REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 331 of 2001

EAST AFRICA INDUSTRIES LTD.....APPELLANT

AND

B.R. NYARANGI.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at

Nairobi (O'Kubasu, J.A.) dated 19th January, 2001

in

H.C.C.C. No. 3797 of 1994)

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JUDGMENT OF THE COURT

The respondent ***B. R. Nyarangi***, was a transporter who owned two lorries, registration numbers ***KYP 045*** and ***KXP 538*** which he contracted to the appellant for conveyance of its various products from Nairobi to various parts of Kenya. On 1st September 1992 his lorry registration number KYP 045 was loaded with the appellant's goods at its premises in Nairobi to be delivered to the appellant's depot in Kisumu. On the way, the lorry was involved in an accident and the goods did not reach their intended destination. The respondent claimed they were looted by thieves after the accident. The *appellant* then filed a suit in the superior court on 26th October 1994 to claim from the *respondent* a sum of Kshs.573,584.00 being the value of goods and survey fees. They blamed the respondent for breach ofcontract, breach of duty as a common carrier, and in the alternative, for negligence for the loss of the goods.

The respondent filed a defence to the suit admitting that he was a common carrier but denied that he was negligent, adding that as the goods had been insured against any risk and the appellant was compensated by the insurance company, he was not obliged to pay the appellant further compensation as claimed in the plaint. During the hearing of the case in the superior court, the parties agreed that there was a standing agreement between them for the respondent to transport the appellant's goods from Nairobi to their depots at Kisumu, Mombasa or any other destination in Kenya. But according to the respondent**,** though the goods had been insured against any risk in the event of their loss or damage while in transit, when the same were being transported, the lorry used to transport them was involved in an accident and the goods were looted by thieves but then the appellant was compensated by the insurance company. The respondent said further that after the accident, he was asked by the appellant to pay excess

fee of Ksh.10,000/= which he paid and he thought his liability ended there. He asked the Court to dismiss the appellant's suit with costs. In his reserved judgment dated 19th January, 2001 (*O'Kubasu, J.A - proceeding under* ***section 64(4)*** *of the Constitution)* stated:

"***Having considered the evidence on record and the submissions by counsel for both parties I find that this was a claim based on negligence of the defendant. In the plaint it was alleged that the defendant's servant or agent was negligent. The particulars of negligence were set out. But when the suit came for hearing there was no witness who testified as to how the accident occurred. The plaintiff sought to rely on the doctrine of*** *Res Ipsa Loquitur****. In my view since the plaintiff set out particulars of negligence then the doctrine of*** *Res Ipsa Loquitur* ***did not arise as it was upto the plaintiff to prove negligence on the part of the defendant. As matters stand it would appear that the defendant's lorry was transporting the goods when it was involved in an accident somewhere near Kericho town and the goods were stolen by looters as stated in the report (exhibit 2) of the insurance surveyor. The plaintiff had insured the goods in transit and on presenting the claim to its insurers the claim was paid in full. Since there was no evidence of negligence, the defendant's servants/agents are not to blame.***

The facts of this case are almost similar to those in the decided case of East African *(sic)* ***– High Court Civil Case No. 600 of 1994 in which a similar claim by the plaintiff was dismissed on 18th February, 2000. I have carefully considered submissions by counsel appearing for the parties herein and I find that taking into account the circumstances under which the goods were lost it cannot be said that the defendant was liable. The document produced as exhibit 6 which made there (sic) defendant to be liable for any loss has been disputed and as already stated the original was not produced but a photo copy of the same. The plaintiff cannot therefore rely on that document.***

In view of the forgoing this suit is dismissed with costs to the defendant.

Order accordingly."

The appellant was aggrieved by this judgment and has filed an appeal to this Court in a Memorandum of Appeal dated 19th December, 2001. The six grounds of appeal listed therein were that:-

"***1. The learned Judge erred in law and in fact in holding that the plaintiff's claim was solely founded on simple negligence and that the plaintiff, having failed to prove the particulars of negligence the plaintiff's claim was by reason thereof wholly lost.***

2. The learned Judge erred in law in failing to hold the defendant wholly liable for the loss of the plaintiff's goods in view of the admitted pleadings that the plaintiff was a common carrier of goods.

3. The learned Judge in law erred in failing to find that the defendant was in law a bailee for reward and that in failing to deliver up the plaintiff's goods the defendant was in breach of the contract of bailment.

4. The learned Judge having admitted in evidence a certified copy of the plaintiff's exhibit 6 erred in law in disregarding the contents and weight of the said documents.

5. The learned Judge erred in law and in fact in holding that the respondent had sufficiently explained the circumstances leading to the loss of the appellant's goods; and

6. The learned Judge erred in law in failing to make any finding on the doctrine of subrogation and the principle of common carrier's liability."

Counsel for the parties appeared before this Court on 10th December 2008 and submitted on this appeal. ***Mr. Kironji***, learned counsel instructed by ***Messrs Kambuni & Githae Advocates*** for the appellant submitted that though the motor vehicle carrying the appellant's goods was involved in an accident and the goods looted by thieves, there was a possibility of collusion between the common carrier and the

thieves. He stated further that although some cartons of the goods were recovered, they were not accounted for; thus giving a further clue to suspicion of collusion between the common carrier and the thieves. Counsel submitted that since the agreement marked as exhibit 6 had been admitted in evidence, its contents should have been given due weight; and since the respondent had undertaken to deliver the goods to its destination which he did not do then he should have been held liable. He submitted that in any event the respondent should have been held liable on the principle of subrogation to compensate the appellant for the loss of the stolen goods. According to counsel there was no evidence on how the appellant's goods got lost and the common carrier, being the guarantor of their safety, was supposed to compensate the appellant for such loss.

Mr. Mogikoyo, learned counsel for the respondent opposed the appeal and submitted that the superior court judgment had not been challenged and that for a claim under a common carrier to succeed, proof of negligence is a condition precedent for liability to arise. He stated that since the case was based on negligence which was not proved against the respondent, liability did not lie. According to counsel, goods were lost due to an accident which was a sufficient explanation. He submitted that there were no pleadings alleging collusion between the lorry driver, servant or agent of the respondent and the thieves and since this allegation came for the first time from the bar in this appeal; the respondent had no opportunity to rebut it.

It was counsel's view that admission of exhibit 6 *per se* was not enough as there was no explanation as to where the original was and the Judge should not be blamed for not relying on it; that the right of subrogation is conditional on the right to be compensated by the insurer and that in this case the doctrine of estoppel applies. Counsel asked that the appeal be dismissed.

In reply learned counsel for the appellant submitted that negligence was not necessary in case of liability by a common carrier and that in that case the burden of proof shifts to the common carrier.

As this is a first appeal, we have a duty to reconsider the evidence and evaluate it ourselves in order to draw our own independent conclusions, of course, bearing in mind that we neither saw nor heard the witnesses testify and making due allowance for this ***Selle v. Associated Motor Boat Company [1908] E.A. 123*** at p 126.

The appellant's main complaint against the respondent was that the latter had not only breached the agreement entered into by the parties, but also in his duty to the appellant as a common carrier and failed to deliver the goods to the appellant's order or to return the full quantity of the goods transported by him. However, the prayer in the plaint before the superior court was not for the return of the quantity of the goods but for compensation because the respondent said when the lorry transporting the goods overturned or was involved in an accident around Kericho town, the goods were lost through theft and/or looting. This is why there was a prayer for compensation for the value of the goods. This compensation was based on paragraph 9 of the plaint which stated:

"**9** ***By reason of the matters aforesaid the plaintiff suffered damage and loss as hereunder:-***

Value of the goods lost Kshs.564,787.00

Less excess Kshs. 10,000.00

Kshs.554,787.00

Add

Survey fees Kshs. 18,797.00

TOTAL Kshs.573,584.00

***And the plaintiff claims from the defendant the said sum of Kshs.573,584*.00."**

The cause of action was pleaded in the plaint in paragraphs 3, 4, 5 and 6 as follows: -

"**3.** ***The Defendant was at all times, a common carrier of goods and/or a general transporter of goods for reward to and from various destinations within the Republic of Kenya, and was further at all material times the registered owner of a motor vehicle registration number KYP 045 (****hereinafter referred to as '****the said truck'****).***

4.On or about the 1st of September, 1992 the defendant as such common carrier as aforesaid received and accepted at the plaintiff's premises at Nairobi a consignment of assorted goods, the property and products of the plaintiff to be safely and securely delivered to the plaintiff's order in Kisumu. The said goods were transported in the defendant's said truck.

5.It was a term of the agreement between the plaintiff and the defendant and more specifically an agreement dated 29th November, 1988 inter alia that the defendant would at all times indemnify the plaintiff for any loss, whether a shortfall, damage or contamination of products at retail value as the plaintiff would specify from time to time, and that in this regard, it would be upon the defendant to obtain full comprehensive cover for the plaintiff's merchandise in accordance with the said agreement. The plaintiff shall crave leave to refer to the said agreement at the hearing hereof for its full meaning and purport.

6. In breach of the said agreement and of his duty to the plaintiff as such carrier, the defendant failed to deliver to the plaintiff's order or alternatively to return to the plaintiff the full quantity of the goods transported by the defendant, and the defendant is therefore in breach of his duty as a common carrier and in contract as bailee for reward.

PARTICULARS

The defendant failed to deliver the full quantity of goods to the plaintiff's order or alternatively to return the full quantity of the said goods to the plaintiff."

There is no dispute that the respondent was a common carrier or that there was a contract of service between the parties as pleaded in paragraphs 3 and 4. Those paragraphs were expressly admitted in the defence. The respondent however denied that there was any warranty of safety and security in transporting the goods or that there was any term of indemnity. At the hearing of the suit, the appellant produced a certified copy of the agreement relied on to establish those facts as pleaded in paragraph 5 of the plaint but objection was raised on admissibility of the document. After considering submissions of counsel on the matter, the learned Judge held that the document was admissible under ***section 68 (1) (C)*** of the Evidence Act and it was thus marked as Exhibit 6. In his final judgment, however, the learned Judge revisited the issue and delivered himself thus: -

"***The document produced as exhibit 6 which made there (sic) defendant to be liable for any loss has been disputed and as already stated the original was not produced but a photocopy of the same. The plaintiff cannot therefore rely on this document."***

The appellant now complains in ground number 4 of the memorandum of appeal, and in submissions of counsel, that the learned Judge was not at liberty to reject that exhibit having admitted it in evidence after hearing both parties on admissibility. The complaint is difficult to resist and we agree that the document admitted in evidence ought to have been considered for its evidential value. Having considered it ourselves, we find nothing objectionable, and indeed the document supports the assertions by the appellant on the terms of the agreement between the parties. We allow that ground of appeal.

The appellant further complains in ground 2 of the memorandum of appeal that the issue of liability on the basis of the respondent's duty as a common carrier as pleaded and admitted, was not considered by the learned Judge. That is indeed so. At no time was any reference made to the pleadings or the main cause of action pleaded by the appellant. The learned Judge was content to examine the alternative issues pleaded in relation to negligence. We agree with learned counsel for the appellant that the omission was

prejudicial to the appellant.

The law on the liability of a common carrier has been laid out in many English decisions which have been applied within our jurisdiction – see ***BAT Kenya Ltd & Another v Express Transport Co. Ltd & Anor***. ***[1968] EA 171*** and ***Express Transport Co. Ltd v BAT Tanzania Ltd [1968] E 443***. In addition to the agreement signed between the parties which was produced as exhibit 6, the respondent, as a common carrier, was responsible for the safety of the goods in all events except if the loss or injury to the goods arose solely from an act of God or hostilities involving the State or from the fault of the consignor or inherent vice in the goods themselves. Illustrations of those exceptions are given in ***Peak v North Staffordshire Railway Co. (1862) 11 ER 1109*** for an act of God or of the Republic's enemies; ***Kanti v British Traders Insurance Co. Ltd. [1965] EA 108***, for inherent vice which would include normal wear and tear and improper packing; and ***Omer v Prudential Assurance [1966] EA 79,*** for a deliberate act of the consignor. The onus of establishing those exceptions lay on the respondent. We have carefully examined the pleadings and the evidence on record and it is clear to us that the respondent did not discharge that onus of proof on a balance of probabilities. The respondent himself did not say anything about what happened to the appellant's goods or call evidence to show how the accident occurred or how the looting took place. The only evidence on this was from PW2 who said:-

"***the transporter said that the driver lost control of the vehicle and the goods were looted. The transporter wrote to us to the effect that the brakes of the lorry failed."***

This is the explanation the respondent gave to the surveyor sent by Lion of Kenya Insurance Company Limited to investigate the matter and from which PW2 made his recommendation in his report, exhibit 2. But as can be seen, the explanation was not an act of God, not a vice in the goods themselves, nor an act of the enemies of state or the fault of the consignor.

Counsel for the respondent attempted to suggest that looters would fall in the category of enemies of the Republic. Perhaps this would be a liberal understanding of the word but taken in its strict sense it means those who wage acts of hostilities or rebel against the Republic or commit acts of aggression against the state, be they internal or external. But in our view looting was not the issue here, what was in issue was the measures required to be taken by the respondent as a common carrier to ensure the appellant's goods were safely and securely transported from Nairobi to Kisumu. It was upon the respondent to ensure that the motor vehicle transporting them, namely ***KPY 045***, was in serviceable condition to carry out the transport exercise for such a long distance without any hitch. To have a vehicle whose brakes failed on the way meant the respondent, as bailee for reward did not take reasonable and proper care for the security and delivery of that bailment, the proof of which rested on him. – see ***Joseph Traver's & Sons Ltd v. Cooper [1915] 1 KB at P.90.***

When PW 1 was cross examined by counsel for the respondent he said:

"***My final conclusion was that not much information was provided by the transporter because he mentioned Major Lang'at to have sent a lorry to recover the goods. No information was given as to how much was recovered. I would not understand why a total loss occurred when Major Lang'at had sent a lorry to recover the goods."***

And in his survey report he stated:

"***The surveyor is of the opinion that the driver/his turnboy and Major Lang'at would be in a better position to state how a total loss had occurred; that is loss of the entire consignment as per the claim. The consignee at the same time should be able to help the underwriters with the information as indicated above in order to facilitate claim adjustment.***

In the circumstances the loss would not be recoverable under a G.I.T. cover without the above information. However the underwriters may consider the loss under F.G. cover as the matter now stands."

The surveyor then assessed the alleged lost goods at Kshs. 564,786/90 and then said:

"***In the meantime we would recommend that the loss be considered under the policy after the insured had provided the information as per above. Such information would enable the surveyor to determine whether the loss would be recoverable under G.I.T. cover or F.G. cover."***

What the surveyor wanted was full information, in particular, as to how total loss had occurred while he had information that a Major Lang'at dispatched (sent) a lorry to collect the goods after the accident. There is no evidence that this information was ever received. Nonetheless, the Insurance Company paid the appellant Kshs.554,787/= as compensation by cheque dated 19th July 1994. No wonder then counsel for the appellant attempted to raise the issue of collusion between the respondent and the looters on this appeal but since there were no pleadings in respect thereof no arguments would turn thereon. However, even if the appellant were compensated by Lion of Kenya Insurance Company Limited for loss of the goods, on the basis of the doctrine of subrogation, policies of insurance are contracts of indemnity by virtue of which the appellant is entitled to be placed in the position of the insured and to succeed to all their rights and remedies against third parties in respect to the subject matter of insurance – see ***General Principles of Insurance Law by E. R. Hardy Ivamy*** at page 415. PW1 testified on this doctrine when he said

"***We signed a subrogation letter."***

which he produced in evidence as exhibit 8. Ruth Njoki Maina (PW3) also testified in respect there of when she said:

"***The total sum settled was Kshs.564,789/90."***

and referred to the subrogation letter (exhibit 8) and then continued:

"***There was an excess of Kshs.10,000/= which the insured had to pay. These are the payment vouchers."***

Then she referred to payment vouchers of Kshs.564,787/= and Kshs.10,000/= and then stated:

"***we instructed an advocate to pursue the matter. I produce demand letter of 24.08.94 (****exhibit 11****). We are seeking to recover the amount in the plaint plus interest and costs."***

That is the claim which the learned Judge dismissed and out of which this appeal has arisen. Having considered the arguments before us on this appeal and perused through the authorities cited we hold the view that the respondent, being a common carrier, was responsible for the safe delivery of the appellants goods to the intended destination in all events, including using a reliable lorry in good condition but having shown that lorry registration number ***KYP 045*** which was used had defective brakes the respondent failed to bring himself within any explanation which would limit his liability or place him within the exceptions which we have mentioned above. In the result we have no alternative but to allow this appeal, set aside the superior courts' order and enter one allowing the appellant's claim with costs, and also for the costs of this appeal. These shall be the orders of the Court.

Delivered and dated at Nairobi this 20th day of March, 2009

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR