



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 113 of 2006

MATHEW OTIENO ONUKO APPELLANT

VERSUS

KENYA WILDLIFE SERVICES LTD RESPONDENT

(Appeal from judgment of Hon. Mrs. Oluoch Resident Magistrate in Kisumu CMCC Number 675 of 2000 delivered on 12th September 2006)

JUDGMENT

The plaintiff Mathew Otieno Onuko instituted proceedings against the defendant corporation for damages arising from the injuries he sustained on the 15th April 1995, when a stray leopard attacked him at his home in Nyamira District. The stray leopard had escaped the guarding of the defendant, which is responsible for guarding all wild animals found within Kenya. It is the plaintiff's case that he is a farmer in Nyamira District and on the material date between 10:00 a.m and 11:00 a.m he was grazing his cows about 300 yards from his home when he was attacked and injured by a leopard. He was bitten on the head, neck, back thighs, hand and stomach. He sought treatment at Koridi Health Centre where he was admitted for two weeks. Thereafter, while at his home he was approached by officers from the defendant corporation and asked to obtain a P 3 form and fill forms obtained from the defendant's office at HomaBay. He was later examined by a doctor who compiled a medical report. He contends that the defendant was to blame for his injuries in that it failed to take care of the wild animal.

The defendant in its statement of defence challenged the institution of the suit by the plaintiff on the ground that it discloses no sustainable cause of action against itself on account of the Wildlife (Conservation and Management) Act Cap 376 Law of Kenya which specifically makes statutory provisions governing all matters relating to compensation claim on account of wildlife transgression. The defence is also a denial of the allegations of negligence made against the defendant by the plaintiff and a

contention that even if the plaintiff was attacked by a leopard the attack must have been a direct consequence of the plaintiff's own negligence and reckless conduct. In any event, the defendant further contends that the plaintiff was fully compensated under the Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya.

The matter was fully heard by the lower court and a judgment delivered on the 12th September 2006, by the Learned Resident Magistrate C. M. Oluoch who made a finding that the plaintiff failed to prove his case on a balance of probabilities. The suit was therefore dismissed with costs.

Being dissatisfied with the judgment the plaintiff has now appealed to this court on the basis of the grounds contained in the Memorandum of Appeal filed herein on the 9th October 2006. The said grounds are as follows:-

- (i) The learned trial magistrate erred in law and fact by failing to assess damages payable to the appellant had he not received the award of the respective District Committee of the Respondent.
- (ii) The learned trial Magistrate erred in law and in facts by failing to take into consideration the fact that the award of Kshs. 7,500/= was paid after the filing of this suit
- (iii) The learned trial Magistrate erred in law and fact by failing to give due regard to the injuries sustained by the appellant in reaching the decision of the award payable to the appellant
- (iv) The learned trial Magistrate erred in law and fact in dismissing the appellant's suit

At the hearing of the appeal the plaintiff was represented by M/S Omollo who stated that the appeal was only against quantum of damages. She argued that the trial Magistrate erred in law and fact by making a finding that she could not enhance compensation payable to the plaintiff / appellant because that would amount to sitting on appeal against the decision of the Wildlife Committee. She said that the payment by the District Wildlife Committee was made after the commencement of this suit in the lower court. She further said that the appellant was entitled to an award of damages from the lower court and that the lower court erred in law and fact by dismissing the appellant's suit when it had been proved and the defendant/respondent found fully liable for the injuries suffered by the appellant. She also stated that even after the dismissal of the appellant's suit, the trial court had the obligation to assess damages. She therefore contended that the trial court reached a wrong holding with regard to the award of damages and prayed that the appeal be allowed with an order to the trial court to assess and award damages.

Mr. Aringo appeared for the respondent and started by conceding to the fact that damages ought to have been assessed by the trial court. However, his position was that an award of damages by the trial court would have been an appeal against the decision of the District Wildlife Committee since a claim for compensation had been filed before the commencement of the appellant's suit. He argued that in any event the time for making a complaint is immaterial for purposes of determining whether or not the trial was the lower court was an appeal. He said that Section 62 of the Wildlife (Conservation & Management) Act provides for compensation and the same was discharged by the District Wildlife Committee. He further said that the appellant having chosen compensation under the Wildlife (conservation & management) Act could not file a Civil suit for compensation. He therefore contended that the trial court did not err by dismissing the appellant's suit even though liability was found against the respondent. He urged this court to dismiss the appeal with costs.

It is always the duty of the first appellate court to evaluate the evidence before the trial court and treat it to a fresh scrutiny and having done so, this court is in agreement with the finding of the trial court in that the defendant was at fault and 100% liable for failing to keep the offending wild animal under guard. Indeed, the respondent's officer Dickson Tom (DW1) conceded that the defendant's responsibility is to manage all Wildlife within the Republic of Kenya. The leopard which attacked and injured the appellant was no exception whether or not it strayed from the Maasai – Mara or any other national park.

Having found that the respondent was liable, the trial court should have gone further to assess the

damages payable to the appellant. This was not done thereby constituting an error on the part of the trial court. The reason given for the failure to assess and/or award damages was that the Wildlife (conservation and management) Act, Cap 376 Laws of Kenya, mandates the District Committee to award compensation to victims of wildlife attacks and in that regard, the appellant was duly paid compensation thereby disentitling him of any additional claim by way of a civil suit such as the present one. The trial court therefore held that the appellant's claim was not proper before the court.

The trial magistrate rendered herself thus: -

“ The plaintiff confirmed having been paid Kshs. 7,500 as compensation. This was after he had instituted the present suit. Under Section 62 (1) of Cap 376 an aggrieved party may apply for compensation to the District Wildlife Committee. If he elects this mode of compensation question is, does he have a right to seek further compensation from court?. The Act is not clear on this issue but my considered view is that a party should elect to prove compensation through the court by suit or the District Wildlife Committee but not both. By asking this court to enhance the award would be tantamount to appealing against the decision of the District Wildlife Committee”.

With respect to the learned trial magistrate, the aforementioned finding was erroneous in law and fact. She seemed not to have taken consideration of or was not aware of the decision of this court by Justice Warsame in Kisumu Civil Appeal Number 124 of 2002, which involved the present parties i.e. Mathew Otieno Onuko =vs= Kenya Wildlife Service Ltd.

The case was an appeal by the appellant therein and herein against the respondent therein and herein challenging the ruling of a Senior Resident Magistrate dismissing the appellant's suit in the lower court for lack of jurisdiction. This is the same present suit, which had earlier on 16th November 2001, been dismissed for want of jurisdiction following a preliminary objection by the respondent raised on the basis of Section 62(1) of Cap 376 laws of Kenya. The respondent had argued that Section 62 (1) of Cap 376 laws of Kenya ousted the jurisdiction of the court thereby requiring parties to a dispute to pursue settlement provided under Section 62(2) of the Cap 376. The trial lower court herein appears to have taken the same view when it said that a party should elect to come to court or go to the District Committee but not both. It held the position that enhancing the award made by the District Committee was tantamount to appealing against the decision of the said committee.

This was a serious misdirection as would be demonstrated hereinbelow by extracts from the decision of Justice Warsame in C/APP NO. 124 / 02 (supra). The learned judge dealt with Section 62 of Cap 376 law of Kenya and stated as follows: -

“ The section talks of a procedure which can be followed or used by a party who is aggrieved (sic) the acts or omission related to Kenya Wildlife whether the person suffers personal injury or loss of damage to crops or property. It is essential to appreciate that Section 62 (1) of Cap 376 is not candid in mandatory terms. However, it states that a person so affected can make an application to the District Committee of the specific area where the claim occurred.”

The said section 62 (1) of Cap 376 provides:-

Where after the appointed day any person suffers any bodily injury from or is killed by any animal or suffers any damage to loss of crops or property or in the case of deceased person, any other person who was dependant upon him at the time of his death may make application to a District Committee established by this Section for the award of compensation for such injury or death or damage or loss2.

The learned judge stated further that:-

"The power to restrict or oust the jurisdiction of the court must be express and where a party is given an option to resolve his dispute with another party there can never be fault if the persons resorts to the court. The words used on Section 62(1) of 376 is may make application to a district committee and in my understanding where the word “may” is applied or used you are given the permission to elect several

options. And the use of the word “may” on Section 62(1) expresses a possibility of either resorting to the District Committee or the court in order to determine the dispute. The jurisdiction of the court is derived from the exercise of judicial authority for the Administration of Justice and the doors of justice cannot be shut by the use of the word “may” therefore in my opinion the provisions cannot oust or usurp the express powers of the court as found on Cap 10 and 21 laws of Kenya”.

This court would associate itself with the said opinion of the learned judge and add that the trial magistrate was under obligation to assess and even award damages over and above what was awarded by the District Committee. The claim herein was essentially for general damages for pain, suffering and loss of amenities arising from the respondent’s negligence and breach of duty of care to those who may in one way or another come into contact with a wild animal normally expected to be confined in a national park or reserve. The compensation made to the appellant was a matter of course and could not preclude him from filing a civil suit for general damages. The compensation was without prejudice to the appellant’s right to pursue further compensation through the civil court system. The dismissal of the appellant’s suit by the lower court was improper.

Consequently, the appeal is allowed to the extent that the order of dismissal of the case by the lower court be and is hereby set aside with the result that the case is reinstated and remitted back to the trial court for assessment and award of general damages. The trial court in the present context would mean the actual trial magistrate or any other with equal or competent jurisdiction. These are the orders of the court.

Dated, signed and delivered at Kisumu this 18th day of June 2008.

J. R. KARANJA

JUDGE

JRK/aao