



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Wildlife Service v Mwawasi (Civil Appeal E022 of 2025)  
[2025] KEHC 18773 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18773 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E022 OF 2025  
AN ONGERI, J  
DECEMBER 19, 2025**

**BETWEEN**

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

**AND**

**THOMAS CHONGA MWAWASI ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. C. K. Kithinji  
(PM) in Voi CMCC No. E143 of 2023 delivered on 21st January 2025)*

**JUDGMENT**

1. The Respondent Thomas Chonga Mwawasi sued the Appellant, Kenya Wildlife Services (KWS) in Voi CMCC No. E143 of 2023 seeking special damages of Kshs. 225,000/= from KWS for water melons and butternuts which were destroyed by elephants at Ndome Area within Ngolia Area on 25<sup>th</sup> May 2023.
2. The Agricultural Officer visited the scene and quantified the damages to the tune of Kshs. 225,000/=.
3. The Respondent averred that the escape of the elephants and subsequent destruction of the crops was as a result of the negligence and/or failure by KWS in monitoring and control of the wild animals or failure to put in place necessary safety measures to contain the wild animals in the park and prevent them from roaming into neighbouring lands.
4. The Appellant filed a defence denying the Respondent's claims.
5. The trial court found that the Appellant was liable in negligence for the loss and damages suffered by the Respondent and assessed damages as follows:-
  - i. Liability 100%
  - ii. Special damages Kshs. 225,000/=



- iii. General damages Kshs. 100,000/=
  - iv. Cost and interest at court rates.
6. The Appellant has appealed against the said judgment on the following grounds:-
- i. That the Learned Magistrate erred in law and in fact by finding that the Respondent had proved their case and 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.
  - ii. That the Learned Magistrate erred in law and in fact by purporting to shift the burden of proof from the Respondent to the Appellant.
  - iii. That the Learned Magistrate erred in law and in fact by awarding Kshs. 225,000/= as special damages for damaged crops whereas the said damage was not proven by way of evidence.
  - iv. That the Learned Magistrate erred in law and in fact by awarding Kshs. 225,000/= sought within the purview of the *Wildlife Conservation and Management Act* No. 47 of 2013.
  - v. That the Learned Magistrate erred in law and in fact in awarding general damages of Kshs. 100,000/= while at the same time admitting that the claim under Section 25 of the Act are not within the jurisdiction of the Honourable Court.
  - vi. That the Learned Magistrate erred in fact and in law in failing to consider all the relevant factors and circumstances of the case in arriving at the decision, judgment and award.
  - vii. That the Learned Magistrate erred in fact and in law in failing to consider the written submissions tendered by the Appellant's Counsel and in failing to consider the legal authorities tendered therewith.
  - viii. That the Learned Magistrate erred in fact and in law by arriving at a decision and judgment that was obviously wrong and against the law.
7. The parties filed written submissions as follows; The Appellant submitted that the Kenya Wildlife Service, is challenging a judgment from the lower magistrate's court that ruled in favor of the Respondent, Thomas Chonga Mwawasi, and awarded him damages.
8. The Appellant's main contention is that the magistrate made two fundamental errors.
9. First, it is argued that the magistrate wrongly shifted the legal burden of proof from the Respondent, who filed the suit, onto the Appellant.
10. The Appellant asserts that the Respondent failed to prove his case on a balance of probabilities, and the court incorrectly relied on an unverified Crop Damage Verification Form.
11. This form, which contained estimated figures, required final deliberation and recommendation by the statutory County Wildlife Compensation Committee before it could serve as reliable evidence.
12. By acting on this preliminary document, the magistrate is said to have improperly assumed the committee's investigative role.
13. Secondly, the Appellant submits that the magistrate awarded damages based on a legal framework over which the court lacked jurisdiction.



14. The Respondent's pleadings specifically sought compensation under the *Wildlife Conservation and Management Act*.
15. The magistrate herself acknowledged in the judgment that claims under Section 25 of that Act fall within the exclusive purview of the Compensation Committee and are an alternative to court litigation.
16. Despite this recognition, the court proceeded to grant the monetary awards. The Appellant argues this creates a contradiction, as the court effectively awarded relief under a statute it admitted it could not apply, thereby disregarding the principle that parties are strictly bound by their pleadings.
17. In conclusion, the Appellant seeks to have the appeal allowed, the magistrate's judgment set aside, and the security provided by the Respondent released.
18. The Respondent submitted that the Appeal should be dismissed in its entirety.
19. The main contention of the Respondent's case is that the Learned Magistrate's judgment was sound in law and fact.
20. The Respondent proved on a balance of probabilities that elephants under the statutory control and management of the Kenya Wildlife Service strayed from a protected area and destroyed his crops.
21. The Appellant's statutory duty to conserve and manage wildlife establishes a duty of care to adjacent landowners.
22. The Appellant's breach of this duty, by failing to prevent the animals from causing damage, founded a valid claim in common law negligence, which exists independently of the statutory compensation scheme under the *Wildlife Conservation and Management Act*.
23. Contrary to the Appellant's grounds, the burden of proof was not shifted. The Respondent discharged his initial evidential burden by providing a crop damage verification form and other documentation, which the Appellant did not effectively rebut.
24. The awards for both special and general damages were justified by the evidence presented and are consistent with the principle that a wrong suffered demands a remedy.
25. Regarding jurisdiction, prevailing Court of Appeal precedent at the time of the trial affirmed that the statutory compensation process is optional, not exclusive, and does not oust the jurisdiction of conventional courts to hear common law claims in negligence.
26. The Learned Magistrate properly evaluated all evidence and submissions before arriving at a reasoned decision.
27. Consequently, the Respondent prays that the Appeal be dismissed with costs, as costs should follow the event in favour of the successful party.
28. The issues for determination in this appeal are as follows;
  - i. Whether the trial court misdirected itself on the burden and standard of proof in finding the Appellant 100% liable in negligence.
  - ii. Whether the trial court erred in awarding KShs. 225,000 as special damages for the destroyed crops.



- iii. Whether the trial court had jurisdiction to entertain the suit and award damages, given the provisions of the *Wildlife Conservation and Management Act*, No. 47 of 2013, and specifically the Respondent's pleaded claim under that statute.
- iv. Whether the award of Kshs. 100,000 as general damages was sustainable in law.
29. This court has carefully considered the record of appeal, the submissions by counsel for both parties, and the relevant law.
30. The appeal raises substantive questions on the intersection of common law negligence and a statutory compensation scheme.
31. On the first issue regarding liability and the burden of proof, the principle is settled that he who alleges must prove.
32. The burden lay with the Respondent to establish, on a balance of probabilities, that the Appellant owed him a duty of care, that it breached that duty, and that the breach caused his loss.
33. The Respondent submitted that the Appellant's breach of that duty, by failing to prevent the animals from causing damage, founded a valid claim in common law negligence, which exists independently of the statutory compensation scheme under the *Wildlife Conservation and Management Act*.
34. This court has carefully considered the record of appeal, the submissions by counsel for both parties, and the relevant law.
35. On the first issue regarding liability, the trial magistrate was correct in her conclusion. The Appellant, the Kenya Wildlife Service, is established by statute with the principal mandate of conserving and managing wildlife in Kenya, including within protected areas.
36. This statutory duty creates a correlative duty of care to adjacent landowners who are foreseeably at risk from wildlife straying from these areas.
37. The Respondent discharged the initial evidential burden by proving, through the Crop Damage Verification Form and his testimony, that elephants from an area under the Appellant's control entered his farm and caused destruction.
38. In the face of this evidence, the legal burden shifted to the Appellant to demonstrate that it had taken all reasonable steps to prevent such an occurrence.
39. The Appellant led no evidence to show any specific measures, such as trenching, fencing, or rapid response protocols that were in place and operational at Ndome Area to contain the elephants in question.
40. In the circumstances, the finding of negligence was sound. Once a claimant establishes damage caused by wildlife under the statutory management of KWS, the evidential burden shifts to KWS to show it exercised reasonable care.
41. The Appellant herein failed to discharge that burden.
42. Concerning the second issue, the award of special damages was justified. I find that the law requiring strict proof of special damages is not a prescription for impossible standards of certainty, particularly in cases of crop damage.
43. The Respondent produced a verified report from a competent government officer, the Agricultural Officer, detailing the extent and value of the loss. This was credible and uncontroverted evidence.



44. The Appellant's contention that this document was merely a preliminary step for the County Wildlife Compensation Committee is, with respect, an attempt to evade accountability.
45. The committee's administrative process does not invalidate or render inadmissible a professional assessment of loss conducted by a public officer in the ordinary course of his duties. The trial court was entitled to rely on it.
46. On the critical third issue of jurisdiction, the Appellant's argument is misconceived. The Respondent's plaint, read as a whole, advanced a clear cause of action in common law negligence, distinct from a statutory claim for compensation.
47. The Trial court clearly stated that the Respondent opted to pursue damages for negligence under common law and that the claim under Section 25 of the WCMA is not applicable.
48. The reference to the Appellant's statutory functions was to establish the existence of a duty of care, not to plead under the Act.
49. The jurisdiction of the magistrate's court to hear claims in tort is unimpeachable.
50. The statutory compensation scheme under the *Wildlife Conservation and Management Act* is an alternative and not an exclusive remedy.
51. It does not oust the jurisdiction of the ordinary courts to determine claims founded on the tort of negligence.
52. The trial magistrate's observation regarding Section 25 was, therefore, a misstatement that did not vitiate her jurisdiction to adjudicate the tort claim properly before her. This ground of appeal fails.
53. Finally, regarding general damages, the learned magistrate erred. The Respondent's proved loss was purely material and quantifiable.
54. An award of general damages for inconvenience or distress in such a case, while perhaps sympathetic, is not legally founded where the claim is essentially for damage to property. This head of damage is therefore set aside.
55. In the final analysis, the appeal succeeds only on the limited issue of general damages. The findings on liability, special damages, and jurisdiction are upheld.
56. Consequently, the appeal is partially allowed only to the following extent;
  - i. That the award of Kshs. 100,000 as general damages in the judgment of the trial court dated 21st January 2025 is hereby set aside.
  - ii. That the trial court's finding on 100% liability and the award of Kshs. 225,000 as special damages are hereby affirmed.
57. The Respondent shall have the costs of this appeal, given his substantial success.
58. Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF DECEMBER 2025 VIRTUALLY VIA MT TEAMS AT VOI HIGH COURT.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-



Court Assistant: Millicent/Mabishi

..... for the Appellant

..... for the Respondent

