



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 387 of 2003**

**JOHN NJOROGE.....APPELLANT**

**VERSUS**

**FRANCIS KAMAU GATUNE.....RESPONDENT**

**J U D G M E N T**

John Njoroge, the appellant herein is dissatisfied by the judgment of the Senior Resident Magistrate, delivered on 12<sup>th</sup> June, 2003 in Nairobi SRMCC No. 5826 of 2001.

The judgment arose from a suit filed by Francis Kamau Gatune (hereinafter referred to as the respondent) against the appellant. The respondent claimed general and special damages for injuries suffered by him as a result of the negligence of the appellant.

The particulars of negligence alleged against the appellant were as follows: -

- a) Handling his firearm recklessly without regard to the safety of those surrounding him.
- b) Firing his gun aimlessly without regard to the safety of those around him
- c) Handling his firearm while under the influence of alcohol.
- (d) The plaintiff pleads *res ipsa loquitor* as applicable to the fact of this case.

The appellant filed a defence to the respondent's claim in which he denied the allegations of negligence attributed to him. The appellant further denied shooting the respondent and maintained that the respondent was shot by unknown persons and/or thugs. During the trial, the respondent testified that on the material night he was in a taxi, with the appellant who was known to him. The respondent sat in front with the driver whilst the appellant who was drunk sat at the rear of the vehicle. As the taxi was moving, the respondent suddenly heard a bang and a bullet went through his stomach and rested on his thigh. The appellant ordered the driver of the taxi to stop. He then alighted and came back a few minutes later claiming that he was shooting at thieves who had just fled.

Samson Theuri Mwangi, who was driving the taxi, testified that he heard a bang and saw the respondent lying on his side injured. The appellant then ordered the witness to stop the vehicle. Appellant alighted from the motor vehicle and fired twice. He thereafter came back into the motor vehicle claiming that it was robbers whom he had shot in the air to scare. The respondent was taken to Kenyatta National Hospital where he was admitted. He was later operated on by Dr. Njoka Muchemi Njue who removed a

bullet which was lodged on the left hand side of the respondent's abdomen.

In his evidence, the appellant explained that he is a police officer stationed at CID Headquarters. On the material day, he needed a vehicle to take him home. The respondent who did not have a vehicle requested his friend, one Theuri to drop the appellant. The appellant boarded the vehicle, registration No. KAD 589 which belonged to Theuri. The respondent also boarded the same vehicle and sat on the front passenger seat. When the vehicle reached near Githurai roundabout, the appellant heard a bang on the left side of the car and immediately the respondent screamed. The appellant ordered Theuri to stop the vehicle and he alighted. He saw four people running towards the vehicle. He fired two shots in the air and the four people scattered in different directions. On rushing back to the vehicle the appellant found that the respondent had been shot on the left hand side near the hip.

The appellant hired an ambulance and took the respondent to Kenyatta National Hospital. The appellant reported the incident at Kasarani Police Station. The appellant testified that the bullet which was removed from the respondent's body was retained in the hospital. He surrendered his firearm at Kasarani Police Station. Appellant maintained that he does not take alcohol because he is diabetic. He produced a letter from the doctor. He denied having shot the respondent and maintained that the bullet recovered from the respondent ought to have been examined to confirm that it came from his gun.

In his judgment the trial magistrate found that the appellant boarded a vehicle driven by Theuri and that the respondent was in the same vehicle. The trial magistrate found that the shot to the respondent came from the appellant and the appellant's shooting in the air was only to feign a robbery attempt. The trial magistrate further found that the appellant carelessly handled his gun endangering the respondent's life. He therefore found the appellant fully liable to the respondent. The trial magistrate awarded general damages of Kshs.200,000/= and special damages of Kshs.9,630/=.

In his memorandum of appeal, the appellant raised six grounds of appeal. Generally the grounds of appeal questioned the trial magistrate's finding on special damages and the trial magistrate's finding on liability. It was submitted that the gun and the bullet recovered from the respondent were not examined to confirm that the bullet was discharged from the appellant's weapon. It was maintained that the possibility of the bullet having come from robbers was not ruled out.

For the respondent it was submitted that the trial magistrate who had the benefit of seeing the witnesses and assessing their evidence, believed the respondent's evidence that the bullet came from the appellant's gun and that the appellant feigned the alleged gunshots from the robbers. It was further submitted that Dr. Njoka Muchemi who operated the respondent testified before the trial magistrate and his evidence was sufficient. The court was therefore urged to dismiss the appeal.

Having reconsidered and evaluated the evidence, I find that it is not disputed that the respondent sustained injuries, and that at the material time he was in the same vehicle with the appellant. It is also common ground that the appellant was armed. Dr. Njoka Muchemi Njue, who operated on the respondent, testified that the respondent had gunshot wounds. This was consistent with the evidence of the respondent and Samson Theuri Mwangi. Although the appellant claimed that the respondent was shot by robbers or unknown persons, neither the respondent nor Samson Theuri Mwangi saw or heard any gunshots from robbers. Given that the appellant was seated in the rear of the vehicle, whilst the respondent was seated in the front passenger seat, and there being no evidence that the bullet which hit the respondent was fired from outside the vehicle, there was sufficient evidence to establish on a balance of probabilities that the appellant is the one who shot the respondent.

No evidence was adduced before the trial magistrate concerning any examination by a firearm expert or ballistic expert. There was therefore no evidence confirming that the bullet which was recovered from the respondent's body was actually fired from the gun which was in the appellant's possession. Nevertheless, the evidence adduced before the trial magistrate was sufficient to establish on a balance of probabilities that the bullet came from the appellant's gun. It was alleged by the respondent and Samson Theuri Mwangi that the appellant was drunk at the time of the alleged incident. The appellant denied this and produced a letter signed by Dr. D. N. Kimathi confirming that the appellant is diabetic and has been

insulin dependant since 1990. While there was no reason to doubt the doctor's confirmation that the appellant is diabetic, the report from Dr. Kimathi did not provide any corroboration that the appellant does not take alcohol. Given the behaviour of the appellant on the material night, the evidence of the respondent and his witness that the appellant was drunk was believable. It is apparent that the appellant handled his firearm recklessly, without regard to the safety of those surrounding him. This was probably aggravated by the influence of alcohol. I am therefore satisfied that the particulars of negligence were proved and that the appellant is liable to the respondent for general and special damages.

As regards the quantum of damages, the only complaint of substance appears to be the allegation that no medical report was produced. From the typed proceedings, there is no indication of the plaintiff's witnesses having produced any exhibits. However, my examination of the original records, reveals that there is a list of exhibits indicating the plaintiff having produced three documentary exhibits. The exhibits are a receipt for Kshs.6,630/= from Kenyatta National Hospital, a medical report from Kenyatta National Hospital signed by Dr. N.N. Muchemi and a receipt from Kenyatta National Hospital for medical report for Kshs.3,000/= marked P.exhibit 1 – 3 respectively. All these documents are in the original court record. In her judgment, the trial magistrate also referred to these exhibits. Noting that the appellant did not raise the issue of failure to produce the exhibits in his submissions in the lower court, I am inclined to believe that the exhibits were actually produced but that it is the recording of the proceedings which is not accurate.

There is no doubt that the plaintiff suffered pain and injury from the gunshot wound for which he had to undergo major surgical operation. In my considered view the award of Kshs.200,000/= was neither excessive nor based on wrong principle as to warrant the intervention of this court. For these reasons, I find no merit in this appeal and do therefore dismiss it with costs.

**Dated and delivered this 17<sup>th</sup> day of June, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Achoki for the respondent