REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL APPEAL NO. 548 OF 2009

ESTHER WAVINYA MULWA ……APPELLANT

VERSUS

REDLAND ROSES LIMITED ……. RESPODNENT

(Being an Appeal from the Judgement and Decree of the Hon. Mr. S.N. Riechi, Chief Magistrate, as he then was delivered on 11th September, 2009 in CMM NO. 2528 OF 2002)

JUDGMENT

The appellant was employed by the respondent as a general worker assigned to pick flowers. After two years of employment she was retired on medical grounds. Her ill health according to her pleadings was occasioned by exposure to chemical substances at her place of work. She brought the suit in the lower court for damages for her medical condition blaming the respondent for failing to provide safe and sound working conditions, exposing her to danger and failing to provide protective devices during her employment.

As a result of her ill health, she pleaded that she had been substantially incapacitated and therefore lost future earning capacity. The respondent denied the claim in its defence and stated that it was not aware of any ill health suffered by the respondent and that if she retired as its employee, then she did so at her own request and for reasons only known to her.

After the trial which was ordered by the Court of Appeal following previous proceedings, the appellant's suit was dismissed with costs to the respondent. Aggrieved by the said dismissal, the appellant filed this appeal. In the memorandum of appeal the appellant faulted the lower court for holding that she had not adduced evidence that she enjoyed good health before joined the respondent's employment and that the appellant was retired voluntarily on grounds of ill health.

The lower court was also accused of ignoring the appellant's evidence and submission which were not controverted. The appellant also challenged the lower court for not understanding the medical evidence adduced by the appellant. The standard of proof proposed by the trial court was also faulted and further, the admission of the evidence of the defence witness which showed that she did not prepare any medical opinion upon the appellant was also faulted. In that regard there is a prayer that the appeal be allowed. As the first appellate court, I have to evaluate the evidence adduced before the trial court with the view to arriving at independent conclusions. The evidence of the appellant found at pages 67 to 69 of the appeal record proved that she was indeed employed by the respondent. She produced a payslip showing her net salary of Kshs. 3,973/=. That payslip has the names of both the appellant and the respondent.

There is medical evidence by two doctors, the first by doctor Clifford Amaganga contained in a medical

report dated 26th April, 2002. The doctor in the summary and conclusion stated as follows,

> **"Esther Wavinya Mulwa was perfectly healthy till she was employed in a flower farm in 1999. She then developed progressive hypersensitivity reactions 1 one and II due to exposure to the chemical environment within the farm. Despite withdrawal from the farm following her physician recommendation, her broncospastic attacks have persisted. She had further developed mental derangement following the referral for psychiatric treatment. In addition she will require repeated bronchodilator medical regimes to control her bronco spastic attacks."**

There is yet another report dated 14th April, 2005 by doctor Moses Kinuthia on the appellant. Doctor Kinuthia had the benefit of looking at the medical report by doctor Amaganga and various treatment notes from Central Memorial Hospital, Guru Nanak And AAR Hospitals. In his opinion the doctor said as follows,

> **"Esther was continuously exposed to flower spraying chemicals with no benefit of proper protective clothing for a period of about 3 years. She developed hypersensitivity type 1 and severe bronchospasm. The psychiatric review was of no assistance and left her more confused than depressed. As per physician recommendation she was retired on medical grounds to avert further exposure. She however did have severe symptoms two years later. She still complains of episodic bronchospastic attacks usually relived by use of Broncho dilators. These are clinical symptoms in keeping with Bronchial Asthma which is a permanent condition. She will hence require a constant follow up and use of bronchodilators."**

The respondent called Dorcas Muthoni Githinji the company nurse who is a Kenya Enrolled Community Health Nurse. She confirmed that the appellant was their employee who however was retired at her request. She also said that she could not connect the appellant's breathing difficulties to her work because she was not sprayer but a casual worker and women do not do spraying work. She also testified that hypersensitivity is a problem with the person and not the substance.

Although the appellant was provided with a dust coat and gloves she said the chemicals ended up on the said coats and gloves and failure to protect her led to her illness. The defence witness is not a doctor. The report from Central Memorial Hospital signed by doctor S J Ndombi a consultant physician reads as follows,

> **"The above named has severe hypersensitivity type 1, to spray chemicals. She regularly attends on MOPC for follow up. In order to help her from this hypersensitivity state she is strongly recommended to be re-allocated duties in an area free from these spray chemicals. Please assist her."**

It is clear that, contrary to what D.W. 1 told the court, the appellant's condition was directly connected to her duties in respondent's employment. With that material the learned trial magistrate should have held that the appellant had proved her case against the respondent on a balance of probability. I so find.

On quantum the cited authorities were not of much help to the court. As the complications to the plaintiffs were not comparable to the present case. See **CA No. 84 of 2005 James Musembi Vaita Vs. Automotive Industrial Battery Manufacturers K**

Hiribo Mohamed Fukisha Vs. Redland Roses Limited (2006) e KLR and CA No. 315 of 2001 Sesphinaf Company Limited & another Vs. Daniel Nganga Kanyi. Doing the best I can I make an award of Kshs. 600,000/= general damages for pain and suffering.

The medical report shows that the appellant was born in 1963 and at the time she was retired she was 38 years old.
As the evidence shows, hers was a risky job. Had she continued in the employment of the appellant she stood the same risk of infection just as what befell her in this case. She pleaded loss of earning capacity.

In her evidence she told the court that she is still unwell and cannot do any heavy work. She is not trained in any skill and can only do casual work. This depended on her own strength and weakness. She had not, at the time of the trial, been able to get any job since she left the respondent. Her claim for loss of earning capacity has been justified.

At her age I would apply a multiplier of 15 years and taking her net salary at the time she was discontinued from the respondent's employment damages for loss of earning capacity add up to Ksh. 3,973 x 12 x 15 .Kshs. 572,112/=. She did not prove any special damages.

Accordingly this appeal is allowed, and the judgment of the lower court set aside in its entirety. In place thereof there shall be judgment for the appellant in the total sum of Kshs. 1,172,112/= made up as under;

1. Kshs. 600,000/= general damages for pain and suffering,

2. Kshs. 572,112/= general damages for loss of earning capacity.

The plaintiff shall also have the costs of the appeal and interest at court rates.

Dated, signed and delivered at Nairobi this 15th Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE