



**Mbithi v Attorney General (Civil Suit 1105 of 2001)
[2024] KEHC 281 (KLR) (Civ) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 1105 OF 2001

JN MULWA, J

JANUARY 25, 2024

BETWEEN

LAWRENCE MUCHANGI MBITHI PLAINTIFF

AND

HON. ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The Plaintiff Lawrence Muchangi Mbithi sued the Defendant, the Hon. Attorney General on behalf of Kenya Police Force Officers named as Senior sergeant Munyinyi, PC Mutunga, PC. Malwa, and PC Ngunyi who on the 30/10/1997 are alleged to have, while in the course of their duties arrested the Plaintiff, tortured, beaten and brutally harmed him causing him to sustain permanent injuries for which he seeks compensation in special and general damages as specifically pleaded in the Further Amended Plaint dated 7/02/2018, Court, and supported by bundle of documents dated 24/05/2012.
2. Leave to file this suit out of time was granted by the court on 28/06/2001.
No challenge has been raised by the defendant against the grant of leave granted by court.
3. The Defendant filed a statement of defence on behalf of its employees dated 3/10/2001 denying all the allegations stated at the plaint, and in the alternative, that if at all such acts were committed upon the plaintiff, and or malicious prosecution was done, then, the same was warranted and carried out within the realms of the law of the country.

Plaintiff's Case

4. The plaintiff adopted his two witness statements dated 6/02/2012 and 19/12/2019 as his evidence in chief. He also adopted documents in three bundles dated 24/05/2022, 30/01/2012 and 20/01/2020 which were marked as P exhibit 1-18.



It was his evidence on cross examination that on 30/10/1997 he was arrested from his house in the presence of his wife and daughter by some police officers, namely Sgt. Munyinyi, Pc. Mutunga, Pc. Ngunyi, PC. Nuru, PC Mulwa and PC Othoo all from Kamburu Police Station, and upon being handcuffed and brutally beaten to pulp, was taken to Kamburu Police Station where the beatings continued and later rescued by the OCS who ordered for him to be taken to Matuu Nursing home.

5. That as he could not walk, it was his evidence that he was carried to the hospital but the doctors therein referred them to Kenyatta National Hospital as his bladder was damaged and urine was flowing freely, where a catheter was inserted in his genital organ to control the urine.

6. It was his further testimony that he was taken to court after seven (7) days and charged for the offense of creating disturbance contrary to Section 95 of the Penal Code in Kithimani Criminal Case No. 90 of 1998 R. Vs. Lawrance Muchangi but after trial, he was discharged under section 215 of the Criminal Procedure Code on the 25/05/1999. Additionally, he testified that he did not know why he was arrested and brutally injured.

7. He stated that he incurred a lot of injury and damage to his bladder and other body parts, and relied on the medical records in his bundle of documents.

He testified before this court that to date he still uses a catheter which is changed every two weeks, and also attends neurology clinic at Kenyatta National Hospital.

In his estimation, he stated that he has spent over Kshs. 1,839,200 on medical treatment and medication.

8. In addition, he testified that at the time of the incident, he was 25 years old, and at the date of hearing was 50 years; that he was employed as a matatu driver by Neno Sacco where he was earning Kshs. 10,000/= per month as well as a farmer. He added that he knew the police officers who arrested him and they knew him too, but he had no grudges with them.

He therefore urged the court to compensate him for permanent injuries he sustained, pain and suffering as well as for the costs he incurred and continues to incur for medical treatment, and for the wrongful arrest, torture and malicious prosecution.

9. The defendant did not produce any witness to court nor filed submissions, despite having been given an opportunity to do so.

Analysis And Determination.

10. In his Further Amended Plaintiff dated 7/02/2018, the Plaintiff pleaded that the Defendant's Police Officers (named) earlier breached their statutory duty by their negligence as stated at Article 10(2), 28 and 49 of *the Constitution* by unlawfully arresting the plaintiff, perpetrating unreasonable violence afflicting him with permanent disability; detaining him in custody for seven(7) days contrary to the statutory 24 hours and maliciously prosecuting him in Yatta RM's Court Criminal case NO. 90 of 1998 which case was dismissed under Section 215 of the Criminal Procedure Code.

11. The Plaintiff pleaded particulars of the injuries he received under the hands of the defendants' employees to wit:

- i. Ruptured bladder causing him to depend on disposal catheter for the rest of his life
- ii. Crushed private organs such that he cannot engage in sexual intercourse
- iii. Injured testicles



- iv. Fracture right tibia
- v. Multiple bruises to the scalp, chest, abdomen, elbows and shoulders; knees and hip joints.

The Medical Report by Dr. Okere C. O. dated 18/11/2004, was produced by consent of both parties and marked as P. Exhibit 2.

12. In terms of Special Damages, the plaintiff pleaded Kshs. 19,080/= as at date of the plaint, but indicated more expenses would be produced and adduced during the hearing as treatment was still ongoing.

The plaintiff therefore prayed for:

- a. Special damages
- b. Future medical expenses
- c. General damages
- d. Punitive and Aggravated damages
- e. Costs of the suit
- f. Interest on the above and any other relief the court may deem fit and just to grant.

13. On the matter of special damages, the court notes that two bundles of documents dated 20/01/2020 and 24/05/2022 were filed and produced by the plaintiff during the trial with consent of the defendant.

Liability

14. The defendant filed a statement of defence, but failed to adduce any evidence to support its averments in the defence though its advocate participated in the trial, and also failed to file its submissions upon conclusion of the same. It is trite that a pleading is not evidence; that if a defendant files a defence and calls no evidence to prove the allegations, the defence remains unsubstantiated, and the claims made in the statement of defence stands unchallenged.

See North End Trading Company Limited T/A Kenya Refuse Handlers Ltd vs. City Council of Nairobi [2019] eKLR; Netah Njoki Kamau & Another v. Eliud Mburu Mwaniki [2021] eKLR.

15. Further, the court in Kyalo Elly Joy V. Samuel Gitahi Kanyeri [2021] eKLR held citing decision in Edward Muriga through Stanley Muringa (Supra) rendered that

“---apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statements in the defence therefore remain as mere allegations ---- section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

To that extent, the defendant's defence remains mere statements with no evidential value.

Analysis and Determination

16. There is no dispute that the Plaintiff was arrested, brutally beaten, and injured by Police Officers named earlier on the 30/10/1997; and detained at Kaburu Police Station beyond the statutory 24 hours, precisely for 7 days, denied food and viciously tortured when he was taken to court aided to walk by the same villains, and charged for an alleged offence of creating disturbance C/S 95 of the Penal Code via



Yatta Criminal Case no. 90 of 1998 and upon trial, he was acquitted under section 215 of the Criminal Procedure Code.

17. It is also not in dispute that the defendants' servants (Police Officers) brutally injured the Plaintiff causing him to sustain severe permanent injuries for no reasonable grounds at all; as none were adduced before the court. It is also not in doubt that the plaintiff was maliciously prosecuted and therefore suffered loss and damage for which he seeks compensation.
18. The court is aware that an acquittal in a criminal case does not necessarily connote malice on the part of the prosecutor, or is it prima facie tortious, but to do so for no apparent reasons, dishonestly and unreasonably, is against the very basic Human Rights under Article 25(a) of the constitution that guarantees an individual's rights against inhuman or degrading punishment or other treatment arbitrary arrest and torture.
19. Protection against torture or other degrading inhuman treatment is provided under various International Human Rights Treaties, such as the International Covenant and Civil and Political Rights Article 7; and Article 5 of the United Nations Declaration of Human Rights.
20. In the case Lucas Omolo Wamari vs. AG and DPP [2017] eKLR, the court held the AG responsible for its police officers who shot the appellant without any reasonable cause, and awarded him damages.
21. The Court of Appeal in James Willy Mwanzia v. AG [2020] eKLR, found that the Appellant was tortured and prosecuted, but found the prosecution not to have been malicious; but for the torture, it found that the police had no authority or reasonable cause, and awarded damages.
22. In the matter of arbitrary arrest and detention of the plaintiff by the Defendants' Police Officers, Article 49 of the Constitution protects the interests of arrested persons. It states:
 - 49; Rights of arrested persons
 1. An arrested person has the right
 - a. To be informed promptly, in a language that the person understands, of
 - i. The reason for the arrest
 - ii. The right to remain silent and;
 - iii. The consequences of not remaining silent;
 - b. To remain silent
 - c. To communicate with any advocate, and other persons whose assistance is necessary
 - d. ---
 - e. ---
 - f. To be brought before a court as soon as reasonably possible, but not later than
 -
 - i. Twenty-four hours after being arrested; or
 - ii. If the twenty-four hours ends outside ordinary court hours, on a day that is not an ordinary court day, the end of the next court day;



- g. At the first appearance, to be charged or informed of the reason for the detention continuing, or to be released and
- h. To be released on bond or bail, on reasonable conditions pending a charge of trial unless there are compelling reasons not to be released.

23. Article 9 of the International Covenant on Civil and Political Rights states as follows:

1. Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention.....
2.
3. ...
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

24. In very similar circumstances to the plaintiff, the court in Constitutional Petition 14 of 2017 – Mohamed Feisal & 19 others vs. Henry Kanaie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others [2018] eKLR, made a finding that the arrest and detention of the petitioners was unlawful as well as the prosecution that was malicious, and awarded each of them damages.

25. The Plaintiff must also prove that the prosecutor acted with malice in institution of the criminal proceedings – see also Antony Shireaka Alielo V. Kenya Post Office Savings Bank & AG (UR) – wherein upon the appellant being acquitted for the offence he had been charged with under Section 210 of the Criminal Procedure Code, the appeal court made a finding that the prosecution was malicious and was awarded damages.

26. The above principles have over the time been applied in our Kenyan courts and particularly by the Court of Appeal in James Willy Mwanza v. G. [2020] eKLR (supra).

In this instant case, the Defendant did not testify to controvert the plaintiffs evidence that he did not know why he was arrested tortured and prosecuted. On cross examination, the Plaintiff was not moved or swayed as to change his evidence.

27. As stated in the case Stephen Gachau Githaiga & Another v. AG and Murunga v. Ag [1979] eKLR, I am persuaded to find that the arrest, torture and detention of the plaintiff in police station for seven days were all unlawful and contrary to Article 25 of the Kenya Constitution.

28. On the prosecution that terminated in an acquittal after trial, I am also persuaded that the same was actuated by malice, with no reasonable cause or justification.

It is therefore clear in my mind that the Plaintiff was subjected to brutal torture, violence, inhuman degradation treatment and cruelty which is clearly spelt out under Article 29 that

“ Every person has the right to freedom and security of the person which includes the right not to be;

- (c) subjected to any form of violence from either public or private sources....
- (d) subjected to torture in any manner, whether physical or psychological.



(f) treated or punished in a cruel, inhuman or degrading manner.

29. And therefore for the stated unlawful actions by the Defendant's agents and servants, the Plaintiff is entitled to compensation from the Defendant who is vicariously liable for the unlawful, inhuman and degrading treatment and brutal injuries that are permanent in nature and will live with for the rest of his life.

Assessment Of Damages

30. In assessment of damages, the court is guided by the following cardinal principles thus: -

1. Damages should not be inordinate too high or too low.
2. Damages should be commensurate to the injuries suffered.
3. Damages should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before. See James Willy Mwanzia vs. AG [2020] eKLR.

Damages for Unlawful Arrest Confinement, Torture and Malicious Prosecution.

31. To arrive at a fair and reasonable assessment, I take guidance from several decisions of the comparable superior courts, but in particular, it is noted that the Plaintiff not only suffered physical pain and serious injuries leading to permanent incapacitation as clearly stated in the Medical Report, but also inhuman treatment, torture, harassment and mental psychological being conscious that in this instant the Plaintiff also suffered physical pain and permanent injuries.

32. The Plaintiff in his submissions dated 31/07/2023 cited James Alfred Koroso V. AG [2008] eKLR in proposing Kshs. 10,000,000 general damages under this sub-head.

33. I have considered the Court of Appeal decision in Koigi Wamwere V. AG. [2015] eKLR wherein the Court, for two detentions of the Appellant, torture, and arraignment for fake robbery with violence charges, the Appellant was awarded Kshs. 12 million, upsetting the trial court's award of a higher sum.

34. A sum of Kshs. 1,000,000/= was awarded to the Plaintiff for detention for 8 days in Charles Mwapagha vs. Kenya Airways Ltd & Another [2015] eKLR.

35. In Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another each of the plaintiffs were awarded Kshs. 500,000/= for general damages for malicious prosecution.

The Plaintiff in Crispus Karanja Njogu V. AG [2008] eKLR was awarded Kshs. 800,000/= for malicious prosecution as the Acting Senior Assistant Registrar of Kenyatta University.

36. The court in Thomas Mutsotso Bisembe vs. Commissioner of Police Another [2013] eKLR, the victim was awarded Kshs. 800,000/= on 7/02/2013 whereas in Stephen Gachau Githaiga (Supra) and Christine Caleb Otieno (Supra) were awarded Kshs. 300,000/= by the trial court and which the Appellate Court upheld.

Having considered the above comparable decisions, I am of the view that a sum of Kshs. 600,000/= would be fair and reasonable compensation to the Plaintiff for unlawful arrest and detention in General Damages for Pain and Suffering.

Considering the medical report prepared by Dr. C. O. Okere dated 18/11/2004, and produced by consent of both parties Advocates, the Plaintiff sustained the following injuries at the hands of the Defendant's agents; -



- a. Ruptured bladder causing him to depend on disposable catheters for the rest of his life.
- b. Crushed private organ that he cannot engage in sexual intercourse.
- c. Injured testicles
- d. Fracture right tibia
- e. Multiple bruises to the scalp, chest, abdomen, elbows, knees, shoulders and hip joint swellings
- f. Inability to perform heavy duty.

38. The Medical Report is based on the discharge summary/treatment notes from Kenyatta National Hospital and was also produced by consent.

There is no doubt that the injuries were very serious. The defendant did not testify or challenge the medical report, nor did it provide a doctor to prepare a second medical report on the plaintiff's injuries.

The Plaintiff testified that he had incurred and continue to incur medical expenses at both Thika level five hospital and attendance at Urological therapy clinic at Kenyatta National Hospital. He testified that he will use a catheter for urine disposal for the rest of his life, which has to be changed twice in a week, and as a result, he is unable to do any meaningful work for a living.

39. The Plaintiff's Advocates however did not particularize the damages he sought save for proposing the following sums: -

1. The torts of false imprisonment and malicious prosecution – Kshs. 10,000,000/=
2. Violations of constitutional rights Kshs. 20,000/=
3. Special damages – Kshs. 235,000/=
4. Exemplary damages Kshs. 5,000,000/=

40. At the Supplementary bundle of documents dated 24/05/2022, attached are what the plaintiff refers to as "expenses and damages breakdown" he itemized the same as: -

- a. Treatment and medication Kshs. 1,839,200/=
- b. Transport to and back from hospital for himself and aid Kshs. 849,600/=
- c. Daily bread for family for 12 months 11,880,000/=
- d. Rental homes (accommodation @Kshs. 4,000 X 12 X 22= 1,056,000/=
- e. Water Kshs. 457,600/=
- f. Other household expenses Kshs. 1,144,000/=

And income of Kshs. 9,424,800/= before the injuries and family expenses for 10 years at Kshs. 30,000/= per month – Kshs. 360,000

clothing for family Kshs. 5,000/= per month for 22 years, Kshs. 1,320,000/= as well as transport costs to and from hospital, and associated costs.

41. In my considered view, it would not be appropriate to award the itemized damages, both special and general for the pain and suffering resulting from the brutal torture, that resulted to the plaintiff's



incapacitation and permanent injuries for which he continues with treatment. The injuries as stated by Dr. C. O. Okere in the medical report are evidently serious and for the rest of his life, the plaintiff will be permanently incapacitated including never a thought of ever siring children. In the circumstances, a global compensation in damages in this regard would be most appropriate as ably stated by the Court of Appeal on *Prestone Kariuki Taiti & 9 others vs. Chief of Kenya Defence Forces* [2021] EKLR.

42. In the case *Eliud Wefwafwa Luucho & 3 others vs. AG* [2017] the plaintiffs were subjected to inhuman torture and degrading treatment including injury to the testicles by a wire, that lead to impotence, were fed on water as well as detention for eight days.

The court Mativo J. (as he then was) awarded to the Plaintiff Kshs. 5 million as a global award in general damages. Also in *Njuguna Githiru vs. AG*. [2020] eKLR the Court of Appeal award the Appellant Kshs. 2.5 million based on global awards for torture and unlawful detention.

43. In *Peter Mauki Kanjanja & 9 others vs. Chief of Defence Forces & Another* [2019] eKLR, *Jacob Ntubiri Japheth & 8 others vs. AG* [2016] eKLR, the petitioners were awarded global awards of damages ranging between Kshs. 1 million to 3 million. Further, awarded in *Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 others* [2018] eKLR, *Nyakundi J.* in very similar circumstances awarded each Kshs. 100,000/= as exemplary damages, and the 20th petitioner awarded a global sum of Kshs. 3 million for both general and aggravated damages on 20/12/2018.

44. The court notes that the above decisions arose from Constitutional Petitions, but based on similar Human Rights violations by agents of the Government to wit, police officers, who in numerous ways subjected the petitioners to numerous acts of torture, unlawful detentions in harsh conditions, unlawful prosecutions and inhuman degrading treatment, contrary to various constitutional provisions being Article 22, 25, 28 and 29.

45. This case having been instituted by way of plaint is no different than the Constitutional petitions referred to above.

Notably, Article 159 (2)(d) of the 2010 Kenya Constitution implores courts to be guided by justice, without undue regard to procedural technicalities, including form in pleadings.

Indeed, Section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya grants the court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

46. Having rendered as above, I now proceed to pronounce myself on the general damages that comment to me; considering the injuries inflicted on the plaintiff by the Defendant's agents for no apparent reasons, and for the severe and brutal torture that the plaintiff received.

Guided by the cited decisions above, I am persuaded that a Global award of Kshs. 6 million shall be fair and just in the circumstances.

47. Consequently, I find and hold that the Plaintiff has established and proved his case to the required standard of a civil case, upon a balance of probabilities against the defendant and find the Defendant, the Honourable the Attorney General vicariously liable for the unlawful acts of its police officers, in damages as hereunder: -

- a. Damages for unlawful arrest and detention for 7 days and malicious prosecution - Kshs. 600,000/=
- b. A global award of General damages for brutal torture, inhuman and degrading treatment of Kshs. 6,000,000/=
- c. Costs and interest at court rates from the date of this judgment are awarded to the plaintiff.



ORDERS ACCORDINGLY.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH DAY OF JANUARY, 2024

J. N. MULWA

JUDGE

