



**Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 328 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 243 OF 2017  
S OLE KANTAI, HA OMONDI & P NYAMWEYA, JJA  
DECEMBER 17, 2021**

**BETWEEN**

**PETER NDEGWA KIAI T/A PEMA WINES & SPIRITS ..... APPELLANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR INTERNAL SECURITY AND COORDINATION  
OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal from the from the judgment of the High Court of Kenya at Nairobi (Mativo J.) dated 13th May 2017 in Petition No. 323 of 2015)*

**JUDGMENT**

1. The Appellant herein, Peter Ndegwa Kiai t/a Pema Wines & Spirits, filed a constitutional petition in the High Court at Nairobi, wherein he sought various declarations as regards infringement of his right to property, Fair Administrative Action and dignity, equality and also sought compensation for the violation of his rights and in terms of the losses suffered. The facts of the said petition, which were largely not disputed, were that on 4<sup>th</sup> July 2015 a group of armed gang led by the District Commissioner and Administrative Police and Chiefs under his command descended on the duly licensed Petitioner's business premise situated in Eastleigh, and engaged in destruction of the Petitioner's property wherefore stock worth colossal sums of money was looted and/or unlawfully seized. The Petitioner registered a complaint against the arbitrary and wanton destruction of his property with the Pangani Police Station and National Campaign against Drug Abuse Authority and claims that no action was taken. He also claimed to have suffered substantial loss of livelihood, which he had operated for a couple of years and was left destitute with a loss of stock worth Kshs 32,000,000/



- =. of alcoholic drinks ranging from brandy, vodka to wines and beer all from licensed manufactured and/ or dealers.
2. The Respondents filed Replying Affidavits in the trial Court, that were sworn on 28<sup>th</sup> June 2015 and 25<sup>th</sup> April 2016 by Dr. William N. Okedi, the Chief Executive Officer at the National Authority for the Campaign against Alcohol and Drug Abuse. They responded that the validity period of the various permits to manufacture spirits were subject to periodic inspections and continuous compliance with standards and requirements of the laws, which had been necessitated by the deaths occasioned by illegal, unlicensed and substandard alcoholic drinks. They denied that the government agencies enforcing the compliance involved hooligans in the crackdown, which was done in public interest and within the confines of the law.
  3. After hearing the parties, the trial Judge issued a declaration that the Rights of the Appellant under Articles 40, 47 and 28 of the *Constitution* were violated by the agents of the second and third Respondent., and entered judgment in his favour against the Respondent jointly and severally in the sum of Kshs 1,000,000/= by way of general damages with interest. The Respondents were also condemned jointly and severally to pay the costs of the Petition to the Appellant with interest.
  4. The Appellant being dissatisfied with the said judgment and decree therefrom, proffered this appeal. The grounds of appeal in the Memorandum of Appeal dated 10<sup>th</sup> July 2017 can be compressed into one, being that the award of Kshs 1,000,000/- was manifestly low and an inadequate relief in the circumstances of the Petition and applicable law. He therefore seeks orders that the judgment of the trial Judge with regard to quantum be set aside, and that the Appellant's prayer for award for the loss of stock in trade of Kshs 32,000,000/= sought in Nairobi Petition No. 323 of 2011 be allowed and/ or upheld. In addition, that the costs of the Appeal and those in the superior Courts be awarded to the Appellant.
  5. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others (1968) EA 123* where it was stated that;  

“..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”
  6. When the matter came up for hearing on 12<sup>th</sup> July 2021, Mr. Maingi, the learned counsel for the Appellant, relied on submissions dated 22<sup>nd</sup> November 2017. There was no appearance on behalf of the Respondents during the hearing, even though they opposed the appeal through submissions dated 13<sup>th</sup> December 2017. The main issue that arises for determination in this appeal is whether the award of damages by the trial Court was based on the correct principles of law and reasonable in the circumstances.
  7. The Appellant's learned counsel urged that the Appellant justified the value of the stock destroyed by submitting invoices, statements of accounts and itemized breakdown of the claimed figure of Kshs 32,000,000/=, and that his prayer for compensation was predicated on Article 23 (3) (e) of the



- Constitution of Kenya, 2010. Counsel submitted that the trial Judge ought to have taken into account the extent of loss suffered by the Appellant and the fact the damages sought were in the nature special damages. They submitted in the alternative, that if the trial Judge was correct in awarding the global sum, then the same should have reflected the financial loss suffered. Therefore, that the sum awarded was erroneous.
8. Reference was made to decisions in the case of *Arnacherry Limited v AG [2014] eKLR* where special damages were awarded in a petition for vindication of the rights to property under Article 40 of the Constitution, and in *The Attorney General vs Siew Chand Ramanoop (Privy Council Appeal No. 13 of 2004) 2005, UKPC 15* where it was held that the comparable law for measure of the damages is a useful guide in assessing the amount of this compensation. Also cited were the decisions in *Ntandazeli Fose vs The Minister of Safety and Security (Case CCT 14/96)* Constitutional Court of South Africa, *Minister of Police vs Vongani Sharon Mboweni & Another (657/2013) ZASCA 107* and *President of the Republic of South Africa & Another vs Modder Klip Boerdery (PTY) LTD CCCT 20/04* for the position that an appropriate award can be made to compensate the injured party for loss that they suffered as a result of violation of their constitutional rights.
  9. The Respondents in opposition submitted that the burden of proving constitutional violation and infringement rests with the person alleging, and to this they placed reliance on the case of *Anarita Karimi Njeru v the Republic (1976-1980) KLR*. They contended that the Appellant did not prove his case to be awarded the damages and did not specifically plead the award of Kshs 32,0000 and introduced it on appeal.
  10. Our starting point in considering the issue in this appeal is the applicable law to the Appellant's constitutional petition in the trial Court. Articles 22 and 23 of the Constitution grants the High Court authority to enforce and uphold the Bill of Rights in claims of infringements of rights, and to grant appropriate relief, including an order for compensation. The Constitution does not define the term compensation, and recourse is in this regard had to the definition in Black's Law Dictionary Tenth Edition at page 343 which is the "payment of damages or a other act that a court orders to be done by a person who has caused injury to another". The Appellant in his Petition dated 29<sup>th</sup> July 2015 filed in the trial Court sought a declaration that as a result of the breach of his rights, he had suffered loss and damage, and compensation for the said breach and violation in terms of the losses suffered.
  11. The trial Judge while relying on the decision by the South African Constitutional Court in *Ntanda Zeli Fose vs Minister of Safety and Security, 1996 (2) BCLR 232 (W)*, acknowledged that compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution, as a distinct remedy and additional to remedies in private law for damages. Further, that the comparable common law measures of damages will be a useful guide in assessing the amount of compensation, which will depend on the facts and circumstances of each case. In this particular case, the trial Judge found that the alleged loss of stock in trade in the sum of Kshs 32,000, 000/= had not been proved to the required standard, and that an award of global sum of Kshs 1,000,000/= for violation of the Appellant's rights and compensation for the loss incurred would be adequate.
  12. We are of the view that the trial Judge did apply the correct principles of law in determining liability for compensation in constitutional petitions and the quantum. It is necessary to point out that the trial Judge did not rule out the possibility of payment of compensatory damages where proven, and indeed, the range of common law damages including general, special, nominal and punitive damages may be available in constitutional petitions. General damages are given for losses that the law will presume are the natural and probable consequence of a wrong, and may be given for a loss that is incapable of precise estimation, such as pain and suffering or loss of reputation.



13. It is notable in this respect that comparative jurisprudence limits the award of general damages in constitutional cases to only proven damages and not presumed damages. In *Ntanda Zeli Fose vs Minister of Safety and Security* (supra), the Court held that an award of constitutional damages in addition to delictual damages would not be appropriate, and that delictual damages are an adequate vindication of the Plaintiffs constitutional rights. The Court was however not decided on the nature of an award where delictual damages are not available, and observed that the law was flexible to provide relief that was appropriate for a breach of constitutional rights.
14. The US Supreme Court in *Carey vs Piphus*, 435 U.S. 247 (1978) ruled that while presumed compensatory damages may not be awarded in an action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance. Presumed compensatory damages in this regard are general damages that are recoverable without proof of actual loss.
15. The relevant principles applicable to award of damages for constitutional violations under the Constitution were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004*. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:.

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.
17. Special damages on the other hand are awarded for losses that are not presumed but have been specifically proved and that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury and the hearing of the action. The attendant common law rules of proof are also applicable, in the absence of specific rules that regulate awards of compensation in constitutional petitions. It is trite under common law in this regard that special damages must be specifically pleaded and proven. This Court is guided by the reasons why special damages must be pleading and proved as set out in D.B. Casson and I.H. Dennis, *Odgers: Principals of Pleading and Practice in Civil Actions in the High Court of Justice* at pp. 170 to 171:

“Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant’s act, but which depends in part, at least, on the special



circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote."

18. Likewise, in the English case of *Perestrello e Companhia Ltda vs United Paint Co. Ltd.*, [1969] 3 All E.R. 479 Lord Donovan held as follows at pp. 485-486.:

"Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. "The question to be decided does not depend upon words, but is one of substance" (per Bowen L.J., in *Ratcliffe v. Evans* ([1892] 2 Q.B. 524 at 529)). The same principle gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as . . . "special" in the sense that fairness to the defendant requires that it be pleaded. The obligation to particularize in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible."

19. As regards the other types of damages that can be awarded in constitutional petitions, nominal damages typically consist of an insignificant allocation awarded upon proof that the defendant has violated the plaintiff's legal and constitutional rights. They are awarded for the purposes of declaring and vindicating legal and constitutional rights, and do not require proof of harm. Punitive damages are awarded in addition to compensatory or nominal damages, and proof of a highly culpable state of mind is necessary to support an award of punitive damages. Punitive damages primarily serve penal and deterrent functions in cases of gross constitutional violations, as well as vindicatory function.
20. Coming to the present appeal, the Appellant did not specifically plead the loss he alleged to have incurred as a result of loss of stock in trade and destruction of his property by the Respondents of Kshs 32,000,000/= in his petition. The trial Judge was however still willing to consider the claim but for the fact that the Appellant also did not prove the said loss. Proof of special damages is on a balance of probabilities, by way of verifiable evidence demonstrating precise calculations. The Appellant in this respect attached an annexure marked "PNK8" to the affidavit in support of his petition, which was described as a breakdown of the losses incurred. The said document which was titled "Pema Wines Spirits Stock Count & Value" , does not indicate the source or maker, and the costing of the items therein are not supported by any documents or evidence to show that the Appellant did indeed purchase or acquire the said items and their price. We cannot in the circumstances fault the trial Judge for his finding that the said quantified loss was not sufficiently proved.
21. The Appellant has asked us to relook the quantum of the general damages awarded by the trial Judge of Kshs 1,000,000/= . The Appellant submitted that this award was inadequate in light of the losses demonstrated by the Appellant, to amount to an error. The principles that guide this Court in this



regard were stated by Kneller JA in *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini vs A.M. Lubia & Olive Lubia (1982-88)* I KAR 727 at page 730, 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 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. *See Ilango V Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970] E.A. 414, 418, 419.* This court follows the same principles.”

22. We note that the trial Judge did not indicate the factors and circumstances of the case that he took into account in coming to the global award of general damages of Kshs1,000,000=. The trial Judge in this respect at page 6 of his judgment did find that “the conduct of the Respondents’ agents constituted both a commission and an omission: the unlawful destruction of the petitioner’s property and failure to protect his property rights”. In our view, while the award of of Kshs1,000,000/= was adequate to vindicate the Appellant for violation of his rights, the trial judge did not adequately factor in the compensation for destruction of the Appellant’s property which was proved, and the award was inordinately low to compensate the Appellant in this regard. In our view, this was also an appropriate case for punitive damages against the Respondents, given the wanton destruction by their agents.

23. For this reason, we partially allow the appeal only to the extent of setting aside the award of general damages of Kshs 1,000,000/ by the trial Judge and substitute therefor, an award of general damages of Kshs 5,000,000/= as compensation for violation of the Appellant’s rights and for the losses he suffered.

All the other orders in the judgment of the trial Court dated 13<sup>th</sup> May 2017 delivered in Nairobi H.C. Petition No. 323 of 2015 are hereby upheld, save to the extent that they may have been modified or qualified by the findings made in this judgment.

24. The Respondents shall jointly and severally meet the Appellant’s costs of this appeal.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

