



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 457 OF 2015**

**DHL GLOBAL FORWARDING (K) LIMITED. ....APPELLANT**

**VERSUS**

**AUDIOVISUAL ENGINEERING LIMITED. ....RESPONDENT**

***(Appeal from the judgment of the Resident Magistrate Irene W. Gichobi delivered at the Chief Magistrate's Court, at Nairobi on 28<sup>th</sup> August, 2015 in CMCC No. 2445 of 2013)***

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

1. Audiovisual Engineering Ltd, the Respondent herein, filed an action against DHL Global Forwarding (K) Ltd, the Appellant herein, before the Chief Magistrate's Court, Nairobi vide the plaint dated 26<sup>th</sup> April, 2013.
2. In the aforesaid plaint, the respondent sought to be paid USD.12,929/40 being the value of the lost consignment plus interest.
3. It also sought for general damages for loss of expected and/or future profits and business opportunities at 75% of the value of the consignment plus costs.
4. The Appellant filed a defence to deny the Respondent's claim. Hon. Irene Gichobi, learned Resident Magistrate heard the case and on 28<sup>th</sup> August, 2015. She awarded the Respondent judgment in the sum of USD.23,929 plus interest and costs.
5. The Appellant was dissatisfied with the aforesaid decision hence it preferred this appeal and put forward the following grounds: -
  - i) That the learned magistrate erred in law and in fact I failing to find that the respondent was bound by the terms of the agreement entered not between the parties and the Standard Trading Conditions thereto.***
  - ii) The learned magistrate erred in failing to find that the Appellant's liability was limited under its Standard Trading Condition.***
  - iii) The learned magistrate erred in law and in fact in holding the Defendant wholly liable to the Appellant for the loss of Plaintiff's goods in view of the admission that the Plaintiff failed to insure its goods.***
  - iv) The learned magistrate erred in law and in fact in failing to find that proof of negligence was a condition precedent for liability to arise.***
  - v) The learned magistrate erred in finding that the Appellant was negligent in performing its duties hence failure to report with authorities.***
  - vi) The learned magistrate erred in law and in fact in failing to find that the cases cited by the Respondent were distinguishable on the facts thereof.***
  - vii) The learned magistrate erred in law in making a determination on issues not pleaded by the parties.***
  - viii) The learned magistrate erred in law in finding the insurance cover cannot extend beyond the limits of possession and custody.***
  - ix) The learned magistrate erred in finding that the Appellant us liable to pay the plaintiff US 12,949.20 from the Appellant.***

6. When this appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have this appeal disposed of by written submissions.

7. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Before considering the merits of this appeal, it is important to just consider the background to this dispute.

8. On or about 13<sup>th</sup> November, 2012, the appellant and the Respondent entered into an agreement for the importation of the Respondent's goods from the Netherlands to Nairobi. The Appellant sent a quotation by email on the same date containing an Air Freight Import Estimate and the Appellant's Trading Conditions.

9. DHL Netherlands collected the Respondent's goods from the Respondent's supplies on 15<sup>th</sup> November, 2012 and issued it with an all Waybill setting out the description of the goods and the terms upon which the Appellant was to transport the same.

10. In the month of December, 2012 upon carrying out inquiries with DHL Netherland, it was established that despite having performed its duties with a responsible degree of care, diligence, skill and judgment, the Respondent's goods were lost in transit in Netherlands. Negotiations between the parties to settle the dispute out of court did not yield any settlement forcing the Respondent to file the suit before the trial court.

11. Though the appellant put forward a total of nine grounds those grounds could be summarized to two main grounds.

**a) Whether the relationship between the parties to this appeal was governed by the terms of the Appellant's Standard Trading Conditions.**

**b) Whether the Appellant was wholly liable for the loss of the Respondent's goods.**

12. On the first issue, the appellant is of the submission that its contractual relationship with the Respondent was governed by the standard Trading Conditions contained at the back of the Air Freight Estimates, therefore it was the duty of the trial court to strictly apply the said terms to give effect to the intention of the parties.

13. The appellant argued that despite stating that the aforesaid conditions applied to the relationship between the parties, the learned Resident magistrate failed to uphold and enforce the terms of the Standard Trading Conditions.

14. The Respondent on the other hand is of the submission that it agreed to be bound by the terms and conditions of the Air Freight Import Estimates. However, it is of the submission that the exclusion clause does not relieve the Appellant of liability occasioned due to negligence on its part or on the part of its agents. It further argued that a holistic reading of the Standard Trading Conditions is clear that the appellant shall only be excluded in so far as the events leading to the loss of the goods and services arose out of the consequences that the Appellant had no control over.

15. This court was urged to find that the learned Resident Magistrate's judgment was in consonance with clause 29 (A) (i) (a) of the Standard Trading Conditions which provides for claims for loss or damage to goods being the value of any goods lost or damaged.

16. Having considered the rival submissions, it is apparent that the parties are not in dispute that their relationship is governed by the Standard Trading Conditions contained at the back of the Air Freight Estimate.

17. The Appellant's liability is limited under Clause 29A of the Standard Trading Conditions which provides *inter alia* as follows: -

***"Clause 29A: subject to Clause 2 (B) above and sub-clause (D) below, the company's liability howsoever arising and notwithstanding that the cause of loss or damage be unexplained shall not exceed,***

***1) In case of claims or loss or damage to goods:***

***a) The value of the goods lost or damaged,***

***b) The sum at the rate of two special Drawing Rights as definite by the International Monetary Fund (SDR's) per kilo of gross weight of any goods lost or damaged whichever shall be least."***

18. It is, therefore, clear that the Appellant's liability for the loss or damage of goods was limited only to the value of the goods at the rate of two special Drawing Rights, per kilo of gross weight of those goods lost or damaged.

19. The learned Resident Magistrate came to the conclusion that the Respondent was entitled to the amount claimed being the value of the goods lost.

20. It is clear in my mind that the Learned Resident Magistrate fell into error in that she did not fully appreciate the meaning of Clause 29(A) of the Standard Trading Condition. The Appellant had through its witness shown that the Respondent's claim should be the sum at the rate of two Special Drawing Rights as definite by the International Monetary Fund (SDR's) per kilo of gross weight of the goods.

21. The Appellant tabulated the Respondent's claim as follows: -

**356Kg (gross wt) X 3.4 (equivalent of two special Drawing Rights – Euros 1210.40).**

22. The aforesaid amount is plainly less than **USD 12,929.40**. Therefore, the correct amount which should be awarded to the Respondent is Euros 1210.40 which is equivalent to Ksh.132,611/42.
23. The second issue is whether the Appellant is wholly liable for the loss. It is the submission of the Appellant that the learned Resident Magistrate erred when she found it wholly liable for the loss of the Respondent's goods.
24. It is the submission of the Appellant that the learned Resident magistrate erred when she found it wholly liable for the loss of the Respondent's goods. It was pointed out that proof of negligence was a condition precedent that had to attach for liability to arise which the Respondent did not discharge.
25. It is argued that the investigations carried out to trace the missing goods could only point to the chronology of events that led to the loss of the goods but negligence could not be established.
26. The Appellant further submitted that the Respondent failed to prove any of the particular of negligence pleaded in the plaint.
27. The Respondent is of the submission that it established the particulars of negligence on the part of the Appellant. It is pointed out that the Respondent engaged the Appellant to collect its consignment at Netherlands and deliver the same at JKIA, Nairobi, so that the Respondent could clear with customs. It is said that the Appellant sent the airway bill which confirmed that the consignment of sound equipment had been collected by them from the supplier and were in their custody.
28. It is also pointed out that the Appellant sent an email on 20<sup>th</sup> November, 2012 which confirmed that they had the Cargo awaiting further instructions. The Learned Resident Magistrate found that the Respondent had tendered evidence proving that the Appellant is wholly to blame.
29. Having considered the rival submissions, it is apparent that Respondent's, the consignment was never delivered as agreed as it went missing. According to the Appellant the goods were collected from the supplier but got lost on their way to the airline.
30. In my humble view, I am convinced that the learned Resident Magistrate rightly found the Appellant wholly liable. It is apparent that the Appellant confirmed receiving the Respondent's consignment to be delivered at JKIA, Nairobi. It is admitted that the same was never delivered at the agreed destination since the same got lost.
31. There is no doubt that the Appellant had a duty to ensure that the consignment was delivered to the Respondent intact. The Contract between the Appellant and the Respondent does not provide for a deliberate disregard of the Appellant's duty to deliver the consignment to the Respondent.
32. This is a fundamental breach that goes to the root of the contract and the Appellant cannot escape liability.
33. In the end, this appeal partially succeeds. The appeal as against liability is dismissed. However, the appeal as against quantum is allowed.
34. Consequently, the award of USD 12,929/40 is set aside and it substituted with an award of Euros.1210/40.
35. In the circumstances of this appeal, each party should bear its own costs of the appeal. However, the Respondent should have costs of the suit.

***Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of November, 2019.***

.....

**JK SERGON**

**JUDGE**

***In the presence of***

.....*for the Appellant*

.....*for the respondent*