Kenya Wildlife Service v Kanini (Suing as the Next Friend to Edward Koome) (Civil Appeal 30 of 2020) [2024] KECA 1127 (KLR) (6 September 2024) (Judgment)

Neutral citation: [2024] KECA 1127 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 30 OF 2020

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

SEPTEMBER 6, 2024

BETWEEN

KENYA WILDLIFE SERVICE ..... APPELLANT

AND

PURITY KANINI ..... RESPONDENT

SUING AS THE NEXT FRIEND TO EDWARD KOOME

(Being an Appeal from the judgment of the High Court of Kenya at Meru (S. Chitembwe, J.) dated 24th October 2019 in Civil Appeal No. 57 of 2018)

JUDGMENT

1. By plaint filed on 27th October 2017, the respondent, Purity Kanini (suing as the next friend to Edward Koome), sought general and special damages from the appellant, Kenya Wildlife Service, following snake bite injuries suffered by the minor, Edward Koome, on 4th November 2015. What had happened was that the minor was herding goats in his parents' farm when he was bitten by a snake on his right elbow. The farm was near Murerwa National Park. The minor was admitted at Maua General Hospital for 4 days while on oxygen support. He was subsequently subjected to physiotherapy. The incident was reported to the community warden at Murerwa National Park. In suing the appellant, it was claimed that there was negligence in failing to keep the snake under control and thereby allowing it to attack the respondent; that the wildlife had negligently left its designated area to go and injure the respondent.

2. The claim was resisted by the appellant. It was denied that the appellant had been negligent, as it was common knowledge that in the area in question snakes naturally co-existed with human beings; that the appellant had no duty to control and manage wildlife found in private properties. The appellant denied that it was entitled to compensate the respondent for the injuries to the minor. Lastly, the appellant pleaded that under section 25(3) of the *Wildlife Conservation and Management Act*, 2013 the respondent ought to have launched the claim to the County Wildlife Conservation

and Compensation Committee for its verification and review before recommending to the Cabinet Secretary responsible for Wildlife Conservation and Management for payment; that the appellant was not responsible to pay such a claim, and neither did the Chief Magistrate's Court have the jurisdiction to hear and determine the dispute.

3. The Chief Magistrate's Court at Maua heard the dispute and, while dismissing the plea it lacked the jurisdiction to hear and determine the dispute, found the appellant liable in negligence, and awarded Kshs.3,000,000 in compensation.

4. The appellant was aggrieved by the verdict and appealed to the High Court at Meru. The learned S. Chitembwe, J. heard the appeal and found no reasons to interfere with the decision of the trial court. The learned Judge acknowledged that there were two conflicting decisions by this Court on the question whether in such situation the trial court was duty bound to refer the dispute before it to the County Wildlife Conservation and Compensation Committee under section 25(3) of the Act or could assume jurisdiction and hear and determine the dispute. The Judge found that the High Court had both the original and appellate jurisdiction to handle the dispute.

5. The appellant was not satisfied with the decision, hence this appeal whose grounds were as follows:-

> " 1) That the learned Judge erred in law in dismissing the appellant's appeal and in holding that the Chief Magistrate's Court at Maua had the requisite Jurisdiction to hear and determine the respondent's suit in Maua CMCC No. 192 of 2017.
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> 2. That the learned Judge erred in law in failing to find that the Chief Magistrate's Court did not have jurisdiction to entertain the respondent's suit in Maua CMCC No. 192 of 2017 in light of the provisions of section 25 of the *Wildlife Conservation and Management Act*, 2013, as read together with Section 117 of the same Act.
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> 3. That the learned Judge erred in law by upholding the award of Kshs.3,000,000/= made to the respondent as general damages and which amount is excessively high that there must be an erroneous estimate of the damages payable to the respondent, if any.
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> 4. That the decision and judgment of the learned Judge is against the law against the weight of evidence on record."

6. In the submission by learned counsel Mr. Kariuki for the appellant, it was the County Wildlife Conservation and Compensation Committee that had the jurisdiction to verify, adjudicate and ascertain the compensation, if at all, that was payable following the snake bite injury to the minor; that the trial court lacked original jurisdiction to hear and determine the dispute. It was submitted that the learned Judge had erred when he did not find that the respondent had been guilty of failing to exhaust the procedure availed by section 25(1) and 117 of the Act. While referring to the decision in the Speaker of the National Assembly -vs- Karume [2008] IKLR 426 EP), learned counsel's case was that section 25(1) of the Act created a compulsory requirement for the respondent to exhaust the procedure provided before moving to the court.

7. On the learned Judge's finding that the use of "may" instead of "shall" by the section meant that the respondent had an option to either go to the County Wildlife Conservation and Compensation Committee or to court, learned counsel referred us to the decision of this Court in Peter Muturi Njuguna -vs- Kenya Wildlife Service [2017]eKLR in which the Court was dealing with section 62(1)

of the Wildlife (Conservation and Management) Act, Cap 376 (now repealed) which was similar to the present section 25(1) as regards the use of "may" instead of "shall". This Court had gone on to find that, that notwithstanding, the specific procedure provided under the Act had to be strictly followed to address the human versus wildlife conflict in the country; that the procedure under the Act was quick and less bureaucratic.

8. Learned counsel Mr. Mwanzia for the respondent supported the findings by the learned Judge on the question of jurisdiction, and asked us to dismiss the appeal with costs. Counsel pointed out that the learned Judge was confronted with two Court of Appeal decisions on the question of jurisdiction following injury of wildlife, and the two decisions were Peter Muturi Njuguna (Supra) and *Kenya Wildlife Service -vs- Joseph Musyoki Kilonzo, Civil Appeal No. 306 of 2015*. In the later case, this Court had, in interpreting section 25(1) of the Act, found that the section did not oust the jurisdiction of the court as the aggrieved party had an option to go to the Committee as a first option or go to court. The learned Judge had opted to follow this interpretation and could not be faulted, it was argued.

9. We have anxiously considered this appeal. We remember that our mandate on second appeal is to determine matters of law, and not to interfere with the findings of fact by the two courts below, unless it is shown that the two courts considered matters, they should not have considered or failed to consider matters they should have considered. (See Stanley N. Muriithi & another -vs- Bernard Munene Ithiga [2016]eKLR.

10. The question for our determination is whether the learned Judge erred when he found that the trial court had jurisdiction to hear and determine the dispute between the respondent and the appellant, given the admitted facts regarding the injury suffered by the respondent following the snake attack on a private property next to the national park.

11. It is trite that a court can only proceed to hear and determine the dispute if it has jurisdiction. If it does not, it has to down its tools (See Owners of the Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd [1989]eKLR). In S.K. Macharia -vs- Kenya Commercial Bank, Civil Application *No. 2 of 2012*, the Supreme Court stated that the jurisdiction can only be conferred on a court by *the Constitution* or Statute, and a court cannot therefore otherwise act than within the jurisdiction properly conferred on it.

12. Section 18 of the Act establishes the County Conservation and Compensation Committee. Under section 19, its mandate includes the review and recommendation of claims resulting from loss or damage caused by wildlife for payment of compensation. Section 25 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.
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> 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.
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> 3. The Cabinet Secretary shall consider the recommendations made under subsection
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> 4. 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."

Put briefly, a person injured by a wildlife may launch a claim to the County Wildlife Conservation and Compensation Committee to verify the claim and recommend to the Cabinet Secretary for payment.

13. This Court in Kenya Wildlife Service -vs- Joseph Musyoki Kilonzo (Supra) considered section 25 of the Act in a case where the respondent's deceased daughter, aged 13 years old, had been attacked by a crocodile while fetching water from Tana River in Tseikuru District. The crocodile dragged the deceased daughter into the river. The remains of the battered body were recovered three days later. The respondent therein filed a claim for compensation with Kenya Wildlife Service. He completed some claim forms as provided for under the Act and submitted them for processing and payment of compensation as provided for under section 25(3). He continued following up the claim but the appellant failed to pay. Left with no other option, the respondent moved to the High Court in Garissa and lodged his claim. The question for determination was whether the High Court had jurisdiction to hear and determine the matters arising from claims premised on the said Act. The appellant therein argued that section 25(3) of the Act ousted the jurisdiction of the Court; that section 24 created a non-fault compensation scheme outlined therein that must be followed for such compensation to be paid.

14. The Court of Appeal observed that the respondent therein had indeed lodged a complaint pursuant to the Act, which complaint was ignored by the appellant. In the circumstances, the respondent did not err in filing a suit before the High Court in order to get a remedy. It was further observed that the use of "may" under section 25(1) and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court meant that the aggrieved party had the option to pursue its claim either through the process under the Act, or through the court.

15. In Peter Muturi Njuguna -vs- Kenya Wildlife Service (Supra), the facts were that the appellant was working on his farm in Kabazi area in Nakuru when he was suddenly attacked by a wild pig. It bit off his right index finger causing severe pain and other minor injuries. The appellant reported to the offices of the respondent and was advised to lodge his compensation claim, which he did. But the respondent did nothing for over four (4) years. The appellant went before the magistrate's court in Nakuru under the then Wildlife (Conservation and Management) Act whose section 62(1) used the word "may" as it is in section 25(1) of the Act under consideration in instant appeal. Section 62(1) provided as follows:-

> " Where any person suffers any bodily injury or is killed by any animal, the person injured or in the case of a deceased person, any other person who was dependant upon him at the date of his death may make application to a district committee established by this section, for the award of compensation for the injury or death."

The respondent denied the claim and contended that the court had no jurisdiction as there was a procedure under section 62(1) which needed to be exhausted. The appellant contended, that the court was properly seized of the matter. The magistrate's court found that it had no jurisdiction and dismissed the appellant's suit. The appellant filed an appeal in the High Court which found that there was a process laid down for compensation under the Act, the process was quick and less bureaucratic, and that the appellant was in abuse of process by pursuing the claim under the Act and also going to the court. On appeal to this Court, the learned Judges agreed with the High Court. The Judges' decisions

in The Speaker of the National Assembly -vs- Karume (supra) and Kimani Wanyoike -vs- Electoral Commission, Civil Appeal No. 213 of 1995 (UR), that held that where there is a specific procedure as to redress of grievance, the same ought to be strictly followed.

16. On the use of the word "may" in the section 62(1), this Court stated as follows:-

> " 15. The true construction therefore lies in the context. Ordinarily the word "may" is permissive and not mandatory but the contextual meaning would vary with the intention of the drafters. In this case, the argument is not so much the meaning of the word but the effect of it; whether it ousts the jurisdiction of the court. The High Court found, correctly in our view, that the decision of the district committee was amenable to challenge by way of Judicial Review and therefore in that sense the jurisdiction of the court is not ousted. Nevertheless, and again we agree, there was compulsion to exhaust the procedure provided under the section before going to court. To that extent therefore, whereas the appellant was under no compulsion to make any claim, once he chose to do so, as he might, he was compelled to lodge it at the appointed forum, being the District Committee.

17. The Supreme Court in the case of NGO's Coordination Board -vs- E.G. & 4 Others; Katiba Institute (Amicus Curiae) (Petition No. 16 of 2019) [2023] KESC 17 (KLR) observed that the exhaustion of administrative remedies aids in protecting administrative autonomy, preserving the separation of powers, gaining judicial economy, avoiding administrative inefficiency, and permitting courts to benefit from own administrative body's determination of facts and exercise of discretion. In Albert Chaurembo Mumba & 7 Others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) -vs- Maurice Munyao & 148 Others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) S.C. Petition No. 3 of 2016; [2019]eKLR, the Supreme Court stated as follows at paragraph 118:-

> " .....Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals of any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

18. Both NGO's Coordination Board case and in Nicholas -vs- Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties) (Petition No. E007 of 2013 [2023] KESC 113 (KLR)), the Supreme Court emphasized that in exceptional circumstances courts may intervene where the exhaustion requirement would not serve the values enshrined in the Constitution and where a party applies to be exempted by the court from proceeding with the internal dispute resolution mechanism. There were no exceptional circumstances in this appeal.

19. From the record, the respondent made a complaint to the County Wildlife Conservation and Compensation Committee. There was no evidence given as to what became of the complaint, whether the respondent pursued it or abandoned it. If there was delay on the part of the Committee in dealing with the claim, there was no effort to force it to act by way of Judicial Review. In our considered view, the intention of the framers of section 25 of the Act was to cause claimants who had been injured, or those persons whose relatives had died, by actions of wildlife, to benefit from the dispute resolution mechanism under the Act; a mechanism that was less cumbersome and which would benefit from the specialized knowledge on matters human wildlife interaction. The respondent, instead, opted for

the court which, quite unfortunately, did not have the original jurisdiction to hear and determine the dispute.

20. It is for these reasons that we find that the learned Judge fell into error when he dismissed the appellant's appeal by holding that the Chief Magistrate's Court had jurisdiction to hear and determine the claim following the snake attack on the minor.

    We do not agree that the respondent had the option either to lodge the claim in court or go to the County Wildlife Conservation and Management Committee. The claim belonged to the County Wildlife Conservation and Management Committee.

21. Consequently, we allow the appeal with costs. There will be an order dismissing the suit with costs.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the Original.

Signed

DEPUTY REGISTRAR