



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 90 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

JOHN KIMATHI MARETE.....APPELLANT

AND

KENYA WILDLIFE SERVICES.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon.L. Ambasi, CM date 10th October 2017 at the Chief Magistrates Court at Meru in Civil Case No. 8 of 2017)

JUDGMENT

1. The appellant alleged that he was attacked by a stray elephant from the nearby forest on 5th November 2016 while walking on his farm at Nkunga Village. As a result of the injuries he suffered, he sued the respondent for damages. The respondent denied the claim and asserted that the court lacked jurisdiction to entertain the claim under **section 25** of the *Wildlife Conservation and Management Act* (“**WCMA**”). The respondent raised the issue as a preliminary objection and the trial magistrate held that the procedure for compensation set out in the **WCMA** ousts the jurisdiction of the court. Consequently, the suit was dismissed thus precipitating this appeal.

2. The issue in this appeal was encapsulated in the memorandum of appeal dated 23rd October 2017, the appellant contended that the trial magistrate misinterpreted **section 25** of the **WCMA** in holding that the court had no jurisdiction. He condemned the trial court for ignoring the doctrine of precedent in coming to the conclusion she did. Before the trial court, the appellant’s counsel cited the case of *Joseph Munyoki Kalonzo v Kenya Wildlife Services GRS HCCC No. 5 of 2015 [2015] eKLR* where Dulu J., held that **section 25** of the **WCMA** is couched in permissive terms that the court had jurisdiction. He stated as follows;

Lastly, section 25(1) of the Act is permissive and uses the word “may” and does not say specifically that the ordinary courts have no jurisdiction in such claims.

3. Counsel for the respondent emphasized in oral submissions that the court had no jurisdiction to entertain the claim. In his submissions before the trial court, he relied on the principle that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, then that procedure should be strictly followed. He cited several cases among them *Speaker of the National Assembly v Njenga Karume [2008]1 KLR 425*.

4. At the heart of this case is **section 25** of **WCMA** 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.

(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) Any person who suffers loss and 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. It is clear from the provisions I have cited that there is indeed an elaborate procedure prescribed for prescribing how claims for injuries

caused by wildlife should be dealt with. The trial magistrate was correct in citing and applying the principle outlined in *Speaker of the National Assembly v Njenga Karume (Supra)*. However, the appellant complained that the trial magistrate ignored the doctrine of precedent. At the time the preliminary objection was argued there was a High Court decision; *Joseph Munyoki Kalonzo v Kenya Wildlife Services (Supra)* interpreting section 25 of the WCMA and holding that the provision was merely permissive. Although the case was cited by the appellant, the respondent did not submit on it and the trial magistrate ignored it in her judgment. What is clear from the judgment of the subordinate court is that trial magistrate took a different position in interpreting section 25(1) of the WCMA by stating that:

The reference to the use of the word may in section 25(1) which reads, "... the person injured, or in the case of a deceased person, the personal representative or successor or assign, may launch a claim," is in my view an option to opt whether or not to pursue a claim, and is no way related to the Defendant.

6. In my view, the trial magistrate failed to follow established precedent that was cited to her resolving the clear interpretation of section 25(1) of the WCMA. The trial magistrate had no choice but to follow the precedent of the High Court notwithstanding that she disagreed with or took a different view of the interpretation. The importance of the doctrine of precedent cannot be overstated and I will cite a few cases to make the point. In *Dodhia v National & Grindlays Bank Limited and Another [1970] EA 195, Duffus VP, stated as follows;*

The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State.

7. As to whether the High Court can depart from the decision of the Court of Appeal, the Court of Appeal in *Mwai Kibaki v Daniel Toroitich Arap Moi [2008] 2 KLR (EP) 351* observed that:

The High Court, while it has the right and indeed the duty to critically examine the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that obiter dictum if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules.

8. On the same note the Court of Appeal in *National Bank of Kenya Ltd v Wilson Ndolo Ayah [2009] KLR 762* observed that:

It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter.

9. Based on the principles I have cited, I also hold that the Magistrates' Court is bound by decisions of the High Court where there is no controlling precedent on issue by the Supreme Court or the Court of Appeal. Just as the Court of Appeal has stated, where the trial magistrate does not agree with the decision of the High Court, the court may express its view on the matter or distinguish the case on established grounds but absent any grounds to distinguish the case, it must follow the precedent. In this case, the trial magistrate had no choice but to follow the precedent established in *Joseph Munyoki Kalonzo v Kenya Wildlife Services (Supra)*. I would allow the appeal on this basis.

10. Nine days after the trial magistrate delivered her ruling, the Court of Appeal affirmed the decision in *Joseph Munyoki Kalonzo v Kenya Wildlife Services (Supra)* in *Kenya Wildlife Service v Joseph Musyoki Kilonzo NRB CA Civil Appeal No.306 of 2015 [2017] eKLR*. The Court asked and answered the question whether section 25 of the WCMA ousted the jurisdiction 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.

11. The Court then concluded that the WCMA did not bar anyone from seeking relief from the court by stating that;

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.

12. I would be remiss if I did not state that about a month later on 22nd November 2017, a differently constituted bench of the Court of Appeal came to a different conclusion in a similar case. In **Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017] eKLR** the court considered the import of **section 62(1)** of the **Wildlife (Conservation and Management) Act (Repealed)** which provided as follows;

62(1) Where any person suffers any bodily injury from or is killed by any animal, the person injured or in the case of a deceased person, any other person who was dependant upon him at the date of his death may make application to a district committee established by this section, for the award of compensation for the injury or death...."

13. The court concluded that "may" in the context of the statute was mandatory and thus it held that;

*[18] From the foregoing, it is abundantly clear to us that where there is a specific procedure as to the redress of grievances, the same ought to be strictly followed. Having arrived at that conclusion, we are satisfied that the learned Judge of the High Court did not err by upholding the lower court's finding. **Section 62 (1)** of the Act is explicit on the procedure to be followed by any person who suffers bodily injury from or is killed by any animal. Such person, is required to make an application to the District Committee. It is good practice intended to foster public confidence and trust to let each organ perform its mandate. The appellant ought to have approached the District Committee first and followed the appellate system designed under the Act.*

14. The decision in **Peter Muturi Njuguna v Kenya Wildlife Service(Supra)** supports the position taken by the respondent that where the legislature provides a specific procedure then that procedure must be exhausted before recourse to the courts. That case though can be distinguished from **Kenya Wildlife Service v Joseph Musyoki Kilonzo (Supra)** on several grounds. Although both cases dealt with provisions that are similar, the former case was in respect of the repealed **Wildlife (Conservation and Management) Act** while the latter case dealt directly with **section 25** of the **WCMA**. In the latter case the Court considered the issue of access to justice which is a fundamental right protected under **Article 48** of the Constitution. Even though I would venture to say that the words of the statute may, in the context of the **WCMA**, support the application of the principle that where the Act provides the exclusive means to agitate cases of injury by wildlife that procedure should be followed, the interpretation given by the Court of Appeal on **section 25** of the **WCMA** is binding on this court until the Court revisits the matter.

15. Turning back to the case at hand, I find and hold for the reasons I have set out that the trial magistrate erred in law in not considering and applying the decision in **Joseph Munyoki Kalonzo v Kenya Wildlife Services(Supra)** which was binding on the court. I therefore allow the appeal, set aside the ruling dated 10th October 2017 and substitute it with an order dismissing the preliminary objection with costs to the appellant. For the avoidance of doubt, the matter shall proceed for hearing.

16. The respondent shall bear the appellant's costs of this appeal assessed at Kshs. 30,000/-.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of June 2018.

A. MABEYA

JUDGE

Mr Igweta instructed by Igweta Murithi and Company Advocates for the appellant.

Mr Kariuki instructed by Mithega and Kariuki Advocates for the respondent.