Leukupe v Kenya Wildlife Service (Civil Appeal E012 of 2024)
[2025] KEHC 10655 (KLR) (Civ) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CIVIL

CIVIL APPEAL E012 OF 2024

SC CHIRCHIR, J

JULY 17, 2025

BETWEEN

WOIYORIKO LEUKUPE ..... APPELLANT

AND

KENYA WILDLIFE SERVICE ..... RESPONDENT

JUDGMENT

1. The Appellant herein sued the Respondent in the trial court seeking for damages for injuries sustained following an attack by hyena at Waso West location. The trial court heard the case and dismissed the claim. That dismissal is what has given rise to this Appeal.

Memorandum of Appeal

2. The appellant has presented the following grounds for determination: -

    1. That the trial court erred in law and fact in not considering the "clear evidence" that was placed before him in reaching his decision.

    2. That the trial magistrate erred in law and fact in considering "totally irrelevant" factors which were never pleaded by the parties.

    3. That the trial magistrate erred in law and fact in failing to consider the appellants submission on quantum.

    4. The learned magistrate proceeded on demonstrably wrong principles in reaching his decision.

3. The appeal was argued by way of written submissions.

Appellant's submissions

4. It is the appellant's submission that he proved his case and that there was no document filed by the Respondent to contradict his evidence . It is further submitted that the trial court considered irrelevant issues, which had not been pleaded. That there was no evidence that the Appellant had been convicted for an offence so as to make him illegible for compensation. The Appellant state that only a Court of Law could make a finding on the criminal liability of a person, which had not happened in this case.

5. It is the Appellant's further submission that the appellant did prove the nexus between the incident and the injuries he suffered. The Appellant finally proposed Kshs. 400,000/= as fair compensation for the injuries suffered.

Respondent's submissions

6. It is the Respondent's submissions that as the Appellant had not been granted permission to graze his livestock in the national park, the respondent did not owe him a duty of care. That the only duty of care the Respondent owes under Section 7(b) of the *Wildlife Conservation and Management Act* 2013. (The Act) is for the wildlife and visitors to the national parks, wildlife conservation area and sanctuaries.

7. It is the respondent's further submission that indeed pursuant to Section 102 (2A) and (3) of the Act, the Appellant was committing a crime and therefore no duty of care was owed to him.

8. It is further contented that the injuries suffered were contributed by the negligence of the Appellant under the doctrine of volenti- non -fit – injuria. That by grazing his livestock in the park without permit the Appellant was placing himself at risk.

Analysis and determination

9. This is a first appeal, and this being the first appellate court, it is under the duty to review the evidence , evaluate it and arrive at its own findings (Ref *Gitobu Imanyara & 2 others v A.G*. (2016) eKLR.)

10. I have considered the trial court's record, the grounds of appeal and the rival submissions of the parties. The only issue for determination is whether the Respondent is liable for the injuries suffered by the Appellant.

11. A perusal of the plaint shows that the Appellant based his claim on breach of statutory duty by the Respondent. The statutory duty is founded on the *Wildlife Conservation and Management Act* No. 47 of 2013. On particulars of negligence the Appellant set out grounds as follows:

    a. Failed to keep any proper look out or to have any or sufficient sign posts.

    b. Failure to sensitize the community on how to co-exist with wildlife.

    c. Failure to engage the community in Public Barazas.

    d. Failed to observe basic safety measures. (Fencing) by wantonly exposing the plaintiff.

    e. Knowing and wantonly exposed the plaintiff to the perils of a wildlife habitat.

    f. Failed to take care of animals under its charge by statute.

    g. Failing to keep wildlife under the control or within its confines or in designated areas.

    h. Failure to secure the Hyena thus leaving them to cause wanton harm.

12. Under Cross -examination , the plaintiff admitted that he was grazing his livestock in the park. The hyena was therefore, at its natural and legal habitat, it had not strayed out of the park. On the contrary, it is the Appellant who had strayed into the animal's habitat. Grounds (a) (d) (e) (f) and (g) therefore fly in the face of the Appellant's admission that he was grazing his animals inside the park. Further, the issue of whether the park should have been fenced, or failure to control the hyena ,for instance were immaterial as the Animal was not outside the park as aforesaid.

13. On the issue of educating the host communities the defence witness stated that they had held a series of meetings, while the plaintiff denied this. This is a case of one party's word against the other. However, the burden of proof lay with the Appellant as the then plaintiff to prove his case. This is what the law of Evidence demand of him. Section 107 of the *Evidence Act* provides:-

> " Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> It was therefore upon the Appellant to have brought an Independent witness to back up his claim.

14. Notwithstanding what I have pointed out on the preceding paragraph, I am of the considered view that any independent witness's testimony would have been of little help to the Appellant and this is why; As earlier stated, from the Appellant's own Admission he knew that he was inside the park. In terms of Section 2 of the Act, parks are Protected Areas, and pursuant to Section 102 of the same Act, it is prohibited for a person to enter a protected area.

15. Section 102 provides:-

> " 2A. A person shall not enter any Protected Area with livestock without permit or written permission from the authority responsible as the case may be."

16. Thus, even if the Respondent had failed to carry out any public Education as alleged, the prohibition to enter the protected areas is by law. He could not plead ignorance of the prohibition as ignorance of the law is never a defence.

17. Further a breach of section 102 (A) is a criminal act with penal consequence. Section 102 (3) of the Act provides "Any person who contravenes subsection (2) commits an offence and is liable to a fine not exceeding one hundred thousand shillings or the imprisonment for a term not exceeding six months." Thus, in effect the Appellant had sought to benefit, not just from an apparent plea of the ignorance of the law, but by committing a crime. That is not tenable. His advocate argument that he was yet to be tried and found guilty cannot stand in the face of the Appellant admission that he was grazing his livestock in the park.

18. The Appellant has further argued that the issue of whether the appellant was illegally in the park was not an issue and the trial magistrate erred by addressing it. However, what the trial magistrate addressed is an issue of law. Courts are at liberty to address issues of law even where parties to a case have acquiesced on them.

19. Under Section 7A of the Act, the Respondent owes duty of care to the visitors to the park and licensees as implied by Section 102 (2A). The Appellant herein was a trespasser and whereas the law recognizes occupier's liability to trespassers in some instances ,the presence of the Appellant in the park was not foreseeable, particularly in the face of the express prohibition set out under Section 102(2A) of the Act.

20. On the doctrine of volenti -non -fit -injuria, I concur with the findings of the trial court and this defence was pleaded to under paragraph 4(iv) of the defence, as demonstrated in the plea that the defendant "willfully exposed himself to the accident" To the extent that the Appellant knew that he was inside the park, he knew that there was real danger of being attacked by the wild animals.

21. In the end, I am entirely in agreement with the findings of the trial court. This Appeal has no merit, it is hereby dismissed with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT ISIOLO, THIS 17TH DAY OF JULY, 2025.

S. CHIRCHIR

JUDGE

In the presence of:

Roba Katelo- Court Assistant

Mr. Amule for the Appellant.