REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 85 OF 2014

AMOS MUCHIRI NDUNG'U.....APPELLANT

VERSUS

CHINGA TEA FACTORY.....1ST RESPONDENT

DAVID MUTHUMBI MATHENGE.....2 RESPONDENT

(An appeal from the Judgment and Decree of the Hon. H. Nyakweba, P.M. delivered on 3.10.2014 in Nyeri C.M.C.C. No. 23 of 2013-test case)

JUDGMENT

The appellant herein sued the Respondents in PMCC No. **11** of 2013 seeking damages for personal injuries sustained in a road traffic accident on 3rd December 20012 along Othaya-Chinga Road. The appellant was a lawful pedestrian at the material time along the said road when the second respondent herein is alleged to have negligently caused the accident while driving the motor vehicle registration number KBR 092 P. The first Respondent was sued vicariously.

Three other suits arose from the same accident, being PMCC No. 8 of 2013, PMCC No. 10 of 2013 seeking damages arising for personal injuries and PMCC No 23 of 2013 which was a fatal accident claim. Initially, the first three cases proceeded separately and the plaintiff in this case gave evidence in his suit, but subsequently, PMCC No. 23 of 2013 was selected as a test suit and its findings **on liability** was to bind the other suits. I have underlined liability because in my understanding, the only finding that was to bind the other suits is only the question whether or not the Respondents were liable for the accident. In other words, as far as liability is concerned, the only thing the claimants were required to do was to wait for the court to hear the test case and determine whether or not the Respondents were liable for the accident and the outcome would then bind the other suits. After the issue of liability was determined, the outcome would be recorded in the other files and then if the Respondents were found to be liable in the test case, the other suits would proceed individually to resolve the other issue, that is quantum of damages.

The learned Magistrate heard the test case and found that the Respondents were liable in the test case but proceeded to find that the appellant herein never gave evidence in the test case so he had no material upon which he could find in his favour and consequently the magistrate held that the appellant had not proved liability. This to me, was a wrong interpretation of the law. The plaintiffs in the other suits were not required to participate in the test case. Instead, they were to await its outcome on liability whether or not on the basis of the evidence adduced in the test case, the Respondents were liable.

A test case is a suit brought specifically for the establishment of an important legal right or principle. It can also be a term that describes a case that tests the validity of a particular

law.Test cases are useful because they establishlegal rights or principles and thereby serve as precedent fo r future similar cases. Test cases save the judicial system time and expenses of conducting proceedings for each and every case that involves the same issue or issues.

In my view, the learned magistrate was to determine liability in the test case on the basis evidence adduced in the said case because admittedly the accident arose from the same accident, same facts, same evidence and same witnesses were to be used to determine liability and in was not necessary for the plaintiffs in all the suits to testify to determine liability. For this reason I find that liability having been established in favour of the plaintiff in the test case, the same applied and was binding in the other suits. It was not necessary for each and every plaintiff to testify in the test case.

The other crucial point to highlight is that the four suits were not consolidated. The record does not that show an order consolidating the suits. Thus, the suits remained separate suits and all that was required was once the issue of liability was determined in the test suit, the same would be formally recorded in the appellants suit in the lower court and then the suit would proceed for assessment of damages. It was wrong for the learned magistrate to give a final judgement dismissing the appellants claim. Even if the court found the Respondents were not to blame in the test case, still, the proper course of action to follow was to enter the order in the other suits individually because they remained separate files.

Counsel for the Respondents have not filed submissions in this appeal but the appellants counsel filed their written submissions. As indicated above, the appellant herein did not testify in the lower court and I maintain that it was not necessary to testify since the issue of liability was to be determined on the basis of evidence tendered in the test case.

The lower record shows that on 25th July 2013 hearing commenced and the appellant herein **Amos Muchiri Ndungu** gave evidence and was cross-examined **but** on 16th January 2014 the trial magistrate stated that he handled the traffic case which arose from the accident, the subject of the civil suit and directed that the matter be handled by another court. The relevant record is contained in PMCC No 8 of 2013, but as for PMCC No. 11 of 2013, the court recorded that the said orders made in PMCC no. 8 of 2013 do apply.

On 19th May 2014, the matter came up for hearing before Hon. Nyakweba who directed that the hearing starts *de novo.* On the same day the parties agreed that PMCC No. 23 of 2013 which was a fatal accident claim would be a test case on the issue of liability whose findings would bind the other suits among them the appellants suit being PMCC No. **8** 0f 2013. Counsel for the appellant submits that since the appellant herein had testified initially, it was not necessary to testify again. I do not agree. I propose to set the record straight on this point. The correct legal position can be established by examining the meaning and effect of trial *de novo*.

Trial *De novo* refers to a new trial on the entire case conducted as if there had been no trial in the first instance. *De novo* is a Latin expression meaning *"anew," "from the beginning," "afresh." De novo* is a Latin phrase for *"anew"* which means starting over.[1] *The Black's Law Dictionary**[2]*** defines a *de novo* trial thus:-

> *"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the instance."*

The dictum of Ibrahim Tanko Muhammed, J.S.C in the Nigerian case of *Babatunde v Pan Atlantic Shipping and Transport Service**[3]*** is also apposite and is quoted verbatim thus:-

> *"The Latin maxim "De Novo" connotes a "New" "fresh" a "beginning" a "start" etc. In the words of the authors of Black Law dictionary, De novo trial or hearing means trying a matter anew, the same as if it had not been heard before and as if no decision had been previously rendered … new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. On hearing "de novo" court hears matter as court of original and not appellate jurisdiction… that a*

trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter or rather, in a more general sense the parties are at liberty, once more to reframe their cases and restructure it as each may deem it appropriate."

From the above definition, for a matter to be tried *de novo* would mean considering the matter *anew*, as if it had never been heard. The foregoing makes it clear that a *de novo* trial should examine the evidence before it afresh. Obviously since a retrial has been ordered and the case is to be heard *de novo*, the plaintiff must reprove his case as if there has been no earlier trial.

It is crystal clear from the above authorities that the plaintiff must prove his/her case afresh though previous evidence in an abortive trial is admissible as long as the ends of justice are met. For example, if the appellant had given evidence in the retrial, and seeks court permission to rely on the documents or exhibits produced earlier or if a witness died after testifying, for the interests of justice the court may allow a party to rely on the evidence.

There is nothing one can add to the above explanation. It is very clear that a *de novo* trial must be started from the beginning as if a trial had never taken place and the matter decided on its merits. It is also clear that the expression *"new trial" trial de novo, 'retrial', 'fresh hearing', 'trial a second time* all have the same meaning. Thus, it is my considered opinion that the appellant cannot rely on the earlier evidence but he must adduce fresh evidence and since the issue of liability was resolved in the test case, the only issue the appellant will have to adduce evidence on is the issue of assessment of quantum of damages.

I have noted a serious flaw in these proceedings. As mentioned at the beginning, these were four separate suits, but the Magistrate ordered that PMCC No 23 of 2013 be selected as the test suit on the issue of liability which would bind the other cases including this one. The four cases were never consolidated, they remained separate files and three separate appeals among them this one were filed. To my mind, since they were separate files, the proper procedure was for the determination on liability to be recorded in the individual files and then depending on the outcome on liability, the cases could proceed for assessment of damages and or final determination.

But, ironically, the learned magistrate rendered a judgment that determined all the four suits, thus, he dismissed the appellants case without hearing the appellant. To me that was improper because the files were separate suits and technically there is no judgment in PMCC No 11 of 2013, the subject of this appeal. The only part of the judgment that is relevant to this suit is the issue of liability.

I therefore find that the learned magistrate erred in pronouncing orders that had the effect of determining the appellants case without hearing them. I reiterate that the courts mandate was restricted to resolving the issue of liability in the test case and it was not proper for the learned magistrate to hold that the plaintiff in the test case established liability, and find that the plaintiffs in the other suits had not established liability, yet they were not expected to participate in the test case, and above all the suits arose from the same tort, so it beats logic to hold that the Respondents are only liable to some of the claimants.

The upshot is that this appeal is allowed and the learned magistrates orders are hereby set aside and or varied as here under:-

a. **That** judgement on liability be and is hereby entered in favour of the appellant against the Respondents jointly and severally on 100 % basis in PMCC No.**11** of **2013**.

b. **That** PMCC No.**11** of **2013,** be and is hereby remitted back the Principal Magistrates Court, Othaya, for assessment of general and special damages.

c. **That** no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at **Nyeri** this **19th** day of **July** 2016

John M. Mativo

Judge

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[1] www. Dictionarylaw.com

[2] {2004} Eight Edition

[3] Sc. 154/2002 (2007) 13 NWLR (pt 1050)