challenge in assessing awards of punitive damages.

24. However, there are safeguards in cases where exemplary damages are being sought. First, the conduct that is relied upon to claim exemplary/punitive damages must be clearly set out in the pleadings so that the defendant is put on notice as to what he is going to be faced with. Additionally, according to ***Archer v. Brown (1985) QB 401*** where a defendant has been convicted and sentenced for conduct that gives rise to a claim for exemplary/punitive damages, a court is barred from making such an award, because it will amount to double punishment. If a person has been convicted or acquitted he shall not be tried for that same offence again. This is prohibited by Article 50 (2) (o) of the 2010 Constitution of Kenya. In our laws, this is constitutionality not permitted and it is also not permitted by the provisions of ***sections 138 of the Criminal Procedure Code (Cap 75) Laws of Kenya***. It therefore follows an award of exemplary damages may not be made against a person who has been acquitted of a criminal charge.

25. In addition to the foregoing, according to the ***Court of Appeal in Davis v. Shah (1957) EA 352*** an award of punitive damages is made without reference to any proved actual loss suffered by the plaintiff. Furthermore, the award of punitive damages in civil cases causes confusion between the function of the criminal law which is aimed at punishing convicted persons and the function of civil law which is aimed

at compensating victims of tortious actions. This confusion has arisen because of the provisions of section 31 of the Penal Code (Cap 63) Laws of Kenya, which makes provision for compensation to victims in criminal trials to be compensated by the convicted person. In terms, the provisions of **section 31 of the Penal Code provides** as follows: **“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.”**

26. It is to be borne in mind that the respondents are not the actual tortfeasors since they are vicariously liable for the conduct of the prison officers. The deterrent effect of awarding punitive damages in these circumstances is considerably reduced, since the pockets of the actual tortious wrongdoers is not affected . Such an award may awaken the supervisors to closely supervise their junior officers.

27. I bear in mind the foregoing principles and challenges posed by an award of exemplary/punitive damages in assessing the award to be made under this heading to the petitioner. I find that he is entitled to an award of exemplary/punitive damages. In this regard, I have considered the many authorities cited by his counsel and I find that they are distinguishable. In the circumstances, I award a sum of Kshs 100,000/- as exemplary/punitive damages. In doing so, I have taken into account awards in comparable cases and the conduct of the respondents.

28. I also find that the petitioner is entitled to costs and interest of this petition.

29. I therefore enter judgement for the petitioner in the sum of Kshs 1,500,000/- being general and aggravated damages, and Kshs 100,000/- being exemplary/punitive damages together with costs and interest of this petition.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **4<sup>th</sup>** day of **JANUARY 2017**

In the presence of Mr Kariuki for the petitioner and in the absence of the respondents

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**04.01.17**