



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 183 OF 2008**

**ETS PALUKU KATALIKO.....PLAINTIFF**

**VERSUS**

**SDV TRANSAMI (K) LTD.....DEFENDANT**

**1. K.K SECURITY (KENYA KAZI LTD).....1<sup>ST</sup> THIRD PARTY**

**2. HAKIKA TRANSPORT SERVICES.....2<sup>ND</sup> THIRD PARTY**

**JUDGMENT**

1. Through a plaint dated 21<sup>st</sup> July 2008, the plaintiff filed a claim against the defendant for USD 82,836 together with costs and interest of the suit therein. The plaintiff's claim is that it contracted the defendant to clear for it a container 1X 20 PICU 2045690 Seal No. J857670 from the Port of Mombasa and store the same in its yard awaiting collection by the plaintiff. It is claimed that the said container had goods valued at USD 82,836 and that while under the custody of the defendant, the container was vandalized resulting in loss of the said goods. The plaintiff further claims that the container was resealed in an effort to conceal the tampering.

2. It was further claimed by the plaintiff's witness that before collecting the container from the custody of the defendant, it was confirmed in the presence of the defendant's agents and other witnesses that the goods were missing. It was further claimed that the defendant could not give an explanation on how the container's seals were broken and replaced with custom seals.

3. In support of its case, the plaintiff called two witnesses. PW1, Kambale Ebale and PW2, Shou Dingjun. PW1 was a Director of the plaintiff in charge of overseas management. PW2 was a Salesman in International Trade Department of Huafang Company in China, from which the plaintiff had allegedly bought the goods. The said goods which were imported to Kenya were on transit to the Democratic Republic of Congo (DRC).

4. Upon service of the plaint, the defendant on 18<sup>th</sup> August, 2008 filed its written statement of defence dated 15<sup>th</sup> August 2008. Save for the descriptive parts of the plaint, the defendant denied all the other averments in the said plaint. The defendant applied for leave to issue Third Party Notices to K.K Security (Kenya Kazi Limited) and Hakika Transport Limited. This was on the basis that the Third Parties who were security and transporting agents, respectively, involved in the transportation and storage of Container 1 x 20 No. PCIU 2045690, Seal No. J857670 from the Port of Mombasa, were instrumental in the vandalism of the said container. Consequently, it led to the claim for USD 82,836. Leave was granted and the defendant served Third Party Notices to the Third Parties.

5. In its defence, the defendant maintained that the goods were consigned to the plaintiff in good condition and if at all there was theft of the consignment, then the same happened between the dock and the defendant's warehouse. The defendant averred that the container in issue was at that time in the control of Hakika Transport Services Limited (the 2<sup>nd</sup> Third Party).

6. Pursuant to leave obtained by the defendant, Third Party notices were issued against the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties, in which the defendant sought judgment in its favour against the Third Parties in the event the Court found for the plaintiff. The defendant also sought an order for compensation in full respect of the plaintiff's alleged vandalism of container 1 x 20 No. PICU 2045690 Seal No. J857670 for goods valued at USD 82,836 cleared at the Port of Mombasa, costs of the Third Party Proceedings and interest thereon in the event that the court finds for the plaintiff. The defendant alleged that the consignment was intact when it was handed over to the 2<sup>nd</sup> Third Party for transportation and that the 1<sup>st</sup> Third Party provided security at the defendant's yard when the container got vandalized.

7. The 1<sup>st</sup> Third Party filed a defence on 16<sup>th</sup> October, 2008 in which it admitted having offered security to the subject consignment and that its role was restricted to monitoring the entry and exit into the defendant's premises. It stated that its role did not include handling import and export documents on behalf of the defendant and that the defendant acted negligently by assigning its agent duties beyond its contract.

8. The 2<sup>nd</sup> Third Party filed a statement of defence on 13th October, 2008 in which it admitted to being the transporter of the subject container which was transported under the escort of the Police and Customs Officers. The 2<sup>nd</sup> Third Party averred that the said container was delivered safely and intact at the defendant's yard. It denied having interfered with the said container whilst on transit or at all.

9. This suit was initially heard by Hon. Mohamed Ibrahim J (as he then was) who took the evidence of one witness. The evidence of the second witness was taken by Hon. Justice E.M Muriithi.

### **The plaintiff's case**

10. **PW1** was Kambale Ebale. He testified as a Director in charge of overseas management of the plaintiff's company located in Butembo DRC. His evidence was that he used to import general merchandise from overseas into Kenya and transit goods to the DRC. He stated that the defendant was their clearing agent and when the subject goods were ready to be picked, the plaintiff demanded to inspect the goods but the defendant refused. On checking the register at the defendant's premises, he noticed some alterations in respect of the subject goods. He also noticed that the seals from abroad were missing and instead they had been replaced with customs seals which had super glue.

11. PW1 further testified that he reported the incident to the Police. Later on, the subject container was opened in the presence of the defendant's agents, the Police and the plaintiff's agent and it was noticed that 137 bales of Kitenge were missing. The Customs later complained that there was dumping and they impounded the container.

12. PW1 further testified that the defendant prepared documents as the plaintiff's clearing agent (p. exhibit No.3) which bore the address No. 95 Congo but the plaintiff never received the said letter and that by 8<sup>th</sup> September 2008 it had already filed this case. PW1 indicated that the plaintiff never collected the remaining cargo as the buyer cancelled the order and the goods became useless to it. PW1 further stated that he testified in a criminal case against the person who stole the plaintiff's goods but he was not aware of the outcome of the criminal case.

13. On cross-examination by Mr. Oloo for the defendant, PW1 confirmed from the bill of lading produced as p. exhibit 5 that the bales were 234 in number and the goods were from China. He stated that the invoice that was being relied on by the defendant was not accurate since the plaintiff produced the correct invoice from its Shipper in China.

14. PW1 confirmed that they discovered the theft after verification and in the container, only 97 bales remained which were later impounded by Customs and 137 bales were missing. He stated that the bill of lading and invoice are necessary to prepare Customs documents. He said that the value of the goods was Kshs. 2,291,140.215 at an exchange rate of Kshs. 64.31 to 1 US Dollar. He admitted that the amount used came to US Dollars 35,789 according to the documents from the defendant although he had produced an invoice for US Dollars 82,936 as exhibit No. 2 and that exhibit No. 5, which was the bill of lading, showed that there were 234 bales in number.

15. On being cross-examined by Mr. Obura for the 1<sup>st</sup> Third Party, PW1 stated that the plaintiff did not owe the Customs anything and that the goods were not under-declared as it was the defendant which was to do the declaration. He denied that there was dumping and the subject container was seized by Customs. He stated that the defendant being the plaintiff's clearing agent took no action and did not report the theft and that it was discovered by the plaintiff only when PW1 refused to have the container transported unchecked.

16. On being cross-examined by Mr. Omondi for the 2<sup>nd</sup> Third Party, PW1 indicated that he was given import documents from China which he gave to the defendant as their clearing agents, to clear the goods.

17. On re-examination by Mr. Oddiaga, PW1 confirmed that the subject container no. PCIU 2045690 was the number on the bill of lading (exhibit No. 5) and the plaintiff paid according to the certification. PW1 stated that the clearing agent used a bond which covers goods to the destination. PW1 indicated that he was the one who reported the theft of the goods to the Police on behalf of the plaintiff and it was not the defendant which reported about the loss.

18. **PW2** was Zhou Dingjun. He testified that he worked as a Salesman in the International Trade Department of Huafang Company Limited which deals in textile and garments. It was his evidence that his company issued the invoice for USD 82,836 to the plaintiff and he was also aware of the certification. He produced the invoice and certification as p.exhibits 2 and 3, respectively. He went ahead and testified that no invoice was ever issued to the defendant by his company.

19. On cross-examination by Mr. Obura for the 1<sup>st</sup> Third Party, PW2 stated that his duties as a Salesman are to contact and offer customers purchases and thereafter, to invoice the customers via email. The customers then pay as per the pro-forma invoice. PW2 admitted that his identity card did not bear the company stamp or any signature, that he did not have any other proof to show that he was an employee of the company. He did not also have in his possession a letter of authority from the company. He did not know when the money was paid by the plaintiff.

20. On cross-examination by Mr. Omondi for the 2<sup>nd</sup> Third Party, PW2 stated that when summons from the High Court were received, he was chosen to attend court because he was in charge of the transaction with Ketchuko but he did not have any document authorizing his attendance in court. He also indicated that their company does not issue receipts after payment. He confirmed that he did not issue any other invoice in relation to the subject container apart from the invoice and certification he produced.

21. On cross-examination by Mr. Oloo for the defendant, PW2 stated that he was requested to attend court by summons from Mombasa Court to give evidence. The said summons were received by their Manager Miss Chen Yang Yang. PW2 indicated that he was not the one who prepared the invoices and certification but he prepared the entries in the invoice. He confirmed that the invoice produced as exhibit 3 originated from their company.

22. On re-examination by Mr. Oddiaga, PW2 stated that proof of receipt of money is the certification dated 5<sup>th</sup> April, 2008 and that the

plaintiff paid for a total of four containers each at USD 82,836 and the goods would not have been released had the plaintiff not paid for the same. He clarified that Dostane International Corporation are Shippers and they were instructed by the plaintiff to deliver the goods to the said Shippers from China.

### **The defendant's case**

23. **DW1** was Mwangi Gitau. He testified that he was the Legal Manager of the defendant now known as Bollore Africa Logistics Kenya Limited which was previously known as SDV Transami (K) Ltd. He adopted his statement dated 6<sup>th</sup> February 2013 and filed on the 11<sup>th</sup> February 2013. He testified that on or about 10<sup>th</sup> July, 2008 he received oral instructions from his Manager Mehboob Virji to handle a case of suspected theft of goods and that the plaintiff's representative visited their office. A joint verification of the subject container established that only 97 bales were in the container. On the following day the Kenya Revenue Authority (KRA) issued form F89 for Notice of Goods Deposited in customs warehouse, restraining the movement of the subject container without authorization from the customs department.

24. DW1 further testified that the container was transported from the Port by the 2<sup>nd</sup> Third Party on instructions of his Manager. The manifest showed the container had 234 bales. He indicated that the yard where the container was vandalized was guarded but the 1<sup>st</sup> Third Party. He stated that by a letter dated 10<sup>th</sup> July, 2008 the Third Parties were informed of the loss and that they would be held liable for the same.

25. It was DW1's testimony that after the subject container was released by the customs department, through a letter dated 8<sup>th</sup> September, 2008 the plaintiff was informed to collect the remaining 97 bales. The letter was collected by Herman Katebo who refused to acknowledge receipt of the same. They refused to collect the bales.

26. DW1 further testified that Dennis Mulamba was charged and convicted in Criminal Case No. 2572 of 2008 for theft of goods on transit.

27. On cross-examination by Mr. Oddiaga, DW1 stated that they did not write directly to the plaintiff in Congo to inform them of the loss since the plaintiff's representative was present and that the defendant complied with the Customs. He also said that a service notice is part of the plaintiff's list of documents and that 94 bales were deposited with Customs and 3 bales were taken by the Police as evidence. DW1 indicated that the defendant did not write to the plaintiff to collect the remaining 97 bales because they assumed that Herman Katebo was the plaintiff's representative. DW1 confirmed that they received a demand letter from the plaintiff's advocate but they did not respond to it.

28. DW1 further testified that the verification of the seals was done by a KK Security Guard, one Dennis Mulamba who received the truck in the defendant's customs bonded warehouse yard and recorded in the master book that the seals were intact and container was offloaded from the truck. It was DW1's evidence that it was only when the plaintiff's representative came with a reach stacker and lifted the container that they realized that the container weighed less than the weight on the bill of lading.

29. DW1 also stated that the value of the consignment was Kshs. 2,291,140.25, which amount is contained in the customs entry document and that Herman Katebo brought the defendant an invoice of the sum of USD 35,100 which was the value of the entire consignment. DW1 could not remember writing a letter claiming USD 82,836.

30. On cross-examination by Mr. Obura for the 1<sup>st</sup> Third Party, DW1 stated that the 2<sup>nd</sup> Third Party's Driver disappeared for about 3 hours before arriving at the yard. DW1 stated that he could not verify whether the Security Guard on duty had been trained on how to verify if seals on containers were broken. DW1 did not know how the theft occurred.

31. On cross-examination by Mr. Oduor, DW1 confirmed that the container in issue was delivered on the 2<sup>nd</sup> of July 2008 and the theft was discovered on the 10<sup>th</sup> of July 2008 and there was no discovery of the tampering until the plaintiff's representative prompted the opening of the container.

32. **DW2**, Mehboob Virji testified that the plaintiff was the defendant's client and through its representative would take documents for clearance and also for transport of the cargo to Congo. He explained that the documents for the consignment in issue were received at the defendant's customer's desk. The consignment was for 234 bales valued at USD 35,100. DW2 testified that the defendant lodged a transit entry after receiving a clearance form from the Shipping Line. He indicated that the client gave a letter nominating the defendant as its clearing agent and stamped on the reverse of the bill of lading.

33. DW2 further testified that the cargo was loaded on a truck belonging to their nominated transporter (Hakika Transporters) under the customs seal to transport it to the defendant's bonded warehouse yard. The truck was received by KK Security and Dennis Mulamba the Guard on duty verified the seals and recorded that they were intact. DW2 stated that it was when the plaintiff's representative was loading the consignment with a reach stacker that he realized that the container weighed less. The weight on the bill of lading was not the same as the weight of the container at the yard.

34. DW2 gave evidence that KRA was informed of the possible theft and the plaintiff's representative refused to take delivery of the cargo based on the weight of the machine and after permission was given by the Customs, the container was opened on the 11<sup>th</sup> July 2008. It was realized that 137 bales were missing. Investigations were carried out which revealed that the 1<sup>st</sup> Third Party's employee altered the register to conceal the theft. The 2<sup>nd</sup> Third Party was informed of the delay by its Driver for 3 hours from the KPA gate to the defendant's yard.

35. In reference to invoices, DW2 testified that the invoice for USD 82,836 from Huafang Company Ltd was not the same as the one presented to them. The bill of lading the defendant produced shows that the motor vessel that carried the container in issue was KOTA WARUNA voyage No. WRA 173, while the plaintiff's invoice shows a ship by the name KOTA WARIS voyage No. WRS 165, the shipping line was Dostane International Corporation, room 1701 Houizhou Building, which is the same supplier number with the invoice supplied to

the defendant of USD. 35,100.

36. DW2 testified that if goods were found missing, the defendant had to pay duty, taxes and penalties for home conversion which was done to avoid cancellation of its license. He stated that despite several reminders, the plaintiff refused to take the remaining 97 bales.

37. DW2 testified that the 1<sup>st</sup> Third Party's employee Dennis Mulamba was charged and convicted for falsifying the register of the goods received and he has never appealed against the conviction. DW2 stated that the 1<sup>st</sup> Third Party should pay for the price of the goods at USD 35,100 even if liability attaches to the defendant.

38. On cross-examination by Mr. Oddiaga for the plaintiff, DW2 stated that a part of the consignment got lost under the defendant's care and the plaintiff did not know the Third Parties herein. The value of the consignment as per the invoices submitted by the plaintiff's representative Herman Katebo was USD 35,100 and that in another matter involving the loss of a container at the port, DW2 stated that the value of the container was 35,100. Invoice number PTD 081037 of 7<sup>th</sup> May, 2008 was from Dostane International Corporation and it was for 234 bales. It relates to this case. He stated that the 2<sup>nd</sup> invoice No. PTD 081031 dated 9<sup>th</sup> April 2008 from Dostane International Corporation for 234 bales loaded in 1x20ft container port of loading Qingdao, the value was USD 35,100, weight 17,000 kg. He stated that the two invoices were handed to the defendant by the plaintiff's representative.

39. On cross-examination by Mr. Obura for the 1<sup>st</sup> Third Party, DW2 stated that his job was to review security, ensure sufficient security and there was CCTV at the defendant's yard which was working but at the time of the theft, it was not working. He stated that in the contract signed between the defendant and 1<sup>st</sup> Third Party, the latter was to man what goes in and out of the defendant's yard, register the container numbers and condition of the seals. They maintained the master book which would be reconciled with the records every two weeks.

40. DW2 further stated that the master book belonged to the defendant and he was not aware if the 1<sup>st</sup> Third Party signed for a new master book. He stated that it was the yard supervisor who was in charge of reconciling the containers that came in and out of the yard and checked the seals. He added that the said verification was done in the morning and evening. The yard supervisor did not note anything amiss with the subject container and there was no representative of the plaintiff at the time of the delivery of the container at the yard.

41. DW2 stated that the Security Guards for the 1<sup>st</sup> Third Party had been trained on ascertaining if the seals were broken at the time of receiving the goods but he did not know whether Dennis Mulamba was trained and by which person but the Transport Supervisor and the Security Manager used to train the 1<sup>st</sup> Third Party Security Guards. DW2 was not aware if it was the duty of Dennis Mulamba to check the seals at the time of delivery.

### **The 2<sup>nd</sup> Third Party's Case**

42. The 2<sup>nd</sup> Third Party's witness one Harold Wafula Mufutu testified that he worked for the 2<sup>nd</sup> Third Party as a Legal Assistant Manager and they were supposed to transport the subject container from the Port to the defendant's yard and their driver was Wiliam Sang. A delivery note No. 63981 was issued by the 2<sup>nd</sup> Third Party to the defendant. The latter stamped it to signify that there was delivery of the subject container. He stated that the said Driver left the services of the 2<sup>nd</sup> Third Party. He indicated that they did not participate in the criminal case proceedings and that the Driver was never charged with any offence and that he was a witness in criminal case No. 2572 of 2008.

43. On cross-examination by Mr. Oddiaga for the plaintiff, the witness confirmed that the Driver carries the delivery note and the recipient signs to signify receipt of cargo. The witness for the 2<sup>nd</sup> Third Party testified that the defendant stamped and signed the 2<sup>nd</sup> Third Party's delivery note.

44. On cross-examination by Mr. Busieka for the defendant, the said witness stated that he had no legal training and that he was not the maker of the documents which he had produced.

### **ANALYSIS AND DETERMINATION**

45. This Court has carefully considered the parties' pleadings, evidence and submissions. The Court has also considered the relevant law and precedents on the key issues falling for determination.

46. Issues not in dispute

- i. The plaintiff contracted the defendant to clear container No.1 X 20 No. PICU 20456690 Seal No. J. 857670 from the Port of Mombasa as its clearing agent;
- ii. Herman Katebo was an authorized agent of the plaintiff;
- iii. The container was cleared by the defendant and transported by the 2<sup>nd</sup> Third Party to the defendant's yard for safe keeping awaiting collection by the Plaintiff; and
- iv. There was theft of 137 bales of cargo at the defendant's yard and 97 bales remained.

47. The consolidated issues for determination are:-

**(i) What was the value of the consignment;**

**(ii) Who is to blame for the theft? and**

**(iii) Whether the plaintiff should have remedied its losses by collecting the remaining 97 bales.**

#### **What was the value of the consignment**

48. There was admission by the plaintiff and the defendant that theft of 137 bales of the plaintiff's cargo took place. The dispute is the value of the specific consignment. The plaintiff through PW1 admitted that the defendant was its clearing agent and in cross-examination confirmed that all documents in an envelope were handed to the defendant to facilitate clearance of the consignment. PW1 also admitted that a bill of lading and invoice are necessary in the preparation of documents for customs entry clearance.

49. In support of the value of the invoice of USD 82,836 the plaintiff called PW2 who purported to be a Salesman in the International Trade Department of Huafang Company Limited, a company that deals in textile and garments. He acknowledged that the invoice of USD 82,836 originated from their company.

50. On cross-examination, PW2 stated that they contact their customers through email and that they never sent the defendant any invoice. PW2 admitted that his identity card did not bear any signature or company stamp, he did not have a letter of authority from the company, he did not have a contract of employment with the company and he did not have evidence to show that a sum of USD 82,836 was paid by the plaintiff to their company for the cargo in issue. He confirmed that he did not prepare the invoices and certification and that Dostane International Corporation were Shippers hired by the plaintiff

51. On the part of the defendant, DW1 testified that Herman Katebo brought them an invoice for the sum of USD 35,100 as the value of the entire consignment and that was reflected on the customs entry document as Kshs. 2,291,140/=, which when converted into US Dollars was USD 35,100. DW2 testified that the plaintiff's representative furnished the defendant with an invoice, a bill of lading and a packaging list and that the defendant lodged a transit entry after receiving a clearance entry from the Shipping Line. He stated that the value of the bill of lading was USD 35,100 based on the clearance of the documents that were lodged.

52. The plaintiff acknowledged that Herman Katebo was its authorized agent and the defendant's witnesses stated they were supplied with copies of the invoice and the bill of lading by the said plaintiff's representative to facilitate the clearance of the subject consignment.

53. It is my finding that the defendant's assertions on the value of the consignment remain uncontroverted since no evidence was called to displace the inference that the bill of lading and invoice were provided to the defendant by a duly authorized agent of the plaintiff. The evidence by the defendant that the value of the goods according to the customs entry was Kshs. 2, 291,140.25, which equates to USD 35,100 at the exchange rate as at that time, cannot be displaced as it was the plaintiff's agent who took a copy of the invoice and bill of lading for the cargo in issue to the defendant to clear the goods.

54. The plaintiff failed to annex a bill of lading which corresponds to the quantity exhibited on the invoice of USD 82,836. The weight and quantity of the cargo is reflected both in the invoice and the bill of lading furnished by the defendant while the invoice furnished by the plaintiff only shows the container number and seal number but the weight is not shown. The quantity of 190 bales reflected thereon is misleading. It is therefore my finding that the invoice produced in support of the plaintiff's case cannot be relied upon and I hold that it does not relate to the container in issue. The said container had 234 bales of textile and not 190 bales as per the invoice relied on by the plaintiff with a value of USD 82,326.

55. The evidence adduced by PW2 is of no probative value since there was no authority from the company he claimed to work for to give testimony on its behalf and also he testified that he was not the one who prepared the invoices he produced in court. He was not sure when the goods were paid for but confirmed that a certification and the release of goods was sufficient proof of payment.

56. It is my finding that the defendant has on a balance of probabilities proved that the total value of the subject consignment was USD. 35,100 as per the bill of lading produced by them in evidence. If by any chance the plaintiff bought the goods in issue at USD 82,826, it gave the defendant a bill of lading for the sum of USD 35,100 for customs clearance. It would therefore mean that the plaintiff understated the value of the goods for reasons best known to itself. The plaintiff cannot now turn around and claim to have bought the goods for USD 82,826. The 190 bales reflected on the invoice the plaintiff relied on does not even tally with the evidence adduced that the plaintiff had imported 234 bales of clothing material.

#### **Who is to blame for the theft?**

57. It was the plaintiff's claim that the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties are strangers to it as it only engaged the services of the defendant as a clearing agent. It was while in the care and custody of the defendant, its goods were vandalized and stolen. Upon being served with the pleadings the defendant herein applied for leave to issue Third Party notices to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties, which was granted. It has been admitted that the defendant's yard was guarded by the 1<sup>st</sup> Third Party which through its employees ensured that the goods going in and out of the yard were documented. The 1<sup>st</sup> Third Party sought leave to produce its contract with the defendant but the application was dismissed for having been brought very late in the day after the defendant had already called its two witnesses. Therefore, the 1<sup>st</sup> Third Party never called any witness to support the averments in its statement of defence and therefore, the averments therein remain just mere allegations.

58. The 2<sup>nd</sup> Third Party's witness, a Legal Assistant by the name Harold Wafula Mufutu though not the author or recipient of the documents relied on by them, produced an inventory of the cargo delivered and the subject container is among the cargo that was received at the defendant's yard. He also produced a receipt issued by the Kenya Ports Authority that shows that the cargo went through customs clearance.

The defendant stamped the cargo receipt and the inventory to signify that there was delivery of the subject container.

59. He also testified that the driver who did the delivery had since left the services of the 2<sup>nd</sup> Third Party to Buzeki Transporters. The said Driver was not called to testify in this case but he gave evidence in the criminal case against Dennis Mulamba, the 1st Third Party's Security Guard who was convicted for the theft of the cargo and for fraudulent false accounting. In the foregoing circumstances, it is clear that having accepted the goods that are the subject of this suit, it became the defendant's responsibility to ensure the safe delivery of the cargo to its yard and for the safe custody of the same. The defendant had been assigned the work of a clearing agent for the plaintiff's goods and is the one which arranged for storage of the same. I therefore find that defendant is liable to the plaintiff for the loss of 137 bales of clothing material. I enter judgment in favour of the plaintiff against the defendant for the said loss.

60. In **Securicor (K) Limited vs Drapers and Another, Civil Appeal No. 67 of 1985**, the Court of Appeal took the position that:-

*"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."*

61. In the case of **United Manufacturing Company Ltd. v. Wafco Ltd [1974] EA 233** the majority of the Court of Appeal's predecessor held that the bailee would be vicariously liable for its employees' acts. Mustafa, J.A., stated as follows at page 243:

*"I think it is clear that the respondent's employees were engaged in bonded warehouse to safeguard and look after the goods stored by the appellant. In stealing or helping steal such goods while in their custody would clearly be acting in the course or within the scope of their employment, albeit in unlawful manner. The respondent would be liable for its employees' acts."*

62. Going by the evidence adduced by the defendant against the 1<sup>st</sup> Third Party's Security Guard whom it had deployed to the defendant's yard was under a duty to ensure that the cargo was safe. The Security Guard who was manning the gate at the defendant's yard where the plaintiff's goods were kept was charged and convicted of theft and fraudulent false accounting, as a result thereof, the 1<sup>st</sup> Third Party is therefore liable to indemnify the defendant for its loss. I therefore enter judgment against it in favour of the defendant.

63. With regard to the 2<sup>nd</sup> Third Party, it was contracted by the defendant to transport the plaintiff's goods from the Port of Mombasa to the defendant's yard. According to the documents produced in court, the goods were delivered safely. No evidence was adduced to demonstrate that the 1st Third Party's Security Guard and the Driver of the 2nd Third Party colluded to steal the goods from the container in which the plaintiff's goods were stored. The alleged delay of 3 hours by the 2nd Third Party's Driver cannot be conclusively said to have been deliberately occasioned so as to give an opportunity to the said Driver or another party to pilfer goods from the container in issue. If the said goods got lost in the hands of the 2nd Third Party's Driver as alleged by the defendant and the 1<sup>st</sup> Third Party, they failed to prove it. I therefore find that the 2nd Third Party is not liable for the loss of the plaintiff's goods. The claim against it by the defendant is hereby dismissed.

#### **Whether the plaintiff should have remedied its losses by collecting the remaining 97 bales**

64. As earlier stated, Mr. Herman Katebo was a duly recognized plaintiff's agent and he was requested to collect the remaining cargo belonging to the plaintiff but he refused to pick it saying that its customer had since cancelled the order and that it would have been illegal to transport cargo that had been tampered with. The evidence of DW1 was that Customs had given clearance for the 97 bales to be collected. Failure to collect the same led the defendant to pay duty for the said goods in order to prevent the withdrawal of its trading licence.

65. Even if PW1 testified that the buyers of the goods cancelled the orders for the said goods, the plaintiff could have applied for re-shipment of the goods and could have looked for market for the remaining goods in the DRC. Apart from PW1 stating that it would have been unlawful to reship the goods, this court's attention was not drawn to the relevant law that forbid the entry of part of the cargo that had been imported to the DRC. Therefore, it is my finding that the plaintiff ought to have remedied its losses by collection of the remaining bales of clothing material for re-shipment.

66. In **African Highland Produce Ltd v John Kisorio Civil Appeal No. 264 of 1999**, the Court of Appeal stated as follows:-

*"The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum, which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort and he is then bound to act, as best he may not only in his own interest but also in those of the defendant."*

67. In this case, the plaintiff proved its case on a balance of probabilities against the defendant. The defendant in turn proved its case on a balance of probabilities against the 1st Third Party. Although the plaintiff gave the value of the entire consignment as USD 82,836, the bill of lading and invoice which had been given to the defendant for customs clearance for the said goods was for USD 35,100. Having found that the entire consignment of the plaintiff's cargo was not stolen, the plaintiff is entitled to compensation for the 137 bales that were stolen. The upshot of the foregoing is that the suit is partly successful. The final orders are that:-

(i) The defendant is liable to the plaintiff for the value of the 137 lost bales of clothing material and shall pay the plaintiff the sum of USD 20,550.00 at the exchange rate that was applicable at the time the loss of the goods occurred;

(ii) The plaintiff is awarded costs of the suit which shall be met by the defendant;

(iii) The 1st Third Party shall indemnify the defendant in the sum of USD 20,550.00 for the loss of the goods in issue;

(iv) The 1st Third Party shall indemnify the defendant for the costs of this suit against the plaintiff;

(v) The defendant shall meet the costs of the 2nd Third Party for this suit; and

(vi) Interest is awarded to the plaintiff at court rates.

**DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of July, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Mwanzia for the plaintiff

Mr. Oddiaga for the 1st Third Party

Mr. Otieno V. for the defendant

Mr. Kiseo holding brief for Mr. Waweru for the 2nd Third Party

Mr. Oliver Musundi – Court Assistant