



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 24 OF 2017

KENYA WILDLIFE SERVICE APPELLANT

VERSUS

GEORGE ODHIAMBO WERE RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate's Court at Homa Bay in CMCC No.37 of 2014, delivered on 8th February, 2017 – Hon. P. Mayova)

JUDGMENT

1. This appeal arises from the judgment of the Senior Resident Magistrate at Homa Bay delivered on the 8th February 2017 in **Chief Magistrate's Court Civil Case No.37 of 2014**, in which the Appellant/Defendant, **Kenya Wildlife services**, had been sued by the respondent/plaintiff, **George Odhiambo Were**, for general damages resulting from injuries suffered by the respondent on account of a snake bite.

2. It was pleaded that on or about the 4th October 2013, the respondent/plaintiff was lawfully walking on his way to a farm near Kayanja in Mbita District when a snake escaped the guardianship of the appellant/defendant and assaulted him thereby causing him serious injuries.

He attributed the incident to the defendant's negligence and/or breach of its statutory duties and prayed for judgment against the defendant together with the costs of the suit and interest.

3. The defendant in its statement of defence denied the allegations made against itself by the plaintiff and contended that the plaintiff's suit was not valid as the Wildlife Conservation and Management Act No.47 of 2013 excludes compensation of victims of injury or damage inflicted by wildlife and provides that any person who suffers bodily harm from any animal ought to apply for compensation to the County wildlife Conservation and compensation Committee and if aggrieved by an award of compensation made by the committee, the remedy would be an appeal to the National Environment Tribunal and a further appeal to the Environment and Land Court.

4. Alternatively, the defendant contended that if indeed the plaintiff suffered injuries and damages as alleged, then this was due to his own negligence or substantial contribution thereto.

The defendant therefore prayed for the dismissal of the plaintiff's case even as it expressed its doubt on the jurisdiction of the court to deal with the matter.

5. After a full trial, the trial court entered judgment in favour of the plaintiff for general damages for pain, suffering and loss of amenities in the sum of Kshs.500, 000/= together with costs of the suit and interest.

Being aggrieved with the decision, the defendant preferred this appeal on the basis of the six (6) grounds contained in the memorandum of appeal filed herein on the 3rd May 2017.

6. The hearing of the appeal was by way of written submissions.

In that regard, the appellant filed its submission on 11th October 2019, through Messrs **Siganga & Co. Advocates**, while the respondent's submission were filed on 20th September 2019, through **M/s Everlyne Kuke & Co. Advocates**.

Both parties fully relied on their respective submissions which have been given due consideration by this court together with the grounds in support of the appeal and those in opposition thereto.

7. As a first appellate court, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial

court had the benefit of seeing and hearing the witnesses.

In that regard, the evidence led by the respondent through a **Mr. Ochola (PW1)**, the respondent (**PW2**) and a chief, **Justus Ochwedo (PW3)** as well as that led by the appellant through its employee, **Amos Nyaoro (DW1)**, was re-visited by this court which holds the view that what clearly emerged as the basic issue for determination was whether the appellant/defendant was liable for the injury occasioned to the respondent/plaintiff by a snake bite and if so, whether the respondent was entitled to general damages and to what extent.

8. Basically, no dispute or substantially dispute arose with regard to the fact that the respondent suffered injury as a result of a snake bite within the compound of his homestead situated near Ruma National Park. He implied that the offending serpent strayed from the National Park into his compound through a fence of euphorbia plant. He indicated that he was drawn towards the fence and hence, the snake, by screams of a child. On arrival, he heard a funny sound and realized that it was a snake. He became scared and felt pain on his leg only to realize that the snake had bitten him and had coiled on his right leg.

9. The respondent contended that the fence surrounding the nearby Ruma National Park was not sufficient enough to keep away straying animals.

His witness (PW3) who was the area chief at the material time indicated that the said national park was 10 km away from the respondent's Kayanja village where the respondent was bitten by the snake while walking to his farm. He (PW3) opined that it was possible for a snake to stray from the park into the respondent's homestead and suspected that the offending snake was the very venomous **"black-mamba"**.

He blamed the appellant for the respondent's plight and for allowing the snake to escape from the park to a residential area.

10. The medical reports exhibited in court showed that the respondent suffered bodily harm occasioned by a snake bite to his right ankle joint. This fact was never disputed by the appellant. Its official (DW1) confirmed that the incident was reported to them but at a later date. He also confirmed that the culprit snake was a **"black mamba"** and that the incident occurred at a location which is near the Ruma National Park. He contended that the appellant has no mandate to fence off animals as they belong to the people and may roam about. He indicated that 75% of wildlife live in non-protected areas and that they do not attack people unless provoked. He opined that the culprit snake may have been provoked and also indicated that a snake bite victim could be compensated if the right procedure for doing so is followed.

11. The appellant in essence denied liability and suggested that the offending snake did not stray from the national park and if it did, they were not in a position or obligated to withhold its free movement within and without the park.

It was therefore incumbent upon the respondent to prove on a balance of probabilities that the appellant was negligent and/or in breach of its statutory duty by its failure to prevent the snake from straying into the respondent's homestead from the national park or failing to secure and keeping it from escaping to human dwellings.

12. It is this court's opinion and holding that the respondent did not discharge its burden of proving negligence on the part of the appellant as the evidence adduced by himself and his witness (PW3) in that regard was insufficient and largely based on conjecture. There was no evidence that the offending serpent actually strayed from the Ruma National Park or that it escaped from there. It is a matter of common knowledge that snakes habitats include water, forests, deserts, grasslands, bushes and shrubs.

13. A bushy or unkempt homestead would easily attract a snake from other habitats. The respondent could not really tell where the snake came from other than guess that it came from the nearby Ruma National Park which according to the chief (PW3) was 10 kms away.

14. If it were not for the child's screams, the respondent would not even have known that the snake had found good habitat in his compound or euphorbia fence. He could not therefore have attributed the unfortunate incident to the appellant's alleged negligence. Yes, he was bitten by a snake but could not tell where it came from nor prove that it escaped from the custody of the appellant.

He was in the circumstances, not entitled to an award of general damages. His case against the appellant was lacking in merit and would hereby be dismissed with costs.

Grounds 1, 2 and 3 of the appeal are therefore sustainable and so are grounds 4, 5 and 6.

15. The award of damages was anchored on proof of liability on the part of the appellant but this obligation was not discharged by the respondent.

If the obligation had been discharged, the award of Kshs.500,000/= as general damages for pain, suffering and loss of amenities was rather excessive as the respondent did not suffer permanent incapacity going by the medical report (P3 from) annexed in the record of appeal.

The fact that the respondent walked in a limp as observed by the trial court did not translate to permanent incapacity.

An award of Kshs.200, 000/= would, in the opinion of this court, have been reasonable and adequate compensation for pain, suffering and loss of amenities.

16. Otherwise, this appeal is allowed to the extent that the judgment of the trial court delivered on 8th February 2017 be and is hereby set aside and substituted with a judgment dismissing the respondent's case with costs to the appellant.

The appellant shall also have the costs of the appeal.

Ordered accordingly.

J.R. KARANJAH

JUDGE

17.10.2019

[Dated and delivered this 17th day of October, 2019].