Oraro v Kenya Wildlife Services (Civil Appeal E088 of 2022)
[2023] KEHC 26625 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E088 OF 2022

KW KIARIE, J

DECEMBER 20, 2023

BETWEEN

DAVID NYAMBAGA ORARO ..... APPELLANT

AND

KENYA WILDLIFE SERVICES ..... RESPONDENT

(Being an Appeal from the judgment and decree in Mbita Senior Resident Magistrate's SRMCC No. E020 of 2021 by Hon. Nicodemus N. Moseti–Senior Resident Magistrate)

JUDGMENT

1. The appellant was the plaintiff in SRMCC No. E020 of 2021 at Mbita Senior Resident Magistrate's Court. The respondent had been sued for special and general damages following injuries the appellant sustained after he was attacked by a hippopotamus while fishing in Lake Victoria. The learned trial magistrate delivered a judgment dated the 12th day of October 2022. He struck out the suit for want of jurisdiction.

2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of M/s Apondi & Company Advocates. He raised the following grounds of appeal:

    a. That learned trial magistrate erred in law and fact in striking out the appellant's suit with costs to the respondent.

    b. The learned trial magistrate erred in law and fact in finding that in holding that he does not have jurisdiction to grant general damages in the lower court suit.

    c. The learned trial magistrate erred in law and fact by not considering the pleadings and particularly the written submissions of the appellant before writing his judgment.

d. The learned trial magistrate erred in law and fact by not awarding general damages even if not the one stipulated by the Kenya *Wildlife Conservation and Management Act*.

e. The learned trial magistrate erred in law and fact in not stipulating the amount he would have awarded if he had jurisdiction.

f. The learned trial magistrate erred in law and fact in not considering the pleadings of the appellant.

g. The learned trial magistrate erred in law and fact in holding that section 25(3) of the *Wildlife Conservation and Management Act* excluded the jurisdiction of the court.

3. The respondent was represented by the firm of Benta N. Musima Advocates. The respondent opposed the appeal and stated that the trial court lacked the requisite jurisdiction to hear the matter.

4. As the first appellate court, I understand my responsibility to carefully review all of the evidence presented on record without having the advantage of witnessing the witness's testimony or demeanor. Following *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, I will consider and assess the evidence presented before the trial court and draw my conclusions on the matter.

5. The genesis of this case was that as the appellant was fishing in Lake Victoria, their boat rocked and he fell into the water. A hippopotamus attacked him and fractured his right leg. He filed a suit against the respondent for general damages. In his prayer, he stated as follows:

The plaintiff prays for judgment against the defendant for: -

a. As per Kenya Wildlife Compensation Act, 2013 [sic].

b. Special damages.

c. Costs of and incidental to this suit.

d. Interest arising thereof.

6. There is no Act of parliament known as the Kenya Wildlife Compensation Act, 2013. The Act of Parliament that provides for the protection, conservation, sustainable use, and management of wildlife in Kenya and for connected purposes is known as the *Wildlife Conservation and Management Act*. The appellant therefore cited a non-existent statute. Probably he meant the *Wildlife Conservation and Management Act*.

7. Section 25 of the *Wildlife Conservation and Management Act* provides guidelines for Compensation for personal injury, death, or damage to property. Subsection 3 (c) states:

> The Cabinet Secretary shall consider the recommendations made under subsection (2) and where appropriate, pay compensation to the claimant as follows—
>
> c) in the case of any other injury, a maximum of two million shillings, depending on the extent of injury.

8. Parties are bound by their pleadings. The Court of Appeal in *David Sironga Ole Tukai vs. Francis arap Muge & Others*, Ca No. 76 Of 2014, expressed itself as follows:

> It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and

subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

It has been argued that when the appellant pleaded general damages under the *Wildlife Conservation and Management Act*, he was bound by the provisions of the said Act.

9. Section 25 of the *Wildlife Conservation and Management Act* does not oust the jurisdiction of the court to hear and determine issues arising from the Act. This was stated by the Court of Appeal in the case of *Kenya Wildlife Service vs. Joseph Musyoki Kalonzo* [2017] eKLR. This is what the Court said:

> In our view, even from a literal interpretation, this provision does not oust the jurisdiction of the High Court to hear any matters raised under that Act. If the Act meant to remove those matters from the realm of the High Court or the other courts, then it would have expressly stated so. It gives an aggrieved party an option to go to the committee as a first option. This in our view was meant to ease matters for the poor people whose crops and domestic animals are ravaged by wild animals occasionally, and which people may be far removed from the structured judicial systems. We do note that most of the areas that are prone to wildlife/human conflict are in areas that are outside urban areas where courts are situated. The Act in our view meant to make it easier for such people to access justice that is more easily accessible in terms of not traveling long distances and also in terms of simplicity in lodging their claims. It could not have been meant to shut out everybody else who would prefer to pursue their claims before the conventional courts. That would explain the use of the word 'MAY' and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court.

10. Going by the interpretation by the Court of Appeal, I am persuaded that in *Kenya Wildlife Service vs. Abraham M'ngai M'itumitu* [2021] eKLR was per incuriam. The Court delivered itself as follows:

> (13) Consequently, this court must return a verdict of want of jurisdiction of the Magistrate's Court to award compensation under section 25 of the *Wildlife Conservation and Management Act* 2013, and therefore allow the appeal as prayed by the appellant.

11. The respondent sustained the following injuries:

    a) Fracture of the right tibiofibular fracture; and

    b) Amputation at the right knee.

12. For these injuries, he opined that Kshs.3, 500,000/= would be adequate compensation. He relied on the decision in the case of *Abdi Werdi Abdulahi vs. James Royo Mungatia & another* [2019] eKLR. In this case, the plaintiff was awarded Kshs.3,500,000/= for the following injuries:

a) Multiple fractures on the right lower and upper limb;

b) Amputation of the right lower limb;

c) Multiple fractures and bruises on the upper right limb leading to affixation of two metal plates;

d) Injury to the right eye leading to impaired vision;

e) Compressed burst L4 vertebra with retro-pulsed fracture fragments;

f) Deep bruising on the chest due to dragging on the tarmac; and

g) Head trauma injuries leading to concussion.

13. The appellant had proposed Kshs. 800,000/= as adequate compensation and relied on the decisions in the following cases:

a. *Daniel Kinyua Thaari vs. Kenya Wildlife Service & another* [2000] eKLR where Kshs.250,000/= was awarded as general damages for an amputated leg above the knee.

b. *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & another* [2017] eKLR the appellant was awarded Kshs. 800,000/= for injuries on both legs, on the head, and hand. The right leg was amputated.

14. After factoring in the injuries sustained by the appellant herein, the decided cases relied on by both parties and the inflation, I consider Kshs.1,500,000/= as adequate compensation. Parties entered a consent on liability on January 27th, 2022 at 80:20% in favour of the appellant.

15. I therefore set aside the decision of the trial Court and substitute with orders in terms spelled in herein above. Costs in the lower court and this court shall be borne by the respondent.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER 2023

KIARIE WAWERU KIARIE

JUDGE