



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 52 OF 2008**

***(Being an appeal from the judgment and decree of Mrs Onditi, Senior Resident in NAKURU CMCC  
NO. 636 OF 2007)***

**PETER NGIGI KAMAU .....APPELLANT**

**VERSUS**

**PHILIP KAMAU NJUGUNA.....RESPONDENT**

**JUDGMENT**

Philip Kamau Njuguna, the respondent herein, was standing beside a food kiosk along Game Park Road, near Dr. Authur PCEA Church in Nakuru Town when he was knocked down by motor vehicle KXE 276 which belonged to Peter Ngigi Kamau, the Appellant herein. He sustained injuries and blamed the occurrence of the accident on the negligence of the owner or driver of the said motor vehicle. He filed a suit claiming damages.

Peter Ngigi, the appellant herein filed a defence, denying the allegations of negligence levelled against him and in the alternative pleaded that if the accident occurred at all, then, the plaintiff substantially contributed to it. The parties recorded a consent on liability in favour of the plaintiff against the defendant to the extent of 70% while the plaintiff bore 30%. After formal proof, the court entered judgment for the plaintiff in the sum of Kshs.507,050/- less contribution of 30%. The appellant is aggrieved by the said award contending that the award is inordinately high; that the magistrate applied the wrong principles and failed to take into account material facts and arrived at the exaggerated award; that the magistrate erred in awarding special damages yet the same were not pleaded and strictly proved and lastly, that the trial magistrate disregarded the appellant's submissions and erred on points of law and facts as respects the award.

At paragraph 4 of the plaint, it was pleaded that the respondent sustained the following injuries; comminuted fracture of the right tibia and fibula, bruises on the left forearm and hand, bruises on the left thigh. He was examined by Dr. Kiamba on 1/2/07 about 7 months after the accident and was found to be

in fair health, 7 cm long scar on the anterior aspect, leg was swollen and tender, the tibia and fibula had a malunion and resulted in a deformity with an angulation deformity and that the last X-ray taken on 1/12/06 showed good callous formation, malunion and movements of right ankle joint were restricted. He classified the degree of injury as grievous harm and assessed temporary disability at 8 months and permanent disability at 20%. Dr. Malik prepared another report on the respondent on 9/11/07 and he found that the right leg had a scar of a deep abrasion 6cm by 4cm on the anterior surface of the shin, right lower leg was swollen with pitting oedema, a bony bump at the area of the fracture but the bone was solidly united and the joints were fully mobile. He found that the X-rays showed slight anterior bowing of the bones and will render the bones easily breakable if the respondent falls and that the bump at the fracture site indicates malunion of the bone. He formed the opinion that the respondent sustained a total incapacity of temporary nature for a period of 6 months followed by partial incapacity of a permanent nature to date and awarded him a permanent physical disability of 5%.

Juma Advocate filed submissions on behalf of the appellant whereas Mrs Gatei for Ikua Mwangi & Co. Advocates appeared for the respondent. Mr. Juma contends that the trial magistrate did not consider the appellant's submissions and merely stated in the judgment that she had considered the submissions in full. In the case of **ISAAC KETER V DISMAS WABWIRE MASINDE ELD HCCC NO. 129/02** the court adopted the decision of the East Africa Court of Appeal in **KEMFO AFRICA LTD V M. LUBIA CA 21/1984** where that court considered the principles to be considered by the court before interfering with an award on quantum of damages. It said that the court must be satisfied that either the judge (magistrate) in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or is inordinately high that it must be wholly erroneous estimate of the damage. The above principles are what the court should take into account. I have seen the record and do agree that the magistrate did not make any specific reference to the submissions or the decisions that the appellant relied upon and did not compare with the appellant's injuries before arriving at the award. The magistrate did not state exactly what the court considered before arriving at the damages awarded. In his submissions, the Respondent's counsel had suggested an award of Kshs.800,000/- as damages and had relied on the case of **FRANCIS BARAZA V. JOSEPH MAKAMU NRB HCCC 2986/86**. In the above case, the plaintiff suffered a fracture of the right tibia and fibula, fracture of the left tibia and dislocation of the left ankle and was admitted for 6 months and could not walk for 2 months. He was also found to have no movement in the four toes of the left foot and big toe of the right foot. In my view, the injuries sustained in the above cited case were much more serious than the respondent's injuries. It is however, noteworthy that that decision was made in 1986. The appellant did not submit on the amount of the award and relied on **MSA HCCC 893/1980 ABDALLA MWAKASHA V. KALIMUNDA GERALD** where the plaintiff suffered a compound fracture of the lower tibia-fibula, was hospitalized for 3 months and was off duty for 7 months. The fracture healed with slight shortening of the left leg and an award of Kshs.75,000/- was made. The above injuries compare well with the injuries which the respondent sustained. However, the above award was made in 1989, about 20 years after the award made to the plaintiff. The appellant also relied on **MSA HCCC 192/1988 SULTAN KITI KARISA V. HASSAN S. HASSAN**, where the plaintiff suffered a compound fracture of the shaft of the left tibia-fibula and soft tissue injuries on the back and left leg and was hospitalized for 5 days. The fracture healed with malunion and body swelling at the fracture site. An award of Kshs.90,000/- was made. Again I find that the injuries suffered herein compare well with the respondent's injuries but again, this award was made about 20 years before the award to the respondent. That also applies to the case of **SHARIFF SALIM & ANO V. MALUNDU KIKAVA HCCA NO. 15/89**. The plaintiff sustained fracture of the right tibia was hospitalized for 18 days, lacerated wound on supra-orbital. The fracture healed with restricted movement. An award of Kshs.80,000/-. In the above case it seems the plaintiff suffered more serious injuries. From 1989 when the awards were made in the above cited cases up to when the court rendered its decision on 11/4/2008, the value of the shilling has depreciated a lot due to inflation and that fact should be taken into consideration. Having considered the above, it is my view that the award of Kshs.500,000/- was reasonable in the circumstances. The award is not too high or low nor has it been demonstrated that it is based on wrong principles. This court has considered the submissions of the appellant and the decisions relied upon and comes to the same figures as did the magistrate.

The trial magistrate made an award of special damages of Kshs.7,050/- which has been disputed. In the plaint, the respondent made a claim of the following special damages:-

Medical report .....	2,500
Police abstract .....	100
Medical expenses .....	<u>5,850</u>
<b>Total.....</b>	<b><u>8,450</u></b>

Special damages have to be specifically pleaded and proved. The respondent produced medical invoices/receipts for Kshs.5,950/-. The appellant urged that there were no stamps affixed in compliance with the Stamp Duty Act. It was the appellant's contention that the award of Kshs.7,050/- as special damages is baseless. In my view, the appellant would only be entitled to Kshs.5,950/- that was supported by receipts. Revenue Stamps are only issued upon demand by the person paying or upon delivery of the money. If they were not demanded, the respondent had no duty to issue them. He is entitled to the special damages of Kshs.5,950/- which were proved. Accordingly the respondent will have judgment as follows:-

General damages.....	- Kshs. 500,000.00
Special damages.....	- <u>Kshs. 5,950.00</u>
Total .....	Kshs. 505,950.00
Less 30% contributory – $505,950 \times 70/100 =$	<b><u>Kshs.354,165.00</u></b>
Plus costs and interest.	

It is so ordered.

**DATED and DELIVERED this 15<sup>th</sup> day of February, 2011.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Nyandieka holding brief Mr. Juma for the appellant.

Ms Wanjiru for the respondent.

Kennedy – Court Clerk.