Kenya Wildlife Services v Kioko (Suing as the legal representatives of the estate of Brian Musyoki Mwanzia (Deceased)) (Civil Appeal E035 of 2021) [2022] KEHC 13088 (KLR) (21 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13088 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E035 OF 2021

LM NJUGUNA, J

SEPTEMBER 21, 2022

BETWEEN

KENYA WILDLIFE SERVICES ..... APPELLANT

AND

MWOMBUA JOHN KIOKO ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF BRIAN MUSYOKI MWANZIA (DECEASED)

(Being an appeal against the judgement of T.K. Kwambai SRM, in Embu CMCC No. 33 of 2016 dated and delivered on 01.09.2021)

JUDGMENT

1. The appellant herein being dissatisfied with the judgment of the trial court preferred the appeal herein on the following grounds that :

    i. The learned trial magistrate erred in law and fact by awarding damages under section 25 (3) of the *Wildlife Conservation and Management Act* which is a statutory remedy whereas the claim before the court was brought under common law.

    ii. The learned trial magistrate erred in law and fact by failing to find that he did not have jurisdiction to award damages under section 25 of the *Wildlife Conservation and Management Act* which is a preserve of the wildlife compensation committees established under the Act and the Environment and Land Court.

    iii. The award of general damages in the sum of Kshs 5,000,000.00 is inordinately excessive considering that the deceased was a minor aged seven years.

iv. The judgment of the learned trial magistrate is against the law and weight of the evidence on record.

2. Reasons wherefore the appellant prayed that the judgment of the learned trial magistrate based on section 25 of *Wildlife Conservation and Management Act* (WCMA) be set aside and the honourable court be pleased to assess a reasonable amount of damages payable to the respondent under the common law and that it be awarded the costs of the appeal.

3. The appeal herein arose from the determination made by the trial court wherein the deceased was fatally injured while fetching water from Kamburu dam as a result of alleged negligence occasioned by the appellant. The appellant denied the allegations at the first instance but later on, the parties entered a consent on liability in the ratio of 80% to 20% in favour of the respondent.

4. Directions were issued that the appeal be canvased by way of written submissions and wherein all parties complied.

5. The appellant submitted that the parties herein having entered a consent on liability in favour of the respondent in the ratio of 80:20 %, the only issue that remained for determination was the quantum of damages. That PW1 as the substituted plaintiff, relied on her statement as her evidence in chief whereby she averred that the deceased was her grandson and stated that he was attacked by a crocodile at Kamburu dam on September 16, 2014. It was submitted that this claim was founded on common law and it was entirely brought under the doctrine of negligence and that remedies were sought under the *Law Reform* and the *Fatal Accidents Acts*. That the fact that the plaint made reference to section 25 of the *Wildlife Conservation & Management Act* was inconsequential.

6. The appellant further submitted that if the respondent had first employed the said mechanisms and was not compensated, then he would have been justified to take the matter to court in order to have the said section enforced. It was his case that the proper route for enforcing the said provision of the Act would have been to seek from the Hon court orders for mandamus to issue upon the entity that is responsible for paying compensation. It argued that the entity established for the purposes of compensation under section 18 is the respective county's compensation committee established under the *Wildlife Conservation and Management Act*. Reliance was placed on the case of *Charles Apudo Obare v Clerk, County Assembly of Siaya & another* [2020] eKLR.

7. The appellant also submitted that the award on quantum of damages was erroneous. That since the Hon court opted to entertain this matter, it should have limited itself to the bounds of law envisaged by its vast inherent jurisdiction. That the claim of negligence under common law did not justify the award under section 25 (3) of the Act. That the only possible claim that can be entertained in a court of law is a suit or claim seeking orders of mandamus to issue towards the cabinet secretary or the county conservation and compensation committees. That the Hon court has no business assessing claims, verifying claims or deciding amounts payable where the same statute has clearly designated an authority to perform the said functions.

8. On whether the assessment of damages at Kshs 5 million was excessive, the appellant submitted on various heads under both the *Law Reform* and *Fatal Accidents Acts* being, loss of expectation of life, pain and suffering and loss of dependency at Kshs 150,000/=; Kshs 50,000/= and Kshs 900,000/= respectively. It urged the court to allow the appeal.

9. The respondent on the other hand submitted that the issue of jurisdiction had been dealt with and the appellant did not prefer an appeal against this court's decision (in Embu High Court Appeal No 69 of 2016); thus the issue of jurisdiction had been settled. That the High Court dismissed the preliminary objection and the same was remitted back to the trial court for determination and disposal. It placed

reliance on the Court of Appeal decision in *KWS v Joseph Munyoki Kilonzo* Nairobi CA No 306 of 2015 where the court stated that indeed section 25 did not take away the jurisdiction of the court to hear and determining wildlife compensation matters. The respondent further relied on the case of *Jediel Murithi Njeru v KWS* [2020] eKLR to support its contention. In the end, this court was urged to dismiss the appeal herein.

10. I have certainly perused and understood the contents of the grounds of appeal, submissions and the decisions referred to by the parties. It is my considered view that the main issue for determination is whether the appeal herein has merits.

11. The appellant has raised the issue of jurisdiction in that, the trial court lacked the jurisdiction to entertain the matter herein. That it arrogated itself jurisdiction which it does not have. [See *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (supra]; and for that reason, I will deal with the issue first. The respondent in response to the issue of jurisdiction raised by the appellant, submitted that the same was previously dealt with by this court although differently constituted, bringing into sharp focus, the doctrine of res judicata.

12. The principle of *res judicata* is found in section 7 of the *Civil Procedure Act* which provides that: -

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

13. For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied that is; the suit or issue was directly and substantially in issue in the former suit; that former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. [See *Accredo AG & 3 others v Steffano Uccelli & another* [2019] eKLR].

14. The respondent submitted that this court rendered itself by holding that indeed the trial court was clothed with jurisdiction and thereby remitted the file back to the trial court for determination. Treading from this premise, this court has independently perused the record herein and indeed I find that the same is true as this court had on July 23, 2019 rendered itself on the issue of jurisdiction. However, I find that the main contention by the appellant is based on the fact that the trial court had no jurisdiction to award damages under section 25 of the *Wildlife Conservation & Management Act* arguing that the same is a preserve of the county compensation committee established under the Act and in its view, the court ought to have awarded damages under the *Fatal Accidents* and the *Law Reform Acts*.

15. The appellant has impugned the trial court's decision for its findings on quantum. The appellant argues that essentially, once a party elects to claim under the common law, it cannot change its claim into one under the WCMA and rely on the compensation awardable under the Act rather than on common law principles.

16. The court has perused the respondent's claim as set out in his plaint dated February 18, 2016. The same is anchored on the tort of negligence, the particulars whereof have been particularized in paragraph 3 thereof. The respondent sought for damages under the *Law Reform* and *Fatal Accidents Act*, cap 32 Laws of Kenya. He went ahead and set out the particulars under both statutes. However, in

paragraph 10 of the plaint, he sought for compensation as provided for by the *Wildlife Conservation & Management Act, 2013*.

17. In its submissions, the appellant has argued that the figures outlined under section 25(3) of the *Wildlife Conservation & Management Act, 2013* are only meant where an aggrieved party chooses to pursue his claim under the Act. The appellant therefore invited the court to make an award under the common law which is under the *Law Reform Act* and *Fatal Accidents Act*.

18. The court notes that, unfortunately, the respondent in his submissions did not address this issue but instead dwelt at length on the issue of jurisdiction which issue had been dealt with conclusively, by the High Court which remitted back the file to the trial court for hearing upon finding that the trial court had jurisdiction to entertain the matter.

19. As I have already noted earlier in this judgment, the issue of contention is that the trial court had no jurisdiction to award damages under section 25 of the Act.

20. Section 25 (3) provides as follows:

> (3) The cabinet secretary shall consider the recommendations made under sub section (2) and where appropriate, pay compensation to the claimant as follows:
>
> a) In the case of death, five million shillings;
>
> b) .....

21. My reading and understanding of the above sub section is that under sub section (2), the county wildlife conservation and compensation committee shall upon verification, submit the same to the cabinet secretary together with its recommendations.

22. The cabinet secretary shall then consider the recommendations made under sub section (2) and where appropriate, pay compensation to the claimant as provided for under sub sections 3 (a) (b) and (c) but in this case, sub section 3 (a) is what is relevant.

23. Looking at section 25 (2) and sub section 3 (a) in regards to compensation, my considered view is that though an amount of Kshs 5 million is provided for as compensation in the case of death, there is a procedure to be followed before the cabinet secretary can pay compensation;

> 1). Once the person injured or the personal representative (as in this case), launches a claim to the county wildlife conservation and compensation committee, it is supposed to verify the claim and upon verification, submit the same to the cabinet secretary together with its recommendation. The cabinet secretary shall consider the recommendations and where appropriate pay compensation to the claimant as stipulated in sub clause (3) (a) (b) and (c).

24. What clearly emerges from section 25 (2) and (3) is that the compensation to the person injured or the estate of a deceased person is not automatic. The same has to be verified and the claimant shall be paid in cases which the cabinet secretary find appropriate.

25. It is, however, not clear the considerations or the parameters the cabinet secretary uses to determine the appropriate cases where compensation should be paid as the Act is silent on the same.

26. And therefore, going by the above arguments and in my considered view, it cannot be argued that the compensation of Kshs 5 million in cases of death is automatic.

27. Further, the choice of words in both subsections (2) and (3) of the Act is the word ''shall'' which is mandatory in nature and is addressed to either the county conservation and compensation committee

and the cabinet secretary. Therefore, for the trial court to have applied the section as a guideline for assessing and awarding compensation is erroneous. The respondent chose to approach the court basing his claim on negligence under the law of tort and his pleadings attest to that. A consent on liability was recorded by the parties. It is indeed trite that each party to a suit is bound by its own pleadings and courts have repeatedly affirmed that fact. [See the case of Stephene Mutinda approval by the Supreme Court of Nigeria in *Adetour Oladej Ltd v Nigeria Breweries* Plc 91 of 2002 in which the court stated:

''It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issues and must be disregarded..... in fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.''

28. For the above reasons, I find that the court ought to have awarded damages under common law as pleaded by the respondent, which I hereby proceed to consider.

29. On quantum of damages, the applicable principles in making an award for loss of dependency under the *Fatal Accident Act* were well stated in the case of *Ezekiel Barng'entuny v Beatrice Thairu* HCC No 1638 of 1988 where Justice Ringera (as he then was) held thus; -

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents' and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature."

30. It is trite that evidence as to earnings must be proved with evidence. Where there is no such evidence, the court ought to apply the minimum wages applicable at the time of death as long as it can be proved that the deceased was earning some income.

31. In the case herein, the deceased was aged 7 years and as such, I am guided by the case of *Sheikh Mushtaq v Nathan Mwangi Kamau Transporters & others,* (1985-1988) 1KAR 217 where Nyarangi J held that:

> In general, in Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various african and asian communities in Kenya. This particular custom is broadly accepted, respected and practised throughout Kenya both by africans and asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the asian community, the customs is supported by the hindu religion whose influence on the life of the hindu community is well-nigh total. That is common knowledge. With regard to africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the *Judicature Act*, cap 8 and therefore

to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The customs is well within the tenets of the great religions of hinduism, christianity and islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is 'outrageous and pernicious' is not well founded and must be rejected.

32. The Court of Appeal cited several of the past decisions where it made awards on loss of dependency using global sums i.e *Kenya Breweries Ltd v Saro* [1991] eKLR where the Court of Appeal awarded Kshs 100,000/= for loss of dependency to a parent of a child and stated that:

> " damages are clearly payable to a parent of a deceased child irrespective of the age of a child and irrespective of whether there is no evidence of pecuniary contribution."

33. In *Kwamboka Grace v Mary Mose* [2017] eKLR the court awarded a global sum of Kshs 300,000/= for loss of dependency under the *Fatal Accidents Act* in respect of the death of a child aged 4 years.

34. In *Daniel Mwangi Kememi & 2 others v JGM & another* [2016] eKLR the court (Gikonyo J awarded Kshs 1, 000,000/= for loss of dependency where the deceased child was aged nine (9) years, a bright student who was always in position one to three in their class and expressed her desire to be a doctor upon completion of her education but all her dreams were shattered by the untimely death.

35. In a more recent case, *Savannah Hardware v EOO (suing as representative of SO (deceased)* [2019] eKLR, the court held the view that Kshs 700,000/= was adequate. In the case herein, the appellant had suggested an amount of Kshs 900,000/= which, in my view, given the inflation rate and the number of years this case has been before the courts for determination, is not reasonable. I hereby award Kshs 1,500,000/=.

36. Looking at awards made under loss of expectation of life, the court in the case of *Rose v Ford* [1937] AC 826, held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate and in *Benham v Gambling* [1941] AC 157 it was held that-

> " In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects."

37. The deceased herein was 7 years of age at the time of death. The conventional award for loss of expectation of life ranges from Kshs 100,000/= to 200,000/= as per comparable authorities. I am guided by the decision of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Robert Mwangi)* (2019) eKLR where the court observed that:-

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/= .....

[Also See *Joseph Gatone Karanja v Michael Ouma Okutoyi & 2 others* [2022] eKLR].

38. In regards to pain and suffering, it is not clear whether the deceased died immediately after the accident or how long he took before he died. As correctly noted by the appellant, there was no death certificate produced by the respondent. The deceased allegedly met his death after having been attacked by a crocodile and as submitted by the appellant and in the given scenario of attack, it is evident that the deceased died immediately after the accident happened. In the case of *Hyder Nthenya Musili & another v China Wu Yi Limited & another* [2017] eKLR, the court stated as follows;

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award ..... for pain and suffering, the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

39. In view of the above decisions and bearing in mind that this court is exercising its discretion, I find that the award of Kshs 30,000/= for pain and suffering is sufficient having in mind the high inflation rate currently witnessed in our country as opposed to the appellant's proposed amount of Kshs 10,000/=.

40. In regard to special damages, the law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved before they can be awarded by the court. Suffice it to quote from the decision of the Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716, at p. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag J.A - held:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

41. In the current case, the same has not been controverted and therefore, I will proceed and award the amount pleaded by the respondents. I therefore award damages as follows;

Pain and suffering.....Kshs 30,000/=

Loss of life expectation.....Kshs 100,000/=

Loss of dependency.....Kshs 1,500,000/=

Special damages.....Kshs 40,000/=

Total.....Kshs 1,670,000/=

Less 20% contributory negligence...Kshs 1,336,000/=

42. In the above premises, I set aside the decision of the trial court on quantum and enter judgment as above.

43. Each party to bear its own costs.

44. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent