REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 312 OF 1988

AFRICAN SAFARI CLUB LIMITED…….. PLAINTIFF

VERSUS

KENYA KAZI LIMITED…..…… DEFENDANT

JUDGMENT

This action arises as a consequence of an agreement dated 1st day of March, 1986 entered into by the plaintiff African Safari Club Limited and the defendant Kenya Kazi Limited.

This “cash in transit” security contract, by mutual agreement provided the following 8 clauses:-

1. (a) The employer shall employ Kenya Kazi Limited and Kenya Kazi Limited shall serve the employer for the period of twelve months from the first day of March one thousand nine hundred and eighty six to guard case and / or valuable and / or other property of the employer while in transit on journeys between Bahari Beach, Shimo-La-Tewa, Malika, Dolphin and Coral Palm Beach Hotels every business day as specified in the letter reference MT/Q/KK dated 23rd February, 1986.

(b) This contract shall be renewable by mutual consent and arrangement but whilst Kenya Kazi Limited continues to serve the employer after its expiration the terms and conditions thereof shall continue to apply until a new contract is issued by Kenya Kazi Limited.

2. Kenya Kazi Limited shall on each journey undertake by it as aforesaid provide an escort (armed so far as lawfully permissible) a cash box, a reliable vehicle and a driver and shall take all such measures and precautions as shall be reasonable practicable and lawfully permissible for the protection and safety of the property of the employer being guarded or carried.

3. The time and day on which any particular journey shall be undertaken by Kenya Kazi Limited hereunder shall be arranged to suit the mutual convenience of the parties.

4. Kenya Kazi Limited shall be entitled to issue such orders and instructions as it shall consider necessary during the operation of its duties hereunder to any servant of the employer who shall ensure that the same are promptly obeyed.

5. (a) The employer shall pay to Kenya Kazi Limited ..... remuneration for the services hereunder the

sum of Fourteen Thousand shillings (shs 14,000/=) per month payable in arrears on or before the fifteenth day of the next following month. In default of prompt payment in accordance herewith Kenya Kazi Limited reserves the right to terminate the contract without notice.

(b) In the event of the employer requiring Kenya Kazi Limited to undertake journeys more frequently than herein before provided the employer shall pay to Kenya Kazi Limited further remuneration at the rate of five hundred shillings (shs 500/-) for each additional journey undertaken, such further remuneration to be payable in the manner provided in subclause

(a) of this clause.

(c) Steel Security 'T' Seals to be charged at shs 7/50 each. PROVIDED THAT if there shall at any time be any increase in the prescribed mininum monthly wages and / or benefits or allowances of any servant of Kenya Kazi Limited acting as an escort or driver hereunder or any other relevant increase in the costs of vehicles, fuel, licences, firearms, etc. Keny Kazi Limited reserves the right to a consequential increase in the said remuneration under sub-clauses (a) and (b) hereof.

6. The employer shall effect suitable insurance to cover the risk of loss or damage of the employer's property in transit hereunder.

7. Kenya Kazi Limited shall be responsible to the employer for ensuring that the risk of loss or damage to the employer's property hereunder shall be minimized so far as is reasonable practicable within the limits of the services contracted but Kenya Kazi Limited shall not be responsible for any such loss or damage unless it be shown that the same was solely and directly due to theft or dishonesty on the part of Kenya Kazi Limited or an employee of Kenya Kazi Limited actually employed in providing the aforesaid services and acting within the course of his employment and that the said employee shall have been duly convicted thereof under the relevant criminal section of the Penal Code.

8. Nothing herein contained shall constitute Kenya Kazi Limited or any servant of Kenya Kazi Limited a bailor of any property of the employer. In pursuance of the above agreement the plaintiff handed over a sum of shs 2,335,590/- in cash on the date material to this case for transportation from National Bank of Kenya Limited, Nkuruma Road Mombasa to the plaintiff's head office at Bamburi Mombasa. Shs 20,400/- in cash mostly in coins were ultimately delivered to the plaintiff, the balance of shs 2,315,540/- was not delivered to the plaintiff, hence this action of the plaintiff against the defendant for the recovery of the balance.

This action is brought by way of subrogation proceedings brought by Provincial Insurance Company of East Africa Limited.

The facts relating to these proceedings are not in dispute these have been agreed and are as under:-

1. By an agreement in writing dated 1st March, 1986 made between the plaintiff and the defendant and headed "Cash in Transit Security Contract", the defendant for the consideration and on the terms and conditions therein stated, agreed to "provide an escort (armed so far as lawfully permissible), a cash box, a reliable vehicle and a driver" to guard "cash / or valuables and / or other property" of the plaintiff whilst in transit on journeys between certain agreed places. A copy of the said agreement is included in the agreed bundle.

2. In pursuance of the said agreement,

(i) the plaintiff entrusted to the defendant shs 2,335,540.00 in cash for transportation from National Bank of Kenya Limited, Nkurumah Road, Mombasa to the plaintiff's head office in Coral / Palm Beach Hotel, Bamburi, Mombasa; and

(ii) the defendant provided for such transport a Toyota Land Cruiser (registration No KWN 567) manned by the following employees of the defendant:

(a) Silas Apolo Juma – crew commander (Juma)

(b) Peter Waswa Walubengo – driver (Waswa)

(c) Gabriel Wandera Odede – escort (Wandera)

(d) John Wabukala Mukhwana – escort (Wabukala)

(e) Elisha Otwoma Onyango – escort (Onyango)

3. The said Land Cruiser was a 4 wheel drive of 3980 cc, and had, built on it, a steel body in two compartments. The inside compartment was the stronghold and was used for the storage of cash or other valuables in fixed metal boxes. This was guarded by an escort who locked himself in and was also locked in from outside. The outside compartment, which was situated at the back of the vehicle had steel seats on either side inside the rear door and was guarded by two other escorts who in turn were locked in from outside. A rough sketch of the vehicle (not drawn to scale) and 11 photographs of the said vehicle are also included in the agreed bundle.

4. The said vehicle was equipped with a Motorola two-way radio to maintain continuous contact with the defendant's control room. It also had bolts stretching inside along both sides of the vehicle which were operated from the inside or stronghold compartment to prevent;

(a) anyone from outside to break into the cab; and / or

(b) the driver and crew commander from leaving the cab.

5. The crew commander Juma was armed with a chemical mace whilst the three escorts were armed with *pangas* and truncheons, these being the best weapons permissible by law. Guards employed by security companies are not permitted to carry fire-arms.

6.(a) The crew commander Juma was first employed by the defendant on 1st September, 1984 on the recommendation of two referees. He is still employed by the defendant and his record of service has been excellent.

(b) The driver Waswa was first employed by the defendant on 11th June, 1986,having previously worked for another security company (Securicor (K) Ltd) and having been recommended to the defendant by Police Inspector Fred Barasa and one other referee. His record of service until 29th August, 1987 was also excellent.

(c) The escort Wandera was employed full time with effect from 1st September, 1983, having previously worked for the defendant as a casual for a long time. Until 29th August, 1987, he too had a very good record of service.

(d) The escort Wabukala was first employed full time on 1st September, 1984 after having previously worked as a casual. He was suitably recommended by two referees and had, until 29th August, 1987, a clean record of service.

(e) The escort Onyango was first employed on 1st September, 1984 having been recommended for employment by two referees. He is still employed by the defendant and his record of service has been excellent.

7. At the time of entrustment, the amount of shs 2,335,540/- was contained in a large money box provided by the defendant at the special request of the plaintiff and in 11 cloth bags containing coins. The box had two padlocks fixed on it by the plaintiff's Chief Cashier. It also had two seals affixed thereto by the defendant's crew commander. Because of its size, it could not fit into any of the fixed metal boxes in the inside or stronghold compartment of the vehicle but was placed together with the 11 cloth bags in that compartment in the custody of the escort Wabukala who locked himself in and was thereafter locked in from outside in accordance with the defendant's standing instructions. The outside compartment at the rear of the vehicle was manned by the escorts Wandera and Onyango. They were locked in from outside. The crew commander Juma occupied the front passenger seat in the cab of the vehicle with Waswa occupying the driver's seat.

8. At the time of the said entrustment and until the happening of the event referred to in paragraph 9 hereof, the defendant took all necessary steps to comply with the requirements of clause 2 of the aforesaid cash in transit security contract.

9. On the way to the plaintiff's head office, the crew commander Juma was tricked into stopping the vehicle near the Customs Training Centre on the main Mombasa / Malindi Road with a view to check persistent banging from the rear of the vehicle. As soon as he stepped out of the cab, the vehicle drove off at great speed leaving Juma behind on the road.

10. The escort Onyango protested at the hijacking of the vehicle but he was forcibly ejected therefrom on a murram road behind Bamburi Portland Cement Company, and the vehicle was then driven off at great speed in the direction of the Kiembeni Estate.

11. The crew commander Juma, having been abandoned on the road, ran to a near-by petrol service station and notified the Kenya Police 999 Patrol and the defendant's control room of the incident.

12. As a result of the crew commander's report, three radio cars belonging to the defendant joined the chase in an effort to trace the stolen vehicle. It was eventually found abandoned at Nguu Tatu, 18 kilometres from Mombasa. They money in notes, amounting to shs 2,315,140.00 was missing, having been extracted from the large box by cutting a hole through the top, but the 11 cloth bags containing shs 20,400.00 in coins were still in the vehicle. The amount of shs 20,400.00 in cash was later handed over to the police who in turn handed the same over to the plaintiff.

13. One of the radio cars was left guarding the stolen vehicle whilst the other two followed the roads to Mariakani and Kaloleni to trace the driver and his two accomplice escorts. The defendant also alerted a police road block at the Mariakani vehicle weigh bridge and one of the radio cars with its crew remained at the weigh bridge to assist the police in searching passing vehicles. The efforts of the defendant and of the police to trace the driver and the two escorts were however unsuccessful.

14. The sum of shs 2,315,140.00 was stolen by the defendant's employees Waswa, Wandera and Wabukala whilst they were actually employed by the defendant in providing services under the aforesaid

Cash in Transit Security Contract and acting in the course of their employment.

15. The said three employees have not been convicted of any criminal offence arising out of the said theft.

16. The plaintiff was insured against the aforesaid loss. On or about 29th October, 1987, its insurers, Provincial Insurance Company of East Africa Limited, indemnified the plaintiff against the said loss by paying the plaintiff a sum of shs 2,315,140.00. This action is brought by Provincial Insurance Company of East Africa Limited under its right of subrogation.

Mr Fraser for the plaintiff and Mr Inamdar for the defendant have addressed the court at length and have canvassed for their respective stand. The learned counsel have also made extensive legal arguments, augmented by the numerous decisions they cited in support thereof

Furthermore, written submissions were made to supplement and to elaborate the subject matter. I have considered all the facts submitted in the light of submissions made.

It would suffice to say that I have directed my mind to the principles of the decisions cited. I do not intend to refer to all the decisions except where it is pertinent and directly relevant to do so.

The main bone of contention is the meaning, interpretation and implication and the scope of clause No 7 of the agreement. (Cash in Transit Security Contract).

Briefly, Mr Fraser, *inter alia*, cites the following decisions of Court of

Appeal in England.

1. *Levison v Patent Steam Carport Cleaning Company Limited* (1978), 1QB 69

2. *Mendelssohn v Narmand Limited* (1970) 1QB 177.

3. *Harbutts Plastician Limited v Wayne Tank Pump Co, Limited* (1970) 1 QB 477.

And argues that these decisions clearly establish the existence of a doctrine of fundamental breach in English Common Law which had developed since 1950.

He furthermore contends that *Suisse Atlantique* decision did not reject the said doctrine. The position was only changed by the introduction of Unfair Terms Act 1977.

It is further contended that the decision made in *East African Road Services v J S Davis & Company Ltd* [1965] EA 676 and *Scheuller & Company Ltd v Railway Corporation* [1975] EA and *United Manufacturers Ltd v Wafco Limited* [1974] EA 233 supports this argument in support of the doctrine of fundamental breach.

Mr Fraser further submits that in case of this main argument not succeeding in respect of fundamental breach, an interpretation of the contract, it is urged upon me, should be strict so as to make the exclusion clause capable of performance so as to avoid an absurd result.

If the facts show the employees stole the money, the absence of a conviction should not make his employer able to escape liability.

Mr Inamdar *inter alia,* disputes that the plaintiff arguments advanced do establish the existence of local law applicable to the facts pertaining to the case now before the court. He submits that 'Local Doctrine' is not consistent with reality of the situation.

The learned counsel has advanced his argument and has distinguished the decision made in said three decisions cited ie,

1. *Road Services Limited* (*supra*)

2. *Schulter & Co Ltd* – (*supra*)

3. *WAFCO* = (*supra*)

It is contended that the decision of Bandari J in *EA Draper Limited (supra)* supports the defendants case. The law as laid down in *Suisse Atlantiquie* and the recent decision in *Photo Production Ltd v Securior Transport Limited* [1980] AC 827 is the Kenya Law, it is submitted.

It is further contended that unless two conditions set out in the exemption clause are satisfied the defendant could not be held liable under the terms of the contract.

Having considered all the matters before the court in determining the issues before me I commence with the agreement.

Ex 1- clause 7 (*supra*) 'Kenya Kazi Limited shall be responsible to the employer shall not be responsible for any such loss or damage unless it be shown that the same was and directly due to theft or dishonesty on the part of Kazi Limited or employee ..... and that the said employee shall have been duly convicted thereof under the relevant section of the Penal Code.'

It is not in dispute that the employees of the defendant company were actually employed in providing the employer's said service and acting within the scope and the course of employment. It cannot be seriously contended that the plaintiff did suffer loss which was due to a degree of theft and / or dishonesty on the part of some of the employees. If this was not so, the plaintiff company contends that it would not have suffered the loss which it did.

What is the major conflict" It is the words in clause 7 – the employee should have been duly convicted of an offence under the relevant section of the Penal Code.

Mr Fraser simply wanted this part of the clause 7 be disregarded – more accurately to be deleted or an interpretation be provided which would avoid an absurdity. Considering the submissions in light of the reasons for this demand from the court of this course of action; I ask myself is it just or indeed proper for this court to disregard totally and to delete from consideration certain undertaking made in a written agreement by contracting parties freely and commercially to carry out a contractual undertaking for a consideration.

My reaction to deal with such a submission is to analyse and scrutinize the agreement with a view to provide an answer to this vital question. I would begin by taking into account all that forms part of the agreement and then subsequently venture to provide the interpretation in the light of the facts and the circumstances pertaining thereon and by applying the principles of law enunciated in the numerous decisions cited for my guidance by the learned counsel.

The agreed issue before me is this:

“On the basis of the statement of agreed facts and agreed bundle of documents read in the light of pleadings is the plaintiff entitled to recover shs 2,315,140/- from the defendant.”

Prior to this exercise I briefly access the relevant facts on the material date. In pursuance of the agreement the plaintiff handed over to the defendant the sum of shs 2,335,540/- in cash to be transported from the bank to the plaintiff’s head office. The plaintiff provided a Toyota Land Cruiser for such transport manned by 5 employees of the defendant. One of the employees was Commander Juma.

All the employees of the defendant detailed in respect of this assignment had a good and a clear record of service. None of the crew carried any firearm but were armed with *pangas* and trenchons. One of the escort protested and was ejected from the vehicle. One of the crew was issued with a chemical mace. Commander Juma informed the Police 999 Patrol and control room. The driver and two escorts are still missing and have not been traced. They have, therefore, not been apprehended, charged and thus have not been convicted under the relevant section of Penal Code. Mr Fraser has raised the issue that in conformity with the standing instructions issued to the crew the radio contact was not maintained. These were an internal procedural matters and were independent of the contract. Subsequent the contact as seen was maintained with the police and the employers.

The decision made in *Suiss Atlantique* in my understanding of the facts, when fog of judicial verbosity lifts and horizon is visible, does not support, in my view, the claim of a ‘Fundamental Breach’ in certain circumstances which could nullify the provisions of an agreement negotiated and entered in by the contracting parties.

The House of Lords decision in *Photo Studio Production Limited (supra)* restored the judgment of Mackenna J, for a claim for damages based on breach of contract and / negligence.

The Court of Appeal decision on appeal was reversed. It was held:

“Allowing the appeal, (1) that the doctrine of fundamental breach by virtue of which the termination of contract brought in and with it, any exclusion clause to an end was not good law; that the question whether and to what extent an exclusion clause was to be applied to any breach of contract was a matter of construction of the contract and normally when the parties were bargaining on equal terms they should be free to apportion the risks as they thought fit, making provision for their respective risks according to the terms they chose to agree (post, pp 841D, 842E-G H-843A, E, 848E-G, 849A-B, 850A-851B-C E-F),” *Suisse Atlantique Societe D’Armement Maritime SA v N V Rotterdamche Kolen Centrale* [1977] 1 AC 361 H L (E) explained. *Chaterhouse Credit Co, Ltd v Tolly* (1963) 2 QB 683 CA *Harbutt’s “Plasticine” Ltd v Wayne Tank and Pump Co Ltd* (1970) 1QB 447 CA and *Wathes (Western) Ltd v Austins (Menswear) Ltd* (1976) 1 Lloyd’s Rep 14, CA overruled

2. That the words of the exclusion clause were clear and on their true construction covered deliberate acts as well as negligence so as to relieve the defendants from responsibility for their breach of the implied duty to operate with due regard to the safety of the premises, (post, pp 8460, R-F, 850D-F, 851D-E, 852E-F) Decision of the Court of Appeal [1978] 1 WLR 856, [1978] 3 All ER 146 reversed.

3. Lord Wilberforce *inter alia* observed: It is first necessary to decide upon the correct approach to a case such as this where it is sought to invoke an exception or limitation clause in the contract. The approach of Lord Denning MR in the Court of Appeal was to consider first whether the breach was “fundamental.” If so, he said, the court itself deprives the party of the benefit of an exemption of limitation clause (1978)

1 WLR 856, 863). Shaw and Waller L JJ, substantially followed him in this argument.

Lord Denning MR in this was following the earlier decision of the Court of Appeal, and in particular his own judgment in *Harbutts "plasticine" Ltd v Wayne Tank & Pump Co* (1970) 1 QB 447. In this case Lord Denning MR distinguished two cases.

(a) The case where as the result of a breach of contract the innocent party has, and exercises, the right to bring the contract to an end,

(b) The case where the breach automatically brings the contract to an end, without the innocent party having to make an election whether to terminate the contract or to continue it. In the first case the Master of the Rolls, purportedly applying this House's decision in *Suisse Atlantique Societe D'Armament Maritime S A v N V Rotterdamsche Kaolen Centrale* (1967) 1 AC 361 but in effect two citations from two of their Lordships speeches, extracted a rule of law that the "termination" of the contract brings it, and with it the exclusion clause, to an end. The *Suisse Atlantique* case in his view, "affirms the long line of cases in this court that when one party has been guilty of a fundamental breach of the contract ..... and the other side accepts it, so that the contract comes to an end ..... then the guilty party cannot rely on an exception or limitation clause to escape from his liability for the breach."

He then applied the same principle to the second case. My Lords, whatever the intrinsic merit of this doctrine, as to which I shall have something to say later, it is clear to me that so far from following this House's decision in the *Suisse Atlantique* it is directly opposed to it and that the whole purpose and tenor of the *Suisse Atlantique* was to repudiate it. The lengthy, and perhaps I may say sometimes indigestible speeches of their Lordships, are correctly summarized in the headnote – holding No 3 [1967] 1 AC 361, 362 – "That the question whether an exceptions clause was applicable where there was a fundamental breach of contract was one of the true construction of the contract." That there was any rule of law by which exceptions clauses are eliminated, or deprived of effect, regardless of their terms, was a clearly not the view of Viscount Dilhorne, Lord Hodson, or of myself. The passages invokes for the contrary view of a rule of law consists only of short extracts from two of the speeches – on any view a minority. But the case for the doctrine does not even go so far as that.

Lord Reid, in my respectful opinion and I recognize that I may not be the best judge of this matter, in his speech read as a whole, cannot be claimed as a supporter of this rule of law. Indeed he expressly disagreed with the Master of the Rolls' observations in two previous cases (*Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 and *U G S Finance Ltd v National Mortgage Bank of Greece and National Bank of Greece S A* [1964] 1 Lloyd's Rep 447 in which he had put forward the "rule of law" doctrine. In order to show how close the disapproved doctrine is to that sought to be revived in *Harbutt's* case I shall quote one passage from *Karsales* (1956) 1 WLR 936, 940:

"Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract."

Lord Reid comments at p 401 as to this that he could not deduce from the authorities cited in *Karsales* that the proposition stated in the judgment could be regarded as in any way "settled law." His conclusion is stated on p 405 "In my view no such rule of law ought to be adopted" – adding that there is room for legislative reform.

It is only because of Lord Reid's great authority in the law that I have found it necessary to embark on what in the end may be superfluous analysis. For I am convinced that, with the possible exception of Lord Upjohn whose critical passage; when read in full, is somewhat ambiguous, their Lordships, fairly read, can only be taken to have rejected those suggestions for a rule law which had appeared in the Court of Appeal and to have firmly stated that the question is one of construction, not merely of course of the exclusion clause alone, but of the whole contract. The doctrine of "fundamental breach" in spite of its imperfection and doubtful parentage has served a useful purpose. There was a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exemption clauses to operate. Lord Reid referred to these in the *Suisse Attlantique case* (1967) 1 AC 361, 406, pointing out at the same time that the doctrine of fundamental breach was a dubious specific. But since then Parliament has taken a hand; it has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts terms and enables exemption clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions. I also take note of (Note No 4, p 4 - (cited).

Freedom of contract. In the nineteenth century freedom of contract was regarded by many philosophers, economists and judges as an end in itself. The parties were supposed to be the best judges of their own interest, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it. It was immaterial that one party was economically in a stronger bargaining position than the other. If he introduces qualifications and exceptions to his liability, eg in what are known today as exemption clauses, and the other party accepted them, then full effect would be given to what the parties agreed. These ideas have to a large extent lost their appeal today. "Freedom of contract," it has been said, "is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large."

Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedures for consultation, and by which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief from contractual obligations on the ground of "inequality of bargaining power." It must not be supposed, however, that even today the concept of freedom of contract lacks judicial support.

In 1966, in the House of Lords, Lord Reid rejected the idea that the doctrine of fundamental breach was a substantive rule of law, negativing any agreement to the contrary, on the ground, *inter alia*, that this would "restrict the general principle of English law that parties are free to contract as they may think fit." And in 1980, when the same point was under consideration by the House of Lords, Lord Wilberforce said.

"At the state of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made ....."

And Lord Diplock observed;

“A basic principle of the Common Law of a contract ..... is that the parties are free to determine for themselves what primary obligation they will accept.” (*Chitty on Contracts* 25th ED Vol I) is referred to illustrate the extent of exemption. I take note of this.

1. EXTENT OF CLAUSE:

“Each clause must be considered according to its actual wording, but it must clearly extend to ..... if it is to protect the party relying on it. So, for example, mere difficulty or performance or an increase in price or expense or unprofitableness is not enough to invoke the protection of liability if he is ‘prevented’ from delivering the goods; performance must have become legally or physically impossible. But a wider scope is given to the word ‘hindered.’ Again, a party relying on the exemption

‘Unforeseen contingencies excepted’ is required to show that these have made a performance totally impossible, not merely impossible in the way originally intended source of supply proving impracticable, if it is possible to obtain the goods elsewhere.”

2. LIABILITY FOR NEGLIGENCE

“Liability for negligence may be effectively excluded if words are used which indicate that all damage, however caused, is to be comprehended within the exception, or which throw the risk upon the plaintiff. Any words, in fact, which clearly indicate an intention to exclude all liability without exception, for example, ‘no liability whatever,’ or ‘ under any circumstances’, will be considered sufficient. Similarly such words as ‘at sole risk,’ ‘at customers’ sole risk’, ‘at owner’s risk’ and ‘at their own risk’ will normally exclude liability for negligence.” Having taken full account of what is observed above I once again revert to the contentions made by the learned counsel. The learned counsel, for the plaintiff submits that had one of the employees been shot dead in the circumstances of this case, that would render the defendant liable. Likewise argues Mr Fraser that when the employees has been obviously involved and had absconded, the court is entitled to drive the conclusion that they are as good as convicted. This is an interesting proportion and tempting at first sight.

However, every case must be determined in the light of its own peculiar circumstances. I am not in a position to decide this matter on the basis of hypothetical situation only. The reason being that the facts before me are well established and spelt out.

I can only go by what the parties in equality matually agreed upon. Risk of the property remained with the plaintiff who had insured it as required in the terms of the agreement. I have carefully perused all the clauses of the agreement to give it a proper construction and hence implementation. Reference has been made to all the clauses with specific reference to clause No 7.

I note (Clause No 5) – it provides for a remuneration for the services – at shs 14,500/- pm to guard cash/valuable/other property - between Bahari Beach, Shimo-La-Tewa, Malaika, Dolphin and Coral Palm Beach Hotel every business day as specified in letter. Shs 500/- is stipulated for any additional journey undertaken. Clause No 6 provides, ‘The employer shall effect suitable insurance to cover the risk of loss or damage of the employers property in transit hereunder.’

The sum of shs 14,500/- pm as provided under clause 5 it is obvious from the nature of services offered and that the remuneration paid did not cover the ‘risk of loss or damage’ in transit.

From the facts and the document before the court I hold that the two parties in this litigation are of equal bargaining power. I would therefore construe, strictly, the words used by their natural meanings.

Clause 6 clearly, in my view, demonstrates that it was the intention of the parties that the risk of the loss should be borne by the employer. Clear and concise words have been used to make this provision and I so construe it. (*Scotish Special Housing Association v Com Ltd* (1954) I ALL ER 210).

The remuneration in clause 5 covered the transport and escort charges. The parties in my view were free to determine for themselves ‘what primary obligation’ they will accept.

The provision were made for a situation when theft is committed by a servant. The plaintiff has to satisfy that the employee is charged and convicted.

These are unambiguous terms. This situation, was, in my view anticipated and the parties agreed to provide for this eventuality. The risk rests with the Insurance Company in the terms and conditions of the contract. I conclude by holding that I do not find that the rule of law as to the fundamental breach has an existence, and an application in the case before me despite the persuasive argument. I am unable, despite best effort, to detect it.

The decision made in *Photo Production (supra)* and the legal principles and the rules above enunciated I, *inter alia,* apply and rely upon when determining this case.

The present case depends, furthermore, upon the true contruction of the clauses Nos 5 and 6 and 7 in question, in the light of the entire agreement. What the parties have agreed between themselves is what really matters. In this contract, they stand equal in status and there is no suggestion that they did not know what was being agreed to. I must therefore be guided by and apply the agreement in its entirety. This I do.

For these reasons the plaintiff’s action is dismissed and judgment is entered for the defendants with costs.

Dated and Delivered at Nairobi this 27th Day of September, 1990

S.K. AMIN

……

JUDGE