



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 150 OF 1998**

**KIMATU MBUVI ..... APPELLANT**

**VERSUS**

**JOSHUA MUINDE KILONZO ..... RESPONDENT**

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

The appellant was the defendant in Kangundo SMCC 281/98 where he had been sued by the Respondent who was the plaintiff, for damages for injuries which the respondent had sustained as a result of a road traffic accident involving motor vehicle KAC 520 C which belonged to the appellant. The respondent was a fare paying passenger in the vehicle at that time of the accident.

After the pleadings closed, the case came up for hearing inter partes on 12.11.1998. Only the plaintiff testified. The defence had no evidence to offer. Submissions were reserved for 20 11.1998. Mr. Masika submitted orally. Mr. Wambua for plaintiff did not make any submissions on quantum on that day. On perusal of the file however I do note that Mr. Wambua filed written submissions on quantum on 17.11.1998, accompanied by some authorities. The magistrate considered submissions of both counsels, the authorities cited and made an award of Kshs. 130,000/- as general damages. The appellant has no dispute with the issue of liability but appeals against the award on grounds that it was manifestly excessive and was not supported by comparable authorities.

In opposing the appeal counsel for the respondent cited the case of **KENYA BUS SERVICES & ANOTHER V. FREDRICK MAYENDE CA 34/90** in which it was held that the appellate court will interfere with the trial judge's assessment of damages only where an error of principle by the trial judge is shown or where the damages awarded are so high or low that they must be a wholly erroneous estimate and an error of principle.

I have carefully scanned the record of the lower court and I do agree with appellant that at no time was it ever agreed that the respondent was to file written submissions. Mr. Wambua for the respondent was present when a date was reserved for taking of submissions by the court and on that date Mr. Wambua was present and made none. The court has no idea whether the appellant was aware of the submissions which were filled by the respondent and which the court also took into consideration in making its award. It was wrong for the court to rely on these written submissions and authorities which the appellant was not aware of. There is no evidence that appellant was served with these submissions. The court should only have considered the authorities submitted by the appellant but not the respondent.

The authority cited by the respondent refers to appeals from the High Court to the Court of Appeal. And even if the same principles were to apply to the present case, the court did err by considering authorities that were improperly on record and which the other party had no notice of.

The question is whether the award was excessive in the circumstances. From the medical reports produced in evidence, the respondent suffered soft tissue injury to the nasal bridge which got swollen, blunt injury to right shoulder, mid back, cut wound on lateral aspect with left finger and cut wound anterior aspect left leg 6 cm. long. He was left with some scars, but generally healed well. The appellant had suggested an award of Ksh. 70,000/- and relied on the cases of **ONYANGO OGUTU V. JOHN MIGUI HCC 346/90** in which the plaintiff suffered lacerations on the scalp and contusions to the chest, was admitted for 5 days and left with post traumatic headaches fatigue, forgetfulness and the case of **GEORGE ONYANGO V. MINERAL MINING COMPANY HCC 146/89** in which the plaintiff

sustained lacerations on the left parietal region of the head, multiple abrasions over right knee, and lumbar region, was unconscious for 8 hours and suffered cerebral concussions. In both cases an award of Ksh. 120,000/- was made in 1993 and 1992 respectively. The injuries sustained in the cases cited were more serious but the award had been made several years earlier. In my assessment I would have made an award of Kshs. 90,000/- as general damages, special damages are not interfered with .

I accordingly set aside the award of Ksh. 130,000/- as general damages and instead make an award of Ksh. 90,000/- as general damages. Special damages confirmed and costs to the appeal to the appellants.

Dated, read and delivered at Machakos on 30th day of September 2004.

**R. V. WENDOH**

**JUDGE**