REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 126 of 2011

BILDAD ONDITI ..... 1ST APPELLANT

PLATINUM CAR HIRE LIMITED ..... 2ND APPELLANT

V E R S U S

BELINDA ATIENO ONYUKA …….…….RESPONDENT

(Appeal against the judgment and decree of [MR. E.K. MAKORI, PM] dated 19th July 2011 in Mumias Senior Resident Magistrate's Court in Civil Case No. 134 of 2010)

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 a passenger on the motor cycle while the vehicle was being driven by the first appellant. The respondent was awarded KShs.750,000/= 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.750,000/= as general damages was excessive. Counsel submitted the award is not commensurate to the injuries suffered. Counsel for the appellant relied on the case **of SAMUEL KINYANJUI THUO V FRANCIS KURIA GATHUKA. Nyeri HCCC No. 180 of 2003** where the appellant suffered concussion, cut on the forehead, left hand, upper lips and loss of some teeth. KShs.250,000/= was awarded as general damages.

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-collusion. 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 the trial court's apportionment of liability was fair. The 1st appellant

was overtaking and in the process hit the motorcycle. Counsel for the respondent is satisfied with the award but is of the view that the appellant ought to have been found 100% liable.

The record of the trial court shows that only one witness testified for the respondent and none for the appellants. The respondent's evidence was that on the 16.12.2009 she was a passenger on a motor cycle when it was hit by a motor vehicle that was overtaking. She became unconsciousness and was taken to St. Mary's hospital where she was admitted for two weeks. She blamed the owner of the vehicle for the accident as the driver was overtaking at high speed.

This appeal is similar to Civil Appeal No. 125 of 2011. In that appeal I did make the following observations.

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. In the appeal number 125 of 2011 I did find that the trial court was correct in holding that the appellant was 80% to blame. These two appeals ought to have been consolidated as the respondent herein was a passenger in the accident motorcycle. I will therefore uphold the finding of the trial court and find that the apportionment of liability was correct.

On the issue of quantum, the trial court was guided by the case of **SILIPER OKOKO & MARGARET AWINO V RADIPO & BEN KABAKA**, **Nairobi HCCC No. 3741 of 1987**, where KShs.700,000/= was awarded.

The plaintiff is this case sustained the following injuries. Loss of four teeth in the upper jaw, fracture of one tooth in the upper jaw, cut wound to the lower lip and chin, laceration wound on the right knee and fracture of the right patella. The authority of Siliper Atieno was produced by the respondent. The appellant had proposed a sum of KShs.130,000/=. The evidence on record shows that the respondent was also treated at the Aga Khan Hospital Kisumu where the above injuries were confirmed. The doctor opined that the respondent sustained permanent loss of four teeth and inability to chew on the left

side. She also could not squat due to the residual effect of the injury of right patella. The above injuries are more serious than those sustained by MARGARET AWINO who was the 2nd plaintiff in the SILIPER OKOKO case. In that case the plaintiff sustained loss of teeth (the number is not given), injury to the

mouth leading to distortion of the mouth and injury to the face. I do find that the authority was relevant to the current case. I do also find that the award was not excessive.

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 **SILIPER OKOKO & MARGARET AWINO** case herein above cited.

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