THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO.32 OF 1998

(Arising out of Civil Suit No 875/97 Mengo)

ETHIOPIAN AIRLINES::**PLAINTIFF**

VERSUS

ALFRED GBORIE::: **DEFENDANT**

BEFORE: THE HON. LADY JUSTICE M.S.ARACH-AMOKO.

JUDGMENT.

This Appellant, Ethiopian Airlines brought this appeal against the judgment and decree of His Worship A.Namundi Chief Magistrate of Mengo, as he then was, delivered on l9th March 1998.

The brief background to the appeal is as follows:
The Respondent, Alfred Gborie, a Sierra Leonian, then pursuing a Master of Statistics Degree at Makerere University, went to Sierra Leone to collect data for his Dissertation. When returning from Free Town on 26th January 1997, he boarded the Appellant's plane at Accra-Ghana. He had two baggages, a hand baggage and a big baggage. At Accra, the big baggage was checked up to Entebbe. As for the hand baggage, the Applicant's staff removed it from him, marked it with a baggage identification tag and told him that he would receive it on arrival at Entebbe Airport.

The Respondent had to change to a Uganda Airlines Plane at Nairobi airport. Before boarding the Uganda Airline plane, passengers were supposed to identify their baggages. The Respondent did not see his baggage. He inquired from the Appellant's Officials who also failed to trace it. They told him that it was possible that the baggage was not offloaded from the Appellant's plane. The Appellant's employees promised to find the said baggage and told him to proceed to Entebbe.

On arrival at Entebbe Airport, the Respondent did not still see his baggage. He therefore reported the loss of his baggage to the officials of Uganda Airlines. He was made to fill a declaration form indicating the contents of the lost bag. He was then told to check later with the tracing staff. He checked several times at Uganda Airlines and Ethiopian Airlines without any success.

On the 29/10/97 the Respondent then instituted the suit against the Appellant in the Chief Magistrate Court at Mengo, for breach of contract, and for negligence, where he prayed for special damages of Shs 2,400,000, and general damages together with interest and costs. Judgment was given in his favour by the Chief Magistrate on the 19/3/98 and he was awarded the following:

a) Shs 2,600,000 special damages.

b) Shs 1,500,000 general damages.

c) Interest on (a) and (b) at court rate from date of judgment till payment in full.

d) Taxed costs of the suit.

The Appellant is dissatisfied with the decision, hence this appeal.

In the Memorandum of Appeal the Appellant raised 8 grounds of appeal. However, at the hearing, Mr. Wakida learned Counsel for the Appellant abandoned all the grounds except grounds 2, 6, 7 and 8. They are set out as follows:

2. The learned trial Magistrate erred in law when he awarded a greater sum of special damages than that pleaded by the Plaintiff.

6. The learned trial Magistrate having found that the Plaintiff was bound by the terms and conditions on the receipt/ticket, later misdirected himself in finding that there was breach of contract when no term or condition on the ticket was found breached by the Defendant.

7. The learned trial Magistrate erred in law in refusing to take Judicial notice of the **WARSAW CONVENTION, 1929** as amended by the **HAGUE PROTOCOL, 1955,** and dismissing the same as in applicable to the contract of carriage in issue.

8. The trial Magistrate erred in law in awarding damages which contravene specific provisions of the **WARSAW CONVENTION,** 1929 (as amended).

Arguing the 2nd ground of Appeal, Mr. Wakida submitted that the learned trial Magistrate erred when he awarded special damages of Shs 2,600,000, and yet what was pleaded in paragraph 10 of the plaint was a total of Shs 2,400,000. That court does not have the powers to award what was not pleaded. The court can award less than what was pleaded because there was no proof, but it cannot award more than what is pleaded or proved for to do so would amount to punitive damages which were neither pleaded nor proved in the instant suit.

Mr. Tusasirwe learned Counsel for the Respondent conceded that the trial Magistrate had awarded Shs 2,600,000 instead of the Shs 2,400,000 pleaded but submitted that part of the claim was in foreign currency of $800 for the value of the lost properties, which was converted to Shs 900,000. He further submitted that even if the trial Magistrate had failed to indicate the conversion rate, this court as a first Appellate court ought to re-examine the evidence as a whole and draw its own conclusion.

Alternatively, Mr. Tusasirwe explained that if you add the awards on page 5(b) that is the US $ 800 converted to Shs 900,000 plus Shs 1,000,000 for fresh research and Shs 500,000 (for transport expenses to Entebbe 10 times at a rate of 50,000 per trip) you get Shs 2,4000. As another alternative, Counsel prayed court to regard the sum of 2,600,000 as a slip or arithmetical error and submitted that the Appellant should have applied the slip rule.

I agree with the submission of Counsel for the Appellant on this ground. With respect, I think the should not awarded Shs 2,600,000 instead of Shs 2,400,000 as pleaded in paragraph 10 of

the plaint, which set out the particulars of special damages as:

a) Value of lost physical property as set out in annex 'C' hereto....900,000.

b) Transport to /from Entebbe and Defendant's offices and telephone calls in an attempt to trace lost property 500,000

c) Cost of carrying out fresh research for Masters Degree following loss of already compiled research 1,000,000

Total 2,400,000.

The law on special damages is well settled. Special damages must be specifically pleaded and proved. See: Senyakazana -Vs- AG (1984) HCB 48 & Haji Asumani Mutekanga -Vs- Equator Growers CA NO 7/1995 (SC). The court cannot award what is not pleaded and proved.

The Respondent in his evidence on pages 5 to 6 stated that the cost of the lost items was US $ 800, he spent Shs 1 million on fresh research and Shs 500,000 on taxi hire for 10 trips between Kampala and Entebbe. If the US $ is equivalent to 900,000, the total amount proved by the Respondent is Shs 2,400,000. The learned Chief Magistrate should have been awarded Shs 2,400,000 and not 2,600,000. The trial Magistrate therefore erred in awarding more special damages than what was pleaded. The 2nd ground of appeal succeeds.

On the 6th ground of Appeal, Mr. Wakida submitted that the learned Magistrate misdirected himself in holding that the terms of the contract contained in the ticket were not applicable to the present case, and yet the same Magistrate had found as a fact that once the Respondent accepted the receipt, he became bound by the terms and conditions thereof. That having held that those conditions are binding on the Respondent, it was wrong of the learned Magistrate to hold that they were not applicable to the baggage. He referred to page 5 paragraph 2 of the

judgment where the learned Magistrate observed that:
“I agree with defence that once the Plaintiff accepted the receipt then he became bound by the terms and conditions as outlined by the defence. However, these terms are not applicable to the present case and hence I hold that the court has jurisdiction in this matter.”

The terms and conditions in issue are at the back of the air ticket headed “Advice To International Passengers On Limitation of Liability” and “Notice Of Baggage Liability Limitations.” The relevant part states as follows:
“Passengers on Journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw. The carriage is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not an international carriage as defined by the Convention”, and “Liability for loss, delay, or damage to baggage is limited unless a higher value is declared in advance and additional charges paid. For most international travel (including domestic portions of international Journeys) the liability limit is approximately US $ 9.07 per pound (US $ 20.00 per kilo) for checked baggage and US $ 400 per passenger for unchecked baggage.”

Mr. Wakida submitted that the Respondent did not declare the value of the goods, in cross-examination yet he said he had travelled before, he did not read the ticket, and the said baggage was not weighed. He could not estimate how heavy it was, so the $ 20 per kilo thresh- hold does not apply. According to Mr. Wakida, what would apply, would be the compound figure of US $ 400 per passenger for unchecked baggage. That the ticket governed directly the relationship between the Appellant and the Respondent and they should be bound by the terms and conditions which the lower court should have followed, unless they were not brought to the attention of the traveller before he travelled, or unless they were not printed legibly enough for him to read, or in a language he does not understand. This was argued in the lower court, that is why the court rejected them and came to the conclusion that there terms were binding on the Respondent who had alleged that he had not seen them.

Mr. Wakida referred to the case of E.A. Road services Ltd-Vs-G.S.Davies Co. Ltd. (1965) EA at 676. as authority on exemption clauses.

Mr. Wakida submitted further that for the court to reject the terms expressly contained in the air ticket of $ 400 and award Shs 4.1 million equivalent to $ 4,000 when the parties had agreed to $ 400 would amount to the court making a contract for the parties which it has no hand or freedom to do. He referred to the case of Masaba -Vs- Bank of Uganda. (He did not give its citation)

Mr. Wakida further submitted that even if the court came to the conclusion that the exclusion clause does not apply to this case, the same liability provisions are repeated under the Warsaw Conventions governing International Air travel, and Uganda is a party by accession. The Warsaw Convention was signed in 1929 and Great Britain was one of the parties on behalf of itself and all its Colonies and Protectorates. Upon Independence, Uganda acceded to all the treaties that had been signed on its behalf by Great Britain. So Uganda is a party to the Warsaw Convention which was subsequently amended by the Hague Protocol. He referred to Article 3(2) of the Warsaw Convention as amended by Article 3(2) of the Hague Convention which states in part:
"The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage if the ticket does not include the notice 5 required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22."

Article 22 of the convention provides that:

"a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty Fracas (17 special drawing rights) per kilogramme, unless the passenger or consignor has made, at the time when the baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.

In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than that passengers or consignor's actual interest in delivery at destination". Mr. Wakida also referred to clause 25 of the Warsaw Convention and submitted that the Appellant was entitled to the exclusion clauses under Article 25 of the Convention. Finally, Mr. Wakida submitted that if the court had applied both the law and the conditions on the air ticket correctly, it would have come to the no other conclusion but to award *250* Francs or $ 400 which ever is the higher. It was wrong for the court to award 10 times as much without categorising it as punitive damages.

Mr. Wakida then called upon this court to uphold grounds 2, 6, 7 and 8 of the appeal and set aside the orders of the lower court, and award in its discretion US $ 400 in lien thereof. Mr. Wakida also prayed that the costs of the lower court and this court be awarded to the Appellant.

Mr. Tusasirwe supported the decision of the lower court. On ground 6, he submitted that the air ticket was actually a receipt. The question is therefore, whether exclusion clauses contained in such a document are contractually. He submitted at length on the rules which court applies in determining whether exclusion clauses are binding on the parties namely:

1) The court must decide whether or not the document in question was an integral part of the contract. According to Chesire and Fifoot on The Law of Contract- 12th Edn. 1991 at page 157, the document must have been intended as a contractual document and not a mere acknowledgment of payment. To hold a party bound by the terms of a document which reasonable persons would assume to be no more than a receipt is an affront to common sense. In determining whether the document is part of a contract, one looks at the time at which it was issued. Common law authorities show that tickets come into existence after the contract and exclusion clauses contained in them are to be regarded as mere warnings and not contracts. Mr. Tusasirwe referred to the case of Chaplatone-Vs- Barry UDC (1940) 1 QB 532 in support of his submission. He submitted that the case of E.A. Road Services (supra) cited by Mr. Wakida is distinguishable from the instant case, first of all because it does not show what kind of authority the clause was. In that case the clause seems to have been a full contract and

not a mere receipt, so it was definitely part of the contract. Secondly, in that case, the clause was very specific in terms of scope. It excluded the Defendant from liability from negligence or otherwise, unlike this one which was very general. Mr. Tusasire submitted that the ticket was not part of the contract, it was just an acknowledgement of payment for travel. That even if this court were to find that the receipt was part of the contract, then the second rule will apply, that is

2) That if the document was not signed by the party affected by it, the court must then ask itself whether, he was given reasonable notice of the clause. The clause must have been brought to his attention before the conclusion of the contract and not after, so as to be incorporated into the contract. In the instant case, the Respondent uncontested testimony on page 5 (b) says: "I have travelled before. When I was given the ticket, I never bothered to read it. I was just eager to travel. I do not know the terms you are talking about… I did not know about the regulations of the contract between myself and the Ethiopian Airlines"

That the Respondent was reasonably ignorant because it is only the most inquisitive person who would ask to read the ticket or receipt before paying because by its nature, it must come after the contract.

3) The third rule is even if the exclusion clause applies, it must be interpreted narrowly and must be construed contra-preferendum, that is, if there is any ambiguity must be resolved against the party who seeks to rely on it. Cases indicate that such clauses are to be construed as mere warnings. He referred to the case of Hollier -Vs- Rambler Motors (1972) 2 QB 71 and Chitty on Contract 22" Edition 1961 at 691, 693 Exemption Clauses.

He argued that if one looks at the receipt in the instant case, the Clause was worded in general terms. The phrase "Liability for loss, delay or damage to baggage" is too general. It does not show whether it is limited in negligence or in contract. The next sentence "For most international travel (including domestic portions of international Journeys) the liability limit

is approximately US $ 9.07 per pound (US $ 20.00 per kilo) for checked baggage and US $ 400 per passenger for unchecked baggage" is also too general. That this was not sufficient notice and it would not in any case exclude the airline from liability for negligence, for in the instant case, there was not only breach of contract but the highest form of negligence resulting into non-delivery of the Respondent's baggage because bags kept with adequate care do not just disappear without explanation.

4) The fourth rule is the doctrine of fundamental breach which is to the effect that the exclusion clauses do not apply where to uphold them is to enable a party to contract to evade performing an obligation that is at the core of the contract. The basic obligation in this contract is that the baggage should be delivered at its destination; and once that was not done, there was a fundamental breach which terminated the exclusion clause.

Apart from that, Mr. Tusasirwe submitted that the main reason why the exclusion clause cannot apply is that, it is clear from the facts that the contract of carriage of the particular baggage was a distinct contract, collateral but separate from the one of the air ticket. The uncontested evidence is that at Accra, the Appellants agents withdrew the luggage from the Respondent. The neither weighed it nor issued a baggage check as required by the ticket itself and the Warsaw convention, which the Applicant is relying on. In so doing, they entered into a new contract with the Respondent by which they implied by undertook to exercise reasonable care to deliver the goods to its destination. So this was breach of a simple contract and the question of the exclusion clause does not arise. This transaction did not fall under checked or unchecked baggage which is covered by the Warsaw convention as Amended does not therefore apply to it. When a baggage is unchecked, it means the airline leaves the baggage in possession of the traveller. That is why Article 4(b) of the Hague Protocol provides that if the carrier accepts the baggage without issuing a baggage check, it cannot avoid itself the limitations of the ceilings provided in Article 22 of the convention. Although there is a valid contract of carriage, the baggage was not checked because it was not given a baggage check. The Respondent was only issued with a 'baggage identification tag' and not a baggage check, and yet this was not unchecked baggage because it was taken away from the Respondent. The baggage identification tag therefore proves the existence of a separate contract, not governed by either the ticket or the Warsaw convention and the Respondent

claim is on the basis of that separate contract. In addition, the bulk of the Respondents claim falls outside the scope of the ticket and the convention so one cannot use the ticket and the convention to limit the Respondents claim. The ticket and the convention only cover the direct value of the property lost, so it would only limit liability in respect of the claim in paragraph 10 (a) of the plaint - that is 900,000. The rest of the claims are consequential cases in respect of which the conventions and the ticket are silent.

On grounds 7 and 8, Mr. Tusasirwe submitted that firstly, the Courts in Uganda do not take Judicial Notice of International conventions such as the Warsaw convention or the Hague Protocol. Conventions are International agreements and like all agreements they only apply to entities which are parties to them. Even then a convention does not take effect unless an enabling Act of Parliament is passed. He referred to IAN BROMLEY PRINCIPLES OF PUBLIC INTERNATIONAL LAW, OXFORD UN 1979 at page 49 and submitted that a convention effects the private rights or liabilities like the Warsaw convention which limits the amount which one may claim cannot apply without an enabling Act because it seeks to reverse the common law position which is to the effect that all losses occurring naturally arising from a breach of contract must be compensated. At the trial the Appellant did not adduce evidence that Uganda has adapted the convention and the Magistrate was right in not taking judicial notice of it.

After careful consideration of the submissions and after re-evaluation of the evidence on record, I have come to the following decision.

On ground 6, I respectfully agree with the trial magistrate that the terms and condition of the air ticket or receipt are not applicable to the present case for the reasons stated in his judgment at page 5 where he said:
“This is for the simple reason that from the evidence the baggage was neither checked since it was not weighed. But on the other hand, it cannot be defined as unchecked since it was taken from the Plaintiff by the Defendant’s servants who acknowledged its receipt by issuing a tag. It was accordingly their duty to deliver it safely since they did not also comply with the terms of the contract.

If it was a hand baggage, then they should not have taken it away from the Plaintiff. Alternatively, they should have weighed it to bring it within the operation of the conventions and Regulations cited by the defence. I must accordingly find that the Defendants were negligent through their servants and were also in breach of a contract".

It is clear from the foregoing that the learned trial Magistrate did not state anywhere in his judgment that the Defendant breached a term or condition on the air ticket. He stated clearly that from the evidence the said baggage was neither checked, nor weighed. It cannot be defined as a checked baggage or unchecked baggage. It was not also a hand baggage since it was taken away from the Respondent. The contract referred to in the judgment is therefore not the one covered by the ticket, but a separate and collateral contract of carriage in respect of that particular baggage. This ground of appeal fails.

On the 7th ground, I have read the judgment of the learned trial Magistrate very carefully. I have not found anywhere in the said judgment where the learned trial Magistrate was asked to, and he refused to take judicial notice of the Warsaw Convention. According to the records, there were 3 issues for determination by the court namely:

1. Whether the Plaintiffs baggage was lost while under the care of Defendant.
2. If so, whether this amounted to breach of contract.
3. Whether the conditions in the air ticket formed part of the contract
4. Quantum of damages.

In his judgment the learned Magistrate said at page 5:
"If it was a hand baggage, then they should not have taken it away from the Plaintiff. Alternatively, they should have weighed it to bring it within the operations of the Conventions and Regulations cited." (the underlining is mine)

The above are not the words of a person who has refused to take judicial notice of the Conventions. It is true as Mr. Wakida stated, Uganda acceded to the Warsaw Convention after

independence. It was signed by Great Britain in 1929 on its own behalf and that of its Colonies and Protectorates.

The Warsaw convention applies to Uganda under the Civil Authority Statute No. 3 of 1994 which provides:
"33 (1) The Authority shall be responsible for carrying out its functions in a manner consistent with the Chicago Convention, any Annex to the Convention relating to international standards and recommended practices and any amendment made in accordance with the Convention, or other international Conventions relating to Civil Aviation"

Section 2 (1) of provides:
"2(1) This statute shall extend to all our craft operating in Uganda air space, be it foreign or of Uganda registry and to Ugandan aircraft operating outside Uganda territory."

The learned Magistrate did not therefore refuse to take judicial Notice of the Warsaw Convention. In any case, the need for him to do so did not arise, in light of the clear provisions of the Civil Aviation Statute. This ground of appeal also fails.

The 8th and last ground is that the trial magistrate contravened specific provisions of the Warsaw Convention. Having held as I have in ground 6 and 7, this ground does not arise. The trial Magistrate did not apply the Warsaw Convention or the terms and conditions on the air ticket. He stated clearly that the baggage in question was neither checked, nor unchecked baggage. He couldn't have contravened the provisions of Convection which he found inapplicable to the case before him. This ground of appeal also fails.

In the result, I allow appeal on ground 2 and dismiss it on grounds 6, 7 and 8 and substitute the award of special damages with Shs 2.4 million. The rest of the award remains the same as in the court below.

I do award 3/4 of the costs of the appeal to the Respondent since the appeal was partially successful.

M. S .Arach-Amoko
JUDGE
7/2/2002