



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.20 OF 2020

BETWEEN

NDHIWA VILLAGE RESORT LIMITED.....APPELLANT

AND

JOO [Suing as the administrator of the estate of PGO].....RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's

SRMCC No. 2 of 2019 by Hon. Mary A. Ochieng –Senior Resident Magistrate).

JUDGMENT

1. Ndhiwa Village Resort Limited, the appellant herein was the defendant in Ndhiwa Senior Resident Magistrate's SRMCC No. 2 of 2019. The claim against the appellant was for damages following the death of the deceased in the appellant's swimming pool where he had gone for swimming. The learned trial magistrate delivered judgment dated 4th June, 2020 in favour of the respondent.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Otieno Okeyo & Company Advocates. The appellant raised the following grounds of appeal:

- a) That the honorable magistrate erred in law and in fact in holding and finding the appellant 80% liable despite the overwhelming evidence surrounding the circumstances of the incident.
- b) That the honourable magistrate erred in law and in fact in finding the appellant 80% liable by dismissing the crucial evidence tendered by the appellant's witness and upholding that of the respondent which was full of contradictions and out rightly thereby reaching a wrong decision.
- c) That the honourable magistrate erred in law and in fact in finding the appellant 80% (eighty percent) liable by failing to apply the law pertaining to excluded liability given the clear exculpatory evidence tendered by the appellant.
- d) That the honourable magistrate erred in law and in fact in finding the appellant 80%(eighty percent) liable when in fact, pursuant to the evidence tendered clearly put all the blame on the brothers of the deceased who negligently omitted to be their brother's keepers and also sneaked the deceased into the appellant's premises without notice to the appellant and her consent.
- e) That the honourable magistrate erred in law and in fact in finding the appellant liable to compensate in damages of kshs.1,000,000/- in damages under the Fatal Accident's Act, the same with which amount was not only exorbitant but is neither supported by facts of the case and evidence.
- f) That the honourable magistrate erred in law and in fact in finding the appellant liable to compensate Kshs.110, 000/- for pain and suffering and loss of expectation of life is not supported by evidence adduced and the law.
- g) That the honourable magistrate's finding on special damages is erroneous as the respondents did not specifically prove the same
- h) That the honourable magistrates erred in law and in fact on the assessment of liability and quantum against the weight of evidence adduced, the applicable law and thus occasioned a miscarriage of justice.

3. The appeal was opposed by the respondent and who filed a cross appeal. The respondent was represented by the firm of G.S. Okoth & Company, Advocates. The following grounds of cross appeal were raised:

a) The learned trial magistrate erred in law in attributing contributory negligence to the deceased who the court observed was of a tender age.

b) The learned trial magistrate erred in law in awarding contributory negligence to the deceased due to the failure of his adult companions whereas the latter had paid for the services and the security of the minor thereafter was solely on the hands of the defendant.

c) The learned trial magistrate decided the case of contributory negligence against the weight of evidence in that:-

i) The deceased was of a tender age and since the defendant was charging fees for rendering swimming services within their hotel, on payment of the fees the Hotel owed special duty of care to guarantee the security of paid-up swimmers whether adult or minor by providing professional lifesaver or lifeguard at the pool.

ii) The defendant expressly stated in evidence that there was no lifeguard at the pool although they were charging fees for swimming services which was in total violation of the Public Health Act and even the Common Law was therefore negligent 100%.

iii) The notice to be at the Hotel entrance and not at the pool was said no to have been conspicuously displayed which was contrary to the provisions of the Occupiers Liability Act and was in fact a clear proof of negligence and lack of duty for care to its customers, inclusive of trespassers.

iv) That the court sets aside the order that the respondent was contributory negligent and hold that the defendant was 100% liable in negligence.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. At the time of his death the deceased was 11 years old. He drowned while swimming in the appellant's swimming pool. The appellant had posted a notice that children under 12 years should not be left unattended at the pool. This was not denied. The posted disclaimer does not however take away the statutory duty of care as provided for under Occupiers Liability Act, from the appellant. In **Jumuia Hotel vs. SN & JCO (Suing as the Legal Representatives in the Estate of CAN – Deceased) & another [2021] eKLR** the hotel was found liable in light of the Occupiers Liability Act and liability as apportioned at 50:50 by the trial court upheld. The court stated:

“43. As the duty of care is imposed by statute, I find that once the deceased had visited the hotel, she was entitled to the common duty of care. The evidential burden shifted to the hotel, to prove that it had discharged the obligation to see that the visitor was reasonably safe in using the premises.

44. I find that the Appellant failed to demonstrate that it had discharged its common duty of care to the deceased”.

6. In the instant case, I find the liability at 80:20 in favour of the respondent high. I therefore set aside the same and substitute it with a liability of 50:50. This takes care of the cross appeal on liability. The respondent ought to have ensured that the deceased did not go to the pool unattended.

7. The appellant contended that the award for loss of dependency of Kshs.1, 000,000.00 was very high. I perused the following similar cases:

a) **Jumuia Hotel v SN & JCO (Suing as the Legal Representatives in the Estate of CAN – Deceased) & another [2021] eKLR** the court made an award of Kshs.500, 000.00 was given.

b) **Mt. Kenya Leisure Lodge & another v Nicholas Kogi Njogu (Suing as the Administrator of the Estate of Hellen Njoki Kogi) [2020] eKLR** the court awarded Kshs.500, 000.00.

c) **Jumba Holding Ltd. T/A Baharini Chalets v Nadum Said [2006] eKLR** a global sum of Kshs.100, 000.00 was given.

In the instant case I agree with the appellant that the award for loss of dependency was on the higher side. I set it aside and substitute it with an award of Kshs.600, 000.00

8. The award on pain and suffering is the standard and I will not disturb the same.

9. The legal requirement on special damages is that they ought to be specifically pleaded and strictly proved. The respondent pleaded a total of Kshs. 150,130.00 at the trial court, he proved Kshs. 108,000 .00 and this is what was awarded I will not disturb this award.

10. The upshot of the foregoing is that the appeal succeeds to the extent of apportioning the percentage of liability and on award on loss of dependency. The award will be as follows:

(a) Pain & Suffering.....Kshs. 10,000/=

(b) Loss of Expectation of Life.....Kshs. 100,000/=

(c) Loss of Dependency.....Kshs. 600,000/=

(d) Special Damages.....Kshs. 108,000/=

Sub-Total..... Kshs.818, 000/=

Less contributory negligenceKshs. 409,000/=

Net **Kshs. 409,000/=**

11. Since the appeal has partially succeeded, the appellant will have half costs in the trial court and in this court.

DELIVERED and SIGNED at HOMA BAY this 30th day of March, 2022

KIARIE WAWERU KIARIE

JUDGE