



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 99 OF 2011

KENYA WILDLIFE SERVICEAPPELLANT

- V E R S U S -

DAVID MUTETIRESPONDENT

(Being an appeal from the judgement of the Hon. Mrs. Owino SRM dated 7th February, 2011 in Thika CMCC No. 915 of 2007)

JUDGEMENT

1) David Muteti, the respondent herein filed an action before the Senior Resident Magistrate's Court Thika against Kenya Wildlife Service, the appellant herein, in which he sought for damages for the injuries he sustained as a result of an attack on him by a hippopotamus which allegedly escaped from the appellant's Ol Donyo Sabuk National Park. The appellant filed a defence to deny the respondent's claim. The case proceeded for hearing and eventually Hon.. Owino (Mrs) gave judgement in favour of the respondent in the sum of ksh.300,000/= as general damages and ksh.2,260/= as special damages. The appellant was directed to shoulder 90% liability while 10% would be shouldered by the respondent. Being aggrieved, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds:

- 1. The learned trial magistrate erred in law and in fact in holding that the respondent was entitled to general damages yet the cause of injuries was not proved at all by the respondent.***
- 2. The learned trial magistrate erred in law and in fact by failing to consider the appellant's witness evidence and further erred in finding for the respondent despite the weight of evidence against the respondent.***
- 3. The learned trial magistrate erred in law in failing to properly evaluate the evidence on record, in particular plaintiff's exhibit 2 and defence exhibits, and finding for the respondent.***
- 4. The learned magistrate erred in law and in fact in taking into account irrelevant matters in finding for the respondents.***
- 5. The learned trial magistrate erred in law and in fact assessing damages in favour of the respondent, which the respondent in any event was not entitled to.***
- 6. The learned trial magistrate generally misdirected herself and failed to give any due and***

proper consideration to submissions of counsel for the appellant.

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. Learned counsels were also invited to make oral highlights on the written submissions.

4) I have re-evaluated the case that was before the trial court. I have further taken into account both the written and oral submissions presented by both sides. Though the appellant listed six grounds of appeal in its memorandum, those grounds can be summarised to two main grounds: First, whether or not the trial magistrate properly evaluated the evidence on record. Secondly, whether or not the quantum of damages was properly assessed.

5) On the first ground, the appellant is of the view that the trial magistrate failed to properly evaluate the evidence before the court. It is pointed out that the evidence tendered by the respondent were contradictory. The respondent is said to have told the trial court that he had been attacked in his farm which borders the appellant's National park. However when Shadrack Kisozi Nzuki (PW3) testified, he told the trial court that the respondent's home is not bordering the appellant's National park. In fact PW3 claimed that the respondent's home is 2 Km's away from the park. The appellant argued that there was no credible evidence showing that the respondent was attacked in the National Park. The appellant was also critical of the respondent treatment cards and discharge summary. According to the treatment cards, the respondent was injured on the right thigh and scalp while the discharge summary show he was injured on the left thigh. The respondent at times is said to have suffered soft tissue injuries while in another document he is said to have suffered grievous harm. The appellant also claimed that the injuries sustained are inconsistent with an attack by a hippopotamus. The appellant further argued that since the Ol Donyo Sabuk Park has no water mass then the likelihood of the presence of a hippopotamus was nil. The appellant urged this court to find that the respondent's claim was fictitious.

6) The respondent argued that there was credible evidence showing that he was attacked by a hippopotamus while in his farm which were not challenged by the appellant. I have on my part re-examined the evidence tendered before the trial court. The respondent in my view managed to discharge the burden of proof. The evidence of PW2 corroborated the respondent's assertion that he was attacked by an animal. It appears that the respondent could be residing in the neighbourhood of Ol Donyo Sabuk National Park, therefore due to its proximity it is possible the respondent was attacked by a stray hippopotamus. There is no dispute that the respondent was injured on the material date and was in fact admitted at Thika District Hospital. I find that the discrepancies pointed out by the appellant has not diminished the liability and credibility of the respondent's evidence. I am convinced that the learned Senior Resident Magistrate arrived at the correct conclusion on liability. I am satisfied the respondent tendered evidence proving his case on a balance of probabilities.

7) The second ground is the challenge on quantum of damages. I have already stated that the appellant is of the submission that the award is manifestly excessive and exorbitant. The appellant is of the opinion that an award of kshs.50,000/= is sufficient. It relied on the case of **Simon Muchemi Atako & Another vs Gordon Osore (2013) eKLR**, where this court awarded ksh.120,000/= for general damages for multiple injuries to wit blunt injury on the chest, right hip, head and thumb.

8) The respondent on the other hand is of the view that the award of damages is not excessive but is commensurate with the injuries suffered. I have reconsidered the submissions on quantum and the authorities submitted in support. There is no doubt that the respondent suffered cut wounds on the head and buttocks. I find the authority of **Simon Muchemi Atako & Another vs Gordon Osore (2013) eKLR** to be applicable to this case. In this case, the trial court awarded the respondent ksh.300,000/=. With respect I agree with the appellant that the sum is not commensurate with the injuries suffered and is also off the mark with comparable awards. I am convinced the appeal as against damages is meritorious. Taking into account previous awards and the inflationary trends, I think an award of ksh.200,000/= is sufficient.

9) In the end, I dismiss the appeal as against liability. I however allow the appeal as against quantum.

Consequently the award of ksh.300,000/= for general damages is set aside and is substituted with an award of ksh.200,000/=. The final award on appeal is calculated as follows:

General damages	ksh.200,000/=
Special damages	ksh. 2,260/=
Less 10% contribution	ksh. 20,226/=
Net total	ksh.182,034

10) I direct that each party to meet its costs on appeal. The respondent to have costs of the suit based on the award on appeal.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent