Kenya Wildlife Services v Mwanziu (Civil Appeal E276 of 2023)
[2024] KEHC 9038 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9038 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E276 OF 2023

BM MUSYOKI, J

JULY 24, 2024

BETWEEN

KENYA WILDLIFE SERVICES ..... APPELLANT

AND

PETER MUTEMI MWANZIU ..... RESPONDENT

(Being an appeal from judgement and decree of Honourable S. Atambo CM dated 1-08-2023 in Thika Chief Magistrate's Court civil case number 101 of 2019)

JUDGMENT

1. The respondent was on 9-07-2016 attacked and injured by a hippopotamus near Oldonyo Sabuk bridge and by plaint dated 15-09-2019 in the lower court's civil suit number 101 of 2019 prayed for judgement against the appellant as follows;

    a. A declaration that the defendant (now appellant) is entitled to compensate the plaintiff (now respondent) with the amount pf Kshs 2,000,000/= as provided under Section 25 of the *Wildlife Conservation and Management Act* 2013 plus interest from the date of judgment until payment in full (sic).

    b. Special damages as pleaded in paragraph *6* above (i.e. Kshs 26,930/=) with interest at court rates from the date of institution of the suit till payment in full.

    c. Future medical expences amounting to Kshs 150,000/= as pleaded in paragraph *7* above with interest from the date of judgment till payment in full.

    d. Costs of the suit.

    e. Interest at court rates.

    f. Any other relief deemed fit by the court.

2. The respondent pleaded negligence on the part of the appellant accusing it of failing to keep the offending hippo away from the public and failing to warn the public of the presence and danger of the hippo and breach of other statutory duties. The appellant denied liability and at the same time pleaded negligence on the part of the respondent. Upon hearing of the matter, the honourable magistrate found the appellant 100% liable and awarded the respondent a sum of Kshs 2,000,000.00 as general damages, Kshs 150,000.00 as future medical expences and a sum of Kshs 9,900.00 as special damages. The appellant has challenged the whole judgment and raised the following grounds of appeal;

    1. The learned magistrate erred in law and fact by holding the appellant 100% liable. The court ought to have considered that the respondent had lived in the area for 10 years and proceeded to walk at night near a river bank known to have Hippos instead of using alternative means of transport.

    2. The learned magistrate erred in fact by holding that the respondent was entitled to future medical expences of Kshs 150,000.00 where the respondent's doctor testified during cross examination that the respondent's wounds had healed and no reconstructive surgery was required.

    3. The learned magistrate erred in law by wholesomely relying on the provision of Section 25 of the Wildlife and Conservation Management Act (WCMA) and holding that the respondent was entitled to Kshs 2 million in damages without considering that the claim was not before the Wildlife Conservation and Compensation Committee.

    4. The learned magistrate erred in law and fact by awarding damages of Kshs 2 million based on section 25(1) of the WCMA without considering the severity of injuries.

    5. The learned magistrate erred in law by failing to consider decisions of the High Court in similar cases where it has been held that the approach in awarding damages in human-wildlife conflict should be the same as that adopted in road traffic accidents where the nature and severity of the injuries is what determines the amount to be awarded.

    6. The learned magistrate erred in law and fact by awarding general damages of Kshs 2 million which is inordinately high considering that the respondent only suffered soft tissue injuries and his doctor confirmed that the injuries sustained had healed by the time of the hearing of the case.

    7. The learned magistrate erred in law by making an award that is out of character with similar cases with similar types of injuries as the case before the court.

3. This is a first appeal and as such, I am obligated in law to re-examine and re-evaluate evidence already on record and come to my own independent conclusion. I must however bear in mind that I did not have the benefit of observing the demeanour of the witnesses during the trial. In order to achieve this, I will reproduce summary of the evidence produced before the court as shown below.

4. The respondent testified in the lower court and adopted his witness statement dated 15-02-2019. The respondent told the court that on the fateful day, he was walking from Donyo Sabuk shopping centre and upon reaching Donyo bridge, he was attacked by a hippo which approached him from the front. He narrated his efforts to escape which were futile as the hippo caught up with him and bit him on his right hand and left leg. He lost consciousness which he regained after being rescued by guards from Delmonte Kenya Limited. He was taken to Kilimambogo hospital where they declined to receive him due to the seriousness of the injuries and referred him to Thika Level 5 hospital where he was admitted at 1.00 am the following day. He was in hospital until 5-08-2016. He produced exhibit 1 to 7 and 9

among them treatment records and P3 form. The respondent claimed that he had a hearing problem caused by the noise of the hippo during the attack.

5. In cross examination, he stated that he was not in a park and that he had lived in the locality for ten years. He also stated that he was not aware that there were wild animals in the area in which he was attacked. He also stated that it was normal for people to use the route and that he did not see any problem with walking at night and on the said date, he was not alone as there were other people walking at the time.

6. The respondent's other witness was one Doctor Charles Kasuki who produced medical report dated 7-04-2017 as plaintiff's exhibit 8. According to the doctor, he confirmed that the plaintiff had sustained a deep wound to the right hand and an injury to the right leg. The doctor recommended that the respondent needed a reconstructive surgery which would cost Kshs 150,000.00 in a modest hospital. In cross examination, the doctor stated that the respondent needed skin drafting and the injury was a permanent one.

7. The appellant called one Polycarp Okuku who described himself as a senior Warden at Kisumu Impala Sanctuary at the time of his testimony. He told the court that as at the time of the incident, he was based in Oldonyo Sabuk National Park (hereinafter referred to as 'the park'). He adopted his witness statement dated 21-05-2020. In his statement, he said that the appellant had no statutory obligation or responsibility under the Wildlife Conservation and Conservation Act (hereinafter referred to as 'the Act') to protect the public from wildlife that does not fall within its jurisdiction as set out in Sections 7(a) and (b) of the Act. He claimed that the place the respondent was attacked is five kilometers from the boundaries of the national park. In his opinion, the respondent should not have decided to walk home alone at night and the appellant should not be blamed for the risk the respondent took. According to him, the plaintiff authored his own misfortune.

8. He was cross examined and he stated that he was familiar with the area where the respondent was attacked and that it was used by villagers. He alleged that appellant was mandated to control wildlife but the bridge was not part of the park. He maintained that the hippo was in a river which was not part of the national park. He also stated that the appellant had the responsibility of ensuring that wildlife does not stray to residential areas. He stated that their signages for warning members of the public were only in the national parks and not outside. In re-examination, he told the court that the river which is the habitat of hippos crosses through several counties but not thorough the park and could not be fenced.

9. It is not disputed that the respondent was injured as pleaded in his plaint. The nature of injuries is also not disputed safe for the extent of disability of the respondent. The appellant has in its submissions collapsed its seven grounds of appeal to three by identifying the following as the issues for determination;

    a. Whether the trial court was correct in holding that the appellant was 100% liable.

    b. Whether the trial court erred in relying on section 25 of the *Wildlife Conservation and Management Act* to award the respondent Kshs 2,000,000.00 in damages without considering the nature and severity of the respondent's injuries and without considering awards issued for comparable injuries.

    c. Whether the trial court erred in awarding the respondent Kshs 150,000.00 as future medical expences.

10. I do agree that the above three proposed issues sufficiently cover the grounds of appeal contained in the memorandum of appeal and I hereby adopt the same for my consideration. Although the appellant had claimed in the lower court that it had no control or responsibility over wild animals outside the

national park, game reserves and sanctuaries, this point was not taken or included in the memorandum of appeal and therefore any argument along this line are not right for purposes of this appeal. Doing so will go against the provisions of Order 42 Rule 4 of the Civil Procedure Rules which provides that;

> 'The appellant shall not, except with the leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confirmed to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule.'

11. On the first issue, the appellant faults the lower court for having held that the appellant's witness had stated that the appellant was aware of the hippos being in the river which was away from the park but it did not put up any visible signboards warning members of the public of presence of wild animals. I have looked at the testimony of the appellant's witness. It is clear to me that in cross examination, he admitted that the hippo was in the river but denied that the river was inside the park. He was in essence saying that there were hippos but since they were not inside the park, it was not the responsibility of the appellant to warn the public. The magistrate did not have to quote the said witness in verbatim for her to make a conclusion. Just as the magistrate concluded, I am of the view that the statement by the witness would point to the fact that the appellant was aware of the presence of hippos in the river. The same witness is on record telling the court that the appellant would hold forums to sensitize the public about dangers of hippos. Such sensitizations would not be necessary if the appellant was not aware of the presence of the hippos outside the park.

12. It is submitted that the appellant did not owe a duty of care to the respondent and the public. It is common ground that management of wildlife is the responsibility of the appellant. He who keeps anything which is potentially hazardous or dangerous to the public has a duty to take all the precautions in his capability to ensure that the thing does not harm the public. The appellant has referred me to the case of Moloyian Ole Mengati & Another v Kenya Wildlife Service [2009] eKLR where it has cited a portion of the holding of the court that the appellant is not the owner of wildlife. The appellant has, I must say deliberately, failed to appreciate that this holding was on the basis of Section 62(4) of the then Wildlife (Conservation and Management) Act Chapter 376 of the Laws of Kenya which provided for a compensation scheme funded by the Parliament and managed by the District Committee and not the appellant and as such the wildlife then belonged to the government. This Act was repealed by Section 118 of *Wildlife Conservation and Management Act* 2013 which when put into context bestows the responsibility of wildlife on the appellant. I do understand that *advocates act* to the best interests of their clients but it behoves an advocate as an officer of the court to lay bare all the facts to enable the court appreciate the case before it as a whole.

13. Section 25(1) of the Act does not restrict payments of compensation for injuries to those sustained within the parks, reserves or sanctuaries. The fact that the law puts the responsibility of compensation for injuries without restriction to the parks, reserves or sanctuaries, in my view, means that the appellant has the responsibility over wild animals outside the said areas. The Act goes further in Section 77 to give the appellant the mandate to enter into any land with or without authority of the occupier or owner to destroy a problematic animal. This means that it is only the appellant who has the authority over a problematic animal safe for the provisions of Sections 77(2) and (3) which gives an occupier or owner of a land to destroy such an animal but still report to the appellant with an explanation. In my view the context and liberal interpretation of these provisions places the duty of care to the public on the appellant.

14. As observed elsewhere above, the issue of duty of care is not even raised in the memorandum of appeal and no leave has been sought by the appellant to urge this point. Be that as it may, I hold that the

appellant has a duty of care to the public in respect of wildlife in or outside national parks, game reserves or sanctuaries. The submissions by the appellant that its mandate under Section 7 of the Act limits it to national parks, game reserves and sanctuaries is in my opinion an escapist and selective interpretation of the Act.

15. Was the injury foreseeable? The appellant admitted that the river under which the bridge where the respondent was attacked is inhabited by hippos. The appellant's witness told the court that the hippos live in rivers during the day and come out to graze at night. This was a position known to the appellant and in the circumstances, it is obvious that with exercise of due diligence, the appellant would foresee the danger of the hippos harming human at night.

16. Hippos are animals under third schedule of the Act. It was not placed in the Schedule as a matter of coincidence, accident or mistake. The Legislature must have had in mind that hippos are dangerous animals from which the public should be protected. It is admitted by the appellant that it had not put up any signage warning members of the public of dangers and presence of the dangerous animal.

17. It is also the duty of the appellant to ensure that dangerous animals do not pose danger to the public. The appellant should have exercised all due and reasonable diligence in identifying spots where the hippos inhabit and warn the public of their presence. This would include monitoring the movements of the animals. The appellant did not make any attempt to show the court that it took steps in discharging this duty. It was not stated or submitted that the offending hippo escaped from its normal habitat. It was incumbent upon the appellant to establish presence of the dangerous animals in residential areas or areas frequented by the public.

18. The appellant argues that the respondent did not tender any evidence to support a conclusion that the appellant had control over wildlife - human interactions outside the park. I do believe that the appellant in exercise of its statutory functions must remain vigilant and do surveillance to ensure that wildlife-human conflict is minimized, prevented or eliminated. It is not right to state that the appellant is confined to national parks. It is argued that, the statute creating the appellant does not impose a duty on it to erect signages on all areas which may be possibly inhabited by wildlife. A statute cannot list all administrative or procedural functions a statutory body should undertake. Putting of such warning signs are auxiliary functions which are covered by the main functions just like the sensitization barazas the appellant said it usually organises. That would in my view be too narrow an interpretation of a statute. If the appellant is responsible for management of wildlife, the animals classified as wild must be its responsibility wherever they are. I find no fault in the magistrate's finding that the danger was foreseeable and preventable.

19. According to the appellant, the respondent was the author of his own misfortune. The appellant asks me to disturb the magistrate's finding that it was 100% liable and find that the respondent was the sum result of his own negligence or at least apportion liability on him which it suggests to be at 50:50. To further this argument, the appellant submits that the respondent failed to account for the period between 7.30 pm on 9-07-2016 when he was attacked and 1.00 am of 10-07-2016 when he was admitted to Thika level 5 hospital. I do not see how this failure to account can turn out to be negligence on the respondent. Even so, I have read the proceedings and noted that the respondent stated that after the attack, he was taken to Kilimambogo hospital where the hospital refused to admit or treat him due to the nature of injuries necessitating him being transferred to Thika. This is a good account of the five hours. I see no merit in this appellant's argument.

20. The appellant has also invited me to make assumption that the respondent must have been negligent because the hippo singled him out of many other people walking on the same road. The appellant argues that the respondent must have provoked the animal. This is too much a fishing expedition. This

court cannot make such assumptions. In any event, the respondent had explained how he made several attempts to escape the attack. That is not a conduct of someone provoking an animal.

21. It was also submitted that since the appellant had conducted sensitizations through meetings with the local administration, radio stations, barazas and school forums, the respondent should not have used this route and by doing so, he assumed the risk of attack. The appellant is on record denying that the area had hippos. The appellant is blowing cold and hot on this point. I find this part of submissions contrary to the evidence adduced on behalf of the appellant. I see no conduct of the respondent that can be interpreted to mean that he was negligent and I will not apportion any liability on him. The appellant failed to take its responsibilities seriously and I uphold the magistrates finding on liability.

22. I now turn to the second issue. It has been submitted that the trial court erred in relying on Section 25(1) of the Act in awarding Kshs 2,000,000.00 in damages without considering the nature and severity of the respondent's injuries and without considering awards issued for comparable authorities. Section 25(1) reads;

> 'Where any person suffers any bodily injury or is killed by any wildlife listed under the Third Schedule, the person injured or in the case of a deceased person, the personal representative, successor or assign, may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act'.

23. Subsection 3 goes on to give the maximum figures which the Committee can award in three categories. This Section is clear and does not need special interpretation. It imposes strict liability on the appellant where injuries or death of a person are caused by animals listed in the Schedule. The hippo is one of the animals in the list. The appellant elected to bring his claim under the common law principle of negligence. He did not elect to go to the County Wildlife Conservation and Compensation Committee. The magistrate in awarding the amount complained of stated that;

> 'Although the doctor testified that he did not assess the degree of permanent disability, the plaintiff submitted that Kshs 2,000,000.00 would be enough compensation as provided for in section 25 of WCMA. The defendant however submitted it was not mandated and responsible to compensate the plaintiff and section 25 only applies where the compensation had been awarded if a plaintiff makes a claim to the WMCC. In this case, considering the gravity of the injuries the plaintiff sustained and in the authorities cited by both parties, it is my view that the award of Kshs 2,000,000/= is reasonable considering the inflation of Kenya shilling and the economic state of our country and fact that he also reported at Oldonyo Sabuk National Park and was issued with an OB number and I do award him the same"

24. It is my opinion, Section 25(3) gives a maximum of the amount awardable by the Committee. It does not state that any one suffering injuries must get the amounts indicated therein. It would be the discretion of the Committee to recommend awards based on the nature of the injuries. In the circumstances, I do agree with the appellant to the extent that when a court is assessing damages for a party who has elected to claim under the common law, it should not be guided by the provision of the said Section.

25. However, I find nothing in the quoted holding of the magistrate that would suggest that she was guided by the said Section. Her reference to the Section was a citation of what the parties had submitted. It was not a statement of her decision neither did she indicate that she considered the said provision. It is clear from the cited holding that the magistrate said that she considered the nature of injuries, authorities cited, inflation and the state of the economy. The appellant is therefore wrong to fault the magistrate along these lines.

26. I must observe that prayer 'a' of the plaint was not sustainable. The magistrate had no jurisdiction to make a declaration as framed in that prayer. However since, there has been no contest on this issue and since the parties proceeded on the understanding that the respondent was asking for general damages under the common law, I will not belabour this point.

27. Having said the above, I proceed to determine whether the magistrate erred in awarding a sum of Kshs 2,000,000.00 for general damages. It has been held that an appellate court should not interfere with an award of damages unless it is satisfied that the trial court took into account an irrelevant factor or failed to consider a relevant factor, applied the wrong principle of law or that the awarded amount was too high or low as to amount to an erroneous estimate. In Kemfro Africa Limited t/a "Meru Express Service [1976]" & Another v A.M. M. Lubia & Another (No 2) [1985] eKLR it was held that

> 'The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages"

28. From the trial court's judgement, I cannot say that the magistrate applied wrong principle or left out a relevant factor or considered an irrelevant factor. I will therefore consider whether the award was too high as to amount to an erroneous estimate. According to the medical report produced as plaintiff's exhibit 8, the appellant sustained the following injuries

    a. A deep bite wound in the medial aspect of the right hand which was approximately 15 centimeters in length exposing muscles and tendons; and

    b. A deep extensive bite wound with a cavity on the antero-lateral aspect of the proximal thigh exposing muscles which was approximately 20 centimeters in length.

29. Dr Charles Kasuki indicated in his medical report dated 7-04-2017 that the right hand wound had at the time of examination healed but the left right thigh wound was still there and was unlikely to heal soon due to the nature of extent and depth of the wound. At the time he testified, he told the court that the left thigh needed grafting through a reconstructive surgery. I do note that the respondent was admitted in hospital for about a month. He has been left with a walking disability although there was no permanent incapacity assessed.

30. The appellant has cited authorities of Damaris Mwongeli Muaia v Kenya Wildlife Services [2017] eKLR, Christine Adhiambo v Falcon Coach Limited & Another [2009] eKLR and Gusii Deluxe Limited & 2 Others v Janet Atieno [20120] eKLR. Of these I find the Damaris case more relevant to the case in hand. In the said authority, the appellant had sustained deep cut on the lower limp leading to her admission in hospital for 28 days where she underwent skin drafting. The respondent has cited authority of Kenya Wildlife Services vs Ann Muindi, civil appeal number 47 of 2017 which he did not attach to his submissions and my search of the same has not yielded fruits. I would not therefore be able to ascertain the facts therein if any. I have also had opportunity of going through judgment in Dedan Njoroge Mwangi v & Another v Jane Wanjiku [2020] eKLR where the respondent had sustained a degloving injury (open wound) on the right arm, fracture of the right radius and ulna, bruises on the right side of the head, the right thigh and right upper arm and the court went on to award a sum of Kshs 600,000.00 in general damages for pain and suffering and loss of amenities.

31. Having considered the evidence on injuries and the relevant authorities, it is my view that a sum of Kshs 600,000.00 would be sufficient compensation to the respondent. The amounted awarded by the lower court was too high and disproportionate to other decided cased involving similar injuries.

32. I turn to the last issue on whether the court was right in awarding Kshs 150,000.00 for further medical expences. The appellant has attacked this finding arguing that the court failed to consider the doctor's testimony that the respondent's wounds had healed and no reconstructive surgery would be required. I have read the evidence of the doctor as recorded and I do not agree with the appellant on its position. The doctor's report clearly shows that the respondent would require a sum of Kshs 150,000.00 for reconstructive surgery. I think the appellant is capitalising on an isolated sentence where it is record that 'no skin grafting is required'. This was amid cross examination where the doctor in other sentences maintained that the reconstructive surgery was necessary. For clarity purposes I reproduce the doctor's testimony in cross examination thus;

> 'He recovered partially 9 months after the incident. Right hand had healed well. Right thigh needed skin grafting. Today is 5 years after the incident and the wound has not healed. No skin grafting is required. The plaintiff developed walking disability. I never rated a percentage. He required reconstructive surgery due to permanent injury though its not in my recommendation"

33. In my view, the totality of the above testimony is that the reconstructive surgery was still necessary. In any event, I don't think skin grafting is synonymous to reconstructive surgery. The appellant has made an attempt to refer me to a report by Dr Wambugu on second examination. However, this report was never produced in evidence although the same was in the appellant's filed list of documents. Since it was not produced, it has no probative value and the trial court and this court should not give any consideration to it. In Jackson Ndwiga v Elizabeth Thara Ngahu [2021] eKLR, Honourable Justice L. Njuguna had the following to say in respect of documents not formally produced;

> 'Since the documents referred to in the list of documents were not formally produced in support of the suit, coupled with the fact that the correct procedure for recording and production of evidence as laid down in Order 18 Rule 1 and 2 was not complied with, the learned magistrate with tremendous respect fell into error and the whole trial was rendered a nullity"

34. In this regard I dismiss this ground as lacking merit.

35. In conclusion, I partially allow the appeal and I make the following orders;

    1. The finding of the trial court in Thika Cmcc number 101 of 2019 on liability is upheld.

    2. The award of the trial court of Kshs 2,000,000.00 in general damages is hereby set aside and substituted for an award of Kshs 600,000.00.

    3. The award of Kshs 150,000.00 for future medical expences and Kshs 9,900.00 for special damages are upheld.

    4. The respondents shall have the costs of the suit in the lower court based on the awards in 2 and 3 above.

    5. Since the appellant has substantially succeed in this appeal it is awarded half costs of the appeal.

    6. The amounts in 2 and 3 above shall attract interest at court rates from the date of the lower court's judgement until payment in full.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.