



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kemoi v State & another (Civil Appeal E043 of 2022)  
[2023] KECA 1542 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1542 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL E043 OF 2022  
DK MUSINGA, F SICHALE & FA OCHIENG, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**GEOFFREY KIBET KEMOI ..... APPELLANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**STATE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and decree of the High Court of Kenya at Nakuru, (R. Ngetich, J.) dated 30th March, 2022 in HC.CR. Petition No. 1 of 2018)*

**JUDGMENT**

1. The appellant alleged to have been tortured while in the custody of the 3<sup>rd</sup> respondent. He moved the High Court on the grounds that his fundamental rights and freedoms had been breached, seeking orders *inter alia*:
  - “ a A declaration that the appellant was entitled to fundamental rights and freedom, including protection from any of torture and harassment; and a guarantee to safety of life and health.
  - b. A declaration that the 3<sup>rd</sup> respondent failed in its duty to guarantee the appellant his rights and fundamental freedom.
  - c. A declaration that the appellant was entitled to damages arising from the torture meted on him while in custody.
  - d. Compensation in terms of exemplary or aggravated damages.
  - e. Costs of the petition.”



2. The appellant's case was that, he was arrested on 17<sup>th</sup> October, 2004 on the charges of robbery with violence, and he was placed in the custody of the 3<sup>rd</sup> respondent. At the end of the trial, the appellant was found guilty and sentenced to life imprisonment. The sentence was later reduced to 25 years' imprisonment, on the appellant's application for resentencing.
3. While in custody, the appellant claimed that he had sustained serious injuries, which were inflicted on him by one, PC Cheruiyot. As a result of the injuries, the appellant developed difficulties in eating and was disoriented for over five (5) days.
4. In January 2005, the appellant informed the court of his failing health on three (3) separate occasions. The court issued orders that he be taken to hospital on all occasions, but the 3<sup>rd</sup> respondent failed to adhere to the orders. The case was heard and determined without him being taken to hospital.
5. On 15<sup>th</sup> February, 2010 the appellant informed the court that he had been tortured while in custody. The court ordered that an inquiry be conducted. When called upon to shed light on the matter on 16<sup>th</sup> February, 2010, the 3<sup>rd</sup> respondent's officer did not give a clear picture of what had happened.
6. The appellant produced several medical reports from Jaramogi Oginga Odinga Teaching and Referral Hospital, Kericho District Hospital, Nakuru Provincial General Hospital, AIC Cure International Children Hospital, and the Ministry of Health PWD's medical assessment report in support of his claim.
7. The appellant was of the view that his rights under Articles 27(1), 28 and 51(1) & (3) of *the Constitution* and Articles 2, 3 & 5 of the *Universal Declaration of Human Rights* were violated.
8. The appellant said that as a result of the violent torture meted on him by the 3<sup>rd</sup> respondent, and the failure to be taken to the hospital, and the failure to investigate and report to the court, he became lame and is confined to a wheelchair.
9. The respondents' case was that, the injuries sustained by the appellant were not sustained while he was in the custody of the 3<sup>rd</sup> respondent. They noted that the appellant suffered a head injury in 2009, and the same reflected in the medical report from Jaramogi Oginga Odinga Teaching and Referral Hospital. However, the report did not point out the cause of the head injury, and the burden to prove the same was on the appellant in light of Section 107 of the *Evidence Act*.
10. The respondents denied that the appellant's illness was reported to the 3<sup>rd</sup> respondent in accordance with Section 144 of the *Prison Act*. The respondents further stated that the appellant attended the hospital while in custody, as provided for by Section 157 of the Act.
11. They were of the view that the appellant had failed to prove beyond reasonable doubt how his constitutional rights had been violated by the 3<sup>rd</sup> respondent. There was no evidence to show that the appellant was assaulted and tortured.
12. The learned Judge held that it was common ground that the appellant was confined to a wheelchair while in the custody of the 3<sup>rd</sup> respondent. The learned Judge also held that the appellant's claim that he was assaulted by PC Cheruiyot was not investigated. The learned Judge pointed out that the trial court record showed that the appellant requested to be taken to the hospital, and the court issued an order to that effect.
13. Citing the case of *Coalition on Violence against Women & 11 others v Attorney General & 5 others; Kenya Human Rights Commission, (Interested Party); Kenya National Commission on Human Rights & 3 others, (Amicus Curiae)*, [2020] eKLR, the learned Judge pointed out that the State has an obligation to prevent violations by State actors. The learned Judge quoted with approval the decision



in *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR to the effect that the State has a legal duty and positive obligation to protect each of its citizens' rights to security of their person and their property by securing peace through maintenance of law and order.

14. The learned Judge held that the three (3) medical reports produced by the appellant indicated that he suffered head injuries and as a result, a blood clot had left him confined to a wheelchair. Consequently, the learned Judge held that the appellant had sustained injuries leading to confinement to a wheelchair while in custody. As per the medical reports, the appellant had suffered a permanent disability and he was not able to cater for himself. The learned Judge found that the appellant's fundamental rights were infringed and that he was entitled to compensation on general and aggravated damages. The learned Judge awarded the appellant 1,500,000/- in damages; and made a declaration that the 3<sup>rd</sup> respondent had failed to offer the appellant protection from any form of torture, harassment, and he also held that the respondents failed to guarantee the life and safety of the appellant when he was in custody.
15. Aggrieved by the award of damages, the appellant lodged this appeal in which he raised four (4) grounds, to wit that, the learned Judge correctly established and held that:
  - a. The constitutional and fundamental rights of the appellant were infringed, but the court erred in failing to note that the degree of violation was so grave that the amount that was ordered was inordinately low in the circumstances.
  - b. The constitutional and fundamental rights of the appellant had been violated to the extent that the confinement to a wheelchair was not short term, but the court erred in failing to note that the said confinement constrained the appellant from engaging in an income generating activity for himself, and to any other person who depended on him, and the award given was not commensurate with the appellant's condition.
  - c. The appellant's confinement was due to the violation of his rights by the respondents, but the court erred in failing to note that the respondents were culpable of meeting the compensating award equal to the torture and threat to life and the health of the appellant.
  - d. The appellant was entitled to both general and aggravated damages, but the court erred in failing to note that the appellant suffered and continues to suffer pain, mental anguish, social mobility and limitation, and the award given flies from the face of fair balancing of the scales of justice."
16. When the appeal came up for hearing on 25<sup>th</sup> September, 2023; Mr. Maragia, learned counsel appeared for the appellant, whereas Ms. Nyambura, learned senior state counsel appeared for the respondents. Counsel relied on their respective written submissions.
17. The appellant pointed out that he sustained serious injuries that resulted in his disablement, he not only suffered physical torture but he also suffered emotionally and mentally. The appellant was of the view that violation of his rights was a direct threat to his life. The appellant in a bid to buttress this submission relied on the cases of *Azapo v President of South Africa*, CCT17/96, *Lucy Wanjiku (suing as a legal representative of the estate of Mukaru Ng'ang'a, (deceased) v Attorney General* [2018] eKLR, *Republic v Minister for Home Affairs & others, ex parte Stanze* [2017] eKLR and *Selmouni v France* [2000] 29 EHRR to the effect that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.



18. The appellant submitted that he had pleaded for both exemplary and aggravated damages. Citing the cases of *D. K Njagi Marete v Teachers Service Commission* [2020] eKLR and *Dr. Juma Mikidadi v Ali Khalfan & another* [2004] eKLR, the appellant pointed out that the respondents' act or omission was arbitrary and unconstitutional, and the appellant merited the award of exemplary damages because his case was one of oppressive, arbitrary or unconstitutional action by the servants of the government.
19. Relying on the case of *Penthouse Group Limited & another v Gloria Adisa Diffu* [2021] eKLR, the appellant submitted that he was entitled to general, exemplary and aggravated damages, after the court held that the respondents were culpable; and given that exemplary damages go beyond compensation, which are meant to punish the wrongdoer, whilst serving as a deterrent from similar conduct in future. The appellant submitted that the award ought to be enhanced.
20. The appellant faulted the learned Judge for; failing to appreciate that the amount awarded was not sufficient; awarding only one of the damages sought; failing to consider the age of the appellant, who was 44 years at the time, which would imply that much more would be required to help him be appropriately catered for. The appellant was of the view that he ought to be awarded ksh 15,000,000/- as compensation. He relied on the case of *Lucy Wanjiku (suing as a legal representative of the estate of Mukaru Ng'ang'a, (deceased) v Attorney General, (supra)*, in support of this submission.
21. The respondents were of the view that the appellant ought to have pleaded that he had sustained serious injuries in the trial court, and in any event, the appellant failed to produce sufficient evidence to prove the grave injuries. Citing the case of *Anerita Karimi Njeru v Republic* [1979] 1 KLR 54, the respondents submitted that the appellant had failed to establish the threshold that his constitutional rights had been violated through torture and assault.
22. We have carefully considered the record, submissions by counsel, authorities cited, and the law. The issue for determination is whether the appellant is entitled to an enhancement of the award by the trial court.
23. This being first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In *Selle v Associated Motor Boat Co.* [1968] EA 123, the court stated thus:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abdul)”
24. It is common ground that the court held that the appellant's fundamental rights and freedoms from torture or inhuman and degrading treatment were contravened and violated, hence the award of ksh1,500,000/- as compensation for the violations.
25. The appellant was not satisfied with the award, and lodged the present appeal. The appellant has urged this Court to enhance the award from ksh1,500,000/- to ksh15,000,000/-. The respondents have maintained their stance that the appellant has not met the threshold for violation of his constitutional rights.



26. The appeal before us is limited to the award of damages, and as such we shall not delve into the threshold for violation of constitutional rights. If the respondents were dissatisfied with the determination of the trial court on the said issue, they ought to have moved this court through a cross-appeal. However, as there is no such cross-appeal, there would be no legal basis upon which we can begin the process of considering whether or not the issue of liability was properly founded.
27. In *Zablon Ombati Ongeri v Attorney General* [2017] eKLR the court held that:
- “Assessment of damages is a discretionary exercise which must be undertaken judicially and in consonance with defined legal principles. In *Butt v Khan* [1981] KLR 349, the court stated thus:
- “... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...”
28. On whether or not we should interfere with the award by the trial court, in the case of *Kenya Bus Services Limited v Jane Karambu Gituma* (2004) EA 91, the court stated that:
- “In this regard, both the East African Court of Appeal (the predecessor of this Court) and this Court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law ( as by taking into account some irrelevant factor or leaving out of account some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low as to represent a wholly erroneous estimate of the damages (See, for example, *Kassam v Kampala Aerated Water Co. Limited* [1965] EA 587, *Idi Shabani v Nairobi City Council* [1982-88] 1 KAR. 681, *Butt v Khan* [1981] KLR. 349 and *Kimotho & others v Vesters & another* [1988] KLR. 48).”
29. Lenaola, J (as he then was), in *Jennifer Muthoni Njoroge & 10 others v Attorney General* [2012] eKLR considered the following factors in the award of damages for violations of fundamental rights and freedoms:
- “(i) The torture inflicted on each petitioner;
- ii. The length of time the petitioners were held in unlawful custody;
- iii. The decided cases on the subject or matter;
- iv. What is fair and reasonable in the circumstances of each case.”
30. In *Koigi Wamwere v Attorney General* [2015] eKLR, this Court held that:
- “Given, however, the age of some of the older authorities some of which we have referred to, which all range between ksh 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 ksh 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 ksh 12 million with interest at court rates from the date of the judgment of the High Court appealed against.”

31. In the case of *Njuguna Githiru v Attorney General* [2020] eKLR the court held that:

“In conclusion therefore, having found that the award of ksh1,000,000.00 is manifestly low, and considering the circumstances as set out above and other comparable awards, we think a global award of ksh2,500,000.00 is appropriate and just.

We accordingly set aside the award of ksh1,000,000.00 and substitute therefor an award of ksh2,500,000.00. Interest thereon

will accrue from the date of judgment of the High Court until payment in full. The appellant shall also have the costs of this appeal.”

32. In the case of *Peter M. Kariuki v. Attorney General* [2014] eKLR, the court awarded the appellant general damages of ksh15,000,000/= for violations of his constitutional rights (torture, unlawful pre-arraignment detention of 147 days and violation of the right to a fair trial).

33. Similarly, in the case of *Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another* [2017] eKLR, the court awarded a global sum of ksh10,000,000/= for pre-trial detention of 86 days and torture.

34. Taking the foregoing into account, we are persuaded that the award of ksh1,500,000/- was inordinately low, given that the appellant suffered a permanent disability. From the cited authorities, the awards included unlawful detention and torture. In this instance, the appellant was tortured and suffered a disability, a situation which cannot be reversed. We have considered the age of the appellant, the fact that he will soon be released from prison, and will then be expected to cater for himself, and the fact that he can no longer engage in gainful employment.

35. In the result, we find that an award of ksh 8,000,000/- with interest from the date of the judgment of the High Court will be sufficient compensation in the circumstances. Accordingly, the appeal is allowed with costs to the appellant.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

