

THE REPUBLIC OF SEYCHELLES
IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT
VICTORIA

Civil Side No. 09 of 2011

Esterilia Charline Napoleon=====Plaintiff

Versus

Evans Morel=====Defendant

Clifford Andre for the plaintiff

Joel Camille for the defendant

JUDGMENT

Egonda-Ntende CJ

1. The plaintiff is the mother of one Jeffrey Napoleon who passed away by drowning on the 7th June 2009 at Bel Ombre, Mahe. It is contended for the plaintiff that the deceased left home on 7th June 2009 for the beach. The deceased was a retarded person. The deceased met the defendant on the beach. The defendant asked the deceased to clean underneath his boat which was anchored at Bel Ombre. The deceased did as he was told by the defendant. The defendant did not supervise him or provide him with any equipment. The deceased drowned under the boat.
2. The plaintiff contends that the death of the deceased was due to the fault of the defendant and sets out the following as particulars of fault:

‘(a) The plaintiff avers that the defendant requested and allowed the deceased to dive and clean under his vessel without proper equipment to do so.

(b) The plaintiff avers that the defendant knowing the psychological condition of the deceased requested and allowed him to perform the duties.

(c) The plaintiff avers that the defendant knowing fully well that the deceased had not surfaced for over 10 minutes failed to take appropriate measures which would have prevented the deceased from drowning.

(d) The defendant failed to do everything in his power to prevent [prevent] from drowning.

3. The plaintiff SR3,000,000.00 for loss of life of the deceased and moral damages for pain, suffering, emotional distress, mental anguish and trauma SR1,500,000.00.
4. The defendant denied the plaintiff’s version of events. He had no prior knowledge of the deceased whatsoever. One of his employees was having difficulty to retrieve an anchor for his boat that had been moored at Bel Ombre Jetty. The deceased came along on his own and volunteered without the use of mask or snorkels to remove the anchor stating that he was well versed with the waters at Bel Ombre Jetty. The defendant accepted that offer.
5. The deceased swam up to the boat and dived up and down on 2 occasions but did not come up thereafter. The defendant contends that the deceased was solely responsible for his demise and not the defendant. He prayed that this suit should be dismissed.
6. To prove her case the plaintiff testified as well as 4 other witnesses. PW1, the plaintiff, stated that on the day in question she was at home. Her son,

the deceased left for the beach. It was between 12.00 and 12.30 pm that she received a call being notified that her son had died. She proceeded to the mortuary where she saw the body and the police subsequently recorded a statement from her. Maxwell Duval was PW2. He was cohabiting with PW1. On the day in question he received a call from Jim, the deceased's brother informing him that he had drowned at the beach. He asked a lift from neighbour to the beach. They found that the body had been taken to the mortuary. They went to the mortuary and saw the body.

7. PW3 was Ricky Cupidon. He is a diver. He was going to work on the day in question when he was approached by a one Gary who asked to assist and recover someone who had drowned in the sea at the Bel Ombre. He jumped into the water and swam to the boat. He went under and felt for a person and finally brought up the body to the surface. There was a boat in which they put the body. There was a doctor in the boat and they attempted to give artificial respiration to the body without any success. It was taken ashore where there was an ambulance. The witness was in shock and went away from the scene.
8. PW4 was Steve Payet, the owner of the boat in which the body was put once it was recovered from the sea. He testified that he was approached by someone to assist and rescue someone from the sea. He told the person that his nephew will assist. His nephew, Ricky jumped into the water and swam to the boat and the witness followed in the boat. Ricky eventually succeeded to recover the body and brought it up to the surface and put it in his boat.

9. The last plaintiff's witness was Dr Daniella Malulu, a Psychiatrist at Victoria Hospital. She testified that she had attended to a patient by names of Jeffrey Napoleon, born in 1975. The patient had attended the Psychiatric Unit from 1994 with both involuntary and voluntary admissions. He was suffering from acute etoxiprosis cyclosis secondary cannabis use and alcohol dependent syndrome. In spite of being on treatment he had relapses during his continuous drugging and poor compliance with treatment and follow up. He had considerably improved and able to keep a job around 2006. He was last seen at the Psychiatric Unit on 19th November 2008 and transferred to beau Vallon clinic for follow up by local doctor.
10. The defendant testified that he had a small yacht / boat at the Jetty at Bel Ombre. He went with his brother and a worker to try and move it. He entered the boat and one of his workers took the dinghy and got hold of the chain holding the anchor and tried to pull the anchor to free the boat. The anchor could not come free. The engine was not working and the defendant was prepared to use the sail. His brother remained on the jetty. The deceased came up in the water and offered to help to remove the anchor from underneath the boat. The defendant asked him if he could manage given that he did not have any equipment. The deceased replied that he was used to cleaning under the boats without any equipment and he would manage.
11. The deceased dived below the boat and came up twice. The third time he did not come up again. The defendant realised there must be something wrong. He asked his brother to call for help and he went to report to Bea Vallon Police Station. By the time he came back the body had been

recovered. He went into shock. For fear of a hostile reaction he did not visit with the deceased's parents or attend the funeral of the deceased.

12.DW2 was Norcy Peter Morel, brother to the defendant. They were together on the fateful day. They were at Bel Ombre trying to remove an anchor from the defendant's yacht when the deceased came along and offered to help. He jumped into the sea and later failed to come up again. The defendant asked him to look for help which he did and asked some to help them. That person actually went into the water and retrieved the body of the deceased.

13.The last defence witness, DW3 was Lindsay Accouche. He was employed by the defendant. On the fateful day they were at Bel Ombre trying to retrieve an anchor and move the yacht belonging to the defendant. The witness was in the dinghy trying to remove the anchor and the deceased came along swimming in the water. He told the defendant that he could help. The defendant asked him whether he had any equipment. The deceased said he did not any as he was used to doing this work. He dived into the sea below. The witness suspected there was something wrong and waived to the defendant telling to call for help. The defendant's brother called for help and the defendant went to report to the police station. Someone came to help and recovered the body of the deceased.

14.Mr Clifford Andre, learned counsel for the plaintiff, in his submission to court stated that all the three defendant's witnesses' testimony was somewhat inconsistent. The defendant mentioned that the deceased came up twice before finally failing to come up again while the other two witnesses never mentioned this fact. This shows that the defendant is responsible for the death of the deceased.

15. Mr Camille, learned counsel for the defendant, submitted that the plaintiff had failed to prove fault on the part of the defendant for the death of the deceased. The death was unfortunate but not the fault of the defendant. It was caused neither by an act or omission of the defendant.
16. What is clear to me is that the version of the plaintiff on the events leading to the death of the deceased remains unproven. It was contended that the defendant hired the deceased to clean under his boat and in the process of doing so died. Whereas it is not in dispute that the deceased died, it is clear there is no evidence to support the contention that he had been hired by the defendant to clean under his boat.
17. The other contention was that the deceased to the knowledge of the defendant was a retarded fellow. There was no evidence produced to show that the defendant knew the deceased prior to meeting him on that day. The defendant was unaware of the medical history of the deceased. The deceased seems to have been the victim of substance abuse for which he had been on treatment and had improved substantially at some point to even take a job.
18. Even if one were to accept the submission of Mr Clifford Andre for the plaintiff that the defendant was not telling the truth this does not advance the case for the plaintiff any further. In the absence of the defendant's evidence there is no explanation as to how the deceased met his death. More particularly evidence that such death was the fault of the defendant is not available. The plaintiff was not able to produce any such evidence before this court.

19. The inconsistency that Mr Andre places so much score upon is explainable. Given the different positions of the defendant and his witnesses at the critical point as this fast paced tragic event unfolded and the passage of time since it occurred it is possible in the narration of what happened that each person may describe the event as he recalls the same with varying emphasis on the details. The details embedded in the memory and recounting may vary from person to person. This does not necessarily point to untruthfulness but is simply an aspect of human nature.

20. I find the defendant's version of what happened that fateful day, as narrated by the defendant and his witnesses probable. The deceased swam to the defendant's yacht. The deceased approached the defendant with an offer for help. The defendant cautioned the deceased that he did not have any equipment. The deceased responded that none was necessary. He had been doing this kind of thing all the time. The defendant did not hire the deceased. The deceased offer to help to retrieve the anchor.

21. I find that the death of the deceased was by his own misadventure though it occurred while trying to render assistance to the defendant. I am not sure if the defendant would have been able to prevent the deceased from diving under his boat. In the circumstances of this case I am unable to find fault on the part of the defendant. This case is dismissed with costs.

Signed, dated, delivered at Victoria this 16th day of November 2011

FMS Egonda-Ntende
Chief Justice