



**Ongwayo v Shake Distributors Ltd & another (Civil Case
E001 of 2024) [2025] SCC 12 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] SCC 12 (KLR)

**REPUBLIC OF KENYA
IN THE SMALL CLAIMS COURT AT VOI
CIVIL CASE E001 OF 2024
FM MULAMA, RM
MAY 14, 2025**

BETWEEN

JOSEPH SHAKO ONGWAYO CLAIMANT

AND

SHAKE DISTRIBUTORS LTD 1ST RESPONDENT

JAVAN MWANGALA MAGANGA 2ND RESPONDENT

JUDGMENT

1. Vide a further amended statement of claim dated 24th January 2025 the claimant seeks compensation in the nature of general damages and diminished earning capacity.
2. The claimant avers that on or about 2nd March 2024, the claimant was a lawful pedestrian along Voi road when the respondents' agent recklessly and negligently drove and controlled and/or moved motor vehicle registration number KBT 998F so as to cause it to run over the right foot of the claimant occasioning him injuries.
3. That as a result of the said accident the claimant suffered loss and damage as a result of the respondent's actions. He avers that he sustained the following injuries; fracture of the 3rd and 4th metatarsal, swollen and tender pigments foot and abrasion on the right foot.
4. It is the claimant's case that were it not for the respondents' negligence, he would not have been injured and he has pleaded particulars of negligence on the part of the respondents and he thus holds the respondents liable for the accident jointly and severally.
5. The respondents entered appearance and filed a response, a witness statement as well as documents however, at the hearing of the matter they opted not to prosecute their defence to the claim.
6. A little history of the matter is relevant before I get into the merits or otherwise of the suit. I was reliably informed by counsel for the claimant that this is the first matter ever to be filed at the Voi small claims



court. The matter proceeded *ex parte* and a judgment delivered which was later set aside *vide* a ruling delivered on 15/1/2025.

7. The ruling had the ultimate effect of setting aside the judgment but the said setting aside was conditional to wit among other orders the payment of thrown away costs of Kshs.15,000/=. The respondent cherry picked which orders to complied with and complied with all the other orders albeit outside the prescribed timelines save for the one for thrown away costs. All these proceedings happened before my brother Hon. Musili.
8. Come the 17/3/2025 when the matter was first placed before me Mr. Mwazighe for the respondent sought time to file some additional documents and statements and prayed for a day to do so and directions were issued by this court as to compliance to both parties and a date for hearing fixed for 1/4/2025.
9. On the said 1/4/2025, Mr. Mwazighe informed the court that he was ready to proceed with the claimant's case only since he was yet to receive and file the signed statement of the 2nd respondent and as it was expected, Mr. Chebii for the claimant objected and termed the actions of Mr. Mwazighe as a plot to delay the matter even more. The court was gracious enough and granted the respondents more time to comply with a further order that the orders made on the 15/1/2025 be complied with and a date for 9/4/2025 was fixed.
10. On this particular day, Mr. Mwazighe was a no show and he sent Mr. Mwandotto to hold his brief. It was noted that compliance with the orders of 15/1/2025 had not been complied with and Mr. Mwandotto sought for an adjournment. Mr. Chebii prayed that the judgement reverts as against the 1st respondent and he is willing to proceed with the 2nd respondents' case and forego all his costs. At this point the court could read the frustration on the claimant's part and his counsel. The court directed the matter to proceed hence this judgment.
11. Allow me to state from the onset that the respondent and/or his counsel ought to understand that gone are the days when such tactics were employed and that we are in a new dispensation where we are guided that justice should be administered promptly since justice delayed is justice denied. I feel sorry for the trouble the claimant and his counsel had to go through but finally the same will be determined shortly.
12. I have also noted that the orders as to filing of submissions were not complied with but be that as it may I have considered the claim in its entirety although as it stands despite the defence and statements being filed the same was not prosecuted but in the spirit of section 30 of the *SCC Act* and in order to do justice, I have considered the said response and the statement and/or documents as filed.

Issue For Determination.

- a. Whether the Respondent is liable for the accident.
- b. What is the quantum of damages awardable if any.
- c. Who bears costs of the claim.



Analysis And Determination.

a. Whether the respondent is liable for the accident.

13. The claimant avers that on the material day he was a pedestrian along the Voi road when the respondents' motor vehicle registration number KBT 998F carelessly run over his right foot causing him injuries to the said foot and now blames the respondents jointly and severally.
14. The occurrence of the accident is not denied by the respondents. On one hand the 1st respondent opines that the suit motor vehicle had been sold to the 2nd respondent and as such he is not liable. The 2nd respondent on the other hand opines that the claimant entered into an agreement with the claimant and compromised the matter out of court.
15. The claimant in his further statement denounces being part of any agreement as between him and the respondent and opines that the same was forged but admits that he indeed received some Kshs.15,000/= from the respondent driver which according to him was to aid in his medication and not to settle the matter out of court.
16. I have perused the documents filed to wit the agreement dated 25th March 2015 between the 1st and 2nd respondents as well as cheques for payments and certificates of insurance and what I can deduce is that the vehicle changed ownership to the 2nd respondent after the loan takeover and even the insurance policy that was issued to the said motor vehicle in the year 2025 and 2024 was in the name of the 2nd respondent.
17. This is important because the accident happened when ownership had changed hands based on the insurance certificate. This is further confirmed by the police abstract dated 17/4/2024. Therefore, there is no doubt that the motor vehicle as at the time of the accident was owned by the 2nd respondent.
18. I did not have the occasion to hear the side of the story as to the causation of the accident on the part of the 2nd respondent. I have no option but to rely in the documents as filed and produced in evidence as exhibits. The police abstract dated 17/4/2024 confirmed that the suit motor vehicle was involved in the accident on the material day and the said abstract names the claimant as the one who was injured in the said accident.
19. I have no doubt that indeed an accident indeed occurred on the material date and as a result of the said accident the claimant was injured and in the absence of any defence on the part of the respondents I do find that the 2nd respondent is to be blamed wholly at 100% for the said accident.

b. What is the quantum of damages awardable if any.

20. It is the claimant's case that as a result of the accident he suffered a fracture of the 3rd and 4th metatarsal, swollen and tender pigments foot and abrasion on the right foot. The said injuries were confirmed by Dr. Hanif vide his medical report dated 6/1/2024. It was his view that at the time of his examination he was using a single crutch for support. In his conclusion he expected full recovery but with physiotherapy for a period of 1 month that could cost approximately Kshs.20,000/=.
21. The claimant has pleaded for general damages and diminished earning capacity. It is trite law that no two cases can be completely similar but it is a settled principle that comparable injuries should attract comparable awards see the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR.
22. In the case of *Grace Wamue v Wicks Mwethi Njenga* [2020] eKLR the high court on appeal awarded Kshs.500,000/= to a victim who had suffered blunt chest injuries, blunt injury left lower limb, swollen



left tender foot and fracture of the left 3rd and 4th metatarsals. I do note however that the victim in the Grace Wamue case suffered more serious injuries than those suffered by the claimant herein. In the circumstances, I proceed to award the claimant Kshs.350,000/= which in my view is commensurate compensation to injuries sustained by the claimant.

23. On the limb of diminished earning capacity, the claimant did not submit any evidence regarding his remuneration other than just stating that he was earning Kshs.2,000/= per day and working for 5 days a week. He never produced any evidence to show his earnings.
24. Furthermore, it is not stated that the claimant was unable to work during that period and given the nature of the work he is involved in which majorly involves the hands I don't think he was greatly incapacitated and the inconvenience was for 6 weeks only as per the report. In any event the claimant did not lead any evidence to prompt the court to consider awarding damages under this head. Any attempt to make a calculation in his favour under this head would be based on mere speculation. This, the court cannot be engaged in. the claim under this head is thus disallowed.
25. On special damages, it is trite law that they have to be specifically pleaded and proved. The claimant has pleaded a total of Kshs.46,350/=. I have perused the documents in support of the expenses and in my view a total of Kshs.26,350/= has been pleaded and proved and that amount is awarded under this limb. The cost of physiotherapy being pleaded under special damages was a fatal mistake since under that head it has to not only be pleaded but be specifically proved which is not the case herein.

c. Who bears costs of the claim?

26. The basic rule on attribution of costs is that costs follow the event. It is also well recognized that the principle costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.
27. The claimant having been successful in the matter and that costs follow events he is awarded costs of the claim.

Conclusion And Disposition.

28. The upshot of the foregoing I make the following final orders;
 - a. The claim contained in the further amended statement of claim dated 24th January 2025 is allowed in the following terms.
Liability 100%
General damages Kshs.350,000/=
Special damages Kshs. 26,350/=
Total Kshs.376,350/=
 - b. The claimant is awarded costs and interests from the date of judgment until payment in full.
 - c. Let the file be closed forthwith.
29. Orders accordingly.

F.M. MULAMA

ADJUDICATOR/RM

In the presence of:



Court Assistant:- Daniel Joshua.

N/A for the Claimant

Mwandotto for the respondent.

**DATED, SIGNED AND DELIVERED AT LAMU SMALL CLAIMS COURT THIS...14th....DAY
OF ...MAY...2025.**

