REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 580 OF 2011

SECURICOR SECURITY SERVICES KENYA LIMITED.....APPELLANT

VERSUS

TECRITE KENYA SUPPLIES LIMITED.....RESPONDENT

(Appeal from the original judgment and decree of Hon. Mrs. Oganyo (PM) in Milimani CMCC No. 9203 of 2004 delivered on 25th October, 2011)

JUDGMENT

1. The Respondent herein **TECRITE KENYA SUPPLIES LIMITED** instituted Nairobi Milimani Commercial Court CMCC No. 9203 of 2004 against the Appellant **SECURICOR SECURITY SERVICES KENYA LIMITED** seeking cost of its damaged goods valued at KShs. 460,000/=. In its amended plaint filed on 9th September, 2006, the Respondent claimed that it on 26th August, 2002 contracted the Respondent to transport and deliver assorted goods worth KShs. 460,000/= to its clients, IT Kids in Eldoret and one John Murunga in Kakamega. That it was a term of their contract that the Appellant would in discharging its duty exercise due diligence and care to avoid any destruction and or loss to the goods. It was alleged that on 27th August, 2002 while the goods were in transit, the Appellant's driver negligently drove the Appellant's motor vehicle registration number KAN 311C causing it to lose control and roll over at Kaitui Corner along Kericho-Kisumu road and the goods were damaged and or stolen. The alleged particulars of negligence against the Appellant's driver were that he failed to exercise due care and or skill while driving the subject motor vehicle which was carrying the goods, driving recklessly causing the subject vehicle to roll several times hence the goods were destroyed and or stolen, failing to obey the standing orders and or instruction of his employer and failing to exercise due care and skill while handling the goods on transit.
2. In its defence, the Appellant claimed that by signing the consignment note, the Respondent agreed and was bound by the terms and conditions therein whose express term was that in the event of liability the Appellant would be liable to the tune of KShs. 1,000/= only. It denied that the accident occurred as a result of its driver's negligence but rather that the accident was inevitable. It was further denied that the goods under waybill number 426074 were valued at KShs. 460,000/= as alleged.
3. 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 – Vs – 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."

4. The above decisions followed the principles laid down in **Peters V. The Sunday Post Ltd (1958) EA 424** that;

   ".....whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the Appellate court will not hesitate so to decide....." See also **Mkube V. Nyamuro (1983) KLR 403-415 P. 403** where the court of appeal stated that:

   "***A court of 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 a Judge is shown to have demonstrably acted on wrong principles in reaching his conclusion."***

5. Circumstances under which an appellate court may interfere with a decision of the trial court were also set out in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the court stated as follows:-

   "I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."

6. Evaluating the evidence on record, Chief Inspector of Police Morris Okul (PW1) confirmed that the accident occurred on 27th August, 2002 involving the subject motor vehicle. It emerged from his evidence that the said accident was self involving with the driver sustaining fatal injuries and that the goods that were in the said vehicle were stolen. He further testified that the value of the said goods was never ascertained by the police. He produced two police abstracts i.e. for the fatal injury and the other for the loss of goods as P. Exhibit 1 and 2 respectively.
7. Jackson Wanjuki Wachira (PW2) who is the director of the Respondent Company recounted how the Respondent received a request to supply a laptop and a projector to BeGood Computers in Kakamega. He stated that he gave BeGood a quotation (P. Exhibit 3 and 4) and were furnished with a Purchase Order (P. Exhibit 5 and 6). That he took the goods to the Appellant, they were weighed and he was given a Consignment Note No. 426074 (P. Exhibit 7) which he signed to that effect. He stated that when he made a follow up he was informed that an accident had occurred and the goods had been vandalised.
8. On cross examination, PW2 stated that he did not read the conditions set out in the consignment note and that he was used to reading it. He further acknowledged having not insured the goods although it was of a high value. He stated that there were two consignees and that the goods to be delivered in Eldoret were delivered. He stated that the laptop and the projector were to be delivered to BeGood computers but the consignment was addressed to the Director's name. He stated that in the Consignment Note it was indicated that the laptop and projector were to be delivered to John Murunga and IT Eldoret. That when the goods were weighed he paid KShs. 810/=. He stated that it was indicated in the box that the items were a laptop and projector so the Appellant knew what was being transported.
9. David Muchira Mwangi (DW1) the Assistant Operations Manager at the appellant's Company

testified that the Appellant never asked its customers to declare what is being sent. That theirs was to weigh and charge on the basis of the weight and distance to which the parcel is to be delivered. He confirmed that the Appellant received three packages from the Respondent. One to be delivered in Eldoret and the other to Kakamega. That the Eldoret parcel was delivered. He confirmed that the parcel to Kakamega was not delivered since the subject vehicle had an accident enroute on 27th August, 2002. That some goods were lost while others were recovered. He stated that should a parcel get lost or be damaged, the Appellant is liable to the extent of KShs. 1,000/= only as per clause 2b on the conditions of service. On cross examination, DW1 admitted that the two parcels to Kakamega were never delivered.

10. In her judgement, the trial court framed and determined two issues thus the value of the parcels and whether the Appellant was a common carrier. On the first issue, the trial magistrate deduced the value of the consignment from the Purchase Orders and Quotations and found that their value was KShs. 458,500/=. On the second issue, the trial magistrate pointed out that both parties' advocates were in agreement that a common carrier is one who holds themselves out to the public as prepared to carry generally for such public and not for particular members. The trial magistrate further found that since there was evidence on record that the Appellant provided courier services, it was established that the Appellant was a common carrier and was under duty to carry the Respondent's goods safely to its destination. The trial magistrate on that basis proceeded to find the Appellant liable to the extent of KShs. 458,500/=.
11. Aggrieved by the said decision, the Appellant filed this appeal setting out the following grounds:-

i. ***The learned magistrate erred in failing to consider the Appellant's defence that the contract between the Appellant and the Respondent limited the Appellant's liability to KShs. 1,000/=.***
ii. ***The learned magistrate erred in failing to find that the limitation in clause 2 (b) of the Conditions of Service on the consignment note applied to limit the Appellant's liability.***
iii. ***The learned magistrate erred in law in failing to follow the decision of the Court of Appeal in Civil Case No. 323 of 2002., Securicor Courier (K) Limited v. Benson David Onyango and Another which had upheld the application on clause 2 (b) in a similar contract.***
iv. ***The learned magistrate erred in finding that the Appellant was a common carrier.***
v. ***The learned magistrate erred in finding that the Respondent had proved that the value of the goods damaged while being transported by the Appellant was KShs. 458,500/=.***

12. As stated above, this being a first appeal, this court has had to re-evaluate the facts afresh, assess it and make my own independent conclusions. See ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.*** *From the pleadings, evidence, submissions filed in the court below and in this appeal, and the judgment of the trial court, I am of the view that the issues that fall for this court's determination are as follows:-*

a. *Was the Appellant a common carrier?*
b. *Whether or not the alleged loss occurred as a result of the appellant*
c. *Driver's negligence.*
d. *If (a) above is answered in the affirmative, to what extent is the Appellant liable.*
e. *What orders should this court make?*

13. On the first issue, the Appellant contended that the Respondent did not adduce any evidence to prove its assertion that the Appellant was a common carrier. That section 107 (1) of the Evidence Act placed the burden of so proving on the Respondent. The Appellant cited **Royal Insurance Company of East Africa & another v. Super Freighters Ltd & 4 Others (2003) KLR 722** where Ringera J as he then was held that:

> ***"...the principle of adjective law is that he who asserts must prove. The 2nd Plaintiff having asserted that the 2nd-5th defendants were a common carrier, it was incumbent on them to prove that by leading evidence that the said defendants had held themselves out to the public as prepared to carry generally for such public and not for particular members thereof. In the event, the plaintiff did not call any such evidence and it has accordingly failed to discharge the evidential burden of proof which it bore that the defendants were a***

common carrier."

14. The Appellant further cited **Chitty on Contracts, 31st Edn. Volume 11 Specific Contracts para. 36-014** and **36-017** which distinguishes a common carrier from a private carrier as follows:-

> ***"A common carrier has three obligations: to accept for transport goods tendered with appropriate freight provided he has space in his vehicle; to charge only a reasonable rate for their carriage; and he is responsible for all loss or damage which occurs in the course of transit.***
>
> ***A private carrier is under no obligation to accept any goods for carriage, but once he has done so for reward, his obligations are regulated by the contract of carriage to which the acceptance of goods has subjected him."***

15. The Respondent on the other hand dwelt on DW1's evidence particularly his following statement. ***"...we do not even ask people to declare what they are sending, we charge based on weight and distance..."*** It was argued by the respondent that the Appellant held itself out as prepared to carry goods generally for the public. Reliance was placed on the cases of **Express Transport v. B.A.T. Tanzania (1986)** and **Eveready Transport Company (K) Ltd v. Proost Paper (2005) eKLR**. In both cases, the respective courts were of the opinion that a common carrier is one who holds himself out as ready to carry goods of any person and not a particular person.
16. In its amended defence, the Appellant at paragraph 3a averred thus *" save that the defendant on 26th August, 2002 received from the Plaintiff three parcels for delivery to IT Kids in Eldoret and John Murunga in Kakamega, under the defendant's way bill number 426074 signed by the Plaintiff's agent and on the conditions set out in the said way bill, the defendant denies paragraph 3 and 4 of the plaint."* Paragraph 3 of the plaint alleged that the Appellant was contracted to transport goods worth KShs. 460,000/= and at paragraph 4 that it was a term of the contract that the Appellant was in so discharging the duty bound to exercise due care. To my understanding, the Appellant has not in the defence denied being a carrier rather it denied having been contracted to transport goods worth KShs. 460,000/= and asserted that it was not bound to exercise due care. But even if I am to be found wrong in that analysis, it emerged from the Appellant's own witness DW1 that it was approached by the Respondent to render delivery of goods to a specific destination and it accepted to do so. The Appellant issued the Respondent's agent PW2 with a Consignment Note which he signed and made payment for the service. Unlike in the **Royal Co.** (supra) case, the Respondent produced a Consignment Note which is basically an agreement for carriage between the two parties, which even bears terms and conditions of carriage. The fact that the Appellant had a Consignment Note is an indication that they not only rendered the delivery of goods services to the Respondent but also to other members of the public. Having produced the Consignment Note, the burden shifted to the Appellant to prove otherwise, particularly that it does not render such services of carrying and delivery of goods for members of the public generally and not for specific individuals only. It failed to do so. I therefore find that the Appellant rendered itself out as a common carrier and the trial court was right to so find. On this point, I share the same opinion as was expressed in **Eveready Transport Company (K) Ltd v. Proost Paper (2005) eKLR** where it was held:-

> ***" A carrier is not necessarily deemed to be, or to be classified as such, only because he has printed words to that effect on the terms and conditions of his transport. It is...a question of fact-did he hold himself out as such? Was his service available to anyone who wanted his goods transported...?"***

17. On the second issue, the Appellant contended that the accident was inevitable and did not occur as a result of its driver's negligence. PW1's testimony was to the effect that the accident was self involving and that when the traffic case was placed before a magistrate, there was no one to be prosecuted since the driver died in the accident. The Appellant's driver having been in control of a lethal machine, thus the subject vehicle ought to have exercised due care in his driving. Had he done so, he would have been able to control the vehicle to avoid the vehicle losing control and the

accident occurring. From the evidence on record, the accident was a grisly one, an indication that perhaps the driver was over speeding. It is trite law that accidents do not just happen. They are caused. In this case, precisely how the material accident happened was a matter within the knowledge of the driver of the appellant's motor vehicle but since the dead tell no tales, I leave it at that only to emphasise that well driven motor vehicles do not just get involved in accidents. **see the COURT OF APPEAL** decision **(CORAM: BOSIRE, KARANJA & MARAGA, JJ.A) CIVIL APPEAL NO. 179 OF 2003 RAHAB MICERE MURAGE (suing as a representative of the Estate of ESTHER WAKIINI MURAGE v ATTORNEY GENERAL , SIMON PETER MWANGI** And **JOHNSON MUGO NGUNGA.**

18. It was as a result of the accident that the goods are said to have been lost. PW1 produced an abstract which proved that the Respondent lost the subject goods in the accident a fact that was confirmed by the Appellant's witness. I therefore find that the Appellant was liable for the loss.
19. What follows, therefore, is to what extent the Appellant was liable. The Appellant took the position that the exemption clause in the Consignment Agreement limits its liability to the cost of replacing the consignment subject to a maximum of KShs. 1,000/= in respect of one claim. The Appellant adduced evidence that it was not made aware of neither the contents nor the value of the parcel. That it advised the Respondent on the terms of the Consignment Note of the need to self insure all items of value. It was therefore contended by the appellant that the Respondent was bound by the said terms and urged that the court ought to have been guided by decision of the Court of Appeal in **Securicor Courier (K) Limited v. Benson David Onyango and Another (2008) eKLR which found that in similar circumstances, the respondent would be bound by the exemption and limitation clause**.
20. The Respondent on the other hand argued that the exemption and limitation clause ought not to be read selectively. The Respondent acknowledged the holding in the latter case that by signing the Consignment Note, a party is bound by its terms. However, citing **Consolidated Bank of Kenya Limited v. Securicor Security Services Kenya Ltd (2013) eKLR**, where it was held that ***"where an exemption clause runs away from negligence of the defendant's employees or is particularly onerous, the common law and courts have intervened by restricting its application"*** and it was argued that the Appellant was under duty to transport the Respondent's goods safely and cannot be exempted from liability where loss or damage as a result of negligence has arisen.
21. The applicable condition thereby is clause 2 (b) of the Condition of Service which is subject to the provision of clause 3. Clause 2(b) is couched in the following terms:-

> ***" subject to the provision of clause 3 hereof indemnify the customer against any damage resulting from loss of or damage to a consignment occurring during any period of the Company's responsibility and which was caused solely by negligence on the part of the servants or agents of the Company acting in the course of their employment provided that this indemnity shall apply only to loss or damage represented by or consisting of costs of replacing such consignment and (in the case of data) of the hiring of any additional computer time necessitated thereby with an overall maximum of Kenya Shillings One Thousand (KShs. 1,000/=) in respect of any one claim and subject further to a maximum of Kenya Shillings Twenty Thousand (KShs. 20,000/=) in respect of all such loss or damage occurring in any consecutive period of 12 months. (This indemnity shall not, nor shall any liability of the Company its servant or agents to the Customer, on any ground or for any cause whatever or under any circumstances extend to) any consequential loss or to (any loss or damage other than the cost of replacement) and (where appropriate) computer time is as aforesaid."*** (Emphasis added).

22. I note that the Respondent did not deny being issued with the Consignment sheet which contained the Conditions of Service. It was incumbent upon the Respondent to read the terms of service before appending their signature. Having appended the signature, it is to be taken that they were agreeable and were to be bound by the terms therein. It is indicated at the front page of the said sheet that ***"customers are advised to self insure all items of value being sent through the courier service."*** Having appended the signature, the Respondent was bound by the terms therein including ensuring that they self insure the parcels they were sending. All said and done, I am of the view that the advice to clients to self insure is in bold and clear and contained in the conditions

of service and the limitations are also very clear. I agree with and fortified by the elaborate Court of Appeal decision of **Securicor (K) Limited** case (supra) citing with approval the Alisa Craig case that the clause limiting liability as opposed to those totally excluding liability should be enforced if they are clear and unambiguous are binding upon the Respondent. The reasons as given by the CA case above is that as explained by Lord Wilberforce and Lord Fraser in the Alisa Craig case is that those clauses mostly related to other contractual terms; that the risk that the defending party may be exposed to might be so great in proportion to the sums that can reasonably be charged for the services contracted for, and that the other party has the opportunity to insure. In the Alisa Craig case, a similar clause limiting the respondent's liability to 1,000 pounds was held to be binding although the appellant had suffered loss of 55,000 pounds. In addition I find that the trial magistrate did not make any finding whether the exemption clause was efficacious if indeed, it formed part of the contract. This court finds that it formed part of the contract between the parties hereto, which exemption limits the appellant's liability for negligence to the cost of replacing the consignment subject to a maximum of Kshs 1000 in respect of one claim. Accordingly, I find that the trial magistrate was in error in holding that the respondent was entitled to the actual value of the consignment which was lost in transit.

23. In the end, I allow this appeal to the extend stated above, set aside the judgment and decree of the trial magistrate and substitute it with judgment for the respondent against the appellant for a sum of Kshs 1,000 in accordance with Clause 2(b) of the terms and conditions of carriage as stipulated in the single Consignment Note, with interest at court rates from date of filing suit until payment in full. The respondent shall have 1/3 costs in the lower court.
24. In view of the heavy loss suffered by the respondent, I find that it is just in the circumstances of this case that i should order that each party bear its own costs of this appeal.

Dated, signed and delivered at Nairobi this 8th day of December, 2015.

R.E.ABURILI

JUDGE