IN THE COURT OF APPEAL,

AT NAIROBI

(CORAM: NYARANGI, PLATT & APALOO JJA)

CIVIL APPEAL NO. 38 OF 1985

KARANJA …….APPELLANT

VERSUS

INTER CONTINENTAL HOTEL & ANOTHER…..…..RESPONDENTS

JUDGMENT

This is an appeal from the award of damages made by the High Court in a personal injury suit. Although the facts were contested in the court below, the learned judge's findings of fact were not in issue on this appeal. The appellant's grievance was limited to the quantum of damages.

In order to consider the validity or otherwise of the appellant's grievance, it is necessary to relate the facts briefly. The appellant is the owner of a motor car which he uses as a taxi. It appears that he often frequents the respondent hotel, either in ordinary course of business or sometimes for purely social purposes.

There is evidence that before April 1976, there was some difference between the appellant and the management of the respondent hotel. So he was not a welcome visitor there. At about 7.30 pm on April 23, 1976, the appellant visited the respondent hotel apparently to have drinks with friends. They went to a bar in the hotel known as "The Big Five".

The appellant was noticed by a manager of the hotel and as he was previously warned off the premises, the former gave instructions to the security personnel to request him to leave. When he was informed of this, he either sought to be allowed to complete his drink or just refused to leave. So instructions were given for him to be removed. This instruction was obeyed and the appellant was forcibly ejected. It is the mode of the ejection that gave rise to this action. The appellant claimed that he was badly beaten up and was forcibly and violently pushed and thrust out of the hotel and such was the severity of the assault committed on him, that he suffered bodily injuries, indignity and humiliation. It is for these that he sought damages.

The respondent's position was that the appellant was politely requested to leave but he declined to do so. He was accordingly evicted by the respondent's servants who used no more force than was reasonable to

secure his eviction. The learned judge found that the appellant was not removed from the hotel peacefully but with force and the force used in ejecting him exceeded what was reasonable in the circumstances. The court said the appellant "suffered no serious injuries". He suffered "slightly" but the judge was of the

opinion that the appellant was in part to blame for his injuries. As the judge put it.

> "He (meaning the appellant) must be considered as one who contributed to what took place."

The court considered therefore that the appellant was entitled to some compensation for his injuries and "loss of dignity" and after applying his best judgment to the matter, the judges assessed this at Kshs 2,000.

It is plain the judge did not consider that the facts warranted the award of anything like substantial damages. The court felt that the appellant was minded of making a financial profit out of a small incident. In the judge's words the appellant was seeking:

> "to make money out of a minor incident in which he was partly to blame."

The appellant complains that the compensation awarded him was wholly inadequate and was based on incorrect principles and invites us to increase it. In ground 2 of the memorandum of appeal he says;

> "The learned trial judge erred and misdirected himself on the principles applicable in considering the award of damage in a case like the present one."

Before considering any special principles which apply to the present case, it is necessary to bear in mind the normally accepted grounds on which Court of Appeal may interfere with the assessment of damages. The *locus classicus* is the statement of Green LJ in *Flint v Lovell* [1935] KB 354 CA. It is:-

> "The court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount on damages, it will generally be necessary that the court should be convinced that either the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small, as to make it in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

Mr Hayanga submitted that in this case, as I understand him, the judge was at fault in not directing himself on the correct principles for awarding damages for assault and that this has a two-fold basis, namely, first compensation for the physical injuries and the resultant pain and second, injury to feelings. It was said in this case, the judge's award was only limited to injured feelings but no consideration was given to the pain and suffering which the physical assault occasioned to the appellant. It was also submitted that the judge was in error in taking into consideration the plaintiff's contributory conduct in quantifying the damage. Counsel said had the judge not committed these errors, he would have awarded a much higher compensation to the appellant, who on the medical evidence, suffered fairly serious injuries. For authority, counsel cited and relied on the case of *Lane v Halloway* [1968] 1 QB 379-392.

The contention that the judge awarded compensation for loss of dignity but not for the physical injury suffered by the appellant, is superficially attractive but I think that is only because of the way the learned judge expressed himself. He said:-

"Even though he contributed, I think he is entitled to some compensation for loss of dignity since the force

used in ejecting him from the hotel far exceeded what was reasonable in the circumstances. Doing the best I can in the circumstances, I come to the conclusion that Kshs 2,000 is reasonable compensation for loss of dignity and the slight injuries suffered by the plaintiff."

It is plain from this, that the global sum of Kshs 2,000 which the judge awarded, was not only for "loss of dignity", but also for the appellant's injuries. Although the appellant sought to make it out that he sustained grave physical injuries from the assault and indeed produced some sort of medical evidence to

buttress this, the learned judge was unimpressed by this. He did not think a great deal of the medical evidence and of the plaintiff's *viva voce* evidence of the extent of his injuries. He thought that evidence was exaggerated because the appellant was minded to make a financial profit of this small incident. Having read and considered the evidence, I am not prepared to think differently and indeed concur in the judge's view of it.

It should suffice for me to say that the judge was entitled to decline to attach any credence to the medical evidence. There is also the fact that although the appellant claimed to have suffered serious injuries on the day of the alleged assault and indeed made a complaint to the police that very night, he did not breath a word to them about his injuries. This self denying "moderation", is reasonable only if the appellant did not consider his "injuries" serious enough to warrant police action. In my opinion, the learned judge was entitled to find and was right in finding that the appellant suffered only slight injuries by his forcible eviction.

The learned judge put at the forefront of the appellant's entitlement to compensation, what he called his "loss of dignity". It is not entirely clear what the judge meant by this. "Dignity" is said by the *Chambers English Dictionary* to mean, *inter alia*, "elevation of mind or character; grandeur of mien." According to the *Little Oxford Dictionary*, it includes "True worth, excellence elevated manner." On the facts of this case, the appellant was an unwanted guest at the respondent hotel. When he was requested to leave, any implied licence he may have had to enter or remain there was revoked. If he persists in remaining there after the revocation of his licence, he became a trespasser and could lawfully be evicted by the use of reasonable force. If the appellant obliged the respondent to use force to evict him, he can hardly be heard to say that his dignity was punctured thereby.

He could have prevented this by making a "dignified" exit himself. At all events, it does not seem to me that the appellant exhibited anything like "elevated manner" at the hotel.

The learned judge, by necessary implication, accepted the right of respondent to evict the appellant by force. His only reservation was that the force used was in excess of what was reasonable. That being so, I am far from satisfied that besides obtaining compensation for his injuries, the appellant, made a case for damages for "loss of dignity" or injured feelings, which I believe, is what the judge meant. In quantifying the compensation for the "loss of dignity", and the slight injuries, the judge must have considered that the appellant was in part to blame for the incident and must have awarded him less compensation than he would otherwise have done. Although the learned judge did not say so, I think he would not have adverted to the fact that the appellant himself contributed to the fracas if he did not intend to take that fact into consideration in assessing the compensation. If as seems clear he did, he must have awarded the appellant less damages than he would otherwise have felt disposed to award.

Mr Hayanga argued that the judge was in error in doing so, because the appellant's contributory conduct was not a relevant factor in the computation of damages. On this, he stood firmly on the judgment of English Court of Appeal in *Lane v Halloway* (cited *supra*).

It was there held that the fact that a plaintiff who has suffered a civil wrong himself behaved hardly, was not a matter which ought to be taken into consideration in awarding him compensatory damages for injuries unlawfully inflicted upon him. Lord Denning, who read the leading judgment of the court, acknowledged that in England, New Zealand and Canada, it was held that provocation could be used to reduce damages. But he preferred the guidance provided by the Australian High Court which held in *Fontin v Katapodis* [1962] 108 CLR 177 that although provocation could be used to wipe out the element of exemplary damages, it could not be used to reduce "the actual figure of pecuniary compensation."

That holding is not free from difficulty as it seems somewhat unreal that if a party seeks compensation for injury sustained by an assault which he himself provoked or for which he was in part to blame, a court should shut its eyes to this fact. Provocation as a mitigating circumstance is accepted in the administration of penal justice and the principle that a party blameable in part for any damage or injury he sustained, should receive diminished compensation, underlies the learning relating to contributory negligence in the law of tort. It seems odd that a party who provokes or is in part of blame for an assault on himself, should

be better off financially than a man who is injured by a motor car as a result, partly of his own fault. In so far as *Lane v Halloway* seeks to lay down a general principle of the common law, this decision is less than a reliable guide. Indeed, its integrity as a judicial precedent was punctured in the 1971 decision of the same court in *Gray v Barr* [1971] 2 All ER 949 Lord Denning again speaking on the subject of compensation for assault, delivered himself as follows:-

> "In an action for assault, in awarding damages, a judge or jury can take into account not only circumstances which go to aggravate damages but also those which go to mitigate them. They could take into account in this case the provocation to Mr Barr and his distraught and anxious state."

As a statement of principle, that is a complete departure from *Lane v Halloway*.

In the 1976 case of *Murphy v Culhane* [1976] 3 All ER 533 Lord Dennning again on the subject of compensation for assault reiterated the principle he laid down in *Gray v Barr* and acknowledged that it seems at odds with *Fontin v Katapodis* which he followed in *Lane v Halloway*. But he sought to distinguish them by saying

> "But those were cases where the conduct of the injured man was trivial and the conduct of the defendant was savage. ……. I do not think they can or should be applied where the injured man by his own conduct can be fairly regarded as partly responsible for the damage he suffered."

Lord Denning said quite frankly that:

> "That is the principle I prefer than the earlier case."

With respect, *Gray v Barr* more accords with principle and seems a truer reflection of the common law. I think therefore that it is legitimate for a court invited to assess compensation to a party who suffered injuries as a result of assault, to take into consideration the fact that the injured was in part responsible for the damage he suffered. I therefore hold that the learned judge did not fall into any error of law when he took the appellant's conduct into consideration in quantifying the damages and I am in disagreement with Mr Hayanga on that score.

If that is the right view to take, one must return to the accepted statement of principle in *Flint v Lovell*. As, in my view, the judge did not transgress any principle of law, the only question is; is the Kshs 2,000 awarded to the appellant for his "slight injuries" and so-called "loss of dignity" so very small as to be an entirely erroneous estimate of the damage? I answer that question without hesitation in the negative. That being so, *cadit quaestio*. There must be an end of this appeal.

Although I acknowledge the force of Mr Hayanga's fair and full argument, in my judgement, no good ground exists for interfering with the quantum of damages awarded by the court below. It follows that this appeal fails and ought to be dismissed with costs.

Platt JA. I agree entirely. I will only refer to the appeal on damages. When Mr Hayanga opened the case of *Lane vs Holloway* [1968] 1 QB 379 –392, the court asked whether he could put forward any logical explanation, how a person who had acted without dignity could be said to have lost that dignity? There appears to be no answer to that question. It is plain that *Lane vs Holloway* is misleading, and ought not to be followed in future. Later on, common sense prevailed in *Murphy vs Culhane* [1976] 3 ALL ER 533 which represents the true principle to be applied.

I agree that the appeal should be dismissed and with the orders proposed.

Nyarangi JA. I entirely agree with the judgment prepared by Apaloo JA. I wish, however, to add a few words on the topic of dignity which was canvassed before us.

I would say one who acts without dignity acts with indignity at that moment of time and will, to that

extent, have no dignity to lose. On a common sense basis, one who causes or takes part in a fight as a result of which he is unlawfully assaulted ought not in an action for damages to have his full pecuniary compensation because that would be treating him as if he is wholly blameless; thereby ignoring part of relevant evidence. The decisions in *Murphy v Culhane* [1976] 3 All ER 533 and *Gray v Barr* [1972] 2 All ER 449 per Lord Denning are good law. *Lane v Holloway* [1968] 1 QB 379 is bad law and ought to be discarded.

I agree that the appeal should be dismissed with costs and as Platt JA agrees, it is so ordered.

Dated and Deliveredat Nairobi this 15th day of April, 1987

J.O NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL