



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Appeal 153 of 2001**

***(An appeal arising from Chief Magistrate's Case No. CMCC 2832 of 1999 MSA between Naduwa Said and Juma Holdings Ltd t/a Baharini Chalets)***

**JUMBA HOLDING LTD. T/A BAHARINI CHALETS .....APPELLANT**

**VERSUS**

**NADUM SAID .....RESPONDENT**

**J U D G M E N T**

By a plaint dated 5<sup>th</sup> March 1999, Naduwa Said, the Respondent herein, sued Jumba Holdings Ltd t/a Baharini Chalets, the appellant, claiming both general and special damages for the death of the Respondent's son called Ahmed Abdulhamid deceased due to drowning at the appellant's swimming pool on 9<sup>th</sup> March 1997. The appellant filed a defence denying the Respondent's claim.

The suit was heard and the action was found in favour of the Respondent. She was awarded a total sum of Kshs.220,050 in a judgment delivered on 24<sup>th</sup> October 2001. Being aggrieved by the aforesaid decision the appellant then preferred this appeal.

On appeal the appellant has enumerated five (5) main grounds of appeal. Mr. S.P. Master argued the five grounds of appeal altogether. The first ground was to the effect that the Respondent did not establish negligence on the appellant's part in her evidence. On the second ground it is argued that the trial magistrate was biased in his judgment despite the fact that the Respondent told lies in her testimony. It was submitted before this court that the trial magistrate when he held that the appellant was liable by virtue of the Occupiers Liability Act. Finally the appellant argued that the trial Magistrate erred when he concluded that the Respondent had been awarded damages under the Law Reform Act and the Fatal Accidents Act when there were no such claims in the plaint or proved in evidence tendered before court.

Being a first appellate court, I am enjoined by law to reassess and re-evaluate the entire evidence. The facts leading to this appeal appear to be short and straightforward. One witness testified from each side before the trial court. It is the evidence of the Respondent that on the 9<sup>th</sup> day of March 1997, she and her son who was aged 5 years by then, now deceased visited Baharini Chalets. She claimed she was also accompanied by her cousin called Anisa Aboolraziz who came along with other child to swim in the swimming pool of Baharini Chalets. It is said when they arrived the children were taken to swim under the watchful eye of the appellant's swimming pool attendant as the adults went to relax in a nearby cottage a few metres away from the pool. The Respondent said she came back after half an hour only to discover that her son was missing. She made inquiries upon which a search for the boy was commenced. Shortly a white tourist was seen diving into the swimming pool to rescue the drowning boy. The boy was

finally brought to the surface and given first aid next to the swimming pool before being rushed to Aga Khan Hospital where he was unfortunately pronounced dead. The owners of Baharini chalets were then sued for negligence.

The Manager of Baharini Chalets, Hellen Matano testified in support of the appellant's defence before the trial court. She admitted the following facts:

First that the Respondent had visited Baharini Chalets while in company of her little son now deceased. Secondly, she admitted that she was allowed to let her son to swim in the appellant's swimming pool. She further conceded that Ahmed Abdulrahim drowned in the appellant's swimming pool. She also admitted that Baharini chalets had swimming pool attendant who was a qualified lifesaver. What Hellen Matano did not admit are first, that the Respondent did not pay to use the swimming pool facility hence she was not entitled to a swimming pool attendant. Secondly, she said that the hotel was not liable for the deceased's death because there was a disclaimer notice fixed next to the swimming pool. That was, in short the scenario presented before the learned Senior Resident Magistrate.

Let me start with the last ground of appeal argued by the appellant. It is the submission of Mr. S.P. Master advocate for the appellant that there was no prayer for remedies under the Law Reform Act and under the Fatal Accidents Act. I will only state that the submission is displaced by paragraph 5 of the plaint where the Respondent specifically pleaded that her claim was premised on the occupiers Liability Act, the Law Reform Act and the Fatal Accidents Act.

I shall deal with grounds 1,2 and 3 together. It is the arguments of the appellant that the Respondent had miserably failed to establish negligence on the appellant's part. The main contention is that the cause of death was not established. It is further contended that there was a disclaimer notice which was placed for all and sundry to note that the owner was not liable. From the onset it must be made clear that the trial court heavily relied on the word of appellant's only witness as against the Respondent's evidence. It should further be stated that in civil cases the standard of proof is that of a balance of probability as opposed to that of beyond reasonable doubt. Where there is evidence of one for one, the trial court will normally examine their demeanor to lay a basis as to who to believe. In this case it is clear from the record that the trial magistrate observed the demeanor of the witnesses and found the Respondent to be truthful. The trial magistrate appreciated the fact that there was no postmortem report to show that indeed the deceased died as a result of drowning, but he found the evidence of the appellant as having admitted that the deceased drowned in the appellant's swimming pool. After a careful consideration I am satisfied that there was sufficient evidence on a balance of probabilities that the deceased died as a result of drowning. The Respondent's evidence and that of Hellen Matano agree that the deceased was retrieved from the appellant's swimming pool while he was unconscious and was given first aid before being taken to hospital where he was pronounced dead. I am convinced that in the circumstances and in the absence of any contrary evidence that the deceased died as a result of drowning. The issue which remains is whether or not the appellant is liable. There was evidence of both witnesses that there was a professional lifesaver. It is the appellant's submission that the services of the professional life saver were not enlisted hence the Respondent endangered the life of her son in view of the clear notice of disclaimer of liability by the appellant.

On the other hand it is the evidence of the Respondent that she left the deceased under the care of the appellant's pool attendant. The trial Senior Resident Magistrate dealt with this issue at length.

I am satisfied that the alleged motive of disclaimer did not absolve the appellant from liability under section 3 of the occupier's liability Act Chapter (34 Laws of Kenya). Even if the appellant were said to absolve by such notice, still I doubt whether it is applicable in cases involving children of tender age like in this case. Such children are not even liable for contributory negligence. The Appellant failed to call for the evidence of the pool attendant who was said to be a professional lifesaver. There is evidence that there were many children who were swimming in the appellant's pool. It was necessary for the appellant to ensure that there was a professional lifesaver present at the poolside to either restrain unaccompanied children from swimming or to be present to save them at the hour of need. My conclusion in the matter is that the evidence strongly proves that the appellant was found to be negligent hence liable or vicariously

liable for the negligence of its servant or agent, the pool attendant. It has been alleged that the trial magistrate was biased in favour of the Respondent throughout in the trial. I have examined the alleged bias. The record shows that the trial magistrate observed the demeanor of the witnesses. He also noted the contradictions in Respondent's evidence. I see no clear bias on the part of the trial magistrate.

The last ground argued on appeal is to the effect that the global sum of Kshs.100,000 had no legal basis because there was no evidence of the deceased's mental capability. As far as I can understand it is clear that the appellant is attacking the award on the ground that the child is always expected to assist his or her parents. I find this submission untenable because a close perusal of the learned Senior Resident Magistrate's judgment will reveal that he took into account the issues the appellant now raises before this court. It is evident that the trial court considered past decisions in respect of such awards before giving the award. In the end I am satisfied that the trial Senior Resident Magistrate applied the correct principles in making the award. I see no reason to interfere with his decision.

In the end the appeal is dismissed in its entirety with costs to the Respondent.

**Dated and delivered at Mombasa this 4<sup>th</sup> day of October, 2006.**

J.K. SERGON

J U D G E