



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 513 of 2003

- 1: Civil suit – TORT
2. Occupiers liability
 - a) Wilderness lodge on private land specializing inter alia on foot safaris
 - b) Three guests go out jogging with masai guide/ employee of lodge
 - c) Four are attacked by an elephant but only plaintiff is gored and injured
3. Plaintiff, female adult aged 40 years old in 2000

Injuries:-

- a) Intra-abdominal trauma – kidney & duodenum
 - b) Elephant tusks goes through upper right thigh, lower right calf
 - c) Damage to musculocutaneous nerve left arm
 - d) Fracture – pelvis, left side, four rami fractures anteriorly, displacement of left hemipelvis, left suprapubic ramus fracture-acetabulum
 - e) Loss of L5
 - f) Laceration
 - g) Rib fractures
 - h) Head injury
 - i) Dislocation/sterno clavicular joint
 - j) Fracture of left thigh
4. Plaintiff airlifted to Nairobi, airlifted to England
 5. No compensation paid

a) After 3 years almost expiring transpired no insurance cover

b) Insurance cover for 2nd and 3rd defendant repudiated

6. Defence:

a) denies jogging authorized

b) Guide really a waiter at lodge

c) Remedy lies with the Wildlife (Conservation and Management) Act Cap.376 Laws of Kenya

Defendant No.1 denies links with defendant 2 and 3 and vice versa

7. By consent letter of 25.5.06 separate trials on issues of liability and damages be held

Conen v Payne & Another

[1974] 2 ALL ER 1109

8. Liability only:

1: Issues

a) Did the second and or third defendant control, direct and advise the first defendant and or IL Ngwesi lodge (hereinafter referred to as “the lodge”) on the activities caused on at the Lodge for the benefit of its guest so as to be occupiers of the Lodge within the meaning of the occupiers liability act Cap.34 Laws of Kenya

b) Did the defendants (or any one of them) own the plaintiff a common duty of care by virtue of section 3 of the occupiers liability act or otherwise?

c) Was the plaintiff injured as a result of the defendants (or any one of them) and/or their agents breach of that duty of care?

d) Are the defendants or any of them relieved of liability by virtue of the Wildlife (Conservation and Management) Act Cap.376 Laws of Kenya.

9. Held: There is a duty of care. Liability at 100%

10. Statute

a) Occupier Liability Act Cap.34 Laws of Kenya 1989.

b) Judicature act Cap 8 Laws of Kenya

c) The Wildlife (Conservation and Management) Act

d) Royal National Park Order

e) Seasonal paper 7 of 1957/58 – Report of the 1956 gave policy committee

f) Seasonal papers No.3 of 1975 – statement on future wildlife management policy in Kenya

g) The Wildlife (Conservation and Management Act) 1976

- h) Legislature supplement No.26 (LN No.120). The Wildlife Conservation and Management Prohibition on hunting and wild game”
- i) Act No.5/1978; LN 181/1979
- j) The Wildlife (Conservation and Management) (Amendment act) No.16/1989
- k) State Corporation Act No.11/86
- l) Occupiers Liability Act, 1957 (England and Wales)
- m) Occupiers Liability Act 1984 (England and Wales)
- n) Civil procedure Act order 1 r 21 Civil Procedure Rules

11. Text Books

I: Bench Research Hotline

- o) Law of TORT – John Cooke 5th edition 2001
- p) Background to Human Wildlife conflicts in Kenya – Kenya Land Alliance
- q) Policy Dimensions in Human –Wildlife conflicts in Kenya
evidence from Laikipia and Nyandarua District – Institute of policy analysis and research (1 part)
- r) Wildlife Conservation and Management in Kenya. Towards a co-management approach John Mburu centre for development Research (ZEF) University of Bonn.

III: Supplied by plaintiff

- s) Financial and Livelihood impacts of IL Ngwesi Lodge Laikipia District Kenya by George Michael Sikoyo with Caroline Ashley and Joana Elliott (African Wildlife Foundation)
- t) The role of community wildlife – based enterprises in reducing human vulnerability and environmental degradation.
- u) The case of IL Ngwesi Ecotourist Kenya by John Waithaka

12. Case law:-

- a) Wheat v E. Lacon & Co. Ltd 91966) I ALL ER 582
- b) Hassan & Another v Soma Properties Ltd (2004) Hccc1517/02 Ang’awa,J
- c) British Railways Board v Herrington (1972) Act 877
- d) Ivot v Wilks (1814-23) All ER 277

III: Discovery

- e) Dr. Lubna Khawanja v Dr. Hizart Verje

Unreported Hccc1576/2001 (Waki, J).

f) Wendy Martin v IL Ngwesi company Ltd & Others (2005) IEA 382, (Ojwang,J)

IV Case Law: Liability.

g) Glasgow Corporation v Taylor (1922) 1AC 44

h) Phipps v Rochester Corporation (1955) IQB 450

i) Hamis v Birkenhead Corporation (1976) I WLR 299

13. Advocates

Pheroze Nowrejee leading S.Kapila & S. Nagi & instructed by Kapila Anjawalla & Khanna Advocates for the plaintiff

S.M. Mwenesi instructed by Mwenesi & Co. Advocates for the defendants 1,2 &3.

WENDY MARTIN PLAINTIFF

VERSUS

IL. NGWESI COMPANY LTD.....1ST DEFENDANT

THE LEWA WILDLIFE CONSERVANCY.....2ND DEFENDANT

IAN HAMISHI CRAIG.....3RD DEFENDANT

JUDGMENT ON LIABILITY

1: PROCEDURE

1. By a consent letter filed herein of the parties to the application dated 25th May 2006 filed by the plaintiff, that this trial should be heard separate on the issue of liability and that of damages. (Coenen V Payme & Another [1974]

2 ALL ER 1109).

2. The issue for discovery was dealt with by Ojwang J in his ruling of 25 February 2005. (Wendy Martin v IL. Ngwesi Company Ltd & 2 Others (2005) I EA 382). The Hon. Judge was transferred to the Criminal Division and was not able to proceed with this case. The file was placed before his court for hearing of the main suit as this court then dealt with personal injury claims.

II: Parties

3. Wendy Martin, the plaintiff herein is a resident of England. In 2000 she was in Kenya because her husband then was employed as a diplomat and had just reached the tail end of his contract. She sued the three defendants being IL Ngwesi Co. Ltd Company Ltd, Lewa Wildlife Conservancy and Ian Hamish Craig in TORT for injuries sustained as a result of being attacked by a rouge elephants. She is represented by M/s Kapila Anjarwalla & Khann & Co. Advocates.

4. The three defendants filed separate memorandum of appearance and separate defence denying any liability. All three were represented by M/s S. Musalia Mwenesi advocates.

III Background

5. Wendy Martin together with her husband and children drove with a convoy of other couples and their children to a remote lodge known as IL Ngwesi Lodge. This was to be the family last safari trip in Kenya before leaving for England. In Kenya the 1st of June 2000 is a public holiday. In the year 2000 the party arrived at the lodge. It was not the plaintiff's first trip to the said lodge. The six adults and ten children arrived at about 4 O'clock in afternoon. They were greeted by the staff and their luggage off loaded. The lodge is self catering and they did carry their own food. At the kitchen they discovered that the fridge was not working. The manager was one James Ole Kinyaga (PW3). He radioed Craig whom the plaintiff came to know as the third defendant herein and DW1 in this case. At all times she had full confidence in James Ole Kinyaga who knew what he was doing.

6. At dinner that evening, James Ole Kinyaga joined the group after the food was served. He did not sit down but stood. He engaged the group in a conversation that went to speak of the famous "marathon" held each year at Lewa Downs. James Ole Kinyaga volunteered information how he and the staff take part in the marathon and how he had a brother who participated in the Boston Marathon. The question arose and put to James Kinyaga whether it was possible to have a "run" in this bush as was done in the previous visits? Whether the children would come along or not was also discussed but if they did, the party would walk and not run. The agreement was that a guide would be available at 7.00 a.m who would meet with them. The plaintiffs retired with the children whilst the other adults remained behind.

7. The following morning the children did not wish to go out for the morning walk/run. The plaintiff went to the main lounge and there found one J. Brown talking to the guide who was dressed in a red shuka. Jenny, DW2 arrived soon after. The lodge was situated in a raised area with a circular parking at the bottom. They proceeded down the stair case and began to run led by, the guide, J. Brown with the plaintiffs and Jenny following. They ran for 15 to 20 minutes when the guide increased his pace. The plaintiff got tired and wanted to return back. The two ladies called the guide and J. Brown. They retraced their steps and returned towards the lodge. They joked as they ran back about the size of the plaintiffs feet. The run back lasted for 10 minutes before the guide screamed "stop" all three stopped. An elephant appeared in the bushes in front of them. It was trumpeting loudly. The guide then screamed "run". He gave no indication on which direction that the parties ought to run. The plaintiff ran. She remembers falling down. She was unable to out run the elephant. She went under a bush. The elephant caught up with her and pushed her on the ground for a considerable distance. Its tusks went into her body with the full weight of it on her. It crushed her, when it raised her up and landed heavily on the ground on her. The elephant struck her with its tusk. Twice she felt the tusks go directly through her torso. Twice through her right leg. Her kidney was removed. The other tusk went through her back and through her leg. Her pelvis was crushed. She was dragged for a distance. The injuries sustained as discovered was:-

A: Injuries:

- a) Intra abdominal trauma – kidney and diaphragm
- b) Elephant tusk that went through her abdomen, lumbar area upper right thigh lower right calf
- c) Damage to musculocutaneous nerve left arm.
- d) Fracture, pelvis, left side four with rami fractures anteriorly, displacement of left hemipelvis. Left suprapubic rami. Fracture acetabulum.
- e) Loss of L5
- f) Lacerations
- g) Rib fractures
- h) Head injury.
- i) Dislocation /sterno clavicular joint

j) Fracture of left thigh

8. She laid there with J. Brown by her side. Jenny came and she was able, from her medical knowledge to tell Jenny to keep her warm to counteract the effects of shock. The plaintiff was a physiotherapy by professions and was going to open up her own practice in England once she had returned from Kenya. The crowd that gathered around removed them "shukas" to cover her. She did not lose consciousness. She instructed that her legs be kept together and suggested a door be used as a stretcher.

9. A plane came piloted by the 3rd defendant Ian Craig. A nurse was at hand. She was airlifted to the nearest clinic hospital where the Italian doctors recommended immediate help be sort in Nairobi. She was airlifted to Nairobi and was admitted to the Nairobi Hospital. When she stabilized she was further air lifted to England where she recovered.

10. By the time she came to court to give evidence she had undergone fifteen to 21 operations. She gave evidence whilst standing in the witness box but fainted in court. This was caused, she states from the pain in her back and legs.

11. According to her evidence, the guide she came to know as "kip" Jonathan Kipkorir Nteeme. The manager of the hotel was one, James Ole Kinyaga and Ian Craig was the 3rd defendant and pilot who air lifted her to Nairobi by plane.

12. To her mind all along she was under the impression that

IL Ngwesi and the Lewa Conservancy was one and the same organization. The brochures and publication produced show how Ian Craig and Lewa Conservancy were instrumental in the day to day management of IL Ngwesi.

b) The defence

13. In response, the defence called evidence. Ian Craig denied that there was any link with the organization of IL Ngwesi and Lewa Wildlife Conservancy. The Lewa Downs had original been livestock farm. It went into conservation of wildlife animals having various activities. The Lewa Wildlife Conservancy was created in order to co-ordinate the activities being the promotion of conservancy of wild life beyond their boundary. Education, water project, and marathon is undertaken to assists in fund raising activities.

14. IL Ngwesi ranch – a group ranch memberships sort his assistant to be an unpaid director. In his capacity he oversaw the opening of a lodge. The staff and certain activities such as accounts and vehicle maintenance would be done at the Lewa Downs. Apart from this IL Ngwesi was a totally different organization from the Lewa Wildlife Conservancy. He produced the Memorandum of Articles of Association for either of the organizations. He admits apart from being a director of both organization he was a honorary member of the Kenya Wildlife Service, a reserve police and a pilot. In his capacity as a director he actually attends the IL Ngwesi board.

15. On the material day of 2 June 2000, he received information that there had been an accident. He got into his plane together with a nurse who had knowledge of medicine and proceeded to the site. First aid was administered upon Wendy and she was loaded onto the aircraft. She was flown to a nearby clinic/hospital but was referred to Nairobi.

16 On pursuing the allegations contained in the plaint he stated that at no time was he aware there was an activity of a bush ran. When the accident occurred his mission was purely to assist the injured guest at their request.

17. As a game warder he wrote to Kenya Wildlife Services -attention Mr. Rotich and notified him of the incident. Though he had not initially talked to the staff who were within the vicinity of the incident, he did assume that the elephant that attacked Wendy was a female with calf. That he had by now spoken

to the staff and had since changed the system and had began a strict rule that no one was to leave the lodge on foot unless accompanied by an armed guard and to ensure the rules is enforced. He then took no action.

“The action I took as director at IL Ngwesi was nothing as we were no longer responsible in “her” welfare.”

18. Kip – gave evidence and stated that he was actually employed as a waiter. He noticed the guest start to run off. He was alarmed and did not want them to go on their own. He pursued them to ensure they were safe. On the way back they were attacked by an elephant. He clapped his hands together to scare the elephant. It was persistent. The elephant attacked the plaintiff and caused her injury. He denied that he was a guide and that the run was actually planned.

19. The attacked by the elephant shocked him that he was given four days off duty. He wrote a statement that was dictated by him.

20 James Ole Kanyaga stated that the plaintiff had been rude and difficult from the time she arrived to the lodge . (Something to do with the sausages that had been bought). He denied that he organized any run. That he had a conversation over supper on the activities next day that included running. All he knew at 8.00 a.m. he was to organize for the children to be at the “bagga”. There was no run planned.

C) Dispute

21. What brought this dispute to the fore was a letter of enquiry via the email from Wendy’s husband to Ian Craig enquiring about compensation (July 11, 2000 (Ext. 21). He by now worked in Dubai but appears to often go to England for visits. He sought to know about any insurance cover.

“What [is] the situation for insurance of clients at IL Ngwesi”

He did state that the medical bill was paid by “Bupa” but this was not adequate for needs required for recuperation. It seems no reply to this email was made. Six months later, the 3rd defendant wrote to the insurance company known as AON Minet LTD notifying them of an accident that occurred on 2 June 2000. The letter is dated 19 December 2000 and written on the Lewa Wildlife Conservancy letter head. It referred to a policy number 12 PL 2131 cover No.006 9969.

Re: Lewa Wildlife Conservancy and all associate companies. The said letter forwarded a report of the accident. On January 1 2001 Wendy Martin, the plaintiff emails the 3rd defendant and makes inquiry on the “public liability insurance” that she was informed was in place at IL Ngwesi. She required more information to know how to proceed.

22. It was by a reply of that email that the plaintiff was notified to deal with the 1st defendant IL Ngwesi direct:-

“Please deal direct with IL Ngwesi Group Ranch on this issue who are the owners of IL Ngwesi. Their contact address is P.O. Box 66 Dol Dol Kenya. I hope you will continue to recover and a very happy new year to you.”

23. The plaintiff engages advocates in Kenya – Hamilton Harrison & Mathews who actually do write to the manager II Ngwesi Group ranch on January 22, 2001. She also spoke to journalist of her plight (Ext 27). The problem was it was not clear who was behind IL Ngwesi Group ranch and whether they have any insurance . . . Ian Craig, as founder member was approached to give some clarification.

24. On February 6 2001 Aon Minet Insurance Brokers Ltd wrote to the plaintiffs advocate and stated that the claim was passed on to them for further dealings and had forwarded to the Principal M/s Phoenix of E.A. Assurance Co. Ltd. The insured was described as IL Ngwesi Group Ranch/Lewa Wildlife Conservancy. The advocate for the plaintiff then was informed that their advocates M/s A.F. Gross

would be handling the matter.

25. In the meantime the plaintiff published her story with the media in England.

26. Negotiations began with a rude letter dated April 17 2001 to the plaintiffs then advocate, that the plaintiff in fact decided to go for an early morning run at 7.00 a.m before breakfast without it being organized by the staff – one of the Maasai camp staff on seeing them leave volunteered to go with them. No armed guards accompanied them. They would have if they had been notified in advance. The defendant's stand then was that the plaintiff was aware of the dangerous animals and was aware an armed guard was required. As such they requested that the plaintiff bear 50% liability as she substantially contributed in the negligence. By a plaintiff letter of May 22, 2001 this was denied. That the staff indeed knew what they were doing and did arrange the said activity including “Kip” who said he was waiting to take them on a bush jog or walk. They claimed full liability.

27. Parties attempted a meeting but it was unclear to the plaintiff who was the correct representative. That one Alexander Dixon and Charlie Mayhew would represent the IL Ngwesi group Ranch and the Lewa Wildlife conservancy. Alexandra Dixon did come to court and stated that the meeting had been set up purely that she could share her experience with the plaintiff. She too had been attacked by an elephant and also knew the trauma of such incident. It was never intended to be a meeting to come up with an out of court settlement.

28. A full detail of the insurance cover held by Phoenix Insurance was requested. This was not forthcoming. The limitation of action was drawing near. It was by a letter of 27 January 2003 that M/s Phoenix of East Africa Assurance Co. Ltd notified the brokers that the insurance policy they hold “does not fall within the scope of the policy.” They therefore repudiated the claim because when the accident occurred on 2 June 2000, IL Ngwesi Lodge was not covered by an insurance policy. M/s Lewa Wildlife Conservancy were by their letter of

30 January 2003 arranging a meeting, mentioned earlier, with Alexandra Dixon- the overseas director for Lewa Wildlife conservancy and Charlie Mayhew the Chief Executive of TUSK Trust which meeting they admitted was not authorized by the insurance company. The impression that the Lewa Wildlife conservancy had was that IL Ngwesi was covered by a public liability Insurance policy held by Phoenix Insurance that provided a cover of ksh.10 million. They disputed the liability and were of the view that the state should be responsible in compensating the plaintiff. It was then disclosed that IL Ngwesi was a separate entity from Lewa Wildlife Conservancy.

29. The plaintiffs filed suit for damages on the 29 May 2003.

IV: Issues

30. The agreed issues for determination between the parties being and is:-

- “a. Did the second and or third defendant control, direct and advice the first defendant and or IL Ngwesi lodge (hereinafter referred to as “the lodge”) on the activities carried on at the lodge for the benefit of its guests within the meaning of the Occupiers Liability Act Cap.34 Laws of Kenya?
- b. Did the defendant (or any one of them) owe the plaintiff a common duty of care by virtue of section 3 of the occupiers liability act or otherwise?
- c. Was the plaintiff injured as a result of the defendants (or anyone of them) and or their agents breach of that duty of care?
- d. Are the defendants (or any of them) liable at all?
- e. Are the defendants (or any of them) relieved of

liability by virtue of the provisions of the Wildlife (Conservation and Management) Act Cap. 376 Laws of Kenya.”

31. The suit herein is based on the Occupiers Liability Act Cap 34 Laws of Kenya an act of Parliament that commenced on 1st January 1963, to “amend the law as to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from damages due to the state of the property or to things done or omitted to be done there.”

32 This act is similar to the English Act known as the Occupier’s Liability Act of 1957. There has been no amendments or new act thereafter in Kenya. In England, Occupiers Liability are governed by two statute. The first being the Occupies Liability Act of 1957 where a claimant is a visitor. The second statute is the Occupiers Liability Act of 1984 where the claimant is a trespasser. In either case the defendants is the Occupier of the premises.

“The term occupier is . . . misleading as it is the person who controls the premises rather than the physical occupier who is responsible”

(Law of Tort John Cooke 5th edition 2001).

Four categories of Occupies were identified by Lord Denning in the case law of:-

Wheat v E. Lacon & Co. Ltd (1966) AC 522.

“Whenever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an occupier and the person coming lawfully there is his visitor.”

Thus the categories (as summarized in Law of TORT J. Cooke 5th Edition page 161) by Lord Denning.

“32.1. The Landlord who lets premises. The landlord has parted with control of the premises so the tenant will be the occupy.

32.2. The landlord lets part of a building but retains other parts such as common stair case. The landlord remains as occupier for the part of the building he has retained.

32.3. Where a landlord licenses a person to use premises and the owner has a right to enter on the premises to do repairs, the owner retains control and is the occupier and

32.4. Where independent contractor are employed to do work on premises, the owner will generally retain sufficient control to be an occupier. It is possible that the contractor will also be occupiers. This will depend on the amount of control which they have while the work is in progress.”

33. The issue therefore before this court is whether the three defendants had sufficient control over the said premises and environs and are therefore occupiers. If they were occupiers was the plaintiff Wendy Martin a visitor?

34. The advocate for the three defendants relied on the case law of British Railways Board v Herrington (172) AC 877. This case law fell under the category of cases known as liability to trespass “a trespasser is a person who goes on to land without an invitation of any sort and whose presence either is unknown to the occupiers or if known is objected to” law of Tort John Cooke (supra) page 171.

“The common law in England is said to have been traditionally hostile to trespassers. The original duty owed was the basic one of not intentionally or recklessly injury a trespasser know to be present (Addie v Dumbreck Colliers (1929) AC 358. This was the law until 1972 where the case law of British Railway Board V Herrington (1972) Act 877 introduced a new duty on what would “amount to legal fiction” that is implied licenses and allurements to turn trespassers into visitors in deserving case mainly involving

children". The new duty so introduced, the occupier owed a duty of common humanity to a trespasser. This case law resulted to the Law Commission considering the criticism raised herein (Law commissioner 75 Cmnd 6428). It is this case that formed the bases of the Occupiers Liability Act of 1984 which act is not Kenyan law and not applicable.

It is this act that applies to persons other than visitors. It touches on activity duty and occupancy duty.

35. The other aspect I require to touch on is the issue of "duty of care". I had stated in the case law of Hassan & Another v Soma Properties Ltd (2004) E KLR, Hccc1517/02 that under the English act section 2 it provides:-

"An occupier of premises owes the same duty

35.1 The common duty of care to all its visitors except in so far as he is free to and does extend restrict modify or exclude his duty to any visitor or visitors by an agreement or otherwise.

35.2. The common duty of care is a duty to take such case as in all circumstances of the case is reasonable to see the visitor will be reasonable safe in using the premises for the purposes of which he is limited or permitted by the occupier to be there."

36. This sections is identical to the Kenya Act Cap 34 laws of Kenya by section 3(1) and (2). It therefore provides that the occupier of premises owes a common duty of care to all lawful visitors to the premises. It is the visitor and not the premises that have to be reasonably safe. The Kenyan act applied to land building, vehicle ,aircrafts etc.

A) Arguments in submission by the defendant

37. All three defendants are represented by one law firm. If it is correct by their defence that they have nothing do with each other and further state that they had been wrongly sued to court, then they each, respectively argued they are not liable for the plaintiffs injuries. The plaintiff had come to the lodge. The question the defence argued is that who was the occupier of the lodge visited by the plaintiff? Secondly, when she met the accident, who was the occupier? The accident in effect occurred 300 to 400 yards away from the lodge. The defendants could therefore not have been responsible for the said accidents. The land outside the lodge belonged to the IL Ngwesi Group ranch a totally different entity form the three defendants.

38. Are the three defendants occupiers of II Ngwesi Lodge? The plaintiff say that they are . They exercised full control over the lodge. It is not denied that the plaintiff was a lawful visitor to the lodge. What brings this out is the way the management interaction of the organization had been set up. The collaboration and activities of the three defendants were intertwine. The accounts, the repair of vehicles, the security issues were all co-ordinated by the 2nd and 3rd defendant. The advertisement of the IL Ngwesi lodge was done through the 2nd defendant. The address, telephone contracts and email booking were received through them. This explained the reasons that the plaintiff initially contacted the third defendant to find out what her claim would be as a result of the said accident. Indeed the third defendant and the chair of the 2nd defendant reacted to the letters (albeit at times late) and were involved in initial correspondences on this matter. At all times the parties were under the impression that the 1st defendant had insurance cover until the insurance company repudiated the same.

39. There was indeed control over the said premises by the three defendants. The defendants though argue further that the plaintiff went off running into the wildness. She was 300 to 400 yards away from the lodge. As such there was no duty of care owned to her.

40. As stated earlier the act applied to land building vehicles, aircraft etc. In this case the defendant argue that the land she was running on belonged to IL Ngwesi ranch and not to any of the defendants being separate entity. The activities of the defendants, argued the plaintiffs actually took place on the said

land. They specialized on foot safari, trekking and even advertised that “jogging with a masai worrier” was available. They could therefore not deny the activity undertaken.

41. I noted elsewhere that a defendant was held liable where a child ate berries that were poisonous in a public park. No warning had been given that the tree bore poisonous fruits. It was held that the defendants were liable (Glasgow Corporation v Taylor (1922) I AC 44).

42. In another case a 5 years old fell into a ditch on land used by children. The defendants were held liable (Phipps v Rochester Corp (1995) IQB 450).

I use these two cases to illustrate that under the Occupiers Liability Act you require not to be physically in a building for an accident to occur in order that you may claim damages. In the case law of Harris v Birkenhead Corp. (1976) I WLR 279 the defendant, local authority gave a notice to occupiers of a building to vacate within 14 days. They did so within 3 months or so. The building was left empty. The defendant failed to bond the building. A child wandered into the building and fell from the second floor. It was held that although the defendants were not in actual physical possession of the said premises they were held liable for the said accident.

b) Arguments by the plaintiff in reply.

43. The plaintiffs have maintained all along that the three defendants had control over the premises and environs. That the plaintiff was a lawful visitor to the said lodge and as a guest, a duty of care was owed to her. As stated earlier, their activities were namely one on foot and not by car. There was no game drive but trekking and walking.

44. When the parties started off for their “run” Kip did not tell them wait, I require to consult with the manager. There was no warning that they may encounter wild game. There was no warning not to go out unless there was an armed guard.

45. The plaintiff maintains that the defendants owed her a duty of care as to her safety during her stay at the IL Ngwesi lodge.

46. “A relationship of occupier has been established between the parties, once this is done, then there is a common duty of care to the visitor”. Where a relationship of occupier and trespasser is established then the duty of care is not automatically. The plaintiff argues that she indeed was never a trespasser but was lawfully at IL Ngwesi as a visitor.

c) Negligence

Was the defendant negligent as to cause the said accident to the plaintiff?

47. In the case law of Blyth v Birmingham Waterwork Co. (1856) II Ex 781 it defined negligence as:-

“... the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.”

48. The plaintiff claims that the defendants were negligent. That a bush run organized knowingly that it was not safe to do so. Failing to provide security, failing to take adequate action to ensure she was not attacked by the animals.

49. The defendant called Ian Douglas Hamilton a renowned zoologist who has worked with elephants for many years. He stated that elephants abound in the region due to the safe habitat created by the community ranching of wild animals. The animals have a corridor between the formal game park and the outside areas.

50. In the publications such as “Background To Human Wildlife Conflict” by Kenya Land Alliance, “Policy Dimensions In Human Wildlife Conflicts in Kenya” by Institute of Policy Analysis and Research, “Wildlife Conservation And Management in Kenya: Towards a Co Management Approach” by John Mburu, “Financial and livelihood impact to of IL Ngwesi lodge, Laikipia District Kenya” by George Michael Sikoyo and others (Africa Wildlife Foundation). “The Role Of Community Wildlife Based Enterprises In Reducing Vulnerability And Environment Degradation: The Case of IL Ngwesi ECO Tourist Project Kenya” by – John Waithaka; there is a move in Kenya to try to have communities living near wildlife to be able to participate and co- exists with the animals. IL Ngwesi area was a hunting area in 1950’s. with the assistance of Lewa Downs and elders, Tented Camp Safaris and Camel treks began in the 1980s. The area is 8,765 hectares with 448 household having a population of 5,520 people. The lodge itself in a 12 bed self catering that was set up in December 1996. The area has 600 elephants which elephants are reasonable. Ian Douglas Hamilton describe the elephants as being able to streak at night. An elephants is able to go through the night from one area to the other. This would bring the population to the said area of elephants over night.

51. The defendant’s witnesses admitted that the population of animals in the area has increased due to the security the animals now enjoyed as opposed to the threats with poachers.

52. With this knowledge in mind the plaintiff claims that the defendants ought to have taken a duty of care and by failing to do so are negligent. A prudent and reasonable man would have required to have taken caution in providing security and warning the runners of the dangers they may meet.

53. The defendants would have had as a defence the doctrine of volenti non fit injuria that the plaintiff actually volunteered and took a risk when she went out running. This doctrine was never pleaded in the three defence filed. It is therefore not an issue herein. The defence did not plead particulars of negligence that the plaintiff may have contributed towards the cause of her injuries. A party is bound by their pleadings.

54. The conduct of the staff at the time prior to the run and back was negligent.

c) Kenya Government

I now wish to turn to the aspect that the plaintiff sued the wrong party. The Government of Kenya is the one to be sued and not the defendants.

55. The area in question, they argued fall within the mandate of the Kenya Wildlife Services and as such, any compensation ought to be paid by the government through the act of parliament known as the Wildlife (Conservation and Management) Act Cap.376 Laws of Kenya.

56. Historically, the first legislation enacted in Kenya was basically for the control of hunting and the protection of wildlife. These were by way of official gazette of 1898 under the East African Protection.

57. The legislation defined the boundaries of game reserves established for wildlife protection. In 1930, the society for the prevention of fauna was commissioned to inquire into the state of fauna. Recommendation was made that permanent formal sanctuaries be established to persevere the bio diversity. It was not until 1938 that a conservation order stipulating the location supervision and management of National Parks in Kenya was made. In 1945 the Royal National Park orders was passed creating National Parks that to day number over 50 with over 45 protected areas established after independence.

58. A sessional paper No.7 of 1957/58 – the report of 1956 Game Policy Committee, the Secessions Paper No. 3 of 1975, Statement on Future Wildlife management policy in Kenya, it was declared and recognized that the Kenyans wildlife should be preserve as assets of economic, scientific and recreational importance. That there be a long terms preservation of game and having regard to the interest of the human population.

59. The effect of the sessional paper 3/75 gave rise to the 1976 Wildlife (Conservation and Management) Act. It called on policy between newly created wildlife conservation and management department and local communities. The game department and the National Parks Board formed the wildlife conservation and management department under the Ministry of Tourism and Wildlife.

60. Banning of hunting of wild animals in or outside protected areas was made by the legislature supplement No.26 (legal notice 120). The Wildlife Conservation and Management prohibition or hunting of wild game. Other additional prohibition made was act No.5/1978 and legal order No.181/1979.

61. The Wildlife (Conservation and Management (amendment) Act No.16 of 1989 tried to cure the inadequacy of the 1976 Act. The Kenya Wildlife Service became a semi autonomous parastatal. Its functions were inter alia

“61.1. _____

61.2 _____

61.3 _____

61.4 Sustenance of wildlife to meet conservation, research and management goals.

61.5 Advice government, local authorities and land owners and wildlife conservation and management.

61.6 Render service to farmers to enhance protection of crops and domestic animals against wildlife.

62. The Kenya wildlife service is subject to the state cooperation act

No.11 of 1986.

63. Where there is a wildlife human conflict, Kenya had a system where compensation to those whose property was damaged because of wildlife would be made. This was stopped in 1989 and a new policy known as community wildlife service was begun. The government instead of giving compensation would build schools, health centres and social services as compensation for damages.

64. Compensation for personal injury is disbursed by the TREASURY of the Kenya government NOT the Kenya Wildlife services.

Payment for injuries and or death caused by wildlife is now offered by the Kenya Government but not for damage to crops.

Thus under section 62 of the Wildlife (Conservation and Management (Amendment) act 1989 states:-

Section 62

“Where any persons suffers any bodily injury from or is killed by an animal the person injured or in the case of a deceased person, any other person who was depended upon him at the date of his death may make application to a district committee established by his section for the award of compensation for the injury or death.”

65. The amount given by the state is a maximum of Ksh.30,000/- for death and a maximum of Ksh.15,000/- for personal injury. This amount is what the defendants ask the plaintiff should sue the Kenya wildlife service for. In reality, it is the Kenya government and not the Kenya wildlife service who ought to be sued. There is a limitation of 12 months in which a suit against the government may be brought.

66. The plaintiff states yes that she could have sued the government but this is just an alternative claim

to the one she makes under the Occupiers Act. For instances, in a claim for death a party may sue under the Fatal Accidents Act Cap. 34. And the Law Reform Act Cap. 26 Laws of Kenya. The courts sees as a good illustration the case law of Kemfro African Ltd V Lubia & Another (1987) KLR 30. (Kneller, Nyarangi JJA & Chesoni Ag JA)

Where Kneller JJA explains the relationship between the two acts and taken into account of the sum to be awarded. A person is entitled to sue under both acts.

67. The other example is the Workman's Compensation Act Cap 236 Laws of Kenya where an employee injured in the course of duty may obtain compensation but, at the same time, still sue in the civil courts by way of a plaint in tort regardless that they had been paid under the Workman's Compensation Act.

In this case I would agree that the plaintiff may sue under both laws.

v) Conclusion

68. I find herein that the plaintiff was established on a balance of probabilities that she was a visitor to the defendant's premises. That the said premises was under control of the 1st, 2nd and 3rd defendant. She was owed a duty of care as to her safety whilst inside the lodge and its environs.

68.1. The second and third defendants did control, direct and advice the first defendant and or IL Ngwesi lodge on the activities carried out at the lodge for the benefit of the guest.

68.2. That the defendants 1,2 and 3 owed a duty of care to the plaintiff by virtue of section 3 of the Occupier Liability Act Cap 34 Laws of Kenya.

68.3. That the defendant 1,2 and 3 are liable which liability is held at 100% jointly and severally (noting that order 1 r 21 Civil Procedures Rules was not complied with by them).

68.4 That defendants 1,2 and 3 are not relieved of the liability under the Wildlife (Conservation and Management) Act Cap. 376 Laws of Kenya.

68.5 That the plaintiff was indeed injured

69. That the costs of this suit to abide the finalization of the issue of quantum.

Dated this 11th day of June 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Pheroze Nowrejee leading S. Kapila, & S. Nagi & instructed by Kapila Anjawalla & Khanna Co. Advocates for the plaintiff

S.M. Mwenesi instructed by Mwenesi & Co. Advocates for the defendant 1,2 and 3.