

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E078 OF 2023

**ROUTE CRUISER LOGISTICS
LIMITEDAPPELLANT**

VERSUS

**KENAFRIC INDUSTRIES LIMITED
RESPONDENT**

(Being an appeal from the judgment delivered by Hon. E.K Suter (PM) on 6th April 2023 in Mavoko CMCC No. 901 of 2019)

JUDGMENT

1. This is an appeal on both liability and quantum. The appeal arises from a suit instituted by the Respondent vide a Plaint dated 24th October 2019 in which the Respondent sued the Appellant for breach of contract.
2. The Respondent pleaded that pursuant to an agreement, the appellant, acting as the common carrier, transporter and or bailee of the goods, undertook to transport 1200 drums of glucose from Mombasa port to Baba Dogo in Nairobi using Motor Vehicle Registration Number KBS 452W/ZC 1896.
3. It was averred that an express term of the agreement was that the Appellant would ensure the safety of the consignment while in its possession and deliver the goods in the same condition in which the received. The

Respondent further pleaded that in breach of this agreement, the appellant or its agents negligently drove Motor Vehicle Registration Number KBS 452W/ZC 1896 on or about 19th October 2016, thereby damaging 20 drums of glucose forming part of the consignment.

4. As a consequence of the alleged breach, the Respondent sought restitution and or recompense for the damaged goods in favour of M/S GA Insurance Limited pursuant to its subrogation rights in the sum of Kshs 330, 479/= together with interest from the date of filing the suit until payment in full and costs of the suit with interests at court rates.
5. The Appellant filed a defence denying the Respondent's claim in its entirety. During the hearing before the trial court, the Respondent called 3 witnesses while the Appellant did not call any witness in support of its defence. After hearing and analysis of the evidence presented, the trial court entered judgment in favour of the Respondent as prayed in the plaint, together with costs and interest from the date of filing the suit.
6. Aggrieved by the decision of the trial court, the appellant lodged this appeal. The Appellant contends, inter alia, that the Learned Trial Magistrate erred in law and fact and exhibited bias by finding that the Appellant was in possession of and transported the consignment despite there being no documentary evidence of an agreement for transportation; by wrongly holding that the Appellant was a common carrier and bailee notwithstanding evidence

that it neither owned Motor Vehicle Registration Number KBS 452W/ZC 1896 nor entered into such agreement; failing to appreciate that the Appellant acted merely as an agent and that the Respondent, as principal, bore the obligation to insure the goods.

7. The Appellant further faulted the trial court for finding that the Appellant's driver was solely to blame for the accident without proof, and for failing to consider that the vehicle belonged to a third party and that no criminal charges were preferred in respect of the accident. The Appellant also challenged the court's findings on the existence of a marine insurance contract, subrogation, and indemnification by GA Insurance Limited, and contended that the loss assessment was conducted without its participation.
8. For those reasons, the appellant prayed that the Judgment of the trial court delivered in 6th April 2023 be set aside and the costs of the suit and appeal be provided for.
9. The Appeal was canvassed by way of written submissions.

Appellant's submissions

10. The Appellant challenges the entirety of the trial court's judgment, contending that the learned magistrate was biased and erred both in law and fact. At the core of the Appellant's case is that the argument that, despite expressly acknowledging that no written agreement for transportation of the consignment had been produced,

the trial court nonetheless arrived at contradictory findings that the goods were in the possession of, and transported by, the Appellant.

11. The appellant submits that no contractual relationship was established between the parties, and that the court erred in finding, without a proper evidentiary basis, that the Appellant was a common carrier or bailee. It is further contended that documentary evidence, including logbooks, showed that motor vehicle KBS 452 W/ZC 1896 did not belong to the appellant, and therefore the appellant could not have assumed the legal obligations attributed to a common carrier.

12. The Appellant further submits that the trial court wrongly imposed upon it the duties of a common carrier, including the obligation to deliver the goods in the same condition, in which they were received notwithstanding its position that it merely acted as an agent for transportation. Under the alleged arrangement, the Respondent, as principal, bore the obligation to insure the goods. The appellant also impugns the finding that its driver was wholly to blame for the accident, contending that this conclusion was reached without proper consideration of evidence and without due consideration of the fact that the vehicle belonged to a third party and that no traffic charges were preferred against any person following the accident. Additionally, the Appellant faults the trial court's findings on the existence of a marine

insurance contract, indemnification, and subrogation, arguing that critical procedural omissions such as the failure by the loss assessor, Moses Kariuki, to involve the Appellant in the assessment of the damaged goods were ignored.

13. On the role of the first appellate court, the Appellant relies on **Abok James Odera t/a A.J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR**, emphasizing the duty of the appellate court to re-evaluate, reassess, and reanalyse the evidence on record and to draw its own conclusions. The appellant also cites **Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR** for the proposition that an appellate court may interfere with a trial court's exercise of discretion where it is shown to have been whimsical, capricious, or prejudicial. It is argued that the impugned findings meet this threshold and ought to be set aside.

14. On the issue of liability, and specifically whether the Appellant's driver was sole to blame for the accident, the Appellant disputes the trial court's conclusion. While acknowledging the general principle stated in **Express (K) Limited vs Manju Patel [2001] eKLR** that a custodian of goods may be liable for loss or damage in the absence of an explanation, the appellant submits that that such liability only arises where goods are proven to have been in the custody of the alleged carrier. If further relies

on **Securicor (K) Limited vs Drapers & Another, C.A. No. 67 of 1985**, which affirms that a principal is liable for the acts of its agents where it owes a duty to safeguard goods; however, the Appellant maintains that this presupposes the existence of a contractual duty which did not arise in the absence of a contractual relationship.

15. The Appellant elaborates on the law governing common carriers, submitting that liability attaches only upon acceptance of goods for transport and continues until delivery, subject to recognized exceptions. Reliance is placed on **East Africa Industries Ltd vs B.R. Nyarangi [2009] eKLR**, where the Court of Appeal set out four exceptions to a carrier's liability: acts of God, hostilities involving the State, fault of the consignor, and inherent vice in the goods. Further reference is made to **P.N. Mashru Transporters Limited vs Rayshian Apparels Limited [2016] eKLR**, where the Court held a carrier liable for theft of goods in transit due to failure to establish any of the recognized exceptions. The Appellant invokes these authorities to argue that liability is not absolute and must be assessed on the specific facts of each case.

16. On negligence, the Appellant contends that the trial court erred in finding that the Respondent had proved negligence on the part of the Appellant's driver. It submits that the accident occurred when the driver attempted to avoid a matatu that abruptly changed lanes,

causing the lorry to overturn. The Appellant characterizes the incident as unavoidable and submit that mere occurrence of an accident does not, of itself, amount to proof of negligence. In support, reliance is placed on **Simpson vs Peat (1952) 1 All ER 447 and Rambhai Shivabhai Patel & Another vs Brigadier-General Arthur Corrie Lewin [1943] 10 EACA 36**, both of which affirm that an accident alone is not evidence of negligent driving and that an error of judgment does not necessarily constitute negligence.

17. The Appellant also addresses the concept of duty of care, citing **PNM & Another (the legal personal representative of estate of LMM) vs Telkom Kenya Limited & 2 Others [2015] eKLR**, which affirms that drivers owe a duty of care to other road users and passengers. Further reference is further made to **Bourhill vs Young [1943] AC 92**, where it was held that the duty of care extends only to persons reasonably foreseeable as being at risk, and to **Lochgelly Iron & Coal Co. Ltd vs McMullan [1934] AC**, which define negligence as requiring proof of duty, breach, and resulting damage. The Appellant further relied on **Blyth v Birmingham Waterworks Co (1856)**, which defines negligence by reference to the conduct of a reasonable person.
18. Applying these principles, the Appellant submits that its driver acted reasonably in the circumstances by attempting to avoid a collision and therefore cannot be

found negligent. It further invokes **Coggs v Bernard [1558-1774 All ER 1-10]**, which outlines the strict liability of common carriers while recognizing exceptions, including acts of God and hostilities involving the State. The Appellant argues that the circumstances of the present case falls within such exceptions and that it should not be held liable for the loss of the goods.

19. On costs, the Appellant submits that an award of costs is discretionary under Section 27 of the Civil Procedure Act and is not automatic. While costs generally follow the event, the court retains the discretion to depart from this principle for good reason. Reliance is placed on **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR** where the court, explained that “the event” refers to the overall outcome of the litigation, and that costs may be apportioned depending on success or failure on distinct issues.

20. In conclusion, the Appellant urges the appellate court to find that the trial court’s decision was based on erroneous findings of fact and law, misapplication of principles governing common carriers and negligence, and failure to properly evaluate the evidence. The Appellant prays that the judgment be set aside in its entirety, that it be absolved from liability and that appropriate orders as to costs be made.

Respondent’s submissions

21. The Respondent opposes the appeal and urges the court to uphold the judgment of the trial court in its entirety, submitting that the appeal is devoid of merit both in fact and in law. At the outset, the Respondent invokes the established principle guiding a first appellate court as set out in **Selle & Another -Vs- Associated Motorboat Co. Ltd. & Others (1968) EA 123** emphasizing that while an appellate court is obliged to reconsider and re-evaluate the evidence and draw its own conclusions, it must nonetheless bear in mind that it did not have the advantage of seeing or hearing the witnesses.

22. On the facts of the case, the Respondent submits that a contractual relationship existed pursuant to which the Appellant was engaged to transport 1,200 drums of glucose from Mombasa to Nairobi. During transit, the vehicle conveying the goods was involved in a self-involving accident, resulting in damaged of the consignment and failure to deliver the goods in the agreed destination. The Respondent places reliance on the police abstract, which indicated that no other motor vehicle was involved in the accident, thereby imputing full responsibility to the driver of the subject vehicle. It is further submitted that the Appellant failed to adduce any evidence or call witnesses to controvert the Respondent's case, thus leaving the Respondent's evidence unchallenged.

23. On the issue of negligence, the Respondent adopts the definition from **Salmond and Heuston's Law of Torts**, submitting that negligence consists of conduct involving an unreasonable risk of causing damage, measured against the standard of a reasonable person. Applying this standard, the Respondent argues that the Appellant's driver was negligent in the manner in which he operated the motor vehicle carrying the goods thereby causing the accident and resultant loss. The Respondent further anchors its case on the legal principles relating to the burden of proof, citing Sections 107, 108, and 109 of the Evidence Act. It is submitted that as the Plaintiff in the trial court, the respondent bore the burden of proving its case on a balance of probabilities, a burden it duly discharged by demonstrating that the accident was attributed to the Appellant's negligence. Specific reliance is placed on Section 107 for the principle that a party asserting a legal right or liability must existence the facts relied upon.

24. On liability as a common carrier, the Respondent maintains that the Appellant was a common carrier, transporter and/or bailee of the consignment and therefore owed a duty of care in respect of the goods. Reliance is placed on **East Africa Industries Ltd -Vs- B.R. Nyarangi (2009) eKLR**, where the Court of Appeal affirmed that a common carrier is responsible for the safety of goods entrusted to it except where loss

arises from recognized exceptions including an act of God, hostilities involving the State, fault of the consignor, or inherent vice in the goods. The Respondent reinforces this position by citing additional authorities referenced to in that decision, including **BAT Kenya Ltd & Another v Express Transport Co. Ltd & Another [1968] EA 171** and **Express Transport Co. Ltd v BAT Tanzania Ltd [1968] E 443**. Further illustrations of the exceptions are drawn from **Peak v North Staffordshire Railway Co. (1862) 11 ER 1109**, **Kanti v British Traders Insurance Co. Ltd [1965] EA 108**, and **Omer v Prudential Assurance [1966] EA 79**. It is submitted that the burden of proving that the loss fell within any of the recognized exceptions lay with the Appellant, a burden it failed to discharge.

25. The Respondent further asserts that the Appellant did not deny being a common carrier and therefore owed a duty of care, which it breached through the negligent acts of its driver. In addition, the Respondent submits that the Appellant was a bailee and is consequently liable for the loss of the goods. In this regard, reliance is placed on **Equator Distributors -Vs- Joel Muriu & 3 Others (2018) eKLR**, where the Court held that a bailee is presumed liable where bailed goods are not returned, subject to the circumstances and that even a gratuitous bailee or agent may incur liability in tort for failure to exercise due care. The Respondent emphasizes that the Appellant owed a duty of ordinary care to ensure

safe delivery of the goods and failed to meet this obligation.

26. The Respondent reiterates that it adduced sufficient evidence to establish the Appellant's liability on a balance of probabilities, while the Appellant failed to tender any rebuttal evidence. It is further noted that the Appellant did not challenge the quantum of damages or the actual loss suffered. On the standard for appellate interference, the Respondent relies on **Idris Abdi Abdullahi -Vs- Ahmed Bashane & 2 others [2018] KECA 455 (KLR)**, where it was held that an appellate court should not interfere with a trial court's finding unless the decision is so perverse that no reasonable tribunal, properly directing itself could have arrived at it. The Respondent submits that this threshold has not been met.

27. In conclusion, the Respondent prays that the appeal be dismissed with costs, submitting that the trial court properly evaluated the evidence, correctly applied the principles governing negligence, burden of proof and the liability of common carriers and bailees and arrived at a sound decision that ought to be upheld.

Analysis and Determination

28. This being a first appeal, this court is under a duty to re-evaluate and reassess the evidence on record and to draw its own independent conclusions. In doing so, it must, bear in mind that the trial court, unlike the

appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. This principle was succinctly stated by the Court of Appeal in the case of **Selle v Associated Motor Boat Company Ltd (1968) EA 123**.

29. Upon a careful consideration of the record of appeal, the judgment of the trial court, and the parties' submissions, the following issues arise for determination:

- a) **Whether the trial court erred in finding that the Appellant was liable as a common carrier and/or bailee, for the loss of the Respondent's goods; and**
- b) **Whether the award of Kshs. 330,479/= under the doctrine of subrogation was proved and justified.**

Whether the trial court erred in finding that the Appellant was liable as a common carrier and/or bailee for the loss of the Respondent's goods

30. The Appellant's central grievance is that the trial court imposed liability in the absence of a formal written contract and notwithstanding evidence allegedly showing that the motor vehicle involved did not belong to it. The Appellant further challenges the finding that it was a common carrier and that its driver was negligent.

31. Upon re-evaluation of the evidence, it is not disputed that the Respondent's goods were being transported from Mombasa to Nairobi; that an accident occurred during

transit and part of the consignment was damaged as a result. The determinative issue is whether, in law, the Appellant bore responsibility for that loss.

32. The trial court expressly acknowledged that no formal written agreement between the parties was produced. Nonetheless, it relied on documentary evidence on record including the delivery note, the assessor's report and email correspondence attributed to the Appellant all of which confirmed that the Appellant's truck was involved in the accident while transporting the Respondent's goods.

33. A contract need not be reduced into writing, it may be implied from conduct of the parties and the surrounding circumstances. Further, once goods are delivered to another for purposes of transportation, a relationship of bailment arises by operation of law, imposing corresponding duties on the bailee.

34. In **Equator Distributors v Joel Muriu & 3 Others (2018) eKLR** the Court of Appeal affirmed that a bailee has a duty to return goods entrusted to it and is presumed liable where the goods are not returned or are returned damaged, unless a lawful explanation is provided. The court stated that,

“The basic rule is that the bailee is expected to return to its owner the bailed goods when the bailee's time for possession of them is over, and he is presumed liable if the goods are not returned. We note that the bailee is not an insurer of the goods’

safety; liability depends on the circumstances. The 3rd respondent and its employee driver, the 2nd respondent, owed the appellant a duty of ordinary care to safely deliver the vehicle at Voi.”

35. In the present case, the Respondent adduced evidence demonstrating that the Appellant was engaged to transport the goods, that the goods were in transit under that arrangement, and that the goods were in transit under that arrangement, and that the damaged occurred before delivery to the consignee. Notably, the Appellant did not call any witness to controvert this evidence. Its defence therefore remained a mere pleading unsupported by evidence. As the trial court correctly observed, the Respondent’s evidence stood unchallenged.

36. Moreover, even accepting the Appellant’s contention that the motor vehicle belonged to a third party, that fact alone would not absolve it of liability if it had undertaken the obligation to transport the goods. In **Securicor (K) Ltd v Drapers & Another C.A. No. 67 of 1985**, the Court of Appeal held that a party may be liable for the acts or omissions of its agents or servants in the course of executing assigned duties. The court held 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.”

37. The trial court properly directed itself on the definition and legal obligation of a common carrier, relying on **Express Transport vs BAT Tanzania [1968] EALR 443** and correctly found that the Appellant had been subcontracted to transport the Respondent's goods. The law on common carriers as restated in **East Africa Industries Ltd v B.R. Nyarangi [2009] KECA 446 (KLR)** is that a common carrier is liable for loss or damage to goods while in its custody unless it proves that such loss falls within recognized exceptions, including an Act of God, acts of the State, fault of the consignor or inherent vice in the goods. The burden of proving the applicability of any such exception lies squarely on the carrier.
38. In the present case, the Appellant did not adduce any evidence to bring itself within any of the recognized exceptions that would absolve a common carrier from liability. The assertion that the accident occurred while avoiding a matatu was not supported by evidence and remained a statement in submissions. The question that then arises is whether negligence therefore proved? The trial court relied on the police abstract which indicated that the accident was self-involving. In the absence of any rebuttal or alternative explanation from the

Appellant, the court drew an inference of negligence. While it is correct that the mere occurrence of an accident does not, of itself, establish negligence, where evidence demonstrate that an accident was self-involving and the defendant offers no explanation, a court is entitled to infer negligence. In this case, the Respondent proved that the accident was self-involving and the Appellant offered no evidential explanation. The trial court therefore cannot be faulted for finding that negligence was established on a balance of probabilities.

39. Therefore, upon re-evaluation of the entire record, this court is satisfied that the trial court's finding of liability was sound, well supported by the evidence and firmly grounded in law.

Whether the award of Kshs. 330,479/= under the doctrine of subrogation was proved and justified.

40. The Respondent's claim was premised on the doctrine of subrogation; the insurer having indemnified the insured for the loss suffered. The trial court found that a valid marine insurance policy was in force, that the insurer compensated the insured in the sum of Kshs.330, 479/= and that the insured executed a discharge conferring subrogation rights upon the insurer. These findings were supported by the testimony of PW3 and the documentary evidence produced in court.

41. The doctrine of subrogation was correctly articulated by the Court of Appeal in **Africa Merchant**

Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR, where it was held that once an insurer has indemnified the insured is entitled to step into the shoes of the insured and pursue recovery from the party responsible for the loss.

42. Significantly, the Appellant did not challenge the quantum of damages nor did it adduce any evidence to controvert the assessment report or proof of payment by the insurer. The complaint that the Appellant was not involved process in the assessment process does not, in itself, displace otherwise credible, cogent and unchallenged evidence of loss. Further, guided by the principles enunciated in **Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2018] KECA 455 (KLR)** this Court finds no basis to interfere with the trial court's findings, which were supported by evidence and cannot be describe as perverse or based on wrong principles.

43. In this regard, this court finds that the Appellant's appeal lacks merit. The appeal is accordingly dismissed in its entirety with costs to the respondent.

44. Orders accordingly.

Dated, signed and delivered at Machakos this 7th day of May, 2026

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

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