REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appeal 45 of 2001

COTECNA INSPECTION S.A …….....…….
APPELLANT

AND

HEMS GROUP TRADING COMPANY LIMITED.....RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya

doret (Nambuye, J) dated 19th October 2000

in

H.C.C.C No. 126 of 1997)

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JUDGMENT OF ONYANGO OTIENO, J.A:

The respondent, Hems Group Trading Company Limited, sued the appellant, Cotecna Inspection S.A, by way of a plaint dated 16th April 1997. That plaint was amended on 29th May 1997. In the amended plaint, the respondent claimed Ksh.35,241,968/= as special damages, general damages for breach of duty, interest on the two claims and costs. These claims were made against the appellant on grounds that the appellant, being a company operating a comprehensive import supervision scheme intended to ensure that goods imported into Kenya comply in quality and quantity with contractual specifications and which duty enjoined the appellant to carry out preshipment inspection of goods for quality and quantity, was in breach of that duty to the respondent in that it failed to carry out that duty and fraudulently purported to issue a Clean Report of Findings relating to the soya beans the respondent was importing into Kenya on 9th February 1995 at which time it was not in a position to inspect the same soya beans and could not verify their compliance with specifications in the Import Declaration Form. The respondent claimed in that amended plaint that he suffered loss as a result of the breach of duty to it by the appellant.

In a statement of defence dated 4th July 1997, the appellant admitted that it operates an import supervision scheme as set out in the plaint but denied having had any contractual duty to inspect the goods at destination or that it owed any duties to the respondent. It also admitted particulars of IDF set out in the plaint but denied that the IDF was forwarded by the respondent stating that it was forwarded by the respondent's bank on 24th October 1994. It denied that it had any duties to the respondent or any statutory duty as alleged in paragraph 5 of the plaint or at all and in particular denied:

"**(a) That it ever loaded or witnessed the loading of cargoes as alleged in paragraph (ii) or at all.**

(b) That it was under any obligation to any one to inspect goods at destination as alleged in paragraph (iii) or at all.

(c) That it was under any obligation to anyone to check the authenticity or veracity of documents as alleged in paragraph (iv) or at all.

(d) That it issued a CRF for goods which it had not seen as alleged in paragraph (vi) or at all.

(e) That it had no knowledge of every allegation of fact in paragraph 5(vii)."

It also denied that it was under any duty to the plaintiff as alleged in paragraph 6 and in particular denied:

"**(a) That it was under any duty to inform an exporter as alleged in paragraph (i) or at all, the matter being common knowledge among exporters.**

(b) That it failed as alleged in paragraph (ii) it having tested the goods identified to it.

(c) That it was under any duty to make checks on board as alleged in paragraph (iii) or at all.

(d) That it acted as alleged in paragraph (iv).

It further denied every allegation of fraud as set out in paragraph 6(v) and the particulars thereof and denied having permitted shipment of goods alleged in paragraph 6(xi). Lastly, at paragraph 8 of that statement of defence, the appellant stated:

"**8. The defendant denies that the plaintiff has suffered the alleged or any loss or damages as a result of its acts or omissions. The plaintiff made payment to the exporter prior to the defendant being requested to inspect the consignment of soya beans it inspected in February 1995."**

It maintained that no general damages were available in the circumstances and denied that the respondent suffered the damages it (respondent) alleged at paragraph 7 of the plaint or at all.

On 20th August 1997, the respondent took out a notice of motion under **section 3A** of the Civil Procedure Act, **Order 6 rule 13(1) (c) and (d), Order 12 rule 6 and Order 35 rule 5** of the Civil Procedure Rules. In that notice of motion, the respondent sought mainly three orders and costs. The order it sought were:

"**(1) That the defence filed by the defendant be struck out on the ground that it may delay the fair trial of the action and it is otherwise an abuse of the process of the court.**

(2) That judgment be entered in favour of the plaintiff on admission.

(3) That summary judgment be entered against the defendant in terms of the amended plaint."

That application was heard by the superior court (Nambuye J.) who dismissed it expressing herself thus:

"**In the final analysis, I am inclined to rule that the pleadings of both parties and the documents annexed as forming the basis of the contract leading to the proceedings raised triable issues and this is not a proper case where judgment should be entered on admission, defence struck out and summary judgment entered."**

The respondent felt aggrieved by that ruling and appealed to this Court vide Civil Appeal No. 114 of 1998. In a considered judgment delivered on 26th March 1999, this Court, differently constituted, stated as follows on liability:

"**In relation to liability therefore, we are satisfied on the strength of the material before us, that there is no defence to the plaintiff's claim. The defence dated 4th July, 1997 and filed in court on 25th July 1997, raises no triable issues as regards liability. Accordingly, save as to admission, paragraphs 2 and 3 of the defence are struck out. We also strike out in their entirety paragraphs 4, 5, 6 and 7 of the defence. Since the plaintiff is claiming general damages and a very large sum of money by way of special damages, some of which relate to payments alleged to have been made to third parties, the plaintiff has to prove these by evidence. The grounds of appeal relating to the dismissal of the application under Order 6 rule 13(1) (c) and (d) accordingly succeed and are allowed. …….**

After that judgment, the respondent sought and got particulars from the appellant. The respondent then filed a re-amended plaint on 7th February 2000. In that re-amended plaint, the respondent states the duties of the appellant and continues at paragraphs 4, 5 and 6 and states further as follows:

"**4. On or about 23rd of August 1994, duly completed Import Declaration Form Number AB 026870, (hereinafter called the "IDF") in which the said plaintiff stipulated, inter alia, the specifications of soya beans it was importing from Trade International Inc., a supplier of the same in the United States of America, and submitted the IDF to the Defendant to facilitate the inspection of the soya beans by the Defendant at both ports of exit and entry to ensure compliance of the said soya beans with the said specification.**

5. In breach of its duty to the plaintiff and its statutory duty to the defendant:–

(i) Failed to carry out any preshipment physical inspection of the soya beans.

(ii) ……. (amended in full by deletion).

(iii) Permitted to be loaded on the vessel for shipment to Kenya and consigned to the plaintiff soya beans which did not comply with specifications in the IDF or the contract of sale either in quantity or quality and which were in fact partly rotten and/or mixed with other substances not contracted for.

(iv) Failed to check the authenticity and veracity of the document.

(v) Failed to ensure that the soya beans were in conformity with the Import Declaration Form.

(vi) Having failed to inspect the goods, falsified a Clean Report of Findings in the full knowledge that the same was false and the goods had already left the port of exit and thus preshipment inspection was impossible.

(vii) Being aware that the plaintiff's bankers would pay for the goods only upon production of a valid Clean Report of Findings prepared by the defendant, and notwithstanding that no valid or proper Clean Report of Findings had been prepared, nevertheless tendered the false Clean Report of Findings thereby causing the plaintiff's bankers to pay for the substandard goods.

(viii) Failed to comply with the statutory import regulations.

6. In further breach of duty to the plaintiff, the defendant:

(i) Being the preshipment inspection authority at the port of exit failed, omitted and neglected to inform the exporter immediately upon receipt of the copy of the Import Declaration Form that the goods must be subjected to preshipment inspection.

(ii) Failed, omitted and neglected to seek a sample of the goods in question for testing to confirm compliance with the specifications of the Import Declaration Form.

(iii) Omitted and neglected to make a further on board check of the bulk goods before the vessel set sail.

(iv) Having full knowledge of its falsity, issued a spurious Clean Report of Findings purporting it to be a record of the results of an inspection which it had not in fact carried out.

(v) ……. (amended and deleted).

(vi) Defendant fraudulently purported to issue Clean Report of Findings relating to the soya beans on 9th February 1995, at which time it was in no position to inspect the soya beans so as to verify compliance with specifications in the IDF, the goods having left he (sic) port of exit on 27th January 1995.

(vii) In effect permitted the shipment of goods which were of a substandard quality and which did not conform to the specifications stipulated in the Import Declaration Form."

Having pleaded thus, the respondent proceeded to plead at paragraph 7 that as a result of the appellant's breach of duty, it suffered special and general damages and itemized the special damages it was claiming. At paragraph 9, it prayed for judgment against the appellant as follows:

"**(a) Special damages of Ksh.43,685,275;**

(b) General Damages for breach of duty;

(c) Interest on (a) and (b) at the ruling overdraft

rates;

(d) Costs of this suit;

(e) Such further or other relief as this Honourable

Court may deem fit and just to grant."

I note that the major amendments in the re-amended plaint were mainly on the special damages that the respondent was claiming and which special damages together with general damages were not in any way affected by this Court's judgment of 26th March 1999. The hearing then proceeded in the superior court as indicated by this Court in its judgment.

After the full hearing before the superior court, (Nambuye J.), that court in a lengthy judgment considered that the respondent had proved the following factors:

"**1. That the plaintiff ordered a consignment of soya beans imported from the United States of America which were for human consumption.**

2. That the soya beans were supposed to be inspected by the defendant before being shipped to ensure that they conform to the specification given in the proforma invoice.

3. That the said soya beans were indeed shipped without being inspected before shipment.

4. That a clean report of findings was issued by the defendants without first inspecting the goods at the port of shipment.

5. That when the said soya beans arrived at the port of Mombasa, they were seized by the customs and excise officials allegedly for being unfit for human consumption and were released from the

carriership Ashley Likes on condition that they were to be taken to a bonded warehouse where they would undergo a cleaning process to see if they could be made fit for human consumption.

6. That as per evidence of PW 1 there were no cleaning facilities in Mombasa and so he was forced to transport the soya beans in Railway Wagons by Railway to Mombasa (sic) where they were taken to the express bonded warehouse under bond to await cleaning process.

7. That an attempt was made to try and clean the soya beans manually but this method was rejected by the customs officials necessitating the soya beans to be ferried in various lorries from express bonded warehouse to Caritech where they were to be cleaned using modern electric machines. That a cleaning contract to that effect was executed between the plaintiff and Caritech management a copy of which was produced in court as exhibit.

8. The reconditioned soya beans were transported to the House of Manji also in various lorries being 590 tonnes while the waste was also transported away from the site and disposed off.

9. That documents produced and relied on by the plaintiff subject to this Court's approval tends to show that indeed money changed hands and that services were not free of charge and were meant to be paid for. Some were paid while others are still outstanding.

10. That it came out during cross-examination that the plaintiff partly paid for the goods while the other bit was paid for by the House of Manji.

11. That it is the plaintiff's case that although there are no documents showing that the exporter was paid and indeed he was paid as the soya beans were exported to the plaintiff, received by the plaintiff disposed off and not returned and yet the said exporter has not sued the plaintiff for their value.

12. Payments have been proved through production of receipts which receipts were not challenged by the defence.

13. That the plaintiff himself (sic) made a calculation of the profit loss and short fall as per the evidence adduced.

14. The issue of liability was settled by the Court of Appeal."

The superior court, bearing the above points in mind, considered the claim for damages both special and general, and concluded thus:

"**I therefore enter judgment for the plaintiff against the defendant on the following terms:**

(1) Special damages in the sum of Ksh.34,764,410.00.

(2) Claim of general damages dismissed.

(3) Interest at ruling overdraft rates on item No. Pr. 7(iii) relating to bank charges.

(4) Interest at court rates from the date of filing until payment in full on the rest of the award.

(5) Costs of the suit."

That award of special damages reflected a summary of awards on several items in respect of different prayers in the plaint which were stated in the judgment as follows:

"**SUMMARY OF AWARD:**

1. **Pr 7(ii) Insurance paid on waste Ksh.207,153.00**

2. **Pr. 7(iv) Port charges Ksh.2,900,000.00**

3. **Pr. (v) travel expresses Ksh.283,296.00**

4. **Pr. 7(vi) analysis report and**

Staff expenses Ksh.124,490.00

5. **Pr. 7(vi) (sic) extra expenses to**

House of Manji Ksh.1,985,500.00

6. **Pr. 7(ix) Bond charges Ksh.1,788,677.00**

7. **Pr. 7(x) being bond fee Ksh.1,893,120.00**

8. **Pr. 7(xi) cleaning charges Ksh.4,175,243.00**

9. **Pr. 7(xiii) Railway Transport Ksh.1,715,000.00**

10. **Pr. 7(xiv) Loading of the wagons Ksh.193.385.00**

11. **Pr. 7(xv) Purchase of bags and**

labour Ksh.288.000.00

12. **Pr. 7 (xvi) Cleaning Charges (sic) Ksh.2, 775,980.00**

13. **Pr. 7(iii) Bank charges Ksh.4, 812,000.00**

14. **Pr.7 (l) Loss of profit Ksh.5, 741,141.00**

15. **Pr. 7(xii) short landing Ksh.5, 881,425.00**

Total award Ksh.34, 764,410.00."

The appellant felt aggrieved with that judgment and has come to this Court on appeal by way of a memorandum of appeal dated 13th March 2001 premised on eleven grounds. These are that the superior court erred in holding that the Court of Appeal had held that the damages flowed from the acts of the appellant whereas that Court left damages to be dealt with by the superior court, and the superior court should have found that no loss or damages flowed from the appellant's acts or omissions; that the Judge erred in failure to find that the Import Declaration Form was received by the appellant on Friday 21st October 1994 and processed on Monday 24th October 1994 as that was what was proved by evidence including evidence of PW 1 (Dr. Mwangale's fax of that Friday); that the learned Judge should have found that the appellant was not in breach of any duty prior to the expiry of the letter of credit on 13th November 1994 as the Import Duty Form contained no details of where and when the goods could be inspected; that the Judge erred in finding that the Clean Report of Findings produced by the appellant was used to release the payment from the respondent's bank account for the supplier of goods, when that payment was released before the date of the Clean Report of Findings; that the learned Judge erred in finding that the appellant could have stopped the shipment of the goods by using a non negotiable Clean Report of Findings, since the goods left and were paid for before the incorrect Clean Report of Findings was or could have been issued; that the Judge erred in failing to find that Kenya Commercial Bank Limited or its agent paid for the goods without receiving evidence of inspection of the goods, thereby

causing the respondent loss; that the Judge erred in holding that the appellant had to join the supplier (who is not in Kenya) as a third party when it was proved and admitted that the damages to the appellant flowed from the supplier's breach of contract in supplying to the respondent defective goods; that the learned Judge erred in awarding damages based on the original price of the soya beans agreed between the respondent and the House of Manji when it was proved that the reduction in the purchase price had been agreed before the issue of the Clean Report of Findings; that the Judge erred in using the figure for the respondent's profit from its 1993 accounts when there was evidence that the year 1993 was good year for the respondent and when no explanation as to why later the accounts were not produced; that the Judge erred in holding that the damages should not be reduced by US Dollars 65,000 being the offer from the suppliers which was not accepted and no good reason was given for the refusal of the offer, and lastly, that port charges, transport to Nairobi and Import Declaration Form fees were payable in any event and could have been a deduction in ascertaining the respondent's profits and those should not therefore have been awarded by the learned Judge.

In support of the above grounds of appeal, Mr. Kiragu Kimani, the learned counsel for the appellant company, addressed us at length stating what I may briefly summarise that while he admits that the Court of Appeal had in Civil Appeal Number 114 of 1998 struck out the defence on liability in striking out paragraphs 4, 5, 6, & 7 of the statement of defence in their entirety, and parts of paragraphs 2 and 3 in so far as the same paragraphs denied liability, the Court of Appeal left paragraph 8 of the defence the which paragraph denied that the respondent had suffered the alleged or any loss or damage as a result of its acts or omissions.

The same paragraph further stated that the respondent made payment to the exporter prior to the appellant being requested to inspect the consignment of soya beans it inspected in February 1995. Mr. Kimani saw this as a window that to him required the respondent to strictly prove that the action of the plaintiff, though not proper, was directly related to the loss that the respondent suffered. He submitted further that the learned trial Judge did not in her judgment properly interpret the Court of Appeal decision in Civil Appeal No. 114 of 1998, and proceeded in the flawed understanding that all it was required to do was to assess damages as the question of liability had been finalised by that Court's decision which struck out all pleadings on liability, by the appellant. Mr. Kimani urged us to analyse and evaluate the evidence that was adduced in the superior court a fresh and urged that in doing so we ask four questions which he set out as, first, what losses did the respondent suffer, secondly, what was the cause of the same losses, thirdly, were the respondent's losses caused by the appellant's acts or omissions and lastly who as between the appellant and the respondent was in a position to stop the action that led to the respondent's losses. In his submission, paragraph 8 of the defence was not disproved as there was no nexus between the failure by the appellant to inspect the soya beans and the losses that the respondent allegedly incurred. He contended that this was so because, the cause of the respondent's loss was the sale of substandard soya beans and not the lack of inspection of the soya beans, and stated further that the opportunity to inspect the soya beans and issue a Clean Report of Findings was availed to the appellant after the soya beans had been sold as it was issued after the goods had been paid for and the ship carrying them had set sail. The respondent was aware of this fact and should have stopped the transaction but instead it extended the validity of the letter of credit which had expired. At the time the respondent was informed of the failure to inspect the soya beans by the appellant, the appellant had not issued a Clean Report of Findings. If at that time the respondent had stopped the transaction, it would not have been obliged to accept the substandard soya beans which were then on the high seas. As the Clean Report of Findings was issued later, it could not have been used for releasing the goods which left the port of loading long before the Clean Report of Findings was issued. He submitted that the exporter was to blame as well as the bank that honoured letters of credit and the respondent should have sued the same for his losses. Apart from his contention that the losses the respondent suffered did not flow from the acts of the appellant and thus paragraph 8 of the statement of defence was not disproved so that the appellant was not liable for any of the losses the respondent allegedly suffered, Mr. Kimani also contended that even if the court were to find that the losses were caused by the failure of the appellant to inspect the soya beans and issuing of a Clean Report of Findings, still there were certain losses awarded by the superior court that were in respect of payments that the respondent was bound to make in any event whether the soya beans arrived in good condition and had already been taken care of in awarding loss of profits. These, he contended, were such as damages awarded for railway transportation from the port of landing to the

House of Manji in Nairobi. He also submitted that the superior court made certain awards that were not pleaded such as award of interest on bank charges, clearing charges and anticipated damages. Further, Mr. Kimani stated that the learned Judge of the superior court awarded Ksh.1,893,120/= as bond fees whereas what was pleaded by the respondent at paragraph 7(x) was Ksh.120,000. His complaint was that this was awarded notwithstanding that the law does not allow it and further notwithstanding that the plaint was not amended to accommodate the same. He also urged us to consider that the respondent failed to accept mitigating factors such as an offer of US Dollar 65,000 from the exporter which could have reduced the claim considerably. Mr. Kimani lastly contended that the learned Judge in awarding profits to the respondent as well as value of soya beans undelivered or shortlanded, was in error as that represented a duplication of the awards and further, the learned Judge erred in awarding damages for delay in delivery while the offending act of the appellant had no bearing on the delay of delivery of the goods, the subject matter of the suit.

As I have stated above, Mr. Kimani addressed us at length on several days on the appeal and I cannot pretend to have summarised fully all that he submitted on the appeal. I feel however, that the above short summary sets out the main aspects of his address to us. He referred us to several authorities which I have fully considered.

Mr. Ojiambo, the learned Counsel for the respondent, also addressed us at length. In his submission, Mr. Ojiambo was of the view that the decision arrived at by the superior court was inevitable when the facts and circumstances as regards the matter are analysed and evaluated and the applicable law is fully considered. He agreed with Mr. Kimani, that as this is a first appeal, the law requires us to revisit the case afresh as if by way of a fresh hearing, analyse and evaluate the evidence on record and come to our own conclusion, of course always bearing in mind that the trial court had the advantage of hearing the witnesses and seeing their demeanour and giving allowance for the same. In his submission, even after adopting that approach, the court would still find that the superior court's decision was inevitable. That court, he said, had made a finding based on facts before it that the appellant had breached the duty put upon it to inspect the soya beans at the port of origin and to certify that the same were upto the standard required by the respondent. He referred us to the judgment of the superior court and submitted that the court was satisfied that without the issue of a Certificate of Compliance or a Clean Report of Finding, the payment for the soya beans could not have been made by the bank pursuant to the letters of credit, and that if the appellant had not done the inspection then it should have issued Non-Negotiable Certificate of Compliance or Non-negotiable Certificate of Clean Report of Findings and that would have prevented the release of the funds pursuant to the Exchange Control Notice No. 10 (Revised). He maintained that all that the respondent needed to demonstrate was that payment to the exporter was made while the appellant was the preshipment inspector appointed by the government and that the appellant was dully and procedurally informed of the need to inspect the soya beans, the rest would be within the knowledge of the appellant and so the appellant could not complain that payment was made to the exporter and goods released before they inspected the goods. In any event, they were the only authority who could, through the issue of non-negotiable certificate of Clean Report of Findings, have stopped the transaction. He contended that it was the appellant to prove that the payment was made without issuance of certificate of compliance or a Clean Report of Findings as this was a matter particularly within the appellant's knowledge. In this case, the exporter, Trade International Inc., was paid by the bank. It was only the appellant, and the bank, that were in USA where payment to the exporter was made. The respondent (importer) was in Kenya and so could not know what happened. The respondent had to rely entirely on the integrity of the appellant i.e. the preshipment company. If the bank made payment, then it had to be assumed that the appellant issued the certificate of Clean Report of Findings. If they did not issue the certificate, then they had to show they did not. In its defence, the appellant did not deny that it issued the certificate. He submitted that in the circumstances of this case, payment to the exporter could only have been done after the appellant had issued the certificate. In this case it must have been recklessly issued. He further submitted that the loss occurred as a result of the failure by the appellant to issue a certificate of non-negotiable Clean Report of Finding that could have prevented release of funds and added that it was no excuse that the appellant had not inspected the soya beans and so could not issue a certificate of non-negotiable Clean Report of Findings as the appellant had indeed issued a Clean Report of Findings whereas they admitted they did not inspect the soya beans. Mr. Ojiambo maintained that preshipment inspection meant the entire process of examination including examining and checking documents to

ensure goods could be of acceptable standards in Kenya and not only looking at the goods on the ground and examining them. In his view, the appellant could have rejected the goods if they did not have time to inspect them thoroughly. As a result of the failure to issue a Clean Report of Findings or as a result of failure to issue non-negotiable Clean Report of Findings, substandard goods were brought into the country, were condemned by the Customs Department and hence a chain of losses to the respondent. Mr. Ojiambo further stated that the appellant was issued with an Import Declaration Form (IDF) in good time and the IDF contained all the details required to enable the appellant trace the whereabouts of the soya beans and inspect them. Further, they also had a Proforma Invoice which contained all about the goods and what was required to be inspected. The appellant was therefore aware of the whereabouts of the subject soya beans. Clean on Board Bills of Lading were issued and forwarded and this could not happen if inspection was not done. Date of payment was to be 90 days after issue of a Clean on Board Bills of Lading. In law and in practice, the respondent could not stop payment even if it had become aware of the irregularity. He thus argued that in order that a Clean on Board Bills of Lading was issued, a CRF must have been there even though it was fraudulently issued as the appellant had not inspected the soya beans. The appellant, according to Mr. Ojiambo, agrees to this but the appellant says it was given by their employee who then escaped into the thin air. That issuance made it difficult in law to proceed against the exporter. If the appellant received the documents and request for inspection late, then they should have declined to carry out inspection in stead of issuing a fraudulent CRF which made it possible for the bank to make payment for substandard goods. If they declined to issue the fraudulent CRF then the goods could not have been imported into the country as none can import goods into the country without inspection. Thus, the preshipment inspection can stop the shipment of goods into the country. He therefore argued that the loss that the respondent suffered was the direct result of the action of the appellant and thus the learned Judge was right in her decision.

On the award of damages, Mr. Ojiambo concurred with Mr. Kimani on the legal principles applicable and both referred us to the case of **African Highland Produce Limited vs. John Kisorio - CA No. 264 of 1999 (unreported)** and the case of **British Westinghouse vs Underground Electric Railway (1912) AC 673** and submitted that each one of the items of loss which was claimed and proved before the superior court flowed naturally from the breach of duty by the appellant. These breaches were first, failure by the appellant to undertake inspection of soya beans, the respondent was importing, secondly, forwarding to the bank a false certificate of Clean Report of Findings thereby making the bank pay the seller, thirdly, issuing a false Clean Report of Findings without which the respondent could not have taken possession of the soya beans. If the appellant had agreed to see the goods at the port of Mombasa and verified them as requested by the respondent as not the goods the respondent had sought, before the respondent received the goods, the respondent could not have suffered the losses. As the appellant failed to do so, the goods had to be put into a bonded warehouse and could only be released after cleaning and even as they were moved to Nairobi, the goods were so moved still under bond. He admitted that the respondent could have moved the goods to Nairobi in any event but stated that in this case, the goods were moved to a warehouse from where they had to be taken elsewhere for cleaning, so that much as he admitted that transportation from Mombasa to Nairobi was not claimable, there was however, transportation from bonded warehouse in Nairobi to the place where the soya beans were to be cleaned, and back to the bonded warehouse in Nairobi and to House of Manji after cleaning. The respondent had to pay additional duty for goods being in bonded warehouse for a year and other additional duties related to the same soya beans as a result of their being of substandard quality, and cleaning. In mitigation of losses, the respondent had to purchase extra soya beans in the local market to honour its obligation to the House of Manji. He conceded that the award for analyst reports by the Kenya Agricultural Research Institute, the Kenya Bureau of Standards and SGS (K) Ltd. which the superior court made at Ksh.124,490/= was not proper as in the plaint, the amount pleaded by the respondent was Ksh.120,000/= and the plaint was not amended to reflect the amount in the receipts. That award was not proper and the respondent was bound by what was pleaded i.e. Ksh.120,000 for that item. He also conceded that claim for bond fees which was allowed at Ksh.1,893,120.00 was not proper as in the plaint the amount sought was Ksh.120,000 and he admitted lastly that there was no plea for award in respect of shortlanding as the short fall claimed was to be in respect of shortage realised after cleaning and not in respect of shortlanding.

Lastly, Mr. Ojiambo submitted that the superior court acted properly and took into account the element of

mitigation that was raised by Mr. Kimani. Again, as I said about the summary of Mr. Kimani's submission, I cannot pretend to have made an exhaustive summary of Mr. Ojiambo's submission.

As this Court had in another appeal to which I have referred hereinabove i.e. Civil Appeal No. 114 of 1998 made it clear by striking out all the paragraphs and parts of the paragraphs of the defence denying liability, that the appellant was liable to the respondent in its failure to inspect the soya beans which the respondent was importing into the country and in further issuing of false Clean Report of Findings purporting that the appellant had inspected the goods whereas it had not, it would not have ordinarily been necessary to go into facts of the entire case in details as all that could have been before the superior court could have been only assessment of damages. However, in this case, the appellant, through its counsel claims that by leaving paragraph 8 of the defence intact, the learned Judge of the superior court had more to do and that was to go into the entire case and see if the acts of the appellant which were already declared by this Court to be improper were the direct cause of the losses that the respondent suffered. Mr. Kimani referred us to the judgment of this Court in Civil Appeal Number 114 of 1998 which states:

"**Since the plaintiff is claiming general damages and a very large sum of money by way of special damages, some of which relate to payments alleged to have been made to third parties, the plaintiff has to prove these by evidence."**

He also referred us to paragraph 8 of the defence which states:

"**8. The defendant denies that the plaintiff has suffered the alleged or any loss or damage as a result of its acts or omissions. The plaintiff made payment to the exporter prior to the defendant being requested to inspect the consignment of soya beans it inspected in February 1995,"**

and argued that the combination of the two above meant that though the issue of liability was settled, the superior court had to receive evidence, analyse it and evaluate it particularly on the nexus between the appellant's acts and the ensuing losses allegedly suffered by the respondent. This is a first appeal, and the law as regards what is required of us on a first appeal is now well settled. In the well known case of **Selle vs. Associate Motor Brat Company (1968) EA 123**, Sir Clement De Lestang, V.P addressed himself thus:

"**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness 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 if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif vs. Ali Mohamed Sholan (1955), 22 EACA 270)."**

It is with all the above in mind that I now proceed to set out in brief the facts that gave rise to the claim as was adduced in the evidence of the witnesses. The Government of Kenya has a duty to protect its citizens and all in the country from substandard goods entering into the country. In ensuring that no substandard goods enter the country, it has put in place regulations to ensure that importers subject whatever they are to import into the country to preshipment inspection which is to take place either at the port of origin of the goods to be imported or at the port of offloading the goods before the same goods are allowed into the country. It has appointed several companies to carry out preshipment inspection in respect of goods from various countries. Under the preshipment Inspection Programme, General Information and Conditions issued by the Ministry of Finance and which was availed as exhibit in the superior court, the appellant, Cotecna Inspection S.A., was appointed as a preshipment company by the Government of Kenya and assigned U.K, Ireland, Americas and Oceania (which includes Australia and New Zealand) as its geographic areas of responsibility. A preshipment inspection contract was dully signed between the government and the appellant and this was exhibited during the hearing of the case. The respondent,

Hems Group Trading Company Limited, was at the material times registered as one of the importers of various materials into Kenya. Wycliffe Basa Mwangale (PW 1) (Mwangale) was the Director and Chairman of the respondent company. He said in his evidence that at the relevant time the respondent was one of the twenty companies registered with Food Programme and was one of the companies requested to quote for the supply of soya beans, which is one of the ingredients for Unimix. These were to be supplied to the House of Manji which would in turn use it to manufacture Unimix to be supplied to the famine relief areas. The respondent, in turn made a contract with Trade International Inc., a company in the United States of America for the supply of the soya beans. The terms of their contract was 90 days from the bill of lading which he said meant that the respondent company was to pay Trade International Inc. for the supply of soya beans within 90 days from the date of shipment. The quantity of soya beans to be supplied was 1,000 metric tonnes. The price was US Dollars 327 per ton totaling to US Dollars 327,000. That was for cost and freight (C&F) Mombasa. On to this, the respondent added its own local costs which included duty, railway transport to Nairobi, off loading and loading charges. Having quantified the entire cost together with the agreed price of sale of the soya beans from Trade International Inc., the respondent made a quotation of Ksh.30,000,000/= for the supply of 1,000 tonnes of soya beans to the House of Manji. The respondent's quotation was accepted and it was given the tender to supply the soya beans to the House of Manji. It was given contract vide LPO No. 655. Having got the tender, the respondent then requested Trade International Inc. to provide it with a proforma invoice. That was supplied. The profarma invoice stated the quantity of soya beans to be imported to be 1,000 metric tonnes at a price of US Dollars 327,000. The respondent thereafter filled an import declaration Form (IDF) which was a document to facilitate the preshipment inspection of the soya beans. The respondent paid the required preshipment inspection fee amounting to Ksh.306,887/= to the government through Central Bank. After that the respondent opened a letter of credit in favour of Trade International Inc. with Kenya Commercial Bank. That letter of credit was No. 019/94/300. It was originally dated 25th August 1994. Later it was amended on 12th September 1994. Mwangale maintained that the proforma invoice and Import Declaration Form were forwarded to the appellant company through the proper channels. The duties of the preshipment Inspection Company are spelt out in the appendix to the preshipment inspection contract. After the respondent had complied with the requirements, Mr. Mwangale says Trade International Inc., the supplier, confirmed that it was supplying the soya beans as specified. When the consignment arrived in Mombasa, it was seized by the Kenya Ports Health Authorities because the consignment was unfit for human consumption as it was rotten. It was also seized by the Customs and Excise Department. The soya beans had a Clean Report of Findings which was prepared by the appellant which confirmed that the soya beans did conform to the specifications in the Import Declaration Form, the final invoices and the bill of lading. The Clean Report of Findings was No. KEVS 009236US dated 7th March 1995. It indicated that the soya beans conformed to the requirement in the Import Declaration Form as at the port of shipping.

Mr. Mwangale maintains in his evidence that the goods would not have been allowed into the country without a Clean Report of Findings. According to him, the soya beans were allowed into the country only because the Clean Report of Findings stated they were inspected and were found to be in accordance with specifications. As the soya beans were apparently not according to the specifications in the Import Declaration Form, Mwangale approached the defendant through their office in Mombasa and asked the defendant to go and confirm whether the soya beans that arrived at the port was the soya beans that the appellant inspected. He wanted them to inspect the soya beans a fresh. This was proper according to Mwangale because under the rules, if the importer failed to have the goods inspected at the port of shipment, the importer could have the goods inspected at the port of entry, but the importer would pay penalty of 5% of the C&F of the value of the soya beans. In this case, although there was a Clean Report of Findings, the respondent later found out that the appellant did not do preshipment inspection and the alleged Clean Report of Findings was false. Further, the respondent also found out that there was a shotlanding of 350 bags of 50kgs each. The soya beans could not be released before testing if they were fit for human consumption. Kenya Port's Health Authority directed that the soya beans be tested. The respondent requested SGS-1 Company, Kenya Bureau of Standards and Kenya Research Institute to test the soya beans and confirm whether it was in accordance with the specification in the IDF which was No. AB026870 dated 23.8.94. They all confirmed that the soya beans was not according to the specifications. The exhibits confirming the same were produced in court. The Import Declaration Form which was dated 23.8.94 was forwarded as I have stated, to the appellant through the bank. It gave the

name of the importer which was the respondent; the country of supply which was USA; the exporter which was Trade International Incorporation; the port of discharge which was Mombasa; the transport mode which was a ship; the estimated time of the latest shipment from the USA which was the 15.9.94; the transaction terms which was a letter of credit and also stated the proforma invoice which was 2707 MKA/7 dated 4.8.94; the currency to be used in the transaction which was US Dollars; the item to be imported which was soya beans for human consumption and it gave specifications of the soya beans. Mr. Mwangale's further evidence was that the Import Declaration Form and the accompanying documents represents an inspection order from the importer, the respondent, and effectively initiates the preshipment inspection procedures. The government through Central Bank was paid Ksh.206,887/= for processing the preshiment which was to be done by the appellant and the payment was to initiate the preshipment process. He also stated in his evidence what the contents of the proforma invoice No. 2707MKHA/1 dated 4.8.94 were. Once the appellant received the two documents IDF and proforma invoice plus bill of landing, it was required to initiate the preshipment inspection. A letter of credit would also be given to the appellant through the bank. Because of the specification, the inspection of the soya beans was to include both physical and laboratory tests. He said further that the certificate of Clean Report of Findings was a requirement for payment against letters of credit. It was therefore important that the appellant should have known that it was one of the documents it should have sought from the beneficiaries to provide. If an inspection has been carried out by the preshipment inspector, he would issue a Clean Report of Findings to show that the inspection has been carried out and a Clean Report of Findings is issued only when the physical goods conform to the description in the IDF and proforma invoice and the documents mentioned there. If the goods do not conform to the description in the documents, then the preshipment inspection company, in this case the appellant, was required to give an inspection report detailing that the goods were rejected and then it would tell the seller if there was any remedial action that would be taken to recondition the goods and the appellant would stop the preshipment inspection until such time that the goods were reconditioned. If the seller did not recondition the goods to the satisfaction of the preshipment inspector, then a non-negotiable Clean Report of Findings would be issued and then the government department concerned would be informed that the goods had been rejected and thus the transaction would be stopped. He stated that in one of the Clean Report of Findings which was produced as Exh. 6, dated 6.3.95, the respondent showed that goods were shipped at Houston Texas, USA, and that the pre-shipment Inspector saw the goods on board Ashley Likes on 10.1.95. To Mwangale, that meant that they did pre-shipment inspection at the port of loading and they also saw the goods on board and they had been shown in the Bill of Lading No. 04EE00819. The letter of credit expired on 15.9.94 but it was extended to expire on 27.10.94 at the seller's request. The goods should have left the port of shipment latest on 27.10.94, whereas the documents show that pre-shipment inspection was done on 10.1.95. Mr. Mwangale then says:

"**They should not have been carrying out the inspection then because the documents had expired. They should have declared a non-performance on this transaction and informed the importer and informed the importer (sic) and customs and excise."**

He went further and stated that after finishing the pre-shipment inspection, the appellant issued a final invoice from the supplier dated 19.10.94, exh.7. That final invoice gave the quantity as 1,000 metric tonnes at 327 US Dollars per metric tonne coming to the value of US Dollars 327,000. It also specified that the goods conformed to the proforma invoice No. 2707 MKHA/1 dated 4.8.94. That document had expired by the time the respondent purported to have been inspecting the goods. They could not say the goods they were allegedly inspecting on 10.1.95 conformed to the proforma invoice dated 4.9.94 and they should not have issued a Clean Report of Findings. Further, the bill of lading No. 04EE00819 upon which the appellant purportedly acted upon was not dated. The letter of credit specifically sets out the terms of payment as 90 days from the date of the bill of lading and thus a bill of lading not dated as the one the appellants acted upon was not valid for issuance of a Clean Report of Findings. That bill of lading also gave false information that the bags loaded in the ship Ashley Likes were 19896 which was indicated as 1,000 metric tonnes packed in 50kg each. That was false information and a Clean Report of Findings should not have been issued based on that information. The appellant, according to Mwangale, should have stopped the goods from leaving the USA. However, contrary to what the appellant should have done, it allowed the goods to leave USA and issued a Clean Report of Findings to show the goods conformed to the contents of IDF and the proforma invoice. When the goods arrived at Mombasa, they

were seized. Immediately the goods were seized, Mwangale asked the appellant to go to the port, look at the goods and see if they were the goods they had inspected in USA, but the appellant's officer in Mombasa refused to go and see the goods. He told Mwangale that he would get into contact with their head office and get back to Mwangale but he never did so. The respondent wrote to the appellant two letters dated 11.4.95 and 19.4.95 requesting the appellant to go and clear the soya beans again but the appellant never complied and never got in touch with the respondent.

The seizure notice required the goods to be reconditioned before being released to the respondent. There were no reconditioning plants in Mombasa to handle the reconditioning exercise. The respondent had to move the goods to Express Warehouse under bond to have them reconditioned in Nairobi. That was extra expenses to the respondent. The respondent also had to get the soya beans tested as we have stated and paid for the same testing. Thus, the respondent paid the railway charges for moving the goods to Nairobi for reconditioning. They also paid charges for testing to Kenya Bureau of Standards, SGS, and KARI. They then paid for transportation of the soya beans to the companies in Nairobi that were to carry out the reconditioning of the soya beans and paid for reconditioning of the soya beans. They made several other payments as itemized both in the proceedings and in the judgment of the superior court. I will revert to them later in this judgment. He also gave an outline of the respondent's loses which covered several items. Likewise, I will revisit the list later in this judgment.

In cross-examination, Mwangale said that he found out from the agents that the shipment left USA on 27.1.95 and arrived in Mombasa on 9.4.95. He further stated that the appellant's role in the whole saga was a statutory duty and that the appellant was sued because of its failure to perform its statutory duty to the respondent; that the payment for the letter of credit was released on 13.2.95; that the appellant was to blame because it had the mandate to stop the transaction if the then supplier, Trade International Inc., had not performed its duty. He however went on to give the supplier allowance to perform outside the validity of the letter of credit. He maintained that although the Trade International Inc. was the supplier, and was required to supply the goods as per specification in the proforma invoice, the appellant had statutory duty to inspect the goods against the documents and issue a certificate to allow the bank to pay. By issuing a Clean Report of Findings as the appellant did, the appellant confirmed that Trade International Inc. acted according to specification which was not the case and so to him, the appellant was to blame. He said, although he did not know how the money moved from KCB to Bank of Novascotia, as the appellant was in a better position to know the same, he however knew that no payment could have been made without a certificate from the appellant. He maintained that as the respondent was not in America, the appellant was the one to answer for anything that happened in America as the appellant was supposed to handle the goods physically against the documents given and issue certificate for payment on letter of credit and the bank could open a letter of credit without first distributing the copies of the Import Declaration Form. Exh. 5 shows that the appellant inspected the goods on 10.1.95, the CRF should have been in Nairobi within 2 days to be passed on to the respondent and customs. Instead it was delayed for 2 months contrary to the comprehensive guidelines given by Central Bank. He further said in answer to Mr. Le Pelly's question that the respondent found out that the shipment was done on 27.1.95, and the appellant had issued a CRF on 10.1.95 whereas the bank made payment on 13.2.95. The bank could not pay without a certificate to show the goods conformed with the proforma invoice. Thus, to him, the appellant must have issued a Clean Report of Findings to enable the bank to pay as it did. He admitted that in another suit in which the Kenya Commercial Bank was suing the respondent, he had stated in the counter-claim that the bank made payment without a Clean Report of Findings in this matter but he reiterated that he was wrong when he stated so. He stated further that there was claim against the respondent because the House of Manji rejected the whole consignment of the soya beans which came under the appellant's Clean Report of Findings and that the respondent paid the House of Manji Ksh.1,985,500 to buy soya beans to continue processing unimix as the House of Manji made a claim against the respondent. That claim was for about Ksh.24,600,000. On the question of the letter of credit he stated:

"**This was a document which had been confirmed irrevocable letter of credit and the only person who could have stopped this transaction was the defendant because he had been given the mandate for preshipment inspection if the supplier had not complied with the letter of credit it renders the whole transaction invalid. He should have told us that he had not performed and stop the**

transaction."

He stated that the respondent could not claim from the supplier because the appellant issued the supplier with a certificate. The contract between the respondent and the supplier was subject to issuance of a certificate of a Clean Report of Findings which was issued showing that the soya beans complied with what was in the Import Declaration Form and the proforma invoice and added that it was the duty of the appellant to inform the supplier that the goods would not be allowed into the country without a Clean Report of Findings. There was short shipment, yet the appellant issued CRF to show the supplier had shipped the entire quantity paid for whereas this was not true. On the damages, Mwangale, in cross-examination, said that the respondent was claiming all the expenses from the appellant plus the profits and to him that was not double charge. The respondent, in its claim, took into account the benefits after cleaning the soya beans. It insured goods which turned out to be substandard goods and hence the claim for insurance. In re-examination, he denied the suggestion by the appellant that IDF was received by the appellant on 24.10.94. He stated that could not be so because he received request for further information on the document from Miss Limo for the appellant on 21st October 1994. That request was for tariff number only. Mwangale was the only witness called by the respondent in support of its case in the superior court.

The appellant called three witnesses. Ronald Kibiegon Koech (DW 1) (Ronald) was an employee of the Kenya Commercial Bank at the material time. At the time he gave evidence, he was a business man in Kericho. From April 1994 to 1995 he was with currency dealing division of the department of Foreign Exchange at Kenya Commercial Bank. All Branches of KCB in Kenya were answerable to his division which was situated at the Kencom House, Head Office. He dealt with Import Declaration Forms. He gave the procedure on dealing with IDF and the requirements to be complied with by the importer and the bank. Basically, the importer was to file the IDF and present it to the branch which would process it within two days. The branch would put in the exchange rates prevailing at the date of presentation, assess the fee payable, and make a covering letter to the relevant pre-shipment inspection company. The branch would then forward them to the currency dealing division where Ronald was working. He would receive the IDF, a proforma invoice and a cheque to Central Bank of an amount in Kenya currency equivalent to 2% fee. He denied having ever seen a letter of credit being sent to his bank. Once received, they would work on them for one day and they would be ready for collection the next day. They would not hold any IDF. The inspection company received two documents from the bank which were the IDF and the proforma invoice and nothing else. He confirmed that relevant IDF which was shown to him had instructions at the back like all IDFs. On cross-examination, he said he had resigned from KCB in February 1999 and the KCB management did not know that he was giving evidence as he was directly approached to give evidence by the appellant. He said he knew preshipment agencies but he did not know what work they do and what they had to look for when carrying out preshipment inspection of goods neither did he know that preshipment inspection had to be done within the validity of the letter of credit although he knew what a letter of credit was. He did not know the effects of the expiry of a letter of credit. He did not know when he received the subject IDF and when it was handed over to the appellant.

The second witness for the appellant was Maria Limo (DW 2) (Maria). She was employed by the appellant at the relevant period. She confirmed that the appellant received the IDF Exh. 5(b) together with the proforma invoice but the IDF was not complete as it did not have the importer's name. The appellant informed the respondent and the correct name of the respondent was faxed to the appellant. The fax also contained harmonising code which was also entered into the IDF. The fax was received by the appellant at around 3.00 p.m. on 21st October 1994 which was a Friday. It was to be worked upon on the following Monday 24.10.94. She denied having received that IDF two months before 21.10.94. In cross-examination, she said it was not true as stated in the defence that IDF was received from the bank on 24.10.94. Her basis for saying it was received on 21.10.94 was the confirmation of the fax that the respondent sent to the appellant although she admitted that the fax did not mention the date when the inquiry resulting into the fax being sent was made. The date 24.10.94 is the date when the IDF was processed. In 1994, harmonising code was a must. She ended her evidence by saying:

"**If IDF was improper our duty was to reject it pending clarification from the importer. It is also**

contained in the guidelines."

She referred to Cotecna pre-shipment inspection guideline to confirm that statement and agreed that when she left the office on 21.10.94, she had all the information required but that was after 3.00 p.m.

Bosco Karingithi was the third witness for the defence (DW 3). His evidence was that the appellant was employed by the Government of Kenya in 1994 to receive import documents from Commercial Banks, check for completeness and if found correct, transmit the same electronically to Cotecna inspection offices overseas. If the documents were found not complete, the importer was to be informed to correct them and if not corrected, they would be rejected. They would also transmit by courier the hand copies of the documents. Its other duty was to receive electronic data after inspection and issue to the customer a Clean Report of Findings or a non-negotiable report where there was non-compliance. Those were the roles of the Nairobi Liaison Office of the appellant company. It could also carry out inspection at destination if requested in writing either by the Central Bank or the customers but in that event there would be 5% penalty payable before such authority is given. In his evidence, IDF and proforma invoice are never accompanied by a letter of credit. IDF does not specify when and where the goods are to be inspected. He then referred to Exh. D2 which he said was the request for information sent out upon receipt of IDF. That document gave details of the name of the seller, the name of the contact person, the telephone number and the nominated day of inspection and date of inspection. He admitted that it was correct the company issued a Clean Report of Findings on 6.3.95. That was correctly issued. The appellant had not seen the bill of lading as the only bill of lading it had sighted related to a vessel that had left before the inspection. That, he stated, was a mistake by the report drafter who should have rejected it as an incorrect bill of lading. CRF refers to shipment at a particular port and on board a particular ship, but there is no regulation or law requiring the preshipment company to inspect goods on board the ship although the preshipment company is required to confirm the quantity that goes into the vessel and they could use 100% piece count or random sampling. He said that Mwangale called and asked for destination inspection but he told him that the appellant needed written authority from the customs or the Central Bank to do so. He said on the letter of credit as follows:

"**The bank has or normally have to pay on the presentation of prescribed document in the letter of credit. Normally, the prescribed documents would include a Clean Report of Findings. It is correct that it would include the IDF and the final invoice.**

Once we have handed over our CRF we can never know when this is presented to the bank or in most cases to which Bank. We had no mandate to authorise or stop payment."

He ended his evidence in chief by saying that the inspection date was given as 2.2.95. In cross-examination, his evidence was that Exh. D11 was a contract between the appellant and the Government of Kenya covering the period 1994 and it stated that preshipment inspection would be carried out regarding quality, quantity and value of all goods into Kenya. He then described the method to be used in inspecting the goods. He had computer data of the day the IDF was processed but not the day it was received. He checked the appellant's records as to when the IDF was received by the appellant but was unable to establish when it was received. He further agreed that they carry out inspection as a result of the IDF and do go in terms of the IDF in so far as the same are relevant but the letter of credit and its expiry dates are not relevant to the appellant. The terms of payment were totally irrelevant to the preshipment inspection and what was complied with were the terms of inspection findings which are set out in the IDF and the proforma invoice.

The above are the brief facts of the case that was before the superior court as can be deciphered from the evidence adduced in that court. As I have stated, the question of liability had already been settled in this Court's judgment delivered on 26th March 1999 in Civil Appeal No. 114 of 1998 to which I have referred earlier in this judgment. I have no jurisdiction to revisit the same and thus it remains that the appellant has been found liable to the respondent in its breach of duty to the respondent. My analysis and evaluation of the evidence, a summary of which is given above, must only be confined to the question as to whether or not that breach of duty was the cause of the losses the respondent suffered and if so, whether the assessment of damages was properly carried out by the trial court. But first, the law. What

are the principles to be applied when considering the nexus between the acts of an offending party and the loss suffered by the offended party? I do agree with both leaned counsel that there must be a link between the action complained of and the loss incurred. That to me goes without saying and is a matter of common sense. It underlies the doctrine of remoteness of damages. In **Charlesworth & Peray on Negligence, 7th Edition**, it is stated at paragraphs 5 - 70 as follows:

"**Evidence of causation must be given on behalf of plaintiff. Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the plaintiff. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that on a balance of probabilities, the most likely cause of the damage was the negligence or breach of duty of the defendant, his servant or agent and not solely the negligence of some other person. If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail. Such a failure will result whether this happens to be expressed in terms of lack of result or for reasons of remoteness.**

It is a question of law, whether the evidence adduced allows a reasonable finding of causation, but it is a question of fact, whether any particular head of damages is so caused by a defendant's negligence or breach of duty."

Thus, the mere fact that a party is found liable for breach of duty to another party does not of necessity mean that the party in breach must meat all the damages that the offended party suffers. The offended party still has the duty to show that the breach of duty caused the damages he suffered – see the case of **Moris v. W. Moss & Sons Ltd. (1954) 1 WCR 346**. It is upon the plaintiff to prove that the breach was the cause of the loss, for it is the plaintiff that alleges the loss. In the case of **Overseas Tankship (U.K), LTD. vs. Morts Dock & Engineering Co, Ltd**, **(1961) 1 All ER 404**, the Privy Civil held (*per incuriam)* as follows:

"**It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too hash a rule."**

In my view, the case of **South Australia Asset Management Corporation vs. York Montague Ltd. & others** (**1997) 3 All ER page 191** is closer to the case before us. There the House of Lords held as follows:

"**That the duty of the defendants in each case, which was the same in tort as in contract had been to provide the plaintiffs with a correct valuation of the property, namely the figure that a reasonable valuer would have considered it most likely to fetch if sold on the open market; that where a person was under a duty to take reasonable care to provide information on which someone else would decide on a course of action he was, if negligent, responsible not for all the consequences of the course of action decided on but only for the consequences of information being wrong: that the measure of damages was the loss attributable to the inaccuracy of the information suffered by the plaintiffs through embarking on the cause of action on the assumption that the information was correct; that in the first case the consequences of the valuation being wrong had been that the plaintiffs had had ?10m less security than they had thought; that if they had had that margin they would have suffered no loss and the whole loss had therefore been within the scope of the defendants' duty: that in the second case the consequences of the valuation being wrong had been that the plaintiffs had had £700,000 or 650,000 less security than they thought; that the defendants had not been asked to advise on the risk of the borrower defaulting and any increased risk of default consequent on their overvaluation did not affect the scope of their duty to the plaintiffs; and that the damages should be reduced to the difference between their valuation and the correct valuation; and that in the third case the damage should similarly be reduced to the difference between the defendants' valuation and the true value of the property at the date of valuation."**

In this case before us, the appellant's position is that whereas it admits that it did not inspect the soya

beans as was required of it and as was its duty to do, and whereas having failed to do so, it nonetheless issued a false Clean Report of Findings dated 6th March 1995 purportedly certifying that the soya beans were inspected in accordance with their mandate and found acceptable as to quantity, quality and price, and whereas that Clean Report of Findings showed in particular that it was issued in Chantily, Virginia, USA in relation to 1,000 metric tonnes of soya beans imported by the respondent on board a carrier called Ashley Lykes, and whereas the same false CRF was signed by the appellant's inspection representative, nonetheless their act did not cause the respondent any loss as the same act could not be linked to the consequential loss. In their evidence, that contention is based on the allegation that the appellant got the Import Declaration Form and the proforma invoice late and the documents had no letter of credit and that the shipment date was 27th January 1995, and by the time the proper documents were received for preshipment inspection the goods were already on the high seas and so preshipment inspection could not be done and that being the case, the cause of the respondent's losses was the act of the seller, Trade International Inc. which supplied the soya beans unfit for human consumption and the bank that made payment on letters of credit without a Clean Report of Findings and not the appellant. That position taken by the appellant during the hearing of the case in the superior court and the evidence given by the appellant during the hearing of the case appears to me different from the stand that they took when the application by the respondent for striking out the defence was before the superior court. From the judgment of this Court in **C.A 114 of 1998 (supra)**. The defendant's witness, Karingithi (DW 3) stated in his affidavit, *inter alia*, as follows at paragraph 22:

"**22(a) The defendant has no knowledge how the bags were loaded nor of the letter from the shipping agent dated 11th September 1995.**

(b) The inspection method used by the defendant are random (sic). The inspection carried out on the identified soya beans complied with the Import Declaration Form.

(c) The soya beans inspected by the defendant are not the soya beans delivered to the port of Mombasa. The defendant's inspector found both the quality of the soya beans identified to him satisfactory.

(d) The Clean Report of Finding issued by the defendant did not make reference to a letter of credit or to a proforma invoice."

It is clear from that part of his affidavit that the appellant issued a Clean Report of Findings after allegedly inspecting the soya beans. That could not have been done if the IDF and proforma invoice were received late as the appellant alleges. In any case, if due to action of the respondent preshipment inspection was made impossible, then what was the necessity of later producing a false Clean Report of Findings and more importantly, what did the appellant anticipate could have been the effect of such a Clean Report of Findings? In the preshipment inspection contract between the appellant and the government through the Ministry of Finance, paragraph 1.1. (n) defines pre-shipment inspection as follows:

"**Preshipment inspection means the activity undertaken in a country of export to establish that the goods are properly described and reported as to their eligibility for importation into Kenya."**

That duty of ensuring that the goods imported into Kenya are properly described as to their eligibility was placed on the appellant through that contract. Paragraph 3.1.1 sets out the standard of performance required of the appellant both to the government and to third parties. It states:

"**The company shall perform the services and carry out their obligation hereunder with all due diligence, efficiency and economy, in accordance with generally accepted techniques and practice used in the inspection agency profession and with professional consulting standards recognized by international professional bodies, and shall observe sound management and technical practices, and employ appropriate advanced technology and safe and effective equipment, machinery, materials and methods. The company shall always act, in respect of any matter relating to this contract or to the services, as faithful advisers to the client, and shall at all <u>times support and</u>**

safeguard the client's legitimate interests in any dealing with sub-contracts or third parties."

(underlining supplied)

One of the legitimate dealings between the government, the importer and Trade International Inc. (the seller) was to ensure that the seller (read the Trade International Inc.) did not bring into the country substandard goods. Appendix B of the contract states at paragraphs 1.1 and 1.2 on inspection report requirements as follows:

"**1.1. Upon completion of each preshipment inspection, the company shall, where the results of the inspection are satisfactory in all respects with regard to quality, quantity and value, issue a CRF, based on final invoice, and Bill of Landing. Every effort shall be made by the company to make the CRF available to the importer before the arrival of the goods. Persistent failure to meet this requirement shall be a cause for termination of the contract in accordance with the provisions of clause 2.9 of the contract.**

1.2. Where a preshipment inspection discloses any discrepancy or defect with respect of the quality, quantity or value, a Non-Negotiable Report of Findings shall be issued which may not be negotiated or processed by any bank in support of payment for the goods. The client shall be immediately notified in all such cases."

The contract made it clear that the purpose of the Clean Report of Findings was to ensure both the government and the respondent that the soya beans were of the quantity, quality and value as was stated in the Import Declaration Form. The respondent relied on the CRF for the quality, quantity and the value he paid for the goods and the appellant knew this all along. The appellant says in its written defence that the IDF was forwarded to it by the respondent's bank on 24th October, 1994. In the evidence given before the court, its witness, Maria Limo said that the appellant's offices received the IDF on Friday 21.10.94 and processed it on the following Monday 24.10.94 contrary to what the written defence stated. When shown paragraph 3 of the defence in cross-examination, she said:

"**I can see paragraph 3 of the defence. It is not true that the IDF was received from the bank on 24.10.94."**

Thereafter, she agreed that she believed the IDF was received by them on 21.10.94 only because they received a fax supplying them with more information on it on that date. Otherwise there was no conclusive evidence that the subject IDF was received on 21.10.94 either. That in effect meant that it could have been received earlier and the appellant could have delayed in acting on it. I do not accept the alleged delay on the part of the respondent. If that were the case, the appellant could have rejected the request to inspect the soya beans. That would have been the most sensible and natural act to take as if the request was made late, then the appellant knew it would not effectively carry out its work. If that were so, the appellant could not have considered it necessary to issue a false Clean Report of Findings. If by the time it was requested through the IDF to carry out preshipment inspection there was nothing for it to inspect then it would have meant that the seller or the exporter had taken an acceptable action of shipping to the country goods which had not been inspected before the seller exported them. The preshipment inspection company could have issued a non-negotiable certificate and would have distributed the same report to various interested parties including, the respondent, so that the goods would not have been imported into the country and the exporter would not have been in any way protected from any suit by the importer. In this case, the CRF was issued on 23rd August 1994. It was to be sent to the appellant through the bank. The appellant, as we have stated above, first claimed in the written statement of defence that it got it on 24th October 1994, later in evidence it stated it got it on 21st October 1994 and remembers that date only because on that date further facts were supplied by fax on the same IDF; otherwise it has no evidence of when it received it. It was supposed to communicate with its agents in USA to have the soya beans inspected. There is very little evidence as to what it did with it immediately on receipt of it even if one were to accept for purposes of arguement that it got it on 21.10.1994 and acted on it on 24.10.94. Further, the appellant says in its evidence that it does not handle letters of credit and indeed that it knows very little about them, yet Appendix B of the contract between the appellant and the

respondent which I have reproduced above states in no uncertain terms that value of the subject goods was one of the matters that it had to ascertain before issuing a Clean Report of Findings. Letters of credit is to facilitate payment of whatever value was ascertained. Common sense would demand that the value be approved by the preshipment company before the paying bank is authorized to make the payment. In my view, to proceed otherwise would make nonsense of the agreement. Bosco Karingithi, in his evidence in chief says:

"**The letter of credit is between the trading partners namely the importer and the bank. The bank has or normally have to pay on the presentation of prescribed amount in the letter of credit. Normally the prescribed documents would include a Clean Report of Findings. It is correct that it would include the IDF and final invoice. That means CRF is a must for payment to be effected on letter of credit."**

There was also submission that the respondent supplied insufficient information and so the appellant could not know where the goods were for inspection purposes. That could not be so because, first, the appellant's witnesses themselves stated that where IDF did not contain sufficient information they requested for the same and it was supplied the same day. Further, it could not be so because IDF would always accompany the proforma invoice. That proforma invoice gives all other relevant information as to whereabouts of the subject goods. In any event in a letter dated 27th October 1994, the respondent supplied the appellant with the particulars of the whereabouts of the soya beans. In this case, the ship carrying the goods that were to be inspected left the shipment port on 27.1.95. By that time the appellant had received the information on the whereabouts of the goods on the same ship. Further, by that time, the appellant had received IDF and was in a position to contact its agents in USA long before the ship set sale. If the appellant inspected some goods in the month of February 1995, then they must have inspected the same goods whilst in the highseas for by that time the ship was already afloat. Whatever happened, I agree with the respondent's learned counsel, that only the appellant could know and thus had the duty under the Civil Procedure Rules to adduce such evidence. What however seems to me certain is that there must have been a Clean Report of Findings that accompanied other documents as Karingithi said in evidence to release the money. That Clean Report of Findings could not have represented the accurate position as both parties do agree that the soya beans imported was clearly of substandard quality and was not fitting the quantity as per the IDF and Bill of Lading. It was a recklessly false Clean Report of Findings. It ought not to have been issued. Alternatively, the latter Clean Report of Findings issued later, which the appellant also agrees was false was also issued recklessly and without any regard to the duty that the appellant owed to the respondent to ensure that the goods imported were according to samples supplied on quality and quantity required and value as stipulated in the IDF and the proforma invoice. In my view, if the appellant had honoured its duty to the respondent and had issued a non-negotiable Clean Report of Findings, the respondent would not have ended up with the only alternative of accepting rotten soya beans. That the soya beans were seized by health authorities and the customs for being unfit for human consumption is not in dispute. The payment which was released to the exporter's bank on 13.2.1995, about four months after the appellant admitted receipt of IDF would not have been made to the exporter. In saying this, I put in mind that the ship arrived in Mombasa on 9.4.95 about two months after the payment had been made. The importance of these remarks is that the respondent could not have known the quality, quantity and value of the soya beans till the soya beans docked at Mombasa in April 1995. By that time payment had been made and he could not recall it because by that time the appellant's Clean Report of Findings, later found to be false, had been issued and circulated to all including the exporter. In my view, I entertain no doubt that the appellant's action was directly connected to the respondent's loss and I so find. Thus, viewing the evidence before the superior court from a different perspective, I have come to the same conclusion as the superior court that loss suffered by the respondent was direct consequence of the appellant's actions in breach of its duty to the respondent.

My finding above however, must not be construed to mean that I endorse all the damages that were awarded by the superior court. All I have stated is that the acts of the appellant were, in my view, directly related to the loss the respondent suffered. I must now look at individual awards made to see if each could in law be sustained i.e. to see if the assessment was properly done by the superior court.

The re-amended plaint sets out at paragraph 7, the various special and general damages that the

respondent allegedly suffered. I have set out above the prayers sought by the respondent. The learned Judge of the superior court went into details over each damage sought and its quantum and having carefully done so, supported by several legal authorities, she dismissed the claim of general damages. In my view, she was plainly right in doing so. As there was no cross appeal against that dismissal of the prayer for the award of general damages, I say no more on it.

The learned Judge proceeded to consider other prayers for special damages. She considered those item by item again in detail. She dismissed the claim for special damages claimed in respect of extra 30% waste which was claimed at Ksh.887,845.00. Having done that the learned Judge then proceeded as I have stated above and made awards of special damages as follows:

"**1. Pr 7(ii) Insurance paid on waste Ksh.207,153.00**

2. Pr. 7(iv) Port charges Ksh.2,900,000.00

3. Pr. (v) Travel expresses Ksh.283,296.00

4. Pr. 7(vi) Analysis report and Staff expenses Ksh.124,490.00

5, Pr. 7(vi) (sic) Extra expenses to House of Manji Ksh.1,985,500.00

6. Pr. 7(ix) Bond charges Ksh.1,788,677.00

7. Pr. 7(x) Being bond fee Ksh.1,893,120.00

8. Pr. 7(xi) Cleaning charges Ksh.4,175,243.00

9. Pr. 7(xiii) Railway Transport Ksh.1,715,000.00

10. Pr. 7(xiv) Loading of the wagons Ksh.193.385.00

11. Pr. 7(xv) Purchase of bags and labour Ksh.288.000.00

12. Pr. 7(xvi) Cleaning Charges (sic) Ksh.2,775,980.00

13. Pr. 7(iil) Bank charges Ksh.4,812,000.00

14. Pr.7(l) Loss of profit Ksh.5,741,141.00

15. Pr. 7(vii) short landing Ksh.5,881,425.00

Total award Ksh.34,764,410.00."

Mr. Kimani, in his submission on the assessment of the damages contends that the above assessment was not properly done in that the learned Judge of the superior court in assessing damages, did not consider that the respondent did nothing to mitigate its losses. He stated specifically that the exporter had offered US Dollars 65,000 which at the time the offer was made was equivalent to Ksh.3,499,346/50. That offer was rejected by the respondent. The Court, he submitted, should have considered that mitigating factor which the respondent refused to accept. Thus, he felt the respondent's award for damages should have reflected that element of failure by the respondent to mitigate its losses. He further attacked the award on grounds that some items awarded were matters that the respondent was bound to meet in any event whether the appellant inspected the goods or not and whether the goods were of substandard quality or not. He gave as an example, the fact that the soya beans were destined for Nairobi right from the time the order for their supply was made. That being the case, that award was improper as it had been calculated in the claim of profits as these were some of the items that were included in the cost element when the alleged lost profit was arrived at. He included in that cluster of special damages, the award for bond fee

as well and the award shortlanding. These were duplication of the award. He also contended that in awarding Ksh.1,893,120/= for bond fee, the learned Judge awarded an amount that was not pleaded as the respondent in its re-amended plaint pleaded bond fee at Ksh.120,000/= and not Ksh.1,893,120/= which was awarded. Included in that aspect of awards was the award for interest on bank charges which was claimed and was awarded. The learned Judge also awarded Ksh.3,080,000/= being payment to Caritech for cleaning the soya beans. Whereas the learned Judge found as a fact that the balance outstanding left in respect of that claim for payment to Caritech was Ksh.1,650,000, she nonetheless awarded Ksh.3,080,000 making it appear that she was awarding anticipatory damages whereas she was dealing with special damages and not anticipatory damages. Mr. Kimani felt the action of cleaning soya beans was not a reasonable cause of action for the respondent to take in the circumstances that were obtaining and in doing so, the respondent should not have been awarded for so reconditioning the soya beans. It should have rejected the consignment and its loss would have been the profit only. He thus contended that in reconditioning the beans, the respondent did not do anything positive to mitigate the loss but rather it increased the loss. Lastly, he felt the award on bank charges was not proper as the appellant could not foresee the impecuniary situation in which the respondent would be as a result of its acts in alleged breach of duty. He however, agreed that the law at present as spelt out in the case of **Lagden vs. O'Connor (2004) ALL ER 277)** specifies that the award can be made in a case where the claimant proves that his impecuniousity is as a result of the acts of the defendant, whether it was breach of duty or in tort.

Mr. Ojiambo, in his address to us on the assessment of damages urged us, as I have stated elsewhere, to consider that after the appellant had failed to inspect the goods and had issued a false certificate of Clean Report of Findings, when the goods at last arrived at the port of Mombasa and were found to be unfit for human consumption, the respondent pleaded with the appellant to visit the port and inspect the goods before they were received by the respondent. The appellant refused that plea demanding that 5% of costs and freight be paid first. If the appellant had agreed to see the soya beans at that time and if it had confirmed that they were not the proper goods then the respondent could not have had to meet all the consequential expenses as the goods would not have been seized by the health authorities as they would have been rejected before offloading. But because the appellant declined to act at that time, the soya beans had to be put into the bonded warehouse because there was a Clean Report of Findings and so could only be released to the respondent after cleaning. He admitted however, that whether the soya beans were not substandard, the respondent still had to transport it to Nairobi from Mombasa. That was cost that had to be incurred in any event and he conceded that it was wrongly awarded against the appellant. However, once the goods reached Nairobi, the same goods were not taken directly to the House of Manji which should have been the destination but were taken to the bonded warehouse at Nanyuki road in Nairobi and then taken for cleaning at Lunga Lunga Road and later after cleaning to the House of Manji. Thus, whereas he conceded that the award for transport from Mombasa to Nairobi should not have been made, he nonetheless maintained that transport from the bonded warehouse on Nanyuki Road to the cleaning site on Lunga Lunga Road and then to the House of Manji was properly awarded. He also stated that as the soya beans took a long time in the bonded warehouse because of cleaning, the award for additional duty to warehouse was called for and that was directly because of the act of the appellant. He submitted that the respondent, in seeking to mitigate its loss had to purchase extra soya beans in the local market to keep the House of Manji going on with manufacturing the products of which the soya beans were required. Mr. Ojiambo also conceded that the learned Judge awarded a higher amount in respect of prayer 7(vi) which was a claim for analysis report by Kenya Agricultural Research Institute, the Kenya Bureau of Standards and SGS(K) Ltd. in which the claim in the plaint was Ksh.120.000 but the learned Judge awarded Ksh.124,490. In his view, this was not proper as the plaint was not amended. He further conceded that bond charges in as far as it was awarded on that head exceeded what was claimed as what was claimed in the plaint was Ksh.120,000. However, he felt the learned Judge had confused that claim with that of cleaning charges where bond penalties for cleaning were confused with cleaning charges. However, he also admitted that exhibits had been omitted from the records. He also submitted that the superior court did not deal with shortfall at all as the amount of Ksh.5,881,425 was given in respect of goods which did not arrive whereas the shortfall was a claim in respect of the shortage realised after cleaning. Shortlanding was not claimed in the plaint but there was evidence of shortlanding. He was equally at sea as to what the court meant in its judgment that 588 bags were shortlanded. Lastly, Mr. Ojiambo took us through all the items claimed and submitted that only those proved were granted.

I have anxiously considered this aspect of the case. As I have stated, the learned Judge of the superior court went into full details in assessing the damages and considered every item as set out in the plaint. However, reminded of the principles that guide us as a first appellate court, the which principles I have set out hereinabove, I now need to consider the assessment afresh bearing in mind that the trial court had the advantage of seeing the witnesses, hearing them and more importantly seeing the exhibits some of which Mr. Ojiambo says were not included in the record before us but were before the trial court.

First is the question of mitigation. Both counsel agree that the law as to the need for the claimant to mitigate its costs is well summed up in the case of **African Highland Produce Limited vs. John Kisorio - Civil Appeal No. 264 of 1999** to which both Counsel referred us. This Court stated as follows in that case.

"**The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests, but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him minimize the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See Halsburys Laws of England Vol. 11 page 289, 3rd Edition 1955."**

Mr. Kimani referred us to a letter dated 26th June 1995 addressed to the respondent by Trade International Inc. in which the latter was offering to the respondent US Dollar 65,000/= as a settlement. That settlement was apparently not accepted by the respondent and Mr. Kimani read in that, lack of mitigation of the respondent's damages by the respondent. As is stated in the **African Highland Produce Limited vs. John Kisorio (supra)**, it is necessary to consider the circumstances under which this offer was made, by whom it was made and to what extent it could have affected the respondent's claim against the appellant herein as the question of what is reasonable for a party to do in mitigation is a matter of fact in the circumstances of each particular case. It does not appear from the records that the respondent's only witness, Mwangale, was taken to task as to why the offer from Trade International Inc. of US Dollars 65,000 was not accepted but even going by Mr. Kimani's calculation and submission, at that time USD 65,000 was Ksh.3,499,346/50. The letter dated 26th June 1995 making the offer stated in salient part as follows:

"**We are ready to wire transfer funds immediately provided it is under a legal settlement. We are afraid that you will continue to increase costs to us along the way. Therefore, please, have your attorney send us a legal settlement agreement stating that once we pay $65,000, this is a final settlement of your claims. Furthermore, any proceeds from our claims against our supplier will be paid to you minus the $65,000 we will pay on friendly terms so that we can proceed to better things."**

It is clear from the above that this offer was uncertain as the amount to be secured from the suppliers of International Trade Inc. was uncertain. Yet this offer was to be the final settlement of all claims against International Trade Inc. notwithstanding that by that time the respondent had lost well over an amount of Ksh,3,499,346/50 and was still continuing to lose more and further notwithstanding that it did not meet the profit that the respondent was expecting from the entire transaction. It is not surprising that it was not accepted. In any event, it was not an offer from the appellant. It was from a third party and could have only been considered as against that third party particularly as the appellant was said to have hoodwinked the respondent to make claims against the supplier. I think, considering the case of **African Highland Produce Limited vs. John Kisorio (supra)** that for the respondent to have accepted this offer in mitigation of its losses, it could be said to have taken action against its interests in doing so. That was not required of the respondent. While on the question of mitigation, I may say that the action taken by the respondent to clean the substandard soya beans, though later became expensive on cost and time, was in

itself a mitigating factor and the intention was commendable. It is unfortunate that it took more time and funds to do so, but that was the risk of the trade. I do not think the respondent failed to take steps to mitigate damages.

Mr. Kimani also submitted that the assessment proceeded based on the accounts from the year 2000 whereas the events took place in 1994 and therefore the respondent's accounts which should have been used for assessing damages should have been those of 1993. He did not buttress this claim with legal authorities, but on my part, whereas I see some sense in that submission, I note however that the appellant did not demand the 1993 accounts and that its advocates proceeded with the statements of accounts that were before the court. In any case, Mr. Kimani has not stated to what extent that approach affected the entire assessment on some of the items. I need not belabour it further.

I now propose to look at the assessment in respect of various items that were awarded. As I have stated above, as there was no cross appeal, I have no jurisdiction to consider the items of damages pleaded which were rejected by the superior court.

Insurance fee was pleaded at Ksh.207,253.00 and that was allowed by the superior court. I have looked at the evidence and I have no doubt this was loss which should have been made good. On prayer 7(iv), the respondent claimed Ksh.3,213,336.00 being port charges and demurrage. The learned Judge of the superior court allowed Ksh.2,900,000.00 saying:

"**The soya beans passed through the part (sic) and they had to be paid for. The relevant documents were produced as exhibits 43 (a) (b). There is no contrary evidence. The receipt No. 898112 is exhibited. It is to the tune of Ksh.2,900,000.00 which I allow."**

It is clear from the foregoing that the learned Judge did not consider that the respondent was duty bound to pay port charges for the soya beans in any event and the payment of the same charges i.e. port charges was not occasioned by the non inspection of the soya beans or the issue of a false Clean Report of Findings for the respondent had to make and indeed made arrangements for payment of the port charges. In its letter to the House of Manji dated 20th March 1995, the respondent stated as follows:

"**REF. ADVANCE TO CLEAR THE SOYA BEANS**

The Ashley Lykes docks in Mombasa anytime from the 24.3.95, and we have been assured by the shipping agents Marship that the documents accompanying the shipment will be with them on the 24.3.95. We have to lodge the documents, have them passed in advance so that there is no delay to incur demurrage.

The advance is for the following:-

(i) Loading/offloading, port charges 500,000

(ii) Clearing Charges 250,000

(iii) Kenya Railway Charges (Transport

Mombasa – Nairobi) 2,250,000

2,950,000

The funds will cover the clearing, transport and delivery of the soya beans to your godown in Nairobi."

It is thus clear that the respondent had in its calculations arriving at a profit which was also allowed, included port charges. I do agree that demurrage charges could have been incurred and could have increased because of the discovery by the respondent that the soya beans were of substandard quality and

seizure by the health authorities and customs but I feel allowing port charges together with profit as damages would be allowing one item twice. As I have stated, demurrage charges resulted from the actions taken on the soya beans because of the action of the appellant. Doing the best I can in the circumstances, that award will be reduced by Ksh.500,000. It is allowed at Ksh.2,400,000 which form demurrage charges and not port charges. On travel expenses, the superior court allowed Ksh.283,296.00. I have perused and considered the basis of this award and whereas I feel the first journey Mwangale made to Mombasa could not be treated as part of the losses to the company because he had to go to Mombasa to receive the soya beans in any event, I nonetheless find it impossible to separate that expense from the rest as there is no evidence as to which payment was for the first visit to receive the goods and some receipts relied on by the superior court are not annexed to the record before us. In the circumstances, and as there was no attempt by the appellant to challenge this item, I will let it remain as was awarded by the superior court. I however have problem with the learned Judge's reasoning leading to her allowing prayer 7(vi) – analysis reports and staff expenses at Ksh.124,490.00. The plaint shows that the respondent pleaded this item and sought damage for it at Ksh.120,000.00. That was what was in the pleading. It is now well settled law that a court of law will only allow special damages that are pleaded and strictly proved and not otherwise. In the case of **Mohamed Hassan Musa and another vs. Peter M. Mailanyi & another** – **Civil Appeal No. 243 of 1998**, this Court stated:

"**It has been held time and again by this Court that special damages must be pleaded and, of course, strictly proved."**

In respect of this item, the amount pleaded was Ksh.120,000. The respondent did not amend its pleadings to raise that amount to Ksh.124,490.00 which they set out to and did prove. I do agree that in certain cases, a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision – see the case of **Odd Jobs vs. Mubia (1970) EA 476**, but that principle applies to other cases and while dealing with issues already canvassed at the hearing. It does not certainly apply to cases where a claimant is seeking special damages where the law is strict and stipulates that the claim must be pleaded and strictly proved. Mr. Ojiambo conceded that this award was not proper. I agree. I disallow the extra Ksh.4,490/= which was improperly allowed for this item. The award shall be Ksh.120,000/=. The next item is the extra expenses that were incurred to enable the House of Manji to meet its contract with the World Bank. This was pleaded as prayer 7(vii). This became necessary because the soya beans arrived late whereas the contract between the respondent and the House of Manji stipulated that the soya beans were to be delivered to the House of Manji in December 1994. I cannot see in what way the appellant's action directly contributed to the late arrival of the soya beans, whether the soya beans were in bad or in good state. It is observed that this purchase was in respect of exhibit 60 and the entries giving rise to this claim were made in December 1994. This was long before the beans arrived in Mombasa and was before the respondent received a Clean Report of Findings. How then could the appellant be condemned to meet this loss? Even if the appellant had actually inspected the soya beans, the delay would still have occurred. The appellant had no control and could not have any control on the movement of the ship that carried the soya beans. I reject this claim.

That brings me to the claim for bond charges. This item consisted of charges for retaining the soya beans in bonded warehouse during the time the same soya beans were being reconditioned. The learned Judge in allowing Ksh.1,788,677/= stated as follows:

"**Bond charges also cover transportation for the reconditioned soya beans from the bonded warehouse to House of Manji, transportation was undertaken (sic) by various lorries which were registered with the express bonded warehouse and were hired to transport soya beans on a daily basis. A schedule of the same was made and they were paid in cash on daily basis. No receipts were given by the transporter but payment was evidenced by the marking of the schedules. They were produced in a bundle as exhibit 41 and they total Ksh.269,140. The total allowed under this subject is Ksh.1,788,677 which I allow."**

Although no receipts were exhibited, I concur with the learned Judge that this item was proved through the invoices which were produced and the schedules. This award stands. On bond fees, the amount pleaded was Ksh.120,000/=. The learned Judge allowed Ksh.1,893,120/=. I refer to my remarks above

where I discussed the amount allowed for analysis report by Kenya Agricultural Research Institute, The Kenya Bureau of Standards and SGS Ltd. and the legal principles I have cited above. This again is a case where the learned Judge allowed an amount well above what was pleaded. Mr. Ojiambo conceded this error but urged us to treat this as the amount that should have been for cleaning charges which was wrongly put into record as clearing charges, although there were no receipts in support of the same in the record. As the receipts which Mr. Ojiambo alleges were considered by the superior court were not in the record before us, I cannot for certain consider this item under a different head as Mr. Ojiambo was urging us to do, for to do so would be making an uninformed decision. The award of this head will be Ksh.120,000 that was pleaded. The rest of Ksh.1,773,120 is disallowed.

For cleaning charges, the learned Judge allowed Ksh.4,175,243. She gave a detailed account of how that amount was arrived at. Mr. Kimani attacked this award on grounds that the learned Judge found that the balance was Ksh.1,650,000 yet she allowed Ksh.3,080,000 for payment to Caritech for cleaning. My reading of the learned Judge's approach is different. All she said was that the amount originally due to Caritech for cleaning was Ksh.3,080,000 of which the respondent had paid Ksh.1,430,000 leaving a balance of Ksh.1,650,000 yet to be paid to Caritech and so Caritech was entitled to Ksh.3,080,000 for cleaning services which she awarded. I note that the total cleaning for that head was Ksh.4,948,777.00 and of this the amount allowed after proof of the loss was Ksh.4,175,243. I do not find any fault in this head. It will stand.

I am of the view that railway transportation of the subject soya beans from Mombasa to Nairobi was not an item that should have been awarded to the respondent. Mr. Ojiambo conceded this. The reason is simply that the beans were destined for Nairobi as they were to be delivered to the House of Manji in Nairobi. In a letter dated 3rd August 1994 addressed to the respondent by Kenya Railways, it is stated as follows:

"**RE: <u>RAILWAY TRANSPORT: SOYA BEANS</u>**

This has reference to your letter dated 1st August 1994, regarding the above subject. The tariff for soya beans from Mombasa to Nairobi will be as follows:-

Rates will be Sh.1,980.00 per tonne in addition you will be required to pay terminal/siding charges at sh.364.00 per bogie wagon.

The corporatin will be able to provide enough wagons to move the traffic.

Yours faithfully

S.M. OMAE

PRINCIPAL MARKETING

OFFICER

FOR: BUSINESS MANAGER."

I have earlier in this judgment referred to another letter dated 20th March 1995 addressed to the House of Manji by the respondent in which the respondent asked for advance of Ksh.2,250,000 for railway charges for transport from Mombasa to Nairobi. This item therefore is an item that was in respect of what the respondent was to do whether the beans were of good quality or not and was not losses directly caused by the act of the respondent. It was taken care of or should have been taken care of when calculations for profit were done. It is not allowed. Equally, the loading of wagons in Mombasa and offloading in Nairobi also falls in that same category. It is not allowed.

Prayer 7(xv) is for Ksh.288,000 being the amount used by the respondent to replace torn bags to make the loading for repacking of transportation to Nairobi for cleaning. I think this was a necessary award as

the inspection would have revealed the nature of the bags in which the soya beans were packed and the quality of the said bags. It is allowed.

The next prayer was for cleaning charges for soya beans which is stated in the judgment of the superior court as clearing charges. Mr. Ojiambo submitted that this was a wrong nomenclature and that what was meant was cleaning charges. There was however evidence by Mwangale that the total cleaning charges was Ksh.3,914,355 which was made up of Ksh.3,136,000 being actual cleaning costs, transport to Caritech at Ksh.578,355 and customs supervision (whatever this was for) of Ksh.200,000. The learned Judge had allowed cleaning charges at Ksh.4,175, 243. This appears to me to be a charge in respect of other matters not clear even from the evidence. It includes the cost of advocates for defending the respondent in some suit. I cannot see why payments to advocates hired by the respondent for other suit, though connected to the soya beans saga, should be met by the appellant. I reject this claim as it is not clear what was being claimed and it included claims which strictly are not for the appellant to meet.

The respondent also claimed bank charges as a result of their failure to pay overdraft taken from the bank for the transaction which it could not meet as it never realised the profit which was anticipated from the deal. Mr. Kimani submitted that the fact that the respondent borrowed some money from a bank to complete the deal was not something that the appellant could have foreseen. He referred us to the case of **SAAMCO vs. York Montague Ltd**. **(1997) AC 191** in support of his arguement. I have considered the facts and law in that case. What the respondent contends in this case is that when it took the bank overdraft, it knew or had reasonable cause to know that the profit of the deal would clear the overdraft, but due to the acts of the appellant, that profit became elusive and hence the overdraft had to accumulate interest due to the respondent's impecuniosity resulting from the appellant's breach of duty to the respondent. I see no fault in the superior court allowing that claim. I allow it.

On the claim for loss of profit, I have carefully perused the approach adopted by the superior court and all that the court considered. I am in full agreement with the learned Judge of the superior court. I do accept her assessment of Ksh.5,741,141.00 on that item. However, on the shortfall which she variously termed shortlanding, I, like Mr. Ojiambo, have some difficulties in understanding what the learned Judge meant by short fall. The learned Judge appears to have put together the deficiency on shortlanding and the deficiency after cleaning and called the tally a shortfall. My understanding is that profit was allowed at Ksh.5,741,141.00. Our perusal of the evidence shows that the profit was calculated after what was purchased was considered as against what was received and again after what was eventually treated as a waste after cleaning had been considered and the cost at which the cleaned beans were sold to the House of Manji. I find it difficult therefore to appreciate what could be treated as a shortfall or shortlanding to be assessed as loss to the respondent. This claim cannot in law stand. It is rejected.

In conclusion, the learned Judge of the superior court after full analysis and evaluation of the evidence before her stated as follows:

"**This Court agrees with the plaintiffs (sic) assertion that had the defendants inspected the goods then they would have seen that the goods were of substandard (sic) and they would have rejected them and these proceedings would not have arisen. Further upon realising that the ship had left without or before inspection of the goods, then they would have issued a non negotiable CRF or certificate of compliance to stop the bank from releasing the funds due under the contract as regulations show clearly that the bank can only release funds upon presentation of these two documents."**

She thus found a direct link between the breach of duty by the appellant and loss to the respondent and proceeded to assess the loss suffered by the respondent and allowed a total of Ksh.34,764,410/= having rejected the plea of general damages.

I have, for my part, analysed and evaluated the evidence, considered the law and I have come to the same conclusion that the appellant was directly liable to the respondent in respect of the loss the respondent suffered. I have however rejected some heads of the loss that were awarded, reduced some claims and confirmed others. After doing so, the amount I would find due to the respondent is **Ksh.19,935,510/=**

(**nineteen million, nine thirty five thousand, five hundred and ten shillings**). I would award interest on that amount at court rate from the date of filing the suit till the date of payment in full. On the issue of costs, the appellant has succeeded in having the damages substantially reduced from **Ksh.34,764,410/=** awarded by the trial Judge to **Ksh.19,935,510/=**. The appeal has, accordingly largely failed but partly succeeded. In the event, I would award to the respondent **2/3** of the costs of the appeal.

Dated and delivered at Nairobi this 27th day of April 2007.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & ONYANGO OTIENO, JJ.A)

CIVIL APPEAL NO. 45 OF 2001

BETWEEN

COTECNA INSPECTION S.A …… APPELLANT

AND

HEMS GROUP TRADING COMPANY LIMITED …… RESPONDENT

(*Appeal from a judgment and decree of the High Court of Kenya at Eldoret (Nambuye, J) dated 19th October, 2000*

In

H.C.C.C. No. 126 of 1997)

****

JUDGMENT OF O'KUBASU, J.A

I have had the advantage of reading in draft form the judgment of Onyango Otieno, J.A and I agree with his conclusion that the appeal be allowed to the extent that the damages awarded by the superior court be reduced from Kshs.34,764,410/- to Kshs.19,935,510/- with interest at court rates from the date of filing the suit to the date of payment in full. I also agree that the respondent be awarded **2/3** of the costs of the appeal.

Dated and delivered at Nairobi this 27th day of April, 2007.

E.O. O'KUBASU

……..

JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & ONYANGO OTIENO, JJ.A)

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In

H.C.C.C. No. 126 of 1997)

****

JUDGMENT OF OMOLO, J.A

I had the advantage of reading in draft form the judgment of Onyango Otieno, J.A , and I agree with his conclusion that the appeal be allowed to the extent that the damages awarded by the learned trial Judge be reduced from Kshs.34,764,410/- to Kshs.19,935,510/-. I also agree with him that the sum of Kshs.19,935,510/- shall carry interest at court rates with effect from the day the suit was filed to the date of full payment. I further agree that the respondent be awarded $^2/_3$ of the costs of the appeal. As O'Kubasu, J.A also agrees, those shall be the orders of the Court.

Dated and delivered at Nairobi this 27th day of April, 2007.

R.S.C. OMOLO

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.