



**Ondiek v Macharia (Civil Suit E1202 of 2021)
[2025] KEMC 357 (KLR) (20 November 2025) (Judgment)**

Neutral citation: [2025] KEMC 357 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E1202 OF 2021
PA NDEGE, SPM
NOVEMBER 20, 2025**

BETWEEN

ANDREW ONDIEK PLAINTIFF

AND

EVANS NGIGI MACHARIA DEFENDANT

JUDGMENT

1. In this matter, the Plaintiff sued the Defendant for negligence following a road traffic accident involving the Defendant’s motor vehicle registration number KBW 524X. As a result of the accident, the Plaintiff sustained bodily injuries and is seeking general damages, special damages amounting to Kshs.11,100/=, costs of the suit, and interest on the special and general damages, and costs at court rates. In his defence, the Defendant herein denied liability and on a without prejudice basis, averred that if such an accident happened, that the Plaintiff was entirely or substantially to blame for negligence.
2. On 10/12/2024, this matter was fixed for the hearing. The date was taken on 21/05/2024 in the presence of Counsel Chepngetich for the plaintiff and Kemunto holding brief for Kagira for the defendant. On the hearing date, only the plaintiff was represented. There was no appearance for the defendant. The court thus allowed the plaintiff to proceed ex parte, pursuant to the provisions of Order 12, rule 2(a) of the Civil Procedure Rules, 2010, which provides that if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied that notice of hearing was duly served, it may proceed ex parte. In this case, however, there was no need for service of notice given that the hearing date was taken in the presence of both parties herein.
3. The plaintiff thus testified on his own. He basically relied on his filed written statement dated 04/11/2021, where he stated that on 11/01/2021, at around 7.30pm, he was walking along Kenyatta Avenue at Total petrol station near Gate house when the defendant herein negligently controlled motor vehicle registration number KBW 524X, thereby permitting it to hit him and thereby causing him to sustain severe injuries. That he went to a nearby chemist for first aid where he was given medication to



soothe the injuries incurred from the said accident. That the chemist/ pharmacist then directed him to go for an x-ray scan at Gatehouse, which he did. That the x-ray scan established that he had dislocated his right ankle as a result of the said accident. He was then referred to Dr. Mokuia for further treatment. That Dr, Mokuia gave him medication for the injuries and asked him to go back after two days for plastering of the injured ankle. That he went back to see the doctor after the two days as instructed and that his ankle was plastered. That the doctor also instructed him to report the accident at Nakuru Central police station, which he did. That Dr. Mokuia continued with the treatment of the ankle for about 4 months. That he has suffered loss as a result of the said accident as his health has continued to deteriorate. He hold the registered and/or beneficial owner of motor vehicle registration number KBW 524X liable for the said accident and the injuries which he sustained. He also produced the documents which he had filed herein as PEXH. Nos 2 to 12.

4. This matter was then fixed for submissions on 20/05/2025. On that day, Ms. Nasimiyu appeared holding brief for Kagira for the defendant and requested to be given 3 days to file their submissions for the defence. The defence was therefore granted more time on 12/08/2025 and 28/10/2025. There is however still no submissions for the defence. I thus have the submissions by the plaintiff to consider herein.
5. Learned counsel for the plaintiff has impressively framed the issue for determination herein as follows:
 - a. Whether the Defendant is liable for the accident herein
 - b. Quantum of damages
 - c. Cost of this suit.
6. As to liability of the defendant, learned counsel has submitted that the plaintiff has satisfied the provisions of Sections 107 and 108 of the Evidence Act that state that he who asserts must prove his assertion. That the plaintiff has established that the defendant had a duty to care for the plaintiff as he was a road user. That the defendant breached that duty of care. That the duty of care is breached when one fails to operate within the parameters of a reasonable person and, in the instant case, failure to take and observe the reasonable level of care. That the plaintiff herein was walking off the road. That thus therefore points to the defendant's recklessness for him to hit someone off the road. That that breach led to the accident that cause the injuries to the plaintiff. That the defendant's action and inaction therefore were the substantial causes for the damage suffered herein. That the harm suffered by the plaintiff was a natural and probable result of the actions of the defendant as would have been anticipated by a reasonable person in the same circumstances. That driving carelessly on a road that is prone to have a lot of pedestrian like Kenyatta Avenue, is bound to cause an accident.
7. As to quantum. Learned counsel submitted that from the various documents produced herein, the plaintiff suffered the following injuries: -
 - a. Small fracture on talus bone
 - b. Severe lateral S.T.I of the right ankle
 - c. Dislocated ankle as per the witness statement
 - d. Pain in the right ankle joint.
8. Relying on several authorities, counsel submitted for an award of Kshs. 500,000/- as general damages for the pain and suffering suffered as a result of the injuries. Learned counsel further submitted that the receipts and other expenses produced herein proved the Kshs. 11,100/- special damages as pleaded.



Finally, as to costs, learned counsel submitted that the suit herein is merited and the court should therefore award costs as per its jurisdiction.

Analysis and Determination

9. I have carefully considered the evidence adduced before me in its entirety; and the written submissions filed by the Plaintiff together with all the authorities cited. Having done so, I do adopt the issues arising for my determination as framed by the learned counsel for the plaintiff in his written submissions.
10. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as; ‘Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.’
11. In this case, the plaintiff must first prove who was to blame for the accident. The scope and extent of the fundamental legal principles on this subject are settled. In the cases of *Nandwa v Kenya Kazi Ltd [1988] KLR 488* and *Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR* the Courts on this issue held that:

In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant provides same answer adequate to displace that inference.

12. The Plaintiff’s position is that the Defendant never called any witnesses or evidence to contradict his version of how the accident occurred and who is to blame. He submitted that the accident occurred while he was walking off the road and that the driver of the motor vehicle had a higher duty of care.
13. The Defendants did not call any witness to testify in Court. I am alive to the fact that even without the Defendant’s testimony, the Plaintiff is obliged to prove his case on a balance of probabilities. In the case of *Kerai Ghanshyam v James Wambua Muendo [2021] eKLR*, the court stated as follows: -

14. I am alive to the Court of Appeal’s position in *Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR* that espouses the correct legal position that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

14. In the above case, the court held that pleadings alone do not amount to evidence. The appellant in the lower court failed to tender evidence and hence the respondent’s evidence remained uncontroverted. However, in the case of *Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007*, Ali Aroni, J citing the decision in *Edward Muriga through Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* stated that:

In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere



allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.

15. Guided by the above cases, I find that the statements in the defence filed on 21st March 2022 remain mere allegations having not been substantiated orally in court by the Defendant to controvert the Plaintiff's testimony. The Defence in this case consequently contains mere allegations that were not substantiated in evidence, and I so find.
16. In examining the evidence presented before this court, the Plaintiff in his plaint alleged that he was walking off the road along Kenyatta Avenue when he was hit by the Defendant's vehicle. In his witness statement, which he adopted as his evidence-in-chief, he stated that he was walking along the said road. He stated that he was hit when the defendant herein negligently controlled the vehicle herein.
17. On the Defendant's part, he closed his case without calling any witnesses but he maintained in his defence that the Defendant was to blame for the accident. I thus do hereby find the plaintiff's case as unchallenged given that the defendant did not adduce any evidence to controvert the plaintiff's version. The defendant is thus found to be 100% liable.
18. As to the quantum awardable herein, the Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that comparable injuries should attract comparable awards. Thus the court must first ascertain the injuries that were pleaded and suffered by the plaintiff.
19. PEXH No. 9, the Radiological Report from Ranalo Medical Imaging Centre, dated 12/01/2021, is the only clear medical document to prove the injuries that the plaintiff sustained herein. It confirms that the plaintiff sustained soft tissue injuries at the ankle joint. There was no proof of any fracture as pleaded. I find the medical report admitted as PEXH. NO. 10, not to be clear on the injures that the plaintiff sustained. The P3 form admitted as PEXH. No. 4, is also not complete. That leaves this court with the radiological report which makes me find that the plaintiff herein has been able to prove that he sustained severe lateral soft tissue injuries on the right ankle.
20. While the injury sustained herein cannot therefore be compared to those sustained by the victims in the authorities or cases cited by the learned counsel for the plaintiff, I find that the amount proposed of Kshs. 500,000/- might not be that high considering the pain and suffering that torn ligaments can occasion to a victim. I am guided by the case of *Boniface Waiti & Another –vs- Michael Kariuki Kamau* [2007] eKLR, where Lady Justice Nambuye (as she then was) stated that the following principles should guide the court in awarding general damages: -
 - a) An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.
 - b) The award should be commensurate to the injuries suffered.
 - c) Awards in decided cases are mere guides and each case should be treated on its facts and merit.
 - d) Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.
 - e) Awards should not be inordinately too high or too low.
21. I still therefore find that an award of Kshs500,000/- as proposed by the learned counsel for the plaintiff shall be fair as general damages for the pain and suffering that the plaintiff suffered herein. PEXH. No. 9 confirms that his lateral ligaments were torn and this must have been extremely painful to him. I thus do hereby award him Kshs. 500,000/- as general damages herein.



22. As to special damages, it is trite law that the same must be specifically pleaded and strictly proved. The plaintiff has been able to prove Kshs. 5,000/- cost of the medical report via PEXH. NO. 11 and Kshs. 5,800/- medical expenses vide PEXH. NO. 12, and the court therefore awards him Kshs 10,800/= as special damages.
23. From the foregoing therefore, judgment be and is hereby entered for the plaintiff against the defendant at Kshs. 510,800/-, costs and interest.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF NOVEMBER, 2025.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

..... Temba..... For Plaintiff

..... Chemutao..... For Defendant

Chemutai: Praying for 30 days stay of execution

Temba: No objection and praying for a copy of the judgment

CT: 30 days stay granted. The plaintiff's counsel be supplied with a certified copy of the judgment upon payment of the requisite fee.

