COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 6 of 2021

B E T W E E N

DOUGLAS NGUMI

Appellant

AND

THE HON. CARL BETHEL
(in his capacity as Attorney General of The Bahamas)

THE HON. BRENT SYMONETTE
(in his capacity as Minister of Immigration

WILLIAM PRATT
(in his capacity as Director of Immigration)

Peter Joseph
(in his capacity as Officer in Charge of Carmichael Detention Centre)

Respondents

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Frederick Smith, QC, Mr. Roderick Dawson Malone and Ms. Kandice Maycock, Counsel for the Appellant**

Ms. Kenria Smith, Counsel for the Respondents

DATES: **23 June 2021; 18 August 2021**

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Civil appeal – Award of damages – General damages - Unlawful arrest - False imprisonment – Breach of constitutional rights – Assault and battery – Compensatory damages - Exemplary damages – Aggravated damages – Constitutional damages – Vindicatory damages - Whether damages awarded for false imprisonment unreasonably low – Interest – Costs on an indemnity basis - Costs on a party and party basis - Sections 40 & 41 of the Immigration Act – Section 3 of the Civil Procedure Award of Interest Act – Section 30 of the Supreme Court Act

The appellant, a Kenyan national, was arrested and imprisoned from January 2011 to August 2017. He was detained at the Carmichael Road Detention Centre during this period. Upon his release the appellant brought an action against the respondents. The judge below found the respondents liable for false imprisonment, assault and battery and breaches of the appellant's fundamental rights and awarded the appellant $386,000.00 for compensatory damages (for the torts of false imprisonment and assault and battery); $100,000.00 for exemplary damages; $50,000.00 for aggravated damages; $105,000.00 for breach of his constitutional rights and $950.00 as special damages. The total award was $641,950.00 ($641,000.00 general damages and $950.00 special damages). The appellant was also awarded interest from the date of the judgment until payment and costs on a party and party basis.

The appellant has appealed the award as being unreasonably low and seeks an increase in general damages to $11,000,000.00. He also seeks interest from the date the cause of action arose and costs on an indemnity basis.

Held: appeal allowed; general damages increased from $641,000.00 to $750,000.00. The total award is $750,950.00. Interest to run from the date of the Writ. The Court will hear the parties on the issue of costs of the appeal.

The appellant was detained for a period of 6 years 7 months. However, three months was a reasonable period of time to allow the State to organize the appellant's deportation as recommended by the magistrate following his guilty plea to an offence against the Immigration Act. The three-month period was deducted from the otherwise unlawful detention. Therefore, the period of unlawful detention is 6 years 4 months 6 days.

The failure of the judge to specify what amount of the $386,000.00 was awarded for assault and battery as against the amount awarded for false imprisonment is not sufficient to render the total award unreasonable. However, the award of $386,000.000 as compensatory damages is unreasonably low.

It was improper for the judge to have made an award for both exemplary damages as well as vindicatory damages for breach of the appellant's constitutional rights.

Having regard to all the circumstances, a global award of $750,000.00 in general damages is appropriate.

Section 3 of the Civil Procedure Award of Interest Act gives a judge wide power in awarding interest. Interest may be awarded for any period between the date the cause of action arose and the date of judgment. In the present case, the Court awards interest from the date of the Writ instead of the date of the judgment.

There is no basis to interfere with the award to the appellant of costs on a party and party basis.

AXD v Home Office [2016] EWHC 1617 (QB) considered
Guishard v Attorney General of the Virgin Islands [2021] 1 LRC 510 applied
Lockwood v Department of Immigration [2017] 2 BHS J No 120 mentioned
Merson v Cartwright and another [2005] UKPC 38 considered
Millette v Nicholls (2000) 60 WIR 362 considered
Nance v British Colombia Electric Railway Company Ltd. [1951] A.C. 601 applied
Nathanson v Mteliso and others [2020] 2 LRC 135 considered
R (on the application of Iwona Deptka and another v Secretary of State for the Home Department [2019] EWHC 503 (Admin) considered
Ruddock & Ors. v Taylor [2003] NSWCA 262 considered
Takitota v The Attorney General and others [2009] 4 BHS J. 40 considered
The Queen (on the application of Khalid Belfken) v Secretary of State for the Home Department [2017] EWHC 1834 (Admin) considered

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J U D G M E N T

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an appeal by the appellant against an award of damages made in his favour by Charles, J. on a successful claim for damages for false imprisonment and breach of his constitutional rights. He was awarded damages in the total sum of $641,950.00. He asserts that the amount awarded is unreasonably low and that this Court should increase the award to a sum in excess of $11,000,000.00.

2. The appellant, a Kenyan citizen, brought an action claiming that he was unlawfully arrested and falsely imprisoned by the respondent for a six-and-a-half-year period from 11 January 2011 until 4 August 2017. He was held at the Carmichael Road Detention Centre, he claimed, and the judge found as a fact that he suffered cruel, inhumane and degrading treatment and, on numerous occasions, was beaten and assaulted by Immigration and Defence Force Officers. The appellant claimed aggravated, punitive, exemplary and vindicatory damages for wrongful

arrest and subsequent false imprisonment occasioned by the oppressive, arbitrary, and unconstitutional conduct of the respondents and its agents.

3. The trial judge held that the failure of the respondents to charge and arraign the appellant within the statutory period and to deport him within a reasonable time rendered his nearly 7-year detention unlawful. The court held that the respondents were liable for false imprisonment, assault and battery of the appellant and also for breaches of the appellant's fundamental rights under the Constitution. The judge awarded the appellant damages in the global sum of $641,950.00 as compensation for aggravated, exemplary and vindicatory damages with interest and costs.

4. The sum was made up as follows:

"1. Damages for false imprisonment, assaults and batteries	**$ 386,000.00**
2. Special Damages	**$950.00**
3. Aggravated Damages	**$50,000.00**
4. Exemplary Damages	**$100,000.00**
5. Constitutional damages by way of compensation and vindication	**$105,000.00**
TOTAL DAMAGES AWARDED	**$641,950.00"**

The judge awarded interest on that sum from the date of the judgment. The appellant was also awarded his costs on a party and party basis.

5. This appeal by the appellant is against the amount of the award. The respondents have not challenged the finding on liability, nor have they challenged the award as being too high.

6. The appellant seeks an order setting aside the award and asking that the award be increased to $11,000,000.00 or such other increased sum as the Court determines. The appellant also seeks interest on any amount awarded from the date of the cause of action and that he be awarded costs on an indemnity basis.

7. The grounds of appeal are many. There are 9 grounds, and each ground is divided into a number of sub grounds.

8. I remind myself of the observations made by the Privy Council in **Nance v British Colombia Electric Railway Company Ltd.** [1951] A.C. 601 when considering an appeal against an award made by the courts of British Colombia, Canada. It said:

> **"…Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v. Lovell (21), approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries, Ld. (22)). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (per Lord Wright, Davies v. Powell Duffryn Associated Collieries, Ld. (23))."**

9. More recently in **Guishard v Attorney General of the Virgin Islands** [2021] 1 LRC 510 the Court of Appeal of the Eastern Caribbean said at paragraph 32:

> **"[32] …The burden, which rests squarely with an appellant who invites an appellate court to interfere with an award of general damages, is a heavy one. Accordingly, unless the learned Master has committed an error of principle or failed to take into account a correct principle or failed to take cognisance of comparable awards, or where, on the particular facts of this case, the quantum which he awarded under this or any head is so low or high as to make it erroneous or manifestly wrong, this Court cannot interfere with the award. Put simply,**

the award of general damages must be so outside the generous ambit of reasonable disagreement as to warrant it being interfered with…"

10. It is important therefore to set out the judge's reasoning in full in arriving at the amount awarded:

> **"[59] In the Writ of Summons filed on 27 September 2017, Mr. Ngumi sought damages under the following heads namely:**
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> **1. Damages;**
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> **2. Special damages; $950.00**
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> **3. Aggravated damages;**
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> **4. Exemplary damages;**
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> **5. Vindicatory damages;**
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> **6. The return of any and all his personal items;**
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> **7. Alternatively, damages in the value of his personal items;**
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> **8. Compensation under Article 19(4) of the Constitution;**
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> **9. Damages for breaches of his rights under Articles 15,17,19(1), 19(2), 19(3) and 27 of the Constitution;**
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> **10. Interest on each of the foregoing pursuant to statute;**
>
> **11. Costs on full indemnity and solicitor and own client basis certified fit for three counsel and;**
>
> **12. Such further or other relief as to the Court may think fit.**
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> **[60] In Mr. Ngumi's Submissions in Reply to Defendants' Submissions resisting liability and quantum, Mr. Ngumi urged the Court to measure damages as follows:**
>
> **1. General Damages $3,000,000.00**

2. Special Damages	**$ 950.00**
3. Aggravated Damages	**$1,000,000.00**
4. Exemplary Damages	**$5,000,000.00**
5. Constitutional damages by way of compensation and vindication	**$2,000,000.00**
6. Interest on each of the foregoing	
TOTAL DAMAGES SOUGHT	**$11,000,950.00**

False imprisonment, assault and battery

Submissions and analysis

[61] Mr. Ngumi is entitled to general damages for the torts of false imprisonment, assault and battery. The amount of such an award cannot be precisely measured. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of Mr. Ngumi's general damages to compensate him for what he has lost bearing in mind all the probabilities.

[62] As already mentioned, Mr. Ngumi was deprived of his liberty at the Detention Centre for 6 years 4 months and 6 days or 2,316 days (my computation). His evidence that he was kept in deplorable, inhumane and degrading conditions and he endured cruel and inhumane treatment whilst being housed at the Detention Centre remained uncontroverted. He was finally released when a Habeas Corpus application was issued.

[63] Mr. Smith QC submitted that instead of admitting the mistake and settling, the State defended these proceedings.

[64] Mr. Smith QC also submitted that, to this date, the State offered no apology. The Defendants remained unrepentant and defended Mr. Ngumi's claim even though they had no defence in law and had no evidence to

present. I observed that the State did not aggressively challenge liability. In fact, they offered no evidence in this case. The State however served submissions on the law which I do not believe is the same as "defending the indefensible" since Mr. Ngumi is claiming very substantial damage.

[65] Mr. Smith invited the Court to make one global and compendious award for the torts of false imprisonment, assault and battery as was similarly done and accepted by the Privy Council in Merson. I agree.

[66] Mr. Smith QC relied on a plethora of authorities to support his contention that for this head of damage, Mr. Ngumi should receive $3,000,000.00. He submitted that in Merson, she was falsely imprisoned for more than two days. Her constitutional rights were breached but, in a way that can only be described as somewhat "tenderly" when compared to Mr. Ngumi's treatment: there were also, in comparison, gentle elements of aggravation compared to Mr. Ngumi: she was awarded, in 1994, $190,000.00 for assault and battery, $90,000.00 for false imprisonment and $100,000.00 for breaches of her constitutional rights. She was also awarded special damages of $8,160.00 and $90,000.00 for malicious prosecution.

[67] Mr. Smith QC submitted that taking inflation into account from a Google search on the internet, that would be an award of approximately $324,000.00 in 2019 and divided by 2 days would equate to an award of $162,000.00 for each day. According to Mr. Smith QC, if this were a completely scientific calculation, Mr. Ngumi would be entitled to an award in the region of $387,990,000.00. He further submitted that that could be reasonably increased taking into account the many more aggravating factors in Mr. Ngumi's case.

[68] Mr. Smith QC next submitted that even if the Court were to take only the damages awarded to Ms. Merson for false imprisonment, $90,000.00 (pre-inflation) $153,507.00 (with inflation) that would be $45,000.00 per

day pre inflation and $76,500.00 (with inflation). Applied to Mr. Ngumi, with inflation, that would be $76,500.00 per day for 2,395 days (Mr. Smith's computation) totaling $183,217,500.00. Taking out any factor for inflation, at $45,000.00 per day for 2,395 days (Mr. Smith's computation) an award, just for assault and battery and false imprisonment would total $107,775,000.00.

[69] Added to that would be the other heads of damages for breaches of Mr. Ngumi's constitutional rights.

[70] Mr. Smith QC also argued that if the Court were to factor in exemplary and punitive damages to send a lesson to the State that this behaviour has to stop, the award would be truly astronomic.

[71] Mr. Smith QC acknowledged that this is not a purely scientific exercise and such figures may perhaps be regarded as fantastical. He surmised that if however there were jury trials in The Bahamas, damages in such amounts would not be out of the realm of possibility as happens in the United States to mark societies' condemnation of such State conduct. He referred to the case of Matuszowicz v Parker (1987) 50 WIR 24. In that case, Mr. Smith had urged the learned Chief Justice to pay some regard to the verdicts in Florida which the learned judge found unacceptable and unreservedly rejected: page 25 (e) to (f).

[72] I however agree with Mr. Smith QC, as the Privy Council remarked in Scott v AG [2017] UKPC 15, (a personal injury case) that:

> **'The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change…. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction.'**

[73] Given the astronomical escalation in kindred cases, the sanction in Scott becomes even more persuasive for us to develop our jurisprudence in this area of law.

[74] Mr. Smith QC also cited the case of Tynes v Barr (1994) 45 WIR 7 to support his quest for $3,000,000.00 in damages under this head. Tynes, a renowned attorney-at-law was falsely imprisoned for less than one day; his constitutional rights were breached and Mr. Tynes was awarded 115,000.00 for assault and battery and false imprisonment. This was in 1994.

[75] In Takitota, the Plaintiff was awarded a total of $600,000.00 of which $100,000.00 was awarded for exemplary damages. This was in 2005. He was falsely imprisoned for 8 years. Mr. Smith QC noted that Mr. Takitoka was not subjected to the same horrifying treatment as Mr. Ngumi. I disagree. Mr. Takitoka was incarcerated at Her Majesty's Prison at Fox Hill for more than 6 years, firstly, in the maximum security unit in an area called "the Bulkhead" (a cell of some 18' v 8' in area where some 18 or 19 other persons were also housed); secondly in the maximum security unit and finally at the Detention Centre from 1998. In all, Mr. Takitoka was detained for approximately 8 years and two months on the only ground stated in his detention order that he was "an undesirable and his presence was not conducive to the public good." He attempted to commit suicide on three occasions.

[76] I take judicial notice of the fact that Her Majesty's Prison is less satisfactory and comfortable than the Detention Centre for obvious reasons.

[77] Mr. Smith QC also referred to the case of Lockwood v Department of Immigration and another [2017] 2 BHS No. 120. In this case, Mr. Lockwood was unlawfully detained for 2 days. Mr. Lockwood got $50,000.00 representing aggravated and exemplary damages: para. 39 of the Judgment. He also received $10,000.00 as vindicatory damages for breach of his constitutional right

under Article 19(1) of the Constitution and costs of $25,000.00.

[78] It is obvious that damages for false imprisonment, assault and battery are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. The Court of Appeal in Jamal Cleare v Attorney General and others [2013] 1 BHS No. 64 puts it in this way:

> **'47. The measure of and quantum of damages for unlawful detention would, of course, depend on the nature and circumstances of each case. There can hardly be one size fits all formula for the breach of such an important constitutional right as the right to personal freedom.**
>
> **48. Needless to say, in our view, it would be most invidious to put a price tag or tariff on the deprivation of personal liberty. But it is undoubted that the right to personal liberty is, next to the right to life, an elemental right on which the enjoyment of most, if not all, of the other rights guaranteed in the Constitution is dependent. Personal liberty truly is priceless.**
>
> **49. It is for these reasons that we are unable to support the quantum of damages of seven hundred and fifty dollars ($750.00) awarded by the learned judge; nor for that matter do we think the measure of damages of two hundred and fifty dollars ($250) per day, used to arrive at that quantum, is justified or appropriate. As we have stated, we are convinced and satisfied that Takitota did not intend to lay down a general tariff for the unlawful detention of an individual.**

[79] The Court of Appeal awarded the appellant the sum of $25,000.00 as both compensatory and vindicatory damages.

[80] As can be seen from the above cases, our courts have been struggling to find a suitable formula to compensate

a plaintiff for torts of this nature. Some assistance, to my mind, can be gleaned from the case of Alseran and others v Ministry of Defence [2019] Q.B. 1251 where the English Court conducted a helpful review of the damages recoverable for the torts of false imprisonment, assault and battery and stated at paras. 876-880:

> **876. First of all, where a person is a victim of an assault or false imprisonment, the wrong itself—that is to say, the interference with the claimant's bodily integrity or liberty—is an injury for which the claimant is entitled to be compensated in English law whether or not the interference has resulted in any "actual harm" to the claimant. As Lord Rodger of Earlsferry said in Ashley v Chief Constable of Sussex Police (Sherwood intervening) [2008] AC 962, para 60: "battery or trespass to the person is actionable without proof that the victim has suffered anything other than the infringement of his right to bodily integrity." See also Watkins v Secretary of State for the Home Department [2006] 2 AC 395, para 68. Likewise it is well established that loss of liberty is itself an injury for which a claimant is entitled to be compensated apart from any damage which has resulted from the loss of liberty: see e g R v Governor of Brockhill Prison, Ex p Evans (No 2) [1999] QB 1043, 1060. This kind of injury which is inherent in the wrong itself is often referred to as "moral injury".**
>
> **877. Second, an assault or false imprisonment may cause identifiable physical or psychiatric injury. In such circumstances damages are awarded in English law for what is conventionally referred to as "pain and suffering" and any loss of amenity.**
>
> **878. A third kind of injury is injury to feelings. This includes the distress, misery, humiliation, anger and indignation that such a tort may cause. The distinction between this kind of injury and what I am calling "psychiatric injury" is that psychiatric injury refers to a recognised medical condition**

(such as clinical depression or post-traumatic stress disorder) whereas injury to feelings refers to mental suffering which does not amount to such a medical condition. Each of these types of injury is a separate head of damage but in awarding damages where both are suffered it is obviously important to avoid double counting.

879. Fourth, English law recognises that injury to the feelings of the victim of an assault or false imprisonment may be increased by the defendant's motivation in committing the tort if the defendant shows particular malice towards the victim, or by other particularly egregious features of the defendant's conduct in committing the tort or subsequent behaviour towards the victim: see Rookes v Barnard [1964] AC 1129, 1221; and the report of the Law Commission on Aggravated, Exemplary and Restitutionary Damages (Law Com No 247) (1997), pp 10–11, paras 1.1 and 1.4. As already mentioned, the damages which, in English law, may be awarded for such additional injury to feelings are referred to as "aggravated damages". Such damages, which are intended solely to compensate the claimant, must not be confused with "exemplary" or "punitive" damages, which in certain exceptional circumstances only may be awarded in English law in order to punish or make an example of the defendant.

880. A fifth kind of injury which may be suffered is financial loss—consisting, for example, of the cost of medical treatment or loss of earnings if the assault or false imprisonment prevents the claimant from working. [Emphasis added]

[81] Stripped to its bare essentials, the following principles emanate from Alseran:

1. Firstly, a victim of an assault or false imprisonment is entitled to be compensated whether or not the 'interference' has resulted in any

"actual harm" to the plaintiff. Loss of liberty is itself an injury for which a plaintiff is entitled to be compensated apart from any damage which has resulted from the loss of liberty. This is referred to as "moral injury."

2. Second, an assault or false imprisonment may cause identifiable physical or psychiatric injury for which damages are awarded. This is conventionally referred to as "pain and suffering" and any loss of amenity.

3. There is a third kind of injury referred to as injury to feelings or mental suffering. This includes the distress, misery, humiliation, anger and indignation that such a tort may cause.

4. Fourth, English law (and indeed Bahamian law) recognizes that injury to the feelings of the victim of an assault or false imprisonment may be increased by the defendant's motivation in committing the tort if the defendant shows particular malice towards the victim, or by other particularly egregious features of the defendant's conduct in committing the tort or subsequent behavior towards the victim.

5. A fifth kind of injury which may be suffered is financial loss. For example, loss of earnings if the assault or false imprisonment prevents the plaintiff from working.

[82] Further in paragraphs 885 to 887, the English Court emphasized that:

885. There is no doubt that under English law the court has power to award damages as a remedy for each of the five kinds of injury identified above. Where the injury consists of financial loss, the assessment of damages simply involves calculating the amount of the loss and ordering the defendant to pay an equivalent amount to the claimant. But the other four kinds of injury mentioned are non-

financial in nature. Damages awarded for such injuries are not capable of arithmetical computation. No sum of money is comparable to loss of liberty or to physical or psychiatric injury or mental distress. Nevertheless, given the ubiquity of money as a measure of value in modern society, awarding a sum of money is the best that a court can do by way of compensation. The aim is to award a sum which would generally be perceived as fairly reflecting the gravity of the injury suffered by the claimant.

886. Of course, people will differ, often widely, in their perceptions of what sum of money would represent, or would be seen by fair-minded members of society to represent, appropriate compensation for any particular injury or kind of injury. In these circumstances it is important that judges should not simply award a sum of money which they think appropriate but should strive for consistency. As Lord Woolf MR, giving the judgment of the Court of Appeal in Heil v Rankin [2001] QB 272, para 25 said:

> **'Consistency is important, because it assists in achieving justice between one claimant and another and one defendant and another. It also assists to achieve justice by facilitating settlements.'**

887. The doctrine of precedent requires English courts to try to ensure that the amounts of damages which they award are consistent with amounts previously awarded in factually similar cases. In addition, the consistency and predictability of damages awards have been markedly increased in recent times by the promulgation of various scales and guidelines. The most important and comprehensive of these are the Guidelines for the Assessment of General Damages in Personal Injury Cases published by the Judicial College (the "Judicial College Guidelines"), which are now in

their 14th edition. These guidelines indicate appropriate levels of award across the whole range of physical and psychiatric injuries to the person.

[83] Now, dissecting paragraphs 885 to 887, the following principles emanate from those five kinds of injury namely:

1. The court has power to award damages as a remedy for each of the five kinds of injury. Where the injury consists of financial loss, the assessment of damages simply involves calculating the amount of the loss and ordering the defendant to pay an equivalent amount to the claimant. But the other four kinds of injury mentioned are non-financial in nature. Damages awarded for such injuries are not capable of arithmetical computation. No sum of money is comparable to loss of liberty or to physical or psychiatric injury or mental distress. But the Court must award a fair and reasonable sum to compensate the victim.

2. It is important that judges should not simply award a sum of money which they think appropriate but should strive for consistency.

3. It is important that the courts try to ensure that the amounts of damages which they award are consistent with amounts previously awarded in factually similar cases.

4. As a guideline, a plaintiff who has been wrongly kept in custody for 24 hours would be entitled to an award (in England, about £3,000). For subsequent days the daily rate will be on a progressively reducing scale. The figures were not intended to be applied in a mechanistic manner. The assessment of damages should be sensitive to the facts of the case and the degree of harm suffered by the particular plaintiff.

5. No two cases are the same; the shorter the period of unlawful imprisonment the larger can be the pro

rata rate and the length of the lawful period of imprisonment is also a relevant factor. [Emphasis mine]

[84] In Takitota, the Privy Council stated at para 16 of the Judgment that the local courts are very much better placed than the Board to say what is appropriate by way of damages, having regard to the conditions in the country concerned. At para 17, the Board stated:

> **'The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.' [Emphasis added]**

[85] No doubt, Takitota is the locus classicus in this jurisdiction dealing with lengthy periods of wrongful imprisonment. The principles emanating from it are helpful because the present case bears close affinity to Takitota. The cases of Merson, Tynes and the litany of cases referred to by Mr. Smith QC dealt with short periods of imprisonment. As stated in Alseran, a plaintiff who has been wrongly kept in custody for 24 hours would be entitled to an award (in England, about £3,000). For subsequent days the daily rate will be on a progressively reducing scale. The figures were not intended to be applied in a mechanistic manner.

[86] So, what is a reasonable and fair compensation for a man who was deprived of his liberty for over 2,316 days and kept in deplorable, inhumane and degrading conditions whilst being housed at the Detention Centre? As I stated earlier, the Court takes judicial notice that the Detention Centre is more palatable than Her Majesty's Prison (now the Bahamas Department of Corrections).

[87] Besides the inhumane conditions that Mr. Ngumi found himself in whilst awaiting his deportation to his home country of Kenya, his liberty was also taken away from him for 2,316 days. If he were not detained, he might still have been gainfully employed, as he says, as a jitney driver, perhaps something better or something worse. It is too difficult to predict the future. Although he did not particularize the monthly salary which he used to receive as a jitney driver in Kenya, the Court takes judicial notice that a person working as a bus driver in Kenya typically earns around 49,500 Kenyan shillings monthly: www.salaryexplorer.com. This is the equivalent of $450.10 Bahamian dollars monthly. It is unfortunate that Mr. Ngumi did not provide this evidence. Anyway, this is nothing more than a surmise and therefore unhelpful to compensate a man for 2,316 lost days of his life.

[88] That said, Mr. Ngumi claims total compensation of $3,000,000.00 under this head. Indeed, and in Mr. Smith's own words, such an astronomical amount is nothing more than a fantasy.

[89] In my opinion, even though the Court of Appeal in Cleare did not find favour with the $250.00 daily rate in Takitota, I still consider the daily rate of $250.00 to be fair and reasonable considering the socio-economic conditions in The Bahamas. I also took into account the aggravation suffered by Mr. Ngumi which was nothing short of cruel and inhumane. Therefore, for 2,316 days at $250.00 daily is equivalent to $579,000.00. As the Privy Council noted at para 9 of Takitota, it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment: Thompson v Commissioner of Police of

the Metropolis [1998] QB 498, 515, per Lord Woolf MR. So I will reduce the quantum of damages by one-third which equals $386,000.00.

[90] For the torts of false imprisonment, assault and battery, I assess damages in the amount of $386,000.00.

Exemplary damages

[91] Mr. Ngumi seeks damages not only on a compensatory basis but also damages on an exemplary basis in the amount of $5,000,000.00.

[92] Exemplary damages are awarded when the state or government has taken oppressive, arbitrary or unconstitutional action: Rookes v. Barnard [1964] A.C. 1129 is the landmark case for this head of damage. At page 1221, Lord Devlin stated thus:

> **'Exemplary damages are essentially different from ordinary, damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England.**
>
> **It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a**

change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved.

Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed'.

[93] The principles derived from Rookes v Barnard were adopted with approval in Takitota. At para. 12, Lord Carswell had this to say on exemplary damages:

'The award of exemplary damages is a common law head of damages, the object of which is to punish the Defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in Rookes v Barnard [1964] AC 1129 at 1223, [1964] 1 All ER 801, [1972] 2 WLR 269, to restrain such improper use of executive power. Both Lord Devlin in Rookes v Barnard and Lord Hailsham of St. Marylebone LC in Broome v Cassell & Co, Ltd [1972] AC 1027 at

1081, [1972] 1 All ER 801, [1972] 2 WLR 645 emphasized the need for moderation in assessing exemplary damages. That principle has been followed in The Bahamas (see Tynes v Barr (1994) 45 WIR at 26), but in Merson v Cartwright and the Attorney General [2005] UKPC 38, [2006] 3 LRC 264 the Privy Council upheld an award of $100,000 exemplary damages, which they regarded as high but within the permissible bracket.' [Emphasis added]

[94] Mr. Smith QC relied on the following evidence to support the award for exemplary damages:

1. Mr. Ngumi was unlawfully arrested and falsely imprisoned by the Defendants for 6 years 4 months and 6 days and not 6 years and 7 months as alleged;

2. He was only released after Habeas Corpus proceedings were served. The Defendants did not even at that time seek to defend the legality of his imprisonment;

3. Accordingly, defending the imprisonment now in this case is perverse and can only be explained that the State has determined to behave illegally regardless of the Constitution and the civil rights of the public and Court censure;

4. Mr. Ngumi was beaten severely on different occasions while being detained at the Detention Centre;

5. That the conditions at the Detention Centre were unsanitary, degrading and inhumane;

6. Mr. Ngumi contracted at least two communicable diseases while being detained at the Detention Centre namely scabies and tuberculosis;

7. His belongings were taken away by officers of the Detention Centre and never returned;

8. Mr. Ngumi was treated at the Princess Margaret Hospital for 7 months after his release to treat his tuberculosis;

9. Mr. Ngumi is still on an invisible leash and mandated to check in the Department of Immigration. Despite this trial, the Defendants have failed and/or refused to release him of this;

10. The Defendants have obstinately defended this case for 2 years and continue to do so. They refuse to even admit liability and allow an interim payment on judgment despite no evidence in defence and the dire financial straits of Mr. Ngumi. The State has failed to apologize.

[95] Accordingly, says Mr. Smith QC, an award of $5,000,000.00 meets the justice of this case and nothing less will cause the State to awaken from its endemic abuse.

[96] As outrageous as the acts of the State are, so also is the amount of $5,000,000.00 that Mr. Ngumi is claiming. There is not a single authority that can support his claim for such amount in the English-speaking Commonwealth. Learned Queen's Counsel Mr. Smith seemed to suggest that since the Bahamian societal expectations are more acculturated to Florida and the United States, damages should be reflective of the awards made in the courts of Florida. This is utterly preposterous. I adopt unequivocally what Georges CJ said in Matuszowicz at page 25:

> **'Although there may be superficial resemblances between this Commonwealth and the State of Florida, I do not think that their societal and industrial conditions can be said to be similar. Florida is a part of the USA, a superpower and one of the economic and industrial giants of the world. .. The Commonwealth…and its economy far more fragile.'**

[97] As I stated previously, the instant case bears similarity to Takitota. The Court of Appeal, in 2006, did not reduce the sum of $100,000.00 by way of exemplary damages since that sum was awarded to show the strong disapproval of the courts for the conduct of the Defendants from the time of Mr. Takitota's arrest until his case was finally disposed of.

[98] For exemplary damages, I will make a similar award of $100,000.00 even though I am very conscious of the decline of the value of the dollar due to inflation. However, I make an award of the same amount even 14 years later because, in my considered opinion, the treatment meted out to Mr. Takitota by the State was more appalling than that endured by Mr. Ngumi. Furthermore, Mr. Ngumi was detained at the Detention Centre (a more satisfactory facility than Her Majesty's Prison) for a shorter period than Mr. Takitota.

Aggravated damages

[99] Mr. Ngumi seeks aggravated damages in the amount of $1,000,000.00. Aggravated damages are awarded when, among other things, the Defendant's conduct has caused or is capable of causing injury to feelings, for any indignity, disgrace, humiliation or mental suffering occasioned from the conduct.

[100] In Merson and Takitota, the Privy Council stated that aggravated damages form a quite distinct head of damage based on altogether different principles. This is how Lord Carswell puts it in Takitota at para11:

> **'In their reference to aggravated damages in para 94 of their judgment the Court of Appeal appear to have equated them with exemplary damages, whereas they form a quite distinct head of damage based on altogether different principles. In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would**

have given simply for the deprivation of liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the conditions in which the claimant was held. The rationale for the inclusion of such an element is that the claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award. The latter factor, the conditions of imprisonment, is directly material in the present case, and it would be not merely appropriate but desirable that the award of compensatory damages should reflect it. It may be that the Court of Appeal had it in mind when they expressed their intention in paragraph 90 to compensate the appellant "for the loss of more than 8 years of his life and for the misery which he endured by being treated in a less than humane way." They did not spell it out in their judgment, though they were not obliged to do so: see Subiah v Attorney General of Trinidad and Tobago [2008] UKPC 47, para 11. Their Lordships do not find it possible to ascertain with sufficient clarity whether the Court of Appeal included any element of aggravation in their calculation of the compensatory award, and if so, how much represents that element. Although they stated in para 93 of their judgment that the sum of compensatory damages "does not take into account any assessment for aggravated or exemplary damages", it is not possible to determine whether in reaching that figure they had in fact taken account of aggravating factors.'

[101] Mr. Ngumi seeks aggravated damages for the following:

1. The emotional distress in connection with the unlawful detention;

2. During his viva voce testimony, he appeared visibly emotionally traumatized by the event;

3. The distress from the non-return of his personal items especially his passport which created travel hurdles and eventually made deportation to his home country impossible as the State itself admitted;

4. The humiliation and indignity of having to perform duties with the hope of being released (i.e. washing government vehicles and kitchen duties);

5. Being exposed and contracting scabies and tuberculosis;

6. The distress and humiliation from having been released in the public with nothing and no provisions for Mr. Ngumi to earn a living or survive;

7. The particulars at para 39 of his Statement of Claim also relied upon.

[102] The State has denied liability but they offered no evidence to rebut the assertions by Mr. Ngumi. Having examined the cases which Mr. Smith QC submitted, awards for aggravated damages vary from case to case. In Anthony Deveaux v The Attorney General [2005] CLE/gen/FP/236, the learned Deputy Registrar awarded the sum of $10,000.00. In Takitota, as the Privy Council observed, the Court of Appeal appeared to have equated aggravated damages with exemplary damages so one global award was made under that head.

[103] In the present case, I opined that an award of $50,000.00 is reasonable. For the record, I should state that Mr. Ngumi abandoned the prayer relief at (k) for "further aggravated damages".

Damages for breaches of constitutional rights

[104] Mr. Ngumi abandoned his claim for damages under Articles 15 and 27 of the Constitution. He however seeks vindicatory damages and compensation for Articles 17,19(1), (2), (3) and (4) of the Constitution.

[105] The Court has already found, on a balance of probabilities, that there have been breaches of Mr. Ngumi's constitutional rights. The issue is the measure of damages.

[106] In addition to general damages, the Court may also award compensatory damages and vindicatory damages for breaches of Mr. Ngumi's constitutional rights. As the Privy Council said in Merson at para 18:

> **'These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to (sic) executive not to misbehave. The purpose is (sic) vindicate the right of the complainant, whether a citizen or a visitor, to carry out his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.' [Emphasis added]**

[107] Also the guidance of Elias CJ in the New Zealand Supreme Court case of Taunoa v. A-G [2007] 5 LRC 680 at para 109 that:

> **'It [damages] should be limited to what is adequate to mark an additional wrong in the breach and, where appropriate, to deter future breaches. But where a Plaintiff had suffered injury through denial of a right, he was entitled to compensation for that injury, which might include distress and injured feelings as well as physical damage.'**

[108] In Inniss v Attorney General of St. Christopher and Nevis [2008] UKPC 42, the Privy Council reverberated this guidance. At paras 21 to 29, Lord Hope focused on the issue of whether an award of damages would be appropriate at all in the case. Ms. Inniss was the Registrar of the High Court and an Additional Magistrate in that jurisdiction when she was unceremoniously removed with immediate effect from that position. She received an award of $50,000.00 Eastern Caribbean currency (approximately Bah$20,000.00) for breach of her constitutional rights. That was twelve years ago.

[109] Here at home, Merson received $100,000.00 for breaches of her constitutional rights in the Supreme Court in 1987. She was a 29 year old school teacher from the United States who came to The Bahamas to visit her father. She was falsely imprisoned and her constitutional rights under Articles 17 and 19 of the Constitution were infringed. The Court of Appeal set aside that award. On appeal to the Privy Council, it was held that:

> **'The sum appropriate to be awarded as vindicatory damages depends on the particular infringement and the circumstances relating to the infringement and is at the discretion of the trial judge.'**

[110] The Privy Council held, at para 21, that on the extreme facts of the case, they regard the award of $100,000.00 by way of vindicatory damages as high but within the bracket of discretion available to the judge.

[111] In Takitota, the Privy Council ruled that the "sum of $100,000.00 representing constitutional or vindicatory damages, should remain undisturbed".

[112] This Court is considering an appropriate sum for constitutional or vindicatory damages at a time of a global pandemic. I need not say more on this. However, taking all matters in consideration, I am of the opinion that an appropriate award for vindicatory damages to Mr. Ngumi for breach of both Article 17 and 19 of the Constitution would be $105,000.00. The matters which I took into consideration are:

> **1. Mr. Ngumi's long struggle to secure his release or to comply with two deportation orders to repatriate him to his homeland of Kenya;**
>
> **2. Mr. Ngumi was imprisoned in inhumane and degrading conditions;**
>
> **3. Mr. Ngumi's health was severely affected while he was falsely imprisoned: Exhibit DMN-2: Letter from Dr. Bartholomew confirming Mr. Ngumi's tuberculosis diagnosis;**
>
> **4. The Defendants did nothing to assist Mr. Ngumi upon his release. He was currently unemployed and resided in a room at Fox Hill during the trial.**

[113] As indicated above, a fair and reasonable award for vindication and compensation for breaches of Mr. Ngumi's constitutional rights is $105,000.00.

Special damages

[114] In a detinue action, generally the relief that is claimed and awarded is the return of the property to a plaintiff. In this case, Mr. Ngumi pleaded and gave evidence that his clothing, jewellery (sic) and cash in the amount of $950.00 were taken from him upon his arrival at the Detention Centre. These items were never returned to him. There is no evidence from the Defendants refuting Mr. Ngumi's allegations.

> **[115] Mr. Ngumi will receive the sum of $950.00 as special damages which were specifically pleaded and proved."**

11. I now proceed to consider the grounds of the appellant's attack on the amounts awarded by the judge.

Ground one - The learned judge erred in fact in determining the length of the appellant's unlawful detention

12. The gravamen of this attack is that the judge wrongfully found that three months was a reasonable time for the respondents to deprive the appellant of his liberty whilst making arrangements for his deportation.

13. In considering this ground I have regard to the following findings by the trial judge:

> **"Factual findings**
>
> **[31] This is a civil case (with constitutional considerations) wherein the burden of proof is based on a preponderance of evidence. As already mentioned, the Defendants led no evidence to challenge or undermine the credibility of Mr. Ngumi and/or the veracity of his evidence. This is unfortunate because it undoubtedly tips the scales in favour of Mr. Ngumi. That being said and having had the opportunity to see, hear and observe Mr. Ngumi in the witness box, over-emotional as he was, I have no other evidence to dispute what he was saying. For the most part, I also found his evidence to be consistent with his pleadings and witness statement. As such, I accept his evidence. His account of what he endured during the 6 years and 7 months at the Detention Centre is most unfortunate.**
>
> **[32] Accordingly, I find as a fact that, although immigration officers had reasonable suspicion to arrest Mr. Ngumi without a warrant on 12 January 2011, he was not charged within the statutory period of 48 hours or 2 days. He was arraigned before the Magistrate Court on 18 January 2011 when he should have been arraigned within 48 hours (or two days) after his arrest. I therefore find that he was unlawfully detained for four days.**

> **[33] Additionally, I find that, following his arraignment and subsequent sentence on the 18 January 2011, Mr. Ngumi ought to have been deported as soon as was reasonably practicable as recommended by the learned Magistrate. This was not done. It resulted in a protracted unlawful detention which ended on 4 August 2017. There was some evidence by the Defendants that his passport was "lost" and it was impossible to repatriate him to Kenya. Again, this is unfortunate as the passport was "lost" during his detention at the Detention Centre.**
>
> **[34] In the absence of any evidence from the Defendants, I further find that Mr. Ngumi was badly beaten on several occasions by officers at the Detention Centre. He was also subjected to cruel, inhumane and degrading treatment so much so that he developed health problems and, at some point, he contracted tuberculosis and scabies."**

14. I pause to note that there is no finding that a deportation order was made under section 40 of the Immigration Act.

15. The judge based her decision to reduce the time by three months on the following basis:

> **"[42] As mentioned above, Mr. Ngumi admitted under cross-examination that prior to his arrest on 12 January 2011, he would often travel in and out of The Bahamas to avoid overstaying and also, at one point in the past, he was "deported to Cuba". With this in mind coupled with the fact that Immigration officers went directly to his home and arrested him for an offence to which he subsequently pleaded guilty, I would conclude that the officers had reasonable cause to arrest Mr. Ngumi on that date. Therefore, his arrest was lawful. However, he was detained at the Detention Centre for 6 years and seven months.**
>
> **[43] The Learned Magistrate recommended deportation and one would have expected the Authority to act with some expediency to deport Mr. Ngumi to Kenya. I would consider three (3) months to be reasonable and sufficient**

to organize for his deportation. The Defendants suggested in their Defence that there was a failure to deport Mr. Ngumi because he refused to cooperate with Immigration officials to facilitate his return to Kenya and because of national security concerns, he could not be released in the community. I do not accept this. I would have been inclined to accept this position had the Defendants supported this assertion with evidence at trial. Moreover, during his testimony, Mr. Ngumi stated that he *"was never asked to sign any documents by Immigration officials during his time at the Detention Centre."* This was not challenged during cross-examination. I accept this as a fact. In the circumstances, I would also deem as an unlawful detention the time Mr. Ngumi spent in custody at the Detention Centre after the Magistrate's recommendation of deportation (excluding 3 months which I consider to be sufficient time to organize and deport) which is 6 years and 4 months.

[44] My position on deportation within a reasonable time finds approval in the Privy Council case of Tan Te Lam and others v Superintendent of Taio A Chau Detention Centre and another [1996] 4 All ER 256 which was applied by the Bahamian Court of Appeal in the case of Atain Takitota v. The Attorney General and others SCCivApp No. 54 of 2004. Sawyer P stated:

> **'79. That case was about whether a number of persons of ethnic Chinese origin who were proven to have entered Hong Kong illegally could be legally detained pending removal from Hong Kong under section 13D of the Immigration Ordinance of Hong Kong.**
>
> **Their Lordships held that -**
>
> > **'(1) Where a statute conferred power to detain an individual pending his removal from the country, in the absence of contrary indications in the statute, it was to be implied that that power could only be exercised during the**

> **period necessary, in all the circumstances of the particular case, to effect that removal, that the person seeking to exercise the power of detention had to take all reasonable steps within his power to ensure the removal within a reasonable time and that, if it became clear that removal was not going to be possible within a reasonable time, further detention was not authorized. The courts would construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention for unreasonable periods or in unreasonable circumstances.'**
>
> **80. If it had been proven earlier on that the appellant had landed in The Bahamas illegally, such a decision would have justified the detention of the appellant for a "reasonable period of time" in order to return him to his homeland."**
>
> **[45] For all of these reasons, I find that the tort of false imprisonment has been proven to the requisite standard. Mr. Ngumi was falsely imprisoned for an aggregate of 6 years 4 months and 4 days and not 6 years and 7 months or 2,395 days as argued by Mr. Smith QC."**

16. Section 41(4) of the Immigration Act provides:

> **"41. (4) Subject to the provisions of subsection (3) of this section any person in whose case a deportation order has been made may be detained, under the authority of the Governor-General until he is dealt with under subsection (1) of this section; and a person in whose case a recommendation for deportation is in force under section 40 shall (unless the court, in a case where the person is not sentenced to imprisonment, otherwise directs) be detained until the Governor-General makes a deportation order in his case or directs him to be released." [Emphasis added]**

17. In this case the appellant pled guilty to an offence under the Immigration Act and the magistrate recommended deportation. The Immigration authorities had a reasonable time to arrange deportation.

18. This was the position stated by this Court in **Takitota v Attorney General** [2004] BHS J No 294 at paragraph 80:

> **"80 If it had been proven earlier on that the appellant had landed in The Bahamas illegally, such a decision would have justified the detention of the appellant for a "reasonable period of time" in order to return him to his homeland."**

19. In the circumstances, I agree with Charles, J. that this reasonable time can be deducted from what would otherwise be an unlawful detention.

20. The appellant challenges the period of three months as being unreasonable. Given the evidence of the respondents of the challenges it faced, I see no basis for interfering with the judge's finding that three months was a reasonable period.

21. This ground, in my view, must fail.

Ground two - The learned judge erred in assessing damages for false imprisonment in the sum of $386,000.00 (equivalent to $161.17 per day)

22. In paragraphs 84 to 90 of her judgment, the trial judge said:

> **"[84] In Takitota, the Privy Council stated at para 16 of the Judgment that the local courts are very much better placed than the Board to say what is appropriate by way of damages, having regard to the conditions in the country concerned. At para 17, the Board stated:**
>
> > **'The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an**

> **initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.**

[85] No doubt, Takitota is the locus classicus in this jurisdiction dealing with lengthy periods of wrongful imprisonment. The principles emanating from it are helpful because the present case bears close affinity to Takitota. The cases of Merson, Tynes and the litany of cases referred to by Mr. Smith QC dealt with short periods of imprisonment. As stated in Alseran, a plaintiff who has been wrongly kept in custody for 24 hours would be entitled to an award (in England, about £3,000). For subsequent days the daily rate will be on a progressively reducing scale. The figures were not intended to be applied in a mechanistic manner.

[86] So, what is a reasonable and fair compensation for a man who was deprived of his liberty for over 2,316 days and kept in deplorable, inhumane and degrading conditions whilst being housed at the Detention Centre? As I stated earlier, the Court takes judicial notice that the Detention Centre is more palatable than Her Majesty's Prison (now the Bahamas Department of Corrections).

[87] Besides the inhumane conditions that Mr. Ngumi found himself in whilst awaiting his deportation to his home country of Kenya, his liberty was also taken away from him for 2,316 days. If he were not detained, he might still have been gainfully employed, as he says, as a jitney driver, perhaps something better or something worse. It is too difficult to predict the future. Although he did not particularize the monthly salary which he used to receive as a jitney driver in Kenya, the Court takes judicial notice that a person working as a bus driver in Kenya typically earns around 49,500 Kenyan shillings monthly:

> **www.salaryexplorer.com. This is the equivalent of $450.10 Bahamian dollars monthly. It is unfortunate that Mr. Ngumi did not provide this evidence. Anyway, this is nothing more than a surmise and therefore unhelpful to compensate a man for 2,316 lost days of his life.**
>
> **[88] That said, Mr. Ngumi claims total compensation of $3,000,000.00 under this head. Indeed, and in Mr. Smith's own words, such an astronomical amount is nothing more than a fantasy.**
>
> **[89] In my opinion, even though the Court of Appeal in Cleare did not find favour with the $250.00 daily rate in Takitota, I still consider the daily rate of $250.00 to be fair and reasonable considering the socio-economic conditions in The Bahamas. I also took into account the aggravation suffered by Mr. Ngumi which was nothing short of cruel and inhumane. Therefore, for 2,316 days at $250.00 daily is equivalent to $579,000.00. As the Privy Council noted at para 9 of Takitota, it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment: Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 515, per Lord Woolf MR. So I will reduce the quantum of damages by one-third which equals $386,000.00.**
>
> **[90] For the torts of false imprisonment, assault and battery, I assess damages in the amount of $386,000.00."**

23. I begin by adopting the words of the High Court of Zimbabwe in **Nathanson v Mteliso and others** [2020] 2 LRC 135 where at paragraph 111 the court said:

> **"[111] The quantification of damages is one of the greatest challenges faced by courts in many of these cases. This is primarily so because there is no mathematical formula in place which one can rely on. Invariably one has to rely on the decisions arrived at in other similar matters but bearing in mind that every case is unique in its own way".**

24. In my judgment, the judge, by adopting the mathematical formula as she appears to have done, did not apply the guidance given to the court in paragraph 17 of the judgment in **Takitota v The Attorney General and others** [2009] 4 BHS J. 40, notwithstanding the fact that she expressly referred to that paragraph in her judgment.

25. The import of the judgment in **Takitota** was, in my judgment, best expressed in the recent decision of **Guishard,** a case emanating from the Court of Appeal of the Eastern Caribbean, delivered on the 20 October 2020, just prior to the delivery of the judgment in this case and for which the trial judge may not have had the benefit. In that case the court said:

> **"The Decision of the Board in Takitota**
>
> **[34] In Takitota the Privy Council, in 2009, had to consider the correctness of an award of compensatory and exemplary damages made by the Court of Appeal of the Commonwealth of the Bahamas in favour of the claimant. The claimant was a Japanese national, who brought a claim in the High Court for damages for wrongful detention and breach of his fundamental rights under the Bahamian Constitution. This case concerned an immigration matter for which the claimant had been arrested, but had never been charged with an offence, nor was he ever brought before a court. During the long period of his detention, he had been detained in various facilities, including a maximum-security facility, and subjected to horrendous, degrading and inhumane conditions. These conditions had driven him to attempt suicide on three separate occasions.**
>
> **[35] The Court of Appeal, contrary to the findings of the trial judge, found that the claimant had been unlaw-fully detained and incarcerated for a total of eight years and two months, for which period (2,981 days) he was entitled to be compensated in damages for unlawful detention and breach of his fundamental rights, and to a separate award for exemplary damages. Accordingly, in allowing his appeal against the quantum of damages awarded by the High Court, the Court of Appeal substituted a total award of $BS500,000.00 ($US500,000.00). The award of compensatory damages was arrived at using a daily rate of $BS250.00 which resulted in the total sum of $BS730,500.00. This was then significantly discounted**

upon the patently wrong and inappropriate application of the principle relating to lump sum awards in matters of compensation for personal injuries. The Bahamas Court of Appeal arrived at the base figure of $BS250.00 by dividing the sum of $BS1,000.00, awarded by the trial judge for 'the initial detention and false imprisonment', by the number of days for that period, which the Court of Appeal, as the Privy Council found, wrongly calculated as four days. They then reduced the total sum of $BS730,500.00 by $BS330,500.00 arriving at a final award of $BS400,000.00, since the claimant would have been receiving a lump sum award. However, the Privy Council found that, on the available evidence, the initial period of detention was actually six and not four days. This erroneous calculation is what resulted in the so-called daily rate of $US250.00.

[36] The assumption that the decision in Takitota is legal precedent for a daily rate of $BS250.00 (or $US250.00) as a benchmark for calculating compensatory damages for wrongful detention is incorrect and totally unfounded, as a simple reading of the opinion of Lord Carswell illustrates. In fact, Lord Carswell pointed out that, on the Bahamian Court of Appeals' approach to arriving at a daily rate (which was itself erroneous), applying the correct number of days of six as the divider, this would have resulted in a daily rate of $BS166.66 and not $BS250.00. It follows therefore that it is totally erroneous to rely on the daily rate of $US250.00 as having been approved or endorsed by the Board in Takitota. Likewise, it would be equally unfounded to say that the Privy Council endorsed or adopted a daily rate of $BS166.66 ($US166.66) as an appropriate daily compensatory rate when assessing damages for false imprisonment. This is clear from the reasoning of the Board and its disposition of the appeal. The decision of the Board was to uphold only the award of $BS100,000.00 for exemplary damages. As to the award of compensatory damages in the sum of $BS400,000.00, the Board declined to conduct its own assessment and arrive at its own

award, and remitted this aspect to the Court of Appeal for reassessment. At para [16] Lord Carswell states:

> **'Their Lordships accordingly consider that that part of the award made by the Court of Appeal [exemplary damages] can be upheld and should not be disturbed. They are unable, however, to regard the figure of either $730,500 or $400.000 by way of compensatory damages as being sufficiently securely based on the facts and the law. The Board was invited by the appellant's counsel itself to revise the amount of the award. In line with its established practice, however, it is reluctant to follow this course, for it has repeatedly expressed the view that local courts are very much better placed than the Board to say what is appropriate by way of damages, having regard to the conditions in the country concerned. Their Lordships therefore consider that that part of the award should be remitted to the Court of Appeal for reassessment.' (My emphasis.)**

[37] Moreover, the Board went on to give the necessary guidance to the Bahamian Court of Appeal when conducting a reassessment of the award of compensatory damages, which includes arriving at a daily rate. At para [17] of the decision, Lord Carswell helpfully encapsulates the legal principles in these terms:

> **'The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out at para [9], above. The final figure for**

> **compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.'**
>
> **[38] The above passage in Takitota, authoritatively sets out the principles which are to guide any court in this jurisdiction, including this Court, when assessing or reassessing, as the case may be, the quantum of compensatory damages to be paid or awarded to a claimant who has made out his or her claim of wrongful arrest and false imprisonment. These principles apply to the second step in the assessment process, as the first step relates to assessing the appropriate figure to compensate for the 'the initial shock' or initial detention. At this juncture, it would be appropriate for me to unreservedly endorse and adopt the two-step process so eloquently formulated by de la Bastide CJ (as he then was) in McNicolls, and by Ramdhani J in Davis, as set out above, both of which were relied on by the learned Master in reaching his decision on the quantum of damages under this head."**

26. In an earlier decision in **Millette v McNicolls** (2000) 60 WIR 362, de la Basitide, CJ writing the judgment for the Court of Appeal of Trinidad and Tobago said:

> **"…I should begin by saying that counsel for the appellant did not pursue the mathematical computation of damages which had been proposed on behalf of the appellant in the court below. The absurdity of such an approach is demonstrated by the fact that on the basis of awards in comparable cases it was submitted in the court below that the daily rate for wrongful detention was $20,000. Multiplying that by the number of days for which the appellant was detained, produces a figure in excess of $2,600,000!**
>
> **We have already indicated in Bernard v Quashie our disapproval of this mathematical approach to the**

> **assessment of general damages in a case of this sort. We are told that in England juries have been instructed that they may adopt a specific daily rate in assessing damages for wrongful detention. Well, we do not have juries in civil cases in this country, and I say unhesitatingly that that is an approach which this court will not adopt or approve.**
>
> **On the other hand, it is obvious that one of the factors (and a very important one) to be considered in assessing damages for wrongful imprisonment is the length of the imprisonment. That is probably the most important factor, but there are others. In cases of this sort, we are not dealing simply with the assessment of common-law damages for wrongful imprisonment. We are concerned here not so much with compensating a person for the infringement of her common-law rights, as with vindicating her constitutional rights. There may be involved as in Bernard an element of compensation for physical violence, although that is not applicable in this case…"**

27. This is consistent with the observation by the New South Wales Court of Appeal in **Ruddock & Ors. v Taylor** [2003] NSWCA 262 where that court said at paragraph 49:

> **"49 Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "the initial shock of being arrested" (Thompson v Commissioner of Police of theMetropolis [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish."**

In that case the plaintiff had been detained for about 316 days.

28. The judge does not appear to have had that approach in mind when coming to the decision as to the amount to be awarded for compensatory damages. It appears that she made the determination simply by a mathematical formula:

> **"[89] …Therefore, for 2,316 days at $250.00 daily is equivalent to $579,000.00. As the Privy Council noted at**

para 9 of Takitota, it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment…"

That approach did not reflect the guidance given by Lord Carswell in **Takitota** referred to earlier.

29. The question is whether the sum of $386,000.00 as basic compensatory damages is so unreasonably low as to warrant it being set aside by this Court.

30. I accept that this Court must develop its own pattern of awards for damages for unlawful detention. In developing our awards it is helpful to take into account the amount of the awards given in other courts for damages for this tort.

31. In **Takitota** the original award for compensatory damages given by this Court was $730,500.00 which the Court reduced to $400,000.00 because it was given in a lump sum. That award was remitted by the Privy Council back to the Court of Appeal to be determined in accordance with the guidelines given in paragraph 17 referred to earlier. The courts did not conduct that exercise as the parties compromised the claim at an agreed sum of $500,000.00 for compensatory damages. Presumably this is what the parties determined to be a reasonable amount having regard to the guidance given by the Board. That sum would have reflected the factors that may have given rise to a higher amount having regard to "appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant". That award was made in June 2009. In present day value that would be about $670,000.00. We note that that award was for a detention of 8 and not 6 and a half years and included the aspect of aggravated damages.

32. Counsel suggests that this award has no value as a precedent. With respect, I do not agree. All awards for damages turn on their own facts and circumstances and are simply guidance as to the awards made by courts in similar circumstances. The fact that the award was agreed by the parties after it was remitted back by the Privy Council with the guidance as to how the damages should be assessed is, in my judgment, of equal value for guidance as if it had been done by the court itself. None are binding. They are simply guidance that assists a court.

33. In **AXD v The Home Office** [2016] EWHC 1617 (QB), a person, an immigrant asylum seeker, was unlawfully detained for 614 days, part of which time he was in prison and later at a removal center. He was awarded £80,000.00 which is approximately $112,000.00.

34. In **The Queen (on the application of Khalid Belfken) v Secretary of State for the Home Department** [2017] EWHC 1834 (Admin) the plaintiff was unlawfully detained for 295 days. He was awarded £40,000.00 which is approximately $56,000.00.

35. In **R (on the application of Iwona Deptka and another v Secretary of State for the Home Department** [2019] EWHC 503 (Admin) the plaintiffs were awarded £43,000.00 as compensatory and aggravated damages for 154 days of unlawful detention in 2017. That is approximately $60,000.00.

36. In **Ruddock v Taylor** the plaintiff was detained for 316 days and was awarded Aus$116,000.00 which is approximately US$87,000.00. The Court of Appeal regarded the sum as on the low side but not so low as to warrant appellate interference. This award was made in 2003.

37. More recently in **Guishard** the plaintiff was detained for 708 days. The Court of Appeal awarded the sum of US$232,000.00 as compensatory damages.

38. A review of these authorities shows that in recent years the amount awarded as compensation for unlawful detention has been consistent. The courts look at the global amount to assess fairness. In none of the cases has there been an awarded in excess of $1,000,000.00 as the appellant proposes.

39. Having regard to these authorities, in my judgment, the sum of $386,000.00 as a basic award for compensatory damages is perhaps inordinately low. However, it must be looked in light of the of the aggravated and exemplary damages discussed later in this judgment.

40. This ground has merit and must be revisited.

Ground three - The learned judge erred in not awarding damages for assault and battery and in not awarding damages for assault and battery as a separate head of damage

41. This is a legitimate criticism of the award, but it is not sufficient to warrant the setting aside of the award. This issue was canvassed by the Privy Council in the case of **Merson v Cartwright and another** [2005] UKPC 38:

> **"[15] The learned judge did not identify, in relation to the $90,000 award for assault and battery and false imprisonment, what sum was being attributed to each tort. There were several events she had found proved, each of which constituted in law the assault and battery tort. <u>It was entirely reasonable, in their Lordships' opinion, for the judge to have made a single award to</u>**

cover all of them. It would, however, have been preferable, in their Lordships' view, to have had separate awards for the assault and battery damages and the false imprisonment damages. Nor did the learned judge identify in relation to any of the awards the element attributable to compensatory damages, including aggravated damages on the one hand and the element attributable to exemplary damages, which are punitive in character, on the other. A reading of the judgment, from the above cited passage to the announcement of the amount of the awards, suggests, their Lordships think, that the judge, having directed herself impeccably as to the approach she should adopt, formed a view as to the totality of the damages that Ms Merson should receive and then divided the sum, in round figures, between the three headings under which the awards were made. Their Lordships do not wish to be unduly censorious of this approach but it does make difficult a critical review of the quantum of the awards. It is to be noted that in Tynes (see para [4], above), in which Sawyer CJ (as the judge had become) was the trial judge and in which the same causes of actions as were found proved in the present case were found proved (but where, measured in degrees of outrageous behaviour, the facts were several degrees below those of the present case) the Court of Appeal said:

> **'We wish to indicate that it would be more appropriate for the damages to be awarded under each head. The award should indicate the amount of damages awarded for assault and battery. There should be an identifiable award for false imprisonment and similarly for aggravated damages and also for exemplary damages.' (See Tynes v A-G (11 May 2001, Civil Appeal 18 of 1994, unreported), p 14 per Zacca P.)**

Their Lordships respectfully concur." [Emphasis added]

42. In my view, it would have been preferable and more helpful if the learned judge had indicated how much of the award was awarded for assault and battery and how much of the award was awarded for false imprisonment. However, this failure, in and of itself, is not sufficient to render the total award unreasonable.

43. This ground fails.

Ground four – The learned judge erred in relation to her assessment of exemplary damages

44. The short answer to this ground is that it was improper for the judge to have made an award for both exemplary damages as well vindicatory damages for breach of the appellant's constitutional rights. This point was made clear by the Privy Council in **Takitota**. The Board said at paragraph 15:

> **"15 Their Lordships consider that it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the vindicatory function of the latter head of damages has been discharged, with the element of deterrence that a substantial award carries with it, the purpose of exemplary damages has largely been achieved. To make a further award of exemplary damages, as the appellant's counsel sought, would be to introduce duplication and contravene the prohibition contained in the proviso to Article 28(1) of the Constitution…"**

45. There was no respondent's notice challenging this award for exemplary damages. In the circumstances we cannot interfere with it. However, we do take it into account in our determination as to what is the proper global award.

Ground five – The learned judge erred in awarding only $50,000 in respect of aggravated damages

46. The trial judge said:

> **"[99] Mr. Ngumi seeks aggravated damages in the amount of $1,000,000.00. Aggravated damages are awarded when, among other things, the Defendant's conduct has caused or is capable of causing injury to feelings, for any indignity, disgrace, humiliation or mental suffering occasioned from the conduct.**
>
> **[100] In Merson and Takitota, the Privy Council stated that aggravated damages form a quite distinct head of damage based on altogether different principles. This is how Lord Carswell puts it in Takitota at para 11:**
>
> > **'In their reference to aggravated damages in para 94 of their judgment the Court of Appeal appear to**

have equated them with exemplary damages, whereas they form a quite distinct head of damage based on altogether different principles. In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would have given simply for the deprivation of liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the conditions in which the claimant was held. The rationale for the inclusion of such an element is that the claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award. The latter factor, the conditions of imprisonment, is directly material in the present case, and it would be not merely appropriate but desirable that the award of compensatory damages should reflect it. It may be that the Court of Appeal had it in mind when they expressed their intention in paragraph 90 to compensate the appellant "for the loss of more than 8 years of his life and for the misery which he endured by being treated in a less than humane way." They did not spell it out in their judgment, though they were not obliged to do so: see Subiah v Attorney General of Trinidad and Tobago [2008] UKPC 47, para 11. Their Lordships do not find it possible to ascertain with sufficient clarity whether the Court of Appeal included any element of aggravation in their calculation of the compensatory award, and if so, how much represents that element. Although they stated in para 93 of their judgment that the sum of compensatory damages "does not take into account any assessment for aggravated or exemplary damages", it is not possible to determine whether in reaching that figure they had in fact taken account of aggravating factors.'

[101] Mr. Ngumi seeks aggravated damages for the following:

1. The emotional distress in connection with the unlawful detention;

2. During his viva voce testimony, he appeared visibly emotionally traumatized by the event;

3. The distress from the non-return of his personal items especially his passport which created travel hurdles and eventually made deportation to his home country impossible as the State itself admitted;

4. The humiliation and indignity of having to perform duties with the hope of being released (i.e. washing government vehicles and kitchen duties);

5. Being exposed and contracting scabies and tuberculosis;

6. The distress and humiliation from having been released in the public with nothing and no provisions for Mr. Ngumi to earn a living or survive;

7. The particulars at para 39 of his Statement of Claim also relied upon.

[102] The State has denied liability but they offered no evidence to rebut the assertions by Mr. Ngumi. Having examined the cases which Mr. Smith QC submitted, awards for aggravated damages vary from case to case. In Anthony Deveaux v The Attorney General [2005] CLE/gen/FP/236, the learned Deputy Registrar awarded the sum of $10,000.00. In Takitota, as the Privy Council observed, the Court of Appeal appeared to have equated aggravated damages with exemplary damages so one global award was made under that head.

[103] In the present case, I opined that an award of $50,000.00 is reasonable. For the record, I should state that Mr. Ngumi abandoned the prayer relief at (k) for "further aggravated damages".

47. The appellant seeks an award of $1,000,000.00 as aggravated damages as a result of the "mental distress" of being incarcerated for 6 years and 7 months in the conditions he was in. He has, however, not identified any error of law on the part of the judge in the exercise of her discretion. His complaint is about quantum. I will return to this when determining the award as a global sum.

Ground six – The learned judge erred in awarding only $105,000 in respect of the breaches of the appellant's Constitutional rights

48. The judge's ruling was in the following terms:

> **"Damages for breaches of constitutional rights**
>
> **[104] Mr. Ngumi abandoned his claim for damages under Articles 15 and 27 of the Constitution. He however seeks vindicatory damages and compensation for Articles 17,19(1), (2), (3) and (4) of the Constitution.**
>
> **[105] The Court has already found, on a balance of probabilities, that there have been breaches of Mr. Ngumi's constitutional rights. The issue is the measure of damages.**
>
> **[106] In addition to general damages, the Court may also award compensatory damages and vindicatory damages for breaches of Mr. Ngumi's constitutional rights. As the Privy Council said in Merson at para 18:**
>
> > **'These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is**

> **not to (sic) executive not to misbehave. The purpose is (sic) vindicate the right of the complainant, whether a citizen or a visitor, to carry out his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.' [Emphasis added]**

[107] Also the guidance of Elias CJ in the New Zealand Supreme Court case of Taunoa v. A-G [2007] 5 LRC 680 at para 109 that:

> **'It [damages] should be limited to what is adequate to mark an additional wrong in the breach and, where appropriate, to deter future breaches. But where a Plaintiff had suffered injury through denial of a right, he was entitled to compensation for that injury, which might include distress and injured feelings as well as physical damage.'**

[108] In Inniss v Attorney General of St. Christopher and Nevis [2008] UKPC 42, the Privy Council reverberated this guidance. At paras 21 to 29, Lord Hope focused on the issue of whether an award of damages would be appropriate at all in the case. Ms. Inniss was the Registrar of the High Court and an Additional Magistrate in that jurisdiction when she was unceremoniously removed with immediate effect from that position. She received an award of $50,000.00 Eastern Caribbean currency (approximately Bah$20,000.00) for breach of her constitutional rights. That was twelve years ago.

[109] Here at home, Merson received $100,000.00 for breaches of her constitutional rights in the Supreme Court in 1987. She was a 29 year old school teacher from

the United States who came to The Bahamas to visit her father. She was falsely imprisoned and her constitutional rights under Articles 17 and 19 of the Constitution were infringed. The Court of Appeal set aside that award. On appeal to the Privy Council, it was held that:

> **'The sum appropriate to be awarded as vindicatory damages depends on the particular infringement and the circumstances relating to the infringement and is at the discretion of the trial judge.'**

[110] The Privy Council held, at para 21, that on the extreme facts of the case, they regard the award of $100,000.00 by way of vindicatory damages as high but within the bracket of discretion available to the judge.

[111] In Takitota, the Privy Council ruled that the "sum of $100,000.00 representing constitutional or vindicatory damages, should remain undisturbed".

[112] This Court is considering an appropriate sum for constitutional or vindicatory damages at a time of a global pandemic. I need not say more on this. However, taking all matters in consideration, I am of the opinion that an appropriate award for vindicatory damages to Mr. Ngumi for breach of both Article 17 and 19 of the Constitution would be $105,000.00. The matters which I took into consideration are:

1. Mr. Ngumi's long struggle to secure his release or to comply with two deportation orders to repatriate him to his homeland of Kenya;

2. Mr. Ngumi was imprisoned in inhumane and degrading conditions;

3. Mr. Ngumi's health was severely affected while he was falsely imprisoned: Exhibit DMN-2: Letter from Dr. Bartholomew confirming Mr. Ngumi's tuberculosis diagnosis;

> **4. The Defendants did nothing to assist Mr. Ngumi upon his release. He was currently unemployed and resided in a room at Fox Hill during the trial.**
>
> **[113] As indicated above, a fair and reasonable award for vindication and compensation for breaches of Mr. Ngumi's constitutional rights is $105,000.00."**

49. The appellant's complaint is about quantum. He has not identified any error in principle. The reference to the global pandemic was, in my judgment, simply a reference that the court should not impose a sum which the State, in the prevailing circumstances of the pandemic and its impact of resources, could ill afford to pay. I am satisfied that it did not play a major role in the quantification and the sum is consistent with awards for breaches of constitutional rights made in other cases. See **Takitota** and **Merson v Cartwright**. While it could have been higher, there is no basis for interfering with it in and of itself as unduly low.

Ground seven – The learned judge erred in refusing to award interest on pre-judgment damages

50. The judge's ruling on interest was in the following terms:

> **"Interest**
>
> **[116] Mr. Ngumi seeks interest not only after judgment but from the date that the cause of action arose. He relied on the judgment in Cara Chan v Wendall Parker (1999) No. FP/88 [unreported], a personal injury case, to ground pre-trial interest. I do not find his argument to be convincing. I am cognizant that, in personal injuries cases, judges including myself have awarded interest from the date when the cause of action arose but I was not provided with any authority to make such an award in cases dealing with these torts and constitutional infringements.**
>
> **[117] That said, I make an order that interest at the statutory rate of 6.25% pursuant to section 2(1) of the Civil Procedure (Award of Interest) Act 1992 as amended by the Civil Procedure (Rate of Interest) Rules, 1992 be awarded to Mr. Ngumi from today's date to the date of payment."**

51. In his Writ, the appellant sought "Interest pursuant to statute".

52. The judge records that the appellant sought interest from the date he was first detained. It was that claim that the judge rejected. The appellant did not seek interest from the date of the issue of the Writ.

53. The Civil Procedure (Award of Interest) Act provides:

> **"3. (1) In any proceedings tried in any court, whether or not a court of record, for the recovery of any debt or damages, the court may if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."**

54. It is clear that the judge has wide authority to award interest including from the date when the cause of action arose.

55. Indeed, that was done in the **Guishard** case.

56. She chose not to do so. It appears however that she may have exercised her discretion to award interest from date the cause of action arose if she was satisfied that she had the authority to do so.

57. However, she may also have exercised her discretion to award interest from date of the Writ if she had been asked to do so. This is what was done in **Lockwood v Department of Immigration** [2017] 2 BHS J No 120.

58. The award of interest is entirely in the discretion of the trial judge and a court of appeal would not lightly interfere with it. However, as the judge operated on a misunderstanding of the law, we are satisfied that we are entitled to override that exercise and substitute our own discretion.

59. We would allow this part of the appeal and award interest at the rate prescribed by the judge from the date of the Writ instead of the date of the judgment.

Ground eight – Overall, the appellant was effectively penalized five times when he was only awarded damages in the total sum of $641,950

60. Under this ground I consider whether the global award of $641,950.00 should be interfered with.

61. This sum was $386,000.00 awarded for compensatory damages, $50,000.00 awarded for aggravated damages and $100,000.00 awarded for exemplary damages. In addition, $105,000.00 was awarded for the breach of the appellant's constitutional rights. The awards for exemplary damages and breaches of the constitutional rights are duplicitous. On the trial judge's determination, the award should only have been for $541,000.00.

62. However, we regard the award of $386,000.00 as unreasonably low having regard to the award in **Takitota**, which in present day value was $670,000.00 for both the compensatory and aggravated aspects of the claim for damages. In addition, there is the $100,000.00 for the constitutional damages. In our judgment, an award in the region of $750,000.00 for 6 years 4 months 6 days of unlawful detention is appropriate. I have no doubt that the sums claimed by the appellant are simply without any merit whatsoever and are in fantasyland. I would allow the appeal on quantum of damages and make a global award of $750,000.00 instead of $641,000.00 as general damages.

Ground nine – The learned judge erred in only awarding costs on a party and party basis, rather than on the indemnity basis

63. In her judgment, the judge explained why she refused to accede to the request by the appellant for costs on an indemnity basis. She said:

> **"Indemnity costs**
>
> **[118] Learned Queen's Counsel Mr. Smith seeks costs on a full indemnity solicitor own client basis. He submitted that given the manner in which this case was conducted by the Defendants, Mr. Ngumi seeks costs on a full indemnity solicitor own client basis and relied on the case of R. v Christie Ex Parte Coalition to Protect Clifton Bay 2013/PUB/jrv/0012 Ruling No. 2.**
>
> **[119] In this vein, I can do no better than to rely on the rulings that I have done on this subject matter. I therefore quote extensively from one of those rulings which was delivered not so long ago on 21 September 2020: Sumner Point Properties Limited v (1) David E. Cummings (2) Bryan. Meyran 2012/CLE/gen/1399 (unreported). In paras 8 to 18, I discussed the law on indemnity costs. I stated:**
>
> > **'The law on indemnity costs**

[8] There is no doubt that the court has the jurisdiction to determine whether indemnity costs ought to be ordered.

[9] A good starting point is the case of E.M.I. Records Ltd v Ian Cameron Wallace Ltd and another [1983] 1 Ch. 59 where it was held that the court has power in contentious proceedings to order the unsuccessful party to pay the successful party's costs on bases other than party and party and common fund basis under rule 28 (UK) and those other bases included orders for costs on an indemnity basis as well as on the solicitor and client basis and the solicitor and own client basis.

[10] E.M.I. Records Ltd was cited with approval by Sawyer CJ in Levine v Callenders & Co. et al [1998] BHS J. No 75 where she stated at pp. 2-3:

> **'As I understand that decision, the Vice Chancellor held, among other things, that the wide discretion set out in section 50 of the Supreme Court of Judicature (Consolidation) Act 1925, (England) which was continued under s.51 of the 1981 Act gives the High Court of that country, the power to make an order for costs on "an indemnity" basis in inter partes litigation, particularly in cases involving contempt of court proceedings. In addition, he equated such an order to an order for costs on solicitor and own client basis under Order 62, r 29(1) of the English Rules of the Supreme Court.'**

[11] The test for the award of indemnity costs was said to be the process of "exceptional circumstances": Bowen-Jones v Bowen-Jones and others [1986] 3 All ER 163 and, in Connaught Restaurants Ltd v Indoor Leisure Ltd [1992] C.I.L.L 798, it is said to be the presence of factors that take the case outside the run of normal

litigation. In that case the factor was litigation was fought "bitterly or unreasonably."

[12] Upon considering an application for indemnity costs, Mr. Justice Rattee in Atlantic Bar & Grill Limited v Posthouse Hotels Ltd [2000] C.P. Rep. 32 referred to the decision of Knox J in Bowen-Jones v Bowen-Jones and others [1986] 3 All ER 163 in which Knox J cited a passage from the well-known judgment of Brightman L.J. (as he then was) in Bartlett v Barclays Bank Trust Co. Ltd. (No. 2)[1980] Ch. 515. Brightman L.J. had this to say at p.547:

> **'…It is not, I think, the policy of the courts in hostile litigation to give the successful party an indemnity against the expense to which he has been put and, therefore, to compensate him for the loss which he has inevitably suffered, save in very special cases. Why this should be, I do not know, but the practice is well-established and I do not think that there is any sufficient reason to depart from the practice in the case before me'.**

[13] Mr. Justice Rattee continued:

> **'Knox J. applied that principle in the case before him. He relied also on the case of Wailes v Stapleton Construction and Commercial Services Ltd and Unum Ltd. [1997] 2 L.L.R. 112, in which Newman J said, at p.117:**
>
> > **'The circumstances in which an order for indemnity costs can be made, while an open ended discretion so far as the rules are concerned, is obviously one which must be exercised on judicial discretion.'**

Having then cited various authorities his Lordship went on to say:

> **'In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving of moral condemnation, in such cases an order for indemnity costs may be appropriate.'**

Newman J. went on to say this:

> **'There may be cases otherwise, falling short of such behaviour in which the Court considers it appropriate to order indemnity costs. The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, some conduct which can be properly categorized as unreasonable, and I would add to that in a way which the Court is satisfied constitutes unreasonableness of such a high degree that it can be categorized as exceptional. There are varying ways in which the course of litigation, parties to it could be categorized as having behaved unreasonably, but one would not, simply as a result of that, decide that they should pay costs on an indemnity basis.' [Emphasis added]**

[14] In Levine v Callenders & Co, Sawyer CJ echoed similar sentiments and stated at p. 4:

> **'While I accept the general principle that the conduct of a party, in some cases, will justify an award of costs on an indemnity or solicitor and client basis, in my judgment conduct which would justify such an order would have to be egregious –for example, a breach of an undertaking by a party (as in the case of a Mareva injunction mentioned earlier –which is itself a specie of contempt) and contumacious contempt of court. A failure to comply with the rules of pleading is not, in my**

> **judgment, in and of itself, a reason to award costs on an indemnity basis.' [Emphasis added]**

Discussion, analysis and conclusion

[15] The general rule is, in most cases, where the issue of costs arises, the court will award costs on a party to party basis. The court does so in the judicial exercise of its discretion and would only depart from this principle when there are exceptional circumstances to do so. Usually, an award for costs on an indemnity basis can be made in exceptional cases where the conduct of a party can be considered egregious or where the conduct of a party can be properly categorized as disgraceful or deserving of moral condemnation.

[16] A court, in making an order for indemnity costs, will have regard to conduct which is so unreasonable during the course of the trial to justify an order for indemnity costs. In this regard, I am guided by the dicta of Judge Peter Coulson QC in Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd [2005] EWHC 2174. At [14], his Lordship stated:

> **'I do not believe that unnecessary or unreasonable pursuit of litigation must involve an ulterior purpose in order to trigger the court's discretion to order indemnity costs. I consider that to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs.'**

[17] A useful approach to adopt is to be found in Cook on Costs 2015 at [24.9] under the heading "Culpability and abuse of process". The learned author said:

'Traditionally costs on the indemnity basis have been awarded only where there has been some culpability or abuse of process such as:

(a) deceit or underhandedness by a party;

(b) abuse of the courts procedure;

(c) failure to come to court with open hands;

(d) the making of tenuous claims;

(e) reliance on utterly unjustified defences;

(f) the introduction and reliance upon voluminous and unnecessary evidence; or

(g) extraneous motives for litigation.

What is clear is that the exercise of the court's discretion is best considered by reference to specific examples of where the court has made indemnity costs orders. It is one of those situations where it is hard to pinpoint specific conduct, but one knows it when one sees it!'

[18] The concept of unreasonableness in Atlantic Bar & Grill Limited v Posthouse Hotels [supra] involves conduct which was outside the norm. This concept coupled with the list enumerated by Cook on Costs illustrate examples of circumstances where the court may make an award of costs on an indemnity basis.'

[120] Applying the legal principles emanating from the above authorities to the facts in the present case, I am not inclined to award costs on an indemnity basis as the conduct of the Defendants was in no way egregious or contumacious. The award of exemplary damages has already taken into account the need in bringing home to the Defendants that "torts do not pay".

[121] I will therefore order that the Defendants do pay reasonable costs to Mr. Ngumi on a party to party basis…"

64. Section 30(1) of the Supreme Court Act states:

> **"30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."**

65. Simply put, the power to award costs is in the wide discretion of the trial judge. In this case the court made an order for costs in favour of the appellant who was successful in his claim for damages. The appellant's case is that he wanted an order for costs on an indemnity basis because of the conduct of the respondents. The judge carefully considered that submission and declined for the reasons cogently set out in her judgment and refused to make an order on an indemnity basis. There is, in my, view no basis for this Court to interfere with the judge's exercise of her discretion on the issue of costs. The order that costs be paid on a party and party basis and not on an indemnity basis is, in our view, fully justified.

66. In summary, we would allow the appeal by increasing the amount of general damages from $641,000.00 to $750,000 and by varying the order so that interests run from the date of the Writ. Having regard to the claim for special damages, the total award is $750,950.00.

67. We will hear the parties on the issue of the costs of this appeal.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Isaacs, JA

The Honourable Mr. Justice Evans, JA