

IN THE HIGH COURT OF LESOTHO

In the matter between :

MOTUBEI PAKALITHA

Plaintiff

vs

KOSE THOBI  
TUMO THOBI

1st Defendant  
2nd Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi  
on the 19th day of October, 1995

The Plaintiff has sued out Summons against the two defendants for the following relief :

- "1. Payment by 1st Defendant of M17,000.00 damages for assault, pain and suffering and contumelia;
2. Payment by 1st Defendant of M210.00 damages for medical expenses.

3. Payment by 2nd Defendant of M3,000.00 damages for unlawful assault;
4. Costs against both Defendant jointly and severally, the one paying the other to be absolved.
5. Further and or alternative relief."

The Defendants were duly served with summons but have not entered appearance to defend. The Plaintiff therefore moves this Court for a judgment in default of appearance as he is entitled to do. He sought to give evidence for proof of damages on oath. This he was allowed to his claim being neither a liquidated debt nor a liquidated demand.

The only witness was the Plaintiff who testified on the 25th September 1995. He said that he was a male adult Mosotho and that he resided at Ha Seqoma, Pae-la-Itlhatsoa in the district of Maseru. Both Defendants were male adult Basotho and reside in the same village with the plaintiff. Therefore the Honourable Court had jurisdiction to determine the claim. On or about the 6th February and at Ha Seqoma at Pae-la-Itlhatsoa the First Defendant (Kose)

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herein wrongfully and unlawfully shot at and injured Plaintiff with a firearm. Furthermore on or about the 6th February 1995, at Ha Seqoma, Pae-la-Itlhatsoa Second Defendant (Tumo) pointed a firearm at Plaintiff herein threatening to kill Plaintiff a threat that Plaintiff genuinely believed Second Defendant would carry out.

The circumstances of both assaults were as follows: On the mentioned date in the morning when Plaintiff had just woken up, he let his cattle from the kraal into the yard to graze. Whereupon First Defendant appeared and said to the Plaintiff that he had often seen the Plaintiff let the cattle graze in the yard, this time he will see what will happen. ("U tla bona ho tla etsaha eng") This was a threat that serious action would be taken. Plaintiff took the threat to be of a violent nature. Plaintiff says he replied to say to First Defendant that he should not threaten him. Plaintiff further replied to the threat, that the yard in which the cattle grazed was his father's, much as he was ordered by his father to release the cattle for grazing there was nothing wrong with that. First Defendant then said to the Plaintiff "You will see my boy". He immediately got into his house.

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Having put on a short pants trousers he immediately came out putting on long pants trousers. This time he came out with his brother Tumo, the Second Defendant. One of them said "This child of a foreigner" (Ngoana enoa oa molata) Apparently the Plaintiff's father is a later arrival at that village. Plaintiff got into his house. He was going to put on a blanket. First Defendant appeared from the lower window to which the Plaintiff had his back. The probability is that he turned back after having bent down to pick up a pin. This gun report that followed was registering a gun shot wound that went through the left side back of the waist through to the left hand side chest region where there was an exit wound of a bullet. Plaintiff had seen him aim when he turned his back. Immediately thereafter he heard a gun report. When he turned he saw First Defendant aiming and pointing his gun through the window. He was aiming at the Plaintiff. It is not clear at the time that he felt the bullet entry or its effect.

The Plaintiff then went outside the house when then he was able to see his mother. The latter then inquired from the Plaintiff as to where he was going and whether he had not heard a gun report. Plaintiff answered to say that he, Plaintiff, was the one who has been shot at. There must

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have been two shots which have been aimed at this Plaintiff because he speaks of having already had a wound on the breast. This proved to be an exit wound.

When already outside Second Defendant was seen by Plaintiff aiming his gun at the Plaintiff then loudly asked "should I give him another shot?" (Ke mo phete?) First Defendant replied "It is not necessary I have finished him already." (Le ha u ke eke ua mo pheta, ke se ke mo qetile). They then went away. The Plaintiff then sank down and sat without any strength to do anything.

He was taken to St. Joseph's Hospital, Roma where the doctor opined that the wounds were situated at vulnerable parts of the body and were dangerous to life "(Nka 'na ka shoa neng kapa neng)." He was put under an X-Ray machine for the necessary report and thereafter transferred to Queen Elizabeth II Hospital at Maseru. He was admitted as an in-patient on the same day. He had had to pay ml6.00 for the services at St. Joseph's Hospital.

At the Queen Elizabeth II Hospital the Plaintiff was operated on the front lower abdomen to correct the damage to a kidney and bladder. It also affected the gut. It

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resulted in a huge scar and disfigurement. A plastic/rubber duct was in the meantime fitted through the penis to drain urine and other liquids. This was that for a considerable time the Plaintiff could not urinate normally with that tubing fixed uncomfortably as aforesaid. This was (coupled with the wounds and operation scars) very painful. So did the Plaintiff suffer pain shock and suffering throughout the whole episode. He was in hospital for about 8 days and was released thereafter. There does not appear to be any permanent disabilities that followed.

The Plaintiff put in exhibits consisting of a receipt for hospital fees from Queen Elizabeth II Hospital dated the 14th February 1995 marked Exhibit A. He also put in Exhibit B being a medical report booklet (bukana) which showed entries describing the injuries and medication administered to the Plaintiff.

The incident involving the shooting and the assault on the Plaintiff appeared to follow on a history of some dispute whose circumstances were not fully disclosed. Suffice it to say that the Plaintiff does not appear to have provoked the Defendants in any way as the events of the day reveal. This is as far as this Court was told, and

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believed. The attack was serious and dangerous to life. The First Defendant was reckless in his use of a lethal weapon. There had been no need for the Second Defendant to have joined in the unlawful manner in which he did. His action was also an unjustified threat to the life of the Plaintiff who was defenceless and already injured. I looked at the conduct of the Defendants in a serious light.

I have in my judgment in CHAKA CHAI RAMAFIKENG vs JULIUS RALETSELA CIV/T/311/94 6th March 1995 (Unreported), adversely remarked at the irresponsible use of firearms, whether licenced or not licenced. This is a serious problem in this country which the Court must be seen to be discouraging in a very firm way. Mr. Mohau was correct to say that the irresponsible use of the firearm in the instant case and in RAMAFIKENG case was almost similar except that the Plaintiff in the RAMAFIKENG case was or ended up being disabled in the use of his hand. I would say that in the RAMAFIKENG case there was an element of drunkenness and all weaknesses that go with it. In the RAMAFIKENG case I made an award for damages totalling M8,000.00 pain and suffering for the two assaults. In the present case Defendants did the unlawful acts in their sober sense and in a deliberate fashion in circumstances

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where they would have been expected to exercise restraint and resort to lawful means of resolving this what appears to be a land dispute.

The fixing of damages is not easy except if one makes use of comparable decided cases. Mr. Mohau referred me to the South African Case of MATROSS v MINISTER OF POLICE AND ANOTHER 1978(4) SA 79. The Plaintiff therein had sustained gun shot wounds on his abdomen and the fourth finger of the left hand. He underwent major abdominal surgery which would have been associated with severe pain for a period of one week. After the initial period he suffered moderately severe pain. The Plaintiff still suffered pain and tenderness of his abdominal scar on vigorous muscular effort and change of the weather. There was a likelihood of incurring further medical expenses and correction of probable future complications. While in hospital he spent 15 days in all, the Plaintiff was also catheterized." This would have caused him some pain and thereafter experienced a burning sensation on micturition for some while ("see page 83 at A-D.") Having regard to the overall picture of injuries, suffering, disability, disfigurement and loss of amenities and with due regard to constant and seemingly never ending decrease in value of money, it seems to me

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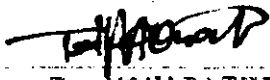
that a fair and reasonable award of general damages would be R3,250.00" per Smalberger J at page 84. The injury had occurred on June 1976 that is about 19 years ago. I felt that figure doubling this award would be suitable in the instant matter. I have already expressed my extreme displeasure at the use of firearms which is not in keeping with our normally peaceful and orderly society.

I have accepted that the amount of M183.00 has been validly proved as special damages. The expenditure in the amount of M16.00 may have been truly incurred in connection with medical expenses for the treatment of the Plaintiff at St. Joseph's Hospital, Roma. I take the view that without any form of a receipt I could not take it that such damages were proved merely on the say so of the Plaintiff.

I decided that I could not accept the whole amount of damages as claimed but the claim succeeds entitling the Plaintiff to the following award of damages:

1. Payment by First Defendant to Plaintiff of M7,500.00 damages for assault, pain, suffering and contumelia.

2. Payment by Defendant to Plaintiff of M2,000.00 for unlawful assault.
3. Payment by Defendant to Plaintiff of M183.00 damages for medical expenses.
4. Costs against both Defendants jointly and severally, the one paying the other to be absolved.

  
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T. MONAPATHI  
JUDGE

19th October, 1995

For the Plaintiff : Mr. K. Mohau  
For the Defendants : No Appearance

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