IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, MAKHANDIA & OTIENO-ODEK, JJ. A)

CIVIL APPEAL NO. 243 of 2011

BETWEEN

MOSES TENGEYA OMWENO........................APPELLANT

AND

THE COMMISSIONER OF POLICE......1ST RESPONDENT

THE ATTORNEY GENERAL...................2nd RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Gacheche, J.) dated 25th July 2011

in

NAIROBI HC MISCELLANEOUS APPLICATION NO. 265 of 2001)

****

JUDGMENT OF THE COURT

1. The appellant, ***Moses Tengeya Omweno***, is a Kenyan Citizen by birth. On 2nd June 2000, at around 6.00 pm he was accosted as he entered his house and arrested by a squad of four Kenya police officers without a warrant of arrest or any order issued by a competent Kenyan court. He was subsequently detained at the Embakasi Police Station in Nairobi. The officers introduced themselves as police officers from Interpol and had come to arrest and take him to Kosovo, Yugoslavia to answer criminal charges. The officers neither showed him a warrant of arrest nor explained the nature of allegations or charges facing him.

2. On 6th June 2000, without a court order issued by a Kenyan court or any extradition proceedings in Kenya, the appellant was forcibly removed from Kenya and deported to **Pristina in Kosovo** to stand trial.Due to the un-procedural manner in which he was removed from Kenya and the failure to observe due process, the United Nations Mission in Kosovo recommended that the appellant's trial be terminated. Subsequently, the appellant returned to Kenya on or about 27th July 2000.

3. By an Originating Motion dated 16th March 2001, the appellant filed suit against the Commissioner of Police and the Attorney General seeking general and special damages as well as punitive damages for blatant violation of his constitutional rights. He prayed for special damages in the sum of Ksh.1,837,651.60 which sum was particularised as direct and consequential costs incurred as a result of the respondents' unconstitutional conduct of illegal search and forcible removal, expulsion and repatriation from Kenya to Kosovo.

4. The appellants claim against the respondents was that his fundamental rights were breached in violation of ***Section 81 (1)*** of the then **Constitution of Kenya.** The particulars of the violation were detailed as:

> "*(a) Brutal search conducted on the persons of the appellant and his wife, his motor vehicle and his house on 2nd June 2000 by police officers without a search warrant or any order from a competent court in Kenya.*
>
> *(b) Subsequent detention in Kenya at Embakasi Police Station without a court order.*
>
> *(c) Forcible removal from Kenya on 6th June 2000 and subsequent deportation to Pristina in Kosovo - Yugoslavia without an order*

issued by a Kenyan court and no extradition proceedings.

(d) Subsequent detention at Amsterdam Schiphol Airport in violation of his constitutional right.

(e) That the appellant's arrest, forcible removal from Kenya and his subsequent detention outside Kenya in totality amounted to torture or inhuman or degrading treatment or punishment in violation of the appellant's right of protection from torture or inhuman or degrading punishment or treatment contrary to Sections 70 and 74 (1) of the then Constitution of Kenya.

(f) That the appellant's arrest and forcible removal from Kenya and his subsequent detention outside Kenya was a dereliction of the fundamental inherent duty of the respondents to ensure the security of person of the appellant and his protection in law as enshrined in Sections 70 and 77 of the then Constitution."

5. In the Originating Motion, the appellant contended that since the respondents neither had extradition order from a court in Kenya nor had any extradition proceedings commenced in Kenya against him, his forcible removal from Kenya was without any legal basis or authority and the same was illegal and unlawful and in reckless and blatant violation of hisfundamental right against expulsion from Kenya. That the absence of any extradition treaty between Kenya and Kosovo or Yugoslavia or the country and authority that purportedly requested for the appellant's extradition and his forcible removal from Kenya was against applicable extradition statutes and basic norms of international law on extradition. That the forcible removal of the appellant from Kenya without extradition proceedings, without due process and without according him an opportunity to be heard on the alleged request for extradition and the incommunicado incarceration in police stations in Kenya prior to forcible removal effectively amounted to torture, inhuman and degrading punishment or treatment. That the continued detention of the appellant outside Kenya pursuant to the forcible removal without extradition proceedings or order from a Kenyan court was illegal, unlawful and in violation of the appellant's fundamental freedom to personal liberty as guaranteed by the then Constitution of Kenya.That his arrest and subsequent forcible removal from Kenya left him and his family devastated, shattered and traumatized; feeling banished from his country and abandoned in a foreign land by his own Government. That at the time of forcible removal and deportation to Kosovo she was experiencing general anarchy, political instability, civil war and the her institutions including the judiciary were in shambles. In terms of special damages, the appellant claimed incidental expenses and costs in legal fees, hotel accommodation and airfare which costs would be borne by the respondents.

6. The Respondents denied committing any unlawful or unconstitutional conduct in relation to the facts and matters alleged in the Originating Motion. Through an Affidavit dated 16th November 2001 deposed to by ***Ms Mary Shadrack Ngariuku***, the Deputy Provincial Criminal Investigation Officer attached to the Kenya Airports Authority, the respondents admitted that on 29th May 2000, a request was received from the United Nations Regional Serious Crime Squad Office in Kosovo requesting Kenya to search and arrest the appellant who was suspected of having committed the offence of fraudulently obtaining large sums of money while working in Kosovo for the International Organization for Migration. That accompanying the request was a warrant of arrest issued by the District Court in Pristina – Kosovo, with an English translation thereof. That upon receiving the request, the deponent contacted and consulted the Attorney General's Office whereupon she was advised to proceed as per the request. That she detailed police officers to search the house of the appellant and arrest him. That on 6th June 2000, the appellant was put on board a KLM Flight from Nairobi to Amsterdam. That on 31st October 2000, she sought to know the circumstances under which the appellant had returned to Kenya but did not receive any response. That the appellant's repatriation from Kenya was facilitated by his former employer, the International Organization for Migration, through Interpol. She deposed that she did not breach any law in the process of handing over the appellant to Yugoslavia authorities.

7. The appellant in response to the Replying Affidavit of ***Ms Mary Shadrack Ngariuku***, deposed that he returned to Kenya upon recommendation of the ***Human Rights Office and Legal System Monitory Section of United Nations Mission in Kosovo*** (UNMIK). That UNMIK Human Rights Office recommended his immediate release because UNMIK unlawfully requested for the arrest and transfer to Kosovo of the appellant; the Human Rights Officer reported that UNMIK had acted recklessly in violation of the applicable law; that the appellant was unlawfully held in detention and on three occasions, UNMIK Police interrogated the appellant without informing him of his legal rights; that UNMIK Police acted in violation of the applicable law and failed to follow the provisions of the Fry Code of Criminal Procedure as it relates to the extradition of persons in a foreign state.

8. Upon full hearing and considering the evidence tendered by both parties, the trial court made the following pertinent findings:-

(a) That the applicant was not expelled from Kenya because removal from Kenya for trial cannot amount to expulsion.

(b) The allegation of brutal search was not proved, that the evidence in the appellant's affidavit was not sufficient to establish that the search complained of was arbitrary to meet the constitutional threshold.

(c) The appellant's arrest per se was not in breach of his constitutional rights as it was not arbitrary or actuated by malice. However, his detention from the date of his arrest till the date when he was released was unlawful and in violation of his fundamental right to personal liberty as contained in sections 70 and 72 (1) of the then Constitution of Kenya.

(d) The appellant's removal from Kenya and surrender to a foreign jurisdiction was in flagrant breach of the law and this constituted psychological torture and it was thus a violation of his fundamental right to protection against torture as contained in

sections 70 and 74 (1) of the Constitution.

(e) That since the appellant was not tried in Kosovo, his arrest, removal from Kenya and subsequent arraignment in the District Court in Pristina Kosovo to stand trial for criminal offences in a legal system and through a language he did not understand and translations he could neither comprehend nor control, his right to protection of the law and fair trial guaranteed by Section 70 and 77 of the Constitution was violated.

(f) That the appellant was surrendered without due process and consequently, the respondents abdicated their duty under the law which led to the violation of the appellant's constitutional rights.

(g) The appellant is entitled to special damages claimed and proved and lump sum general damages for the violation of the constitutional rights stated above.

9. In line with the above findings, the trial court awarded the appellant the following sums:-

I.general damages of Ksh. 2,000,000/= as lump sum damages for violation of his constitutional rights.

II.Special damages of Ksh. 1,070,035/=.

III.Punitive damages of Ksh. 4,000,000/=.

IV. Interest on the above sums at court rates until payment in full.

V. Costs of the suit to the appellant.

10. Aggrieved by the findings and damages awarded by the trial court, the appellant lodged the instant appeal citing the following grounds in the Memorandum of Appeal:-

"(a) The learned judge erred in law and fact in finding that the appellant's forcible removal from Kenya without a court order or any extradition proceedings was not in contravention of his fundamental right of immunity against expulsion from Kenya as contained in Section 81 (1) of the then Constitution.

(b) The learned judge erred in fact and law in finding that the entry into the premises of the appellant by the Kenya police and their search of his person, the person of his wife and his motor vehicles and his house without a search warrant or any extradition proceedings were not arbitrary and unconstitutional contrary to Sections 70 and 76 (1) of the then Constitution.

(c) The learned judge erred in fact and law in finding that the appellant's arrest, forcible removal from Kenya and his subsequent arraignment in the District Court in Pristina- Kosovo to stand trial for criminal offences in a legal system and through a language he did not understand and translations he could not comprehend nor control was not a violation of his fundamental right to protection of the law and to a fair trial guaranteed by Sections 70 and 77 of the then Constitution.

(d) The learned judge erred in fact and law and misdirected her discretion in failing to award the appellant special damages that were specifically pleaded and proved.

(e) The learned judge erred in fact and law in her appreciation and analysis of the evidence placed before the court in support of the appellant's claims.

(f) The learned judge erred in fact and law and misdirected her discretion in assessing and fixing the awards of general and punitive damages made in favour of the appellant."

11. In the Memorandum, the appellant prays for the appeal to be allowed and an order that this Court do assess damages payable to the appellant; he further seeks costs before the High Court and this Court.

12. At the hearing of the appeal, learned counsel Mr. Mbugua Mureithi appeared for the appellant while Mr. Kepha Onyiso, Senior Principal State Counsel appeared for the respondents. By consent of all counsels, the appeal was disposed of by way of written submissions filed by all parties.

13. The appellant filed written submissions dated 18th August 2015.He submitted that ***Section 81 (1)*** of the former Constitution guaranteed to every Kenyan citizen among other fundamental rights ?immunity from expulsion from Kenya.? That as per the Oxford Advanced Learners Dictionary, 7th Edition, ?expulsion means the act of forcing somebody to leave a place - the act of expelling somebody.? That the learned judge erred in fact and law and made contradictory findings in that at pages 727 to 728 of the Record, the trial judge made a finding that the appellant had been forcibly removed from Kenya and surrendered to a foreign entity; that the trial judge contradicted herself when she later held that the appellant was not expelled from Kenya; that the judge erred by giving the forcible removal from Kenya a cover of legality

as ?a lawful transfer for trial abroad.? That the judge having found that the forced removal of the appellant from Kenya was extrajudicial, she fell in error in finding that violation of a citizen's right of immunity from expulsion to Kenya could only be violated if the removal was permanent or prolonged and a subsequent return to Kenya cures any violation of forcible removal.

14. The appellant submitted that ***Section 70 (c)*** of the then Constitution protected the right of every person in Kenya and the protection extended to the right to privacy of his home and other property. That ***Section 76 (1)*** further elaborated the fundamental right to privacy.

The Section provides that ?Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.? That the exceptions and limitations to the right to privacy require *inter alia* authorization by law or enforcement of a judgment or order of a court in civil proceedings. That in the instant case, the respondents did not have any court order and the trial court erred in finding that the appellant's right to privacy was not violated through unlawful search of his person, premises and motor vehicle. That the trial court erred in failing to find that the alleged warrant of arrest issued by the District Court in Pristina- Kosovo was not a valid warrant issued by a competent court in Kenya.

15. The appellant submitted further that the trial court erred in finding that because the appellant was not tried in Kosovo, his right to fair trial and protection of the law was not violated. That the learned judge erred in fact and law in finding that because the trial in Kosovo was terminated without a full hearing, any perceived violation of the appellant's constitutional rights to fair trial were not violated. The appellant submitted that the forcible removal from Kenya was a violation of his rights and such violation continued in Kosovo where Kenya did not extend the assistance expected to be given to a citizen and where the Kosovo proceedings were conducted in a language he did not understand.

16. As regards the quantum awarded as damages, the appellant submitted that the learned judge erred in not awarding the entire claim on special damages. That the appellant pleaded and prayed for special damages in the sum of Ksh. 1,837,651.60 and provided specific proof for each of the items claimed. That the learned judge declined to award the sum of Ksh.160,000/= paid by the appellant to his Albanian lawyer Mr. Destan Ruqiqi; Ksh.250,000/= paid as legal fees to the firm of Khaminwa & Khaminwa Advocates and Ksh.103,044.60 in cost of air fare of the appellant's wife while visiting him in jail in Kosovo; Ksh.15,000/- in cost of hotel accommodation, meals and upkeep for the appellant's wife for 3 days while visiting him in jail in Kosovo before he was released from custody. That the learned judge further erred in law and fact in failing to award the appellant the sum of Ksh.294,572/= being the cost of appellant's return air ticket from Kosovo to Nairobi on the assumption that the ticket was bought by UNMIK. That the learned judge fell in error as there was no evidence on record to prove that UNMIK purchased the ticket.

17. The appellant urged this Court not to disturb the sum of Ksh. 4,000,000/- awarded as punitive damages.

18. As regards the general damages of Ksh. 2,000,000/=, the appellant urged this Court to interfere with the quantum contending that the sum was plainly low, miserly and not commensurate with the violations occasioned to him. He urged this Court toincrease the general damages award to Ksh. 50,000,000/=. The appellant cited the cases of **Peter M. Kariuki -v- Attorney General [2014] eKLR** and **Koigi Wamwere -v- Attorney General (2015) eKLR** in support.

19. The Respondents filed their written submissions dated 28th April 2016. The gist of the submissions is that the appellant failed to prove his case to the required standard. That the trial court did not err in finding that the appellant did not prove that he was subjected to arbitrary search and torture. That the damages awarded by the trial court were reasonable. That the trial court was correct in awarding a lump sum for general damages because the violations complained of arose from a single transaction. It was submitted that the general damages awarded to the appellant was reasonable and compares favorably with damages awarded in other similar cases such as **Gerald Juma Gichohi & 9 others -v- Attorney General Nairobi HC Petition No. 587 of 2012** where a sum ranging from Ksh.850,000/= to Ksh. 3,500,000/= was awarded for various violations of constitutional rights.

20. The respondents also cited the case of **Johnson Evan Gicheru -v- Andrew Morton & another, C.A. No. 314 of 2000** where it was stated that ?an appellate court should be disinclined to disturb the findings 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. That in order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary for the appellate court to 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 small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage which the plaintiff is entitled.?

21. We have considered the grounds of appeal as urged in the Memorandum of Appeal. We have examined and re-evaluated the evidence on record. We have also considered the written submissions filed by the parties and the authorities cited therein.

22. This is a first appeal and as a first appellate court,we proceed on the consideration of the appeal by way of re-evaluation of evidence on recordand making our own independent inferences and conclusions. See, **Selle -v- Associated Motor Boat Co. LTD [1968] EA** 123; **Kenya Ports Authority -v- Kustron (K) Ltd [2009] 2 EA 212**. Even as we do so, we observe that we should not lightly interfere with the findings of fact and conclusions of the trial court unless the trial judge misdirected herself in some matters with the result that she arrived at some wrong decision or where it is manifest from the case as a whole that the judge was clearly wrong and her decision amounted to an injustice. See **Mbogo & anor -v- Shah [1968] EA 93**; **Peters -v- Sunday Post Ltd [1958] EA 524** and

<u>Mwanasokoni -v- Kenya Bus Services Ltd</u> [1985] KLR 931.

23. From the written submissions filed by parties, there is one issue that is not contested. No party contests the quantum of Ksh.4,000,000/- awarded as punitive damages. Accordingly, we uphold the said award of Ksh.4,000,000/=.

24. The next issue for our consideration is special damages. The appellant submitted that the trial court erred in not awarding the following sums as special damages although the same were pleaded;

> *(a)* Ksh. 160,*000/= paid by the appellant to his Albanian lawyer Dr. Destan Ruqiqi.*
>
> *(b) Ksh. 250,000/= paid as legal fees to the firm of Khaminwa & Khaminwa Advocates.*
>
> *(c) Ksh. 103,044.60 being cost of air fare of the appellant's wife while visiting him in jail in Kosovo.*
>
> *(d) Ksh. 15,000/- being cost of hotel accommodation, meals and upkeep for the appellant's wife for 3 days while visiting him in jail in Kosovo before he was released from custody.*
>
> (e) *Ksh. 294,572/= being the cost of appellant's air ticket from Kosovo to Nairobi on the assumption that the ticket was bought by UNMIK.*

25. The law on special damages is well settled.The most important thing to bear in mind in a claim for special damages is that the claim must be specifically pleaded and strictly proved.A claim for each particular type of special damage must be pleaded and each must be proved. (See **<u>Thika Coffee Mills -v- Mikiki Farmers Co-Op Society &another</u> [2013] eKLR**).

26. In **<u>Sande -v- Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)</u>** the Court of Appeal held that: -

> **?As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law.?**

27. As regards the claim for special damages for legal fees paid to Khaminwa & Khaminwa Advocates and the legal fee paid to the Albanian lawyer, Mr. Destan Ruqigi, the appellant submitted and conceded that he paid the legal fees although there were no receipts to support the payment. The trial court in considering the claims for legal fee made a finding that the same was not proved. In arriving at the finding, the trial court held that there were no annexures to support the claim for legal fees. In his written submissions, the appellant concedes that indeed there were no supporting documents and he urges this Court to take judicial notice that indeed the law firm of Khaminwa & Khaminwa Advocates represented him in *habeas corpus* proceedings in **Nairobi HC Misc. Application No. 236 of 2000**. Whereas it is not in dispute that the appellant engaged the services of the law firms, the legal issue in this appeal is what fee was paid to enable the appellant recoup the said fee as special damages? In the absence of specific receipts or documents indicating the exact legal fees paid to the respective law firms, we are of the considered view that the claim for special damages for legal fees was not proved. Plain assertions and allegations do not amount to proof. A trial court, and for that matter an appellate court, cannot make a finding of fact unless there is credible, cogent and verifiable evidence to support the specific finding of fact. In the instant case, we find that the trial court did not err in declining to award special damages for legal fees.

28. The appellant contended that the trial court erred in not awarding the sum of Ksh. 294,572/= being the cost of appellant's return air ticket from Kosovo to Nairobi. In declining the award, the learned Judge expressed himself as follows:

> ***"I do note that although he purports to have footed his return air ticket from Kosovo to Nairobi, the recommendation by the "Report of Findings into the Moses Tengeya Omwemo" case dated 14th July 2000 prepared by UNMIK Department provided inter alia that "Should Moses Omweno choose to leave Kosovo, UNMIK should provide him with travel documents and travel expenses". Given that fact, he would be hard pressed to convince the court to award him that particular aspect of his claim, for his return to Kenya was catered for by UNMIK and there is no evidence that he paid his air fare."***

29. We have considered this claim and the evidence on record. The evidence tendered by the appellant to prove this claim is annexure L being the air ticket from Kosovo to Nairobi. The ticket is a British Airways ticket from Skopje via Zurich via London to Nairobi with date of issue being 26th July 2000. The ticket is valued at US $ 2552.00. The ticket shows it was paid for in cash. Upon re-evaluation of the evidence on

record, we find that the reasoning by the trial court that the air ticket was purchased by UNMIK is erroneous as it is not supported by evidence on record. In the Originating Motion, the appellant pleaded special damages in the sum of Ksh.294,572/= being the purchase price of the air ticket. The ticket was tendered in evidence. The respondents never tendered any evidence to rebut the purchase of the ticket by the appellant. It is our considered view that the appellant proved that he purchased the ticket. If the respondents sought to rebut this aspect, the evidentiary burden had shifted and was not discharged. Accordingly, we find that the trial court erred in not awarding the sum of Ksh.294,572/= as special damages.

30. On the special damages claim for the air ticket and hotel expenses incurred by the appellant's wife, we are of the considered view that the trial court did not err in declining to award special damages under this heading. Whereas the appellant attached copies of his wife's passport and VISA, he failed to adduce documentary evidence to prove that he purchased the said air ticket and paid for the VISA fees. Further, there was no documentary evidence on record to support the claim for hotel expenses in Kosovo in Yugoslavia.In any event the appellant testified that the monies for the return air ticket was obtained from friends and well-wishers in Kosovo. We reject this ground too.

31. A critical ground of appeal urged in this matter is that the trial court erred in law and fact in failing to find that the appellant's constitutional rights were violated; that his arrest and search were unlawful and arbitrary.

32. ***Section 81*** of the former Constitution provides as follows:

> **?81. Protection of freedom of movement.**
>
> **(1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya**. (Emphasis supplied)
>
> **(2) …..**
>
> **(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—**
>
> **(f) for the removal of a person from Kenya to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted;?**(emphasis supplied)

33. We now come to the appellant's grievance that the learned judge should have found that the treatment he was subjected to *vide* unlawful arrest, search without a warrant and forcible removal from Kenya amounted to torture, inhuman and degrading treatment deserving of an award of damages. That torture is outlawed is beyond disputation. ***Section 74*** of the former Constitution proscribed it thus;

> ***"No person shall be subjected to torture or inhuman or degrading punishment or any other treatment."***

34. International instruments to which Kenya is signatory also outlaw torture in the clearest terms. **The International Covenant on Civil and Political Rights (ICCPR)** provides at ***Article 7***;

> ***"No one shall be subjected to torture or cruel, inhuman or degrading treatment. In particular, no one shall be subjected without his free consent to medical and scientific experimentation."***

35. There is a specific Convention for the suppression of torture namely; **The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** which Kenya ratified on 26th June 1987. But even if Kenya had not ratified the Convention Against Torture, it would still have been bound to proscribe torture within its territory under customary international law. The absolute ban on torture is a principle of *jus cogens* and is a peremptory norm of international law binding independent of treaty, convention or covenant. That torture is a deplorable departure from civilized norms and a grave diminution of and derogation from human dignity thus deserving of opprobrium cannot therefore be gainsaid. We do not get any sense that the learned judge failed to appreciate the gravity of the allegations of torture. See **Koigi Wamwere -v - Attorney General** [2015] eKLR.

36. The question that needs to be answered is whether the learned judge was correct in holding that the litany of complaints by the appellant during his arrest, forcible removal from Kenya and detention both in Kenya, Amsterdam and in Kosovo without due process amounted to torture, inhuman or degrading treatment. Further, whether the forcible removal from Kenya and being subjected to trial in a foreign country in a language that the appellant did not understand was a cruel and degrading treatment and a violation of the right to fair trial. Additional, whether immunity from expulsion from Kenya need be long term or permanent to constitute violation of the right of a citizen from expulsion from Kenya.

37. Torture is defined by the Convention against Torture at ***Article 1*** 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 action 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 sufferingarising only from, inherent in or incidental to lawful sanctions."***

38. The record shows that the appellant was arrested and forcibly removed fromand subsequently detained outside Kenya. Torture is not restricted to severe physical pain; it includes mental anguish and emotional distress. It is our considered finding that the forcible removal of the appellant from Kenyawithout due process and without being informed the reasons for his removal and the specific chargeshe wasto face in Kosovo amounted to emotional distress and anguish which is torture.

39. As regards violation of the right to human dignity, the East African Court of Justice in **Samuel Mukira Mohochi -v- Attorney General of Uganda, EACJ Reference No. 5 of 2011**expressed that detention is indeed deprivation of liberty. When it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity. In the instant appeal, the appellant contended that his detention at Embakasi Police Station in Nairobi Kenya and subsequent detention in Amsterdam and Kosovo were a violation of his fundamental rights.

40. Recalling that one of the contentions urged by the appellant is that the search of his person, home and motor vehicle was unlawful, we are appreciative to examine the law on search with or without a warrant. **Section 76 (1) of the former Constitution** provides that: ?Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.? **Section 26 and 118 of the Criminal Procedure Code,** provide that:

> **?26 (1)** A **police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain –**
>
> **(c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.**
>
> **118. Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.?**

41. ***Section 29***of the **Criminal Procedure Act** provides for arrest by a police officer without a warrant. It is stipulated that:

> A police officer may, without an order from a magistrate and without a warrant, arrest—
>
> (a) *any person whom he suspects upon reasonable grounds of having committed a cognizable offence;*
>
> *(b) any person who commits a breach of the peace in his presence;*
>
> *(c) any person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;*
>
> *(d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;*
>
> *(e) any person whom he suspects upon reasonable grounds of being a deserter from the armed forces;*
>
> *(f) any person whom he finds in a highway, yard or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony;*
>
> *(g) any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself;*
>
> *(h) any person whom he suspects upon reasonable grounds of having been concerned in an act committed at a place out of Kenya which, if committed in Kenya, would have been punishable as an offence, and for which he is liable to be extradited under the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) or the Extradition (Commonwealth Countries) Act (Cap. 77);*

(Emphasis supplied)

(i) any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on that person, any implement of housebreaking;

(j) any released convict committing a breach of any provision prescribed by section 344 or of any rule made thereunder;

(k) any person for whom he has reasonable cause to believe a warrant of arrest has been issued.(Emphasis supplied)

42. The provisions of ***Section 76 (1)*** of the former **Constitution** *and* ***Sections 26, 29*** and 118 of the **Criminal Procedure Code** envisions consent of the person searched or a search warrant issued by a competent court in Kenya before a search can be lawful. In the words of **Osiemo, J**. in **Vitu Limited -vs-The Chief Magistrate Nairobi & two Others**, **H.C. Misc. Criminal Application No. 475 of 2004:**

"Since Police duties are not judicial functions, then in the performance of [their] duties, it is anticipated that warrants or [summonses] may be required and for this reason Parliament in its wisdom enacted section 118 of the Criminal Procedure Code (Cap. 75) and section 19 of the Police Act (cap. 84)."

43. In **Vitu Limited -vs-The Chief Magistrate Nairobi & Two Others** (supra), the police had conducted a search at the petitioner's premises without a warrant. The trial court held the search to be unlawful and unconstitutional. The Court expressed itself thus:

?***I am therefore constrained to agree with Counsel for the petitioners that the respondents' justification of their actions is, in the circumstances, unsustainable. Their acts in carrying out the raid on the petitioners'' premises had no lawful justification. It remains to consider whether their acts violated any of the rights of the petitioners guaranteed under the Constitution……***

I therefore do find and hold that the respondents violated the petitioners' rights under section 76 of the former constitution."

44. Ngugi, J in **Standard Newspapers Limited & another -v- Attorney General & 4 others [2013] eKLR** expressed himself as follows on search without a warrant:

"As indicated elsewhere in this judgment, I have come to the conclusion that the search and seizure carried out by agents of the respondents against the petitioners on the night of 2nd March 2006 was arbitrary and in breach of the petitioners' rights under section 76 and 79 of the former Constitution. Even assuming that the reasons for carrying it out, as alleged by the respondents, were justifiable under the proviso to section 76, which this Court cannot determine as no evidence with regard thereto was placed before it, it was nonetheless an unlawful search as it violated the law and the due process requirements with regard to search and seizure. Which then leads to a consideration of the appropriate relief to grant to the petitioners for the violations. (See also Abubakar Shariff Abubakar -v- Attorney General & another [2014] eKLR).

45. In the present appeal, it is not in dispute that there was no search warrant issued by a competent Kenyan court. Likewise, there was no extradition treaty between Kenya and Kosovo or Yugoslavia that could subject the appellant to extradition proceedings envisaged under ***Section 29 (h)*** of the **Criminal Procedure Code**. Accordingly, it is our considered view that the arrest of the appellant and the search of his person, house and motor vehicle and entry into his home/premises was unlawful and a violation of his constitutional right to privacy. We are also of the considered view that the appellant's forcible removal from Kenya and his being subjected to trial in a foreign country was a violation of his constitutional right to fair trial. The fact that the trial at Pristina in Kosovo was not concluded is irrelevant in determining whether removal was lawful or otherwise. The critical issue is whether at the time of forcible removal and repatriation from Kenya due process was followed. It is immaterial for what purpose the appellant was forcibly removed from Kenya. Whether the appellant is a citizen or not, due process must be followed. No person resident in Kenya can forcibly be removed, repatriated or expelled from Kenya without due processand right to fair hearing and access to a court of law in Kenya, if need be.

46. In the case of **Mariam Mohamed & Anor -v- Commissioner of Police & Anor Misc. Crim. Appli. No. 732 of 2007 [2007] eKLR,** Ojwang J, (as he then was) while determining a *habeas corpus* application in respect of the applicant who had been extra-legally removed from Kenya and transferred to the United States Military Detention Facility in Guantanamo Bay, Cuba, stated as follows:

?*The question raised by the applicants herein, therefore, is a logical one: is it not a violation of the Subject's constitutional rights, that someone in State authority would have him taken out of this Court's jurisdiction, so that he no longer can benefit from the High Court's writ of Habeas Corpus? So that the subject can no longer exercise his fundamental rights, as specified in Chapter V of the Constitution of Kenya? Clearly, by taking the Subject out of the jurisdiction of the Kenyan Courts, the foundation of his enjoyment of constitutional rights had, in a formal sense, been taken away; for those rights are enforced by the Courts which have jurisdiction in Kenyan territory.*

That the subject should always have access to the safeguards of the Constitution of Kenya, is a right; and so the person who

made it impossible for the subject to enjoy those rights, committed a constitutional and a legal wrong against him."

47. The case of **<u>Zuhura Suleiman -vs- The Commissioner of Police & 2 Others</u> High Court Misc. Application No. 441 of 2010 [2010] eKLR**, in which the subject was arrested in Kenya and extra-judicially removed to Uganda without extradition proceedings is informative. In holding that the removal was unlawful and unjustifiable and thus a violation of his fundamental rights, even on the ground of suspicion of engaging in terror activities, Muchelule, J stated as follows:

> ***"The subject was arrested at 10.30 p.m. on Friday and on the following day, a Saturday, he was in Uganda being handed over. He had been collected from Kasarani Police Station, where he had slept, at 7.55 a.m. There was certainly no opportunity afforded for him to apply to the Kenyan courts for release, for instance. There was no formal communication with his family or information that he was being taken out of jurisdiction. He is a Kenyan citizen who had immunity against expulsion. There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all the evidence indicates he was illegally arrested, detained and removed from Kenya. Whether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law. Whatever the security considerations the Police had in this case, the recognition and preservation of the liberties of this subject was the only way to reinforce this country's commitment to the rule of law and human rights……..I find that no exceptional circumstances, whether state of war or terrorist actions, can be invoked to justify the treatment handed down to the subject herein by the Respondents. I find that the return made by Inspector Ogeto was not sufficient and that the arrest, detention and removal of the subject from Kenya to Uganda were illegal and transgressed his fundamental rights and liberties. These rights and liberties cannot be given up for expedience's sake."***

48. In the instant appeal, we have perused the record and it is manifest that the removal of the appellant from Kenya was not done under the authority of any law in force in Kenya. Further, ***Section 81(3) (f)*** of the former Constitution has a proviso that permits removal from Kenya. However, for the proviso to apply, the person to be removed from Kenya is to be tried or punished in some other country for a criminal offence under the law of that other country. The removal must be authorized by the law in question.In the instant case, the respondents failed to pin point the law that authorized the removal of the appellant from Kenya. Failure to show such law means that the appellant's removal from Kenya violated ***Section 81*** of the former Constitution. (See **<u>Salim Awadh Salim & 10 others -v- Commissioner of Police & 3 others,</u> Nairobi Constitution and Judicial Review PetitionNo. 822 of 2008)**. Further, we are of the considered view that a warrant of arrest issued by a foreign court (i.e. foreign jurisdiction) is not enforceable on Kenyan soil unless expressly permitted by Kenyan law.

49. On the issue of general damages for violations of the right to fair trial, the right to privacy and protection against arbitrary arrest and search, we are guided by dicta in **<u>Overseas Tankship (UK) -vs- Morts Dock & Engineering Co. Ltd</u> (1961) 1 ALL E.R 404 (Wangon Mound No.1)**, where Lord Reid at page 413 stated,

> ***"For it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them), the answer is that it is not because they are natural or necessary or probable but because, since they have this quality, it is judged, by the standard of the reasonable man, that he ought to have foreseen them."***

50. Lord Denning M.R. In **<u>Stewart -vs- West African Terminals Ltd.</u> (1964)2 Lloyd's Rep. 371** at **375** held,

> ?***it is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate) then it is within the rule that a person who has been guilty of negligence is liable for the consequences."***

51. Guided by the foregoing dicta and upon our re-evaluation of the evidence on record, we come to the considered determination that the trial court erred in fact and law in failing to find that the appellant's constitutional rights were violated in that he was subjected to cruel and degrading treatment due to arrest without a warrant; unlawful search of his person without a warrant and unlawful entry and search of his home and motor vehicle without a warrant issued by a competent court in Kenya. The respondent is liable for all these violations and it is only fair and just that the appellant be compensated by way of general damages.

52. The final issue for our consideration and determination is whether the sum of Ksh. 2,000,000/- (two million) awarded by the trial court as general damages is an adequate compensation for violation of the appellant's constitutional rights. On this issue, we are cognizant of the general rulethat an appellate court will not disturb an award of damages by the High Court unless it is demonstrated that the learned Judge proceeded on wrong principles or that he misapprehended the evidence in some material aspects thereby arriving at a figure inordinately high or low such as to represent an entirely erroneous estimate. (***See*** **<u>Jivanji -v- Sanyo Electrical Company Ltd.</u> (2003) KLR 425).** In short, before we interfere with the learned judge's award of damages, we must be satisfied that the court proceeded on wrong principles or that there was misapprehension of the evidence and pleadings in some material respect and thereby arrived at an erroneous conclusion. **(*See* <u>Great Lakes Transport Co. (U) Ltd. -v- Kenya Revenue Authority</u> (2009) KLR 720, 728-729).**

53. The question before us is whether the sum of Ksh.2,000,000/= is very low or whether the trial court in arriving at the said sum proceeded on wrong principles or misapprehended the evidence and pleadings in some material respect and thereby arrived at a low sum of Ksh.2,000,000/=. The appellant in his submissions urged us to interfere with the sum and award him Ksh. 50,000,000/= as general damages. He founded his claim on the premises that the sum awarded was low and not commensurate with the violations meted on him by the respondents. Conversely, the Respondents' contended that the sum of Ksh. 2,000,000/= was reasonable and compared favourably with previous awards for violation of constitutional rights.

54. We have considered the contention by both parties on the issue of lump sum of Ksh. 2,000,000/= as general damages. In **Koigi Wamwere v Attorney General [2015] eKLR**, this Court in a judgment delivered on 6th March 2015 expressed as follows on the issue of quantum of damages for violation of constitutional rights:-

> ?**The final issue we must address is quantum of damages and it flows from the learned judge's award of Ksh.2.5 million compensatory damages for the torture she found established as suffered by the appellant ?during the period he was held at Nyayo House and while he was held in Block G [at Kamiti Maximum Security] of the prison with condemned prisoners.? In awarding the sum of Ksh. 2.5 million, the learned judge made a global award while doing the best she could in the circumstances but the appellant takes the view that the award was too little and not good enough. He urges us to award him Ksh. 200 million and places reliance on the case PETER M. KARIUKI Civil Appeal No. 79 of 2012 as well as the High Court decision of OTIENO MAK'ONYANGO -v- ATTORNEY GENERAL, High Court Civil Case No. 845 of 2003.**
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> **In PETER KARIUKI Civil Appeal No. 79 of 2012, this Court enhanced the damages awarded to the appellant for violation of his rights under Sections 70(a), 72(5), 74(1), 77(1) (c) and 82(2) of the former Constitution from a global sum of Ksh. 7 million to Ksh. 15 million with particular emphasis having been placed on the rather spectacular violation of his right to a fair trial.This is a recent decision of this Court and we take the view that it provides a reliable guide inconsideration of damages awardable being mindful, of course, that each case must be decided in accordance with its peculiar facts.**
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> **As to the OTIENO MAK'ONYANGO case, it is first of all a decision of the High Court though it does relate to the violation of the rights of a detainee as was the appellant herein. There is an important distinction, however, in that whereas the appellant's detention did have formal compliance with the law in the sense that a detention order was served on him as required by Regulation 10 of the Public Security (Detained and Restricted Persons) Regulations, no such order or statement was served on Mak'Onyango with the result that Rawal J (as then was) found categorically that Mak'Onyango's detention was plainly unconstitutional. In contrast, the learned judge here found that a judge of concurrent jurisdiction (Simpson, J) had already found the appellant's detention not** to be unconstitutional ?decades before? in **R -v- THE COMMISSIONER OF PRISONS EXPARTE KAMONJI KANGARU WACHIRA & 3 OTHERS [including the Appellant], Civil Case No. 60 of 1984.**
>
> **A yet more important distinction relates to quantum. In MAK'ONYANGO Rawal, J awarded Kshs.20 million compensatory damages. In arriving at that sum, however, Rawal, J considered, among others, the case of MWANGI STEPHEN MURIITHI -v- HON DANIEL ARAP MOI NAIROBI High Court Petition No. 625 of 2006) where general damages on the footing of punitive damages were awarded to the petitioner who was found to have proved that his detention was an abuse of detention without trial by Ex-President Moi with a view to achieving the ulterior motive of plundering that petitioner's interest in their joint property and commercial enterprises. Gacheche, J awarded that petitioner some Ksh.50 million in punitive damages.We have no hesitation in finding that the award of Ksh.50 million in MURIITHI (supra) was, on the face of it, so much beyond the range of awards given in similar cases that it cannot be a fair reflection of what awards this type of cases should attract. In any event, it was more than ten times higher than other cases such as;**
>
> 1. **WACHIRA WEHEIRE -v- AG High Court Civil Case No. 1184 of 2003 where the petitioner, confined at Nyayo House for 16 days was awarded Ksh. 2.5 million**.
>
> 2. **DOMINIC ARONY AMOLO -v- AG – Misc. Application No. 494/03 where a soldier alleged to have participated in the 1982 …cup was awarded Ksh. 2.5 million.**
>
> 3. **HARUN THUNGU WAKABA & OTHERS -v- AG Nairobi High Court Civil Case No. 1411 of 2004 where sums of Ksh. 1 million and 3 million were awarded to victims of torture at Nyayo House.**
>
> 4. **MIGUNA MIGUNA -v- AG. Petition No. 16 of 2010 where the petitioner a former leader of the Student Organization of Nairobi University (SONU) was awarded Ksh. 1.5 million for torture, inhuman treatment and violation of the right to liberty.**
>
> **The MUREIITHI decision could not long stand, so aberrent was it. In Civil Appeal No. 240 of 2011, the award was set aside. In setting aside that award and the judgment in entirety, this Court (Mwera, Musinga & Ouko JJ.A) stated, *inter alia*;**
>
> ***"Regarding the punitive damages of Ksh. 50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st respondent. We are unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained."***

We agree with those sentiments and, as far as this appeal is concerned, we are of the respectful view that the Ksh. 200 million urged both before the High Court and in the submissions before us has no foundation in authority or reality. The sum is literally plucked from the air and placed in counsel's submissions.The learned judge quite properly rejected that sum and we, too, can find no justification for it.

Given, however, the age of some of the older authorities some of which we have referred to, which all range between Ksh.1.5 million and 2.5 million in damages, and considering that the violation of rights suffered by the appellant fell under two distinct instances namely the torture at the macabre Nyayo House cells and while held in Kamiti's Block G, which the learned judge found and accepted, we think the sum of Ksh.2.5 million awarded to him as the global general damages was patently inadequate.

Accepting that the award of damages is not an exact science, and knowing that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed, we find and hold that the appellant is entitled instead to damages in the global sum of Ksh. 12 million with interest at court rates from the date of the judgment of the High Court appealed against.?

55. Guided by the dicta and legal reasoning in **Koigi Wamwere -v- Attorney General** [2015] eKLR, and taking into account that we have found that the trial court erred and consequently did not award general damages for unlawful search, unlawful arrest and violation of the appellant's right to privacy, we are inclined to interfere with the sum of Ksh. 2,000,000/= awarded by the trial court as general damages in this matter.

56. The High Court has awarded damages for violation of constitutional rights in a number of torture cases that have come before it. In the case of **Haruni Thungu Wakaba -v- The Attorney General Misc Appl. No. 1411 of 2004,** Okwengu J, (as she then was) awarded the Petitioners who were incarcerated and had their rights violated, general damages for each of the 20 applicants ranging from Ksh. 1,000,000.00 to Ksh. 3,000,000.00. In the case of **Rumba Kinuthia –v- Attorney General** Nairobi HC Misc. Appl. No. 1408 of 2004,Wendoh J made an award of Ksh. 1,500,000.00 as general damages. In **Standard Newspapers Limited & another v Attorney General & 4 others** [2013] eKLR, the petitioners in 2013 were awarded a global sum of Kenya Shillings Five Million (Ksh. 5,000,000.00) in damages. In **Arnacherry Limited v Attorney General** [2014] eKLR, the petitioner was awarded *g*eneral damages of Ksh. 3,000,000 (Three Million) being compensation for the State's violation of the petitioner's constitutional rights. In, **Peter M. Kariuki v Attorney General [2014] eKLR,** the appellant was awarded Ksh. 15,000,000/- (fifteen million) as damages for violation of his constitutional rights**.** In **Koigi Wamwere -v- Attorney General** [2015] eKLR, a global sum of Ksh. 12,000,000/-was awarded as damages.

57. We are conscious and swayed by the general trend of award of general damages by the High Court and the Court of Appeal in the various cases cited above.Persuaded by the award in these cases, it is our considered view that the sum of Ksh.2,000,000/= was not commensurate with all the constitutional violations meted upon the appellant. The said sum was patently inadequate. We set aside the lump sum award of Ksh.2,000,000/= as general damages and substitute it with a lump sum of Ksh. 5,000,000/= to cover all violations of the constitutional rights of the appellant.

58. Accordingly, the final orders of this Court is that: *a. The appeal is allowed to the extent that:*

i. We *find that the appellant's forcible removal from Kenya without a court order or any extradition proceedings was in contravention of his fundamental right of immunity against expulsion from Kenya as contained in* Section 81 (1*) of the then Constitution;*

ii. We find that the entry into the premises of the appellant by the Kenya police and their search of his person, the person of his wife and his motor vehicles and his house without a search warrant or any extradition proceedings was arbitrary and unconstitutional contrary to ***Sections 70*** *and* **76 (1)** *of the then Constitution;*

iii. We find that the appellant's arrest, forcible removal from Kenya and his subsequent arraignment in the District Court in Pristina-Kosovo to stand trial for criminal offences in a legal system and through a language he did not understand and translations he could not comprehend nor control was a violation of his fundamental right to protection of the law and to a fair trial guaranteed by ***Sections 70*** *and* ***77*** *of the then Constitution.*

b. We set aside the lump sum award of Ksh. 2,000,000/= as general damages and substitute it with a lump sum of Ksh. 5,000,000/= to cover all violations of the constitutional rights of the appellant.

c. For avoidance of doubt, the sum awarded by the trial court as punitive damages of Ksh. 4,000,000/- be and is hereby confirmed.

d. The sum awarded by the trial court of Ksh.1,070,035/= as special damage be and is hereby confirmed.

e. We award an additional sum of Ksh.294,572/= as special damages for the purchase price for the air ticket from Kosovo to Nairobi.

f. Interest on the damages awarded to be at court rates from the date of judgment by the High Court until payment in full.

g. ***The costs in this appeal and before the High Court be and is hereby*** *awarded in favour of the appellant.*

Dated and Delivered at Nairobi this 27th day of April, 2018.

W. OUKO

....

JUDGE OF APPEAL

ASIKE MAKHANDIA

....

JUDGE OF APPEAL

J. OTIENO-ODEK

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR