

3. Whether/not the Defendants are liable for the alleged loss of goods?
4. Whether the Defendants are exempted from liability for the alleged loss of goods?
5. Remedies available to the parties.

The first issue is whether or not the Plaintiff delivered the alleged parcel of goods on board the Defendant's bus? It is the case for the Plaintiff that on the 26th March 2004 she travelled to Nairobi by bus from Kampala to buy goods for her business. She further contends that the goods were bought and put on the defendant's bus on the 27th March 2004 for delivery to Busia on the Kenyan side of the border. Counsel for the Defendant Mr. Nagemi in his submissions does concede that the Plaintiff delivered to the Defendant's bus 3 packages for onward carriage 'aboard the Nairobi –Busia (Kenya) Bus route. This is in agreement with what PW1 Stella Twinebirungi testified in her evidence-in-chief. The receipt Exh P 1 supports her evidence. Exh. P1 the luggage receipt was a document admitted by both Plaintiff and Defendant as having been received by PW1, Stella Twinebirungi from the Defendant's servant responsible for such issuance.

DW1, David Njenga, who was at the manager at the Akamba boarding office' at Nairobi at the time testified that he witnessed the loading of the Plaintiff's packages and issued the receipt (Exh P1).

From the above evidence as shown by the receipt as admitted by the parties, it is clear that the alleged parcel of goods were delivered aboard the Defendant's bus. Issue No. 1 is therefore answered in the affirmative.

The second issue was whether/not there was an alleged short delivery of the plaintiff's goods? What has to be determined is whether all goods loaded on the defendant's bus reached their destination as per the contract. It is the case for the Plaintiff that she had booked to travel on the same bus as her goods. However when she brought her goods (totally 3 packages) to the bus terminal in Nairobi she was told that the bus she was to travel on had its

luggage compartment full and so she had to load her goods on another bus since both buses would go to Busia Kenya. PW1, Stella Twinebirungi testified that her bus arrived at Busia Kenya at 5.30 am and found that the bus with her goods had already reached and been off-loaded. Only two out of three packages could be found. She then testified that she complained to the Akamba Manager on the Kenya side of the border, and also to John Ounde her clearing agent on the Uganda side of the border. However DW2 Alex Katele who works for Akamba at their Office's at the Busia border on the Kenya side denies that the Plaintiff lost any luggage or that she complained about the loss. DW2 Mr. Katele in his evidence did admit that luggage in the second bus would be off-loaded at the Office and that owners would collect the luggage. He stuck me, as he gave his evidence as someone who did not care much about the off-loaded luggage because such luggage according to him was carried at owner's risk. His interest in the lost luggage appears to be minimal.

PW1, Stella Twinebirungi clearly testified that 3 pieces of luggage were loaded at Nairobi and only 2 were recovered at the end of the journey. PW2 Mal Kifampa who travelled with PW 1 and PW3 Mr. Oundo PW 1's clearing agent both corroborate PW 1 Stella Twinebirungi's evidence that she could only find two out of three packages. PW2 Ms Kifampa and PW 3 Mr. Oundo both of whom struck me as truthful witnesses. I am therefore inclined to believe the plaintiff when she says that one of her pieces of luggage was missing. I therefore answer issue 2 in the affirmative too.

Issue 3 is whether that the defendants are a liable for the alleged loss of goods?

The plaintiff filed this suit in negligence against the defendants as public transporters/ common carriers for the loss of luggage she entrusted to the defendants.

Orsbons Law Dictionary 6th Edition by John Burke page 65 defines a common carrier as one who by profession to the public undertakers for hire to

transport from place to place either by land or water, the goods of such persons as may choose to employ him. He is bound to convey the goods of any person who offers to pay his hire and he is an insurer of goods entrusted to him; that is he is liable for their loss or injury in the absence of a special agreement or statutory exemption unless the loss or injury was caused by the act of God or the Queen's enemy.

In EXPRESS TRANSPORT COMPANY LTD –VS- B.A.T TANZANIA LTD (1968) E.A.443, It was observed that whether a party is a common carrier is a question of fact.

In his testimony, DW1, Mr.Njenga who is now manager Akamba Kampala branch but was manager Nairobi when the dispute arose testified that they usually load luggage on their buses, which the customer pays for. The customer is issued in receipt similar to Exhibit P1 for the luggage, which is put in the luggage compartment under the bus. The goods are carried to the destination of the customer and on arrival the customer takes his /her goods and the rest kept in the warehouse. where the luggage is unaccompanied a consignment note is given to the customer on payment. The goods and payment are also listed on a Goods Transfer Form (GTF). DW2, Mr. Kalele corroborates this evidence. In his submission Counsel for defendants Mr. Nagemi asserts that there are company policies and practices pertaining to accompanied and unaccompanied luggage.

From the evidence given at trial, it is therefore clear that Akamba Transport Company are common carriers. They consequently owed a duty to the plaintiff a duty of care to ensure that her goods are safely delivered to her. They breached this duty when they delivered only 2 out of the 3 pieces of luggage entrusted to them. The defendants are therefore liable as common carrier for the loss caused to the plaintiffs.

Issue 4 was whether the defendants are exempted from liability for the alleged loss of goods?

Exhibit P1, The receipt given to PW1, Stella Twinebirungi exhibit had an exemption clause to the effect that goods are carried at owner's risk' further conditions were laid out of the back of Exhibit P1, the receipt.

Sir Charles Newbold in the case EXPRESS TRANSPORT (supra) held:

“Even if a party to a contract knows generally from the previous dealings that there are conditions but is un aware of any particular condition, the Courts will not imply a condition excluding liability for negligence unless the fact that such a term is one of the conditions has actually been brought to his notice so that he would be in no doubt that the contract was entered into on that basis”

Where the exclusion clause is set out or referred to in a document, which is given by one party to another, it must have been brought to the notice of that party in order to bind that other party.

Thus in DAR-ES-SALAM MOTOR TRANSPORT CO –VS-MEHTA (1970) E.A 596 C.A. It was held that conditions exempting the party from liability had to be sufficiently brought to the attention the other party or their argents to make them part of the contract.

And in B.A.T KENYA LTD –VS- EXPRESS TRANSPORT (1968) E.A 171, It was held that the phrase 'all goods at owners risk' was not brought home to the minds of the plaintiff's officials and was ineffective to exempt the defendants from liability? Nevertheless such knowledge can be imputed by Court especially where a party knew about the existence of the clause.

In cross-examination PW1, Stella Twinebirungi testified she has been travelling with the defendants for six years and they have been carrying her goods as common carriers for six years. She admits that she is familiar with the luggage receipt Exhibit P1 and what is written on it and that she has got such a receipt many times. It is the receipt she usually gets. She was

present when the goods were loaded and concludes that she knows goods are carried at owner's risk.

Knowledge of the exemption clause is therefore imputed on the plaintiff and I find that the defendant carried the luggage at her own risk a fact that she was aware of and did admit to having read and understood. She however testified that she went to Akamba to assist her with "a little refund" based on the loss that she had experienced but they said they could not assist her in any way. From the evidence before Court the defendants are therefore excluded from liability by virtue of the exemption clause In Exhibit P1.the receipt.

The fifth issue is Remedies available to the plaintiff. From my findings above it is clear that the defendants were protected by the exclusion clause on the receipt Exh P1 to which the plaintiff clearly said she was aware of and therefore liability would not attach to the defendants. I accordingly dismiss the suit for that reason. Since the defendants were simply protected by an exclusion clause I order that each party bears its own costs.



Geoffrey Kiryabwire

Judge

Date 20/06/05