



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCA NO. 22 OF 2019**

**CATHERINE KANYUA GATUURA & JOSPHAT MWATHI KIURU**

**(appealing as legal representatives of the Deceased one**

**PETER KIUURU MUCHOMBA.....APPELLANTS**

**VERSUS**

**KENYA WILDLIFE SERVICE.....RESPONDENT**

**(Being an appeal from judgment/decree of the Honourable Senior Resident Magistrate Hon. S.M Nyaga**

**delivered on 4<sup>th</sup> day of April 2019 in the Senior Principal Magistrate's Court**

**at Marimanti Civil Suit No. 8 of 2017)**

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**J U D G E M E N T**

1. **CATHERINE KANYUA GATUURA and JOSPHAT MWATHI KIURA** (Suing as legal representatives of the late Peter Kiuura Muchomba) the Appellants herein were dissatisfied with the decision of the subordinate court in **Marimanti Senior Resident Magistrate's Court in Civil Case No.8 of 2017** and have appealed to this court.

2. Briefly the Appellants had sued Kenya Wildlife Service, the Respondent herein for general and special damages payable to the estate of the deceased whose life was taken away by injuries inflicted by a stray elephant. The Appellant alleged that the deceased was fatally injured by an elephant and blamed the Respondent for negligence. The Respondent had pleaded that it was not liable and challenged the jurisdiction of the lower court to entertain the matter. The trial court while overruling the Respondent on the issue of jurisdiction found them liable and awarded the Appellants shs.800,000/- in general damages and Kshs.58,605/- as special damages. In making the award of Kshs.800,000/, the trial court found no evidence to prove that the deceased made Kshs.30,000/- per month and made global award of Kshs.800,000/- to cover for loss expectation of life.

3. The Appellants felt aggrieved and preferred this appeal on the question of quantum and listed the following grounds namely;

- i. That the learned magistrate erred in law and fact in awarding the Appellants general damages that were manifestly low.**
- ii. That the learned magistrate erred in law and fact by failing to award the Appellants general damages for pain suffering and loss of expectation of life.**
- iii. That the learned trial magistrate erred by failing to award the Appellants Kshs.5 million as provided under Section 25 of the Wildlife Conservation and Management Act 2013.**
- iv. That the learned trial magistrate failed to take into consideration relevant factors.**
- v. That the trial magistrate failed to note that it was not a legal requirement to demonstrate an income of a person through documentary evidence.**

vi. That the trial magistrate erred in law and fact in holding that the Appellants did not demonstrate clearly that the deceased was dependable.

4. In their written submissions through their learned counsel, Ms J.G. Gitonga & Company Advocates, the Appellants have pointed out that this court can interfere with an award given by the lower court following the principle enunciated in the case of Robert Msioki Kitavi -vs- Coastal Bottlers Ltd (1985) KAR which held as

**"The Court of Appeal in Kenya, as it was then, should as its fore-runners did, only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or that the award is so high or so low that it amounts to an erroneous estimate."**

5. The Appellants have also cited the decision in the case of IDI AYUB SHABANI S/O YUSUF JUMA -VS- City Council of Nairobi & Another (1985) 1 KAR where the Court of Appeal also held that 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.

6. The Appellants submit that the deceased was a farmer aged 44 years at the time of his demise and that he was survived by a wife and 5 children. They aver that they proved dependency by the fact that the deceased used to pay school fees for his children buy food and clothes for them among other needs. According to the Appellants the award given of Kshs.800,000/- was simply too low and not based on correct principle or evidence tendered.

7. The Appellants contend that an award of Kshs.5 million would have been reasonable and have relied on the case of Joseph Musyoki Kalonzo -vs- Kenya Wildlife Services (Garissa HCC No. 5 of 2014) where they claim that the awarded court award Kshs.5 million to the estate of the deceased after the deceased was killed by a stray animal from Kenya Wildlife.

8. The Respondent have opposed this appeal through written submissions of its counsel Ms Mitheka Kariuki Advocates. The Respondent contends that the Appellants suit at the trial court was hinged on common law and it was presented and is as such. It further contends that under common law the trial court has unfettered discretion to assess damages based on facts and evidence presented and is guided by the law.

9. The Respondent contends that the Appellants cannot claim an award of Kshs.5 million as provided under **Section 25 (3) of Wildlife Conservation and Management Act** whereas his claim was a common law claim and not a claim under the said statute.

10. The Respondent insists that having made a claim under common law, the Appellants cannot now go back and say that the trial court should have made an award under the said statute.

11. The Respondent further contends that the award made by the trial court was fair, just and reasonable. It has pointed out the claim that deceased earned Kshs.30,000/- per month in farming was doubtful given the fact that the deceased came from Tharaka region which is remote and dry. It has asked this court to take judicial notice of that fact and contended that it was even unlikely that the deceased could make 30,000/- annually. The Respondent has submitted that the Appellants had the burden of proof and they failed to discharge the same.

12. This court has considered this appeal and the response made. As observed above this appeal is only on quantum and the Appellants have faulted the trial court for making an award too low in their view.

13. There is no dispute that this court as an appellate can only interfere with an award of damages on principles that are now well settled. The test is clearly captured in the decision of Butt- vs- Khan (1977) 1 KAR cited by the Appellants where the Court of Appeal held 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 the wrong principles or that he misapprehended the evidence in some material respect and so arrived at figure which was either inordinately high or low."**

14. Before I delve on whether the sum of Kshs.800,000/- awarded as general damages was too low or high, I will first determine whether the award should have been based on common or statute (Wildlife Conservation and Management Act 2013) because that is an issue that has in my view cropped up in this appeal.

15. This court has perused through the plaint filed in the subordinate court and it is clear that the claim filed was purely a common law claim. The Appellants never pleaded that their suit was based on **Section 25 (1) of the Statute** or sought a declaration that the Respondent ought to compensate them as provided by the statute. This court finds that the Appellants omission in that regard rendered their claim a common law claim which meant that the trial court could only exercise its discretion under common law and given an award based on the evidence tendered. The provisions of order 2 Rule 4 of the Civil Procedure Rule made it mandatory for the Appellants to plead their claim specifically which they did by implying in their pleadings that their claim was based on common law. I agree with the Respondent that having specifically implied that their claim was under common law they cannot turn back and say that the trial court should have given them an award that was not pleaded. The reason for that is simple. Pleadings must be specific and open in order to give the opposite side a fair chance to defend itself.

16. The Appellants were duly represented by counsel at the trial and they had the option to specifically plead that their claim was based on the Statute (Wildlife Conservation and Management Act 2013) and seek declaratory reliefs under the said statute. That way the Respondent would have known what it faced in court and the trial court would have been guided accordingly.

17. This court finds that contrary to the Appellant's contention, the trial court properly directed itself that it was dealing with a common law claim like any other claim because that is what was pleaded. A party is always bound by his/her pleadings and it would have amounted to a departure if the trial court were to decide that the claim was statutory or declaratory when it was clearly not.

18. Turning back to the quantum, I have already highlighted the legal position on when this court can be called upon to disturb or interfere with an award of damages. It is apparent from the evidence tendered at the trial that the deceased was aged 44 years but his means of income in my view was not established. The Appellants simply pleaded that the deceased was a farmer with a monthly income of Kshs.30,000/- . They were required to prove the same on a balance of probability because a trial court must satisfy itself before making an award that the claim is well founded otherwise it would set a bad precedent where claimants would make crazy claims without any basis. I have re-evaluated the evidence tendered in regard to income of the deceased at time of his demise and find that the claim of monthly income of 30,000/- was unsupported. There was nothing to show what kind of farming the deceased practiced in that region which I take judicial notice of the fact that it is dry and remote. That fact clearly supported the decision made by the trial court to make a global award to cater for loss of dependency and less of expectation of life. The Appellants did not seek for a separate relief for pain and suffering and neither did they lead evidence to establish the period the deceased took from the time he was attacked to the time he died.

In the end this court finds no merit in this appeal. The same is disallowed but each party shall bear own costs.

**Dated, signed and delivered at Chuka this 7<sup>th</sup> day of May 2020.**

**R. K. LIMO**

**JUDGE**

Judgment dated, signed and delivered in open court in presence of Kaaria holding brief for Kariuki for Respondent.

**R. K. LIMO**

**JUDGE**

**7/5/2020.**