



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Wildlife Service v Hassan (Civil Appeal E059 of 2023)
[2025] KEHC 5813 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E059 OF 2023**

SM GITHINJI, J

MAY 6, 2025

BETWEEN

KENYA WILDLIFE SERVICE APPELLANT

AND

ALI ABDI HASSAN RESPONDENT

*(Being an Appeal from the Judgment of E. Tsimonjero (SRM) in
Isiolo CMCC No. E080 of 2021 delivered on 8th of November, 2022)*

JUDGMENT

1. This Appeal arises from the judgment of the learned Senior Resident Magistrate Hon. E. Tsimonjero delivered on 8.11.2022 in Isiolo Civil Suit No. E080 of 2021 wherein judgment was entered in the following terms;
 - a. Liability 100%
 - b. General Damages Ksh. 3,000,000
 - c. Special Damages Ksh. 11,250
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 26th April, 2023;
 1. The Learned Magistrate erred in law and fact in proceeding to adjudicate upon a matter in which the court lacked the requisite jurisdiction to hear and determine.
 2. The Learned Magistrate misapplied and/or misapprehended the law in proceeding to make an award of general damages to the Respondent under statute while the Respondent's claim as presented before court was purely a common law claim.



3. The Learned Magistrate misdirected himself into usurping the powers of the Cabinet Secretary in charge of Tourism and Wildlife in basing the award for general damages on the provisions of section 25 (3) of the *Wildlife Conservation and Management Act*, 2013, yet the Respondent's claim had not been presented in the manner prescribed under section 25 (1) of the said Act.
4. The Learned Magistrate erred in law and fact by finding the Appellant 100% liable in negligence where there was no evidence in support and in total disregard of the evidence to the contrary adduced at the hearing.
5. The Learned Magistrate erred in law and fact in finding that the Plaintiff had suffered permanent disability on the basis of an incredible and unreliable medical report and against the weight of evidence.
6. The Learned Magistrate erred in law and fact in failing to consider all the relevant factors and circumstances of the case in arriving at the decision, judgment and award.
7. The Learned Magistrate erred in law and fact in failing to consider the written submissions tendered by the Appellant's counsel and in failing to consider the legal authorities tendered therewith.

Evidence at trial

3. Pw1 Ali Abdi Hassan, the Respondent herein and a Camel Pastoralist adopted his statement dated 14/2/2021 as his evidence in chief and produced the list of documents dated 14/2/2021 as exhibits 1 - 9. He told the court that on 1/2/2021, he was attacked by an elephant, as a result of which he suffered injuries and was treated at Isiolo General Hospital, Mutuati Hospital and subsequently admitted for one month at Kiirua Hospital. After treatment, he reported the incident to the Appellant and was issued with K.W.S compensation claim form.
4. Dw1 James Mapel, the Deputy Warden KWS Isiolo adopted his witness statement dated 21/5/2022 as his evidence in chief. He told the court that the compensation claim form (Pex 3) was issued by K.W.S Meru National Park. The said form however did not bear the name, details, signature and O.B Number from KWS, and thus it could not be confirmed to have been issued by KWS.

Appellant's Submissions

5. The Appellant through their Advocate Gideon Mutai filed submissions dated 14th November, 2024, faulting the trial court for hearing and determining the suit when it lacked the original jurisdiction to do so, and relied on *Kenya Wildlife Service v Kanini* (Suing as the *Next Friend of Edward Koome*) (*Civil Appeal 30 of 2020*) [2024] KECA 1127 (KLR) and *Peter Muturi Njuguna v Kenya Wildlife Service* [2017] KECA 42 (KLR). Counsel submitted that the Respondent ought to have exhausted the statutory remedies by pursuing his claim and compensation before the County Wildlife Conservation Committee, which has the original jurisdiction to hear such claims, and cited *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 others* (2019) eKLR, *NGO's Coordination Board v E.G & 4 Others*; *Katiba Institute (Amicus Curie)* (Petition No. 16 of 2019) [2023] KESC 17 (KLR), *Kimani Wanyoike v Electoral Commission & another* [1995] KECA 128 (KLR) and *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* (Petition 11 of 2015) [2018] KESC 48 (KLR). Counsel further submitted that the institution by the Respondent of 2 claims based on the same facts at the County Wildlife Conservation and Compensation Committee and in court amounted to abuse of the court process, and cited *Kenya Wildlife Service v Abraham M'ngai M'itumitu* (2021)eKLR and *Kenya Wildlife Service v Awuor* [2023] KEHC 3721 (KLR). Counsel argued that if the appeal is



allowed, the right to access to justice could not be impeded since a party may still approach the court by way of judicial review. The trial court was faulted for usurping the powers of the Cabinet Secretary by awarding the Respondent general damages of Ksh. 3,000,000 as provided under section 25 (3) (b) of the Act, and relied on *Kenya Wildlife Service v Jefrisi Indimuli Obati & another* (2020)eKLR. The Appellant cited *Lomolo (1962) Limited v Anam Kwangulei* [2019] KEELRC 1044 (KLR) and *Paul Gakunu Mwinga v Nakuru Industries Ltd* [2009] KEHC 407 (KLR) to support its position that the Respondent had failed to prove negligence on its part, and prayed for the appeal to be allowed with costs.

6. The Respondent through the firm of Khan & Associates Advocates filed undated submissions urging that the failure to attach the decree is fatal, and cited *Lucas Otieno Masaye v Lucia Olewe Kidi* (2022) eKLR, *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2015) eKLR, *Chege v Suleiman* (1988) eKLR and *Paul Karenyi Leshuel v Ephantus Kariithi Mwangi & Another* (2015) eKLR. Counsel submitted that the Appellant had admitted the jurisdiction of the trial court by filing its defence and tendering evidence therein, and cited *Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C 91/2002*, *Stephen Onyango Achola and Another v Edward Hongo Sule and Another* (2004) eKLR and *Grace Khisa Malenya v Jane Kilimo* (2017) eKLR. Counsel argued that the Appellant was responsible for the occurrence of any incident occasioned by wildlife to the public, whether death, injury, destruction to crops or livestock, and cited *Joseph Munyoki Kalonzo v Kenya Wildlife Service Civil Case No. 5 of 2014*, *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* (2014) eKLR, *Kenya Wildlife Service v Jefrisi Indimuli Obati & anor* (Supra) and *Jediel Murithi Njeru v Kenya Wildlife Services* [2020] eKLR.

Analysis and Determination

7. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.
8. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held as follows:

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
9. I have considered the appeal herein, the trial court’s judgment which is the subject of this appeal as well as the submissions by counsels.
10. From the grounds of appeal, the twin issues for determination are; whether liability was proved and whether the trial court had jurisdiction to hear the claim and award Ksh. 3,000,000 under section 25 (3) of the *Wildlife Conservation and Management Act*.
11. Before delving into those issues, I wish to preliminarily address the issue belatedly raised by the Respondent in his submissions that the appeal is incompetent for want of a decree in the record of appeal. The record shows that on 20/1/2023, the Appellant applied for certified copies of the typed proceedings, judgment and decree in this matter, but only the typed proceedings and the judgment were supplied.
12. Order 42, Rule 13 (4) (f) of the Civil Procedure Rules provides that: “Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to



- say — (a) the memorandum of appeal; (b) the pleadings; (c) the notes of the trial magistrate made at the hearing; (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing; (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate; (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that— (i) a translation into English shall be provided of any document not in that language; (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”
13. In *South Nyanza Sugar Co. Ltd v Daniel Obara Nyandoro* (2010) eKLR, the court (D. Musinga J, as he then was) held; “In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweni when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the *Civil Procedure Act* as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.”
 14. I find that since a certified copy of the judgment appealed from has been attached, no prejudice is conceivable, and the Appellant’s failure to attach a decree, is a mere procedural technicality, which does not go to the root of the appeal. Besides, Order 42 Rule 13 (4) (f) of the Civil Procedure Rules aforesaid is not coached in mandatory terms as it gives an Appellant the leeway to file either the judgment appealed from, order or decree.
 15. On liability, the Respondent pleaded that he was milking his camel at Topes area when he was mauled by an elephant, thus occasioning him serious injuries. Even on thorough cross examination, he maintained that he had been attacked by an elephant.
 16. Section 7 of the *Wildlife Conservation and Management Act* places an express obligation on the Appellant to protect the public from animal related attacks. I find that the Respondent was indeed attacked by an elephant while he milked his camel at Topes area, and apportionment of liability at 100% on the Appellant by the trial court was proper.
 17. On jurisdiction, the Appellant contends that the trial court’s jurisdiction to hear and determine the matter was ousted by the provisions of section 25 of the *Wildlife Conservation and Management Act* whilst the Respondent insists that the trial court was vested with the requisite jurisdiction to hear and determine it.
 18. There is no doubt that the Respondent sustained the injuries herein, the subject of this appeal, from a vicious attack by an elephant. He promptly reported the matter to the Meru National Park Kenya Wildlife Service, and was duly issued with K.W.S compensation claim forms.
 19. Section 25 of the *Wildlife Conservation and Management Act* provides as follows; “(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.”

20. In its elaborate discussion on the interpretation of section 25 of the *Wildlife Conservation and Management Act*, the Court of Appeal in *Kenya Wildlife Service v Joseph Musyoki Kalonzo* [2017] eKLR espoused as follows; “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....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.”
21. Given the foregoing position, it’s explicit that Section 25 of the Kenya *Wildlife Conservation and Management Act* does not oust the jurisdiction of the Courts to hear matter in the first instance. In law, Ouster of Court Jurisdiction must be plain and clear, and such provisions are interpreted narrowly by courts for they touch on crucial areas of access to justice and the rule of law.
22. The Respondent aptly reported the attack to the Appellant as required by the statute, but he could not possibly be expected to do nothing when it was apparent that no compensation was forthcoming, even after a formal demand had been made.
23. Having found that the Respondent had proved his case on a balance of probabilities, the trial court was justified in awarding general damages of Ksh. 3,000,000 as provided under the *Wildlife Conservation and Management Act*. “Justice though blind, cannot be blinded”.
24. I therefore find the appeal to be without merit and it is hereby dismissed with costs to the Respondent.



DATED, SIGNED AND DELIVERED THIS 6th DAY OF MAY, 2025.

S. M. GITHINJI

JUDGE

APPEARANCES:

Mr. Amule Advocate for the Respondent.

Mr. Mutai for the Appellant.

