IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 86 OF 2013

(CORAM: WAKI, KIAGE & J. MOHAMMED JJ.A)

BETWEEN

KOIGI WAMWERE ……APPELLANT

AND

THE ATTORNEY GENERAL .....RESPONDENT

(An Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ngugi, J.) dated 28th March, 2012

in

H.C. PETITION NO. 737 OF 2009)

****

JUDGMENT OF THE COURT

Koigi Wamwere (the appellant), a warrior of conscience and a scarred veteran of Kenya's democratization travails, filed a petition on 31st December 2008 at the High Court's Constitutional and Judicial Review Division seeking redress on account of contravention and violation of his fundamental rights and freedoms. He described himself as an adult of sound mind, a former political prisoner and a former member of Parliament.

The petition against the Attorney General (the respondent) at paragraph 4 identified four specific instances of the gross violations he complained of as perpetrated by "Special Branch Police Officers and other Kenyan Government servants, agents, employees and institutions ..," that is;

"(a) During his first detention without trial between 9th August 1975 and 12the December 1976

(b) His second detention without trial from 5th August 1982 to 12th December 1984

(c) Torture at Nyayo House torture chambers for 11 days from 8th October 1990 to 19th October 1990, and Torture at Kamiti Maximum Security Prison from 19th October 1990 and to (sic) 19th January 1993 and

(d) for false arraignment for fake robbery with violence charges from 5th November 1993 to December 1996 at Nakuru Chief Magistrate Criminal Case No. 2273/92 R. Vs. Koigi Wa Wamwere & 3 Others."

Each of those instances was expounded upon and further particularized in the petition and in a detailed supporting affidavit sworn by the appellant on 30th December 2009 as well as in his expansive 48-page, 148 paragraph supplementary affidavit sworn on 30th June 2011 and filed on 11th July 2011 with leave of the High Court.

The respondent filed a memorandum of appearance but did not file any replying affidavit to answer the factual averments of the appellant as contained in the petition and the affidavits. Both parties did, however, file written submissions accompanied by lists of authorities on the consideration of which Ngugi J delivered a considered judgment on 28th March 2012.

Whereas the appellant sought declarations, damages on an aggravated scale and also compensation for violations of rights in respect of the four instances we have already referred to, and in submissions besought the learned judge to award him Kshs. 100 million in general damages plus a similar sum in exemplary damages making a total of Ksh. 200 Million, the judge determined the case thus, as captured in the decree;

"1. THAT a declaration be and is hereby issued that the fundamental rights and freedoms of the petitioner were grossly violated in the period that he was in custody in Nyayo House between the 8th and the 19th of October 1990 and the holding the petitioner with condemned prisoners at Block G at Kamiti Maximum Security Prison amounted to a violation of his rights under Section 74(1) of the Constitution.

2. THAT the Petitioner be and is hereby awarded a global award of Kshs. 2,500,000 for violation of the petitioner's rights under Section 74 of the former Constitution plus interest thereon on damages (sic) from the date of judgment until payment in full.

3. THAT the petitioner will also have the costs of the suit."

The appellant was dissatisfied with that judgment and decree and preferred an appeal to this Court. His dissatisfaction was only partial as is clear from the rather peculiarly crafted notice of appeal which contains grounds of appeal and reads like a memorandum of appeal. The memorandum of appeal itself contains five grounds by reason of which the appellant appeals against part of the learned judge's ruling. In summary, he avers the learned judge erred by;

a. *Not awarding general damages for torture, inhuman and degrading treatment perpetrated on the appellant during his two stints of detention terming the acts of the respondent's prison officers as deplorable prison conditions not amounting to torture.*

b. *Not awarding general damages for the violation of the appellant's fundamental right to protection of law in Nakuru Criminal Case No. 2273 of 1993.*

c. *Relying on the court's own research and reasoning to defeat the appellant's unchallenged or scantily challenged averments and submissions.*

d. *Failing to find that the appellants' detention was unconstitutional as it was impelled by political, personal and ideological differences with the respective presidents then sitting who misused the law on detention without trial.*

When the appeal was listed for hearing, both parties opted for the option availed by **Rule 100** of the Court of Appeal Rules, 2010 and filed written submissions with lists of authorities on the basis of which they urged us to render a decision on the appeal. We have carefully read and considered those rival

submissions and authorities in which the appellant asks us to set aside the learned judges' award of Kshs. 2.5 million and award a global sum of Kshs. 200 million compensation in its place, while the respondent urges us to leave the award undisturbed.

We find it convenient to deal with the four points we have distilled from the memorandum of appeal in reverse order. We thus need to first decide whether the appellant's two stints in detention had constitutional sanction at the material time. The retired Constitution at **Section 83** provided for the constitutionality of detention without trial in so far as it legitimized Part III of the Preservation of Public Security Act as follows;

> ***"83(1) Nothing contained in or done under the authority of Parliament shall be held to be inconsistent with or in contravention of Section 72, 76, 77, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of part III of the preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of the Constitution when and in so far as the provision is in operation by virtue of an order made under Section 85.***
>
> ***(2) Where a person is detained by virtue of a law referred to in sub-section (1) the following provisions shall apply-***
>
> > ***(a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;***
> >
> > ***(b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorized."***

Given that clear provision of the Constitution, we respectfully are unable to agree with the appellant's submission on the learned judge's reliance on some authorities to buttress her view that the Constitution then in place did countenance detention without trial. The appellant's submission on this point was that;

> ***"At page 385 to 388 the judge dug out out- dated and anti-fundamental human rights authorities of 1960's 1970's and 1980's which justified violations of human rights like UGANDA Vs. COMMISSIONER OF PRISONS EX-PARTE MATOVU [[1966] E.A 514], ANARITA KARIMI NJERU [Vs. REPUBLIC [1979]KLR 154] and KAMONJI WACHIRA [& 3 OTHERS (EX PARTE) Civil Case No. 60 of 1984] which were not cited to her by the respondent."***

Whereas counsel may be entitled to have a certain opinion as to the correctness or otherwise of those decisions, it seems plain to us that they were indicative of the correct position on the limited question of whether or not the detentions in question had constitutional sanction. And they did. The said decisions had not been overruled and so the learned judge was perfectly entitled to make reference to them in the course of her analysis of the case before her. That the cases had not been cited by the parties before her did not preclude the learned judge from doing so. It is of course the burden of counsel for the parties to place before the court all relevant decisions – even those against their respective cases, with appropriate attempts at distinguishing them or otherwise showing why they should not be applied – to enable the court to arrive at a just decision with the benefit of all germane judicial pronouncements. This is a professional and ethical duty of all counsel at the bar, which, alas, appears to be honoured more in the breach.

That counsel did not cite relevant authority cannot strait-jacket a judge into a consideration of only what was placed before her as far as the law is concerned no matter how scanty or irrelevant. Judges are not mere processors and regurgigators of what law is placed before them by counsel. Rather, they are avowed

to a duty to do justice by a consideration of all the jurisprudence and learning on any given subject. This necessitates research well beyond that which has been placed before them. To do otherwise would be to court the risk of making *per incuriam* pronouncements and determinations to their, and to everyone else's embarrassment. The judge did the judgly thing in the circumstances and deserves commendation and not calumny. And this disposes of the third limb of the appellant's complaints as well, as devoid of merit.

We now turn to the appellant's grievance that the learned judge erred by not awarding damages for the violation of the appellant's rights in Nakuru Criminal Case No. 2273 of 1993. It was the appellant's contention that the charges preferred in that case on which he was convicted by the trial court but acquitted on appeal in 1997 were fabricated for political reasons and he was thus entitled to compensatory general damages. Further, his rights are alleged to have been violated by reason of legal and constitutional irregularities inimical to a fair trial as set out in **Section 77(1) and (2)** of the old Constitution.

The learned judge took the view that the judicial system was properly functional at the time as evidenced by the fact that the appellant was able to file and successfully argue an appeal from his conviction which the High Court quashed and set aside the sentence. She therefore held that had the appellant genuine complaints as to the prosecution which he termed malicious, he ought to have filed a suit for appropriate redress. The learned judge was quick to add that the success of a criminal appeal does not, in and of itself, mean that the trial in which the successful criminal appellant was tried and convicted was *ipso facto* malicious or improper.

Should we interfere with the learned judge's finding? As a first appellate court we proceed on the consideration of the appeal by way of a re-hearing or re-evaluation of evidence but on the basis of the record only before making our own fresh and independent inferences and conclusions. See, **SELLE Vs. ASSOCIATED MOTOR BOAT CO. LTD** [1968] EA 123; **KENYA PORTS AUTHORITY Vs. KUSTRON (K) LTD** [2009]2 EA 212. Even as we do so, however, we do not lightly interfere with the findings and conclusions of the trial court, which is not the same as saying that we would not do so in appropriate cases. The appropriate cases are where, as was stated by this Court in **MBOGO & ANOR Vs. SHAH** [1968] EA 93 the judge misdirected himself in some matters with the result that he arrived at some wrong decision or where it is manifest from the case as a whole that the judge was clearly wrong and his decision amounted to an injustice. See also **PETERS Vs. SUNDAY POST LTD** [1958] ea 524 and **MWANASOKONI Vs. KENYA BUS SERVICES LTD** [1985] KLR 931.

We have anxiously perused and considered the learned judge's reasoning on the question of the alleged violation of the appellant's rights within the context of Nakuru Criminal Case No. 2273 of 1993. We are unable to agree that the learned judge misdirected herself, applied wrong principles, considered extraneous matters or failed to take into account relevant matters and thus arrived at a decision that was so plainly wrong as to invite our interference. We are not satisfied that the complaints raised before the learned judge with regard to the motivations that impelled the institution of the charges against the appellant are such as bring his case outside of the general purview of the tort of malicious prosecution, if at all, and are therefore unable to accept as valid the criticism leveled against the judge for concluding as she did. We have not been able to find that there was anything in the proceedings that remotely approached the egregious abuse and virtual negation of the fair trial guarantee that justified this Court's award of damages in the recent decision of **PETER M. KARIUKI Vs. ATTORNEY GENERAL** Civil Appeal No. 79 of 2012. We cannot say here, as we did there, among other critical things that;

> ***"We are satisfied that the cumulative effect of the violation of the appellant's right to conduct his defence, the refusal to summon General Mulinge, who the appellant wished to call as a witness, and the general conduct of the judge advocate, was to compromise beyond salvage the appellant's constitutional right to a fair trial."***

We now come to the appellant's grievance that the learned judge should have found that the treatment he was subjected to in the two periods of detention amounted to torture, inhuman and degrading treatment deserving 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."***

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."***

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.

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 detention and imprisonment amounted to deplorable prison conditions only, and not torture. We note that the submissions by counsel for the appellant were particularly scathing of the learned judge assailing her of being 'biased', 'playing devil's advocate', being 'a gatekeeper' for the State and being "Executive minded". With respect, we find that this kind of attack on the learned judge is way too personalized and deficient of decorum and temperance. It behoves counsel when making submissions before court, be they written or oral, to be as professional and objective as possible even as they press their client's case with all legitimate force and passion. It must never be forgotten that the aim of submissions is to persuade and in that art, courtesy and felicity of expression are a great asset.

The appellant has in counsel's submissions listed more than two dozen instances of physical and psychological torture allegedly suffered in the three periods complained of. These include;

> "**…**
>
> ***(a)Being imprisoned while innocent of any crime that caused him unbearable pain and hurt.***
>
> ***(g) giving him bad food of half-cooked ugali, unfired and unwashed vegetables that were spiced with snails, spiders and worms, deliberately served to ensure meal times were moments of torture***
>
> **…**
>
> ***(i)exposing him to mosquitoes and malaria which exposed him to a deliberate plot by the Government to kill him***
>
> **…**
>
> ***(j)Denying him a bed and serving him a sisal mat to sleep on a concrete floor …***
>
> ***(k)Denying him trousers, pullovers and other warm clothing making the cold months of May, June, July and August months of terrible torture by cold in the Maximum Security Prisons of Kamiti, Manyani and Naivasha.***

…

(r)Denying him news from home even when they concerned the death of a loved one was terrible torture

…

(w) Taking his name and humanity away and calling him by a mere prison number was to him, humiliating torture ….”

The learned judge in considering those complaints and others by the appellant had this to say at paragraph 44 of her judgment;

> ***“I have set out in detail some of the averments of the petitioner with regard to what he considers to be acts of torture committed against him by state and state agents during his detention and incarceration in his two trials. Weighed against the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognized in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change. To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya’s prison system. Looked at against the definition of torture, however, I find and hold that there was no violation of the petitioner’s rights under Section 74 with regard to the above instances cited as illustrations of the torture he was subjected to while in detention.”***

On our own consideration of the matters complained of, we come to the unhesitating conclusion that the ascription of the term torture to them was a subjective and loose stretching of the term, which, though conversationally and informally understandable, does not bear fealty to the technical legal definition of torture. 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. <u>It does not include pain or suffering</u> <u>arising only from, inherent in or incidental to lawful sanctions.”</u>***
>
> *(Our emphasis).*

We have highlighted the last phrase or sentence of that definition not only because it seems, on the face of it, to be exclusionary of some of the complaints by the appellant but, more so because, whether by default or by design, they are missing from the appellant’s counsel’s quotation of the article in their submissions. It seems to us arguable that had counsel fully quoted the article, and given full weight and credit to the last phrase, the submissions made would necessarily have been either altered or otherwise qualified.

We take the view, as did the learned judge, that whereas prison conditions as picture-squarely described by the appellant left a lot to be desired and cried out for reform, the treatment suffered by the appellant in common with the other inmates, whether in detention or in prison,did not amount to torture as legally

defined. We do not understand the learned judge to have been speaking as an apologist for, or gatekeeper for the State in stating, obiter, that to hold that the appellant had been tortured would be opening floodgates of litigation on the same basis by all persons who passed through the Kenya prisons system at the time. Such an avalanche of litigation would, of course, have grave and deleterious effects which the judge, as a responsible judicial officer, could not afford to be oblivious to.

The final issue we must address is quantum of damages and it flows from the learned judge's award of Kshs. 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 Kshs. 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 Kshs. 200 million and places reliance on the case **PETER M. KARIUKI** (supra) as well as the High Court decision of **OTIENO MAK'ONYANGO Vs. ATTORNEY GENERAL,** High Court Civil Case No. 845 of 2003.

In the **PETER KARIUKI** case, 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 Kshs. 7 million to Kshs. 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 in consideration of damages awardable being mindful, of course, that each case must be decided in accordance with its peculiar facts.

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 Vs. THE COMMISSIONER OF PRISONS EX PARTE 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 Vs. 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 Kshs. 50 million in punitive damages.

We have no hesitation in finding that the award of Kshs. 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 Vs. AG High Court Civil Case No. 1184 of 2003 where the petitioner, confined at Nyayo House for 16 days was awarded Kshs. 2.5 million.

2. DOMINIC ARONY AMOLO Vs. AG – Misc. Application No. 494/03 where a soldier alleged to have participated in the 1982 …cup was awarded Kshs. 2.5 million

3. HARUN THUNGU WAKABA & OTHERS Vs. AG Nairobi High Court Civil Case No. 1411 of

2004 where sums of Kshs. 1 million and 3 million were awarded to victims of torture at Nyayo House.

4. MIGUNA MIGUNA Vs. AG. Petition No. 16 of 2010 where the petitioner a former leader of the Student Organization of Nairobi University (SONU) was awarded Kshs. 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. It received its well-deserved quietus when on 9th May 2014 was decided an appeal from it, being Civil Appeal No. 240 of 2011. 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 Kshs. 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 Kshs. 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 Kshs. 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 Kshs. 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 Kshs. 12 million with interest at court rates from the date of the judgment of the High Court appealed against.

As the appellant has succeeded only to the limited extent of quantum, he shall have only half of the costs of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of March, 2015.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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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