REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO Civil Appeal 8 of 2003

AFRICAN HIGHLANDS PRODUCE CO. LTD……APPELLANT

-VS-

DOUGLAS OUNYA ARAMA……...RESPONDENT

JUDGMENT

I. TORT

1. A tort is a wrong commuted against another as a result of an accident that was never planned.

2. Douglas Ounya Arama, a 20 year old male adult *(the age of majority in Kenya being 18 years old and not 21 years old)* was employed by M/s. African Highlands produce Co. Ltd as a casual worker No. 903.

3. The relationship between the parties is that of employer/employee.

II: Background of case

4. On the 20th august, 2001 Douglas was assigned duties of cutting tobacco trees along with others not before court. His actual employment was that of a tea plucker. On the material day in question they ventured into a forest where there were stumps of blue gum having been cut down. Surrounding the stumps were planted tobacco trees that required to be cut down.

5. Dauglas stepped into a hole that had been hidden and camouflaged by weeds. In the process he slipped and the cutlass that he held in his hand slipped form his grip. He held the cutlass at the cutting edge that resulted to his fingers, 1, 2, 3 and 4 on his right hand being cut. This affected the tendous in the 2 and 3rd finger.

6. It was the evidence in the lower court that he was then rushed to a dispensary Chemasingi, then to a hospital called central hospital where he was admitted for two days. He attended the District hospital Kericho.

7. Then Douglas filed, *(on 18th January, 2002)* a court case in the Magistrate's court at Kericho claiming damages in TORT for injuries sustained. Namely, that he had never done the type of work assigned to do before. He had therefore not undergone any training, further he was never given gloves to wear as protection from any cuts he would sustain. He claims that the employer was negligent thereby was held accountable for his accident.

8. The employer denied these allegations but half way through the trial namely, on the 17th December, 2002 conceded that the employer was indeed liable for the accident. The parties apportioned this liability at a ratio to be borne by the employer and 20% to have been contributed by the employee in negligence.

9. The trial magistrate's task was reduced to determining the quantum that should be awarded to the employee. The defence employer called no evidence to support their case. The findings of the trial magistrate in damages was Kshs. 150,000/= for pain and suffering and Kshs. 2,000/= for special damages made up of a medical fee report charged by the doctor. This sum was accordingly approved to kshs. 120,000/= and 2,000/= making a total of Kshs. 122,000/=

10. The employer appealed to this High Court, the employee declined to have a stay of execution. The parties nonetheless agreed that the taxed costs be kshs. 28,500/=. They further agreed that Kshs. 70,000/= be deposited into the account as security pending the appeal that was filed some time in the year 2003. No action was taken on this appeal by the High Court until 11th January, 2005 when a record of appeal was filed *(13th January, 2005)* even before the appeal was admitted for hearing. Directions was given on 16th June, 2007 and at the same time the appeal was admitted for hearing (Koome J). Directions was redone afresh on 13th May, 2009 (Ang'awa J).

III: <u>The appeal</u>

11. The Appellant, employer, original defendant herein filed this appeal on grounds that

(i) The findings in favour of the respondent employee or liability when no such evidence existed.

(ii) The basis of the trial magistrate on the findings was on irrelevant matters.

(iii) The award given in damages was excessive when in fact the injuries consisted of soft tissue injuries.

(iv) The case was not proved on a balance of probability and was in correct

a) <u>Liability</u>

12. Before the appeal commenced for hearing the appellant informed this court that they abandon their claim on liability. I can see why they do so as the defendant had actually admitted to the wrong and conceded that they are 80% liable for the accident. This was not determined by the trial Magistrate's court by the consent between the employer and employee.

13. The issue of liability therefore means that in this case it has been settled and this court confirms that liability against the appellant/employer is 80% whilst the respondent/employee it is 20 %.

b) **Quantum**

(i) **General Damages**

Pain and suffering

14. Argument put forward under this head was the trial Magistrate's award of Kshs. 150,000/= was extremely excessive. He relied on the evidence of the treatment card at page 22 of the record of appeal and that of the doctor who said that the injuries are minor and expected to have total healing and restoration.

15. In reply the respondent's advocate stated that the respondent had undergone treatment at hospital. Tendons to the fingers were opened. The award of Kshs. 150,000/= was adequate.

IV: **Opinion**

16. It is important that the record keeping by the employer is maintained. The employer records show that the employee/plaintiff was injured in the course of duty. That he sustained injuries and was taken to hospital. The initial records of treatment is important proof to show that the appellant actually did sustain injuries.

Medical report

17. Dr. Sammy Masyuki MB ch.B (Nairobi), a medical officer with Marie Stoppes hospital examined the employee Douglas Ounya Arama on 17th October, 2001. This was two months after the accident.

18. The history given to him was that the employee slipped and fell down whilst carrying the cutlass which cut him to the right hand and injured him. The injuries sustained being

i. Deep cut wounds to the palmer aspect of the right 1-4 fingers causing damage to the tendons.

ii. Wounds were stitched at Chemogonday hospital under breath anesthesia

iii. Further treatment undertaken at Kericho district hospital where the wounds was cleaned and dressed.

iv. a further treatment by way of operation was done at Chemogonday hospital and tendons repaired.

19. Examining the treatment notes the medical report is at variance whereas as of 17th October, 2001 the doctor confirms repairs was done to the tendon. the treatment note though shows the operation was NOT done until two days later being 19.10.2001

"tendon repaired".

20. It therefore is unclear to this court whether by 9th October, 2001 and on during the hearing of the trial that the tendons were adequately healed and the fingers normal. No further medical report was given to this effect by the plaintiff. The chain of evidence on medical treatment is imperative. This being the initial treatment at the stage of first aid or the first point of clinical treatment is required. The notes of

the medical officer is essential as treatment proof. Thereafter the P3 form issued by the police to confirm that the person has been examined by a police doctor. Thereafter an examination by a consultant doctor on the filed in question.

21. The employee's examination was made by one Dr. B.Musyuki two months after the injury. It would have been important to have a further latest report given by the same doctor or another doctor to confirm the extent of the current injury. That the employee has fully been healed.

22. In evidence the doctor described the injuries as maim when in fact the injuries may be described as harm. From the plaintiff/respondent, employee in evidence never spoke of his injury in details save that when he fell (it) (the cutlass) cut (his) four fingers. "*that two fingers healed but two others did not*" no elaboration by the doctor and or a recent medical report was given by the respondent/employee.

23. Assessment of damages on the amount of Kshs. 150,000/= was excessive on the evidence given before court. To this extent I would agree with the defendants/appellant oral submission. I though note the submissions put forward by the appellant referred to an eye injury. I presumed that this submission was not for this case as the matter and plaintiffs are different. The original court records were never found herein.

24. I accordingly find that a reasonable and fair award to be awarded be kshs. 70,000/= at 100% liability. Therefore if the apportionment is applied on the contributory negligence then the sum of

Kshs. 70,000/=

Less 20% Kshs. 14,000/=

Net total **Kshs. 56,000/=**

Should be awarded and paid to the respondent for the head of general damages for pain and suffering

25. Special Damages was awarded of kshs. 2,000/= being the doctor's medical report fee. There was no other expenses. From the evidence the appellant is said to have spent kshs. 50,000/= by way of treatment. If this was spent by the appellant/employer the respondent/ employee is not entitled to claim it. He would claim it only if the amount had **NOT** been paid by the employer.

26. I accordingly allow the appeal on the following terms to which judgment is duly entered in favour of the respondent /employee against the appellant /employer.

In summary

26.1 **TORT**

26.2. Industrial accident

26.3 male adult aged 20 years old in August, 20th 2001

26.4 **Injuries**

a) Deep cut wounds to the palmar aspect of 1, 2, 3, & 4 fingers of right hand.

b) Damages to tendons of 2 & 3 fingers

26.5. **Liability**

Agreed in PMCC 38/01 and confirmed on appeal *(abandoned by appellant)*

i. 80% against the defendant

ii. 20% against the plaintiff

26 b. **Quantum**

i. **General Damages**

ii. pain and suffering Kshs. 70,000/=

iii. Special Damages Kshs. 2,000/=

Total Kshs. 72,000/=

less 20% 14,000/=

Net total 58,000/=

Special damages add 2,000/=

Total Kshs 60,000/=

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Obiter dictum

27. In a trial, there must always be a complainant. The plaintiff at all times should give evidence before the medical evidence of a doctor is taken in order to examine the doctor to the full extent of the injuries evidenced by the plaintiff.

28. A complaint must first be established.

29. Where there is admission by the defendant, then the defendant may then begin his case.

30. I noted from the trial magistrate's recording that the authorities relied on were extract or digests of cases. These are not authorities but a guide to lead the practioner to extract the authorities and full text if the authority is a judgment of the court it must be signed by the judicial officer or certified as a true copy of the original by the Deputy Registrar *(order 20 r.3 CPR).* A reported case law is ideally the best to be relied on as provided under **Section 90** of the Evidence Act.

Costs

31. In this matter I would award costs to the respondent in the lower court and costs to the appellant/employer in this court. That interest of special damages be from the date of filing suit, interest on general damages from the date of this appeal

DATED this 3rd day of June, 2009 at **KERICHO**

M.A.ANG'AWA

JUDGE

Advocates

M. Nyolei advocate instructed by M/S Kibichiy & Co. advocates for the Appellant originally Defendant – present

K. Ochieng advocate instructed by M/S Sila Munyao & co. advocates for the Respondent originally Plaintiff - present