IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KOOME & MUSINGA, JJ.A)

CIVIL APPEAL NO. 305 OF 2016

BETWEEN

MARGARET WANJIRU NDIRANGU....................1ST APPELLANT

CECILIA WANGU MACHARIA............................2ND APPELLANT

MARY NJERI KAMAU..3RD APPELLANT

JACINTA MWIHAKI WAMWERE......................4TH APPELLANT

MARY NJERI KURIA..5TH APPELLANT

AND

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

(An appeal against the Judgment and Decree in Nairobi (Lenaola, J.) delivered on 11th day of September, 2015

in

NRB Petition No. 210 of 2013)

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JUDGMENT OF THE COURT

When a party institutes a claim in court against another alleging some wrongdoing on the part of that other, the rules of evidence require the party bringing the claim to prove that a wrong was committed against him or her. That is what Madan, J.A. – as he then was - summarized in a sentence in the case of **CMC Aviation Ltd vs. Crusair Ltd (No1)** [1987] KLR 103, as **"proof is the foundation of evidence".**

All the five appellants petitioned the High Court citing violation of **Articles 22, 23, 25(a), 29(a), 29(c)** and **29(f)** of the Constitution and claiming that they were subjected to torture, cruel, inhuman and degrading treatment by the State on diverse dates between 3rd March, 1992 and 19th January, 1993.

In the petition, they asserted that, while engaged in peaceful demonstrations agitating for the release of some 53 political prisoners at the famous or infamous Freedom Corner at Uhuru Park and later at the All Saints Cathedral, they were inhumanly and brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by Kenya Police officers and General Service Unit (GSU) officers.

They prayed to the court to declare that, as a result of the acts complained of, their constitutional rights and fundamental freedoms from torture were contravened and grossly violated by the State; and that each one of them was entitled to be paid general, exemplary and moral damages for those violations.

The State, through the respondent, denied the claims and asked the court to dismiss them for having been brought after inordinate delay and without proof.

Because the appellants made specific allegations of torture, cruel, inhuman and degrading treatment committed by state agents on specific dates and places, in terms of **sections 107, 108** and **108** of Evidence Act, the burden of proof was on them to present evidence to support the claims. All the five of them testified without calling any other witnesses.

The respondent called no evidence in defence.

Lenaola, J. – as he then was - upon weighing both oral and affidavit evidence as well as submissions by the parties, found no merit and proof in the claims of violations of the appellants' rights in the manner pleaded.

The learned Judge also found that the facts giving rise to the claims having occurred between 3rd March 1992 and 19th January, 1993, before the promulgation of the Constitution 2010, they could only be considered under the repealed Constitution as the 2010 Constitution does not permit retrospective application.

In dismissing the petition, the Judge explained that;

> **"35. With all the above inconsistencies, I am unable to believe the Petitioners. In saying so, I am aware and I indeed take judicial notice of the time that has lapsed since the alleged violations took place. I am also conscious of the fact that memories fade with time, but I cannot find any justification for the inconsistences in their testimonies. Such inconsistencies coupled with lack of evidence if they were to be admitted by this Court, would greatly prejudice the Respondent as he would not be able to defend the claims made against him.**
>
> **36. Even if I was to take the Petitioners' evidence at its face value, I would still face one more hurdle; lack of crucial evidence. It is not enough for the Petitioners to claim that they lost their treatment notes and cards and for instance PW2, PW3 and PW5 testified that they have since become sickly out of the violence meted upon them by State agencies; that they still suffer chest pains, diabetes, high blood pressure etc. If that is the case, why would they not produce current medical reports to that effect? It would not have been difficult for them to such** (sic) **medical reports giving their medical history and their present conditions.**
>
> **…**
>
> **38. In the instant case, the Petitioners may well have been at Freedom Corner on 3rd March 1992 but I have found no evidence that they were beaten as alleged. In addition, although the Affidavits in support of the Petition are replicas of each other, the evidence tendered orally sharply differed from what was contained in the said Affidavits. The drafting of the Affidavits and presentation of evidence in Court is a crucial exercise in the test of credibility of any case and the Petitioners and their Counsel failed that test".**

The appellants are now before this Court on appeal contending that the learned Judge erred; in not believing their evidence of torture and inhuman treatment; in contradicting himself by finding no proof in their claim yet finding proof in an earlier case of **Milka Wanjiku Kinuthia and 2 Others V Attorney General**, Petition Nos. 281, 282, 337 and 338 of 2011, arising from the same facts and events; in ignoring the holding in **Harun Thungu Wakaba & 20 Others,** HC Misc. Application No. 1411 of 2004 to the effect that treatment cards and medical reports in respect of injuries sustained many years ago are not necessary in proving torture, which broadly includes not only physical, but also psychological and mental pain; in finding that since the acts complained of took place 20 to 22 years before the institution of the action, the appellants had no right to petition the court for violations of their rights; in failing to find that the appellants had presented sufficient oral and affidavit evidence that they were indeed attacked and tortured; by being biased against the appellants when he addressed the appellants' advocate telling him that the Government had no more money to spare for such claims; in not awarding damages claimed; and in failing to be persuaded by the reports in the ***Society Magazine*** of 23rd March, 1992 when its veracity was not in question.

The appellants also filed written submissions which their advocate, Mr. Mwara highlighted before us. In particular, it was contended that the learned Judge ought to have been consistent in deciding the case having earlier on in the case of **Milka Wanjiku Kinuthia** found that the petitioners' constitutional rights were violated; that, like the appellants, the petitioner in that other matter had camped at the Freedom Corner and were also subjected to police brutality; that even after delivery the decision impugned in this appeal, the High Court (Mativo, J.) in Petition 376 of 2014, **Irene Wangari Gacheru & 6 others v Attorney General** , arising also from the same facts and circumstances, found that the State violated the rights of the seven petitioners before him, entered judgment against the respondent and awarded each of the petitioners Ksh. 3,000,000. In addition, counsel submitted that the learned Judge did not follow decisions by which he was bound, such as **Major General Peter M. Kariuki vs. Attorney General**-Civil Appeal No. 79 of 2012, to the effect that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

The respondent did not file submissions or attend court when the appeal came up for hearing, though duly served with that day's hearing notice.

Pursuant to its jurisdiction under **section 3(2)** of Appellate Jurisdiction Act, this Court exercises the power, authority and jurisdiction vested in the High Court, and in considering a first appeal, it does so by way of a rehearing. It will re-assess the entire evidence on record and draw its own independent conclusions on that evidence. If the finding of the trial court is supported by evidence and the law, the Court will uphold it, but it will reverse it if the findings are erroneous, or are not supported by the evidence and the law, of course making appropriate allowance, for the fact that it did not see or hear the witnesses.

See **Peters V. Sunday Post Ltd** (1958) EA 424.

We reiterate that Judges make decisions based on the evidence presented by parties and guided by various rules of evidence. For instance,

section 107(1) of the Evidence Act places the burden of proving the existence of a fact on the person who wants the court to find in his favour that that fact truly exists. That is the often-stated principle of **"he who asserts (alleges) must prove". Section 108** explains this further by stating that;

> **"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".**

The effect of this is that if the party seeking judgment in a suit fails to avail evidence, or to avail evidence to the required standard, then such a party would fail to obtain judgment. This is the statutory yardstick to determine on whom the burden of proof in civil cases lies.

The appellants' case, which they were bound to prove by presenting evidence was that, on 28th February, 1992, they were part of a group of women who, after presenting to the Attorney General of the day, Amos Wako, a petition demanding the release of political prisoners, retreated to Uhuru Park's Freedom Corner to wait for the Government's response to their petition.

They have explained that on the same day while at Uhuru Park they were "brutally battered with boots and batons, slaps, rubber whips, kicks and blows" all over their bodies by over 100 Kenya Police officers and G. S. U. officers, sustaining serious injuries while others like the 1st appellant and the late Prof. Wangari Mathaai were taken to Nairobi Hospital, the latter being unconscious while the former was discharged after 2 days. It was her testimony that in the evening of the same day, between 4.00pm and 9.45pm, while still at the "Freedom Corner", they were all arrested by over 100 police officers and bundled into a police truck known as "Black Maria" and taken to various police stations in Nairobi before being dispatched to their respective rural homes; that they were treated at Nakuru Provincial General Hospital but, unfortunately their treatment documents were either burnt or misplaced; that as a result of the torture unleashed on them, they are today sickly, suffering from high blood pressure, diabetes and pains in the chest, ears and eyes; that between one and five days after their deportation they returned to Nairobi and continued their peaceful campaign and hunger strike, this time, hosted at the All Saints Cathedral compound; that while there, the police and G. S. U officers would sporadically attack them, prompting them, between 4th March, 1992 to 19th January ,1993 (9 months) to relocate to the basement of the Cathedral until the last political prisoner was released.

These were, no doubt, very specific allegations with specific dates and events. We have looked through the appellants' pleadings, affidavits as well as their testimonies in court but, like the trial learned Judge, find it difficult to believe their account based on their bare word of mouth without any other proof in support. From that deposition, and even from the number of suits that have been filed, it is discernable that there were many people at the Freedom Corner and the Cathedral. None of those people were called to lend support to the appellants' case by confirming that they were indeed part of the protestors, particularly bearing in mind that the whole protest lasted nearly 10 months. Though many years had passed, if the appellants were seriously aggrieved by the events, through exercise of due diligence, they would have retrieved copies of some documents from the hospitals where they were attended.

Although complaining that today they live with the marks of the brutal police actions in the form of hypertension, diabetes and other ailments, no proof of these present conditions, was tendered. If a petition demanding the release of political prisoners was presented to the Attorney General, one would have expected to hear from the appellants that they and others signed it, especially when they have deposed in their affidavits that all the five of them are related to political detainees, Koigi Wamwere and Charles Kuria Wamwere .

For instance, the 1st 2nd 3rd 4th appellants stated that they are sisters to Koigi Wamwere and/or cousins to Charles Kuria Wamwere. The 5th appellant swore that she is Kuria's wife and therefore Koigi's sister-in-law. In practice such petitions ought always to be signed by those demanding Government action or response on any matter; and this one was clearly grave, given the public interest and the length of time it took.

Like the trial Judge, we find the account of events presented by the appellants incredible; that they were beaten and dispersed by the police from Uhuru Park at 4pm, with some of them sustaining injuries; that they were taken to various police stations in Nairobi before being relocated to their rural homes in Nakuru area; that they were able to go to a hospital in Nakuru and back to Nairobi the next day!

All we are saying is that the appellants failed to establish by evidence, their pleaded case. The respondent, having denied all the allegations, the legal burden remained with the appellant to persuade the trial Judge that all the facts pleaded existed. We do not, on our part, think that the burden was discharged by preponderance of evidence.

It was immaterial that the respondent did not call evidence. They were not bound to, so long as they did not admit the claim. That is the law, as confirmed in **Dave vs. Business machine Ltd** [1974] E.A 69 where the Court held:

> **"Now if an appearance had been entered and the defence filed and if only failure on the Defendant's part had been failure to appear, either personally or through his advocate on the day the suit was called on for hearing, then I think the plaintiff ought to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim. [He did not do so]".**

The High Court affirmed that principle in **Susan Mumbi .V. Kefala Grebedhin** , HCCC No.332 of 1993, stating that:

> **"The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial"**

But the clearest statement of the law was restated by this Court in **Charterhouse Bank Limited (Under Statutory Management) V. Frank N. Kamau [2016]** eKLR, and on account of its relevance and importance we quote it *in extenso*, as follows;

“The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant’s failure to testify when he had filed a defence and a counter-claim. While the defendant’s failure to testify has fatal consequences for the counter-claim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities…..

In <u>Karugi & Another v. Kabiya & 3 Others</u> [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.

We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in <u>Karugi & Another</u> <u>v. Kabiya & 3 Others</u> (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgement, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis”.

To suggest that the minute a defendant who has participated in a trial does not call evidence, the plaintiff’s case is proved, would breed an absurdity. There are clear provisions in the Civil Procedure Rules where judgement will be entered in the manner suggested in some of those authorities enumerated in the above case. The essence of some of those authorities go against the letter and spirit of Order 12 that stipulates that;

“12. When only plaintiff attends [Order 12, rule 2.]

2. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—

a. that notice of hearing was duly served, it may proceed ex parte;

….

4. If only some of the plaintiffs attend, the court may either proceed with the suit or make such other order as may be just”.

Even where the defendant does not present evidence, the plaintiff must still present his or her case and prove it on a balance of probabilities in order to obtain judgment. The only other way that we know of, where judgments will be obtained summarily is when the defendant does not enter appearance or file a defence under **Order 10 rules 4**, or upon the respondent admitting the claim under **Order 13**, or where the defence is struck out pursuant to **Order 2 rule 15**, among others.

We may add too, that it is equally immaterial that some cases arising from the events of the period in question have been decided in favour of some of the victims. As the learned Judge noted, the appellants may well have been at the Freedom Corner on 3rd March, 1992; they may well have been brutalized by the police, but for the Court to agree with them, it was their burden to convince the court with cogent evidence. The case of **<u>Milka Wanjiku Kinuthia</u>** was decided on its own merit and evidence presented and does not offer a constant yardstick for all cases brought on the basis of the events presented in this appeal. Moreover, it is not documented in that case that the appellants were also present. Again, we cannot comment on its merit as it may be subject of an appeal. We have however come across two reported decisions of this Court from judgments of the High Court arising from the Uhuru Park events of 3rd March, 1992. In both appeals, the Court agreed with the learned trial Judge that the appellants did not present evidence to prove their claims and dismissed the appeals. See **<u>Michael Maina Kamami & another v Attorney General,</u>** Civil Appeal No. 189 of 2017 rendered on 6th day of August, 2019 and **<u>Priscilla Mwara Kimani & 2 others v</u> <u>Attorney General</u>**, Civil Appeal No. 190 of 2017 of the same date.

No purpose, in our view, will be served to consider the other grounds in the memorandum of appeal, suffice however to observe, with respect, that the learned Judge properly found that, in its many forms, torture is prohibited; and that there can never be any justification to subject a person to torture, which explains why it is one of those fundamental rights and freedoms that cannot be abrogated. Unfortunately, the appellant presented general evidence that was below per. The contents of the ***“Society Magazine,*** Issue No. 4” of 23rd March, 1992 and its lead story, ***“State Tyranny”*** served no useful evidential purpose without any material in it linking the appellants to the events complained of.

Finally, the Judge did not reject the action because it was filed after many years. We understand the concern the Judge was expressing to be that, the claim was an afterthought; that the reason proffered for the delay, that President Moi was still in power, was lame. The period spanning 11 years between 2002, when President Moi handed over power to 2013 when the petition was filed, was not explained. The Judge

was justified to conclude that the petition was an afterthought. He did not base that decision on the statute of limitations.

Though this may not sound pleasant, but for our part, we think, when the courts began to compensate political prisoners whose cases were genuine, clear and proven, floodgates appear to have been opened. An avalanche of petitions have been filed by everyone who may have had a brush, no matter how slight with the law and others who may just want to exploit the situation and reap where they did not plant. We do not see why the genuine claims should fail, but those who see this as a cash cow, where it is imagined that one would walk in and walk out with money, should except such outcomes as this.

The claims of the five appellants, just like those whose cases have been decided are a copy-and-paste work that betrays truth and reality. Nothing has been presented to warrant our interference with the conclusions made by the learned Judge.

This appeal lacks merit and is accordingly dismissed. Parties to bear their own costs.

Dated and delivered at Nairobi this 8th day of May, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR