



Onderi & another v ESO (Aminor through next friend and father JTO) (Civil Appeal E538 of 2021) [2024] KEHC 10551 (KLR) (4 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E538 OF 2021
WM MUSYOKA, J
SEPTEMBER 4, 2024**

BETWEEN

KWAME ONDERI 1ST APPELLANT

HENRY ENDEKWA IGAMBI 2ND APPELLANT

AND

**ESO (AMINOR THROUGH NEXT FRIEND AND FATHER
JTO) RESPONDENT**

*(An appeal arising from the judgment of Hon. DW Mburu, Principal Magistrate,
PM, delivered on 30th July 2021, in Nairobi CMCCC No. 5042 of 2019)*

JUDGMENT

1. The suit, at the primary court, was initiated by the respondent, against the appellants, for compensation, arising from a motor vehicle accident, which allegedly happened on 15th June 2018, within Umoja II Estate, Nairobi, involving the minor respondent and motor vehicle registration mark and number KBP 280U, which was allegedly owned or controlled by the appellants at the material time. The minor respondent was allegedly outside his house, when the vehicle was allegedly negligently driven, and knocked him down, wherein he sustained injury. The appellants filed a defence, in which they denied everything pleaded in the plaint. In the alternative, they attributed negligence on the minor respondent and his guardian.
2. Liability was settled, vide a consent that was recorded between the parties, on 10th March 2021, at 80:20, in favour of the respondent, and against the appellants. The parties agreed, on 28th May 2021, to have the court assess quantum based on agreed documents and written submissions. Judgment was delivered on 30th July 2021, where general damages were awarded at Kshs. 800,000.00, subject to contribution, while special damages were assessed at Kshs. 102,058.00, with costs.



3. The appellants were aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 27th August 2021, largely turn on the quantum of the damages awarded being excessive.
4. Directions, on the disposal of the appeal, were given on 31st July 2023, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions.
5. The appellants have submitted that the quantum of general damages, assessed by the trial court, was inordinately excessive, and the decisions, in TAM (a minor suing through her father and next friend JOM) vs. Richard Kirimi Kinoti & another [2015] eKLR (Njuguna, J), Akamba Public Road Services vs. Abdikadir Adan Galgalo [2016] eKLR (J. Kamau, J) and Jackson Mbaluka Mwangangi vs. Onesmus Nzioka & another [2021] eKLR (Odunga, J). The respondent wholly supports the award by the trial court, and relies on Reuben Mongare Keba vs. LPN [2016] eKLR (Okwany, J) and EWO (suing as a friend and minor COW) vs. Chair Board of Governors Agoro Yombe Secondary School [2018] eKLR (Aburili, J).
6. The appeal turns only on assessment of general damages.
7. The injuries sustained by the minor respondent were not particularised in the plaint, as it was merely pleaded that he had sustained multiple injuries, including a fractured bone on the right leg. The respondent, however, filed a number of medical records, where the injuries were noted. The P3 form, dated 3rd August 2018, recorded a fracture of the midshaft of the right femur. The injury was similarly recorded in the case summary from Kenyatta National Hospital, dated 31st July 2018. There is no other record, of a medical nature, in the original trial record file, and although the parties agreed to canvass the quantum by way of written submissions, based on agreed documents, the relevant record of the trial court did not record the documents that were put in evidence for that purpose. In the judgment, the trial court relied on a medico-legal report, by a Dr TS Mogire, dated 21st August 2020, but it is not documented how the trial court came to have access to that report, as there is no such report, filed in the trial record, and no such report was produced, as there was no formal trial, by way of an oral hearing. Although the appellant mentions, in his written submissions, another medico-legal report, by a Dr Wambugu, I have been unable to find a copy of it in the trial record, and I have noted that the trial court did not refer to any such report in the judgment, neither is it mentioned in the trial notes.
8. There are glaring gaps in the trial record, relating to the material that the trial court relied on in its judgment to assess the damages, but since the appellants do not raise issue with it, I shall go by what the court relied on, the medico-legal report by Dr. TS Mogire. As I have indicated hereabove, and in my ruling of 25th June 2024, that report is not in the original trial court record, and it was not referred to in the proceedings, and it first appears in the judgment. It has been placed before me, through a supplementary record of appeal, filed herein on 3rd July 2024. It is dated 21st August 2020, and documents the injury sustained by the minor, as a right thigh injury, with a fractured femur, and head bruises. It notes a shortening of the affected leg by 2.5 centimetres, and permanent disability is assessed at 4%.
9. It would appear that this was a case of a fracture of the right femur, without complications, except for the shortening of the leg by 2.5 centimetres. There were also minor or superficial soft tissue injuries.
10. In its assessment of damages, the trial court did not indicate the decided cases from which it was guided, except for citing the decisions that the respondent relied on, that is to say Jackline Kamunyu vs. Simion Kiiru Njoki [2018] eKLR, which I have been unable to access from the Kenya Law search engine, and Edward Kamau & James Karanja vs, Hannah Mukui Gichuki & Gestether [2018] eKLR (Sergon, J), which involved fractures of the femur.



11. I have looked at the authorities cited by the appellants. In TAM (a minor suing through her father and next friend JOM) vs. Richard Kirimi Kinoti & another [2015] eKLR (Njuguna, J), the claimant had sustained a fracture of the left femur, and the court awarded Kshs. 250,000.00. In Akamba Public Road Services vs. Abdikadir Adan Galgalo [2016] eKLR (J. Kamau, J), the injuries were a fracture of the right tibia leg malleolus and right fibular bone, with a blunt injury to the ankles, and Kshs. 500,000.00 was awarded. In Jackson Mbaluka Mwangangi vs. Onesmus Nzioka & another [2021] eKLR (Odunga, J), the claimant suffered a fracture of the left femur, with blunt injury to the right shoulder, and Kshs. 600,000.00 was awarded.
12. Only 2 of these authorities is relevant, that is to say TAM (a minor suing through her father and next friend JOM) vs. Richard Kirimi Kinoti & another [2015] eKLR (Njuguna, J) and Jackson Mbaluka Mwangangi vs. Onesmus Nzioka & another [2021] eKLR (Odunga, J), to the extent that they involved fractures of the femur. Akamba Public Road Services vs. Abdikadir Adan Galgalo [2016] eKLR (J. Kamau, J) was about the bones of the tibia and fibula, and not the femur. TAM (a minor suing through her father and next friend JOM) vs. Richard Kirimi Kinoti & another [2015] eKLR (Njuguna, J) is rather dated, but Jackson Mbaluka Mwangangi vs. Onesmus Nzioka & another [2021] eKLR (Odunga, J) is more recent.
13. The respondent has cited Reuben Mongare Keba vs. LPN [2016] eKLR (Okwany, J) and EWO (suing as a friend and minor COW) vs. Chair Board of Governors Agoro Yombe Secondary School [2018] eKLR (Aburili, J). In Reuben Mongare Keba vs. LPN [2016] eKLR (Okwany, J), the injuries were a fracture of the tibia-fibula bones of the right leg, fracture of the right femur, dislocation of the right hip joint, degloving injury of the right leg, and bruises on the chin, and the award was Kshs. 800,000.00. In EWO (suing as a friend and minor COW) vs. Chair Board of Governors Agoro Yombe Secondary School [2018] eKLR (Aburili, J), the minor suffered a fracture on the right mid-shaft femur with tibiofibular fracture, and the court awarded Kshs. 800,000.00.
14. I doubt that the 2 authorities, cited by the respondent, would be of much assistance, for, although the claimants sustained fractures of the femur, the same were in addition to fractures of the tibia and fibula bones, and, therefore, the injuries were a lot more serious, than what the respondent in the instant case suffered. They are also fairly dated.
15. I have done a survey of recent decisions, where the claimant had sustained a midshaft fracture of the femur, and preferably of the right leg, for comparative purposes, to guide in assessing whether the trial court properly assessed the damages awardable. I have surveyed first cases of a simple fracture of the midshaft of the femur, followed by cases where the fracture was accompanied by other relatively serious injuries.
16. In Kiran Kumar Somchand Shah vs. Isaac Kimathi Kaai [2021] eKLR (Cherere, J), the claimant had sustained a midshaft fracture, but it was not indicated if it was of the femur, but Kshs. 550,000.00 was awarded. In FKM (suing as the next friend and mother of DK – Minor) vs. Security Group Cash in Transit Limited & 2 others [2023] KEHC 11764 (KLR)(Limo, J), the injury was a fracture of the midshaft femur, and Kshs. 300,000.00 was awarded.
17. In Kimani vs. Mwangi & 2 others [2024] KEHC 6744 (KLR)(Nzioka, J), the midshaft fracture of the femur of the right leg was accompanied by a cut wound on the left leg, and the court awarded Kshs. 550,000.00. In Kihara & another vs. Mutuku [2022] eKLR (Mwongo, J), the fracture of the right femur, was in addition to blunt injuries to the chest and left thigh and bruises on the forearms, and an award of Kshs. 700,000.00 was made. Kshs. 800,000.00 was awarded, in Kiautha vs. Ntaragwi [2022] KEHC 10595 (KLR) (Muriithi, J), for a midshaft femur fracture, with bruises on the upper arm and the right shoulder, tender upper back, bruised left foot and a tender and swollen right thigh.



In *Transbionics Limited vs. Micheni* [2023] KEHC 18332 (KLR)(Njuguna, J), the accompanying injuries to the fracture of the right femur midshaft were a lot more serious, being extensive degloving injury of the right thigh, contusion of the left elbow joint and knee joint, chest contusion and multiple laceration on the forehead, and an award of Kshs. 1,200,000.00 was made.

18. The above review does not leave me any wiser, for it displays a fairly wide variation in assessment of damages for this class of injury. I am alive to the fact that assessment of damages is at the discretion of the court. Some of the more recent decisions, such as *Jackson Mbaluka Mwangangi vs. Onesmus Nzioka & another* [2021] eKLR (Odunga, J), *Kihara & another vs. Mutuku* [2022] eKLR (Mwongo, J) and *Kiautha vs. Ntaragwi* [2022] KEHC 10595 (KLR) (Muriithi, J), are closer to the injuries sustained by the minor respondent herein. I am disinclined to interfere with the assessment made by the trial court, and I am inclined to find that the award made was within range, and the trial court did not apply a wrong principle.
19. Perhaps the final word should be with respect to the crucial importance of the trial record. I mention this because of the gaps that I have seen in this matter, in the manner in which the trial proceedings were recorded, and documents received. Trial courts are courts of record, in the sense that it is their record which is permanent, for, should their decisions be challenged, by way of appeal, the appellate courts would not conduct fresh hearings, but would rely exclusively on the record generated by the trial court. If the trial court does not do a good job, of properly and scrupulously recording what transpires before it, inclusive of the documents that it receives in evidence, the appellate court would be handicapped, with the result that it may not do justice to the matter as a consequence.
20. I am persuaded that there is no merit in the instant appeal, for reasons that should be clear, from the body of the judgment. I hereby, therefore, dismiss the same. There shall be no order on costs.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 4th DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ombati, instructed by Ombati Ong'au & Company, Advocates for the appellants.

Ms. Muriuki, instructed by Mutai Maina Kimeu & Company, Advocates for the respondent.

