



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 73 OF 2016

ROSE NDINDA MUTUKU.....APPELLANT

V E R S U S

KENYA WILDLIFE SERVICES.....RESPONDENT

J U D G M E N T

1. The appellant was aggrieved by the ruling of Embu Chief Magistrate delivered on 15/11/2016 upholding a preliminary objection challenging the jurisdiction of the court with a damage claim under the Wildlife Conservation and Management Act, 2013. He therefore filed this appeal on 10/03/2017.

2. The ground relied on may be summarized as follows:-

(a) That the magistrate erred in law and fact in failing to consider the appellant's submissions on the issue of jurisdiction.

(b) That the magistrate misinterpreted Section 25 of the Wildlife Conservation Management Act, 2013 in holding that the court had no jurisdiction to deal with the claim.

(c) That the entire ruling was against the constitution and other relevant statutes.

3. By consent the parties agreed to argue this appeal by way of written submissions.

4. The appellant's counsel Messrs F.K. Gitonga & Co. filed their submissions on 27/11/2017. The respondents advocate Messrs Mithiga & Kariuki were served with the appellant's submissions on 27/11/2017 but failed to file their submissions.

5. The Chief magistrate in his ruling determined two issues which were the basis of upholding the respondents objection. Firstly, he found that the Act confers jurisdiction on County Boards in matters of compensation to victims of injury by wild animals.

6. He observed that the respondent was wrong to ignore the County Board and file the matter in a court of law.

7. It was further observed that bodies created under the law should be left to deal with the matters arising from breach of such law.

8. Secondly, the court found that issues of compensation in wildlife cases are handed by the Environment and Land Court as stipulated by Section 15 of the Land Act.

9. The relevant law in this appeal is Section 25 of the Wildlife Conservation and Management Act which provides:-

(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.

(2) The County Wildlife Conservation and Compensation Committee established under section 18 shall verify a claim made under subsection(1) and upon verification, submit the claim to the Cabinet Secretary together with its recommendations thereon.

(3) The Cabinet Secretary shall consider the recommendations made under subsection (2) and where appropriate, pay compensation to the claimant as follows—

(a) in the case of death, five million shillings;

(b) in the case of injury occasioning permanent disability, three million shillings;

(c) in the case of any other injury, a maximum of two million shillings, depending on the extent of injury.

(4) Any person who suffers loss or damage to crops, livestock or other property from wildlife specified in the Seventh Schedule hereof and subject to the rules made by the Cabinet Secretary, may submit a claim to the County Wildlife Conservation and Compensation Committee who shall verify the claim and make recommendations as appropriate and submit it to the Service for due consideration.

(5) The County Wildlife Conservation and Compensation Committee shall review the claim and award and pay a compensation valued at the ruling market rates:

Provided that no compensation shall be paid where the owner of the livestock, crops or other property failed to take reasonable measures, to protect such crops, livestock or property from damage by wildlife or his land use practices are in compatible with the ecosystem-based management plan for the area.

(6) A person who is dissatisfied with the award of compensation by either the County Wildlife Conservation and Compensation Committee or the Service may 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.

(7) The Cabinet Secretary may, by notice in the Gazette, prescribe such regulations and guidelines as are necessary and appropriate to carry out the purposes of this section.

10. Arguing that the magistrate was wrong in upholding the objection, the appellant relied on the Court of Appeal case (by Visram, Karanja and Koome J.A.) of **KENYA WILDLIFE SERVICES VS JOSEPH MUSYOKI KALONZO Nairobi C.A. No.306 of 2015** where it was held:-

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 first option this in our view was meant to ease, matters for the poor people whose crops and domestic animals are damaged 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 claim. It could not have meant to shut out everybody else who would prefer to pursue their claims. It could not have meant to shut out everybody else who could 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.

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 the Act... 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.

11. The court further held:-

The respondent could either lodge his claim through the Act, which he did but no remedy was forthcoming, or pursue the remedy under the common Law through the courts. Every person has a right to pursue a remedy under the common law for a wrong or injury suffered.

12. It was explained clearly by the Court of Appeal that the use of the word “may” in Section 25 of the Act is permissive and gives the claimant an option of filing his claim in court. This interpretation of the law is correct in my view.

13. If the legislature intended to shut out the courts, it would have used the word “shall” to make it mandatory that all compensation claims should be filed before the County Board.

14. It was observed that jurisdiction in civil claims is determined on the value of the claim. The Court of Appeal in the **JOSEPH MUNYOKI KALONZO case** was dealing with a High Court judgment where the judge had found that the court had no jurisdiction in wildlife compensation matters. However, the Court of Appeal addressed the issue of jurisdiction of courts generally. In that case, it was held that both the High Court and the magistrates courts have jurisdiction to deal with wildlife injury compensation cases. The magistrates court is only limited by the pecuniary jurisdiction of the particular rank of the magistrate concerned.

15. The relevant law confers jurisdiction of adjudicating on matters of compensation for injury by animal exclusively on the magistrates and the High Court but not under the Environment and Land Court as stated by the learned magistrate.

16. In view of the foregoing analysis, I find that it was a misdirection by the trial magistrate to uphold the preliminary objection on ground of lack of jurisdiction.

17. The second ground of upholding the preliminary objection was that the respondent did not owe a duty of care to the appellant. The relevant statute must not expressly state that a certain body has a duty of care. It may be express or implied. The respondent had a choice of instituting his claim under common law or under the statute.

18. It was held in the *JOSEPH MUSYOKI KALONZO case (supra)* that the appellant admitted “the duty to manage and conserve wildlife which comes with the attendant responsibility to shoulder an claims of loss or damage caused by the breach of that duty”. I agree with this view expressed by the Court of Appeal.

19. It was held in the case of *JOSEPH BOLD NGERA & SUPERDUKA NAKURU LTD VS KENYA WILDLIFE SERVICES C.A. NO. 171 of 1997* that the absence for a compensation provision does not bar an aggrieved party to claim damages. As I, have said earlier in this judgment, the claimant may lodge his compensation claim even under common law.

20. It was a misdirection on part of the learned magistrate to find that the respondent did not owe a duty of care to the appellant.

21. In conclusion, I find that the magistrate erred in both law and fact in upholding the preliminary objection. The appellant has satisfied this court on the two main grounds of appeal.

22. I find the appeal merited and allow it with costs to the appellant.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF FEBRUARY, 2018.

F. MUCHEMI

JUDGE

In the Absence of parties

DR to issue notice of the judgment