



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 3332 of 1994**

**TRU FRUITS KENYA LIMITED ..... PLAINTIFF**

**VERSUS**

**COMPAGNIE GENERALE MARITIME ..... 1<sup>ST</sup> DEFENDANT  
KENYA SHIPPING AGENCIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed this suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants way back in September 1994. The plaintiff is seeking for judgment against both the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally a sum of Ksh.1,969,353.05/-, general damages and costs of the suit. The court records show the hearing of this case started before Justice Hewett sometimes in June 2000, who recorded the evidence by the plaintiff's 1<sup>st</sup> witness. On 20<sup>th</sup> February 2003 Ringera J ordered the matter to proceed before another judge from where **Justice Hewett** left it.

On 24<sup>th</sup> April 2004 the plaintiffs witnesses continued to give evidence before **Azangalala J.** Who was also transferred to another court station before completing the matter. In between the defendants applied to strike the plaintiff's suit for want of prosecution which was application was heard by **Justice Mwilu** and by a ruling delivered on 27<sup>th</sup> January 2009, the plaintiff was given 60 days within which to fix the matter for hearing and to pay costs of Ksh.10,000/- to the defendant. That is when the matter was fixed for hearing on 18<sup>th</sup> June 2009, before me. The defendants did not appear although the hearing dates were fixed in court before a Judge by the consent of both parties.. The plaintiff closed their case without calling any further evidence, and proceeded to file written submissions. The defendants did not offer any evidence.

The plaintiffs case is supported by the evidence of **Aloysias Iriga Nderi and Dominic Mureithi Mathenge.** According to the plaintiff, the defendants were contracted between the 19<sup>th</sup> October 1993, and 20<sup>th</sup> December 1993, to transport 2,457 cartons of frozen French beans from the port of Kilindini in Mombasa to Marseilles France which was the port of discharge on behalf of the plaintiff. The 2<sup>nd</sup> defendant was acting as the agent of the 1<sup>st</sup> defendant. The goods were supposed to be carried in a 1 x 40 container; the container was supposed to be refrigerated and in the course of transportation the temperature was to remain at (-18 C), commonly known in the business of affreightment as a Reefer. The defendants were supposed to deliver the cargo in good and wholesome order. The terms and conditions were stipulated in the carriers Bill of Lading and the plaintiff was supposed to pay the freight charges.

On 17<sup>th</sup> October 1993, the 2<sup>nd</sup> defendant supplied the plaintiff with a container described as CMGU 470472 – 0 for purposes of carriage of the cargo in accordance with the contract. The plaintiff loaded the cargo and on 17<sup>th</sup> January 1994 but the container broke down. The plaintiff requested M/s Transami who were the forwarding agent to provide them with a temporary relieve for storage of the cargo up to 25<sup>th</sup> January 1994 while awaiting the 1<sup>st</sup> defendant to provide a replacement container. On 25<sup>th</sup> January 1994, the 1<sup>st</sup> defendant provided the plaintiff with another container LPIU 590067-1 and the goods were shipped to Marselles France. However on arrival in France on 28<sup>th</sup> February 1994, the cargo was found unfit for human consumption due to fluctuation of temperature and was rejected by the buyers. The plaintiff maintained that before loading the cargo into the 1<sup>st</sup> defendants container it was in good and merchantable condition as verified by SGS.

The plaintiff maintains that they were not at fault because it paid the freight, forwarding, demurrages and inspection charges. The plaintiff contends that it is the defendants who were negligent and failed to honour their part of the contract by failing to supply a container fit for the purposes of maintaining the required temperature at -18C. The defendants also failed to supply a container in good condition and delayed the cargo from the broken down container to an alternative container. As a result of the defendants breach of the contract, the plaintiff who is a horticultural exporter lost their goods name and standing, with their overseas customers and had to pay for the goods to be destroyed by the officials of the French government . They suffered the loss of the cargo and all the expenses they had incurred as follows:-

(a)	Loss of cargo – full value of invoice #269 to wit 2400 cartons of haricot verts and surgeles 15931 Kgs valued @ (101,400 French francs) rate of exchange (at Shs.11,499 per 1 FF... Ksh.1,166,000.00	
(b)	Forwarding charges .....	Ksh. 180,000.00
(c)	Demurrage .....	Ksh. 96,172.55
(d)	Inspection .....	Ksh. 22,020.00
(e)	Overseas clients loss	
	Freight charges (51.369.52) .....	<u>Ksh. 505,160.50</u>
	Total .....	<u>Ksh.1,969,353.05</u>

The plaintiff also relied on several documents which included the shipping order by the 2<sup>nd</sup> defendant dated 19<sup>th</sup> October 1993, delivery slip of the container, the Bill of Lading, fax messages, from the 2<sup>nd</sup> defendant to the plaintiff among other documents. The issues for determination in this matter were agreed upon between the plaintiff and the defendants advocates on 13<sup>th</sup> February 1998 as per the statement of agreed issues as follows:-

1. Did the plaintiff enter into two valid contract with 2<sup>nd</sup> defendant dated 19<sup>th</sup> October 1993 and 20<sup>th</sup> December 1993 as alleged by the plaintiff or one valid contract dated 31<sup>st</sup> January 1994 as alleged by the defendants?
2. Did the 1<sup>st</sup> defendant convey the cargo upon the terms and conditions of the contracts pleaded in the plaint?
3. Was the said cargo found to be unfit for human consumption due to fluctuation of temperature on arrival in France on 28<sup>th</sup> February 1994 as a result of a breakdown of the container on 17<sup>th</sup> January 1994?
4. Were the 1<sup>st</sup> and 2<sup>nd</sup> defendants in breach of contract and/or negligent in the performance of the same and did such breach and/or negligence if any occasion loss and damages to the plaintiff?
5. Is the plaintiff entitled to claim the loss by way of special damages totaling Ksh.1,969,363/05 as alleged in the plaint or at all jointly and severally from the 1<sup>st</sup> and 2<sup>nd</sup> defendants?

6. Has the plaintiff suffered loss of market as alleged in the plaint and is it entitled to claim general damages jointly and severally from the 1<sup>st</sup> and 2<sup>nd</sup> defendants?.
7. Can the liability (if any) of a disclosed principal be visited on its agent?
8. What is the quantum of general damages payable to the plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants?
9. What is the quantum of special damages payable to the plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants?
10. Who should be condemned as to costs?

As noted above, the defendants did not offer any evidence to support their defence, they denied liability but for lack of evidence to support their defence, the plaintiff's case is not controverted. The evidence by the plaintiff is supported by documents which show that the plaintiff contracted the 2<sup>nd</sup> defendant as an agent of the 1<sup>st</sup> defendant to transport their cargo as per the order and the bill of lading. There is also evidence on record that before the cargo was transported, the goods were inspected by SGS Kenya Limited and were certified to be in good condition for purposes of trade. However when the goods reached the destination they were unfit for human consumption as a result of which they were destroyed by health officers in France.

Were the defendants liable for the loss of goods as carriers of the goods? According to the plaintiff, the defendants was responsible for the safety of the goods in all events. Counsel for the plaintiff relied on several authorities to support the proposition that the plaintiff's case was proved that their goods were destroyed while in the hands of the defendants who were the carriers. The only defence the defendants could validly give was if they successfully proved to the court that the damage to the goods arose solely from as an act of God or hostilities involving the State or from the fault of consignor or inherent vice of the goods themselves. **See BAT Kenya Limited and Another v Express Transport Co. Ltd & Another [1968] EA 171 and Express Transport Company Ltd v BAT Tanzania Limited [1968] E 443.**

The onus of establishing those exceptions lay on the defendants who did not offer any evidence. Having found that the plaintiff's goods were destroyed while being transported by the defendants this court is satisfied that on a balance of probabilities the plaintiff has established their claim that the goods were destroyed due to the negligent on the parts of the common carrier. In the absence of any explanation as to how the damage occurred, the court must presume that it was as a result of the carriers negligence, for goods if properly transported do not just get damaged without some intervening human act or omission hence the rule of evidence ***res ipsa loquitur***. Negligence in this case can be presumed on the part of a carrier if goods are damaged while in its possession and no explanation is offered as to how the loss occurred.

Accordingly, I will enter judgment for the plaintiff for the sum of Ksh.1,969,353.05/- which is proved by the documents and the evidence adduced the by the plaintiffs witnesses. No evidence was adduced to support the loss suffered by the plaintiff due to loss of credibility and overseas customers, therefore there will be no award for general damages. The plaintiff shall have the costs of this suit with interest from the date of the judgment.

JUDGMENT READ AND SIGNED ON 9<sup>TH</sup> OCTOBER 2009 AT NAIROBI.

**M.K. KOOME**  
**JUDGE**