REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 12 OF 2016

(CORAM: J.A. MAKAU – J.)

KENYA WILDLIFE SERVICE….....APPELLANT

VS

AMOS MFWAYA KOKOTH *(suing as the Personal Representative of the*

***Estate of* EZEKIEL ONYANGO (*Deceased*).....RESPONDENT**

(Being an Appeal against the Judgment dated 30.09.2016 in Civil Suit No. 36 of 2013

in Bondo Law Court before Hon. M. Obiero – S.R.M)

J U D G M E N T

1. The Respondent was the Plaintiff at the Lower Court whereas the Appellant was the Defendant. The Plaintiff through a Plaint dated 3rd June 2013 through the firm of M/S Kuke & Co. Advocates sought the following orders:-

a) General damages under the Law Reform Act and Fatal Accident Act, Laws of Kenya

b) Cost of the suit.

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

2. The Appellant through a statement of defence dated 11th July 2013 denied liability and urged the deceased herein was negligent praying the Respondent's suit be dismissed with costs.

3. The Respondent called two witnesses whereas the Appellant called one witness. The Respondent through PW1 Amos Kokoth averred that, the deceased Ezekiel Onyango who was has brother was attacked by a crocodile on 19th September 2011, rushed to JOORTH otherwise referred to as Russia Hospital where he died. PW1 produced burial permit exhibit PR and Death Certificate and P.exhibit 1; Letters of Administration as P.exhibit 3 Chief's letter P.exhibit of Yimbo location; Receipts from Russia Hospital. He urged the deceased aged 30years and unmarried but was a fisherman and had dependant being his brother PW1, and a nephew who he was educating and was earning an average of Kshs. 30,000/= per month. PW1 urged he sued the Appellant because they do not attend their barazas and for failure to tell them the limits to reach while at the Lake. He gave his age as 55; his father's 87 and that his nephew about 16 years. He stated he did not report the matter to the police and KWS. Pw2, George Ochieng, a fisherman testified that he knew Ezekiel Onyango, his neighbour, who he was with on 19th September 2011 at Nyandunge Beach fishing in a boat when a crocodile grabbed him and dragged him into the waters while at the shore. PW2 chased and hit the crocodile with a saddle and it released the deceased. PW2 took the deceased and placed him on the boat who had seriously been injured by the crocodile as it had ripped off his chest, back and left hand. PW2 called a vehicle, took the deceased to Bondo District Hospital from where he was transferred to Russia Hospital from where had died after 2days. He blamed KWS for failing to put a fence to keep off the animals and for failing to sensitize the users of the lake on how to keep the animals off. PW2 testified that the incident occurred at night while the banks of the lake catching Tilapia. That he recorded his statements with Usenge Police Station on 26th September 2011. He stated one of the brothers of the deceased reported the matter to KWS, thus one Richard Okiya. He urged that they could make Kshs. 30,000/= per month and that they were registered at Nyandenga Beach where there was no KWS.

4. The Appellant's case through DW1, Amos Nyaoro, employee of KWS, as a Senior Sergeant In charge of the Human-Wildlife conflict, is that he coordinates issues in as far as reports are made and verifies them as well as educating the public on how they relate with the wild animals. That on 19th September 2011, KWS received a report from the Chief of West Yimbo and someone having been attacked by a crocodile at Nyandenga Beach; and proceeded to the scene but found the victim had been rushed to Bondo District Hospital, and on visiting

the severity of the injuries, he requested that the victim be transferred to New Nyanza General Hospital, however the victim succumbed on 22nd September 2011. The victim was ferried to his home and KWS gave the family instructions on what to do after burial as regards issue of compensation but they did not follow. DW1 derived negligence on their part as they usually educate in public on their safety, urging the crocodile was on its natural habitats and that the deceased was negligent as he took himself to the water, urging they cannot fence off the lake as it's the natural habitat of water animals. DW1 on cross-examination stated the deceased was attacked by the crocodile which caused his death, adding he was not at the scene. He admitted he did not have any documents to show they had educated the public on the dangers.

5. After trial, the trial court apportioned liability in the ratio of 70:30 per cent in favour of the Respondent and awarded the Respondent award as follows: -

a) Special Damages - Nil .

b) Pain and suffering - Kshs. 100,000/=

c) LOD of Dependency,

The court took a multiplicand of

Kshs. 10,000 and a multiplier of

20 years and dependency ratio of 1/3

(10,000 x 12 x 20 x 1/3)…….. - Kshs. 800,000/=

d) Loss of expectation of life - Kshs. 200,000/=

Total - Kshs. 1,100,000/=

Less 30% Contributing Negligence - Kshs. 366,000/=

Balance - Kshs. 767,000/=

6. The Appellant being aggrieved by the trial court's judgement preferred the appeal through a memorandum of appeal dated 15th September 2016 and filed on the same day setting out the following six (6) grounds of appeal being as follows: -

(i) The Learned Magistrate misdirected himself in law in failing to consider and make a finding on the issue of negligence.

(ii) 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.

(iii) 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 absolves it from blame.

(iv) The Learned Magistrate erred in his analysis of the evidence in holding that the Respondent was entitled to 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 an attack by wild animal.

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

7. At the hearing M/S Omollo, Learned Advocate appeared for the Appellant whereas M/S Kuke appeared for the Respondent. M/S Omollo on her part filed list of authorities dated 27th September 2017. She urged grounds no(s) 1 and 3 together then 4, 5 and 2 together and ground no. 6 on its own.

8. On ground no(s) 1 and 3, M/S Omollo urged that the Learned Trial Magistrate erred in finding and holding that the Respondent had proved liability and/or negligence against the Appellant without analyzing the entire evidence and when the entire evidence clearly absolves it from blame. M/S Omollo urged the Respondent ought to have proved there was a duty owed to him, by the Appellant, that there was a breach of duty and as such he sustained injuries.

9. Section 3A (a)(b)(c)(d)(e)(f)(j) of the Wildlife (Conservation and Management) Act (Chapter 376) Laws of Kenya on functions of the service provides: -

"3A. The functions of the Service shall be to: -

(a) Formulate policies regarding the conservation, management and utilization of all types of fauna (not being domestic animals) and flora;

(b) Advise the Government on establishment of National Parks, National Reserves and other protected wildlife sanctuaries;

(c) Manage National Parks and National Reserves;

(d) Prepare and implement management plans for National Parks and National Reserves and the display of fauna and flora in their natural state for the promotion of tourism and for the benefit and education of the inhabitants of Kenya;

(e) Provide wildlife conservation education and extension services to create public awareness and support for wildlife policies;

(f) Sustain wildlife to meet conservation and management goals;

(j) Administer and co-ordinate international protocols, conventions and treaties regarding wildlife in all its aspects in consultation with the Minister"

10. From the above-mentioned section, it is clear that the Appellant owes duty to the public in discharge of its functions. It is duty bound to manage national parks and national reserves; prepare and implement management plans for water/parks and national reserves for the benefit and education of inhabitants of Kenya; provide wildlife conservation education and extension services to create public awareness and support for wildlife policies. It is not therefore correct for the Appellant to urge that they did not owe the deceased herein duty of care. In the instant case, PW2 blamed KWS as they had not put a fence to keep off the animals whereas I find this impossible for KWS to have put a fence along Lake Victoria. I find that at least a blame for failing in to sensitize the public on how to keep away or handle the dangerous species at the Lake. They do not even put notices to at least alert the public of eminent danger that could be posed by crocodile especially while fishing at night. DW1 urged that they normally educate the public on the danger of wild animals, however he did not explain to the court on how that was being done not did he produce any evidence to show that was over been done. He said they cannot fence the Lake, which is true but in protecting public KWS need not fence the Lake but put warning notices and call barazas and distribute education materials so that public can be aware of the dangers posed by fishing at night even at certain areas during even daytime. I therefore find the Appellant owed the Respondent duty of care, which they breached and as a result of such breach, the deceased sustained injuries from which he succumbed to death.

11. The Trial Court upon considering the evidence apportioned liability at 70:30 in favour of the Respondent. I have considered the evidence in this case as noted the deceased was fishing at night in a small boat at the time when it was not very safe and ought to have taken precaution to protect himself. The Appellant who also owed the Respondent duty of care failed in his duty by failing to put measures and structures for ensuring the fishermen fished with precaution and in a safe environment. This failure on both the Respondents and assailant's calls for apportionment of liability as both of them were in blame to ascertain extent. I was not addressed by both counsel on the apportionment of liability.

12. The Respondent in his plaint under *paragraph 4* set out the particulars of negligence attributed to the Appellant's servants and its agents and/or employee and the statutory breach of duties by the Appellant which can be as follows: -

"The Plaintiff states that on or about 19/09/11 while the deceased - Ezekiel Onyango Mfwaya was a lawful fisherman at Lake Victoria at Nyaudenge Beach when the deceased was attacked by animals (crocodile) thereby causing /permitting the same/boat to capsize thereby the deceased died thereof."

13. I have considered evidence in light of the particulars of negligence attributed to the Appellant such as failing to warn the deceased of the existence thereby and failing to keep watch of the animals ……and failing to employ enough manpower or qualified employees to guard the animals. I have also considered the Appellant's defence on negligence contribute to report as set out under *paragraph 10* which ones follows: -

"The Plaintiff deceased was negligent in that he: -

a) commenced continued illegal activities at the Lake;

b) failed to keep any or any proper lookout or to have any or any sufficient regard for his own safety when illegally so engaged at the said lake habitat;

c) used the waters of the said Lake Habitat without first ascertaining or ensuring that it was safe to do so and when it was unsafe and so dangerous so to do;

d) failed to see and appreciate the peril he was exposing himself to in good time to avoid the said accident or at all;

e) knowingly and wantonly exposed himself to the perils of a wild habitat."

14. I have considered the pleadings and part of the evidence adduced by both the Respondent and the Appellant at the Lower Court and the

findings arrived at by the trial court, I find that the apportionment of liability at 70:30 percent in favour of the Respondent if in accordance with the pleading, and evidence and I find that there is no reason to disturb the same as it was properly arrived at.

15. The Appellant preferred this court to the case of **Nickson Muthoka Mutavi v Kenya Agricultural Research Institute Civil Appeal No. 93 of 2012 (Machakos)** at *Page 4* where the Court held: -

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connected must be established."***

16. I am in agreement with holding of the court on that burden of proof and in this case the Respondent has discharged the burden of proof by demonstrating some duty owed to him by the Appellant, some breach of the duty and an injury to the deceased. I find the connection of the injury and the breach of duty owed to the deceased was established to required standards of proof.

17. On ground numbers 2, 4, 5 and 6, the Appellant urged that the quantum of damages was arrived at without the analysis of the entire evidence and more particularly that the Learned Trial Magistrate erred in his finding that the Respondents was entitled to an award for loss of dependency that without proof. It was also urged that the trial court applied wrong principles in reaching its conclusion by making double compensation by awarding damages under both **the Fatal Accidents Act and the Land Reform Act** without deducting the award made under the **Law Reform Act**.

18. As regards the correct principle regarding awards **under Fatal Accidents Act and the Law Reform Act** and in dealing with principle of duplication of awards. This principle in *Kemp & Kemp on Damages* is clearly stated to be that where a claim is made under both the **Fatal Accidents Act** and the **Law Reform Act**, and where the claimant succeeds in both, the award made under the **Law Reform Act** must be deducted in full from the award made under the **Fatal Accidents Act** as the deceased's estate cannot benefit twice. In the instant case, both sides appreciates the law and have in their respective submissions appreciated the principle and cited the law in support urging the Court to do so in this matter. I accordingly adapt the same.

19. In the case of **Hellen Warunguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) V Kiarie Shoe Stores Limited, Nyeri CA Civil Appeal No. 22 of 2014 [2015]eKLR**, the court stated: -

> ***"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise"***

20. The Appellant further urged the multiplicand applied of Kshs. 10,000/= per month applied by the trial court was excessive and unjustified in absence of proof of income in the instant case, the Respondent only averred the deceased was a fisherman earning Kshs. 30,000/= per month but failed to produce any record in support the Respondent's counsel conceded that record was produced but urged the deceased was a fisherman could have been earning Kshs. 10,000/= per month the figure taken by the trial court as estimated gross months wage. The Appellant's counsel on the other hand submitted the trial court should have applied a figure of Ksh. 2,000/= as the wage of the deceased referring this Court to the case **Philip Wanjera & Another Ahmed Libah & Another, HCCA No. 343 of 2014** where the Court stated as follows: -

> ***"No documentation was produced to show that she earned Kshs. 15,000/= per month. While I am alive to the fact that a farmer may not have any payslips or books of accounts to prove her earning or any documentation for that matter, the onus of proof rests with the respondent to prove that she was indeed a farmer who earned Kshs. 15,000/= . There was no evidence adduced to show that she was a farmer. However, in broad interest of justice I am inclined to apply the Government Minimum Wage Guide for unskilled labourers. The Regulation of Wages (Agricultural Industry) 2008 provides for Kshs. 5,000/= for unskilled employee."***

21. In the instant case, the Respondent did not produce any document to confirm the deceased was earning Kshs. 30,000/= per month nor that he was indeed a fisherman as alleged, while I am alive to the fact that fisherman or casual labourers or people engaged in Jua Kali businesses etc, making earnings on daily basis or on monthly basis they may have no payslip or books of accounts or records to prove that indeed they make the earnings they may claim to earn, and this matter the Respondent claim of Kshs. 30,000/= per month. However, the wrongdoer cannot be heard to say a victim should be denied compensation for failure to produce documents in support of his earnings nor Court of Justice should fail to do justice by failure of the victim to produce documents on his earnings but should strive in the interest of justice to apply the **Government Minimum Wage Guide for Unskilled labourers**. The **Labour Institution Act No. 12 of 2017, Kenya Subsidiary Legislation 2011** provides for Kshs. 7,586/= for unskilled employees.

22. In the case of **Jacob Ayiga Maraja and Francis Karani V Simeon Obongo (suing as the Administrator of the Estate of Thomas Ndenga Obonyo C.A. No. 167 of 2002 (Kisumu)**, the Court of Appeal stated thus:-

> ***"In our view, there was more than sufficient material nr record from which the learned judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps no record and yet earn their livelihood in various ways. If documentary***

evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things.

In this case, the evidence of the Respondent and the widow coupled with the production of several reports was sufficient materials to amount to strict proof for damages claimed. Ground one of the grounds of appeal must accordingly fail on ground two, we known of no law or any other requirements that a self-employed compensator must retire at age 55."

23. Having considered the evidence on record, respective rival submissions by both counsel and authorities stated herein above, I am satisfied as of 2011, when the deceased died, a minimum of earnings of Kshs. 8,000/= per month was applicable as Government **Minimum Wage Guide for Unskilled employees.** I therefore find the appropriate multiplicand would have been Kshs. 8,000/= instead of Kshs. 10,000/=. I will therefore apply a multiplicand of Kshs. 8,000/=, the multiplier of 20 years was not challenged for the deceased who died of the age of 35 years. I will therefore apply the same.

24. The Appellant urged the Court to disturb the award made in this case. The Court of Appeal has laid down guidance on which court can disturbs an award on appeal. In case of **Shaberi V County Council of Nairobi (1985)KLR 546**, the Court of Appeal stated thus: -

"The tests as to when an appellate court may interfere with an award of damages was stated by Law JA in Butt V Khan, Civil Appeal 40 of 1977 (a case referred to in another context by learned Judge) as follows:-

"An appellate court will not disturb an award of damages unless it is so inordinately high or law as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This direction has since been followed frequently by this court. The assessment of damages is a question which we who have had the task of doing so have frequently found to be one of the utmost difficulty. As lord Morris said in H West & Son Ltd V Shephard (1964) AC 326, at P. 353:-

The difficulty task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. IN a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

"(Also see Kenya Bus Service Ltd V Jane Karambu and Another C.A. 241 of 2000, Mohammed Mohamoud Jabane V Highstone Butty Tongo, Olenja C.A.2 of 1986, Kemtro Africa Ltd T/a "Meru Express Services (1976) and Another V Lubia and Another (1987) KLR 30, Kitovi V Coastal Bottlers Ltd (1985) KLR 470)."

25. In the end, I allow the appeal and hereby set aside the decision on quantum by substituting it with an award of Kshs. 358,000/= to the Respondent. The aforesaid award is tabulated as follows: -

Liability 70% :30% in favour of the Respondent

a) Special Damages - Nil .

b) Pain and suffering - Kshs. 100,000/=

c) General Damages

(8,000 x 12 x 20 x 1/3) - Kshs. 640,000/=

d) Loss of expectation of life - Kshs. 200,000/=

Total - Kshs. 940,000/=

Less award under Fatal Accident Act - Kshs. 300,000/=

- Kshs. 640,000/=

Less 30% Contributing Negligence - Kshs. 282,000/=

Net Total due - Kshs. 358,000/=

26. As the parties have won and lost in one way or the other in the appeal, each party shall bear their respective costs of the appeal but costs of the Lower Court shall go to the Respondent with interest.

DATED AND SIGNED AT SIAYA THIS 17TH DAY OF NOVEMBER 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT ON 24TH NOVEMBER 2017.

In the presence of:

M/S Omollo: for Appellant

M/S Kuke: for Respondent

Court Assistants:

1. Kevin Odhiambo

2. Beryl Kachuodho

J.A. MAKAU

JUDGE