IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 323 OF 2002

SECURICOR COURIER (K) LTD. …..……...…… APPELLANT

AND

BENSON DAVID ONYANGO

MARGARET R. ONYANGO ……. RESPONDENTS

(Appeal from the judgment of High Court of Kenya at Nairobi (Aganyanya J.) dated 19th day of March, 2002

in

H.C.C.C. NO. 229 OF 2000)

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JUDGMENT OF THE COURT

The appellant is aggrieved by the judgment of the superior court, Aganyanya J – (as he then was) delivered on the 19th March, 2002 dismissing the appellant's appeal against the quantum of damages awarded by the subordinate court for breach of contract on carriage on goods.

By a plaint filed in the Senior Resident Magistrate's Court, Naivasha, the two respondents claimed from the appellant, a courier company, Shs.76,150.90 being the value of two parcels, a Sony Television and a Micro-component (JVC system) which the appellant allegedly in breach of contract failed to deliver to the rightful consignee. The respondents in addition claimed general damages for breach of contract.

The essential facts are not in dispute. On 13th July, 1995, the 1st respondent, a military man, took two parcels to the offices of the appellant, at Thika for delivery to his wife, the 2nd respondent at Naivasha. One of the parcels contained a Sony Television and the second parcel a JVC system. This was not known to the appellant.

The appellant's clerk weighed the two parcels. Their total weight was 34 kilograms. The 1st respondent was charged Shs.980 for the service. He signed the Consignment Sheet which contained Conditions of the Service overleaf. The 1st appellant produced the client's copy of the Consignment Sheet as an exhibit at the trial. The goods were received at appellant's Naivasha office by Julius Mwangi Mylalya (Julius). Thereafter Julius received a telephone call from a man calling himself Benson Onyango from Naivasha who told him that he would send one John Abuto to collect the goods. The said Benson Onyango gave the Identity Card No. of John Abuto and further informed Julius that John Abuto would

arrive in a motor vehicle Reg. No. KTD 823. Shortly thereafter, a man who identified himself as John Abuto arrived at the offices of the appellant at Naivasha. He had the parcel numbers and the goods were released to him after signing for them. The 1st respondent went to the Naivasha offices of the appellant about half an hour later to collect the goods. He was informed that the parcels had already been collected by John Abuto. The 1st appellant denied authorizing John Abuto to collect the goods. The appellant reported the incident to the police. After sometime, John Abuto was arrested and Julius went to an Army Barrack at Thika and identified him. The result of the police investigations were not disclosed. On those facts, the 1st respondent pleaded that the appellant was negligent and had breached the contract of carriage. The appellant denied negligence or breach of contract and further pleaded that the contract limited the appellant's liability for loss or damage to goods at Shs.1,000/=.

The trial magistrate in a terse judgment held the appellant liable for breach of contract holding in part:

"This case relates to exclusion clauses. The defendants defence is pegged on these clauses which are found on the conditions of service in the consignment sheet number exhibit 3. I have perused the said clauses and I find that they are not prominently exhibited to customers except those insuring the goods. This to my mind is an unconscionable contract. I further find that the defendant acted in unprofessional way by changing the terms of contract through acting on so called information by telephone. Such was not envisaged in the contract. Apart from breach of contract, I find that the defendant was negligent in identifying as a third party a consignee".

The subordinate court entered judgment for the respondents for Shs.25,000/= being general damages for breach of contract and Shs.76,150.90 being special damages (value of the goods).

The appellant appealed to the superior court against the quantum of damages only contending that the subordinate court erred in awarding more than Shs.1,000/= being the maximum liability under the contract and in awarding general damages for breach of contract. The superior court dismissed the appeal in its entirety. Since this appeal raises an important legal issue concerning validity of exemption clauses in various contracts it is important to show in full how the superior court resolved the legal issue. The superior court reasoned, thus:

"Counsel for the appellant relies on paragraph 2 (b) of the conditions provided overleaf the receipt issued to the customer where a claim for loss of the items conveyed will not exceed a maximum of Shs.1,000/= for every item or Kshs.20,000/= in any one year. In the first place this provision is at the back of the receipt to which the client is referred at the front thereof. Look at this situation where a customer goes to the offices of the courier company with parcels for delivery and at the counter he finds a counter clerk, most of whom, if not all, are not conversant with warning to customers over the conditions of service. Their role actually is to receive the package and collect the charges; here the charges were Kshs.980/=.

This (sic) must have been very valuable items for which a sum of Kshs.980/= was paid. These parcel (sic) had excess weight of 29 kg and the clerk did not query this but accepted to convey it and charged Kshs.980/=. The clients may or may not be literate or even if they are literate, where is the time to first read those conditions before formerly handing over the package at the counter and paying the charges for conveyance? If they are not literate, are sort of clerks normally at the counters of these courier companies, the type to know of these conditions and to refer clients to them before offering the service? I feel not, and when the learned magistrate said the conditions were unconscionable, he had in mind these observations I have stated above.

In any case the clerk who received the parcels at Thika office of the appellant did not appear to confirm that he drew the attention of PW1 *(1st respondent)* ***to paragraphs 2(b) of the conditions of service before accepting to convey them to their Naivasha office for delivery to the rightful consignee, thereof.***

And if it was PW1 who had sent these items from Thika to Naivasha why accept a telephone call from him at Naivasha to release the same to one John or Joals Abuto when the actual consignee was

Margaret R. Onyango? This was the height of negligence on the part of the appellant at its Naivasha office and on my part I would say the respondents were not bound by the contract not drawn to their attention and this was a suitable case for the magistrate to brush aside or ignore this contract and award the respondent general damages for negligence, apart from the special damages as these were specifically proved ……".

This appeal is against those findings.

Although the 1st respondent stated in his evidence at the trial that the agreement he was given did not bear conditions, he admitted that he was issued with the forms which he signed. Indeed, he produced as exhibit at the trial, the client's copy of the Consignment Sheet which has the Conditions of Service overleaf. The two courts below seem to have accepted the Consignment Sheet as embodying the contract as they proceeded to construe clause 2 (b) therein.

The Consignment Sheet has two pages, the front and the back. The last part of the first page is important. It reads:

"Special Remarks:

THE CLIENTS ATTENTION IS DRAWN TO THE CONDITIONS OF SERVICE OVERLEAF.

CUSTOMERS ARE ADVICED TO SELF INSURE ALL ITEMS OF VALUE BEING SENT

THROUGH THE COURIER SERVICE.

NOTE: CASH IS NOT CARRIED ON THE COURIER SERVICE AND THE COMPANY WILL NOT ACCEPT

ANY LIABILITY FOR ANY LOSS OF CASH IF CARRIED ON THIS SERVICE.

Signature of Client (or authorized signature) ____(Sgd.)_____ Date 13/7/95

Name in capitals and designation BENSON D. ONYANGO

Confirmed, Checked and Received ____(Sgd.)_____ Signature and Date 13/7/95

CSPA (9/92) **CONSIGNMENT SHEET NUMBER".**

Clause 2 of the Condition of Service which is printed in small letters provides, *inter alia*, thus:

"2. In consideration of the payment hereinafter agreed to be made to the company by the client, and by way of limitation of the liability of the Company, the company shall (subject as hereafter mentioned during the continuance of the contract

(a) Carry out (subject to the provisions of the Contract) with proper care the services described in the schedule overleaf.

(b) Subject to provisions of clauses 3 hereof indemnify the Client against any loss or damage resulting from loss or damage to a consignment occurring during any period of the Company's responsibility and which was caused solely by negligence on the part of the servants or agents of the Company acting in the course of their employment provided that this indemnity shall apply only to loss or damage represented by or consisting of the cost of replacing such consignment and (in the case of Data) of hiring of any additional computer time necessitated thereby with an overall maximum sum of Kenya Shillings One Thousand (Kshs.1,000/=) in respect of any one claim and subject further to a maximum sum of Kenya Shillings Twenty thousand (Kshs.20,000/=) in respect of all such loss or damage occurring in any consecutive period of 12 months. This indemnity shall not, nor shall any liability of

the company its servants or agents to the client, on any ground or for any cause whatever or under any circumstances extend to any consequential loss or to any loss or damage other than the cost of replacement ……".

Clause 3 (d) of the Conditions of Service further provides that if the company carries out more than one service for a client on any one day the total liability for the company during that day shall not exceed Shs.10,000/=.

The 1st respondent agrees that he signed the first page of the Consignment Sheet as shown.

In this case, the appellant had conceded liability and is not therefore relying on any exemption clause in the contract to exclude its liability for breach of contract or negligence. However, the appellant is relying on clause 2, an exemption clause, which limits its liability to the sums specified in that clause. It is not therefore necessary to examine in detail the law on the efficacy of various forms of exemption clauses which exclude liability altogether. The history of the English courts' approach to the contractual clauses excluding or limiting liability was comprehensively traced by Lord Denning M.R. in ***George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*** [1983] 1 All E.R. 108 from page 111 – 117.

The history shows that for some years in the development of the common law, the English court introduced the doctrine of *"fundamental breach"* of a contract to obviate injustice which may be caused by an exemption clause in certain cases. Under that principle, if a party with superior bargaining power, especially in standard form contracts, was guilty of breach of the contract which went to the root of the contract, he would not be permitted to rely on the exemption clause in the contract which absolved him from liability entirely. That principle has now been reversed by House of Lords and in some cases by Legislative intervention. In ***Photo Production Ltd. vs. Securicor Transport Ltd.*** [1980] 1 All E.R. 556, the House of Lords discarded the doctrine of fundamental breach holding that there was no rule of law by which an exemption clause in a contract could be eliminated from consideration of the parties' position when there was a breach of contract, whether fundamental or not or by which such a clause could be deprived of effect regardless of the terms of the contract.

The House of Lords reiterated that common law approach as enunciated in ***Photo Products Ltd.*** (supra) to exemption clauses in ***George Mitchell (Chesterhall) Ltd. vs. Finney Seeds Ltd.*** [1983] 2 All E.R. 737. However, in that case, the House of Lords applied the test of what is fair or reasonable to the exemption clause in issue which test is provided in the English Sale of Goods Act, 1979.

The English Parliament has regulated the application of exemption clauses in one way or another in various statutes e.g. Supply of Goods (Implied Terms) Act, 1973; The Unfair Contract Terms Act 1977; The Sale of Goods Act 1979 and in Consumer Contracts Regulations, 1994.

Thus under English law the standard form contracts containing exemption clauses are in some cases governed by common law and in others by statute.

In our jurisdiction however, such contracts are purely governed by the common law. It seems that the current law governing the exemption clauses is as expressed by the House of Lords in ***Photo Production Ltd.*** (supra) and in ***George Mitchell (Chesterhall) Ltd.*** (supra).

The House of Lords has however, held that a limitation clause was not subject to the very strict principles of construction applicable to clauses of complete exclusion of liability or of indemnity (see ***Ailsa Craig Fishing Co. Ltd. vs. Malvern Fishing Co. Ltd.*** [1983] 1 All E.R. 101 which was applied in ***George Mitchell (Chesterhall) Ltd. vs. Finney Lock Seeds Ltd.*** (supra).

In ***Ailsa Craig***, Lord Wilberforce said in part at page 102 -103 j:

"Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly stated and unambiguously expressed, and, in such a contract as this, must be construed contra

proferentem. …… Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other to insure".

In the same case, Lord Fraser of Tullybelton said at page 105 h – j:

"There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity. …….

…….

In my opinion, these principles are not applicable in their full rigour when considering the effect of conditions merely limiting liability. Such limitations will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these conditions is the inherent improbability that the other party to a contract including such a condition intended to release the proferens from liability that would otherwise fall on him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when …… the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for. It is enough in the present case, that the condition must be clear and unambiguous".

Turning to the present appeal, it is apparent that the trial magistrate did not make any attempt to construe clause 2 (b) of the Conditions of Service. The trial court merely said that the clause was unconscionable without assigning any reasons. The superior court failed to give effect to the limitation clause because it was not satisfied that the clause was drawn to the attention of the 1st respondent. The superior court however, used general expressions which might be understood to mean that the exemption clauses in standard form contracts, particularly those relating to courier companies, are generally unenforceable either because, the clauses are in small print at the back of the consignment sheet; or the client though literate can never have time to read the clauses or that counter clerks employed by courier companies are not qualified to advise illiterate clients of the existence and tenor of such clauses.

The fact that the exemption clause is in small print and at the back page of a contract is not a valid ground for rejecting such a clause. Moreover, the findings of the superior court that literate persons would never have time to read such clauses and that courier companies do not have competent counter clerks were mere speculation as they were not based on any evidence.

That notwithstanding, the statement of the law by the superior court to the effect that a party cannot be bound by a contract which has not been brought to his attention is no doubt correct. Indeed, where clauses incorporated into a contract contain particularly onerous or unusual condition, the party seeking to enforce that condition has to show that he did what was reasonably sufficient to bring it to the notice of the other party, otherwise, the condition does not become part of the contract. (See ***Thornton vs. Shoe Lane Parking Ltd***. [1971] 2 Q.B. 163; ***Interfoto Picture Library Ltd vs. Stiletto Visual Programmes Ltd.*** [1989] 1 Q.B. 433).

An exemption clause can be incorporated in a contract by, *inter alia*, signature or notice. Generally speaking, if a party signs contractual documents containing an exemption clause, he is bound by it even though he has not read the terms, unless he signed the documents through fraud or misrepresentation. In ***L'Estrange vs. F. Graucob Ltd.*** [1934] 2 K.B. 394; Scrutton L.J. said at page 403:

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not".

That case was applied in ***Curtis vs. Chemical Cleaning & Dyeing Co. Ltd.*** [1951] 1 All E.R. 631 where Denning L.J. said at page 633 H:

"If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature is shown to be obtained by fraud or misrepresentations".

In this case, the 1st respondent admits that he signed the ***Consignment Sheet*** which forms the contract between the parties. He also retained the client's copy of the Consignment Sheet which he relied on as evidence of the contract of carriage and which he also produced as an exhibit. We have reproduced above part of the front page of the contract. Immediately above the space provided for the signature of the client the clients attention is drawn in bold prints to the Conditions of Service overleaf. The advice to the customers to self insure all items of value is also inserted in big bold print. Thus, the Conditions of Service were prominently referred to on the face of the Consignment Sheet. The superior court gave one of the reasons for rejecting the exemption clause as the failure by the clerk who received the parcels to give evidence that he drew the attention of the 1st respondent to the exemption clause. That was a misdirection. There is no requirement in law that the party relying on an exemption clause *actually* bring the exemption clause to the notice of the other party. He will be protected if he demonstrates that he did what was reasonably sufficient to bring the clause to the attention of the other party.

In the circumstances of this case, we are satisfied that the appellant by prominently bringing to the attention of the 1st respondent on the face of the Consignment Sheet of the Conditions of Service overleaf, the appellant discharged its burden and upon the 1st respondent signing below the notice, the exemption clause was automatically incorporated in the contract. In our view, the superior court erred in law in holding that the exemption clause was not brought to the attention of the 1st respondent and that it was not therefore a part of the contract.

The superior court did not make a finding whether the exemption clause was efficacious if indeed, it formed part of the contract. We have found that it formed part of the contract. The exemption limits the appellant's liability for negligence to the cost of replacing the consignment subject to a maximum of Shs.1000/= in respect of one claim. In this case, there were two parcels which would constitute two claims. There was evidence at the trial that the appellant did not know of the contents of the two parcels as it requires that parcels be properly packaged. The appellant on the body of the consignment sheet prominently advised the 1st respondent to self insure all items of value. As the case of ***Ailsa Craig*** (supra) illustrates, the exemption clauses limiting liability as opposed to those totally excluding liability should be enforced if they are clear and unambiguous. The justification for enforcing such clauses is explained in that case by both Lord Wilberforce and Lord Fraser of Tullybelton – that is, that, those clauses mostly related to other contractual terms; that the risk that the defending party may be exposed to might be so great in proportion to the sums that can reasonably be charged for the services contracted for; and that the other party has the opportunity to insure. In the ***Ailsa Craig*** case, a similar clause limiting respondent's liability to ?1,000 was held binding although the appellant had suffered loss of ?55,000. Similarly, in ***George Mitchell (Chesterhall) Ltd. vs. Finney Lock Seeds Ltd.*** (supra), a limitation clause limiting liability of the appellants to merely replacing the defective seed or refunding the purchase price, which was ?201.60, was held effective at common law even though the respondent had suffered loss of ? 61,513.

The limitation clause in the present appeal is clear and unambiguous. It is a condition of the contract for carriage. The superior court only considered whether it was incorporated in the contract. It did not consider its efficacy. Having regard to the nature of the appellant's business, the modest charges levied in relation to the value of the goods now claimed; the opportunity of the 1st respondent to insure the goods and the fact that the appellant did not know the contents of the two parcels or their value, it is just that the limitation clause should be enforced.

As for the award of Shs.25,000/= as general damages for breach of contract, this Court has repeatedly

held that general damages are not awardable for breach of contract (see ***Dharamshi vs. Karsan*** [1974] E.A. 41).

For those reasons, we allow the appeal, set aside the judgment of the superior court dismissing the appeal and substitute therefor an order allowing the appeal to the extent that the awards of Shs.76,150.90 and Shs.25,000/= respectively are set aside, and, in substitution therefor, judgment is entered for the 1st respondent against the appellant for Shs.2,000/= within interest at court rates. The 1st respondent shall have 1/3 costs of the suit in the subordinate court.

It is just in the circumstances of this case that there should he no order as to costs of this appeal and the costs of the appeal in the superior court and we so order.

Since the 2nd respondent was not a necessary party in the suit, she is not entitled to any costs.

Dated and delivered at Nairobi this 30th day of May, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR