



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1495 OF 1982

CHINGA TEA FACTORY COMPANY LTD.....PLAINTIFF

VERSUS

MIUGU GENERAL TRANSPORT CO LTD.....DEFENDANT

JUDGMENT

The plaintiff herein Chinga Tea Factory Company Ltd, a limited liability company, sued the defendant, Miugu General Transport Company Ltd, also a limited liability company, for loss and damage caused to their consignment of 240 chests of tea which the defendant was transporting from the plaintiff's factory at Chinga along the Murang'a/Chinga road for delivery to Mombasa. The plaintiff alleged that it was due to the defendant's negligence in the way its Leyland lorry was driven, which resulted in the vehicle being involved in an accident, thus causing the loss and damage complained of.

The defendants did not appear in court on the day of the hearing, though their advocate on record Messrs Macharia and Njore, advocates of Thika, were served with a hearing notice. A copy of a hearing notice was produced in court, showing that they had received it and affixed their stamp at the back.

Because of that evidence showing that they had been served with a hearing notice, I proceeded to hear the case *ex-parte*, since I did not receive any explanation why they were not in court. I recorded evidence from four witnesses, on behalf of the plaintiff. First was the evidence of David Njoroge Chuchu, (PW 1), who, during the period 1980 – 1983, worked at Chinga Tea Factory first as an assistant manager, and later as the factory manager.

During the course of his work with the plaintiff company, he got to know the defendant, who was their transporter since the plaintiff company got into an agreement with it to transport tea for them for a period of 12 months. The period ran from September 1, 1979. A copy of the agreement was produced as Ex 1.

The witness recalled that on October 11, 1980, a consignment of 240 chests of tea was loaded from the plaintiff's factory, into a Leyland lorry No KRG 688, belonging to the defendant. The tea was to be transported to Mombasa. He produced as Ex 2 the documents that accompanied the consignment as required by regulations.

This consignment of tea, however, did not reach Mombasa as was supposed to, because the lorry was involved in an accident and the tea was destroyed. Whatever was salvaged was taken back to the factory and sorted out afresh, thus causing a lot of expenses as shown on the plaint. The plaintiff was insured, so the insurance met the loss, but that money has not got to be recovered from the defendant whose negligence resulted in the accident. For the purposes of the plaintiff company, the accident was

investigated by Patrick Ndungu Kairo of Kenya Tea development Authority, who were the managing agents and secretaries, managing the plaintiff's company on their behalf.

After receipt of the report of the accident, Mr Kairo went to the scene of the accident and found the vehicle lying in a trench off the road, about 80 ft deep. The road at that portion he noticed goes downhill and has a bend. There are metal rails put by the bend to stop vehicles falling off into the trench, in the unfortunate event of an accident. Mr Kairo noticed that these metal rails were knocked down, leaving a space of about 10 ft wide. He concluded that the lorry must have lost control, hit and broke the metal rails and dropped into the soft deep trench. His further observation of the vehicle revealed that the tyres of the lorry were very smooth, ie worn out.

Mr Norman Woodgates, "a loss adjuster" with Toplics and Harding, quantified the loss suffered in this case, as far as the tea was concerned. He saw the tea that was salvaged at Chinga Tea Factory, and had it weighed. He thereafter compiled a report, which he forwarded to Kenya commercial corporation the insurers of the plaintiff's goods, whilst on transit. The report was Ex 4 in court. Mr Woodgates assessed the loss suffered at Kshs 72,224. His fees was Kshs 3,605.

The defendant driver's original statement of how the accident occurred was Ex 3 in court. Mr Woodgates had sight of it, whilst he was compiling the report. Finally was the evidence of Joackim Okulo, of Kenya Commercial Insurance company the insurers of the plaintiff company. They provided the company with a cover for their goods in transit. It was this insurance company that instructed Mr Woodgates to investigate and compile a report concerning the accident of October 11 1980. A report was produced showing the estimated sum of the loss, Kshs 74, 224.

The Insurance company paid that sum to the plaintiff company, who in turn gave them a letter of subrogation, Ex 5. They also paid a fee of Kshs 3,605. In total they paid a total of Kshs 77,829 which they are now claiming under subrogation.

After the evidence, I received written submissions, which now form part of the record. However, according to evidence on record, which is also reflected on Ex 1, the contract between the plaintiff and defendant ran for 12 months, from September 1, 1979. This would have put it to about September 1, 1980.

The date the plaintiff's consignment was being transported by the defendant was October 11, 1980. By mere calculation, this was a few days after the expiry date of the contract, yet the defendant agreed to transport the tea. I would say therefore that by implication the defendant "carried out" the contract. By his conduct, he acted as if the original contract was either still in force, or was renewed on the same terms. In this aspect, I am in agreement with Mr Shimenga's submission that by the defendant's act of transporting the tea a few days after the expiry of the contract aforesaid, the original agreement between them continued to operate. This evidence has not been challenged in anyway. I find from evidence I have just analysed that the contract of transportation between the plaintiff and the defendant continued to operate on same terms even after the expiry of the term.

The defendant's vehicle was involved in an accident according to their driver's own written statement, Ex 3, he "lost the braking system of the vehicle", whatever that means. Further evidence revealed that the vehicle's tyres were badly worn out. From this evidence I found that it was the braking system of the vehicle coupled with the defective tyres that caused the accident. These 2 factors showed negligence on the part of the defendant in not keeping the vehicle in a good working order, which vehicle the defendant loaded with the plaintiff's goods for transportation to Mombasa. I find that defendants were negligent in not ensuring that the plaintiff's goods were transported safely. The value of the tea destroyed is as per the evidence led in court, which I accept.

From all the evidence I have analysed and considered, I find that the plaintiff has proved his case against the defendant on a balance of probabilities, and I find judgment for the plaintiff under prayers 1,2 and 3 as prayed in the plaint. For the purposes of prayer (2), I consider the date of, "filing the suit", to be May 12, 1982, and date of judgment to May 6, 1987.

Dated and Delivered at Nairobi this 6th Day of May, 1987

J.A. ALUOCH

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JUDGE