



**Kenya Wildlife Services v MMM (Suing as Legal Representative for HM -Deceased)
(Civil Appeal E073 of 2022) [2023] KEHC 20825 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20825 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E073 OF 2022
TW CHERERE, J
JULY 27, 2023**

BETWEEN

KENYA WILDLIFE SERVICES APPELLANT

AND

**MMM (SUING AS LEGAL REPRESENTATIVE FOR HM -
DECEASED) RESPONDENT**

*(Being an appeal from the judgment and decree in Tigania PMCC
No. E050 of 2021 by Hon. P. Wechuli (SRM) on 12th May, 2022)*

JUDGMENT

1. Haron Mutethia (deceased) died of injuries he suffered when he was trampled by an elephant. His father, the Respondent herein filed suit in Tigania PMCC No E050 of 2021 seeking damages.
2. By consent dated March 2, 2022, liability was agreed at 90:10% in favour of the Respondent as against the Appellant.
3. By a judgment delivered on May 12, 2022, Respondent was awarded damages in the sum of KES 5,170,000/- which sums were subject to 10% contribution.

The Appeal

4. The Appellant being dissatisfied has appealed on the grounds among others that the trial court made awards under both the statute and common law and arrived at a decision wrong in law.

Appellant's submissions

5. Appellant by submissions filed on June 14, 2023 holds the view that the court erred in assuming the role of the Cabinet Secretary who is mandated to make awards under Section 25 (3) of the [Wildlife](#)



Conservation and Management Act (WCMA) and in support thereof relied on Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR and Kenya Wildlife Service v Abraham M'ngai M'itumitu [2021] eKLR where the courts ruled that it is erroneous to award damages for personal injury in the civil suit for the amounts set out under the mechanism of the Wildlife Conservation and Management Act. (WCMA)

6. It was submitted that the trial court misapprehended the decision in Kenya Wildlife Service v Jefrisi Indimuli Obati & another [2020] eKLR for the reason that damages under WCMA are only available to claimants who pursue the statutory procedure under Section 25 of the Act.
7. On appeal, Appellants proposed an award of KES 400,000/- for loss of dependency, KES 10,000/- for pain and suffering and KES 100,000/- for loss of expectation of life and relied on Kwamboka Grace V Mary Kemuma Mose [2017] eKLR where a global sum of KES 300,000/- for loss of dependency was awarded for a 4 ½ year old child.

Respondent's submissions

8. The respondent's position was that section 25 of WCMA was not mandatory and that a claimant had the option of following the procedure under the Act or filing suit in court. He cited the case of Kenya Wildlife Service v Joseph Musyoki Kilonzo NRB CA Civil Appeal No306 of 2015[2017]eKLR where the Court of Appeal upheld that position. Respondent also relied on Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR where the court held that though not provide in the Act, KWS had an obligation to compensate for destruction of crops by wildlife under common law.

Analysis and Determination

9. I have considered this appeal in the light of evidence on record, submissions and cited authorities.
10. The claim by the Respondent was clearly made under common law and statute. Statute and case law are clear that a party cannot be compensated both under WCMA and common law. The trial magistrate, with respect fell into error in awarding damages under WCMA.
11. The foregoing notwithstanding, I have considered whether the disputed award of KES 5,000,000/- was merited.
12. Under common law, damages for fatal injuries awarded under three headings. Pain and suffering, loss of expectation of life and loss of dependency.
13. At the hearing, Respondent asked for KES 5,000,000/- and cited section 25 of WCMA. Appellant on the other hand made no offer.
14. As a general principal, the assessment of damages is a matter of the exercise of court discretion and as such, an appellate court will normally be slow to interfere with such discretion unless the trial court misdirected itself in arriving at the award in question. The Court of Appeal in Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR stated as follows in this regard:

“ An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”



15. Deceased died at the age of 3 ½ years. It is an accepted fact of life in the African society that even young children once they become adults they are expected to and do invariably take care of their aged parents as stated by the Court of Appeal in *Kenya Breweries Limited vs. Saro*, [1991] KLR 408.
16. Both the Appellant and the Respondent did not guide the trial court with the relevant authorities for awards in cases of minor children such as the deceased in this case and Appellant’s submissions of authorities on the issue on appeal is misplaced.
17. In *Catholic Diocese of Kisumu v Tete* [2004] eKLR the Court of Appeal the Court of Appeal identified the circumstances under which an appellate court can interfere with an award of damages as follows:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”
18. Although the trial court applied the wrong principles in awarding damages under *WCMA*, it has not been demonstrated that the award of KES 5,000,000/- would be excessive for loss of dependency and this court therefore declines the invitation to substitute the sum with its own figure.
19. Accordingly, I find that this appeal has no merit and it is dismissed with costs to the Respondent.

DATED AT MERU THIS 27th DAY OF July, 2023.

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Karinga

For Respondent - Mr. Ondieki for J.O.Ondieki & Co. Advocates

