**Diocese of Nyeri v Kibe**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 26 November 1971

**Case Number:** 1073/1970 (17/74)

**Before:** Madan J

**Sourced by:** LawAfrica

*[1] Costs – Instruction fee – Double the fee allowed – Whether error of principle.*

*[2] Costs – Witness expenses – Travel from another country – When allowable – Whether special order*

*necessary.*

**JUDGMENT**

**Madan J:** This summons of objection to the taxation of a bill of costs reads as follows: “. . . . objection by the defendants above named to the decision of the taxing master in increasing the basic instruction fee item 2 beyond Shs. 1,000/- and the ‘witness expenses’ allowed to Father John De Marchi in the bill of costs filed herein by the plaintiff and for an order that it be taxed by another taxing master or be reduced to Shs. 1,000/- and Shs. 40/- respectively or otherwise suitably. . . .” The proceedings in the suit arose out of a collision between the plaintiff’s vehicle which at the time of the accident was being driven by Father John De Marchi and the first defendant’s vehicle which was being driven by the servant or authorised agent of the first defendant, the second defendant. The accident took place in Kenya on the 22 September 1969. Father John De Marchi was transferred for work to Ethiopia in August 1970. He came to Kenya solely for the purpose of giving evidence at the trial on the 22 November 1971 of the claim against the defendants for the damage caused to the plaintiffs’ vehicle in the collision. Father John De Marchi was the sole occupant of the plaintiff’s car at the time of the collision. The claim was determined in favour of the plaintiff purely on a question of fact in the sum of Shs. 13,600/-. It is common ground that the basic instruction fee is Shs. 1,000/-. The plaintiff claimed an instruction fee of Shs. 3,000/- in his bill of costs. The taxing master after considering the objection to any increase in the basic fee taxed off Shs. 1,000/- and allowed an instruction fee of Shs. 2,000/-. The taxing master also allowed a sum of Shs. 1,064/60 in respect of Father De Marchi’s expenses being Shs. 824/60 the return air fare to Ethiopia, and Shs. 240/- expenses incurred for the witness’s stay in Nairobi for the purpose of giving evidence and which the taxing master described as a reasonable sum. Counsel for the objector has strongly attacked *inter alia* the taxing master’s ruling that there is a practice to allow more than the basic instructions fee when a suit of this type is contested. I understand this to mean that a practice to that effect has grown up in the court. While there would seem to be no legal sanction for it and of course every case must be dealt with on its own facts, a healthy and savoury practice which tends to enlighten advocates in regard to the possible costs which will be incurred in court ought not to be condemned provided it does not step outside the bounds of reasonableness. Although in the instant case the contest between the parties at the trial proceeded on the basis of facts only, it nevertheless required the exercise of a certain amount of skill both in examination-in-chief and cross-examination. In my opinion the most that can be said is that the taxing master was somewhat, only slightly but not very much, generous in allowing an instructions fee of Shs. 2,000/- which by itself creates no justification for interference by this court with the taxing master’s discretion. I cannot find anything in the rules which precludes witness expenses being allowed for a witness who has travelled from abroad to give evidence in the court in Kenya. In the instant case Father De Marchi was the sole occupant of the vehicle when the collision took place. The plaintiff could not do without his evidence. The taxing master correctly appreciated that the witness was reasonably out of the jurisdiction of the court when his evidence was required and that he travelled from Ethiopia solely for the purpose of giving evidence at the trial and not for some other purpose. The taxing master further correctly appreciated that the evidence of Father De Marchi might have been recorded de bene esse or upon commission. The former was not possible. As regards the latter I venture to think it would be probably more expensive to have the evidence taken on commission. In the circumstances of this case in my opinion the taxing master properly held that the personal attendance of this witness was reasonable and proper. In my opinion it is not necessary that there should be an express order made by the court to enable the expenses of a witness who has travelled from abroad to be claimed. A general order making an award of costs embraces such expenses; thereafter, it is for the taxing master to decide what reasonable amount is. It is not necessary that the court should specifically make an order allowing each individual item. For these reasons these objection proceedings are dismissed with costs. *Order accordingly.*

For the plaintiff:

*S Malik-Noor* (instructed by *Archer & Wilcock*, Nairobi)

For the defendant:

*DN Khanna* (instructed by *Khanna & Co*, Nairobi