

UGANDA / JUDGMENT

Kiminingini Gold Mining Co. Ltd v Macleod (Civ. App. No. 42/37) [1938] EACA 207 (1 January 1938)

[1938] EACA 207

COURT

East African Court of Appeal

BEFORE

Lucie-Smith, J. (Kenya)

CASE / FILE NUMBER

Civ. App. No. 42/37

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APPELLATE CIVIL

BEFORE LUCIE-SMITH, J.

KIMINGINI GOLD MINING CO., LTD., Appellants (Original Defendants)

v. D. M. MACLEOD, Respondent (Original Plaintiff)

Civ. App. No. 42/37

Mining Ordinance, 1933—Mining (Amendment) Ordinance 1934— Accident—Inquiry by Magistrate—Section 85—Compensation— Assessment by magistrate—Section 86 (2)—"Permanent incapacitation"-Costs.

Held (15-1-38).—That permanent incapacitation means incapacity to work or to earn wages not the physical and mental incapacity caused by the accident except in so far as it affects the wage-earning abilities of the injured person. Decisions under The Workmen's Compensation Act, 1906, followed.

- Held further.—That hospital expenses and half salary paid to the injured person as "an act of grace" cannot be set off against the compensation.
- Held further.—That the sums of £750 and £350 mentioned in the relevant sections are maxima of compensation which may be awarded and not maxima from which the percentage of compensation may be computed.

Anderson for the appellant.

Respondent, absent, unrepresented.

JUDGMENT.—On the 24th January, 1937, the present respondent, who was then employed as a sampler by the appellant company, sustained an injury to his left hand which injury resulted in the loss of the middle finger of that hand and also a portion of the metacarpal bone. At the inquiry held by the magistrate under section 85 of the Mining Ordinance the present appellants did not dispute that the respondent was, at the time of the accident, acting in the course of his employment. It is admitted that at the time of the accident the respondent's monthly wage was Sh. 455. Respondent was off duty for sixty-four days and during that period he received half pay. On his return to duty he was again put on the same full pay as before, as an act of grace according to Mr. Wardrop who added: "as of course he was not of the same value to the company". By his own desire the respondent left the service of the appellants on 2nd July, 1937. The inquiry under section 85 was opened on 23rd July, 1937, and the finding given on the same day.

On 24th September, 1937, the magistrate assessed compensation under the provisions of section 86. From that assessment the appellants have appealed.

I will deal with the grounds of appeal seriatim. First, it is contended that the magistrate erred in holding that the assessment of compensation should be calculated in accordance with the provisions of section 86 (2) (a) of the Mining Amendment Ordinance. That section reads as follows: —

"The amount of compensation so assessed shall not exceed (a) in the case of death or total or permanent incapacitation \$a\$. sum of seven hundred and fifty pounds or a sum of money calculated by multiplying by thirty-six the monthly wage or salary of which the person killed or incapacitated was in receipt at the time of the accident, whichever sum is the less".

At the inquiry Dr. Marshall stated: "His (the respondent's) hand is partially disabled and I estimate his permanent disability at 10 per cent" and at the assessment hearing Dr. Connolly said: "I estimated his permanent inability to resume the work on which he was employed to perform at the time of the accident at 10 per cent". Here it is well to remind ourselves that respondent resumed work at his previous wage with appellant company and subsequently obtained work with another company as an assayer at a salary of between Sh. 425 and Sh. 450 per month. Dr. Connolly continues: "In arriving at this percentage I was influenced by the actual surgical loss of one complete finger plus a portion of the hand which would diminish his output, which would diminish his capacity in an emergency and which would lessen his chances of employment. I was also influenced by the psychological loss, his inability to play games and to keep fit and his social loss in an obvious disfigurement". The magistrate estimated the diminution of earning capacity resulting from the permanent partial disablement at 8 per cent and with this estimate no fault is found. I have however quoted Dr. Connolly as it seems to me that his evidence may well have influenced the magistrate in coming to the conclusion that there had been "permanent incapacitation". We now have to consider what is the meaning of "permanent incapacitation" in the context. Webster defines incapacitation as: "Act of incapacitating or state of being incapacitated—incapacity" while incapacity is given as "Quality or state of being incapable want

of capacity—lack of physical or intellectual power or of natural or legal qualification—inability—incapability—disability—incompetence".

Mr. Anderson has argued that the disability or incapacity with which the Ordinance seeks to deal is not a physical or mental disability or incapacity but a disability or incapacity for work or to earn wages.

While fully realizing the difference between our Ordinance and the English Act it appears to me that in the present absence in this Colony of precedent on the subject under consideration one may derive valuable assistance from cases under the Workmen's Compensation Act, 1906.

In *Calico Printers Association Ltd. v. Higham* (1912 1 K. B. 93) it was held that the words "where the incapacity is permanent" in the Workmen's Compensation Act 1906 include partial as well as total incapacity; but the question whether the diminished capacity to work is permanent or not is one which the arbitrator must decide ... It does not follow because the physical injury is permanent, as, for example, the loss of a finger, that the diminished capacity to work is necessarily permanent also. In the same case Farwell L. J. laid it down that the onus of proving permanent incapacity is on the person alleging it.

Fletcher Moulton L. J. at p. 100 says: "There is a greater difficulty in arriving at the interpretation of the phrase "where the incapacity is permanent"; but it must be remembered that "incapacity" means incapacity for work; and the compensation to be given depends on the effect of that incapacity on the power to earn wages, and varies with it" and Farwell L. J. at p. 104: "Next, I am of opinion that the incapacity meant is that for which the Act provides, namely, incapacity to earn' full wages. The Act does not give compensation for e.g. the loss of a limb, but for the loss of earning capacity actually caused by the loss of such limb during the continuance of such incapacity: the loss of the limb doubtless diminishes the capacity to earn, but the Court has to measure the compensation by loss of earnings. If, therefore, the workman has learned as a one-armed man to earn, and earns, as high or higher wages than he got as a man with both arms he cannot thenceforward get compensation, for there is no loss; but it by no means follows that this renders his capacity permanent, any more than his present failure to earn full wages makes his incapacity permanent ... In considering, therefore, the question of fact whether the incapacity is permanent, the Judge must consider all the circumstances of the case with proper evidence."

In *Eirmingham Railway Carriage and Waggon Co. v. Round* (1917 B. W. C. C. 612 C. A.) an electrician's assistant while at work met with an accident which rendered the little finger of his right hand permanently useless and left the ring finger partially stiff, so that the grip of the hand was impaired. The arbitrator found that the condition of the ring finger was likely to improve; that the hand would not prevent him working at a machine, and that there was no reason why he should not at some future date earn the same wages as before the accident. In short he found that there was no permanent loss of capacity, though there was some partial incapacity at the time of the arbitration. It was held by the Court of Appeal that there was evidence upon which the Judge could find that the incapacity was not permanent.

In *Curry v. Doxford and Sons Ltd.* (1915 8 B. W. C. C. 19 C. A.) a workman lost the top joint of his thumb. After some months total incapacity he was given light work for six months. He later refused to resume his former work on the ground that owing to the accident he was unable to do it properly—it was held that the Judge was right in finding he was still partially incapacitated.

In *Cardiff Corporation v. Hall* (1911 1 K. B. 1009) it was laid down that inability to earn, for the purposes of the Workmen's Compensation Act, 1906, Schedule 1, para. 3, is inability to get employment owing to some incapacity for work personal to the workman, to the exclusion of inability to get employment owing to the state of the labour market. This decision was followed in *Gaffney v. Chorley Colliery Co.* (1922 L. J. K. B. 1).

In view of the above decisions and the evidence on the record, I have come to the conclusion that the magistrate was wrong in making his assessment under section 86 (2) (a), the respondent having failed to discharge the onus which is on him of proving permanent incapacitation. In view of my decision it might be argued that the respondent is not entitled to any compensation but that point has not been put forward and in any event section 86 (1) read with (2) (b) would appear to give any injured employee a right to compensation—the amount of such compensation being in the discretion of the magistrate as sub-section (2) (b) sets only a maximum and not a minimum to the compensation which may be awarded.

As I stated in Court, I am quite unable to agree with Mr. Anderson's contention under paragraph 2 of the Memorandum of Appeal. The sum of £750 is a maximum of what compensation may be finally awarded and not a maximum figure from which a percentage may be allowed.

I think that the third ground of appeal must also fail as the appellants have themselves made it clear that the payment of halfsalary was not by way of compensation but was an act of grace on their part.

In the result, I find that the amount assessed by the magistrate must be reduced to a sum of Sh. \$655/20.

As regards the question of costs, I have come to the conclusion that owing to this being in the nature of a test case rendered necessary by an error of law on the part of the magistrate—the nonappearance of the respondent and the fact that he is still entitled to compensation though reduced—the equitable order to make is that each party bear their own costs. Order accordingly.

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