



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Suit 92 of 2000**

**PETER NJOROGE GICHII.....PLAINTIFF**

**VERSUS**

**BERNARD THIMANGU.....1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed suit against the defendants seeking to be paid damages on account of gunshot injuries he alleged to have sustained on the 1<sup>st</sup> of December 1995 when he was shot by the 1<sup>st</sup> defendant outside Weavers Darts Club, Shabab, Nakuru town. The plaintiff averred that the 1<sup>st</sup> defendant, a police officer, kicked him in the stomach and later shot him with a pistol without any provocation or justifiable cause. As a result of the said shooting, the plaintiff sustained gunshot wound on his stomach. The plaintiff further sustained intra-peritoneal haemorrhage and perforations of the descending colon and ileum. The plaintiff pleaded that as a result of the said injuries, he suffered loss and damage and should accordingly be compensated. He further pleaded that the High court had granted him leave to institute the suit out of time in **Nakuru High Court Civil Case No. 177 of 1999 (O.S.)**. The plaintiff further prayed to be awarded costs of the suit. When the defendants were served, they duly entered appearance and filed a defence. They denied the averments made by the plaintiff in his plaint. They denied that the plaintiff was shot by a police officer. They further denied that the plaintiff was injured as a result of the said alleged shooting.

At the hearing of the case, the plaintiff testified that on the 1<sup>st</sup> of December 1995 at about 11.00 p.m. he had gone to park his motor vehicle at Weavers Bar near Tanners in Nakuru West. As he was driving his car outside the gate of his house, he heard people screaming from the bar. He went to investigate. He saw a woman being beaten by a man whom he later identified to be a police officer. The plaintiff went to where the man was beating the woman and intervened. In the course of the intervention, the police officer took offence. He slapped the plaintiff and kicked him in the stomach. He withdrew a pistol from his pocket and pointed the said pistol on the head of the plaintiff. The police officer referred the plaintiff as a thug. The plaintiff realised that if he did not do something, the police officer was going to shoot him dead. It is at that point that the plaintiff held the hand of the police officer that was holding the pistol. In the course of holding the pistol, a struggle ensued and both the plaintiff and the police officer fell to the ground.

The plaintiff recalled that it was while there were wrestling on the ground that the police officer fired two bullets, the second one of which hit him in the stomach. The plaintiff however managed to disarm the

police officer. After shooting him, the police officer ran away and disappeared from the scene. The police officer returned to the scene after a while with two administration police officers who however knew the plaintiff. It is at that point that the police were informed and the plaintiff taken to hospital. The plaintiff testified that the police officer who shot him is the 1<sup>st</sup> defendant in this suit. He testified that he was admitted at the Nakuru Nursing and Maternity Home for over a month and thereafter attended clinic for two months. During his admission he was operated on to repair the damage that was inflicted by the bullet. He produced the medical treatment papers as *plaintiff's exhibit No. 1*. He was issued with a P3 form when he made a report to the police. The P3 form was produced as *plaintiff's exhibit No. 2*. He saw Dr. Angelo D'cunha who wrote a medical report which was produced as *plaintiff's exhibit No. 3*. He paid Kshs 1,500/= for the preparation of the said report (*receipt produced as plaintiff's exhibit No. 4*). During his hospitalization he paid medical bills. A bundle of eighteen receipts were produced as *plaintiff's exhibit No. 5*.

The plaintiff testified that the 1<sup>st</sup> defendant was arrested by the police and charged with the offence of unlawful wounding in Nakuru CMC Criminal Case No. 1968 of 1995. The 1<sup>st</sup> defendant was convicted and sentenced to serve one year imprisonment. The plaintiff served the Attorney General with the notice of intention to file suit before he filed the present suit (*notice produced as plaintiff's exhibit No. 6*). He further testified that he applied to the High Court and was issued with an order extending time for him to file suit against the Attorney General (*order produced as plaintiff's exhibit No. 7*). The plaintiff urged this court to pay him compensation for the injuries that he had sustained as a result of the said unlawful assault by the 1<sup>st</sup> defendant. The plaintiff denied that he was drunk when he intervened in the fight between the 1<sup>st</sup> defendant and the woman. He testified that he had intervened because he saw the woman was bleeding from an injury on her face.

The plaintiff recalled that when the 1<sup>st</sup> defendant pointed the pistol at his face, he was apprehensive that the 1<sup>st</sup> defendant was going to kill him hence his decision to hold the 1<sup>st</sup> defendant's hand that held the pistol. He denied that the 1<sup>st</sup> defendant had shot him in self defence. He reiterated that he was the one who was defending himself when he struggled with the 1<sup>st</sup> defendant. He confirmed that he had not produced the proceedings of the subordinate court's case where he had testified that the 1<sup>st</sup> defendant had been convicted as a result of the said unlawful shooting. He reiterated that the 1<sup>st</sup> defendant had not identified himself to him that he was a police officer. The plaintiff then closed his case. The defendants did not have any evidence to offer and closed their case. After the close of the plaintiff's case the plaintiff presented to this court written submissions in support of his case. No submissions were filed by the defendants.

I have read the pleadings filed by the parties to this case and also considered the evidence that was adduced by the plaintiff. I have considered the submissions that were made before me by the plaintiff. The issue for determination by this court is whether the plaintiff has established, on a balance of probabilities, that he was injured as a result of the unlawful action of the 1<sup>st</sup> defendant. The other issue for determination is what damages, if any, should be paid to the plaintiff. In this case, the plaintiff adduced evidence which was uncontroverted. He testified that he was shot on the stomach by the 1<sup>st</sup> defendant when he sought to intervene when the 1<sup>st</sup> defendant was assaulting a woman. The plaintiff at the time was not aware that the 1<sup>st</sup> defendant was a police officer. In the course of the intervention, the 1<sup>st</sup> defendant removed a pistol from his pocket and shot the plaintiff in the stomach. The plaintiff holds the Attorney General liable in tort because the 1<sup>st</sup> defendant was a police officer. It was the plaintiff's case that the 1<sup>st</sup> defendant having been issued with a firearm by the police, unlawfully used the said firearm to shoot him and therefore causing him to sustain serious injuries.

I have evaluated the said evidence adduced. It is clear that the 1<sup>st</sup> defendant shot the plaintiff without any justification or reason. He was armed. He had been issued the firearm by the police. The 1<sup>st</sup> defendant had the said pistol in his possession in the course of his employment. When he shot the plaintiff, he was therefore acting in the course of his duties. Although the 1<sup>st</sup> defendant was later convicted after he was charged for unlawfully wounding the plaintiff, the fact that it was established that

the 1<sup>st</sup> defendant acted unlawfully when he shot the plaintiff, does not absolve the 2<sup>nd</sup> defendant from liability in tort. In the circumstances of this case, I do hold that the plaintiff established on a balance of probabilities that he was unlawfully shot by the 1<sup>st</sup> defendant and thereby seriously injured. The 2<sup>nd</sup> defendant on behalf of the Kenya Police, as the employer of the 1<sup>st</sup> defendant is vicariously liable. I therefore hold that the plaintiff has established that the 2<sup>nd</sup> defendant is liable to pay him damages in tort.

According to the P3 form which was produced in evidence by the plaintiff, he sustained a bullet wound with an entry point on the left side of the abdomen and which lodged near the lumbar spine. After surgery, it was discovered that the bullet had torn the descending colon. According to the medical report prepared by Dr. Angelo D'cunha, the plaintiff sustained gun shot wound of the stomach which resulted in intra-peritoneal haemorrhage and perforation of the descending colon and ileum. The plaintiff underwent an operation to remove the bullet from his abdomen after the shooting. He was admitted in hospital for a period of twenty two days. The injuries that the plaintiff sustained were classified as grievous harm with 15% permanent disability. In his submissions before court, the plaintiff has urged this court to award him the sum of Kshs 400,000/= as general damages for pain suffering and loss of amenities. He relied on the decision of **Rotiken ole Kiparen –vs- The Attorney General & Anor Nairobi HCCC No. 402 of 1997 (unreported)** where the plaintiff in that case was similarly shot and sustained gun shot wounds. As earlier stated in this judgment, the defendants did not make any submissions on quantum. Having considered the injuries sustained by the plaintiff, and in view of the above authority referred to I will in the circumstances, doing the best that I can, award the plaintiff general damages of the sum of Kshs 300,000/= for pain suffering and loss of amenities.

The plaintiff proved that he suffered special damages of Kshs 109,135/70 being medical expenses and consultation fees paid to the doctors. He produced the said receipts in evidence. I will award him the said proven special damages of Kshs 109,135/70. The upshot of the above is that judgment is entered for the plaintiff against the defendants jointly and severally as hereunder:

**(i) On liability**

The defendants are found to be liable in tort for the injuries that the plaintiff sustained when he was unlawfully shot.

**(ii) On quantum**

(a) The plaintiff is awarded Kshs 300,000/= being general damages for pain suffering and loss of amenities.

(b) The plaintiff is awarded the sum of Kshs 109,135/70 being the proven special damages.

The total sum awarded to the plaintiff is Kshs 409,135/70.

(iii) The plaintiff shall have the costs of the suit.

(iv) Interest on special damages shall be paid from the date of filing suit while interest on the general damages shall be paid from the date of this judgment.

**DATED at NAKURU this 13<sup>th</sup> day of July 2006.**

**L. KIMARU**

**JUDGE**