



**London Distillers (K) Ltd v Ilani Enterprises Ltd (Civil Appeal
E136 of 2023) [2024] KEHC 8523 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E136 OF 2023
RE ABURILI, J
JULY 5, 2024**

BETWEEN

LONDON DISTILLERS (K) LTD APPELLANT

AND

ILANI ENTERPRISES LTD RESPONDENT

*(An appeal arising out of the Judgment of the Honourable C.N.C.
Oruo in the Senior Principal Magistrate's Court at Winam delivered
on the 14th July 2023 in Winam SPMCC No. E002 of 2021)*

JUDGMENT

Introduction

1. The appellant sued the respondent vide the amended plaint dated 2.8.2022 seeking special damages of Kshs. 2,170,407 with interest as well as costs of the suit in favour of GA Insurance Company Limited under its rights for subrogation.
2. The appellant averred that on the 11.11.2017 it entered into a contract for carriage of goods with the respondent for transport of goods to the appellant's destination and that it was an express term of the contract that the respondent ensures the correct quantity and quality of goods is delivered to the appellant's premises and that in the event of any loss, the respondent was to bear full liability for such loss and shall indemnify the appellant.
3. The appellant averred that on the 28th June 2018, the respondent lost the whole consignment of goods allegedly when the truck was hijacked along the Londiani – Muhoroni road subjecting the appellant to a loss of Kshs. 2,170,407 which the respondent was liable to settle.



4. The appellant averred that it had since been compensated for the loss by his insurer and as such, it was making its claim on behalf of the insurer, GA Insurance. It was the appellant's assertion that the respondent was strictly liable for the breach of the contract of carriage of goods.
5. The respondent filed its amended defence dated 12.9.2022 denying the contents of the amended plaint and contending that even though the goods were collected from the appellant, the transporting motor vehicle was hijacked by armed robbers who stole the goods and as such, there was no negligence or intentional conspiracy on its part as provided in Clause 4 of the contract between the parties herein.
6. In his impugned judgement, the trial magistrate found that the appellant's case lacked merit and proceeded to dismiss it. The trial court held that the appellant failed to prove that the theft of the goods was caused by the respondent's negligent acts and further that having the respondent pay for any loss would result in double payment as the appellant had already been indemnified by the insurer.
7. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 8th August 2023 based on the following grounds;
 - a. That the learned magistrate erred in law and fact by dismissing the appellant's suit despite the overwhelming evidence tendered in court which weighed heavily in the appellant's favour.
 - b. That the learned magistrate erred in law and in fact by failing to appreciate that the goods got lost in transit and while in possession of the respondent who owed a duty to the appellant as common carrier and/or bailee for reward to ensure safe custody and safe delivery.
 - c. That the learned magistrate erred in law and fact by failing to appreciate that there was overwhelming evidence to demonstrate that the respondent was in breach of the contract.
 - d. That the learned magistrate erred in law and fact in failing to address any of the issues raised in the appellant's submissions thereby arriving at an erroneous finding to the prejudice of the appellant.
 - e. That the learned magistrate erred in law and in fact by misunderstanding and misapplying the doctrine of subrogation hence arriving at an erroneous finding.
 - f. That the learned magistrate erred in law and fact in holding that any order to have the respondent pay for any loss would amount to double payment despite the pleadings being clear that the appellant was claiming on behalf of GA insurance company under subrogation rights.
 - g. That the learned magistrate erred in law and in fact in failing to appreciate that in civil cases unlike in criminal cases, all the plaintiff has to do is to prove on a balance of probabilities that his/her case is true and noting that different aspects of evidence not brought in criminal proceedings may emerge during subsequent civil proceedings.
8. The parties filed written submissions to canvass the appeal.



The Appellants' Submissions

9. It was submitted that the Learned Magistrate ought to have appreciated that any prudent transporter would therefore take necessary precautions to try and avoid incidence of hijacking and theft. Reliance was placed on the case of P.N Mashru Transporters Limited v Rayshian Apparels Limited (2016) eKLR, where the Court of Appeal expressed the view that a common carrier is liable for any loss occurring while goods are in transit and under his charge.
10. It was further submitted that the Transportation Contract highlighted that the Respondent would only be liable to compensate the Appellant's insured for their loss in three instances i.e. where the theft was out of their own negligence or they conspired or where the Appellant's insured had declined to pay for the loss.
11. The appellant relied on the case of Toyota (Kenya) Limited v Express (Kenya) Limited [2013] eKLR, where the Court of Appeal quoted the case of Coggs v Bernard, (1558-1774) ALL ER 1 where Gould, J stated that "Any man who undertakes to carry goods is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost or come to any damage".
12. It was submitted that the act by the respondent's driver to drive alone, at 5.30 am without any security or backup while carrying goods consignments worth Kshs. 2,170,057 amounted to active, advertent and culpable negligence led to the theft thus breaching the contract.
13. The appellant submitted that the Respondent was actively negligent based on his positive action of driving alone in the darkness while having knowledge of the risks associated with protecting the consignments; that he was also advertently negligent since he confirmed that he has never driven alone at 5.30 am thus he was aware of the unreasonable risk they were creating and that he exhibited culpable negligence by disregarding the consequences (herein theft and loss) that would likely result from the Respondent's action of transporting goods worth millions without proper security/backup, and lack of attention to a secure time to transport the goods.
14. It was submitted that the Respondent was under strict liability to take care of the goods against all events thus ought to compensate the Appellant for any loss or theft, which in this case amounts to Kshs. 2,170,407/.
15. The appellant submitted that the Learned Magistrate did not discern that it is not the Appellant who was suing for the claim money (since he had already been compensated by his Insurer), but the Appellant's Insurer, which company was exercising its rights under subrogation as aired in the Amended Plaintiff.
16. It was submitted that that the Appellant proved its case on a balance of probability as indeed goods were stolen, which the Respondent also admitted and/or confirmed that the same was stolen under its watch and that that it was immaterial whether the alleged hijackers were arrested and charged in criminal proceedings as clearly it was their responsibility to ensure safe custody of the Appellant's goods and delivery, which goods were never accepted by the Appellant as was held in the case of Big Road Enterprises v DHL Global Forwarding (K) Ltd (2017) eKLR.
17. The appellant submitted that these proceedings are civil in nature and the burden of proof is on a balance of probabilities; That the proceedings are not dependent on the outcome of criminal proceedings in respect of an offence with which the property is concerned and the fact therefore that the Respondent was acquitted is immaterial; that the funds in issue constitute property or economic advantage derived or realized as a result of an offence.



18. It was submitted that by virtue of the Respondent being a common carrier, the liability of a common carrier begins once he has accepted goods for carriage and once he assumes the goods for carriage, he assumes a duty, not only to carry safely, but also to deliver safely to the destination and his liability only ends upon delivery of the goods, which the Respondent failed to do and was negligent on its part hence the Appellant ought to be compensated for the theft and/or loss.

The Respondent's Submissions

19. The Respondent's Counsel submitted on the following framed issues:
- A. Whether the learned magistrate erred in law and fact by dismissing the appellant's suit and finding that the Appellant did not prove that the loss accrued due to the Respondent's Negligence?
 - B. Whether the learned magistrate erred in law and fact by dismissing the appellant's suit and finding that no conspiracy could be proved against the Respondent?
 - C. Whether the Respondent as a common carrier can invoke the exceptions under strict Liability doctrine.
 - D. Whether the learned magistrate erred in law and fact by failing to appreciate that the Appellant proved their case on a balance of probabilities.
20. On the first to the fourth grounds of appeal, it was submitted that the language of the clause expressly limits liability to situations where negligence or conspiracy can be proven and that the alleged 'overwhelming evidence' tendered by the Appellant during trial does not establish neither negligence nor conspiracy on the part of the Respondent.
21. On the appellant's attempt to show that the Respondent was negligent for failing to deliver the goods since they were common carriers and they had the duty to safely transport, by hiring someone to accompany the driver or a police escort and that failure to do so meant negligence on the part of the respondent, it was submitted in contention on behalf of the respondent that the Respondent testified that he diligently ensured the security of the consignment by installing a tracker on the motor vehicle. That the installation of the tracker enabled the Respondent to monitor the movement of the vehicle and promptly identify any deviations from the intended route and that the use of a tracker proved to be effective in tracking the vehicle's movements and played a crucial role as it assisted him in knowing that the lorry was no longer travelling to its destination as it was stationary for quite some time.
22. The respondent's counsel further submitted that it is trite that for a negligence claim to be sustained particulars of negligence have to be pleaded and all the elements of negligence have to be proved and that the principles and threshold required to sustain a claim in negligence were established by Lord Macmillan in *Donoghue Vs. Stevenson* when he stated that:
- “The law takes no cognisance of, carelessness in the abstract. It concerns itself with carelessness only where there is a duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence ... the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty.”



23. Further reliance was placed on the case of *Anastassios Thomos v Occidental Insurance Company Limited* [2017] eKLR stated that before a claim can succeed in an action for negligence, the damages alleged must be damage which the law recognises and which is not too remote. It further stated that:
- “When it comes to remoteness of damages, the court ought to determine whether there was a sufficient cause or proximate connection between the defendant’s negligence and the damages suffered by the plaintiff that is recognisable as a matter of policy that the Defendant should pay for the damages.”
17. The respondent’s counsel also relied on the case of *Elijah Ole Kool Vs George Ikonya Thuo*[2001] eKLR where Vishram J addressed the requirement for causations follows:
- “When will an act or omission be said to be the cause of the Plaintiff’s injuries? A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff’s injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions.”
24. On the issue of proximate cause, reliance was placed on the case of *United Overseas Agencies Ltd v Samuel Mbogo Githengu* [2019] as cited in the case of *Edward Mzamili Katana CMC Motors Group Ltd & Another*[2006] citing the case of *Obwogi vs Aburi* [1995-1998] where the court explained the term proximate cause as follows:
- “to render the respondent liable in an action for negligence, it must be shown that the negligence found is the proximate cause of the damage. Where the proximate cause is the act of a third person against whom precautions would have been inoperative, the respondent is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.”
25. According to the respondent, for it to be held liable for negligence, it must be demonstrated that their actions were the proximate cause of the damage incurred. However, that when the proximate cause of the damage is attributable to the actions of a third party against whom precautions would have been ineffective, the respondent cannot be held liable unless it is shown that they instigated the act or failed to foresee and prevent it.
26. The respondent argued that in light of this legal principle, even if it were argued that the Respondent was negligent in their duty, any such negligence would not constitute the proximate cause of the damage suffered. Rather, that the theft perpetrated by third-party criminals, against whom precautions would have been ineffective, serves as the proximate cause of the loss.
27. It was further argued that even with the presence of an escort, the armed hijackers posed a significant threat that could not have been avoided solely by the presence of an additional person hence, it is evident that the hijacking could have transpired regardless of whether an escort accompanied the driver or not.
28. It was therefore argued that in the absence of evidence demonstrating that the Respondent instigated the theft or failed to foresee and prevent it, they cannot be held liable for the actions of external perpetrators, which further reinforces the position that the Respondent acted reasonably and diligently in safeguarding the goods and their actions were not the direct cause of the loss incurred.



Reliance was placed on the case of Walker v. Goe [1859], 4 H. & N. 350 where it was stated as quoted in Anastassios Thomos v Occidental Insurance Company Limited (supra) that:

“The option of the Appellant suggesting that hiring police escort would have enhanced security, such a measure may not have been economically tenable for the Respondent as the cost associated with hiring police escort for every transport would likely outweigh the benefits, particularly for a small-scale transporter like the Respondent.

29. Counsel for the respondent further submitted that it is a well-established norm within the trade that goods of this nature are routinely transported without the direct protection of the police and the absence of police escort during the transportation of goods is not uncommon and is widely accepted as part of standard industry practices.
30. Moreover, that despite the isolated incident of theft, it is noteworthy that the Appellant has chosen to maintain its business relationship with the Respondent as was testified by the Appellant’s witness. Further, that despite the contract between the parties providing for termination, yet the Appellant has consciously opted to continue working with the Respondent. That by exercising their option to continue the contractual relationship, the appellant implicitly acknowledges the Respondent’s reliability and the adequacy of the security measures in place as the goods are still transported without an additional person and/or the escort of the police.
31. That the Appellant having failed to demonstrate how the defendant was negligent, the Respondent was not in any way negligent and therefore not in breach of the contract.
32. On the issue of whether the learned magistrate erred in law and fact by dismissing the appellant’s suit and finding that no conspiracy could be proved against the Respondent? It was submitted that the Appellant’s contention that the goods might have been stolen due to conspiracy by the driver considering that the driver was unaccompanied at the time of transportation was not founded as the ingredients of conspiracy were not proved. The case of Lawrence Gitau Karanu v Republic [2020] eKLR quoted the case of Christopher Wafula Makokha -v- Republic (2014) eKLR was cited, where the Court stated as follows on what constitutes the offence of conspiracy:

“In Archibold: Writing on Criminal Pleadings, Evidence and Practice (Supra), the learned writers observe at pages 2589 and 2590 that: -“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

33. Applying the above principles, it was submitted that it was evident that the Appellant’s assertions of conspiracy lack merit. That there is no evidence to suggest the existence of an agreement between the driver and the alleged robbers to commit the theft of the goods in question.
34. On the appellant’s reliance on the driver not being accompanied to prove conspiracy, it was submitted that if that were to be the case, then the appellant would not continue to use the Respondent’s transportation services even after the hijacking incident. The case of Moses Kathiari Rukunga v Republic [2018] eKLR was cited where it was stated that:

“The essential ingredient to thus prove the offence of conspiracy to commit a felony is that two or more people agree to put into effect a scheme whose ultimate aim would be the



commission of a criminal offence. It will not matter that the criminal offence proposed to be done may be impossible to be undertaken.”

35. It was argued that if indeed there was a conspiracy between the driver and the robbers, such extreme actions of threatening and drugging their own accomplice would be unnecessary and counterproductive. Further, that the Respondent’s driver was interrogated by the police and was subsequently exonerated of any criminal liability. Additionally, that the owner of the motor vehicle together with the driver also actively participated as witnesses in the Criminal case No. 90 of 2019 where the hijackers were tried. Counsel for the respondent argued vehemently that had there been any semblance of a conspiracy, it is improbable that the driver and other witnesses, including DW1 and DW2, would have cooperated with the authorities and appeared as witnesses in the criminal case.
36. On whether the Respondent as a common carrier can invoke the exceptions under the doctrine. it was submitted that although the appellant had invoked the principle of strict liability, citing the case of *Toyota (Kenya) Limited V Express (Kenya) Limited* [2013]e KLR. However, that the doctrine is subject to exceptions as delineated in legal precedent and that one such exception, as highlighted in the same case, is when the loss or injury arises solely from the Act of God or hostilities involving the state, or from fault of the consignor or inherent vice in goods themselves.
37. It was further argued that the case of *Coggs v. Bernard* [1558-1774 All E.R.1-10] as was quoted in the above case, underscores the stringent liability imposed upon common carriers. It also recognizes exceptions, notably exempting carriers from liability in cases involving acts of God or enemies of the King. The court in the said case stated as follows:

“A common carrier would be responsible for the safety of goods in all events except if the loss or injury arose solely from the Act of God or hostilities involving the state, or from fault of the consignor or inherent vice in goods themselves...”
38. It was argued that in the present case, the loss of goods was by a violent robbery committed by armed robbers. That the incident, characterized by the use of force and intimidation, clearly falls within the purview of hostilities and that the involvement of the state through the subsequent investigation and arrest of the perpetrators further underscores the nature of the incident as a matter of public concern and state intervention. It was further submitted that when matters of a criminal nature are tried, the aggrieved party is the Republic, which prosecutes cases on behalf of its citizens. As such, acts of violence against individuals or property are equivalent to hostilities against the state and its citizens.
39. It was therefore submitted that given the circumstances surrounding the loss of goods and the subsequent legal proceedings initiated by the state, it is evident that the incident falls squarely within the exception to the doctrine as articulated in legal precedent. Robbery with violence perpetrated by armed assailants constitutes an act of hostility against the state and its citizens, thereby exempting the common carrier from strict liability.
40. It was therefore respectfully submitted that the Respondent, as the common carrier, cannot be held liable for the loss of goods and we urge the Honourable court to find that the incident qualifies as an exception under hostilities involving the state.
41. On whether the learned magistrate erred in law and fact by failing to appreciate that the Appellant proved their case on a balance of probabilities, the respondent submitted relying on the case of



Christine Kalama v Jane Wanja Njeru & another [2021] eKLR where the court had this to say with regard to the standard and burden of proof in civil cases:

“In the sense of the case before the trial Magistrate, it was the appellant who bore the evidential burden to lead evidence against the respondents to show that acts of negligence and breach of the duty of care owed to her on the material day. On the other hand, once the appellant discharges the burden of a prima facie case, the respondents were to be under a duty of offer tactical evidence to rebut or controvert the elements of the appellant’s case.”

42. It was the respondent’s submission that the Respondent offered tactical evidence enough to controvert the Appellants case and that the Respondent has effectively countered the Appellant’s case on the elements of negligence, conspiracy, and strict liability.
43. Further, that regarding the issue of negligence, the Respondent has demonstrated that all reasonable measures were taken to safeguard the goods during transport, that the installation of a tracking device and the driver’s compliance with safety protocols were sufficient under the circumstances. Moreover, that the armed nature of the robbery and the subsequent exoneration of the driver highlight the unforeseeable nature of the incident, absolving the Respondent of any negligence.
44. on conspiracy, it was submitted that the respondent had rebutted this claim by highlighting inconsistencies in the alleged conspiracy and emphasizing the extreme actions taken by the robbers hence there was no evidence supporting the conspiracy theory, coupled with the driver’s cooperation with authorities, which undermines the credibility of the Appellant’s argument.
45. On strict liability, it was submitted that the respondent had effectively invoked the exceptions outlined in *Toyota (Kenya) Limited v Express (Kenya) limited* (supra). By framing the robbery with violence as an act of hostilities involving the state, the Respondent has successfully positioned the incident within the exceptions of strict liability, thereby absolving themselves of any liability for the loss of goods.
46. In light of the above, it was submitted that the Respondent had sufficiently rebutted the Appellant’s case on elements of negligence, conspiracy and thus did not succeed in proving their case on a balance of probabilities. The respondent urged this court to consider the above submissions, uphold the findings of the trial court and dismiss this appeal with costs.

Analysis and Determination

47. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & Anor. v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).
48. I have considered the trial court record as a whole, the Record of Appeal, the Supplementary Record of Appeal, the grounds thereof and the parties’ written submissions.
49. I find that the primary suit was filed under the doctrine of subrogation where an Insurance Company steps into the shoe of the Insured to seek compensation after compensating the Insured as is clear from the amended plaint.



50. The Black's Law Dictionary, 11th Edition at page 1726, defines the word subrogation as:
- “the substitution of one party for another, whose debt the party pays, entitling the paying party to rights, remedies or securities that would otherwise belong to the debtor.”
51. The same Dictionary also defines the doctrine of subrogation as follows:
- “The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”
52. In *Kenya Power & Lighting Company Limited v Julius Wambale & another* [2019] eKLR, the High Court stated as follows:
- “The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party.”
53. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party and to sue in the name of the insured.
54. Courts of law make determination of issues raised in pleadings or issues brought by the parties for determination. From the pleadings in the trial court, it is evident that the plaintiff the last paragraph of their Amended Complaint stated:
- “The cause of action arose at Jagorol area within the jurisdiction of this court. REASONS WHEREFORE the plaintiff prays for judgement against the Defendant in favour of M/s. GA Insurance Company Limited under its right of subrogation for....”
55. It is clear that the plaintiff had pleaded the principle of subrogation. Further, it alluded to this principle in their submissions. In this principle, that parties are bound by their pleadings was the subject of a court of Appeal decision in: *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 8 others* [2014] eKLR viz:
- “Support its contention, the appellant cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd Vs. Nyasulu* [1998] Mws 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The present importance of pleadings”. The same was published in [1960] *Current legal problems*, at P174 whereof the author had stated;
- “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which



the parties themselves have raised by pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called: "Any other business" in the sense that points other than those specific may be raised without notice."

56. This is an appeal from the appellant's subrogation claim against the respondent, a position which both the Appellant's and respondent's submissions agree with. It is clear that the main bone of contention is whether or not the appellant is entitled to the award claimed in their pleadings under the doctrine of Subrogation.

57. In the case of *Egypt Air Corporation v Sufish International Food Processors (U) Ltd and Another* [1999] 1 EA 69 the Court defined the subrogation doctrine as follows:

"The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation."

58. The principle of subrogation applies where there is a contract of insurance. If the "insured's risk" takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. Subrogation therefore presupposes the existence of an insurance contract. The doctrine of subrogation applies to indemnity insurance claims. In cases of indemnity, the insured's loss is premeditated and can be computed up to the last cent.

59. In "General Principles of Law" 6th edition (E. R. Hardy Ivamy), the author states as follows at page 493: -

"In the case of all policies of insurance which are contracts of indemnity, the insurers, on payment of the loss, by virtue of the doctrine of "subrogation" are entitled to be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance."

60. In "Bird's Modern Insurance Law" (7th edition) – John Birds, the author states as follows in chapter 15 under "subrogation":

"This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer's right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The "fundamental rule



of insurance law” is “that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified”. A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points:- subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance.”

61. Further, The Learned author Mac Gillivay & Parkington “Insurance Law” at page 471 had this to say with regard to this doctrine of subrogation:

“Nature of the doctrine. The doctrine confers two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured, whatever rights the assured assesses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a son suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party, if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss.” [Emphasis my own]

62. However, the extent of the compensation is not more than what has been paid to the insured. In the case of *George White V Jubits Corporation* (supra), it was observed:

“The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor.”

“The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a “double recovery.” The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits.”

63. Further in the case of *Opiss v Lion of Kenya Insurance Company* Civil Appeal No. 185 of 1991, it was stated that:

“The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.”

64. From the foregoing there appears to be three issues for consideration in this subrogation claim:

- i. Whether there was a binding and operative contract of indemnity between the respondent and the Insurance company in the first instance
- ii. Whether the insurance company made payment to the claimant pursuant to the original indemnity contract to which they now seek reimbursement



- iii. Whether the Appellant is entitled to the sum claimed before the Trial court for failure to deliver the consigned goods and for failure to take reasonable precaution for the safety of the goods in possession or custody thereof.

65. I will now proceed to consider each of the above issues. On the first issue, it is not denied that there was a binding and operative contract of indemnity between the respondent and the Insurance company. The appellant pleaded and the same remained uncontroverted that it had insured its goods on transit with M/s. GA Insurance Company Limited under the Insurance Policy Cover Number P-2014-100-3041-12857. There is therefore no doubt that indeed, the appellant's goods in transit were insured by the said M/s GA Insurance Company Limited.

66. Secondly, there is no doubt that the insurance company made payment to the appellant pursuant to the original indemnity contract to which the appellant now seek reimbursement on behalf of the insurance company. The general principle here was stated in *Indemnity Insurance Co. of North America and Another v Kenya Airfreight Handling Ltd and Another* [2004] 1 EA 52 thus:

“Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured.”

67. The evidence on record is clear as the appellant produced four payment vouchers, all dated 6th September 2018, of the payment received from the insurance company. As such, I find that indeed, the insurer did indemnify its insured for the loss of suffered.

68. As to whether the appellant is entitled to the sum claimed in its amended plaint, having established that there was indeed a subrogation claim by the appellant against the respondent, I find that subject to issue number three below, the appellant would have been entitled to the award, upon proof that the loss was due to negligence or intentional conspiracy of the transporter or its employed staff as per clause 4 of the contract of carriage.

69. With regard to the issue of double payment, I am satisfied that the recovery of the special damages from the respondent, if found to have been proven, would not amount to double payment. This is because the respondent is not party to that arrangement between the appellant and its insurer. The respondent is simply liable to satisfy the amount of damages suffered by the appellant who is seeking to recover the same on behalf of the insurance company under the doctrine of subrogation. This does not amount to double compensation.

70. In the case of *Abdul Razak (suing on behalf of the International Air Transport Association – IATA & ANOTHER) v Pinnacle Tours & Travel Limited & Another* [2005] eKLR the Court stated that:

“Before concluding this matter an issue has been raised as to whether the payment made by the 2nd Plaintiff to the 1st Plaintiff absolves the defendants from liability. With respect this is a misapprehension of the Law. The 2nd Plaintiff was entitled to file suit against the Defendants under the doctrine of subrogation. The claim made by the Plaintiff is one and as against the Defendants, it is joint and several. The question of double enrichment does not therefore arise.”

71. In the circumstances, therefore, the issue of double payment does not arise.

72. The last issue is whether the amount claimed was payable under the contract of carriage between the respondent and the appellant for alleged breach of the said contract as pleaded. The trial magistrate's



judgment is impugned on account that he dismissed the appellant's suit for failure to prove negligence or intentional conspiracy of the respondent or its employed staff.

73. To address this issue, I will venture widely, on the principles under common law and judicial pronouncements. As I do so, I am cognizant of the fact that the respondent did not dispute the fact that it was a common carrier and the fact that the appellant's goods got lost or were stolen while being transported by the respondent.
74. In the instant case, the appellant pleaded breach of contract and the particulars of breach were set out as follows:
- a. failure to deliver the consignment as contracted;
 - b. failure to take reasonable precaution for the safety of the goods in possession or custody thereof.
75. The appellant also pleaded that the respondent was strictly liable for the entire loss suffered by the appellant as a result of breach of contract of carriage of goods.
76. On the part of the respondent, it was pleaded that it was not responsible for the loss of the goods as the loss was due to robbery/hijacking by strangers who stole the goods and not through theft, negligence or intentional conspiracy of its employee in the transportation of the goods. It was argued that the robbery with violence was an act of hostility by enemies of the states hence the exceptions to the strict liability rule were proved by the respondent, considering that the matter was investigated by the police who confirmed that it was pure robbery with violence, with the transporter and its driver cooperating with the police in the investigations leading to the arrest of the perpetrators of the robbery, who were eventually charged with the offence of robbery with violence before a Kericho Court. Further, that even if the respondent had security escorting the goods in transit, it would have made no difference as that would not have prevented the hijacking or the robbery that took place.
77. I have perused the investigations report dated 16th August, 2018 by the Oceanic Marine Surveyors Kenya Limited. In the said report, it was stated that the police indicated that the Londiani- Muhoroni road is prone to hijackings.
78. I further observe that the alleged suspected robbers were apprehended and charged before court. However, one of the accused persons absconded while the other suspect/accused was acquitted for lack of evidence linking him to the offence. This was vide Kericho CM Criminal case No. 90 of 2019 vide judgment rendered on 28th February, 2020 by Hon B.R Kipyegon, Senior Resident Magistrate. The Prosecution in that case did not pursue the case against the accused person who absconded.
79. I have carefully considered the evidence adduced in the lower court subject of this appeal by both parties and the well written submissions in writing both on appeal and the lower court by both counsel for the respective parties.
80. 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.
81. 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.
82. The starting point is to determine whether the respondent was a common carrier or a private carrier and secondly, whether the exceptions to the strict liability rule are applicable in this case and whether they are available to the respondent.
83. The Black's Law Dictionary, 11th Edition defines a common carrier to be:
- “a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.”
84. The same Dictionary further states that a common carrier is “generally required by law to transport freight or passenger without refusal if the approved fare or charge is paid; also termed as public carrier.”
85. Robert Hutchinson, in his book “A Treatise on the Law of Carriers” 30 – 31 (1882) further describes a common carrier as:
- “... to bring a person therefore within the description of a common carrier, he must be engaged in the business of carrying goods for others as a public employment And this duty or obligation to the public by reason of the public nature of the employment and the increased responsibility imposed upon him by the law upon the grounds of public policy, mainly distinguish the common from the mere private carrier for hire.”
86. A private carrier is defined as any carrier that is not a common carrier by law. Was the respondent therefore a common carrier or a private carrier?
87. Halsbury Law of England Volume 3 para 365 at page 24 states as follows regarding a common carrier:
- “... 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...”
88. In this case, there was no dispute that the respondent was a transporter and that there was a transportation contract dated 11th November, 2017 between the two parties and the charges for transportation would be determined by mutual consent between the parties from time to time.
89. It is also not in dispute that on 27th June, 2018, the respondent received Delivery note No. 20851 from the appellant containing the quantity of the goods that were to be transported from the appellant's depot to Kisumu being 600 cartons of assorted alcoholic drinks.
90. There was no evidence that the respondent was engaged in the transport business with a special class of persons or in a special manner. He demonstrated to have been a transporter at large. The respondent in my opinion, therefore, squarely fits within the definition of a common carrier.



91. In *Express Transport Co Ltd vs. BAT Tanzania Ltd* [1968] EA 443, at P 447 the Court stated as follows concerning this aspect of common carrier: -

“... 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...”

92. From the above discussion, I am satisfied that the respondent was a common carrier. Therefore, is the respondent liable for the loss of the goods having regard to the contract of transportation and was the loss proved to have been due to the breach of contract as pleaded and asserted by the appellant or it fell within the exceptions identified above?

93. The respondent testified through its driver and director and maintained that he was not culpable for any loss for reasons that no negligence or intentional conspiracy on its part or on the part of its employees was proved and further, that, the goods were stolen through robbery with violence by unknown persons along Londiani-Muhoroni road, an incident which was reported to the Police who investigated and arrested culprits. Additionally, that as there was no proof of negligence or intentional conspiracy, it could not be held liable for the loss. It was also submitted that the appellant never pleaded negligence on the part of the respondent.

94. On the part of the appellant, it was asserted that the respondent was strictly liable for the loss as no precautions were put in place to ensure the safe delivery of the goods. Further, that in any case, there was no evidence that the robbery took place, the suspects, one of them having been acquitted as there was no evidence linking him to the robbery while the other absconded.

95. There is no dispute that the goods did not reach their final destination which was Kisumu. There is also no dispute that there were no pleadings and particulars of negligence on the part of the respondent. However, the appellant pleaded and provided particulars of breach of contract and not the tort of negligence as the two are totally different.

96. Both negligence and breach of contract are civil wrongs. However, negligence is in the nature of a Tort. It involves harm or injury to persons or property, regardless of any contractual relationship. Breach of Contract on the other hand, centers around the violation of agreed-upon terms or implied terms within a contractual arrangement. The remedies in Tort often include monetary compensation for damages or injunctive relief.

97. According to Winfield: “At the present day, tort and contract are distinguished from one another in that the duties in the former are primarily fixed by the law, while in the latter they are fixed by persons themselves. Moreover, tort duty is towards persons generally, in contrast it is towards specific persons or a specific person.”

98. The question is, when does liability for breach of contract arise in such circumstances and what are the exceptions if any to the general rule? In resolving this issue, I will examine the exceptions before



venturing into the binding decisions of the superior Courts on the subject since there is no statutorily-prescribed law at hand on the very issue.

99. Act of God: This is where, if the loss or damage to the goods being transported was caused by an act of God, such as a natural disaster or severe weather conditions, the common carrier cannot be held liable for the loss. For example, if a hurricane destroys a truck carrying goods, the common carrier cannot be held responsible for the loss of the goods.
100. Public Enemy: If the loss or damage to the goods was caused by public enemy action, such as a terrorist attack or war, the common carrier cannot be held liable. This exception is designed to protect carriers from liability in situations where they have no control over the cause of the damage.
101. Fault of the Shipper: If the loss or damage to the goods was caused by the fault of the shipper, such as improper packaging or mis-labeling of the goods, the common carrier cannot be held liable. For example, if a shipper fails to properly label a hazardous material and it causes damage to other goods being transported, the common carrier cannot be held responsible.
102. Inherent Vice: If the goods being transported have an inherent defect or quality that causes them to deteriorate or be damaged during transport, the common carrier cannot be held liable. For example, if perishable goods are being transported and they spoil during transport due to their natural tendency to deteriorate, the common carrier cannot be held responsible.
103. There are no issues regarding the other exceptions. The issue is with the exception on acts of public enemy and whether that exception as relied on by the respondent applies in this case.
104. In *Express (K) Limited vs. Manju Patel* [2001] eKLR, the Court of Appeal was emphatic that a custodian of goods is liable if the same are lost or damaged in his custody and he gives no explanation on how such loss occurred.
105. Further, in *Securicor (K) Limited vs. Drapers and Another* C.A. No. 67 of 1985 The Court of Appeal held as follows: -

“... When a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also, if the servant or agent himself steals them or makes away with them...”
106. From the above judicial pronouncements, 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 transporter services, the carrier is then under an obligation to take reasonable steps to ensure safety of the goods in transit and have them delivered to the desired and/or expected destination and that is when liability stops. In addition, the doctrine of vicarious liability is imported so that the common carrier is answerable to the acts of his servant or agent.
107. The exceptions to the above general rule were examined by the Court of Appeal in the case of *East Africa Industries Ltd vs. B.R. Nyarangi* [2009] eKLR, where the Court, upon considering several decisions on the issue, set out four exceptions on the general liability of the common carrier. These exceptions 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.

108. In *P.N. Mashru Transporters Limited vs. Rayshian Apparels Limited* [2016] eKLR, the Court of Appeal considered a case where goods were stolen while in transit and on close examination of the circumstances, the Court held that the carrier was liable for the loss incurred when the goods were stolen in transit as it did not demonstrate any of the exceptions stated above.

109. Therefore, in the instant case, for the respondent to be absolved from liability in the circumstances of this case, it was under a duty to demonstrate any of the above exceptions.

110. 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.

111. In the seminal bailment case of *Coggs v. Bernard* (1704), [1558-1774] All E.R. Rep. 1, Holt C.J. described bailment for reward as being necessary for the safety of all persons, whose affairs oblige them to trust carriers. Otherwise, these carriers might have an opportunity of undoing all persons with whom they deal, by combining with thieves and undertaking clandestine activities. The Court stated as follows, on the liability of a common carrier:

“As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to the bailee..., The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he 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 person 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 in that point.”

112. The duties of a bailee arise out of the voluntary assumption of possession of another's goods. Once the bailor proves bailment, the onus shifts to the bailee to rebut the presumption of negligence and he must prove that he took reasonable care of the property and exercised the standard of care demanded



by the circumstances of the particular case. See *Houghland v RR Low Luxury Coaches Ltd.* [1962] 2 All ER 159 and *Joseph Travers & Sons Ltd. v Cooper* [1915] 1 K.B. 73. cited in *Eorge W. Bennett Bryson's & Co. Ltd Trading as Bryson's Shipping Vs George Purcell Trading as Hortico Landscaping And Nursery.*

113. Deriving from the foregoing, it is this Court's finding that the respondent was in breach of the contract to transport the goods to Kisumu and that the loss did not fall within the exceptions stipulated above. The terse submissions that the acts of robbery with violence, which were not proved as no case succeeded against any of the suspects arrested, in my view, did not amount to evidence displacing the exceptions. Furthermore, the liability of a common carrier is unique as it contracts to deliver the consignment to its destination.
114. Acts of a public enemy are not merely acts of armed robbers. A public enemy must be so declared to be such by the state. An act of "public enemy" is a legal term that refers to acts of war or other hostile actions taken by an enemy of the state or nation. These acts are considered a threat to the safety and security of the public and may include acts of terrorism, sabotage, espionage, or other forms of aggression. Public enemies are often the subject of public scrutiny and may be pursued by law enforcement agencies. They are not merely robbers described by the respondent's counsel in his submissions.
115. From the evidence on record, I am unable to find that the loss was due to acts of public enemy as alleged.
116. I am therefore satisfied that this appeal is merited to warrant this court to interfere with the trial court's judgment. I set aside the judgment dismissing the appellant's suit against the respondent and substitute it with an order entering judgment for the plaintiff/ appellant against the defendant/ respondent herein as pleaded in the sum of Kshs 2,170,407 as per the amended plaint dated 2nd August 2022, together with costs of the suit in the lower court and interest from the date of filing suit until payment in full.
117. The respondent shall also have costs of this appeal assessed at Kshs 50,000 to be paid within 60 days of this Judgment and in default, the respondent is at liberty to execute for recovery.
118. Judgment to be uploaded to the e-portal and the lower court file to be returned together with a copy of the order and judgment.
119. Subject to the recovery of costs above in this appeal by the respondent, this file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY

R.E. ABURILI

JUDGE

