THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE S.B.K. KAVUMA, JA

CIVIL APPEAL NO. 43 OF 2005

KENYA AIRWAYS LIMITED:::::::::::::::::::::::::::::: APPELLANT.

VERSUS

RONALD KATUMBA:::::::::::::::::::::::::::::::::::: RESPONDENT.

(Appeal from the judgement and decree of the High Court of Uganda at Kampala before Honourable Mr. Justice R. O Okumu Wengi, dated the 28th day of February 2005 in civil Case No. 75 of 2005)

JUDGEMENT OF HON JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

This appeal arises from the judgement and orders of Okumu Wengi, J, dated 28-02-05.

The respondent sued the appellant seeking special and general damages arising out of breach of contract and negligence. The appellant denied the allegations, relying on the terms of the said contract. The learned Judge preferred the respondent's story. Hence this appeal.

The facts, briefly, are that the respondent was a frequent passenger on the appellant's airline from Dubai to Entebbe and vice versa. On 30-01-2003, armed with a return air ticket to Dubai, the respondent checked in his luggage weighing 56 kilograms, on flight No. KQ413H and KQ310H. He, however, did not declare any special value for the baggage, nor did he pay any sums over and above that indicated on the ticket for the said special value of the baggage.

On arrival back at Entebbe, the respondent's baggage was found to be missing. At the request of the appellant, the respondent filled in a property irregularity form, informing the appellant that he had not retrieved his luggage; it was missing. The appellant took steps to try and locate the missing luggage. Arrangements were made to fly him to Nairobi in an effort to

trace the missing luggage. It was, however, irretrievably lost. The appellant thus offered to compensate the respondent in the sum of US. $ 1120, in accordance with the terms and conditions stated on the Air ticket, under the Warsaw Convention, which is US $ 20 per kilogram lost, for the 56 kgs.

The respondent declined the offer and opted to file a suit seeking U$ 17963 as the value of the goods lost together with U$ 150 additional cost for the flight to Nairobi, with general damages and costs.

The appellant denied liability beyond the limit of US $ 1120.
The learned Judge held that the appellant's liability was not limited as claimed and ordered it to pay US $ 17,963 to the respondent as prayed.

The memorandum of appeal is dated 30-06-05 and comprises the following grounds:

1. **The Learned trial Judge erred in law in finding that the appellant's liability was not limited under the Warsaw Convention.**

2. **The learned trial Judge erred in law and in fact in finding that notice of the limitation of the appellant's liability was not brought to the attention of the respondent.**

3. **The learned trial Judge erred in law in holding that the Illiterates Protection Act cap 78 applies to airline tickets.**

4. **The learned trial Judge erred in fact in holding that the respondent was illiterate.**

5. **The learned trial Judge erred in law and in fact in holding that there was an element of wilful misconduct on the part of the appellant.**

6. **The learned trial Judge misdirected himself on the law governing the award of special damages and erred in awarding the sum of US$ 150 to the plaintiff as special damages.**

7. **The learned trial Judge misdirected himself in evaluating the evidence on record and arrived at a wrong decision.**

At the conferencing, three issues emerged for determination by the court:-

1. **Whether the appellant's liability is limited. (This issue covers grounds 1,2,3,4,5 and 7 of the Memorandum of Appeal).**
2. **Whether the trial Judge properly directed himself on the remedies available to the respondent. (This issue covers grounds 6 and 7 of the Memorandum of Appeal).**
3. **What remedies are available to the parties.**

Regarding issue No.1, Mr. Sim Katende, learned counsel for the appellant, citing Article 22 (2) of the Warsaw Convention, pointed out that its wording limiting the appellant's liability was replicated on the airline ticket issued to the respondent and that the respondent was aware of it. In support of this submission learned counsel relied on **Ethiopian Airlines v Olowu Motunrola Court of Appeal Civil Appeal No. 30 of 2005**, where this court held that in the absence of any special declaration of excess baggage, the airline's liability for lost baggage was limited to US$ 20 per kg under the Warsaw Convention. Similarly, in this case, the respondent never declared any excess baggage nor its value at checking in and no additional sum was ever paid to her. Mr. Katende submitted that the compensation the respondent was entitled to was limited to what was stated under the Warsaw Convention.

Concerning notice of this limitation to the respondent, learned counsel pointed out that the respondent being a frequent flier ought to have been aware of the information on the ticket. Ignorance of the law is no defence. He was not entitled to the Illiterates Protection Act (cap 78) as claimed by his counsel in the lower court and agreed by the court. He cited **Thompson v London Midland & Scottish Railway Co (1930) 1KB 41**, where the railway company was held not liable for the injury to an illiterate passenger because limitation of liability was clearly stated in the ticket. Inability to read the ticket was irrelevant. Mr. Katende submitted that the appellant was not an illiterate within the meaning of the Illiterate Protection Act (cap 78) and nor was the Airlines ticket such a document as envisaged by the Act. It was never

prepared for the respondent for use, in this trial, as evidence. Mr. Katende further contended that there was no wilful loss of the respondent's luggage as stipulated under article 25 so as to deprive the appellant of the protection. The duty lay on the respondent to show that the appellant wilfully and intentionally lost his luggage. This the respondent failed to do. The appellant was therefore entitled to rely on article 22(2) of the Warsaw Convention which limits liability.

Regarding the special damages claimed and awarded, Mr. Katende pointed out that these were not strictly proved. The receipts for the goods tendered in were of no probative value as they were never made in the names of the respondent.

Concerning the general damages awarded, learned counsel reiterated that the appellant's liability was limited by the Warsaw Convention. The appellant was ready and willing to compensate the respondent up to U$ 1120. There had been no need to file this suit. The money had been deposited in court before the suit. Mr. Katende prayed court to allow the appeal with costs.

Mr. Brian Othieno, learned counsel for the respondent, opposed the appeal, submitting that the learned Judge did not err to find that the appellant's liability was not limited under the provisions of the Warsaw Convention. Citing Articles 4(1) and (4) of the Warsaw Convention, the learned counsel argued that no luggage ticket was issued to the respondent as required under 4(1) in which case article 22 would not be available to the appellant. He pointed out that *"The baggage check"* relied on was only relevant in the Warsaw Convention as amended at the Hague. Under the amendment, the baggage check which article 4 talks of can be combined with the passenger ticket. This is not the same as under the Warsaw Convention.

He asserted that Uganda is not a High Contracting Party to the Warsaw Convention as amended at the Hague. She never ratified the Warsaw Convention and cannot therefore apply their terms like 'Baggage Check'. In his view, since the luggage ticket was not issued, which luggage ticket is not a baggage check, article 22 was not available to the appellant.

Learned counsel contended that if a luggage ticket is issued under article 4(4), it contains particulars stipulated under article 4(d) (f) and (h) e.g. weight and liability limitation. He asserted that article 4(f) was thus not complied with by the appellant. The particulars required were not given. He sought to distinguish this case from the Ethiopian case (supra) relied on by Mr. Katende on the ground that in this case, the luggage ticket was not filled in

as was done in the Ethiopian case. This means that the particulars in this case required to be given under article 4(d) (h) and (f) were not given. The respondent was given only a baggage tag which is not the luggage ticket envisaged under the Warsaw Convention. The learned Judge was thus correct in his conclusion that the Warsaw Convention limitations were not available to the appellant.

Concerning ground No.2, Mr. Othieno argued that no notice of the alleged limitations was ever brought to the attention of the respondent. The respondent's being a frequent flyer was not sufficient proof of the notice of limitations to the respondent. He further argued that the respondent was protected under the Illiterates Protection Act as ruled by the learned Judge. The airline ticket was a document as defined by the Act and the respondent was such an illiterate as he could not read and understand the terms on the air ticket and the Warsaw Convention. In his view, **Thompson v London Midland & Scottish Railway Co. (supra)** relied on by Mr. Katende was not applicable. Mr. Othieno asserted that there was wilful conduct on the part of the appellant in handling the respondent's luggage as evidenced by their letter endorsed "without prejudice" dated 10-03-03, (Ex P3), which was put in evidence with the consent of the appellant. In this letter the appellant admitted mishandling the respondent's luggage. He cited article 25 of the Warsaw Convention which provides that if the loss or damage is caused by such wilful misconduct or default by the appellant, then the limitations would not be available to the appellant.

Regarding special damages, Mr. Othieno contended that they were proved by the cash receipts tendered in as Ex P9-i-ii. These were never objected to. The fact that they were not in the respondent's names was never raised at the trial. It was therefore safe to infer that their contents and value were admitted. He stated that even the U$ 150 awarded for hotel expenses was not challenged. He prayed Court to find that the special damages had been satisfactorily pleaded and proved and to dismiss the appeal.

In reply Mr. Katende submitted that indeed no luggage ticket was issued to the respondent but that its absence did not affect the validity of the contract. He pointed out that a luggage ticket and a baggage check were all one document in this case. It was combined with the passenger ticket. It was a question of terminology. Furthermore, the air ticket lists all the particulars required. Learned counsel asserted that though the witness had poor eye sight, the appellant was still protected by the Warsaw Convention since they issued a proper document. The

baggage check and luggage ticket being used interchangeably supports the appellant's contention that a luggage ticket and baggage check are the same thing (Ex P8). They are one document. Mr. Katende further stated that it is the respondent who tendered in the ticket at the trial thus he cannot turn round and deny that he never had notice of the liability limitation. He had a document in which the limitation was embodied. He had accepted the ticket without any objection. He cannot, therefore, plead ignorance of its terms and conditions.

Regarding the letter endorsed ***"without prejudice"*** (Ex P3), Mr. Katende stated that it could not be relied on in court without the consent of the appellant. That is the law. However, it could be used by the appellant if it made an offer prior to filing the suit which was rejected. It (Ex P3) did not prove wilful misconduct as claimed by the respondent who had to prove wilful misconduct and not merely misconduct. The burden of proof is high and is akin to culpable negligence. Concerning the receipts, learned counsel pointed out that they were challenged in court (page 28 line 6).

Mr. Katende reiterated that both the 1925 Warsaw Convention and the amendment at the Hague were complied with. The appellant fulfilled all the requirements of the luggage ticket. This fits in with the Warsaw Convention, the luggage ticket and baggage check being on one document. He prayed Court to allow the appeal and set aside the judgement and orders of the High Court.

The learned Judge held:

> **"… it is the view of this court firstly that it is the Warsaw Convention and not the Hague amendment that is to be applied in this case. This Convention rationalises the generality that once a notice is said to be given that is final and requires that the Convention itself has to be notified (sic). This is logical given the fact that the Illiterates Protection Act Cap 78 does not exempt airline tickets. In the present case the literacy status of the plaintiff was demonstrated.**
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> **Further still article 25 of the Warsaw Convention does not allow exemption where, as in this case, an element of wilful misconduct taking the form of mishandling baggage, has also been demonstrated. I have not been advised that the carriage By Air (Colonies Protectorates and Trust Territories) Order No. 144 of 1953 has been revoked or amended. The**

first schedule to that order is the Warsaw Convention which makes provisions in sections 2(article 4) and in chapter 3(article 25) that operate to liberate the plaintiff in this case from the clinical exclusion of the Airlines liability in any event.

The plaintiff in my view has proved his case on the basis of breach of contract of carriage and or in the mishandling of his baggage resulting in loss that he has proved by Exhibit P9(i) to (xi) as admitted by the defendant. He is entitled to judgement against the defendant for U$ 17,963 or its equivalent in Uganda shillings with costs as prayed.

Secondly, the plaintiff is entitled to general damages given the inconvenience he has gone through and the loss of his investment in trade goods. I will allow him to collect U$ 4150 being special damages and Shs 3 million (Three million only) as general damages. He will recover the costs of this suit from the defendant. It is so ordered."

The first issue to resolve is whether it is the Warsaw Convention 1929 or the Warsaw Convention as amended at The Hague, 1955 which is applicable to this case. This has to be looked for from the four corners of the air ticket itself. The conditions of contract are set out on a coupon of the ticket Ex P8 which appears on page 54 of the record of proceedings. Clause 1 thereof states, inter alia:

"…Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw Convention as amended at the Hague, 28th September 1955, whichever may be applicable.

Clause 2 goes on:

"2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "International Carriage" as defined by that Convention.

I think it is quite plain, it is the Warsaw Convention applicable to this matter as the learned Judge correctly found. If it were the amendment at the Hague, it would have been so stated. It is trite that no extraneous evidence is admissible to vary and or contradict the terms and conditions of the written contract (Ss 91 and 92 of the Evidence Act – chapter 6).

I turn to the issue of liability for loss, delay etc, by the appellant. It is clear that the appellant issued one ticket comprising the passenger ticket and the baggage check all in one. Clause 1 of the conditions of contract clarifies:

> **"1. As used in this contract 'ticket' means this passenger ticket and baggage check."**

The liability for loss is set out on a coupon (page 55 of the record) and reads:

"NOTICE OF BAGGAGE LIMITATIONS.

Liability for loss, delay or damage to baggage is limited unless a higher value is declared in advance and additional charges are paid. For most international travel…the liability is approximately US$ 9.07 per pound (US $ 20.00per kilo) for checked baggage. Excess valuation may be declared on certain types of articles. …. Further information may be obtained from the carrier."

This is a replication of Article 22(2) of the Warsaw Convention. Relying on the above provision, in the **Ethiopian Airlines case (supra),** this Court declined to order compensation for undeclared excess baggage. The baggage tag the respondent seeks to base his claim on has nothing to do with the value or contents of the luggage. It simply reads:

"Limited Release" even if your baggage has been tagged to final destination, you may have to clear through customs at Point of Transfer. This is not the Baggage Check (Luggage Ticket) described in Article 4 of the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol, 1955.

It is an identification tag as stated by Ismail Nsubuga (DW) and by the writing on it.

I therefore find it impossible to read into this tag anything else other than what it says. It says nothing about the contents of the luggage. A clause in the liability limitations page 55 of the record of proceedings reads:

> **"Excess valuation may be declared on certain types of articles. Some carriers assume no liability for fragile, valuable or perishable articles. Further information may be obtained form the carrier."**

It is therefore only one document that was issued to the respondent under the conditions of the contract. This contains all the relevant information as required under article 4 of the Convention. I cannot therefore take the view that since no luggage ticket was issued, the protection under article 22(2) is not available to the appellant. I think, with respect, the learned Judge was in error over this point.

Another issue taken was that the respondent could not read the ticket and was therefore protected under the Illiterates Protection Act (cap 78). The learned Judge agreed with the respondent which I would take to be a misdirection. The air ticket was not the respondent's document. It was never prepared for him for use as evidence of any fact or thing as stipulated under the Act. Most importantly, the respondent could read though with difficulty as do most people. He could therefore not categorize himself as an illiterate even if the law stated otherwise.

Furthermore, it is well settled that the fact that the respondent could not read would not exonerate him from his obligation under the contract. Once he is handed the ticket and has accepted it, he is bound by it. **Thompson v London Midland and Scottish Railway Company,(1930) 1 KB 41**. Kenya Airways (KQ) made the offer by tendering the ticket to the respondent which he duly accepted fully, thus undertaking to be bound by its terms. Also see **McCutheon v David Mac Brayne Ltd (1964) 1 ALL ER 437. (1964) 1 WLR 134**. Where it is stated:

> ***"… when a party assents to a document forming the whole or part of his contract, he is bound by the terms of the document, read or unread, signed or unsigned, simply because they are in the contract…"***

The contractual terms on tickets have always been held to be sufficient notice to the holders handling them without objection. In **Mendelssohn v Normand Ltd (1970) 1 QB 177**; the attendant gave the plaintiff a ticket with printed conditions on it. The plaintiff had been to this garage many times and he had always been given a ticket with the self same wording. Every time he had put it into his pocket and produced it when he came back for the car. It was held that he may not have read it but that did not matter. It was plainly a contractual document and as he accepted it without objection, he must be taken to have agreed to it.

Similarly, the respondent explained:

> ***"Yes I was a frequent traveller on K.Q….. I did not have to explain that was in my bag. I did not know I had to do this. I am a frequent traveller having travelled KQ so many times."***

Apparently the respondent has only himself to blame. He used to take everything for granted. The law would not exonerate him.

This brings me to the question as to whether the appellant's conduct was equivalent to wilful misconduct under article 25 of the Convention thus disentitling him to the protection under article 22(2). Mr. Katende clarified that it was incumbent upon the respondent to prove that the luggage had been lost due to the appellant's wilful misconduct. Learned counsel submitted that this was a case of negligence and not wilful misconduct. The appellant took a lot of trouble trying to search for the lost baggage, even to the extent of arranging a trip to Nairobi for the respondent to try and locate it. In counsel's view, this was not conduct amounting to wilful misconduct. Mr. Katende pointed out that the burden of proof is high and akin to culpable negligence. It was never discharged, he submitted. Mr. Othieno, in my view, did not attempt to counter this.

It has been clearly stated that in a case like this regarding carriage by air, "in order to establish wilful misconduct, a plaintiff must satisfy Court that the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding or alternatively, that he did it quite recklessly, not caring whether he did the right thing or the wrong thing quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers – to which should be added their property, for which he was responsible;" **Horaben v British Overseas Airways Corporation (1952) 2 ALL ER 1016**.

I hold the view that the appellant's exhibited a high degree of diligence and concern over the respondent's luggage. By arranging a trip for the respondent to try and locate the luggage, the appellant's conduct passed the test of diligence. The letter Ex P3 cannot be regarded as an admission of wilful misconduct. It should not have been put in evidence without the consent of both parties. It can only be used when it contains an offer that has been accepted and also in criminal matters. That being the case the respondent failed to establish wilful misconduct whose burden is high.

I find the wording on the air ticket and the law on the matter so clear that the result is to allow this appeal with costs. The respondent is only entitled to the compensation as stipulated under the Warsaw Convention, of U$ 1120 i.e. U$ 20 per kg of 56 kg lost.

Dated at Kampala ……29th … day of..…August…. 2006.

5 ***A.E.N. MPAGI-BAHIGEINE***

JUSTICE OF APPEAL.