IN THE COURT OF APEAL

AT NAKURU

[CORAM: OKWENGU, KIAGE & SICHALE, JJ. A]

CIVIL APPEAL NO. 97 OF 2016

BETWEEN

JOHN KIMANI GITAU.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru (Mshila, J) dated 5th June, 2015

IN

NAKURU HIGH COURT PETITION NO. 3 OF 2014)

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JUDGMENT OF THE COURT

John Kimani Gitau (the appellant herein) filed an appeal against the judgment of **Mshila, J** delivered on **5th June, 2015**.

A brief background to the appeal is that the appellant filed a Petition in the High Court of Kenya at Nakuru being Petition No. 3 of 2014 against the **Attorney General** (the respondent herein) seeking the following orders:

> ***"***
>
> ***(i) a declaration that the fundamental rights and freedoms of the petitioner (the appellant herein) were contravened and violated various times during the trial;***
>
> ***(ii) a declaration that holding the petitioner in police custody for twenty-one (21) days before taking him to court was unconstitutional;***
>
> ***(iii) a declaration that the trial of the petitioner without taking plea was illegal and unconstitutional;***
>
> ***(iv) a declaration that the three year period that the trial took was in contravention of the Constitution's provisions for speedy trial;***
>
> ***(v) a declaration that the petitioner's right to have a trial concluded without unreasonable delay was contravened when his appeal was determined after six years;***
>
> ***(vi) a declaration that holding the petitioner for twenty-one (21) days before arraigning him for retrial when the Court of Appeal had ordered that he be arraigned in court within 14 days was unconstitutional;***
>
> ***(vii) a declaration that charging the petitioner with the offence of murder and later arraigning him for retrial for the same offence only to enter a nolle prosequie as there had never been any evidence to uphold the charge is a gross violation of the***

petitioner's fundamental rights and freedoms;

(iii) general, exemplary and aggravated damages;

(ix) any other orders that the court may deem fit to grant and finally,

(x) costs of the suit and interest".

The petition was supported by the appellant's affidavit sworn on **24th January, 2014** in which he deposed that on **4th November, 2003**, he was arrested for the offence of murder contrary to section 203 as read with section 204 of the Penal Code; that he was held in custody until **25th November, 2003** when he was arraigned in the High Court at Nakuru; that when he was presented to the court, he was not given an opportunity to plead to the charge; that nonetheless, he was tried, convicted and sentenced to death; that the death sentence was commuted to life imprisonment by His Excellency, the President of Kenya; that the appellant was dissatisfied with the conviction and sentence and on **7th December, 2006**, he filed an appeal to this Court and his appeal was determined on **23rd February, 2012 (**after a period of six (6) years**)**; that the Court of Appeal found as a fact that the appellant was tried without plea taking and it set aside the conviction and sentence; that this Court further ordered that the appellant be arraigned in the High Court within fourteen (14) days of its judgment for a retrial; that again, the appellant was kept in remand for a period beyond fourteen (14) days and he was later taken to court after twenty-one (21) days for retrial and; finally, that the re-trial proceeded for some time and on **7th October, 2013,** a *nolle prosequie* was entered by the Director of Public Prosecutions (DPP). The appellant blamed the police for violating his right to be brought to court within fourteen (14) days for plea and the judiciary for violating his right to fair administrative action by failing to give him an opportunity to plead to the charges and further in the lengthy trial that took three (3) years (at the High Court) and six (6) years in the Court of Appeal. According to him these failings amounted to gross violation of fair trial under section 77 (1) of the retired Constitution.

In opposing the petition, the respondent entered appearance and filed grounds of opposition on **4th December, 2014** in which it opposed the petition contending that the appellant had not demonstrated how his rights had been infringed; that failure to take the appellant's plea was a mere procedural technicality which was corrected by the Court of Appeal and further that a *nolle prosequi* is a mere discharge, an administrative action which did not amount to an acquittal.

The petition was heard by **Mshila, J** and in a judgment delivered on **5th June, 2015,** the learned judge dismissed all of the appellant's complaints save the complaint that he was presented for plea after 14 days. The trial court awarded him Kshs 200,000.00 under this head.

The appellant was aggrieved by the findings of the honourable judge and in a Memorandum of Appeal dated **20th December, 2016** listed six (6) grounds of appeal which were argued before us on **19th February, 2020** when the appeal came up for hearing. In urging the appeal, **Mr. Morintat,** learned counsel for the appellant relied on the appellant's submissions and list of authorities both filed on **29th August, 2018**. The learned judge was faulted for failing to hold that the appellant was unlawfully held in custody for over a decade; for erroneously holding that the appellant had been held in custody for only seven (7) days hence arriving at a very low award as compensatory damages; for erroneously holding that the appellant was not tortured while in custody and not appreciating that torture was not only physical; that although the trial judge found that failure to take plea amounted to unfair trial, she failed to hold that the appellant was illegally held in custody for over nine (9) years; for failing to hold that failure to allow the appellant to take plea, the judiciary violated the appellant's rights to fair administrative action and finally, for failing to assess the damages and/or compensation to be awarded to the appellant hence arriving at a very minimal award. The appellant urged us to allow the appeal and have the global award of Kshs 200,000.00 awarded as damages enhanced together with interests from the date of judgment (**5th June 2015**).

In opposing the appeal, **Mrs. Cheruiyot**, learned counsel for the respondent highlighted the submissions and list of authorities filed on **18th February, 2020.** Counsel contended that although the matter was pending at the High Court for 3 years, the trial commenced on **4th May, 2004** and judgment delivered on **24th November, 2006**, and that the appellant contributed to the delay as during the trial he sought adjournments. In particular, in the period between **4thMay, 2004** to **24th November, 2006,** the appellant sought adjournments twice. As regards the period the appeal was pending in the Court of Appeal (between **7th February, 2006** when the appeal was filed and **23rd February, 2012** when the appeal was determined), counsel was of the view that this was not unreasonable. Further, the Court of Appeal ordered a retrial thus vindicating the appellant in his contention that his trial proceeded before plea-taking. Although the State entered a *nolle prosequie* during the re-trial, this was not an acquittal. It was her conclusion that the sum of Kshs 200,000 awarded was not low in the circumstances.

We have considered the record, the evidence adduced at the trial court, the rival written and oral submissions made before us, the authorities cited and the law.

This being a first appeal our mandate is as set out in ***Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:

"I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of a re-trial 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 the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif – vs- Ali Mohamed Sholan (1955)22 EACA 270".

The undisputed facts of this appeal are that the appellant was arrested on **4th November, 2003** and charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He appeared for plea on **25th November, 2003**. Thereafter, his trial was conducted by **Kimaru, J**. who found the appellant guilty and sentenced him to death as per the law then prescribed. The appellant was dissatisfied with the outcome of his trial and on **7th December, 2006**, he filed an appeal to this Court. The appeal was determined on **23rd February, 2012**. In its determination, this Court found that the appellant's conviction was not preceded by plea taking. Consequently, the Court ordered a retrial and further directed that the appellant was to appear for plea taking within 14 days of its judgment. According to the appellant this was not to be as he was presented to court after 21 days. Thereafter his re-trial commenced. However, on **7th October, 2013**, the State entered a *nolle prosequi*, thus terminating the appellant's re-trial.

The appellant's grievances are that upon his arrest, he was not presented to court within 14 days for plea taking contrary to Section 72 (3) of the retired Constitution. Section 72(3) of the repealed Constitution provided as follows:

"3. A person who is arrested or detained –

(a) …

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with".

It is not disputed that the appellant was not presented for plea taking until after the expiry of 21 days. The trial court rightly observed that the respondent failed to explain why the appellant was not arraigned in court within 14 days of his arrest. The court concluded:

"Without any explanation, I find that the Police, without any justification, failed to present the Petitioner to court within the fourteen days provided for by Section 72 (3) of the Constitution. The State is therefore liable for infringing the Petitioner's right to liberty".

In awarding the sum of Kshs 200,000.00 as damages, the court took into account other comparable, under this head. The trial judge stated:

"I have considered awards made in comparable cases. In Elly Onyango Gumba vs. Republic [2012] eKLR, the applicant was awarded Kshs 150,000.00 as general damages, after being detained for seven days after arrest. In Dick Joel Omondi vs. Hon. Attorney General (supra) the petitioner who was unlawfully detained and tortured was awarded in the global award of Kshs 250,000.000.00.

Taking all the above into account, I award the petitioner a global sum of Kshs 200,000.00 as damages".

We too think that the sum of Kshs 200,000.00 was reasonable compensation given the comparables under this head, and perhaps on the more generous side given the circumstances of this case. As there is no cross-appeal however; the less we say on it the better. Further, we note that in the decision of ***Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR*** this Court stated:

"Further, it is firmly established that this Court will be disinclined to disturb the finding 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 low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v. Rairrie [1941] 1 ALL E.R 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law. J.A 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".

Further, in ***Gitobu Imanyara*** (supra), it was held:

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 are 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".

As regards the complaint that the appellant's plea was not recorded before the commencement of the trial, again it is not disputed that when the appellant was found guilty, he (the appellant) filed an appeal and this Court found as a fact that the trial proceeded without the appellant's plea being recorded. It is on this basis that this Court quashed the appellant's conviction and ordered a re-trial. To this extent, the appellant was vindicated as this Court agreed with the appellant and allowed his appeal against conviction and sentence.

The appellant complained that the trial at the High Court took three (3) years and six (6) years in the Court of Appeal and he was of the view that this was excessively long, the respondent's position (which was not denied) is that during the trial at the High Court, the appellant sought for adjournment on two separate occasions. The adjournments undoubtedly occasioned the further delays. In addition, we take judicial notice of the number of criminal trials pending at the High Court and in our view, a trial that is concluded within 3 years cannot be said to have been unduly delayed. As regards the complaint that the appellant's appeal took 6 years to be concluded at the Court of Appeal, again, nothing turns on this. The appellate process begins by the filing of a Notice of Appeal. Thereafter, the entire record of proceedings at the trial court has to be typed. Sometimes, this takes long because of the pending backlog. Once in the Court of Appeal, the appeal is put on a queue. The appellant did not demonstrate that other appeals filed after his were heard and determined whilst his remained pending. Indeed, the trial Court rightly pointed out that ***"… it is noteworthy that at the time, there was a limited number of Court of Appeal Judges who were tasked with hearing appeal cases from all courts in the country***". We too, like the trial court, find that given the circumstances prevailing then, the trial was concluded within a reasonable time. We have gone through the record and we cannot fault the trial judge in coming to the conclusion as there was no proof of this delay.

As regards the lapse of 21 days after the Court of Appeal directed that the appellant be taken for plea taking at the High Court within 14 days, the trial judge found that:

"The petitioner failed to offer evidence that the court was indifferent to his predicament, despite any steps he took to prosecute his matter. He did not present the proceedings to show that the delay was not as a result of any act on his part. There was no allegation that the prosecutor stalled the hearing of the appeal".

We have gone through the record, and we cannot fault the trial judge in coming to the conclusion that there was no proof of this delay. The appellant tendered no evidence to support this contention.

Then there was the complaint that the appellant suffered torture during the period of incarceration. Again, the learned judge found that there was no proof of torture. However, the appellant faulted this finding on the basis that torture is not necessarily physical. Whereas we agree with the appellant that torture is not necessarily physical and that there can be mental torture, we find that there was no proof of this. Torture whether physical or mental has to be proved. It is not sufficient for a party to merely allege and expect to be compensated in absence of proof of his/her contention.

It is in view of the above that we are disinclined to disturb the award of Kshs 200,000.00 as damages.

We find no merit in this appeal. It is hereby dismissed. However, each party shall bear his/its own costs.

Dated and Delivered at Nairobi this 10th Day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR