REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 59 OF 2015

CECILIA ACHIENG AWINO..............................APPELLANT

VERSUS

GUARDIAN COACH......................................RESPONDENT

(Being an Appeal from the Judgment of Hon. A.A.Odawo

in Kisumu CMCC NO.21 OF 2014 delivered on 8th July2015)

JUDGMENT

Cecilia Achieng Awino ***(hereinafter referred to as appellant)*** sued **Guardian Coach** ***(hereinafter referred to as respondent)*** in the lower court claiming damages of Kshs. 111,739/- being the value of lost goods together with loss projected profits she suffered on 4.12.13 when the respondent lost her consignment of 3 cartons of cosmetics allegedly due to its negligence. The appellant's claim was founded on breach of contract as bailee for reward. The particulars of negligence on the part of the respondent were laid out in paragraph 7 of the plaint.

The respondent filed its defence denying the pleaded negligence and urged the court to dismiss the appellant/plaintiff's claim with costs.

The appellant and the respondent called 1 witness each. On **8th July2015,** the learned trial magistrate having considered the evidence on behalf of both parties, the written submissions and various authorities cited, reached the verdict that the appellant had failed to prove her claim and dismissed it with costs to the respondent.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 9th March 2015 which set out 7 grounds that:-

1. **The Learned trial Magistrate erred in law and in fact in failing to consider that the standard of proof in civil cases is that of balance of probabilities**

2. **The Learned trial Magistrate erred in law and in fact in making contradictory findings and decisions in the judgment**

3. **The Learned trial Magistrate erred in law and in fact in failing to refer to, read or make**

reference to the submissions by the plaintiff as well as well as the authorities cited

4. **The Learned trial Magistrate erred in law and in fact in failing to find that the defendant's witness (DW1 Patrick Arthur Gundo) was not present at the time the lost luggage was offloaded and hence could not dislodge or rebut the plaintiff's evidence**

5. **The Learned trial Magistrate erred in law and in failing to take account the admission by the defendant's witness that only the defendant's personnel do offloading of luggage at their Kisumu office**

6. **The Learned trial Magistrate erred in law and in fact in relying on the exclusion clauses set out at the back of the receipts to dismiss the plaintiff's case notwithstanding the fact that the said receipts are issued after consideration has been made**

7. **The decision by the Learned trial Magistrate is against the weight of the evidence and not in tandem with the well settled law on contract**

SUBMISSIONS BY THE PARTIES

Appellant's submissions

When the appeal came up for hearing on 30.3.17, the appellant's Counsel Mr. Onsongo stated that he was relying on submission filed in the lower court. He additionally submitted that the respondent did not call a witness from their Kisumu office where the luggage in question got lost.

Respondent's submissions

The respondent's Counsel Mr. Nyabega similarly stated that he was relying on submission filed in the lower court. In addition; he submitted that the appellant did not establish her case and that the decision by the lower court was judicious. He further submitted that the appellant acted negligently when she gave her goods to a stranger and was therefore solely to blame for their loss.

The evidence

The appellant stated on 3.12.13; she booked a seat to travel from Nairobi to Kisumu by Guardian Bus and was issued with a receipt PEXH. 1. That on 4.12.13, she bought cosmetics and was issued with 3 receipts for Kshs. 3,240/- as PEXH. 3 (a); for 92,899/- as PEXH. 3 (b) and 3 receipts for Kshs. 10,860/- , Kshs. 4,660/- and Kshs. 5,800/- as PEXH. 3 (c). That the goods were parked in 3 cartons and on the same date, she went to the respondent's office in Nairobi and handed over the 3 cartons for delivery to the respondent's Kisumu office for which she paid Kshs. 600/- and was issued with a receipt PEXH. 2. It was the appellant's evidence that upon arrival in Kisumu, she alighted at Stage Coach Bus stop; she received 2 out of her 3 cartons of luggage which she gave to a watchman, one Bosire to take to respondent's office for safe custody. That the following day when she went to collect her luggage but still did not get the missing carton which contained goods valued at Kshs. 96,139/-. That she reported the matter to the police after the respondent failed to avail her luggage but did not get any assistance. She stated that the respondent ignored her demand letter as a result of which she filed the present case.

DW1 Patrick Arthur Gundo a clerk at respondent's parcels and luggage deportment in Kisumu confirmed that the appellant travelled in respondent's bus from Nairobi on the night of 4th and 5th December 2013 and arrived in Kisumu on the morning of 5.12.13. He denied that Bosire with whom the appellant left her luggage was respondent's employee.

Analysis and Determination

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account

the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270)."***

In **Makube v Nyamuro (1983) KLR 403,** the Court of Appeal reiterated that

> ***"a Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion".***

I have perused the entire record of appeal and considered the submissions on behalf of both parties. I have considered ***Toyota East Africa Ltd V Express Kenya Limited [2009] eKLR*** cited by the appellant where the duties of common carrier/bailee were defined as follows:

> "***A common carrier would be responsible for the safety of goods in all events except if the loss or injury arose solely from the Act of God or hostilities involving the state, or from fault of the consignor or inherent vice in goods themselves."***

On the basis of the foregoing, I have no doubt that the respondent that held itself to the appellant as being able to carry her goods for hire is a common carrier that assumed a duty to not only carry safely, but to also deliver safely the goods to their destination.

The appellant stated that she received 2 out of 3 cartons and that the one that got lost contained goods valued at Kshs. 96,139/-. DW1 Patrick Arthur Gundo a clerk at respondent's parcels and luggage deportment in Kisumu confirmed that he did not offload the goods or deliver them to the appellant. He did therefore not rebut the appellant's evidence that she received only 2 cartons out of 3. Hence, I find that the appellant has established that she lost one of her packages delivered to the respondent for carriage.

The question that then follows is whether the appellant has established that the lost package contained goods valued at Kshs. 96,139/-.

Express (Kenya) Limited v Manju Patel [2001] eKLR cited by the appellant was in connection with a contract of bailment. In determining whether the respondent was entitled to the value of lost goods, the court held:

> ***……… It is not in doubt that the respondent was the owner of the goods. She deponed to the fact that she paid Shs. 97/-per gunny bag. That would place the value of stolen gunny bags at Shs.4,753,000/-. That is the amount she claimed. She brought forward evidence to show that she could have purchased such bags at about Shs. 94/65 per bag after obtaining several quotes from suppliers or sellers of gunny bags. Quite obviously that evidence was brought forward to show what was the market value of gunny bags as at the date of theft. Also I do not see why the respondent should pay storage charges when the goods were stolen. She was entitled to a refund thereof and the learned Judge quite properly allowed that item as loss suffered by the respondent.***

While I agree that the appellant was the owner of the lost goods and knew the contents and value of the lost package, this case is distinguishable from the cited case on the ground that the respondent in the cited

case not only claimed that the goods were his but also proved their value.

Similarly ***Toyota East Africa Ltd V Express Kenya Limited [2009] eKLR*** cited by the appellant is distinguishable from this case on the ground that the defendant received specific goods on behalf of the plaintiff and failed to deliver them.

The appellant's case is a special damages claim. It was submitted for the respondent, that the goods in this case were not disclosed to the respondent and that their value, quality and quantity remain in the realm of conjecture. The respondent relied on the case of ***Kenya Power and Lighting Co Ltd v Henry Wafula Masibayi [2013] eKLR*** in which the court reinforced the position that special damages must not only be claimed specifically but must also be proved strictly for they are not the direct natural or probable consequences of an act complained of and may not be inferred from the act. That the goods in the 3 packages were not disclosed is confirmed by the fact that the receipt for Kshs. 600/- PEXH. 2 issued to the appellant upon delivery of the goods to the respondent lists only 3 packages whose contents were not disclosed.

That is not to say, however, that the lost package was of no value to the appellant. The reality however remains that the burden of proof lies with whoever would want the court to find in his favour in support of what he claims. In ***Toyota East Africa Ltd V Express Kenya Limited [2013] eKLR*** cited by the respondent, the court reiterated Section 107 of evidence Act which succinctly states:

> ***"Whosever desires any 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.***

Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. It was the duty of the appellant to prove on a balance of probabilities that the lost package contained goods valued at Kshs. 96,139/-. The evidence adduced by the appellant fell short of that. It left serious doubt concerning the value, quality and quantity of the contents of the lost package.

In the end, I am of the considered opinion that the learned trial magistrate arrived at the correct finding that the appellant had not proved the liability of the respondent on a balance of probabilities. The appeal is dismissed and the lower court's decision is confirmed. The respondent will have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 30th DAY OF May 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk…....Felix

Appellant………Mr. Federico holding brief Mr Onsongo

Respondent…..N/A