



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO. 435 OF 2011**

**TORNADO CARRIERS LIMITED.....APPELLANT**

**VERSUS**

**BAYER EAST AFRICA LIMITED.....1<sup>ST</sup> RESPONDENT**

**EXPRESS KENYA LIMITED.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the judgment of the Chief Magistrate's Court Nairobi***

***in CMCC No. 8677 of 2006, P.M. Gichohi, Senior Deputy Principal Registrar***

***delivered on 12<sup>th</sup> August, 2011)***

**JUDGMENT**

In the judgment of the lower court, the appellant and 2<sup>nd</sup> respondent were found liable to the first respondent and the court went further and condemned the appellant to pay the 1<sup>st</sup> respondent Kshs. 514,562/= plus costs and interest. The appellant was aggrieved by the said judgment and lodged this appeal.

As the first appellate court I have evaluated the evidence adduced before the lower court with a view to arriving at independent conclusions. In so doing, I have read the submissions of the parties, both in the lower court and in this appeal. The brief facts are straight forward.

The 1<sup>st</sup> respondent contracted the 2<sup>nd</sup> respondent to transport some goods from Mombasa to Nairobi. The 2<sup>nd</sup> respondent then subcontracted the appellant to carry out the said transportation. In the process, the goods were damaged and the 1<sup>st</sup> respondent sued the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent then joined the appellant as a third party hence the judgment of the court.

I have looked at the pleadings, the evidence and the judgment of the lower court. Part of the Judgment reads as follows,

***“There is no doubt that goods were damaged. The issue is who is to blame for the damage. From the evidence on record the plaintiff had no contribution in the loss involved. It is clear that the defendant was in breach of the contract between it and the plaintiff herein. The goods were damaged while being delivered to the plaintiff. The defendant failed in his obligation to deliver to the plaintiff the goods in the same condition it had received. The plaintiff had no knowledge of the contract between the defendant and the 3<sup>rd</sup> party. It was not privy to the same.***

***In the circumstances, and as between the plaintiff and defendant, I find the defendant liable.***

***The evidence on record is that the 3<sup>rd</sup> party was responsible for consolidating and packaging the goods and transporting them once they were received at the defendant's warehouse. This is not disputed. It was in the course of transportation that the goods were damaged. The vehicle was not involved in any accident. The goods were carried with others for other consignee which goods included a fork lift. The 3<sup>rd</sup> party failed to take precaution in the manner they packed the goods and transported them yet they seem to have been aware of the condition of the road they were to use. In the circumstances, I find that as between the defendant and 3<sup>rd</sup> party, the 3<sup>rd</sup> party is liable. I enter judgment accordingly. Costs follow the event.”***

The trial magistrate was concise in the analysis of the evidence. There was evidence that the road was in poor condition. This was known to the appellant. The endorsement about leakage and loss was done when the goods arrived at Nairobi. The goods which comprised drums were loose on the lorry and were not in a container.

The appellant owed a duty to the 1<sup>st</sup> respondent who had contracted the 2<sup>nd</sup> respondent to do the transportation. That duty extended to the principal and liability must therefore attach.

I find that the appeal has no merit and therefore is dismissed with costs to the respondents.

*Dated, signed and delivered at Nairobi this 10<sup>th</sup> Day of April, 2019.*

**A. MBOGHOLI MSAGHA**

**JUDGE**