



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT No. 381 OF 1993**

JITENDRA M. KANABAR.....PLAINTIFF

=V E R S U S=

SPARTAN FORWARDERS LTD.....DEFENDANT

J U D G M E N T

Plaintiff claims Kshs.581,100/- being value of 40 packages of goods which were entrusted to the Defendant to transport from Mombasa to Nairobi. The transaction was for payment of transport charges.

The Defendant undertook to deliver the goods to Nairobi. However, due to want of care and due diligence the Defendant failed to so deliver the goods.

In the Statement of Defence the Defendant denies liability saying goods were accepted at “Owners Risk” and that the said goods were packed in cartons and boxes whose contents were not disclosed nor value disclosed and also that the conditions of carriage were expressly set out in the Defendant’s Waybills issued by the Defendant.

The Plaintiff’s evidence shows that the parties have been doing similar business of transportation over a period of time before this incident. It is alleged the goods were lost and that the matter was in police hands – see Exhibit 6 - when the vehicle carrying the goods was hijacked.

The Defendant did not produce any evidence to contradict the Plaintiff’s testimony. The defence was not proved. I have considered the evidence of the Plaintiff, the pleading of defence by the Defendant and submissions of both counsel.

I have also perused the authority submitted. There is no evidence that the words “Owner’s Risk” stamped on form not bearing the normal print on the Waybill but it was stamped in corner in an illegible manner were drawn to the attention of Plaintiff on acceptance of the goods.

In the case of Ruwenzori Coffee Curing Co. Ltd. vs. Said, [1970] E.A. 642, the court found that where a transporter undertook to transport goods for reward, he was under duty to show that the loss of goods was not due to any negligence on his part and that he had taken adequate precautions to secure the safety of the goods.

In the present case there is no proof of how the goods got lost. I have also perused Express Trans Co. vs. B.A.T. Tanzania, [1968] E.A. 443 at page 447 the court (P. Newbold) stated:-

“I have come to the conclusion after close examination of a number of cases and bearing in mind that the judgments in each case are related to the facts of the particular case, that 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 public and not for particular members thereof. If therefore a carrier reserves to himself either by public Notification or by cause of practice complete freedom of selection as to the persons for whom he will carry, he is not common carrier.”

From the evidence on record I find the Defendant was holding himself as a common carrier. He had large offices in Bondeni. As common carrier may limit his liability by special contract but in this case no evidence of such special terms were made or notified to the Plaintiff when his cargo was accepted.

I therefore find Defendant liable to the Plaintiff in the sum of Kshs.581,100 as pleaded in the Plaintiff.

Judgment is entered accordingly with interest and costs.

Dated at Mombasa this 10th day of June, 2004.

JOYCE KHAMINWA

J U D G E

Read on 10/6/04.

Mr. Kagam – H/B for Kishore

N/A for Defendant.