



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M. KOOME, G. B M. KARIUKI & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 163 OF 2014

BETWEEN

THE HON. ATTORNEY GENERAL.....APPELLANT

AND

JAMES ALFRED KOROSO.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (J.B. Ojwang, J.) dated 22nd February, 2008 in

H.C.C.C No. 2966 of 1996)

JUDGMENT OF THE COURT

Background

1) This is an appeal from the judgment of the High court (J.B. Ojwang, J. (as he then was), delivered on 22nd February 2008 in which the learned judge awarded **JAMES ALFRED KOROSO** (the respondent herein), general damages for the torts of false imprisonment and malicious prosecution, violations of constitutional rights, exemplary damages and costs of the suit with interest at court rates from the date of filing suit against the **HON. ATTORNEY GENERAL** (the appellant herein).

2) The Respondent, who was the Plaintiff in the High Court, filed a Plaint dated 15th November 1996 seeking the following prayers:

a) Special damages to be stated at the hearing.

b) General damages on the footing of aggravated and exemplary damages for wrongful arrest, false imprisonment, malicious prosecution, assault and battery.

c) Costs and interest.”

3) During the hearing at the High Court, the respondent testified that he was a Tanzanian business man carrying on diverse businesses in Tanzania; that on 17th December, 1993 he received a request from the Officer Commanding Station (OCS), Taveta, in Kenya to travel to Kenya; that he obliged and met the OCS and 2 other police officers who informed him that he was suspected to have purchased a stolen lorry (*the stolen motor vehicle*); that he was physically assaulted and deprived of his freedom and movement, wrongfully detained and moved to different parts of Kenya and that he was maliciously prosecuted.

4) The respondent further testified that he was held *incommunicado*; that he was charged with the offence of robbery with violence and was denied bail; that the prosecution did not adduce any evidence to link him to the robbery of the stolen lorry yet he adduced evidence that he was not in Kenya at the time the lorry was allegedly stolen in Kenya; that he sustained serious injuries at the hands of police officers resulting in his ill health and that his businesses and family were adversely affected during the time of his incarceration in Kenya.

5) Five other witnesses testified in support of the appellant including **John Fredrick Njau**, an Executive Assistant at Kiambu Law Courts who testified that the register of cases indicated that the respondent had been acquitted in Kiambu Law Courts Criminal Case No 73 of 1993 under Section 210 of the Criminal Procedure Code. **Dr Manasse Ndakalu**, testified that he examined the respondent who presented a history

of assault to which he had been subjected to between 18th December 1993 and 23rd December 1993 in the course of which he suffered injuries to his chest, head and back. **Mrs Elizabeth James Koroso**, the respondent's wife testified that shortly after her husband's arrest she was informed of his arrest and travelled to Kenya; that the respondent was in poor health having been severely assaulted during arrest and confinement; that the family and businesses were adversely affected during the time the respondent was incarcerated and that she was compelled to travel to Kenya on several occasions at great expense. **Alexander James Koroso**, the respondent's son testified that he had to leave home to live with an uncle and that the family suffered financial hardship during their father's incarceration in Kenya:

6) In its Defence dated 11th September, 1997 the appellant denied the allegations that on or about 17th December, 1993, police officers from the criminal investigations Department of the department of Police in Kiambu arrested the respondent without justifiable cause and placed him in custody in various police stations in Kenya without his consent, depriving him of his liberty and freedom; the appellant further denied that the said police officers wrongfully and unlawfully subjected the respondent to inhuman and degrading treatment and wrongfully, unlawfully and in contravention of the Constitution of Kenya physically assaulted the respondent and inflicted grave personal injuries on the respondent.

7) The appellant further denied that the arrest and remand of the respondent by police officers was without any justification, or driven by malice; the respondent was arrested and arraigned in a court of law and charged with the offence of robbery with violence in Kiambu Magistrate's **Criminal Case No. 73 of 1993** after he was reasonably suspected to have committed an offence. However on 7th December, 1995 the respondent was found not to have a case to answer and was acquitted under Section 210 of the Criminal Procedure Code and discharged; that did not mean the charges were baseless and malicious and without any reasonable foundation but that they did not meet the test as set out in the law. The appellant further denied that the police officers acted and/or purported to be acting as police officers in the course of their employment and within the scope of their authority and that the appellant is liable for the said unlawful acts. The appellant denied the particulars of injuries claimed as 2 broken limbs, loss of income from business, damages and legal expenses in Criminal Case No 73 of 1993.

8) The learned trial Judge considered the evidence and the oral written submissions by counsel and held in favour of the respondent and awarded damages as follows:-

1) (i) the torts of false imprisonment and malicious prosecution - Kshs. 10,000,000/=,

(ii) violations of constitutional rights=Kshs. 10,000,000/=,

(iii) exemplary damage = Kshs. 1,000,000/=,

2) The defendant shall pay the plaintiff's costs of the suit, which shall bear interest at Court rate, as from the date of filing suit.

The learned Judge declined to award special damages as prayed.

9) Aggrieved by that decision, the appellant preferred this appeal based on the grounds of appeal *inter alia* that the learned Judge erred in law and fact by:-

a) *Finding that the Respondent's claims for physical injuries, malicious prosecution and false imprisonment were proved on a balance of probabilities when no evidence of such was tendered before the Court.*

b) *Disregarding the statement of Defence filed by the Appellant and proceeding to determine the suit as if the same were a formal proof.*

c) *Finding that the Respondent's claim for false imprisonment was proved on a balance of probabilities despite the failure by the Respondent to adduce any evidence to support this claim.*

d) *Holding and finding that the claim for malicious prosecution was proved on a balance of probabilities when no evidence of malice was tendered by the Respondent.*

e) *Failing to find that any prosecution proceedings before the subordinate Court could only be proven by the production of certified copies of proceedings and subsequently relying on the same as proof.*

f) *Finding that the Respondent ought to have been extradited to Kenya despite evidence pointing to the Respondent having entered Kenya lawfully.*

g) *Awarding inordinately high sums of damages to the Respondent totaling Kshs. 10,000,000.00 on the heads of false imprisonment and malicious prosecution without any comparable decisions.*

h) *Awarding to the Respondent damages totaling to Kshs. 10,000,000.00 on the head of violation of constitutional rights when no such damages were pleaded for in the Plaint and despite the fact that the same could only be awarded by a Court sitting pursuant to Section 84 of the retired Constitution.*

i) *Awarding high sums of damages totaling to Kshs. 21,000,000.00 thus failing to balance the interests of the Respondent and the countervailing public interest of the Appellant to prosecute suspected criminals.*

10) The appellant sought the following orders:

a) That this appeal be allowed.

b) That the judgment and decree of the learned Judge be set aside and the Suit by the Respondent before the High Court be dismissed.

c) That the costs of this appeal and the costs in the High Court be awarded to the appellant.

d) That this Honourable Court be pleased to make such orders as will meet the ends of justice.

e) Any other order or further order as this Court may deem appropriate.”

Submissions:

11) During the hearing of the appeal, learned counsel, **Ms. Wambui** appeared for the appellant while **Mr. Njau Kayai** represented the respondent. Pursuant to Rule 100 of the Court of Appeal Rules, counsel urged that the appeal be disposed of by way of written submissions.

The Appellant's Submissions

12) Learned counsel for the appellant submitted that the learned Judge erred in finding that the respondent had proved his claim for physical injuries when there was no evidence tendered to prove that there was any connection between the respondent's injuries and the alleged acts of torture committed by the police. Developing the argument further, counsel submitted that the respondent was suspected of the offence of robbery with violence under the Penal Code and was arrested and charged for the same offence; that he was lawfully detained during the pendency of the case; that there was no unlawfulness in his arrest or imprisonment as that was conducted in the normal penal and judicial process; that the respondent was found in possession of the stolen motor vehicle and there was therefore sufficient probable cause to arrest the Respondent and a claim for unlawful arrest and imprisonment cannot hold.

13) It was the appellant's contention that the learned Judge erred in finding that the respondent had proved his case for malicious prosecution despite there being no evidence to support this claim; that the mere fact that criminal proceedings were terminated in favour of a person claiming malicious prosecution is not by itself sufficient cause to succeed under such a claim; that there must be evidence of malice; that the Police acted well within their duties with probable cause to arrest and charge the Respondent and had no spite or ill-will against the respondent; that the respondent did not prove or demonstrate that there was any ill-will or malice or spite by the police officers against him in the prosecution of the criminal offence.

14) On the award of damages, counsel for the appellant submitted that the respondent had not proved his case on a balance of probabilities and was therefore not entitled to any award of damages and that the award was so inordinately high and without justification as to beg intervention by this Court; that the learned trial Judge did not give any justification for an award for false imprisonment and malicious prosecution and that the learned trial Judge did not base the award or any precedent for any special circumstances that would justify this and neither was the award comparable to any other awards for similar claims. Counsel further submitted that the trial Judge awarded the respondent damages for violation of Constitutional rights which had not been claimed by the respondent in his Plea; that a party is bound by its pleadings; that this was a claim in tort and the enforcement of Constitutional rights should not have been considered by the trial court; that the trial court should not have awarded damages for violation of Constitutional rights as the court was not constituted as a Constitutional Court; that general damages include exemplary and aggravated damages and are not awarded separately and that the award for exemplary damages should also fail as this would amount to double compensation.

15) On procedural and evidentiary grounds, the appellant contended that the learned trial Judge completely disregarded the defence filed by the appellant and did not give any weight or credence to it; that the defence was properly on record and the trial Judge was bound to consider it during his determination but failed to do so; that the Court put a lot of weight on the evidence of John Fredrick Njau, a Court Registrar to determine the existence of the criminal case against the respondent without any documentary proof of the same; that accordingly, the respondent did not discharge the evidentiary burden and his claim should therefore fail in totality. Counsel urged us to allow the appeal with costs.

The Respondent's Submissions

16) Counsel for the respondent submitted that the respondent suffered injuries in the hands of the appellant's agents or servants; that the respondent's evidence, and that of his witnesses remained uncontroverted; that the respondent testified that he was assaulted by 2 police officers and the complainant who claimed that his lorry had been stolen; that the respondent also produced a Doctor's report which proved that he had suffered injuries; that the Doctor who had examined the respondent also testified and produced a Medical Report which corroborated the respondent's testimony regarding the injuries that he suffered; that the respondent's wife **Mrs. Elizabeth John Koroso** also testified and corroborated the respondent's evidence and that of his witnesses. It was the respondent's further submission that the complainant together with the police officers assaulted him causing him injuries which clearly was not part of the normal performance of the duties by the police officers as the appellant claimed and that there was no reasonable or probable cause for the arrest and the subsequent charges against the respondent; that the appellant's submission that there was sufficient probable cause to arrest the respondent because he was found in possession of the stolen motor vehicle is not supported by any direct or circumstantial evidence; that on the contrary, the overwhelming evidence adduced by the respondent defeats such submission and there was no justification for the respondent's arrest and subsequent charges; that no evidence of the basis for the arrest and charges were laid out by the appellant; that the appellant's actions were baseless but caused immense injury to the respondent; that the respondent proved his claim for unlawful arrest and false imprisonment.

17) On the issue whether the respondent proved his claim for malicious prosecution, counsel for the respondent submitted that the test for

proving malicious prosecution was laid out in the case of **George Masinde Murunga V Attorney General (1979) KLR 138**; that the respondent proved each of the stipulated requirements; that the respondent was lured from Tanzania to Kenya by police officers, tortured all the way from Taveta to Kiambu, denied medical treatment or access by his close relatives before being charged; that this evidence was not challenged and it all points to malice by the police officers; that there was no justification for the intentional illegal and unfair treatment of the respondent by the police officers and the prosecutor and that they were actuated by malice.

18) On the award of damages, the respondent submitted that contrary to the appellant's submissions, the respondent proved his case on a balance of probabilities and his case was not challenged; on damages, the respondent submitted that the award of the same is an exercise of judicial discretion; that the trial judge did not misdirect himself in any matter, and was not wrong in the exercise of his discretion; that in assessing general damages, a judge is not bound by precedents, he is only bound by the facts of the case and comparable awards; that even though the trial judge did not quote any comparable awards, recent awards show that the general damages awarded were not out of range and were reasonable.

19) It was counsel's further submission that the learned Judge took note that the respondent's constitutional rights were violated as the torts of false imprisonment and malicious prosecution were being meted out on the respondent, that the trial court found that the respondent's constitutional rights were violated; that in as much as the same were not directly pleaded, the respondent had pleaded for general damages for wrongful arrest, false imprisonment, malicious prosecution, assault and battery in his Plea; that the respondent had led clear evidence to the breach of such rights; that the issue of the breach of the respondent's constitutional rights was left to the court to decide; that an unpleaded issue can become an issue in a suit if it appears from the course followed at the trial that the issue has been left to the court for decision and that therefore, the learned trial Judge did not err in considering the breach of the respondent's constitutional rights and awarding damages for the same.

20) Regarding the amount awarded, counsel submitted that Kshs 21, 000,000 was not so excessively high as to make it an entirely erroneous estimate of the damages to which the respondent is entitled; that in a case where malice is established, the judge is well within the law to punish the defendant for such malice by awarding exemplary damages; that in the instant appeal, all essential elements for award of aggravated damages existed and the award of Kshs 1,000,000 was founded on a proper appreciation of the law and this aspect of the judgment should therefore not be interfered with; that the learned Judge's award of exemplary damages was well founded as the respondent had successfully proved malice on the part of the police officers.

21) On procedural and evidentiary grounds; counsel for the respondent submitted that in view of the fact that the appellant did not call any evidence, the Statement of Defence on record contains mere denials and allegations which cannot stand against the cogent evidence adduced by the respondent; that it is an erroneous view that termination of criminal charges can be proved by the criminal proceedings and judgment; that there is no such legal evidentiary requirement and the submission is baseless; that the respondent called John Fredrick Njau, an Executive Officer Assistant at Kiambu Law Courts who produced the court register as an exhibit indicating that the respondent was acquitted in Kiambu Criminal Case No 73 of 93 and who testified that the file could not be found; that the appellant did not challenge the court register or the evidence of PW2 and cannot seek to do so at this stage; that the respondent proved his arraignment in court; that the appellant claimed in its Memorandum of Appeal that no Notice of intention to sue was produced by the respondent and that the suit before the High Court was incompetent and fit for striking out; that this is a misleading ground in light of the appellant's Written Statement of Defence dated 11th September 1997 which clearly indicated that the Notice of Intention to Sue had been received.

22) Counsel for the respondent concluded by submitting that the respondent had demonstrated that the judgment of the learned trial Judge was sound, based on facts and the correct interpretation of the law; that the respondent suffered at the hands of police officers, was maliciously prosecuted, and it is only fair that he be let to enjoy the fruits of the resultant litigation well knowing that no amount of damages "can erase the scarring of the soul and the deprivation of dignity" that he underwent. Counsel urged us to dismiss the appeal with costs to the respondent.

Determination

23) This is a first appeal and it is trite law that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court and the principles upon which this Court acts in such an appeal are well settled. 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 neither saw nor heard the witnesses and should make due allowance in this respect. See **Selle and Another V Associated Motor Boat Company Limited and others** [1968] EA 123.

24) In the case of **Abok James Odera T/A A.J Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR, this Court stated as follows:

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

25) In the discharge of our mandate of evaluating the evidence placed before the High Court, we are guided by the case of **Peters V Sunday Post Limited** [1958] EA 424 where the predecessor to this Court stated as follows:

"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 or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide..."

26) We are also guided by the principle enunciated in the case of **Rook V Rairrie** [1941] 1 ALL E.R. 297 which was cited with approval in

the case of **Butt v Khan [1981] 1KLR 349** when it held as per Law, JA as follows:

“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”.

The foregoing are the guiding and legal principles which will guide us in the determination of this appeal.

27) We have considered the judgment of the trial court, the record of proceedings, the written submissions of both counsel, the authorities cited and the law. On the contention that the learned Judge disregarded the statement of defence filed by the appellant and determined the respondent’s suit as if the same were a formal proof, the learned trial Judge in his judgment stated as follows:

“A landmark element in this suit, which has already been remarked, is that the defendant (the appellant herein) conducted the defence, in many respects, as a pure formality. The statement of defence itself was denial, and more denial; and thereafter, no witness was called to respond to the testimonies of the plaintiff’s (the respondent herein) six witnesses...the defence strategy clearly left the plaintiff’s case to propel itself by its own momentum, free of the constraint of defence challenges.”

28) From the record, the appellant did not call any witnesses and did not adduce any evidence in support of the assertions made in its statement of defence or to controvert the respondent’s case. It is instructive that the appellant did not call the complainant, the owner of the alleged stolen motor vehicle as a witness.

Further, the investigation diary by the police officers or any other documentary evidence were not adduced in court to demonstrate that the police officers were performing their normal duties in their interaction with the respondent. To the contrary, the respondent testified that the complainant and police officers assaulted him, causing grievous injuries. The respondent’s evidence was corroborated by the evidence of several witnesses. It is also instructive that the respondent testified that he had not bought the alleged stolen motor vehicle and that there was no evidence that he was in Kenya when the lorry was allegedly stolen or disposed of. The respondent produced his passport in evidence to prove that he was not in Kenya in November, 1993 when the motor vehicle is alleged to have been stolen or disposed of in Kenya. There was no direct or circumstantial evidence linking him to the offence and he was acquitted of the charges under Section 210 of the Civil Procedure Code. In the circumstances of this case, we therefore find that the learned Judge did not err when he found that the evidence adduced by the respondent remains uncontroverted. We are fortified in so finding by the case of **Edward Muriga through Stanley Muriga V Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, where this Court stated:

“In this matter; apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

See: **Kenya Power & Lighting Company Limited v Pamela Awino Ogunyo [2015] eKLR.**

29) The learned trial Judge found that the remedies in regard to the respondent’s case is founded on the Constitution and on tort law. Specific assertions were made in the two spheres of law and evidence was adduced to support the claims. It was the respondent’s case that the alleged assault and restriction was a violation of his constitutional rights and as such amounted to inhuman and degrading treatment in contravention of Section 74(1) of the retired Constitution which provided that:-

“no person shall be subject[ed] to torture or to inhuman or degrading punishment or other treatment.”

30) The learned trial Judge found, that for the police officers to cause the respondent to depart from his home and go into hardship and harm was wrongful and actionable. Further, that beyond this, the respondent’s constitutional liberties were severely compromised which was wrongful and actionable.

On the respondent’s claims in tort, the learned trial Judge found the respondent’s claim in tort under the heads of assault and battery and false imprisonment, were supported by sufficient, un rebutted evidence which proved the respondent’s case on a balance of probabilities; that the allegation that the respondent was continually assaulted and battered over a long period of time, had evidence to support it and no evidence against it and the evidence of false imprisonment stood unchallenged. Further, the learned Judge found that the torts of false imprisonment and malicious prosecution are closely related and were in his view sufficiently proved by the respondent.

31) In the circumstances of this case, the learned Judge held, that the drawing of a Tanzanian citizen (the respondent herein), ill-treating and confining him and later charging him with offences in a Kenyan court were both intentional and wanting in just cause and excuse. The learned Judge referred to a similar case, **Thomas Mboya Oluoch & Another, Nairobi HCCC No 1729 of 2001** where he held that:

“If an alleged offender is in a territory other than the state seeking to exercise jurisdiction, the lawful method of securing his return to stand trial is to request his extradition. Extradition is the handing over of an alleged offender (or convicted criminal who has escaped before completing his prison term) by one state to another.”

32) The learned Judge found that from the record there was no evidence of a request by the Kenyan law-enforcement authorities for the extradition of the respondent herein in connection with any known offence, his removal from his country to be incarcerated and prosecuted in Kenya, must be held to have been guided by malice for purposes of the law. Consequently, the learned Judge found, correctly in our view, that the claims of false imprisonment and malicious prosecution to have been sufficiently proved by the respondent in this case. On the issue

whether the respondent proved his claim for malicious prosecution, we are guided by the case of **George Masinde Murunga v Attorney General (supra)** where this Court laid down the 4 conditions which must be fulfilled for a claim of malicious prosecution to succeed:-

- “a) That the prosecution was instituted by the police officers;*
- b) That the prosecution terminated in the plaintiff’s favour;*
- c) That the prosecution was instituted without reasonable and probable cause; and*
- d) That it was actuated by malice.”*

33) From the record, we note that the respondent fulfilled all 4 conditions as follows;

- a) The prosecution in Kiambu Criminal Case No 73 of 93 against the respondent was instituted by police officers from the Criminal Investigation Department of the Department of Police in Kiambu who are represented by the Appellant;*
- b) The prosecution was terminated in the respondent’s favour. The respondent testified that he was acquitted of the charges of robbery with violence and handling stolen property under Section 210 of the Criminal Procedure Code. This evidence was corroborated by PW2, John Fredrick Njau, the Executive Officer Assistant in Kiambu Law Courts produced a Court register which indicated that the respondent was acquitted under Section 210 of the Criminal Procedure Code;*
- c) The prosecution was instituted without reasonable and probable cause. The respondent submitted that there was no reasonable and probable cause for his arrest and subsequent charges. There was no direct or circumstantial evidence to link the respondent to the alleged stolen motor vehicle;*
- d) The prosecution was actuated by malice. The respondent testified and the Learned Judge noted that there were ulterior motives and bad faith behind the arrest and prosecution of the respondent. The respondent was lured from Tanzania by police officers from Kenya, tortured from Taveta to Kiambu, denied medical treatment or access his close relatives before being charged. The respondent’s evidence was corroborated by the evidence of PW3, Dr Manasse Ndakalu and the respondent’s wife, PW5, Mrs Elizabeth James Koroso. The evidence in support of the respondent’s case was not challenged.*

34) We find that in the circumstances of this case, all 4 conditions were met and the respondent proved his claim of malicious prosecution.

The learned Judge found that:

“... most of the claim in tort, under the heads of assault and battery and false imprisonment, have been supported with sufficient, unrebutted evidence which, therefore, proves the plaintiff’s case at least on a balance of probabilities. The allegation that the plaintiff was continually assaulted and battered over a long period of time, has evidence to support it and no evidence against it.

Similarly, the evidence of false imprisonment stands unchallenged through evidence to the contrary.”

We are guided by the following definitions:-

Osborne’s Concise Law Dictionary defines “malice” as:

“ill will or evil motive: personal spite or ill-will or sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse.”

Black’s Law Dictionary at page 618 defines “false imprisonment” as;

“A restraint of a person in a bounded area without justification or consent. False imprisonment is a common law misdemeanor and a tort. It applies to private as well as government detention.”

In the circumstances of this case, we find and hold that the learned trial judge did not err in finding that the respondent sufficiently proved the claim of false imprisonment and malicious prosecution. The respondent’s case having succeeded on a balance of probabilities, the learned Judge was spot on in awarding general and exemplary damages.

See: **Johnson Evan Gicheru V Andrew Morton & Another,**

CA NO. 314 of 2000.

We are guided by the following recent cases:-

- a) **Gitobu Imanyara & 2 Others V. Attorney General (2016) CA NO. 98 OF 2014,** this Court declined to disturb the trial Court’s award of Kshs. 15,000,000.00 and Kshs. 7,000,000.00 as general damages to the three petitioners for the breach of their fundamental

rights and freedoms.

b) **Peter M. Kariuki V. Attorney General (2014) CA NO. 79 OF 2012**, this Court awarded the Appellant Kshs. 15,000,000.00 as damages for violation of his fundamental rights and freedoms.

c) **Koigi Wa Wamwere Vs. Attorney General (2015) CA. 88 OF 2013**, this Court enhanced an award of Kshs. 2,500,000.00 as general damages by the trial Court for violation of fundamental rights and freedoms to Kshs. 12,500,000.00.

35) We take cognizance of the fact that each case must be determined on its own peculiar facts and circumstances. The above stated recent awards are comparable to the amounts awarded by the learned Judge and are a reliable guide. We find that the general damages awarded to the respondent were reasonable in the circumstances of this case.

On exemplary damages, the learned Judge stated as follows:

“...I believe the facts brought out in the evidence make a clear case for exemplary damages, to record the Court’s concern to discourage the egregious conduct of the Police authorities”.

Where malice is established, the learned Judge is well within the law to punish the defendant for such malice by awarding exemplary damages. We are guided by the case of **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company Advocates [2013] eKLR** where this Court cited the English Court of Appeal decision in the case of **John v MG Ltd. [1996] 1 All E.R. 35** where it was held that:

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused...Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”

In the circumstances of this case the appellant did not adduce evidence to controvert the respondent’s evidence. The respondent’s evidence remained unchallenged and uncontroverted.

36) Where we part company with the learned Judge is where he found that the respondent’s constitutional rights were violated and awarded him Kshs. 10,000,000/=. We note that the respondent had not claimed for violation of his Constitutional rights. It is trite law that a party is bound by its pleadings. In any event the learned Judge overlooked the award made in respect for malicious arrest, illegal detention and prosecution also cut across the fundamental rights which basically entail the same elements of inhuman and degrading treatment. That perhaps explains why the respondent did not plead for the same. We are guided by the case of **Anthony Francis Wareheim t/a A. F. Wareheim & 2 Others v Kenya Post Office Savings Bank, NRB CA Civil Application Nos. Nai 5 & 48 of 2002**, where this Court held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings.

Accordingly, the learned Judge erred in awarding damages for breach of constitutional rights which were not pleaded. This ground of appeal therefore succeeds.

37) In the circumstances of this case we come to the conclusion that the learned trial Judge’s decision was sound, based on facts and correct interpretation

of the law, save on the award for violations of Constitutional rights. Accordingly, the appeal is allowed in part on the following terms:-

i) The award of Kshs.10,000,000/= for violations of constitutional rights is hereby set aside.

ii) The respondent is entitled to the award of damages for the torts of false imprisonment and malicious prosecution - Kshs.10,000,000/=.

iii) The respondent is entitled to the award of damages for exemplary damages - Kshs.1,000,000/=.

iv) Given the unique circumstances of this case, we direct that each party shall bear their own costs in the High Court and in this Court.

38) In conclusion, we wish to apologize for the delay in the delivery of this judgment; it was occasioned by challenges presented by the transfer of all three members of the bench to new Duty Stations and is highly regretted. This judgment has been signed under **Rule 32** of this Court’s Rules as the Hon. Mr. Justice G.B.M. Kariuki, SC had retired before the delivery of the judgment.

Dated and delivered at Nairobi this 2nd day of March, 2018.

M. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR