



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**HIGH COURT CIVIL APPEAL NO. 73 OF 2018**

**KENYA WILDLIFE SERVICE.....APPELLANT**

**VERSUS**

**JEFRISI INDIMULI OBATI .....1<sup>ST</sup> RESPONDENT**

**MARY WANJIKU NJAU.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon K Bidali CM delivered on 29<sup>th</sup> November, 2019 in Naivasha CMCC No 309 of 2014)*

**JUDGMENT**

**Background**

The respondents, as beneficiaries of the estate of the deceased on behalf of all beneficiaries and dependants of the deceased, filed suit against the appellant in the lower court for compensation for the death of the late Samuel Nganga Mwaura on or about 26<sup>th</sup> February, 2014. The deceased was allegedly fatally mauled by hippos near Kwamuta River in Karagita area, Naivasha. The plaint asserts that the death from wildlife was caused by the negligent failure of the appellant to manage and secure the environment or wildlife, failure to secure, manage or protect dangerous wildlife and to ensure the safety of the deceased.

2. According to the plaint, the respondents' claim for damages and declaration for compensation were under common law and under both the Law Reform Act and the Wildlife Conservation and Management Act (WMCA). They sought general and special damages, and a declaration under the WMCA that the plaintiff is entitled to compensation of Kshs 5 million for the death of the deceased.

3. The defence denied that the plaintiff was brutally attacked and killed by a hippo whilst lawfully walking in Karagita area, and urged that if he was killed in an attack it was due to his negligence, particulars of which were set out. The defence also denied the jurisdiction of the court

4. The trial court found and apportioned liability at 60%: 40% against the appellants and awarded Kshs 5,000,000/- under the WMCA, less 40%, giving a total award of Kshs 3,000,000/-. The trial court held that damages under the Law Reform Act, Fatal Accidents Act and common law could not apply as the WMCA specifically provided for compensation for this kind of case.

5. Dissatisfied the appellant appeals against both liability and damages. They argue that the finding on liability was not grounded in evidence; that the trial court failed to consider that there were no eyewitnesses; that the trial court disregarded evidence of the probable location of the attack as an indicator that the deceased was involved in illegal fishing; that the award of no fault damages under the WMCA was wrongly apportioned under common law whilst failing to invoke common law principles as to multiplicand, multiplier and dependency, hence arriving at an award that was manifestly excessive. Finally, the appellant states that the trial court had no jurisdiction to determine the issues raised in the claim under section 25 of the WMCA.

6. In the appeal, the parties filed submissions and authorities which they relied upon.

7. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty of the court was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 123* in the following terms:

***I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily 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 (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).*

## Issues

Having perused the record of appeal and the submissions of the parties, the issues arising for determination by this court are:

- Whether the trial court or this High Court has jurisdiction in the matter
- The question of liability
- The issue of the quantum of the award.

## Jurisdiction

8. On jurisdiction the defendant argues that the section 19 of the WCMA provides for a County Wildlife Conservation Committee whose role is to assess compensation claims. The relevant provision is as follows:

***“19. The functions of the County Wildlife Conservation and Compensation Committee shall be to-***

***(a).....***

***(i) review and recommend claims resulting from loss or damage caused by wildlife for payment of compensation”***

Accordingly, the defendants submitted that the court's powers only kick in to enforce awards made by the Compensation Committee or on review or appeal.

9. In the appeal, the appellant conceded that the court had jurisdiction to deal with human wildlife conflict but only in respect of appellate jurisdiction through the Environment and Land Court pursuant to section 25 of the WMCA, which provides for appeal to the National Environmental Tribunal and the ELC as follows: that where a person is dissatisfied with the Committee's award of compensation as follows:

***“(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.”***

10. The plaintiff's response, accepted by the trial court, was that the WMCA does not expressly oust the jurisdiction of the court, and that Articles 47 and 50 of the Constitution entitle the plaintiff to a fair hearing. They cited **Lakter v Bomas of Kenya [2003] eKLR** and **Mathew Otieno v KWS [2008] eKLR** in both of which the High court held that the WMCA does not bar civil suits from being filed.

11. In their submissions on appeal, the plaintiff cited the Court of Appeal decision in **Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR**. There, the Court dealt directly with the issue of ouster in reference to **section 25 WMCA** which provides:

***“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.”*** (Emphasis supplied).

12. The Court of Appeal asked the question *“Does the High Court have the jurisdiction to deal with matters arising from the Wildlife Conservation and Management Act”*, and answered 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.***

15. Learned counsel for the appellant sought to distinguish the authorities cited to us on the ground that they were determined under the repealed Cap 376. It is true that Section 62(1) of the Cap 376 used the word ‘MAY’ which is permissive and not mandatory. However, Section 25 of the current Act is couched in exactly the same words. This inevitably means that those decisions made before the Wildlife and Conservation Management Act 2013 came into force are relevant today as they were prior

to 2013. Neither the repealed Act (Cap 376) nor the current Act ousts the jurisdiction of the court to hear and determine the said matter.

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.

Under common law there cannot be a wrong without a remedy - or in other words,

***‘Equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium). The Respondent suffered a wrong; he went to the appellant seeking relief and he was repulsed’***

13. The above case lays to rest the question of jurisdiction, and also settles the issue as to whether common law remedies are available in such a claim. I understand the position therefore to be that where a party opts for the compensation route through the County Compensation Committee, then if he is dissatisfied with the award of compensation by either the Compensation Committee or the Service may, his recourse is to 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.

#### **Analysis of Evidence and determination on liability and quantum**

14. PW1 Jefrisi Indimuli, the deceased’s wife testified that the deceased left home on 26<sup>th</sup> February, 2014 and never returned. The next day, neighbours told her that the deceased had been attacked by a wild animal at river Karagita. By the time she got to the scene, the body had been removed to the district hospital by, according to her, KWS. She said she then went to the appellant’s offices for compensation and later visited the scene. She stated they had been married 10 years and had two children. She produced various exhibits including the deceased’s payslip and printed photos of the alleged scene which she had taken with her phone.

15. In cross examination, she said a neighbor witnessed the attack. That neighbor did not testify. She denied that the deceased was a fisherman. She stated that the scene of the attack was at Lake Naivasha in an open place where there are public boats.

16. PW2 James Ojoi, the plaintiff’s cousin, testified that the scene of the incident was by the lakeside. In cross examination, he said that he learnt about the death after two days. He said the photo of the exact scene of the attack was not among the ones in court. He said that he was not aware that the deceased was an illegal fisherman, or that the deceased’s body was retrieved from the lake.

17. DW1 was PC Patrick Ndambuki of Naivasha Police Station. He testified that he was aware that a report vide OB 5 of 27.2.14 had been received by phone that a man was bitten by a hippo and taken to the deep shores. The report was made by Corporal Kabugu of KWS who reported that he had received a telephone report from Kamuta Farm near the shores of Lake Naivasha. KWS did not follow up the matter, nor did the police visit the scene.

18. In cross examination he said he was the one who recorded the OB entry as he was in the report office.

19. DW2 Moses Omurambi was a warden of the KWS. E adopted his statement recorded on 4/4/2016. He disputed the pictures exhibited by PW1 as exhibit 4, stating that they showed a lake not a river, which was a breeding zone for fish. He stated that there is no place called Kwamuta river as the only water body is Lake Naivasha; that the complainant’s body was found in Muta river in Kamuta Farm which is private prohibited land that is fenced

20. In cross examination he said that he did not witness the attack; that he did not know who retrieved the body; that KWS did not retrieve the body; that the breeding zones are under the body dealing with Fisheries.

21. I note from the evidence that no eye witness to the attack was availed to give evidence. That notwithstanding, the best evidence of the occurrences of the day is the OB No 5/27/2/2014 which was not disputed, and referred to at the hearing by DW1. It stated that a man was bitten by a hippo and taken to the deep shores. That is the only evidence availed that there was a human wildlife conflict in the absence of any eyewitness, and it was availed by the defence. The exact location where the incident occurred is not specified in the OB except that the deceased was bitten by a hippo and taken to the deep shores.

22. Although DW2 sought to explain that hippos kill and leave their victims on the spot and not drag them to the deep waters, this was contradicted by the only evidence of the death which was by the OB report. DW2 also stated that the KWS received a report about the hippo attack and recorded it in the relevant KWS OB stated to have been attached. I did not see the KWS OB either in the record of appeal or in the lower court file.

23. It is not known how or by whom the deceased’s body was retrieved since neither the police took any action, nor did KWS retrieve it, despite the plaintiff stating that KWS retrieved the floating body from the river. No post mortem report was availed, although the 1<sup>st</sup> plaintiff in her written statement said that such a report was done and revealed the cause of death as severe abdominal injury due to attack by hippo.

24. Ultimately, the uncontested and only clear evidence is that the deceased was bitten by a hippo and, according to the OB report, was dragged to the deep waters.

25. Who bears liability in such circumstances?

#### **Liability**

26. Under Section 7 of the WMCA, the appellant is statutorily established to perform the following functions, inter alia:

***“7. The functions of the Service shall be to –***

***(a) conserve and manage national parks, wildlife conservation areas, and sanctuaries under its jurisdiction;***

***(b) provide security for wildlife and visitors in national parks, wildlife conservation areas and sanctuaries;***

27. In the plaint, the plaintiff claimed damages and compensation under the WCMA and under the common law and the Law Reform Act.

28. As far as the WCMA is concerned, it appears to place an unrestricted or no fault based obligation on the KWS to make compensation to a person injured or killed by wildlife if such wildlife is listed in the Third Schedule to the Act. The relevant provisions are section 25 and the Third Schedule of the Act which provide 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.***

.....

***Third Schedule (S.25) Wildlife Species in Respect of which Compensation may be Paid***

***A. Death and Injury – Elephant, Lion, Leopard, Rhino, Hyena, Crocodile, Cheetah, Buffalo, Poisonous snakes, Hippo, Shark, Stone Fish, Whale, Sting ray, Wild dog, Wild pig”***

29. In the present case, there is no dispute that the deceased was killed by a hippo or hippos. However, there was no concrete proof as to exactly where or how the attack occurred. The appellant conceded in their submissions that in circumstances where a plaintiff has failed to fully prove all the particulars and allegations of breach of negligence which they instituted, and where there is uncertainty “as to the circumstances of the attack, apportionment of liability then ought to have been 50%: 50%. They supported this view on the principle stated in **Berkley-Steward Ltd, David Cottle and Jean Susan Cottle v Lewis Kimani Waiyaki (1982-88) 1KAR**, where the Court of Appeal held in a motor vehicle accident case that:

***“Since there was no concrete evidence to distinguish between the blameworthiness or otherwise of the two drivers, both should be held equally to blame”***

30. DW2 for the defence conceded in cross examination that:

***“My duties are to conserve and protect and to create awareness, I manage wild animals. We take care of wild animals....***

***.....We are in charge of all wild animals”***

The above statements can only be understood to mean that the defence admitted responsibility for taking care of wild animals as provided in the statute.

31. Discussing the question of liability, the Supreme Court, in the case of **KWS v Rift Valley Agricultural Contractors Ltd [2018]eKLR** cited by the respondents in the lower court, the Court, made the following significant determination concerning liability under the repealed Wildlife Act:

***“It follows therefore that though the Government would ideally be expected to have control of the wildlife, factually it was KWS which had the duty of control of the wildlife by dint of section 3A of the Wildlife Act. Consequently, the liability for the damage occasioned falls on it.***

Despite the fact that the Act under consideration was the repealed Act, it may be noted that the functions of the KWS and its obligation as to compensation under that Act were not antithetical to those of the appellant under the present Act. Indeed, in the **Rift Valley case**, the supreme Court pointed out that:

***“[66] A global comparison of laws and jurisprudence relating to animal and wildlife management normally provide that an entity charged with such a management task also collects the revenues generated from activities relating to the same. The***

*rationale being that such revenue supports the costs of management and any related outcomes, including compensation for damage made by animals and wildlife. The architecture of the current law in Kenya – the Wildlife Conservation and Management Act No.47 of 2013, follows this rational principle – that the management of national parks lies with Kenya Wildlife Service which is also the revenue collector at these parks – with the exception of the Maasai Mara National Park. In the case of Maasai Mara, although the management of the park lies with Kenya Wildlife Services, the recipient of revenue collection belongs to the County of Narok. The Wildlife Act gives responsibility to Kenya Wildlife Service as the Park revenue collector to compensate for damage occasioned by wild animals. Indeed, this has been the procedure in all other parks in Kenya. However, the instant case before the court is an interesting one, where Kenya Wildlife Service which does not collect revenue from the Maasai Mara but has been found liable for compensation by dint of the law. The county that receives this revenue is not liable. When therefore, the issue of compensation is raised, its application and resolution appears disjointed compared to the norm as practiced elsewhere in the country and indeed the world. We deem it fit to recommend that this is a dilemma that ought to be studied and possibly remedied by Parliament.” (Emphasis added).*

32. For these reasons, I find no fault in the trial court’s finding that the appellant was liable, neither do I see any reason for not apportioning liability in light of the fact that the respondent was not able to specify the circumstances and actual location of the attack, so as to better place the baton of responsibility.

33. On my part, whilst I might have preferred an apportionment of liability at 50%:50% I see no persuasive reason to disturb the trial court’s apportionment of liability at 60%:40% as between the parties. I say so given the absence of clear cut evidence one way or the other, that any particular party was wholly responsible for the attack. In the present case, it was hotly disputed whether the attack occurred in a prohibited area of the lake in or in a public open area, and the evidence availed did not clarify that point.

### **Quantum of damages**

34. The appellant impugned the trial court’s decision for its findings on quantum. The appellant argued that essentially, once a party elected to claim under common law it could not morph its claim into one under the WMCA and rely on the compensation awardable under the Act rather than rely on common law principles. In **Mathew Otieno Onuko v KWS [2008]eKLR** which the plaintiffs relied on in the trial court, it was stated by Karanja JR as follows:

*“[I would] add that the trial magistrate was under obligation to assess and even award damages over and above what was awarded by the District Committee. The claim herein was essentially for general damages for pain suffering and loss of amenities arising from the respondent’s negligence and breach of duty of care to those who may in one way or another come into contact a wild animal normally expected to be confined in a national park or reserve. The compensation made to the appellant was a matter of course and could not preclude him from filing a civil suit for general damages. The compensation was without prejudice to the appellant’s right to pursue further compensation through the civil court system....”* (emphasis added).

35. It appears to me that when you consider the WMCA as a whole and in juxtaposition to the common law remedies for compensation, there is nothing to preclude the two systems from running side by side. I therefore agree with Karanja J that a party can seek compensation both under the statute and under common law. The Supreme Court in the **Rift Valley** case agreed with the High Court’s and Court of Appeal’s decisions upholding an award of Kshs 31,500,000/- made on the basis of the application of common law principles.

36. Having carefully perused the record, the authorities, submissions and documents on record, I have come to the conclusion that the trial court was entitled to apply both common law and the Act in arriving at a quantum of damages. Both parties were agreed that the KWS did not act on the respondents’ demand letter resulting in the suit.

37. On whether the quantum of damages awarded was excessive, the trial court was guided by the case of **Joseph Munywoki Kalonje v KWS [2015] eKLR** where Dulu J stated:

*“In my view the plaintiff is entitled to compensation under the WCMA which is the specific Act that deals with accidents and fatalities associated with wildlife conservation, and the deceased was killed by a (sic) wildlife. Since the Act is also a more recent one, it has to be the guide in determining awards for damages [f]or death or injuries caused by wildlife...The general law under the Fatal Accidents Act and Law Reform Act cannot be used in determining damages as Parliament has made a specific provision for the same under the Act of 2013”*

38. The trial court thus started by taking the statutory compensation of 5,000,000/- and apportioned liability at 40%: 60%.

39. The respondents argue that there should be strict statutory liability of 100% as against the appellant and that the court should make an award for the full liability and order compensation for the full statutory amount of Kshs 5,000,000/-. This is the figure for statutory compensation under section 25(3) WMCA:

*“(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”*

40. In **Kenya Wildlife Services v Rift Valley Agricultural Contractors Limited [2014] eKLR** the Court of Appeal took a position approved by the Supreme Court, that:

*The tort which the High Court awarded damages in relation to is breach of statutory duty. The appellant argues that the movement of wild animals was due to drought and migration. In view of the fact that the appellant as the statutory entity in charge of wildlife should have foreseen the possibility of such an event, this was not an act of God. Accordingly, we find that the*

*defence of Act of God does not apply in the circumstances of this case.*

***Accordingly, we find that the appellant had a statutory duty to protect the respondent's crops from damage which it failed to do. The absence of provision for remedy for breach of that statutory duty was no bar to the respondent to claim damages under the common law."***

41. Although the court in that case awarded damages of Kshs 31,500,000/- which is not the statutory amount, the amount awarded was proved in tort.

42. Here the respondent sought in the lower court, and has pleaded to this court to award compensation of Shs 5,000,000/- under the Act and compensation in tort. I do not think it is for this court to make an award or declare an award under the Act. Section 25 of the WMCA, under which compensation is awardable clearly requires that the plaintiff makes a positive step to claim under that Act to the County Committee.

43. The steps are as follows: the applicant may launch a claim to the County Committee (Sec 25(1)); then the claim must be verified by the Committee (sec 25(2)); after verification, the Committee submits the claim to the Cabinet Secretary who then considers the claim for compensation and then makes an award of compensation if appropriate. In this case, there was no evidence that any such claim for compensation was placed before the lower court. Accordingly, no such award was or may be made by this court.

44. As for the claims in tort, the plaintiff claimed the following:

- Damages for loss of dependency – 10,000 x12x 30 x 2/3 +	2,300,000/=
- Damages for loss of expectation of life	200,000/=
- Damages for pain suffering and loss of expectation of life	200,000/=
- Damages for pain and suffering	200,000/=
- Funeral expenses	<u>115,000/=</u>
Total	3,115,000/=

45. The trial court awarded 5,000,000/- under the WMCA, less 40%, giving a total award of Kshs 3,000,000/-. The trial court made an award founded on the compensation under the Act, and subtracted the apportioned liability. To me the figure does not appear inordinately high or low or unreasonable. As a global figure for damages, I would not disturb the award.

46. The 1<sup>st</sup> respondent, however, also asserts that she was entitled to a award for special damages. In her plaint she pleaded special damages as coffin- 40,000/- body transportation 35,000/- and burial arrangements 40,000/-. In evidence she exhibited receipts for these as P Exhibits 2(a,b,c) made up as follows: coffin shs 40,000/-, Funeral transport 35,000/- and tents and catering 40,000/-. These receipts were not challenged and are therefore payable. The trial court erred in not awarding special damages as pleaded and proved. I award these special damages in the amount of Kshs 115,000/-

### **Disposition**

47. In light of all the foregoing, I allow the appeal only in respect of special damages on and set aside the award of the trial court to that extent. I hereby substitute the trial court's award with the following award:

For avoidance of doubt, the final award shall therefore be as follows:

Liability is apportioned at

a. General damages	Kshs	5,000,000.00
b. Special damages	Kshs	<u>115,000.00</u>
<i>Sub-total</i>	Kshs	5,115,000.00
Less Liability contribution 40%	Kshs	<u>2,046,000.00</u>
<b>Total Award</b>	<b>Kshs</b>	<b>3,069,000.00</b>

48. The parties shall bear their own costs of the appeal.

### **Administrative directions**

49. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the

Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

50. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

51. Orders accordingly

**Dated and Delivered via videoconference at Nairobi this 9<sup>th</sup> Day of July, 2020**

**RICHARD MWONGO**

**JUDGE**

Delivered by video-conference in the presence of:

1. Ms Ombonya for the Appellant
2. Mr Nyaende for the Respondent
3. Court Clerk - Quinter Ogutu