



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 125 of 2011

BILDAD ONDITI 1ST APPELLANT

PLATINUM CAR HIRE LIMITED 2ND APPELLANT

V E R S U S

RASHID M. RATENG alias

RASHID RAMADHAN RESPONDENT

J U D G M E N T

A road traffic accident occurred on the 16.12.2009 involving motorcycle registration number KMCE 848 and motor vehicle number KAS 399 M at Lukoye area along the Mumias – Bungoma road. The respondent was the rider of the motor cycle while the vehicle was being driven by the first appellant. The respondent was awarded KShs.350,000/= as general damages less 20% contributory negligence. Being dissatisfied by the award, the appellants preferred this appeal.

The grounds of appeal are that the trial court treated the evidence on liability superficially thereby made the wrong conclusion, the trial court ignored the principles applicable and the relevant authorities including the appellant's written submission, that the trial court did not sufficiently take into account the evidence on record, considered extraneous factors, applied wrong legal principles and failed to hold that the respondent did not proof negligence on the part of the appellant.

Parties agreed to argue the appeal by way of written submissions. The appellant contends that the award of KShs.350,000/= as general damages was excessive taking into account the fact that the Doctor who examined the respondent was of the opinion that the injuries would heal with no resultant disability. Counsel for the appellant relied on the case of **SOKORO SAW MILLS LTD. VS GRACE NDUTA NDUNGU. Nakuru HCCC No. 99 of 2003.**

The appellant further contend that the trial court made an error by holding that the motor cycle was hit from behind yet it was a head-on-collision. The motor cycle was heading to Mumias town while the 1st appellant was heading to Mumias Sugar Company and the accident occurred on the left side of the road. The apportionment of liability at 80:20 in favour of the respondent was therefore wrong. The 1st appellant was not charged with any offence.

The respondent maintains that his apportionment of liability was fair. The 1st appellant was overtaking and in the process hit the respondent. On quantum, the respondent's counsel submitted that the authority relied upon by the appellants is irrelevant and gives injuries which cannot be compared to those suffered by the respondent.

The record of the trial court shows that two witnesses testified for the respondent and one for the appellants. The respondent's evidence was that on the 16.12.2009 he was riding a motor cycle when he was hit by a motor vehicle that was overtaking him. He had a female passenger. There were bumps along the road and the vehicle pulled behind a matatu. The road is straight where the accident occurred. He had a helmet and a reflector. He sustained injuries and was taken to St. Mary's hospital where he was admitted. He denied that there was another motorcycle on the road.

PW2 PETER NDERITU was a police officer based at Mumias police station. His rank was not given. He testified that he did not investigate the case. He stated that the case was still under investigation by the time he was testifying, almost one year later. According to PW2's evidence, the motor vehicle registration number KAS 399 M Pajero was overtaking another vehicle and it hit the motor cycle injuring the respondent and the lady passenger. He did not know whom to blame as he did not investigate the case.

The 1st appellant's evidence before the subordinate court was that he was driving the motor vehicle form Mumias Sugar Company Ltd. It was about 7.30 p.m. when he reached Shimche river he saw two motor cycles that were heading towards Mumias Town. There were bumps and a head on collusion occurred with one of the motorbikes. He was on the left lane of the road. He tried to avoid collusion by moving off the road. The motorcycle had two passengers who were injured. He was not charged with a traffic offence and the vehicle was inspected and found to be mechanically sound.

The main issue for determination is whether the trial court's finding on liability and quantum was proper. On the issue of liability, the trial court noted that there were two versions as to how the accident occurred. The trial court accepted the respondent's version as it was convinced that the 1st appellant was overtaking. The evidence on record is very scanty as to how the accident occurred. Although the appellant contends that the point of impact was on the left side of the road, that is not established by the evidence on record. Counsels for both parties did not strive to ensure that the entire evidence as to how the accident occurred was revealed. The respondent testified that the 1st appellant was overtaking. The trial court's record on the 1st appellant's evidence indicates that there were two motorcycles. The motorcycles by-passed the 1st appellant and then an accident occurred. I do find that the trial court was not convinced by the 1st appellant's version of the sequence of events leading to the occurrence of the accident. Although PW2 did not investigate the accident, he had the police file and stated that the Pajero was overtaking another vehicle and in the process hit the motorcycle.

If the court is to go by the 1st appellant's version as to how the accident occurred, the question will be as to whether the respondent's motorcycle was ahead of the other motorcycle or they were running parallel to each other. How comes the other motor cycle was not involved in the accident. How did the other motorcycle avoid being involved in the accident? The trial court was able to see the demeanor of the witnesses and assessed the evidence on record. It opted to believe the respondent and apportioned liability at 80:20 in favour of the respondent. I do find that the trial court's assessment of the manner in which the accident occurred fair and I need not interfere with its findings.

On the issue of quantum, the trial court was guided by the case of **KENNETH MARGARET KIFAFA VS PATRICK WASUA NDUNDA & ANOTHER**. Civil Appeal No. 143/1991. The trial court considered that fact that the authority was 19 years old. Before the trial court, the respondent urged the court to grant an award of **One Million (KShs.1,000,000/=)**. Counsel for the respondent relied on the case of **MARY WANGECHI & ELIJA MWANGI VS KENYA TEA DEVELOPMENT AUTHORITY – Nairobi HCCC No. 2732 of 1998** where **KShs.800,000/=** was awarded in 2001 for posterior dislocation of the left hip joint and laceration wound on the right groin. The appellant urged the court to make an award of **KShs.15,000/=** based on the authority of **MESHACK INGUSI V SYNTHETIC FIBRES (K) LTD. – Nairobi HCC No.469 of 1987**. The plaintiff in that case sustained soft tissue injuries to the chest, right leg and head.

The respondent produced a medical report prepared by Dr. Charles Andai dated 6.04.2010. The injuries are listed as posterior dislocation of the right hip joint. The Doctor opined that the respondent was to recover completely after eight (8) months from April 2010. The record of appeal contains a further

medical report from the Aga Khan hospital Kisumu done on 16th August 2010. The report describes the respondent's injuries as posterior dislocation of the right hip joint. The respondent was admitted at St. Mary's hospital, Mumias from 16th December 2009 to 24th December 2009. According to the medical report, from the Aga Khan hospital, the respondent had tenderness on the right hip area and restriction of movement.

The appellant is relying on the case of **SOKORO SAW MILLS LTD. VS GRACE NDUTA NDUNGU, Nakuru Civil Appeal No. 99 of 2003**. The plaintiff sustained soft tissue injuries to the right hip joint and the back. The doctor in that case opined that the injury had caused the plaintiff a temporary disability of two weeks. The court made an award of KShs.8,000/= but was reduced to KShs.30,000/=.

Although the two medical reports describe the respondent's injuries as of soft tissue nature, the two reports are in agreement that the respondent sustained a dislocation of the right hip. That appears to me to be a more serious injury to be categorized as soft tissue injuries.

Did the trial court apply the wrong principles in determining the amount of quantum? The underlying legal principle is that a superior court will only interfere with awards made by a lower court if it is of the view that the award is inordinately low or that the trial court took into account irrelevant factors in assessing the damages. The judgment of the trial court shows that the magistrate relied on the case of **KENNETH MARGARET KIFABA** herein cited. The judgment in that case was made in 1992 and it involved a fracture of the left hip.

From the record of the trial court, I am satisfied that an award of KShs.350,000/= for posterior dislocation of the right hip in the year 2011 is extremely reasonable. I do not find the award to be excessive. The appellant's authority on quantum before the trial court was not helpful. A sum of KSh.15,000/= as suggested by the appellant was unreasonable. In the Sokoro case, the plaintiff had two weeks temporary disability. In the current case, the plaintiff still experienced mild restricted movement and tenderness of the right hip almost eight months later. I do find the respondent's injuries to be more severe compared to those in the Sokoro case. The trial court fairly evaluated the respondent's injuries and made an award that is fair. I do not see any reason to interfere with the award.

In the end, I do find that the appeal lacks merit and the same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 27th day of February, 2013

SAID J. CHITEMBWE
J U D G E