



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 53 OF 2019

MT. KENYA LEISURE LODGE.....1ST APPELLANT

PETER MUTHIGA MBICHIRE.....2ND APPELLANT

-VERSUS-

NICHOLAS KOGI NJOGU (suing as the administrator of the estate of)

HELLEN NJOKI KOGI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. W. Kagendo (CM) in the Chief Magistrate’s Court at Nyeri Civil Case No.370 of 2018, delivered on 31st July 2019)

JUDGMENT

1. The Respondent filed a suit in the lower court seeking general damages under the Law Reform Act (LRA) on behalf of the Estate of *Hellen Njoki Kogi* pursuant to a swimming pool drowning incident at the Appellants’ premises on 25/12/2015. He also prayed for special damages, costs of the suit and interest.

2. The Appellants filed a joint statement of defence and denied any liability in the resultant death. They specifically denied being negligent or breaching any duty of care to the deceased. After the preliminaries; the matter proceeded for hearing and judgment eventually delivered in favour of the Respondent. The learned trial Magistrate apportioned liability in the ratio of 80:20 and assessed quantum as follows;

Pain & suffering.....kshs 50,000/=

Loss of expectation of life.....kshs 100,000/=

Loss of dependency.....kshs 500,000/=

Special damages.....kshs 221,130/=

Total.....kshs 871,150/=

Less

20% contribution.....kshs 174,230/=

Net award.....kshs 696,920/=

3. Aggrieved by the judgment, the Appellants filed this appeal through the firm of Macharia Kahonge and company advocates and listed six grounds as follows:

- a) *The learned Magistrate failed to accord the Appellant a fair hearing contrary to the clear provisions of law.*
- b) *The learned Magistrate erred in law in disregarding and/or failing to appreciate or properly consider the Appellants' submissions on quantum.*
- c) *That the award was made without considering the deceased's family negligence as was evidenced before the Court and failed to be guided by the authorities on apportionment of liability hence ended up imposing the higher liability on the Appellants.*
- d) *That the learned Magistrate erred in law and fact and ended up awarding an exorbitant quantum of damages of Kshs.500,000/= for loss of dependency by failing to appreciate and be guided by the prevailing range of comparable awards considering that the deceased was a minor.*
- e) *The trial Magistrate erred in law and fact by failing to consider conventional awards in cases of similar nature.*
- f) *The whole evidence on quantum and special damages was against the weight of the evidence.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. The Appellants were later represented by Ng'ang'a Munene and company advocates while the Respondent was represented by Lucy Mwai and company advocates

5. Mr. Nganga for the Appellants started with ground (c) and it is his submission that the deceased's family bore a greater part of the negligence which led to her death. He highlighted the evidence of the deceased's father (Pw1) in which he stated that it was not his first visit at the 1st Respondent's (lodge) hence they went straight to the pool. He also highlighted the evidence that Pw1 had not previously taken the deceased out for swimming but she was an active swimmer in school. He contends that from the evidence, Pw1 did not bother to follow the laid down regulations before allowing the deceased into the pool.

6. He highlighted the evidence of PW2 who took the photo marked 'B' and testified that the floater was at the shallow edge. That according to PW2, the deceased was not a good swimmer and contend that despite such knowledge, PW2 did not inquire about a life guard and he allowed the deceased to venture into the deep end without supervision. Relying on the case of **Butt –vs- Khan**, they submit that each case depends on its own peculiar circumstances.

7. Further, counsel contends that if indeed the deceased was a good swimmer in school, she ought to have been aware of the dangers involved. On the other hand, he submits that if Pw1 and Pw2 knew that the deceased was not a good swimmer, they ought not to have allowed her to swim without supervision. He submits that the deceased and Respondent were 100% negligent in the circumstances.

8. On grounds (b), (d), (e) and (f), counsel submits that the award of Kshs.500,000/= was not based on sound evidence at all. That loss of dependency is a claim under the Fatal Accidents Act and should always be subjected to a dependency ratio in that dependants are not entitled to the full earnings of a deceased. He has cited the case of **Chen Wambo & 2 Others –vs- IKK & Another (2017) eKLR** to support that submission. Counsel argues that there is no evidence on record that would have assisted the trial Magistrate to objectively assess the sort of future that the deceased would have enjoyed and as such, the only damages available to the Respondent were in respect to loss of life.

9. On ground (a), he submits that the Appellants objected to the production of the receipt dated 25/12/2015 for non compliance with the Stamp Duty Act and contend that the objection should have been upheld.

10. On grounds (a) and (c), M/s Lucy Mwai for the Respondent submits that all the witnesses were heard in chief, cross-examined and re-examined as provided in the law. She submits that there is nothing on record to show that the Appellants were denied an opportunity to call evidence or that their witnesses' testimonies were interrupted. Further, she submits that the Appellants did not plead the negligence of the deceased's guardians hence the trial Magistrate cannot be faulted for not apportioning any blame to them.

11. On grounds (b), (d), (e) and (f), she submits that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or misapprehension of evidence. She contends that an award of Kshs.696,920/= cannot be said to be inordinately high or that the trial Magistrate proceeded on wrong principles in arriving at it.

Analysis and determination

12. It is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle and Another –vs- Associated Motor Boat co. Ltd & Others 1968 E.A 123.**

13. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

- a. Whether the apportionment of liability in the ratio of 80:20 should be disturbed.
- b. Whether the quantum of damages should be disturbed.

Liability

14. It is not in dispute that the deceased drowned while swimming at the Appellants' lodge. The point of departure is the percentage of liability that should have been assigned to her guardians as the Appellants feel that they were 100% liable. In apportioning liability, the trial Magistrate expressed herself as follows;

“ In this case, the deceased was 9 years old. The defendant in the evidence and submissions pointed out that the parents/guardians were liable in allowing her to swim while unattended and failing to keep a constant eye on her. That fact of the guardians' negligence was not pleaded and parties are bound by their pleadings.”

15. Apart from particularizing the deceased's negligence, the Appellants pleaded as follows in paragraph 6 of their defence;

“The defendants also deny the particulars of negligence attributed to them in paragraph 5 of the plaint and aver that the deceased was liable for her own misfortune by her own negligence and/or swimming without proper skill and or without guidance from an adult member.”

16. In my view and contrary to the finding of the trial Magistrate, the last part of the above paragraph is a pleading on the negligence of the deceased's guardians. Be that as it may, is there a reason to warrant interference with the apportionment done by the trial court? The provisions of the Occupiers Liability Act are applicable due to circumstances under which the drowning occurred. Section 3 thereof provides as follows;

“3. Extent of Occupier's ordinary duty

1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitors by agreement or otherwise.

2) For the purposes of this Act, 'the common duty of care' is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases;

a) an occupier must be prepared for children to be less careful than adults and

b) an occupier may expect that a person, in the exercise of his calling will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

4)

5)

6)”

17. Evidently, the above section imposes a duty of care on the occupier of premises save in instances where a permissible exemption is in place. The trial Magistrate made a finding that the deceased was lawfully in the premises and that finding has not been challenged. *Prima facie* therefore, the Appellants had a duty to ensure the deceased's safety while in their premises.

18. **Pw1** is the deceased's father and the Respondent herein. He adopted his witness statement in which he narrated his family's activities on the Christmas day of 2015. He stated that they arrived at the lodge at around 1600 hrs and registered the vehicle at the gate. They settled at a table next to the pool and he paid kshs 200/= for the deceased's swimming. He looked for a waiter to serve their table and then entered the washroom. Upon his exit, he heard shouts of life saver! life saver! and hurried to the pool. He found his daughter lying next to the pool and Steve Njogu (Pw2) trying to resuscitate her. The receipt was produced as P.Ex5.

19. In cross examination, he said that they arrived at the lodge at 4pm and there were other guests. They went straight to the pool and not the playing fields. On being referred to the photographs (P.Ex4), he said that only the one on page 16 was taken on that day. There were people at the pool and about 3-4 children were inside the pool. He was not the one who took the photographs as he was busy looking for refreshments.

20. It was not his first time at the lodge, so they went straight to the pool and settled down. He went to the washroom and was followed by Pw2 who had enquired the terms of the pool. He paid kshs 200/= and was issued with a receipt but not the ETR receipt. He was not there when the deceased got into the pool as he was still looking for refreshments. At some point, he saw the deceased going to the deep end and returning. Shortly thereafter, he heard the distress call.

21. He said that had not taken the deceased out swimming again but she was an active swimmer in school. He had no independent witness as they left the lodge in a hurry.

22. **Pw2** was Steve Njogu, the cousin to Pw1. He adopted his statement in which he stated that they arrived at the lodge some minutes to 4pm and he proceeded to inquire about the swimming charges. He said that Pw1 paid Kshs.200/= and he (Pw2) kept the receipt at his back pocket. The deceased proceeded

to the pool which had 3 other children. After sometime, they decided to take a photo and capture the deceased in the pool and it was at that point that they noticed her absence. Their frantic search led to her discovery at the bottom of the pool.

23. Pw2 dived in with his clothes and was assisted by other guests to retrieve her. He tried to resuscitate her after which she was rushed to a nearby hospital. It was his statement that they did not get assistance from a life guard all that while.

24. On cross examination, he said that he was the one taking photographs but he did not take a photo of the deceased in the pool. He noticed her absence at the point where he wanted to take her photo. He told the deceased to stay at the edge as she was not a very good swimmer. He did not inquire if there was a life guard on duty. The photograph on page 16 shows the deceased before she got into the pool. The crowd was on the other side. He was not sure as to when the photographs on page 15 were taken.

25. There was no floater in the pool on that material day. There were independent swimmers in the pool and he had some of their contacts but he lost the phone which had them. The deceased drowned in the middle of the pool at the start of the deep end. At the time she was drowning, none of them was keeping an eye on her.

The receipt was retrieved from his pocket. He agreed that there was a lapse on his part.

26. The lodge manager, **Dw1** testified that life guards were present and there were various rules clearly displayed in the pool area. He did not recognize the payment receipt (P.Ex 5) and said that there were no swimming charges at that time as the pool was open for all guests.

27. Further, he testified that at the material time, they were cleaning the pool and only the deceased was in the pool. That the cleaning machine is in another room near the pool hence the attendant was in that room and not at the pool area.

28. Upon cross examination, he said that there was a disclaimer but agreed that he had not photographed it. The charges for children were Kshs.300/= but in November, it was 200/=. He said that the receipts have bar bills and the revenue stamps would be on the original. That the pool attendant closed the pool at 5.00pm and the guests arrived at 5.00pm. He denied that by 5.00pm, the girl was still swimming. He said that they had a register for guests driving in but did not produce it as evidence.

29. Having re-examined the evidence on liability very keenly, there is an obvious contradiction in the Appellants' evidence and pleadings. On one hand, they pleaded that the pool was free to the public on the material day and on the other hand, they pleaded that the deceased sneaked into the pool without paying hence the pool attendant was not aware of her presence at the pool. In their evidence in court, Dw1 said that the pool was open for all guests as there were no swimming charges at that time.

30. If it is to be taken that there were no swimming charges at the material time, then the Appellants had a duty to ensure that the pool area was reasonably safe for the visitors. Dw1 testified that there were life guards present but as correctly observed by the trial Magistrate, the life guard did not testify and there was nothing to prove his/her existence.

31. One would expect such a person to be an employee of the Appellants hence there should be documentation to that effect. Dw1 also testified that there was a disclaimer and various rules displayed at the pool area but did not tender any proof of the same. He agreed that he had not photographed the disclaimer and I am not convinced that it was such an onerous task to do if at all they existed.

32. If on the other hand it is to be taken that the pool was closed for washing, the obvious expectation is that no person would have been able to access the pool and there would have been measures to enforce the restriction. This narrative was also displaced by production of the receipt. As for the lack of a revenue stamp, I agree with the trial Magistrate that the omission should not be used to defeat justice. In any case, the receipt originated from the Appellants and it was their responsibility to ensure that it had the revenue

stamp.

33. The deceased was 9 years old and as correctly observed by the trial Magistrate, she was a child of tender years. The circumstances of this case are such that the deceased was a victim of lapse of care from the people who were responsible for her. Accordingly, I am not convinced that she should have been assigned any liability. In fact, sub-section 3(a) (supra) clearly stipulates that ‘*an occupier must be prepared for children to be less careful than adults.*’ In the same breadth, a guardian should be alert when dealing with minors in circumstances that would compromise their safety. Pw2, the minor’s uncle readily conceded that there was a lapse on his part.

34. In as much as the Appellants had a duty of care for its customers the deceased’s parent and guardian had a role to play to ensure her safety. 20% was a bit on the lower side. I apportion liability at 65:35 in favour of the Respondent.

Quantum

35. Award of damages is largely a question of discretion and the principles which should guide an appellate court in deciding whether to interfere with such an award are well settled. The appellate court should be satisfied that in assessing the damages, the trial Magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate.

36. The Appellants complained that the trial Magistrate gave a global award of Kshs.500,000/= for loss of dependency but did not subject it to a dependency ratio. It is trite that the dependency ratio is relevant in the multiplier approach only. Further, I do not agree with the Appellants’ submission that the deceased’s estate is not entitled to the award at all. The objective of the Fatal Accidents Act is to compensate families of persons killed in accidents. Precedent shows that courts give awards for loss of dependency even where the deceased persons are minors.

37. In **Chhabhadiya Enterprise Ltd & another –vs- Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu [2018] eKLR**, an award of Kshs.1,200,000/= for a 12 year old deceased was reduced to Kshs.700,000/= and in **Kitale Industries Ltd & another v Zakayo Nyende & another [2018] eKLR**, an award of Kshs.900,000/= was reduced to Kshs.600,000/= for the estate of a 12 year old deceased who was an average student in school. Consequently, the award of Kshs.500,000/= given in this case is within an acceptable range.

38. Similarly, the awards for pain and suffering and loss of expectation of life are conventional and within an acceptable range.

39. As for special damages, I have looked at the receipts tendered and the figure of Kshs.221,150/= was pleaded and proved.

40. My conclusion is that the appeal succeeds to the extent of apportioning the percentage of liability and the one to the deceased goes to the guardians. The computation of the award remains:

Total.....	Kshs.871,150/=
Less 35% contribution.....	Kshs.304,902.5
Net award	Kshs.566,248/=

41. I therefore set aside the judgment by the trial court and enter judgment for Kshs.566,248/= plus costs and interest in favour of the Respondent. The Appellants to pay half the costs of the appeal.

Orders accordingly.

Dated and signed this 13th day of November 2020, in open court at Makueni.

H. I. Ong'udi

Judge