IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & OTIEN0-ODEK, JJ.A)

CIVIL APPLICATION NO. SUP. 4 OF 2015 (UR 3/2015)

(An application for leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi (Waki, Kiage and J. Mohammed, JJ.A) dated 6th March 2015

BETWEEN

KOIGI WA WAMWERE...APPELLANT

AND

THE ATTORNEY GENERAL...RESPONDENT

in

Civil Appeal No. 86 of 2013)

****

RULING OF THE COURT

1. A sad feature in the history of Kenya is the infamous Nyayo House torture chambers. The Applicant herein***, Koigi wa Wamwere***, is a former political detainee who was incarcerated at Nyayo House and Kamiti Maximum Security Prison and tortured therein. He filed a Petition at the High Court seeking general damages against the Government of Kenya on the basis that his fundamental constitutional right of protection from torture, inhuman and degrading treatment was violated.

2. The pertinent facts giving rise to the Petition and claim for general damages are that:

"(a) The applicant was first detained without trial between 9th August 1975 and 12th December 1978.

(b) His second detention without trial was 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 to (sic) 19th January 1993 and

(d) For false arraignment for fake robbery with violence charges from November 1993 to December 1196 at Nakuru Chief Magistrate Criminal Case No. 2273/92 R vs Koigi wa Wamwere & 3 others.

3. Upon hearing his case, the High Court (Ngugi, J.) vide judgment dated 28th March 2012 gave the following orders:

"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 8th and 19th October 1990 and the holding of the petitioner with condemned prisoners at Bock G at Kamiti Maximum Security Prison amounted to a violated of his rights under Section 74(1) of the Constitution.

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

3. That the Petitioner will have the costs of the suit."

4. Aggrieved by the judgment and decision of the High Court, the applicant lodged an appeal to the Court of Appeal which, by its judgment dated 6thMarch 2015, enhanced the general damages awarded to Ksh.12 million with interest at court rates from the date of the judgment by the High Court. In enhancing the quantum of general damages, this Court expressed itself as follows:

"…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,…we think the sum of Ksh. 2.5 million awarded to him as the global general damages was patently inadequate…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."

5. The applicant is aggrieved by the judgment of this Court and by Notice of Motion dated 19th March 2015, the applicant seeks Certification and leave to appeal to the Supreme Court. The order sought is that: "Leave be granted to the applicant to file an appeal to the Supreme Court against part of the judgment delivered on 6th March 2015 on 16 issues of general public importance and in the interest of justice to a former political detainee/other former political detainees under ***Article 163 (4) (b)*** of the Constitution of Kenya 2010. Further on ground that substantial miscarriage of justice will occur unless the appeal is heard by the Supreme Court."

6. The sixteen (16) grounds upon which the application is founded are stated on the face of the Motion and the supporting affidavit of the Applicant as reproduced hereunder verbatim as:

1. *The judgment intended to be appealed against was delivered by 3 Judges of Appeal on 6th March 2015 whereby the Court of Appeal correctly granted the appellant compensation for torture at the macabre Nyayo House Torture cells between 8th and 19th October 1990 to 19th January, 1993 of* ***Kshs.12 million*** *with interest from the date of judgment of the high Court but it declined to award him compensation for torture, inhuman and degrading treatment while in prison during periods of detentions without trials AND refusal to award general damages for the violations of the appellant's fundamental rights in the criminal trial in Nakuru Chief Magistrate's Court Criminal Case No. 2273/93 R vs. Koigi wa Wamwere.*

2. *The appellant wishes to pray to the Supreme Court to rule and decide on the following 16 issues of general public importance in the interest of justice under Article 163 (4) (b) of the Constitution of Kenya 2010: -*

a. *Whether the use or misuse of Detention Law between 1975 to 1984 to punish the appellant by the Kenya Governments of the 1st and 2nd Presidents because he was a political opponent, because of his open political dissent and his ideological differences with the two former presidents was unconstitutional or not.*

b. *Whether the use or misuse of Detention Law by the 2 former Presidents when Kenya was not at war or was not involved in any emergency or was not involved in any civil war as envisaged by former Section 83 (a) of the former Constitution between 1975 to 1984 was unconstitutional or not.*

c. *Whether the 23 specified particulars of torture which were specifically used to punish the appellant as detained person and specifically other detained persons were outlawed by former Section 74 of the former Constitution and hence unconstitutional or not.*

d. *Whether the 23 specified particulars of torture which were specifically used on the appellant as a detained person specifically other detained persons were common "deplorable conditions", "incidental pains" and "suffering" common to all Kenyan Prisoners held in Kenya Prisons and were statutorily provided in The Prisons Act Cap 90 Laws of Kenya and whether they were "Torture or inhuman or degrading punishment or any other treatment" contrary to Section 74 of the former Constitution. Which has transited to Article 29 of the Constitution of Kenya 2010 or not.*

e. *Whether the so called "deplorable conditions" and "incidental pains and sufferings" the appellant was subjected to in (a) the 1st detention (1975 to 1978) and the 2nd detention (1982 to 1984) and during his criminal trial between 1993 to 1997 were torture as strictly outlawed in the former Section 74 of the repealed Constitution which was transited to Article 29 of the Constitution of Kenya 2010 or that they were justified by virtue of being a detained person or not.*

f. *Whether the 23 or "2 dozens" of particulars of torture enumerated by the appellant were human rights violations outlawed under former Section 74 of the repealed Constitution which was transited to Article 29 of the Constitution of Kenya 2010 or not.*

g. *Whether the 23 enumerated particulars of torture were justifiable in view of the plain and strict wording of Section 74 of the repealed Constitution which was transited to article 29 of the Constitution of Kenya 2010 or not.*

h. *Whether the appellant was entitled to compensation for torture suffered during the two stints of detention and during the Nakuru trial between 1993 to 1997 or not. If in the affirmative how much on top of the global sum of Kshs.12 million awarded and accepted for torture at Nyayo House Cells and for Torture at Block G at Kamiti Maximum Security Prison and how much should the Supreme Court award the appellant reasonable and additional compensation or not.*

i. *Whether the appellant was entitled to petition for compensation by way of constitutional reference for torture and human rights violation in the Constitutional and Human Rights Division of the High Court and under The Constitution of Kenya (protection of fundamental Rights and Freedoms of individual practice and procedure Rules 2006) having failed to sue for malicious prosecution for the NAKURU CRIMINAL CASE NO. 2273/92 R vs. KOIGI WA WAMWERE & 3 others between*

1997 to 2008 or not.

j. *Whether having awarded the appellant compensation for torture in lawful remand prison at Block G in Kamiti Maximum Security Prison between October 1990 to 19th January 1993, the High Court and the Court of Appeal were justified to refuse to award compensation for the same particulars of torture the appellant suffered while in the 2 stints of "lawful" or "constitutional" detention between 1975 to 1978 and 1982 to 1984 AND while in lawful remand prison or while lawfully imprisoned during the NAKURU CRIMINAL CASE NO. 2273 OF 1993 R vs. KOIGI WA WAMWERE which lasted between 1993 to 1997 or not.*

k. *Whether the bad decisions of the former Court of Appeal and the High Court which justified Torture and Human Rights violations are still binding and applicable in view of the new Constitutional dispensation under PART IV of the Constitution of Kenya, 2010 which specifically provides for upholding and respect for Human rights, Transitional Justice and redress of historical injustices or not.*

l. *Whether these bad decisions should be overruled by the Supreme Court or not.*

m. *Whether the appellant can be denied justice and compensation on ground that it will open a flood gate of litigation by former detainees or former political prisoners who are alive or not.*

n. *Whether the Supreme Court has constitutional duty to look at each of the appellant's 148 paragraph of his 48 pages affidavit and determine whether any of the alleged acts of torture amount to torture or not.*

o. *Whether the Supreme Court has constitutional duty to take a look at the Kenyan legal, judicial and personal experiences of former detainees such as Ngugi wa Thiong'o, their history, books, biographies and autobiographies and determine whether there has been torture in Kenyan detention camps and maximum security prisons. These rich historical documents explains (sic) why former detainees Martin Joseph Shikuku and Kenneth Matiba came out of detention literally and physically crippled or not.*

p. *Whether the Supreme Court has constitutional duty to determine that the former Section 74 of the repealed Constitution and which transited to Article 29 of the Constitution of Kenya 2010 was far progressive and better than even the restricted definition of torture by UN Convention against Torture Article 1 which excluded from torture, acts of torture sanctioned as lawful or legal restrictions, denials, pain and suffering "arising only from, inherent in or incidental to lawful sanctions.*

3. *Further that under 16(1) of the Supreme court Act 2011, leave to appeal to the Supreme Court lies where it is in the interest of justice for the Supreme Court to hear and determine the proposed appeal if the appeal involves a matter of general public importance or a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard."*

7. At the hearing of the application, learned counsel Gitau Mwaura appeared for the Applicant while State Counsel Samuel K. Odiwour appeared for the Attorney General. Both counsel filed written submissions and submitted a list of authorities in support of their submissions.

8. We have considered the application, the grounds in support thereof, the written submissions by counsel and the list of authorities cited. An appeal from this Court to the Supreme Court arises in only two instances as set out in ***Article 163(4)*** of the ***Constitution***. The said Article

provides:- **“163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-**

(a) As of right in any case involving the interpretation or application of this Constitution; and

(b) In any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”

9. The applicant premises his application under ***Article 163 (4) (b)*** of the Constitution that a matter of general public importance is involved. The issue before us is to determine whether indeed there is a matter of general public importance that is raised and disclosed. This Court in **Hermanus Philipus Styen -vs- Giovanni Gnecchi-Ruscone - Civil Application No. Nai. Sup.4 of 2012** observed:-

“…The requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.”

10. What constitutes a matter of general public importance? The Supreme Court of Kenya in **Hermanus Philipus Steyn -vs- Giovanni Gnecchi-Ruscone - Application No. 4 of 2012** held,

“….a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact and consequences are substantial, broad based, transcending the litigation- interests of the parties, and bearing upon the public interest.”

The majority opinion in the aforementioned case set out the following as the governing principles in the determination of matter(s) of general public importance:-

i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

iii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;

iv. Where the application for certification has been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. Mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must fall within the terms of Article 163(4)(b) of the Constitution;

vi. The intending applicant has an obligation to identify and concisely set out the specific elements of ‘general public importance’ which he or she attributes to the matter for which certification is sought;

vii. Determinations of fact in contests between parties are not, by themselves, a basis for

granting certification for an appeal before the Supreme Court." (See also the Supreme Court's decision in **Malcolm Bell -vs- Hon. Daniel Toroitich Arap Moi & another - Application No. 1 of 2013)**.

11. The applicant has moved this Court that a matter of general public importance is involved. The Supreme Court in defining what a matter of general public importance is, expressed itself as follows in **Hermanus Philipus Steyn -vs- Giovanni Gnecchi-Ruscone - Application No. 4 of 2012.**

> **"In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."**

12. From the undisputed facts of this case, the applicant was detained and held at Nyayo House and Kamiti Maximum Security Prison. A finding and determination has been made by the High Court and upheld on appeal that the fundamental rights and freedoms of the applicant were grossly violated in the period that he was in custody in Nyayo House between 8th and 19th October 1990 and the holding the petitioner with condemned prisoners at Bock G at Kamiti Maximum Security Prison amounted to a violation of his rights under ***Section 74(1)*** of the Constitution. We have examined and analyzed the grounds in support of the instant application. The Applicant does not intend to appeal against this specific finding by the High Court which was upheld by the Court of Appeal.

13. A common thread that is decipherable from the 16 grounds cited in support of this application is that the applicant is aggrieved by that part of the judgment of this Court which awarded him the enhanced sum of Ksh.12 million. The applicant at paragraph 2 (h) of the grounds intends the Supreme Court to determine how much on top of the global sum of Ksh.12 million awarded and accepted for torture at Nyayo House cells and for torture at Block G at Kamiti Maximum Security Prison and how much should the Supreme Court award to the applicant as reasonable and additional compensation or not. We have considered this specific ground in paragraph 2 (h) to determine if this ground discloses a matter of general public importance that transcends the interest of the parties in this case. We note that the Supreme Court is not a court of original jurisdiction in civil and criminal matters; to this extent, the Supreme Court is not a trial court for issues of fact. The issue raised by the applicant in Paragraph 2 (h) relates to quantum of damages.

14. Whereas the principles used in calculating and determining the quantum of general damages to be awarded are principles of law, the quantum awarded is a matter of fact. The applicant seeks to engage the Supreme Court in calculating, determining and enhancing the quantum of damages to be awarded to a litigant. At stake in the applicant's intended appeal is the issue of quantum of damages which would be a contestation of findings of fact by the High Court and Court of Appeal. Such a contestation and determination of fact in contests between parties cannot be in itself, a basis for granting certification for an appeal before the Supreme Court.

15. It is our considered view that the jurisdiction of the Supreme Court as outlined in the Constitution and its appellate jurisdiction as stated in ***Article 163 (4) (b)*** does not extend to calculating the measure and quantum of damages to be awarded to a litigant. We find and hold that the Supreme Court has no jurisdiction to calculate quantum. The Court of Appeal in the judgment delivered in this matter enhanced the global sum of general damages awarded to the applicant to Ksh.12 million. It is our considered view that the quantum of damages as awarded by this Court is an issue of fact that does not involve a substantial point of law transcending the interest of the parties to this case. The quantum as awarded is final and not appealable and we

decline to grant leave to appeal to the Supreme Court to consider the issue as framed in Paragraph 2 (h) of the grounds in support of the application.

16. We note that both the High Court and the Court of Appeal made findings and declarations that the fundamental rights and freedoms of the applicant were grossly violated in the period that he was in custody in Nyayo House between 8th and 19th October 1990; a declaration also issued that the holding of the petitioner with condemned prisoners at Bock G at Kamiti Maximum Security Prison violated the applicant's rights under ***section 74(1)*** of the Constitution. We note that the applicant herein does not intend to appeal these declarations and findings. We have examined and analyzed grounds in Paragraph 2 (a) (b) (c) (d) (e) (f) (g) and (i) of the grounds in support of the instant application. In light of the findings and declarations by the High Court, as upheld by this Court, we hold that the grounds in Paragraph 2 (a) (b) (c) (d) (e) (f) (g) and (i) have been determined by both the High Court and Court of Appeal with the declaration that the applicant's fundamental rights were violated. The grounds in the aforementioned paragraphs do not reveal any contestable issue for consideration and determination by the Supreme Court. We decline to grant leave to appeal to the Supreme Court based on the grounds in Paragraph 2 (a) (b) (c) (d) (e) (f) (g) and (i) aforestated.

17. We now analyze the applicant's grounds in support of the instant application as stated in Paragraph 2 (n) and (o). We have considered these grounds and examined the judgment of the Court of Appeal delivered on 6th March 2015. We are satisfied that the issues raised in these grounds were neither pleaded, canvassed, considered nor determined by the High Court or Court of Appeal; the issues are theoretical contestations that invite the Supreme Court to muddle into a factual and an academic exercise and do not reveal a substantial point of law of general public importance. In any event, a positive or negative answer to the issues and grounds raised in these paragraphs will not affect the outcome of the judgment delivered by this Court on 6th March 2015. There is no cogent and recurrent constitutional issue of controversy or point of law as to require further input by the Supreme Court. We decline to grant leave to appeal to the Supreme Court on the grounds cited in Paragraph 2 (n) and (o) of the grounds in support of the instant application.

18. We now consider the ground in Paragraph 2 (k) in support of the present application. The applicant has neither identified nor cited the "bad decisions" of the former Court of Appeal and the High Court which justified torture and human rights violations. To ask the Supreme Court to determine if unknown and un-cited "bad decisions" are still binding is to engage the Supreme Court in a fishing expedition to rake through and scrounge Kenya's judicial decisions to answer a question that was neither pleaded nor canvassed before the High Court and Court of Appeal. It is our considered view that if there is any "bad decision" made in the past by the High Court or Court of Appeal, such judicial decisions must be cited on a case by case basis and the same shall be considered, distinguished or reversed as appropriate when facts and points of law relevant to the cases arise. The doctrine of *stare decisis* and doctrine of precedent are replete with instances when judicial decisions have been overturned or distinguished. The practice of this Court allows a five judge bench to be constituted to consider, determine or reconcile any conflicting decisions made by this Court. The Supreme Court's appellate jurisdiction cannot be invoked when the alleged conflicting precedents have neither been identified nor cited by the Applicant. We are guided in this regard, by the precept of conscientious deployment of precious and scarce public resources, that the judicial time of the Supreme Court should not be deployed in a fishing expedition on issues that do not disclose a matter of general public interest - (See **Wavinya Ndeti -v- IEBC & 4 others, Supreme Court Petition No. 19 of 2014).**

19. Having considered and analyzed all the grounds in support of the instant application, what ground remains that discloses a matter of general public importance that warrants leave to appeal to the Supreme Court? The applicant in Ground 1 on the face of the Notice of Motion contends that both the High Court and Court of Appeal declined to award him compensation for torture, inhuman and degrading treatment while in prison during 2 periods of detention without trials and refused to award general damages for the violations of the applicant's fundamental rights in the Criminal trial in **Nakuru Chief Magistrate's Court Criminal Case No. 2273/93 R**

vs Koigi wa Wamwere. This ground is tied to ground 2 (m) *to wit*, whether the applicant can be denied justice and compensation on the ground that it will open a flood gate of litigation by former detainees or former political prisoners who are alive or not. We have considered these grounds and examined the judgment of this Court dated 6th March 2015 wherein this Court expressed itself as follows:

> **"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."**

20. We are satisfied that the statement by the High Court that floodgates of litigation may be opened was made *obiter* and was not the basis of the court's decision. We are further satisfied that this Court correctly observed that such statement was *obiter*. We are of the view that there is no contestable issue for clarification and determination by the Supreme Court in so far as obiter remarks by the High Court are concerned. We decline to grant leave to appeal to the Supreme Court on ground 2 (m) of the grounds in support of the Notice of Motion.

21. A further ground cited by the applicant in support of the instant application is that a substantial miscarriage of justice might occur unless the appeal is heard by the Supreme Court. "*Miscarriage* of justice" is more consistent with failings in the judicial process of a rather glaring nature. From the details set out in the Notice of Motion and the affidavit in support thereof; from the written submissions filed and authorities cited, we find that the applicant has not demonstrated to us any glaring failings in the judicial process and we find this ground in support of the instant application to have no merit.

22. In so far as Ground1 in support of the application is concerned, the applicant contends that both the High Court and this Court declined to award him compensation for torture, inhuman and degrading treatment while in prison during 2 periods of detention without trial and refused to award general damages for the violations of the applicant's fundamental rights in the Criminal trial in **Nakuru Chief Magistrate's Court Criminal Case No. 2273/93 R vs Koigi wa Wamwere.**

23. In awarding general damages to the applicant, the High Court awarded a global award of Ksh.2,500,000/= for violation of the Petitioner's rights under ***Section 74*** of the former Constitution (emphasis ours). This global award was enhanced by this Court to Ksh.12 million. The applicant interprets the global award to mean that the High Court and this Court declined to award him compensation as stated in Ground 1. This raises the issue of interpretation of the meaning of the phrase global award. On our part, we take judicial notice that time and again, judgments have been delivered and consent orders made where a sum awarded is a global sum or a global award settling the claim and dispute between the parties. Noting that a dispute has now arisen as to the meaning and import of the phrase global award, we are of the view that the applicant has demonstrated that there is a point of law which transcends the circumstances of the case herein and/or has a bearing on the proper conduct of the administration of justice and a significant bearing on the public interest. We are inclined to issue a Certificate and leave to appeal to the Supreme Court on two questions.

24. We hereby frame only two questions for determination by the Supreme Court as follows:

a) What is the meaning and or legal interpretation of the phrase global award?

b) Given the definition of global award as shall be determined in (a) above, did the Judgment of the Court of Appeal dated 6th March 2015 as read with the Judgment of

the High Court dated 28th March 2012 awarding the applicant a global award of Ksh.12 000,000/= for violation of his rights under Section 74 of the former Constitution exclude and decline compensation for torture, inhuman and degrading treatment of the applicant while he was in prison during 2 periods of detention without trials; and did the Court of Appeal decline or refuse to award general damages for the violations of the Applicant's fundamental rights in the Criminal trial in Nakuru Chief Magistrate's Court Criminal Case No. 2273/93 R vs Koigi wa Wamwere.

25. The upshot of the foregoing is that we find that the Notice of Motion dated 19th March 2015 partially has merit and we hereby allow the application to the extent that only two questions are forwarded to the Supreme Court for consideration and determination. We grant leave and issue a Certificate to appeal to the Supreme Court. The questions and issues for determination by the Supreme Court are as enumerated above. We order that each party shall bear its costs in this application.

Dated and delivered at Nairobi this 3rd day of July, 2015.

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR