



REPUBLIC OF KENYA



KENYA LAW
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**Bariu v Kenya Wildlife Services (Civil Appeal E088 of 2022)
[2023] KEHC 25173 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 25173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E088 OF 2022
LW GITARI, J
OCTOBER 27, 2023**

BETWEEN

WILLIAM BARIU APPELLANT

AND

KENYA WILDLIFE SERVICES RESPONDENT

(Being an appeal from the Judgment of Hon M.A Odhiambo delivered in Meru Law Courts on the 30th day of June 2022 in the Magistrate's Court Civil Case No.207 of 2019)

JUDGMENT

1. This is an appeal from the Judgment in Meru CMCC No E207 of 2019 delivered on 30th June, 2022. The said judgment was issued in the favour of the Appellant herein as against the Respondent in the following terms:
 - a. Liability at 100% in favour of the Appellant against the Respondent
 - b. General damages – Kshs 0/=
 - c. Special Damages – Kshs 20,000/=
 - Net Award of Kshs 20,000/=
 - d. Costs and Interest of the suit to the Appellant at court rates.
2. The Appellant at the trial court contended that on or about 12th December, 2017, he was brutally attacked and injured by an elephant and sustained serious injuries for which he held the Respondent liable for. He thus sought for general damages for pain and suffering and loss of amenities, special damages as well as costs and interest of the suit.
3. Aggrieved by the decision of the trial court, the Appellant raised 20 grounds of appeal but he collapsed them into six in his submissions challenging the award and prayed that the appeal be allowed. The



judgment of the magistrate's court on the general damages apportioned at Kshs 0 be set aside and substitute the same with an award of Kshs 3,000,000. The Appellant also prayed for the cost of the appeal as well as the cost of the suit in the subordinate court.

The grounds of appeal are as follows:-

1. That the honourable court erred in law and in fact by purporting that the treatment notes, P3 form and the medical report produced in evidence by the appellant were of no relevance in the case.
2. That the honourable magistrate erred in law and in fact by concluding that no particular of injuries were pleaded hence visiting the same on the amenities were pleaded in the plaint and there were documents relied upon being the P3 form, medical report and treatment notes, plaintiffs testimony and the testimony of PW2 who is the doctor who examined the appellant.
3. That the honourable magistrate erred in law and in fact by disregarding the medical report and the P3 form hence coming to a wrong conclusion.
4. That the honourable magistrate erred in law and in fact by concluding that no particular of injuries were pleaded hence visiting the same on the appellant while general damages for pain and suffering and loss of amenities were pleaded in the plaint and there were documents relied upon being the P3 form, medical report and treatment notes, Plaintiffs testimony and the testimony of PW2 who is the doctor who examined the appellant in line with the Article 22 of the *Constitution*.
5. That the honourable magistrate erred in law and in fact when she proceeded on a wrong principle as she misapprehended the evidence in same material and so arrived at wrong conclusion.
6.

4. The Respondent opposed the appeal and the appeal was canvassed by way of written submissions.

The Appellant's Submissions

5. It is the Appellant's submissions that the trial erred in finding that the Appellant did not plead any particulars of injuries. According to the Appellant, the medical report produced by PW2 as well as his P3 Form and treatment notes formed part of the court's record and was the basis upon which the Appellant proved the injuries that he suffered. It was thus the Appellant's submission that his prayer for general damages for pain and suffering and loss of amenities in his pleadings together with his testimony and that of PW2 were sufficient proof of the injuries he sustained.
6. It was further his submission that Article 159 of the *Constitution* and the oxygen principles command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities. The Appellant thus prayed for this appeal to be allowed by awarding him general damages for pain and suffering and loss of amenities as pleaded in his plaint dated 15th July, 2019.



The Respondent's Submissions

7. On its part, it was the Respondent's submission that the trial court applied the law correctly and arrived at an appropriate conclusion. That the failure by the Appellant to plead and particularize in his plaint the injuries that he allegedly sustained was fatal to his claim and contrary to Order 2 Rule 10 of the Civil Procedure Rules. In this regard, the Respondent urged this Court to be guided by the decision in the case of Nelson Ole Keiwa v Victoria Limited & Another [2015] eKLR.
8. The Respondent further relied on the case of Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91 and submitted that by failing to plead any particulars of injuries or amending his plaint after receiving the medical report, the Respondent failed to disclose any basis of assessing general damages and as such, the trial court was right in failing to award the Appellant general damages. Further that the failure to plead and particularize injuries is not a mere technicality as it goes to the substantive issue in assessing general damages and therefore such failure cannot be cured by invoking the provisions of Article 159(2)(d).
9. The Respondent maintained that it is trite law that parties are bound by their pleadings and that evidence which tend to be at variance with the pleadings are to be rejected. In view of these submissions, the Respondent urged this Court to find that the trial court's disregard of the Appellant's P3 form and medical report as proof of the alleged injuries sustained was a proper finding that should be upheld by this Court.

Issue for Determination

10. I have carefully considered the judgment of the trial court, the grounds of appeal and the record of appeal as well as the submissions by the parties. The main issue that arises for determination is whether the trial court erred in not awarding the Appellant general damages for pain and suffering and loss of amenities.

Analysis

11. This is a first appeal. It is therefore this Court's duty to evaluate the entire evidence on record bearing in mind that it had no advantage of seeing the witnesses testify and watch their demeanor. See the pronouncements in the case of Selle v Associated Motor Boat Co. Ltd. [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

This being a first appeal, parties are entitled to a fresh evaluation and consideration of the evidence by the appellate court and its independent finding. However the court has to bear in mind that it did not see the witnesses when they testified so as to have an opportunity to assess their demeanor, then leave room for that.

In Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR the Court of Appeal stated as follows:-

“An appeal to this court from a trial in the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”-



In *Peters v Sunday Post Ltd* (1958) EA 434 the court held

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the trial judge has failed to appreciate the weight or bearing the circumstances admitted or proved or had plainly gone wrong, the appellate court will not hesitate so to decide.”

See also [Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & C. Advocates](#) (2013) eKLR.

Analysis of the Evidence

12. The Appellant testified as PW1. He adopted his witness statement as his evidence in chief and produced as exhibits copies of the documents listed in his list of documents. It was the Appellant’s testimony that on the material day, he was attacked by an elephant that had escaped from a nearby national park and that as a result, he sustained fracture on the ribs and injuries on the leg. The Appellant stated that he reported the incident at Kabachi Police Station and at the KWS offices. He was asked to go for treatment and then return but KWS never compensated him. The Appellant thus blamed KWS for the injuries he sustained and stated that he still feels pain on his hands and stomach. He further stated that he was a farmer but he cannot work any longer. In cross-examination the appellant admitted that he did not have other documents to proof that he was still receiving treatment or medication.
13. PW2 was Dr. Maria Mwangi, assistant director medical services in Meru Teaching and Referral Hospital. She produced the Appellant’s P3 form and medical report stating that when the Appellant was seen, his clothes had dried blood stains and he was in a stable condition. That the Appellant has sustained fractures of the right ribs, right tibia and fibula, and left radius and ulna. That the injuries were two weeks old. It was her testimony that she opined that the Appellant had sustained complication of polytrauma and required comprehensive medical review.
14. On cross examination, PW2 stated that while the Appellant was attacked on 12th December, 2017, he made a report to the police two and a half months later as per the OB No 19/1/2/2018. PW2 could however not tell why the Appellant took so long to make a report to the police and could also not tell the status of the healing of the fracture at the time. She told the court that her report was secondary to the treatment notes. She did not assess the degree of disablement.
15. On the part of the defence, Mohamed Mandera, a worker at KWS Isiolo testified as DW1. He adopted his witness statement dated 11th April, 2022 as his evidence in chief. On cross examination, he denied that any of the officers at KWS told the Appellant to go seek treatment and then go back. That had the Appellant reported to the KWS offices, the same could have been minuted in their books. It was his testimony that Kabati area does not have any elephants but that it was possible that an elephant could have wandered to that area. DW1 thus maintained that no such incident as alleged by the Appellant was made to their offices.

The decision of the Trial Court:

16. The trial court correctly observed that Sections 107, 108 and 109 of the [Evidence Act](#) places the burden of proof of a fact on the person who wishes the court to believe the existence of such fact. That it was the duty of the Appellant to prove on a balance of probabilities that he was attacked by an elephant as alleged. The only proof of the alleged attack was the testimony of the plaintiff. No evidence was adduced to substantiate the Appellant’s claim that he made a report at the KWS offices. He stated



that he was with his son one Joel Baariu who was however not called as a witness before the trial court. From the evidence, the Appellant subsequently made a report to the police two and a half months after the alleged incident happened. The learned trial magistrate considered the report made vide OB No 19/1/2/2018 and the Appellant's P3 Form as well as the treatment notes which note that the Appellant was injured by an elephant while in his farm. It was the trial court's finding that on a balance of probabilities, the Appellant had proved that he was attacked by an elephant on the date in question. Consequently, the court found that the Respondent was to blame for the accident as he was the custodian of such animals and therefore owed the Appellant a duty of care. It was thus the finding of the trial court that the Respondent was 100% liable for the attack that occurred on the material day.

17. On quantum of general damages, which is the issue that forms the substratum of this appeal, it was the trial court's finding that although the Appellant produced his P3 form and medical report, the same had no relevance as the particulars of the injuries sustained were not pleaded. That even after obtaining a medical report, the Appellant did not seek leave of the court to amend his pleadings and include the particulars of the injuries.

Analysis and determination:

The claim by the appellant was based on the part of negligence.

I have perused the impugned plaint which was filed by the appellant. At paragraph four (4) he pleads the particulars of the negligence by the defendant and that he sustained extreme loss and damage. He then proceeds to list the particulars of special damages. The appellant does not particularize the injuries which he sustained. It was at the stage of trial that he adduced evidence of the injuries that he sustained. He then produced a medical report, P3 form and treatment notes. Unfortunately these documents are missing from the record of appeal. The appellant contends that since the P3 form and the medical report forms part of the record, it is a basis upon which the appellant avers that he proved the injuries he sustained. The respondent had denied that the plaintiff was injured on the material day as he did not report to the respondent and further that the report was made to the police two months after the incident. It is trite that a denial is a defence and the appellant had to discharge the burden of proof.

18. In their submissions, the Respondent referred this court to the Court of Appeal case of *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR which I have considered. In that case, the Court of Appeal held that:

“We have carefully considered the judgement of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the *Civil Procedure Rules*. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters...”



Pleadings are a bedrock upon which a suit is founded. It is the duty of the party to plead their case. Order 2 rule 10 of the [Civil Procedure Rules](#) on particulars of pleading states that:

“Subject to subrule (2) every pleading shall contain the necessary particulars of any claim, defence of other matter pleaded.....”

When a party pleads a matter, he has the burden to prove it on a balance of probabilities. He bears the legal and evidential burden of proof.

Section 107, 108 and 109 of the [Evidence Act](#) provides as follows:-

107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The record of the learned trial magistrate shows that the medical report, P3 form and treatment notes were produced during the trial and did not elicit any objection by the respondent.

The learned trial magistrate in his Judgment at page 21 of the record stated as follows:-

“Even though the Plaintiff never produced an OB extract as proof of the alleged attack, I do take note of the fact that he made a report vide OB 19/1/02/2018 and the police issued him with a P3 form. From the P3 form and the treatment notes the history presented by the plaintiff was that “He was injured by an elephant while in his form.” I therefore find that the plaintiff has on balance of probabilities proved that he was attacked by an elephant on the date in question.”

When it came to assessing general damages, the learned trial magistrate held that the P3 form and the medical report had no relevance as the particulars of injuries sustained were not pleaded. A look at paragraph 3 of the plaint, the plaintiff had stated that as a result of the brutal attack by an elephant, he sustained serious injuries for which he holds the defendant liable. Upon such pleading, the plaintiff placed on himself a burden to prove that he sustained such injuries for which he was entitled to claim for general damages for pain and suffering and loss of amenities. Having pleaded thus a basis was laid for the plaintiff to prove the injuries sustained. This he did with the production of the P3 form and the medical report which were produced in court without any objection. I find that failure by the plaintiff to plead the particulars of injuries was not fatal to the appellant’s claim for general damages for pain and suffering. This is because, firstly the respondent did not suffer any prejudice. He had not requested for particulars and did not oppose the production of the P3 form, treatment notes and the medical



report. Secondly, there are provisions of law which allow the trial magistrate to exercise discretion in such circumstances.

Article 159 (2) (d) of the Constitution provides as follows:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (d) justice shall be administered without undue regard to procedural technicalities.”

The courts are called upon not to give undue regard to procedural technicalities. On the other hand Section (1A& 1B) of the Civil Procedure Act (Cap 21 Laws of Kenya) provides for what is popularly known as oxygen principles which commands courts seek to do substantive justice. Section 1A & 1B Civil Procedure Act on the objective of the Act provides:-

“ 1A

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B.

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources.
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”

These provisions places a duty on courts a duty on courts to ensure the just fair and proportionate determination of disputes.

19. The Court of Appeal has stated that failure to plead particulars of injuries is not a reason to hold that there is no cause of action. In the case of *Mungai v Texcal House Service Station* while allowing the



appeal where the plaintiff had failed to plead particulars of the injuries stated as follows..... “She erred in saying that when particulars of injuries are not pleaded there is no cause of action shown.” “Further her conclusion that the plaint was incurably defective was erroneous.”

The requirement for giving particulars is under the Civil Procedure Rules.

In *Dominion Farm Limited v African Nature Stream & Another* HCCC 21/2006, the court stated that:-

“Whereas Rules of procedure are not made in vain and are not to be ignored, often times the court will encounter inadvertent transgressions or unintentional or ill advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of discretion of the court comes into play to salvage the situation for the ends of justice.”

It has been stated that rules of procedure cannot be allowed to become mistresses of justice, it is her handmaid of justice. Rules of procedure are not themselves the end but the means to achieve the ends of justice and are not huddles to obstruct the pathway of justice. See *Seaford Court Estates Ltd v Asher* (1994) 2 All ER 155 & 164 Microsoft Corporation v- Mitsumi Compute Garage Ltd & another (2001) KLR 470 courts must strive to do justice and exercise their wide discretion in a manner that will salvage the situation.

In Harit Sheth T/A Harit Sheth Advocate v Shamascharania Civil Application No Nairobi 68/2008 UR. The Court of Appeal held inter alia that; “the principle aims of the provisions of Section 1A & 1B the Civil Procedure Act include the need to act justly in every situation, the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the court by ensuring that the principle of equality arms is maintained and as far as possible to place the parties on equal footing.”

20. In the present case, the initial treatment notes from Nyambene District Hospital are dated 12th December, 2017 at 1200H and indicate that the Appellant complained of a swollen right leg and back pains. The Appellant was sent for x-rays on record is an abdominal ultrasound report dated 12th March, 2018 which indicates that the sonographic features of the Appellant was suggestive of right lumbar region hernia. I also have considered the medical report by Dr. M. M. Mwangi. The Appellant was examined on 15th April, 2019 and the doctor found that he had suffered multiple fractures of the right ribs, right tibia and fibula, and left radius and ulna. From the P3 form, the Appellant was at MOH Meru on 1st February, 2018. In my view, the testimony of PW2 as well as the medical evidence adduced disclosed a cause of action against the Respondent that warrants an award of general damages for pain and suffering and loss of amenities.

I find that the learned trial magistrate erred by holding that the P3 form and medical report were not relevant and failing to award general damages to the appellant for pain and suffering when they were properly pleaded.

On liability the trial magistrate held that the respondent who is a custodian of these animals owed the plaintiff a duty of care. That there was a breach of this duty when the animal strayed into human habit (sic). That the respondent could not therefore run away from liability. He is to blame in the circumstances. I find the defendant 100% liable for the attack that occurred on 12/12/2017. The respondent has not challenged the finding by the trial magistrate on the issue of liability. It behoves this court to assess the quantum of damages for pain and suffering.

21. The plaintiff is entitled to compensation under the Wildlife Conservation and Management Act 2013 which is the specific Act that deals with accidents and fatalities associated with Wildlife Conservation.



The award of damages for pain and suffering is explained in paragraph 883,4th Edition, Vol 12(1) page 348-883 *Halsbury Laws of England* as follows:-

“Pain and suffering – Damages are awarded for the physical and mental distress caused to the plaintiff both pre-trial and in future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alienate it, the awareness of an embarrassment at the disability or disfigurement, or suffering caused by the anxiety and the plaintiff’s condition may deteriorate. In addition to damages for subjective pain and suffering sustained by a plaintiff by reason of his injuries damages are awarded for the objective losses thereby sustained by him this may include loss of ability to walk, loss of a limb or its use, the loss of congenial employment, the loss of pleasure in ones work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not; damages are awarded for deprivation, rather than for awareness of it.”

Section 25 of the (*Wildlife Conservation and Management) Act* 2013 provides for compensation for personal injury or death or damage of property. It provides:-

- “(1) Where any person suffers any bodily injury or is killed by any wildlife listed under the Third Schedule, the person injured, or in the case of a deceased person, the personal representative or successor or assign, may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act. Compensation for personal injury or death or damage to property.
- (2) The County Wildlife Conservation and Compensation Committee established under section 18 shall verify a claim made under subsection (1) and upon verification, submit the claim to the Cabinet Secretary together with its recommendations thereon.
- (3) The Cabinet Secretary shall consider the recommendations made under subsection (2) and where appropriate, pay compensation to the claimant as follows— (a) in the case of death, five million shillings;
(b) in the case of injury occasioning permanent disability, three million shillings;
(c) in the case of any other injury, a maximum of two million shillings, depending on the extent of injury.
- (4) Any person who suffers loss or damage to crops, livestock or other property from wildlife specified in the Seventh Schedule hereof and subject to the rules made by the Cabinet Secretary, may submit a claim to the County Wildlife Conservation and Compensation Committee who shall verify the claim and make recommendations as appropriate and submit it to the Service for due consideration.
- (5) The County Wildlife Conservation and Compensation Committee shall review the claim and award and pay a compensation valued at the ruling market rates: Provided that no compensation shall be paid where the owner of the livestock, crops or other property failed to take reasonable measures to protect such crops, livestock or property from damage by wildlife or his land use



practices are in compatible with the ecosystem-based management plan for the area.

- (6) A person who is dissatisfied with the award of compensation by either the County Wildlife Conservation and Compensation Committee or the Service may within thirty days after being notified of the decision and award, file an appeal to the National Environment Tribunal and on a second appeal to the Environment and Land Court. (7) The Cabinet Secretary may, by notice in the Gazette, prescribe such regulations and guidelines as are necessary and appropriate to carry out the purposes of this section.”

The *Wildlife Conservation and Management Act*. The Act is the law that deals with fatalities and damages associated with Wildlife Conservation and provides a guide in determining awards for damages or death or injuries caused by Wildlife, Under Section 25 of the Act (supra) Ksh 3,000,000/- is provided for injuries occasioning permanent disability and Ksh 2,000,000/- depending on the extent of the injury. Courts have jurisdiction to award damages as Section 25 (1) of the *Act* does not specifically oust the jurisdiction of the court to entertain claims for compensation arising from injuries and fatalities caused by wild animals. The appellant testified that he reported to the respondent who did not take any action. On the other hand the respondent stated that they investigated the claim when they were served with demand notice. They did not take any action. They did not produce the OB. There is nothing to prevent this court from awarding the appellant damages for pain and suffering. The P3 form states that the degree of injury is grievous harm. The medical report did not give the degree of disablement.

The appellant sustained the following trauma (injuries)

Fracture to three (3) ribs on the right side of his anterior chest. Fractures to the right tibia and Fibula. Fractures to the left radius and ulna.

At the time of examination, the patient had evidence of complications of serious polytrauma and required further comprehensive medical evaluation to ascertain the degree of disablement. Grievous Harm is defined under the P3 form as, “any harm which amounts to maim or endangers life or seriously or permanently injure health or which is likely so to injure health or which extends to permanent disfigurement or to any permanent or serious injury to the external or internal organ.”

Having considered the injuries sustained by the appellant I find that he was maimed. He suffered serious injuries occasioning permanent disability. For such injuries, a claimant is entitled to Ksh 3,000,000/- as compensation. This I find is what the plaintiff is entitled to.

Conclusion:

For the reasons stated herein, I find that the learned trial magistrate erred by failing to award the appellant general damages for pain and suffering. I therefore order as follows:-

1. The appeal has merits and is allowed.
2. The order by the learned trial magistrate awarding the appellant nil for pain and suffering is set aside.
3. It is substituted with an award of Ksh 3,000,000/- general damages for pain and suffering.
4. I award the appellant the costs of the appeal and the costs in the lower court.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF OCTOBER 2023.



L.W. GITARI
JUDGE

