



**Kenya Wildlife Service v Lagasola & another (Suing as the Legal Representative of the Estate of Lteeslan Lonchilin Lekasula) (Civil Appeal E008 of 2021) [2023] KEHC 19149 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19149 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CIVIL APPEAL E008 OF 2021**

**JN NJAGI, J  
JUNE 22, 2023**

**BETWEEN**

**KENYA WILDLIFE SERVICE ..... APPELLANT**

**AND**

**NAPIRINGERA LEKASULA ..... 1<sup>ST</sup> RESPONDENT**

**DALASWAN LAGASOLA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LTEESLAN  
LONCHILIN LEKASULA**

*(Being an appeal from the judgment and decree of Hon. Collins Ombija, Resident Magistrate, in Marsabit PM's Court Civil Case No.7 of 2019 delivered on 16/9/2021)*

**JUDGMENT**

- The Respondents herein brought suit against the Appellant at the lower court in their capacity as the legal representatives of the estate of the deceased herein. The Respondents were seeking to recover damages under the Law Reform Act and under the Fatal Accidents Act after the deceased was killed by a rogue elephant at Karare area adjacent to Marsabit National Park. The parties entered consent on liability in the ratio of 80:20 in favour of the Respondent. The trial magistrate then proceeded to assess damages and awarded the same as follows:

General damages ..... Ksh.4,000,000/=

Pain and suffering ..... Ksh. 50,000/=

Loss of dependency ..... Ksh. 300,000/=

Special damages .....Ksh. 20,000/=



2. The Appellant was aggrieved by the award and filed the instant appeal. The grounds of appeal are that:
  - (1) That the learned trial Magistrate erred in law and fact by awarding general damages in the sum of Kshs.4 million in addition to general damages to loss of dependency thereby arriving at an award that is inordinately excessive.
  - (2) That the learned trial Magistrate erred in law and fact by awarding general damages in sum of Kshs.4million which award is inordinately excessive and a wholly erroneous estimate of the damages payable in the circumstances of this matter.
  - (3) That the Judgment of the learned trial Magistrate is against the law and weight of evidence on record.
3. The appeal was canvassed by way of written submissions.
4. The Advocates for the Appellant, M/S Mithega & Kariuki Advocates, submitted that for a claim under the Law Reform Act and Fatal Accidents Act, general damages are only payable under section 2 of the Law Reform Act or under section 3 of the Fatal Accidents Act. That under the Law reform Act the damages that are payable are classified under the heading of pain and suffering as well as loss of expectation of life. That on the other hand damages under the Fatal Accidents Act are essentially damages for loss of dependency. That in the premises the trial court erred in law in that it awarded general damages at Ksh.4,000,000/= after awarding damages for pain and suffering, loss of expectation of life and loss of dependency which led the court to arriving at inordinately high award. Consequently, the Appellant submitted that the award of Ksh.4,000,000/= had no basis in law and should be set aside.
5. The advocates for the Respondents, Khan & Associates, on the other hand submitted that the law applicable at the time of the incident was the Kenya Wildlife Conservation and Management Act No. 47 of 2013. That all claims for compensation for death, injury or damage to property caused by wildlife should be brought against the Service as per the provisions of Section 6 of the Act. That the KWS is the only entity clothed with power and authority to compensate for any injury, death or damage to property. The Respondent relied on the decision in the case of Joseph Munyoki Kalonzo v Kenya Wildlife Service Garissa HCCC No.5 of 2014 (2015) eKLR, where the deceased was killed by a crocodile and Justice Dulu in a judgment upheld by the Court of Appeal, held that:

In my view, the plaintiff is entitled to compensation under the Wildlife Conservation and Management Act 2013, which is the specific Act that deals with accidents and fatalities associated with wildlife conservation, and the deceased was killed by wildlife. Since the Act is also a more recent law, it has to be the guide in determining awards for damages or death, or injuries caused by wildlife, as Parliament has it its wisdom decided to treat damage, injuries and deaths caused by wildlife differently. The general law under the Fatal Accidents Act and Law Reform Act cannot thus be used in determining damages as Parliament has made specific provision for the same under the Act of 2013.

Since in my view, it was proved that the deceased died due to an attack by a crocodile, I hold that a figure of Kshs. 5,000,000/= is awardable to her estate as damages as compensation, as provided under Section 25 of the Wildlife Conservation and Management Act 2013.

The Respondent urged the Court to follow this authority and uphold the decision of the trial court and dismiss the appeal.



6. This being a first appeal the duty of the court is to analyze and evaluate afresh the evidence adduced at the trial court and draw its own independent conclusion while bearing in mind that it did not see or hear the witnesses testify – see *Selle & another v Associated Motor Boat Co. Ltd* & (1973 EA 123.
7. I have considered the appeal, the submissions, the authorities cited and the law. It is trite law that assessment of damages is at the discretion of the trial court. The principles on which an appellate court will interfere with the trial court’s findings on award of damages are settled. In the case of *Butt v Khan* 1982 -1988 1 KAR the court pronounced itself as follows: -
 

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
8. Similarly, in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288[1990-1994] EA 47, the Court of Appeal held that:
 

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”
9. The Respondent filed his suit under the *Law Reform Act* and under the *Fatal Accidents Act*. The body of the plaint sought for damages under the two Acts and for special damages of Ksh.20,000/=. The trial court awarded general damages in the sum of Ksh.4,000,000/= in addition to a sum of Ksh.300,000/= for loss of dependency under the *Fatal Accidents Act*. The Appellant argues that the trial court was wrong in making the awards. They argued that the court should only have made the award for loss of dependency as that is what was pleaded under the *Fatal Accidents Act*.
10. The Respondent supported the award of Ksh.4,000,000/= on the basis of the award in the case of *Joseph Munyoki Kalonzo v Kenya Wildlife Service* (*supra*) where the court compensated the deceased in accordance with the compensation set out in the *Wildlife Conservation and Management Act*. According to that *Act*, the compensation for death arising from an attack by a crocodile attracts a compensation of Ksh.5,000,000/=. The learned Judge in that case stated that:
 

The general law under the *Fatal Accidents Act* and *Law Reform Act* cannot thus be used in determining damages as Parliament has made specific provision for the same under the Act of 2013.
11. It is however clear from the judgment in that case that the claimant sought to be compensated under the *Wildlife Conservation and Management Act*. In this case the claim was not made under that *Act* but was made under the *Law Reform Act* and under the *Fatal Accidents Act*. It is only in their submissions that the advocates for the Respondent sought for the Respondent to be compensated in the sum of Ksh.5,000,000/= under section 25(3) of the *Wildlife Conservation and Management Act* that places compensation for death occurring as a result of an attack by a crocodile at Ksh.5,000,000/=.
12. It is trite that parties are bound by their pleadings -see *Independent Electoral and boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR in which the court cited



with approval the Nigerian Supreme Court decision in *Adetoun Oladeji v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:

“... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...

... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

13. It is also trite that submissions cannot take the place of evidence - see Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another (2014) eKLR. The Respondent made his claim under the *Law Reform Act* and under the *Fatal Accidents Act*. The damages payable under the *Law Reform Act* are for pain and suffering and loss of expectation of life. On the other hand, the damages payable under the *Fatal Accidents Act* is loss of dependency by the dependants. The trial court awarded damages under the two Acts. In my considered view, it was not legally tenable for the trial court to award further damages ostensibly under the *Wildlife Conservation and Management Act* when the same was not pleaded. The award of Ksh.4,000,000/= in my view would amount to double compensation after the awards under the *Law Reform Act* and *Fatal Accidents Act* were made. It would also amount to amending a claim after pleadings and hearing had closed.
14. It is to be noted that the Appellant did not appeal against the awards made under the *Law Reform Act* and *Fatal Accidents Act*. Neither did the Respondent counter appeal on those awards. The court cannot interfere with those awards when there is no appeal on them. The awards will therefore remain as adjudged by the lower court. It is my considered view that the award of Ksh.4,000,000/= was not justified and should therefore be set aside.
15. The upshot is that the court upholds the appeal and the award of Ksh.4,000,000/= is hereby set aside. The other awards as made by the trial court are to remain as awarded.
16. The Appellant to have the costs of the appeal.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 22<sup>ND</sup> JUNE 2023**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Miss Masamba for Appellant

N/A for Respondent

Court Assistant – Jarso

30 days R/A.

