REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 10 of 2006

WILSON K KAVIVYA ……..……..…..……..… APPELLANT

VERSUS

1. THE REGISTERED TRUSTEES CATHOLIC DIOCESE OF MACHAKOS

2. MICHAEL M MULEI ……..…..…… RESPONDENTS

JUDGMENT

1. On 15/10/2008, the Respondent herein Wilson Kavivya filed his Plaint in CMCC 1017/2003 at Machakos and in it he sought general damages for pain and suffering, loss of amenities and for malicious prosecution. At paragraph 5 thereof, he averred that on 18/6/2003 he was lawfully standing off the Kitui-Machakos road at Kipandini area "**when the 2nd Defendant in his capacity as the 1st Defendant's agent…managed and/or controlled the 1st Defendant's motorcycle registration number KAD 751 K so negligently, carelessly and/or recklessly that the same hit the Plaintiff."** Particulars of negligence are given but they are now irrelevant for reasons to be shortly stated.

2. At paragraph 7 thereof, it is also averred that the "**2nd Defendant on the instructions of the 1st Defendant maliciously reported to the police and manipulated investigations and had the Plaintiff maliciously prosecuted in Machakos Chief Magistrate's Court Traffic Case Number 3723 of 2003."** Again particulars of malice are given at paragraph 9 of the Plaint and at this stage, I should refer to the issue of liability for the two claims.

3. On 30/11/2005, parties recorded a judgment on liability at 65% in favour of the Plaintiff (now Respondent). I heard Mr Wainaina for the Appellant to be making a rather preposterous argument on this issue; that since there was no proof of any prosecution in Machakos CM'S Court Traffic Case No. 3723/2003, no award in damages should have been made on that aspect of the claim. The point is moot because once liability was admitted there was no need for proof of liability for obvious reasons. The only issue to address was the quantum of damages to be awarded for the two heads of damages. I note that in submissions filed on 19/12/2005, the advocates for the Defendant (now Appellants) the issue of malicious prosecution was completely ignored while the Plaintiff's advocates properly raised the issue and suggested a quantum of Kshs.60,000/= under that head. The learned trial magistrate addressed the issue in his judgment and found that Kshs.50,000/= was proper in the circumstances. I will return to that issue shortly but suffice it to say that this court deems it proper to award damages under that head.

4. Turning back to the issue of damages for the two heads, the learned trial magistrate awarded Kshs.150,000/= for damages arising out of the injuries sustained during the road accident.

5. Since only quantum on both heads are in issue, I am alive to the powers of this court as an appellate court. That duty is to the effect that if the damages awarded were either inordinately high or low or that a wrong principle was invoked, then this court can interfere with the award.

6. Alive to that duty therefore, I note that parties at the subordinate court agreed that two medical reports be used as evidence of the injuries suffered. Mr Yusuf Kodwavwala, a consultant surgeon and Senior Lecturer, University of Nairobi saw the Respondent on 25/6/2004. He reviewed the injuries suffered which he noted as the following:-

i. laceration on his right wrist;

ii. laceration on the right elbow

iii. contusion on the right ankle and right nostril.

7. The doctor found that on the date of the examination, there were two scars, permanent but hardly visible. He concluded **that "there is no permanent disability"** but suggested "**a small payment for his pain and two weeks off-duty."**

8. Dr. Walter Jaoko examined the Respondent on 26/9/2003 and he found that he suffered "**blunt injuries to the neck, right elbow, right hand and right ankle."** That he was treated with anti-tetanus injection, antibiotics and pain-killers and the cut was stitched.

9. My own conclusion is that the Respondent suffered minor soft tissue injuries. Advocates appearing have referred me to the comparable authorities cited before the subordinate court. I have seen them and particularly (i) Jane Ogalo vs Nyabichuyu Farm & Ano. H.C.C.C 1540/1988 where for injuries to the forehead, chest, abdomen and multiple abrasions on both elbows and where the Plaintiff was hospitalized for 3 weeks, Kshs.60,000/= was awarded. (ii) Richard Muchiri Ndirangu vs Joseph Maina Wachira, H.C.C.C 3716/1989, where the Plaintiff was awarded Kshs.75,000/= for soft tissue injuries to the right arm, left upper arm, right cheek, lower back and cuts on the leg.

10. I note that in this case, the injuries were relatively minor and even with the element of inflation, changing life trends, and harsh economic times, Kshs.150,000/= cannot be justified in this case. I think that a fair and reasonable award would not be Kshs.60,000/= as suggested by the Appellant but Kshs.100,000/=.

11. On the element of malicious prosecution, no submission was made in the trial court and none on quantum was made before this court. In any event, I see no need to interfere with the award of Kshs.50,000/= which I will sustain.

12. In the event therefore, the Appeal is allowed to the extent that the award for general damages for pain and suffering is reduced to Kshs.100,000/=. The final judgment is therefore as follows:-

i. General damages (pain and suffering) – Kshs.100,000/=.

ii. Damages for malicious prosecution – Kshs.50,000/=.

iii. Special damages – Kshs.1,000/=.

iv. Costs and interest thereon save that the Appellant shall have only ¼ costs of the Appeal.

13. The Appeal is allowed in those terms.

14. Orders accordingly.

Dated and delivered at Machakos this **2nd** day of **October** 200**8**.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kamwendwa h/b for Mr Musyoki for Appellant**

ISAAC LENAOLA

JUDGE