Bikbat Investment Limited v Swiflink Supremacy Limited (Commercial Appeal E232 of 2024) [2025] KEHC 2947 (KLR) (Commercial and Tax) (14 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E232 OF 2024

BM MUSYOKI, J

MARCH 14, 2025

BETWEEN

BIKBAT INVESTMENT LIMITED ..... APPELLANT

AND

SWIFLINK SUPREMACY LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Honourable Cheloti B.M. Principal Magistrate delivered on 21st August 2023 in milimani commercial suit number E214 of 2020)

JUDGMENT

1. By a plaint dated 1st July 2020, the respondent brought a suit in the chief magistrate's court at milimani commercial courts vide commercial suit number E214 of 2020 where he asked for the following orders;

    a. Special damages of Kshs 1,690,050/- being Kshs 60,895 for professional services for an investigator and Kshs 1,629,155 being loss of transit goods occasioned by the defendant.

    b. General damages.

    c. Costs of the suit.

    d. Interest on (a), (b) and (c) above at prevailing commercial rates until payment in full.

    e. Any other relief this Honourable Court deems fit to grant.

2. After hearing the parties, the Honourable Magistrate in rather short judgment held that;

    > 'I have reviewed the plaint, statement of defence, witness statement, submissions, annexed documents and authorities. The issue for determination is whether the plaintiff is entitled to the remedies sought.

I am of the opinion that the plaintiff has argued their case beyond a balance of probabilities and such, are entitled to the reliefs sought. The court orders as follows;

a. The defendant does pay the plaintiff Kshs 1,690,050/=.

b. The costs of this suit be borne by the defendant.

c. Interest on (a) and (b) above at court's rate from the date of delivery of this judgement until payment in full.'

3. It is this short judgement which sparked this appeal in which the appellant has raised the following grounds;

1. The learned magistrate erred in law and in fact in that she misconstrued that the suit before her was based on contractual liability and the insurance combined and that there existed an agency relationship between the parties and that the payment by the plaintiff's insurance company was a declaration of no fault and a claim for reimbursement was unjustified thereby making an erroneous finding for the respondent against the clear evidence presented to her contrary to law.

2. The learned magistrate erred in law and in fact in disregarding the appellant's pleadings, documents and submissions and in presumably relying on the submissions of the respondent in her judgment rather than basing her judgment on the totality evidence tendered in relation with the claim.

3. The learned magistrate erred in law and in fact in not finding that the respondent had not proved fault or liability against the appellant thereby failed to prove his case on a balance of probabilities notwithstanding the express evidence of the director of the respondent that he did not blame the appellant.

4. The learned magistrate erred in law and in fact in not finding that the appellant had no control over the third parties who attached, hijacked and made away with the consignment of the respondent.

5. The learned magistrate erred in law by failing to evaluate and analyse the evidence presented before her thereby dismissing the appellant's defence and submissions and evidence by inaccurate and misconstruction of the case before her.

6. The learned magistrate erred in law by failing to give reason for the judgement.

4. It is clear to me that the magistrate did not record in her judgment her reasons for making the findings as she did. In that regard, she erred in law as law requires that the court must in its judgment give analysis and reasons for its determination. That is the purport of Order 21 Rule 4 of the Civil Procedure Rules. The appellant is therefore right and justified to raise complaint as it has in ground 6 of the memorandum of appeal. Other than complying with the law, giving reasons for one's judgment helps the parties appreciate why they are winning or losing their cases which is their right.

5. However, an appeal cannot be allowed or dismissed for the sole reason that the trial court did not give its reasons for its judgment unless the appellate court feels it is necessary to refer the matter back to the trial court for rewriting a proper judgement. I however don't think that this is such a case. A first appeal like this one should be conducted as a retrial where the appellate court re-analyses, re-evaluates and considers the evidence produced before the trial court and come to its own independent conclusion. This is a proper case where this principle must make a lot of sense to the parties. The evidence produced

before the trial court is sufficient for this court to make an independent decision on the rights of the parties. For this reason, I will not go by each ground of appeal but will write my judgment based on the evidence produced before the trial court.

6. The respondent's case was that it subcontracted the appellant for transportation of consignments as need arose. On the matter in question, the appellant had been instructed by the respondent to transport 826 jerry cans of edible oil. It was a term of the contract that the appellant would be solely responsible for the safety and shall be liable for any damage, loss, theft or any loss whatsoever and however arising while the goods being transported were in its custody. Another relevant term was that the appellant would install and maintain fleet management and vehicle tracking system for purposes of tracking all vehicles that would be involved in the provision of the contracted services. On 20-12-2018, when the appellant's driver and conductor were on transit in motor vehicle registration number KBV 875T, they were attacked and hijacked along southern bypass in Nairobi and robbed of the consignment and the vehicle. The respondent blamed the incidence on the negligence of the appellant. The respondent called three witnesses while the appellant called two.

7. The appellant's first witness was one Robert Ochieng who testified that he carried out investigations on the incident and did a report dated 14-02-2019 which he produced as exhibit 1. He interviewed the appellant's driver and conductor and visited Langata police station where the incident was reported. His relevant conclusion was that the vehicle had not been fitted with any tracking devices. He also recommended that the insurance company should, recover the loss from the appellant. He added that he was paid Kshs 60,595.00 for conducting the investigations and preparing the report and Kshs 15,000.00 for court attendance. When he was cross examined by Mr. Omariba, he confirmed that he had been instructed by Mayfair Insurance Company and maintained that his report was based on the evidence he had collected.

8. The respondent's other two witnesses told the court that the respondent had been insured by Mayfair Insurance Company Limited vide police number 01/01/064/4013/2018. When the incident was reported to the insurance company by the respondent, it was investigated and the respondent compensated for the loss of the goods at Kshs 1,629,155/=. None of the witnesses could confirm whether the appellant's motor vehicle had a tracking device but they relied on the investigations report. The contract between the appellant and the respondent was produced in evidence as well as the details and proof of the payments to the respondent and the investigator. They confirmed that the insurance company had brought the suit in the name of the respondent under the principal of subrogation.

9. The appellant called two witnesses. Francis Mutua testified that the appellant received instructions to collect goods from Golden Africa Ltd to be delivered to Ray Stores in Kisumu. He added that the appellant received information of the incident from the driver and the conductor of the motor vehicle. He attributed the late departure from Nairobi to a long queue in receiving the goods which made them wait up to 7.00 pm. He stated that prior to getting the contract with the respondent, their vehicles were fitted with tracking devices from SGA Security which devices were working at all the times. He denied negligence on the part of the appellant. In cross examination, he told the court that he was not aware of what happened after the incident but maintained that the device was active and working. He admitted that the data of the device was not produced in court thought it ought to have.

10. The testimony of one Dickson Onyangi Nyangau who was the conductor was that on 20-12-2018, they left with the goods at 8.00 pm through southern bypass in Nairobi to Kisumu. At Ngong road - Karen junction, they were flagged down by a vehicle which was hooting from behind but they decided not to stop because they were aware that the place was not safe at night. The saloon car overtook them and blocked their way and robbed them. He was bundled into a car and driven for two hours then transferred to another vehicle and eventually dumped in a maize plantation where he was left tied up

to a tree until 6.00 am the following day. He called for help and was rescued by villagers around and told that he was in Murang'a County and the nearest police station was Kabati. He said further that, he went to Kabati police station and reported upon which the matter was booked and he was advised to report to Langata police station. He does not state whether he went to Langata police station or whether the matter was investigated further.

11. The appeal was disposed off by way of written submission. The appellant filed submissions dated 30th October 2024 while the respondent's submissions are dated 18th November 2024. From the pleadings of the parties, filed documents, evidence reproduced above and the submissions of the parties, I gather that there is no dispute that there existed a contract between the parties for the appellant to transport the consignment to Kisumu and that the consignment was lost while on transit. The only two issues I have identified in this matter are whether the appellant was liable for the loss of the consignment and whether the respondent having been compensated by the insurance company the said compensation can be recovered from the appellant.

12. The respondent had pleaded negligence on the part of the appellant for failure to maintain a tracking system which made it easy for the goods to be stolen; failure to have communication tools which would have made it easier for the crew to communicate danger; failure to employ well trained personnel and failing to put up adequate safety measures to avoid incidences such as the one in question. The appellant countered this by arguing that the robbery was a normal incidence and that it had taken all safety measures to ensure that the goods were safe including installation of fleet tracking system. According to the appellant, there was nothing it could have done to avoid the unfortunate incidence as it was unforeseeable

13. The defendant has maintained that it had fitted tracking devices in its motor vehicle and in support thereof produced certificate issued by SGA Kenya Limited dated 7-11-2014 whose expiry date is shown to have been 6-11-2019. It must be empathized here that the security of the consignment was the responsibility of the appellant. This is both in common law and as per contract between the parties. Clause 5.6 of the agreement between the parties provide as follows;

> 'The subcontractor hereby covenants that it shall solely be responsible for the delivery of the product to the designated delivery points and the sub-contractor shall be held solely responsible for the safety and shall be liable for any damage, loss, theft of any loss whatsoever and however way arising while the goods to be transported are in the custody of the sub-contractor'

14. The appellant's witnesses' testimony does not go beyond the alleged robbery. They did not tell the court whether they followed up with the police after reporting the incident for purposes of investigations. The court was not told what happened to the motor vehicle. Was it ever recovered and how? If indeed the vehicle had a working tracking device, the appellant would have noticed that the same had deviated from its authorised route and taken a quick action in order to mitigate loss. It is not enough for the appellant to state that it had fitted tracking device and produce a certificate to that effect. I note that in its evidence, the appellant indicated that it had not bothered to produce the data for the device.

16. According to the conductor, he was dumped at Kabati in Murang'a but the court was not told where the driver was dumped and why he could not activate any alarm when he saw danger of being robbed. In my view the onus of proving that the tracking system was working was on the appellant. The appellant's witnesses were not in a position to confirm its activity or how the system worked. The appellant has argued that the respondent should have logged into their system to monitor the vehicles movement

because that is what the contract provided. The contract may have provided so but that does not place on the respondent the responsibility over the appellant's fleet.

17. It behooves a prudent driver to take precautions in order not to put the life and security of his passengers and property on board in a state of compromise. It is noteworthy that the incident occurred at 9 pm. The appellant's driver may not have intended to have the goods stolen but I find that he was reckless in driving on an insecure route at night and without necessary security systems in place. In this era of technology, it would call for a simple click of a button for a driver to alert the office of his employer once he faces a threat to safety or security of his cargo or life. Negligence or recklessness does not have to contain an element of a voluntary action or intention. Absence of care and due attention which are otherwise innocent may constitute negligence and I find that to be the case in this matter. A party who pleads that an act happened in absence of negligence must show that it used all necessary means, processes and actions in order to avoid the injury to the other members of the public or a contracting partner. In view of the above, it is my finding that the appellant and its driver were guilty of negligence.

18. The appellant claims that the investigations were done without involving them and as such the report should not have been relied upon. It is hard to tell whether or not the magistrate relied on the investigations report. Be that as it may, there was no requirement that the investigations were to be conducted jointly. The appellant was at liberty to call witnesses to testify to discredit the investigations report which in any event was not binding on the court. Even without the investigations report, the appellant was still required to prove that it was not liable for the loss.

19. Even if I were wrong on negligence, the appellant would still be liable under common law doctrine of strict liability which is also replicated in the contract signed by the parties. The appellant was a common carrier and it has been held that the safety of goods on transit is on the carrier and loss or injury or damage on the goods calls for strict liability on the carrier unless the carrier proves that the damage, loss or injury is as a result of an act of God, acts of enemies of the state, fault of the consignor or inherent vices of the goods. In London Distillers (K) Ltd v Ilani Enterprises Ltd (2024) KEHC 8523 (KLR) it was held as follows;

> 'Everywhere, carriers incur a measure of liability for the safety of the goods. In common-law countries, carriers are liable for any damage or for the loss of the goods that are in their possession as carriers, unless they prove that the damage or loss is attributable to certain excepted causes. The excepted causes at common law include acts of God, acts of enemies of the crown, fault of the shipper, inherent vices of the goods and fraud of the shipper.
>
> Theft and hijacking of Cargo or Cargo theft during transit is not an uncommon issue, especially in regions with high crime rates or inadequate security measures. It is for that reason that Carriers are responsible for ensuring adequate security protocols to mitigate such risks and may be liable for losses resulting from theft by third parties.'

20. It is instructive that the appellant's crew was aware of the security of the route they were using on the night of the robbery. It has not been suggested that the appellant was forced to travel at night and use a particular route. The respondent argues that the responsibility of ensuring security on roads is on the government and not the appellant. That may be so but, in my view, the appellant should have been more cautious and taken deliberate steps to ensure that it took the safest of the routes and time. Failure by the government to provide security cannot be classified as an act of God or said to constitute an incident of an enmity to the state sovereignty. The incident can therefore not fit under the exemptions under the common law principle on the liability of a common carrier. The circumstances of this case were the same as in London Distillers (K) Ltd v Ilani Enterprises Ltd (supra) and in dealing with the

argument that the respondent had been robbed with no fault on its part, Honourable Justice R.E. Aburili stated as follows;

> 'The contentions that the goods were stolen by strangers through robbery with violence and that the investigations revealed so, was not, in my humble view, not proved and that allegation of robbery with violence in itself did not reach the requisite bar to any of the exceptions set out above. This is so because the respondent, a common carrier, was under a duty to put into place measures that would ensure the safety of the goods under its transportation. One such way would have been for it to insure such goods against any loss as a result of theft by strangers and secondly, as it allowed the goods to be transported during the night and on a road that was said to be prone to hijackings as per the investigator's report, which fact was not controverted. The respondent should have ensured that the goods were under armed escort to their destination. It is not enough to say that since the goods were stolen through alleged criminal acts of robbery with violence by armed people, then there is nothing else that the respondent could have done in the circumstances to secure the goods. The fact of the matter is that there was no evidence of what security measures that the respondent put in place to ensure that the goods were safely transported and delivered to the intended destination, for this court to reach a finding that notwithstanding the security measures put in place, the goods were nonetheless stolen by armed robbers.'

21. The other issue is whether the insurance company was entitled to sue for compensation under the doctrine of subrogation. The appellant has argued that since the compensation was paid to the respondent, it must be assumed to have been no fault basis. I must admit that I do not understand the appellant's line of thought. It is an established principle of law that where an insurance company compensates its insured, it subrogates the insured's rights of seeking compensation from the third parties which caused the injury or damage. The fact of this matter is that the appellant was liable to compensate the respondent. The respondent's right to seek compensation from the appellant was passed on to the insurance company. In the circumstances, the answer to the second issue is that the insurance company was entitled to recover compensation for the amount it paid its insured and other attendant costs. There are many judicial authorities on this issue such as Gahir Engineering Works Limited v Rapid Kate Services Limited & Another (2018) KEHC 5321 (KLR) where the court held as follows;

> 'Under the doctrine of subrogation, when the insured risk crystalizes and the insurer pays or compensates the insured for financial loss arising from an insurance claim against a 3rd party, the insurer is in law entitled to step into the shoes and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from the 3rd party. The only qualification to this general principle is that the indemnity must be sought in the name of the insured.

22. The principle of subrogation was discussed in Halsbury's Laws of England, 4th Edition (2003 re-issue) at paragraph 490 where the learned author stated:

> ..Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss. ..."
>
> From the foregoing, it is evident that a claim under the doctrine of subrogation will be established if the insurance company on whose behalf suit is instituted proves to the required

legal standard that it had paid its insured for the loss or damage occasioned to the subject matter of the insurance contract and was thus entitled to recover its loss from the 3rd party.'

23. The totality of the above is that, I find no merits in this appeal and the same is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.