

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 23 OF 2019

EVANSON MUYA.....

APPELLANT

VERSUS

FRED SHITAMBASI MULUBI.....

RESPONDENT (Being an appeal from the decision of Hon C M Kasese, SRM, dated the 28.05.2019 in the original Kitale CMCC No. 232 of 2017, between Fred Shitambasi Mulubi vrs Evanson Muya)

JUDGMENT.

1. Before the trial court was a suit grounded on the tort of negligence and in it the respondent sought a judgment for general and special damages for pains and suffering and loss of amenities on account of bodily injuries suffered while in the employment of the appellant as a farm worker tasked to make animal feed using a chaff cutter machine. The respondent attributed his injuries to have been the consequence of negligence on the part of the appellant to provide safe working conditions; failing to ensure that the workplace was not slippery or muddy, failure to provide due instruments and training for the work, failure to keep the machine lubricated. The respondent equally invoked the doctrine of *Res ipsa loquitur* to support his case.
2. The suit was resisted by the appellant by the statement of defense dated 31.08.2017 in which the appellant admitted the presence of the respondent in the farm as a worker and that he was indeed injured on the date alleged. The appellant however asserted that the injury on the respondent was out of volens in that he chose to work on the machine while utterly drunk and derived/resultant misfortunes and thus could not blame the appellant for his own designs.
3. A full trial ensued at which the respondent called three (3) witnesses while the appellant called four (4).
4. From the summary of the evidence adduced, it was common ground that indeed the respondent was on duty and got injured at about 4 pm

on the material day. It was not disputed that the injury was as a result of the respondent's hand getting crushed by the chaff cutter. The disagreement was whether the accident and resultant injury was out of poor working environment or the fact that the respondent was drunk while on duty.

5. Because the suit was grounded on the particulars of negligence pleaded at paragraph 5 of the plaint, the onus remained with the respondent to prove those particulars on a preponderance. Even this early the court has expressed doubt whether the cause of action here ought to have not been breach of duty of care or even a cause under the occupiers' liability Act, but away from the tort of negligence.
6. It is to be kept in mind that none of the witnesses, apart from the respondent, witnessed the actual incident. When cross examined, the respondent was explicit that he had been in the same employment for a long time and had never been involved in any accident. His explanation was that he was working while standing on a wooden platform and kept pouring water to cool the engine. He then alleged that the floor was slippery hence he slipped, fell and his hand went into the machine. The totality of the evidence was that the respondent was fully in charge of the operation of the equipment and its surrounding. He did not allege that there was another person whose duty was to pour the water in a particular way so as not to wet the ground. There was equally no allegation that it was not the duty of the respondent to wipe the ground after water spilt on it. The court thus infers that the respondent had the full control of the particular space for work, was the person to cool the engine by adding water to the radiator system of the machine. He was equally to ensure that the platform he was to stand on while feeding the machine was not made slippery and if wetted was dried up. That was squarely in his yard as a claimant in a tort of negligence.
7. To counter that evidence, the appellant called the four witnesses three of whom, PW2,3 and 4 interacted with the plaintiff and asserted that he

was drunk on the date of the accident. PW3 on his part testified to have negotiated a settlement between the two parties by which there was a payment of Kenya shillings twenty thousand was paid to the respondent. In his evidence, all the respondent could yield is that he went for assistance at the organisation but was never assisted. However, the memorandum signed by him and witnessed by PW3 had the effect of not only settling the claim over the injury and undertaking never to raise a claim over the same but also apologising for having been injured due to drunkenness. To the court, therefore, that the respondent was drunk when he got injured was proved to the standards expected in a civil proceeding.

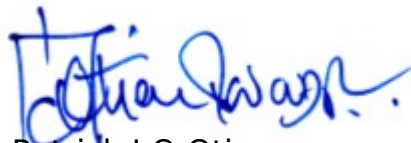
8. In coming to the apportionment of liability at 70:30, in favour of the respondent, there is no reason advanced or in deed a finding that the appellant was at fault as pleaded. To the contrary the trial court was satisfied that the respondent was drunk while operating the machine and did so against past consistent warnings. The finding of being drunk and the apportionment of liability are incongruent and incapable of being reconciled. A court decision to be judicious must coherently flow from the evidence and finding on such evidence. Where the conclusions cannot be drawn from the evidence on record, such decision qualify as on perverting the evidence and must be set aside.
9. For that reason, this case stands out as a classicus of when a court must interfere with the trier of facts' conclusions of fact. In fact, the finding that the respondent was drunk is fully aligned to the evidence. However, the conclusion apportioning liability is far from the any relation with the evidence on record.
10. Consequently, and upon the court exercising its mandate on a first appeal, the court finds that the trial court was obviously wrong in its apportionment of liability which found the appellant blameworthy. For being erroneous, the apportionment is set aside and, in its place, substituted a finding that, no liability was proved against the appellant and that the evidence showed that the respondent occasioned the injury by being drunk and losing judgment expected of him while on

duty. In short, no liability was proved against the appellant hence none attaches.

11. The ultimate consequence is that the judgment against the appellant was entirely erroneous. It is set aside and, in its place, substituted a judgment dismissing the suit with costs to the appellant.

12. The appeal is thus found merited and is allowed as prayed. Costs are awarded to the appellant as the successful party. It is so ordered.

Dated, signed and delivered, Virtually, at Lodwar, this 6th day of October, 2025.



Patrick J O Otieno
Judge

ORIGINAL