



**Explorer Parcel Handlers v Mukabane (Civil Appeal E068 of 2023)
[2024] KEHC 4774 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E068 OF 2023
PJO OTIENO, J
MAY 8, 2024**

BETWEEN

EXPLORER PARCEL HANDLERS APPELLANT

AND

SANTRY ANDEYI MUKABANE RESPONDENT

(Being an Appeal from the Judgment of the Small Claims Court of Kenya at Kakamega by Hon. Sylvia A. Wayodi (Adjudicator/Resident Magistrate) dated the 6th day of April, 2023 in SCCOMM CASE NO. E092 OF 2023)

JUDGMENT

1. Before the Small Claims Court was a claim by the Respondent seeking recovery of the sum of Kshs.201,930 being the cost of goods lost while in the custody of the Appellant as a provider of courier services. The Respondent produced the invoice for the purchase of the goods as well as the receipt issued by the Appellant for the service and text message sent to the Appellant for the service and a message sent to the Respondent that a parcel had been sent to him. The receipt issued by the Appellant disclosed that the packages were seven in number.
2. It was the claim by the Respondent that of the seven packages only four were received and three were lost. He identified the four received to have been boxes containing other electrical goods while the lost boxes contained cables and that a person was charged for stealing from the Appellant's premises.
3. From the evidence, it is not denied that the Respondent did bail its goods for transport from Nairobi to Mumias by the Appellant and that the service was to be given at a consideration which was duly paid.
4. The fact of loss is not denied by the Appellant. The Appellant only denies liability on the facts; that its liability was agreed and capped at Kshs.5,000 and further that its liability was limited to the declared value of the goods being Kshs.27,000/=.



5. Having re-examined and re-appraised the record as a first appellate court, the issues that emerge for determination is whether the exclusion clause in the receipt was a complete defence which limited the liability to Kshs.5,000 and if the Respondent proved its case to the requisite standards to merit the Judgment by the trial court.
6. As said before, the fact of loss of three (3) packages is not in dispute. Not in dispute because the documents show that Packages were delivered to the custody of the Appellant. Even if the Appellant said in the witness statement by its three witnesses that, only three packages were delivered and one collected back by Cyrus Musyoka, such evidence being parol cannot upset the written document, being the receipt issued by the Appellant himself. The court therefore makes a finding that seven (7) packages were sent but only four were delivered. The lost three packages were lost while in custody of the Appellant as a bailee and that constitutes a breach of contract for which the Appellant must be made liable and called upon to make good the loss.
7. What was the effect of the exclusion clause including liability for loss to Kshs.5,000 and requires that goods with value of Kshs.5,000 be insured by the shipper?
8. 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.
9. 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 alienate 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](#).
10. The court finds that the exclusion clause being userous and calculated to shield the Appellant from every liability even for deliberate maleficence cannot be given effect by enforcement in favor of the Appellant.
11. The other reason the defendant must be told that the exclusion clause affords him no protection is the provisions of Section 6 of the [Consumer Protection Act](#). The Appellant owed to the Respondent, as a Consumer of its services to bring to his attention any special condition like the exclusion clause prior to the execution of the contract to transport the Respondent's goods. No evidence was led by the Appellant in that regard. It was content to say that the contract envisaged by the receipt, issued to the Respondent upon payment for the courier services.
12. The four delivered were demonstrated by the Respondent to have been boxes containing electrical items while what was lost were electric cables. That evidence was not meaningfully challenged in cross examination with the invoice for the Respondent's supplier, it is easy to identify what was the value of the electric cables away from the other electrical items.
13. I have studied the invoice and find that the electric cables listed at items No. 2, 4, 7 and 12 were the lost items and had the aggregate value of Kshs. 201,930. That the loss I find to have been suffered by the Respondent.
14. The trial court thus accurately found that the lost goods were valued at Kshs.201,930. Such was a finding of which resonates and sits well as an accurate and candid evaluation of the evidence led. As a



trial court, and trier of facts, it takes a strong case for an appellate court to interfere. This court find no justification to interfere with the Judgment.

15. The last question on liability the court considers relevant is whether after receiving the goods and getting paid for its services as a bailee or transporter for consideration, the Respondent had the right to retrieve the same while in the control of the Respondent, so that it could demand and receive the same elsewhere apart from the contracted destination.
16. In my opinion, the contract of bailment was concluded at the point the consideration for the service was paid and goods deposited. Henceforth, from that moment, the custody, possession and control vested wholly upon the Appellant and if it parted with possession or control it did so or it own peril and obligation. It is thus no defence that the goods were retrieved by a third party who was subsequently arrested and charged.
17. It being conceded that the package(s) was (were) released to one CYRUS KISAVI MUSYOKA, a well-known luggage carrier, who normally ventures into the business of transporting parcels to the Respondents offices for different customers and dispatch to various destination and he being a common face' and the fact that the Appellant treated him as a thief leading to the concerted efforts culminating on his arrest and being charged with theft, only buttresses the fact that he could not have been an agent of the Respondent.
18. In conclusion this appeal fails on the liability of the Appellant and the court find that the Appellant is liable to the Respondent in the sum of Kshs. 201,930 as determined by the trial court.
19. Flowing from that determination, the appeal fails in entirety and is thus dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MAY, 2024.

PATRICK J O OTIENO

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Polycap

