



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NAIROBI
MILIMANI LAW COURTS**

CIVIL CASE NO. 3797 OF 1994

EAST AFRICA INDUSTRIES LTD PLAINTIFF

VERSUS

B. R. NYARANGI DEFENDANT

J U D G M E N T

The plaintiff (East Africa Industries Ltd) brought this suit against the defendant seeking judgment in the sum of Shs.573,584/- plus interest and costs.

The facts giving rise to this dispute appear fairly simple and straightforward. The defendant was a transporter who had two lorries registration numbers KYP 045 and KXP 538 which lorries were used in transporting the plaintiff's goods from the main warehouse in Nairobi to the outside depots. This case concerns the goods transported by the lorry registration number KYP 045. This lorry was loaded with the plaintiff's goods on 1st September, 1992 at the plaintiff's premises in Nairobi. The goods were to be delivered to Kisumu. It was the plaintiff's contention that the defendant was negligent. According to the plaintiff, the particulars of negligence were as follows:

"The Defendant's servant and/or agent was negligent in that he:-

(a)Drove at a speed which was excessive in the circumstances.

(b)Drove a defective motor vehicle

(c)Drove an unroadworthy motor vehicle in contravention of the Highway Code and in breach of the said Agreement.

(d)Drove whilst under the influence of excessive drink (alcohol)

(e)Failed to stop, to slow down to swerve or in any other way so to manage the said motor vehicle as to avoid the said accident.

(f)Caused the said accident."

In paragraph 8 of the plaintiff, the plaintiff states that it would rely on the doctrine of Res Ipsa Loquitor.

The defendant (Mr. Benjamin Ratemo Nyarangi) in his evidence testified to the effect that he had a contract with the plaintiff for transporting goods and that the plaintiff had insured the goods in transit. As

to what happened to the goods, the defendant stated that the vehicle in question (KYP 045) was involved in an accident and as a result the plaintiff was paid for the loss.

The plaintiff's claim is based on the fact that the defendant was in breach of agreement and that the defendant was negligent. The particulars of negligence were set out in the plaint.

From the evidence of Daniel Ndeto Kimondiu (PW1) who is an insurance surveyor instructed by the plaintiff to carry out investigations, it would appear that the lorry in question was involved in an accident and while at the scene of accident the goods were stolen. In that report Mr. Kimondiu (PW1) states inter alia:-

"From the information contained in your insured's report the driver and his turnboy claimed to have been attacked at the scene of accident by looters. Therefore it appears that the driver of the vehicle took another vehicle to return at the scene of accident and had left the police officers behind (Kericho Police Station). No further explanation was given to us by the insured regarding that information".

It should be pointed out that this report by PW1 was produced in evidence as exhibit 2.

And in concluding his evidence in chief the defendant (Mr. Nyarangi) stated:

"The plaintiff was compensated for the loss of goods. When the accident happened they asked us to pay 10,000/- for them to claim from insurance which we paid. After we paid we thought everything had been finalized. After I paid that money that was the end of that issue. I produce invoice for Shs.10,000/- (Exhibit A) dated 7.10.92. I ask the court to dismiss this claim with costs".

From the foregoing it is now clear that the defendant had a contract with the plaintiff and that the defendant's vehicle which was transporting goods was involved in an accident in which the goods were stolen. Since the plaintiff had insured the goods in transit the plaintiff was compensated for the loss. The plaintiff has now brought this suit against the defendant under the principle of subrogation.

It is to be noted that Exhibited 6 which is a document marked "LIST OF VEHICLES" there are the following words at the bottom of the page:-

"We/I undertake the responsibility for any losses or damages for goods carried by the above vehicle".

The above was, however, disputed by the defendant who stated that these words did not appear on the original copy. It is true that what was produced as Exhibit 6 was a photocopy and not the original.

Having considered the evidence on record and the submission by counsel for both parties I find that this was a claim based on negligence of the defendant. In the plaint it was alleged that the defendant's servant or agent was negligent. The particulars of negligence were then set out. But when the suit came up for hearing there was no witness who testified as to how the accident occurred. The plaintiff sought to rely on the doctrine of Res Ipsa Loquitor. In my view since the plaintiff set out particulars of negligence then the doctrine of Res Ipsa Loquitor did not arise as it was upon the plaintiff to prove negligence on part of the defendant. As matters stand it would appear that the defendant's lorry was transporting the goods when it was involved in an accident somewhere near Kericho town and the goods were stolen by the looters as stated in the report (Exhibit 2) of the insurance surveyor. The plaintiff had insured the goods in transit and on presenting the claim to its insurers the claim was paid in full. Since there was no evidence of negligence the defendant's servants/agents are not to blame.

The facts in this case are almost similar to those in the decided case of East Africa Industries v. Kariuki Macharia - High Court Civil Case No. 600 of 1994 in which a similar claim by the plaintiff was dismissed on 18th February, 2000.

I have carefully considered submissions by counsel appearing for the parties herein and I find that taking into account the circumstances under which the goods were lost it cannot be said that the defendant was liable. The document produced as exhibit 6 which made there defendant to be liable for any loss has been disputed and as already stated the original was not produced but a photocopy of the same. The plaintiff cannot therefore rely on that document.

In view of the foregoing this suit is dismissed with costs to the defendant.

Order accordingly.

Delivered and dated at Nairobi this 19th day of January, 2001.

E. O. O'KUBASU

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JUDGE OF APPEAL