



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE No. 1271 OF 1979

SYAN.....APPELLANT

VERSUS

SUNSET HOTEL LTD.....RESPONDENT

JUDGMENT

March 3, 1988, **Mbaluto J** delivered the following Judgment.

This suit arises from an incident that occurred on the night of 7th and 8th June, 1977 at the Sunset Hotel, Kisumu when the plaintiff was attacked in the hotel by a man called Amrik Singh. At the material time the hotel was the property of the defendant and was being managed by it. The plaintiff claims that the attack upon him took place because of the negligence of the defendant and alternatively be reason of the defendant's failure to observe the duty of care required of it by the contractual relationship between it and the plaintiff while the plaintiff was a guest for valuable consideration and or reward at the said hotel.

The defendant has denied liability contending that it was neither negligent nor guilty of any breach of duty of care as alleged or at all. It was averred in behalf of the defendant that the claim for damages lay against Amrik Singh and not against the defendant. The defendant also lodged a counter claim in the sum of Ksh 1,100/= in respect of property damaged during the attack on the basis that the plaintiff allowed the said Amrik Singh into the hotel room and whilst therein engaged him in a brawl during which the said property was destroyed.

It will therefore be seen from the pleadings that the issue I have to determine in this are as follows:

- (a) Whether the defendant's servants were negligent;
- (b) Whether the defendant owed any duty of care (contractual or at common law) to the defendant and, if so, whether such duty was breached;
- (c) Whether the plaintiff was negligent;
- (d) Quantum of damages.

In support of their respective cases each of the parties called only one witness i.e the plaintiff for himself and Agnelo Gomes (D.W 1), who was the receptionist at the material time, for the defendant. The evidence of these two witnesses is directly in conflict in all material respects and I have to decide which of the two to believe. This exercise is not made any easier by the fact that the evidence of DW 1 was taken *de been esse* on 22nd January, 1986 and I was therefore not able to observe him in the witness box. Be that as it may, the evidence for the plaintiff was that he was at the material time the construction and

maintenance supervisor for Esso Company and on 7th June, 1977 was at Kisumu in connection with his employer's business. Having been booked in room 509 at the defendant's hotel, he checked therein at 6.30 pm. It is common ground that the said room had been occupied by Amrik Singh the previous night but he had checked out in the morning of 7th June, 1977. The plaintiff is also said by D.W 1 to have been a friend of Amrik Singh with whom he was seen on 7th June, 1977 but he categorically denies having known Amrik Singh or being with him, on the day in question.

The plaintiff further testified that having checked in at the hotel, he went for super at 8.30 p.m and was through with it by 9.30 pm whereupon he went to town returning therefrom at 9.45 p.m. He then proceeded to his room, locked the door, keeping the key on a table in the room and went to bed. He slept until well after midnight when he was woken up by the ringing of the telephone and on lifting the receiver found the caller was D.W 1 who wanted him to share the room with a man called Amrik, D.W 1 explaining that the hotel was fully booked and that he could not get the said Amrik alternative accommodation. The plaintiff further said that he told DW 1 that he did not know Amrik and could not share the room with him. Amrik is also to have spoken to the plaintiff in an attempt to persuade him to share the room but the plaintiff stood firm in his refusal. He therefore disconnected the telephone and went back to sleep.

According to the plaintiff further evidence, immediately thereafter Amrik somehow managed to open the plaintiff's room got hold of him and Amrik Singh being a hefty fellow, proceeded to administer such heavy blows upon the plaintiff that he rendered him unconscious. When the plaintiff regained consciousness Amrik re-appeared in the room this time accompanied by two other men and again thoroughly beat up the plaintiff, after which, he left. The plaintiff then called the night attendant and later the police were called. Amrik Singh was arrested in another room of the hotel and later the following day on 9th June, 1977 taken to court where he was charged, apparently, with assault occasioning actual bodily harm to which he pleaded guilty, was convicted and sentenced to pay a fine of shs 50/=.

The evidence for the defence was that both the plaintiff and Amrik Singh were known to be friends and though the latter had checked out of room 509 on the morning of 7th June, 1977 before the room was occupied by the plaintiff later in the same day, it was possible both were sharing the room at the time of the attack. DW 1 said that he had seen both the plaintiff and Amrik Singh together on the evening of 7th June, 1977 and that he knew that they were friends. He was not therefore surprised or concerned when at around midnight he saw Amrik Singh at the reception desk asking for the plaintiff. DW 1 further testified that before he could answer him, Amrik Singh left the reception desk and went away. The witness said he knew that Amrik Singh was heading for the plaintiff's room. Later DW 1 heard the ringing of the buzz on the telephone switchboard and on picking up the receiver heard a lot of screams. He therefore instructed a watchman to go to room 509 and check what was happening there. The watchman later came down with the plaintiff who appeared to be in pain and, later, the police were called.

The plaintiff's claim on the basis of negligence hinges on the allegation that DW 1, i.e the night attendant or receptionist unlawfully permitted Amrik Singh this was done against the plaintiff's wishes. Although the plaintiff did not expressly so state, the implication from his evidence is that DW 1 must have given the duplicate key of the room to Amrik Singh so that he could gain entrance thereto since without the key there is no way Amrik Singh could have entered the room without breaking it. In the absence of any direct evidence on the point, I find this suggestion on the part of the plaintiff extremely difficult to believe, and, I say so for two reasons.

Firstly the Sunset Hotel, even if not a five star hotel is one of the better facilities there are in the town. It certainly is not a back street outfit which would be associated with the type of conduct the plaintiff has suggested. I therefore find it hard to believe that a receptionist in a hotel like sunset, would, at the middle of the night, force on a hotel guest, a stranger just because no alternative accommodation could be found for the stranger. The usual thing to do in such circumstances would have been to tell the stranger to look for accommodation else where since the hotel was full. In the circumstances of this matter, I am inclined to believe that is exactly what Amrik Singh would have been told if what the plaintiff explains as the reason for the Amriks presence in his room were the truth.

Secondly taking the position of Amrik Singh, how many normal people, and it has not been suggested that Amrik Singh was abnormal, would at the middle of the night, insist on going to sleep in a room already occupied by a person or persons not known to them. Having considered both the evidence of the plaintiff and the D.W. 1, I think, between the two, that of DW 1 is more credible. I therefore accept his evidence that both the plaintiff and Amrik Singh were not only friends but were on the night of that incident seen together. Consequently it is likely that they were sharing the room. However, even if they were not sharing the room, on the evidence before me, I believe that Amrik Singh gained access to the plaintiff's room, not because of any collusion between him and DW 1, but with the consent of the plaintiff who must have opened the room for him, if, at all, it was closed.

In reaching the above conclusion, I am re-inforced by certain other aspects of the plaintiff's evidence which when closely examined raise considerable doubt as to the veracity of his testimony. Firstly, throughout his evidence, the plaintiff was at pains to point out that Amrik Singh, though an Asian, was a total stranger to him and was not a Sikh, like him. Having regard to this evidence, it is significant that in the Criminal Proceedings (exhibit 1) against Amrik Singh, the man is not only referred to as Singh, which title in my experience is used only by Sikhs in this country but also in giving the summary of facts before the Court, the prosecutor stated:

“Facts are that on the material date the parties (i.e complainant (the plaintiff) and the accused (Amrik Singh) were all sharing the hotel room. There broke a quarrel between them. The accused hit the complainant with a stool. He sustained some injuries.”

This statement was made on 9th June, 1977 one day after the attack and I think it must have been true. It was obviously based on the statement made by the plaintiff to the police as there was no one else in the room when the fight started who could have explained how the fight started. I recognize that that the plaintiff states that he was not present when Amrik Singh was charged and when the prosecutor made the statement, but this does not explain how the prosecutor came to know the circumstances of the brawl so quickly after the event. I believe that what the prosecutor said was what he was told by the plaintiff. I also accept D. W. 1's evidence that not only were the plaintiff and Amrik Singh friends but they were also possibly sharing the room even though Amrik Singh was not officially booked therein. There was therefore no negligence on the part of any of the defendant's servants with regard to Amrik entrance to the plaintiff's room and consequently his claim on negligence must fail.

The second issue I have to decide is whether the defendant was under any contractual obligation or under some other common law duty of care to ensure that the plaintiff was not, under any circumstances, even without negligence on the defendant's part, attacked by anyone whilst in the defendant's hotel. As I understand it, the position is that:

“at common law it is the duty of the hotel proprietor in his capacity as in-keeper to take reasonable care of the person of his guests, so that they should not be injured by anything happening to them through his negligence while they are his guests. No absolute liability to insure the personal safety of guest is however imposed on him such as he is under with respect to the safety of their goods, so that if a guest is beaten in an inn the innkeeper is not liable (the emphasis is mine) – (*Halsbury's Laws of England* – 3rd Edition - Volume 21 pages 450 - 451).”

In the absence of negligence the plaintiff has no claim either on contract or at common law generally against the defendant. For the above reasons therefore the plaintiff's claim against the defendant fails and is dismissed with costs.

As regards the defendant's counter-claim, no evidence was led to show that the plaintiff was responsible for the breakage. The mere fact that the plaintiff allowed Amrik Singh into the room is not, in my view, sufficient to place responsibility for the damage upon the plaintiff. Further there is no evidence to show that it was the plaintiff's conduct rather than that of Amrik Singh that led to the fight. All there is, is that there was a brawl between the two and the plaintiff was, so to speak, at the receiving end of the blows that were thrown. Defendant's counter-claim is therefore not supported by any evidence and is similarly

dismissed with costs.

Finally I must decide what damages I would have awarded to the plaintiff if he had been successful. According to the medical report compiled by Dr Amrit R Patel on 9th June, 1977 and produced in court as exhibit 2 the plaintiff sustained multiple bruises on several parts of this body including the scalp, face, neck shoulders, upper back hands and the trunk. He had no other injuries and no residual disabilities. No further medical examination was done to determine whether there were any residual scars and I was not shown any during the trial of this case. I would therefore not be wrong in describing the injuries sustained by the plaintiff as simple soft tissue injuries. For those injuries I would have awarded the plaintiff Ksh 15,000/= general damages for pain and suffering.

The result is that both the plaintiff's claim and the defendant's counter claim are dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi on March 3, 1988.

MBALUTO

JUDGE