



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, G.B.M. KARIUKI & KANTAI, J.J.A.)**

**CIVIL APPEAL NO. 256 OF 2009**

**BETWEEN**

**P.N. MASHRU TRANSPORTERS LIMITED ..... APPELLANT**

**VERSUS**

**RAYSHIAN APPARELS LIMITED ..... RESPONDENT**

*(Being an appeal against the whole of the Judgment and Decree of the High Court of Kenya at Nairobi (Osiemo, J.) dated 17<sup>th</sup> October, 2008*

**in**

**HCCC No. 2408 of 1996)**

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**JUDGMENT OF THE COURT**

By an amended plaint filed at the High Court of Kenya at Nairobi on 31<sup>st</sup> March, 2004 the respondent, **Rayshian Apparels Limited** claimed from the appellant, **P.N. Mashru Transporters Limited**, a sum of **US\$158,437.10**. It was alleged in the plaint that the respondent had contracted the appellant as a common carrier of goods to transport and deliver to the respondent its goods from Mombasa to Nairobi but that after receipt of those goods the appellant had failed to deliver the goods which were lost or stolen while on transit.

The appellant denied the claim and raised as a defence that the goods were transported at owners risk and that loss, if any, could not be visited on the appellant.

The suit was heard by Osiemo, J, who, in a judgment delivered on 17<sup>th</sup> October, 2008 dismissed the appellant's defence and entered judgment for the respondent as pleaded in the plaint. Those orders provoked this appeal premised on a Memorandum of Appeal where the appellant raises 9 grounds of appeal. Those grounds are to the effect that the learned judge of the High Court erred in law and in fact in failing to make any or any specific findings for or against the respondent's case and give reasons for the judgment and decide on the agreed issues filed by the parties and on the evidence at the trial; that the learned judge erred in failing to make a finding whether the appellant was a common carrier; that the learned judge erred in failing to find that the parties were bound by an exemption clause "goods carried at owners risk"; that the learned judge did not make a specific finding on that exemption clause; that the

appellant should not have been found liable to the respondent; that the learned judge erred in not finding that the respondent should have insured the goods; that the learned judge erred in entering judgment for the respondent based on a document listing two cargos when the respondent had lost only one; that the respondent was given judgment for claims whose value was not proved and finally that the learned judge erred in law and in fact in failing to find and hold that the respondent's claim for special damages was not specifically proved.

This is a first appeal and we are mandated to reconsider the evidence and make our own findings. A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it was based on no evidence or it was based on a misapprehension of the evidence or it is shown that the judge acted on wrong principles in reaching the finding that he did -see **Sumaria and Another v Allied Industries Limited [2007] 2KLR 1** or **Mwanasokoni vs. Kenya Bus Service Limited [1985] KLR 931 Civil Appeal No. 35 of 1985 Mombasa (unreported)** for an enunciation of these principles.

It was alleged in the plaint that on 10<sup>th</sup> August, 1996 the respondent delivered to the appellant and the appellant as a common carrier received trims which it agreed to carry safely from Mombasa to Nairobi and that in breach of that agreement and in breach of its duty the appellant did not safely or securely carry the said goods or deliver them to the respondent. It was claimed in the alternative that the said loss of goods occurred as a result of the appellant's negligence or **that of its servants or agents. Particulars of negligence and/or breach of duty and/or fraud were duly set out and the claim was particularized as follows:**

(a)	Cost	of	lost	trims	-	US\$59,888.40
(b)	Customs	duty	and	VAT	on	US\$34,921.50
(c)				Expenses		US\$3,500
(d)	Loss	of	profits	on	lost	US\$60,128
	US\$158,437.10					

In evidence recorded by the learned judge **Sammy Kimani Mwangi**, who testified on behalf of the respondent, said that he was the respondent's record keeper in respect of import and export and that the respondent had imported goods from Hong Kong which were handed over to the appellant on 10<sup>th</sup>

August, 1996, at the port of Mombasa. That those goods which he called trims were to be used for manufacture of materials whose finished products were to be exported to the United States of America but that the motor vehicle transporting them broke down en route to Nairobi and all the goods were stolen. He produced as part of the evidence a Police Abstract Report issued by Sultan Hamud Police Station (a report had been made there by the appellant's representative), a document issued by Customs and Excise Department detailing goods imported and the duty payable, an invoice from the Hong Kong company exporting goods, and he also produced other documents. He claimed US\$58,888.4 for lost items, duties at US\$34921.50, expenses of US\$3500 and loss of profits US\$60128.

The appellant called as witness **David Masai Olinyo**, its Claims Manager. He confirmed that his company had been contracted to transport goods for the respondent from Mombasa to Nairobi; that there were conditions attaching to that contract – that:

***“... Even if such loss was caused through negligence of servants to company liability (sic) is excluded goods transported and handled at owners risk ....”***

He stated that he knew that the container carrying the respondent's goods was lost or stolen. On the terms and conditions governing the contract of carriage:

***“..... The conditions terms were for owners application, delivery notes page 5-6 is signed. Signed when the good (sic) received by owner. As we invoice our client we attach these terms and conditions.....”***

and that:

**“..... The delivery note is signed after we deliver the goods ....”**

The learned judge considered the pleadings, documents produced before him and the evidence set out in this judgment and came to the conclusion that the exemption clause relied on by the appellant was not applicable and held, therefore, that the appellant was fully liable for the entire claim raised by the respondent.

**Miss Akong’a**, learned counsel for the appellant, in arguing the appeal before us, abandoned ground 6 in the Memorandum of Appeal, and, although stating that she would urge the other grounds in clusters proceeded to make a general argument in arguing the appeal. Learned counsel submitted that the learned judge erred in not giving reasons for the judgment and that the learned judge did not consider the evidence recorded to reach the findings that he did. Counsel cited **Order 21 Rule 4 Civil Procedure Rules** on what a judgment should contain and complained that the judgment written and delivered by the learned judge failed to meet the set conditions as set out in that provision of the law. Counsel also submitted that the learned judge was wrong not to have upheld the exemption clause when the appellant and the respondent had past business contracts of a nature similar to the one subject of the suit before the High Court.

On the award of special damages learned counsel for the appellant faulted the learned trial judge for making the award when, according to counsel, no proof had been placed before the trial court to entitle the judge to make the award.

**Mr. Wananda**, learned counsel for the respondent, did not agree. He submitted that the invoice produced from the exporter in Hong Kong coupled with the documents issued by Customs and Excise Department of Kenya Revenue Authority were sufficient to show that the respondent had imported the goods claimed in the plaint. On the claim for expenses and loss of profits learned counsel was of the view that the items were properly awarded though he conceded that the respondent had not proved the same. On liability counsel submitted that the respondent’s claim was founded on various heads – common carrier, bailment, fraud, breach of contract and negligence.

We have carefully considered the record of appeal, the submissions made, the authorities filed and the law and having done so we take the following view of the matter.

There was no dispute that the respondent had imported goods from Hong Kong which, upon landing at the port of Mombasa, were assigned to the appellant as a common carrier to ferry the same to the respondent’s premises in Nairobi. Also common ground was that the truck ferrying those goods broke down at or about Sultan Hamud and that the truck driver and loader both disappeared after stealing the goods in the container or allowing the same to be stolen. The appellants representative Mohamed Amin made a report of that theft at Sultan Hamud Police Station and a Police Abstract Report, produced as part of the evidence before the learned judge, was made detailing the said theft and particulars and estimated value of the items stolen. The appellant was not able to call the driver or loader of its truck reason being that they disappeared raising a rebuttable presumption that they were either the thieves of the stolen items or were accessory to the theft. The issue of liability should therefore have rested there but the appellant raised as a defence an exemption clause attached to a delivery note. This clause stated that:

- “1. P.N. MASHRU LTD. (hereinafter called the Company) shall not be liable for loss damage, deviation mis-delivery or detention of or to a consignment or any part thereof or to any goods or any part thereof no matter how such loss, damage, deviation mis-delivery, delay or detention was called and whether or not such loss, damage, mis-deviation, mis-delivery or detention was caused by or through or due to the negligence of the Company or its servants or agents or otherwise.***
- 2. Maximum time allowed for offloading – 5 hours only, additional hours will be charged accordingly.***
- 3. Goods transported and handled at owner’s risk.***

4. ***We would advise the consignor to Insure the goods mentioned overleaf while they are being transported and handled by us.***

The learned judge considered this line of defence and held that:

***“..... I do not think that clauses (sic) the exemption stated herein can in any way inure to the benefit of the Defendant and reduce its liability to the Plaintiff. ....”***

The learned judge so held after considering the evidence produced by both parties, part of which we have set out in this judgment.

The appellant’s witness testified *inter alia* that the terms and conditions inclusive of the exemption clause were attached to a delivery note and that the delivery note was a document prepared and availed to a customer upon delivery of goods to the customer. The delivery note was prepared after the customer ascertained that goods had been transported and delivered safely.

In **Joginder Auto Service Limited v Mohamed Shaffique & Another [2008] eKLR** it was held that a defence of “exclusion clause” will fail where there is no evidence that such clause was brought to the attention of the aggrieved party.

In **Express (K) Limited v Manju Patel [2001] eKLR** this Court stated that a custodian of goods is liable if the same are lost or damaged in his custody and he gives no explanation on how such loss occurred.

The learned trial judge considered the case of **Securicor (K) Limited v Drapers and Another C.A. No. 67 of 1985** where it was held by this Court 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.”***

A useful discussion on the duty of a common carrier appears in Halsbury’s Laws of England, 3<sup>rd</sup> Edition at page 130. A common carrier is one who is ready to carry for hire as a business and not as a casual occupation and one who holds himself out as being ready to carry goods for any person no matter who they are. Thus the liability of a common carrier begins once he has accepted goods for carriage and once he assumes the goods for carriage, he assumes a duty, not only to carry safely, but also to deliver safely to the destination and his liability only ends upon delivery of the goods.

In the old English case of **Coggs v Benard [1558-1774] All ER 1 Gould, J**, was of the view that:

***“Any person who undertakes to carry goods is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost or come to any damage.”***

John Holt, CJ, who sat in that case delivered himself thus:

***“For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he (the common carrier) is chargeable. This is a politic establishment, contrived by the policy of the law for the safety of all persons, that they may be safe in their ways of dealing, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered.***

***This is the reason the law is founded upon that point.”***

In the case before Osiemo, J, the evidence was that conditions including an exemption clause were attached to a delivery note which was prepared by the appellant and handed to the respondent after goods had been safely transported and delivered to the respondent. In the premises where terms and conditions of carriage were not brought to the respondent's attention until after delivery of goods the appellant could not avail itself of the exemption clause. We agree with the learned judge that the appellant was liable for the loss incurred by the respondent when its goods were stolen while on transit from Mombasa to Nairobi.

The appellant has also raised as grounds of appeal that the learned judge made awards for special damage claims which, though pleaded were not proved as required in law.

The claims in the amended plaint related to cost of trims; customs duty and VAT on the lost trims; expenses and loss of profits on lost trims. In respect of the first two items the respondent produced an invoice from Edin Textile Company Limited of Hong Kong, Manufacture Under Bond Import Entry issued by Customs and Excise Department of Kenya Revenue Authority showing items imported, their respective values and the tax payable and paid on the same. Also produced was a Police Abstract Report issued by Sultan Hamud Police Station at the request of the appellant setting out stolen items and approximate value. We have perused these documents and are of the respective opinion that the same particularly the document by Kenya Revenue Authority detailing value of goods and tax paid are proof of the value of items imported by the respondent and which items were handed over to the appellant as a common carrier to ferry to Nairobi but which items were stolen en route either by the appellant's servants or with their connivance, actions which the appellant as employer was vicariously liable for.

On the items "expenses" and "loss of profits on lost trims" Mr. Wananda, learned counsel for the respondent readily conceded that they were not proved but was of the view that the same were properly awarded as flowing directly from the loss suffered by the respondent. The fact that loss suffered was a direct consequence for which the respondent should recover is true. But this Court has often stated, and we repeat, that special damages, once pleaded, must be specifically proved. Let us revisit, if that be necessary, **Coast Bus Services Limited v Sisco E. Murunga Denyi & 2 Others C.A. No. 192 of 1992 (ur)** where we stated:

***"We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection it is not enough simply to aver in the plaint as was done in this case that the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit the special damages is not known with certainty then those particulars can only be supplied at the time of trial amending the plaint to include the particulars which were previously missing. It is only when the particulars of Special Damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars."***

The respondent in the case before the learned judge did not make any attempt to place any evidence before the learned judge to prove that it had incurred expenses in following up the claim and profits it would have made if the trims subject of the suit had not been put to the desired use and produce a finished product for export to the United States of America. That part of the appellant's complaint is certainly merited.

The appellant also takes as grounds of appeal that the judgment as written did not comply with certain provisions of the law. We have perused the judgment and note the same complies with the relevant law and we cannot find any merit in this complaint at all.

The result of our findings is that this appeal succeeds in part. We set aside that part of the judgment awarding the respondent expenses and loss of profits. The respondent was only entitled to the award on cost of trims and customs duty and VAT on the lost trims. Thus Judgment for the respondent for cost of trims at US\$58,888.40 and customs duty and VAT in lost items at US\$34,921.50. Having partially succeeded we think that the proper order on costs is that each party meet their own. We vary orders on costs in the High Court and award costs to the respondent only on the part of the claim that we have affirmed in this judgment.

These, then, are our orders.

*Dated and Delivered at Nairobi this 19<sup>th</sup> day of May, 2016.*

**M.K. KOOME**

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**