



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2751 OF 1986

ALI JUMA MAINGI..... PLAINTIFF

VERSUS

METAL BOX (K) LTD..... DEFENDANT

JUDGMENT

The plaintiff Ali Juma Maingi sued his former employer Metal Box (K) Ltd claiming damages for the injuries he sustained as a result of being assaulted by one of his fellow co-employees, in the course of their employment with the defendant. The plaintiff claimed that the assault was “caused and/or precipitated by the defendant’s negligence, in the management and control of its factory/premises”. He proceeded to give particulars of such negligence in para 4 of his plaint.

The defendant denied in its defence, that the assault of the plaintiff by his fellow employee occurred in the course of their employment nor was it precipitated by the negligence of the defendant, as assault is a criminal act, and the defendant cannot in law be held responsible for it.

In his evidence in Court, the plaintiff re-called the 10th December, 1983. He was working as a machine operator having reported on duty at 5 pm.

He was sorting out tins behind a machine and at 5.30 pm, Lawi, his fellow employee and a machine operator appeared behind him, and without talking, hit the plaintiff on his head at the back, using a pipe he got beside the open machine the plaintiff was working on. These pipes had been lying there for the past 3 days as they were being repaired.

The plaintiff fell down unconscious. He found himself lying in bed at Kenyatta National Hospital, when he regained consciousness.

He was injured on his head at the back and was later examined by Prof Ndetei and Dr Risso. He produced as Ex 1, a medical report, prepared by Dr Risso.

The plaintiff returned back after a period of about 1 and 1/2 months, and reported the incident to the police, but he did not find Lawi and has never seen him since.

The plaintiff re-called that he had met Lawi in the toilets that evening and they had had a brief discussion as a result of which Lawi pointed at him, warning him.

The plaintiff stated further that Law had been warned by the management against bullying other

employees. That Lawi used to be aggressive and even used to come to work drunk and the management was aware of this. He blamed them for not having taken any action against him and for not calling police to arrest him on that day.

The plaintiff eventually left his work with the defendant company in 1990. This was because one Bwire threatened him to withdraw his case from Court, but he refused.

During cross-examination the plaintiff explained that on that fateful evening Lawi appeared from behind him and held his waist, then the two fell down and the fore-man came to separate them.

He re-called that Lawi alleged that he (the plaintiff) was removing tubes from his place where he was filling the gauge. The plaintiff maintained that he was supposed to do that as part of his work. He also recalled that they had struggled first, before they met in the toilet.

The plaintiff admitted that on 30th December, 1990 he was stopped at the gate after having been found with 4 tins by Kiwi Company, and that is why he was dismissed. He identified a statement he signed to that effect as an exhibit in Court.

To give evidence for the defendant's company was Gachina Mwangi, a machine operator. Both the plaintiff and one Lawi were his fellow work mates.

He re-called 10th December, 1983, all 3 of them were on duty at night, having reported at 5 pm.

That during the course of that night, he witnessed a fight between the plaintiff and Lawi. That as the plaintiff was putting tins in a tray and was about to complete, Lawi walked to him and demanded to know why he had taken the tray before it was full.

Law then held that the plaintiff and pushed him down and a scuffle ensued.

Gachina and the others moved to separate them, and Lawi was held and moved to a distance of 5yd away from the scene. That Lawi returned found the plaintiff sitting on a pipe and hit him with his hand. The plaintiff fell down and hit his head at the back, on the floor.

That the plaintiff was taken to the dispensary but Lawi went away. The witness said that Lawi had hit several other people before, and on cross examination he said:

“That night, Lawi was drunk because of the way he was talking. He was harsh to the people. He was showing signs of being violent. He was pushing people aimlessly as he was walking around. The fore-man was there and he saw him”.

Further still on cross examination, the witness answered that, “the foreman was warning Lawi to stop quarreling other people...”, but he was not thrown out of the factory.

The witness said further that Lawi forced his way out of the factory, though there was a shift manager who saw them dragging the plaintiff to the dispensary and the same manager had been informed of the assault.

James Ohowa, too has been an employee of the defendant since 1979, as a machine operator. He knew both the plaintiff and Lawi, whom he re-called had a “war” on the night of 10th November, 1983. That Lawi hit the plaintiff with his fist, then the 2 were separated by the fore-man Oloo.

James went to the plaintiff to enquire why the 2 were fighting but almost immediately, Lawi returned and hit the plaintiff, who fell on the floor, and Lawi got hurt at the back of his head, and he was carried to the dispensary.

James knew Lawi as a bad-tempered man, but had never seen him fight. To him, Lawi did not look drunk

that evening

After the fight he saw Lawi escape.

Finally for the defendant was the evidence of Panada Okado Dismas by, the Personnel Manager of the defendant company. He was the one who wrote the letter of termination to the plaintiff on 7.1.91. The allegation against the plaintiff was that he illegally obtained shoe polish tins which had been returned by their clients, and further, that he attempted to remove them from the defendant's premises without permission. The plaintiff made a statement in connection with that incident. This was produced in Court as an exhibit.

Concerning the incident between the plaintiff and Lawi Nyatuoro, the witness produced a report which the Production Foreman Leonard Oloo had prepared.

The two counsel filed written submissions and quoted several cases which I have read and considered.

I consider that there is sufficient evidence on record from which to find that there was a scuffle between the plaintiff and Lawi Nyatuoro, during the evening or night of 10th November, 1983, as the two were on duty in the factory. Evidence is on record as to what happened from the various witnesses including the report of Leonard Oloo, the Production Manager.

This evidence brings out the sort of person Lawi was, generally. Oloo described him "a difficult person who would argue over orders...". The plaintiff says he was a bully and aggressive, and would come to work drunk, a factor known to the management. The plaintiff has been challenged in the written submissions for not producing or naming anybody whom Lawi bullied.

The defendant's own witness Gachina said Lawi had hit several other people before, and according to him Lawi was drunk, judging by the way he was talking, he was harsh and showed signs of being violent.

Gachina's observations of Lawi is particularly important because Oloo's report confirms that "Nyatuoro (Lawi) and Gachera Mwangi were working together on one machine".

This makes him the person who worked or was closest to Lawi, so his observations would be more accurate than anybody's. Joshua's evidence too was that Lawi was a bad tempered man.

I would want to consider that evidence against the evidence that the 2 had a scuffle or a "war" as it was called by some witnesses then they were separated, but that Lawi, with no explanation or cause whatsoever went up to the plaintiff again and hit him until the latter fell down unconscious. The plaintiff says he hit him with a pipe, but the defence witnesses say he hit him with his hand and he fell down on the floor unconscious.

To me, the important part of that evidence is that the hitting or falling on the floor was so severe that it made the plaintiff unconscious!

Since the 2 had been separated by Oloo and the other workers, what was it that made Lawi Nyatuoro suddenly hit the plaintiff a second time, which hit, resulted in the plaintiff falling down unconscious.

From the evidence on record I find that the plaintiff was either drunk, as the workmate who was close to him testified or his usual hot temperament made him hit the plaintiff a second time after they had been separated.

After separating the 2, Oloo writes on page 2 that he thought it was a minor problem which ended there but he must have been surprised to see Nyatuoro suddenly turn to Maingi (plaintiff) and hit him with a fist, as a result of which the latter fell down.

I am making a finding, from this set of facts that Oloo as the fore-man who was present on the scene, and

who knew Nyatuoro's temperament, should have taken Lawi Nyatuoro away completely after separating them. His evidence that:

"I thought it was a minor problem and I told him to go back to work" in my view showed a non – caring, casual and negligent attitude when dealing with a man such as Nyatuoro.

Even when the plaintiff had fallen on the ground after having been hit by Lawi, in Oloo's presence, Oloo simply told him to go home, instead of detaining him for further questioning. I find this to have been a negligent way of dealing with a problem of this nature, under these circumstances, and I find that the plaintiff was quite right in suing the defendant for negligence, precipitated in the management and control of its factory premises. The fore-man Oloo knowing that Lawi was "a difficult person" to use his words in the report, whom he had just separated from a fight with a fellow worker in the factory at night, failed to order Lawi out of the factory at that time, thus causing Law to remain in the factory where he hit the plaintiff who fell down unconscious as Lawi escaped scot-free!

I find the defendant liable for negligence in this case.

The plaintiff was examined by 2 doctors, and a report is on the record, with a conclusion that no neurological permanent disability was detected, but a reduction of his sight field on the left eye was detected. This plus the fact when the injury was inflicted on him must have suffered a lot of pain and he also stayed in hospital for the length of time he stated.

I have considered the awards of damages in the various cases which were quoted to me, but each must be looked at from its own facts and circumstances. Taking all factors into consideration, including the value of the Kenya Shilling at the moment, I would say that an award of Kshs 80,000/- for pain, and suffering, would suffice in this case.

The plaintiff did not lose his job or salary as a result of this incident, but a different incident which had nothing to do with this case. I will therefore not award any damages under the workmen's compensation or loss of salary, as the plaintiff's services were terminated and his dues were paid in accordance with his terms of service.

I find judgment for the plaintiff against the defendant in the sum of Kshs 80,000/= plus costs and interest.

Dated and delivered at Nairobi this 22nd day of July, 1993

J.A. ALUOCH

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JUDGE