



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, GATEMBU & J. MOHAMMED, JJA)

CIVIL APPEAL NO. 289 OF 2016

BETWEEN

**BERNARD KIHU MATAMA.....APPELLANT**

AND

**THE ATTORNEY GENERAL.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Lenaola, J.) delivered on 11<sup>th</sup> September 2015*

in

**Petition No. 208 of 2013)**

\*\*\*\*\*

**JUDGEMENT OF THE COURT**

[1] This is an appeal from the judgment of the High Court at Nairobi delivered on 11<sup>th</sup> September, 2015 by **Lenaola, J.** (as he then was) in Petition No. 208 of 2013. The said petition was filed on 7<sup>th</sup> April, 2013, before the High Court Constitutional and Human Rights Division. In it, **Bernard Kihiu Matama** ( the appellant) sought declaratory orders against the Attorney General, (the respondent) that his fundamental rights and freedoms from torture were violated by the respondent’s Special Branch Officers on diverse dates from 8<sup>th</sup> – 17<sup>th</sup> October, 1990 at Buru Buru Police Station, Pangani Police Station and the infamous Nyayo House Torture Chambers; a declaration that the appellant was entitled to payment of damages and compensation for violations and contraventions of fundamental rights and freedoms for a total of eight (8) days and general, exemplary and aggravated damages under **Article 23 (3)** of the Constitution.

[2] The petition was opposed by the respondent vide grounds of opposition that challenged the petition on the grounds that; it was brought after inordinate delay of 23 years after the alleged violation was committed; that no reasons were advanced for the delay; that no evidence was put forth to show the alleged acts were committed by officers of the government; that the respondent would be gravely prejudiced if the petition were to be allowed to proceed as the would be witnesses had either retired, left service or passed on and that the petition was otherwise an abuse of the court process.

[3] The matter fell for hearing as aforesaid before **Lenaola, J.** (as he then was) who dismissed the grounds of opposition by the respondent and found the appellant’s oral evidence of how he was tortured was unchallenged; on the delay in filing the petition, the learned Judge noted that despite there having been a regime change in 2003, and there having been a likelihood of parties abusing the indulgence by courts allowing cases to be filed after decades since the cause of action took place, he nonetheless allowed the appellant’s case. In doing so, he made reference to the cases of **Chomondely vs. Republic (2008) eKLR** and **Gerald Gichohi & 9 Others vs. Attorney General Petition No. 487 of 2012** where it was held: -

**“It is true that the State today cannot shut its eyes for the failings of the past. It must pay the price for its historical faults. I must also agree with the Petitioners submission that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past.”**

[4] Following the ratio in the said cases the learned Judge found the appellant’s rights under **Section 74 (1)** of the **Repealed Constitution** were violated. It provided that: -

**“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”**

The Judge therefore issued the following orders which aggrieved the appellant: -

**“(1) It is hereby declared that the Petitioner’s fundamental rights and freedom from torture were contravened and grossly violated by the Respondent’s Special Branch Police Officers who were Kenyan Government servants, agents, employees and in its institutions on diverse dates at Buruburu Police Station, Pangani Police Station and at Nyayo House Torture Chambers for eight (8) days from 8<sup>th</sup> October 1990 to 17<sup>th</sup> October 1990.**

**(2) It is hereby declared that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms from torture under the aforementioned provisions of the Constitution of Kenya for a total of eight (8) days.**

**(3) The Petitioner is awarded Kshs.400,000 as damages under (2) above plus interest from the date of this judgment.**

**(4) The Petitioner is awarded costs of the Petition plus interest thereon.”**

[5] The appellant, not being fully satisfied with part of the aforesaid judgment lodged this appeal before us challenging the quantum of damages and the fact that he was not awarded exemplary or punitive damages. The appellant raised five (5) grounds of appeal in which he contends that the amount awarded is low; that the learned Judge ignored binding precedents in which previous awards ranged from Ksh 1,500,000 to Ksh 3,000,000; and that the learned Judge was wrong in declining to grant exemplary damages. In his memorandum of appeal, the appellant prayed that this Court should ‘reassess and award just, fair and adequate general damages’ for the violations suffered at the hands of the State.

[6] During the hearing of the appeal, **Mr. Mwara** learned counsel for the appellant relied on his written submissions which he orally highlighted. He argued that in awarding general damages of Ksh. 400,000, the High Court disregarded precedents in which awards for similar cases ranged from Ksh 1,500,000 to Ksh 3,000,000 and that the award of Ksh. 400,000 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 learned judge ought to have awarded a much higher amount in damages. With regard to the claim for exemplary damages, it was submitted that the learned Judge erred in taking the view that the same was not available. Reference was made to the case of **Dr. Odhiambo Olel vs. Attorney General 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 a proved actual loss. The appellant therefore, proposed the following as damages; (i) Ksh. 4,000,000 in general damages; and (ii) Ksh. 4,000,000 in exemplary damages.

[7] Opposing the appeal, **Mr. Ngumi** learned counsel for the respondent, submitted that the award of Ksh. 400,000 was commensurate with the circumstances of the case; that each case is decided on its own merits; and that the appellant had not produced any medical evidence to substantiate allegation of torture. Moreover, the said award cannot be said to be low considering the station of the appellant who said he was working as a house boy. His case was also different from the ones cited. In the case of **Koigi Wamwere** and **Rumba Kinuthia**, in addition to having been subjected to torture at Nyayo House, they were detained and charged with trumped up charges of treason which were subsequently withdrawn. Counsel for the respondent urged us to dismiss the appeal.

[8] This is a first appeal, that being so, we are conscious of our duty to re- evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See **Mary Njoki vs. John Kinyanjui Mutheru [1985] eKLR: -**

**“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484.” Also the case of; - S. M. v E. N. B. [2015] eKLR: -**

**“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we, however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”**

[9] In the premise and having regard to the grounds of appeal, the evidence before the trial court and the submissions made before us, the sole issue falling for determination is the award of damages, whether Ksh. 400,000 was too low and whether the learned Judge erred in failing to award exemplary or punitive damages.

[10] We will therefore examine the evidence before the trial court to assess whether the learned Judge erred as alleged in this appeal. The evidence by the appellant was not challenged by the respondent. That is, he was arrested by Special Branch Police Officers on 8<sup>th</sup> October, 1990. At the time of the arrest, the appellant was working and living as a houseboy at a house belonging to **Rumba Kinuthia** within Kariobangi South Estate, Nairobi. The appellant claimed that he was bundled up in a police land rover vehicle and driven in circles for hours before being taken to Buru Buru Police Station and locked up in a solitary cell. The following day he was allegedly bundled into a police land rover, blindfolded and driven around for hours before being taken to Pangani Police Station where he was locked up in a solitary cell. In the evening he was taken to Nyayo House and locked in a dark basement cell. He claimed he was later taken to the 24<sup>th</sup> floor of the Nyayo

House where he was interrogated by a panel of ten people led by **Mr. James Opiyo** about the Kenya Patriotic Front which was formed by **Koigi wa Wamwere**.

[11] The appellant maintained that he was thereafter ordered to strip naked and was beaten with slaps, rubber whips, broken chair pieces, kicks and blows until he bled. He would also be sprayed with pressurized water while naked, forced to do press ups and rotate on his fingertips. The alleged torture at Nyayo House was repeated for eight (8) days where the appellant was kept in a dark cell flooded with cold water. He alleges he was also kept without food, a sleeping mat, a blanket or drinking water for the eight days. As if that was not enough the appellant stated that he was not allowed to communicate with his friends or family about his whereabouts which caused them anguish.

[12] As a result of the alleged torture by State agents, the appellant maintained that he still suffers trauma, poor eyesight and significant loss of earning up to date. It was the appellant's case that the actions by the State agents amounted to a violation of **Section 74** of the **Repealed Constitution** which prohibited inhuman or degrading punishment. For those reasons, the appellant prayed for general and exemplary damages of Ksh 8,000,000.

[13] As stated above, the respondent only filed grounds of opposition which principally objected to the appellant's petition on two grounds. First, that it could not present any live witnesses because the petition was filed after an inordinate delay and second, that the alleged torture was not supported by any medical evidence. Regarding the quantum of damages sought, the respondent submitted that an award of Ksh. 200,000 was sufficient to compensate the appellant and that exemplary and aggravated damages ought not be granted in constitutional petitions.

[14] Following the hearing of the petition, the learned Judge fastidiously examined the facts and found that the acts of being held in solitary confinement in a dark room; deprivation of basic foods, water and clothing, blind folding the appellant while naked, being whipped and sprayed with water amounted to torture and cruel, degrading treatment in violation of **Section 74** of the **Repealed Constitution**. Having found that a constitutional violation had occurred, the court awarded the appellant general damages as stated above.

[15] We have to answer the question whether the award made was erroneous. In the impugned judgment, the learned Judge held that the appellant's fundamental rights and freedoms were violated stating as follows; -

*“Having found a violation of the petitioner's right under section 74(1) of the Repealed Constitution, I must now grant him an appropriate remedy. He has sought in that regard both general and aggravated/exemplary damages of Ksh 8,000,00 aside from the declarations regarding violation of fundamental rights. This court in Jennifer Muthoni Njoroge & 10 others v AG [2013] eKLR articulated the criteria to be used in awarding damages in torture type cases.*

*It expressed itself as follows; “In awarding damages therefore, I shall use the following criteria (i) The torture inflicted on each petitioner; (ii) The length of time the petitioners were held in unlawful custody (iii) The decided cases on the subject matter (iv) What is fair and reasonable in the circumstances of each case, and I have chosen to give a lump sum in each case.”*

*I will use the same approach in the instant petition.*

*Further I am also alive to the principle that exemplary and general damages for the violation of fundamental rights and freedoms ought not to be granted in the same petition as the alleged transactions leading to the violation in question are of the same facts and therefore a global figure should be granted. (See*

*Benedict Munene Kariuki & 14 others vs Attorney General HC Petition No 722 of 2009; Samwel Waweru Kariuki vs Attorney General [2013] eKLR*

*On the basis of the above principles and bearing in mind that the violations of the petitioner's right as set out elsewhere above were part of the same transaction, and noting the eight days he was held incommunicado and subjected to acts of torture, I shall order that he be awarded Ksh. 400,000 as general damages...”*

[16] We are cognizant of the general rule that an appellate court will not disturb an award of damages by the High Court unless it is demonstrated that the learned Judge 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 Butt vs. Khan [1981] 1KLR 349 and Jivanji vs. Sanyo Electrical Co. Ltd (2003) KLR 425). In urging us to interfere with the award, counsel for the appellant submitted that the High Court has set precedent in awarding a range of damages in a number of torture cases which the Judge did not consider. Thus, in Harun Thungu Wakaba & 20 others vs. Attorney General, Nairobi HCCC No 1411 of 2004 the court awarded the petitioners general damages for each of the 20 petitioners ranging from Ksh 1,000,000 to Ksh 3,000,000. In the case of Rumba Kinuthia vs. Attorney General Nairobi HCCC No 1408 of 2004 the court made an award of Ksh 1,500,000 as general damages.

[17] Assessment of damages and the quantum is in the discretion of the court, taking into account the nature of the violations. In Koigi Wamwere vs. Attorney General [2015] eKLR this Court deliberated on what is reasonable and fair compensation and held that ‘*the award of damages is not an exact science*’ and each case must be decided in accordance with its peculiar facts. In Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR this 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.

[18] It is not in doubt and we cannot deny the inhuman treatment, physical and mental torture suffered by the appellant at the hands of the state agents when he was kept incommunicado at the infamous Nyayo House torture chambers for eight (8) days. In Koigi Wamwere vs. Attorney General (above) the Court reviewed previous court decisions relating to somewhat similar violations where the awards of damages

ranged between Ksh. 1,500,000 and Ksh. 2,500,000. Finding that those were much older authorities, the Court held that the amount of Ksh. 2,500,000 awarded to be ‘*patently inadequate*’ and enhanced the award to a global sum of Ksh. 12,000,000. We are also acutely aware that each case is guided by its own peculiar circumstances, and obviously the facts in **Rumba Kinuthia** case who was a practicing advocate with his own law firm, was taken to Nyayo House and later incarcerated for months, underwent a trial on politically instigated charges cannot be equated with the case of the appellant and so was **Koigi Wamwere** a former Member of Parliament who was co- accused with Rumba Kinuthia.

[19] We have taken into consideration the length of time that the appellant was incarcerated and subjected to torture was eight (8) days compared to the other cases where the plaintiffs were held for months. However, in **Jennifer Muthoni Njoroge and Others vs. the Attorney General [2012] eKLR**, each of the four of the petitioners were 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 seven (7) days and fourteen (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. In the more recent decision of this Court in **Njuguna Githiru vs. Attorney General [2020] eKLR**, this Court made a global award of Kshs. 2,500,000.00 in slightly more severe circumstances. Taking those decisions into consideration and the particular circumstances of this case we are persuaded that the award of damages of Ksh. 400,000 by the trial Judge is an erroneous estimate.

[20] On the issue of exemplary damages, the Judge was equally exercising judicial discretion. It is trite that exemplary or punitive damages, are only awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of *Halsbury’s Laws of England*, as follows:-

“Exemplary damages should be awarded only in cases within the following categories: -

- (1) Oppressive, arbitrary on unconstitutional action by servants of government;
- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
- (3) Cases in which the payment of exemplary damages is authorized by statute.”

[21] We have also found some persuasion in the dicta stated in the celebrated case of **Rookes vs. Barnard [1964] I ALL ER 367**, where it was held that there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government.

Although the Judge faulted the police officers for subjecting the appellant to gross violation of human rights, he expressed that there was no demonstration of a propensity for the violations being repeated and, on that basis, declined to award damages under this head. It has not been shown that the Judge failed to consider matters that he should have or that he took into account irrelevant matters or that his decision in that regard is plainly wrong for us to interfere with his decision. We therefore decline to interfere with the Judge’s decision declining to award exemplary damages.

Accordingly, the appeal partially succeeds. We set aside the award of Ksh. 400,000 awarded as general damages, and substitute therefor a global award of Kshs. 2,000,000.00. The appellant will also have the costs of this appeal

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020.**

**M. K. KOOME**  
.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**  
.....

**JUDGE OF APPEAL**

**J. MOHAMMED**  
.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**