



REPUBLIC OF KENYA



**Kenya Wildlife Service v Awuor (Civil Appeal E013 of 2022)
[2023] KEHC 3721 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E013 OF 2022
RE ABURILI, J
APRIL 26, 2023**

BETWEEN

KENYA WILDLIFE SERVICE APPELLANT

AND

QUINTER AWUOR RESPONDENT

*(Being an appeal from the judgement of Hon. J.P. Nandi
delivered on 11th March 2022 in Bondo PMCC E015 of 2022)*

JUDGMENT

Introduction

1. The appellant Kenya Wildlife Service was sued by the respondent Quinter Awuor for general damages, costs of the suit and interest following the death of her husband, a fisherman who was attacked by a stray crocodile as he fished in Lake Victoria.
2. It was the respondent's case that the crocodile had escaped the guardianship, protection enclosure, control or custody of the appellant and as such the respondent attributed negligence to the appellant.
3. In their defence dated January 27, 2021, the appellant denied the accident ever occurring and further that if at all the accident occurred, it was due to the deceased's sole negligence.
4. In his judgement, the trial magistrate found that the appellant through DW1 having testified that the deceased was awarded Kshs 5,000,000 that meant that the appellant was 100% liable for the deceased's death. The trial magistrate went on to award general damages of Kshs 5,000,000 as compensation for the deceased.
5. Aggrieved by the aforementioned decision, the appellant filed an appeal dated March 29, 2022 on the April 1, 2022 in which he raised the following grounds of appeal;



- i. That the learned trial magistrate erred in law and in fact in awarding damages on full liability.
 - ii. The learned trial magistrate erred in law and in fact in failing to consider all the issues raised by the appellant in the written submissions on quantum before him.
 - iii. The learned trial magistrate erred in law and fact in basing his award of general damages on a mirror image of the awards made under the Wildlife Management and Conservation Act yet the said legislation had its own procedure leading to the making of awards.
 - iv. The learned trial magistrate proceeded on demonstrably wrong principles in reaching his decision on the award to the respondent.
6. The parties canvassed the appeal by way of written submissions.

The Appellant's Submissions

7. The appellant submitted and urged the court to apportion liability at 50:50 against the respondent as it could not control the occurrence of the accident as it could not fence off non-protected areas such as lakes and further that the deceased was aware of the dangers posed by wild animals around the lake and thus ought to bear responsibility for putting himself in harm's way.
8. The appellant relied on the case of *Teresia Njeri Ngige v Peter Muteru Kimamo 7 Another [2014] eKLR* where the court held inter alia that where it is proved by evidence that both parties are to blame and there are no means of making a reasonable distribution between them, the blame can be apportioned equally on each.
9. It was submitted that the respondent was not entitled to compensation from the appellant as awarded by the trial magistrate as she had already opted to pursue her claim under Section 25 of the *Wildlife Conservation and Management Act, 2013* and if she was dissatisfied, the Act provided a mechanism for appeal against the award. Reliance was placed on the case of *Kenya Wildlife Service v Abraham M'ngai M'itumitu [2021] eKLR* where the court held that the magistrate court had no jurisdiction to award compensation under section 25 of the Wildlife Management & Conservation Act, 2013.
10. On general damages, the appellant proposed the multiplier approach as a method of assessing damages as held by the Court of Appeal in the case of *Roger Dainty v Mwinyi Omar Haji & Another [2004] eKLR*.
11. The appellant further submitted that the respondent failed to show that the deceased earned a stable income as a fisherman nor that he was skilled and thus the appellant proposed that Kshs 5,000 would be sufficient as monthly wage. They relied on the case of *Evans Muthaita Ndiva v Father Rino Menegbello & Another [2004] eKLR* where the court held that since there was no proof of income produced to court to show that the deceased earned Kshs 12,000 as a businessman, Kshs 2,000 would be adopted.
12. The appellant further submitted that a multiplier of 10 years and a dependency ratio of 2/3 would suffice and thus the general damages under this head would be $Kshs\ 5,000 \times 12 \times 10 \times 2/3 = 400,000$.
13. On pain and suffering the appellant proposed Kshs 10,000 as the deceased died in hospital on the same day. Reliance was placed on the case of *Wangari v Nkaru [2004] eKLR* where the deceased died within one or two hours after the accident and the court awarded Kshs 10,000. On loss of expectation of life, the appellant submitted that the conventional award was Kshs 100,000.



The Respondent's Submissions

14. It was submitted that the trial magistrate correctly analysed and applied the principles governing apportionment of liability since the awarded amount was conceded by the appellant's witness to be the amount awardable under the Act.
15. The respondent submitted that the apportionment by the learned trial magistrate was correct as the appellant had a statutory duty to ensure the safety of the respondent's husband. Reliance was placed on the cases of *Kenya Wildlife Services v Rift Valley Agricultural Contractors Limited [2014] eKLR*, *Kenya Wildlife Serviced v Jefrisi Indimuli Obati & Another [2020] eKLR* and the Supreme Court case of *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR* where the court in all these instances held that the appellant herein had the statutory duty to control wildlife by dint of Section 3A of the Wildlife Act.
16. The appellant submitted that once the appellant was found liable for the death of the respondent, the hands of the trial magistrate were tied as to how much damages he was to award in general damages to the respondent since the figure was predetermined by statute as was similarly held in the case of *Kenya Wildlife Serviced v Jefrisi Indimuli Obati & Another supra*.
17. It was submitted that the appellant's averments both before the trial court and before this court were without basis and further that the appellant had failed to substantiate the grounds of claims in its memorandum of appeal.

Analysis and Determination

18. I have considered the pleadings herein and as well before the trial court, the submissions filed by both parties. The issue for determination in my mind is whether the trial court was right in awarding the respondent general damages in light of an existing award by the County Wildlife Conservation and Compensation Committee.
19. This question was determined by the Court of Appeal in the case of *Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR*, and is primarily whether section 25 of the Wildlife Management and Conservation Act ousts jurisdiction of the court. The Court of Appeal dealt directly with the issue of ouster regarding section 25 Wildlife Management & Conservation Act which provides as follows:
 - ' 25.
 - (1) Where any person suffers any bodily injury or is killed by any wildlife listed under the Third Schedule, the person injured, or in the case of a deceased person, the personal representative or successor or assign, may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act.' (Emphasis supplied).
20. The Court of Appeal asked the question 'Does the High Court have the jurisdiction to deal with matters arising from the *Wildlife Conservation and Management Act*', and answered as follows:
 14. In our view, even from a literal interpretation, this provision does not oust the jurisdiction of the High Court to hear any matters raised under that Act. If the Act meant to remove those matters from the realm of the High Court or the other courts, then it would have expressly stated so. It gives an aggrieved party an option to go to the committee as a first option. This in our view was meant to ease matters for the poor people whose crops and domestic animals



are ravaged by wild animals occasionally, and which people may be far removed from the structured judicial systems. We do note that most of the areas that are prone to wildlife/human conflict are in areas that are outside urban areas where courts are situated. The Act in our view meant to make it easier for such people to access justice that is more easily accessible in terms of not traveling long distances and also in terms of simplicity in lodging their claims. It could not have been meant to shut out everybody else who would prefer to pursue their claims before the conventional courts. That would explain the use of the word 'MAY' and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court.

15. Learned counsel for the appellant sought to distinguish the authorities cited to us on the ground that they were determined under the repealed Cap 376. It is true that Section 62(1) of the Cap 376 used the word 'MAY' which is permissive and not mandatory. However, Section 25 of the current Act is couched in exactly the same words. This inevitably means that those decisions made before the Wildlife and Conservation Management Act 2013 came into force are relevant today as they were prior to 2013. Neither the repealed Act (Cap 376) nor the current Act ousts the jurisdiction of the court to hear and determine the said matter.
16. In other words, there is no ouster clause in the Wildlife and Conservation Management Act, that bars a party from seeking relief outside the process provided for under that Act. An ouster, or privative clause specifically divests the court of jurisdiction to hear or entertain any matters arising from the specific statute. In this case, Section 25 of the Act only gives an aggrieved party an option to pursue its claim either through the process stipulated under the Act, or through the court.
17. The respondent could either lodge his claim through the Act, which he did but no remedy was forthcoming, or pursue the remedy under common law through the courts. Every person has a right to pursue a remedy under common law, for a wrong or injury suffered.

Under common law there cannot be a wrong without a remedy - or in other words,

'Equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium). The Respondent suffered a wrong; he went to the appellant seeking relief and he was repulsed'
21. The above authority which is binding on this court lays to rest the question of jurisdiction, and also settles the issue as to whether common law remedies are available in such a claim. I understand the position therefore to be that where a party opts for the compensation route through the County Compensation Committee, then if he is dissatisfied with the award of compensation by either the Compensation Committee or the Service may, his recourse is to within thirty days after being notified of the decision and award, file an appeal to the National Environment Tribunal and on a second appeal to the Environment and Land Court.
22. The evidence before the trial court was that the respondent's husband met his death while fishing and was attacked by a crocodile. The same was not denied by DW1 Sgt Amos Nyaoro who adopted his written statement dated June 4, 2021 as his evidence and stated that the respondent's case had already been deliberated, determined an award of Kshs 5,000,000 made by the County Wildlife Conservation and Compensation Committee.
23. The Question for the court in this appeal, however, is whether the court had jurisdiction under section 25 to make the award it made, not whether in addition to the mechanism under the Act, the civil court has jurisdiction in common law to make compensation. The question whether the appellant had a duty to pay compensation which is positively determined by the Court of Appeal in Kalonzo supra, arises only after the jurisdiction of the court to make the award is settled.



24. Had the court on the usual principles of the law of negligence of breach of duty of care occasioning the plaintiff injury determined that damages in the sum awarded was payable by the appellant defendant upon assessment on the common law principles governing award of damages in fatal accidents, and there would have been, in my respectful view, no cause for complain if the plaintiff did not thereby achieve a double compensation for the same injury.
25. However, the court in this case purported to assess and award damages in accordance with section 25, and the issue then arises whether the court could validly do that under the provision.
26. Clearly, the appellant having assessed an amount under the Act, further intervention in court could only have been by the appeal process following upon the provision of the section.
27. The respondent may have opted to pursue her claim for compensation in negligence for damages for personal injury in the civil court as an alternative to the statutory compensation mechanism. Without deciding, I would consider that the respondent may also have pursued judicial review remedy in the High Court, if so advised by her advocates, for the award of the full award of compensation prescribed under the Act. The respondent may also, as she may be advised by her legal advisors, file an application for extension of time to pursue the appeal process set out in section 25 (6) of the Act.
28. The court is not without sympathy for the family of the deceased but it considers that the procedure for the pursuit of compensation therefor was wrong, and the trial court could have, if it found that there was no evidence of any award, stayed the suit and referred the parties to the County Wildlife Conservation and Compensation Committee and not to adopt the assessed award which could only have been payable by the appellant through the established statutory compensation channel.
29. Having opted to pursue for compensation under the Statute, the respondent disintitiled herself of the claim in negligence in the civil court. As was held in *KWS v Kalonzo*, supra, the mechanism for compensation under section 25 of the Act and the forum of the court are options that a claimant may choose to employ in the pursuit of compensation for injury or damage by wildlife. In awarding damages for personal injury in the civil suit for the amounts set out under the mechanism of the statute, the *Wildlife Conservation and Management Act*, the trial court, with respect, fell into error.
30. As observed hereinabove, the respondent has various options to pursue, She can seek enforcement of the award already assessed to her by the County Wildlife Conservation and Compensation Committee.
31. Consequently, this court must return a verdict of want of jurisdiction of the Magistrate's Court to award compensation under section 25 of the *Wildlife Conservation and Management Act* 2013. The trial court could only have quantified the claim under the common law and not adopt what was assessed by the appellant's Compensation Committee under the Act.
32. I therefore allow this appeal, set aside and vacate the trial court's judgement and decree dated and delivered on the March 11, 2022 In Bondo PM CC No E015 of 2022 in its entirety. In its place, I invoke the provisions of section 78 of the *Civil Procedure Act* and remit this case back to the Magistrate's Court at Bondo with an order for stay of the proceedings therein pending the determination of the dispute/ claim lodged before the County Wild life Management and Conservation Compensation Committee as contemplated in section 25 of the Act.
33. Each party to bear their own costs of this appeal as the error was on the part of the trial court.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF APRIL, 2023

R.E. ABURILI

JUDGE

