



**MN (Minor Suing Through Her Next Friend RL) v Kenya Wildlife Service (Civil Appeal E002 of 2024) [2025] KEHC 11153 (KLR) (Civ) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11153 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CIVIL  
CIVIL APPEAL E002 OF 2024  
SC CHIRCHIR, J  
JULY 24, 2025**

**BETWEEN**

**MN (MINOR SUING THROUGH HER NEXT FRIEND RL) ..... APPELLANT**

**AND**

**KENYA WILDLIFE SERVICE ..... RESPONDENT**

*(Being appeal from the Judgment of Hon. M.A.Odhiambo  
(SRM) delivered on 28/6/2024 in Isiolo CMCC No.E102 of 2022)*

**JUDGMENT**

1. The appellant brings this Appeal challenging the above stated decision of the trial court and seeking orders as follows:
  1. This appeal be allowed
  2. The judgment of the Honorable M.A Odhiambo Senior Resident Magistrate delivered on 28<sup>th</sup> June, 2024 be set aside and the court herein be pleased to re-determine the issue of liability apportioned to the appellant
  3. Costs for appeal be borne by respondent.
2. The appeal is premised on the grounds that:
  1. That the learned magistrate erred in law and in fact in reaching her decision on liability without analyzing the entire evidence on record.
  2. The learned magistrate proceeded on demonstrably wrong principles in reaching her decision on liability at the ration of 50%:50%.



3. Through a plaint dated 1<sup>st</sup> December, 2022, the appellant sought for general damages and special damages and costs of the suit against the Respondent. She stated that on 13<sup>th</sup> June, 2022 at Kipsing Area she was viciously attacked by an elephant occasioning her serious injuries as a result of the respondent's negligence and or breach of statutory duty. He listed the grounds of negligence as follows:
  - a). Failing to keep any proper lookout or to have sufficient sign posts.
  - b). Failure to sensitize the community on how to co-exist with wildlife
  - c). Failure to engage the community in public Barazas
  - d). Failing to observe safety measures
  - e). knowingly and wantonly exposed the plaintiff to the verils of a wild habitat
  - f). Failure to take care of Animals under its charge by statute
  - g). Failing to keep wildlife under control or within its confines or in designated areas
  - h). Failing to secure the Elephant thus leaving them to cause wanton.
4. The respondent filed the statement of defense dated 12<sup>th</sup> January, 2023 denying the allegations of negligence and shifting blame to the minor plaintiff and her parent or guardian:

Particulars of Negligence against the plaintiff were given as follows:

  - a. Carelessly and recklessly wandering in an area she knew or ought to have known that such conduct was dangerous.
  - b. Putting herself close to an area known to be inhabited by wildlife thereby exposing herself to impending danger.
  - c. Failure to observe and avoid the path of the elephant either in time or at all thereby precipitating the attack
  - d. Attacking or provoking the elephant thereby causing it to retaliate, the elephant being an Animal that does not ordinarily attack people.
  - e. In the circumstances, failing to run, flee or otherwise get out of the way of the elephant.
5. The particulars of negligence against the parent/ Guardian were:
  - a). Failing to enroll the minor at school thereby exposing her to danger
  - b). Causing the minor to guard Animals on a school day in an area inhabited by wild animals
  - c). Failing to accompany the minor thereby exposing her to wild Animals
  - d). Failing to warn the minor of the existence of wild Animals inhabiting the Area
  - e). Failing to teach the minor what to do in the event of confrontation with wild Animals that inhabit the area.
6. The trial court delivered Judgment and apportioned liability in the ratio of 50/50 between the parties. The Appellant was aggrieved, and hence this Appeal.
7. On 3<sup>rd</sup> March, 2025 this court directed that the appeal be canvassed by way of written submissions and both parties complied.



### **The Appellant's Submissions.**

8. It was the appellant's submissions that she proved on a balance of probabilities that the accident was caused by negligence on the part of the respondent: that the respondent owed the appellant a duty of care which duty it breached, and the Appellant was able to demonstrate how that duty was breached.
9. It was also submitted that the incident happened outside the protected area which connotes total negligence on the part of the respondent; further that incident happened near the home of the appellant, meaning that the wildlife herein had escaped the custody of the respondent within the protected area.
10. It was further submitted that the appellant was able to show, through her pleadings that the incident happened outside the protected area as defined under the *Wildlife Conservation & Management Act*.
11. The Appellant has relied on a number of decisions which I have considered.

### **The Respondent Submissions.**

12. In its submission dated 18<sup>th</sup> March, 2025, respondent argues that it did not owe a duty of care to the Appellant at the time of injury; That the persons under the duty of care in the are visitors to national parks, whereby the respondent is required to provide security to them. Reliance was placed on Section 7 (b) of the *Wildlife Conservation and Management Act, 2013*, (The Act) wherein it places responsibility on the respondent to provide security to visitors in a national park .
13. It was also submitted that the injuries suffered by the appellant were substantially contributed to by her negligence under the doctrine of *volenti non fit injuria* since the appellant voluntarily placed herself at the risk of attack by wild animals by living in the national park . It is submitted that the Appellant did indeed admit that she lives inside the National Park
14. The respondent therefore urged this court not to disturb the trial court findings.

### **Analysis and determination**

15. This being a first Appeal, the role of this court is as was stated in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123. The court held: "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."
16. I have considered the pleadings , the evidence, the grounds of Appeal and submissions and I consider that the only issue for determination is whether liability should have been apportioned equally between the parties.
17. In arriving at the decision on liability , the trial court stated interalia that the plaintiff was aware that she was living in a restricted Area; that she admitted to have been living in National Park. The trial Magistrate was referring to the plaintiff's testimony in her cross- examination, where she stated" " I live in a park/ National reserve. I know it is unlawful to stay in the park. I was born and brought up in the reserve".



18. However further on, in cross- examination she stated : I do not understand what a National Park is”. That Statement in my view was significant. It was significant enough to require the respondent to prove that indeed the Appellant was living within the National park. Further the Appellant response should have been considered together with the Respondent’s witness responses to questions during cross- examination. DW1 stated : “ I do know kipsing town. The same is far from Meru National park. The nearest National park is Buffalo spring and Shaba” . DW1’s answers did not answer the question of whether the Appellant was in the park, if anything he stated that the place of the attack , namely kipsing is near and not in the park. In arriving at the decision of apportionment, the trial court seemed not to have considered the two witnesses accounts in totality.
19. Further , in this case , the evidential burden as to whether the respondent was attacked inside the park so as to entitle the respondent to disclaim liability they owe the respondent, was on the respondent.

Section 109 of the Evidence Act states:

“Proof of particular fact:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112 of the same Act provides : “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

20. Further again, it is instructive that the National Reserve or park in which the Appellant was residing in and grazing her Animals was not named. The burden of proof on the Appellant was to prove that she was attacked by a wild Animal . Once she had proved that ,the allegation that the respondent was grazing animals in National park or other protected Area was on the respondent. It is a burden they did not discharge , especially in the face of the Appellant’s confession that she did not know what a National park is.
21. It is the respondent who knows their particular National parks or other protected areas and their boundaries. The moment they allege that a claimant was living in or grazing their livestock or was in any other way encroaching into the park or other protected Areas, then they should be in a position to state with precision which national park or other protected area a claimant was encroaching into. It is a burden that they fail to discharge in this case.
22. Further 12 paragraph of respondent’s defence where it has set out the particulars of negligence on the part of the Appellant, amounts to indirect acknowledgment by the respondent that wild animals are in constant interaction with humans in that particular part of the country. And that being the case , the Respondent owed a duty of care to the Appellant and others from attacks from wild Animals unless it can otherwise prove that a claimant ventured into a protected Area.
23. It is further instructive that in its defence, there is no plea by the Respondent that there was any encroachment by the Appellant. It is only in their evidence that the issue of encroachment was brought up as the main, and indeed, the only defence. The Respondent’s evidence therefore was in variance with their pleadings.
24. The overall duty of managing wildlife is the work of the Respondent,( within their area of jurisdiction,) and for that reason it owes a duty of care to the general public , unless it proves that a particular individual had illegally accessed a National park or any other protected Area. The burden of proving



such illegal or unauthorized Access is always on the respondent. In the event that they fail to prove , then they must be liable for any injury ,loss or damage caused by wild Animals.

25. In view of all the foregoing , I find the conclusion of the trial court to the effect that the Appellant was in the park to have been erroneous

26. In conclusion:

- a). The judgment of the lower court, limited to its finding on liability is hereby set aside.
- b). Judgment is hereby entered for the plaintiff as against the defendant at a 100 % basis.
- c). costs of this Appeal and the trial court is awarded to the Appellant.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 24<sup>TH</sup> DAY OF JULY 2025**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Roba Katelo- Court Assistant

Mr. Amule for the Appellant

