**ASHABI KOGBE**

**V.**

**JOSEPH IKUPOLOWO**

HIGH COURT LAGOS STATE

10TH DAY OF MARCH, 1972

SUIT LD/738/70

**LEX (1972) - LD/738/70**

OTHER CITATIONS

2PLR/1972/80 (HC)

(1972) NCLR 103

**BEFORE HIS LORDSHIP:** GEORGE J

**BETWEEN**

ASHABI KOGBE – Plaintiff

AND

JOSEPH IKUPOLOWO – Defendant

**REPRESENTATION**

AWOYINFA for the Plaintiff.

AIBINU for the Defendant.

**ISSUES FROM THE CAUSE(S) OF ACTION**

TORT AND PERSONAL INJURY:– Negligence:- Bailment of goods - Liability of a bailee for valuable consideration – Onus of proof of lack of negligence – Measure of damages

COMMERCIAL LAW:– Bailment of Goods – Duties of care and diligence of custodian for reward – Effect of failure thereof

CHILDREN AND WOMEN LAW: Women in Business – Housewife and daughter in textile business - Bailment of goods - Loss of goods on account of store owner’s negligence – How treated

**MAIN JUDGMENT**

**GEORGE J.:**

The plaintiff, who is a housewife and trader in textiles, has a stall at Ajao Street in an area popularly known as “Gutter” in the vicinity of No. 10 Ijaiye Street, Lagos, where the defendant’s shop is situated. The plaintiff entered into an agreement with the defendant that she should deposit her textiles in his shop for safe-keeping every evening in consideration of a monthly payment by her to the defendant of the sum of 15s. (fifteen shillings). It was further agreed between the plaintiff and the defendant that every evening or at the close of the day when the wares were to be deposited, an accredited servant of the plaintiff or of other depositors should follow a carrier if and when one was engaged.

It was pleaded in paragraphs 5 and 6 of the statement of defence as follows:

“5. That every morning the said wares should be delivered only to the accredited servant of the plaintiff or of other depositors where the plaintiff or other such depositors could not come by themselves.

6. These facts are well known to the servants and/or agents of the defendant and were strictly adhered to by the defendant and his agents or servants. All these facts are not in dispute as the defendant in paragraph 1 of his statement of defence admitted paragraphs 1, 2, 3, 4, 5, and 6 of the statement of claim.”

The plaintiff’s case is that it was on understanding between her and the defendant that her daughter Toyin should bring textiles in the evenings together with the carriers to the defendant, and in the mornings the defendant should not release the textiles to anybody except herself or her daughter Toyin. On October 23, 1970, the plaintiff’s daughter Toyin took two bundles of textiles tied together to the defendant’s shop. The bundles consisted of patent woolen textiles. The following morning Toyin, P.W.3, went to the defendant’s shop and found only one bundle out of the two.

The samples of textiles in the missing bundles are exhibits “A“, ”A2.” The plaintiff testified that there were five rolls, each of 40 yards length of the type of exhibit “A“ in the missing bundle. Exhibit “A “ which is dark violet in colour was £I 15s. per yard and the selling price was £2 per yard. This works out to be £350 in value. Further, there were five rolls each of 30 yards in length and exhibit “A1“ which is pink in colour in the missing bundle and the cost price was £l 15s. per yard; the selling price was £2 per yard and this works out to be £262 10s. in value. There were 10 rolls each of 25 yards in length of exhibit “A2“ (blue) in the bundle and the cost price and selling price were £I 15s. and £2 respectively. This works out to be £437 10s. in value. The total cost price of the textiles as given in evidence by the plaintiff was £1,050. The plaintiff also gave evidence and was cross-examined concerning one Mustapha Alao and Elegbon whom she described as common carriers and she maintained that the agreement between her and the defendant was that her daughter or herself would come and collect the textiles in the morning. In cross-examination, she said that these textiles were bought about four days before she lost them. Apparently, they were new and she could not produce in evidence any receipt because she brought them from traders from other countries who brought them to her in her store.

The plaintiff also called a witness, Victoria Gbalajobi, who is also a dealer in textiles and also at a place popularly known as “Gutter.” The plaintiff’s store was exactly opposite that of this witness. She testified that she was in the store when the plaintiff packed her textiles in two bundles and she could recognise them if seen. Exhibits A-A2 according to her, were similar in description to the ones which the plaintiff packed inside her two bundles on October 23, 1970. She further testified that the cost price of exhibits A-A2 was £1 15s. and the selling price was £2, and she was also one of the people depositing textiles with the defendant at the close of the day. As far as she knew, common carriers did not carry goods alone unaccompanied to the defendant’s shop. The agreement and the practice was that the daughter could accompany the carrier. In cross-examination, she testified that she was present when the goods were deposited in the shop of the defendant on October 23, 1970. She was also in her store on October 24, 1970, when the plaintiff’s daughter Toyin brought one bundle to the store in the morning.

Now the plaintiff’s daughter testified that in the evening she usually carried textiles to the shop of the defendant and in the morning she went to carry them from the shop. On October 23, 1970, she carried two bundles of textiles to the defendant’s shop and she called a carrier who helped her to carry the bundle. She was positive in saying that Elegbon was not the carrier and the name of the carrier who assisted her on that day was Alao Mustapha. The following day she and the carrier went to the defendant’s shop but they found only one bundle. She told the defendant that although they left two bundles in the shop, they could only find one but the defendant said that they could search for the one bundle. Ever since she has been depositing textiles in the defendant’s shop, at no time did the carrier alone carry or deposit textiles. She identified exhibits “A’,”A2“ as samples of the textiles in the missing bundle and she described also the quantity of textiles in her mother’s bundles.

The defendant testified that on October 24, 1970, when the plaintiff’s goods were removed he did not come to his workshop. He got there at 12 noon and was told that some of the plaintiff’s goods were missing. Then the plaintiff’s husband sent a police officer to call him and he went to the police station and made a statement. He further said that he was not aware that the plaintiff told Ohatunji Elegbon, a common carrier, not to collect her goods from his house again. He said he did not know and he did not tell the plaintiff anything. In further cross-examination, he said he was aware of the fact that the plaintiff brought two bundles of textiles to his shop on October 24, 1970. His own version of the agreement was that the plaintiff told him that if her daughter did not come, Elegbon, the common carrier, could come and in fact Elegbon alone had come to remove these goods on previous occasions. As the plaintiff’s counsel cross-examined him further, he testified that it was his responsibility to deliver the goods to these women in the morning but there was no agreement that he should pay the plaintiff the value of the missing goods.   
His only witness testified that on October 24, 1970, it was Elegbon who came to remove the goods from the shop in the morning. The defendant had not come when the goods were removed, and he said that he too was not aware that the common carrier Elegbon was not asked to carry the goods for the plaintiff, otherwise, he would not have allowed him to remove them. But in cross-examination, when confronted with the statement he made to the police, he said “I do not know whose goods Elegbon carried that day. I say it is that of the plaintiff because the plaintiff said a bundle was missing.”

I have to decide in this case (i) whether the plaintiff authorised the common carrier to remove her goods from the defendant’s shop and (ii) whether the defendant was negligent.

Both counsel addressed me at the close of the case for the defendant and it seems that both of them are of the opinion that this is a case of bailment for valuable consideration. The law and liability of a bailee for valuable consideration has been stated as follows in Halsbury’s Laws of England (3rd ed), Vol. 2, para. 225 which reads:

“Care and Diligence: A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depositary, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances.

He is therefore bound to take reasonable care to see that the place in which the chattel is kept including the tackle used in connection with it is fit and proper for the purpose, to see that the chattel is in proper custody, to protect it against unexpected danger should that arise, to recover it if it is stolen, and to safeguard the bailor’s interest against adverse claims and if it is injured through his negligence, he will not be excused on the ground that it has been subsequently destroyed by inevitable mis-chance. The custodian may limit or relieve himself from his common law liability by special conditions in the contract; but they will be strictly construed and will be held not to exempt the bailee from responsibility for losses due to his negligence unless the words used are clear and adequate for the purpose or there is no other liability to which they can apply.”

There is no dispute that one bundle of textiles was actually lost. Both the defendant and his witness as well as the plaintiff agree on this issue. With regard to the evidence that it was Elegbon who removed the lost bundle, I cannot rely on the evidence of the defendant’s witness who contented himself with merely saying that it was Elegbon who removed the bundle, but when confronted with his own previous statement to the police, he retracted from his evidence-in-chief. In his statement to the police, he said “Elegbon came to carry some loads, but I do not know whose goods he came to carry.” He went further to say, “I do not know whose goods Elegbon carried, that day, I say it is that of the plaintiff because the plaintiff said a bundle was missing.”

The defendant himself was not present when the goods were removed, but the first defendant’s witness apparently got confused as to who removed what, hence his prevarication. The defendant, in my view, did not take proper care of the goods entrusted to his care, otherwise, he would not have allowed the goods of one customer to be removed by any unauthorised person. From the evidence adduced, it is my finding of fact that the plaintiff did not authorise Elegbon to remove her goods from the defendant’s shop.

The onus is on the defendant to prove that he was not negligent. In my view, the evidence of his witness clearly shows that he did not exercise that degree of care and diligence required of a bailee for valuable consideration. Since the plaintiff had about 40 customers keeping their goods under his care, he should have labelled each load belonging to each customer. If he had done this, a situation as this would not have arisen. He was clearly negligent and the plaintiff is entitled to judgment for special damages.

The plaintiff gave evidence of the value of each specimen tendered in evidence and in these she was supported by the first plaintiff’s witness who was also a dealer in textile. Her daughter Toyin, the third witness, also gave evidence of the value of the textiles in the bundle. The evidence of these three witnesses, that is the plaintiff and the first and second witnesses for the plaintiff, was not challenged in cross-examination by the defendant.

I accept them as representing the true value of these goods. In all they amount to £1,050.

I therefore enter judgment for the plaintiff for the sum of £1,050 special damages with costs.

Judgment for plaintiff.