



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 79 OF 2020**

**1. WMT**

**2. LCM (Suing in their own capacity**

**and as administrators of the estate of the late ETM.....APPELLANTS**

**-VERSUS-**

**SAROVA HOTELS LTD T/A**

**SAROVA WHITESANDS BEACH RESORT & SPA.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Mombasa Senior Resident Magistrate Hon. E. Muchoki delivered on 22<sup>nd</sup> May, 2020 on his behalf by Hon. C. N. Ndegwa, Senior Principal Magistrate in Mombasa C.M.C.C No. 1532 of 2018)***

**JUDGMENT**

1. This is an Appeal from on part of the Judgment of the Hon. E. Muchoki, SRM, dated the **22<sup>nd</sup> May, 2020**. To bring the context closer home a brief back ground of this case will suffice. The genesis of the Appeal is **Mombasa CMCC No.1532 of 2018** which was instituted by way of **Plaint** dated **23<sup>rd</sup> July, 2018** by the Appellants herein.

2. In their **Plaint**, the Appellants pleaded that they had taken their children, including the deceased who was then aged **9 years old**, to the Defendant's premises located along Mombasa-Malindi Road to attend a birthday party. It was averred that the Defendant's management then allowed the Deceased to swim in a pool within the Defendant's premises but owing to the negligence or poor supervision of the Defendant's employees and/or employees, the Deceased drowned and was rushed to A.A.R Hospital in Nyali, after he was evacuated from the swimming pool. Unfortunately, he (the deceased) passed away at the hospital while undergoing resuscitation.

3. The particulars of negligence attributed to the Defendant were articulated at **paragraph 8** of the **Plaint**, and the Plaintiff claimed the doctrine of *res ipsa loquitur*. All in all, the pertinent part to note for purposes of this Appeal is the claim on special damages wherein the Appellants claimed upto a tune of Kshs.1,039,050/=. That claim was broken down as follows;

***a) Autopsy.....Kshs.36,000.00***

***b) Coffin.....Kshs.35,000.00***

***c) Application for grant.....Kshs.50,000.00***

***d) Transport & funeral expenses.....Kshs.520,000.00***

***e) Jocham Hospital.....Kshs.300,000.00***

***f) Burial Permit.....Kshs.50,000.00***

***g) Grave preparation.....Kshs.98,000.00***

***h) Food.....Kshs.300,000.00***

**Total** **Kshs.1,389,000.00**

4. The Respondent was the Defendant in the lower court case and he denied the claims by the Appellants/Plaintiffs. He averred that the death of the deceased was wholly or substantially contributed to by his own negligence.

5. After the hearing where the Plaintiff/Appellants gave evidence and the Respondent failed to call any witness, the Trial Magistrate in his Judgment and after rightly pointing out that the parties had recorded a consent on liability in the ratio of **10:90** in favour of the Appellants, awarded damages as follows:-

*a) Damages for Lost years.....Kshs.1,500,000.00*

*b) Pain and suffering .....Kshs.200,000.00*

*c) Loss and expectation for life.....Kshs.200,000.00*

But on **special damages**, the learned Trial Magistrate in awarding the same, had this to say;

*“the court will proceed to make an award of the following sum as special damages. A sum of Kshs.25,000/= will be awarded as the fee of obtaining limited grant of letters of administration. A sum of Kshs.35,000/= would be awarded as the costs of buying coffin. A sum of Kshs.36,000/= would be awarded as the pathologist fees of conducting the postmortem. A sum of Kshs.300,000/= would be awarded as medical expenses fees at Jocham Hospital.”*

6. Also, the learned Trial Magistrate went on to state as follows and I quote:-

*“the Plaintiffs have sought special damages for Transport and other expenses but have only availed to the court invoices for the services without any proof of payment. The court will only award special damages for the above amounts which have been proved by presentation of receipts”.*

7. It is this part of the Judgment that the Plaintiffs/Appellants were aggrieved about and proceeded to lodge their Memorandum of Appeal on **22<sup>nd</sup> June, 2020** which was later amended on **22<sup>nd</sup> September, 2020** raising two grounds, namely:

*a) That the learned trial magistrate erred in law and in fact and disregarded judicial precedent and doctrine of stare decisis in failing to make an award for damages for funeral and burial expenses being Kshs.98,000/= for digging and preparation of the grave and Kshs.300,000/= for food.*

*b) That the learned trial magistrate erred in law in holding that the invoices which had been deposited of payment for funeral, tents and chairs and transport expenses amounting to Kshs.520,000/= did not prove the special damages claim strictly.*

8. They urged that their appeal be allowed, the trial court’s Judgment dismissing the claims for Kshs.520,000/= for transport and funeral expenses, Kshs.98,000/= for digging and preparation of grave and Kshs.300,000/= for food be set aside and in its place this court makes an award on those claims together with costs of the Appeal.

9. When this Appeal came up for directions on **2<sup>nd</sup> November, 2020**, directions were issued that the same be canvassed by way of written submission which were dutifully filed by the counsel on record for the parties. The Appellants submissions were filed on **25<sup>th</sup> September, 2020** while those for the Respondent were filed on **30<sup>th</sup> November, 2020**. Those submissions were later highlighted on **16<sup>th</sup> March, 2021** with the learned Counsel, **Mr. Jengo** appearing for the Appellants whilst **M/S Nasimiyu**, appeared for the Respondent.

#### **Appellants Submissions**

10. **Mr. Jengo**, counsel for the Appellants opened his submissions by stating that the Appeal only challenges the refusal by the trial court to award part of the special damages claimed. In his view, the Trial Magistrate failed to appreciate that the standard of proof on special damages is that of preponderance of evidence and not as high as in criminal cases.

11. It was the counsel’s submissions that production of receipts is not the draw line of proof in Civil cases, that the burden of prove can properly be discharged if for example the invoices produced are corroborated with other evidence. In a case like the one at hand where the Respondent failed to adduce any evidence, then the court should interpret the evidence produced by the Appellants in their favour in so far as the special damages were pleaded. He relied on the case of **Great Lakes Transport Company (U) Ltd –vs- Kenya Revenue Authority (2009)eKLR** to canvas the argument that an invoice that had been endorsed by inclusion of the word **“Paid”** would turn its status to a receipt.

12. In comparing that case to the instant case, **Mr. Jengo** submitted that had the trial court considered the invoices presented before it, then it could not be hard to see that they were endorsed by indicating the word **“deposit”** as proof that the money was paid. It is that ground that **Mr. Jengo** sought the court to award the amount claimed. I have also read through all the other authorities cited by **Mr. Jengo**.

#### **Respondent’s Submissions**

13. The Respondent on her part pointed out the issue for determination as whether the Appellant’s were entitled to special damages which

they now seek. It is argued that special damages should not only be specifically pleaded but also specifically proven. In this case, it was argued that the funeral expenses claimed were extensively high and the Plaintiff had to give a break down on how the money was specifically used.

14. It was further argued that the 1<sup>st</sup> Appellant in cross-examination had acceded that there were no receipts that would support the claim for digging and preparation of funeral as well as the claim for expenses on food. The court was also invited to consider the case of **Premier Diary Ltd -vs- Amarjit Singh Sagoo & Another [2013]eKLR** where the trial court adopted a practical and pragmatic approach in a claim for sum of Kshs.400,000/= and awarded a sum of Kshs.150,000/=.

15. In a nutshell the submissions by the Respondent canvas the argument that the expenditures by the Plaintiffs for the burial were too remote and unwarranted and without clear break down clear break down on how the money was expended the same cannot be award.

### **Analysis and Determination**

16. I have considered this appeal, submissions by parties and the authorities they have relied on. I have also perused the trial court's record and the impugned Judgment.

17. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. (In this regard, see the decisions in the cases of **Jabane -vs- Olenja [1986] KLR 661, Selle -vs- Associated Motor Boat Company Limited [1968]EA 123** and **Peters -vs- Sunday Post [1958] E.A. 424**). The duty of this Court is therefore to examine and re-evaluate the evidence that was adduced, and findings of the trial Court, so as to reach its own independent conclusion as to whether or not the findings of the trial Court should stand.

18. The parties recorded consent on liability before the trial court in the ratio of 10% as against the Appellants and 90% against the Respondent. The trial court was left to determine the issue of quantum and parties led evidence on that. However, from the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are only contesting the failure by the lower court to award part of the special damages claimed on basis that the claim was not supported by production of receipts but by invoices which were not convincing to the court.

19. As has been reiterated by the court, the principles upon which this court can interfere with an award made by the trial court are that this Court ought to first, be satisfied that either the trial court, in assessing the damage took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. However, this being an appeal on special damages claim, the Appellants ought not to have only pleaded the same but also specifically proven the amounts claimed.

20. Under **paragraph 12** of the **Plaint** filed before the lower court, the Appellants had claimed for Kshs.520,000/= as expenses for transport & funeral, Kshs.98,000/= as claim for grave preparation and Kshs.300,000/= as expenses incurred on food. During the hearing the 1<sup>st</sup> Plaintiff/Appellant produced as **exhibit "4(d)"** an invoice for Kshs.520,000/= paid for transport purposes. On cross examination, he conceded that there were no receipts to buttress that they had incurred Kshs.98,000/= and Kshs.300,000/= for grave preparation and food respectively.

21. I have subjected the above evidence tendered before the trial court to re-evaluation and come up to a conclusion that the claim for food and burial preparation was not supported by any evidence. The Plaintiff could not show how the monies under those claims were expended beyond a mere assertion that they incurred expenses to a tune of Kshs.98,000/= and Kshs.300,000/= for grave preparation and food respectively. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. There was not credible documentary evidence in support of the alleged special damages under the heads for grave preparation and the food.

22. The Plaintiff ought to understand that in bringing an action for damages, it is for them to prove the same and that it is not enough to state that the amount spent was this or that without anything to back those assertions. In such a case, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims. It was upon the Plaintiffs/Appellants to prove their case on a balance of probability and the fact that the Defendant did not adduce any evidence is immaterial.

23. As regards the claim for Kshs.520,000/= as the expenses incurred for the transport, I have considered the **Invoice Note** at **page 20** of the **Record of Appeal**. It shows that most of the expenses were incurred for transportation of chairs and tents to Kaloleni and Utange for seven days. However, even without going to the extent of considering if the invoices would be endorsed as receipts, it is my view that funeral expenses should be reasonable and limited to the funeral ceremony but not other engagements that the family members opt to conduct.

24. The invoices show that those tents and chairs were delivered to Utange and Kaloleni on various dates and it is more likely than not that the burial was conducted in a particular place but not both Utange and Kaloleni. The Plaintiffs ought to have adduced evidence to show that the Chairs and tents delivered for seven days were purposely for the burial ceremony rather than leaving that issue for mere speculation.

25. Be that as it may, I take judicial notice of the fact that the Appellants together with their relatives must have expended money to bury their deceased child and should reasonably be compensated notwithstanding the general rule that special damages should be specifically proved besides being specifically pleaded.

26. It is therefore my view that funeral expenses may be awarded where a claim has been made based on the fact that burials attract certain expenses borne by the relatives of the deceased. Although the Appellants herein pleaded the expenses in amounts which were subject to this Appeal, I will award the sum of Kshs.150,000/= which in my view is reasonable to compensate the Appellant's family for funeral expenses in burying a nine year old boy.

27. In effect, I find this Appeal is partly successful and the same is allowed in terms that the Appellants are further awarded Kshs.150,000/= to compensate for all funeral expenses expended. As regards costs of the appeal, each party shall bear their own costs.

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF AUGUST, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Hamisi counsel holding brief for Mr. Jengo counsel for the Appellant

M/S Nasimiyu counsel for the Respondent

Court Assistant - Winney