



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 86 OF 2014**

**CATHERINE WANJIKU KAGUA.....APPELLANT**

**VERSUS**

**CHINGA TEA FACTORY.....1<sup>ST</sup> RESPONDENT**

**DAVID MUTHUMBI MATHENGE.....2 RESPONDENT**

*(An appeal from the Judgment and Decree of the Hon. H. Nyakweba, P.M. delivered on 3.12.2014 in Nyeri in test suit no. PMCC No. 23 of 2013)*

**JUDGMENT**

The appellant herein sued the Respondents in PMCC No. 8 of 2013 seeking recovery of general and special damages arising from personal injuries sustained in a road traffic accident on 3<sup>rd</sup> December 20012 along Othaya-Chinga Road. The appellant was a lawful pillion passenger on motor cycle KMCB 028 F 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. 11 of 2014, PMCC No. 10 of 2014 both of which were for recovery of damages for personal injuries and PMCC No 23 of 2014 which was a fatal accident claim. Initially, the first three cases proceeded separately and the plaintiffs gave evidence in their respective suits, but subsequently, PMCC No. 23 of 2013 was selected as a test suit and its findings **on liability** were to bind the other suits stated above.

I have underlined liability because to 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, only the finding on liability was to bind the other suits. Thus, 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 on the basis of the evidence tendered in the test suit, the other suits would proceed individually to resolve the other issue, mainly quantum of damages.

The learned Magistrate heard the test case and found that the Respondents were liable for the accident and entered judgement on liability against the Respondent in the test case. Interestingly, the key evidence that the learned magistrate relied on to arrive at the conclusion that liability had been proved was offered by non other that the appellant in this case. However, the magistrate proceeded to find that the appellant herein though she gave evidence, she did not establish that she sustained injuries. This to me, was a

totally wrong. The case before the magistrate was a "test" case on the issue of liability and it was not open for the magistrate to proceed to establish whether or not the appellant had sustained injuries. The issue of quantum of damages or whether or not the appellant was injured in the said accident was to be determined in the appellants case in the lower court and not in the test case.

This is because the question of assessment of damages was an issue that was to be tried in the appellants suit. The only issue before the magistrate in so far as it applied to the other suits was the question of liability. Thus, the claimants in the other suits among them the appellant herein were to await the outcome on liability whether or not on the basis of the evidence adduced in the test case, whether the Respondents were liable and the proceed to conclude their cases in the respective files.

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 establish legal rights or principles and thereby serve as precedent for 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 cases arose from the same accident, same facts, same evidence and same witnesses were to be used to determine liability and it was not necessary for the appellant herein to prove that she was injured because the test case had nothing to do with quantum of damages. The appellant was called as a witness in the test case to help the court resolve the issue of liability and since that was not her case, the issue of prove of injuries and assessment of damages was an issue that was to be determined in her suit after liability was resolved.

Also it is important to note that the cases had not been consolidated and for the learned magistrate to purport to write a final judgment that would determine final rights in a separate suit on issues that were not before him was totally wrong. 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 appellants suit. All that remained was for the aforesaid finding to be recorded in the appellants suit in the lower court and then the case was required to proceed for the court to determine quantum of damages.

I reiterate that the four suits were not consolidated. 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 this suit and then the suit would proceed for the appellant to prove the question of damages. It was wrong for the learned magistrate to give a final judgment 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. The lower record shows that the appellant herein gave evidence and was cross-examined but subsequently 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 magistrate who took over directed that the trial begins afresh.

Counsel for the appellant submits that since the appellant herein had testified initially, it was not necessary to testify again. I do not agree. 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.<sup>[1]</sup> *The Black Law Dictionary*<sup>[2]</sup> 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*<sup>[3]</sup> 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.

There is nothing one can add to the above explanation. The fact 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 is on 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 determination of quantum of damages.

But, ironically, the learned magistrate rendered a final judgment on all the four files and in the process dismissed the appellants case. To me that was improper because the files were separate suits and technically there is no judgment in PMCC No 8 of 2013, the subject of this appeal. The only part of the judgment that is relevant to this suit is the issue of liability which was not recorded in the said suit.

I therefore find that the learned magistrate erred in pronouncing orders that had the effect of determining the appellants case yet the test case was to determine only one issue. 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 all the suits arose from the same tort.

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. 8 of 2013.
- b. **That** PMCC No. 8 of 2013, be and is hereby remitted back to 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 **19<sup>th</sup>** day of **July** 2016

**John M. Mativo**

**Judge**

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[1] [www. Dictionarylaw.com](http://www.Dictionarylaw.com)

[2] {2004} Eight Edition

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