IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & KANTAI JJ.A)

CIVIL APPEAL NO 308 OF 2009

BETWEEN

ECHKEN AGENCIES.....APPELLANT

AND

ARGOS FURNISHERS LTD.....1ST RESPONDENT

P & O CONTAINERS LTD.....2ND RESPONDENT

KENYA PORTS AUTHORITY.....3RD RESPONDENT

COMMERCIAL TRANSPORTERS LTD.....4TH RESPONDENT

(Appeal against from the judgment of the High Court of Kenya at Nairobi (Azangalala,

J.) dated 25th April, 2008

in

MILIMANI H.C.C.C. No. 1013 of 1999

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JUDGMENT OF THE COURT

The appeal herein is against the judgment of ***Azangalala, J***. (as he then was) delivered on 25th April 2008.

A brief background to this appeal is that by an amended plaint dated 1st December 1998, ***Argos Furnishers Ltd*** (the 1st respondent herein) filed suit against ***P. & O. Containers*** (the 1st defendant and the 2nd respondent herein); ***Kenya Ports Authority*** (hereinafter KPA) (the 2nd defendant and the 3rd respondent herein); ***Echken Agencies*** (the 3rd defendant and the appellant herein) and ***Commercial Transporters Limited*** (the 4th defendant and the 4th respondent herein).

In the amended plaint, it was averred that all the defendants "*...**failed to deliver, clear, carry respectively the said goods intact or at all and to deliver the same to the plaintiff and/or the plaintiff's representative in Nairobi***".

The1st respondent sought the following orders against the defendants jointly and severally;-

> ***"a. Kshs.531,818 as particularized in paragraph 12 herein.***
>
> ***b. Costs of this suit plus interest thereof at court rates.***
>
> ***c. Interest on (a) and (b) at the rate of 12% per annum or at court rates from the date of filing this suit until payment in full.***

d. such further or other relief as this honourable court may deem just and reasonable."

P & O Containers filed its statement of defence dated 8th July 1981; ***Echken*** filed its amended statement of defence dated 23rd June 1998; ***Commercial Transporters Ltd*** filed its undated statement of defence and ***KPA*** filed a defence dated 14th July 1997. In their statements of defence, all the defendants denied liability for the loss of the 1st respondent's goods.

The pleadings having closed, the trial commenced before ***Mbaluto, J***. (as he then was). It was later taken over by ***Azangalala, J***. who heard the evidence to the end before rendering a judgment delivered on 25th April 2008. In the judgment, the learned judge found in favour of the 1st respondent and rendered himself thus:-

"1) The plaintiff's suit as against the 1st and 2nd defendants is dismissed with costs to the 1st and 2nd defendants.

2. Judgment is entered for the plaintiff against the 3rd and 4th defendants jointly and severally as prayed in the plaint.

3. The 3rd and 4th defendants shall pay the plaintiffs costs. Orders accordingly."

The appellant and the 4th respondent were dissatisfied with the said outcome and they lodged Notices of Appeal dated 26th May 2008 and 28th May 2008 respectively. However, the 4th respondent did not progress the matter any further by filing an appeal. The appellant on the other hand lodged its memorandum of appeal dated 18th December, 2009 where it listed 3 grounds of appeal. These were:-

1. "The learned Judge erred in law and in fact in failing to properly consider evidence adduced before the court.

2. The learned judge erred in law and in fact by entering judgment against the 3rd defendant without proper or any evidence in support of the finding.

3. The learned judge erred in law and in fact in ordering the 3rd defendant to pay costs."

On 16th February 2017, this Court (differently constituted) acceded to the request of respective counsel who were present to have the appeal heard by way of written submissions which were to be orally highlighted thereafter. On the same day an order was made dispensing with the appearance of the 2nd and 3rd respondents who had been absolved from liability by the trial court.

On 2nd October 2018 the appeal came before us for plenary hearing on which date learned counsel ***Mr. Kimamo Kuria*** appeared for the appellant; learned counsel ***Mr. Ndegwa*** held brief for ***Mr. Mege*** for the 1st respondent and learned counsel ***Mr. Kyandili*** appeared for the 3rd respondent.

On behalf of the appellant, ***Mr. Kimamo Kuria*** highlighted the submissions dated 24th April 2018. It was his submission that there was insufficient evidence to hold the appellant liable for loss of part of the consignment from India to the Port of Mombasa; that it was not possible to know at what point or in whose hands the goods were lost; that the packaging of the consignment took place in India in the absence of the 1st respondent's representative; that the appellant by virtue of being a clearing agent was not obligated to verify the contents in the containers; that the 1st respondent's claim was for special damages which were not specifically pleaded and proved and that the loss of the alleged 27 bicycles was not pleaded in the plaint. It was counsel's further contention that in view of the 1st respondent inability to prove its claim, it follows that it was not entitled to damages.

In opposing the appeal on behalf of the 1st respondent, ***Mr. Ndegwa*** wholly relied on the submissions dated and filed on 13th July 2018. In the written submissions, the 1st respondent contended that although the amended plaint did not specify the number of stolen items, that did not defeat the 1st respondent's claim; that contrary to the appellant's assertions, the learned judge properly considered the evidence in arriving at the outcome that he did and finally that costs follow the event and hence it was proper for the 1st respondent to be awarded costs.

As the 3rd respondent did not wish to participate in this appeal, its presence having been dispensed with on 16th February, 2017 an order was made discharging it from the proceedings herein. This was after ***Mr. Kimamo Kuria*** confirmed that he was not pursuing the appeal against the 3rd respondent.

This being a first appeal our mandate is as set out in the case of ***SELLE VS.***

ASSOCIATED MOTOR BOAT CO. LIMITED [1968] EA 123 wherein it was stated:

"I) An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs-Ali Mohamed Sholan (1955)22 EACA 270".

The undisputed facts of this appeal are that the 1st respondent purchased 3960 units of unassembled bicycles ***"(the consignment)"*** from ***M/s Roadmaster Industries of India. P & O Containers Ltd***, the 2nd respondent herein was the carrier of the said consignment from Bombay to Mombasa. Upon arrival at the port of Mombasa, the consignment was to be delivered to the 3rd respondent after completion of the requisite clearances by the appellant (who were the 1st respondents clearing and forwarding agent) and the goods would then be transported to the 1st respondent in Nairobi.

In or about 26th December 1995, '*Afro Asia Star'*, the vessel aboard which the consignment had been loaded by ***Roadmaster Industries of India*** arrived at the port of Mombasa, an event which the appellant was duly notified about. Subsequently, five 20 foot containers namely:- '***OCLU – 059419-0 ('20'), 'POCU-010876-4 ('20')', TPHU –647321-7 ('20'), 'OCLU-075130-3 ('20')*** and '***TPHU-668783-6 ('20')*** laden with the 1st respondent's consignment were offloaded from the said vessel and onto the quay. Thereafter, the appellant took up its duties as a clearing agent to the 1st respondent and oversaw *inter alia*: - preparation of documentation, verification, payment of requisite levies and taxes; loading and eventual dispatch of the consignment to the 1st respondent.

Everything went according to plan with the 1st respondent taking delivery of its consignment in parts on diverse dates in January 1996. However, on 13th January 1996, during the course of a delivery made by a lorry (KQQ 371) belonging to the 4th respondent, it came to the attention of the 1st respondent's employees that the container loaded thereon ***('TPHU – 668783-6')*** had a shortfall of 27 cases, an event which the 1st respondent brought to the attention of the appellant by way of a letter dated 18th January 1996. In the letter the 1st respondent pointed out that there were 66 cases of unassembled bicycles and that each case contained 6 unassembled bicycles. In response, vide its letter dated 23rd January 1996, the appellant stated that the container in question was not verified at the port, the original seal was found intact and that the 1st respondent had found the said seal to be in good order. Accordingly, the appellant discounted liability for the goods lost and advised the 1st respondent to seek recourse with its insurance company.

On 25th January 1996 the 1st respondent wrote back to the appellant notifying it that the original seal number for the container in question was A 418068, that the said container was not verified, but had its seal changed nonetheless. The 1st respondent further stated, *inter alia* that all the 5 containers bearing its consignment had seal numbers commencing with the letter 'A', that the same were checked by its branch manager at the port at Mombasa, that two containers namely: 075130-3 and 668783-6 were loaded on Saturday, 13th January 1996 (according to one Mr. Hasid an employee of the appellant) but in the absence of the 1st respondent's branch manager namely Mr. Festus Yaa. The said sequence of events was contrary to an earlier representation by the appellant that loading could not take place on a Saturday. There was no response to the said letter. In due course, the 1st respondent approached its insurer M/s Tausi Assurance Co Ltd for remedial action. Upon conducting an assessment of the loss incurred by the 1st respondent and undertaking an investigation into the circumstances under which it occurred, payment for the sum of Ksh.531,818 was made in favour of the 1st respondent by ***Tausi Assurance Co. Ltd***.

Thereafter, and pursuant to its rights of subrogation over the 1st respondent, M/s Tausi Assurance Co. Ltd instituted legal proceedings geared towards recovering the amount it spent in compensating the resultant claim. It is against the foregoing background that the 1st respondent lodged an amended plaint dated 1st December, 1998 at the High Court at Nairobi (Milimani) principally faulting the appellant, 2nd, 3rd and 4th respondents herein for breach of duty of a common carrier, breach of contract and negligence.

The evidence adduced before the trial court and as correctly analyzed by the learned judge show that the 1st respondent's goods left India after inspection and clarification. The company that carried out the inspection *Societe Generale Du Surveillance*, provided a clean report of finding which was produced by the 1st respondent's witness, Chandrakani S. Shah, the then Depot Manager. Upon arrival at the port of Mombasa the consignment was placed under the charge and care of the 3rd respondent pending clearance. The appellant was appointed the clearing agent. Armed with the Import Declaration Form, the appellant cleared the 1st respondent's goods and had them transferred to the 1st respondent in Nairobi. Three containers were transported by M/s Rift Roadways Ltd and the other two containers were transported by the 4th respondent. It is one of the two containers that had 27 bicycles missing.

As rightly found by the trial judge the 2nd respondent's obligation was discharged when it received the original bill of lading in exchange for the delivery of the goods. It was the 2nd respondent's case that no complaint was received from the appellant of any tampering of the consignment.

As for the 3rd respondent, its witness John Nyange testified that the appellant cleared the 1st respondent's goods; that upon verification of the cargo by customs officers, the goods were handed to the appellant who gave a clean receipt on behalf of the 1st respondent which was on the reverse side of the "***Mombasa Port Release Order"***, thus endorsing that the goods were in good order.

The appellant's witness ***Godfrey Kimanthi Kithunu*** testified that he handed over the documents for the consignment to M/s Rift Roadways Limited who in turn subcontracted the 4th respondent in respect of two of the containers. According to him, it is the 1st respondent who contracted Rift Roadways who subcontracted the 4th respondent. However, the 4th respondent's witness ***Peter Okumu*** testified that it is the appellant who contracted the 4th respondent to transport the consignment to Nairobi.

The learned trial court considered the said evidence and summed it up as follows:

"According to John Nyange, 2DW 1, when the 3rd defendant lodged the port clearance documents all the 5 containers were delivered to the 3rd defendant in good order and condition. The 3rd defendant signed Mombasa Port Release Order serial number 248629 and the 2nd defendant's gate passes (2D EXS 1 and 2) and by so signing confirmed receipt of all the containers on behalf of the plaintiff in good order and condition. It is the 2nd defendant's case that the only container which was opened at the port for verification was container OCLU 075130-1. The container was opened in the presence of a customs official, the 2nd defendant's security clerk, Clearing Agent and the plaintiff's branch manager and after the verification the said plaintiff's branch manager affixed a padlock on the container. 2DW 1 testified that container number TPHU - 668783-6 was never opened for verification and the same was delivered to the 3rd defendant intact. In any event if there had been a complaint a joint survey would have been done and as there was none, no such survey was carried out. I find and hold that when the containers were handed over to the 3rd defendant by the 2nd defendant without complaint, the 2nd defendant discharged its duty to the plaintiff who was ably represented by the 3rd defendant during the clearing process. I believe the testimony of 2DW 1 that at the time of verification he did not notice any shortage and that that was the position when the goods were released to the 3rd defendant. The documentary evidence relied upon by the plaintiff and the 3rd defendant clearly support the position taken by the 2nd defendant. The 3rd defendant signed Mombasa Port Release Order. The reverse thereof has the signature of the 3rd defendant's representative. In the 6th column it is clearly endorsed thereon that goods were received in good order and condition. In any event the 3rd defendant's witness Godfrey Kimanthi testified that when he confirmed that the seals on the containers were intact, he handed the documents to the transporter M/s Rift Roadways Ltd. According to 3DW 1 he saw the containers leave Mombasa for the Nairobi journey. That testimony to my mind absolved the 2nd defendant from blame".

The said court further disbelieved the appellant's witness who stated that it was the 1st respondent who contracted the 4th respondent. The reason for this is simple as it is the 4th respondent's witness ***Mr. Peter Okumu*** who testified that it was the appellant who contracted them. It is also not denied that the delivery note in respect of one of the containers carried by the 4th respondent had the remarks "***short 27….some cases broken.***"

Hence, the goods received by the 1st respondent were not in good order and condition. In view of the above, it is our conclusion that the appellant having received the consignment in good order and having contracted M/s Rift Roadways Ltd who subcontracted the 4th respondent, the onus lay on the appellant to transport the goods safely to Nairobi. It failed to do so.

One more issue falls for our consideration. The appellant contended that the 1st respondent did not plead nor specifically prove the loss of the 27 bicycles, this being a claim for special damages. However, it is not lost to us that the 1st respondent instituted the suit at the High Court to enable the insurer, Ms Tausi Assurance Company Ltd recover the value of the lost goods which sum it had paid to the 1st respondent. The said insurance company had appointed M/s Allied Assessors Limited to quantify the loss. The report of the assessor was produced as exhibit (Exhibit 17). In our considered view, the assessors report detailed the loss. Further, the appellant did not object to the production of the assessor's report. In paragraph 7 of the amended plaint the 1st respondent averred:- **"….**

That some goods were stolen and/or lost….." The goods lost and /or stolen were assessed by M/s Allied Assessors Limited at Ksh.531,818.00 which sum the insurance company paid to the 1st respondent and hence the filing of this suit by the 1st respondent under the doctrine of subrogation.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs to the 1st respondent, the other respondents having opted not to take part in this appeal no costs will be awarded to them.

It is so ordered.

Dated and delivered at Nairobi this 10th day of May, 2019

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR