**Malde and another v Gichugu**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 4 December 1974

**Case Number:** 20/1974 (1/75)

**Before:** Spry Ag P, Law Ag V-P and Musoke JA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Kenya – Muli, J

*[1] Evidence – Document – Receipt signed on list – Proved by signatory of receipt – Document proved.*

**JUDGMENT**

The following considered judgments were read. **Spry Ag P:** The appellants, who were the plaintiffs in the High Court, are a firm of transport agents. The respondent carries on business as a transporter. The appellants engaged the respondent to transport one hundred and two packages belonging to various of their customers from Mombasa to Nairobi and it was part of the arrangement that the respondent’s employees would deliver the packages to those of the consignees who were resident in Nairobi. The appellants complained that two of their customers, who should have received four packages each, only received one each. They said that they paid their customers the value of the goods not delivered and they claimed to be entitled to be re-imbursed by the respondent. They claimed also a small sum representing the proportion of the transport charges attributable to the missing cases. The respondent denied liability. He denied that any goods entrusted to him had been lost or, if they had, he claimed that it was after the appellant’s agents in Nairobi had assumed responsibility for them. The system operated by the parties is that the appellants collected goods in their godown in Mombasa. They would then load them onto the respondent’s lorry, handing the driver, one Kimani Nganga, a list of them, which he would sign by way of receipt, together with delivery orders made out by the senders of the goods and addressed to the consignees. When he reached Nairobi, the driver would go to the appellants’ office and hand over the list and the delivery orders. The employees of the appellants would make out delivery notes from the delivery orders and hand these to the driver to take round with the goods. It was common ground that there was no inspection of the goods by or on behalf of the appellants after their arrival in Nairobi and before their distribution. The issue that was most strongly contested in the High Court was whether or not the distribution of the goods was supervised by the appellants’ servants. The appellants denied that they or any of their employees played any part in the distribution of the goods; the respondent, on the other hand, claimed that the distribution was conducted by an employee of the appellants, named John, assisted by two labourers. On this issue, the trial judge found for the appellants, and held that there was no such person as John and that no employee of the appellants accompanied the driver when he distributed the goods. The judge found for the respondent, however, because he was not satisfied that it had been proved that the missing packages had ever been put on the lorry. He rejected the list on which the appellants relied and the delivery orders on the ground that the authors were not called, adding: “I must say at once that what was written on them was of very little value and did not prove in any way that Kimani in fact received the ill-fated consignment at Mombasa.” I think, with respect, that the judge seriously misdirected himself when he said that the author of the list had not been called. It is true that the person who made out the list was not called but it was produced as a receipt and the person who signed it, the driver, was a witness for the defence. He acknowledged that he signed it and that he understood what it was and the purpose for which it was prepared. He was, therefore, the “author” of the receipt and it is immaterial that he did not personally prepare the list. I accept that the giving of a receipt does not stop the giver from proving that he never received the goods acknowledged, but it does, I think, put the onus on him to disprove receipt. In the present case, the defence contained a statement that the respondent did not admit receipt of the goods but no specific denial that they had been received. The driver, in his evidence, never asserted that the number of packages loaded was less than that shown in the list: all he said was that he slept while his lorry was being loaded. The only other material witness, the turnboy, said that he did not count the packages while they were being loaded. Indeed, the aim of the defence at the trial was to show that the goods must have been lost or stolen in Nairobi, while they were under the control of the appellants’ servants, and that defence, as I have said, was rejected by the judge. The judge said, rightly, that the onus was on the appellants to prove that they delivered the goods to the respondent at Mombasa but I think, with respect, that he was wrong when he went on to say that they failed to do so. I think the receipt was admissible evidence and, in the absence of any rebutting evidence, was sufficient evidence. It is clear from his judgment that had he not held that the delivery of the goods at Mombasa had not been proved, the judge would have found for the appellants. There was evidence, which he accepted, that the missing packages were not delivered to the consignees and he accepted that all the packages remained in the charge of the respondent until the time when his employees delivered them, or ought to have delivered them. It is not disputed that the respondent is liable, vicariously, for the fault of his servants. There was evidence by the clerk who prepared the delivery notes that by mistake he omitted one item, relating to three packages, from each of the two delivery notes with which we are now concerned, when copying the particulars from the delivery orders, and this may well have created the opportunity, and the temptation, for theft, but it is unnecessary to make any finding on this. All that it is necessary to say is that the respondent was a bailee who received goods, through his servants, and failed to account for them. For the reasons I have given, I would allow the appeal, with costs, set aside the judgment and decree and substitute an order giving judgment for the appellants for Shs. 7,842/85, with interest at 6 per cent from the date of the filing of the suit. I would award the appellants their costs in the High Court, but I would not award interest on the costs. As the other members of the Court agree, it is so ordered.

**Law Ag V-P:** I agree with the judgment prepared by the Acting President.

**Musoke JA:** I agree with the judgment of the Acting President, which I have had the advantage of reading in draft, and there is nothing which I can usefully add.

*Appeal allowed.*

For the appellants:

*SC Gautama*

For the respondent:

*DN Khanna* (instructed by *Khanna & Co*, Nairobi