Attorney General v Mutua (Civil Appeal 100 of 2019)
[2025] KECA 194 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 194 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 100 OF 2019

A ALI-ARONI, AO MUCHELULE & GV ODUNGA, JJA

FEBRUARY 7, 2025

BETWEEN

THE ATTORNEY GENERAL ..... APPELLANT

AND

KISILU MUTUA ..... RESPONDENT

(Being an Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 13th May, 2017 in HCC Petition No. 19 of 2015)

JUDGMENT

1. The background of this appeal is that the respondent, Kisilu Mutua, was on 5th July, 1965 charged, along with another, with the offence of murder, the victim being Pio Gama Pinto. Following the trial, he was convicted and sentenced to death. His appeal to the then Court of Appeal for Eastern Africa was dismissed on 12th November, 1965. The death sentence was later commuted to life imprisonment. He remained in prison for 36 years until 1st February, 2001 when he was released on Presidential Order.

2. In a petition filed in the Constitutional and Human Rights Division of the High Court in Nairobi on 11th March, 2015, the respondent claimed that he was on 24th February, 1965 arrested by six police officers who took him to Eastleigh Police Station for an offence he had not committed. While in custody, he was brutalized by the police. His testicles were squeezed, and he was beaten on the toes using a rungu. He was threatened with death and forced to sign an already written statement which was used as a confession by the court to convict him. At the trial he denied recording a voluntary statement but the court dismissed his claim. His case in the petition was that his entire case was founded on uncorroborated retracted involuntary confession.

3. The respondent sought relief for the violation of his right not to be subjected to torture; his right to be treated humanely and in dignity; the violation of his right to due process of the law and fair trial; the

violation of his other fundamental freedoms and rights; and for the fact that his trial was a fundamental miscarriage of due process and justice.

4. The appellant filed a replying affidavit though a Commissioner of Police denying that any of the respondent's rights and freedoms were denied or violated. It was stated that the respondent had been tried and convicted for the murder of Pio Gama Pinto, and his appeal to the highest court had been dismissed. It was then pleaded that the delay of 49 years in filing the petition was unreasonable and prejudicial as there was no explanation why the petition could not be instituted earlier. The allegations of torture and mistreatment while in police custody were denied.

5. The respondent withdrew the prayers seeking declaration that his fundamental rights and freedoms were violated and that the trial leading to his conviction for the offence of murder was a fundamental miscarriage of justice, leaving only the claim for damages for the alleged torture.

6. The High Court heard the petition in which the respondent was the only witness. He was cross-examined by the counsel for the appellant. The appellant did not call any witness.

7. On 13th May, 2017, the learned John M. Mativo, J. (as he then was) rendered a judgment in which he declared that the right of the respondent not to be subjected to torture and degrading treatment by the police had been violated, and awarded him Kshs.2,500,000/- by way of general damages, with interest and costs. The court dealt with the appellant's complaint that the respondent was guilty of inordinate delay in bringing the petition and observed that the political climate then obtaining could not allow for the seeking of redress by victims of violation of constitutional rights and freedoms, and that it was only following the promulgation of the 2010 Constitution that it had become possible for such a complaint to be brought.

8. The appellant was aggrieved by the judgment and decree and filed this appeal whose grounds were as follows:

> "i. The learned Judge erred in law in holding that the evidence of the petitioner was uncontroverted on account that the respondent did not call a witness, yet the petitioner was extensively cross-examined to determine the accuracy and veracity of his statement in line with Section 145 of the *Evidence Act*.
>
> ii. The learned Judge erred in law by awarding the petitioner a blanket amount of Kshs.2,500,000 with no medical report adduced to prove hard occasioned during the alleged detention.
>
> ii. The learned Judge erred in law in finding that the petitioner was not guilty of inordinate delay, the petition having been filed 50 years after the alleged torture."

9. This Court was asked to allow the appeal, set aside the judgment and decree of the High Court and substitute it with an order dismissing the petition with costs.

10. During the hearing of the appeal before us, the appellant was represented by learned counsel Ms. Wawira while learned counsel Mr. Ojwang Agina represented the respondent. Each counsel had filed written submissions. They elected to wholly rely on the submissions.

11. It was submitted on behalf of the appellant that the learned Judge had erred in holding that the rights of the respondent had been violated when there was no evidence that had been led to support such a finding; and that once the respondent had made a claim of such violation, it was incumbent upon him to prove the allegations, and it did not matter that the appellant had not called evidence. In this

case, it was submitted that the undisputed facts were that the respondent had been charged with, and convicted of, the murder of Pio Gama Pinto and had been sentenced. The alleged torture was in respect of the confession, but he had withdrawn the plea that had challenged the criminal proceedings, and therefore the claim of torture had gone with the plea. In any event, it was submitted, there was no evidence, medical or otherwise, indicating that he had been tortured while in police custody. Learned counsel referred us to the decisions in Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR and Priscilla Mwara Kimani & 2 Others vs. Attorney General [2019] eKLR in which it was reiterated that the issues of violation of constitutional rights cannot be proved by mere allegations. The appellants therein had an obligation to prove that they had been tortured and that, as a result, they had suffered, either physically or mentally.

12. Lastly, it was submitted that the delay of 50 years in bringing the petition was inordinate and had prejudicial to the appellant who could not assemble evidence to rebut the claims of torture in custody. We were referred to several decisions, including Lt. Col. Peter Ngari Karuma & Others vs. Attorney General [2009] eKLR; Wellington Nzioka Kioko vs. Attorney General [2018]; and *James Kanyita Nderitu vs. Attorney General & Another HCPT 180 of 2011*, among others.

13. According to learned counsel for the respondent, the learned Judge was well guided in arriving at the decision that failure by the appellant to call witnesses left the respondent's evidence without any challenge; that the learned Judge had accepted the evidence which he had found to be credible and had proved the allegations of torture. Secondly, the award of Kshs.2,500,000/- in damages for the torture was justified in the circumstances. We were referred to the decision in David Gitau Njau & 9 Others vs. Attorney General [2013] eKLR and asked to find that the award of a global figure of Kshs.2,500,000/- for both physical and psychological torture was reasonable.

14. This is a first appeal. As was observed in Abok James Odera Associates vs. John Patrick Machira t/a Machira & Co. Advocates, Civil Appeal No. 165 of 1999, our primary duty is to re-evaluate, re-assess and re-analyze the evidence on record and draw our own conclusions thereon, while making allowance for the fact that the trial Judge had the advantage of seeing and hearing the witnesses who testified before him.

15. In reaching the conclusion that the respondent had established that he had been tortured by the police following his arrest, the learned Judge observed that what the respondent stated had not been challenged or controverted as the appellant had merely cross-examined him but had not called evidence in rebuttal. The evidence of torture was the squeezing of the respondent's testicles by the police officers. It was found that such action was inhumane, degrading, illegal and unconstitutional.

16. We have looked at the record. When the respondent filed the petition, he swore a supporting affidavit in which he stated as follows:

> 2. That I was arrested on 24th February, 1965 at about 11.00pm while having a drink at New Rwathia Bar, Nairobi with friends without being informed of the grounds of arrest.
>
> 3. That I was taken to Eastleigh Police Station where I was interrogated and severely tortured by European and African Police Officers while asking that I confess to murdering Pio Gama Pinto and I was forced to sign a statement confessing to the murder.
>
> 4. That on 5th July, 1965, I was charged with the said murder at a trial that was presided over by the Honourable Sir John Ainely, the Chief Justice.

5. That I was convicted of the alleged offence on 15th July, 1965 and sentenced to death.

...”

17. While testifying in the petition, this is what the respondent stated:

> “I was arrested on 24th February, 1965. At the police station, I was tortured. I was taken to the police station from 7.00am until 2.00pm. They squeezed my private parts. To date, I still suffer pain. I lost consciousness.....I was forced to sign a pre-prepared statement. I did not know what I had signed. I only came to know about it in court.....I was found guilty and sentenced ”

18. When he was cross-examined, he was asked whether he got any treatment for the torture. He responded that he was never taken to any hospital. He was asked if he was still in pain. He responded that he was still in pain and was attending treatment, many years after the 36 years in custody and he had been released from jail. He was asked if he had any hospital record to show that he was being treated for the pain. He responded that he had none. He was asked if he had any witness to show he was still attending treatment. He had none.

19. This is how the learned judge proceeded:

> “I note that counsel for the respondent opted not to call witnesses but cross-examined the petitioner. Thus, the only evidence on record is the evidence tendered by the petitioner. In the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited, it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. It is trite that where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of fact since in so doing, the party fails to substantiate his pleadings. In the same vein, the failure to adduce any evidence means that the evidence of the plaintiff against the defence is uncontroverted and therefore unchallenged. In short, the petitioner’s evidence remained unchallenged.”

20. We consider that, the onus was on the respondent to prove that his testicles were squeezed during interrogation while being forced to confess that he had killed Pio Gama Pinto, and that the action amounted to torture. Section 107 of the *Evidence Act* provides as follows:

> “107. Burden of proof.
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 109 provided that:

> “109. Proof of particular fact.

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

21. Whether or not the appellant called witnesses, under Sections 107 and 109 of the *Evidence Act* the respondent was the owner of the petition in which he alleged that the police who arrested him had tortured him by squeezing his testicles so that he confesses that he had killed Pio Gama Pinto. The burden of proof lay on him to prove these allegations. In Ndirangu Monica Wangu Wamwere & 5 Others vs. The Attorney General, S.C, Petition No. 26 of 2019, it was emphasized that a petitioner bears the burden to prove her/their claim of alleged threat or violation of rights and freedoms to the required standard of proof, which is on the balance of probabilities. The fact that the respondent had testified regarding the threat or violation of rights and freedoms and the defence had not called any evidence in rebuttal may have made his work easier, but that did not take away his duty to call sufficient evidence to prove his case.

22. In this petition, the respondent testified that his testicles were squeezed until he lost consciousness, and until he signed the pre-prepared statement of confession. He stated that he still suffers pain from the injury that he suffered. He was asked to admit that while in custody, he was not, treated for the injury. When he came out of prison, he stated that he continued with his treatment. He was asked for any medical evidence. He had none. Any witness he could call to support the alleged injury or treatment? He had none.

23. We have considered that the respondent abandoned the following grounds in his petition:

> " 4. The petitioner signed a statement. He never read it in fear of death to the effect that amounted to a confession but at the trial he retracted the statement.
>
> 5. The entire case was founded on uncorroborated retracted confession. The Kenya Court of Appeal erred in not accepting the opinion of the assessors who unanimously found that the applicant was not guilty as charged."

24. The trial court observed as follows:

> " The petitioner withdrew the prayer seeking a declaration that his fundamental rights were violated and that the trial was fundamental miscarriage of justice, leaving only the claim for damages for the alleged torture."

25. Given that the appellant conceded that he was properly charged, tried, convicted and sentenced, it followed that he had abandoned his claim that he had been mistreated and his testicles squeezed to force him to confess to an offence he had not committed. It means, in our view, that his confession had been voluntary. Given those circumstances, was the trial court correct in finding that the respondent's testicles had been squeezed and therefore he had been tortured? If the reason for the torture was to obtain a confession to support the trial, and now that he conceded he was tried on the basis of a voluntary confession, was he tortured? Were his testicles squeezed? Our conclusion is that, given the evidence, the learned Judge fell into error in finding that the respondent's testicles were squeezed or that he was tortured. We find that the respondent did not discharge the burden placed on him under Sections 107 and 109 of the *Evidence Act*. This finding settles all the complaints contained in the appellant's memorandum of appeal.

26. Consequently, we allow the appeal, set aside the judgment and decree of the trial court and in its place, there shall be an order dismissing the petition.

27. Given the nature of the petition, and the respondent having served 36 years in prison, we order that each party shall bear their costs both here and in the trial court.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

ALI-ARONI

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.