Gas Kenya Limited v Technology Today Limited (Civil Appeal E919 of 2022) [2025] KEHC 8237 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8237 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E919 OF 2022

REA OUGO, J

JUNE 5, 2025

BETWEEN

GAS KENYA LIMITED ..... APPELLANT

AND

TECHNOLOGY TODAY LIMITED ..... RESPONDENT

(Appeal from the judgment and decree of the Principal Magistrate at Milimani Commercial Courts Nairobi Hon L.B. Koech delivered on 26.8.2022 in chief magistrate civil case number 2006 of 202)

JUDGMENT

1. The respondent, in its amended plaint dated 29.9.2020, states that on 14.10.2019, it engaged the appellant to transport 28 units of assorted printer toner cartridges to Kenya Integrated Water Sanitation & Hygiene (KIWAS) in Kisumu. The appellants took possession of the said consignment and issued a shipment waybill No. G4SWB11xxxxxxxxxx. Upon receiving the consignment in Kisumu on 15th October 2019, the respondent's officials established that the consignment had been unsealed and that all 28 printer toner cartridges had been stolen and replaced with old, empty printer toner cartridges. The respondent further averred that it was a term of their contract that the appellant would be liable for any loss or damage to any of the respondent's consignments arising out of or in connection with the transportation of the said consignments, including the loading or unloading, whether due to negligence or any other cause. The respondent sued the appellants for loss and damages in the amount of Kshs. 266,380/- being adjusted loss- Kshs.240720/- and loss adjuster fees- Kshs.26,100/-. The respondent contends that the loss was borne by their insurer, Mayfair Insurance Company Limited, which, together with the respondent, initiated the proceedings under the principle of subrogation in insurance.

2. The appellants filed a defence dated 28th August 2020. The appellant denied having knowledge that the consignment contained 28 units of assorted cartridges. It averred that, as a courier service provider,

it was not expected to open courier packages for shipping at the time of acceptance or delivery, in accordance with the terms and conditions of service set out on the reverse of the waybill. It further states that if any liability arises from the loss of the consignment, it is limited under Clause 2(b) of the G4S Courier Terms and Conditions of Service, as detailed in the waybill, to Kshs 1,000/-.

3. The appellant contends that when the consignment was delivered on 15.10.2019 at KWAS, the consignee's representative, Caroline Ndire, received the consignment in good condition and affixed her signature to the proof of delivery. At the time of delivery, the consignment was physically intact, displaying no signs of damage or pilferage, and the consignee's representative raised no complaints. The consignee handed over the parcel to Byron Otieno, the IT Assistant, who did not open the consignment immediately. The IT Assistant opened the package three days later. Upon receiving the complaint on 23.10.2019, they conducted an investigation to ascertain whether there had been any issues in the transportation and delivery of the consignment to the consignee. The appellant denied that the respondent discovered the alleged tampering of the consignment on the day it was delivered and asserted that the complaint was raised three days after the consignment was delivered.

4. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle is set out in the Court of Appeal decision of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123.

5. During the hearing, three witnesses testified on behalf of the respondent. Verenice Kaburu, Pw1, the operations manager, adopted her witness statement as her evidence-in-chief. In her statement, she deponed that they have a long-standing engagement with the appellants to transport various consignments. On 14th October 2019, they engaged the appellants to transport their consignment to Kisumu. On 15th October 2019, their client informed them that the consignment had been received on the same day, but it had been unsealed, and all 28 printer toner cartridges had been stolen and replaced with old, empty printer toner cartridges. On 18th October 2019, they wrote to the appellants, formally notifying them of the loss of the consignment; however, there was no response from the appellants. They lodged a claim with their insurer and were paid Kshs. 240730/-. During cross-examination, she stated that they had worked with the appellants for ten years, during which the appellants would collect the consignments from their offices. She recognised Samuel Wafula as the person who signed for the consignment in October 2019. The packing was processed in the presence of G4S; it was sealed and then taken.

6. Robin Muriuki, Pw2, an officer from Marine Insurance Surveyors, a loss adjuster, testified that they are service providers to the insurance company, Mayfair Insurance Company, to inspect goods which were allegedly swapped. They did so and found that the packing of tonners had been tampered with. The seals were broken, and they found empty toners. According to them, the tampering of the toners was done by G4S. During cross-examination, he informed the court that he had only spoken with the insurer, not the client.

7. Consolata Makuni, Pw3, an assistant legal manager at Mayfair Insurance, presented the policy for goods in transit. She informed the court that they indemnified the respondent for Kshs. 240,730.

8. Kennedy Ochieng, an assistant manager with the appellant company, adopted his statement dated 27th August 2022. He admitted that they were engaged by the respondent to deliver the toner cartridges to their client in Kisumu. He explained that upon receiving the consignment, the respondent neither declared the contents of the consignment nor the value of the items inside, nor did they opt for the appellant's good-in-transit insurance cover offered by the defendant, which was meant to cover any unforeseen eventualities during the delivery of the consignment to the consignee. The consignment was delivered to the consignee on 15th October 2019. The consignee accepted the consignment in good

condition and signed it as proof of delivery. On 18th October 2019, they received a complaint that the seals on the said consignment had been broken. They conducted an investigation and found that the consignment had been received in good condition. Caroline Ndire passed it to Byron Otieno, the IT assistant, who, during their investigation, confirmed that he received the consignment well-packaged and intact, with no signs of tampering. The respondent's complaint was received three days after 15th October 2019, alleging that the consignment had been interfered with. DW1 further explained that the respondent alleged that the toners were refilled during the transit of the consignment, which is denied; toners are of a particular specification. A person refilling the toners would need to be an expert with specific knowledge of the toners being transported. The only individuals who knew of the contents of the consignment were the respondents and the consignee. Since the consignment was held for three days before being opened, it may have been tampered with at the consignee's premises.

9. The trial magistrate, in her judgment, determined that before the consignment was handed over to the appellant, it had been packed and sealed in their presence. The parties were aware that the items being delivered held value. If there was an issue, the defendant's representative who collected the consignment should have noticed it. The court held that the shipment could not have been interfered with at the consignee's premises. The defendant presented no evidence to contradict the respondent's statements. The trial court further found that the contract signed by the parties was a standard contract and that the appellant could not rely on Clause 2 of the conditions, which limited the appellant's liability to Kshs. 1,000/-. The trial court held that the loss of the consignment constituted a fundamental breach of the contract, which goes to the root of the contract, and the appellant could not rely on the Clause to absolve itself of liability.

10. Aggrieved by the judgment, the appellant has lodged this appeal. The appeal is based on the following grounds: -

    1. The learned magistrate erred in holding the appellant liable for the respondent's loss.

    2. The Learned Magistrate erred in failing to uphold the limitation of liability clause contained in the appellant's contract of carriage.

       The appellant seeks that the appeal be allowed and that the judgement of 26th August 2022 be set aside and be substituted with a finding dismissing the suit.3. Costs of this appeal be allowed to the appellant

11. Parties canvassed the appeal through written submissions. For the appellant, it was contended that two matters required determination: whether the magistrate erred in holding the appellant liable and whether the trial magistrate erred in failing to uphold the limitation of liability clause in the appellant's contract of carriage. Regarding the first issue, it was submitted that the trial court overlooked the following facts when it reached its decision that the appellant's employee was present during the packing of the consignment. Samuel Wafula, a representative of the respondent, signed the waybill on 9th October 2019, and PW1 confirmed this during cross-examination. Pw1 testified that the respondent called the appellant to collect the parcel once it was ready. However, Pw1 did not identify any appellant employee who was present when the consignment was packed and sealed. The evidence on record indicates that Samuel was not an employee of the appellant, and Pw1 also admitted in re-examination that they would call the appellant when the consignment was ready for collection. Caroline confirmed that the consignment was in good condition when she received it. Furthermore, it was submitted that the trial magistrate overlooked the investigation report and failed to consider the appellant's evidence regarding when the consignment was potentially tampered with during interrogation. The respondent did not account for two significant periods during which the consignment could have been tampered with: the time span between when the consignment was

packed on 9th October 2019 and 14th October 2019, when the appellant picked it up, and the second period between 14th October 2019, when the consignee opened it. Pw2 received instructions from the respondent and inspected only the toners but did not interrogate the consignee or raise any queries with the appellant. Pw2's evidence was speculative, as it did not demonstrate how he reached the conclusion that the appellant's employees had tampered with the consignment. None of the appellant's employees were arrested or charged despite the respondents reporting the matter to the police. Reliance was placed on two cases: the case of Hydro Well (K) Limited vs Sechere & 2 Others (sued in their representative capacity as the officer of Chae Kenya Society Civil Suit No. E212 [2021], where the court held that for a plaintiff to successfully claim damages, they must not only establish that a contract existed but also that the contract was breached by the defendant, resulting in damages suffered by the plaintiff as a consequence of the breach, and the case of Malachi Bob Mwango vs Sarova Hotels Limited & Another [2022] eKLR, where the court, having established that the standard of proof in civil liability is that of a balance of probabilities, held that a party seeking a judgment as to any legal right or liability dependent on the existence of asserted facts must prove that those facts exist.

12. Regarding the second issue, it was submitted that the appellant, as a courier, enters into a contract of carriage with its customers. The conditions of carriage are contained in the waybill that the customer is required to sign upon handing over the consignment. The appellant referred to Clause 2 and argued that, as a private carrier offering its services for consideration, subject to the terms and conditions, the appellant would be liable to pay Kshs. 1,000. Reliance was placed on the explanation in Chitty on Contract Volume 2 Thirty-Fourth Edition and the Court of Appeal decision in Securicor Courier (K) Limited vs Benson David Onyango [2008] eKLR, where the court held that;

> 'The justification for enforcing such clauses is explained in that case by both Lord Wilberforce and Lord Fraser of Tullybelton – that is, that, those clauses mostly related to other contractual terms; that the risk that the defending party may be exposed to might be so great in proportion to the sums that can reasonably be charged for the services contracted for; and that the other party has the opportunity to insure. In the Ailsa Craig case, a similar clause limiting respondent's liability to ?1,000 was held binding although the appellant had suffered loss of ?55,000. Similarly, in George Mitchell (Chesterhall) Ltd. vs. Finney Lock Seeds Ltd. (supra), a limitation clause limiting liability of the appellants to merely replacing the defective seed or refunding the purchase price, which was ?201.60, was held effective at common law even though the respondent had suffered loss of ? 61,513.'

13. It was further submitted that the trial court disqualified the application of the limitation of liability clause on the grounds that the appellant fundamentally breached the contract. The trial court did not justify why the limitation of liability would not apply where damage or loss had been proven, nor did it explain why it departed from the binding judgment of the superior court. Reliance was also placed on the decision in Alisa Craig Fishing Co. Ltd vs Malvern Fishing Co. Ltd [1983], which upheld a clause limiting a courier's liability on the understanding that such clauses were inserted to protect a defending party from potential liability that may far outweigh the service offered and that the other party had the opportunity to insure themselves against loss.

14. The respondent submitted that the court was justified in its finding that the consignment was lost while in the custody of the appellant. It was argued that PW1 stated they would call the appellant when the toners were ready for delivery and that the appellant's representative would inspect the consignment. The appellant confirmed that they delivered the consignment at the consignee's premises. Kennedy Ochieng's testimony was that it was the appellant's responsibility to ensure that the consignment was delivered in good condition. The appellant did not tender any evidence that anyone other than Mr. Byron Otieno opened the package after it was delivered at the consignee's premises. It was further

submitted that the appellant tendered no evidence showing that the limitation of liability clause expressly excluded losses arising from negligence and that it was brought to the attention of the respondent and accepted by them, thereby forming part of the contract of carriage. Reliance was made on the case of Consolidated Bank of Kenya Limited vs Securicor Security Kenya Ltd, in which the court stated that;

> " True, the defendant had limited its liability to Kshs 2,500,000 or Kshs 100,000 respectively on any claims. But was negligence expressly excluded? This is important because in all probability no contracting party will absolve the other entirely from consequences of the latter's own negligence. That statement is found in Chitty on Contracts, 27th edition, London, Sweet & Maxwell paragraph 14 – 010:"
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> "But since it is inherently improbable that one party to the contract would intend to absolve the other party entirely from the consequences of the latter's own negligence, more exacting standards are applied to clauses which are alleged to exclude altogether liability for negligence. The duty of a court in approaching the consideration of such clauses was summarized in the form of three propositions in the opinion of the Privy Council delivered by Lord Morton in Canada Steamship Lines Ltd Vs The King. These tests, or guidelines, have been subsequently approved and applied both by the Court of Appeal and the House of Lords;

15. It was submitted that the respondent's claim was based on a breach of contract and negligence. The appellant provided no evidence that the respondent was made aware of the Clause and accepted it at the time of surrendering its consignment to the appellant for delivery.

Analysis And Determination

16. The two issues for determination are whether the trial magistrate erred in holding the appellants liable for the respondents' loss and whether the trial magistrate erred in failing to uphold the limitation of liability clause contained in the appellants' contract of carriage. I have carefully considered the evidence presented before the trial court. It is undisputed that the respondent provided the appellant with a consignment on 14th October 2019 for delivery to their client on 15th October 2019. The consignment was received by Caroline Ndire, who signed for it. Three days later, the appellants were informed that the consignment had been tampered with. The appellants contend that the trial magistrate erred in concluding that the consignment was inferred to be within the appellants' premises. The appellants have drawn the court's attention to the waybill that was signed at the time of collection. The shipment waybill no. G4SWB11xxxxxxxxxx bears the signature of one Samuel Wafula, the sender/representative, dated 9th October 2019, alongside details of the G4S employee who received the shipment on 14th October 2019. An issue that arose was whether the said consignment was packed by the respondent's representative on 9th October 2019 and picked up on 14th October 2019. What transpired between 9th and 14th October 2019 while the consignment was within the respondent's premises was not established. The investigation report, on pages 33 to 36, does not indicate whether the investigator interrogated Samuel, the sender's representative. PW1 admitted knowing Samuel. In my view, Samuel's statement could have shed light on the status of the consignment when he signed for it on 9th October 2019 and when it was collected on 14th October 2019. PW1 received the consignment and signed for it, raising no concerns at that time. It was then passed to the IT assistant, who noticed three days later that the consignment had been tampered with. What occurred with the consignment during those three days was not established, even by the investigator. The investigator's statement that the seals on the consignment were noted as broken contradicts the evidence of PW1. PW1 also stated that the items were packed in the presence of the appellant's representative; however, in re-

examination, she informed the court that they would call the appellant when the consignment was ready for inspection and confirmation. The investigator's report does not indicate that the IT officer was interviewed to clarify the status of the consignment when he received it. From the appellant's report, Byron admitted that the consignment showed no signs of being tampered with. I agree with the appellants' submission that the trial court disregarded these facts when it determined that the appellant's representative was present during the packing of the consignment. I find that had the trial magistrate considered all of the aforementioned facts, she might have noted that there were gaps in the respondents' case. I conclude that she erred in holding the appellants liable for the respondents' loss.

17. On whether the trial magistrate erred in failing to uphold the limitation of liability clause contained in the appellant's contract of carriage, the trial court noted the contents of Clause 2 and concluded that the contract between the respondent and appellant was a standard contract. Clause 2 of the conditions provides:

> " In consideration of the payment hereinafter agreed to be made to the company by the customer and by way of limitation of liability the company shall (subject as hereinafter mentioned) during the continuance of the contract:
>
> a. Carry out (subject to the provisions of the contract) with proper care the service described in the Scheduled overleaf.
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> b. Damage resulting from loss or damage to a consignment occurring during the period of the company's responsibility and which was caused solely by the negligence on the part of the servants or agents of the company acting in the course of their employment provided that the indemnity shall only apply to loss or damage represented by or consisting of the costs of replacing each such consignment and (in the case of Data) of hiring of any additional computer time necessitated thereby with an overall maximum of Kenya Shillings One Thousand (Kshs.1,000) in respect of any one claim and subject further to a maximum of Kenya Shilling Twenty Thousand (Kshs.20,000) in respect of all such loss or damage occurring in any consecutive period of 12 months. "

18. The respondent has submitted that the appellant tendered no evidence that the respondent was made aware of the Clause and that they accepted it at the time of surrendering its consignment to the appellant for delivery. I find this submission misleading and in contradiction to the evidence of Pw1, who informed the court that they have worked with G4S for over ten years. I conclude that the respondents were well aware of Clause 2, the terms and conditions which speak of limited liability. The respondent signed the waybill, which detailed the terms and conditions of G4S on the reverse side. The respondent did not dispute the limited liability in its plaint or even in evidence before the trial court. There was no reply to the defence. Any loss incurred would be subject to the terms indicated in the waybill. The respondent failed to demonstrate that the appellants were negligent as alleged, and had they proved it, they would have been entitled to Kshs.1000/-. The case relied upon by the appellant, Securicor Courier (K) Limited vs Benson David Onyango [2008], explains the importance of upholding a limited liability Clause. The Court held as follows;

> " We have found that it formed part of the contract. The exemption limits the appellant's liability for negligence to the cost of replacing the consignment subject to a maximum of Shs.1000/= in respect of one claim. In this case, there were two parcels which would constitute two claims. There was evidence at the trial that the appellant did not know of the contents of the two parcels as it requires that parcels be properly packaged. The appellant on

the body of the consignment sheet prominently advised the 1st respondent to self insure all items of value. As the case of Ailsa Craig (supra) illustrates, the exemption clauses limiting liability as opposed to those totally excluding liability should be enforced if they are clear and unambiguous. The justification for enforcing such clauses is explained in that case by both Lord Wilberforce and Lord Fraser of Tullybelton – that is, that, those clauses mostly related to other contractual terms; that the risk that the defending party may be exposed to might be so great in proportion to the sums that can reasonably be charged for the services contracted for; and that the other party has the opportunity to insure. In the Ailsa Craig case, a similar clause limiting respondent's liability to ?1,000 was held binding although the appellant had suffered loss of ?55,000. Similarly, in George Mitchell (Chesterhall) Ltd. vs. Finney Lock Seeds Ltd. (supra), alimitation clause limiting liability of the appellants to merely replacing the defective seed or refunding the purchase price, which was ?201.60, was held effective at common law even though the respondent had suffered loss of ? 61,513. The limitation clause in the present appeal is clear and unambiguous. It is a condition of the contract for carriage. The superior court only considered whether it was incorporated in the contract. It did not consider its efficacy. Having regard to the nature of the appellant's business, the modest charges levied in relation to the value of the goods now claimed; the opportunity of the 1st respondent to insure the goods and the fact that the appellant did not know the contents of the two parcels or their value, it is just that the limitation clause should be enforced." (emphasis mine).

19. The limitation clause was a condition of the contract of carriage. It formed part of the agreement between the parties. Indeed, it would be onerous and prohibitively expensive for the appellant's business to bear the loss or damage when it occurs. I find that the trial court erred in failing to uphold the limitation of liability clause contained in the appellant's contract of carriage. The appeal is allowed. I set aside the judgment dated 26th August 2022 and dismiss the respondent's suit with costs to the appellant. The appellant is also awarded the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 5TH DAY OF JUNE 2025.

R.E.OUGO

JUDGE

In the presence of:

Miss Muthiani - For the Appellant

Respondent - Absent

Wilkister -C/A