REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 103 of 2007

ASHFORD MURIUKI ……. APPELLANT

VERSUS

CPL. DANIEL MUANGE …….. 1ST RESPONDENT

RANGER DAVID KITHINJI ……. 2ND RESPONDENT

RANGER WILLIAM …….. 3RD RESPONDENT

RANGER JAMES MURUNGI ……. 4TH RESPONDENT

KENYA WILDLIFE SERVICE ……. 5TH RESPONDENT

(Appeal from the Judgment/Decree of Hon. Mr. J.R. Karanja Chief Magistrate delivered on 7th September 2007 in Meru CMCC No. 269 of 2003)

JUDGMENT

The appellant was the plaintiff in the chief magistrate court Meru Civil case No. 269 of 2003. In that claim, he sued the defendant (respondent) for wrongful assault by shooting by the first to the fourth respondents in his right leg. He claimed for general and special damages from all the respondents. The evidence that was adduced before the lower court by the appellant was that on 26th June 1999 he had

gone into Chogoria forest in search of his stolen power saw. He said that the saw had been stolen a few weeks earlier. He went into the forest at 9am and remained there until 6pm. He located those who had stolen the saw. He named them as Njagi and Kiruja. These people were known to him. When he approached them, Njagi dropped the power saw and escaped. Kiruja stood by as he confirmed that the saw belong to him. After recovery of the saw he begun to return home. Whilst still in the forest he met 4 Kenya Wildlife services (KWS) Game Rangers. According to him, they ordered him to stop and sit down. They questioned him about where he was coming from with a panga and a power saw. He explained to them but they were unwilling to accept his explanation. They accused him of cutting down trees. They asked him for a bribe so that they would not confiscate the saw and he gave them Kshs. 3,000/=. They had asked for Kshs. 7,000/=. When he gave them the money they stood together and he noted that they were all armed. Then one fired and shot him on his right leg. The rangers quarreled amongst themselves and went away. The one who shot him remained behind and after a while the others returned. They placed him in their vehicle and took him to the police station. He said that the rangers alleged that he had been injured by the power saw. The rangers took him to Chogoria hospital where they paid Kshs. 3,000/= for his admission. The appellant remained in hospital for 2 months. He incurred expenses to the tune of Kshs. 189,030/=. He produced receipts in respect of those expenses. His leg did not heal and in the end it had to be amputated. He at the time of giving evidence said that he was using an artificial leg. He produced a P3 that had been filled at Chogoria hospital. He also produced medical notes from the same hospital. After his discharge, he had been attended by Doctor Macharia who prepared a medical report for him. He stated that he was not charged with stealing forest produce. He could not identify which of the respondents had shot him. He then stated that he had sued KWS since it was the employer of the first to the 4th respondents. Although he had now healed by the time he was testifying he said that he was now disabled. That he only walks with the aid of a stick. He conceded that he had not received permission to enter into the forest. On being cross examined, he said that the rangers had taken the law into their own hands instead of reporting the matter to the police. He conceded under cross examination that although he knew who had stolen his power saw he had not reported it to the police. He was emphatic that he entered the forest at 9am. Attention was drawn to one of his exhibits number 8 being a letter written by his advocate to the Attorney General making demand over this action and dated 6th March 2000 where his advocate stated as follows:-

"***Under instructions from the above named, we must address you as hereunder:-***

That on 27th day of June 1999, at around 1.00am our client was returning home from Chogoria forest after tracking down thugs who had stolen his power saw, when forest rangers Cpl. Daniel Muange…… ranger James Mutungi …. ranger William…….and ranger David Kithinji …….unlawfully and without any cause at all shot and seriously injured him."

Although that letter written by the appellant counsel stated that the appellant met with the respondents at 1am, in evidence, the appellant refuted that and stated that he met the respondents at 9am. In further cross examination, the appellant conceded that when the respondents told him to sit down he did fall down. This is material because as with seen from the evidence of the respondent, it is their case that the appellant fell down and injured himself with the power saw. The appellant was recalled and in evidence stated that he was earning a monthly income of Kshs. 10,000/= and because of his injury, he was no longer able to continue working. He therefore made a claim for loss of earning. On being cross examined on this issue, he said that he earned an income of Kshs. 9,771/= per day. That contradicted his evidence in chief that he was earning Kshs. 10,000/= per month. Dr. Macharia was the first witness for the appellant. He first examined the appellant on 25th January 2000. It should be noted that the incident at Chogoria forest occurred in June 1999. He examined the appellant who he described having suffered

injuries of a gun shot. He produced the medical report he had prepared after the examination. He however conceded that in making the report, he relied on other medical reports and notes and also on the history given to him, presumably by the appellant. The 2nd witness for the appellant was one who described himself as an accountant cum business man. He said he had known the appellant since 1985. He had been responsible for keeping his books of accounts up to 1998. The appellant according to him was carrying out what he called power saw business. The appellant requested him to compile a report of his earnings for the periods 1985 to 1988. The appellant gave him his books of accounts where each revealed that he was earning Kshs. 977/= per day. He produced his report on the appellant's earnings. On cross examination this witness confirmed that he was not registered as an accountant. He also stated that he was unaware whether the respondent was paying income tax. His report was based on the record of income made by the appellant. The 3rd witness for the appellant was a Doctor who produced the P3. In his evidence he said that the appellant had allegedly been shot with a firearm when he was taken to the hospital. The witness confirmed that he had not examined the appellant personally. The respondent's defence was essentially supported by the evidence of the 3rd respondent. In evidence he said that he is a warden with KWS based at Meru National Park. He confirmed that the 1st, 2nd and 4th respondents were his colleagues. They were together on 27th June 1999. On that day they went to Chogoria area of Meru in pursuit of information they had received that there was illegal logging. They entered the forest at 7pm. While patrolling the forest at 11pm, they heard the sound of a power saw. They decided to investigate by following the sound. It took them quite sometime because of the terrain of the forest. At about midnight, they reached what he called the forest barrier. They parked their vehicle there and begun to go on foot. They had spotlights. At 1am they reached where the sound was coming from and they spotted 5 people. These people had divided themselves. Two of them were cutting logs using power saw. When they accosted them they run away except the one who was holding the power saw. This one begun to charge towards them with the power saw still on and in his reaction he shot his gun on the ground in an attempt to stop him. The man continued charging at them but suddenly he slipped rolled downwards whilst the power saw was still on. They followed him and found that he had injured himself with the power saw. They took him to the police station and the police instructed them to take him to Chogoria hospital. On being cross examined, this respondent said that he fired on the ground and not to the person who was charging at them. He stated that the appellant was not shot by any of them but that he was injured by the power saw. He however later on stated that he was not sure whether he shot the appellant. All the other respondents' number 1, 2 and four adopted the evidence given by DWI. The learned magistrate in his considered judgment found the 3rd and 5th respondents liable for assault of the appellant and awarded the appellant Kshs. 500,000 as general damages. He also found that the appellant contributed to the assault by 40%. It is that judgment that the appellant has appealed against. The appellant has brought four grounds of appeal as follows:-

1. THAT the learned chief magistrate erred in law and in fact in apportioning liability at 60:40 as between the 3rd respondent and the appellant respectively when the issue of contributory negligence was not pleaded by any of the respondents in the defence and despite having found as a fact that the respondents used excessive force in shooting the plaintiff in the circumstances.

2. THAT the learned chief magistrate erred in law and in fact in not finding that the appellant had proved his claim for loss of future earnings after disregarding the accountants report produced in evidence and erroneously proceeding to hold that the appellant whose right leg was amputated below the knee would not require his legs to operate a power saw.

3. THAT the learned chief magistrate erred in law and in fact in failing to find that the 1st – 4th

respondents all directly or indirectly participated in shooting the appellant and thus erroneously proceeding to dismiss the appellants suit against 1st, 2nd and 4th respondents with costs.

4. THAT the learned chief magistrate erred in law in awarding the appellant general damages for pain, suffering and loss of amenities which viewed against the injuries sustained and the circumstances of the case are so inordinately inadequate as to warrant this honourable court's interference therewith.

In the first ground the appellant faulted the learned magistrate for apportioning liability 60 – 40%. I will consider ground number 1, 3 and 4 together because they touch on liability. In my view, having considered the evidence tendered on behalf of the appellant, I find that the appellant failed to prove liability against the respondent. The evidence tendered by the appellant in my view clearly show that the appellant was not a credible witness. The appellant was emphatic that he entered the forest at 9am and was on his way out at 6pm when he was arrested. As stated before, his documents do not support his version of being in the forest. In particular, his advocate's letter which is quoted in this judgment above, further, the Chogoria medical card shows that the appellant was received on 27th June 1999 at around 12 midnight (12mn). Further, the P3 produced by the appellant the part which is filled by the medical officer number 2 shows that the report was made at midnight 26th June 1999. I find that the appellant evidence cannot be relied upon. Even the reason given by the appellant for being in the forest is not altogether credible. The appellant did not give details of the circumstances under which he lost his power saw to those people he said he knew. Having lost it, and having admitted to knowing the people who had taken it, he did not sufficiently explain why he did not report to the police. It is not credible that he would on his own enter the forest with a view to recovering his saw at the risk of being injured by those who had stolen it. The more credible version is that given by the respondents. That is, the appellant was in the forest with others and they were in the process of logging. Since I find that the evidence of the respondents to be more credible, it is in my view, believable that the appellant was then injured as a result of his own mischief. In saying so, I am in agreement with what was stated by the learned magistrate in his judgment as follows:-

"***A person found in a protected forest in the hours of darkness without any likeable (sic) authority and/or probable reason would to any reasonable person raise great suspicion as to his intentions therein. He would for all intents and purposes be treated as a trespasser up to no good.***"

The learned magistrate in his summary of the evidence did also accept the evidence tendered by the respondents that the appellant was left by others who they were logging with and begun to charge at the warders. The learned magistrate was of the view however that the wardens were not entitled even under those circumstances to have used excessive force. There we part company with the learned magistrate because I am of the view that the evidence before court was not conclusive that the appellant had been shot. The evidence produced by the appellant relating to his treatment all relied on the report given by the appellant. Even the P3 talked about him being injured by a high velocity missile. No evidence was tendered what that could be. It certainly was not proved that such a missile cannot be a power saw. For that reason, I am of the view that the learned magistrate erred in finding that the appellant had proved his

claim on liability against the respondents. In my view, he failed to so prove. In perusing the lower court file, I did find that the appellant obtained by consent leave to amend his plaint on 27th January 2004. The appellant failed however to pay for that amended plaint. Any document which requires payment cannot be accepted unless it is paid for. See Section 71(1) of Interpretation and General Provision Act Cap 2. Because that amended plaint was not paid for, the same ought not to have been entertained by the court. In the amended plaint, the appellant enhanced his claim for special damages for Kshs. 63,664.40/= to Kshs. 174,634.40/=. That enhanced claim cannot be entertained by the court because the amended plaint was not properly before court. The court should then have resorted to the original claim where although in the body of the plaint the appellant had claimed Kshs. 63,664.40/= in the final prayer he had not specifically prayed for that special damages either for failing to be made in the final prayer of the plaint. As a consequence, the court cannot entertain his claim for special damages. The appellants claim will also fail because the appellant in filing this appeal failed to extract the decree of the lower court. According to Order XLI rule 8 (B) (4) (a) (b) (f) and (ii). That Rule provides as follows:-

"***Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in possession of either party have been served on that party that is to say:-***

(a) …….

(b) ……..

(c) ……..

(d) ……..

(e) ……

(f) The judgment, order or decree appealed from and where appropriate, the order (if any) giving leave to appeal:

(g) ……

Provided that:-

(i) ……..

(ii) ***The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a) (b) and (f).***

The appeal not being accompanied by the decree makes the same to be incompetent and liable to be struck out. Finally, I wish to also state that the appellant did not plead vicarious liability against the 5th respondent. Indeed there is no claim in the plaint against the 5th respondent. His claim against that respondent also fails. In the end, the judgment of this court is as follows:-

1. The appellant appeal for enhancement of his claim fails and this court does hereby set aside the judgment in Meru Civil Case No. 269 of 2003 delivered on 7th Sep. 2007 and is substituted with an order dismissing that suit with costs to all the respondents.

2. The respondents are awarded costs of this appeal as against the appellant.

Dated and delivered at Meru this 26th day of November 2009.

MARY KASANGO

JUDGE