IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 218 OF 2016

BETWEEN

JOSEPH NJUGUNA NJOROGE.....APPELLANT

AND

HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS....3RD RESPONDENT

(Being an Appeal from the Judgment of the High Court (D.S. Majanja, J) dated 26th *May, 2014 in Constitutional Petition No. 151 of 2013)*

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JUDGMENT OF THE COURT

At the heart of this appeal are allegations of assault and violations of constitutional rights and fundamental freedoms of the appellant by a police officer, Paul Mutia, in the course of his arrest. It was the appellant's case that on 11th March, 2001, he met with three of his friends at Oil Man Café situated in Banana area within Kiambu County for an evening cup of tea after work. At around 9.00pm, upon leaving the said café for their respective homes, they met four police officers who stopped them and proceeded to handcuff them in pairs. The appellant sought to know from the officers why they were being arrested. Instead of an answer, they were beaten by one of the officers while being frog marched to the police station. The beating continued at the police station where the same officer kicked the appellant directly on his face and injured his eye from which he bled profusely. He had to be taken to Karuri Health Center for treatment by some other officers at the station while his friends were locked up in the cells. Due to the severity of his injury, he was transferred to Kiambu District Hospital and later Kenyatta National Hospital where he was treated and discharged the next morning. Upon his release from hospital, he went back to the police station and was issued with a P3 Form. He subsequently filed a complaint against the officer who assaulted him. On 26th March, 2011 at a police mounted identification parade, the appellant identified the officer who assaulted him. His friends also positively identified the officer. However, no action was taken against the officer, even after the parade. This precipitated the filing of a petition by the appellant before the High Court against the respondents for alleged violations of his fundamental rights.

The respondents, for their part, denied these allegations but conceded that the appellant was arrested and in the process was injured. It was their case that four officers were on patrol that night at Banana trading center following complaints that a group of people were extorting money from motorists at the Banana Matatu terminus; that the appellant and his friends were among the seven people suspected of touting and were arrested; that upon their arrest, the appellant got injured while entering the police station and was rushed to Karuri Health Center. According to the officer who investigated the incident, the appellant got injured when a group of people attempted to rescue him through the barbed wire fence of the police station; and that in the process, the appellant slid, fell and injured his right lower eye lid. To the respondents, therefore no wrong was committed by any of the officers who effected the arrest of the appellant and his colleagues.

The petition was presented before Majanja, J. who found that although there was no evidence of torture in the strict sense of the word, the appellant established that in the course of his arrest he was assaulted; and that his rights under **Article 29(a)** and **(c)** of the Constitution were therefore violated. The Judge rejected the allegation that the appellant was injured during a scuffle by people who wanted rescue him. He came to the conclusion that;

> **"On the evidence, I find that the petitioner has established that on the balance of probabilities he was assaulted by a police officer while he was in the custody of the police. DW 2 testified on the basis of police reports and statements but such statements and the Occurrence Book were not produced in evidence. None of the policemen who were involved was called to**

give evidence. The results of the identification parade were not produced. In the circumstances, I am entitled to draw an adverse inference that in fact it is likely that the assault that the petitioner and his witnesses described took place. I also find the evidence of the petitioner and his witnesses was clear and consistent."

Violations of the appellant's rights having been proved, the Judge awarded him the sum of Kshs. 200,000 as compensation.

The appellant found the award inadequate and has lodged this appeal on three grounds, which in our judgment translates to whether the award of Kshs. 200,000 was manifestly and inordinately low in view of the nature of the injuries sustained by the appellant.

Satisfied by comprehensive submissions filed in this Court, parties found no need to highlight them and instead urged us to consider them in our judgment.

In his submissions, the appellant pointed out that, given the grave extent of his injuries, which included lacerations on the right upper and lower eyelid, he was entitled to more than was awarded; that his treatment by the police amounted to torture; and that as a result of the injury to his eye, he now suffers from excessive watering of the eye which in turn may require surgical revision in future. Giving as an example the case of **Jemima Njira Ndereva V. Rich Food Products Limited** & **Anor**, Nairobi HCCC No. 2552 of 190, where the plaintiff had been awarded Kshs. 170,000 as costs for future operation in additional damages for injuries similar to those suffered by the appellants, the appellant urged that a sum of Kshs. 450,000 would be sufficient general damages to cater for both pain and suffering endured and the costs of future surgical revision of his eye.

The 1st respondent, for his part, was quite satisfied with the award and asked us to dismiss the appeal.

As the Court has repeatedly said of first appeals from the High Court, this Court is enjoined to consider the evidence on record, evaluate it itself and draw its own independent conclusions though it ought always to bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. See **Kenya Ports Authority versus Kusthon (Kenya) Limited** 2000 2 EA 212.

As we have pointed out, the only issue in this appeal is on the adequacy or otherwise of the award. To the appellant, he was tortured and suffered serious injuries which ought to have attracted more commensurate damages.

In prayer (b) of his petition, the appellant sought a declaration that the brutal and indiscriminate beatings amounted to torture, inhuman punishment and/or degrading treatment. The learned Judge was however of the view that there was no evidence of torture as defined under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and in terms of the holding in the cases of **Republic V. Minister for Home Affairs and Others ex parte Sitamze** [2008] 2 EA 323 and **Frankline Kithinji Muriithi V. Loyford Riungu Muriithi and Others,** Nyeri Civil Appeal No. 43 of 2013.

Article 1 of The United Nations Convention against Torture and other Cruel and Inhuman or Degrading Treatment, defines 'torture' as;

"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."

From the evidence of the assault and the medical report, with respect, we agree with the learned Judge that the threshold of torture as defined above was not attained. Torture, cruel and inhuman treatments are terms of art which have acquired a specific meaning drawn from international law. The acts complained of by the appellant do not amount to torture.

Like the Judge, we are persuaded from the facts of this case that the appellant was, for no justification at all assaulted by a police officer. Because torture, cruel and inhuman treatments have specific meaning based on international law, an assault such as the one the appellant was subjected to can only be treated as a common form of violence which is prohibited by **Article 29(c)** of the Constitution which stipulates that;

"29. Every person has the right to freedom and security of the person, which includes the right not to be—

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(c) **subjected to any form of violence from either public or private sources".**

In awarding damages, the Judge exercised judicial discretion which we cannot lightly interfere with unless it is shown that he failed to apply the correct principles. This was well enunciated in the case of **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini V. A.M. Lubia and Olive Lubia** (1982 –88) 1 KAR 727 at p. 730 as follows:

"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."

In addition, and as this Court explained in **Gitobu Imanyara & 2 others V. Attorney General** [2016] eKLR, the court's discretion for award of damages in constitutional violation cases 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 learned Judge obviously had these principles in mind. Bearing in mind that there was no justification at all for arresting the appellant, in view of the injuries he sustained and considering that the appellant may need future medical attention, we are of the view that the award of Kshs. 200,000 was on the lower scale.

The injuries in cases of **Jemima Njira Ndereva V. Rich Food Products Ltd** & **Anor**, HCCC No. 2553, cited by the appellant were more severe than those of the appellant and an award of Kshs. 825,950 in that cited case was appropriate. Here the appellant has asked us to enhance his award to Kshs. 450,000. This request is not unreasonable. Accordingly, and to the extent stated the appeal succeeds. We set aside the award of Kshs. 200,000 and in its place grant Kshs. 450,000 which in our own assessment is sufficient to vindicate the appellant and cater for his future treatment.

We award interest on the sum at court rate from the date of judgment of the High Court and costs to the appellant.

Dated and delivered at Nairobi this 8th day of November, 2019.

W. OUKO, (P)

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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