



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 13 OF 2016**

**(CORAM: J.A. MAKAU – J.)**

**KENYA WILDLIFE SERVICE.....APPELLANT**

**VS**

**CLIFF ODINGA OBADHA (*suing as the Personal Representative of the Estate of***

**DANIEL OTIENO (*Deceased*).....RESPONDENT**

***(Being an Appeal against the Judgment dated 13.10.2016 in Civil Suit No. 33 of 2013 in Bondo Law Court before Hon. M. Obiero – S.R.M)***

**J U D G M E N T**

1. The Appellant was the Defendant at the Lower Court whereas the Respondent was the Plaintiff. The Respondent through his Plaintiff dated 23<sup>rd</sup> May 2013 sued the Appellant seeking 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 filed a statement of defence dated 24<sup>th</sup> June 2013 denying liability and seeking that the Respondent's suit be dismissed with costs.

3. The Respondent gave evidence and called one witness whereas the Appellant called one witness. That upon conclusion of the case, the trial court found for the Respondent on liability at 70:30 per cent; General damages Kshs. 1,360,000/=; Pain and suffering Kshs. 20,000/=; Loss of expectation of life Kshs. 500,000/= less 30% Contribution Levy Kshs. 1,316,000/= less Advance Compensation of Kshs. 200,000/= leaving Net Total of Kshs. 1,116,000/= plus costs and interest.

4. The Respondent's case is that PW1, Cliff Odinga Obadha, a fisherman is a brother to the deceased Daniel Otieno who was on 3<sup>rd</sup> September 2012 attacked and killed by a hippopotamus. He was survived by 3 children aged between 3, 5 and 7 years; who were under custody of PW1 following the death of his brother as his wife had died earlier on. The deceased was aged 38 years. PW1 obtained grant of Letters of Administration in respect of his brother's estate in Succession Cause No. 25 of 2013 which he produced as exhibit 1, Death Certificate as exhibit P2, Burial Permit as P3. Letters of Administration P.exhibit 4 dated 12<sup>th</sup> November 2012; Postmortem exhibit P5. PW1 upon reporting the matter to KWS, he was issued with a form exhibit P 6 and paid Kshs. 200,000/=. PW1 stated he sued KWS because they look after the hippopotamus and for failure to control them by putting them where they are supposed to be put and for leaving them unattended. He claimed damages for the children of the deceased urging the amount given to him of Kshs. 200,000/= was very little. PW1 stated the deceased was knocked by hippopotamus and drowned.

5. PW2, Armstrong Akach testified that the deceased Daniel Otieno, who was known to him, was involved in an accident on 3<sup>rd</sup> September 2012. He saw a hippopotamus knocking the boat he was in and as it turned upside down and capsized. That all passengers drowned and died. That PW2 and others tried to assist but were too late. He blamed the hippopotamus and KWS for failing to take care of the hippopotamus.

6. The Appellant's witness Amos Nyaoro, an employee of KWS is a Senior Sergeant in Charge of Human Wildlife Conflicts, who coordinates reports coming from the field and verifies them by going to the field. DW1 testified that he is aware of this case stating that on

3<sup>rd</sup> December 2012 when the incident occurred, KWS went to the beach and denied KWS was negligent relying on the **Wildlife (Conservation and Management) Act, Cap 376, Laws of Kenya**. He urged that their mandate include educating people of the dangers of the animals in the lake amongst others. He testified the animals include hippopotamus urging that they are not supposed to fence off the lake as that is the natural habitat for the animals. He added that animals only run after animals after provocation. DW1 stated upon visiting the scene, they found the boat that had been hit at the shore of the lake, while casualties had been taken to Bondo District Hospital whose particulars including the deceased herein they were supplied with that KWS paid Kshs. 200,000/= in respect of the deceased herein as compensation. He urged KWS is not wholly liable as the victim, did not take any safety precautions as a hippopotamus always gives an alarm before an attack.

7. The Trial Court in its judgment apportioned liability at 70%:30% in favour of the Respondent and proceeded to apply a multiplicand of Kshs. 10,000/= notwithstanding no evidence was read on the deceased's earnings. The Trial Court applied a multiplier of 17 years which the Appellant did not challenge the Appellant challenged the multiplicand of Kshs. 10,000/= urging Kshs. 20,000/= would have been appropriate would have been appropriate whereas the Respondent stated the multiplicand applied by Court of Kshs. 10,000/= was appropriate. Both Counsels agreed that the sum of Kshs. 520,000/= awarded by Trial Court under the Law Reform Act should be declined in full.

8. The Appellant being aggrieved by the Trial Court's judgment, preferred this appeal through a Memorandum of Appeal dated 15<sup>th</sup> September 2016 filed by M/s Siganga & Co. Advocates setting out six (6) main 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.*

9. 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 disturb 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 low 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, Kentro 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.”*

10. The Upshot is that the appeal succeeds and I hereby set aside the decision on quantum by substituting it with an award of Kshs 929,000/= to the Respondent. The aforesaid award is tabulated as follows: -

**Liability 70%:30% in favour of the Respondent**

Kshs

a) General Damages  $(8,000 \times 12 \times 17 \times \frac{2}{3})$  - 1,088,000/=

<i>b) Pain and suffering</i>	-	<i>20,000/=</i>	
<i>c) Loss of expectation of life</i>	-	<i>500,000/=</i>	
<i>Sub Total</i>	-	<i>1,608,000/=</i>	
<i>Less 30% Contributing Negligence</i>	-	<i>482,000/=</i>	
			- <i>1,126,000/=</i>
<i>Less Advance Payment</i>	-	<i>200,000/=</i>	
<i>Net Balance due</i>	-	<i>926,000/=</i>	

11. 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 DAY OF 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**