Yanda v Kenya Wildlife Services (Civil Appeal E073 of 2023)
[2024] KEHC 16063 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16063 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E073 OF 2023

LM NJUGUNA, J

DECEMBER 19, 2024

BETWEEN

STANSLAUS MUTINDA YANDA ..... APPELLANT

AND

KENYA WILDLIFE SERVICES ..... RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii PM in the Magistrate's Court at Siakago Civil Suit No. E098 of 2021 delivered on 16th November, 2023))

JUDGMENT

1. The appellant filed a memorandum of appeal dated 29th November 2023 challenging the above cited decision of the trial court and seeking the following orders:
    1. That the appeal be allowed;
    2. That the order of the Principal Magistrate be set aside and the order disallowing the appellant's claim and not awarding him damages against the respondent be substituted with an order allowing the said suit with costs against the respondent:
2. The appeal is premised on the grounds that:
    1. The learned trial magistrate erred in law and fact in failing to appreciate the clear evidence that was placed before him in reaching his decision;
    2. That the trial magistrate erred in law and facts by considering totally irrelevant factors which were never pleaded by the parties for his determination;
    3. The learned magistrate erred in law and fact in failing to consider the appellant's submissions on quantum; and

4. That the learned magistrate proceeded on demonstrably wrong principles in reaching his decision.

3. The appellant sought general and special damages from the respondent. He alleged through the plaint that he was at his farm in Ndunguni village near Masinga dam on 21st December 2019 when he was attacked by a hippopotamus and he sustained serious injuries. The respondent filed a statement of defense in which it denied the allegations made in the plaint and alluded negligence to the appellant. In his reply to defense, the appellant stated that the respondent owed him a duty of care which it breached causing the hippopotamus to attack him.

4. PW1 was the appellant who stated that on the day of the incident, he was herding his cattle when the hippo attacked him. That he raised alarm and people assisted him and rushed him to Matuu hospital where he was treated. That he was given compensation forms to fill but before he returned the forms, the officers from the respondent told him to report the matter at the police station, which he did. That he was treated for the injuries and he obtained a medical report from Dr. GN Njiru.

5. He stated that the respondent failed in its mandate to sensitize the community about co-existing with wild animals. On cross-examination, he stated that he was attacked by the hippo while on his land at around 6:30pm. That the land has a live fence and that after the attack, he sustained injuries on his right leg, thigh, ribs and shoulder. That he was helped by well-wishers after he screamed.

6. DW1 was Augustine Lang'at a warden employed by the respondent, who stated that he was familiar with the incident and that the County Wildlife Conservation and Compensation Committee (CWCCC) was mandated to review, verify and award compensation to the victim. That following the incident, the appellant reported the matter at the respondent's office and they gave him forms to fill but he did not return the forms for processing by CWCCC. On cross-examination, he stated that the area where the appellant was attacked by the hippo is infested with wild animals and part of his job is to sensitize the community about the wild animals. That the fact that the appellant failed to return the forms does not disentitle his claim for compensation from the court.

7. In its judgment, the trial court found that the incident was not properly reported as the details thereof were not captured in the OB from Mbondoni Police Post. That the circumstances under which the accident occurred were unclear. He relied on the case of Ndung'u Kimanyi v. Republic (1979) KLR 282 and found that the claim was unmerited on grounds that the causation was untruthfully rendered.

8. The appeal was canvassed by way of written submissions.

9. The appellant relied on the case of Zakayo Wanzala Makomere v West Kenya Sugar Co. Ltd [2013] KEHC 1609 (KLR) where the court rehashed that the standard of proof is on a balance of probabilities and that in the eyes of the trial court, the appellant failed to prove his case. That the testimony of the respondent did not rebut that of the appellant that it was likely that he was not attacked by a hippo. He relied on the case of Mugunga General Stores v Pepco Distributors Ltd [1987] KECA 68 (KLR) where the court held that mere denial of the allegations is not sufficient defense. It is his argument that there was inference of negligence from the facts provided and that the fact that facts were not explained a lot does not change that. He referred to the cases of Regina Mpinda v Reuben Muthiora Johny [2022] KEHC 1300 (KLR) and Nandwa v Kenya Kazi Limited [1988] eKLR. He submitted that from the attack, he suffered mental and physical injuries and he ought to be compensated by the respondent. Further reliance was placed on section 107(1) of the *Evidence Act* and the cases of Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 and Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR.

10. The respondent submitted that the trial court was correct in finding that the cause of action was not proved to the required standard and it relied on section 107 of the *Evidence Act*. It relied on the case of Arrow Car Limited v Bimomo & 2 Others, (2004) 2 KLR 101 and urged the court to uphold the findings of the trial court. It also stated that the alleged negligence does not fall under the circumstances provided under section 7 of the *Wildlife Conservation and Management Act*.

11. The issue for determination is whether the plaint raised a cause of action that could be determined by the trial court to warrant payment of damages.

12. The appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, thus:

> " ..this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. The appellant alleged that he was attacked by a hippo while he was manning his farm near the Masinga dam. DW1, an officer employed by the respondent acknowledged that the place where the appellant's farm is, in infested by wild animals and part of his mandate is to educate the community on how to co-exist with wildlife. One of the elements of negligence alluded to in the plaint is that the respondent, who owed a duty of care to the appellant, failed to sensitize the community on how to co-exist with wild animals.

14. The appellant's case is that as he was taking care of his greengram crop, a hippo went to his farm and when he tried to chase it away, it attacked him and caused him injuries. That he reported the matter at the respondent's office and DW1 said that he was given compensation forms to fill but he never returned them. The appellant testified that before he returned the compensation forms, he was told by an officer of the respondent that he should report the matter to the police station and he did so at Mbondoni Police Station.

15. Part of the appellant's documentary evidence was a P3 form filled by a medical practitioner at Mbondoni Dispensary which indicates that it pertains to OB number 05/21/12/2019 from Mbondoni Police Patrol Base. The P3 form states that the appellant presented with wet and dry blood stains and he told the medical practitioner that he had been attacked by a hippopotamus. That he had sustained multiple bite wounds on the left shoulder, bilateral wounds on the thighs and an extensive wound on the right tibular part of the right leg. That the wounds were caused by a sharp object.

16. The trial court noted that the appellant gave 2 conflicting versions of how the events leading to his attack occurred. In one version he said that he was herding cattle while in the other, he said that he was taking care of his crops, to wit, greengrams. The trial magistrate highlighted this flaw and dismissed the appellant's case. It is my view that the documentary evidence produced by the appellant is clear about the attack which he stated was caused by a hippo. Whichever way one looks at the case, the fact remains that the appellant was attacked by a hippo, a fact that has not been controverted. In fact, DW1 stated that it was indeed the respondent's responsibility to sensitize the community about human and wild animal conflict. He stated that the area where the appellant was attacked by the hippo was prone to wild animals. In my view, the respondent abdicated its responsibility knowing that the community was likely to be invaded by wild animals at any given time.

17. According to Clerk & Lindsell on Torts 18th Edition the elements of negligence were discussed thus:

> " There are four requirements for the tort of negligence namely; -
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> 1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
> 2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;
> 3. a causal connection between the defendant's careless conduct and the damage;
> 4. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote. When these four requirements are satisfied the defendant is liable in negligence.
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> "A defendant will be regarded as in breach of a duty of care if his conduct fails below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson; "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case.""

18. In the old case of Donoghue v. Stevenson (1932) A.C. 562, the court stated thus regarding the duty of care and the neighbor principle:

> " ....The liability for negligence, whether you style such or you treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

19. This means that the respondent owed the appellant a duty of care under section 7 of the *Wildlife Conservation and Management Act*, which duty was breached, thus there was negligence on its part.

20. That being said, the appellant stated that he reported the matter to the respondent and he was given compensation claim forms to fill and return. He stated that when he was about to return the forms, one of the officers of the respondent advised him to report the matter to the police, and he did. This evidence was also not controverted. In as much as there was no OB extract from the police station

produced as evidence, there is on record, a P3 form that was filled pursuant to a police report in OB number 05/21/12/2019 from Mbondoni Police Patrol Base.

21. Regardless of the activity that the appellant was undertaking before the attack, it is my view that it does not change the fact that he was attacked by a wild animal. The compensation would have been granted under section 25 of the *Wildlife Conservation and Management Act*. However, since the process was not initiated and the matter has found its way into the court system, the appellant has to be compensated through the assessment of damages since the respondent has been found liable for negligence.

22. The appellant sustained multiple bite wounds on the left shoulder, bilateral wounds on the thighs and an extensive wound on the right tibular part of the right leg. The court is cautious that in referring to comparable awards, the year of the award matters in guiding on issues such as economic inflation. In the case of Simon Taveta v Mercy Mutitu Njeru (2014) eKLR the Court of Appeal observed thus:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

23. Here are some of the case where the courts awarded general damages for injuries inflicted on the victims by hippopotamuses:

    1. In the case of Damaris Mwongeli Muia v Kenya Wildlife Service [2017] eKLR, the appellant sustained injuries in an attack by a bloat of hippopotamuses. She suffered deep cuts on the left lower limb leading to her admission in hospital for 28 days. The nature and extent of the injuries resulted in skin grafting to patch up the deep cut wound on the left thigh. At the time of the trial the Appellant was still walking with the aid of crutches. There were large unsightly scars on the affected limb and the limb would at times become numb. The court upheld the decision of the trial court which had awarded Kshs. 500,000/-;

    2. In Laban Buyole Mamboleo v Rift Valley Textiles [1998] eKLR, the claimant had, among other injuries, multiple fractures. He suffered 60% permanent brain disability including amnesia, generalized weakness on the left side of the body and urine incontinence. The court awarded him Kshs. 650,000/- in 1998;

    3. In Kiru Tea Factory & Another v Peterson Watheka Wanjohi [2008] eKLR Kshs. 800,000/- was awarded for a degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius and ulna bones, fracture of the right iliac bone in the pelvis and generalized pains over most of the chest, but without any fractures, indicating soft-tissue injuries. Treatment involved surgical toilet of the wound and, later, skin grafting. The fractures were fixed by plating; and

    4. In Gusii Deluxe Limited & 2 Others v. Janet Atieno [2012] eKLR in which an award of Kshs. 500,000/- was upheld for deep cut wound frontal head exposing the skull bone, unconsciousness for about 8 hours with brain concussion, bang to the right-upper and lower jaw loosening the right-lower incisors teeth, injury to the right shoulder with bruises over it, deep cut wound in right upper limbs just below right elbow, injury to the right big toe with bruises over it and blunt injury to the anterior part of the chest.

24. The injuries in these cases are more severe than those suffered by the appellant herein. Given the exigencies of economic inflation, I find that an award of Kshs.500,000/= is fair in the circumstances. The appellant was treated but he did not seek any medical expenses save for Kshs.10,000/= for the medical report, which was proved by way of a receipt dated 13th September 2021 by Dr. GN Njiru.

This amount is to be awarded as pleaded and proved. This court also finds the respondent 100% liable for the injuries suffered by the appellant.

25. In the end, I find that the appeal has merit and it is hereby allowed with orders as follows:

    1. The judgment and orders of the trial court in Siakago MC Civil Suit No. E098 of 2021 delivered on 16th November 2023 are hereby set aside;

    2. The respondent is held 100% liable for the injuries inflicted upon the appellant;

    3. The respondent to pay the appellant damages as follows:

        i. Special damages of Kshs.10,000/= with interest from the date of filing the plaint until payment in full;

        ii. General damages for pain and suffering of Kshs.500,000/= with interest from the date of this judgment until payment in full;

    4. Interests shall be at court rates; and

    5. The appellant is hereby awarded the costs of this appeal.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE