



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 253 OF 2017

BETWEEN

NJUGUNA GITHIRU.....APPELLANT

AND

THE ATTORNEY GENERALRESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, J.) delivered on 15th April, 2016

in

H.C.PET. No. 204 of 2013)

JUDGMENT OF THE COURT

1. The appellant, Njuguna Githiru, petitioned the High Court seeking: a declaration that his fundamental rights and freedoms were contravened and grossly violated by the respondent's Special Branch police officers at Nyayo House torture chambers for eight days from 14th April 1989 to 22nd April 1989; a declaration that he is entitled to payment of damages and compensation for the violation and contravention of his fundamental rights and freedoms; and general damages, exemplary damages and moral damages on an aggravated scale under section 23 of the repealed Constitution for the unconstitutional conduct by the Kenyan Government servants and agents.
2. He pleaded that on 14th April 1989, he was arrested at his home and bundled into a waiting land rover, driven for hours and taken into the dark basement cells at Nyayo House torture chambers; that the following day he was taken in a lift to the 24th floor of the same building where he was presented to a panel of about 10 people who interrogated him about his association with, Koigi wa Wamwere and Mirugi Kariuki; that he was ordered to strip naked and beaten up until he was full of blood all over his body; that after the beating sessions, he would be returned to the cells which would be flooded with cold water and where pressurized water would be sprayed on him while naked; that he was locked up in the cells for eight days and kept without food for days, without a sleeping mat, blanket or even drinking water; that during the entire period neither his family nor friends knew where he was; that he was threatened with death if he did not plead guilty to whatever charges would be preferred against him; and that he was released on 23rd April 1989 with the threat of being rearrested.
3. The appellant contended that his fundamental rights and freedoms from torture or inhuman degrading treatment; freedom from being treated or punished in a cruel, inhuman and degrading manner were violated. He supported his petition with an affidavit in which deposed at length on the matters that he complained of.
4. The petition was opposed. In a replying affidavit, Philip Ndolo, the Deputy Director of operations in Kenya Police Service refuted the claims by the appellant; he contended that the constitutional provisions on which the appellant was relying were not in force at the material time; that the Constitution of Kenya, 2010 could not be applied retrospectively; that no medical reports were produced to support the claims; and that the respondent was highly prejudiced as the alleged cause of action had taken place 25 years earlier.
5. After hearing the petition, the High Court (*Lenaola, J.* (as he then was)) delivered judgement on 15th April 2016 in favour of the appellant and declared that his fundamental rights and freedoms were contravened and grossly violated by the respondent's Special Branch police offices at Nyayo House Torture Chambers for 8 days. The court awarded the appellant Kshs.1,000,000.00 as compensation for the violations.
6. The appellant was dissatisfied with the award of Kshs.1,000,000.00 and instituted this appeal. In his memorandum of appeal, the appellant asserts that the amount awarded is low; that the Judge ignored binding precedents in which previous awards ranged from Kshs.1,500,000.00

to Kshs.6,500,000.00; that the Judge was wrong in declining to grant exemplary damages. In his memorandum of appeal, the appellant prayed that this Court should reassess damages and that Kshs.3,000,000.00 “will be just fair and adequate award.”

7. During the hearing of the appeal, **Mr. Gitau Mwara**, learned counsel for the appellant relied on his written submissions which he orally highlighted. He urged that in awarding Kshs.1,000,000.00, the High Court disregarded precedents in which awards for similar cases about 7 years earlier ranged from Kshs.1,500,000.00 to Kshs.6,500,000.00; and that the award of Kshs.1,000,000.00 is far too low, inadequate and unfair. Citing the decision of this Court in **Koigi Wamwere vs. Attorney General [2015] eKLR** counsel submitted that the Judge ought to have awarded a much higher amount in damages.

8. With regard to the claim for exemplary damages, counsel submitted that the learned Judge got it wrong in taking the view that the same were not available. Reference was made to the case of **Dr. Odhiambo Olel vs. Attorney General, Kisumu HCCC No. 366 of 1995** for the proposition that an award for exemplary damages is supplementary to the normal damages and are awardable without reference to any proved actual loss. Although, as already stated, the appellant prayed for an award of Kshs.3,000,000.00 in his memorandum of appeal, counsel for the appellant concluded his submissions with a prayer for an award of general damages of Kshs.5,000,000.00 and Kshs.3,000,000.00 for exemplary damages.

9. Opposing the appeal, learned counsel for the respondent **Mr. Thande Kuria** urged us to uphold the award by the High Court. Relying on his written submissions which he also highlighted, counsel submitted that the award made is adequate. He argued that the object of the award is not confined to compensation but towards vindicating the infringed constitutional rights. Reference was made to Privy Council decisions including in **Siewchand Ramanoop vs. The AG of Trinidad and Tobago, P.C Appeal No. 13 of 2004** stressing that the award is at the discretion of the court and should not be so large as to be a windfall nor should it be so small as to be nugatory (Per **Patterson, J.A** in **Fuller vs. AG of Jamaica, C.A 91/1195**). According to counsel, the award of Kshs.1,000,000.00 was reasonable, appropriate and just.

10. On exemplary damages, it was submitted that the Judge was right that exemplary damages are only payable where the respondent has had a propensity for repeating the same violations which is not the case here. He referred to the case of **Benedict Munene Kariuki & 14 others vs. Atty Gen, Petition No. 722 of 2009** where **Majanja, J.** declined to award aggravated damages “noting the burden to the innocent taxpayer” and improved political environment.

11. We have considered the appeal and the submissions by counsel. This is a first appeal. We echo the words of the Court in **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

12. The only complaint in this appeal is in relation to the damages and the question is whether we should interfere with the award of damages by the High Court. We bear in mind that an award of damages involves exercise of judicial discretion and that the circumstances in which the Court can interfere with the same are limited. In the case of **Butt vs. Khan [1981] 1KLR 349** the Court held (as per Law, JA) that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

13. In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.M. Lubia and Olive Lubia (1982–88) 1 KAR 727 at p. 730** the Court stated:

“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.”

14. In **Gitobu Imanyara & 2 others vs. Attorney General, C.Appel No. 98 of 2014 [2016] eKLR**, the Court stated that the court's discretion to award damages 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. The appropriate determination is an exercise in rationality and proportionality. The Court stated:

“Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual’s right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court’s discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above 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. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

15. In the present case the learned Judge of the High Court found, as the appellant claimed, that for eight days between 14th April 1989 and 22nd April 1989, the appellant was held and kept incommunicado at the infamous Nyayo House torture chambers where he was beaten,

tortured and humiliated. The Judge expressed:

“Has the Petitioner therefore proved that he was tortured? He claimed that he was continuously beaten by Special Branch Officials (they are therefore public officials) and he was locked up in a water logged cell with occasional bursts of cold water being sprayed on him. That he was also starved of food and water on occasion while being forced to rotate around his finger intermittently. I believe him. There is no defence to torture and I am satisfied that there is cause to make a finding in favour of the Petitioner.”

16. Accordingly, the court held that the appellant’s fundamental rights and freedoms from torture or inhuman and degrading treatment were contravened and violated and as already stated, awarded him Kshs.1,000,000.00 as compensation for the violations.

17. In ***Koigi Wamwere vs. Attorney General*** (above), a 2015 decision, this Court reviewed previous court decisions relating to somewhat similar violations where the awards of damages ranged between Kshs.1,500,000.00 and Kshs.2,500,000.00. In ***Wachira Weheire vs. AG, HCCC No. 1184 of 2003***, the petitioner had been confined at Nyayo House for 16 days and was awarded Kshs.2,500,000.00; in ***Miguna Miguna vs. AG, H.C. Petition No. 16 of 2010***, an award of Kshs.1,500,000.00 was given for torture, inhuman treatment and violation of right to liberty; In ***Harun Thungu Wakaba & others vs. AG, HCCC No. 1411 of 2004***, sums of Kshs.1,000,000.00 and Kshs.3,000,000.00 were awarded to victims of torture at Nyayo House. As the Court observed in ***Koigi Wamwere vs. Attorney General*** (above) those were much older authorities.

18. In ***Koigi Wamwere vs. Attorney General*** (above), the Court found the amount of Kshs.2,500,000.00 awarded by the High Court to be “patently inadequate” and enhanced the award to a “global sum of Kshs. 12 million.”. The violations in that case however involved extended periods of detention without trial, torture at Nyayo House for 11 days and false arraignment for fake robbery with violence charges.

19. In ***Jennifer Muthoni Njoroge and Others vs. the Attorney General [2012] eKLR***, in which four of the petitioners were each awarded general damages for amounts ranging between Kshs.1,500,000.00 and Kshs.2,000,000.00 for torture, cruel and degrading treatment and unlawful detention for periods ranging between 7 days and 14 days. In ***Benedict Munene Kariuki & 13 others vs. the Attorney General High Court Petition No. 722 of 2009***, where the plaintiffs were each similarly awarded general damages of Kshs.2,000,000.00 for similar constitutional violations of torture, cruel and degrading treatment, and unlawful detention ranging from periods of 7 days to 72 days. In ***Lucas Omoto Wamari vs. Attorney General, CA No. 213 of 2014***, the Court upheld an award of Kshs.2,000,000.00 for the constitutional violations.

20. Taking the foregoing into account, we are persuaded that the award of Kshs.1,000,000.00, made as it was in April 2016 is inordinately low so as to be an erroneous estimate.

21. As regards the claim for exemplary damages, the appellant submitted the same are punitive to the State whose servants acted with impunity, recklessness, inhumanly and in a degrading manner against the appellant. In ***John vs. MG Ltd. [1996] 1 All E.R. 35***, cited by this Court in ***Ken Odondi & 2 other vs. James Okoth Omburah T/A Okoth Omburah & Company Advocates [2013] eKLR*** the other hand had gone “punish” the defendant.” it was held that, “exemplary damages on beyond compensation and are meant to

22. In declining to make an award for exemplary damages, the Judge was equally exercising judicial discretion. He considered that there was no demonstration of a propensity for the violations being repeated and that in the circumstances an award under that head was not warranted. He expressed:

“In that regard, exemplary damages and moral damages are only payable where the Respondent has had a propensity for repeating the same violations. That cannot be true in the present case and such damages are not payable in the circumstances.”

23. In our view, it has not been shown that that constituted a wrong exercise of discretion. It is not shown that the Judge took into account an irrelevant factor or failed to consider a relevant factor. We are therefore unable to fault the Judge on his decision in that regard.

24. In conclusion therefore, having found that the award of Kshs.1,000,000.00 is manifestly low, and considering the circumstances as set out above and other comparable awards, we think a global award of Kshs.2,500,000.00 is appropriate and just.

25. We accordingly set aside the award of Kshs.1,000,000.00 and substitute therefor an award of Kshs.2,500,000.00. Interest thereon will accrue from the date of judgment of the High Court until payment in full. The appellant shall also have the costs of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of January, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR