



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 27 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

KENYA WILDLIFE SERVICES.....APPELLANT

AND

ROISE BUNDI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.A.G.Munene, SRM

dated 22nd February 2017 at the Chief Magistrates Court

at Maua in Civil Case No. 208 of 2015)

JUDGMENT

1. That the respondent was injured by a buffalo while she was irrigating her miraa trees at Kinameru near Meru National Park on 8th March 2015 is not disputed since the parties recorded a consent on liability at 80:20 as against the appellant. Thus the appellant raises two issues for determination in this appeal. The first is whether the trial court had jurisdiction to determine the matter in light of the provisions of **section 25** of the *Wildlife Conservation and Management Act* (“*WCMA*”). The second is whether the damages awarded to the respondent were excessive considering the injuries sustained by the respondent.

2. I will deal with the issue of jurisdiction first. In its submissions before the subordinate court, the appellant contended that the trial court did not have original jurisdiction to entertain the claim under **section 25** of the *WCMA* on the ground that there is a specific procedure provided for resolving disputes arising from injury from wildlife. The appellant reiterated this argument before this court and cited several decisions supporting the principal that where the law provides a procedure to be followed, then parties must invoke that procedure before moving to court. Counsel cited several cases among them *Narok County Council v Trans Mara County Council and Another Civil Appeal No. 25 of 2000* and *Diana Kethi Kilonzo v IEBC and 2 Others NRB Petition No. 359 of 2013 [2013]eKLR*.

3. 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 No.306 of 2015[2017]eKLR* where the Court of Appeal upheld that position.

4. The issue of jurisdiction raised by the appellant concerns the meaning and interpretation of **section 25(1)** of the *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 country wildlife conservation and compensation committee within the jurisdiction established under this Act.

5. The trial magistrate rejected the appellant’s argument that **section 25** of the *WCMA* was the exclusive means for raising claims arising from injuries caused by wildlife. The trial magistrate relied on the decision in *Joseph Munyoki Kalonzo v Kenya Wildlife Services GRS HCCC No. 5 of 2015 [2015] eKLR* where the Dulu J., held that the **section 25** of the *WCMA* is couched in permissive terms that the court had jurisdiction and 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

6. I cannot fault the trial magistrate as the decision rendered by Dulu J., was binding on the court. By the time this appeal was urged the decision by Dulu J., was affirmed by the Court of Appeal. In **Kenya Wildlife Service v Joseph Musyoki Kilonzo (Supra)** the Court of Appeal asked and answered the question whether the aforesaid provisions ousted the jurisdiction of the Court. It answered the question 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.

7. 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.

8. I therefore find and hold that on the basis of **Kenya Wildlife Service v Joseph Musyoki Kilonzo (Supra)** the trial court properly took cognisance of the suit and I dismiss the ground that the trial court did not have jurisdiction.

9. I now turn to the issue of quantum of damages. The doctor who examined the respondent on 23th July 2015, Dr Nicholas Koome (PW 1), told the court that the respondent sustained a fracture of the left tibia and fibula. The injuries were treated by plaster of paris case for 8 weeks, use of crutches and physiotherapy. He noted that the respondent was walking with a limb on the left. He concluded that the respondent suffered serious injuries which he classified as maim. The leg had shortened by approximately 2 cm. He assessed disability at 10%. He observed that the respondent had increased chances of developing arthritis.

10. The respondent submitted before the trial court that Kshs. 1,000,000/- would be adequate compensation. Counsel cited the case of **Joash M. Nyabicha v Kenya Tea Development Authority and Others KSM CA Civil Appeal No. 302 of 2010 [2013]eKLR**. The plaintiff in that case sustained a fracture of the right leg following which he underwent several operations. The Court of Appeal accepted an award of Kshs. 1,000,000/- as reasonable in 2013. The appellant submitted that the sum of Kshs. 100,000/- was reasonable based on the case of **Isaac Mwenda Micheni v Mutegi Murango NRB HCCC No. 335 of 2004 [2004]eKLR** where the plaintiff sustained soft tissue injuries and a compound fracture of the left tibia and fibula. He was awarded Kshs. 100,000/- in 2004.

11. It is important to recall the general principle upon which this Court, as an appellate court, will interfere with an award of damages. The Court of Appeal summarised the principle in **Mariga v Musila [1984] KLR 251**, as follows;

The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles

12. In awarding damages, the court takes into account the nature and extent of injuries in relation to awards in similar cases to ensure consistency of awards bearing in mind that no two cases are exactly alike as the Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

13. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see **Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

14. The trial magistrate awarded Kshs. 800,000/- based on the case cited by the respondent. As I have noted in other cases, there is a tendency for advocates to cite cases that are polar opposites and hope that the judge or magistrate strikes a mid-point. The gap between the cases cited by the parties was too wide. I wish to reiterate that it is the duty of counsel to assist the court by citing several decisions in order to assist the court come to a fairer outcome consistent with its duty outlined in the **Salome Maore Case (Supra)**. The **Joash Nyabicha Case (Supra)**, is in my view an outlier, as the issue of quantum was not contested. In fact, the court noted that, "The appellant, in his appeal before us, expressly accepts that assessment as reasonable." The court did not therefore determine whether that award was in fact reasonable in line with prevailing awards. On the other hand, the case cited by the appellant was an outlier on the opposite side and could not provide fair compensation.

15. Considering the injuries sustained by the respondent and particularly the residual disability, I find the sum of Kshs. 1,000,000/-

excessive. I think a sum of Kshs. 400,000/- would keep the award within the margin of prevailing awards. Consequently, I allow the appeal to the extent that I set aside the judgment of the subordinate court awarding the respondent Kshs. 1,000,000/- as general damages and substitute the same with an award of Kshs. 400,000/-. The sum shall accrue interest at court rates from the date of judgment before the trial court.

16. The appellant shall have the costs of this appeal assessed at Kshs. 40,000/- only.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED atMERU this 21st day of June 2018.

A. MABEYA

JUDGE

Mr Njenga instructed by Mithega, Kariuki Advocates for the appellant.

Mr Mwanzia instructed by MuiaMwanziaand Company Advocates for the respondent.