IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 188 OF 2017

BETWEEN

MONICA WANGU WAMWERE.....APPELLANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Nairobi (Lenaola, J.) dated 15th *April, 2016*

in

Petition No. 196 of 2013)

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JUDGMENT OF THE COURT

Monica Wangu Wamwere (the appellant) filed a petition at the High Court's Constitutional and Human Rights Division on 15th May 2013 seeking redress on account of contravention and violation of her fundamental rights and freedoms. She described herself as an old lady having been born in the year 1930 and the mother of Koigi Wamwere; the famous politician and former political prisoner known for his ardent activism against human rights violations and his brother Charles Kuria Wamwere who was equally a political activist. Being the mother of two renowned activists during the Moi era brought her great pain and suffering.

The events constituting her suffering during the above mentioned period necessitated the Petition against the Attorney General (the respondent). It was pleaded that the appellant's fundamental rights and freedoms under Article 25 (a), 29 (a), 29 (c), 29 (d) and 29 (f), 39 (3) and 40 (1) (a) and (b) of the Constitution (formerly Section 74 and 75 of the repealed Constitution) were violated by various government institutions, agents and servants including specifically, the Kenya Police Force and the General Service Unit (GSU) as follows:

a. In June 1986, the appellant's house was razed down by Kenya Police Officers after she refused to persuade her son, Hon. Koigi Wamwere, to return to Kenya from Sweden where he had sought political refuge.

b. In October 1987, the appellant's house which was situated on Plot No. 308 at Migogo Chonjo was demolished and the property allocated to a Senior Criminal Investigation Officer.

c. Similarly, in August 1998, another house belonging to the appellant and her husband located in Mboroni was demolished and re-allocated to a Senior Officer at the Office of the President.

d. On 3rd March 1992, while at Uhuru Park's "Freedom Corner" in a peaceful demonstration for the release of her sons who were detained at the time. She and other women were brutally battered by Kenya Police Officers and those from the General Service Unit (GSU) which left them badly injured. They were subsequently arrested, detained for two (days) in police cells whilst deprived of food and were later released without any charges being preferred against them.

e. Further, on various dates between 4th March 1992 and 19th January 1993, while at a peaceful camp during a hunger strike staged

at the All Saints Cathedral grounds, Kenya Police Force and the General Service Unit (GSU) continued to attack the appellant and her fellow demonstrators throughout the ten (10) months.

The above instances were expounded upon and further particularized in the petition and in a detailed supporting affidavit sworn by the appellant on 15th April 2013 and a supplementary affidavit sworn on 18th June 2014. The appellant sought the following reliefs and remedies in the Petition:

a. A declaration that the Petitioner?s fundamental rights *and freedoms from torture were each contravened and grossly violated by the Respondent?s Kenya Police and* General Service Unit who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and times on 3*rd March, 1992 up to 19th January, 1993.*

b. A declaration that the Petitioner?s fundamental *rights and freedoms were controverted and grossly violated by the Respondent?s Kenya Police and General Service Unit officers who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and time when her houses were demolished and she was evicted from her plots in 1986, 1987 and 1988.*

c. A declaration that the Petitioner is entitled to the payment of general damages, exemplary and moral damages and compensation for the violations and contraventions of their fundamental rights and freedoms from the torture under Article 23 (3) of the Constitution, 2010.

d. General damages, exemplary and moral damages for torture.

e. Any further orders, writs, directions as this Honourable Court may consider appropriate.

f. Costs of the suit and interest.

In opposition, the respondent filed a replying affidavit deposed by Philip Ndolo, the Deputy Director of Operation in the Kenya Police Service, on 22nd May 2014. He denied all the allegations enumerated in the Petition and averred that appellant failed to disclose the Occurrence Book (OB) numbers of the alleged arrests and the identity of the police officers who allegedly violated her rights. The deponent also pointed out that the alleged violations occurred under the dispensation of the former Constitution and therefore the appellant could not rely on the provisions of the current Constitution since the same does not apply retrogressively. Finally, he cautioned that the respondent was highly prejudiced in defending the said allegations as they occurred more than twenty years previously.

The appellant filed its submissions accompanied by authorities and urged the High Court to award it a sum of Kshs. 50 million for general, exemplary and moral damages. The respondents filed submissions not accompanied by authorities and urged the Court to dismiss the Petition. Lenaola, J (as he was then) on the basis of those findings, delivered a judgment on 15th April 2016 and dismissed the Petition in totality.

The appellant, being dissatisfied with that judgment preferred an appeal to this Court. The memorandum of appeal contains sixteen (16) grounds condensed into five (5) complaining that the learned judge erred in law and in fact by;

a. Finding that there was not any evidence of violation of the appellant’s right to protection of property.

b. Failing to find as insufficient the evidence of torture and inhuman degrading treatment of the appellant.

c. Finding that there was inordinate delay by the appellant in instituting the Petition.

d. isregarding the weight of the uncontested affidavit which was unrebutted by the respondent.

e. Failing to award general, exemplary and moral damages as sought by the appellant.

When the appeal was listed for hearing, **Mr Gitau Mwaura** appeared for the appellant, while **Ms Gracie Mutindi** appeared for the respondent. Both parties had filed written submissions with only the appellant furnishing the Court with a list of authorities.

Mr. Mwaura submitted that the appellant gave an account of the perpetrators of the violations against her rights in her evidence and therefore did not solely depend on the articles from the newspaper cuttings alone as the learned Judge wrongly found. The appellant also filed a detailed affidavit on the same where she adopted it as her direct oral evidence. However, the state counsel did not cross- examine her and closed his case without calling any witness in support of his case. Counsel further argued that the reason given by the appellant for the delay in filing the Petition was sufficient. He urged the Court to allow the appeal.

The respondent’s counsel urged that the mistreatment suffered by the appellant which included being kicked and slapped did not amount to torture. Additionally, ***section 35*** of the ***Evidence Act*** on the admissibility of direct evidence does not cover newspaper articles. Counsel contended that the appellant did not provide any evidence of violation of her right to property and the Petition was filed more than 20 years later without any reasonable explanation.

We have carefully read and considered those rival submissions in light of the entire record and have and distilled the following as the issues to deal with; whether there was sufficient evidence of the violation of the appellant’s right to protection of property and of the torture and

inhuman degrading treatment of the appellant; whether the content of the uncontested and unrebutted affidavit was considered; whether there was inordinate delay in instituting the Petition; and whether the appellant deserves to be awarded general, exemplary and moral damages as sought.

The preliminary issue to be discussed is what amounts to torture, since this is the backbone of this appeal. The learned Judge dealt with this issue and relied on the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** in Article 1, which provides:

> **"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."**

From the foregoing and quotes from other publications, the learned Judge concluded that the law expects that an allegation of torture must encompass evidence of the severity of pain and suffering; reckless indifference to the possibility of causing the said pain and suffering; and must involve a public official. He further noted acts that do not cause extreme pain and suffering to an ordinary person are usually outside the ambit of the definition of torture. It is imperative to note that torture is not restricted to severe physical pain; it includes mental anguish and emotional distress. See **Moses Tengeya Omweno v Commissioner of Police & another [2018] eKLR**.

The appellant opined that the torture occurred while she peacefully demonstrated for the release of her sons and 51 other political prisoners together with other women. In her affidavit, she described the torture as being **"brutally battered with tear gases, boots and batons, slaps, rubber whips, kicks and blows all over my *body*"**. Additional torture occurred when she was arrested and detained at Embakasi Police Station and slept on the cold floor for two (2) days without food.

The question to be answered is whether the appellant proved that she was tortured as per the definition in the **Torture Convention**. We respectfully agree and reiterate the finding of the learned Judge that for there to be torture certain aspects of the claims need to be proven in court and from the record which we have carefully and anxiously considered, it is clear that the appellant failed to prove that she was severely injured. She did not produce an iota of evidence to convince the court of her untold suffering as the mother to two political activists. The learned Judge correctly expected the appellant to produce medical records to corroborate the claims. Additionally, the Judge pointed out that the general well-being of the appellant was not indicative of any after effects of the alleged torture.

Counsel for the appellant was convinced that the eyewitness account as given by the appellant and the subsequent newspaper cuttings were sufficient as proof of torture. We respectfully disagree: a party who files suit bears the burden and obligation to tender evidence to prove the elements that would assure success of the claim. Mere claims without solid evidence remain sentimental hopes which are no good. The appellant had an obligation to prove her case on a balance of probabilities and from the evidence before the court, and we say this not without sympathy and respect, it was not sufficient to prove that any form of torture was meted out against her. We echo the sentiments expressed in the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**

> **"It is not in doubt and we cannot deny the inhuman treatment, physical and mental torture, and losses suffered by the appellants in the hands of State agents. In no way can we down play the gory *violations of the appellants? dignity and liberty suffered in the climate of fear and terror created by the Government. However as a court of law we are constrained to apply the law based on the evidence presented before the Court."***

Additionally, the Court echoed the above in ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR;***

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."**

Still, on the issue of the newspapers, the appellant specifically relied on three (3) articles from a newspaper known as *The Society* published on 23 March 1992, titled; "The Time Is Now", "State Tyranny, Suffering With Bitterness" and "The Gallant Sons of Kenya" in support of her case. Her counsel argued that the articles together with her oral evidence and the uncontroverted affidavit were sufficient to prove the appellant's case. In opposition the learned State Counsel pointed out that newspaper articles are not covered under **section 35** of the **Evidence Act**. We also have jurisprudence that shows this Court's position on newspaper articles produced in court in evidence which we adopt in;

Gitobu Imanyara& 2 others v Attorney General (Supra) the Court stated;

> **"In Wamwere vs The A. Gand Randu Nzau Ruwa & 2 Others–vs-Internal Security Minister & Another [2012] eKLR; If we may borrow the words of the court in the Ruwa case, with tremendous respect to the appellants, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the 2nd appellant to demonstrate losses he suffered."**

A similar position was held in the case of **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR** by the Court;

> **"On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of Laxmi Raj Shetty -v-State of TamilNadu1988 AIR 1274, 1988 SCR (3) 706, the Supreme Court held that a newspaper is not admissible in evidence."**

The appellant further claimed that she was arrested and detained for two (2) days at the Embakasi Police Station. There she claimed that she slept on the floor and went without food until she was released from the cells with no charges preferred against her. On whether this amounts to torture, we adopt the holding in ***Koigi Wamwere v Attorney General [2015] eKLR*** where this Court held that being held in a prison under deplorable conditions does not per se amount to torture;

> **"We take the view, as did the learned judge, that whereas prison conditions as picture-squarely described by the appellant left a lot to be desired and cried out for reform, the treatment suffered by the appellant in common with the other inmates, whether in detention or in prison, did not amount to torture as legally defined."**

We also note that the Petition was filed 20 years from when the last alleged violation took place. The appellant stated that the reason for the delay was that she did not have faith in the Judiciary under the old constitutional disposition and especially under the Moi regime. The learned Judge took issue with the explanation given for the delay by the appellant. He noted that since 2003 after end of the Moi era, many aggrieved persons approached the courts seeking redress for their constitutional violations. We dare say, that the appellant's famous son Koigi Wamwere filed his case in 2008, before the promulgation of the current Constitution. In any case, the said promulgation took place in 2010 yet the appellant filed her Petition in 2013 and that delay has not and indeed cannot be sufficiently explained. We have no difficulty agreeing with the learned Judge that the delay was inordinate and cannot be cured. It is apparent that the petition was no more than a speculative afterthought.

The appellant further claimed that the police razed down her house in 1986, 1987 and 1988. As a result two of her houses were demolished and the properties re-allocated to Senior Government Officials. However, she did not indicate who demolished the said houses nor how and to whom the re-allocation took place. The learned Judge noted the failure by the appellant to produce evidence pertaining to the ownership of the said parcels of land that were allegedly re-allocated to other Senior Government Officials. Moreover nothing was placed before the court to show that the appellant was the owner of the same. He concluded that there was an evidentiary vacuum. Having ourselves perused the record, it is impossible not to conclude that the appellant failed to discharge her burden of proof as provided for in **section 107** of the **Evidence Act**;

> **1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

In the case of **Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR**, the Court expounded on section 107 and 109 of the Evidence Act as;

> **"The standard of proof is on a balance of *probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:-"That degree is well settled. It must carry a* reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: *„We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

It was urged by the appellant's Counsel that the learned Judge erred by closing his eyes to the uncontested affidavit evidence which was wholly adopted as the appellant's oral evidence. It was his assertion that the same gave sufficient particulars of the inhuman and degrading treatment suffered by the appellant. He added that the law is that the greatest weight is given to the probative and uncontested evidence by affidavit where it has been adopted as oral evidence. Counsel alleged that the appellant was not cross-examined by the State Counsel during the hearing of the matter. However, from the record, this is far from the truth, as page 93 shows that one Mr Moimbo who was on record for the respondent actually cross-examined the appellant albeit briefly, cursorily even.

The appellant's Counsel urged since the respondent failed to call the maker of the replying affidavit to rebut the appellant's then the affidavit as filed by the appellant constituted the correct factual position because it was uncontested.

The arguments presented by the appellant's Counsel are misleading, to say the least. A court is under duty to conduct formal proof of proceedings and apply the law on the facts and evidence before it, whether or not they suit has been defended. A claimant must prove his case to the required standard before he can obtain relief. Thus the learned Judge was discharging his duty while interrogating the facts and the evidence placed before him before coming to a lawful, logical conclusion. This was well put in **Gitobu Imanyara & 2 others v**

Attorney General (Supra)

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. See Mwangi Muriithi (supra)and Mumbi M'Nabea v. David Wachira Civil Appeal No. 299 of 2012."**

The appeal having failed on each ground, our view is that there is no need for us to address the issue of the award of award general, exemplary and moral damages as it has now become redundant.

Finally, Counsel for the appellant complained that the learned Judge was biased when he personally addressed him after delivering the Judgement and saying that the Government does not have money to pay victims of torture. As a matter of principle, we shall not indulge on this allegation as it can only be termed as hearsay. We have no jurisdiction to address such matters that are not on record, are irreparable of verification and were probably said, if said they were, entirely off the cuff, post-judgment and within a context that has not been disclosed.

All said this appeal is entirely without merit and we accordingly dismiss it. In view of the nature of the case, we order each party to bear their own costs.

Dated and delivered at Nairobi this 28th day of June, 2019.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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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