Speeedex Logistics Limited v Orbit Chemical Industries Limited & 2 others (Civil Appeal E1485 of 2023) [2025] KEHC 12745 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1485 OF 2023

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

SPEEEDEX LOGISTICS LIMITED ..... APPELLANT

AND

ORBIT CHEMICAL INDUSTRIES LIMITED ..... 1ST RESPONDENT

BASH HAULIERS LIMITED ..... 2ND RESPONDENT

SHANI ABDULRAHMAN MBWANA ..... 3RD RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. D.M Kivuti, Senior Resident Magistrate, dated 4.7.2022 arising from Milimani CMCC No. 819 of 2018.

2. The Memorandum of Appeal dated 9.6.2023 raised 12 - paragraph argumentative grounds that are unseemly and do not please the eye. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

3. The rules of this court demand that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. The Court of Appeal had

this to say in regard to rule 86 (which is pari materia with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

4. The 12 grounds of appeal herein revolve around misapprehension of the burden of proof and are repetitive and unnecessarily winding. In Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. The singular ground not said but which clearly emerges from the memorandum of appeal is the that the learned magistrate erred in law and fact by finding in the absence of sufficient evidence that the 1st Respondent proved its case thereby disregarding the contrary overwhelming evidence of the Appellant. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

6. By way of a cross appeal dated 13.6.2023, the 1st Respondent raised the following grounds of appeal:

    a. The learned magistrate erred in law and fact in failing to award interest from the date of filing suit.

b. The learned magistrate erred in law and fact in failing find both the Appellant and the 2nd and 3rd Respondents jointly and severally liable.

c. The learned magistrate erred in law and fact in dismissing the case against the 2nd and 3rd Respondents.

7. The amended plaint dated 21.6.2021 related to a claim for breach of a contract between the 1st Respondent and the Appellant relating to the transportation of Linear Alkyl Benzene.

8. It was pleaded that whereas the contract for transportation was between the Appellant and the 1st Respondent, the Appellant subcontracted the 2nd Respondent who carried out the transport service.

9. It was the case of the 1st Respondent that the 3rd Respondent, while transporting the product vide his Motor Vehicle Registration No. KAZ 424X/ZC an agent of the 2nd Respondent was involved in an accident in which the product on transit, Linear Alkyl Benzene spilt causing loss to the 1st Respondent.

10. Subsequently, the 1st Respondent's insurers General Accident Insurance Co. compensated the 1st Respondent for the loss in transit of Kshs. 5,281,838 and which the 1st Respondent claimed from the Appellant and the 2nd and 3rd Respondents under the doctrine of subrogation.

11. The Appellant entered appearance and filed a defense dated 20th January 2010. Notably, the matter was initially instituted as High Court Civil Suit No. 756 of 2010 but was subsequently transferred to the lower court, where it was registered as CMCC Suit No. 819 of 2018.

12. The Appellant denied the averments contained in the Plaint. Specifically, the Appellant contended that, pursuant to the terms of the contract, the goods were transported at the owner's risk. Further, the Appellant asserted that transportation was exclusively undertaken by the 2nd Respondent, a fact which the 1st Respondent knew or ought to have known.

13. The 2nd and 3rd Respondents also filed their Amended Defense dated 7.3.2022 by which they denied the particulars of breach of contract as attributed to them.

14. The lower court heard the parties and proceeded to render Judgement for the 1st Respondent on the ground that the 1st Respondent proved its case against the Appellant. The court awarded Ksh. 5,281,838 to the 1st Respondent as against the Appellant and dismissed the case against the 2nd and 3rd Respondents. Aggrieved, the Appellant lodged this appeal against the whole of the impugned judgement.

Evidence

15. During the hearing, PW1 was Walter Mochoge. He testified that the 1st Respondent had a general contract for delivery of imported consignment and the consignment in this case arrived in March 2008. He referred to the 1st Respondent's bundle of documents filed in court. Which he produced in evidence. He testified that the Appellant was appointed to transport the consignment and the goods got lost. The consignment was destroyed when the transporter, the 2nd Respondent's Motor Vehicle Registration No. KAZ 424X/ZC while being driven by the 3rd Respondent was involved in an accident along Mombasa Road. The 1st Respondent was compensated by General Accident Insurance and so the suit was about subrogation.

16. On cross examination, it was his stated case that the goods were transported by the Appellant who contracted the 2nd Respondent as transporters.

17. PW2 was Moses Kamike. He described himself as the risk assessor of the 1st Respondent. He described the circumstances of the accident per his investigation that the 2nd Respondent was driving the truck at the time of the accident through which the 1st Respondent's goods spilt. The truck lost control and spilt the liquid. He relied on his report dated 31.5.2006 produced in evidence

18. On its part, the Appellant called DW1, one Adrian Mureithi. He testified that the Appellant was an agent of the 1st Respondent and was to release the cargo from the port to delivery and the Appellant was to clear and forward the goods and the 2nd Respondent was appointed as the transporter.

19. On cross examination, it was his stated case that the 2nd Respondent never acted as agent of the Appellant and the Appellant was licensed for clearing, not transportation.

20. The 2nd and 3rd Respondents did not call witnesses to testify in court.

Submissions

21. The Appellant submitted that it was in the knowledge of the 1st Respondent that the Appellant was in the business of clearing and forwarding and would engage third parties for transport and delivery. On this basis, it was submitted that there was an agency relationship between the Appellant and the 2nd and 3rd Respondents and liability did not attach to the Appellant. They cited COGGS v Benard (1933) 2 KB 107. Based on this case, it was submitted that anyone undertaking to carry goods would be liable for loss or damage to the goods and so the 2nd and 3rd Respondents ought to have been liable and not the Appellant.

22. The 1st Respondent submitted that the Appellant engaged the services of the 2nd and 3rd Respondents as independent contractor.

23. It was submitted that the Appellant would be liable for direct loss due to non-delivery of the goods and the exclusion clause relating to transfer of the risk was inapplicable. Reliance was placed on P.N. Mashru Transporters Limited v Rayshian Apparels Limited [2016] KECA 558 (KLR) and Securicor (Kenya) Ltd v EA Drapers Ltd & another [1987] KECA 88 (KLR). They submitted that if a master entrusted a servant or agent with goods and they are destroyed or stolen, the master is liable.

24. The 1st Respondent also relied on Tornado Carriers Limited v Bayer East Africa Limited & Another (2019) eKLR to submit that the 1st Respondent had no knowledge of the contract between the Appellant and the 2nd and 3rd Respondents and was not privy to the same.

25. In the cross appeal, the 1st Respondent maintained that the lower court ought to have found both the Appellant and the 2nd and 3rd Respondents jointly and severally liable under agency.

26. The 1st Respondent's position in the cross appeal too was that the interest ought to have been declared to commence from the date of filing the suit.

27. The 2nd and 3rd Respondents filed submissions dated 17.3.2025. It was submitted that the lower court properly found that the Appellant was liable to the 1st Respondent as the 2nd and 3rd Respondents were not party to the contract between the Appellant and the 2nd Respondent. Reliance was placed on Agricultural Finance Corporation v Lengetia Limited & Another (1985) eKLR to support the assertion that only a party to a contract can claim upon it.

28. It was submitted that if the Appellant had wanted to be indemnified, the correct procedure was to institute proceedings against the 2nd and 3rd Respondents under Order 1 Rule 21 of the Civil Procedure

Rules that provide for claims against co- defendant. They relied on the case of Amos Kinyuru Kimani v Housing Finance Corporation Limited & Another (2008) eKLR.

29. On interest, it was submitted that the lower court was silent on interest and the Appellant was not correct in praying for interest from the date if filing the suit. I note that the 1st Respondent sought to challenge the silence on interest and submitted in the cross appeal that interest ought to have been computed from the date of filing the suit.

Analysis

30. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

31. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

32. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the court in their usual gusto, held as follows; -

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

33. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

> "Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

34. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

35. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

36. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions. The Appellant urged this court to find that the case against the Appellant ought to have been dismissed as it is the 2nd and 3rd Respondents who were transporting the goods at the time of the accident and loss and not the Appellant.

37. The Appellant stated that their role was limited to clearing and forwarding the Benzene liquid on transit and the 2nd and 3rd Respondent as independent contractors who transported the goods were to be held solely liable for the accident and loss. It must be recalled that there must be fault before liability is attributed to a party. In addressing the question of negligence, in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258, the Court of Appeal stated that:

> " There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

38. This court is entitled to reevaluate by way of a retrial the pleadings and evidence at the lower court. On the prove of the allegations of breach of contract in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR the Court of Appeal stated thus:

> " When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."...
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> ...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

39. The burden was with the 1st Respondent to prove its case against the Appellant and the 2nd and 3rd Respondents. On this subject, Sections 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

40. As regards the evidentiary burden on both the 1st Respondent, the Appellant and the 2nd and 3rd Respondents, a party who invokes the aid of the law and asserts affirmative of an issue has the burden to prove the matters in issue. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

41. The 2nd and 3rd Respondents did not tender any evidence. Ipso facto, once the 1st respondent discharged the burden of proof, if they did, then the Respondents averments became mere allegations of no value. It follows that the initial burden of proof lies on a party bearing the burden and the evidentially burden keeps shifting. The legal burden of proof does not change as it is on the person asserting. The burden of prove is thus cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.

42. On a balance of probabilities, the 1st Respondent had to establish that the existence of the allegation under dispute was more probable than not. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In

percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

43. Courts have established that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

44. The balance of probabilities as a degree of proof is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> > This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

45. In this case, when the 1st Respondent handed the consignment to the Appellant, it was not the business of the 1st Respondent to know how the consignment would be ferried to Nairobi. The duty was on the Appellant to arrange for the transportation of the consignment. It was the case of the Appellant that the 1st Respondent knew or ought to have known that all along, the Appellant previously engaged and would therefore in this case engage the 2nd Respondent for the purpose of transport. However, by that very fact the Appellant was constituted as agent of the 1st Respondent for purpose of acquiring transport services for the 2nd and 3rd Respondents.

46. Having established the Appellant as an agent of the 1st Respondent, there can be no question on the relationship between the 1st Respondent and the 2nd and 3rd Respondents. In City Council of Nairobi

V Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR, the Court of Appeal stated that:

> " In Antony Francis Wareham t/a Wareham & 2 others V. Kenya, Post Office Savings Bank, Civil Application No. NAI 5 and 48 of 2002 at page 10, this court unanimously held as follows:
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> > "It was also prima facie imperative that the court should have dismissed the respondents claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.
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> > Furthermore, the court having found on the evidence that the second and third appellant were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the appellant who had been sued as a principal.
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> > In the circumstances of this case, the 2nd respondent cannot be sued as an agent when there is a disclosed principal.....There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued...There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinment of the 2nd respondent in this case is unwarranted".

47. The 1st Respondent in this case was the principle in respect of the action against the appellant who were its clearing agents. The agents instructed the 2nd and 3rd Respondents to transport the goods which were destroyed. The liabilities for the Appellant and the 1st Respondent should thus merge as principle and agent.

48. The second issue is the question of excluded risk. Whereas the Appellant maintained that the goods were carried at the owners' risk, the said risks by no means included risks due to negligence and loss. As was stated by the court in Khetshi Dharamshi Co. Ltd v P. N. Mashru Ltd [2006] eKLR:

> It is an ingenious argument coming from the defendant. In the pleadings the defendant denies (statement of defence, para. 3) being a common carrier. But in the submissions, learned counsel for the defendant now expressly admitted that the defendant was a common carrier. Firstly this retraction of an express assertion in the pleadings is illegitimate and cannot be allowed. Secondly, I suspect that the defendant is belatedly attempting to escape from the wider net cast by the general law of the tort of negligence, preferring to fall only under the negligence of the common carrier or the bailee, which may in certain circumstances stand qualified by the terms of contract. Yet in the contract in question here, the defendant is unable to identify any specific aspect under which the common carrier's duty of care had been qualified. Only the obscure and indirect statement in past delivery notes, that "goods are carried at owner's risk", is urged to import contractual force into the specific agreement that had been made between the defendant, and the plaintiff's agent. It is such a tenuous connection, that I will hold that the said exemption clause was not part of the agreement reached between the defendant and the plaintiff, for the transportation by the defendant of goods to the plaintiff's premises in Nairobi...
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> ... If the defendant considered that it was involved in a risky operation, as a common carrier, why did it not take out an insurance cover, to protect itself if it should lose goods belonging to a party such as the plaintiff? The defence witness claimed that it was unnecessary for the defendant to take insurance cover; for it was the responsibility of the plaintiff to insure its goods. It cannot, with respect, be the law that a transporter or bailee has the freedom to be negligent, with no duty to insure against losses which

its negligence may cause to others, but it is only for those others to so insure their goods that they may be free of the wrongful act of the defendant. The duty of care rests as much on the plaintiff as on the defendant, and the Court cannot accord the defendant the cover of impunity, while the plaintiff takes all the trouble to secure its interests against the consequences of such impunity.

49. To this court, the 2nd Respondent was clearly a common carrier and was assigned by the Appellant to transport the 1st Respondent's consignment as such. Importing the quote in Volume 3 Halsbury Law of England paragraph 365 it is clearly stated as follows:

> ... To constitute a common carrier, he was ready to carry for hire as a business and not as a casual occupation. It is essential that he ought to hold himself out as being ready to carry goods for any person, or to carry any passengers no matter who they may be. If he carries for particular persons, or certain passengers only, he is not a common carrier, and the relationship between him and the owner of the goods or the passenger is one of special contract. If he retains a right of selection as to whom or what he shall carry he is not a common carrier....

50. Under Article 46 of *the constitution*, consumer rights are protected and this court has to consider a higher pedestal over which the rights of consumers of goods and services has been placed than what the position was in the repealed constitution. The law on exclusion clauses remain that where the same is unconscionable, overly harsh, one sided or imports the effect of enabling the defendant to run away from own fraud, negligence or negligence by employees, common law and the courts world intervene to restrain its application. See Uber Technologies Inc -vs- Heller [2020] SCC 16. In Explorer Parcel Handlers v Mukabane (Civil Appeal E068 of 2023) [2024] KEHC 4774 (KLR) (8 May 2024) (Judgment), the court stated as follows:

> In this matter, the exclusion clause is bare declaration. It is to me brazenly overs and seeks to afford a carte blouch upon the Appellant, as a bailee or transporter for consideration, never to be accountable for the goods bailed to them. They could wantonly waste, pilfer, sell or just allienate to themselves and offer to the owner the paltry Kshs.5,000/= give or take, the value of the goods, notwithstanding. That to this court is not only cruel but equally unconscionable and out rightly oppressive. The court doubts if the terms contained in the receipt and relied upon by the Appellant can pass the test of validity under section 5 of the *Consumer Protection Act*.

51. The court finds that the exclusion clause being userous and calculated to shield the 2nd Respondent from every liability even for deliberate maleficence by its agents like the 3rd Respondent cannot be given effect by enforcement in favor of the 2nd and 3rd Respondents. The other reason the 2nd and 3rd Respondents must understand that the exclusion clause affords him no protection is the provisions of Section 6 of the *Consumer Protection Act*. The 2nd and 3rd Respondents owed to the 1st Respondent, as a consumer of its services to bring to its attention any condition like the exclusion clause prior to the execution of the contract to transport the Respondent's benzene. No evidence was led by the 2nd and 3rd Respondents in that regard.

52. In any case they did not testify to justify the clauses and produce evidence in support of their case. in the case of Grain Industries Limited v Ali & 6 others (Civil Case E051 of 2023) [2023] KEHC

27009 (KLR) (14 December 2023) (Judgment), this court posited as follows regarding failure to tender evidence:

> In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR Justice C Kariuki, J, stated as doth:
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> But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in Shaneebal Limited vs County Government of Machakos [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.39.That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

16.In this case there is not even a defence on record. The evidence reached a prima facie standard and is now uncontroverted.

53. This court is thus unable to strictly apply the exclusion of liability as captioned in the 2nd Respondent's Consignment Note No. 2482 Dated 27.3.2008. The consignment note was note pre-negotiated and the Appellant signed it on its own without the input or views of the 1st Respondent as owner of the goods. In Securicor Courier Kenya Limited Vs Benson Onyango and another Court of Appeal, Civil Appeal 323 of 2002 [2008] KLR 252, [2008] e KLR, the Court confirmed that position:

> " In our jurisdiction however, such contracts are purely governed by common law. It seems that the current law governing the exemption clauses is as expressed by the House of Lords in Photo Production Limited Vs Securicor Transport Ltd [1980] 1 ALL ER 556 and in George Mitchell (Chester Hall) Ltd (supra)"
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> 18. An exemption clause should not be construed in the very strict terms of clauses of complete exclusion of liability or indemnity. See Securicor Courier (K) Ltd Vs Benson Onyango (supra), Ailsa Craig Fishing Company Limited Vs Malvern Fishing Company Limited [1983] 1 ALL ER 101. The key requirement is that an exemption clause must be clear and unambiguous. If it is clear and unambiguous, the Court will, as a general rule, enforce it. In the present case, the contracting parties are a bank and a courier company. The contract is a standard form document drawn by the courier company. It was not pre-negotiated. The bank signed it as drawn. I cannot say that the bank was a weaker party. From a pure law of contract standpoint and the fact that Kenya does not have the equivalent of, say, the Unfair Terms of Contract Act, it is not truly the business of the contract to question whether the clause is unreasonable or unfair. The authorities cited by the plaintiff in Gillespie Brothers & Company Ltd Vs Roy Bowles Transport and another [1973] 1 ALL ER 193 and Levinson and another Vs Patent Steam Carpet Cleaning Company Ltd [1977] 3 ALL ER 498 relate to the concept of fundamental breach of contract. The English courts have since disregarded it in the Photo production case (supra) and as confirmed by our Court of Appeal decision in Securicor Courier Kenya Limited case (supra).

54. The 2nd Respondent was a common carrier who could not invoke the exemption clause in the face of negligence on its part which lead to the loss of the 1st Respondent's consignment. I am fortified by the reasoning of Visram J (as he then was) in Eveready Transport Company (K) Ltd v Proost Paper (E. A.) Ltd [2005] eKLR held thus:

> 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.

55. The 2nd Respondent held itself to the public as a common carrier. Per the Consignment Note No. 2482 Dated 27.3.2008 produced by the Appellant, the 2nd Respondent described itself as a transport agent situated at airport road Changamwe. There was thus evidence that the 2nd Respondent held itself out as ready to carry goods for any person. This Court finds fortification in the above holding in the words of Sir Charles Newbold, P in Express Transport Co Ltd v BAT Tanzania Ltd [1968] EA 443, at P 447 who held thus:

> ... There has never been in England complete certainty as to the attributes a carrier must possess before he can be said to be a common carrier as opposed to a private carrier. It is clear, however, that before a carrier can be said to be a common carrier of goods he must hold himself out as ready to carry the goods of any person and not of a particular person. There is no necessity that there should be a fixed route or a stated timetable; and the fact that the carrier refuses to carry certain goods, for example, dangerous goods, does not mean that the carrier is not a common carrier. I have come to the conclusion, after a 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 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...

56. As above observed, the Appellant signed the Consignment Note Dated 27.3.2008 which stated that the goods were carried at owner's risk as consignee and clearing and forwarding agent. Documents speak for themselves. The facts not disputed are that the goods did not arrive at their final destination. The goods were to be transported to Nairobi. It has also been established that for all intents and purposes, the 2nd Respondent was a common carrier.

57. The 2nd Respondent was answerable to the acts and omissions of the 3rd Respondent under vicarious liability. The lower court erred in not finding the 2nd and 3rd Respondents liable jointly and severally as pleaded the 1st Respondent and the cross appeal succeeds on this ground. In Mohamed v Muchomba (Civil Appeal 53 of 2019) [2022] KEHC 17115 (KLR) (8 December 2022) (Judgment) From the above decisions cited, it is apparent that a common carrier's liability takes effect once the goods are accepted for transport. Upon assumption of the goods in readiness to provide hauler services, the carrier is then under an obligation to take reasonable steps to ensure safety of the goods in transit and

have them delivered at the desired and/or expected destination and that is when liability stops. It must also be borne in mind that the doctrine of vicarious liability is imported so that the common carrier is answerable to the acts of his servant or agent.

58. This court is alive to the exceptions as to the liability of the common carrier. The Court of Appeal in East Africa Industries Ltd v B.R. Nyarangi [2009] eKLR, upon considering several decisions on the issue, laid four exceptions on the general liability of the common carrier. They are:

    a. The loss or injury to the goods arose solely from an Act of God.

    b. The loss or injury to the goods arose solely from hostilities involving the State.

    c. The loss or injury to the goods arose solely from the fault of the consignor; and

    d. The loss or injury to the goods arose solely from or inherent vice in the goods themselves.

59. It follows that for the 2nd and 3rd Respondents to be absolved from liability in the circumstances of this case, they were under duty to demonstrate any of the above exceptions. The liability on common carriers was further aptly captured by John Holt CJ in Coggs v Benard [1558-1774] All ER 1 who held as follows:

> .... For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he (the common carrier) is chargeable. This is a politic establishment, contrived by the policy of the law for the safety of all persons, that they may be safe in their ways of dealing, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. This is the reason the law is founded upon that point....

60. Based on the above authorities, I reiterate that there was no basis for the lower court absolving the 2nd and 3rd Respondents from liability. They were liable jointly liable for the loss of the loss at 100% basis. In Bayer East Africa Limited v Express Kenya Limited [2008] eKLR, the court stated as follows:

> In this case the defendant agreed to carry the goods of the plaintiff through its own agent and the subject goods were lost through the party sub-contracted by the defendant. If the sub-contractor is negligent then the party who entrusted the goods to the sub-contractor cannot escape liability by making defence that it is not a common carrier. Clearly the defendant admitted that the plaintiff's goods were lost while in the custody and control of the defendant and/or its lawful and/or authorized agent. I therefore think the defence by the defendant is untenable in view of the clear admission made before this court.
>
> I agree with the plaintiff's advocate that it is the duty of the defendant to demonstrate that the loss, theft and/or pilferage was as a result of an act outside its control. The defendant company being a common carrier cannot contract to exclude fundamental breach committed by a party it says was negligent in handling the plaintiff's goods. The negligence of the transporter is clearly attributable to the defendant by failing to ensure that the goods of the plaintiff were delivered safely. That was not done and the defendant says that the loss was due to the negligence of the transporter entrusted with the duty of care to deliver the plaintiff's goods to Nairobi. In short if the party sub-contracted by the defendant was negligent by the defendant's own admission, then prima facie the defendant is liable for the loss and damages suffered by the plaintiff.

61. The 2nd and 3rd Respondents failed to call any witness and their defence was but mere denials. As such, the evidence of the 1st Respondent and the Appellant as against the 2nd and 3rd Respondents was as such uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997 that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
>
> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

62. The nature of the 1st Respondent's claim was for a liquidated sum. It is disingenuous to allege that goods were lost. The evidence on record is that the goods were lost in the hands of the 3rd Respondent an agent of the 2nd Respondent. There was no explanation for the loss of the said goods. The 2nd and 3rd Respondents are thus liable for the loss of the goods and the contract as common carriers. The Appellant is not liable since he was an agent of a disclosed principal, the 1st Respondent and thus not a necessary party.

63. On special damages, the amount pleaded was a specific sum of Ksh. 5,281,838/=. The court did not indicate the date the interest was to run from. In this context the 1st Respondents appeal for interest to be declared for the date of filing is otiose as special damages attract interest from the date of filing. Section 26 of the *Civil Procedure Act* provides as follows:

> (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
>
> (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum

64. For avoidance of doubt interest shall be from the date of filing, in the absence of any contrary reason. In the case of John C. Omollo v South Nyanza Sugar Co. Ltd [2020] eKLR, A. K. Ndung'u J posited as follows:

> 5. The court's power to award interest is derived from Section 26 (1) of the *Civil Procedure Act* which stipulates;
>
> > 26 (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution

> of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date.

6. The foregoing provision is articulate on the wide nature of the trial court's discretion in awarding interest. That discretion must however be exercised judiciously. An appellate Court will not interfere with the trial court's discretion unless the trial court proceeded on an erroneous principle or was plainly and obviously wrong.

7. In the case of Shariff Salim & Another vs Malundu Kikava Civil Appeal No 15 of 1989 [1989] eKLR the Court of Appeal observed as follows:-

> There is no gainsaying the fact under Section 26 of the *Civil Procedure Act*, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially.

8. For special damages, the general principle applicable is that interest will begin to accrue from the date of filing suit. This principle was enunciated in the case of Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469 where the court rendered itself thus;

> The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.

65. There was no appeal on special damages. However, the lower court did not pronounce itself on interest. This was a reversible error of law. The claim was for a liquidated amount and interest was to accrue from the date of filing the suit which this court awards. Similarly, in Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR, the court stated as follows:

> 32. I have come to the conclusion that the Learned Trial erred by not adverting her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts' repeated application of Section 26 of the *Civil Procedure Act*. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

66. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any

action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

67. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

68. The net effect is that the Appeal and the Cross Appeal are merited and accordingly allowed. The 1st Respondent shall have costs of the Appeal and Cross Appeal assessed at Ksh. 185,000/ payable by the second and third Respondents.

Determination

69. In the upshot, I make the following orders: -

a. The Cross Appeal and the Appeal are allowed as follows:

. Judgment of the lower court is set aside in its entirety.

b. The order dismissing the case against 2nd and 3rd Respondents is set aside.

c. Judgment is entered for the 1st Respondent against the 2nd and 3rd Respondents jointly and severally for a sum of Ksh. 5,281,838/=, costs and interest.

d. Interest on the Ksh. 5,281,838/= shall apply at court rates from the date of filing suit in the lower court.

e. The suit against the Appellant be and is hereby dismissed.

f. The Appellant is an agent of a disclosed principal hence not liable for the actions as an agent.

g. The 1st Respondent shall have costs of the Appeal and Cross Appeal assessed at Ksh. 185,000/ payable by the 2nd and 3rd Respondents.

h. The Appellant, being the 1st Respondent's agent, shall bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

CM Advocates for the Appellant

Anne W. Kimani & Co. Advocates for the 1st Respondent

Ombonya & Co. Advocates for the 2nd and 3rd Respondents

Court Assistant – Michael