IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO 73 OF 2012

BETWEEN

ZABLON OMBATI ONGERI ……..…….APPELLANT

AND

THE HON ATTORNEY GENERAL ……. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nakuru (Emukule, J.) dated 9th December, 2011

In

Nakuru H.C. Petition No. 8 of 2010

****

JUDGMENT OF THE COURT

This appeal is an offshoot of the proceedings and judgment of the High Court in ***NAKURU H.C. CR. No. 67 of 2007***, wherein ***ZABLON OMBATI ONGERI*** (hereinafter ' the appellant') was charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. During the course of the trial he complained to the trial court that his fundamental rights and freedoms set out under **Section 72 (3)**, **72 (6)** and **84 (1)** of the repealed **Constitution** had been violated during his arrest, incarceration and subsequent arraignment in court.

The specific complaints raised by the appellant were: - of torture at the D.C.I.O.'s office at Molo, following his arrest on **7th July, 2007**; and delayed arraignment in court, in that he took plea on **31st July, 2007**.The trial court directed the appellant's counsel to reduce the same into a constitutional reference with a view to obtaining redress separately. Contemporaneously, the trial court ordered that the trial proceeds to its logical conclusion, with the investigating officer (hereinafter 'the I.O'.) among the witnesses who were expected to testify on the veracity or otherwise of the appellant's allegations. The prosecution elected not to call the I.O. as a witness and closed its case. The trial court then ruled that based on the evidence which had been presented, the appellant had no case to answer and accordingly acquitted him under **Section 306 (1)** of the **Criminal Procedure Code**.

Buoyed by the finding of the trial court no doubt, and in keeping with the direction of the trial court on the question of the alleged violation of his fundamental rights, the appellant lodged **Nakuru High Court Petition No 8 of 2010**. Therein, the appellant framed his twin grievances of alleged torture and delayed arraignment in court and sought:-

> ***(i) A declaration that he had been unlawfully detained and that the said detention amounted to a breach of his fundamental rights;***
>
> ***(ii) A declaration that he was tortured which amounted to a breach of his fundamental rights;***
>
> ***(iii) A declaration that the respondent had the burden to give an explanation for his unlawful detention through the acts of the agents of the Government and by failure to do so it was liable for proceedings for compensation as provided for under Section 72 (b) of the Constitution;***
>
> ***(iv) An order for compensation to the appellant payable by the Government through the respondent comprised of the sum of Ksh 700, 000 computed at Ksh 100, 000 per day;***
>
> ***(v) An order for a further sum of Ksh 200, 000 as compensation for torture whilst in detention;***
>
> ***(vi) Any other relief which the honourable court deemed just and fit to grant.***

The petition was canvassed by way of written submissions filed by the respective parties, after which the court (Emukule, J.) rendering its considered judgment on 9th December, 2011. By and large, the learned trial Judge commended the police for conducting investigations within 15 days, noting that they had run afoul of the prescribed 14 daysby a day but for which there was no explanation. He dismissed the appellant's allegations of torture for want of proof. He also declined to award damages sought by the appellant for prolonged incarceration for the reason that no basis had been laid for the same, and that, awarding the appellant substantial damages would be akin to rewarding him with 'blood money'. He therefore granted the appellant a nominal award of Ksh 10 (ten shillings) and condemned him to pay costs of the suit.

Aggrieved by the judgment of the trial court, the appellant has lodged the present appeal complaining that the learned Judge erred in law and fact in;

> ***(i) Dismissing the appellant's prayer for award of damages arising from torture while under arrest or in detention despite the fact that the presentation of the prosecution's case as was the testimony of PW 2, (sic) glaringly revealing that one Akango and one Otieno both of whom were security officers being involved in assault of the petitioner upon being arrested.***
>
> ***(ii) Dismissing the appellant's evidence of torture despite tendering medical documentaries (sic) which evidence remained unchallenged and or disputed by the respondent.***
>
> ***(iii) Arriving at a finding that compensating the appellant of any sum was tantamount to the appellant benefiting twice and amounting to awarding him with blood money yet the ground for which compensation was sought was not adopted in acquitting the petitioner and more so after finding that his rights were violated.***
>
> ***(iv) Awarding the appellant a sum of money that could not have been remedial by any stretch of imagination even after finding that the rights of the petitioner were contravened.***
>
> ***(v) Basing the award of sum of money mentioned under paragraph 4 above that the appellant had not proved loss of earnings or income yet the petitioner had sought for general damages arising from curtailment of his fundamental rights of liberty and movement.***
>
> ***(iv) Condemning the appellant to bear costs of the petition despite the fact that the said court***

found as a fact that the petitioner's rights had been violated by the respondent.

At the hearing of the appeal, ***MR MARAGIA OGARO***, learned counsel appeared for the appellant. There was no appearance for the respondent though duly served. Counsel commenced his submissions by submitting that ***PW2*** and ***PW 6*** had testified at the criminal trial that torture had occurred. He conceded however that the trial court dismissed the said testimony and refrained from making a finding on torture. Indeed at the hearing of the petition, no witness was called to prove allegations of torture. He also admitted that ***PW 2*** testified that security officers as opposed to policemen were the ones who beat up the appellant.

Next, counsel addressed us on the quantum of damages awarded by the trial court which he assailed as wholly inadequate and ought to be enhanced as the appellant had been unlawfully detained. The case of ***PETER M. KARIUKI V ATTORNEY GENERAL [2014] eKLR*** wherein the sum of **Ksh 15 million** was awarded as general damages was cited in support. Counsel further submitted that the learned trial Judge was wrong to base his award on want of proof of income; since, ultimately, detention is detention. Counsel sought to justify the sum of **Ksh 700,000** that had been proposed before the trial court, but conceded that authorities in support of the same were not availed for the benefit of the trial Judge. He nevertheless urged that the award rendered, though within the discretion of the court, was not remedial and the learned trial Judge should have awarded damages without reference to the murder trial charges which the appellant had faced.

In conclusion counsel submitted that the appellant was deserving of an award of costs having succeeded in his petition, which, the respondent had opposed by way of a replying affidavit and written submissions.

We have considered the submissions by learned counsel for the appellant. We have also analyzed the High Court judgment, examined the record of appeal, as well as the cited cases. As this is a first appeal, we are obliged to re-evaluate the evidence on record with a view to arriving at our own conclusion, always bearing in mind that we did not have the benefit of seeing the witnesses testify. See ***SELLE VS ASSOCIATED MOTOR BOAT CO [1968] E.A.123*** In a case that proceeded without oral testimony, we have greater latitude in arriving at our independent conclusions. This appeal turns on the question of quantum of damages awarded by the trial court, the appellant having proved one out of the two constitutional infractions which had allegedly been visited upon him while going through the motions of the criminal justice process. From the record whereas the appellant was unable to prove the allegations of torture, he was able to establish unlawful detention beyond prescribed constitutional timelines.

He was therefore entitled to damages, which the trial court awarded in the sum of Ksh 10. Was the same unreasonable in the circumstances? Assessment of damages is a discretionary exercise which must be undertaken judicially and in consonance with defined legal principles. In ***BUTT V KHAN [1981] KLR 349***, this Court stated 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…"***

Upon perusal of the judgment of the trial court, we are able to isolate the following illuminating excerpts, which in our considered and respectful view provide a glimpse as to how the learned Judge arrived at the impugned award:-

> ***"As I stated in my ruling dated 14th May, 2010 in Nakuru H.C. Cr. Case No. 67 of 2007 that the taking away of human life, unless justified under the Constitution, is a heinous crime…. it is equally correct to say that the detention of a person beyond the prescribed period under the Constitution is a breach of the Constitution, any explanation (prescribed under Section 72 (3) (b) of the repealed Constitution of Kenya), only goes to mitigate any level or degree of damages which may be claimed under Section 72 (b) of the said Constitution***.

There is no explanation in this case from the DCIO's Replying Affidavit what caused the further delay after the last statement was recorded on 25th July, 2010. In the circumstances I find and hold that there was no valid explanation as to why the petitioner was not taken to court immediately after the recording of the last statement. I hold that the continued detention of the petitioner beyond that date was unconstitutional.

The only question is the level or degree of damages that should (sic) awarded be to the petitioner. Mr. Maragia, his counsel claimed a sum of Ksh 100,000 per day for the unlawful detention. No basis was laid for that sum.

In these circumstances, to award the petitioner any substantial damages would be to reward him with blood money. On the balance I would award him Kenya Shillings ten (Ksh 10/-)". (Our emphasis)

With all due respect, the learned trial Judge allowed his mind to be weighed down by the fact that he had previously acquitted the appellant of the charge of murder, with much reluctance principally because the evidence pointing to the appellant's culpability was only circumstantial and no better evidence had been availed. He was unable, in our considered and respectful view, to reconcile himself with the fact that the appellant also had personal liberty rights deserving of protection, notwithstanding the seriousness of the charge he faced.Accordingly, we find and hold, again with great respect to the learned trial Judge, that he proceeded on wrong principles, considered matters he ought not to have considered and arrived at an inordinately low and erroneous estimate on damages.

Should we then interfere? In ***KENYA BUS SERVICES LIMITED VS JANE KARAMBU GITUMA (2004) E.A. 91***, this Court rendered itself as follows:-

" In this regard, both the East African Court of Appeal (the predecessor of this Court) and this Court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low as to represent a wholly erroneous estimate of the damages (See, for example, KASSAM V KAMPALA AERATED WATER CO LTD [1965] E.A. 587, IDI SHABANI V NAIROBI CITY COUNCIL [1982-88] 1 K.A.R. 681, BUTT V KHAN [1981] K.L.R. 349 and KIMOTHO & OTHERS V VESTERS & ANOTHER [1988] K.L.R. 48)".

In view of the anomalies we have pointed out hereinabove we cannot leave the award undisturbed. We find the criteria propounded by ***LENAOLA, J.*** (as he then was) in ***JENNIFER MUTHONI NJOROGE & 10 OTHERS V ATTORNEY GENERAL [2012] eKLR*** for the award of damages for violations of fundamental rights and freedoms enshrined in **Section 84** of the repealed **Constitution** to be fit for our purposes herein. He considered the following factors on that occasion:-

(i) The torture inflicted on each petitioner *(inapplicable in this instance);*

(ii) The length of time the petitioners were held in unlawful custody;

(iii) The decided cases on the subject or matter;

(iv) What is fair and reasonable in the circumstances of each case.

See also ***JABANE V OLENJA [1986] KLR 661***. The case of ***PETER M. KARIUKI*** **(Supra)** is distinguishable from the present appeal and is of no utility herein because of the extremely long period of detention and the egregious mix of abuses therein. We therefore set aside the award of Ksh 10, general damages and substitute it with an award of Ksh 20,000.

We answer the question as to costs by referring to the words of this Court in ***SUPERMARINE HANDLING SERVICES V KENYA REVENUE AUTHORITY [2010] eKLR*** to wit:-

> ***"Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute 'good reason' within the meaning of the rule"***.

See also **Section 27 (1)** of the **Civil Procedure Act**.

In the present appeal, the learned trial Judge did not give any reason for failing to award costs to the appellant having found in his favour. On our part we cannot find any plausible reason for the said decision, and find that the appellant

was entitled to costs. We so order. The appellant will have the costs of the appeal as well.

Dated and delivered at Nakuru this 27th day of April, 2017

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

……..

JUDGE OF APPEAL

P.O. KIAGE

……..

JUDGE OF APPEAL

I *certify that this is*

a true copy of the original.

DEPUTY REGISTRAR