IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI, MWILU & M'INOTI, JJ.A.

CIVIL APPEAL NO. 20 OF 2004

BETWEEN

TOYOTA (KENYA) LIMITED ……..…….…….. APPELLANT

AND

EXPRESS (KENYA) LIMITED ....……..…… RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Aganyanya, J) dated 29th January 2002

in

HCCC NO. 1406 OF 1994)

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JUDGMENT OF THE COURT

This is an appeal from a decision of the High Court in the exercise of its original jurisdiction. The issues are fairly straight forward and turn on whether ***TOTAL (KENYA) LTD*** (the appellant), proved on a balance of probabilities that its goods, the subject matter of this appeal were stolen or lost while in the custody of its transporter, ***EXPRESS (KENYA) LTD*** (the respondent), or at the appellant's premises after delivery.

The facts that gave rise to this appeal are also fairly straight forward. In December 1991, the appellant imported 61 packages of new genuine spare parts from Toyota Tsusho Corporation, Nagoya, Japan. The spares were prepaid and shipped on the vessel **"Ocean Competence"** which docked at the port of Mombasa on 21st January, 1992. The appellant appointed the respondent, a firm of clearing and forwarding agents to receive, clear and transport the cargo to the appellant's warehouse in Nairobi.

On 14th February, 1992, verification of the cargo was done at the port. The verification entailed the custom officer choosing five packages at random and opening them to confirm that the contents conformed to the declared cargo. Nothing unusual was noted and the respondent resealed the packages, put them back into the container and put its seal on the container. The key to the seal was sent to the appellant. The cargo was released to the respondent the same day and was transported from Mombasa the next day, arriving at the appellant's warehouse in Nairobi on 17th February, 1992.

When the container arrived at the appellant's warehouse, the appellant stated that the seal was found intact, but when the container was opened, several packages were found opened and spare parts missing therefrom. A marine surveyor loss assessor assessed the value of the missing spare parts at KShs.609, 224/=.

On 13th April, 1994 the appellant filed Nairobi High Court Civil Suit No. 1406 of 1994 against the respondent claiming KShs.628,044/= (being the value of the missing spares and KShs.18,000/= assessor's fees), interest and costs. The appellant's claim was founded on breach by the respondent of its duty as a common carrier and also on breach of contract as bailee for reward. The particulars of breach were set out in paragraph 7 of the plaint. In the alternative, the appellant pleaded negligence on the part of the respondent, particulars of which were laid out in paragraph 8 of the plaint.

The respondent filed its defence on 4th August, 1994, and amended the same on 20th December, 1999, denying that it was a bailee or a common carrier as well as the pleaded breach of duty, contract and negligence. The respondent averred that the verification at the port was a brief exercise which did not involve de-stuffing all the cargo and hence it was not possible to verify the shipper's representation in the documents. In paragraph 6 of the amended defence, the respondent averred that the loss of the goods was occasioned by the appellant's own negligence.

The suit was heard by Aganyanya, J *(as he then was)*. The appellant called 5 witnesses while the respondent called 1 witness. On 29th January, 2002, the learned judge held that the appellant had not proved its case on a balance of probabilities, dismissed the suit and ordered each party to bear its own costs. That decision provoked the present appeal.

The appellant's memorandum of appeal lists five grounds of appeal as follows:

1. *The learned trial judge erred in his application of facts and thus arrived at a wrong conclusion by failing to distinguish the act of off-loading the container containing the packages and opening the packages containing the goods in question.*

2. *The learned judge erred in failing to hold that one of the packages containing missing goods had been opened by the respondent for custom verification and resealed by the respondent.*

3. *The learned judge erred in failing to hold that the appellant had discharged its burden of proof when it adduced evidence that the goods had been received intact by the respondent at the port of discharge in Mombasa, transported from Mombasa to Nairobi by the Respondent to the appellant's exclusion and loss discovered upon delivery of the said goods by respondent to the appellant.*

4. *The learned judge erred in failing to hold that the respondent was a common carrier.*

5. *The learned judge erred in failing to find that the respondent had failed to discharge its burden of proof by adducing any evidence to show goods got lost in its custody.*

At the hearing of the appeal on 22nd May, 2013, Mr M. Ngechu, learned counsel, appeared for the appellant. There was no appearance from Messrs Mbari Kioni & Company Advocates for the respondent. Upon being satisfied that the said advocates had been duly served with a hearing notice, the Court directed the appellant to prosecute its appeal in the absence of the respondent.

This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. (See ***SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123, 126 paras H-I, KENYA PORTS AUTHORITY V KUSTON (KENYA) LTD, (2009)2 EA 212 and PIL KENYA LTD V OPPONG, (2009) KLR 442***).

Mr Ngechu argued grounds 1 and 2 together. He submitted that when the cargo was released to the respondent in Mombasa after verification on 14th February, 2003, the respondent confirmed that it was intact as per the manifest. From the moment the cargo was released to the respondent in Mombasa until its delivery to the appellant's warehouse in Nairobi, Mr Ngechu argued, the cargo was at the respondent's risk. Since the loss of some of the spare parts was discovered upon the delivery of the cargo in Nairobi, he argued, the Court must draw the irresistible inference that the lost spare parts were so lost while in the custody of the respondent.

The respondent contended in its defence that the entire cargo had not been verified in Mombasa; only 5 random packages of the 61 packages had been verified. That was also the thrust of the evidence of the respondent's one witness. The respondent is hard-pressed to make this argument. It knew that only 5 of the 61 packages were verified, yet confirmed the entire cargo without demanding verification if it had any doubt about the rest of the packages. Having accepted and taken possession of the cargo on the basis that it had been verified and found to tally with the manifest; the respondent cannot be heard to say that the cargo was not as it had represented it to be after verification. The effect is that if the evidence proves on a balance of probability that the missing spare parts were lost between the release of the cargo to the respondent after verification on 14th February, 1992, and the delivery of the cargo to the appellant on 17th February, 1992, the respondent is precluded from asserting that the cargo it received in Mombasa was different from what it had confirmed and declared.

We have carefully evaluated the entire evidence on record. It is common ground that when the cargo was received at the appellant's warehouse in Nairobi, the seal on the container was intact. The point of great dispute is the circumstances under which the container was opened at the appellant's warehouse before the alleged loss of some of the spare parts was discovered. PW3, Naomi Waithera Karituki was in charge of the receiving section of the appellant's parts department at the material time. Her evidence was that when the container was delivered to the appellant, she noticed that the seal was intact. However, when the container was opened, she found some cartons opened and some parts were missing from those cartons.

It was her evidence that whenever a container was received, it could not be opened by the appellant's workers alone. There had to be what the witness called ***"an insurance man"***. This ***"insurance man"*** was so critical that if a container arrived in his absence, he had to be called and the opening of the container had to await his arrival. In this case, the witness informed the court that she called an insurance man by the name Kimondiu (PW1, Daniel Ndeto Kimondiu). In her own words:

> *"In this case, container was opened in presence of Kimondiu. Packages interfered with were removed and kept aside."*

On cross-examination she told the court that *"insurance man was present when we offloaded the goods."*

The evidence of PW1 was quite different. He told the court that on the material day, he was instructed by Lion of Kenya Insurance Company to proceed to the appellant's premises to examine packages delivered by the respondent. His evidence was that he found the packages already offloaded from the container and on the floor at the entrance. On cross examination he stated as follows:

> *"When I visited the premises packages had been offloaded. Packages were at entrance of the warehouse. Members of plaintiff staff were checking the packages. I cannot say at what particular time the parts were found missing."*

What PW1 stated in his report to Lion of Kenya Insurance Co Ltd dated 17th February, 1992, was even more instructive. That report was produced as appellant's exhibit No. 1. At page 3 of the report, PW1 stated:

> *"The surveyor visited the consignee's (appellant's) premises Nairobi on the 17th February 1992 to carry out survey on the above consignment. At the time of arrival the container No. MOLU 2410273 had its contents already been destuffed (sic) and moved to the*

consignee's warehouse. At the warehouse several members of the consignee's staff were found checking all packages delivered."

At page 15 of the report, PW1 continued.

> *"The surveyor arrived at the consignee's premises on Monday the 17th February 1992 immediately after lunch time and found all the cartons had been destuffed from the container and had been moved to the stores for checking. It was therefore not possible for the surveyor to identify the condition of the packages prior to destuffing from the container.* (Emphasis added). *In this connection the surveyor would recommend that in future joint survey be held prior to breaking of the container seals by the consignee or his agents. The above exercise would also identify the possibility of recovery against the responsible parties. Many more claims have been reported to the underwriters; for which the surveyor had noted were arising as a result of similar circumstances. These losses would not probably be recoverable under marine cover but instead would be recoverable under "F.G. cover". Investigations are therefore necessary in order to enable underwriters ascertain where and how the losses had occurred and under whose custody."*

Faced with this evidence the trial judge concluded, correctly in our view, that the appellant had not proved on a balance of probabilities that the missing spare parts were lost while in the custody of the respondent. The appellant opted to open the seal of the container and to offload the contents in the absence of the independent surveyor, contrary to what was said to be the established practice. Even the surveyor himself could not tell the condition of the packages before or at the time when they were removed from the container. So unsure was the surveyor that he had to recommend investigations to ascertain where, how and in whose custody the losses had occurred. The above finding should dispose of, not only grounds 1 and 2, but also ground 3 of the memorandum of appeal, which we find lacking in merit.

In ground of appeal No. 4 the learned judge was criticized for failing to find that the respondent was a common carrier. Mr Ngechu contended that the respondent was a common carrier. He relied on ***Halsbury's Laws of England, 3rd Ed. Pg 130*** for the proposition that 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. He argued that the liability of a common carrier begins once he has accepted goods for carriage and once he accepts 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.

He cited ***COGGS V BERNARD, (1558-1774) ALL ER 1*** where Gould, J stated that:

> "*Any man 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"*.

The rationale behind the common carrier's liability was given in the same case by John Holt, CJ, as follows:

> *"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."*

Lastly, Mr Ngechu cited ***EXPRESS TRANSPORT CO LTD V BAT TANGANYIKA LTD, (1968) EA 443***, to show that the respondent was a common carrier. In that case, Sir Charles Newbold P. held that as a common law concept, the concept of common carrier applied in Tanganyika and gave the following as

its attributes:

> *"I have come to the conclusion, after a close examination of a number of cases and bearing in mind that the judgements in each case are related to the facts of the particular case, that the essential attributes which determines whether a carrier is a common carrier is that the carrier must hold himself out to the public as prepared to carry generally for the public and not for particular members thereof. If, therefore, a carrier reserves to himself, either by public notification or by a course of practice, complete freedom of selection as to the persons for whom he will carry goods, he is not a common carrier. On the other hand, if a carrier holds himself out as prepared to carry generally for the public, the mere fact that he may refuse for good reason in a particular case to carry for a particular person does not mean he ceases to be a common carrier."*

He then concluded that the appellant in that particular case was a common carrier in the following terms:

> *"The Chief Justice found in this case that Express Transport was a common carrier and in my view the evidence of the witnesses of Express Transport amply justifies that finding. That evidence, in broad outline, was that Express Transport held itself out as prepared to transport goods for anyone who desired his goods to be transported, subject, of course, to the availability of transport. There was also evidence that Express Transport had on occasion refused to carry certain goods offered for transport and might do so in future, but it was quite clear that any such refusal was based on reasonable grounds and not dependent on pure whim. As I have said, if a carrier holds himself out, as Express Transport does, as prepared to carry goods for all and sundry he becomes a common carrier, and the mere fact that he on occasion refuses for good reason to carry goods, as Express Transport has done, does not mean that he thereby cease to be a common carrier. I am satisfied that the chief justice was correct in his finding that express transport was a common carrier."*

(See also ***EAST AFRICA INDUSTRIES LTD V B R NYARANGI, CA NO. 331 OF 2001 (unreported)***.

The learned trial judge did not make any finding whether or not the respondent is a common carrier. Even if we take it that the respondent is, nothing would turn on that, the trial court having found, which we agree with, that the appellant did not prove on a preponderance of evidence that the spare parts were lost whilst they were in the custody of the appellant. From the appellant's own authorities, it has to be proved that the loss occurred while the goods were in possession of the respondent before any liability can attach to a common carrier.

The last ground of appeal found fault with the leaned judge for failing to find that the respondent had failed to discharge its burden of proof by adducing evidence to show how goods got lost in its custody. We must confess that we found this ground of appeal difficult to follow. Under ***section 108 of the Evidence Act, Cap 80 Laws of Kenya***, the burden of proof in a suit lies on the party who would fail if no evidence at all were given by either party. It was, therefore, never the duty of the respondent to prove how the cargo or part of it was lost in its custody. On the contrary, it was the duty of the appellant to prove on a balance of probabilities that the spare parts in question were lost while in the custody of the respondent, as it had pleaded in its plaint. As is normally stated, the general burden of proof lay on the appellant because in order to obtain judgment, it had to establish its case on a preponderance of evidence. The evidence adduced by the appellant fell short of that. It left serious doubt whether those spares were not, in fact, stolen or pilfered at the appellant's own premises.

Under ***section 107 of the Evidence Act*** it is the duty of the party who asserts existence of facts upon which he desires the court to give judgment as to any legal right or liability, to prove the existence of those facts. It was the duty of the appellant to first prove on a balance of probability the facts it had pleaded, particularly that the spare parts were lost in the custody of the respondent. The respondent having admitted to being the appellant's clearing and forwarding agent, but denied that the spare parts were lost whilst in its custody, had no burden of proof when the appellant was not able, in the first place,

to convince the court of the probability that the goods were lost in the respondent's possession.

In the end, we are of the considered opinion that the learned trial judge arrived at the correct finding that the appellant had not proved the liability of the respondent on a balance of probabilities. We accordingly dismiss the appeal. Since the respondent did not attend to defend the appeal, we order that each party bears its own costs. Those are our orders.

Dated and Delivered at Nairobi this 19th day of July, 2013.

P. KIHARA KARIUKI

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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