



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 686 OF 2009
G4S SECURITY SERVICES (K) LIMITED.....APPELLANT

VERSUS

MARTI TELECOMMUNICATIONS LIMITED.....RESPONDENT

(Appeal from the original judgment and decree of Hon. Miss. Maina in Milimani

Commercial Court CMCC No. 3771 of 2008 delivered on 9th November, 2009)

JUDGMENT

1. The Respondent herein filed Milimani Commercial Court CMCC No. 3771 of 2008 against the Appellant. It was the Respondent's claim that it had a contract with the Appellant to carry the Respondent's goods i.e. Safaricom airtime cards from Nairobi to Nakuru and deliver them to one Mr. Muhamud Omar. It was alleged that on 13th March, 2008, the Appellant received the said goods but did not deliver them. That in breach of the term of the contract the Appellant failed to deliver the goods as instructed, failed to take proper care of goods entrusted to it and exposed the Respondent to loss of KShs. 426,816.03. The Appellant in its statement of defence denied the Respondent's claim.

2. It came out in the Respondent's evidence that PW1, the Respondent's manager that he purchased airtime worth KShs. 1,100,225/= for sale in the Respondent's Nairobi and Nakuru branches. He packed airtime worth KShs. 437,726.25 for delivery to the Nakuru branch. He noted down their serial numbers and their denominations. He handed over the said parcel to PW 2, Ahmed Yusuf who took it to the Appellant's Hilton office for delivery. He stated that the parcel was accepted and a consignment sheet no. 999393 was issued thereto upon payment of the courier fee of KShs. 200. It was his testimony that the parcel was expected to be delivered on 14th March, 2008 but the parcel was not delivered.

3. PW3, Ali Osman Noor, who went to collect the parcel on 14th March, 2004 was informed by the Appellant's agent that the parcel had not been received from Nairobi. Upon realisation that the cards had gotten lost, PW1 reported to police and asked Safaricom to block all the airtime cards. Cards worth KShs. 426,816.03 had already been utilised. A purchase order number 89, a Safaricom sales invoice and a pick list (P. Exhibit 2,3 and 4) were produced in evidence.

4. DW1, the Appellant's assistant operations manager admitted that the parcel was received on 13th March, 2008 for their transmission to the Respondent's Nakuru office. He however stated that it was not clear to him whether or not the parcel reached the Respondent's Nakuru office. He contended that clause 2b of the Appellant's conditions of service limited the liability for loss to KShs. 1,000/=.

5. The trial court heard the matter and held the Appellant liable for the loss of the parcel and entered judgment against the Appellant in favour of the Respondent for KShs. 426,816.03. The Appellant felt aggrieved by the said decision and filed this appeal on grounds that:-

i. The learned magistrate erred in law in holding that the limitation in clause 2 (b) of the Conditions of Service only applied to loss of data.

ii. The learned magistrate erred in law in failing to follow the decision of the Court of Appeal in Civil Case No. 323 of 2002., Securicor Courier (K) Limited v. Benson David Onyango and Another

6. Learned counsel for the Appellant, Miss. Kirimi submitted that the Conditions of Service were clear that liability was limited to KShs. 1,000/=. Counsel cited **Securicor (K) Limited v. Benson David Onyango & Another (2008) eKLR**. In the said case the consignment lost comprised of a Sony Television and a JVC system. The conditions of service in the consignment sheet which formed the contract between the parties therein was considered in determining the amount of damages recoverable. It was found in this suit that the Appellant therein having brought to the attention of the 1st Respondent therein the conditions of sale discharged its duty upon signing the sheet, the exemption clause was automatically incorporated in the contract. The effect thereof was that the exception clause was considered to have been brought to the attention of the 1st Respondent. It was found that the exception limited the Appellant's liability for negligence to the cost of replacing the consignment subject to a maximum of Sh. 1,000/= in respect of one claim.

7. Learned counsel for the Respondent, Mr. Mutua on the other hand submitted that from the issues of the claim, the question is whether the claim was based on the tort of negligence or pure theft and submitted that the case cited by the Appellant was not applicable in this matter. It was stated that in the instant case, the Appellant did not investigate or cooperate. That the Appellant did not explain what had happened to the parcel. He contended that the limitation clause was not broadly shown.

8. In response thereto, Miss. Kirimi submitted that the Respondent's claim was predicated on breach of contract of carriage.

9. This being a first appeal, this court is under duty to re-evaluate the facts afresh, assess it and make my own independent conclusions. See **Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123**.

10. I have considered the dispositions in this appeal and re-evaluated the pleadings and the evidence on record. The parcel subject matter of this appeal is a consignment as per the description in clause 1 (a) of the Conditions of Service. The applicable condition thereby is clause 2 (b) of the Condition of Service which is subject to the provision of clause 3. Clause 2(b) it to the following terms:-

" damage resulting from loss of or damage to a consignment occurring during any period of the Company's responsibility and which was caused solely by negligence on the part of the servants or agents of the Company acting in the course of their employment provided that this indemnity shall apply only to loss or damage represented by or consisting of costs of replacing such consignment and (in the case of data) of the hiring of any additional computer time necessitated thereby with an overall maximum of Kenya Shillings One Thousand (KShs. 1,000/=) in respect of any one claim and subject further to a maximum of Kenya Shillings Twenty Thousand (KShs. 20,000/=) in respect of all such loss or damage occurring in any consecutive period of 12 months. (This indemnity shall not, nor shall any liability of the Company its servant or agents to the Customer , on any ground or for any cause whatever or under any circumstances extend to) any consequential loss or to (any loss or damage other than the cost of replacement) and (where appropriate) computer time is as aforesaid." (Emphasis mine)

11. I note that the Respondent did not deny being issued with the consignment sheet which contained the Conditions of Service. It was incumbent for the Respondent to read the terms of service before appending their signature. Having appended the signature, it is to be taken that they were agreeable and were to be

bound by the terms therein. It is indicated at the front page of the said sheet that "**customers are advised to self insure all items of value being sent through the courier service**". Having appended the signature, the Respondent were bound by the terms therein including ensuring that they self insured the cards they were sending. All said and done, I am of the view that the advice to clients to self insure is in bold and the conditions of service and the limitations are very clear. I agree with and fortified by the **Securicor (K) Limited** case (supra), the clause limiting liability was binding to the Respondent. This appeal is therefore merited and the trial court's decision is set aside. The judgment is thus entered for the Respondent against the Appellant for KShs. 1,000/= . The Appellant shall have costs of the appeal.

Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Miss. Miring'u for the Appellant.

N/A Mutua Mboya for the Respondent.