REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 181 OF 2013

SAMUEL IRUNGU NJUGUNA(Legal representative

of the Estate of **PHILIP THUO-deceased .....APPELLANT**

VERSUS

1.FRANCIS KIBE.....1ST RESPONDENT

2.ANDREW WACHIRA.....2ND RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. R. Omwayi, Resident Magistrate at Nakuru dated on 10th September, 2013 in Nakuru Chief Magistrate's Court Civil Case No. 713 of 2009)

JUDGMENT

1. The appellant being as the Legal representative of the Estate of Philip Thuo (deceased) sued the respondents in the trial court seeking special and general damages arising from a road traffic accident where the deceased was knocked down by motor vehicle Registration No. KAS 611D, the property of the first Respondent and being driven by the second Respondent on the 14th February 2009.

Upon full hearing. the trial court dismissed the suit upon findings that the deceased was the one to blame for the accident.

2. The appeal is against the dismissal of the suit by the trial court. The grounds of appeal as enumerated may be summarised into three on liability, *quantum* of damages and bias by the trial court.

On the matter of bias, the appellant submits that the trial magistrate used to work for the respondents Advocates firm, Kairu & McCourt Advocates at sometime in the past and therefore there was a likelihood of bias and conflict of interest that would have interfered with proper dispensation of Justice. It is urged that she should have disqualified herself from hearing the case.

3. I have looked at the proceedings before the Hon. A. Amwayi, Resident Magistrate. Both parties were ably represented in court by counsel. The appellant did not raise the issue of bias during the proceedings. No application was made to the trial Magistrate for her recusal from hearing of the case. The same firm of Advocates, Njuguna Matiri and Company were on record for the appellant during the trial.

4. It is trite that perceived bias against a Judicial officer ought not cause disqualification of the Judicial officer from presiding over a case unless such bias is personal or based on some extra-judicial reason.

I have considered the sweeping statements in the appellants submissions. No semblance of bias was demonstrated. In any event, if such perceived bias was indeed the cause of the dismissal of the case as it is suggested, it ought to have been raised during the hearing and not at the appeal level.

I therefore find this ground of appeal meritless. It is dismissed.

5. **The appellant's case** before the trial court was that the deceased, then 16 years old was riding a bicycle on the fateful day the 14th February 2009 about 4.30p.m. when he was knocked down by the respondents motor vehicle. PW1, the father of the deceased was not an eye witness and did not testify on how the accident occurred.

PW2, Jackson Chege testified that while travelling in the accident vehicle it was overspeeding and was trying to avoid a pothole when it veered off the road and knocked a pedal cyclist who was standing off the road on a bicycle. He blamed the driver of the motor vehicle for the accident due to overspeeding.

On cross-examination, he stated that he did not record a statement at the police station and that the motor vehicle was damaged on the front left.

6. **The Respondents evidence** was adduced by the second respondent who was the driver of the accident vehicle. He testified that he was driving on the left lane towards Nyahururu at a speed of 60 kilometres per hour when the deceased abruptly drove on to his lane from the opposite direction. He tried to brake to avoid the accident but as he was too close, about 5 metres in front of him was knocked down. He blamed him for the accident.

7. DW2, a police officer from Nakuru traffic base, one Stephen Lengopito attended court and produced the Occurance Book and the accident report. He did not have the police file. It was his evidence that the point of impact could not be ascertained nor could he ascertained whether or not or who may have recorded statements without the police file. He nevertheless told the court that from the investigation report, the deceased was blamed for the accident and an inquest file had been opened, but the results of the inquest were not known to him.

8. I have considered the judgment by the trial court. It is evident that the trial magistrate analysed the evidence as recorded. He made a finding that a 16 year old boy has a good sense of road safety and therefore was not of tender age considering the appellant's testimony that the deceased had rode the bicycle for a long time and had not been involved in any accident before. The trial Magistrate further made a finding that the evidence of PW2 was suspect, as the driver of the vehicle never mentioned there having been potholes on the road that he was trying to avoid when the accident occurred. This was buttressed by silence of the police report on the said potholes on the road.

Although the point of impact was not ascertained, the trial Magistrate proceeded to make a finding that the motor vehicle knocked down the deceased on the left lane, the correct lane of the vehicle and as the deceased was coming from the opposite direction ought to have been on the right lane and therefore was the one to blame for the accident.

9. This finding by the trial Magistrate was without basis as it was not supported by any evidence. It would not have been possible for the magistrate to determine the point of impact without the benefit of a sketch map of the scene taken by the investigating office or without evidence of an eye witness, both missing in this case.

Considering the above narration, it is evident that other than the driver of the accident vehicle, all other witnesses were of no assistance to the court.

The police officer having been not the investigating officer, and without the police file could not help the court to determine which party may have caused the accident save a report that the deceased was to blame.

10. That leaves the second respondents evidence unchallenged. The trial Magistrate discounted the appellants witness (PW2) as doubtful. The police investigation report presented to court indicated that the accident motor vehicle had no visible damage to the front from the impact with the deceased and his bicycle. So that when PW2 testified that he did not know whether the vehicle was damaged then his evidence cannot be taken seriously. I am of the same opinion with the trial Magistrate that this evidence was suspect.

11. I take into account that I did not hear or see the witnesses testify in this case but guided by the record of the proceedings. The appellant failed to call evidence that would have sufficiently proved negligence on the driver of the accident vehicle. Indeed I find no evidence at all in proof of the particulars of negligence as stated in the plaint. To the contrary, the second defendant and driver of the vehicle tendered evidence on the occurrence and that evidence as I have stated above was uncontroverted. He was categorical that the deceased moved into his vehicles path abruptly and he took action to avoid the accident by breaking but in view of the distance of about five meters, he could not.

I find the driver's evidence truthful. He was not expected to do the impossible and the duty of care placed upon him as a driver was discharged as he tried to avert the said accident.

12. **Section 107 and 108 of the Evidence Act** places the burden of proof on the person who alleges.

In the case **M'Mbula Charles Mwalimu -vs- Coast Broadway Co. Ltd (2012) e KLR,** no evidence was tendered on how the accident occurred as the only witness who testified was the Administrator of the deceased's estate. The court found that no negligence was established against the defendants and dismissed the case. It is trite that the mere fact that a motor vehicle is involved in an accident with a pedestrian does not in itself *ipso facto,* mean that the driver is automatically to blame. It is probable that the pedestrian is himself to blame and equally probable that each of them contributed to the accident. That observation was made in the case **Leonard Mwashumbe Shinga & Another -vs- Auto Selection (K) Ltd (2009) e KLR.**

In **Kirima Muthuku -vs- Kenya Cargo handling Services Ltd (1991) 2 KAR 258,** the court held that:

> ***"It was for the appellant to prove, of course on a balance of probability one of the forms of negligence as was alleged in the plaint. That on law has not yet reached the stage of liability without fault.----"***

In the present appeal, it is evident that the appellant failed to prove any form of negligence against the respondents. The trial Magistrate rightfully dismissed the suit for lack of sufficient evidence, a position I too take. The appeal on the matter of liability fails.

13. The appellant was not satisfied with the awards in general damages granted by the trial court had the suit been successful.

This court having found that the appeal on liability was without merit, it would not be of any value go to into the interrogation of the damages awarded as doing so would be an academic exercise.

For the foregoing reasons, the appeal is dismissed with costs to the respondents.

Dated, signed and delivered in open court this 22nd day of September 2016

JANET MULWA

JUDGE