



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 705 OF 2014

BETWEEN

EDWARD SANKHULA-----PLAINTIFF

AND

THE ATTORNEY-GENERAL (Ministry of Tourism)-----
-----DEFENDANTS

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Andy Kaonga, for the Plaintiff

Apoche Itimu/Mahonga, for Defendants

Mrs Namagonya, Court Reporter

Itai, Court Interpreter

JUDGMENT

Introduction and Pleadings

This Matter commenced through a writ of summons taken by the plaintiff on 4th of July 2014. The plaintiff who is a minor sued by his next friend Mr Jones Sankhula who is his father.

The plaintiff's claim against the defendants is as follows:

- 1) The plaintiff was at all material times a primary school pupil at Malepera Full Primary School in Kasungu District.

- 2) The defendants operate and run a National Park styled Kasungu National Park where among other very dangerous animals, keep at their pleasure buffalos.
- 3) On or around 7th of December, 2010, whilst walking from school, the plaintiff was attacked by a buffalo that had escaped the National Park premises which sliced his abdomen.
- 4) In the premises;
 - a) The keeping of dangerous animals in an area without proper security features to avoid their escape constituted a non-natural use of the said land.
 - b) Buffalos are dangerous animals.
 - c) The defendants are liable to the plaintiff for the said escape of the buffalo
- 5) Further or in the alternative, the escape of the buffalo and the attack on the plaintiff and the consequent injuries were caused by the negligence of the defendants/ or their servants or agents as hereinafter set out.

The particulars of negligence are:

- a) Failure to install a proper fence over the national park.
- b) Failure to ensure by inspection or repair that the buffalos could not escape from the enclosure if any.
- 6) Further or in the alternative, in the circumstances set out above, the defendants failed to ensure that the buffalo would not escape from the premises and thereby maintained a public nuisance, which led to the attack on the plaintiff.

By reason of the attack, the plaintiff has suffered loss and damage. The Plaintiff claims:

- i) Damages for pain and suffering.
- ii) Damages for loss of amenities of life.
- iii) Damages for disfigurement.
- iv) Past, present and future nursing costs.
- v) Costs of this action.

In defence, the defendants denied any liability. The defendant stated that:

- 1) Records from Kamuzu Central Hospital indicate that the plaintiff was attacked by a buffalo on or about 7th of December 2010 at around 1600 hours in the village of Malepera, T/A Kawamba in Kasungu where he was grazing cattle in the bush near a game reserve.
- 2) The defendants state that the National Parks and Wildlife Act does not provide for compensation for damage caused by wildlife to property, injury or loss of life.
- 3) That section 121(5) of the National Parks and Wildlife Act clearly provides that persons who enter protected areas shall do so at their own risk and that no liability shall attach to the government, an officer or any public officer, for any loss of life or injury sustained by any person or loss of or damage to any property of any person in any national park or natural sanctuary by reason of any presence or action of depredation of any animal.
- 4) That the plaintiff's injury resulted from his own risk and not an act of negligence or omission by the defendant.
- 5) The defendants therefore deny being liable as claimed by the plaintiff.

Survey of evidence

The plaintiff's side invited four witnesses. Pw no 1 was Edward Sankhula the plaintiff himself. He told the court that on 7th of December 2010 at around 1600 hours he was in the company of his friends returning from school. As he was walking, he felt some pain on the left side of his abdomen. When he looked back, he saw a buffalo with its horn deep inside his abdomen. He was pushed to the ground and the buffalo went past him in a gallop. He was immediately taken to Kawamba Health Centre where he was referred to Kasungu District Hospital and eventually referred to Kamuzu Central Hospital in Lilongwe. The plaintiff told the court that he was seriously injured by the buffalo and he felt a lot of pain. He spent a lot of time in the hospital and as a result, this has affected his school as he has spent four years without going to school. He said that he is now in standard 7 whilst his former class mates are in forms 2 or 3 at secondary schools. The plaintiff tendered in court a bundle of medical reports from Kawamba health centre, Kasungu District Hospital and Kamuzu Central Hospital. He also tendered his school reports before the accident. These documents are exhibits ES1, ES2, ES3 and ES4 respectively. The medical reports clearly show that the plaintiff had

been severely injured by the buffalo. It is actually by sheer luck that he is still a live.

Gladys Kachigamba was Pw no 3. She told the court that on the material day, she was in the company of the plaintiff returning from school. Whilst on the way, she saw a buffalo attack the plaintiff. Jones Sankhula the father to the plaintiff was Pw no 2. On the material day, he was informed by people that his son had been attacked by a buffalo. He dashed to the scene and confirmed the injury. He later on dashed with the plaintiff to Kawamba health centre. He confirmed the roadmap that they had taken in trying to rescue the life of his son. He also confirmed the injuries and the effects of these injuries on the life of the plaintiff and how he has also been academically affected. The last witness was Mr Willet Chenjerani Phiri who came as Pw no 4. He is Group Village headman Diwala from T/A Kawamba in Kasungu where the plaintiff comes from. His evidence is that in their area, buffalos are found in Kasungu National park. On the material day, he got a report about the incident where the plaintiff was attacked by a buffalo. He is the one who informed the authorities at Kasungu National Park. The national Park dispatched three game guards namely Mr Munthali, Mr Mazengera and Mr Mkudziwaduka. When these guards arrived in his village, they looked for the buffalo and eventually spotted it in one of the surrounding bushes. Using their skills, the guards managed to guide the buffalo back to Kasungu National Park.

The defendants invited only one witness a Mr Alphius Kuipa Lipiya who came as Dw no 1. He is the Principal Parks and Wildlife Officer. During the material time, he was based at Kasungu National Park as its manager. It was his evidence that following the alleged attack on the plaintiff, the defendants did not receive any report of the said attack, nor were they aware of any buffalo that escaped from Kasungu National Park. The witness told the court that the department of National Parks and Wildlife is not responsible for damages caused by wild animals in Malawi. In some instances, it fences animals in national parks or declares a protective area that is not fenced but where wild animals live so as to preserve the animals but also to prevent attacks by such animals, however, it has no legal duty to do so.

The law

This matter has been premised on the tort of negligence. It is therefore imperative that we do understand what negligence entails at common law. At common law, one would be held to be negligent if he/she or it owed a duty of care to the other person in this case to the plaintiff, breached that duty and as a result of that breach caused the plaintiff loss or injury. The case of **Donoghue vs Stevenson** [1932] AC 562 is authority for that. The question to be answered in this case therefore is does the defendant owe the public any duty of care to prevent any injuries arising from wild animals that are kept in the national parks. If the answer is yes, did the defendants breach that duty? The defendants have said that the department of National Parks and Wildlife is not responsible for any damage caused by wildlife in Malawi. The defendants have however not cited any statutory authority for this sweeping statement. Instead, they referred to section 121(5) of the National Parks and Wildlife Act Cap 66:07 of the Laws of Malawi. This section is an indemnity provision and it provides:

“ Persons who enter or are permitted to reside in protected areas shall do so at their own risk and no liability shall attach to the government, an officer or any public officer for any loss of life or injury sustained by any person or loss of or damage to any property of any person in any national park or national sanctuary by reason of presence, action of depredation of any animal, but so however that this subsection shall not apply to an officer and members of the family of an officer who have been permitted to enter or reside in a protected area.”

It is thus clear that the above provision applies to persons who enter or who are permitted to reside in protected areas. The matter before me is thus not within the ambit of section 121(5) as herein before cited since there is no evidence that the plaintiff had entered a protected area or that the plaintiff was permitted to reside in a protected area. The plaintiff was residing at his village and no evidence has been given that the plaintiff's village was within a protected area. Section 121(5) therefore is not relevant to the case at hand.

Analysis of the evidence and law

There is on record interesting and conflicting evidence that has been given by the plaintiff's side. To begin with, the plaintiff tendered in court several documents

from the hospital. One of the critical documents is the one that was issued by Kamuzu Central Hospital where the plaintiff was admitted on the 7th of December immediately after the buffalo incident in Kasungu. Let us recap here. Upon being struck by the buffalo in his home area, the plaintiff was first taken to Chiwamba health centre in Kasungu. Looking at the seriousness of the injuries, Chiwamba health centre referred the matter to Kasungu district hospital. Upon an assessment of the case, Kasungu District hospital referred the matter to Kamuzu central hospital (KCN) in the capital city Lilongwe. On admission at KCH the record shows that the plaintiff was received at 3:18 on 7th December 2010. Under the column Chief Complaint, it is recorded that the plaintiff was stabbed in the left abdomen by a wild animal whilst herding cattle near the game reserve. Bowels (small intestine) came out immediately. The court takes it that the information on this medical report was given to the medical staff by guardians of the plaintiff who had travelled all the way from Kasungu with the plaintiff. At that time, the accident had just taken place and the plaintiff's memory as well as the memories of his parents and guardians were still very fresh. The information given therefore was that the plaintiff was struck whilst herding cattle. There was nothing about the plaintiff having been struck by a buffalo whilst coming from school. The medical report goes on to describe the details of the incident. It says that the incident happened at 4 pm in the village of Malepera, T/A Kawamba in Kasungu District. That whilst in the bush grazing cattle the buffalo started chasing the plaintiff and struck him with its horn in the left side of the abdomen (exterior left) and small bowels came out instantly. The plaintiff also tendered his Health Passport. The report was issued by Kawamba health centre on 29th of October 2015 some five (5) years after the incident herein. In the health passport, it is recorded that the plaintiff was struck by a buffalo in 2010 on his way to school. Thus the medical report from KCH and the Health Passport are contradicting each other. Both were however tendered by the plaintiff and the plaintiff would like the court to believe these classical contradicting versions. In court, the story told by the plaintiff side was that he was struck by the buffalo whilst returning from school. The evidence that the plaintiff gave in court is also contradicting the evidence that he tendered from his Health Passport as the former says he was returning from school when he met his fate whilst the latter says that he was going to school. These contradictions tell a story. The story is that there was no truth in the testimony that the plaintiff was struck by the buffalo when he was

coming from school. The story as told by both the plaintiff and his friend pw no 3 was just too simple to be taken seriously. For example, Pw no 3 did not even make any description as to how this animal the buffalo had arrived at the scene as they were returning from school. Pw no 3 could not even describe what happened at the scene before the plaintiff had met his fate. She did not even describe as to what she herself had done and how she reacted to the coming of the buffalo. If indeed the two were together coming from school when the buffalo struck, one would have expected some story to be told and not as simple as it was put by Pw no 3. My assessment of the matter is that whilst it is true that the plaintiff was injured by the buffalo on the material day, it is however not true that the injuries were inflicted when the plaintiff was coming from school. The incident happened as the plaintiff was herding cattle in his home village which village is near Kasungu National Park. There is unchallenged evidence from Pw no 4 that three game guards employed by the defendants came to assist and guided the buffalo back to the National Park. Certainly this buffalo should have come from Kasungu National Park as the court was informed that this is the only place in that area where wildlife is kept. The defendants' only witness Mr Alphius Lipiya wanted to sound as if no report was made to them about the incident herein. My observation of the evidence of this witness was that he was not a truthful person. He had just come to court to defend this matter at any cost even if it meant telling lies. He was not a witness of truth. When cross examined about the three guards who had even been mentioned by their names, the witness confessed that they indeed had such names of guards at their establishment. I therefore found it established that the buffalo that struck the plaintiff in his village as he was grazing cattle had come from Kasungu National Park. It left the park and came outside the protected area. The plaintiff did not enter the protected area.

It is accordingly established that the defendants were a keeper of a dangerous animal known as a buffalo. I do not even need to emphasize the point here as it is of common knowledge in Malawi that a buffalo by nature is a dangerous animal. This animal was being kept by the defendants at their national park. Since it was under the control of the defendants, the defendants had the duty to ensure that the dangerous animal did not leave the boundaries of the national park and injure innocent people who were going about their usual day to day chores such as the plaintiff who was herding cattle. The plaintiff was injured in his village in the

course of herding cattle and the plaintiff's village as per Pw no 2 is some distance from the national park. It is thus the buffalo that had followed where the plaintiff was. The buffalo had thus left the national park to this village. It was incumbent upon the defendants to put in place protective measures for example by erecting an electric fence or implementing an effective rapid patrol mechanism to ensure that such dangerous animals like this buffalo are not in conflict with human beings. That duty of care was not fulfilled in this matter. The defendants are therefore held liable for negligence. I therefore order that they should pay:

- i) Damages for pain and suffering.
- ii) Damages for loss of amenities of life.
- iii) Damages for disfigurement.
- iv) Past, present and future nursing costs if any.

I further order that the defendants should pay costs of this action. The Registrar to assess the damages and costs as ordered in i-iv above.

DELIVERED THIS DAY OF AUGUST 2016 AT LILONGWE

M.C.C. MKANDAWIRE
JUDGE