



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO.248 OF 2010

BENTA AUMA MIRUKA.....PLAINTIFF

- V E R S U S -

**SHEPHERDS FOUNDATION EDUCATIONAL
EDUCATION & RESEARCH INSTITUTE CENTRE....1ST DEFENDANT
THE BOARD OF TRUSTEES OF SHEPHERDS
FOUNDATION EDUCATIONAL EDUCATION &
RESEARCH INSTITUTE CENTRE.....2ND DEFENDANT**

JUDGEMENT

1) Benta Auma Miruka, the plaintiff herein in her capacity as the mother and joint administrator ad litem of her deceased son (Martin Miruka), filed a compensatory suit against Shepherd Foundation Educational Research Institute and the Board of Trustees of Shepherds Foundation Educational Research Institute, the 1st and 2nd defendants herein respectively, seeking general damages.

The cause of action arose on or about the 29th August, 2008 when the deceased went for a swim in the defendants swimming pool and suffered death by drowning. The deceased was pronounced dead the same day, upon arrival at Aga Khan Hospital Buru Buru in Nairobi.

2) The plaintiff summoned 3 witnesses. The first to take the stand was Benta Auma Miruka (PW1), PW1 stated that her son (deceased) had been swimming since the age of 5 and he passed on at the age of 18, after drowning at the defendants' swimming pool. She got information about what had happened to her son from her son's friends whom he had gone to swim with. PW1 stated that she was told that there was no life guard on site, and the deceased friends removed him from the pool when he was gasping for breath and coughing. He was still alive when first aid was administered to him at the pool. According to the deceased friends, there was no qualified life guard on duty.

3) Davis Wilson Odera, PW2 a friend to the deceased who was swimming with him on that fateful day, stated that they were both good swimmers. He noticed that the deceased had lagged behind in the deep end of the swimming pool. He decided to check on the deceased only to find him struggling to float. He said he assisted in bringing him to the surface of the water and he was still alive then. The life guard, who is also the person who let swimmers into the pool at the gate, turned the deceased on his back, told other people gathered to see what was happening to move aside and a lady from the crowd at the swimming pool came to apply first aid on the deceased. The deceased was taken to AAR and later

referred to the Aga Khan Buru Buru clinic. PW2 on re-examination reiterated that there was no warning sign stating like “swim at your own risk”. No one showed the swimmers who was the life guard on duty was.

4) Brian Omondi Osore, PW3 stated that the deceased was his good friend and a fellow student at Upper Hill school and was swimming with him on the fateful day. They raced from the deep end to the shallow end. When he was brought afloat by PW2, the gate attendant who let people in to swim, attempted to press on his chest for fast aid. He wouldn't really know whether or not the deceased was alive at the time of first aid, but he could see like he was gasping for breath. He witnessed the accident while seated next to the deep end of the swimming pool. PW3 on re-examination stated that it was his first time to swim with the deceased. There were no warning signs at the swimming pool. There was no qualified life saver on the fateful day. The gate attendant was collecting money to enter the pool and doubled up as a life guard/saver. The lady who helped to resuscitate the deceased was part of the swimming team and not a professional life saver.

5) The defendants' case summoned one witness. DW1 Peter Wang'ondy Mwangi, who stated that he is the director of Shepherd Foundation Education Research Institute since August 2004. He stated that they have provided a swimming pool for the community with a life saver. DW1 stated that at any given time, they have 2 trained life guards at the pool. There are warning signs and rules and regulations on safety at the pool. They have not experienced a drowning incident before like the one that gave rise to this suit. DW1 on cross examination stated that on that fateful, he was at a function when he was called by one of his employees to inform him of the drowning incident at the Foundation's swimming pool. He was told that this boy in question was being given first aid by his staff Alphonse and Evans who were on duty that day. DW1 stated that his life guards were certified and trained, but he did not bring samples of their certificates to court. He also stated that the swimming pool had warning signs, rules and regulations. DW1 on re-examination stated that from his understanding as a swimmer, it is very hard to notice instantly that someone is drowning in a pool with many people. The life guard Evans on that day acted to the best of his ability.

The parties did not raise their list of issues to be determined.

6) Issues for determination by this court are:

i. Whether or not the defendants are liable for the death of the deceased.

ii. What is the quantum payable in any event that the defendants are found liable.

7) The 1st issue for determination is whether or not the defendants are liable for the death of the plaintiff's son Martin Miruka. The swimming pool in question is owned by the 1st defendant, and the 2nd defendant manages the affairs of the 1st defendant. The plaintiff submits that she brought this action in negligence. It is the plaintiff's submission that, negligence is the omission to do something which a reasonable man guided upon the considerations which ordinarily regulate the conduct of human affairs, would do. The concept of duty of care and standard of care are key elements in cases of negligence. It is the plaintiff's submission that the failure by the defendants to show that there was qualified life guard on duty on the day of the accident, who attempted to save the deceased, entirely holds them liable in the tort of negligence.

8) PW2 in fact rescued the deceased when he saw him struggling to float and gasping for breath. PW2 called on the pools 'gate attendant' to help resuscitate the deceased. Both PW2 and PW3 stated that the gate attendant tried to press on the chest of the deceased for first aid. PW3 further stated that it's a fellow swimmer that came into help the 'pool/gate attendant' to resuscitate the deceased and not the defendants' life guard. In fact, the corroborated evidence of PW2 and PW3 is that there was no qualified life guard/saver at the pool. The medical report stated that the deceased died from drowning. DW1 confirmed that indeed the accident occurred at the defendant's premise. PW2 and PW3 both stated that there was no warning sign saying “swim at your risk”

9) The plaintiff submit that the defendants cannot hide behind the notice that states ‘swim at your own risk’ which he produced in court and whether or not the notice and warnings were present, the defendant cannot hide behind the defence of voluntary assumption of risk.

10) The defendants on the other hand submit that for there to be liability, on their part, the plaintiff must satisfy that they owed the deceased a duty of care; they breached that duty of care and the breach was not only the actual cause, but the proximate cause of injury and the breach occasioned the plaintiff’s loss or harm. The defendants submit that they ensured there was lifesaving equipment on site and a life guard was present at all times. DW1 stated the same facts in his testimony, although he wasn’t present of the day of the deceased accident, he stated that he employed qualified personnel, life guard at its facility and provided lifesaving equipment. The swimming pool had regulations and instructions as well as warning signs of the pool users to do so at their own risk.

11) The defendant contends that he owed the deceased a common duty of care, the defendant took steps to ensure that he and others were reasonably safe when using the swimming pool facilities. The deceased being an adult ought to have been careful when using the pool. In fact users of the pool were presumed to be knowledgeable and experienced in swimming. The defendants cited on the case of **Catherine Wangechi Wariahe (suing as the administratrix of the estate of the late James Mwambiro Njeri) – vs- Meridian Hotel Limited (2016) eKLR** where it was stated inter alia that:

“..... volent non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. Am of the view that the deceased knew the nature and the extent of the risk when he ventured into the swimming pool in the absence of the life guard and took the risk to his own death.”

12) The defendants proposed liability to be apportioned at 90% : 10% against the plaintiff. In light of the evidence before this court and the rival submissions on liability I am convinced that the accident occurred at the defendants’ premises. The deceased voluntarily chose to swim at the defendants swimming pool. The deceased was faced with an accident of drowning in which by evidence of PW2 and PW3 corroborated there was no life guard or saver to quickly save and resuscitate the deceased. DW1 on the other hand stated that he had trained and life guards on his premises, the defence case did not call the life guard that was present at his premises on that fateful day to testify, to make a strong case for the defendants. I find the plaintiff contributed to his death by making a choice to swim, while the defendants for not trying their best to help save the deceased from succumbing to death from drowning. I am therefore inclined to apportion liability equally.

13) The 2nd issue for determination is what is the quantum payable. The plaintiff prayed for general damages for loss of life under the Fatal Accident Act Cap 32, General damages under the Law Reform Act Cap 26, special damages totalling to ksh.55,471.00/=. Plaintiff states that she has proved her case on a balance of probabilities and thus entitled to the prayers sought. The defendants on the other hand submitted as follows Under general damages under the Fatal Accident Act:

The proposal that the court should award a minimum wage of ksh.8,579.80/-, multiplier of 37 years arrived at as (life expectation-age at death),1/3 dependency ratio, multiplied by 12 months, computed as:

$8,579.80 \times 12 \times 37 \times 1/3 = \text{ksh.}1,269,810.40/-$ and cited the case of **Daniel Kuria Nganga –vs- Nairobi City Council (2013) eKLR**, where the court placed the income of the deceased aged 18 years at the time of his demise as minimum wage of kshs.8,579,80/= and given a working age 55 years.

The defendants’ proposed ksh.100,000/= for loss of expectation of life and ksh.80,000/= for pain and suffering. The special damages specifically pleaded ksh.55,477.00/- thus a final award computed as follows:

Loss of dependency	ksh. 1,269,810.40
Damages for loss of life	ksh. 100,000.00

Damages for pain and suffering	ksh.	80,000.00
Special damages	ksh.	55,471.00
Total		ksh 1,505,281.40
Less 10% contribution	ksh.	150,521/-

14) The plaintiff did not propose on the award of damages payable to be made. In line with decided cases, the deceased having died at the age of 18, was not of earning capacity, therefore the minimum wage as proposed by the defendant will apply. That subjected to a multiplier of 37 years, where the deceased is given a working age of 60 years with the uncertainties of life, reducing the age to 55 years and a dependency ratio of 1/3, given that he had only one dependant, the mother, the final award will be:

$8,579.80 \times 12 \times 37 \times 1/3 = \text{ksh.} 1,269,810.40/-$

Less 50% contribution ksh.634,905.2/-

15) In the end, I enter judgment for the plaintiff and against the defendants in the following terms.

i. As per the Fatal Accidents Act	ksh. 1,269,810.40
Loss of expectation of life	ksh. 100,000.00
Pain and suffering	ksh. 80,000.00
Special damages	ksh. 55,471.00
Total	<u>ksh.</u> 1,505,281.40
Less 50% contribution	ksh. 752,640.70

ii. Interest at court rates from the date hereof till payment in full.

iii. Plaintiff shall have the costs of the suit.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant