



**Ochieng v Attorney General (Civil Appeal E108 of 2021)
[2025] KECA 1895 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1895 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E108 OF 2021
MSA MAKHANDIA, HA OMONDI & P NYAMWEYA, JJA
NOVEMBER 7, 2025**

BETWEEN

JUSTUS OCHIENG APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kisumu
(T.W. Cherere, J.) dated 30th January, 2020 in Petition No. 9 of 2015)*

JUDGMENT

1. On 1st October, 2014, Justus Ochien’g, the appellant herein and then a journalist with the Star Newspapers, did a story titled “Mystery over return of cop’s stolen money”. The same was based on a report from a member of the public that he had been robbed by a CID officer attached to Kisumu Central Police Station. As a follow up, on 2nd October, 2014, the Star Newspaper ran an editorial titled “Arrest robber with CID day job” after which the appellant claimed that he started to receive threats to his life from a known Police officer which prompted him to report the threats to the Kisumu Police Station.
2. On 29th October, 2014, when he went to the police station to make a follow-up on his case, he was arrested and detained until 30th October, 2014 during which time he was tortured by known police officers and treated in an inhuman and degrading manner, as he was deprived of his freedom arbitrarily and without just cause, by being detained without trial and subjected to corporal punishment (as he was slapped by a police officer) contrary to the provisions of Article 29(a), (b) and (e) of *the Constitution* of Kenya respectively.
3. After his arrest and detention, the appellant moved the High Court of Kenya at Kisumu by way of a constitutional petition seeking declarations that his fundamental rights and freedoms were infringed while exercising his constitutional rights of expression; these included his right under Article 48 of *the*



- Constitution as he was denied access to justice by the State following his report regarding assault by known police officers. He thus sought orders to be paid general damages for breach of his constitutional rights; and special damages of Kshs.1,000.00.
4. The petition was opposed by C.I Calleb Natha, the Deputy DCIO Kisumu, who stated that upon his arrest, the appellant was informed of the reason for his arrest having been accused of linking one Mr. Oswago to fraud; that it was while in the cells that he started screaming and insulting police officers. He conceded that the appellant was released the following day when he also complained that he had been assaulted by a known police officer, a report that was investigated and found to be untrue. C.I. Natha maintained that the appellant was lawfully arrested on 29th October, 2014 and was informed that the reason for his arrest was that he had committed a criminal libel by linking one Mr. Oswago to fraud; and that his freedom of expression which is qualified by respect for the rights and reputations of others, was not violated. He denied that the appellant was tortured.
 5. In her determination, the learned judge found the appellant's arrest was lawful as he had been arrested for libel and did not tender any evidence with precision on how his right to freedom of expression under Article 33 was violated.
 6. In her determination, the learned judge of the High Court (T.W. Cherere, J.) further found that there was evidence that the appellant was tortured, but the appellant's counsel did not provide authorities to guide the court in arriving at a fair award.
 7. The learned judge issued a declaration that the respondent violated the appellant's constitutional rights guaranteed under Article 25 of the Constitution when force was used to inflict pain on his body and awarded the appellant Kshs. 100,000/= as damages.
 8. Aggrieved by the decision, the appellant has appealed to this Court faulting the learned judge for failing to find that he proved special damages, failing to find the arrest unlawful; failing to appreciate the serious extent of the violation of his various fundamental rights and freedoms under the Constitution; and awarding the appellant a paltry Kshs. 100,000/=.
 9. At the plenary hearing, learned counsel, Mr. Kojo appeared for the appellant while there was no appearance for the respondent. Mr. Kojo relied entirely on his written submissions.
 10. In support of the appeal, the appellant contends that special damages were pleaded and specifically proved contrary to the learned judge's finding. In his evidence, the appellant produced a cash sale receipt of the same amount which was not disputed.
 11. The appellant further contends that Article 49 of the Constitution guarantees arrested persons the right to remain silent and to be informed of the reasons for arrest. The appellant claimed that he was neither informed of these rights, nor told the reason for his arrest, but was instead tortured to confess. He was unlawfully detained on 29th and 30th October 2019, without being brought before a court, which violated his constitutional rights under Articles 29(a) and 51(1) of the Constitution.
 12. That the appellant's arrest, detention and torture were unlawful, malicious, and a violation of his constitutional and international human rights to liberty and security. He was detained twice without being charged in court, despite simply following up on his own complaint; thus, the judge erred in concluding that the arrest was lawful; and failed to recognize that his rights under Articles 29, 49, and 51 of the Constitution, as well as international human rights instruments were violated.
 13. The appellant faults the learned Judge for finding that his right to access justice was not breached merely because he had contacted his advocates; and maintains that the right under Article 48 was violated



- when police ignored his complaints of torture; failed to investigate or forward his case to the Directorate of Public Prosecutions “DPP”; and never prosecuted the offending officers. Instead, he was victimized, arrested, tortured, detained, and released without charge. The learned Judge is further faulted for failing to find breaches of his rights to fair administrative action; access to information; liberty; and freedom from torture, all protected under both *the Constitution* and international law. The appellant reiterates that he was arrested and detained without reasons or charges, denied information on his own complaint and Occurrence Book “OB” records and tortured by police officers in public view. His reports of assault were ignored and never forwarded to the DPP, showing abuse of process.
14. The appellant further contends that the respondent’s replying affidavit in response to the application was based on hearsay, as the deponent was not present when the events occurred and key officers with direct knowledge failed to testify. The appellant argues that in contrast his was primary evidence, which was corroborated by two witnesses; that the police admitted arresting and detaining him without charges; confirmed he was injured; and failed to properly investigate his assault. He maintains that the acts of torture violated constitutional and international protections against cruel, inhuman, and degrading treatment, as well as his right to dignity.
 15. The appellant urges the Court to find in his favour, set aside or vary the judgment of the High Court, and award him the prayers sought in his petition including damages for the violation of his fundamental rights.
 16. As at the date of hearing this appeal, the respondent had not filed written submissions.
 17. This being a first appeal, the Court’s mandate is to re-evaluate, re-assess and re-analyze the evidence on the record and determine whether the conclusions reached by the learned judge should stand, and give reasons either way. See *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.
 18. The essence of the appellant’s case before the High Court was that the respondents violated various fundamental rights under *the Constitution*. The appellant argues that in this case, he provided evidence which showed that he was subjected to torture and inhuman and degrading treatment.
 19. It is trite that in order for a court to so find, a petitioner must prove the facts alleged to the required standard. Section 107 of the *Evidence Act* is explicit, that any person requiring a court to give judgment on the basis of certain facts must prove that those facts exist, and the burden of proof lies on the person alleging them.
 20. Did the appellant discharge the burden of proof on a balance of probabilities that his rights were violated? Were the alleged violations proved?
 21. In this regard, the learned judge concluded that although the appellants had made various assertions that his rights were violated, the judge noted that from the documents produced in court the extract of the OB No. 3975/29/10/14 indicated that the appellant was arrested for libel and thus the arrest was lawful contrary to his assertion that his right to freedom and security under Articles 29 and 49 of *the Constitution* were thereby violated.
 22. The appellant’s claim under Article 33 (freedom of expression) failed because he did not provide precise evidence to show how this right was violated. Regarding Article 48 (access to justice), testimony confirmed that his lawyer had been notified of his arrest at Kisumu Central Police Station; and even sent a representative who was allowed access to him, meaning there was no proof of denial of access to justice. However, in relation to Article 25 (freedom from torture), the appellant produced a medical report showing injuries (aches on his cheeks, chest, and abdomen) consistent with beatings while



in police custody. His account was further supported by witnesses, Shabban Opiyo and Dickson Odhiambo, strengthening the claim of torture.

23. A critical ground urged in this appeal is that the trial court erred in law and fact in failing to find that the appellant's constitutional rights were violated. In his petition, the appellant sought a declaration that the brutal and indiscriminate beatings constituted torture, inhuman punishment, and/or degrading treatment. The learned judge believed that the use of force against the appellant was unwarranted and awarded him Kshs.100,000/=. Concerning the violation of his rights, the learned judge concluded that proper procedures were followed and that the appellant was arrested for libel, which in the learned judge's view was an appropriate step, and therefore lawful.
24. The next issue for consideration and determination is whether the sum of Kshs.100,000/= awarded by the trial court as general damages is an adequate compensation for the violation of the appellant's constitutional rights. Regarding damages, the general rule is that an appellate court will not disturb an award of damages by the trial court unless it is demonstrated that it proceeded on wrong principles or that he misapprehended the evidence in some material aspects, thereby arriving at a figure inordinately high or low such as to represent an entirely erroneous estimate. (See *Jivanji vs. Sanyo Electrical Company Ltd.* (2003) KLR 425).
25. The principles were well enunciated in the case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.M. Lubia and Olive Lubia* (1982 –88) 1 KAR 727 as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
26. In addition, and as this Court explained in *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR the court's discretion for award of damages in constitutional violation cases is limited by what is “appropriate and just” according to the facts and circumstances of a particular case; and that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements.
27. The question before the Court is whether the sum of Ksh. 100,000/= is very low or whether the trial court erred in arriving at the said sum, proceeded on wrong principles or misapprehended the evidence and pleadings in some material respect and thereby arrived at a low sum of Ksh.100,000/=.
28. The appellant in his submissions urged the Court to interfere with the sum awarded as general damages. The appellant contends that the sum awarded was low and was not commensurate with the violations meted out to him by the respondents.
29. Be it as it may, in awarding the damages, the learned judge had the principles in mind that there was no justification for excessive force on the appellant and in view of the injuries he sustained and awarded Kshs.100,000/= which is commensurate in the circumstances. In so awarding, the learned judge considered the past decisions cited by the appellant and pointed out that the extent of the injuries suffered by the appellant, which were described in the medical evidence he presented, as generalised aches on the cheeks, chest and abdomen.



30. Is there any reason advanced as to why we should interfere with this award? The guiding principle for an appellate court to disturb an assessment of damages was pronounced by this Court in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini* [1987] KAR 30 held that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that, it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

31. Further, in *Catholic diocese of Kisumu vs. Tete* [2004] eKLR this Court held that:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.”

32. We have carefully perused the record, considered the impugned judgment, submissions by the appellant, the authorities cited and the law. We discern the main issue for determination is whether the award of general damages was inordinately low as to call for interference by this Court. We are keenly aware that there is no standard measure for assessment of general damages; and the trend has been as stated by this Court (differently constituted). In the case of *Kitavi vs. Coast Bottlers Limited* [1985] KLR 470) that:

“It is now settled law that what the appellant was entitled to was a reasonable compensation assessed with moderation and conformity with the general method of approach, local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency but awards will very much depend on the facts of each case and any attempt to standardize “or rigidity” Classify them will be in vain and wrong ...”

33. From our re-evaluation of the medical report and the nature of injuries sustained, we are in agreement with the learned judge that the injuries were not severe and did not result in any disability, whether temporary or permanent in nature. In view of the foregoing, we find that the award of Kshs.100,000 as general damages is not inordinately low to warrant our interference by this Court.

34. The next issue for consideration is special damages. As to whether the trial court erred in declining to award the appellant special damages, it is patently clear from the record that the appellant did not particularise in the petition the special damages he allegedly suffered. The appellant argued that the trial court erred by not awarding the special damages even though they were pleaded and proved. From the record, the appellant only prayed for Kshs.1,000/= but failed to give the particulars of what constituted the special damages.

35. The law on special damages is well settled. The claim must be specifically pleaded and strictly proved. A claim for each particular type of special damage must be pleaded and each must be proved. In *Sande vs. Kenya Co-operative Creameries Ltd* (1992) LLR 314 the Court of Appeal held that:

As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also



be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law.

36. In *Ouma vs. Nairobi City Council* [1976] KLR 207, Chesoni, J. (As he then was) held as follows:

“Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence.”

37. Similarly, in *Banque Indosuez vs. D.J. Lowe & Co. Ltd* [2006] 2 KLR 208, this Court held that:

“It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act.”

38. From the record, the appellant did not state with precision his claim on special damages as such the same could not and cannot be awarded.

The upshot is that this appeal lacks merit in its entirety and is dismissed with no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

