



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**Civil Appeal 144 of 2010**

**KIRIM MBAKA .....APPELLANT**

**VERSUS**

**JOSHUA NYAVUGE OSODO .....1<sup>st</sup> RESPONDENT**

(From original conviction and sentence in Criminal Case number 289 of 2007 of the Senior Resident Magistrate's Court at Kisumu – Mrs. C. M. OLUOCH .)

**JUDGMENT**

On 17<sup>th</sup> December 2004 the Appellant was lawfully traveling as fare paying passenger aboard motor vehicle Registration Number KAS 696 Y owned by the 2<sup>nd</sup> Respondent and driven by the 1<sup>st</sup> Respondent.

It was the appellant's case at the lower court that while traveling along Kisumu – Kakamega Highway near Kondele they were involved in an accident. The said bus overturned and he sustained some injuries. According to him the cause of the accident was the 1<sup>st</sup> Respondent who drove the said bus carelessly, very first and negligently.

After a full trial the lower court found he Respondents 100% liable for the accident. The respondents did not offer any evidence to counteract that of the appellant.

The trial court awarded the appellant general damages of Kshs. 120,000/= with special damages of Kshs. 2,500/=

The appellant being dissatisfied with the said quantum has appealed citing the following grounds:-

- 1. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.**
- 2. The learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.**
- 3. The learned trial magistrate misdirected herself into not taking into consideration the nature of the appellant injuries at the time of assessing the damages.**
- 4. The learned trial magistrate proceeded on the wrong principles when assessing the damages to be awarded to the applicant.**

**5. The learned trial magistrate erred in awarding a sum in respect of damages which was so low in the circumstances that it represented an entirely erroneous estimate vis-à-vis the injuries suffered by the Appellant.**

The subtotal of the appellant's appeal is on quantum. According to him the same is too little and does not represent the injuries that he sustained.

It is also clear that the issue of negligence is not contested here and I shall not add more as I am satisfied with the findings of the court.

The appellant according to the Medical report by **Dr. L. W. Okombo** sustained the following injuries:-

- 0. Injuries to the palm and thumb of the left and right hand with cut wounds.**
- 1. Injuries to the Right shoulder.**
- 2. Chest injuries**
- 3. Back injuries.**

**Dr. Otieno A's** report stated that the appellant sustained the following injuries:-

**(a) Lacerations both hands.**

**(b) Blunt injury left shoulders**

**(c) Blunt injury back**

Both reports talk of weakness in sexual performance or loss of libido.

It is regretted that this item did not come out clearly during the trial. As much as the counsel for the appellant has submitted over the same, the two doctors in my opinion did not give much emphasis over the same. I shall not also spend much time over the same.

Both doctors equally agree that the injuries sustained by the appellant are soft tissue in nature.

Dr. Okombo however proposes that the defendant will need a minimum sum of Kshs. 150,000/= to undergo plastic surgery. This again was not corroborated by any evidence and neither did the appellant raise it when giving his testimony.

In assessing damages it is a trite law that in assessing damages this court shall only interfere with it if the trial court arrived at it based on irrelevant issues or facts or that the award was manifestly low or high in the circumstances. See *Bashir Ahmed Butt vs Uvais Ahmed Khan* [1982 -88] 1 KLR page 5.

As earlier alluded the injuries sustained by the appellant were soft tissue in nature. I have perused the authorities relied on by the parties herein in their submissions. With due respect the appellant's authorities do not correspond with the case at hand. The same referred to injuries more serious than his case. They involved fractures.

I do not see any reason why I should interfere with the judgment. The award of Kshs. 120,000/= in the circumstances was fair, just and reasonable. Taking into consideration the time frame and the prevailing economic circumstances I shall not disturb the quantum. The trial court did not misdirect itself.

For this reason I shall dismiss the appeal with costs to the respondent.

**Dated, signed and delivered at Kisumu this 13<sup>th</sup> day of July 2012**

**H. K. CHEMITEI  
JUDGE**

**In the presence of:**

**Maube Advocate for Appellant**

**Amondi Advocate for Respondent**

*HKC/aa0*