REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 13 OF 2018

MAHAT BULLE YAKUB.....APPELLANT

-VERSUS-

HANNINGTON KYENGO MAENDE.....1ST RESPONDENT

KENYA WILDLIFE SERVICE.....2ND RESPONDENT

(Being an appeal against the judgement of G.W. Kirugumi, Senior Resident Magistrate sitting at Mwingi on 12th October 2017 in Principal Magistrate's Court Civil Suit No. 236 of 2009)

JUDGEMENT

1. By plaint dated 24th June 2016,the appellant sought general damages, special damages of Kshs.232,000/- as well as interest and cost of the suit.

2. The appellant claim arose from shooting incident where the appellant pleaded that the 1st respondent was a game ranger employed by the 2nd respondent.

3. The appellant further pleaded that on 15th September 2006 the appellant's family were having breakfast at an area known as Boka. The 1st respondent in company of other game warders attacked them without any just cause whereby the 1st respondent shot and injured the appellant without provocation and unlawfully and in addition also caused the appellant to loose Kshs.60,000/- proceeds from sale of camels and nine camels.

4. The appellant prayed that the trial court holds the respondents fully liable for the 1st respondent's illegal actions and to order the respondents to pay damages to compensate the appellant for pain, suffering and loss of amenities as well as loss of income, special damages, lost camels and Kshs.60,000/- stolen by the game rangers.

5. The respondents filed a joint statement of defence dated 1st July 2008. The respondents claimed that the appellant had committed the offence of trespassing with cattle into a reserved area being Kora National Park. The 1st respondent further claimed that he acted in self defence since the appellant attacked him.

6. The respondents listed general particulars of negligence attributable to the appellant. The appellant as well listed several particulars of negligence attributable to the respondents. The special damages were abandoned by the appellant at the hearing as well as the claim for loss of earnings.

7. The issue of jurisdiction was not canvassed. The Wildlife Conservation and Management Act (2013) vested jurisdiction for claims based on injury by wildlife to County Wildlife Conservation and Compensation Committee. In this case the injury was not caused by wildlife and the case arose before the coming into effect of the said Act.

8. After full hearing of the case, the trial court dismissed suit with no orders as to costs.

9. Being aggrieved by the decision, the appellant filed appeal herein and set out the following grounds:-

> **(1) That the learned trial magistrate erred by, to the detriment of the appellant, basing a key finding of her judgement on the unproved and untested statement of a person who was neither a witness in Criminal Case No. 181 of 2008 (Republic vs Hannington K. Maende) nor was she a witness in the civil case before her and having chosen to use the statement she wrongfully proceeded to selectively use those parts of the statement supporting the respondents and ignoring key areas of the same statement which supported the appellant's case.**

(2) The learned trial magistrate erred by, again to the detriment of the appellant, basing yet another key area of her judgment on non-existent exhibits, exhibits neither produced in the said criminal case nor produced before her court.

(3) The learned trial magistrate erred by emphasizing the alleged presence of the appellant within Kora National Park, which was never proved, while, without good reason, dismissing/ignoring the significance of the fact that the raid by the rangers was based on the specific allegation which was repeatedly made, that the appellant and his family were poachers, which was also never proved.

(4) The learned trial magistrate erred by bearing allegiance to the findings of the trial magistrate in the said criminal case when the findings of the said magistrate were themselves questionable.

(5) The learned trial magistrate erred by wrongfully failing/refusing to exercise the duty of assessing the general damages she would have awarded the appellant.

(6) That generally the learned trial magistrate erred by failing to appreciate that on a balance of probability the appellant had proved his case thus deserving judgment in his favour.

10. Parties were directed to file submissions to canvass the appeal.

APPELLANT'S SUBMISSIONS

11. The appellant submitted that, at the sight of the rangers all members of the family of the appellant fled including the appellant.

12. No evidence of a verbal exchange or quarrel or history of bad blood between the appellant and 1st respondent. The appellant had no reason to attack the 1st respondent. No evidence was offered by the respondents why the appellant would have suddenly stopped his flight, turned around and started attacking the 1st respondent. In this respect it is worthy to note that all the other family members successfully escaped the rangers.

13. No evidence was found by the rangers that the appellant's family were poachers. This was one of the two specific accusations leveled against the appellant's family. It was the 2nd respondent's testimony that they were chasing away poachers and invaders and trespassers. In cross examination the 1st respondent admitted that they did not get a dead animal.

14. Other than insisting that the appellant and his family were inside the part, no attempt was made to provide proof that the appellant and his family were actually in the alleged park. The 2nd respondent is a well-funded public institution. It had the resources necessary to present evidence of the gazetted boundaries of the alleged part. The court will have noted that the 1st respondent and his fellow rangers were allegedly given co-ordinates to show the location of the appellant's family manyatta by the pilot. The coordinates were never produced yet they formed the basis for the arrival of the rangers at the manyatta.

15. Other than insisting that the appellant had an axe which he allegedly used to attack the 1st respondent the alleged axe was never produced, whether in the criminal case nor in the civil case.

16. The appellant submitted that there was damning admission by the 1st respondent during the hearing that there were no signboards, markers or other identifiable means which would have enabled a member of the public to know that he had entered the alleged part.

17. The trial court did not assess the damages which it would have awarded had it determined that liability was established. The law is clear. The principles upon which it is based are also clear. It was the duty of the court to have assessed the damages it would have awarded.

18. In the case of ***Lei Masaku vs Kalpana Builders Ltd Civil Appeal No. 40 of 2017 (2014) eKLR,*** **Mabeya J** held as follows:

"There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established."

19. The trial court made a specific finding without an iota of evidence presented before it by the 2nd respondent that the appellant had taken some risk in living inside a national park.

20. It is the appellant's submission that national parks are national assets. They are managed by the 2nd respondent. They are all gazatted with official boundaries. It is in the public domain that some are fenced while others are not. Firstly, there was no poof given to the trial court that Kora National Park was a gazatted national park. Secondly, there was no evidence whatsoever about its boundaries. Thirdly, there were no marks or signboards to warm members of the public about the alleged park. So, in the absence of all these, how did the trial court arrive at the definitive finding that the appellant who was an illiterate pastoralist was living inside the alleged national park?

21. The trial court confirmed having perused the criminal court proceedings. If the court did so then it should have noted the evidence of PW3, PW4 and PW5 all of whom confirmed that upon the arrival of the rangers everybody took to his heels.

22. Recalling the incident PW5 on his part also confirmed that the residents of the manyatta ran in different directions when they saw the rangers, interestingly PW6 talked not about an axe but a panga.

RESPONDENTS' SUBMISSIONS

23. From the perusal of the proceedings, it is evident from the testimonies of the rangers that is to include: Elijah Joseph Kiboi, Moses Leshore, Ahmed Noor Mohamed and Hanningtone Kyengo Maende (the 1st respondent herein) that they were under instructions by Cpl. Jere to evict people who were illegally in the park and suspected to be poachers, trespassers and or intruders.

24. This became necessary after an aircraft patrol that identified illegal trespassers in the park. The appellant also confirm that they were in the park in his submission.

25. Further a perusal of the judgment in the criminal case indicates that the appellant was shot inside Kora National Park. This is in respect of the charge sheet.

26. Moreover, the allegation that the appellant was illiterate and that they were not aware that they were in Kora National Park based on their way of lifestyle as pastoralists; this is ignorance of the law which is not a defence.

27. It is the respondents' further submission that in reference to paragraph (f) of the appellant's submission that even if in the event a signboard was put in place, the appellant due to his illiteracy would still not be able to read and know whether or not they were in the park. This therefore cannot afford a defence to illegally being at Kora National Park.

28. It is further the respondents' submission that whether the appellant was a poacher or a trespasser, he was illegally found in the park necessitating his forceful eviction.

29. Therefore, the appellant assertion that, "the court erred in law an facts by emphasizing his alleged presence within Kora National Park" is therefore untrue as this was an afterthought in respect to the civil case decision.

30. At the very first instance, the appellant ought to have appealed on the criminal decision pursuant to section 3 of the Criminal Procedure Code (Amendment) Act Cap. 375 as at then which provides that:

> **"When an accused person has been acquitted on a trial held by a subordinate court or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court the Attorney General may appeal to the High Court or the Court of Appeal as the case may be on a matter of fact and law."**

31. For the reasons enumerated above, it is the respondents' submission under this limb that the trial court did not error in law and fact by emphasizing the alleged presence of the appellant within Lora National Park and by alleging that the appellant and his family were poachers for reasons that the cause of action as per the charge sheet arose within Kora National Park. The park as the locus-in-quo is relevant given that it is the respondents' area of operation.

32. On whether the trial court erred in law and facts by basing its judgment on no-existent exhibits, exhibits neither produced in the said criminal case nor produced before it in the civil case, it is provided under section 164 of the Evidence Act that:

> **"When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies."**

33. In light of section 164 of the Evidence Act, and in response to the appellant's submission, it is clear from the proceedings and testimonies in the criminal case that indeed the 1st respondent in an attempt to evict the illegal people from Kora National Park, the appellant attempted to cut the 1st appellant with an axe which hit the hand guard of the rifle. The hand guard got damaged by detaching itself. This is an uncontroverted fact in the criminal case.

34. Further it is clear from the court proceedings that the hand guard of the F.N. rifle produced as exhibit 1 had a sharp cut. It is further noted in respect to the judgment in the criminal proceedings that the investigating officer confirmed to the court that a knife and an axe were recovered even though the same were never tendered in court as evidence.

35. The court observed in the criminal proceedings that in the event the axe was produced in court, it would have corroborated the 1st respondent's evidence and completely exonerated him from blame.

36. Based on the evidence adduced in court during the criminal hearing, the court found the 1st respondent to have properly used his gun in the course of his duties and subsequently acquitted him under section 215 of the Criminal Procedure Code.

37. It is therefore the respondents' submission that in so far as the trial court in criminal proceedings based its judgment on non-existent exhibits which were neither produced in the criminal case nor produced before it in the civil case, its decision was based on circumstantial evidence as enumerated under section 164 of the Evidence Act for reasons that the sharp cut on the hand guard of the F.N. rifle clearly indicates that there existed an axe which the appellant intended to use to harm the 1st respondent. The prosecution did not produce the said items in the criminal trial which fact the criminal court found in favour of the 1st respondent, the appellant should have complained against the prosecution.

38. As stated above, the judgment delivered in the criminal proceedings were never appealed against and therefore a sound judgment to be relied upon in the civil case. Reliance is placed on the case of ***Paul Masaku Makau vs Republic [2016] eKLR*** as cited herein.

39. For the reasons enumerated above, it is the respondents' submission under this limb that the trial court did not err in law and fact by basing its judgment on non-existent exhibits, exhibits neither produced in the said criminal case nor produced before it in the civil case.

40. The court should note that the learned trial magistrate could not introduce new findings in the civil case which contradicted or replaced the findings of the criminal case. This would amount to re-writing the judgment in the criminal case.

41. On whether the appellant proved his case on a balance of probabilities to be entitled to the general damages sought in his plaint dated 24th June, 2008, as a general rule, sections 107 and 108 of the Evidence Act states that a person who alleges is under a duty to prove all allegations as contained in his claim against the respondent on a balance of probabilities.

42. The respondents relied on the case of ***Ernest Shisia Ngalaba vs West Kenya Sugar Co. Ltd [2013] eKLR*** where the court cited with approval the case of ***Kirugi & Another vs Kabiya & 3 Others [2018] KLR 347***, the Court of Appeal held that:

> **"The burden is always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."**

43. In response to paragraph (b) (b) (c) (d) (e) and (f) of the appellant's submission, it is the respondents' submission that from the proceedings, at no given point did the 1st respondent attack the appellant. It is however evident from the proceedings that the appellant was carrying an axe with which he attempted to cut the 1st respondent, instead cut the gun of the 1st respondent damaging it.

44. From the proceedings and testimonies both at the criminal and civil cases as stated above, it is evident that the actions of the appellant wholly contributed to his misfortune as the respondent was acting in line of his duty and in self defence.

45. Moreover, the appellant's case were dismissed in both the criminal and civil cases owing to the fact that he had failed to prove that the respondent used his weapon in a reckless and/or careless manner to be held liable in the circumstances.

46. From the foregoing, it was incumbent upon the appellant to prove the allegations levelled against the 1st respondent as pleaded in his plaint, occurred due to the negligence acts particularized in his pleadings of which he failed to demonstrate.

47. As a result of the appellant failing to prove his case on a balance of probabilities, the trial court in the civil case dismissed the appellant's suit on the ground that no liability had been established as against any of the respondents.

48. It would have been a gross error for the civil court to have found in favour of the appellant and awarded him damages in a case where he had already committed criminal offences. This would amount to rewarding wrongdoing.

49. It is further important to note that the appellant's plaint dated 24th June 2008 did not outline any particulars of negligence and/or liability as against the 1st respondent.

50. To this end and in response to paragraph (a) of the appellant's submissions, the respondents relied on the case of ***Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR*** where the plaintiff failed to take precaution of her safety by running across the road when he was hit, and there being no evidence that the respondent was driving at an excessive speed and/or acted negligently in the circumstances, court found no valid basis for apportioning liability against the respondent.

51. The court in this case cited with approval the case of ***Stapley vs Gypsum Mines Ltd (2) (1953) AC 663 at pg 681*** where the court interalia held that:

> **"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened..."**

52. In line of this authority, it is the respondents' submissions that were it not for the appellant's conduct and his illegal encroachment and/or trespass into Kora National Park and attempt to cut the 1st respondent, he would not have been shot.

53. As a result, the respondents cannot be held to be liable neither is the appellant entitled to damages. To award the appellant any damages would amount to rewarding the appellant's wrongful and illegal acts that resulted in being injured.

54. For these reasons, it is the respondents' submission that the appellant did not prove his case on a balance of probabilities to be entitled to the general damages he sought in his plaint dated 24th June 2008.

55. Although the trial court did not award the damages it could have awarded to the appellant in the event it found in his favour, failure to do so is not fatal.

ISSUES ANALYSISS AND DETERMINATION

56. After going through the proceedings on record and the submissions filed, I find the issues are; whether **the appellant proved his case on balance of probabilities on liability and the quantum? What was the order as to costs?**

57. The duty of this court will be to re-evaluate, re-assess and re-evaluate, and re-analyze the evidence on record and determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. See the case of ***Selle vs Associated Motor Board Company Ltd (1968) E.A. 123, 126*** where the court considered the principle upon which it acts in a first appeal noting as follows:

> ***"Briefly put they (the principles) are that, this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial judge's finding of fact*** **if it appears either that he has 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 demeanor of a witness is inconsistent with the evidence in the case generally."**

58. In civil cases it is trite law that the plaintiff has to prove his case on balance of probabilities.

59. From the perusal of the proceedings, it is evident from the testimonies of the rangers that is to include: Elijah Joseph Kiboi, Moses Leshore, Ahmed Noor Mohamed and Hanningtone Kyengo Maende (the 1st respondent herein) that they were under instructions by Cpl. Jere to evict people who were illegally in the park and suspected to be poachers, trespassers and or intruders.

60. This became necessary after an aircraft patrol that identified illegal trespassers in the park. Further a perusal of the judgment in the criminal case indicates that the appellant was shot inside Kora National Park. This is in respect of the charge sheet. The trial court in Mwingi SRM CRC 181 of 08 also upheld the locus in quo to be within the park.

61. Thus the finding that the shooting of the appellant was within the Kora national park is valid. He was not authorized to be in the park thus he was illegally therein and a trespasser. The criminal case holding has not been challenged thus this court upholds that finding.

62. Thus the aforesaid finding gives credence that the 1st respondent and other 2nd respondent officers went to the locus in quo to evict the appellant and his family members who were trespassing in the national park.

63. It is clear from the proceedings and testimonies in the criminal case that indeed the 1st respondent in an attempt to evict the illegal people from Kora National Park, the appellant attempted to cut the 1st appellant with an axe which hit the hand guard of the rifle. The hand guard got damaged by detaching itself. This is an uncontroverted fact in the criminal case.

64. Further it is clear from the court proceedings that the hand guard of the F.N. rifle produced as exhibit 1 had a sharp cut. It is further noted in respect to the judgment in the criminal proceedings that the investigating officer confirmed to the court that a knife and an axe were recovered even though the same were never tendered in court as evidence.

65. The court observed in the criminal proceedings that in the event the axe was produced in court, it would have corroborated the 1st respondent's evidence and completely exonerated him from blame.

66. Based on the evidence adduced in court during the criminal hearing, the court found the 1st respondent to have properly used his gun in the course of his duties and subsequently acquitted him under section 215 of the Criminal Procedure Code.

67. This court observes that the trial court had doubt as to the absolute innocence of the 1st respondent thus held that "***in the event the axe was produced in court, it would have corroborated the 1st respondent's evidence and completely exonerated him from blame."***

68. This shows the evidence of the events leading to shooting of the appellant did not convince the trial court in criminal proceedings that the 1st respondent was 100% innocent but some doubt lingered thus same being credited on his side thus earning him an acquittal.

69. The acquittal of an accused person in the traffic case would, of course not be binding on a civil court subsequently considering the issue of negligence on a standard of proof which is lower than, ***"proof beyond reasonable doubt".*** As this Court stated in ***Robinson vs Oluoch [1971] EA 376:***

> ***"It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."***
>
> ***The converse is also true where there is an acquittal.***

70. In criminal case the 1st respondent said that **as they struggled over a gun with the appellant he pulled the trigger to fire a bullet to scare the people who were coming unfortunately it got the appellant and he fell down.**

71. While in the civil case he stated **that while they were struggling with the appellant his hand went into the trigger of the bullet and it hit him on the back.**

72. The appellant on his part stated that while running away carrying nothing at a distance of 400 m, he was hit by bullet from the back.

73. The medical report confirms that the bullet entry was on the posterior and exited on the anterior i.e. entry was back side and exit frontal side.

74. The 1st respondent did not clearly explain how the type of the big gun bullet he had hit appellant on the back when they were struggling. On the same breath the appellant was not candid why while such far as 400m he was shot without threatening the 1st respondent.

75. Thus am convinced in the circumstances that the two parties are equally to blame for the accident which led to the injuring of the appellant therefore liability is apportioned at rate of 50 %:50% basis.

76. The court relies on the cases of ***Haji vs Murair Freight Agencies Ltd [1984] eKLR*** where the Court of Appeal held that where it is proved by evidence that both parties are to blame but there is no means of distribution between them, the blame can be distributed equally on each and also in the case of ***Nderitu vs Ropkoi & Another [2004] eKLR*** where the court pf appeal held that two motorists failed to exercise the degree of skill and care on the road, they are held equally liable for the accident.

77. On quantum the respondents quantified for Kshs. 600,000 less 50% liability relying on case of ***Postal Corp of Kenya vs Dicken Munayi (2004) eKLR*** where claimant had head injuries and multiple other injuries, whereas the appellant quantified for Kshs. 1.3 million relying on cases of ***Ogolla vs Wanachi Marine Products HCA MSA 123 of 2007*** injuries loss of left lung, ***Mehari Transporters vs Maingi HCA MSA No. 190 of 2008*** injuries fractures of 3 ribs.

78. The appellant sustained chest wound 6 x 8cm with excision of 3 ribs at the exit side done. The wound had closed as at the date of examination. Doing the best I can in the circumstances, I award appellant Kshs. 700,000 less liability.

79. The final orders are thus;

I) Liability 50%:50%

II) General damages Kshs. 700,000/- less Kshs. 350,000/- (50%) =Kshs.350,000/=.

III) Plus half costs and interest.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE