**Omar v Gordhanbhai and another**

[1974] 1 EA 518 (HCK)

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 13 November 1974

**Case Number:** 1820/1972 (13/75)

**Before:** Harris J

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*[1] Civil Practice and Procedure – Interrogatories – Principles on which allowed.*

**Judgment**

**Harris J:** This is a summons for directions taken out by the plaintiff under Order 51 of the Civil

Procedure Rules. In the suit the plaintiff claims special and general damages in respect of injuries and losses alleged to have been suffered by him when on 14 March 1971, a motor vehicle, the property of the first defendant and in which the plaintiff was travelling as a passenger, overturned while being driven by the second defendant. The defendants are jointly sued in their capacity as partners at the date of the accrual of the cause of action in a firm known as Mercantile Printers and the second defendant is sued also in his private capacity. The defence of each defendant is a traverse and a denial of liability. The principal matter for consideration is an application for leave to deliver certain interrogatories to the two defendants to be answered by whichever of them is the proper person with knowledge of the facts. As originally framed, the interrogatories were thirty-three in number, but the first thirteen have since been sufficiently answered by admissions of facts made by the defendants in response to a notice for that purpose and the application for leave to deliver interrogatories now relates only to numbers 14 to 33. These are as follows: 14. D id the said Peugeot overturn on the road on the said 14th March, 1971 before it got to Kathini, on the way to Nairobi from Kitui?

15. W as there any rain at the time of the said overturning?

16. W as the road surface slippery or wet, at the time of the said overturning?

17. W as the road surface in a fair condition at the time of the said overturning?

18. W as the road straight?

19. W as the day clear and bright?

20. W as visibility good?

21. W as there obstruction in the road at the time of the said overturning?

22. W as there any sudden braking at or before the said overturning? If so, for what cause?

23. W as Nathalal Gandabhai Patel not negligent in overturning the said car on the said day?

i . Did he not fail to properly control and manage the said vehicle?

ii. Did he not fail to exercise due care and skill in the management of the said vehicle?

i ii. Did he not fail to so manoeuvre the said vehicle as to avoid its overturning?

i v. Do not the said overturning and the circumstances in which it happened speak for themselves

and afford evidence of negligence?

24. D id not as a result of the accident on the said day the plaintiff suffer the following injuries?

*a* . S evere injuries to the right side of the chest; fracture of the 6th, 7th, 8th and 9th ribs on the

right side;

*b* . Extensive bruising and surgical emphysema;

*c* . A small pneumothorax;

*d .* Buising at the right elbow;

*e* . Inability to pass urine.

25. Did not as a result of the said accident the plaintiff suffer the following special damage and expenses?

1 . Government ambulance and hospital fee 20.00

2 . Hire of car Kitui-Nairobi and Nairobi Kitui on 15.4.71 330.00

3 . Loss of earnings during 10 days in hospital (14.3.71 at Thika;

15.3.71 to 24.3.71 at Kenyatta Hospital and for 3 months

thereafter for which the plaintiff was partially disabled and

suffered considerable pain in the chest)

10,000.00

10,350.00

26. W as not the plaintiff at material dates a trader at Kitui?

27. W as not the plaintiff as a result of the said accident hospitalised for 10 days in hospital (14.3.71 at

Thika; 15.3.71 to 24.3.71 at Kenyatta Hospital, Nairobi)?

28. W as not for a further 3 months after 24.3.71 the plaintiff partially disabled and suffered considerable

pain in the chest?

29. W as not the plaintiff unable to attend to his business for 100 days?

30. D id not the plaintiff lose earnings during the said period at the rate of Shs. 100/- per day?

31. D o you accept Shs. 330/- as correct and a reasonable charge for the aforesaid car hire, as per the

photostat copy of the cash sale voucher marked OS3 attached to the Notice to Admit facts?

32. D o you accept as correct the photostat copies of the two reports by J. R. M. Miller, F.R.C.S., Surgical

Specialist, at the Kenyatta Hospital, Nairobi and by I. H. Dawood, Medical Officer, Kitui District

Hospital attached and marked OS4 and OS5 respectively to the Notice to Admit fact and do you agree

it would be unnecessary to call the makers thereof. If not why not, and have you any independent

reports upon his condition?

33. D id you duly receive the original of the attached copy of letter marked OS6 to the Notice to Admit

Facts before action and was it duly received by the defendants?

Mr. Malik-Noor for the defendants, submits that none of these interrogatories should be allowed. In resisting the application he relies upon a number of passages in the *Supreme Court Practice* (“the White Book”) 1967 setting out at pp. 379, 380 and 384 certain principles governing the granting of orders for interrogatories under the English O. 26, r. 1 (3). Mr. Khanna, for the plaintiff, takes his stand upon certain other passages in the same volume as justifying the allowance of all the interrogatories asked for. The passages relied upon by Mr. Malik-Noor and by Mr. Khanna respectively are to some extent difficult to reconcile. The statutory position in this country regarding the right to apply for leave to deliver interrogatories is to be found in O. 10 of the Civil Procedure Rules in which the following precepts are set out: (*a*) Interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant notwithstanding that they might be admissible on the oral cross-examination of a witness: second proviso to r. 1; (*b*) leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs: r. 2; (*c*) objection may be taken to answering interrogatories which are scandalous or irrelevant, not required bona fide for the suit, or not sufficiently material. I have not been referred to any decision of the courts in this country dealing with the matter, but in the Tanzanian case of *Aggarwal v. Official Receiver,* [1967] E.A. 585, Duffus, J.A., sitting in the Court of Appeal and dealing with the position in Tanganyika under civil procedure rules similar to our own, said at p. 588 that the general principle followed is to allow such interrogatories as may be necessary either for disposing fairly or more expeditiously of the case or for the purpose of saving costs. The general position regarding interrogatories under the rules of the Supreme Court in England is similar in effect to that obtaining in Kenya and is set out succinctly in Halsbury’s Laws of England Vol. 12, 3rd Edn. at p. 64 in these words: “The party interrogating may put questions for the purpose of extracting from his opponent information as to the facts material to the questions between them which he has to prove on any issue raised between them, or for the purpose of securing admissions as to those facts in order that expense and delay may be saved, or to find out whether particular statements of fact contained in the pleadings of the party interrogating as to which the onus of proof is upon him are true or untrue, or to ascertain what case he has to meet or what really is in issue, so as to prevent his being taken by surprise at the trial, or to destroy his opponent’s case, or to support his own case. In accordance with the general rules as to discovery, interrogatories may not extend to the evidence wherewith the opposite party intends to support his case at the trial, or to the contents of his opponent’s brief, or to the names of his witnesses (unless their names are in themselves relevant facts), or to the facts which merely support the case of the party interrogated; and the mere fact that the questions would be admissible in cross-examination of a witness does not make them good as interrogatories Thus, interrogatories to credit only will not be allowed.” I have considered in the light of these principles and of the pleadings the interrogatories numbers 14 to 33 here sought and I will allow numbers 14 to 22 and 31. They are to be answered within 30 days. A compromise has been reached in regard to number 32 inasmuch as both counsel agree that all medical reports will go in by consent without formal proof and that the makers thereof will be subpoenad in the usual way and will be available for cross-examination. The remaining interrogatories now sought are disallowed. A question has arisen in regard to interrogatories number 1 to 13. These were originally comprised in a notice to admit facts which was filed and served on 17 April 1974 on Messrs Sikand and Co. who were then the advocates for the defendants and were answered out of time by a letter dated 23 July 1974 by Mr. Malik-Noor, the defendants’ present advocate. In the meantime the plaintiff’s advocates, on 3 June, filed the present summons for directions in which they seek leave to serve on the defendants all 33 interrogatories and it is clear that the inclusion of the first 13 interrogatories would not have been necessary had the notice to admit facts been attended to within the 21 days allowed by O 12. r. 4. The plaintiff now seeks an order for the costs of these thirteen interrogatories and in my opinion he is entitled in any event to such amount of costs therefore as the taxing officer may consider proper in respect of their original inclusion with the remaining interrogatories bearing in mind that they are in terms a repetition of the relevant portion of the notice to admit facts.

*Order accordingly*.

For the plaintiff:

*DN Khanna* (instructed by *Khanna & Co*, Nairobi)

For the defendant:

*SA Malik-Noor*