



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 18 OF 2016

KENYA WILDLIFE SERVICE (KWS).....APPELLANT

VERSUS

PAULINE AWINO OMONDI.....RESPONDENT

Appeal from the judgment and decree by Mr. E.N.Wasike in the Principal Magistrate's Court

at Bondo in Civil Suit No. 12 of 2014 delivered on 24th November, 2016.

JUDGMENT

1. This Appeal is premised on the judgment and decree by Mr. E.N.Wasike in the Principal Magistrate's Court at Bondo in Civil Suit No. 12 of 2014 delivered on 24th November, 2016.

2. The genesis of the case is that by a plaint filed by **PAULINE AWINO OMONDI** (*hereinafter referred to as **the Respondent***) as against **KENYA WILDLIFE SERVICE** (*hereinafter referred to as **the Appellant***) on the 25/3/2014, the Respondent, then the Plaintiff, had prayed for the following orders:-

- a) General damages under the Law Reform Act and Fatal Accident Act, Laws of Kenya.***
- b) Costs of the suit.***
- c) Interest on a) and b) above.***

3. The relevant antecedent facts in this Appeal are discernible from the record. The Plaintiff in Civil Suit No. 12 of 2014 in the lower court and the Respondent in this appeal is **PAULINE AWINO OMONDI** while the Defendant in the lower court case and the Appellant in this Appeal is **KENYA WILDLIFE SERVICE**.

4. The Appellant (**KENYA WILDLIFE SERVICE**) being aggrieved and dissatisfied with the judgment and decree of the Principal Magistrate's Court at Bondo in Civil Suit No. 120 of 2014 delivered on 24th November, 2016 through its advocates filed Civil Appeal Nos. 18 of 2016 on the following grounds:-

- 1. The learned magistrate misdirected himself in law in failing to consider and make a finding on the issue of negligence.***
- 2. The learned magistrate erred in law and in fact in reaching his decision on liability and quantum of damages without analyzing the entire evidence on record.***
- 3. The learned magistrate erred in law and in fact in holding that the appellant contributed to the occurrence of this incident when the available evidence clearly absolved it from blame.***
- 4. The learned magistrate erred in his analysis of the evidence in holding that the respondent was entitled to an award for loss of dependency that was unfounded and not proved.***
- 5. The learned magistrate erred in making an award for damages when there was no evidence led to show that the respondent suffered any injury as a result of the attack by wild animal***
- 6. The learned magistrate proceeded on demonstrably wrong principles in reaching his decision.***

5. In the said proceedings, the learned magistrate entered judgment on liability in the ratio of 60:40 in favour of the Plaintiff and awarded general damages for pain and suffering at Ksh.20, 000/-, special damages were not awarded for reasons that the Plaintiff did not plead them as required by law, loss of dependency at Ksh.3, 680,000/- and loss of expectation of life at Kshs. 200, 000/- making a total of Kshs. 3900, 000/- then subtracted contributory negligence of 40% making the final award at Kshs. 1,340,000/=.

Case Summary

6. The crux of the dispute herein is that the Plaintiff suing as the Legal Representative of the Estate of Stephen Omondi Juma through her advocate in the lower court cases filed Civil *Suit No. 12 of 2014* on 25/03/2014 against the Defendant therein seeking compensation in the form of general damages, loss of expectation of life, pain and suffering, funeral expenses, costs of the suit and interest. She claimed that on the 14/ 9/2013 her husband Stephen Omondi Juma was attacked by a stray animal at around 4.00 a.m. on 15/9/2013 while he had gone fishing at Utonga Beach when he met his death.

7. The plaintiff enumerated particulars of negligence attributed to the Defendant Kenya Wildlife Services (the Defendant now Appellant) as follows:

a) Failing to fence and/ or do proper fencing for the wild animals.

b) Failing to tame the wild animals especially the crocodile.

c) Exposing the plaintiff to a risk they knew or ought to have known.

d) Failing to keep proper watch out for the wild animals.

e) Allowing the accident to occur.

f) Failing to prevent the accident from occurring.

g) Using poor equipment for fencing.

h) Failing to have enough manpower and/ or qualified personnel to keep guard of the wild animals especially the crocodile.

i) Generally failing to abide by the Kenya Wildlife Service code and/ or rules

8. This being the first Appellate Court there is need to give a fresh look at the evidence adduced in the lower court bearing in mind that this court has no benefit of having seen or heard the witnesses.

9. PW 1 Pauline Awino Omondi in her Witness Statement filed in court on the 25/3/2014 alongside the Plaintiff and adopted as her evidence in chief as required under Order 11 of the Civil Procedure Rules testified that she was a co administrator with one Francis Onyango, of the estate of Stephen Juma Omondi who is now deceased. That on 15/9/2013, she received a call from one Odhiambo telling her that her husband Stephen Juma Omondi had been attacked by a crocodile and that it had disappeared with him inside the waters adding that her husband had left on 14/9/2013 to go fishing at Utonga Beach.

10. The witness further testified that she immediately went to the scene after the call and the deceased's body was found at around 5.00 p.m on 15/9/2013, adding that his body was then taken to Bondo Police Station and later to Bondo District Hospital Mortuary.

11. She stated that at the time of the accident, the deceased was aged 27 years old, was healthy, used to do fishing and operated his own boat from which he could earn at least Kshs. 50,000/= per month.

12. She further enumerated the list of dependants that the deceased had left behind that is a wife, mother aged 58 years, father aged 87 years, 2 sons aged 6 years and 1 year respectively and a daughter aged 4 years. She also in her statement attributed the incident to the negligence of the defendant, some particulars of which she reiterated as pleaded adding that the defendant failed to protect the lives of those who live where the animals are, especially that of the deceased, failing to ensure that the wildlife are in their rightful place and employing unskilled personnel to take care of the wild animals.

13. She produced the following documents as exhibits: Death Certificate, grant of letters of administration, copies of Clinical Cards for the three children they had marked, a letter from Majengo Primary School dated 20/11/2013 to show that the children were going to school, and a letter from the Area Chief of Nyimbo Location dated 20/9/2013 showing she was the deceased's wife.

14. It was her further evidence that the deceased was a fisherman and used other people's boats adding that he used to earn Kshs. 2,000/- daily and that there was a record to that effect.

15. She stated that the deceased used to pay for her tailoring classes and maintained her and the family and paid their children's fees at school. According to PW1, her husband died on the same day of the accident. Further, that the deceased was a healthy person.

16. She added that she worked as a casual labourer to sustain her family and pay fees, had not remarried and that she was 21 years old and sought compensation for the loss and for her kids' education.

17. In Cross-examination, she stated that she had left her identity card at home, that the incident happened at 4.00 a.m, that she received information from one of her late husband's fellow fishermen and added that the fisherman came to her place at 4.00 a.m. she maintained that she was the deceased's wife and that the two were living together. She reiterated that the defendant was responsible for the death of her husband as it provided unskilled personnel. She further stated that the proceeds the deceased would bring home daily were over Kshs. 1, 000/-.

18. It was the plaintiff's testimony that the deceased had broken ribs, he had bites on the buttocks and the intestines were protruding outside, adding that she lived in a deplorable condition following her husband's demise.

19. On being Re-examined, she firmly stated that it was the KWS who were supposed to take care of marine life and that is the reason she sued them.

20. PW2, **Francis Onyango Juma** states that he was a mason though earlier on he was a fisherman. It was his evidence that the deceased was his brother and died on 15/9/2013 and that he was killed by a crocodile at Utonga Beach.

21. It was his testimony that he witnessed the accident,; that they were on different boats with the deceased while on fishing sites and as they started to cast their nets, he saw something coming out of the water and attack the deceased and confirmed that it was a crocodile and that as he tried to save the deceased, the boat the deceased was on capsized as the crocodile took him down the water. That he waited for the deceased to come afloat but to no avail and that it was then that he decided to go to the beach and make a report to the Police Station and the body was retrieved the following day at around 5.00p.m and taken to Bondo District Mortuary.

22. Pw2 also attributed the accident to the negligence of Kenya Wildlife Service stating that the defendant ought to ensure that the crocodiles are enclosed at one place, which was not done adding that a sign should be displayed warning members of the public about the presence of crocodiles, stating further that KWS had never held public sensitization meetings at Utonga Beach. He also reiterated that the deceased was 27 years old.

23. In Cross- examination, PW2 stated that he only had a photocopy of his identity card, and stated that the incident occurred at 5.00.a.m. That the deceased was ahead of him and that he only followed him after about an hour although the deceased was about 50 metres from him when the incident occurred. He stated there was moonlight; the weather was calm and that there were no other fishermen at the time.

24. PW2 further averred that he saw the crocodile attack the deceased and that he had never attended KWS Barazas or even heard about them in the area, adding that KWS offices were in Siaya and that he never made any complaint at KWS.

25. In Re-examination PW2 reiterated that he knew how a crocodile looked like and that he saw the crocodile attack the deceased.

26. At the close of the plaintiff's case, the Defendant called DW1, **Amos Nyaoro, who testified on oath that he worked** for Kenya Wildlife Services as a Senior Sergeant in charge of Human Wildlife Conflict covering the Western Circuit. He stated that they did not receive any report in their offices and that the suit was unfounded as it was not possible to fence a lake and hence the plaintiff's suit ought to be dismissed.

27. He stated further that they frequently sensitized the public on the dangers of wildlife through schools, Chief's barazas and beaches and in the media.

28. It was his testimony that it was not common for crocodiles to attack people in the deep waters and stated that the boat must have capsized but the plaintiffs blamed he maintained that the crocodiles attack on the shoreline of the lake not in the deep waters.

29. DW1 further stated that when a crocodile attacks a person it drowns him/ her on the water until he/ she suffocates and then completely feed on its prey. Further, that there is a conflict as to the date of the death of the deceased and that when someone dies on water, he/ she doesn't come up easily, that it takes some time and in this case the deceased came out almost immediately.

30. He stated in defence that they do put up signs but that the people usually vandalize them and said that they are only tasked to conserve wildlife on behalf of the people and government and that if people do not report then as KWS they are not liable. He further stated that crocodiles do not attack at dawn hours.

31. In Cross-examination, DW1 answered that he did not witness the incident and that people are allowed to fish in the lake, stating that it is not easy for the crocodiles to capsize a boat and maintained that a crocodile attack happens in the lake shores.

32. In Re-examination, the witness stated that they usually receive reports when there is an attack.

Submissions in the Subordinate Court

33. The Plaintiff's counsel in submission, reiterated what the pleadings were all about and evidence adduced and maintained that the defendant-Kenya Wildlife Service- was to blame for the accident and that PW2 confirmed that the Kenya Wildlife Service did not take any precautions to prevent such incidents from occurring by not giving any warning to the fishermen using the said lake/ beach waters. That the Kenya Wildlife Service did not provide designated areas for use by these wild animals and were instead left to roam anywhere in the lake waters and in this regard submitted that this was exposing the deceased to a risk that the defendant- Kenya Wildlife Service- knew or ought to have known.

34. It was further submitted that the Kenya Wildlife Service is bestowed with the duty to take care of all wild animals of the country as is

stipulated in the Kenya Wildlife Service's Act Cap 376 of Laws of Kenya.

35. It was submitted that DW1 in his evidence admitted that the incident was reported to the defendant and that the defendant did give the estate of the deceased Kshs. 200, 000/- as is contained in the Act, as money compensation to the deceased's estate after filing in compensation forms which act, it was submitted to be an admission of liability.

36. The plaintiff's counsel further submitted that no evidence was tendered in rebuttal to the circumstances of the accident and as such the evidence of PW1 and PW2 remain uncontroverted.

37. In their counter submissions, the defendant's counsel framed the following issues:

1. *Whether the matter was rightly before the honourable court.*
2. *Whether the deceased was attacked/ bitten by a crocodile on 15/9/2013;*
3. *Whether the deceased was lawfully on the bank of the Lake Victoria on the mentioned date of 15/9/2013;*
4. *Whether the plaintiff was negligent in his conduct that gave rise to the claim therein;*
5. *Whether the plaintiff died as a result of the alleged attack by a crocodile;*
6. *Whether the plaintiff suffered any loss or damage and to what extent;*
7. *Whether the plaintiff is entitled to compensation and if so how much;*
8. *Who is to pay costs plus interests of the suit?*

38. In submission on the evidence, it was contended by the defendant's counsel that there was no evidence adduced by Pauline Awino Omondi to prove that indeed the deceased was solely taking care of the responsibilities stated in her evidence and further that no evidence was tendered to show that the deceased died on the same day; as a result of the injuries sustained through a crocodile bite, as neither was a doctor called to attest to the averments. The defendant's biggest contention during submission was that both PW1 and PW2 stated that they did not report the incident to any Kenya Wildlife Service Officers, site or personnel after the incident and that it was the testimony of DW1 that they did not receive any complaint of the incident and that if a crocodile is to attack, it will drag the person into the water from the shore and there was no way a crocodile can attack someone in the middle of the lake and not even at 5.00 a.m. since they are ecto therms meaning they get heat from their surroundings making it hard to attack a person at 5.00 a.m.

39. It was submitted that at the time of the incident, the law applicable was the (Wildlife Conservation and Management Act) Cap 376 Laws of Kenya and Section 3 thereof establishes the Service and confers on it corporate responsibility while Section 3A sets out the functions of the Service.

40. It was thus argued that the functions and duties of the Service are towards achieving the purpose for which the law was enacted i.e. the protection, conservation, sustainable use and management of wildlife in Kenya for connected purposes and that the plaintiffs' claim for compensation does not fall within the ambit of their functions and duties but that instead, the claim was founded in tort, and that nothing in Section 3A imposes a duty on the defendant to do the things set out in paragraph 5 of the plaint which sets out the particulars of negligence on the part of the defendant to which it was further submitted that the plaintiff had miserably failed to establish negligence against the defendant hence the suit must fail.

41. In submitting further, the courts attention was drawn to Section 62 of the Act which makes provision for compensation for personal injury or death and which stipulates that a person so claiming is to submit his claim to the District Committee. It was therefore submitted what if the plaintiff had a right to lodge a claim before the court, the right party to be sued was the National Government through the Attorney General because it was the National Government through KWS that holds wildlife and natural resources in trust for the people of Kenya.

42. On liability, it was submitted in reiteration that the Defendant cannot be liable for any tort relating to wildlife as the Act limits its engagement to the management of wildlife resource and that all claims of compensation should be as against the government of Kenya and that the Act sets out the compensation procedure with the Kenya Wildlife Service acting only as a coordinator of the exercise.

43. Still on the issue of negligence, it was submitted that the deceased was under duty to appreciate that lakes are infested with crocodiles and as such the deceased was wholly to blame for his misfortune and a party cannot benefit from his own wrong doing.

44. On quantum, as relates to special damages, it was submitted that Pauline Awino Omondi did not plead any award of special damages, but only hence there having been no pleading or proof of the same, was not entitled to any award.

45. On the claim for general damages, it was submitted that the Pauline Awino Omondi did not prepare and produce before the honourable court a medical report or call a doctor to testify as to the extent of injuries or to substantiate that indeed the death was caused by the crocodile and that therefore without the crucial evidence, the injuries as alleged remain a mere speculation. However, the defendant's counsel submitted that should the court find it fit to award the same then an award of Kshs. 20,000/- would suffice, reliance being placed on the case of ***Eastern Produce (K) Limited Vs Amos Malezi Talia Civil Appeal No. 47 of 2000 (2014)eKLR*** where the court quashed an award of

kshs.55, 000/- in general damages for reason that the incidence was so remotely foreseeable.

46. On loss of dependency, it was submitted that taking into consideration that the deceased was a fisherman, the nature of his work being risky, diseases, the imponderables of life and vicissitudes of flesh, the deceased would have lived to the age of 35 hence a multiplier of 10 would be reasonable and opined that Kshs. 2000 monthly average wage would be sufficient as there was no evidence tendered to prove that the deceased earned Kshs. 55,000/= per month.

Lower Court Judgment.

47. The lower court summarized the claim by the plaintiff and what was stated in defence and came up with the following issues for determination:

1. *Jurisdiction.*

2. *Liability.*

3. *Quantum.*

48. On jurisdiction, the court made reference to Section 3 of the Wildlife (Conservation and Management) Act which establishes the Defendant-Kenya Wildlife Service- and confers on it corporate personality with perpetual succession capable of suing and being sued and to Section 62 of the Act on the procedure to be followed by a person who has suffered loss but stated that the section is not framed in mandatory terms thus a party can institute a claim in a court of law and that as such, the matter was properly before the court.

49. On liability, while relying on PW2 as the key witness and the affirmation by DW2 that crocodiles do not attack people in deep waters but on the shoreline and that the boat might have capsized leading to the deceased to drown, the court stated that it was not in doubt / dispute that there was an attack / accident that led to the death of the deceased person. However, the court added that it was logical that a lake is a natural habitat of marine life as such the deceased ought to have been aware of the dangers posed and exercised caution and for that reason he had to bear some liability.

50. The court further stated that the defendant being the custodian of human-wildlife conflict, they ought to have warned the deceased about the dangers of fishing on particular areas of the lake and provide expert assistance hence, both parties were found liable with the defendant bearing the greatest responsibility.

51. On quantum, the court correctly noted that special damages ought to be specifically pleaded and proved and given that the plaintiff did not plead, did not give any award on the same.

52. On the claim for general damages for pain and suffering, the court stated that the deceased died some hours after the attack so he must have suffered some pain before the demise and awarded Kshs. 20, 000/-

53. On loss of dependency, the court took into consideration the fact that the deceased was aged 27 years and left behind a wife and 3 children. The court considered the life expectancy and the risky nature of the work of the deceased and opined that he would have had an active life of about 50 years thereby using a multiplier of 23 years. It went further to state that while PW1 stated that the deceased used to earn an average of Kshs. 2,000/- daily, there was no evidence on record to support the claim and proceeded to adopt an average of Kshs 20,000/- monthly.

54. Having considered afresh the claim, evidence and submissions of both parties in the lower court alongside the judgment of the trial magistrate I now examine the appeal which was canvassed by way of written submissions to which I note that the respondent never filed any submissions despite having been served with the appeal and submissions thereof, notice of the same and given ample time within which to do so.

The Appellant's submissions.

55. The Appellant(Kenya Wildlife Service)in its submission prays that the appeal be allowed, judgment of the Principal Magistrate's court be set aside and the order allowing the Respondent's(Pauline Awino Omondi) claim and awarding her damages be substituted with an order dismissing the suit.

56. The issues as perceived by the Appellant in its submissions to be up for consideration are commensurate or a reiteration of the 6 grounds of Appeal as listed on page 1 above.

57. Ground 1 and 2 is discussed together and a submission made that it was the duty of the Trial Magistrate to proceed and make a finding that the Appellant (Kenya Wildlife Service) owed the Respondent (Pauline Awino Omondi) a duty of care in tort and the Appellant breached that duty of care and was consequently tortuously liable to pay for damages to the Respondent bearing in mind that the Respondent in her claim in the lower court did not plead that the Appellant owed any duty of care in tort and as a result that that duty was negated. It was contended that what the respondent did was to plead a breach of statutory duties by the Appellant and to that extent it was submitted, questioning as to what the duties of the Appellant were, that were particularly breached?

58. The appellant's counsel went further to define negligence as was stated in the case of *Blyth vs. Birmingham Water Works Co as*;

“An omission to do something which a reasonable man guided upon those considerations which regulate the human affairs would do or doing something which a prudent and reasonable man would not do”.

59. It was submitted that there was need for the Plaintiff now Respondent (Pauline Awino Omondi) to prove that a duty of care had been breached; that she ought to have directed herself to the Wildlife Conservation & Management Act of 2013 which clearly spells out the functions of the defendant as enshrined in Section 7; and that she ought to have pleaded in her pleadings the actions of the Defendant-Kenya Wildlife Service- that led to the breach of the statutory duty as alleged. It was further submitted that the Plaintiff ought to have outlined the various statutory mandated obligations that the Appellant failed to discharge to ensure that the injury was not occasioned. It was reiterated that nothing in the section imposes a duty on the Defendant to do the things set out at paragraph 5 of the Plaintiff as at page 4 of the record of appeal on the precept of Order 2 Rule 10 (1) of the Civil Procedure Rules that ***“every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded.”***

60. Further it was submitted that it is essential that a pleading should state those facts which have been alleged to have been breached as material facts and that no averment is to be omitted for the case to succeed, adding that the facts alleged must amount to a cause of action. It was further submitted that not only is the particulars of negligence to be given, but also what is to be stated is, in what respect the Defendant was negligent and only then, would the duty of care follow such allegation and the subsequent injury or damages suffered.

61. It was submitted that the Trial Magistrate erred in finding a breach of duty in tort in a situation where only a breach of statutory duty had been pleaded. Reliance was placed on the case of ***TAI HIGH COTTON MILLS LTD VS LIU CHONG HING BANK LTD*** (1986) at page 107 cited in the case of ***MALAWI RAILWAYS LIMITED VS PTK NYAULU MISC. CIVIL APPEAL NO. 13*** of 1992 at page 12 where it was observed

“.....or as a matter of tort law, when the task will be to identify a duty arising from the proximity and character of the relationship between the parties....the right to determine their obligations to each other and for the avoidance of confusion and because different consequences do follow according to whether liability arises from contract or tort.”

62. On grounds 2 and 3 of the Appeal, it was submitted once again in reiteration that the Appellant –Kenya Wildlife Service- cannot be liable for any tort relating to wildlife in Kenya as the Act that gives it life, limits its engagement to management of wildlife resource and that claims for compensation are to be brought against the government of Kenya and that Kenya wildlife service is only a coordinator of the exercise.

63. Further submission was that animals such as crocodiles are referred to as *animals ferae naturae* meaning they are of a fairly wild and untamed character. Stating that the custodian of such animal has a responsibility to keep the said animals away from situations where they can cause death, injury or harm to humans and destruction of property and stated that the situation has found judicial interpretation in ***KEARY VS PATTINSON (1939) ALL ER 65*** where it was stated that ***“it follows where a person interferes with a wild animal in its natural habitat, he cannot maintain a cause of action in tort.”***

64. On grounds 4 and 5, it was submitted that even if evidence was adduced by the Pauline Awino Omondi in court through a post mortem report showing that the deceased died as a result of “drowning and extensive bite hemorrhage, it could not be conclusive evidence that the death was occasioned by a wild animal.

65. It was also contended in submission that the Pauline Awino Omondi marked a number of documents; death certificate, letter from Majengo Primary and from the Chief and here reference were made pursuant to Section 48 of the Evidence Act which provides that an opinion on a foreign law would be admitted in court if made by persons specially skilled in such foreign law, science or art. As such, the trial court was questioned as to how it arrived at the conclusion that the death was occasioned by the alleged wild animal without admitting evidence of the medical doctor.

66. The appellant’s counsel further submitted that the effect of having documents marked and not produced was dealt with in the case of ***Kenneth Nyaga Mwige Vs Austin Kiguta & 2 Others C.A NO. 140 OF 2008*** at paragraph 22 where it was stated ***“...Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification.”***

67. Additionally, it was submitted that as per Section 107 of the Evidence Act, it was incumbent on the Respondent (Pauline Awino Omondi) to prove the existence of facts specifically, that she ought to have proved the issue of dependency and how she and the children were dependent on the deceased. Reliance was placed on the case of ***BONHAM CARTER VS HYDE PARK LTD (1948) 64 TLR 77*** cited in the case of ***BENADETTA WANJIKU KIMANI (suing as the administrator of the estate of SAMUEL NJENGA NGUNJIRI (DECEASED) VS CHANGWON CHEBOI & ANOTHER CIVIL CASE NO. 373 OF 2008 [2013]eKLR*** where it was stated that ***“ plaintiff’s must understand that, if they bring action for damages, it is not enough to write particulars and so to speak, throw them at the court saying: this is what I have lost, I ask you to give these damages-they have to be proved.”***

68. On the whole, the appellant urged the court to allow the appeal, dismiss the respondents’ case in the lower court and grant costs to the respondent at both levels.

DETERMINATION

69. This court has carefully considered this appeal which was not responded to by the respondent. From the grounds of appeal as supported by submissions and authorities relied on, in my view, the issues that flow for determination are:

1. Whether the deceased met his death by being attacked by a crocodile;

2. Whether the deceased was to blame for the said accident/ attack if at all entirely;

3. Is breach of a statutory duty a tort?

4. Whether the plaintiff/ Respondent is entitled to compensation and by whom?

5. What orders should this court make

6. Who should bear costs of the appeal?

70. On issue 1, PW1 Pauline Awino Omondi in her Witness Statement filed in court on the 25/3/2014 alongside the Plaintiff and as adopted as her evidence in chief stated that on 15/9/2013, she received a call from one Odhiambo telling her that her husband Stephen Juma Omondi had been attacked by a crocodile while he had gone fishing, which information is corroborated by PW2, **Francis Onyango Juma** who testified on oath that the deceased was killed by a crocodile at Utonga Beach, that he saw something coming out of the water and attack the deceased and confirmed that it was a crocodile. On the part of the defendant/appellant, DW1 confirmed in his testimony that he did not witness the incident.

71. On issue No. 2, PW2 in Cross-examination stated that the incident occurred at 5.00.a.m. that the deceased was ahead of him and he only followed the deceased to go fishing after about an hour. He also stated that there was moonlight, the weather was calm and that there were no other fishermen at the time. From the testimony of PW2, it is evident that the deceased put himself in line of danger, more so at night and at a time when they were no other fishermen at the beach, meaning this was a time most fishermen avoided in contemplation of danger. On that note, I agree with the finding by the trial court that it was logical that a lake is a natural habitat of marine life as such the deceased ought to have been aware of the dangers posed and exercised caution and for that reason he had to bear some liability.

72. However, and as was correctly held by the trial court, the defendant being the custodian of human-wildlife conflict, they ought to have warned the deceased about the dangers of fishing on particular areas of the Lake. Furthermore, the defendant/ Appellant submitted on grounds 2 and 3 of the Appeal that *the custodian of such animal has a responsibility to keep the said animals away from situations where they can cause death, injury or harm to humans and destruction of property*. Thus, there is admission that where the defendant fails to ensure that animals are kept away from situations where they can cause injury or death or harm to humans or destruction of property, then such defendant would be liable.

73. The appellant also contended that they did sensitize members of the public at the lakeside on the dangers posed by animals. However, there was no material evidence to show, for example, that they ever wrote posters or send letters to the area administration or placed posters at the lakeside to warn members of the public of the risks posed by the presence of Crocodiles on site for the public to take precautions as to their safety.

74. In my view, it was incumbent upon the defendant /appellant to sensitize people and warn them of the particular areas to be avoided during their various activities as the personnel of the defendant are the ones with the know-how of the dangers posed by the presence of wildlife which information the common person may not be privy to hence the defendant/ appellant bore the greatest burden and responsibility.

75. On issue No 3, which is the main bone of contention necessitating this appeal, the appellant in its submissions in the lower court argued that the functions and duties of the Defendant Service are towards achieving the purpose for which the law was enacted i.e. the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes and that the plaintiff's claim for compensation does not fall within the ambit of their functions and duties but instead the claim was founded in tort, and that nothing in Section 3A of the Act imposes a duty on the defendant to do the things set out in paragraph 5 of the plaintiff which sets out the particulars of negligence on the part of the defendant to which it was further submitted that the plaintiff had miserably failed to establish negligence.

76. In this appeal, the defendant/ appellant's counsel submitted as follows: that ***the Respondent in her claim in the lower court did not plead that the Appellant owed any duty of care in tort*** and as a result that that duty was negated. Its contended that ***what the respondent did was to plead a breach of statutory duties by the Appellant*** and to that extent, it was submitted in question that what were the duties of the Appellant that were particularly breached?

77. The court in the case of ***Kiamokama Tea Factory Co. Limited v Joshua Nyakoni [2015] eKLR*** had this to say on the question of breach of statutory duty and a claim based on tort:

"I agree with the position that breach of statutory duty is a tort. Although the Limitations of Actions Act only defines 'tort' broadly to include devastavit, Black's Law Dictionary 8th ed. defines tort as "a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relationship to one another."

78. The court further observed that ***"To be fair, counsel for the plaintiff appears to concede that breach of statutory duty is a tort as it is sought to base the claim not only on the tortious breach of statutory duty but also as a breach of contract when it was submitted that "paragraph 7 of the respondent's pleadings, it is very clear that the respondent's suit is premised on both contract and breach of statutory duty."...Other than using the phrase 'breach of contract' in paragraph 7 of the Plaintiff, there is no related averment in the entire Plaintiff. The claim is purely presented as a breach of statutory duty and in negligence, and the particulars of the breach of statutory duty and the particulars of negligence are given in paragraphs 6 and 7 of the Plaintiff as shown above. No particulars of breach of contract are given.***

79. In the end the court held that;

“Breach of the statutory duty is not a breach of the contract but breach of duty of care in tort.....To hold otherwise would elevate duties imposed by statute without choice of the parties to the same status as contractual stipulations entered into by parties to a contract who transact at arm’s length, with full knowledge of consequences of breach and independence to contract. The statutory provisions are a legal imposition on parties in a particular contractual relationship must, for lack of the elements of freedom of contract, occupy a lower position relative to contractual conditions and warranties. Accordingly, I find that the plaintiff’s suit herein is an action in tort.”

80. From the above authority, it is clear that a claim can be based on breach of statutory duty or based on negligence in tort and that it is not fatal if a claim is based on the tort of negligence where, in fact, the claimant ought to have based the claim on breach of statutory duty.

81. In this case, it is clear that the appellant selectively chose its engagement yet there are certain aspects associated with its duties that are clearly stipulated in the Act. For instance, the appellant’s duties under Section 7 of the Wildlife Conservation and Management Act at paragraphs(d) and (g) as enumerated by the Appellant in its submissions require that there should be education and extension services to create public awareness and the need to identify manpower requirements and recruit manpower ***at all levels*** respectively, and which are one of the breaches complained of by the respondent in the lower court in paragraph 5 of the plaint where she pleaded that the defendant allowed the accident to occur, exposed the deceased to a risk they ought to have known and failed to have enough manpower and/ or qualified personnel to keep guard of the wild animals especially the crocodile.

82. In this case, the defendant/appellant was accused of having failed to create awareness, sensitize or warn the public of the dangers they exposed themselves to and operated on the assumption that the general public knew the dangers posed by wild animals at the area. The Appellant was also blamed for not having the requisite manpower to abate the situation or prevent it totally.

83. On issue No. 4, **which indirectly brings to issue the question of jurisdiction that was dealt with in the lower court, evidently, from the foregoing issues dealt with, it is clear that the Respondent was entitled to compensation, however the question as to from whom the compensation ought to emanate from albeit having not been dealt with/ brought up by the Appellant ought to be effectively dealt with. The only aspect of this is mentioned when it was submitted** in grounds 2 and 3 of the appeal, that the Defendant now Appellant cannot be liable for any tort relating to wildlife in Kenya as the Act that gives it life, limits its engagement to management of wildlife resource and that claims for compensation are to be brought against the government of Kenya and that Kenya wildlife service is only a coordinator of the exercise.

84. My view is that the appellant is the body with the mandate given by the government, and therefore it is not separate from the government. **The lower court also in its judgment stated** that Section 62 is not framed in mandatory terms thus a party can institute a claim in a court of law as such the matter was properly before it.

85. **The issue of jurisdiction was conclusively dealt with in CIVIL APPEAL NO. 260 OF 2013-Peter Muturi Njuguna v Kenya Wildlife Service [2017] eKLR** and the court had this to consider;

“How do we deal with the damage to property and personal injury or death caused by wildlife which we love and treasure as a major contributor to the national economy.?” Should it be left to the common law system of claiming damages in courts or should it be confined to quick and less bureaucratic administrative processes or should it be open to claimants to choose either process.”

86. In the above cited **Peter Muturi Njuguna** case, it was stated that ‘KWS was basically saying it did not own wild animals since they were wild and can only be sued if the animals caused damage to property. If they caused any injury to the person, there was a procedure set up under **section 62** of the **Wildlife (Conservation and Management) Act** (now repealed) (herein “**the Act**”) which stipulates:

“62. (1) where any person suffers any bodily injury from or is killed by any animal, the person injured or in the case of a deceased person, any other person who was dependant upon him at the date of his death may make application to a district committee established by this section, for the award of compensation for the injury or death....”

87. Aggrieved by the dismissal, the appellant filed an appeal to the High Court contending that **section 62 (1)** of the Act is permissive as the word “**may**” has been used and that a victim of a wildlife attack could choose to go either to court or to the district committee. **Ouko, J** (as he then was) was not persuaded by that argument and upheld the trial magistrate. In doing so, he observed that compensation for damage to or loss of crops or property caused by wildlife had been removed from **section 62 (1)** of the Act leaving only compensation for bodily injury or death’.

88. Ultimately the Court of Appeal held that:

“From the foregoing, it is abundantly clear to us that where there is a specific procedure as to the redress of grievances, the same ought to be strictly followed. Having arrived at that conclusion, we are satisfied that the learned Judge of the High Court did not err by upholding the lower court’s finding. Section 62 (1) of the Act is explicit on the procedure to be followed by any person who suffers bodily injury from or is killed by any animal. Such person is required to make an application to the District Committee. It is good practice intended to foster public confidence and trust to let each organ perform its mandate. The appellant ought to have approached the District Committee first and followed the appellate system designed under the Act. The avenue of Judicial Review which the Committee is always subject to, was also available. Filing the claim before the District committee as the appellant appears to have done and filing a suit for negligence based on the same facts is certainly an abuse of court process. The trial court and the High Court were right in rejecting the suit. However, the two courts made orders dismissing the suit which is ordinarily the consequential order for matters heard and determined on merits. The correct order, in our view,

ought to have been the striking out of the suit. The order for dismissal shall thus be set aside and substituted accordingly.”

89. On what orders this court should make, this court on the basis of the decision of the Court of Appeal in the above case finds that the respondent ought to have filed the claim before the District Committee for compensation. As stipulated in section 62 of the Act. Failure to do so vitiated the proceedings in the lower court.

90. As jurisdiction has been held to be everything and the court's orders not clothed with jurisdiction are inconsequential, it follows that the appeal herein is of no consequence howsoever and the suit in lower court ought to have been struck out.

91. The High Court as the first appellate court has the power to review the evidence and record and arrive at its own independent conclusion. It cannot give a blind eye to the issue of jurisdiction.

92. In this case, albeit I concur with the trial court that the plaintiff respondent established liability against the appellant on a balance of probabilities that the appellant was responsible for the care of the wild animals and that it failed in that duty to a very large extent, iam inclined to finds that the proceedings were conducted without jurisdiction and therefore inconsequential and therefore the appeal herein too is inconsequential.

93. Accordingly, I hold that the trial court lacked jurisdiction to hear and determine the respondent's claim on merit. The trial court should have referred the parties to the District Committee for consideration of the claim by the respondent. The suit in the trial court is accordingly struck out with an order that each party shall bear their own costs of the suit.

94. This appeal only succeeds to the extent that the court had no jurisdiction to hear and determine the claim. All other aspects are dismissed. The respondent can still lodge her claim against the appellant through the District Compensation Committee.

95. On costs, as the appellant is a public body against a respondent who appears to be a woman of straw a widow left with children to fend for by her fisherman husband and who is unemployed in my view should not be ordered to pay costs to a public body.

96. In the end, I hold that each party shall pay their own costs.

97. Orders accordingly.

Dated, signed and delivered at Siaya this 24th Day of October, 2018.

R.E ABURILI

JUDGE

In the presence of:

Ms Ojwang Advocate h/b for Mr Kuke advocate for the Respondent

N/A for the Appellant

CA: Brenda and Modestar