



**Odiero v Minister for State, Provincial Administration & Internal Security & 3 others  
(Civil Appeal 28 of 2016) [2021] KECA 288 (KLR) (3 December 2021) (Judgment)**

Neutral citation: [2021] KECA 288 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 28 OF 2016  
PO KIAGE, K M'INOTI & M NGUGI, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**HEZBON OMBWAYO ODIERO ..... APPELLANT**

**AND**

**MINISTER FOR STATE, PROVINCIAL ADMINISTRATION & INTERNAL  
SECURITY ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF DEFENCE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**MINISTRY OF HOME AFFAIRS ..... 4<sup>TH</sup> RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at  
Kisumu (Maina, J.) dated 28th January 2016 in H.C. Pet. No. 9 OF 2012)*

**JUDGMENT**

1. The background to this appeal is the 1st August 1982 coup attempt in Kenya. Thirty years after the event, the appellant, who described himself as a “military intelligence sergeant” at the material time in the then Department of Defence, filed a petition in the High Court of Kenya against the respondents alleging violation of his rights under the present and the former constitutions of Kenya. He pleaded, in an amended petition dated 23rd July 2013 that following the coup attempt, he was unlawfully arrested and detained from 1st August to October 1982 and ultimately lost his employment in unlawful circumstances. He added that he was detained in different places in Kenya, starved, held in isolation, and subjected to torture, inhuman or degrading punishment or other treatment. Regarding his loss of employment, he pleaded that his certificate of discharge was issued unprocedurally and by an unauthorised officer.



2. The appellant further pleaded that his arrest, detention and loss of employment constituted violation of his rights under the *Constitution of Kenya, 2010*, namely, Article 22 (enforcement of the Bill of Rights), Article 23 (authority of courts to uphold and enforce the Bill of Rights), Article 25 (non-derogable fundamental rights and freedoms), Article 26 (right to life), Article 28 (human dignity), Article 29 (freedom and security of the person), Article 39 (freedom of movement and residence), Article 47 (fair administrative action) and Article 258 (enforcement of the Constitution), as well as under sections 70 to 84 (the entire Bill of Rights) of the former *Constitution*.
3. As is plainly apparent from the outset, the appellant merely threw into the petition provisions of the current and former Constitutions, some of which clearly had no application or relevance in the petition. Be that as it may, the appellant prayed for a declaration that the said actions by the respondents were a violation of his above rights, an order for compensation, punitive damages, proper discharge and clearance certificate, costs and any other remedy that the court deemed appropriate to grant.
4. The respondents opposed the petition vide a replying affidavit sworn by Lt. Col. Paul Mwangemi Kindochimu, a Staff Officer at Kenya Defence Forces Headquarters. They denied that the appellant's arrest was illegal and pleaded that if indeed the appellant was arrested, it was because of commission of criminal offences. The allegations and particulars of torture, inhuman or degrading punishment or other treatment were denied as well. The respondents further pleaded that the appellant was lawfully dismissed from employment under the *Kenya Armed Forces Act, Cap 199* (repealed), following a lawful trial and conviction for criminal offences.
5. The trial court addressed only the alleged violations of the former Constitution and completely eschewed the alleged violations of the Constitution of Kenya 2010, no doubt because the present Constitution was not in force at the time of the alleged violation of the appellant's rights. The court found that a Court Martial held at Langata Barracks tried and convicted the appellant for the offence of mutiny contrary to section 25 (2) of the repealed Armed Forces Act, upon his own plea of guilty. On that score the court concluded that the appellant's arrest and trial were not unlawful.
6. The trial court however found that the appellant was arrested on 1st August 1982 and presented before the court martial on 8th October 1982 and therefore his right to be brought before a court within 24 hours of his arrest as required by section 72(3) of the former Constitution, as well as section 72 of the repealed Armed Forces Act, were violated.
7. As regards the appellant's subjection to torture, inhuman or degrading punishment or other treatment, the court found that the appellant's evidence was not controverted because the respondents did not adduce any evidence.

The Court delivered itself thus on the issue:

“ [I] find that the rights of the petitioner (appellant) were violated in so far as he was beaten, kept in dark cells without ventilation and starved and/or given rotten or raw food and for that he is entitled to compensation.”

For the violations, the court awarded the appellant a global sum of Kshs five million (5,000,000) as damages but declined to award exemplary damages.

8. Turning to the appellant's discharge from the defence forces, the trial court held that the same could not be faulted because of his conviction by the Court Martial, following his own plea of guilty. The court also found that the appellant was already in possession of his discharge certificate, which he had annexed to his petition.



The appellant was aggrieved and lodged this appeal. Although the appellant listed six grounds of appeal, in his written submissions he reduced the grounds of appeal to only two issues, namely:

- i) Whether, notwithstanding the appellant's failure to appeal the decision of the court martial, his condition and sentence were unlawful, null and void by reason of violation of the constitutional guarantees pertaining to fair trial; and
  - ii) Whether the learned judge made such a manifestly low award of general damages as to justify interference with her exercise of discretion.
9. On the first issue, the appellant submitted that having found that his rights under sections 77(1), 77(2)(c), 77(2)(e) and 77(9) of the former Constitution were violated by the respondents, the learned judge erred by failing to hold that his trial by the Court Martial was a nullity. He relied on the decision of the Ugandan Court of Appeal in *Matsiko v. Uganda (1999) 1 EA 184* and submitted that violation of the right to fair trial constitutes a mistrial. The appellant added that whether he had appealed against his conviction by the Court Martial or not, section 84 of the former constitution entitled him to apply for enforcement of his rights without prejudice to any other remedies that were available to him.
  10. On the award of damages, the appellant submitted that the award of Kshs 5,000,000 was manifestly low so as to warrant interference by this Court. He contended that in arriving at the award, the learned judge took into account irrelevant considerations like the appellant's failure to appeal against his conviction by the Court Martial. The appellant submitted that a fair award for unlawful confinement both pre and post trial commensurate with his rank of Major General was Kshs 200,000,000. In support of the proposed award the appellant relied on *Major (rtd) Ezra Imaana Laibuta v Attorney General & 4 Others, Pet. No. 12 of 2013*. For his other violated rights, the appellant urged that an award of Kshs 150,000,000 was reasonable, on the argument that Kenyan courts have not shied away from making hefty awards in commercial matters.
  11. For the above reasons, the appellant urged us to allow the appeal with costs, interfere with the award of damages, award him his basic salary from 1982 to date, and order restoration of his rank, benefits, honours and decorations.
  12. The respondent opposed the appeal on the basis of its submissions dated 15th September 2021 in which the respondent addressed only the issue of award of damages. Relying on, among others, the decisions of this Court in *Catholic Diocese of Kisumu v. Tete [2004] eKLR*, *Kemfro Africa Ltd v. Lubia & Another [1988] eKLR* and *Butt v. Khan [1978] eKLR*, the respondent submitted that this Court will not readily interfere with an award of damages by the trial court unless it is proved that in assessing the damages the court took into account irrelevant factors, or failed to take into account relevant factors, or that the award is so inordinately low or so inordinately high as to constitute an erroneous estimate. It was the respondent's submission that the appellant had failed to demonstrate any error in the award by the trial court.
  13. On the award of damages of Kshs 5,000,000, the respondent submitted that the award was fair and just in the circumstances and cited the judgment of this Court in *Gitobu Imanyara & 2 Others v. Attorney General (2016) eKLR* in support of the proposition that the purpose of a constitutional remedy is not compensatory or punitive but to vindicate violated rights and deter violations in future. Accordingly, the respondent urged us not to interfere with the award of damages and to instead dismiss the appeal with costs.
  14. We have carefully considered the record of appeal, the judgment of the trial court, the submissions and the authorities that the parties cited. From the outset, we must deprecate the appellant's obvious



misrepresentation of the facts of the case and the judgment of the trial court, which misrepresentations the respondent happily went along with.

15. Nowhere in the judgment did the trial court find, as the appellant alleges, that the following of his rights under the former Constitution were violated by the respondents: section 77(1) (the right to a fair hearing within a reasonable time by an independent and impartial court established by law), section 77(2) (c) (the right to adequate time and facilities for the preparation of defence), section 77 (2) (e) (the right to examine adverse witnesses), and section 77 (9) (independent and impartial court). The court could not have made any findings in that regard because at the hearing, the appellant informed the court that he was not challenging his conviction by the Court Martial. In his written submissions, the appellant stated thus:

“The petitioner’s case before the Honourable Court is not challenging the conviction or sentence imposed upon him by the Court Martial, which from the evidence above shows that it was based on his own plea of guilty.”

16. The appellant further explained that he was only seeking compensation for the violation of his rights while he was in custody in various prison facilities and for unlawful discharge from the military.
17. Having informed the trial court that he was not challenging his conviction by the Court Martial, neither the appellant, nor the court, addressed the conduct of the Court Martial or the alleged violation of the appellant’s rights pertaining to a fair trial before the Court Martial. It is therefore quite disingenuous for the appellant to claim that the trial court found his various rights under the former Constitution which we have set out above were violated by the respondents, when the appellant himself informed the court that he was not pursuing the issue. We accordingly find that the first issue in the appeal is utterly misconceived and bereft of merit.
18. On the question of damages, it is common ground between the appellant and the respondent that this Court will not readily interfere with award of damages by the trial court, unless it is demonstrated that the trial court took into account irrelevant considerations or failed to consider relevant considerations or looking at the award as a whole, it is manifestly too low or too high as to constitute an error in principle. In *Johnson Evan Gicheru v. Andrew Morton & Another*, CA No. 314 of 2000 this Court succinctly stated the principle thus:

“It is trite that this Court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

19. What does the appellant rely on to show that the learned judge acted on wrong principle in making the award? First he contends that the learned judge took into account irrelevant factors like his failure to appeal against his conviction by the Court Martial. Nowhere in the judgement did the trial court take into account the appellant’s alleged failure to appeal as one of the considerations in arriving at the award. Indeed, as a matter of fact, the record shows clearly that the appellant appealed, and that is how his sentence of 18 years imprisonment was reduced to 4 years. Again, in view of the appellant’s position in the trial court that he was not challenging his conviction, it is difficult to fathom how the issue could have arisen before the trial court.



20. The other complaint by the appellant is that the court did not take into account his rank of Major General. This is another instance where the appellant's proclivity to misrepresent and mislead stands out. From his own pleadings, the appellant was a military intelligence sergeant when he was dismissed from the Military. So when did he rise to become a Major General which he faults the court for failing to consider? Clearly the appellant had no such rank and the trial court did not err by disregarding a ghost rank. Lastly on this issue, the appellant did not present any comparable awards on the basis of which he could base the claim that the award by the trial court was manifestly low. He merely plucked the figures of 200 million and 150 million from thin air.
21. The prayers by the appellant for award of his basic salary from 1982 to date and restoration of his rank, benefits, honours and decorations have no basis in this appeal. The appellant made no such prayers in his petition and neither did the trial court address the matters. (See *Chumo Arap Songok v. David Keigo Rotich* [2006] eKLR, *Kenya Ports Authority v. Kuston (Kenya) Ltd* (2009) 2EA 212 and *Baber Alibhai Mwaji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001).
22. For all the foregoing reasons, we are satisfied that this is a frivolous appeal, founded on deliberate misrepresentation of the appellant's case and the substance and effect of the judgment of the trial court. The same has no iota of merit and is dismissed in its entirety with costs to the respondents.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF DECEMBER 2021**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

