Murerwa v Kenya Wildlife Service (Civil Appeal E087 of 2022)
[2025] KEHC 427 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 427 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E087 OF 2022

JM OMIDO, J

JANUARY 23, 2025

BETWEEN

ELIJAH MURERWA ..... APPELLANT

AND

KENYA WILDLIFE SERVICE ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. M.A. Odhiambo, Senior Resident Magistrate delivered on 30th June, 2022 in Meru CMCC No. 205 of 2019)

JUDGMENT

1. This appeal was preferred by Elijah Murerwa (hereinafter referred to as "the Appellant"), against the judgement and decree of Hon. M.A. Odhiambo, Senior Resident Magistrate delivered on 30th June, 2022 in Meru CMCC No. 205 of 2019.

2. In the matter before the lower court, the Appellant herein was the Plaintiff while the Respondent was the Defendant.

3. Judgement on liability in the lower court was entered in favour of the Appellant at 100% against the Respondent. The trial court proceeded to assess and award the Appellant special damages at Ksh.20,000/-. The trial court however dismissed the claim for general damages for pain, suffering and loss of amenities. The Appellant was awarded costs of the suit and interest at court rates.

4. Being aggrieved with the judgement of the trial court on the issue of quantum, particularly the finding of the trial court that the claim for general damages for pain, suffering and loss of amenities was not tenable, the Appellant presented twenty (20) grounds of appeal vide the Memorandum of Appeal dated 2nd July, 2022, which however in precis make up the following three grounds of appeal:

i. That the learned trial Magistrate fell into error by holding that where the particulars of injuries, a claim for recovery of damages under the head of pain, suffering and loss of amenities is untenable.

ii. That the learned trial Magistrate fell into error by failing to proceed to assess and award damages for pain, suffering and loss of amenitiesand by failing to consider the treatment notes, P3 form and the medical report produced in evidence by the Appellant to assess and award damages under the said head.

iii. That the learned trial Magistrate fell into error in dismissing the Appellant's claim for damages under the head of pain, suffering and loss of amenities.

5. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Sielle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

6. In Sielle, Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
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> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

7. Going to the record of the trial court, the relevant evidence as concerns quantum is that the Appellant claimed that he was brutally attacked by an elephant on 8th October, 2017 as a result of which he sustained bodily injuries.

8. It is instructive from the plaint dated 15th July, 2019 that the Appellant did not plead or state the nature and particulars of injuries that he sustained.

9. The Appellant testified before the trial court and adopted the contents of his witness statement dated 4th April, 2019 in which he stated that the rogue elephant attacked and injured him when he was from a farm that he had leased in Murukuma. He was treated at Meru General Hospital and later reported the matter to Kiirua Police Station.

10. Although the did not state or describe the nature of injuries that he sustained, the Appellant stated that the attack by the animal rendered him permanently disabled.

11. The Appellant produced a demand notice that was issued to the Respondent to support his case.

12. The Appellant called Dr. Paul Wambugu as his witness. The witness told the trial court that he examined the Appellant and prepared a report on his findings. The Appellant had sustained two broken ribs and a compound fracture of the tibia and fibula. The doctor stated that the degree of injury that the Appellant sustained was classified as "grievous harm" and permanent incapacity was assessed at 30%.

13. The doctor produced his report, the P3 form and treatment notes as exhibits.

14. The trial court, while addressing the claim for damages for pain, suffering and loss of amenities rendered itself as follows:

> " The Plaintiff at paragraph 3 of the plaint pleaded that the plaintiff was brutally attacked by an elephant for which he holds the Defendant liable. Although the Plaintiff produced a P3 form and a medical report, the same had no relevance as the particulars of the injuries sustained were not pleaded. The court in Nelson Ole Keiwua v Victoria Limited & another [2015] eKLR.....faced with a similar situation had this to say:
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> > "The effect of failure in stating the particulars of injuries complained of would render the entire suit as disclosing no reasonable cause of action. One wonders what wouldform the basis of assessing general damages if no particulars of injuries are included in the plaint even after amendment.....".
> >
> > In this particular case the Plaintiff did not plead any particulars to the injuries sustained. Even after obtaining a medical report, the Plaintiff did not seek the leave of this court to amend his pleadings. The P3 form and treatment notes produced were of no relevance as the particulars of injuries sustained were never particularized."

15. With that, the trial court went on to disallow the claim for general damages under the head of pain, suffering and loss of amenities.

16. Having considered the grounds of appeal, the record of the trial court and the submissions by the two sides, I discern the single issue for determination to be whether the learned trial Magistrate fell into error in disallowing the claim for general damages for pain, suffering and loss of amenities.

17. There is no dispute, from the plaint that was filed before the trial court, that the Appellant did not plead the particulars of injuries in respect of which he sought compensation.

18. From the submissions that he filed, the Appellant proffered the position that the treatment notes and medical report that the Appellant produced proved the injuries that the Appellant sustained and that the trial court ought to have proceeded to assess and award the Appellant damages on the basis of the two documents.

19. Counsel for the Appellant sought to distinguish the authority of Nelson Ole Keiwua (supra) urging that the claim therein was rejected by the court on the further ground that the Plaintiff lacked capacity to file the suit.

20. In its submissions, the Respondent relied on the following authorities to buttress its position that the learned trial Magistrate reached the correct finding on the issue:

    a. David Githuu Kuria v Equity Bank (Kenya) Limited & 2 others [2019] eKLR in which the court observed as follows:

> > " ...Pleadings and particulars have a number of functions, they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues of determination in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give the Defendant an understanding of the Plaintiff's claim."

b. Anthony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR in which the Court of Appeal held thus:

> " We have carefully considered the judgement of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters...".

c. Boniface Kinyua Kathuri v David Munyoki [2020] eKLR where the High Court made the following holding:

> The finding of the trial Magistrate in my view cannot be faulted because it is firmly anchored in the law. As observed above under Order 2 Rule 4 the law clearly stipulates that the nature of injuries suffered by a Plaintiff must be specifically pleaded and the operative word in that rule is "must" which means that it is a mandatory requirement. As aptly stated in the decision of Ibrahim J "Treadsetters Tyres Ltd",
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> "in cases of tortuous claims based on negligence, injuries and special damages must be specifically pleaded. They cannot be imagined or inferred. The court's road maps are the pleadings on record if a party alleges he suffered an injury, he must particularize the same so that the defendant can specifically respond to the claims. One must plead the nature and extent of injuries suffered. This is a mandatory requirement of the law....." .
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> This court takes a similar position because a party cannot plead for instance that he suffered certain injuries on the head but during trail and out of the blue goes ahead to list different injuries suffered on the stomach. The omission in my view is fatal. Allowing parties to depart from his/her pleadings is undesirable and a violation of the rules because the result would be to expose the opposing party to unfair trial. A defendant in tortuous claims based on negligence should be able to know specifically what he/she is going to defend in court. When a party pleads specifically the nature and the extent of injuries like the Appellant clearly did at the trial, but goes on to prove different nature of injuries that amounts to an ambush the same is not only unfair but a violation of the rule cited above. In that respect the Appellant really cannot blame the trial Magistrate for applying the law in the manner he did. He can only blame himself for the omission because he had the chance to amend his pleadings if he discovered that the nature and extent of injuries pleaded were not in tandem with the medical documents he was relying on.
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> It is my considered view that the obligation placed by law on the Plaintiff in claims based on tort of negligence to specifically plead the nature and extent of injuries means that a plaintiff cannot make general claims and leave gaps to be filled by assumptions by the defendant or the court. That would be a risky venture and omission. A pleading is everything because a

party is bound by his/her pleadings. Where gaps are discovered, the law provides windows/ avenues to seal the loopholes in his/her pleading which is through amendments.

This court is not persuaded that because the Appellants medical evidence was not challenged or controverted by the Respondent, he was at liberty to depart from his pleadings. A party as observed above is always bound by his/her pleadings whether the same is challenged/ controverted/defended or not. The rules of procedure and the law do not change. The onus or proof remains and the trial court must be satisfied that the case has been proved to the required standard in law.

21. I have carefully gone through the authorities relied upon by the Respondent, including that of Nelson Ole Keiwua and the jurisprudence that emerges from the said decisions is that where a party who seeks to recover general damages for pain and suffering fails to particularize the injuries complained of in his statement of claim, no reasonable cause of action is disclosed in such a claim and such failure to plead the particulars prejudices the other party.

22. It is noteworthy, contrary to the position taken by the Appellant, that the claim in Nelson Ole Keiwua failed on the grounds, inter alia, that the particulars of injuries were not pleaded.

23. The jurisprudence is anchored on the provisions of Order 2 Rule 10 of the Civil Procedure Rules which required every pleading to contain the necessary particulars of the claim or matters that are pleaded.

24. Being of the foregoing findings, it is then my view that the trial court reached the correct decision on the claim for damages under the head of pain, suffering and loss of amenities. There is therefore no basis upon which I can interfere with the finding of the trial court on the same.

25. The upshot then is that the instant appeal has no merit and is dismissed with costs to the Respondent

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 23RD DAY OF JANUARY, 2025.

JOE M. OMIDO

JUDGE

For the Appellant: Ms. Onyango for Ms. Akech.

For Respondents: No appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.