

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 253 OF 2016

MODERN LITHOGRAPHIC (K) LTD.....APPELLANT

VERSUS

FELIX MUTUNGA KILUNGU.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court Hon M. Obura (Mrs) P.M. in CMCC No. 7451 of 2009 delivered on 13th April, 2016)

JUDGMENT

The respondent filed a case in the lower court against the appellant claiming damages for a chest ailment sustained in the course of his employment with the appellant. It was his case that he was employed by the appellant as a machine operator, during which period he was exposed to hazardous chemicals which he inhaled in the course of his duties. He blamed the appellant for exposing him to risks and failing to provide protective gear and a safe system of work.

The appellant denied the respondent's claim including the fact that he was their employee or that it breached any statutory duty or that it was negligent. It was also pleaded in the defence that the cause of action was not actionable and this was a case of *volenti non fit injuria*. Further, it was the appellant's case that the respondent was wholly or substantially to blame for his ailment.

After a full trial the lower court found that the respondent had proved his case against the appellant and held the appellant 100% liable. The court then proceeded to award Kshs. 400, 000/= general damages plus Kshs. 1,500/= special damages. It was this judgment that aggrieved the appellant leading to the present appeal.

In the Memorandum of Appeal, the appellant complained that the damages awarded were excessive and that the lower court did not consider the submissions of the appellant. The lower court was also faulted for disregarding evidence in holding the appellant liable and applying wrong principles in awarding damages. It was also alleged that special damages had not been proved.

This court is duty bound to reconsider the evidence adduced before the trial court, evaluate the same and arrive at independent conclusions.

In finding in favour of the respondent, the lower court relied on his evidence and the medical report prepared by Doctor Waithaka Mwaura. There was also a letter of termination of his duties because of his health condition. The lower court concluded as follows,

“From the medical reports it is shown that the plaintiff sustained a recurrent respiratory infection due to exposure to noxious fumes from a UV machine. The defendant did not call any evidence in rebuttal. I find the plaintiff's case is uncontroverted. The defendant did not adduce any evidence to show any reasonable steps taken to prevent exposure to hazardous fumes or to show it was impossible for the injury to have been suffered at the work place. There was no evidence to rebut the claim that the work environment was unsafe. I find that the plaintiff proved his case on a balance of probabilities. There was no evidence to warrant a finding that the plaintiff was negligent or that he was the author of his misfortune.”

Although the appellant filed a defence, no evidence was called in support of that defence. Parties should know that pleadings and submissions cannot take the place of evidence. Evidence is countered by evidence and nothing short of this will do. On a balance of probability therefore, the respondent's evidence and the doctor's report remained uncontroverted, and the lower court cannot be faulted for finding the appellant wholly liable for the ailment that the respondent suffered in the course of his employment.

In the making the awards complained of, the lower court addressed the cited cases by both parties. The court then took into consideration the injuries sustained by the respondent and inflationary trends. The appellate court may not interfere with the award of damages given by the trial court unless it is inordinately high or low so as to give an erroneous estimate, or that the court applied wrong principles.

Going by the record, it cannot be said that the lower court was wrong in addressing the issue of general damages which I find were within the range of comparable injuries.

The respondent produced some receipts relating to special damages which however did not tally with the pleadings. I agree that the special damages awarded were not supported by evidence. The sum of Kshs. 1,500/= shall therefore be discounted from the said judgment. In the end, I find that the appeal lacks merit and is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 23rd Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE