



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NUMBER 110 OF 2015
CATHERINE WANGECHI WARIAHE (*Suing as*
the Administratrix of the Estate of the late
JAMES MWAMBIRIRO NJERI).....PLAINTIFF
VERSUS
THE MERIDIAN HOTEL LIMITED.....DEFENDANT

J U D G M E N T

The Plaintiff filed the suit herein on the 8th day of October, 2015. She has sued as the Administrator to the estate of the Late James Mwambiriro Njeri (Herein referred to as the deceased).

It is pleaded that, at all material time preceding the suit, the deceased was a regular customer who had been attending swimming lessons at the Defendant's premises when or about 23rd November, 2013, he sought the services and use hereof of the Defendant's swimming pool.

The Plaintiff alleges that it was an express term that the Defendant was to provide the deceased with a swimming trainer whenever he went for lessons. It is averred that the Defendant, due to its negligence and/or that of its employees, left the swimming facilities unattended by a qualified trainer and/or life safe as a result of which the deceased drowned thus sustaining fatal injuries.

The Plaintiff has brought the claim herein on her own behalf as the administrator of the Estate of the deceased and also on behalf of the deceased's children, claiming general and special damages for the deceased's death which she claim was caused and/or occasioned by negligence on the part of the Defendant. The particulars of negligence have been set out in paragraph 9(a) – 9(f) of the Plaint as hereunder: -

- “a) Failing short of the duty of care imposed and required of it as a recreational provider.***
- b) Failing short of the required standard of professionalism as a recreational provider.***
- c) Failing to take the necessary precautions for the safety of deceased.***
- d) Failure by its staff to take proper and due regard of the deceased's presence.***

e) Failing short of the duty of care imposed and required of it as a recreational service provider.

f) Failing to have a trained staff and/or swimming guard at the facility.

It is further pleaded that the deceased who was aged 40 years at the time he met his death was in good health, was very active, productive and he ran a hardware shop and provided support for and supplemented the day to day expenses of his family. That his life was drastically cut short and his estate and dependants have suffered loss. Further, by reasons of the matters aforesaid, the deceased's expectation of life was considerably shortened and the estate and the dependants have suffered loss and damage. The claim has been brought on behalf of: -

- a. Joan Njeri Makobu – Mother
- b. Catherine Wangechi Wariahe – wife
- c. Kelvin Kimani Mwambiriro – son.
- d. Eric Maina Mwambiriro – son.

The particulars of special damages have been set out in paragraph 14 of the plaint. The Plaintiff has prayed for judgment against the Defendant for general damages for pain and suffering, General damages for loss of dependency, damages for loss of expectation of life, special damages in the sum of Ksh.10,104,600/- and costs of the suit.

The Defendant filed a defence on 17th December, 2014 denying that it authorized and/or consented to the deceased's use of the swimming pool and has put the Plaintiff to strict proof thereof. The Defendant has also denied the particulars of negligence attributed to it in paragraph 9 of the Plaint and avers that the deceased was liable for his own misfortune by his own negligence and/or intention to commit suicide. The particulars of such negligence are set out in paragraph 11 of the defence as herein under

“a) Attempting to swim in the deep end contrary to strict instructions given by the instructor.

b) Attempting to swim in the deep end in the absence of the instructor knowing very well that he was unable to swim.

c) Entering the deep end of swimming pool without any due regard to his safety.

d) Failing to alert his companion that he is getting into the swimming pool while not a competent swimmer.

e) Failing to follow any of the safety regulations clearly at the poolside to avoid drowning.

f) Committing suicide.”

It has denied the particulars of loss and damage set out in paragraph 12, 13 and 14 of the Plaint.

The Defendant further denies that the plaintiff has the *locus standi* to institute the proceedings herein. It admits that though it provides certain members of the public swimming lessons with qualified instructor, the same is given under strict rules and that the deceased who was an adult had strict instructions not to swim or venture into the swimming pool when the instructor was on a lunch break. It was averred that the deceased had on that particular day been given instructions to wait for the instructor who had left for lunch break before resuming swimming. It denies that the doctrine of *Res Ipsa loquitor* applies in this case and relies on the doctrine of *volenti non fit injuria*.

The Plaintiff in her reply to defence joins issues with the Defendant in its defence save for the admissions contained therein.

During the hearing, four witnesses testified in support of the Plaintiff's case while the defence called one witness. Doctor Peter Muriuki Ndegwa who is a pathologist testified as PW 1 and according to him, the cause of death was consistent with drowning. He produced a receipt of Ksh.7,000/= which he issued after he was paid his fees to attend court to testify.

The Plaintiff testified as PW 2. She is the wife to the deceased. She produced: -

- a. A copy of limited grant of letters of administration ad litem
- b. Death certificate
- c. Marriage certificate.

In her evidence, she told the court that on the 23rd November, 2013 he was called by a Mr. Wambugu who requested her to accompany him to take the deceased to the hospital. She first went to the Defendant's premises where she found the deceased had already died and the body was lying on the pool side. She telephoned her sister-in-law namely Jane Wanjiku who accompanied her to the City Mortuary where the body was preserved. She told the court that she did not know what happened to the deceased but she knew the deceased was going to the Defendant's premises for swimming lessons. She produced a receipt which the deceased had been issued with by the Defendant after he had paid for swimming lesson on that day. The receipt was for Kshs.350/-. She told the court that she incurred expenses towards the burial and she produced several receipts as exhibits.

According to her, the deceased was running a hardware shop along Sheikh Karume Road christened "***Kucha Mpya Hardware***" in which he dealt with electrical supplies. She produced the birth certificates for the children whom she sired with the deceased who together with herself and the mother-in-law forms the list of the dependants. It was her evidence that they used to rely on the deceased in everything and following his demise, they were forced to move to a cheaper house and to transfer the children to a cheaper school. On cross-examination, she denied that the deceased committed suicide as was being alleged by the Defendant.

The mother to the deceased testified as PW 3 (Joan Njeri Makobu). It was her evidence that the deceased was helping her financially and that he was paying her house rent. He was buying food for her and was using a sum of Ksh.20,000/- per month on her. She told the court that the deceased did not have a mental problem.

The fourth witness was Jane Wanjiku Githuri, she identified the body of the deceased for purposes of the postmortem.

The Defendant called Michael Wekesa Buyayi as its only witness. He told the court that he is a regular visitor at the Defendant's premises, mostly during the weekends. On the 23rd November, 2013, he decided to go for swimming at the Defendant's premises where he found the deceased and a lifeguard/swimming instructor. The instructor told him that the deceased was an amateur and that it was his fourth session since he started learning. The instructor also told him that the deceased could not sustain his energy longer after the session which had taken one hour.

That the instructor excused himself for a lunch break and warned him and the deceased not to enter the pool in his absence unless they know how to swim well but after the instructor had left the deceased entered the swimming pool but on the shallow end. After sometime, all went quiet, he fell asleep and when he got up, he could not see the deceased and he thought he had gone for lunch only to find his body in the pool but on the deep end. He dived in, took him out, and together with some employees of the Defendant, tried to save the deceased life but unfortunately it was too late. An ambulance was called and the body was taken to the mortuary.

It was his evidence that before the instructor went for lunch break he warned them to take care of themselves. He confirmed that there are instructions on the pool side before one can use the pool. He

confirmed that he deceased was a learner.

According to the Plaintiff, the Defendant was wholly to blame for the unfortunate event (herein referred to as the accident) her argument being that the three ingredients establishing negligence have been proved through the witnesses and the documents as produced. She submitted that there existed a duty of care owed to the deceased by the Defendant, that the Defendant had breached that duty and that the Plaintiff has suffered injury and/or damage as a result of that breach.

The Plaintiff's contention is that the Defendant being a hotel, offering swimming facilities including swimming lessons, which the deceased was undertaking owed him a duty of care as he had gone for swimming lessons and the Defendant ought to have taken all reasonable care to ensure that the duty placed on it was not breached. That the deceased was left unattended and he suffered fatal injuries as a result of the breach. As to whether the deceased contributed to the accident, it is the contention by the Plaintiff that as a learner, he did not contribute as he was owed a duty of care by the Defendant.

On the part of the Defendant it has been submitted that when a person is drowns, he/she struggles and makes some commotion either with their hands or shouts which make them take in water which suffocates the victim. It asked the court to take judicial notice that this is prelude of anyone who is drowning in water be it a swimming pool, a river or even the sea implying that the deceased had committed suicide.

So, did the Defendant owe the deceased a duty of care?

The law on owners of premises on the issue of liability is found in the Occupier's Liability Act Cap 34. Section 3 of the Act covers the extent of Occupier's Duty under Section 3(2) which states as follows: -

“For 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.”

Section 3(3) states that: -

“The circumstances relevant for the present purpose includes the degree of care and of want of care, which would ordinarily be looked for in such a visitor.”

Section 3(4) states: -

“In determining whether the occupier of the premises has discharged the common duty of care to a visitor regard is to be had to all the circumstances so that (for example)”

a. Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe....”

Section 3(5) states: -

“The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor. The question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another.”

It was contended that the Defendant had taken reasonable care to ensure the safety of its visitors who were coming to the swimming pool by ensuring that it had stationed an instructor on the pool side. In support of its case the Defendant relied on the case of **Soma Properties Limited Vs Haym**, Civil Appeal No. 74 of 2005 wherein a shopper was shot dead in a shooting at the Sarit Centre Shopping Complex and the court held, that he was owed a duty of care by virtue of being in the premises.

The court has evaluated the evidence on record and the submissions by the parties and in my view, the following issues fall for determination.

1. Whether the Defendant owed the Plaintiff a duty of care?
2. Whether the doctrine of *volenti non fit injuria* applies in this case.
3. Whether the doctrine of *Res Ipsa Loquitur* applies in the case.
4. Who is to bear the costs of the suit?

From the pleadings, it is clear that the Plaintiff's claim is based on the tort of negligence namely, occupier's liability whose origin is traceable to rules developed at common law but which are now enacted into legislation, the Occupiers Liability Act (the Act) which came into force on the 1st January, 1963. The Act imposes a duty on the land owners to those who come onto their land to ensure their reasonable safety while on the land.

Section 2 of the Act provides: -

“The rules enacted by Sections 3 and 4 of the Act shall have effect in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.”

Section 3 of the Act deals with the extent of the occupier's ordinary duty.

Section 3(1)

“(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 visitor or 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.”

This provision imposes a duty of care on an occupier and proceeds to define the standard of care necessary to fulfill that duty. The words “**reasonable**” and “**reasonably**” used in the above extract emphasizes the standard of care expected of an occupier. It is a standard measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected. The standard of reasonableness is not one of perfection. The occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger.

As is the case with any tort, the party advancing the claim, bears the burden of proof the standard of which, is on a balance of probability. Section 3 aforesaid, does not create a presumption of negligence against the occupier of the premises whenever a person is injured on the premises. A Plaintiff who invokes that Section must still be able to point to some act or omission on the part of the occupier which caused the injury complained of, before liability can attach.

As Githinji JA observed in the **Suma Properties Case**, it is clear from Section 3(2) of the Act that from the definition, the common duty imposed by the Act is to take reasonable care in all the circumstances of the case to see that the visitor is reasonably safe. The Act neither imposes on the occupier, an absolute Common Duty of Care, nor guarantees a visitor absolute safety but the standard or degree of care depends on the facts of each case.

According to the evidence on record, the deceased was taking swimming lessons with the Defendant, he was an adult of sound mind and at the material time of the accident, he had held the session for that day for one hour with a life guard. The lifeguard on taking a lunch break had warned him from entering the swimming pool alone until he was back, which warning he ignored and entered the pool in total disregard of his own safety. In my view, the Defendant in providing a lifeguard to take care of the Defendant had taken reasonable care to ensure reasonable safety of the deceased. It is also on record that there are instructions on the pool side warning the pool users of the dangers of using the pool in the absence of a life guard.

On issue number two, counsel for the Defendant submitted that the doctrine of *volenti non fit injuria* is applicable as the deceased quietly moved into the pool making sure that the other swimmer did not hear and that he was not pushed into the deep end.

The general principles applicable to this defence were stated by the judicial committee in **Letang Vs Ottawa Electric Railway Company** in the following terms quoted from the judgment of Wills J in **Osborne Vs the London and North Western Railway Company**.

“If the defendant desires to succeed on the ground that the maxim volenti non fit injuria” is applicable they must obtain a finding of fact that the Plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.”

Volenti non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

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 lifeguard and took the risk to his own death.

The Plaintiff has relied on the principle of Res Ipsa Loquitor which now brings me to issue No. 3.

This principle applies in instances where the plaintiff can prove that the accident occurred, but cannot prove how it occurred so as to demonstrate that the Defendant was responsible. In the case of **Wahindi Vs Pharmaceutical Manufacturing (1994) KLR page 206** the Court of Appeal citing Charles Worth & Percuy on Negligence 7th Edition outlined the requisites for involving the maxim and stated thus: -

i. On proof of the happening of an unexplained occurrence.

ii. When the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the Plaintiff and

iii. The circumstances point out the negligence in question being that of the Defendant rather than any other person.

The effect of properly invoking the *maxim of res ipsa Luquitor* shifts the burden of proof to the Defendant to show that the accident did not occur due to its negligence.

In law, the court can infer negligence from the circumstances of the case in which the accident occurred, this is by invoking the principle of Res Ipsa Loquitor. In the book of Winfield and Jolowicz on tort 17th Edition the learned author wrote: -

“This has traditionally been described by the phrase Res Ipsa Loquitor the thing speaks for itself.... Its nature was admirably put by Morris L. J when he said that it: -

‘Possesses no magic qualities, nor has it any virtue, order than that of brevity, merely because it is oppressed in Latin. When used on behalf of a Plaintiff it is generally a short way of saying.

‘I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the Defendant.....’ there are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer.”

The learned author went further to say: -

“The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant. This is commonly divided into two parts on the basis of Eric C.J’s famous statement in Scott Vs London and St Catherine Cock Co.

‘There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in absence of explanation by the Defendants, that the accident arose from want of care.’

The Blacks Law Dictionary goes further to explain the circumstances the court will infer negligence as follows: -

“The phrase, ‘Res Ipsa Loquitor’ is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances may permit an inference or raise a presumption of negligence or make out a Plaintiff’s prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the Defendant’s negligence, in the absence of an explanation or other evidence which the jury believes.

“It is said that Res Ipsa Loquitor does not apply if the cause of harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the Defendant’s act or inference that defendant’s negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply.”

“Res Ipsa Loquitor is an appropriate form of circumstantial evidence enabling the Plaintiff in particular cases to establish the Defendant’s likely negligence. Hence the Res Ipsa Loquitor doctrine, properly applied, does not enact any covert form of stricted liability.. The doctrine implies that the court does not know, and cannot find out what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accident involved.”

Applying the above principles in the case at hand, the accident herein is not one that can be said would not have happened in the ordinary cause of thing without the negligence on the part of somebody other than the Plaintiff. DW 1 told the court that the last time he saw the deceased, he was in the shallow end of the swimming pool. The evidence of the pathologist who testified for the plaintiff is clear on the cause of death which he said was drowning. The deceased had been warned from entering the pool alone. This, therefore, means that the deceased swam to his death as we do not have any evidence that he was pushed into the swimming pool. With the evidence of DW 1 on record, the Defendant had taken reasonable care in all circumstances of the case to see that the deceased was reasonably safe and therefore, the doctrine of *Res Ipa Loquitor* cannot be applicable in this case.

It is trite law that the Plaintiff should proof his/her case on a balance of probability. It was necessary for the Plaintiff to proof negligence as her cause of action is based on negligence.

In the case of **Jamal Ramadhan Yusuf & another Vs Ruth Achieng Onditi & Another [2010] eKLR**, the Court of Appeal stated: -

“... It is always necessary that the Plaintiff proves negligence with cogent and credible evidence since the mere fact that an accident occurs does not follow that a particular person has driven negligently or was negligent.”

In conclusion, I find that the Plaintiff failed to proof her case on a balance of probability and the same is dismissed with no order as to costs.

In the event that I am faulted an appeal, the law requires that I assess the quantum of damages that I would have awarded, had the Plaintiff succeeded. With regard to special damages, receipts totaling to Ksh.103,150 were produced. For loss of expectation of life, I would have awarded a sum of Ksh.100,000/-, pain and suffering Ksh.10,000/-, loss of dependency, I would have used the minimum wage of Ksh.6,500/- a multiplier of 25 years and a ratio ratio of 2/3 as follows: -

$6,500 \times 25 \times 12 \times \frac{2}{3} = 1,300,000/-$

Making a global sum of Ksh.1,410,000/-

There is no evidence before the court to support the income that the deceased was earning and in its absence, the court has applied the minimum wage but as pointed out herein above, the Plaintiff was unable to proof her case.

Dated, signed and delivered at Nairobi this 22nd day of September, 2016.

.....

L NJUGUNA

JUDGE

In the presence

..... ***For the Plaintiff***

..... ***For the Defendant***