



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 2 OF 2016

(CORAM: J.A. MAKAU – J.)

SAMUEL ODHIAMBO NGOYEPLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES.....DEFENDANT

(Being an Appeal from the judgment dated 04.03.2016 in Civil Case No. 75 of 2014 in Bondo Law Court before Hon. M. Obiero-PM)

J U D G M E N T

1. The Appellant was the defendant at the Lower Court and the Respondent was the Plaintiff. The respondent through a plaint dated 13th November 2014 through the firm of M/S Kuke and Co. Advocates sued the appellant seeking the following orders: -

(a) General Damages under the Law Reform Act and the Fatal Accident Act, Laws of Kenya.

(b) Cost of the suit.

(c) Interest on (a) and (b) above.

2. The appellant filed Memorandum of appearance and defence through the firm of M/S Siganga and Co. Advocates denying jurisdiction of the court as the Plaintiff had not exhausted the remedies under the provisions of the **Wildlife Conservation and Management Act No. 47 of 2013, Laws of Kenya** and sought the plaintiff's claim to be dismissed with costs.

3. The respondent filed reply to the statement of defence terming the defence as a mere sham and prayed it to be dismissed with costs.

4. The respondent gave evidence and called two witnesses whereas the defendant called only one witness. That after trial the Lower Court entered judgment in favour of the plaintiff as follows:-

a. Liability at the ration of 30% against the Plaintiff and 70% against the Defendant.

b. Pain and suffering; Kshs. 20,000/=

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

d. Loss of dependency; Kshs. 720,000/=

Total Kshs. 840,000/=

Less 30% Contribution Kshs. 252,000/=

NET TOTAL Kshs. 588,000/=

e. Cost of the suit and interest from the date of judgment.

5. The appellant aggrieved by the trial court's judgment dated 4th March 2016 preferred an appeal dated 4th April 2016 setting out six(6) grounds of appeal being as follows: -

i. 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.

ii. The Learned Magistrate erred in law and in fact in holding that the appellant contributed to the occurrence of the incident when the available evidence clearly absolves it from blame.

iii. The Learned Magistrate misdirected himself in law in failing to consider and make a finding on the issue of causation and blameworthiness.

iv. 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.

v. 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 incident.

vi. The Learned Magistrate proceeded on demonstrably wrong principles in reaching his decision.

6. The facts of the Plaintiff's case and defendant's case form part of the record of appeal and I need not reproduce the whole of the same but shall make a brief summary of the Plaintiff's case and the defence.

7. The Plaintiff's case is as follows: - the Plaintiff Samuel Odhiambo Ngoye (PW1) sued the defendant in his capacity as the legal representative of Fredrick Odhiambo (deceased) his son who had been attacked and killed by a wildlife, namely a crocodile, on 7th December 2013 at 5.00am at a beach in the Lake Victoria. PW1 proceeded to the beach but did not see the body of his son, he proceeded to make a report at Usenge Police Station from where he was advised to wait till the body was recovered. The body of the deceased was subsequently recovered at 1.00pm, which was skeleton from the waist. PW1 identified the body and it was taken to the mortuary. PW1 attended the postmortem after 3 days. He produced the postmortem report as exhibit 1; and burial permit as exhibit 2. That after burial PW1 made a report to the Wildlife Office from where he was issued with a claim form exhibit 3, which PW1 took to the police and it was signed. That PW1 gave the form to his Advocate who advised him to sue the Wildlife Services. The Advocate issued demand noticed dated 22nd January 2013 exhibit 4. The Wildlife declined to compensate PW1; hence he got a letter from the Chief exhibit 5 and certificate of death exhibit 6. That PW1 filed a succession cause at the High Court and got letters of administration interstate as exhibit 7. PW1 testified that his son used to earn about Ksh. 2,500/= to Ksh. 3,000/= per day and he used to assist PW1, his mother and siblings. PW1 blamed the Wildlife for the death of his son as the Wildlife Services did not keep the crocodile away from the public.

8. PW2, Nicholas Otieno testified that on 7th December 2013. He went fishing with Fredrick Odhiambo (deceased) and Daniel Ochieng in the same boat. That after fishing, they took the boat to the dry land, that one of them went for a short call on the dry land and while on the dry land something hit Fredrick Odhiambo. PW2 realized it was a crocodile at the shore of the lake at 3.00am. That the crocodile

dragged Fredrick into the lake. PW2 and his colleague raised the alarm; the deceased body he stated was traced the following day at 1.00pm. He blamed the Wildlife Services as the place was not fenced as had it been fenced the crocodile would not have attacked the deceased and as they had failed to train fishermen of the dangers of the animals in the lake.

9. PW3, Joannes Gaunye Oduor, a Beach Management Unit Chairman, who was the Chairman in 2013, stated he knew the deceased Fredrick Odhiambo was attacked by the crocodile as the incident was reported to him adding they do not receive any training from KWS and when attack occurs they do report to KWS at their offices at Bondo.

10. The defendant gave evidence through DW1 Amos Nyaoro, a Senior Sergeant with KWS stationed at Kisumu. He stated that on 7th December 2013, KWS received a report of a crocodile attack at Ayanga Beach and that the person attacked died while at the hospital and that the report was received when the person had already been buried. The person who reported was asked to get a Chief's letter; death certificate, postmortem report and was issued with compensation form. The kin later delivered the documents. The compensation form was to be taken to police and confirm the report from the hospital. The kin did not return the form and as such the compensation process could not start. DW1 prayed that the suit be dismissed as the claimant did not comply with the required procedure as regards claims for compensation. He urged the people living along the borders are well trained as animals live in the water which is their habitat.

11. At the hearing of the appeal, Mr. Amule, Learned Advocate, appeared for the appellant and urged his appeal on the grounds on contribution and negligence. Mr. Singalachi, Learned Advocate for the Respondent opposed the appeal.

12. Mr. Amule, Learned Advocate, combined grounds nos1 and 2 of the appeal. He urged that the trial court erred in law and fact in reaching its decision on liability and quantum of damages without analyzing the entire evidence on record and in holding that the appellant contributed to the occurrence of the incident when the available evidence clearly absolves it from the blame.

13. Mr. Amule, Learned Advocate, further urged the postmortem report exhibit 1, was not properly admitted as it was not produced by its maker and the appellant is disputing the cause of the death submitting the cause of the death was not proved. He referred to the case of **ZKM V Republic CRA No. 41 of [2006]eKLR** where Court of Appeal stated: -

“We do agree it was never in dispute that the entire case was based on circumstantial evidence. That the deceased died is not in dispute. The appellant also admits that much. It is also admitted that she died at Athi River where she went with the appellant. There is some grey area as to the actual cause of death. The Postmortem report which unfortunately was not produced by the maker says the cause of death was due to two factors namely increased intracranial pressure and pending toxicology. Had the maker of this report, Dr. Kirasi Olumbe given evidence and produced it, perhaps he would have been able to satisfy the court as to whether the increased intracranial pressure resulted from a hit on the head by an external object or was directly attributed to the pending toxicology and would also have been able to clear the air as to which of the two was the actual cause of death.”

14. Mr. Singalachi, Learned Advocate, in his response urged the postmortem report was admitted in accordance with the right procedure as the appellant's counsel did not raise any objection before the production of the exhibit and that leave was given to the appellant to file appeal but none has been filed since leave was given on the 2nd September 2015.

15. I have very carefully perused the trial court proceedings, the judgment and I have found that the trial court analyzed the entire evidence, set out the points for determination; made determination thereto and gave reasons for its decisions both on liability and quantum of damages. The appellant did not in this ground state what it was that the trial court failed to analyze before reaching its decisions. On

apportionment of liability, the trial court considered the respondent's arguments that the appellant had not taken any precautions to prevent such incidents from occurring by giving warnings to the fishermen using beach waters and further that the appellant had not fenced or provided designated areas for use by wild animals like crocodiles instead of leaving them to roam about anywhere.

16. Whereas the appellant on his part urged the court to find the appellant not liable as the respondent bore the duty to take care and that the incident was purely caused by the negligence of the deceased. In the instant case, the deceased as a fishermen, he must have been aware of the dangers posed by wild animals in the lake and especially at night as it is common knowledge that the lake and its environs is a natural habitat for some of the most dangerous wild animals such as hippopotamus, crocodiles and snakes. The trial court correctly analyzed the evidence and found the deceased being in that position, had a duty of care and duty to be careful while at the shore of the lake and especially during the night hours. He had no light with him and as he had any, he would have seen the crocodile before he went where it was. The trial court quite correctly found the KWS could not fence the lake shore, however, found the KWS should have sensitized the fishermen and trained them on the dangers posed by wildlife and also the dangerous areas around the lake shore. PW2 and PW3 testified that KWS had not sensitized the fishermen and trained them on the danger posed by the wildlife around the lake shore. I find that the trial court correctly found so and apportioned the liability at a ratio of 30% against the respondent and 70% against the appellant. I find no error in such apportionment and shall not interfere with the apportionment of liability.

17. On the causation of the deceased's death, Mr. Amule, Learned Advocate urged that the postmortem report was not properly admitted and in absence of calling the maker of the postmortem report, the cause of death was not established. I have perused the Lower Court proceedings and have noted that the document was produced without any objection and by the time the Counsel realized the document had been produced and tried to object to its production, it was too late hence the court granted the counsel leave to appeal against the production of the postmortem report. From that time, no appeal has been lodged against the production of the postmortem report; the grounds of appeal before this court do not raise that ground as one of the grounds of appeal. My view is that, that ground cannot be raised as it has been overtaken by events as by allowing it at the submission stage would amount to ambushing the respondent.

18. In the case **ZKM V Republic (supra)**, the court was dealing with a criminal murder case in which one of the ingredients of the offence to be proved in a murder case is death of the deceased and cause of the death which is usually proved by production of postmortem report but that case can be distinguished in that it was a criminal case dealing with murder, in which the prosecution case must be proved beyond any reasonable doubt whereas in the instant case, it is a civil claim in which the case is supposed to be proved on balance of probability. Further to that, in this case, the cause of death is not in doubt as PW2, in his evidence he testified that he witnessed the deceased being attacked and dragged into the lake by a crocodile. DW1 admitted that PW1 made a report of the death of his son through an attack by a crocodile. PW1 produced burial permit as exhibit P2, exhibit 3, Community Wildlife Service Complaints claim for person injured/death caused by a wildlife which on *page 3* under circumstances of death indicates the deceased was killed by crocodile. The comments by police from Usenge Police Station indicate the deceased was alleged to have been bitten by a crocodile on 7th December 2013 at 0300hours at Ayanga Beach as per O.B. Mo. 8/7/12/2013. The Chief's letter exhibit 5 confirms the deceased was killed by a crocodile on 7th December 2013. Death certificate exhibit 6 states the cause of death to be haemorrhagic shock mainly due to the wild animal attack. In view of the unchallenged evidence on causation of the death of the deceased, I find that the Respondent proved on balance of probability the death of the deceased and its cause was due to attack by the crocodile which took him into the lake.

19. **Whether the learned trial magistrate erred in his analysis of the evidence in holding the Respondent was entitled to an award for loss of dependency?** The appellant did not urge this ground, however from the evidence of the respondent, he produced limited grant of letters of administration Ad Litem issued to him on 18th September 2014 in respect of Fredrick Odhiambo. In his evidence he testified the deceased was his son and he depended on him and his wife and other children for support. The appellant did not challenge that piece of evidence. In absence of any evidence rebutting the

Respondent's assertion, I find no error that the trial court made in holding that the respondent was entitled to an award for loss of dependency.

20. The appellant further contends the trial magistrate erred in making an award for damages when there was no evidence to show that the respondent suffered any injury as a result of the incident. PW1 adduced evidence that he received a report of the attack of this son on 7th December, 2013, went to the site and did not find his son. He reported to the police and was told to wait till the body was found. When the body was found on 8th December 2013 at 1.00pm, it was a skeleton from the waist. PW2 witnessed the attack of the death of the deceased by a crocodile. The exhibits produced by the respondent confirm PW1's son died as a result of attack by crocodile and was buried. PW1, his wife and children, he stated depended upon the deceased for support. The death of his son caused him a lot of mental pain, anguish and he suffered loss. The award made in favour of the Plaintiff was as a result of the death caused to his son by the wildlife and that headings under which the awards were made was due to the loss he suffered. I therefore find the award was proper as the Respondent suffered loss and damage.

21. The appellant contends the learned magistrate proceeded on demonstrably wrong principles in reaching his decision. The learned counsel for the appellant did not urge this ground nor did he bother to demonstrate how the court's decision was based on the wrong principles. That as this ground and other grounds were not argued before me I shall treat them as abandoned and dismiss them.

22. The upshot is that the appeal is without merits. The appeal is dismissed with costs to the Respondents.

DATED AND SIGNED AT SIAYA THIS 23RD DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

In the presence of:

Mr. Amule: for Appellant

Mr. Singalachi: for Respondent `

Appellant - Absent / Present

Respondent - Absent / Present

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE