REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.947 OF 2003

H.N. KARIITHI……APPELLANT

VERSUS

VIVEK INVESTIMENT LTD…….RESPONDENT

(Appeal from the judgment and decree of Senior Resident Magistrate, Mrs. Owino

delivered on the 27th day of November, 2003 in Nairobi CMCC No.9672 of 2002)

J U D G M E N T

1. This appeal arises from a suit which was filed by Vivek Investments Ltd (hereinafter referred to as the respondent). The suit was initially filed in the High Court at Nairobi, but was subsequently transferred to the magistrate's court. H.N. Kariithi (hereinafter referred to as the appellant), was the defendant. The respondent's claim against the appellant was for recovery of Kshs.525,367/=. The respondent's claim arose from a contract of carriage pursuant to which the respondent delivered to the appellant a container loaded with 144 cartons of insulated hotpots, for delivery to Nairobi as common carrier. Upon delivery of the container, in breach of the contract of carriage, 78 cartons were found missing. The respondent maintained that the appellant was liable for the loss as common carrier.

2. The appellant filed a defence denying that it carried the goods as a common carrier and contended that it was a bailee contracted by the respondent to transport the container form Mombasa to Nairobi. The appellant maintained that it was the respondent's responsibility to pack, seal and lock the container to ensure that the goods within the container were sufficiently secure. The appellant argued that it was not liable for any loss or damage to the goods occurring while the goods were on transit. The appellant denied being liable for the loss suffered by the respondent and counterclaimed a sum of Kshs.40,000/= being the unpaid transport charges due to the appellant from the respondent in respect of the transportation of the container.

3. During the hearing of the suit, 3 witnesses testified for the respondent. These were: Bharat Dhacher

who did not state his specific designation but appears to be an official of the respondent, Francis Waweru a clearing and forwarding agent who cleared the goods imported by the respondent, and Gilbert Kitaka a police constable who participated in the arrest of the appellant's driver.

4. Briefly their evidence was as follows: The respondent was importing goods from India through the port of Mombasa. The goods were cleared from the port by one Francis Waweru of Shuttle Air Services. Waweru verified the container in the presence of customs and KPA officials and paid all the custom charges. He maintained that the container was full and that the seal and twisted wire was affixed to the container in the presence of KPA security. When Waweru handed over the container to the appellant for transportation to Nairobi the padlocks were intact.

5. The truck carrying the container was to leave Mombasa on 23rd December. It did not however arrive in Nairobi until 28th December. Since the container was padlocked and the clearing agent had not given the key to the respondent, the respondent's officers broke open the container in the presence of the driver and the turn boy of the appellant's truck. When the container was opened, it was found that more than half of its contents were missing. The matter was reported to the police. The goods were subsequently offloaded and counted. Out of 144 cartons, a total of 78 cartons were found missing. The total value of the goods missing was Kshs.571,595.90.

6. PC. Gilbert Kitaka, who was at the material time attached to Industrial Area Police Station, accompanied one Inspector Mwaura to Mtito Andei where they traced and arrested the driver of the truck. They did not however recover any of the missing goods. The driver was subsequently charged with the offence of theft of goods in transit at Makadara Criminal Court. The driver was tried and convicted of the offence, but was subsequently acquitted by the High Court. Since the respondent had insured the goods with Kenindia Insurance Company, the respondent was paid by the insurance company and therefore the suit was for recovery of the loss for reimbursement to the insurance company.

7. The appellant called two witnesses. These were the appellant and his driver David Mungai. The appellant identified himself as Hosea Nderi Kariithi. He explained that he was instructed by Shuttle Air Services to reserve one truck for transportation of a container from the port of Mombasa to Nairobi. The container was collected on 23rd December, 1995. Later, he was given some documents which showed what the container was said to contain as well as delivery notes. He noted that the delivery notes were marked indicating that 78 cartons were missing. He explained that as a transporter he was not supposed to know what was in the container. The appellant testified that the driver of the truck was tried and convicted of theft of goods in transit. The conviction was however quashed on appeal. The appellant maintained that he was never paid his charges for transporting the container from Mombasa to Nairobi. He therefore counterclaimed the sum of Kshs.40,000/= as charges due to him.

8. David Mungai a driver then employed by the appellant was the one driving the truck carrying the respondent's container. He explained that he was given the container to transport to Nairobi. The container was locked with a metal steel and a padlock. He was not given any keys to the padlock. He arrived in Nairobi on 26th December, 1995 because the vehicle had a problem on the way. He maintained that he delivered the container intact. The container was opened in his presence by breaking the padlock. He was charged for the loss of the cartons said to be missing from the container. He was convicted by a magistrate's court but was subsequently acquitted by the High Court.

9. In her judgment the trial magistrate found that the truck left Mombasa for Nairobi on 23rd December, with the container sealed and in good condition. She found that the driver and the owner of the motor vehicle contradicted themselves regarding where the motor vehicle broke down and the date of

arrival in Nairobi. She found the evidence adduced for the appellant contradictory and unreliable. She further found that the driver of the appellant absconded but was later arrested by the police at Mtito Andei. She concluded that it was the driver of the truck who tampered with the truck, and stole the goods. She therefore found the appellant liable and entered judgment for the respondent against the appellant. The trial magistrate also found the appellant's counterclaim proved, and ordered that the sum of Kshs.40,000/= be deducted from the amount found due to the respondent. She did not award any interest on the sum of Kshs.40,000/= as she found the appellant to be the author of his own misfortune.

10. Being aggrieved by this judgment, the appellant has lodged this appeal raising 6 grounds as follows:

(i) That the learned magistrate erred in law and in fact by arriving at a decision that was wholly against the weight of the evidence produced.

(ii) That the learned magistrate erred in law and in fact in finding that the respondent's case had been proved on a balance of probability.

(iii) That the learned magistrate erred in law and fact in finding that the appellant, his agent and/or driver was responsible for the loss of 78 cartons worth Kshs.525,367.00, the subject matter thereof in total disregard of the defence exhibit 1, a copy of the judgment HCCC No.1546 of 1996 which sought to establish the innocence of the driver, defence witness number 2 which evidence is binding upon this honourable court, as no appeal was even lodged against that said decision.

(iv) That the learned magistrate erred in law and in fact by failing to absolve the appellant from any liability for the loss of the said goods even after the appellant's agent was set free by the High Court hence the appellant being the principal would obviously not be liable for any loss.

(v) That the learned magistrate erred in law and in fact in allowing the claim for damages for Kshs.525,367.00 and at the same time allowing the defendant's counter-claim for Kshs.40,000.00.

(vi) That the learned magistrate erred in law and in fact in allowing the counterclaim of Kshs.40,000.00 indicating that he performed the contract of bailment to completion, transporting the container with its full contents and thereafter condemning him to settle the plaintiff's claim.

11. Following a consent recorded by the parties, written submission were duly exchanged and filed. For the appellant, it was submitted that the trial magistrate erred in failing to take into account the judgment of the High Court allowing the appeal against the conviction of the appellant's driver, and absolving the driver of any wrongdoing. It was further submitted that the trial magistrate failed to note that the container was delivered by the appellant's driver whilst intact with seals and locks in place, and that the container had to be broken into by the respondent's officers as the clearing agent had not availed the keys to the respondent. It was also pointed out that there was disparity in the figures claimed by the respondent as the value of the missing goods. The court was thus urged to allow the appeal.

12. For the respondent it was submitted that the appellant was a common carrier of goods for hire. It was argued that the appellant agreed as such common carrier to carry a container containing 144 cartons of plastics insulated hotpots from Mombasa to Nairobi. Upon delivery of the container 78 cartons of the

goods were found missing. It was noted that the trial magistrate found the evidence of the appellant contradictory and unbelievable. It was submitted that the standard of proof in criminal proceedings was "beyond reasonable doubt" whilst in civil proceedings it was "on the balance of probabilities". Therefore failure to achieve a conviction in criminal proceedings does not translate to innocence in civil proceedings.

13. It was argued that a contract of carriage was one of strict liability and the appellant having admitted that it was a carrier contracted to carry the goods for gains, he was under strict liability to deliver the goods as agreed. Relying on ***Chitty on Contracts 28th Edition para 36-007***, it was submitted that a person, who holds himself as willing to carry goods for members of the public for reward, is a common carrier. It was argued that the appellant having held himself as such was a common carrier. It was submitted that a common carrier is liable to indemnify the owner of the goods in case of any loss or damage to the goods during carriage or at any time they are under the possession of the carrier. It was submitted that the appellant failed to disprove the loss or that it was inevitable or caused by the owner of the goods. It was argued that even if the court were to hold that the appellant was not a common carrier but a bailee, the loss of goods while in the custody of the bailee places the onus of proof on the bailee to show that the loss was not due to fault of the bailee.

14. It was argued that the respondent was entitled to recover the market value of the lost goods. In this regard ***Express Transport Company Ltd vs BAT Tanzania Ltd [1968] EA 443*** was relied upon. It was further argued that there was no contradiction between the court's finding in favour of the respondent in the main claim, and for the appellant on the counterclaim, as the court was enforcing the contract between the parties.

15. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate, taking note of the fact that the trial magistrate had the advantage of seeing and assessing the demeanour of the witnesses. I find that it is not disputed that the appellant transported a container carrying goods belonging to the respondent. The issue was whether the appellant carried the goods as a common carrier or as a bailee. As stated in ***Chitty on Contracts*** (supra) a common carrier is a person who holds himself as willing to carry goods for members of public for reward.

16. Therefore the question is whether the appellant held himself as willing to carry goods for members of public for reward. In his evidence the appellant testified that he was a transporter. Under cross-examination, he explained that he was a general transporter and had been in the business for many years. He further conceded that he does transportation for a fee and that he received the container carrying the respondent's goods from Shuttle Air Services who cleared the goods for the respondent. Therefore, by his own admission the appellant was in the business of transporting goods for members of the public at a fee. Thus, there is no doubt that the appellant was a common carrier.

17. The duty imposed on a common carrier is described in ***Chitty on Contracts 28th Edition Para 36014*** as follows:

"By reason of his public calling the common carrier is subject, at common law, to 3 peculiar obligations: he must accept for transport goods tendered with the appropriate fee provided he has space in his vehicle, he must charge only a reasonable rate for their carriage, and he is strictly responsible for all loss or damage which occurs in the course of transit."

Thus the common carrier is responsible for all loss or damage which occurs in the course of transit, including loss which occurs through the wrongful act of third parties.

18. In this case, there was evidence that the appellant was handed over a Container by the respondent's clearing agent. The Container was said to contain 144 cartons of plastic insulated hotpots. The appellant undertook to transport and deliver the Container to the respondent. It is evident that when the goods were delivered to the respondent, the Container and the padlock was intact. Surprisingly, although there was no evidence of breakage, over half of the contents of the Container were found to be missing. The respondent's evidence is that out of 144 cartons, 78 cartons were found to be missing. The issue herein is whether the respondent's goods were lost whilst in the possession of the appellant, such that the appellant can be held liable.

19. The respondent's clearing agents who cleared the goods and handed over the Container to the appellant maintained that the goods were verified at the port and that the contents of the Container were intact. There is no evidence as to whether the appellant verified the contents of the Container. The appellant implied that he did not know what the contents of the Container were nor was he responsible for the contents of the Container. Feigning of such ignorance cannot hold. For it is obvious that the appellant must have been given documents pertaining to the Container and the goods carried therein, to facilitate the passage of the goods from Mombasa to Nairobi. The appellant did not produce any evidence showing the terms under which he undertook the contract of carriage. Therefore, it must be assumed that he undertook to deliver not only the Container but also its contents as contained in the document handed over to him. The appellant may have been negligent in failing to verify the contents of the Container. Nonetheless, that cannot absolve the appellant from liability. The appellant was strictly responsible for any loss which arose during the course of transit. Since half the goods did not arrive at its destination, it must be assumed that they were lost during the course of transit.

20. The appellant took issue with the trial magistrate's failure to take into account the fact that the appellant's driver was acquitted by the High Court of the offence of theft of goods in transit. However, the fact of the acquittal does not in any way absolve the appellant from liability. The prosecution had an uphill task of proving the criminal case against the appellant's driver beyond reasonable doubt. The burden on the respondent in the lower court was however much lighter as the respondent had to prove his case against the appellant on a balance of probability. Moreover, the issue was not who stole the respondent's goods, but who was liable for the loss of the goods. It is true that the conduct of the respondent's clearing agent in failing to avail the keys to the respondent's officers was suspicious. However, there is no evidence that the clearing agent came into contact with the goods after handing over the Container to the appellant. In the circumstances, the trial magistrate cannot be faulted for finding the appellant liable.

21. As regards the trial magistrate's finding in favour of the appellant on the counterclaim, I find that there was no contradiction as the counterclaim was a separate claim. It was clear that the appellant and the respondent entered into a contract of carriage pursuant to which the respondent was liable to the appellant for payment of transport charges in respect of the carriage. The appellant having undertaken the transportation he was entitled to his costs subject to his liability in respect of the loss.

22. For all the above reasons, I find that there was ample evidence before the trial magistrate to prove the respondent's case and that the trial magistrate was right in finding for the respondent. I find no merit in this appeal. I therefore reject all the grounds and dismiss the appeal with costs.

Orders accordingly.

Dated and delivered this 11th day of February, 2011

H. M. OKWENGU

JUDGE

In the presence of: -

Githara H/B for Kimathi for the appellant

Amol for the respondent

B. Kosgei - Court clerk