REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 426 OF 1995

KHETSHI DHARAMSHI CO. LTD......................................PLAINTIFF

VERSUS

P. N. MASHRU LTD...DEFENDANT

JUDGEMENT

I. CLAIM BASED ON BREACHES OF DUTY OF CARE BY BAILEE AND COMMON CARRIER, AND ON CONTRACT – PLAINTIFF'S PLEADINGS

The plaint in this suit, dated 16th December 1994 was filed on 13th February 1995. It is pleaded that the defendant was at all material times a common carrier of goods and/or a general transporter of goods to and from various destinations in Kenya, for reward, and was the registered owner of motor vehicle registration number KXN 626. By an agreement dated 16th March, 1994 the plaintiff delivered to the defendant as common carrier at Mombasa a consignment of 344 imported coil wire rods, to be safely and securely carried by road from Mombasa to the plaintiff's premises on Enterprise Road, Nairobi. The plaintiff pleads that the defendant, in breach of duty, did not safely carry or deliver intact the said consignment to the plaintiff, but delivered the same short of 13 coil wire rods. It was pleaded that the defendant was in breach of its *duty as a common carrier* and/or was in breach of its *implied terms of carriage* and, alternatively in breach of its *duty as a bailee for reward*.

The plaintiff pleads that, as a particular of breach of duty as *common carrier*, the defendant failed to deliver the said 13 coil wire rods to the plaintiff in Nairobi. The plaintiff, secondly, pleads *breach of contract* on the part of the defendant who failed to securely and safely deliver the said consignment to the plaintiff as agreed. Thirdly the plaintiff pleads breach of *bailee's duty of care*, as the defendant, who had the goods in its possession as bailee for reward, failed to execute *reasonable care in the custody thereof*. The plaintiff pleads that in consequence of such failure of duty by the defendant, it (the plaintiff) has suffered loss and damage.

The plaintiff's losses are particularized as follows

(i) Value of 13 coil wire rods: Kshs.475,029/=.

(ii) Survey investigation fees: Kshs.21,338/=.

The plaintiff states that in spite of demand made and notice of intention to sue duly given, the defendant has refused and has persisted in its refusal to pay the sum claimed. Consequently the plaintiff prays for judgment against the defendant for:

(a) General damages;

(b) Kshs.496,376/=;

(c) Costs;

(d) Interest on (a), (b), (c).

II. GOODS CARRIED AT "OWNER'S RISK", AND THERE WAS NO CONTRACT – DEFENDANT'S PLEADINGS

In the defendant's statement of defence, dated and filed on 5th April, 1995 it is admitted that the said motor vehicle, registration No. KXN 626 was its property, but it is denied that the defendant was in breach of its duty as a common carrier, or in breach of any contractual obligations resting upon it. The defendant denies that there was ever any agreement between it and the plaintiff for the carriage of the goods

in question from Mombasa to Nairobi; and in the alternative the defendant states that if it had agreed to carry such goods, then the goods were being carried at "owner's risk".

III. AGREED ISSUES FOR TRIAL

A statement of agreed issues signed for both parties was filed on 18th September, 1996. These issues are as follows:

(i) Whether the defendant was at all material times a common carrier of goods and/or a general transporter of goods for reward;

(ii) Whether there was an agreement on 16th March, 1994 between the plaintiff and the defendant, to deliver a consignment of 344 imported coil wire rods from Mombasa to the plaintiff's premises in Nairobi;

(iii) Whether the defendant was in breach of its duty as a common carrier and/or in contract;

(iv) Whether the said goods were carried at "owner's risk" and if so, whether the plaintiff is barred from making any claims;

(v) Did the defendant fail to deliver the 13 coil wire rods to the plaintiff?

(vi) Whether the plaintiff has suffered any loss and damage and if so, to what extent?

(vii) What is the appropriate order as to costs?

IV. THE PLAINTIFF'S CASE: TESTIMONIES

PW 1, Michael Siqueira was sworn and began on his testimony on 9th March, 2005. He testified that he had been an employee of the plaintiff company, holding the position of quality control engineer, since 1986. His employer had ordered mild steel wire rods from France, and documents such as importation forms, bill of lading, port release papers were available to show the relevant dispatch arrangements. The witness testified that the original import declaration form had been surrendered to the customs office, through the clearing agent. Several other documents, including the bill of lading, had also been surrendered to the customs office as required by clearing procedure. When the consignment of 344 coil wire rods arrived at port, the plaintiff was duly notified. The defendant had in the past been the transporter serving the plaintiff; and this time around, an understanding was reached that the defendant was to transport the 344 coil wire rods to the plaintiff in Nairobi. The defendant commenced the delivery process for part of the goods in its vehicle registration number KXN 626; but this vehicle did not arrive in Nairobi. The contents of this motor vehicle, namely 13 coil wire rods should have been conveyed to the plaintiff. When these goods were not received, the plaintiff promptly informed both the Nairobi and Mombasa offices of the defendant, who responded by saying the said vehicle itself, with all its contents had been stolen. The defendant informed the plaintiff, by letter of 16th April, 1994 that the goods in question had been loaded in Mombasa on motor vehicle registration number KXN 626 but it was a surprise that the lorry did not reach Nairobi. The defendant stated that the vehicle in question had broken down at a small town known as Nzau, on 8th April, 1994 and that spare parts had been dispatched there and the vehicle repaired, and it re-commenced its trip to Nairobi, on the same day. However, the vehicle never arrived, and the plaintiff took up the matter with its insurance company, Kenindia Assurance Company. The insurance company carried out investigations, and paid for the loss. The plaintiff gave the insurance company a subrogation letter, which was now the basis of the instant claim. The sum of Kshs.475,028/= as paid to the plaintiff by the insurer.

On cross-examination by Ms. Wanga learned counsel for the defendant, the witness further testified that: the arrangement between the plaintiff and the defendant for the transportation of the coil wire rods was made by oral agreement on 16th March, 1994; the record from the supplier showed that 344 coil wire rods were delivered, and the plaintiff duly paid duty for the same; the process of delivery by the defendant began in or about March, 1994 but the last consignment which left Mombasa on 4th or 5th April, 1994 was not received in Nairobi by the plaintiff – and in the lost consignment there had been 13 coil wire rods. The witness acknowledged that on the back of the defendant's delivery notes there appeared the disclaimer that goods were transported "at owner's risk". According to the witness certain risks might be normal, but the instant loss could not fall in such a category; the transporter (defendant) had reported to the plaintiff that all the goods had been duly loaded at Mombasa; the plaintiff thereafter kept calling and following up on the situation of the goods, but to no avail; later the defendant had stated that its driver and turn-boy manning the lorry registration No. KXN 626 had converted the goods to their own purposes; the conversion is said to have taken place after the lorry had broken down and been repaired and was moving towards Nairobi.

The witness testified that although a report had been made to the police at the weigh-bridge near Machakos, that the vehicle KXN 626 and its load had been hi-jacked at the Mombasa Road- Machakos Junction, it was not possible for the defendant to exempt itself from responsibility for the safety of the goods - because the defendant would as in normal practice, take a cover for such a risk. The witness testified that the defendant had not kept the plaintiff very well informed about the situation of the goods, in spite of the continuous inquiries raised by the plaintiff.

The witness testified that the plaintiff had been compensated for the loss, by Kenindia Assurance Company Ltd; but under a clause in the insurance contract for subrogation, it was the insurance company which was now following up on the loss, as was their right. Under the subrogation clause (relevant letter, plaintiff's exhibit No.3) the plaintiff had surrendered its rights to the insurance company; but the plaintiff's name may be used for the purpose of the suit, as in the case here.

PW2, Joseph Mutua, was sworn and gave his evidence on 5th May, 2005. He testified that he was a private investigator with a firm known as Wide Span Investigations, the main business of which was the investigation of thefts and commercial matters. He had taken up employment with the firm in 2000; and the director of the firm, Mr. Samuel Andrew Michuki who had investigated the loss of the goods in question in this suit, died in December, 2002 (death certificate admitted as plaintiff's exhibit No. 5). The witness averred that the investigation report had been duly compiled and signed by the deceased.

The admission of the investigation report became a subject of contention between counsel. Ms. Wanga for the defendant argued that where the original maker of the investigation report was dead, a special application ought to have been made to secure the admission of that report; for this contention she invoked section 35 of the Evidence Act (Cap.80) But learned counsel Ms. Mulwa reposted by invoking section 35 (1) (a) and (b) and the proviso, of the same Act which provides that the document may be admitted where the maker has died or cannot be found. Learned counsel submitted that an investigation report was only an opinion, and grounds for an opinion could be tested in various ways, including by reference to treatises.

As Ms. Wanga raised no further objections, I admitted the investigation report (plaintiff's exhibit No.6) as the report of an expert, and directed that any issues of knowledge with regard to the report, could be raised in the examination-in-chief, in the cross-examination, in the re-examination and in the submissions of counsel.

In cross-examination the witness reaffirmed that he did not himself conduct the investigations into the loss, and he was not even aware when exactly the loss took place. He had learnt from the report that the loss incurred by the plaintiff stood at the figure of Kshs.475,029

V. THE DEFENDANT'S CASE: TESTIMONY

Learned counsel Ms. Wanga introduced the defendant's case by restating the denial of the assertions in the plaint. The defendant denied being in breach of duty or any agreement to deliver goods to the plaintiff in Nairobi. The defendant would seek to prove that if at all coil wire rods were not delivered in Nairobi by the defendant, then it was a matter beyond the defendant's capabilities and circumstances. The defendant would seek to prove that the plaintiff had consented to have the said goods delivered in Nairobi at the plaintiff's "own risk" - and that, therefore, the plaintiff could not come to Court seeking compensation.

The defendant had one witness, David Masai Olinyu who was sworn and gave his evidence on 20th September, 2005. He testified that he was an employee of the defendant and was familiar with the facts of the case. The defendant had had a verbal agreement with the plaintiff; by this agreement, the defendant was to transport 344 coil wire rods from Mombasa to Nairobi, and the task began on 5th April, 1994.

The oral agreement in question had not been made directly between the plaintiff and the defendant - it was done through an agent of the plaintiff.

All the 344 coil wire rods were duly loaded on to the defendant's vehicles at Mombasa. According to the witness all the 344 coil wire roads were shown in the delivery notes and were delivered to the plaintiff. But on the specific claim for 13 of the coil wire rods said to be missing, the witness said: "We carried at owner's risk". He then said: "[The lorry] KXN 626 disappeared and has not been recovered to date." Such a statement, obviously, was not consistent with the averment that all the 344 coil wire rods had been delivered to the plaintiff in Nairobi. Matching this clear inconsistency against the demeanor of the witness as he spoke,

I formed the impression that I was not getting the truth, and that the witness would have been speaking not so much out of perception and conviction, but out of the constraints of a prepared script.

The witness testified that the defendant had reported to the police the loss of their motor vehicle registration No. KXN 626, and that the defendant had put in place highway patrols monitoring the movement of its transport vehicles. He said that it was only at the planned delivery time, at the Nairobi Industrial Area godown, that it had been realized that the defendant's motor vehicle, registration No KXN 626 was missing – and it is at this stage that reports were made to the police at Athi River and at the Industrial Area Police Station. It was after the reports to the police were made, that the defendant now (16th April, 1994) informed the plaintiff. The witness testified that the said motor vehicle has never been recovered, and its crew also disappeared and have never been found. He averred that the defendant had provided the identities of both the driver and turn-boy of the motor vehicle KXN 626, but the police to-date have not traced or arrested them.

As far as the witness was concerned, the non-delivery to the plaintiff of the goods placed no obligations on the defendant, for "goods are carried at owner's risk". He went on to say: " When we deliver goods the client stamps the [delivery papers]. All our delivery notes bear those limitations of liability. [it is provided], that goods are transported and handled at owner's risk. Those documents will cover us always – even if we give the goods away to our friends. The client signs to show he had received the goods – and he has understood our conditions."

The witness went on to say that "it is the client who insures the goods; and they were [indeed] insured." He averred that the plaintiff had indicated to the defendant, through the plaintiff's agent, that the goods had been insured by Kenindia Assurance Company Ltd. The witness said that the defendant would not have agreed to transport the plaintiff's goods if they were not insured; and the reason was that there would have been risks in transporting uninsured goods. He said in this regard: " we were, protecting ourselves, and protecting the client".

Again the witness, said: " We do not owe [the plaintiff] anything – because they have already been compensated by insurance".

On cross-examination, the witness testified that he joined the defendant as an employee in 1993 and his sphere of work was monitoring the movements of the defendant's trucks on the highway. Contradicting his averments made at the beginning, the witness now said that the 13 coil wire rods had not been delivered to the plaintiff in Nairobi, though the rest of the goods had been delivered. He did not know the value of the wire rods, but could see that document No. 33 in the plaintiff's bundle gave the value of Ksh.445,000 – for the 13 coil wire rods. He also noted that the sum assured was shown as Kshs.268,000, which was less than the value given for the 13 coil wire rods.

The witness testified that the defendant had done transport business for the plaintiff over the years, and that agreements in this regard have always been made verbally, through an agent of the plaintiff. The defendant has always communicated by word, with the agent and not the principal, before transporting goods to the plaintiff in Nairobi. Once the agreement is made, the agent ascertains the state of affairs at the point of loading, on behalf of the plaintiff, and the defendant then transports the goods.

The witness testified that the delivery note for the 13 coil wire rods did not come to the plaintiff, and that it disappeared with the motor vehicle registration No. KXN 626. The witness had no knowledge that the said vehicle had at some point in time broken down and then subsequently been repaired, before continuing along the road towards Nairobi.

The witness again repudiated the possibility that any liability for loss of the goods would fall on the defendant. In his words:

> "**The client receives the delivery note – and there are terms on the same. At the point of loading, the client's agent also reads the terms. Our company does not take out any insurance cover in respect of the goods we transport.**
>
> **We are not the owners of the goods. The client should take out an insurance cover. We are owners of lorries. If the plaintiff has been paid by the insurance company, then their claims have been met."**

On re-examination, the witness testified that the defendant's motor vehicle, registration No. KXN 626 had left Mombasa, carrying the plaintiff's coil wire rods on 5th April, 1994 and would have been expected to arrive in Nairobi within about three days. The vehicle did not reach Nairobi in time because it had a mechanical breakdown at a town known as Nzau. The witness was not aware whether the turn – boy and driver of the lorry were ever apprehended by the police; and to his knowledge, there has been no theft charges brought against either of the two.

VI. SUBMISSIONS ON EVIDENCE AND ON LAW

1. Merits of the Evidence: Submissions for the plaintiff

Learned counsel Ms. Mulwa submitted that the plaintiff had a justified claim against the defendant, in the sum of Kshs.496,367 with costs and interests from the date of filing suit, being the adjusted value of goods lost in transit on or around the months of March and April, 1994 – in accordance with the statements in the plaint of 16th December, 1994.

Ms Mulwa submitted that the statement of defence was largely general, with its main thrust lying in the claim that the plaintiff's goods, the subject of this suit, had been transported "at owner's risk".

A manager of the plaintiff company, Michael Siqueira (PW1) had shown how the plaintiff and the defendant had entered into a verbal agreement for the transportation of 344 coil wire rods the property of the plaintiff, from Mombasa to Nairobi. The goods were transported by the defendant in its several lorries; but one consignment, of 13 coil wire rods, purportedly transported in the defendant's motor vehicle registration No. KXN 626, was not delivered to the plaintiff's business premises in Nairobi. That the goods in question were the property of the plaintiff, had been adequately demonstrated with copies of entitlement documents such as: import declaration forms; commercial invoice; bill of lading; import entry forms; Mombasa Port Release Order. It is clear from the evidence that the said 13 coil wire rods did not reach the plaintiff.

Learned counsel submitted that although a credible aspect of the defendant's evidence is that the goods were lost in transit, the claim that the defendant made reports to several police stations raises difficulties – as no police abstract or any other document was produced to show that indeed, a report of the loss of the goods was ever made. The plaintiff had not been given any reason as to why the goods were not delivered safely in accordance with the transportation agreement. And no further explanation was ever offered to the plaintiff, regarding the loss of the goods.

Upon the non-delivery of the plaintiff's goods, the insurer, M/s. Kenindia Assurance Company appointed a loss adjuster/investigator to adjust the loss of the 13 coil wire rods in proportion, under the insurer's subrogation rights – and the value of the lost goods was set at Kshs.475,029/=, and a fee of Kshs.21,338/= was charge in that regard.

Learned counsel submitted that the main thrust of the defence evidence did not controvert the essence of the plaintiff's claim. The defence witness, David Masai Olinyu averred that the plaintiff's goods got lost in transit to Nairobi; he did not know which lorry was carrying the goods, nor did he know what happened to the goods. He merely disclaimed any knowledge; he had no documentation; he did not attempt to prove anything; he showed no efforts having been made by the defendant to trace the lost goods. In these circumstances, Ms. Mulwa submitted, and with justification, I believe, the defendant had no credible explanation for the non-delivery of plaintiff's goods.

2. Issues of Law: Submission for the plaintiff

(a) Would the Plaintiff's Own Insurance Arrangements Excuse defendant Bailee or Common Carrier From Duty to ensure Safety of Goods?

Learned counsel noted that the defence witness had been at pain to explain to the Court that since the plaintiff had insured its goods with Kenindia Assurance Company Ltd, the defendant had no obligation to the plaintiff. The defence witness referred to the discharge voucher showing that the plaintiff had received payment from the insurance company, and contended that the plaintiff, therefore, could not claim further payment from the defendant.

Such a statement by the witness, Ms. Mulwa submitted, was both legally and factually wrong.

The crucial issues before the Court, counsel submitted, were:

(i) whether the plaintiff is entitled to claim the value of the lost goods from the defendants;

(ii) whether the defendant is a common carrier and a bailee for reward and if so, whether it is liable to pay to the plaintiff the value of the lost goods pursuant to the contract of transportation and bailment'

(iii) whether the exemption clause as a defence, can absolve the defendant from liability to the plaintiff.

Learned counsel submitted that the defendant was in breach of the contract entered into between the parties. Besides, the defendant, counsel urged, was in breach of its duty as common carrier and bailee: the defendant failed to safely and securely deliver the 13 coil wire rods to the plaintiff. Further, the defendant failed to securely and safely deliver the plaintiff's goods while holding those goods as bailee for reward; the defendant failed to execute reasonable care in the custody of those goods, of which it was the bailee. Therefore, learned counsel submitted, the defendant was guilty of negligence and breach of contract.

Relevant authority in this regard is Express Transport Co. Ltd v. B.A.T Tanzania Ltd [1968] E. A. 443, a decision of the defunct East African Court of Appeal. The facts of this case may be stated briefly.

The appellant, Express Transport Co. Ltd, had a transport business and had on several occasions transported machinery for the respondent, B.A.T. On one occasion Express Transport Co. Ltd. agreed to transport certain machinery from Dar-es-salaam to Nairobi. The machine was to be insured by B.A.T. Express Transport Co. Ltd carried on its note-paper a disclaimer statement reading as follows: "All goods at owner's risk". This disclaimer also appeared on a form known ad "Driver's Instruction Briefing Form" – a form which had been presented to BAT at the end of previous transportation journeys. BAT's machinery was duly loaded onto the lorry, but while being re-loaded by Express Transport Co. Ltd. it was negligently dropped. It was damaged beyond repair. BAT sued for the value of new replacement machine, as damages; and BAT succeeded at the High Court: the Chief Justice (in [1968 E.A.171]) held that Express Transport Co. Ltd. was a common carrier and that there was no term in the contract of carriage limiting liability. The Chief Justice found, however, that although the accident was caused solely by the negligence of Express Transport Co. Ltd., the damage to the machine had been caused as to one-third by the contributory negligence of BAT in not packing the machine sufficiently. Express Transport Co. Ltd. appealed, and BAT cross-appealed.

Express Transport Co. Ltd. had in its defence denied that it was a common carrier; denied any liability under the contract of carriage; asserted that in any case, the machine had been carried subject to a term in the contract of carriage exempting Express Transport Co. Ltd from liability for negligence.

The Court of Appeal held that if the appellant was a common carrier, then "its liability in respect of goods carried is that of an insurer" (P.447). "On the other hand, if it is a private carrier its liability would depend upon the terms of the contract of carriage, which normally would result in a duty to take care" (Sir Charles Newbold, P, at P.447). The learned judge thus continued:

> **"It is clear…..that before a carrier can be said to be a common carrier of goods he must carry as a business and not casually, and he must hold himself out as ready to carry the goods of any person and not of [a] particular person. There is no necessity that there should be a fixed route or a stated timetable; and the fact that the carrier refuses to carry certain goods, for example, dangerous goods, does not mean that the carrier is not a common carrier."**

The learned Judge noted that the common law liability of a common carrier "is that of an insurer of goods subject to certain exceptions" (P.448). The exceptions are: act of God or of the Republic's enemies; inherent vice, which would include normal wear and tear and improper packing; and deliberate act of the consignor.

Sir Charles Newbold, P. then stated the general principle that should guid the claims in the matter (p.451):

> **"Where an article has been destroyed by negligence, the owner of that article is entitled to recover from the person who negligently caused the destruction the market value of the article immediately**
>
> **before its destruction, together with any consequential loss following on the destruction of the article which is not too remote"**

The Court dismissed the appeal with costs, and allowed the cross-appeal (by BAT) with costs. Law, J.A stated the law as follows (p.452):

> **"Where damage is due to insufficient packing, which is an aspect of inherent vice, then a common carrier is not liable as such damage falls within the exception to his insurer's liability. But the damage must be caused by insufficient packing before a common carrier can escape liability. If the damage is caused by the negligence of the common carrier, then, whether or not the goods are insufficiently packed, the common carrier is liable for all the foreseeable damage flowing directly from his negligent act ……If for example, a person negligently knocks over a glass and it falls and is broken, he is liable to pay the full value of the glass; and it is no defence to say that if the glass had been packed in rubber it would have suffered only a small chip and, consequently, that he is not liable to pay the full value but only the reduced value of the glass…..A careful examination of the cases …….shows, as is to be expected from a logical consideration of the position, that if the damage was caused by negligence, then it matters not whether the goods were insufficiently packed."**

On the basis of the Express Transport case, Ms. Mulwa submitted that in the instant matter an article has been destroyed due to the negligence of the defendant, and the owners of the article, the plaintiff, is entitled to recover the market value of the article immediately before its destruction, and to recover also the consequential loss.

Ms. Mulwa submitted that the defendant as common carrier did not exercise reasonable care to ferry the plaintiff's goods safely and securely. Apart from the defendant's letter of 16th April, 1994 which reported the loss to the plaintiff, no explanation at all had been proffered as to what really happened to the plaintiff's goods. A prudent transporter would have done a more substantial follow-up, to ascertain what had happened. Learned counsel submitted that the defendant had been manifestly negligent, by failure to follow-up, and by failure to provide any escort service for the vehicle carrying the goods.

Learned counsel relied on a bailment case, a decision of the East African Court of Appeal in Chhatrisha & Co. Ltd. v. Puranchand & Sons [1959] E.A. 746 in which the appellant company had stored metal sheets in the respondent's godown, and then they went missing. The Court's decision, in the word of Gould, J A (pp.754-755) reads:

> **"In the present case the respondents as bailees have failed to produce goods bailed to them and no explanation as to what has happened to them has been forthcoming. There are undoubtedly possible explanations for their loss which would not be covered by the exemption clause contained in the letter of October 31, 1956, and the respondents have therefore failed to bring themselves within its protection ………**
>
> **"In my view……. the learned Judge was correct in holding that, upon a basis of bailment, the respondents were liable for the value of the sheets which are unaccounted for……."**

(b) Is the Defendant Protected by Exemption Clause?

Learned counsel submitted that the defendant could not rely on the exemption clauses displayed on its delivery notes as a defence. For in the Express Transport case it was held that the phrase "at owner's risk" in the case of a common carrier, was not to be construed as excluding such liability as arises from negligence: the phrase will provide no exemption from liability issuing from negligence. In the instant case such a defence must fail, counsel submitted, because the defendant had given no evidence of reasonable or adequate security taken in respect of the plaintiff's goods. The defendant's situation, moreover, did not fall within the categories of exemptions to liability in the case of common carriers, set out in the Express Transport case: act of God, or of the Republic's enemies; deliberate act of the consignor; inherent vice (including normal wear and tear).

Learned counsel submitted that even were the defendant's exemption clauses to be applicable, the same were only exhibited at the back of the defendant's delivery notes and were not brought to the attention of the plaintiff at the time of contracting. The defence witness had stated in his evidence that it was only assumed that the plaintiff's agent would see and read the said exemption clauses.

(c)Common Carrier and Bailee

Learned counsel submitted that the defendant at all material times held itself out as a common carrier, for it carried goods as a business and not on a casual basis; it held itself out as being ready to carry the goods of any person – and not those of a particular person. The defence witness had testified that the defendant transports goods into and out of Kenya, and that to-date, the defendant has continued to carry goods for the plaintiff, for reward.

(d) Was there any agreement to limit the Defendant's Liability?

Learned counsel submitted that in the agreement to transport the plaintiff's coil wire rods from Mombasa to Nairobi, there had been no limitation of the defendant's liability.

3. Submissions for the Defendant

Learned counsel Ms. Wanga contested the submission for the plaintiff, that the defendant was in breach of its duty as a common carrier, and that the defendant was in breach of contract. In her words: "Though the defendant failed to deliver the 13 wire rods out of 344 that it had contracted to deliver, the defendant is not to be blamed, as the reasons for not delivering the wire rods were…..acts beyond the defendant's [control]".

Ms. Wanga noted that in the absence of a "carriers" statute in Kenya, the operative law is the English common law; and under this law a common carrier is liable as an insurer of goods, in respect of the negligence of other persons over whom he has no control – where the goods are destroyed accidentally. This liability, however, is subject to exceptions (as set out in the Express Transport case). Counsel noted that it was also open to the common carrier to limit his liability by special agreement with the consignor.

Ms. Wanga submitted that the instant case is one in which there had been a limitation of liability, on the part of the defendant, by special agreement. The plaintiff's agent, M/s. V. V. & Sons, had contracted on behalf of its principal (the plaintiff), with the defendant to transport the plaintiff's goods to Nairobi. How was this limitation expressed? Counsel stated that behind the delivery note, words had been printed: "Goods are to be transported at Owner's Risk". Ms. Wanga contended that both the plaintiff and the defendant had been aware of the exemption clause. She submitted that all the past delivery notes produced in Court by the plaintiff, and bearing the plaintiff's stamp, did carry the same exemption clause – and therefore the plaintiff knew truly of its existence, and was thus bound thereby. Counsel went on to urge: "It is my humble submission that there existed a contract, on the basis of the stated delivery notes, which limited the defendant's (who are common carriers) liability to this effect". She urged that on that basis, the defendant was not liable for any losses. "occasioned by thieves". Counsel restated the testimony of the defence witness, that "the 13 wire rods were actually stolen by thieves when the defendant's motor vehicle registration No. KXN 626 was hijacked by robbers on the way to Nairobi". Her contention regarding lack of verifying documentation was: "The defendant did not produce any police abstract because nobody was ever arraigned in Court for any offence. No charges were ever preferred against the employees of the defendant." It is not, however, clear to me that those are valid reasons why no police abstract or some other police – reporting document could have been issued and produced in Court.

Learned counsel urged that if the Court should find any liability in this matter, then this should be apportioned between the parties on a 50% -50% basis – for the reason that there had been a special agreement limiting the defendant's liability – and that this was known to the plaintiff.

Ms. Wanga also questioned the figure on loss set out in the loss-adjuster's report; for the reason that the author of the report was dead and his report would be unreliable.

VII. FURTHER ANALYSIS, AND FINAL DECREE

The facts of this case are straightforward. Goods belonging to the plaintiff were entrusted to the defendant, a common carrier, through a contractual arrangement which was made by the defendant for the one part, and by an agent of the plaintiff for the other part. That this was a valid contract between the parties has not been disputed; and so this Court will treat the arrangement as carrying legal force sounding in contract, and capable of giving rise to valid rights - claims by either party. In this case the plaintiff has founded its claim partly on that oral contract entered into on its behalf by its agent, namely, M/s. V. V. & Sons.

The defendant was to transport the goods, which comprised coil wire rods, from Mombasa to the plaintiff's business premises in Nairobi. Thirteen coil wire rods, which had been carried in the defendant's lorry registration No. KXN 626, never reached the plaintiff's premises. Constant inquiry by the plaintiff about the missing goods elicited no response, save that on 16th April, 1994 (some 12 days since the lorry left Mombasa) the defendant wrote to the plaintiff stating that the goods had been lost through theft. There was no explanation of the circumstances in which the theft would have taken place; there was no record of a report from the police; there was nothing at all to convince the plaintiffs that the goods had indeed been stolen. As a result of the non-delivery of the goods, the plaintiff suffered loss and damage. As the plaintiff had insured the goods, it was able to obtain compensation under the insurance contract; but its rights of legal redress then passed on to the insurance company, through subrogation. In this suit a claim is made for damages for breach of contract; damages for breach of duties resting on a bailee, and a common carrier; damages for negligent handling of the plaintiff's goods.

The main thrust of the defence case is a disclaimer: that in the defendant's delivery notes used in past transport services to the plaintiff, and not the particular service which has raised the instant dispute, it had consistently been stated on the back side that "Goods are to be transported at Owner's Risk" – and so the plaintiff must be taken to have been remembering that caveat; and so, further, the plaintiff must have accepted the qualification to the defendant's personal liability as an element in the contract now in question. The argument here, in effect, was that any negligence such as might be attributed to the defendant was qualified, as the defendant was a common carrier, and its contractual arrangement with the plaintiff had incorporated an exemption from liability for negligence.

It is an ingenious argument coming from the defendant. In the pleadings the defendant denies (statement of defence, para. 3) being a common carrier. But in the submissions, learned counsel for the defendant now expressly admitted that the defendant was a common carrier. Firstly this retraction of an express assertion in the pleadings is illegitimate and cannot be allowed. Secondly, I suspect that the defendant is belatedly attempting to escape from the wider net cast by the general law of the tort of negligence, preferring to fall only under the negligence of the common carrier or the bailee, which may in certain circumstances stand qualified by the terms of contract. Yet in the contract in question here, the defendant is unable to identify any specific aspect under which the common carrier's duty of care had been qualified. Only the obscure and indirect statement in past delivery notes, that "goods are carried at owner's risk", is urged to import contractual force into the specific agreement that had been made between the defendant, and the plaintiff's agent. It is such a tenuous connection, that I will hold that the said exemption clause was not part of the agreement reached between the defendant and the plaintiff, for the transportation by the defendant of goods to the plaintiff's premises in Nairobi.

This leaves the defendant subject only to the general law of negligence. This law operates independently of the will of a party. The law of negligence is part of the civilizing legal infrastructure, much like the criminal law, which places fixed duties on all persons – to ensure they take care and do no cause injury to their "neighbours". To such "neighbours" everyone has a duty of care, and anyone who acts in breach of this duty, with consequential injury, stands, at the motion of the injured party, to be compelled to make appropriate recompense.

These principles run through several trenchant judicial decisions of the past. I have earlier on cited several passages from the East African Court of Appeal decision in Express Transport Co. Ltd. v. BAT Tanzania Ltd [1968] E. A.443. The statement of Sir Charles Newbold, P. in that case (p.451) may be recalled

> **"Where an article has been destroyed by negligence, the owner of that article is entitled to recover from the person who negligently caused the destruction the market value of the article immediately before its destruction, together with any consequential loss following on the destruction of the article which is not too remote."**

I have to state that the defendant has placed no material before the Court to show how it could escape liability under the conception of the tort of negligence as defined above.

It is well known that in a suit such as the instant one, the legal burden always rests upon the plaintiff; and this burden is discharged when substantial proof is executed of the several assertions in the pleadings. I have earlier-on summarized the nature of the plaintiff's case; and from the review of evidence and submissions, it is clear to me that the plaintiff did make out a case which required focused response from the defendant. Even as the plaintiff discharges the legal burden of proof, the defendant is always, from time to time, called upon to respond to the play of evidence, to discharge the evidential burden. It is asserted that the defendant did not take due care of the plaintiff's goods as they were being transported to Nairobi; that the defendant rarely responded to the plaintiff's inquiries about the whereabouts of the goods; that the defendant took no sufficient action to follow up on the fate of the lorry transporting the plaintiff's goods; that the defendant had no real explanation for the non-delivery of the plaintiff's goods. To these assertions, the defendant has no response of substance. In the discharge of the evidential burden, I think, the defendant has not been successful.

If the defendant considered that it was involved in a risky operation, as a common carrier, why did it not take out an insurance cover, to

protect itself if it should lose goods belonging to a party such as the plaintiff? The defence witness claimed that it was unnecessary for the defendant to take insurance cover; for it was the responsibility of the plaintiff to insure its goods. It cannot, with respect, be the law that a transporter or bailee has the freedom to be negligent, with no duty to insure against losses which its negligence may cause to others, but it is only for those others to so insure their goods that they may be free of the wrongful act of the defendant. The duty of care rests as much on the plaintiff as on the defendant, and the Court cannot accord the defendant the cover of impunity, while the plaintiff takes all the trouble to secure its interests against the consequences of such impunity.

In my finding, the defendant in this case did cause loss to the plaintiff through negligence. The defendant must pay recompense in that regard.

I will, therefore, decree as follows:

> **(1) The defendant shall pay general damages to the plaintiff in the sum of Kshs.150,000 the same to bear interest at Court rate with effect from the date hereof, until payment in full.**
>
> **(2) The defendant shall pay to the plaintiff the sum of Kshs.496,367, and this is to bear interest at Court rate from the date of filing suit, until payment in full.**
>
> **(3) The defendant shall bear the plaintiff's costs in this suit, and the same shall bear interest at Court rate from the date of filing suit until payment in full.**

DATED and DELIVERED at Nairobi this 3rd day of February, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang. J.

Court Clerk: Mwangi

For the plaintiff: Ms. Mulwa, instructed by

M/s. Janet Mulwa & Co. Advocates

For the Defendant: Ms. Wanga, instructed

By M/s. Archer & Wilcock Advocates