

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MACHAKOS LAW COURTS**  
**CIVIL APPEAL NO. E280 OF 2023.**

JEFF HAMILTON (K)  
LTD.....APPELLANT  
-VERSUS-  
BAMBURI CEMENT LIMITED .....  
RESPONDENT

**JUDGEMENT**

**INTRODUCTION.**

1. The Respondent sued the Appellant claiming material damages by way of special damages incurred in repairing its motor vehicle registration number KBQ 215J which was damaged as a result of an accident which occurred on 31<sup>st</sup> March 2017. It was claimed that the Appellant's driver, agent, servant and or employee in a negligent, careless and or reckless manner drove motor vehicle registration number KCE 144K causing the same to ram into the Respondent's motor vehicle as a result of which the Respondent's motor vehicle sustained extensive damage and loss amounting to Kshs.1,183,716/=.
2. The matter proceeded for trial and on 3<sup>rd</sup> October 2023, the trial court delivered its judgement whereupon the Appellant was held 100% liable and proceeded to award the Respondent special damages of Kshs.1,183,716/=.
3. Being dissatisfied by the trial court's decision, the Appellant filed the appeal herein vide a Memorandum of Appeal dated the 23<sup>rd</sup> of October, 2023 arising from a judgment delivered by Hon. R. Gitau (R.M) on the 3<sup>rd</sup> of October, 2023. The Appellant raised six (6) grounds in the Memorandum of Appeal which can be condensed into one ground on

whether the Respondent proved its case on a balance of probabilities.

4. The Appellant prayed that the Appeal be allowed and judgment entered in the trial court be set.
5. Directions were taken for the appeal to be heard through written submissions. The parties complied and filed their respective submissions. The Appellant's submissions are dated 8<sup>th</sup> October 2024 while the Respondent's submissions are dated 1<sup>st</sup> April 2025.

### **ANALYSIS & DETERMINATION**

6. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in ***Selle & another v Associated Motor Boat Co. Ltd. & others and in Peters v Sunday Post Limited (1968) EA 123, (1958) EA page 424***
7. In the case of ***Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022)***, the court held that: -

*A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into*

*close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.*

8. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
9. I have cautiously and carefully considered the grounds of appeal, the pleadings in the trial court, the evidence adduced on the material damage, trial court's judgment, the written submissions filed by respective counsels as well as the authorities cited.
10. It cannot be gainsaid that in civil proceedings the standard of proof is one on a balance of probabilities as emphasized in the case of **Kanyungu Njogu Vs Daniel Kimani Mwangi [2000] eKLR** where it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
11. As regards the question of burden of proof **Section 107(1)** of the **Evidence Act (Cap 80)** is instructive providing thus:

*"Whoever desires court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

**Sub-section 2** of the foregoing provision adds as follows:

*“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

12. **PW1-Zaphania Amdany** was the police officer testified on behalf of the Respondent and confirmed that indeed an accident occurred involving motor vehicles KBQ 215J and KCE 144K. He testified that both vehicles were headed in the same direction and that motor vehicle KBQ 215J was rammed on the rear by motor vehicle KCE 144J. He confirmed that as per the police abstract, motor vehicle KCE 144K was to blame for the accident. He further confirmed that as per the police abstract motor vehicle KCE 144K was owned by Jeff Hamilton. He produced in evidence the police abstract dated 31/3/2017 as PExt.1 issued to the Respondent and listed as number 15 on the Respondent’s list of documents dated 17<sup>th</sup> April 2020.
13. **PW3-Justin Karunguru**, was the Assessor, who produced the motor vehicle Assessment report prepared by Renze Investigators & Assessors which contained motor vehicle **Copy of Records as at 17<sup>th</sup> February 2019** to be found at page 28 of the record of appeal showing the owner of motor vehicle KCE 144J was owned by JEFF HAMILTON (K) LTD, the Appellant herein.
14. The Respondent did not only produce the police abstract but also presented the Motor vehicle copy of records as part of the Assessor’s report.
15. The Appellant’s witness **DW1-Sheilah Areebahoona** admitted that the Appellant was the current registered owners of motor vehicle KCE 144K but stated that the Appellant was not the registered owners as at 31<sup>st</sup> March 2017 when the accident herein allegedly occurred. She

testified that the Appellant became the registered owners of the subject motor vehicle around August 2017, however, the Appellant did not produce any evidence to support her allegations and demonstrate how they came to own the vehicle and when in order to challenge the Respondent's case.

16. The Appellant also did not object to the production of the said police abstract and the Assessor's report and or challenge the same.

17. In the case of **Ignatius Makau Mutisya Vs Rueben Musyoki Muli [2015] eKLR** it was held that:

*"We agree the best way to prove ownership would be to produce to the court a document from Registrar of Motor Vehicles showing who the registered owner is but when a police abstract is not challenged and is produced in court without any objection the contents cannot be denied."*

18. See also **Wellington Nganga Muthiora v Akamba Public Road Services and Another CA Kisumu [2010] eKLR** and **Joel Muga Opinja v East Africa Sea Food Ltd [2013]**.

19. The accident is said to have occurred when the Appellant's motor vehicle KCE 144K rammed into the rear of the Respondent's motor vehicle KBQ 215J.

20. In **Vehicle and Equipment Leasing Ltd v Ibrahim Otieno [2021] KEHC 6223 (KLR)**, it was held that:-

*"When a motorist rams into the motorist ahead of him, prima facie he is liable for failure to keep safe distance, unless on a balance of probabilities he can adduce evidence to show that the motorist ahead of him is to blame. The appellant did not discharge this*

*obligation. The learned trial magistrate was therefore right in finding him 100% liable for the accident”.*

21. In the circumstances, I find that the Appellant did not disapprove the Respondent’s case and that the trial court was correct in finding that the Appellant was the owner of motor vehicle registration number KEC 144K and holding the Appellant 100% liable.
22. Guided by the decisions in **Kanyungu Njogu Vs Daniel Kimani Mwangi [2000] eKLR**, where it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
23. This court finds no reason at all to disturb the trial court’s finding on the issue of liability.
24. On special damages, it is trite that special damages must be specifically pleaded and strictly proved. In **Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR**, the court held that:

*“We agree with the learned Judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of”*
25. **PW3 Justin Karunguru**, the motor vehicle Assessor confirmed having conducted an assessment on motor vehicle KBQ 215J which motor vehicle was repaired and a re-inspection report done. He produced the Assessment report which quoted the repair cost at Kshs.1,146,921/= and re-inspection report at Kshs.2,900/=.

26. In **Nkuene Dairy Farmers Co-operative v James Kimathi & Ano [2010] eKLR**, the Court of Appeal held that:

*“In our view special damages in a material damage claim need not be shown to have actually incurred. The Claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident Assessor gave details of the parts of the Respondent’s vehicle which were damaged. Again, each item he assigned a value. We think the particulars of damages and the value of the repairs were given with some degree of certainty”*

27. Also, in **David Bagine v Martin Bundi [1996] eKLR** in asserting the probative value of an Assessor’s report, the Court of Appeal observed that:-

*“The Assessor’s report was sufficient proof and the failure to provide receipts for any repairs was not fatal to the Respondent’s claim”*

28. PW4-Cheryl Odipo produced payments receipts amount to Kshs.1,163,781/=. The amount which the trial court awarded. I find no reason to disturb this award for special damages.

### **DISPOSITON**

29. The Upshot is that:

- a) The trial court’s judgement is upheld.
- b) The Respondent will have the costs of the trial court’s suit and of this appeal plus interest at court rates from the date of this judgment to the date of full payment.
- c) There shall be a Thirty (30) days stay of execution.

It is so ordered.

JUDGEMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 2<sup>ND</sup> DECEMBER 2025

**NOEL I. ADAGI  
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 2<sup>ND</sup> DECEMBER 2025

**In the presence of:-**