THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, KANYEIHAMBA, KATUREEBE, AND OKELLO, JJ.SC).

CIVIL APPEAL NO. 09 OF 2008

B E T W E E N

KATUMBA RONALD ========== APPELLANT

AND

KENYA AIRWAYS LIMITED ====== RESPONDENT

(Appeal from the Judgment and Decree of the Court of Appeal at Kampala before L.E.M Mukasa-Kikonyogo, DCJ, A.E.N Mpagi-Bahigeine and S.B..K Kavuma, JJ.A, dated 29th day of August 2006 in Civil Appeal No. 43 of 2005).

JUDGMENT OF KATUREEBE, JSC-

This is an appeal arising from the decision of the Court of Appeal whereby that court allowed the appeal by the respondent after the High Court (Okumu-Wengi, J) had given judgment in favour of the appellant. The appellant was dissatisfied, hence this appeal.

The facts of the case are not in dispute. The appellant, who was a frequent flier, purchased a return air ticket from Entebbe to Dubai. On his return flight in Dubai he checked in luggage weighing 56 kg and was issued with a baggage tag. On arrival at Entebbe, the

luggage was missing. He duly notified the respondent and filled in the necessary forms. But attempts to trace the luggage were futile.

The appellant then wrote to the respondent claiming for the value of the items in the lost luggage. The respondent offered to settle within the limited amount provided for in the ***WARSAW CONVENTION,*** that is to say, US.$20 per Kilogram of lost luggage. This was unacceptable to the appellant who then filed a suit in the High Court. As indicated above, the High Court gave judgment in his favour. The respondent appealed successfully to the Court of Appeal - hence this appeal.

The appellant filed 7 grounds of appeal as follows:-

> ***"1. The learned Justices of appeal, after finding that it was the Warsaw Convention which was applicable in the matter, erred both in fact and law by failing to apply the provisions of the said Convention to the facts in issue and thereby arrived at a wrong decision occasioning a miscarriage of justice.***
>
> ***2. The Learned Justices of Appeal erred both in fact and law by finding that one ticket was issued comprising both the passenger ticket and baggage check and thereby arrived at a wrong decision occasioning a miscarriage of justice.***

3. The Learned Justices of Appeal erred both in fact and law by finding that the baggage check complied with the provisions of the Warsaw Convention and thereby arrived at a wrong decision occasioning a miscarriage of justice.

4. The Learned Justices of Appeal erred both in fact and law by finding that the respondent exhibited a high degree of diligence over the Appellant's luggage, and thereby arrived at a wrong decision.

5. The Learned Justices of Appeal erred in fact and law by finding that there was no willful misconduct on the part of the Respondent.

6. The Learned Justices of Appeal erred in fact and in law by holding that the letter admitted in evidence as Exhibit P3 was inadmissible in evidence.

7. The Learned Justices of Court of Appeal erred in law by failing to shift the evidential burden on the appellant to explain the loss of the appellant's luggage, and thereby arrived at a wrong conclusion occasioning a miscarriage of justice".

Messres Kawenja Othieno & Co. Advocates represented the appellant while the respondent was represented by Messres Katende Sempebwa & Co. Advocates. Both filed written submissions.

In their written submissions to this court, counsel for the appellant argued grounds 1, 2, and 3, together, ground 4, alone, ground 5 and 7 together, and lastly ground 6 alone.

On grounds 1, 2, and 3, counsel argued that since the law applicable to this case was the ***WARSAW CONVENTION*** of 1929 and not the Hague Amendment 1955, the Court of Appeal was wrong to hold that:-

> ***"one ticket was issued comprising both passenger ticket and baggage check and as such the baggage check complied with the Warsaw Convention "***

Counsel argues that under the Warsaw Convention of 1929, it is mandatory for the airline to issue a luggage ticket. If the carrier fails to issue a ticket which also must contain certain particulars, then the carrier is not entitled to avail himself of those provisions of the convention which exclude or limit liability. They cite Article 4(4) of the Convention and submit that since no luggage ticket was ever issued in this case, the respondent could not benefit from the provisions excluding or limiting liability. They further argue that the term "***BAGGAGE CHECK***" was introduced by the 1955 Hague Amendment and was not applicable since Uganda was not a signatory to that Amendment. Counsel further argued that the

luggage ticket envisaged under the convention was an independent document and could not be combined with the passenger ticket.

In the alternative counsel argued that even if the baggage check was in the same document as the passenger ticket, this had been issued in Kampala when the appellant bought the ticket. No baggage check had been issued at Dubai when he checked in his luggage. He had only been given a baggage tag, which was not a ticket and contained no particulars as required by Article 4(4) therefore the limitations on liability were not available to the respondent.

On the other hand, counsel for the respondents, also in written submissions, supported the findings and decision of the Court of Appeal. They argued that the passenger ticket that was issued contained all the particulars required under Article 4(4) of the Convention, and was therefore a ticket within the parameters of the Convention. They submitted that the term "ticket" and "baggage check" properly applied in the context meant one and the same thing. The important thing was that the particulars required by Article 4 were complied with. The use of the term "baggage check" was for convenience. Counsel further argued that under Article 4(4) of the Convention, ***"THE ABSENCE, IRREGULARITY OR LOSS OF THE LUGGAGE TICKET DOES NOT AFFECT THE EXISTENCE OR THE VALIDITY OF THE CONTRACT OF CARRIAGE, WHICH SHALL NONE THE LESS BE SUBJECT TO THE RULES OF THIS CONVENTION*****.....**" To them reference to "baggage check" could be an irregularity, but it did not vitiate the contract of carriage. To them

the Article emphasized substance over form and the Court of Appeal was right to hold that a ticket had been issued.

This case hinges on the interpretation and application of the ***WARSAW CONVENTION.*** To what extent can the carrier avail itself of the limitations as to liability for loss of a passenger's baggage, and to what extent can an individual passenger claim for the loss of the full value of his luggage.

The purpose and interpretation of the Warsaw Convention has been the subject of consideration by courts in a number of Jurisdictions. In the United Kingdom, the House of Lords in ***ABNETT (KNO WN AS SYKES) APPELLANT***

-Vs-

BRITISH AIR WA YS PLC(RESPONDENTS (Scotland)

SIDHUAND OTHERS (A.P) APPELLANTS

-Vs-

BRITISHAIRWAYSPLC(RESPONDENTS) (1996)

Considered and elucidated on the Convention at great length.
The opinion of Lord Hope of Craighead in which all the other Lords concurred, is useful and illustrative. It considers the history and purpose of the convention and how it may be interpreted. One principle laid down therein is that the convention should be given a purposive construction. He states:

“It is now well settled that a purposive approach should be taken to the interpretation of international conventions which have the force of law in this country..... one must give a purposive construction to the Convention looked at as a whole. ”

The learned Lord Justice, after identifying the particular issues as contained in the principal chapter headings as chapter II, III and IV, continues:-

“The principal search for indication of an intention one way or the other about exclusivity of provision in regard to the carrier’s liability must be conducted within the provisions of chapter III. But before I come to this chapter there are two provisions in the earlier chapters which are worth noting as being of some value. First, Article 1(1) states that the Convention applies to “all international carriage of persons, baggage or cargo performed by aircraft for reward.” The word “all” is important, simply because it is so all- embracing. It indicates that the framers of the Convention were looking to solutions, no doubt by a process of adjustment and compromise, which could be regarded as acceptable for universal application in all cases. ” (Emphasis added).

Turning to chapter III, under which Articles 22 and 25 fall which are in issue in this case, his Lordship stated:

> ***"Turning to chapter III itself, the chapter heading expresses its subject matter in the words "liability of the carrier "***
>
> ***In contrast to the title to the Convention itself, which uses the expression "certain Rules, " we find here a phrase which is unqualified. My understanding of the purpose of this chapter therefore, from what we have seen so far, is that it is designed to set out all the rules relating to the liability of the carrier which are to be applicable to all international carriage of persons, baggage or cargo by air to which the Convention applies ....."***
>
> ***"Article 22 however is important, because it limits the liability of the carrier. It does so in terms which enable the limitation of liability to be applied generally to all cases where the carrier is liable in the carriage of persons and of registered***
>
> ***baggage and cargo..... Article 22(2) (a) begins with the words "In the carriage of registered baggage and of cargo." The intention which emerges from these words is that, unless he agrees otherwise by special contract - for which provision***

is made elsewhere in the article - the carrier can be assured that his liability to each passenger and for each package will not exceed the sums stated in the article. This has obvious implications for insurance by the carrier and for the costs of his undertaking as a whole....." (Emphasis added).

In his conclusion, his Lordship considers the principle of freedom of contract vis a vis the Convention. He states:

"Alongside these principles, however, there lies another great principle, which is that of freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts, and contracts of carriage are no exception. It is against that background, rather than a desire to provide remedies to enable all losses to be compensated, that the Convention must be judged. It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed were to be made. A balance

was struck, in the interests of certainly and uniformity.....I see no escape from the conclusion that, where the Convention has not provided a remedy, no remedy is available. ”

(Emphasis added).

In the United States of America, several courts, including the U.S Supreme Court have had occasion to consider various aspects of the Warsaw Convention.

In ***IVONNE MARTIN -Vs- PAN AMERICAN WORLD AIRWAYS, INC. 553 F. SUPP. 135, 138 (US DC DC*** 1983), the District Court of Colombia, considered a case where a passenger's luggage had been lost and she sought to claim the full value of her luggage notwithstanding that she had not declared the same at the time of checking in. She argued that because the defendant had not properly recorded the weight of the baggage on her ticket, the defendant was not entitled to enjoy the limitations on liability. The Court, Flannery, J, chose to interpret article 4(3) liberally arguing that the Convention should not be interpreted within a "tyrannical" or "verbal prison" of literality, but generally with full consideration of the purpose for which the Convention was designed to effectuate. The learned Judge stated:

"The primary purpose of the Warsaw Convention is to limit the potential liability of International carriers.....This was accomplished by establishing limits on the amounts to which an

airline would be liable for personal injury and property loss. ”

The Court decided that the failure to record the weight was a mere technicality and dismissed the plaintiffs claim.

In ***CHAN -Vs- KOREAN AIRLINES LTD 490 U.S. 122, 134 (1989)*** the United States Supreme Court ruled that Courts do not have power to change the language or scope of an international treaty where the text is clear and unambiguous. Relying on CHAN (supra) the US Court of Appeals For the District of Columbia in ***MARIA -V- CRUZ, FOR HERSELF AND REPRESENTATIVE OF GUSTA VO CRUZ AND JOA WUIN RODRIGUEZ, MINORS -Vs-***
AMERICAN AIRLINES overruled MARTIN. The Court held that the requirement to record weight was not a mere technicality but a requirement of the Convention which had to be complied with if the carrier had to benefit from the limitation as to liability. In that case however, the baggage had not been weight and the carrier sought to rely on deemed weight.

Also relying on CHAN the 9th Circuit Appeals Court in ***SPANNER - Vs- UNITED AIRLINES, 177 F. 3RD 1173,*** found that the language of Article 4 were clear enough requiring that the baggage check ***“SHALL CONTAIN A WEIGHT AND NUMBER ”*** of bags notation and therefore the carrier could not avoid that clear text and benefit from limitation

of liability provision where it failed to properly record the weight and number of bags.

It would appear that a lot depends on how one interprets the language of Article 4 in the context of a given set of facts, taking into consideration the intended purpose of the provisions of the Article. In the CHAN Case (supra) Justice Scalia quoted from Justice Story thus:-

".....We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that our duty is to follow it as far as it goes, and to stop where that stops whatever may be the imperfections or difficulties which it leaves behind. "

The above authorities although not binding are illustrative of difficulties that have arisen elsewhere in interpreting and applying certain provisions of the WARSAW Convention. I will bear them in mind as I consider the evidence and law in this appeal.

The argument by counsel for the appellant that no ticket was issued under Article 4 of the Convention, in my view, fails to address that article as a whole and in the context of the Convention as a whole. That Article states as follows:

Article 4

1. For the carriage of luggage, other than small personal objects of which the passenger takes

charge himself, the carrier must deliver a luggage ticket.

2. The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

3. The luggage ticket shall contain the following particulars:-

(a) the place and date of issue;

(b) the place of departure and of destination;

(c) the name and address of the carrier or carriers;

(d) the number of the passenger ticket;

(e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket;

(f) the number and weight of the packages;

(g) the amount of the value declared in accordance with Article 22(2);

(h) a statement that the carriage is subject to the rules relating to liability established by this Convention.

4. The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of

this Convention. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d),

(f) and (h) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

It is common knowledge, and I take judicial notice thereof, that usually when a passenger buys a ticket to travel from one point to another on an airline, he/she is allowed a certain amount of accompanying baggage expressed in weight, depending on the class of air ticket he/she purchases. A first class passenger may, for example be allowed 30 kg of baggage while an Economy Class passenger may be allowed 20 kg. This is a well known practice in the air travel industry. The passenger is then issued with one ticket which also contains some of the particulars referred to in article 4(3) as relates to his baggage. At the point of purchase of the ticket, the passenger has not yet checked in for travel. Particulars as to weigh and number of bags can only be made when the passenger actually checks in to travel at the airline counter. Clearly this information may be recorded on an additional document or documents to be read together with the ticket. In the law of contract, it is normal to discern a contract from several documents. I do not see anything in the Convention that suggests, as counsel for the appellant seems to

suggest, that the ticket must be only one document. In this particular case, the appellant himself testified as follows:

> ***"I am a businessman. I know KQ. On 30/1/2003. I purchased an air ticket to Dubai from defendant. I bought it from Swift Tours. I did travel on the ticket.***

Later in cross examination, he states:-

> ***"My luggage weighed 56 kg. It was part of the ticket. I did not have to pay more money for extra luggage. The maximum allowed weight to me was on a card for a frequent traveller. It varies from day to day. I was entitled to 60 kg. This was on ticket with no extra charge. " (Emphasis added).***

This is in accord with the evidence of DW1, Nsubuga Nsambu who testified as follows:-

> ***"Yes this one is an IATA ticket. This is our ticket issued by KQ. This is our ticket issued by KQ to all their pax. The ticket has advice to international PAX and limitation of liability. At top of ticket is written First Coupon .....passenger ticket and baggage check conditions of contract .....on this ticket. "***

What emerges from this are that one, the appellant was a frequent traveller with the respondent and had even a special card that allowed him the benefit of extra luggage up to 60 kg. Two, the

appellant knew and accepted that the ticket he bought also covered his luggage up to the weight he was allowed on his card. It was both a passenger and luggage ticket. Three, it was a ticket issued under IATA Rules. Clearly the appellant admits that he had ticket for his baggage and a special card that allowed him extra baggage. His baggage was weighed and was within his baggage allowance. In my view that special card became part of his ticket. He had one bag and was issued with one baggage tag. The purpose of the tag was to confirm that the passenger had checked in one piece of luggage given an identification number to be used in the identification and recovery of his luggage at the end of the flight. In the circumstances of this case I find it most curious that counsel for the appellant should argue in Court that no ticket was ever issued to him in respect of his luggage. I agree with counsel for the respondent that his argument is more of form than substance.

Be that as it may, under Article 4(4) the absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage. The exclusion or limitation of liability under Article 4 must be read together with Article 22 under chapter III - ***LIABILITY OF THE CARRIER.*** Article 4(3) (g) gives one of the particulars to be given as ***"THE AMOUNT OF THE VALUE DECLARED IN ACCORDANCE WITH ARTICLE 22(2). "*** Article 22(2) states:-

> ***In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250***

francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery 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 that sum is greater than the actual value to the consignor at delivery. ” (Emphasis added).

This provision was replicated in ***NOTICE OF BAGGAGE LIMITATIONS*** given on the ticket. The purpose of these provisions, in my view, is to enable a passenger to get out of the provisions limiting liability to a certain sum of money per kilogram of luggage, and to claim the full value of the goods lost provided he has declared the same. In other words, in the normal ordinary day to day air travel, when passengers check in, their accompanying luggage is part of the ticket as to weight allowed by that particular ticket. As already observed, the baggage, in this case was weight. It was one bag and one baggage tag was issued. These were admitted facts at the trial. That is the contract of carriage envisaged by the Convention. But the passenger may vary this contract by a special contract made at the time when he delivers the luggage to the air carrier and declares the value of the goods in the luggage. The Article uses the term “***SPECIAL DECLARATION OF THE VALUE AT DELIVERY***.....” Where it is not so, how would carriers ever get to

know the value of what each individual passenger was carrying in their checked baggage.? In my view, even if a passenger were to argue successfully that the absence of certain particulars on the ticket prevent the carrier from enjoying the limitation of liability that passenger would still have to prove in Court the value of the goods he had lost.

There is obviously a public interest consideration here. Airlines would find it impossible to operate if passengers were to be allowed to claim the value of luggage they had not previously declared. They would have had to pay for any extra charges, but importantly, the Airline would have considered appropriate insurance in the matter. This goes to the whole purpose of the Convention. It is my view that the Convention is meant to facilitate international air travel not to cripple it. There would be nothing to stop fraudstars from claiming loss of items they never had. The injustice to the airline would even be more profound where a strict reading was given to the provision of article (4) (3) so that the airline losses the benefit of the limitation of liability provisions even where there is no dispute as to the number of pieces of luggage or weight that were checked in. In my view the passengers a duty to declare his / her valuables to be able to claim beyond what is provided in Article 22(2).

In this case there is no evidence whatsoever that the appellant declared, or even attempted to declare, the value or even the nature of the luggage at the time he delivered the luggage at Dubai airport.

He checked in normally and the weight of his luggage was given as 56 kg and was allowed because of his status as a frequent flier within the ticket that he had purchased and the special card he was in possession of.

He testified thus:-

> ***'7 bought cellular phones and accessories, Radios, chargers of telephones. They were to be brought here and sold. At Dubai after buying I packed the items. I went to the airport my goods were weighed and I was given a baggage tag. "***

Clearly the appellant did not declare the value of the goods and therefore did not bring himself within Article 4(3) (g) and the exception under Article 22(2). The production of the receipts for the allegedly lost items may be evidence of purchase of those items. It is not evidence that those items were necessarily in the luggage that the appellant checked in at Dubai

In the circumstances, I agree with the Court of Appeal that one document was issued to the appellant under the conditions of the contract, covering both the passenger and his luggage. Even if a separate ticket was not issued for luggage as argued by the appellant, still the appellant did not bring himself under the protection of article 22(2) ***BY FAILING TO DECLARE THE VALUE OF HIS LUGGAGE.*** That separate ticket would have been necessary and mandatory had the appellant

declared the value of the goods in his luggage. Grounds 1, 2 and 3 therefore must fail.

On ground 4, learned counsel for the appellant criticised the Court of Appeal for holding that the respondent had exhibited a high degree of diligence and concern over the appellant's lost luggage. Counsel argues that if any diligence was shown by the respondents, it was after the luggage was lost. Otherwise the mere fact that the luggage was lost shows a lack of diligence. I do not find this ground pivotal to the determination of this appeal. The Convention anticipates that luggage may be lost, and makes the carrier strictly liable for such loss. That is why there are provisions for compensation. The respondents admitted that the luggage was lost and sought to pay compensation according to the provisions of the Convention. The real issue is whether there are provisions within the Convention that would allow the appellant to claim more than is provided for. Lack of diligence is not provided for. This ground is inconsequential, and I see no merit in it.

However, grounds 5 and 7 raise the substantive issue of willful misconduct in the loss of the luggage and who has the evidential burden to prove willful misconduct. Counsel for the appellant argued that once the appellant handed over his luggage to the respondent, it was entirely in the hands of the respondent, and it was the respondent to explain how it got lost. They cited S. 106 of the Evidence Act to the effect that when any fact is especially within the

knowledge of any person, the burden of proving that fact is upon that person. Since the carriage and loss of the appellant's luggage was especially within the knowledge of the respondent, the evidential burden could not shift from the respondent to the appellant to prove wilful conduct. If the Court found that there was wilful misconduct in the loss of luggage, then under Article 25, the limitations as to liability and extent thereof would not be available to the respondent.

Counsel for the respondent, citing various authorities, argued, convincingly in my view, that wilful misconduct is more than having knowledge of a given fact. It involves a state of mind. It is to be distinguished from accident or negligence. They argued that section 106 of the ***EVIDENCE ACT*** was not applicable, but what was applicable was Section 101.

The Court of appeal dealt with this matter and, quite rightly, relied on ***HORABEN -Vs- BRITISH OVERSEAS AIRWAYS CORPORATION (1952)2 ALL ER 1016.*** Mpagi-Bahigeine, JA, who wrote the lead judgment dealt with this matter thus:-

> ***"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. 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 to 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. Otheino, 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. " (Emphasis added).

In the MARTIN CASE (supra) the Court also considered the issue of wilful misconduct where it was alleged that the carrier's baggage handler had in fact failed to tag the missing bag even though the passenger had specifically requested him to do so. The Court relying on a number of authorities stated thus;

" The requirement of wilful misconduct is a "conscious intent to do or omit from doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. "

The Court held that although the defendant's conduct might indicate possible negligence on the part of the baggage handler, it did not indicate ~~wilful misconduct and that the circumstances alleged by the plaintiff did not suggest that the baggage handler realized some probability of injury arising out of his conduct and he intentionally disregarded the consequences of such conduct. The court cited the case of~~ ***OLSHIN -Vs- ELAL ISRAELI AIRLINES, 15 AV. 463 (E.D.N.Y 1979)*** ~~where the Court dealt with a case of theft of valuables from a passenger's baggage. That Court held that~~ ***"to establish wilful misconduct, the plaintiff passenger must show that the airline:***

1. ***was aware that she had jewellery in her baggage;***
2. ***knew that there was a danger that the jewellery would be stolen;***
3. ***intentionally failed to warn her of this danger; and***
4. ***knew that the failure to warn plaintiff of the danger of theft would probably result in the loss of the jewellery. "***

I fully agree with the holdings in these cases. Clearly the appellant had the burden to prove wilful misconduct and he failed. The Convention already provides for strict liability in the event of the

loss of the baggage, and provides for limitation as to the amounts

payable under that strict liability. To invoke section 106 would mean that there is a presumption of wilful misconduct where any baggage is lost under any circumstances, and that it is up to the airline to negate that presumption. In my view that would run counter to the whole purpose of limiting liability and the intended protection of airlines. It is my view that the passenger who seeks more than is provided for should prove so. The applicable section is therefore section 101 (1) of the Evidence Act which states: "**Whoever** ***DESIRES ANY COURT TO GIVE JUDGMENT AS TO ANY LEGAL RIGHT OR LIABILITY DEPENDENT ON THE EXISTENCE OF FACTS WHICH HE OR SHE ASSERTS MUST PROVE THAT THOSE FACTS EXIST***" In this case it was not enough to show that the luggage was placed in the possession of the respondents. That was never in dispute. The appellant needed to prove that the respondent, while in possession of the luggage, handled it in such a reckless manner or wilfully took such action with the luggage, unconcerned as to what would happen to it. This would be different from a situation where, for example, luggage was inadvertently placed into a wrong flight and ended up getting lost. That might be negligence, but not wilful misconduct. ***BLACK'S LAW DICTIONARY*** (6th Edition) makes a distinction between "wilful and wanton misconduct" and "wilful and wanton negligence". "The former is defined as:-

> ***"Conduct which is committed with an intentional or reckless disregard for the safety of others or with an intentional disregard for a duty necessary to the safety of another's property."***

This is in conformity with the holding in the ***HORABEN*** case (supra). The appellant did not prove that the respondents intentionally set out to lose his luggage.

In the circumstances grounds 5 and 7 must fail.

This now leads me to consider ground 6 which criticized the Court of Appeal for holding that Exhibit P3, which was a letter written " ***WITHOUT PREJUDICE"*** by the respondents, was inadmissible in evidence. In that letter the respondent stated that the appellant's luggage had been "***MISHANDLED*** To the appellant's counsel that was admission of wilful misconduct. Counsel further contended that since the letter had been admitted into evidence by consent of both parties, it was wrong for the court to say there was no consent for the admission. Citing Tsekooko, JSC, in ***ADMINISTRATOR GENERAL -Vs- BWANIKA SCCA NO. 07 OF 2003***, counsel submitted that since that letter was one of the agreed documents, it had become part of the evidence on record and had to be evaluated with the rest of the evidence before judgment could be given. The statements contained therein were to be taken as truth.

On the other hand, counsel for the respondents supported the Court of Appeal and argued that although counsel for respondent had agreed to the document being exhibited in Court, he did not thereby agree to the truth of its contents which had been written on a ***"WITHOUT PREJUDICE"*** basis. The document could therefore not be an admission of guilt. In any case, he further argued, the

word “mishandling” could not mean wilful misconduct. It might amount to negligence, but it was not wilful misconduct. The Court of Appeal was right to ignore it.

To my mind, when a letter is written “ ***WITHOUT PREJUDICE”*** it implies that the writer is reserving whatever other course of action or defence as may be available to him. When such letter is admitted among the documents admitted at the trial, it goes together with the words “ ***WITHOUT PREJUDICE.*** ” It would not preclude the writer from relying on any other defences available to him. Its contents must be regarded without prejudice, and the Court would not necessarily take its contents as truth.

In this case, I agree with counsel for the respondents that the letter did not admit wilful misconduct, and the Court of Appeal was correct to reject it. Ground 6 also must fail.

In the circumstances, this appeal is dismissed with costs. I would confirm the orders of the Court of Appeal.

Dated at Mengo this ..13th.....day of.....October.....2009.

Bart M. Katureebe

JUSTICE OF THE SPREME COURT

THE REPUBLIC OF UGANDA IN

THE SUPREME COURT OF UGANDA AT

MENGO

(CORAM: ODOKI C.J; TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJ.SC.)

CIVIL APPEAL NO. 9 OF 2008

BETWEEN

KATUMBA RONALD.:::::::::::::::::::::::::::::::::::: APPELLEANT

AND

KENYA AIRWAYS LTD.:::::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mukasa- Kikonyogo, Mpagi-Bahigeine and Kavuma, JJ.A) dated 29th August 2006 in Civil Appeal No. 43 of 2005]

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother, Katureebe, JSC, and I agree with him that this appeal, should for the reasons he has given, be dismissed with orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with costs here and in the Courts below.

Dated at Mengo this ...13th**.**.....day of.....October..... 2009.

B J-Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

[CORAM: ODOKI, C.J, TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJ.S.CJ.

CIVIL APPEAL NO. 9 OF 2008

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[Appeal from decision of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ; Mpagi- Bahigeine and Kavuma, JJ.A) dated 29th August, 2005 in Civil Appeal No. 43 of2005].

JUDGMENT OF TSEKOOKO, JSC.

I have had the benefit of reading in advance in draft, the judgment of my learned brother, the Hon. Mr. Justice Katureebe, JSC, which he has just delivered and I agree with him that the appeal ought to fail. Costs to the respondent.

Delivered at Mengo this……..13th........day of October...of 2009.

J.W TSEKOOKO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, C.J., TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO. J.J.S.C.)

CIVIL APPEAL N0.09 OF 2008 BETWEEN

KATUMBA RONALD::

APPELLANT

AND

KENYA AIRWAYS LTD ::RESPONDENT

(Appeal from the Judgment and Decree of the Court of Appeal at Kampala before L.E.M Mukasa - Kikonyogo, DCJ, A.E.N Mpagi- Bahigeine and S.B.K. Kavuma, J.J.A, dated 29th day of August 2006 in Civil Appeal No. 43 of2005).

TUDGMENT OF KANYEIHAMBA. T.S.C

I have had the benefit of reading in draft the judgment of my learned brother, Katureebe, J.S.C. and I agree with him that this appeal ought to be dismissed. I also agree with the orders he has proposed.

Dated at Mengo this 13th day of October 2009

G.W.KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA ATMENGO

{CORAM: ODOKI, CJ, TSEKOOKO, KANYEIHAMBA KATUREEBE AND OKELLO JJSC).

CIVIL APPEAL NO. 09 OF 2008

BETWEEN

KATUMBA RONALD: ***APPELLANT***

AND

KENYA AIRWA YSLTD: ***RESPONDENT***

{Appeal from the decision of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ, Mpagi-Bahigeine, and Kavuma, JJA) dated 29th August 2006, in Civil Appeal No. 43 of2005}.

JUDGMENT OF OKELLO, JSC:

~~I have had the opportunity to read in draft, the judgment prepared by my learned brother, Katureebe, JSC and I agree that the appeal must fail. I also concur with the orders he proposed as to costs.~~

..13th. day of: .. October

Dated at Mengo this: ***2009.***

G. M. OKELLO JUSTICE OF THE SUPREME COURT