



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Case 126 of 2004

GEORGE KEBASO MABBEYA.....PLAINTIFF

VERSUS

CROWN INDUSTRIES LIMITED.....DEFENDANT

JUDGMENT

1. George Mabeya asserts that he was employed as a machine operator by Crown Industries Limited in Nairobi. His work involved feeding a machine with manila sacks and plastics. These were converted into plastic material for making thermos covers amongst other things.
2. On 21st January, 2002 George went to work as usual in the morning. At about 10:00 a.m. whilst feeding the machine, he alleges that his left hand got entangled with the feed material and was drawn into the machine. His left index, middle and ring fingers were amputated. He was taken to Nairobi West Hospital. He gave evidence that he was admitted for two weeks.
3. Plaintiff produced as Exhibits 1c – 1e, what he called treatment notes. In fact, Exhibits 1a and I b are Appointment cards for eight visits between 9th February 2002 and 10th June, 2002, and Exhibits 1a – 1e are hospital certificates releasing the plaintiff from work for two weeks from 3rd March, 2002.
4. A doctor's medical Report was produced, by consent of the parties, as Exhibit 3(a). It is written by Doctor Gordon Odera Calleb. He examined the Plaintiff on 21st October, 2003. Since it is not a lengthy report, I quote it in part herebelow:

“Date of injury 21st July, 2002, Date of Examination: 21st October, 2003

Injury and Treatment

A machine accidentally cut his left index, middle and ring fingers whilst working at a plastic factory. He was taken to Nairobi West Hospital where he underwent an operation and was discharged after two days; he was re admitted a month later for a second operation to refashion the stumps and was discharged 5 days after that.

Complaints: deformed fingers, phantom pain.

Examination: The left index middle and ring fingers are amputated at the distal inter- phalangeal respective joints.

Opinion: The injury is consistent with amputation of multiple fingerprint permanent incapacity is

calculated at 10.5 % (ten point five per cent).” (underlining mine).”

The report is signed.

5. The report, was produced, as earlier noted, by consent without calling the doctor to give evidence. So that the only witness called was the Plaintiff. No witness was called for the defence.

6. The court observes as follows. The medical report does not indicate on what information or treatment notes the doctor relied upon. There is no indication that he relied on treatment notes from the treating hospital. The date of injury is indicated in the report as 21st July, 2002 contrary to the plaintiff’s evidence that the accident was on 21st January 2002. Exhibit 1c indicates that the Plaintiff was an:

“In patient from 21st January, 2002 – 26th January, 2002 and is not able to carry out his duties for two weeks”.

These are six days and contradicts the medical report that he was initially operated on and discharged after two days.

7. The medical report indicates the plaintiff was re-admitted a month later for a second operation, and was an inpatient for five days. Exhibits 1d and 1e read together with the Appointment card, Exhibit 1b, show that he was an outpatient in February, 2002 and March 2002. If the medical report is correct, the operation dates as an inpatient would be referring to periods in August 2002. There is no hospital record that shows the Plaintiff was readmitted for 5 days for an operation. It is not clear what the basis of the doctor’s report is on this aspect. Even if Plaintiff had in fact been re-admitted a month later, that is in March, 2002, the Appointment Card Exhibit 1 (b) and Certificate Exb 1 (e) both show outpatient appointments only on 2nd, 3rd and 23rd March, 2002.

8. In the circumstances, the medical report does not support the Plaintiffs’ evidence. There is no medical history or treatment notes. The failure to produce treatment notes of the hospital that provided the first post-accident treatment unfortunately destroys the capacity of the doctor to make an emphatically true, medical report based on the alleged industrial accident. It cannot be relied upon by this court, particularly, as it has not been tested through cross examination to clarify its contradictions.

9. A doctor’s report constitutes opinion evidence by an expert. In discussing expert evidence, **Phipson on evidence** Fourteenth Ed) notes at page 804 paragraph 32 – 67:

“An expert’s evidence is necessarily founded on his training and experience both of which involve the acceptance of hearsay information. It is, however, permissible for him to give an opinion on the basis of such hearsay, provided it relates to specific matters of which he does not have personal knowledge, or of which admissible evidence will be given by another witness. He cannot give evidence of any particular transaction if he has no personal knowledge of it, though that does not mean that he cannot refer to such transactions as the basis of his opinion.

Thus a doctor can give evidence of what he was told by a patient about his condition for the purpose of evaluating his diagnosis; though his testimony is inadmissible to show what symptoms were actually being experienced by the patient....” (Underlining mine).

10. The above quotation shows the importance of the connection between an event causing injury, the injury itself and the treatment of it. For the court to satisfy itself as to the nature of the injury, the severity of the same, and how and when it emanated, and the prognosis on recovery, the expert’s report must be explicit must and make explicit connections with an alleged accident. Thus, the importance of the treating doctor’s notes, report or evidence.

11. In this case, counsel for the plaintiff, in urging an award of shs. 1,500,000/= took the following stance as detailed in his submissions:

**“...The evidential burden cast on the Plaintiff is merely on a balance of probability....” And
“Whether the plaintiff was injured on the 21st January, 2012 whilst in the course of employment or not?....We respectively submit so by exhibits tendered, including treatment notes, medical reports.**

These documents demonstrate so”

These submissions can only be considered casual or unconvincing given the analysis I have already provided.

12. I saw the Plaintiff in court. He showed me his left hand with the amputated fingers. He says that happened as a result of an industrial accident whilst he was working in the Defendant\'s factory. The Defendant submitted that he did not work there, but brought no evidence to support their assertion. In 2002 the labour laws, particularly the Employment Act, placed a statutory obligation on employers to maintain records of employees. The Defendant did not produce their records for the material dates. I will therefore accept the Plaintiff’s version of the story so far only as it relates to his employment.

13. As for the nature of injuries suffered as a result of the alleged accident, the extent of damage suffered by the Plaintiff thereat, and the quantum of damages recoverable, there is no compelling medical evidence to persuade me, on a balance of probabilities, as to how I am to award such. The Plaintiff’s suit therefore stands unproven, and is hereby dismissed.

14. Given my observations, I think the Plaintiff’s counsel did not handle this case with the seriousness or alacrity it deserved. In dismissing the suit, I note from the evidence that the Plaintiff is currently a casual worker. As such, and given what I have said as to its presentation, I do not consider this to be a proper case for an award of costs to follow the event. Instead I will order that each party will bear its own costs.

Orders accordingly.

Dated, Signed and delivered this 6th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1.Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)