

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**APPELLATE DIVISION**  
**CIVIL APPEAL NO. E194 OF 2024**

**SAMUEL MUSANGI MWOLOLO.....APPELLANT**

**VERSUS**

**GRAIN INDUSTRIES LTD..... 1<sup>st</sup>**  
**RESPONDENT**

**ALBANUS MUTUA.....2<sup>nd</sup>**  
**RESPONDENT**

**(BEING AN APPEAL FROM THE JUDGMENT/DECREE OF THE HON**  
**KIONGO KAGENYO (RM- ADJUDICATOR) DATED 19<sup>th</sup> JANUARY**  
**2024 IN MILLIMANI SCCC CASE NO E2251 OF 2023)**

**BETWEEN**

**SAMUEL MUSANGI MWOLOLO.....PLAINTIFF**

**VERSUS**

**GRAIN INDUSTRIES LTD..... 1<sup>st</sup>**  
**DEFENDANT**

**ALBANUS**

**MUTUA.....2<sup>nd</sup>**

**DEFENDANT**

## **J U D G M E N T**

### **A. Introduction**

- 1.** The Appellant filed the primary suit vide his statement of claim dated 18<sup>th</sup> May 2023 and averred that on 17<sup>th</sup> May 2022 he was lawfully and carefully driving his motor vehicle **KCX 735S Nissan Saloon** ( herein after referred to as the 1<sup>st</sup> suit motor vehicle ) along North Airport Road, when the respondents motor vehicle Registration Number **KCL 109N Hino Truck** (hereinafter referred to as the 2<sup>nd</sup> Suit Motor vehicle) was so carelessly and/or recklessly driven that it was allowed to crash into the 1<sup>st</sup> suit Motor vehicle thereby causing it to suffer extensive damage. The Appellant thus prayed to be compensated for the loss incurred in repairing his motor vehicle to the tune of **Kshs 273,250/=** plus costs and interest.

2. The respondents did file their response to the statement of claim and denied all the averments made by the Appellant and put him to strict proof thereof.

### **B. Facts at Trial**

3. **PW1 PC Peter Kiogora** of Embakasi police station, confirmed that on 17.05.2023 at about 08.20hrs, along North Airport Road an accident, occurred involving three motor vehicles all heading towards the same direction -Utawala. The circumstances of the said accident were that Motor vehicle Registration Number **KCV 858Z Toyota Hiace** (hereinafter referred to as the 3<sup>rd</sup> Suit Motor vehicle) did abruptly change lanes forcing the driver of the 1<sup>st</sup> suit motor vehicle (**KCX 737S**) to apply emergency brakes and was hit from behind by the 2<sup>nd</sup> suit motor vehicle (**KCL 109Z**). Due to the impact, the 1<sup>st</sup> suit Motor vehicle was pushed and rammed into the back of the 3<sup>rd</sup> suit motor Vehicle (**KCV 858Z**).

4. As a result of the said accident, the 1<sup>st</sup> suit motor vehicle got damaged on its right rear lamp, boot, front

bumper, bonnet and grill. The 2<sup>nd</sup> suit motor vehicle had no physical damage, while the 3<sup>rd</sup> suit motor vehicle was damaged on its rear boot. The accident scene was attended to and booked under **OB No 57/17/5/2022** and it was established that the 3<sup>rd</sup> suit Motor vehicle was at fault and was to be blamed for causing the said accident .

- 5. PW2 Josephat Kamau Ndui** assessed the damage occasioned on the 1<sup>st</sup> suit motor vehicle and costed its repairs at **Kshs 184,200/=**. After repairs he did get a second opportunity to re assess the said motor vehicle again and confirmed that the repairs had been satisfactorily carried out. He presented both his pre assessment and post assessment reports and presented receipts amounting to **Kshs 10,000/=** for both reports and court attendance.
- 6.** The Appellant adopted his witness statement as his evidence in chief and also produced all his documentary evidence to support his case. He confirmed under cross examination that the 3<sup>rd</sup> suit motor vehicle overtook them and encroached on his

lane forcing him to give way. As a result, the 2<sup>nd</sup> suit motor vehicle knocked his motor vehicle from behind and pushed him to also ram into the back of the 3<sup>rd</sup> suit motor vehicle.

**7. DW1 Albanus Mutua Muindi** the driver of the 2<sup>nd</sup> suit motor vehicle also adopted his witness statement, where he explained that the 3<sup>rd</sup> suit motor vehicle overtook them at high speed and suddenly stopped in front of the 1<sup>st</sup> suit motor vehicle, causing both of them to apply emergency breaks. Unfortunately, they did not have enough room to stop and as a result the 1<sup>st</sup> suit motor vehicle rammed into the 3<sup>rd</sup> suit motor vehicle and he also rammed into the back of the said 2<sup>nd</sup> suit motor vehicle. He blamed the driver of the 3<sup>rd</sup> suit motor vehicle for causing the said accident as he overtook and stopped where there was no matatu stage.

**8.** Under cross examination DW1 confirmed that he had kept safe distance and had applied emergency brakes but the accident occurred because the distance between the said motor vehicles was too short for the

motor vehicles to instantly come to a halt. He reiterated that he had maintained a safe driving distance and it was the 1<sup>st</sup> suit motor vehicle, that had rammed into the 3<sup>rd</sup> suit motor vehicle, before he also slightly rammed into the back of the 1<sup>st</sup> suit motor vehicle.

9. The trial court did consider the pleadings, evidence adduced and submissions filed and did find that the Appellant had not proved his case and proceeded to dismiss the case
10. Being dissatisfied and aggrieved by the said award the appellants filed their memorandum of Appeal raising four (4) grounds of Appeal, Namely;
  - a) ***That the Hon. Adjudicator grossly misdirected herself in dismissing the suit despite the evidence that the respondents caused the series of accidents on 17.05.2022.***

***b) The Hon Adjudicator erred in fact and in law in disregarding the appellant's evidence.***

***c) The Hon Adjudicator erred in law and in fact by failing to appreciate the evidence that was placed before her and hence arrived at a decision that was erroneous and against the evidence placed before her***

***d) The Hon Adjudicator erred in law and in fact by exercising her discretion capriciously and not judiciously.***

### **C. Analysis and Determination**

**11.** I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see **Selle v**

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**Associated Motor Boat Co Ltd & Others [1968] EA 123) & Peters Vs Sunday Post Limited (1968) EA 123**

**12.** A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See **Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316**

**13.** In this Appeal, the Appellants are challenging the trial's court finding on liability. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, it was held that apportionment of blame represents an exercise of a discretion with which the appellate court

will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

**14.** PW1 also did testify and confirmed that indeed the said accident did occur and blamed the driver of the 3<sup>rd</sup> suit motor vehicle for causing the said accident by encroaching into the 1<sup>st</sup> suit motor vehicle lane, and stopping abruptly in a place not designated to pick or drop passengers. The Appellant on his part blamed the driver of the 2<sup>nd</sup> suit motor vehicle for failing to keep distance, while DW1 also testified that it is the reckless action of the driver of the 3<sup>rd</sup> suit motor vehicle that directly lead to the said accident, a fact confirmed by PW1.

**15.** The Appellant filed his supplementary list of documents' an attached a judgment issued in **Nairobi SCCC No E2923 of 2022 ( Samwel Musangi Mwololo Vr Family Bank Ltd & 3 others )**, where he had sued the owner and driver of the 3<sup>rd</sup> suit motor vehicle and the said suit was also dismissed on the basis that liability had not been established.

**16.** It is unfortunate that the Appellant opted to litigate in piecemeal and decided to sue the respondent herein as an after thought after the first suit had been dismissed, instead of Appealing against the said decision. His actions constitute an abuse of the process of the court as all issues ought to have been pleaded and litigated in the 1<sup>st</sup> suit filed. Secondly by filing the 1<sup>st</sup> suit where he laid blame on the drive of the 3<sup>rd</sup> suit motor vehicle for causing this accident and making sworn averments to that effect, it is not open for the Appellant to plead alternative facts and in the 2<sup>nd</sup> suit blaming the drive of the 2<sup>nd</sup> suit motor vehicle for causing the said accident. He wants a second bite to the cherry, which cannot be allowed.

**17.** Based on the forgoing, i do find that in the present case, constitutes and abuse of the process of court and also that in light of his pleadings in the first suit and the evidence of PW1 the Appellant has failed to present credible evidence to prove that the accident was as a result of the respondent's negligence. The

trial courts finding on liability, thus cannot be faulted and this Appeal fails.

**C. Disposition**

**18.** This Appeal has no merit and the same is dismissed with costs to the respondents.

**19.** The said costs are assessed at **Kshs120,000/=** all inclusive.

**20.** It is so ordered.

**Dated, signed, and delivered** in open court at  
**MARSABIT** this .....2<sup>nd</sup> .....day of  
**DECEMBER, 2025.**

**FRANCIS RAYOLA OLEL  
JUDGE**

Delivered on the virtual platform, Team this ...2<sup>nd</sup>  
.....day of **DECEMBER, 2025.**

**In the presence of: -**

.....N/A.....Appellant

.....N/A..... Respondent

.....JARSO..... Court

Assistant

ORIGINAL

