



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 24 OF 2019

JUMUIA HOTEL.....APPELLANT

VERSUS

SN & JCO (Suing as the Legal Representatives in the Estate of

CAN- DECEASED).....1ST RESPONDENT

P ACADEMY.....2ND RESPONDENT

[Being an Appeal from the Judgment of Hon. J. N. Ng'arng'ar, Chief Magistrate given on 31st January 2019 in Kisumu CMCC No. 651 of 2016]

JUDGMENT

The Appellant, **JUMUIA HOTEL**, was the Defendant at the trial.

1. The 1st Respondents, **SN & JCO** (suing as the Legal Representatives in the Estate of **CAN**) were the Plaintiffs.

2. Whilst the 2nd Respondent, **[Particulars Withheld] ACADEMY**, was the Third Party.

3. The learned trial magistrate found the Appellant and the 2nd Respondent 100% liable for the accident which led to the death of C.

4. C was a pupil at **[Particulars Withheld] Academy** at the material time. She was 7 years old.

5. The school organized a trip to Jumuia Hotel, where some pupils, including C were going for swimming.

6. During the trial, **SN** testified as **PW1**. He is the father to C. He said that the reason why they had sued the Hotel was because they failed to provide a pool attendant, who could have given guidance to C on how and in which pool she could swim.

7. **PW1** also relied upon the reasons set out in paragraph 5 of the Plaint. At the said paragraph, the Plaintiffs had asserted that the accident was occasioned by a breach of the statutory/common duty and/or negligence on the part of the Hotel. The following are the particulars cited, as constituting the alleged breach of statutory duty and/or negligence;

“(i) Failing to have a life-guard or enough life guards on standby to assist the deceased when she was drowning.

(ii) Failing to ensure the safety of the deceased and other members of the public at any time of their visit at the hotel.

(iii) Failing to ensure that the deceased was fully instructed on the dangers likely to arise and the precautions to be observed in such eventuality.

(iv) Failing to inform the deceased on how to swim and which pool she could use.

(v) Failing to be there for the children in case of they needed any assistance.

- (vi) Failing to make the deceased keep off the deep end pool.*
- (vii) Failing to prevent the said accident.*
- (viii) Failing to provide adequate security for the deceased and the public at large.*
- (ix) Failing to take any or adequate precaution for the safety of the deceased.*
- (xi) Exposing the deceased to a risk of damage or injury of which they knew or ought to have known.*
- (xii) Providing unsafe environment to the deceased and other members of the public.”*

8. After the body of the deceased was retrieved from the swimming pool, a post mortem examination was conducted. Both the Post mortem Report and the Death Certificate were produced in evidence; and they revealed that the cause of death Asphyxia due to drowning.

9. The learned trial magistrate held that the deceased was lawfully swimming at the Defendant’s swimming pool, when she drowned, thereby causing her death.

10. Ultimately, the trial court apportioned liability at 50:50 between the Defendant and the school.

11. The learned trial magistrate awarded compensation as follows;

<i>(a) Pain & Suffering.....</i>	<i>Shs 10,000/=</i>
<i>(b) Loss of Expectation of Life.....</i>	<i>Shs 100,000/=</i>
<i>(c) Loss of Dependency.....</i>	<i>Shs 500,000/=</i>
<i>Sub-Total</i>	<i>Shs 610,000/=</i>
<i>(d) Special Damages.....</i>	<i>Shs 81,225/=</i>
TOTAL	Shs 691,225/=

12. Being dissatisfied with the judgment, the Defendant lodged the appeal herein, citing seven Grounds of Appeal, which can be summarized thus;

- (1) There was no evidence that the appellant was negligent.*
- (2) Liability under negligence and Occupier’s Liability did not attach automatically.*
- (3) There is no finding about the nature of negligence that was established against the appellant.*
- (4) Whether under common law or statute, the plaintiff had the onus to prove negligence against the defendant.*
- (5) The judgment contains fundamental errors and assumptions, so as to amount to a miscarriage of justice.*
- (6) There is no evidence upon which the court could apportion liability.*
- (7) The court did not properly direct itself on who had the burden of proving negligence.*

13. Being the first appellate court, I have a duty to re-evaluate all the evidence on record, and draw my own conclusions. However, when drawing conclusions from the said re-evaluation, I am obliged to bear in mind the fact that I did not have the opportunity to observe the witnesses when they were giving evidence.

14. The starting point in the process of re-evaluation is the pleadings.

15. First, the Plaintiff sued the hotel, only. Earlier in this judgment I set out the particulars of the alleged breach of Statutory and/or Common Duty and/or Negligence which the Plaintiff asserted against the Defendant.

16. By a Defence dated 7th March 2017, the Defendant denied all liability. Further, in the alternative, the Defendant asserted that the accident was attributable to the negligence of the deceased.

17. The Defence also attributed the accident to the negligence on the part of the Third Party.

18. Based on the Defendant's contention regarding the Third Party, the Hotel issued a Third Party Notice against the School. According to the Hotel, its claim against the School was based on the grounds that;

“On or about 18.02.2016 the deceased and other students were swimming at the defendant's alleged swimming pool, the third party allowed the deceased and other students to swim without any supervision or presence of life guards on standby, therefore exposing the deceased and other students to danger, thus causing the deceased to drown to death, and the Defendant craves total indemnity and contribution from the said, third party.”

19. In its Defence, the School denied the assertions set out in the Third Party Notice.

20. It was the contention of the School that the students had entered the Hotel at the express or implied invitation of the Hotel, and that the Hotel owed the Third Party a common duty of care under the **Occupiers Liability Act**.

21. On 15th February 2017 the parties consented to an Order, that the case between the Defendant and the 3rd Party would be handled with the case between the Plaintiff and the Defendant.

22. When the case came up for trial, it is only the Plaintiff who tendered evidence. Both the Defendant and the third party did not offer any evidence.

23. Having given consideration to the evidence and the submissions, the trial court delivered the judgment which is now the subject matter of the appeal herein.

Negligence

24. The Appellant submitted that there cannot be liability without proof of negligence.

25. I have no doubt about that proposition, which was captured as follows, by Asike-Makhandia J. (as he then was) in **JAMAL RAMADHAN YUSUF & ANOTHER Vs RUTH ACHIENG ONDITI & ANOTHER, HIGH COURT CIVIL APPEAL NO. 234 OF 2005**;

“It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence, as he who asserts must prove.”

26. It was the Appellant's submission that the Respondent did not lead any evidence to connect the accident to an act or an omission on the part of the Appellant. Indeed, the Appellant's view was that the real cause of the accident was never established.

27. Pursuant to the provisions of **Section 107 (1)** of the **Evidence Act**;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

28. It therefore follows that if the Plaintiff's case was founded upon negligence that was attributed to the Defendant, the Plaintiffs had the burden of proof, to demonstrate that the Defendant was negligent, and that the accident in issue caused the death of the Plaintiff's daughter.

29. **PW1** was not at the hotel where his daughter drowned, at the time the incident occurred. By the time he got to the hotel, his daughter was already dead. Therefore, the Plaintiff did not adduce evidence of the alleged negligence attributable to the Defendant.

30. To the extent that the trial court held that the Defendant “*automatically*” became liable for negligence, which led to the drowning of the minor, I find that the said finding was not properly anchored on the law.

31. Therefore, if the Plaintiff's claim was founded only upon the Defendant's alleged negligence, the claim should have been dismissed because the Plaintiffs did not prove any negligence on the Defendant's part.

32. However, the Plaintiffs did also assert that the Defendant breached statutory or common duty.

33. The Appellant has submitted that even under the **Occupiers Liability Act**, the Plaintiff had the onus to prove the alleged breach of statutory duty.

34. The Plaintiff cited the case of **CATHERINE WANGECHI WARIAHE Vs MERIDIAN HOTEL LIMITED, HCCC NO. 110 OF 2015** to support its case.

35. In that case the court held as follows, when giving consideration to **Section 3** of the **Occupiers Liability Act**;

“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.”

36. The said **Section 3** reads as follows;

“(1) An occupier of premises owes the said 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 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”

37. **Section 3 (6)** states as follows;

“For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.”

38. Based on the evidence of **PW1**, his daughter C was within the hotel premises. She was together with students from the third party, who had gone on a tour to the said hotel. Accordingly, C was a visitor to the hotel.

39. Pursuant to **Section 3(1)** of the **Occupiers Liability Act**, the hotel owed her a common duty of care.

40. The hotel had a statutory obligation to take such care as, in all the circumstances, was reasonable to see that C would be reasonably safe in using the premises.

41. Pursuant to **Section 3 (3)**, it was necessary for the hotel to be prepared for children to be less careful than adults.

42. C was 7 years old. She was a very young child. Therefore, the law told the hotel to expect that a child, such as C could be less careful than adults.

43. As the duty of care is imposed by statute, I find that once the deceased had visited the hotel, she was entitled to the common duty of care. The evidential burden shifted to the hotel, to prove that it had discharged the obligation to see that the visitor was reasonably safe in using the premises.

44. I find that the Appellant failed to demonstrate that it had discharged its common duty of care to the deceased.

45. Secondly, I find that the Third Party, to whom the deceased had been entrusted, and who organized the tour to the hotel should have, in principle, taken some responsibility in ensuring the safety of the deceased.

46. However, the third party is not an Occupier, as defined under the **Occupiers Liability Act**. Therefore, the statute did not impose any common duty of care upon the said third party.

47. And the Defendant failed to lead any evidence upon which the third party should have been compelled to indemnify the Defendant.

48. Nonetheless, I find that because the third party did not appeal against the judgment, it is not open to me to give any orders touching on it.

49. In the final result, I find no merit in the appeal, and it is therefore dismissed. I award to the 1st Respondent, the costs of the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY 2021

FRED A. OCHIENG

JUDGE