



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO 646 OF 2000**

**EVEREADY TRANSPORT COMPANY (K) LTD ..... APPELLANT**

**VERSUS**

**PROOST PAPER (E. A.) LIMITED ..... RESPONDENT**

**JUDGMENT**

**(An appeal from the Judgment and Decree of P. Ngatia, SRM in Milimani Commercial Courts  
CMCC 9084 of 1995 delivered on 29<sup>th</sup> July, 1997).**

On 15<sup>th</sup> June, 1993 the Respondent handed over three bundles of ream paper to the Appellants to be transported from Nairobi to Mombasa. The goods were extensively damaged when the Appellant's lorry transporting the same overturned en route. The Respondent successfully sued the Appellant in the lower court, which held, among other things, that the Appellant, being a "common carrier" could not rely on the exemption clause ("owner's risk") in limiting its liability. It entered Judgment in favour of the Respondent. Aggrieved by that Judgment, the Appellant has appealed to this Court, outlining the following five short and succinct grounds of appeal:

- 1.        *The learned trial Magistrate erred in fact and law in holding that the Defendant was a Common Carrier.***
- 2.        *The learned trial Magistrate erred in fact and law in finding that the Defendant was negligent.***
- 3.        *The learned trial Magistrate erred in law in shifting the burden of proof to the Defendant.***
- 4.        *The learned trial Magistrate erred in law by not holding that the Exemption Clause applied.***
- 5.        *The learned trial Magistrate erred in law by applying the wrong principle of law regarding Exemption Clause.***

The Appellant's case in the lower court, based on its defence and submissions, was that it was not a "common carrier", but a "carrier" who could rely, and did rely, on the exemption clause that "goods were carried at owner's risk". The existence of the exemption clause was not disputed. The clause was not disputed. The Appellant's second major argument was that the Respondent had not proved that the goods were damaged by reason of the Appellant's negligence – that the burden of such proof was indeed on the Respondent. This is how the lower court delivered itself:

**"The goods were destroyed in the hands of the defendant. The defendant did not give evidence and therefore the court cannot for sure say how this happened. The defendant tried to rely on exemption clauses during cross examination. As was held in the aforementioned case *Express Transport Co. Ltd* such exemptions as "Owners risk" would give no exemption from liability based on negligence. The court finds the defendant was unable to prove he was not negligent while handling the goods."**

Ms Munyasi, for the Appellant, argued that the Appellant was not a "common carrier", but a "carrier" who could properly limit its liability; that the record of evidence (See page 30 – cross examination of PW 1) showed that the Respondent was aware that the Appellant was a carrier; that the Respondent had not discharged its burden to establish negligence on the part of the Appellant, and that such burden could not be shifted to the Appellant; and citing the case of *E. A. Road Services Ltd vs J. S. Davis (1965) E A 676*, she argued that in the absence of any fundamental breach, the exemption clause protected the Appellant.

Ms Mugo, Counsel for the Respondent, submitted that the goods were transported by the Appellant for value as a common carrier; that the Appellant had held itself out as a common carrier; that the Police Abstract showed, and it was not denied, that the goods were damaged in an accident; that the Appellant did not rebut the presumption of negligence; and that because the Appellant was found to be negligent it could not rely on the exemption clause. She cited the case of *Express Transport vs BAT Tanzania (1968) EALR 443*. She argued further the case of *E. A. Road Services (supra)* did not apply to the facts of this case because here there was "fundamental breach" of contract, pleaded and proved, and accordingly, the Appellant had lost the benefit of the exemption clause.

As Ms Mugo correctly put it, the issue in this case is whether the Appellant was "a common carrier", and whether it could rely on the exemption clause to limit its liability.

The lower court found as a fact that the Appellant was a "common carrier" because it had held itself out to be so, that even its name suggested so. There was evidence before the Court that the Appellant had done transportation of the Respondent's goods several times in the past. The Appellant called no evidence to controvert this testimony, and, in my view, on a balance of probability, the lower court was correct in holding that the Applicant was a common carrier.

In the case of *Express Transport (supra)* the Court of Appeal said as follows.

***"It is clear, however, that before a carrier can be said to be a common carrier of goods he must carry goods as a business and not casually, and he must hold himself out as ready to carry the goods of any person and not of any particular person."***

Holding that whether a carrier was a common carrier was a question of fact, the Court of Appeal stated further:

***"... the essential attribute which determines whether a carrier is a common carrier is that the carrier must hold himself out to the public as prepared to carry generally for the public and not for particular members thereof. If, therefore, a carrier reserves to himself, either by public notification or by a course of practice, complete freedom of selection as to the persons for whom he will carry goods, he is not a common carrier. On the other hand, if a carrier holds himself out as prepared to carry generally for the public, the mere fact that he may refuse for good reason in a particular case to carry for a particular person does not mean that he ceases to be a common carrier"***.

The next question is whether a common carrier can by contract limit its liability and if so, whether in this case, the Appellant had done so.

The Court said in the Express Transport case as follows:

***“As Express Transport is a common carrier with a liability wider than the one based solely on negligence, any clause excluding liability would be construed as relating only to that liability which would arise without negligence, unless it was quite clear that liability for negligence was also excluded” (emphasis mine).***

The above passage speaks for itself. A common carrier cannot exclude liability based on its negligence. So, then, the final question is whether the Appellant was negligent in causing damage to the Respondent’s goods.

The Appellant argued before this Court that the burden of proving negligence lies with the one alleging so – in this case the Respondent, and that that burden could not be shifted. Ordinarily, that would be so. However, in this case, the Respondent relied on the doctrine of “*res ipsa loquitur*”. It tendered evidence to show that an accident did happen; that the Appellant’s lorry overturned; and that its goods were damaged. It was then upon the Appellant to rebut that evidence and to demonstrate that the accident did not result from any negligence on its part. However, the Appellant chose not to do so. In fact, it produced not a single witness. The Respondent had, therefore, established the case of negligence on a balance of probability.

I was referred to the case of *East African Road Services (supra)*. In relying on that case, the Appellant argued that unless the Respondent could show that the Appellant was in “fundamental breach” of contract, the latter was entitled to invoke the exemption clause. I accept that principle as it applies to “carriers” as was the case before the Court in that case. Here, I have held, as did the trial court, that the Appellant was “a common carrier” who could not invoke the exemption clause in the face of negligence on its part. Whether a carrier is a common carrier or not is a question of fact to be decided on evidence in each case. 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, as I said, a question of fact – did he hold himself out as such? Was his service available to anyone who wanted his goods transported? I am satisfied that based on the evidence before the trial court, the learned Magistrate was correct in his finding of fact that the Appellant was a common carrier, who was indeed negligent in causing damage to the Respondent’s goods, and who, in the circumstances, could not rely on the exemption clause.

For these reasons, I dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of March, 2005.

**ALNASHIR VISRAM**

**JUDGE**