



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL APPEAL NO. 70 OF 2016**

**KENYA WILDLIFE SERVICES.....APPELLANT**

**VERSUS**

**STEPHEN KITHOME.....RESPONDENT**

*(An appeal from the judgment of the Resident Magistrate Embu delivered on 28<sup>th</sup> October, 2016*

*in Embu CMCC No. 16 of 2016)*

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

**A. Introduction**

1. The respondent filed suit against the appellant for injuries arising from an attack by a crocodile while he was fishing at Kamburu dam. The parties entered consent on liability to the effect that the appellant shoulders 80% liability and the respondent 20%. The trial court awarded the respondent Kshs. 400,000/= in general damages and Kshs. 6,000/= as special damages as well as costs with interest of the suit.

2. Being dissatisfied with the decision and judgement of the trial court, the appellant filed its memorandum of appeal dated 28/11/2016 based on five grounds that can be summarised into one ground as follows;

*“The Learned resident magistrate erred in law and fact in awarding excessively high damages while ignoring the injuries suffered by the respondent as well as the authorities and submissions by the appellant.”*

3. The appeal was dismissed by way of written submissions.

**B. Appellant’s Submissions**

4. The appellant submitted that the injuries suffered by the respondent do not match the award by the trial magistrate and further submitted that the medical report relied on by the respondent was derived from the P3 form and the discharge summary tendered before court. it was further contended that the injuries were highly exaggerated and fabricated.

5. It was the appellant’s submission by way of authorities that this court ought to reject the medical report presented before court. It relied on the cases of **George Kirianki v Michael Mutwiri HCCC No. 14 of 2001** and that of **Kimatu Mbuvi T/A Kimatu & Bros v Augustine Munyao Kioko CIVIL Appeal No. 203 of 2001 [2001] 1 EA 139** where the court held that a medical report can be rejected where there is cogent basis for doing so after considering it alongside all other available evidence.

6. On quantum, the appellant submitted that a global award of Kshs. 300,000/= would suffice for the injuries sustained by the respondent. The appellant relied on the cases of **Eldoret Steel Mills Limited v Eliphias Victor Espilia Eldoret Civil Appeal No. 72 of 2006** where the same award was made for injuries of sub-trachanteric fracture of the right femur and fracture of the metatarsal bones of the right foot, as well as the case of **Jane Muthoni Nyaga v Nichoal as Wanjohi Thuo & Another [2010] eKLR** where the court similarly awarded Kshs. 300,000/= as general damages for injuries of a fracture of the superior and inferior public rami of the pelvis, a cut on the right leg and central dislocation of the hip.

7. The appellant also relied on the case of **Francis Mwangi Muchine v Francis Kimani Mbugua** where the high court awarded Kshs. 100,000/= as general damages for pain and suffering.

8. The appellant also submitted that the trial court lacked jurisdiction to entertain the respondent's claim was non-existent.

### **C. Respondent's Submissions**

9. The respondent submitted that he sustained life threatening injuries a result of which, according to the doctor, he suffered a permanent disability of 15%. He thus submitted that this court ought to enhance the award he was given. Relying on the authority of **Michael Njagi Kirimi v Gedion Ndungu Nguribu & Another [2013] eKLR** where the plaintiff suffered similar injuries to the respondent and was awarded Kshs. 2,000,000/=.

10. Regarding jurisdiction, the respondent submitted that the wording of Section 25 of the Wildlife Management and Conservation Act (WMCA) is permissive using the word "may" which does not bar ordinary courts from having jurisdiction in such claims. The respondent relied on several authorities that have restated the jurisdiction of courts to entertain such claims namely the cases of **Joseph Munyoki v Kenya Wildlife Services Garissa HCCC No. 5 of 2014, Petition of Appeal No 11 of 2015, K.W.S. v Rift Valley Agricultural Contributors Limited** and more recently the decision of the High Court while sitting in Meru in the case of **Kenya Wildlife Services v Roise Bundi Civil Appeal No. 27 of 2017.**

### **D. Analysis & Determination**

11. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion considering the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA.**

12. In the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini v A.M.M Lubia & Another (1982-88)1 KAR 777** the Court of Appeal stated as follows:

**"the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing 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."**

13. *The respondent case at trial was that as a result of a crocodile attack, he suffered the following injuries;*

- *Bite on the left palm dorsal surface,*
- *Fracture of the left ulna*
- *Bruises and scratches on the face and neck and*
- *Fracture of the right femur.*

14. *As a result of the injuries the respondent claimed that he now walks with a limp gait, suffered shortening of the lower limb by 3cm and a deformity of the left forearm. During the trial, the appellant did not question the nature of injuries suffered by the respondent but proceeded to question the medical opinion presented before court in its written submissions before court.*

15. On the issue of jurisdiction, the appellant contended that the trial court did not have original jurisdiction to entertain the claim under **Section 25** of the **WCMA** on the ground that there is a specific procedure was provided for resolving disputes arising from injury from wildlife. The respondent's position was that **Section 25** of Wildlife Management and Conservation Act was not mandatory and that a claimant had the option of following the procedure under the Act or filing suit in court. He cited among others the case of **Kenya Wildlife Service v Joseph Musyoki Kilonzo NRB CA Civil Appeal No.306 of 2015 [2017] eKLR** where the Court of Appeal upheld that position.

16. The correct position is that the court has jurisdiction to hear and determine disputes or claims under the Wildlife Management and Conservation Act. The trial court was therefore possessed of the requisite jurisdiction to determine the claim.

17. *I have perused the authorities cited by the advocate for the respondent on quantum and find them a bit excessive on the damages awarded. I have considered the contention and request for the respondent on enhancement of damages and find no legal or factual basis. It is important to note that no cross-appeal was filed. I therefore decline to enhance the damages. I take cognisance of the fact that the appellant did not present a second medical report to support his claim during the trial. He lost this opportunity and cannot just dismiss the respondent medical report as exaggerated without the input of another expert opinion to the contrary.*

18. I have perused the authorities relied on by the parties in support of the claim for damages. I wish to rely on the case of **Kenya Wildlife Services v Roise Bundi [2018] eKLR** where the High Court allowed the appeal to the extent that it set aside the judgment of the subordinate court awarding the respondent Kshs. 1,000,000/= as general damages and substituted the same with an award of Kshs. 400,000/= where the respondent sustained a fracture of the left tibia and fibula, the respondent walked with a limp on the left and his leg had shortened by approximately 2 cm. His disability was assessed at 10%.

19. It is my considered opinion that the award by the trial magistrate was not excessive and was based on evidence and on conventional awards.

*20. It is my finding that this appeal has no merit and it is hereby dismissed with costs.*

*21. It is hereby so ordered.*

***DELIVERED, DATED AND SIGNED AT EMBU THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2019.***

***F. MUCHEMI***

***JUDGE***

***In the presence of: -***

***Ms. Muthoni for Manasseh Kariuki for Appellant***

***Ms. Ndegwa for Mwanzia for Respondent***