



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

**AT NYERI**

**CIVIL APPEAL NO. 87 OF 2014**

**MICHAEL GITAH NENE.....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 3.10.2014 in Nyeri C.M.C.C. No. 23 of 2013-test case)*

**JUDGMENT**

The appellant herein sued the Respondents in PMCC No. 10 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 2012 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. 8 of 2013, PMCC No. 11 of 2013 seeking damages arising for personal injuries and PMCC No 23 of 2013 which was a fatal accident claim. Appellants counsel submits that initially, the 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** was to bind the other suits. However, I have carefully perused the record in respect of PMCC No. 11 of 2013, and it shows clearly that the appellant never gave evidence so his case had not commenced by the time the test suit was selected.

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 never gave evidence in the test case so he had no material upon which he could find in his favour and he consequently resolved that he had not proved liability. This to me, was a wrong interpretation of the law. The plaintiffs in the other suits including the appellant herein 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 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 of 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 it 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 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 test suit 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.

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 final judgment on all the four files and in the process 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 10 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 this suit.

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.10 of 2013.
- b. **That** PMCC No.10 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 19<sup>th</sup> day of July 2016

**John M. Mativo**

**Judge**