



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & KARANJA, J.J.A.)

CIVIL APPEAL NO. 90 OF 2015

BETWEEN

KARIUKI KIBOI.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 16th December, 2011

in

Petition No. 33 of 2010 Consolidated with Petition No. 564 of 2005)

JUDGMENT OF THE COURT

Kariuki Kiboi (the appellant) was among six other persons who filed Constitutional petitions against the Attorney General (the respondent), who was sued on behalf of the Government of Kenya at the Constitutional and Human Rights Division of the High Court at Milimani Law Courts in Nairobi. The petitions were based on events that took place in this country in the mid-1980s and 90s, a period which some historians like to refer to as the dark days of the Moi era.

The appellants were claiming in the main that some of their Constitutional rights, guaranteed them by the retired, and not so robust Constitution of Kenya, had been violated. It is not evident, why they did not sue earlier, but one can only surmise that they felt encouraged by the promulgation of the new Constitution on 27th August, 2010, which came with broader democratic space, an expanded Bill of rights, and a more vibrant and seemingly impartial judiciary.

It is noted that the appellant actually filed his petition on 26th August, 2010. His petition was brought under **section 84 (1) 84 (2) and 84 (3) of the Constitution of Kenya** (*Supervisory jurisdiction and protection of fundamental Rights and Freedoms of the Individual*) High Court Practice Procedure Rules 2006.

In his petition, the petitioner narrated how he was arbitrarily arrested, locked up in the infamous Nyayo House torture chambers and detained for what he said was a total of 60 days. In the process, he was

subjected to torture and other forms of inhumane and degrading treatment. He stated that his right to personal liberty under **section 72 (1)** as read with **section 72 (3)** and **72 (5)** of the retired Constitution was violated. His right to privacy was also violated as his house was the subject of an arbitrary search.

For these violations of his Constitutional rights, he asked the court for a declaration that his fundamental rights and freedoms were violated by agents of the respondent; declaration that he was entitled to payment of damages for the said violations; General damages, exemplary damages; and what he referred to as “moral damages”. He also prayed for costs and interest.

He deposed a twenty-three paragraphs affidavit in support of the said petition particularizing in great detail how he was tortured. For reasons we shall explain later in this judgment, we do not find it necessary to reproduce these details for purposes of this judgment. When the petitions came up for hearing before Majanja J. on 29th

November, 2011, he directed that all six petitions be consolidated and they be considered together. One judgment was therefore rendered in respect of the six petitions. It is noteworthy however that in the said judgment, now impugned, the learned Judge considered separately the facts surrounding each petitioner as particularised in the separate petitions.

In his findings the learned Judge found that in each case, section 72 of the retired Constitution was violated to the extent that each petitioner was arrested and detained in custody for longer periods than that provided by the retired Constitution.

The learned Judge also found that the petitioners were subjected to cruel, inhumane and degrading treatment against the express provisions of section 74 (1) of the said Constitution. The Court therefore gave the declaratory orders sought by the petitioners. On the issue of damages, the learned Judge, after considering the decided cases that were cited to him came to the conclusion “doing the best he could” that a global sum of Kshs. 2,000,000/= as general damages was adequate compensation for each of the petitioners separately.

In arriving at this figure, the learned Judge made the following observation.

“I did not have the benefit of oral evidence, medical or other expert evidence to enable me assess the nature and extent of injury psychological or otherwise to the petitioner.”

The learned Judge continued to make the following pronouncements which form the crux of his findings. We repeat the same here verbatim, as they form the basis for this appeal.

“... whereas this is an application under section 84 of the Constitution, the normal rule as to pleading and proving special loss and damage still applies particularly to enable the respondent know the case it is to meet. While I have no doubt that the petitioners suffered loss of employment and other forms of actual loss, I am unable to make or take into consideration these losses.

In assessing general damages due for the breaches of the Constitution I considered the cases cited by the parties and awards in similar cases and to the facts of each petitioner. I have also taken into account the time it has taken to bring these matters to court. I consider that each petitioner deserved to be compensated for the wrongs that were committed. Money though, will never erase suffering that was wrought on them. Doing the best I can in the circumstances I award each petitioner a global sum of Kshs. 2,000,000.00 as general damages.”

Aggrieved by the award, the appellant moved to this Court by way of a Notice of Appeal dated 21st December, 2011. The other petitioners did not appeal the said judgment. Indeed when they appeared at the hearing of this appeal, they informed the Court that they were contented with the judgment and their respective awards had been processed and they had been paid. Interestingly, the appellant too confirmed in his reply to learned Counsel for the respondent that he too had been paid 1.9 million, with the balance

being paid to his counsel as fees and other costs.

We shall revert to this issue later.

In his memorandum of appeal dated 14th April, 2015 filed by the appellant in person, he proffered two grounds, which are basically a challenge on the quantum of damages awarded to him. He faults the learned Judge for failing to consider the injuries suffered and the period of incarceration when assessing the damages. On this point, however, as pointed out earlier, the learned Judge decried the fact that no medical evidence was placed before him as proof and extent of the injuries allegedly suffered by the appellant. We note that indeed the learned Judge was constrained not to award just nominal damages, there being no material to go by. He had absolutely no medical or other expert evidence to rely on as a basis for awarding even the two million shillings – That is why in his judgment, he even used the words “*doing the best I can.*” In fact, he just picked the two million from the air and applied his sense of justice to award that amount.

From what we can decipher from the grounds of appeal and submissions both oral and written, the appellant’s discontent is based on the fact that the learned Judge did not consider the length of time each petitioner was detained, and thus awarded all of them a similar amount of money as compensation.

In his response to the appellant’s submissions, learned counsel for the respondent submitted that the award of two million was proper and urged us not to interfere with it. Learned counsel called in aid several authorities on exercise of a

Judge’s discretion and the settled principles that ought to guide an appellate court before it can interfere with a trial Judge’s discretion.

According to learned counsel, there was no evidence presented before us to show that the award was inordinately low so as to represent an erroneous estimate. She submitted that the award was reasonable and neither too high nor too low and urged us to dismiss the appeal.

We have considered fully the evidence presented to the trial court as contained in the petition and the supporting affidavit. There was no oral evidence adduced in this matter and so all we need to do is reconsider the said petition and the contents of the supporting affidavit, along with the brief submission by Mr. Onyiso learned counsel representing the respondent who addressed the trial court on points of law.

As stated earlier, there was no rebuttal of the appellant’s depositions. It was not disputed therefore that he was arbitrarily arrested, tortured and detained for sixty days. There is no dispute that his fundamental rights to liberty and not to be subjected to torture, inhumane and degrading treatment were violated. We need not get into the nitty gritty of those averments for purposes of this judgment, because they are not denied. We appreciate also that this appeal is purely on the quantum of damages, and that is where our minds should be focused.

According to learned counsel for the respondent, in their submission both at the High Court and before this Court, the appellant failed to properly articulate and set out his claim as required. Learned counsel called in aid the case of **ANARITA KARIMI NJERU V REPUBLIC** (No.1) 1979 KLR 154.

Having considered the record of Appeal before us, the findings of the learned Judge, and the grounds of appeal proffered by the appellant, we note as stated earlier, that the only issue before us is the quantum of damages, which according to the appellant is too low. He has asked that the same be increased to Kshs. 11,000,000/=.

The amount of damages to be awarded to a party is really at the discretion of the court. The learned Judge is of course guided by the principles already set for consideration when arriving at a specific amount, and also by the nature of the injuries suffered, and by precedent.

In this case, as rightly observed by the learned Judge, there was no medical evidence presented to court

on the nature or extent of the injuries suffered by the appellant. It is true that he must have suffered mental and psychological torment, but how much?

The learned Judge considered this before he arrived at his award. He exercised his discretion to find that an award of Kshs. 2,000,000/= million was suitable.

Is this amount so inordinately low as to call for our interference? This brings us to the principles that should guide us before interfering with the impugned award. As held in the *locus classicus* case of **BUTT VS KHAN** (1981) KLR 349:-

“An appellate court will not disturb an award of damages unless it is so high or low as to represent an erroneous estimate. It must be shown that the judge proceeded on wrong principle, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

This principle was followed in **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE GATHOGO V A. M LUBIA AND OLIVE LUBIA** (1982-88) KAR 727 at p. 730, where Kneller J.A. stated.

“The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum or damages award by a trial judge were held by former court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account on irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage see Ilango vs Manyoka (1961) E.A 705, 709, 713; Lukenya Ranching and farming Co-operative society Limited vs Kavooloto (1970) E.A 415, 418, 419. This Court follows the same principles.”

Subsequently, in **Gicheru v Morton and Another** (2005) 2 KLR 333, the court held:

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should 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 to which the appellant was entitled.”

Is there cause established to justify our interference with the award herein?

Let us first look at the principle behind granting of reliefs, including that of damages for violation of a citizen's rights by the State. A Constitutional relief against a Government in respect of violation of a citizen's Constitutional rights is principally meant to punish the derogation, and send a message that citizens' fundamental rights are not to be trampled on willy nilly. It is not meant to, and it cannot fully compensate an aggrieved person for the violation against him or her save for assuaging the pain or loss suffered. To this extent, we agree with the Supreme Court of South Africa in its finding in **Dendy v University of the Witwatersrand**, Johannesburg & others(2006) 1LRC 291 that:-

“The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award was a secondary remedy to be made in only the most appropriate case.

The primary object of the constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the right that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff interest but the interest of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

The above was adopted by this Court in **Gitobu Imanyara and 2 others vs Attorney General** (2016) eKLR, where the Court pronounced itself as follows:

“...It seems to us that the award of damages for constitutional violations of an individual’s right(sic) by state or government are reliefs under public law remedies within the discretion of a trial court, however, the court’s discretion for award of damages in Constitutional violation cases though is limited by what is appropriate and just according to the facts and circumstances of a particular case...the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether...”

In our view, given the evidence presented to the court, and in absence of particularization, and proof of the injuries suffered and the damages sought, we are disinclined to interfere with the award of the trial court. It is not enough for the appellant to say that he should have been awarded more money because he stayed in custody for 60 days while those who had been incarcerated for a shorter term got the same amount. That would totally defeat the purpose of award of damages, as a constitutional relief. We also note that in awarding the damages, the learned Judge considered, and rightly so in our view, the length of time that had passed between the acts complained of and the filing of the suit, which time could have ameliorated the appellant’s suffering, because, as the saying goes, time is the best healer. We find no basis for us to interfere with the learned Judge’s exercise of jurisdiction in this matter.

Lastly, although this issue was not fully canvassed before us, and was introduced by way of passing, we note that the appellant actually executed the judgment in question and pocketed the money awarded to him. It is debatable whether having accepted and executed the judgment fully he could still come to this Court and challenge it.

That said, our conclusion is that this appeal is totally devoid of merit, and we dismiss it but with orders that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 9th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR