



Yi (Suing on behalf and as the administrator to the Estate of the Late Luo Jinli) v South Africa Hotels Limited t/a Keekorok Lodge Masai Mara (Civil Case 12 of 2019) [2024] KEHC 2163 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE 12 OF 2019
F GIKONYO, J
FEBRUARY 29, 2024**

BETWEEN

DONG YI (SUING ON BEHALF AND AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE LUO JINLI) PLAINTIFF

AND

SOUTH AFRICA HOTELS LIMITED T/A KEEKOROK LODGE MASAI MARA DEFENDANT

JUDGMENT

Guest stabbed to death in a restaurant

1. The plaintiff has brought the present suit as the widower and the administrator of the estate of the late Luo Jinli. Luo Jinli met her unfortunate demise on the defendant's premises on 08/08/2016.
2. The plaintiff contends that the late Luo Jinli met her death on account of the defendant's negligence. Accordingly, the plaintiff seeks relief and remedy for the inter alia the pain and suffering caused by the defendant's negligence.
3. The action has been brought under the *Fatal Accidents Act* and the Law Reform (Miscellaneous Provisions) Act.

Brief Facts

4. The plaintiff and the deceased checked in to Sun Africa Hotels t/a Keekorok Lodge Maasai Mara on 08.08.2016. Their tour guide was Mr. Bai Jiang who guided them at all material times.
5. On the night of 08/08/2016, the plaintiff with his family went to have dinner at the defendant's restaurant. While at the restaurant a verbal altercation occurred between the plaintiff, the deceased, and Mr. Lee Changpin. The exchange between these parties happened in Chinese.



6. Mr. Changpin left the table and returned with a steak knife from one of the tables in the restaurant. Mr. Changpin used the knife to stab both the plaintiff and the deceased.
7. Following the incident, the deceased succumbed to the injuries. The plaintiff was transferred to Nairobi for further medical attention.
8. The plaintiff consequently instituted this suit by way of the plaint dated 05/08/2019.
9. The plaintiff blamed the defendant's negligence for the injuries inflicted by Mr. Changpin on him and the deceased.
10. The plaintiff prayed for general damages for pain and suffering, damages under the *Fatal Accidents Act*, damages for loss of dependency, damages for loss of life expectation, and special damages of Kshs. 2,065,100. The plaintiff also sought interest on damages sought save for special damages from the date of judgment to the date of payment in full and interest on special damages from the date of the cause of action being 08/08/2016 plus costs of this suit and any other and further relief as the court may deem just and proper.
11. The defendant filed a statement of defence dated 24.02.2020.
12. The defendant averred that there were adequate security measures at all material times and that despite having the opportunity to do so the plaintiff, the deceased and Mr. Bai Jiang failed to report the initial incident. The defendant averred that the incident causing the injuries to the plaintiff and the deceased was so remote that it could not have been reasonably foreseen.
13. The plaintiff testified and did not call any witnesses. The defendant called two witnesses.

The Plaintiff's case.

14. PW1- Dong Yi. He adopted his witness statement dated 29/07/2019 as his evidence in chief. He also relied on the document annexed thereto filed on 05/08/2019.
15. On cross-examination, he stated that he arrived at the hotel in the afternoon of 08/08/2016. The guide helped them to do the procedures of checking in. He could not recall if there were security checks. He had some lunch at a very late time after arrival at a table close to the buffet table. There was no incident during lunch.
16. After lunch he went for a game drive and came back around 7 o'clock. He did not notice any security checks. The hotel was crowded with tourists but some individuals were in black suits whom he believed were hotel employees. He saw employees in the lobby and at the reception desk.
17. He went to the dining place after arrival from the game drive. Other tourists were going to their rooms.
18. The guide was responsible for table reservations. The table was reserved with a name plate. The hotel had placed a name plate. They looked for the logo and the name plate and located it. He took lunch at the same table he had lunch. There were no hotel employees at their table.
19. He asked his wife to wait at the table while he got her food. He then heard a conversation between his wife and a strange man. At the time he did not know the man's name. He could hear the conversation because it was in Chinese.
20. It was his first time in Kenya. The conversation was a quarrel. It was as if people wanted to fight one another. It was about one minute. The confrontation happened twice. He did not report to anybody at the hotel because he did not notice any hotel employees around. Lee was concealing something on his back. He did not take any action at the time as he saw his hands at the back and he did not know



- he had anything dangerous. He asked him why he was quarreling with his wife. He did not suggest changing to another table because there was a logo of their tourist company on this specific table.
21. Lee stabbed his wife. He later learnt that he was a tourist guide of another group of people. People came to their aid. A white lady came to assist but it was a quick incident and he could not tell who was at the scene. They were taken to the clinic.
 22. DW1 blamed Mr. Lee because he attacked his wife. He is aware that Mr. Lee was charged for the attack. He is also aware that the police investigated the incident. He was in hospital during the investigations. He left before the investigations were completed.
 23. His wife worked as a security manager in Beijing. He has not yet received compensation from any insurance for her death. She earned 2 million a year. Her income was not average. It depends on dividends and other elements which may increase with time.
 24. PW1 stated that he does not give up the claim of dependence. He had a bundle of documents which included an income certificate issued by the company where she was working.
 25. PW1 was claiming a refund of 2 days.
 26. In their society dependants include her mother, her mother-in-law, and himself in china they have an obligation and they did not need to issue a certificate of dependency. He was injured by a stab by lee. He was injured on the belly and arm. He was admitted to Nairobi Hospital.
 27. On re-examination, PW1 stated that there was no intervention by any hotel employee or security after the first confrontation. Other tourists paid attention to the confrontation. He did not know Lee when he came to Keekorok Hotel. He sued the hotel because if it had sufficient security martial this incident would not have happened the way it did.
 28. The company issued him a certificate of income and the company has informed him that the certificate has been challenged. He had a booking form which he obtained from his wife's email that they requested for the package at the hotel. PW1 only paid for the trip.

Defendant's case.

29. DW1- Joseph Leshornat. He is a front manager at Keekorok lodge. He relied on his statement dated 30.11.2020 which he tendered as his evidence in chief. He tendered list of documents dated 11.12.2020 as p exh1-8. He also relied on his supplementary list of documents dated 9.3.2023 as p exh9.
30. On cross-examination, DW1 stated that they do not place security guards in the dining hall. Keekorok lodge does not reserve tables only in special cases that the tables are reserved. They did not reserve tables during the high season. Byjam was a team leader. He ought to have acted. His failure to act makes him responsible for the consequent altercation. Had he brought it to the attention they would have acted. They would have known about it because it was in Chinese. For guests who do not speak English, they have a tour leader for all purposes. DW1 accused the plaintiff for not acting. Michael the defendant's employee is not Chinese and does not speak Chinese but saw punches being exchanged so he reported the matter.
31. DW1 could not tell the time lapse between the time the assailant left the table of the deceased and back.
32. Hotel management was not aware of the altercation although they were speaking in Chinese on top of their voices.
33. The capacity of the hotel is 84 in the dining but it was not full at the time.



34. The hotel places steak knives on the table. This is a weapon that was used to stab the deceased. These are eating knives. They are not weapons. They place the steak knives on all the tables. Despite these, they do not place a security officer in the dining hall.
35. On re-examination, DW1 stated that there were no security guards in the eatery areas. They were there but not within the restaurant. The steak knives are used to cut steaks. They are placed there for eating.
36. DW2-Samaire Ole Movosh. He is security for sun Africa hotel. He relied on Don's statement dated 30.11.2020 as his evidence in chief.
37. On cross-examination, he stated that he was at work on the material dated. He was patrolling the outside on the fateful date. Their staff informed him of the fateful events. He was not in charge at the time. Ordinarily, hotels do not place security officers in dining halls but outside the door. Guests take some beer or wine or whisky in the restaurant but not limited scale. They had about 200 guests. The knife used to kill the deceased was a steak knife. Michael was one of the guests he was operating a balloon. Immediately he received the information he rushed.

The plaintiff's submissions.

38. The submitted that the plaintiff was in the premises with the defendant's permission. It thus follows that where the defendant had not quantified its duty of care towards the plaintiff and his late wife, the duty to take such care as was reasonable to see that its visitors would be reasonably safe using the premises for the purpose that it had permitted lay upon the defendant. According to the plaintiff and the deceased was indeed owed a duty of care by the defendant. The plaintiff relied on sections 2(2) and 3 of the Occupiers Liability Act, Winfield and Jolowicz on tort, nineteenth edition, Halsbury's laws of England on negligence, volume 78 of 2018, Soma Properties Limited v HAM [2015] eKLR.
39. The plaintiff submitted that at all material times to this suit, the plaintiff and the deceased were lawful visitors and guests at the said keekorok lodge, the defendant's premises. Accordingly, the relationship between the management of the defendant's premises and its guests is sufficient proximity to justify the existence of a duty of care. The plaintiff relied on section 4(1) of the Occupiers Liability Act, Caparo Industries plc v Dickman and others [1990] 1 All ER, Everett and another v Comojo (UK) Ltd t/a the Metropolitan and others [2013] EWCA civ 13.
40. The plaintiff submitted that it must be foreseeable to any licenced hotelier that there is some risk that one guest might assault another. The attacks upon the plaintiff and the deceased took place while the parties were in the defendant's premises. Being an establishment that also dispense alcoholic drinks to its guests it is well known fact that consumption of alcohol can lead to loss of control and violence both verbal and physical.
41. The plaintiff submitted that it is fair and reasonable to impose a duty of care upon the defendant for the use of a knife provided for meals as a weapon in the course of a physical confrontation.
42. The plaintiff submitted that the defendant breached the duty of care owed to the plaintiff by failing to provide enough staff that would intervene in the event a foreseeable confrontation. The plaintiff relied on Winfred and Jolowicz on tort, nineteenth edition, Ali vs Giatu [1992] eKLR, James Joseph Pinsonneault v Merchants & Farmers Bank Trust Company 99-2 (la. App 3 civ 7/12/99 and Posecai v Walmart Stores inc 99-1222(111/39/99, 752 50 2nd 762.
43. The plaintiff submitted that he has demonstrated the validity of its case against the defendant. The plaintiff urged this court to find and allow the plaintiff's claim as prayed.



Defendant's submissions.

44. The defendant submitted that it does not dispute that it owed the plaintiff and the deceased a duty of care. The defendant relied on section 3(1) of the Occupiers Liability Act.
45. The defendant submitted that the sheer occurrence of an injury or harm on an occupiers' premises is not enough to warrant an occupier negligent liability. Stationing of security guards close to the eatery and not within the eatery is a practice reasonably expected with the circumstances underlying such an environment. The appropriate standard of care for an occupier in the immediate context would entail inspecting the restaurant regularly and putting in place reasonable security procedure, systems and personal access in points close to the restaurant. The defendant has put in place reasonable systems, practices and procedure that correspond to the expected standard of care. Therefore, the defendants did not breach any duty of care it owed to the plaintiff or the deceased. The defendant has relied on *Amani Kazungu Karema v Jack Mash Aouto Ltd & another* [2021] eKLR, section 3(2) of the Occupiers Liability Act, *soma properties limited v HAYM* [2015] eKLR, *modbury triangle shopping centre TYY ltd v tony paul anzil 7 another* [2000] HCA 61.
46. The defendant submitted that there is no causation link between the defendant's conduct and the event causing harm and loss to the plaintiff and the deceased. Mr. changpin is personally liable for the stabbing and for the damage suffered by the plaintiff and the deceased. The defendant has relied on the case of *Timsales Limited v Stanley Njihia Macharia* [2016] eKLR cited with approval *South Nyanza Sugar Co. Ltd v Wilson Ongumo Nyakwemba* [2008] eKLR quoting *Statpack Industries Limited vs James Mbithi Munyao HCCA no. 152 of 2003 (UR)* and *Elijah ole Kool v George Ikonya Thuo* [2001] eKLR.
47. The defendant submitted that the reasonable man would not consider this event reasonably foreseeable. The plaintiff did not adduce evidence that changpin actions were the result of intoxication. The defendant relied on *Overseas Tankship Ltd vs Marts Dock Ltd* [1967] 1 AC 617 with approval in *Teachers Service Commission v WJ & 5 others* [2020] eKLR, *Modbury Triangle Shopping Centre TYY Ltd vs Tony Paul Anzil & another* [2000] eKLR, *Everett and Another v Comojo (UK) Ltd (Ha Metropolitan)* and *others* [2011] EWCA civ 13.
48. The defendants submitted that the doctrine of *res ipsa loquitor* does not apply in the circumstances and facts of this case. The defendant relied on *PGM (Suing a s a legal representative of the estate of KMG- Deceased) v Kimathi Civil Appeal 98 of 2017* [2022] KECA 76(KLR) 4 February 2022) judgement, *Scott vs London First Katherine Docks Co. (1865) 3h & c 596*, *Richard Kanyango & 2 others v David Mukii Mereka* [2007] eKLR.
49. The defendant submitted that the defendant is not liable for the negligence, the plaintiff is therefore not entitled to any of the reliefs sought. The plaintiff has not adduced any evidence to substantiate the claims for special damages. The defendants submitted that the plaintiff cannot seek damages for the whole sum because the tour package had already been substantially utilized. The defendant relied on section 12 of the *Evidence Act*, *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR.
50. The defendant submitted that the plaintiff has not produced any evidence showing that the deceased maintained her family, child and parents as dependants prior to her death. The defendant relied on *Bhupendra M Patel (suing the personal and legal representative of the estate of Manibhai Patel (deceased) v George Omwanza Kenanga* [2017] eKLR, *Isaack Kimani Kanyingi & another (suing as the legal representative of the estate of Loise Gathoni Mugo (deceased) v Hellena Wanjiru Rukunga* [2020] eKLR.



51. The defendant submitted that the plaintiff has not adduced evidence showing the level of dependency alleged on the deceased or the portion of the deceased's net income which would have been given to the dependants. Therefore, the plaintiff is not entitled to damages for loss of dependency.

Analysis and Determination.

Facts not disputed and or agreed

52. The fact of death is not disputed.
53. According to the evidence of DW1 and PW1 the deceased was a guest and a visitor in the defendant's premises. PW1 and the deceased were tourists. DW1 was a front manager at the defendant's hotel.
54. Similarly, an altercation occurred between one Changpin and the plaintiff and the deceased as a result of which the plaintiff sustained injuries and the deceased lost her life.

Issues

55. The pleadings, evidence on the record as well as the submissions of both parties raise two broad issues: i) liability; and ii) quantum of damages.
56. More specifically, the court should determine: -
- i. Whether the defendant breached the duty of care to the plaintiff and the deceased:
 - ii. Whether the defendant is liable for the injury inflicted upon the deceased by a third party within the defendant's premises
 - iii. Whether the plaintiff is entitled to the reliefs sought.
 - iv. Who bears the costs of the suit?

Duty of care

57. In law, 'An occupier of premises owes the same duty, the common duty of care, to all his visitors...(s. 3(1) of the Occupiers Liability Act)'
58. "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' (s. 3(2)).
59. The defendant accepts that the defendant owed a duty of care to the plaintiff and the deceased. Except, the defendant takes the view that, the attack using a steak knife was not foreseeable, and the attacker and the tour guide Bai Jiang were solely to blame for the death of deceased. In other words, the defendant argued that the duty of care owed by the defendant does not extend to actions or risks by third parties.
60. The plaintiff is of a different opinion. The plaintiff tendered evidence that there was no security or security arrangement or response to the incident which would otherwise have saved the situation. And, holds the defendant squarely to blame for breach of duty of care to the plaintiff and the deceased.
61. The plaintiff also relied on the doctrine of *res ipsa loquitur* in the case of *JFA Ogol v Wilson Murumbu Murithi* (1982-88) KAR 859, where it was held that once it was proved that the appellant was hit while on a pedestrian crossing the doctrine of *res ipsa loquitur* applied and the burden was on the respondent to explain and demonstrate that the accident was not due to any fault on his part.



62. The defendant denies this doctrine applies to the case before the court.
63. Be that as it may, the defendant owed a duty of care to the plaintiff and deceased. Security of guests in the establishment is also paramount.
64. The defendant made a superb submission that, the appropriate standard of care for an occupier in the immediate context would entail inspecting the restaurant regularly and putting in place reasonable security procedure, systems and personal access in points close to the restaurant. And, submitted that, the defendant has put in place reasonable systems, practices and procedure that correspond to the expected standard of care.
65. Let us weigh that submission to the evidence.
66. DW1 stated that they have security placed outside the door of the restaurant, but not inside, and had systems in place for the security of the guests. He called this a reasonable practice for restaurants.
67. DW1 did not show how the security systems respond in real time to any security lapse or concern. His testimony was that they became aware of the incident after an employee saw an exchange of blows amongst the guests who were speaking in Chinese and at the top of their voices.
68. DW1 and DW2 only spoke of placing guards outside the restaurant, and others patrolling the outside only. There was nothing to show that there was any systems or security arrangement they had in place to respond to any security lapse or incident in question promptly or that corresponds to the standard of care to guests.
69. It was surprising for him to say that the guests concerned were speaking in Chinese language at the top of their voices but no one responded from the hotel to find out what was happening or save the situation. Other than the report by Michael, no employee or routine relations manager who goes around to find out the welfare of the guests, responded to the incident herein. Their action came too late and after the fact.
70. Fighting in restaurants is not strange or unforeseeable. Some enterprises place workers trained on security at strategic positions just in case of any security lapse, who also keep on finding out whether the guests are ok. Nothing of the sort was alluded to by the defendant. The security systems and procedures DW1 talked about were not identified or demonstrated.
71. Use of knives meant for eating as weaponry is also foreseeable. Thus, prudence in security and risk management for such establishments is to proactively and continually identify, assess risk areas and prescribe appropriate measures to mitigate the risks. The defendant did not take reasonable measures to ensure the security of the plaintiff and the deceased in the restaurant.
72. The defendant under the law being the occupier of premises owes a common duty of care to his visitors which 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.
73. The evidence and circumstances of this case is an indictment of the defendant for breach of duty of care; quite contrary case to their submission.
74. The defendant did not seek indemnity or contribution from third parties it attempted to blame for the accident. No process was adopted by the defendant to achieve this.
75. In light thereof, the court finds and holds the defendant to be wholly liable for breach of duty of care to the plaintiff and the deceased.



Claim under Law Reform and *Fatal Accidents Act*

76. This claim was founded on the *Law Reform Act* and Fatal Accident Act. These laws provide for awards for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years- loss of dependency.

Loss of expectation of life & pain and suffering

77. The death occurred shortly after the accident thus an award of Kshs. 100,000/= is reasonable for pain and suffering.- it is so awarded.

Loss of dependency or lost years

78. Simply put, loss of dependency refers to the loss in terms of support, suffered by dependants of, as a result of the death of the deceased. Loss of dependence may be calculated on the basis of some established formula or methods, or awarded as a global sum of damages assessed on the basis of comparable decide cases.

79. Assessing damages for loss of dependence is, nonetheless, not easy. It has been likened to placing a monetary value on a life that is lost to the dependants. This is complicated further as the Court may also have to anticipate what the deceased could have contributed to the welfare of her family had she lived.

Dependants

80. Who are the dependants in this case and how much they have lost in terms of support as a result of the deceased's death? The loss is felt by all family members irrespective of their financial independence.

81. On the one hand, the plaintiff's counsel submitted that all family members were dependants.

82. On the other hand, the defence counsel submitted that the plaintiff has not proved dependency.

83. The specific evidence by PW1 was that the deceased was depended upon by her child, her mother, her mother in law and himself. These facts were not disproved or controverted in any manner. Dependency is therefore, proved.

Age of deceased

84. According to the certificate of death produced, the deceased was 45 years old at the time of her death. PW1 produced a certificate of income from the deceased employer company. He stated that the deceased earned 2 million yuan annually.

Multiplier

85. The multiplier approach and its application are no longer called upon to justify itself in law. Ringera J (as he then was) in the case of *Kwanzia vs Ngalali Mutua & another* stated that:

“The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”



86. The deceased was aged 45 years. It is reasonably expected that she may have worked up to 60 years. Therefore, considering the vicissitudes of life, a multiplier of 15 years would be appropriate.

Income

87. The plaintiff stated and proved that the deceased was earning an annual income of 2,159,867 Chinese Yuan.

88. Therefore, using a multiplier of 15 years, a multiplicand of 2,159,867 Chinese Yuan, and a dependency ratio of 2/3, the calculation of loss of dependency is thus: -

$$2,159,867 \times \frac{2}{3} \times 15 = 21,598,670/= \text{ Chinese Yuan}$$

Special Damages

89. Special damages should be specifically pleaded and strictly proved.

90. The plaintiff claimed special damages under the Law Reform and *Fatal Accidents Act*. Under special damages falls funeral expenses and transportation of the body, cost of applying for grant, police abstract, air fares and refund of un-utilized tour package.

91. The defendant merely stated that the tour package was substantially utilized without providing any details or evidence thereof.

92. There is no dispute that there was death and funeral expenses were incurred. The amount claimed of Kshs 727,000/- is reasonable and is allowed.

93. As for application for grant charges of Kshs. 18,000, police abstract kshs. 100, air fares for Dong yi of kshs 120,000 and refunds of un-utilized tour package of kshs 1,200,000 were not proved.

94. Except, the plaintiff produced original receipt and confirmed voucher for RDM 23,728 as the cost for each person. This item is allowed.

In the upshot...

95. The final judgment is entered for the plaintiff against the defendant as follows: -

- a. The defendant is 100% liable.
- b. Pain and suffering Kshs. 100,000/-
- c. Loss of dependency... $2,159,867 \times \frac{2}{3} \times 15 = 21,598,670/=$ Chinese Yuan (or equivalent in Kenya Shillings)
- d. Special damages RDM 23,728 (or its equivalent in Kenya Shillings) and Kshs. 727,000 for funeral expenses
- e. Plus, costs and interest.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 29TH DAY OF FEBRUARY, 2024.

.....

F. Gikonyo M.

Judge



In the presence of: -

1. Court Assistant – Otololo
2. M/s Korir for Wamanga for Plaintiff - Present
3. Banji for the Defendant - Present

