REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NO. 68 OF 2017

BETWEEN

KAKUZI LIMITED.....APPELLANT

VERSUS

STEPHEN NJOROGE MUNGAI.....1ST RESPONDENT

KENYA WILDLIFE SERVICE..... 2ND RESPONDENT

(Being an appeal from the original judgment and decree of Hon. C.A Otieno-Omondi, Principal Magistrate delivered on 21st April 2017 in Thika Civil Case No. 213 of 2014)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellant, who was aggrieved by the decision of the trial court aforementioned lodged this appeal on 22nd May 2017 with a prayer that the appeal herein be allowed with costs and the said trial court's decision on both quantum and liability against the appellant be set aside and that this court assesses the proper damages payable to the 1st respondent. The appeal was based on grounds THAT:

a) The learned trial magistrate misdirected herself and erred in law and in fact by holding that the plaintiff had proved his case on a balance of probabilities.

b) The learned trial magistrate misdirected herself and erred in law and in fact by disregarding the defendants' witness testimony and holding the appellant 80% liable for the accident the subject of the suit.

c) The learned trial magistrate misdirected herself and erred in law and in fact by failing to find that the plaintiff did not prove that he was harmed by an animal owned by the 1st defendant hence arrived at an erroneous finding on liability.

d) The learned trial magistrate misdirected herself and erred both in law and in fact in totally ignoring the provisions of the Wildlife Conservation and Management Act No. 47 of 2013 and hence arriving at an erroneous finding on liability.

e) The learned trial magistrate misdirected herself and erred both in law and in fact in failing to find that the duty placed on the 2nd defendant is statutory duty. The duty being statutory and a compensation fund having been created, there is no provision for sharing of the duty between private land owners and the 2nd defendant.

f) The learned trial magistrate misdirected herself and erred both in law and in fact in holding the Wildlife Conservation and Management Act does not apply to private land while the Act is clear on its application.

g) The learned trial magistrate misdirected herself and erred in law and in fact by totally disregarding the defendant's witnesses' testimony and holding the appellant liable for the alleged accident while the evidence or record called for dismissal of the suit against the appellant.

h) The learned trial magistrate misdirected herself and erred both in law and in fact in failing to consider the defendant's overwhelming evidence on record and hence arrived at an erroneous finding on liability.

i) The learned trial magistrate misdirected herself and erred in law and in fact by failing to find that the plaintiff was a trespasser on the 1st defendants premises and therefore the author of his own misfortune.

j) The learned trial magistrate misdirected herself erred in law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous vis a vis the injuries sustained by the plaintiff.

k) The learned trial magistrate misdirected herself erred in law and in fact by totally failing to consider the defendant's submissions on record and thus arrived at an erroneous finding on liability and quantum.

l) **The learned trial magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.**

Pleadings

2. The 1st respondent had filed a suit by way of a plaint dated 25th March 2014 in the lower court against the appellant and the 2nd respondent where he sought *inter alia* general and special damages together with costs of the suit, interest on the same and future medical expenses arising out of an accident that occurred on or about the 5th day of January, 2013 involving the 1st respondent and a hippopotamus. The 1st respondent claimed that he was lawfully walking along an all-weather road known as *Mathitimaini-Kabati-ini road* which was within the *Kakuzi farm* owned by the appellant when a stray hippopotamus abruptly attacked him and as a result of the attack, he sustained severe injuries. The 1st respondent added that along the path, there were no warning signs indicating the presence of wild animals and that the dam nearby had also not been fenced off to protect people passing through that part of the farm from wildlife attacks. The 1st respondent stated that the attack and injuries sustained therefrom was solely caused by the negligence of the appellant and the 2nd respondent, which were particularized in the plaint.

3. The suit was defended by the appellant and the 2nd respondent who filed statements of defence dated 15th May 2014 and 23rd July 2014 respectively in which they denied the contents of the plaint therein and in the alternative blamed the 1st respondent for being negligent and solely causing the accident. The appellant also blamed the 2nd respondent for being negligent.

Trial Court Judgment

4. The suit proceeded to a full hearing and at the conclusion of the trial the learned trial magistrate found that the appellant was liable for the attack on the 1st respondent but absolved the 2nd respondent from any blame. The trial court further found the 1st respondent to have contributed to the attack to the extent of 20%. The trial court therefore entered judgment for the 1st respondent against the appellant on liability in the ratio of 20%:80%. On quantum of damages, the trial court entered judgment for the 1st respondent against the appellant as follows:

General damages Kshs. 1,000,000/-

Future medical expenses Kshs. 300,000/-

Witness expenses Kshs. 5,500/-

Special damages Kshs. 3,000/-

Less 20% contribution

Total Kshs. 1,048,500/-

Costs and interest of the suit at courts rates

5. The trial court further dismissed the suit against the 2nd respondent with costs.

Duty of this Court

6. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis only bearing in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to**: '*** ***re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions*****.'** The provisions were buttressed by the Court of Appeal in the case of **Peter M. Kariuki v Attorney General [2014] eKLR** where it was held that:

"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See* NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 *(unreported)."

The appellant's submissions

7. The appellant submitted that there was sufficient evidence showing clearly that the 1st respondent was trespassing and illegally fishing on their farm and they invoked the general principle of *volenti non fit injuria*. The appellant stated that the evidence of the 1st respondent indicated that he was not an employee of the appellant and yet he was attacked while walking within the appellant's farm past 8.00 pm. The appellant added that the evidence of the 1st respondent further indicated that there was another path he could have used but the path he used was shorter and in a secluded area. The appellant stated that from the evidence of one Mr. Keter (DW1) there was a public road outside the farm which the 1st respondent could have used but then the 1st respondent admitted that he chose not to use it because it was longer. The appellant submitted that this clearly showed that the 1st respondent trespassed through the appellant's farm and knowingly exposed himself to the danger that arose from the trespass. The appellant further disputed the 1st respondent's claim that he was walking on the road and yet he was found naked and his clothes neatly arranged at a distance.

8. It was also submitted by the appellant that the evidence by their witnesses and that of the 2nd respondent that the 1st respondent was illegally fishing on their land was a more plausible explanation of what actually happened on the night of the attack.

9. The appellant further submitted that since the 1st respondent knowingly trespassed the appellant's land and fished illegally, he thus subjected himself to harm by the hippopotamus and he was not entitled to compensation because of the principle of *volenti non fit injuria.*

10. It was the appellant's further submission that the 2nd respondent was solely and wholly statutorily responsible for the injuries caused by the wild animals since, from the evidence of the 2nd respondent's witnesses, all wild animals found in private land belong to the government and that all liabilities for wild animals lie with the government. The appellant added that the appellant neither kept wild animals nor did they have a permit to do so and as such, they were not aware that the hippopotamus was on their land.

11. The appellant stated that from the 2nd respondent's witnesses, there was no proof that the 2nd respondent had carried out a sensitization programme on the victim and the community at large on the existence of wild animals in the area around the appellant's farm. The appellant added that under the ***Wildlife (Conservation and Management) Act (WCMA) No.47 of 2013*****,** the 2nd respondent was responsible for the management of wild animals and that there was a compensation fund under the Act where there was no provision for sharing liability for injuries caused by wild animals.

12. The appellant submitted that quantum payable in wildlife attacks is from the fund created under ***section 25(3) of the WCMA Act*** and that if any liability for the injuries is found, then the 2nd respondent should facilitate the compensation process on behalf of the 1st respondent as it is statutorily liable for the injuries caused by wild animals.

13. In conclusion the appellant urged this honourable court to allow the appeal and set aside the judgment of the learned trial court by finding the 2nd respondent wholly liable for any injuries that may have been suffered by the 1st respondent.

The 1st respondent's submissions

14. The 1st respondent submitted that this court ought not to disturb the trial court's finding on liability and that the apportionment of liability 80%:20% against the appellant was justified based on the totality of evidence. The 1st respondent further stated the road he was using on the material day was a public road and that the public accesses the shopping center inside the appellant's farm using the same. The 1st respondent thus denied that he was a trespasser on the appellant's farm and also denied that he was fishing as alleged by the appellant.

15. The 1st respondent further submitted that in his evidence, he had shown that there were no signs in place to show or to warn the public of wildlife existence in the area. The 1st respondent further stated that the evidence of DW1 and DW2 was contradictory as DW1 alleged that they removed him from the dam where he was fishing whereas DW2 on the other hand stated that they found him standing on the track used by hippopotamuses and was injured already. The 1st respondent submitted that in as much as all defence witnesses claimed that he was fishing, none of them cared to bring the alleged fishing net as an exhibit before the trial court.

16. The 1st respondent stated that there was compelling evidence of negligence on the part of the appellant and that the trial court never acted on the wrong principles in finding them 80% liable for the accident.

17. Regarding injuries suffered the 1st respondent submitted that he sustained the following injuries:

i. Fracture left radius/ulna

ii. Degloving injury left forearm

iii. Degloving injury right wrist joint

iv. Degloving injury right knee

v. Deep cut wounds left thigh

18. The appellant stated that the general damages awarded by the trial court were based on the aforementioned injuries, the duration spent at

the hospital undergoing different surgeries and the permanent disability which was assessed at 40%. The appellant submitted that the award by the trial court was justified and that it should not be reviewed downwards.

19. In conclusion, the 1st respondent submitted that the appeal ought to be dismissed with costs as it lacks merit.

Issues for Determination

20. I have gone through the record and written submissions together with the authorities cited by both parties. I have also considered the grounds of appeal as well the law and the judgment of the learned trial court. The following are the issues for determination:

a) Whether the trial court erred in finding the appellant 80% liable for the accident and injuries suffered by the 1st respondent.

b) Whether the trial court erred in awarding the 1st respondent Kshs. 1,048,000/- in quantum of damages and whether the trial court erred in finding that the appellant was the one to pay for the same.

Whether the trial court erred in finding the appellant 80% liable for the accident and injuries suffered by the 1st respondent

21. **Dr.George Kimiri Karanja** testified as PW1 and stated that he examined the 1st respondent three years after the 1st respondent had been attacked by a hippo on 5th January 2013. PW1 testified that he had seen several patients who had complained about having been attacked by a hippo and he opined that the 1st respondent's injuries were consistent with such an attack.

22. The 1st respondent testified as PW2 and stated that he was attacked by a hippo while walking along *Mathitimaini – Kabatini Road*, a road he claimed was public and was within the appellant's land and used by pedestrians and workers of the appellant company to *Kabati* Shopping Center. The 1st respondent stated that there were no warning signs on the road warning pedestrians of the presence of wildlife in the area and for that reason, he blamed the appellant for the attack by the hippo as they knew of the existence of the wildlife in the area. The 1st respondent also stated that he blamed the 2nd respondent as they were responsible for removing wildlife from residential areas. During cross-examination, the 1st respondent stated that he was not an employee of the appellant and that the road he used on that night was on the appellant's land hence it was a private road though it was often used by all pedestrians. The 1st respondent stated that there were other roads leading to *Kabati* shopping center from where he was and that the road was public. The 1st respondent stated that he chose not to use the alternative road as it was longer.

23. The 1st respondent further testified that there was a signboard at the entrance of the appellant company that read "**No through road for vehicles**" and other signboards prohibiting fishing, lighting and hunting. The 1st respondent added that he had seen a sign prohibiting trespassing of vehicles. The 1st respondent testified that his clothes were removed and torn by the hippo during the attack and denied that he had removed the clothes on his own or that he was fishing at the time of the attack. The 1st respondent stated that he was aware that it was illegal to fish at the appellant's farm and that if he had been fishing at the dam it would have been offence. The 1st respondent stated that the area where he was attacked was not lit save for the area where timber is split. The 1st respondent added that he had been using the road in the appellant's farm for about 40 years and that he knew the area well including that the appellant had a dam and that the dam had hippos. The 1st respondent stated that he blamed the 2nd respondent as the hippo, being a wild animal ought to have been in their custody but he did not know whether the 2nd respondent was aware that the appellant had a dam which had hippos. The 1st respondent added that the appellant ought to have informed the 2nd respondent about wild animals but he did not know whether this was done. The 1st respondent stated that he did not expect to be attacked by the hippo and concluded by stating that the appellant ought to bear more responsibility as he was attacked on the road within their premises and that they had allowed usage of the road despite their knowledge that there were wild animals in the dam. The 1st respondent further reiterated that there was no sign warning road users about wild animals on the road. The 1st respondent added that he had lived in the Kabati area his entire lifetime and that he had never heard of any member of the public who was not an employee of the appellant company arrested for using the road within the appellant company premises.

24. **Julius Keter**, testified for the appellant as DW1 and stated that he was the appellant's Assistant Manager Security and that on the material day at about 8.30pm he received a call that someone had been attacked by an animal. DW1 stated that three people had been attacked and that the 1st respondent was rescued from the water where he had been fishing illegally and that there were clothes nearby and they assumed it must belong have belonged to the 1st respondent as he was only wearing his inner wear. DW1 stated that he knew the 1st respondent was fishing as he saw a fishing net and that he retained the said fishing net. DW1 stated that there were signs at the appellant's gate that prohibited fishing, hunting, littering, lighting fires and trespass and there was one sign that stated "**this is a restricted area**". DW1 blamed the 1st respondent for the attack and stated that had he not trespassed he would not have been attacked.

25. During cross-examination, DW1 stated that when they arrived at the scene, they could not find the other people who were allegedly attacked by the hippo but that they carried out investigations and identified one person. However, DW1 stated that they could not arrest the said person for lack of sufficient evidence and that the 1st respondent's trespass was a "minor issue" and that since they felt the 1st respondent had learnt his lesson, they did not charge him. DW1 added that they reported to the AP officers and the 2nd respondent but he did not record any statement. DW1 reiterated that the 1st respondent was attacked at the dam but he did not know what attacked him as he was not at the scene when the incident occurred. DW1 testified that the appellant did not keep wild animals but did not have a license to keep them and that there were signs informing members of the public to be aware of cattle. DW1 stated that he had never heard of anyone being attacked by wild animals. DW1 further stated that after the attack, they informed the 2nd respondent but they were unable to find any hippos at the dam. DW1 confirmed that there were dams at the appellant for irrigation purposes and there was a thicket around the dam.DW1 stated that it was possible that hippos could find their way into the dam and he reiterated that the 1st respondent and his colleague were fishing and

that he (1st respondent) was found in the water.

26. **Patrick Ndamberi Ireri** testified for the appellant as DW2 and stated that he was their security guard and that on the material day at around 8.15pm he heard someone screaming from where he was stationed. On visiting the scene, DW2 stated that they found the 1st respondent naked standing on the track used by hippos and that he had been bitten on his thighs and right hand. DW2 stated that the 1st respondent told them that he had been bitten by a hippo while he was fishing with his friend and that afterwards they took the 1st respondent to Thika District Hospital and left him there to be treated. DW2 added that at the gate of the appellant company there were warnings against swimming, fishing, lighting, trespassing and tree felling. DW2 stated that he blamed the 1st respondent as he had trespassed into the appellant's farm and was fishing. DW2 confirmed that there were no warning signs for wild animals. During cross-examination, DW2 confirmed that they found the 1st respondent standing on the path of the hippos near the dam. DW2 stated that they found fishing nets being used by the 1st respondent but the said nets were not before court. DW2 further reiterated that the 1st respondent was bitten by a hippo and that employees of the appellant as well as visitors with a gate pass are allowed inside the appellant's farm.

27. **Richard Mwema** testified as DW3 and stated that he worked for the 2nd respondent and was based at Amboseli National Park and that on the material day, he received a call from one Elizabeth Eshiromo, a park warden, that a hippo had attacked someone at the appellant's farm. DW3 stated that he went to the appellant's farm and met security men of the appellant together with two AP officers and the 1st respondent who was lying injured in the appellant's pick up. DW3 stated that on inquiring, he was informed that indeed the person on the pick-up was the same one who had been attacked by a hippo and that it was the 1st respondent. DW3 added that he was informed that the 1st respondent was bitten while fishing in the dam inside the appellant's farm. DW3 stated that he was taken to the scene of the incident but was never led to where the 1st respondent was found. DW3 stated that there was a fishing net which was found and there was blood on the ground which he suspected must have been from the 1st respondent. DW3 further testified that they did not see the animal said to have attacked the 1st respondent and there were no houses or settlements at the scene. DW3 further stated that he went back to his station and recorded in the O.B where he had gone and what had been found, which he produced as *Dexhibit 1*. DW3 blamed the 1st respondent for the incident because he entered the farm without permission and that the 2nd respondent was not to blame for the incident. DW3 stated that the 1st respondent had been warned about the dangers and that the appellant's farm was private land and not a national park. The 2nd respondent stated in cross-examination that it was possible the hippo went away from the scene after attacking the 1st respondent and that they were informed that there were hippos in the appellant's farm and that that appellant informed them that they would let the 2nd respondent know if they needed their help. DW3 reiterated that the 1st respondent was attacked by a hippo inside the appellant's farm and that there were hippos in the said farm. It was also DW3's testimony that the 2nd respondent was the custodian of all wild animals and he confirmed that wild animals roam and it was possible for them to set up home in the area. DW3 further stated that the owner of the land was supposed to inform the 2nd respondent if they sighted wild animals in their property in that it was an offence to keep a wildlife animal without a license. DW3 stated that the appellant did not report about the presence of hippos on their land and that they only reported that someone had been injured by a hippo while fishing.

28. **Thomas Mailu** testified as DW4 and stated he was the warden in charge of Oldonyo Sabuk National Park. His evidence basically comprised the information as per their occurrence book dated 15th January 2013 which DW3 had testified about. DW4 added that the appellant kept wildlife within their property and that there were various wild animals within the said property including hippos. DW4 stated that their policies allowed people to keep animals and that licenses were issued to sanctuaries but the appellant was not one of those sanctuaries. DW4 stated that the 2nd respondent may compensate people who have been attacked by wild animals but that such compensation is dependent on a number of factors and the circumstances of each case. DW4 stated that they only compensated victims who were employees of private entities with animals and that the attack must have happened before sunset. DW4 stated that in the instant case, the 1st respondent did not qualify for compensation from the 2nd respondent as he was attacked at 8.00 pm and he was not an employee of the appellant. DW4 stated further that the 1st respondent never approached the 2nd respondent for compensation and that he was attacked out on provocation on the habitat of the hippo. DW4 opined that the hippo which is a docile animal could not have run after the 1st respondent to the road or struggled with him on the road and the 1st respondent must have been near the hippo's habitat. DW4 further opined that neither the appellant nor the 2nd respondent was liable and that the 1st respondent ought to have taken care of himself. DW4 stated that the scars that the 1st respondent showed the court were consistent with an attack by a hippo. DW4 added that the 1st respondent must have provoked the hippo and that fishing is a provocation to a hippo. DW4 testified that a sign of "**no hunting**" goes towards protection of animals.

29. From the totality of the evidence above, it is not in dispute that the 1st respondent was attacked by a hippo on 5th January 2013 and that he sustained injuries as a result. It is also not in dispute that the attack happened within the private property of the appellant. It is my finding that in as much as the 1st respondent was neither an employee nor expressly authorized as a visitor of the appellant, there was an implied license by the appellant authorizing members of the public including the 1st respondent to use the road within its property. I note that the evidence by the 1st respondent that members of the public ordinarily used the said private road to Kabati Shopping Center was not challenged by the appellant. It was also not controverted that the only visible signage prohibiting trespass was in respect of vehicles and not pedestrians. DW1's testimony that there was a sign stating ***"this is a restricted area"*** is not only vague but unsubstantiated. Section 112 of the *Evidence Act* is clear that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon them. In this case, the appellant claimed that the farm had prohibition signs warning against trespass but they did not call any evidence to prove that assertion or to controvert the 1st respondent's testimony that there was no signage prohibiting/restricting human access into appellant's property.

30. It is also my finding that the appellant was aware of the presence of hippos and other wild animals in its farm or in the very least knew that it was possible that hippos were in the dam area of their farm. The testimonies of all the defence witnesses together with the admission by the appellant that there was a sign prohibiting hunting confirmed this fact and there is no way that the appellant can turn around and say that it was not aware of the presence of hippos and other wild animals within its farm.

31. Furthermore, from my reading of the evidence of DW3 and DW4, the 2nd respondent was aware of presence of hippos and other wild animals in the appellant's farm, only that there had been no reported incident of a human-wildlife conflict by the appellant. DW3 stated

during cross-examination at page 21 of the record as follows:

> **"I am aware that there are wild animals at Kakuzi"**

DW4 then stated during examination-in-chief at page 22 of the record that:

> **"Kakuzi Ltd. keep wildlife animals within their property"**
>
> **…….**
>
> **"There are hippos at Kakuzi Ltd. There are also pythons, dikdiks, hyenas"**

32. I also my find that by his own testimony, the 1st respondent admitted that he was aware that the appellant had a dam and that the said dam had hippos.

33. In sum, I find and hold that all the parties were aware that there were wild animals including hippos in the appellant's farm. The question that logically follows is who, amongst the parties was liable for the said incident and to what extent? It is also imperative to state here that the duty was on the 1st respondent to prove negligence on the part of the appellant and the 2nd respondent based on a reasonable degree of probability (See the Court of Appeal in ***Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR).***

34. In the case of ***Jeffrey L. Brown (suing on his own behalf and as administrator of the Estate of Sharon Mary Brown & MCB) v Castle Forest Lodge Limited & 2 others [2018] eKLR*** Ngaah Jairus J cited the words of **Lord Atkin** in the *locus classicus* case of ***Donoghue versus Stevenson (1932) A.C. 562*** at page 580 on the twin issues of what ***'duty of care'*** entails and when it is deemed to have been breached. The learned judge said:

> ***"In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books instances. The liability for negligence, whether you style such or you treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."***

35. ***Section 7 of the Wildlife Conservation and Management Act, 2013*** provides in part as follows on the functions of the 2nd respondent:

> **"……**
>
> ***(f) develop mechanisms for benefit sharing with communities living in wildlife areas;***
>
> **……..**
>
> ***(n) promote and undertake extension service programmes intended to enhance wildlife conservation, education and training"***

36. In light of the above, and it having been proved that the appellant had the knowledge that wild animals, including hippos were present in its farm, it had a duty of care to its employees, visitors and all members of the public to take reasonable precautions and measures to ensure that they are protected from the said wild animals since the threat and danger posed by them was foreseeable. (Also See A. Mabeya J in Leaves ***(K) Limited v Peter Ondimu Nyabwari [2015] eKLR)***. The appellant thus had a duty of care to everyone who visited them or was using their farm and not just authorized visitors and their employees. The appellant had a duty to warn such persons of the potential danger posed by the wild animals in the farm and take reasonable measures including but not limited to having visible signboards warning of the presence of wild animals and fencing/cordoning off the dam area where the hippos were found. The failure by the appellant to take all the necessary and reasonable steps to protect members of the public, visitors and/or employees automatically means that the appellant was in breach of their duty of care and cannot escape a degree of liability for the attack that happened to the 1st respondent.

37. It is my further finding that since the 2nd respondent was also aware of the presence of wild animals in the appellant's farm making the said farm a '**wildlife area'**, they failed in their statutory duty under ***Section 7 of the Wildlife Conservation and Management Act, 2013*** cited above in not *developing mechanisms for the benefit of sharing with the community which is living in the wildlife area; and they did not promote and undertake extension service programmes intended to enhance wildlife conservation, education and training* with the appellant. The 2nd respondent must also bear some responsibility for the accident and being the custodian of human-wildlife conflict, they ought to have warned and sensitized the community, including the 1st respondent on the dangers posed by the wild animals in the appellant's farm and of the risks posed in using the road inside the said farm. This is information a common person may not be privy to hence the 2nd respondent bore the greatest burden and responsibility for the dissemination of such information. (Also see R. E Aburili J in ***Kenya Wildlife Service (KWS) v Pauline Awino Omondi [2018] eKLR)***.

38. I am also satisfied that the 1st respondent was attacked by a hippo on the road within the appellant's farm which was described by DW2 as the hippos' path. The appellant's claim that the 1st appellant was attacked while fishing fails for want of proof and remains an unsubstantiated claim which was controverted by the 1st respondent. It was incumbent upon the appellant to prove that the 1st respondent was fishing at the time of the attack, but this was not done. I am also in agreement with the learned trial magistrate that the contradictory evidence of DW1 and DW2 did not help their case either and thus could not be relied upon. I find the 1st respondent's testimony to be much more credible and reliable as was observed by the learned trial magistrate who was in a better position to gauge the 1st respondent's demeanor and veracity of his testimony in the trial court.

39. Having said the above, and since the 1st respondent was aware that the appellant's farm had hippos, then he ought to have been aware of the danger and risk posed by him using the road inside the appellant's farm and worse still, at night. The 1st respondent has therefore to bear some responsibility as well for putting himself in harm's way in the face of foreseeable danger.

40. From the evidence and the above analysis, I find and hold that all the parties should bear some responsibility and liability for the attack with the appellant bearing 70%; the 1st respondent 20% and; the 2nd respondent 10%. The decision of the trial court on liability is accordingly set aside and substituted with these percentages on liability.

Whether the trial court erred in awarding the 1st respondent Kshs. 1,048,000/- in quantum of damages and whether the trial court erred in finding that the appellant was the one to pay for the same.

41. The Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, cited the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** at p. 730 where **Kneller J.A**. said:-

> ***"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 that the judge, in assessing the 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 damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419.*** *This Court follows the same principles."*
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> The Court further makes reference to the case of Gicheru ***V Morton and Another (2005) 2 KLR 333*** where the Court stated:
>
> ***"In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***
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> See also ***Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.***
>
> The Court further references the venerable **Madan, JA** ***(as he then was),*** on the difficulties that confront a judge in assessment of general damages in the context of personal injuries claims as follows in ***UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575***, at page *579:*
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> ***"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."***

42. The Court of Appeal in the case of ***Gicheru V Morton and Another Case (above)*** goes on to hold that:

> ***"In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See JABANE V OLENJA, (1986) KLR 1.***
>
> **In MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986**
>
> ***(unreported) Madan, JA again, aptly observed that "an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award."***
>
> **……**
>
> ***"It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons."***

43. The 1st respondent stated that as a result of the attack he sustained various injuries and he produced a case summary from Kenyatta

National Hospital (*Pexhibit 2*) and the medical P3 report (*Pexhibit 4*) in support of his claim. The 1st respondent's evidence was corroborated by PW1 who produced the 1st respondent's medical report (*Pexhibit 1)*. From the 1st respondent's evidence, he sustained the following injuries:

i. Fracture left radius/ulna

ii. Degloving injury left forearm

iii. Degloving injury right wrist joint

iv. Degloving injury right knee

v. Deep cut wounds left thigh

44. This evidence was not challenged and furthermore, DW1 and DW2 confirmed that they found the 1st respondent injured at the scene and was rushed to Thika District Hospital for treatment.

45. The medical report by PW1 indicated that the 1st respondent was admitted to Kenyatta National Hospital for six months and that he was taken to theatre several times. PW1, who examined the 1st respondent 3 years after the accident stated that the 1st respondent's left forearm was "**grossly deformed**" and he had extensive scars and massive tissue loss and was held in a fixed prone position with no movement of the left hand. PW1 added that the right lower limb had extensive scarring covering the right medical aspect of the thigh extending to the knee anteriorly. He added that the right lower limb had multiple extensive scars on medical and lateral aspect of the dorsal left thigh. PW1 opined that the 1st respondent suffered grievous injury and that the deformity and loss of function of the left hand was permanent. He added that the lower limb's scarring was ugly and required cosmetic correction, physiotherapy and estimated future costs of Kshs. 300,000/-. PW1 assessed the degree of permanent disability at 40%

46. In ***Simon Taveta v Mercy Mutitu Njeru civil Appeal 26 of 2013 [2014] eKLR*** the Court of Appeal observed thus:

> ***"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."***

47. The issue that arises for scrutiny in the instant case is whether the award of general damages made by the learned trial court were based on the nature and extent of injuries suffered by the 1st respondent and comparable awards made in the past and whether the same was reasonable in the circumstances.

48. In ***Damaris Mwongeli Muia v Kenya Wildlife Service [2017] eKLR*** the appellant sustained injuries in an attack by a bloat of hippopotamuses. She suffered deep cuts on the left lower limb leading to her admission in hospital for 28 days. The nature and extent of the injuries resulted in skin grafting to patch up the deep cut wound on the left thigh. At the time of the trial the Appellant was still walking with the aid of crutches. There were large unsightly scars on the affected limb and the limb would at times become numb. The court upheld the decision of the trial court which had awarded **Kshs. 500,000/-**

49. In ***Laban Buyole Mamboleo v Rift Valley Textiles [1998] eKLR*****,** the claimant had, among other injuries, multiple fractures. He suffered 60% permanent brain disability including amnesia, generalized weakness on the left side of the body and urine incontinence. The court awarded him **Kshs. 650,000/-** in 1998.

50. In ***Kiru Tea Factory & Another v Peterson Watheka Wanjohi [2008] eKLR*** **Kshs. 800,000/-** was awarded for a degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius and ulna bones, fracture of the right iliac bone in the pelvis and generalized pains over most of the chest, but without any fractures, indicating soft-tissue injuries. Treatment involved surgical toilet of the wound and, later, skin grafting. The fractures were fixed by plating.

51. In ***Gusii Deluxe Limited & 2 Others V Janet Atieno [2012] eKLR*** in which an award of **Kshs. 500,000/-** was upheld for deep cut wound frontal head exposing the skull bone, unconsciousness for about 8 hours with brain concussion, bang to the right – upper and lower jaw loosening the right-lower incisors teeth, injury to the right shoulder with bruises over it, deep cut wound in right upper limbs just below right elbow, injury to the right big toe with bruises over it and blunt injury to the anterior part of the chest

52. In the case of ***James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & another [2015] eKLR,*** the Plaintiff therein suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg. The residual injuries were re-fracture of the right leg, many sinuses on the right leg with pus, bone exposure, chronic bone infection and dead bone, restriction in walking, difficulty in walking, restriction of mobility of the forearm, difficulties in squatting, weakness of the left upper limb, inability to carry or lift heavy objects, restriction of movement of the left limb, pain due to prolonged surgery procedure and now had to walk with the aid of crutches. In that case that was decided in 2015, **Ougo J** assessed damages at **Kshs 1,500,000/=** for pain and suffering and loss of amenities.

53. In the instant case, considering the gravity of injuries suffered by the 1st respondent, and in light of the authorities cited above, it is my considered view that the award of Kshs. 1,000,000/- by the trial court was sound and judicious in the circumstances and was neither inordinately too high nor too low to warrant the court's interference. I accordingly uphold the same.

54. In answering the second part under this main issue, both the appellant and the 2nd respondent are liable to the quantum of damages payable to the 1st respondent subject to their respective ratios of negligence. The 2nd respondent's statutory duty comes with the attendant responsibility to shoulder any claims of loss or damage caused by the breach of that duty. (See the Court of Appeal in ***Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR*** VISRAM, KARANJA & KOOME, JJ.A).

Conclusion

55. To this end it is my conclusion that all parties were negligent and/or negligently contributed to the attack/accident against the 1st respondent. The appellant was negligent in not warning users of its property of the foreseeable danger of wild animals within its property and for not taking the necessary and reasonable precautions to ensure that the wild animals within its property do not conflict with the human population. The appellant was thus in breach of the duty of care they owed to members of the public including the 1st respondent.

56. It is my conclusion that the 1st respondent, despite being aware of the danger and risk posed by the hippos in the appellant's farm, recklessly put himself in harm's way and contributed to his own misfortune by using the road in the appellant's farm at night. The 1st respondent was thus guilty of contributory negligence.

57. It is my further finding that the 2nd respondent failed in their statutory duty of educating, sensitizing and warning members of the public on the danger posed by the wild animals within the appellant's property, facts which were within their knowledge. Let me also add and respectfully fault the learned trial magistrate for her contrary view, that the duties of the 2nd respondent under ***Section 7 of the Wildlife Conservation and Management Act, 2013*** are not vacated/abdicated for the reason that wildlife is in private property. If it is within their knowledge that wild animals are in a private property of either a licensed or an unlicensed sanctuary and/or property like the appellant's, they still had a duty to warn, educate, sensitize and develop mechanisms for benefit sharing for the public or communities living in those wildlife areas. Since this was never done in the instant case, the 2nd respondent was partly negligent for the attack on the 1st respondent and I have so found.

58. In sum, I hereby set aside the decision of the trial court's finding on liability and apportion liability amongst the appellant, 1st respondent and the 2nd respondent in the ratio of 70%:20%:10% respectively.

59. In the premises, this appeal partly succeeds on the issue of liability but fails on the issue of quantum. I therefore set aside the trial court's judgment on liability and now enter judgment as follows:

Liability 70:10:20 in favour of the 1st respondent

General damages Kshs. 1,000,000/-

Future medical expenses Kshs. 300,000/-

Witness expenses Kshs. 5,500/-

Special damages Kshs. 3,000/-

Less 20% contribution

Total Kshs. 1,048,500/-

Costs and interest of the suit at courts rates

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 11th day of June, 2020

…….

CHRISTINE W. MEOLI

JUDGE