**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CIVIL APPEAL NO. E774 OF 2024**

**RADHESHYAM TRANSPORT LIMITED ……………………….….1ST APPELLANT**
**JOSPHAT MUSYOKA………………………………………………….2ND APPELLANT**

**VERSUS**

**DUNCAN MUIA KING'OO ………………………………………....1ST RESPONDENT**
**WILSON GAKURU…………………………………………………2ND RESPONDENT**
**CATHERINE GITAU……………………………………….………3RD RESPONDENT**
**ISAAC NJUGUNA NDUNG'U………………………………………4TH RESPONDENT**

**(An appeal arising from the judgment of Hon. SA Opande, Principal Magistrate, PM, delivered on 16th February 2024, in Nairobi CMCCC No. 8439 of 2016)**

## JUDGEMENT

1. The suit, at the primary court, was initiated by the 1st respondent, against the appellants and the 2nd, 3rd and 4th respondents, for compensation, arising from a motor vehicle accident, which allegedly happened on 9th August 2016, along Ring Road, Nairobi, involving motor vehicles registration marks and numbers KBQ 675U and KCB 324Q, owned or controlled by the parties sued. The appellant was a passenger in motor vehicle, KBQ 675U, at the time of the accident. It was averred that the said vehicles were allegedly so negligently driven, that they caused an accident, wherein the 1st respondent sustained injury.

2. The appellants filed defence, but the 2nd, 3rd and 4th respondents did not.

3. A trial was conducted. The 1st respondent testified, and called 2 witnesses, a doctor and a police officer. Judgement was delivered on 16th February 2024. All the defendants, inclusive of the appellants, were found liable, at 100%. Damages were assessed at Kshs.

250,000.00 general damages, Kshs. 5,950.00 special damages and Kshs. 80,000.00 for future medical expenses.

4. The appellants were aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 6th June 2024, revolve around the trial court erring on liability.

5. The appeal was disposed of by way of written submissions. I have read and considered the written submissions lodged by both sides.

6. The appeal turns only on liability.

7. The accident, the subject of the proceedings, was a collision involving the 2 vehicles. The fact of that collision was not disputed. The dispute was on who was to blame for it. The plaint attributed negligence to both sides. The 1st respondent placed a witness statement on record, which he had signed on 25th November 2016. In that statement, he averred that he was a passenger in KBQ 675U, which he stated was driven carelessly and recklessly, as the driver was over speeding, and he drove over road-bumps, at high speed, and rammed into KCB 324Q from behind.

8. This is what he said, in his own words, in his witness statement:

> "That on this material day, I boarded motor vehicle registration number KBQ 675U from Mwiki heading to Nairobi city centre when while along Ring Road the said vehicle was recklessly and carelessly driven that the driver was overspeeding when he drove over a bump at high speed, lost control and rammed onto another vehicle registration number KCB 324Q from behind."

9. The 1st respondent testified on 14th January 2022, as PW3, where he adopted that witness statement. He informed the court that he blamed KBQ 675U, in which he was a passenger, adding that the driver of KBQ 675U hit the lorry from behind. He was recorded as also saying the lorry, KCB 319Q, came over speeding. That latter bit of his testimony was not consistent with the statement of 25th

November 2016, nor of his earlier testimony, in cross-examination, that KBQ 675U hit KCB 319Q.

10. The recorded testimony is as follows:

> "*... I wrote witness statement. I wish to adopt it ... I blamed KBQ 675U. I was in KBQ. The driver in KBQ hit the lorry from behind. The lorry came over speeding. KCB 319Q.*"

11. He called a police witness, who testified on the same date, as PW2. He produced a police abstract of the accident report. He told the court that KBQ 675U was blamed, by the police, for the accident. Perhaps, I should reproduce a larger portion of the relevant part of his testimony, where PW2 was recorded as saying:

> "*Accident was on 9/8/2016 at 12pm on Ring Road. Motor vehicle KBQ 675U Nissan bus driver Isaac Njuguna and motor vehicle KCB 324Q – Tata Tipper. KBQ was blamed for accident.*"

12. The trial court did not consider that evidence, when it concluded that both vehicles were to blame. It proceeded on the basis that since the defendants, or owners and drivers of the 2 vehicles, did not present witnesses, then the evidence, tendered by the witnesses presented by the 1st respondent, was not controverted. The evidence that was tendered did not point to any negligence or blameworthiness on the part of the appellants, but on the 2nd, 3rd and 4th respondents.

13. The evidence, that the 1st respondent placed before the trial court, was that he was a passenger in the vehicle, KBQ 675U, owned and controlled by the 2nd, 3rd and 4th respondents, that that vehicle was recklessly driven, as it was over speeding, it was driven over road bumps, and the driver lost control of the vehicle, eventually ramming into the vehicle owned and controlled by the appellants, KCB 319Q. That evidence did not attribute any liability on the appellants. They were themselves, according to the evidence, also victims of the accident.

**14.** The trial court treated the appellants and the 2nd, 3rd and 4th respondents as if they were on the same footing. They were not. The 2nd, 3rd and 4th respondents never entered appearance nor filed a defence. Judgement against them was entered on 23rd July 2019. The appellants did enter appearance and file defence. The only commonality, between them, was that they both did not present witnesses at trial. Yet, only the appellants were entitled to do that; the 2nd, 3rd and 4th respondents were not, for they had filed no defence

**15.** The other error was in finding the drivers of both vehicles 100% liable for the accident. That cannot possibly be right. Only 1 of the drivers can bear 100% liability. Where an accident involves multiple vehicles, and 2 or more of their drivers are found liable, by way of having contributed to the collision, then the trial court must apportion liability between them, to get the aggregate of 100%. The 100% liability against both drivers must be shared. The trial court had adequate material, before it, to apportion liability, as between the appellants and the 2nd, 3rd and 4th respondents, if at all the appellants were liable, in any way, for the collision.

**16.** Were the appellants liable for the collision? The evidence in the witness statement and the oral testimonies recorded at the trial did not point to that. The mere fact that the appellants did not present a witness, did not take away the fact that the 1st respondent did not lead evidence which attributed liability to the appellants. His evidence blamed the 2nd, 3rd and 4th respondents. The evidence was that the vehicle owned and controlled by the appellants was hit from behind, by that belonging to the other side. and it is trite, that he who hits another from the rear is presumed to be liable or negligent, for failure to keep proper lookout, and to maintain safe distance. See *Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others* [2017] eKLR (PJ Otieno, J). The conclusion, by the trial court, that the appellants were liable for the collision, was, therefore, not supported by the evidence that was before the court, and the legal principles applicable.

**17.** In the end, I find merit, in the appeal herein. I hereby allow it. The consequence shall be that the judgement of 16th February 2024, is set aside, to the extent that it found the appellants 100% liable, and that judgement is substituted with a finding and holding that the appellants were not liable for the accident, and that liability attached at the 2nd, 3rd and 4th respondents, at 100%. The appeal is disposed of in those terms. Each party to bear their own costs. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED, IN CHAMBERS, AT BUSIA, THIS 3RD OF DAY OF OCTOBER 2025.**

**W MUSYOKA**
**JUDGE**

**Mr. Arthur Etyang, Court Assistant.**
**Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.**

**ADVOCATES**
**Mr. Omagwa, instructed by Munga Kibanga & Company, Advocates for the appellant.**
**Mr. Omina, instructed by Musili Mbiti Advocates LLP, Advocates for the respondent.**