



**Opeth & another v Musa (Civil Appeal E018 of 2022)  
[2024] KEHC 10530 (KLR) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10530 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL E018 OF 2022  
WM MUSYOKA, J  
SEPTEMBER 3, 2024**

**BETWEEN**

**FREDERICK OMONDI OPETH ..... 1<sup>ST</sup> APPELLANT**

**JACKSON MUGA ONYANGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ELISHA MUCHIRA MUSA ..... RESPONDENT**

*(An appeal arising from the judgment of Hon. Lucy Ambasi, Chief Magistrate,  
CM, delivered on 26th april 2022, in Busia CMCCC No. 30 of 2017)*

**JUDGMENT**

1. The suit, at the primary court, was initiated by the respondent, against the appellants, for compensation, arising from a road traffic accident, which allegedly happened on 5<sup>th</sup> January 2016, along the Kericho-Kisumu road, involving the appellant and motor vehicles registration marks and numbers KCA 396Y and KBN 415C. KCA 396Y was allegedly owned or controlled by the appellants at the material time, and the respondent was travelling in it as a fare-paying passenger, when the same rammed into KBN 415C, which was allegedly stationary. The respondent was allegedly injured in the accident, and he attributed it to negligence on the part of the appellants. The appellants filed a defence, in which they denied everything pleaded in the plaint. In the alternative, they attributed negligence on the respondent and the owner of KBN 415C.
2. A formal hearing was conducted, on 1<sup>st</sup> October 2020, when the respondent testified. Judgment was delivered on 15<sup>th</sup> October 2021, where liability was determined at 100% jointly, general damages at Kshs. 1,500,000.00 and special damages at Kshs. 163,543.00, with costs. The said judgment was set aside, on 4<sup>th</sup> May 2021, by consent of the parties, with respect to damages, with throwaway costs, and an oral hearing was to be conducted on quantum. That hearing happened on 12<sup>th</sup> October 2021, when the respondent and his doctor testified. The defence hearing did not take off, but the medico-legal



report, the appellants were relying on, was produced, by consent of both parties, on 19<sup>th</sup> October 2021. Judgment was delivered on 17<sup>th</sup> February 2022, where liability against the appellants was assessed at 100% jointly and severally, general damages at Kshs. 2,500,000.00, and specials at Kshs. 168,500.00, with costs and interests.

3. The appellants were aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 4<sup>th</sup> May 2022, largely turn on the quantum of the damages awarded being excessive.
4. Directions, on the disposal of the appeal, were given on 23<sup>rd</sup> October 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, awarded by the trial court, was inordinately excessive, and the decision, in Daniel Owino & another vs. Elizabeth Atieno Owuor [2020] eKLR (Ougo, J), is cited, where an award of Kshs. 400,000.00 was made. The respondent wholly supports the award by the trial court, and relies on the decisions that he had cited at the trial, being Dorcas Wangithi Nderi vs. Samuel Kiburu Mwaura [2020] eKLR (Muchemi, J), China Road & Bridge Corporation vs. Job Mburu Ndungu [2021] eKLR (Mwita, J) and Regina Mwikali Wilson vs. Stephen M. Gichuhi [2015] eKLR (Mabeya, J).
6. The appeal turns only on assessment of general damages.
7. The medical record relied on by the respondent, to guide the trial court, was the medico-legal report by Dr. Inyangala Dennis, dated 25<sup>th</sup> November 2016, as appears in the respondent's list of documents, dated 9<sup>th</sup> February 2017, filed in court on 16<sup>th</sup> February 2017. A replica of the said report was introduced into the record of appeal herein, through a supplementary record of appeal, dated 19<sup>th</sup> October 2023, filed herein on 23<sup>rd</sup> October 2023, where it is purported to be dated 5<sup>th</sup> June 2021. The more serious injuries noted were bilateral tibio-fibular fractures of the legs, that on the left being compound; with cuts on the face, head, chin and legs; and bruises, abrasions and lacerations on the left arm, right hand and the legs. He was treated as an in-patient for 23 days. There was no assessment of permanent disability, but deformities were noted on both legs, with the scars being described as permanent. He was subsequently seen by Dr. Jenipher Kahuthu, who prepared a second medico-legal report, dated 4<sup>th</sup> October 2018, who identified the injuries sustained as fractures of the left and right tibia and fibula bones, with soft tissue injuries. It was noted that the deformities, of the finger and the legs, noted in the report by Dr. Inyangala, had since cleared.
8. In its judgement, of 17<sup>th</sup> February 2022, the trial court did not purport to have had been guided by any judicial authorities, creating a sense that the figure of Kshs. 2,500,000.00 was plucked from the air. It would appear, however, that the trial court relied on the authorities cited by the respondent. In Regina Mwikali Wilson vs. Stephen M. Gichuhi [2015] eKLR (Mabeya, J), the court had awarded Kshs. 2,500,000.00, for multiple fractures involving 4 ribs; comminuted fractures of the right radius bone; fracture of the right femur, involving its neck, shaft and the condoler region, which were severely comminuted in many pieces; fractures of the right and left tibia and fibula bones; a fracture of the left femur; deep cut wound on the left knee; and an abrasion wound above the eyebrow. In China Road & Bridge Corporation vs. Job Mburu Ndung'u [2021] eKLR (Mwita, J), the court had awarded Kshs. 2,000,000.00, where the injuries sustained were fractures of the left radius, the left ulna, the right tibia and the right fibula. There were 2 medical reports, where one assessed permanent disability at 50%, while the other assessed it at 15%.
9. Quite obviously, the injuries, in Regina Mwikali Wilson vs. Stephen M. Gichuhi [2015] eKLR (Mabeya, J) and China Road & Bridge Corporation vs. Job Mburu Ndung'u [2021] eKLR (Mwita, J), were a lot more serious and extensive, compared with what the respondent had suffered, who had



only sustained fractures of the left and right tibia and fibula bones, with soft tissue injuries, with no apparent permanent disability, nor deformities.

10. At the trial, the appellants cited The Third Engineering Bureau China Construction Group Limited vs. Edwin Kinanga Atuya [2021] eKLR (Ougo, J), where the injuries were compound fractures of the left tibia and fibula bones, with soft tissue injuries to the scalp, hands and right leg, and the court awarded Kshs. 500,000.00 for pain and suffering. In Titus Mburu Chege & another vs. JKN (a minor suing through the next friend and mother DWN) & another [2018] eKLR (Ong'udi, J), the injuries were fractures of the tibia and fibula bones of both legs, a broken tooth, soft tissue injuries to the forehead and nose, and loss of consciousness, and the court awarded Kshs. 500,000.00.
11. The injuries in the cases relied upon by the appellants, that is to say Titus Mburu Chege & another vs. JKN (a minor suing through the next friend and mother DWN) & another [2018] eKLR (Ong'udi, J) and The Third Engineering Bureau China Construction Group Limited vs. Edwin Kinanga Atuya [2021] eKLR (Ougo, J), were closer or comparable to those sustained by the respondent herein.
12. I have also surveyed the following decisions, where the claimants had suffered similar or comparable injuries. In George Raini Atungu vs. Moffat Onsare Aunga [2021] eKLR (Ougo, J), Kshs. 650,000.00 was awarded for a fracture of the right tibia and fibula bones, a fracture of the left radius and ulna, and contusions to the chest and the pelvis. Nahson Nyabaro Nyandega vs. Peter Nyakweba Omboga [2021] eKLR (Maina, J), it was a compound fracture of the right tibia bone; cut wound on the right leg; and bruises on the face, and the court awarded Kshs. 650,000.00. In Atunga vs. Mogambi [2022] KEHC 9854 (KLR)(Ougo, J), the injuries were fractures of the tibia and fibula bones; dislocation of the right hip joint; multiple lacerations on the lower limb; bruises, with multiple cut wounds, on the upper limbs; Dislocation of the right shoulder; chest trauma; and bruises on the frontal part of the head, and Kshs. 550,000.00 was awarded.
13. There is also Sammy Mugo Kinyanjui & another vs. Kairo Thuo [2017] eKLR (Kimondo, J), where the claimant had suffered fractures of the tibia and fibula bones of both legs, and an award of Kshs. 600,000.00 was made. In Pauline Gesare Onami vs. Samuel Changamure & another [2017] eKLR (HA Omondi, J), the injuries were fractures of the tibia and fibula bones of both legs, with lacerations on the neck area, blunt trauma on the chest and a deep cut wound on both legs and shaft, and an award of Kshs. 600,000.00 was made. Kshs. 800,000.00 was awarded, in David Mutembei vs. Maurice Ochieng Odoyo [2019] eKLR (Musyoka, J), for a fracture of the right femur and a proximal fracture of the left tibia. In Damaris Wamucii Kagechu vs. Joseph Kirui & another [2019] eKLR (Msagha, J), Kshs. 1,500,000.00 was awarded, for bilateral compound fractures of the tibia and fibula bones of both legs.
14. Upon review of the decisions mentioned above, it should be abundantly clear that the damages awarded were so inordinately high, as to suggest application of a wrong principle. I shall, accordingly, set aside the said award, and substitute the same with an award of Kshs. 950,000.00, upon taking into account the seriousness of the injuries, the fluctuation of the local currency and the dates on the authorities reviewed. The appellants have not raised issue with the award on special damages, and, therefore, the same shall remain undisturbed, and so shall the award of costs and interests. The appeal herein is allowed in those terms. Each party shall bear its own costs.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3<sup>RD</sup> DAY OF SEPTEMBER 2024**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.



Ms. Eva Adhiambo, Legal Researcher.

Advocates

Ms. Wesonga, instructed by Kimondo Gachoka & Company, Advocates for the appellants.

Mr. Juma, instructed by JV Juma & Company, Advocates for the respondent.

