



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Rwand Air Express Limited v Kumar (Civil Appeal 152 of 2019)
[2022] KEHC 10803 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 152 OF 2019**

MN MWANGI, J

APRIL 28, 2022

BETWEEN

RWAND AIR EXPRESS LIMITED APPELLANT

AND

SAHADEVAN SAJEEV KUMAR RESPONDENT

(Being an Appeal from the Judgment of Hon. E Mutunga, Senior Resident Magistrate, delivered on 28th June, 2019, in the Mombasa Senior Principal Magistrate's Court Civil Case No. 2320 of 2014)

JUDGMENT

1. The suit against the appellant in the lower Court was that on or about November 15, 2012, the respondent booked in as a passenger vide ticket number xxxxxxxxxxxx and delivered to the appellant as common carriers, at Dubai, a bag containing spare parts. The said bag was the property of the respondent to be carried by air for reward by the appellant to Moi International Airport, Mombasa. It was the respondent's case that at the time the respondent arrived at Moi International Airport, Mombasa, the appellant could not deliver and/or account for the said cargo. The respondent averred that the appellant became and is liable to him for the damages sustained for the said loss.
2. The respondent claimed that the appellant is guilty of breach of duty as common carriers and/or breach of the said contract contained in the consignment note, or alternatively, of breach of their duty as bailees for reward, thereby causing the respondent to lose the said bags, the contents therein and the value thereof. The respondent averred that he had been put to immense loss, inconvenience and expense and had suffered loss and damage.
3. The appellant filed its statement of defence on January 15, 2015 where it denied all the averments in the plaint. It averred that the respondent was booked in as a passenger and travelled with the appellant. That it was a term of its conditions of carriage that a passenger shall not include in checked baggage



fragile items, personal items, computers, electronics, valuables and special metals unless the passenger had made a special declaration of interest and paid a fee for such items.

4. The appellant averred that if the respondent booked the alleged bag containing spare parts in checked baggage, he did not disclose the same to the appellant as per the conditions of carriage which the respondent was aware of at the material time. The appellant denied responsibility for the loss.
5. In the lower court, Judgment was delivered on June 28, 2019, where the court found that due to the appellant's acts of commission, the respondent herein suffered damage which could be compensated as per its costs and not as the per kilograms ferried. The said court held that the respondent had proved his case on a balance of probability. The Trial Court entered Judgment as per the plaint dated July 28, 2014.
6. The appellant being dissatisfied by the decision of the Trial Court, filed its memorandum of appeal on July 26, 2019, raising the following grounds of appeal-
 - i. That the learned Magistrate erred in law in failing to decide on the issue of time bar (limitation);
 - ii. That the learned Magistrate erred in law and fact in failing to consider the evidence of the appellant at the trial;
 - iii. That the learned Magistrate erred in fact and law in failing to consider the appellant's submissions and entirely relied on that of the respondent making a wrong Judgement;
 - iv. That the learned Magistrate erred in fact and law by failing to address his mind to the submissions and authorities cited by the appellant.
 - v. That the learned Magistrate erred in fact and law in holding that the plaintiff had proved his case on a balance of probability when there was no evidence to support his findings; and
 - vi. That the learned Magistrate erred in fact and law in holding that the plaintiff suffered damages when there was no evidence to support such finding.
7. The appellant's prayer is for the appeal herein to be allowed with costs and for the respondent's suit in the lower court to be dismissed with costs.
8. The appeal was canvassed by way of written submissions. The appellant's submissions were filed July 27, 2021 and October 19, 2021 by the law firm of Ndirangu Kamau Advocates, while the respondent's submissions were filed on September 23, 2021 by the law firm of Kanyi J & Company Advocates.
9. Ms. Ndirangu, learned Counsel for the appellant submitted that the appellant filed a Notice of preliminary objection on February 16, 2016 on a matter of law citing that the suit before the Trial Magistrate was filed out of time. She pointed that during the hearing of the matter before the lower Court, the respondent did not address the issue of limitation in his evidence in chief or during re-examination or in his submissions but the appellant had raised the issue in its submissions. The appellant's Counsel stated that the respondent had in his submissions before the lower Court submitted that he was granted leave on October 18, 2017 pursuant to his Notice of Motion application dated February 1, 2017, which sought leave to re-open his case and recall his 1st witness. Ms Ndirangu contended that the said application did not deal with the issue of leave, hence no leave was granted.
10. She submitted that the cause of action herein arose on 18th November, 2012 when the respondent lodged his claim, whereas the suit herein was filed on 21st November, 2014. She contended that the contract between the appellant and the respondent was regulated by the *Carriage by Air Act* No. 2 of 1993 and the *Convention for the Unification of Certain Rules for International Carriage by Air* -



- Montreal 28th May, 1999. In citing section 7(1) of the *Carriage by Air Act* No. 2 of 1993 and the *Convention for the Unification of Certain Rules for International Carriage by Air - Montreal* 28th May, 1999, wherein article 35(1) of the *Limitation of Actions Act* shows that the suit herein ought to have been brought within two years from the date of the passenger's arrival at the destination or from the date on which the aircraft ought to have arrived or from the date on which the carriage stopped.
11. She submitted that the claim herein was filed out of time as it was filed after the lapse of the mandatory two years. In citing the case of *Peter Coret v Kenya Airways Limited* Nairobi HCCC No. 442 of 2012, she argued that section 7(1) of the *Carriage by Air Act* No. 2 of 1993 uses the word "shall", which is mandatory, thus the provisions of the *Limitation of Actions Act*, Cap 22 does not apply in this matter.
 12. She submitted further that the respondent's witness testified that her employer, Synergy Gases Kenya Limited, contracted the respondent to travel to Kenya with spare parts for repairs of one of its generators. That on cross-examination, the said witness admitted that there was no document that showed that the respondent was the owner of the goods that allegedly got lost neither was there any document to show that the goods were delivered to the appellant in Dubai.
 13. The appellant's Counsel stated that exhibits number 3-15 do not relate to the respondent and that some of them relate to dates after the cause of action arose, thus proving that there were no goods that the respondent had purchased. She submitted that he who alleges proves but the respondent herein did not prove his case on a balance of probabilities.
 14. Ms. Ndirangu indicated that the appellant called one witness who testified that passengers having luggage containing valuables such as fragile items, special items and special metals are not allowed to check them in, unless the passenger has declared the value of the goods at the check-in counters, after which the value of the goods is noted and the passenger is given a written acknowledgment by the airline representative. She further stated that the respondent did not declare at the check-in counter what was in his luggage. She relied on article 22(2) of the *Convention for Unification of Certain Rules for International Carriage by Air-Montreal* 28th May, 1999 and submitted that for one to be paid more than what is provided for, he or she must have made a special declaration of interest and paid a supplementary sum if the case so requires.
 15. She contended that the appellant's submissions were not considered by the Trial Magistrate. She argued that special damages must be specifically pleaded and proved, but in this case, the Trial Court awarded damages to the respondent when there was no evidence to support such a finding.
 16. Mr. Maundu, learned Counsel for the respondent relied on the provisions of article 1 and (2) of the *Warsaw Convention* as amended at The Hague 1955 and by Protocol No. 4 of Montreal 1975 (The Warsaw Convention), Article 1 of the Convention for the Unification of Certain Rules for International Carriage by Air (1999 Montreal Convention). He submitted that the air ticket which was produced as exhibit No. 11, constituted the contract of carriage between the appellant and the respondent. He further submitted that the contract of carriage ran between 18th November, 2012 and 24th November, 2012, thus the contract of carriage did not end until the 24th November 2012.
 17. Mr. Maundu also relied on the provisions of Article 17(3) of the 1999 Montreal Convention, under liability of the carrier and extent of compensation for damage and submitted that on 17th December, 2012, the appellant wrote to the respondent admitting liability, thus the respondent's right to enforce under the contract arose severally. He submitted that since the suit before the Trial Court was filed on 21st November, 2014, the same was within the two years, thus not time barred.
 18. It was submitted by Mr. Maundu that from the testimony of PW1 Clemence Masinde, she testified that the client ordered the spare parts valued at USD 9,676.00 and paid for them. That the parts were



received on the plane by the appellant who then lost them. She stated that the respondent having lost the spares had to replace them at his own cost and travel back again to do the work and that he incurred costs of travelling and accommodation again, as per the receipts produced in Court. He contended that no evidence was adduced to rebut the claim that the respondent incurred the loss evidenced in the documents produced. Mr Maundu submitted that on a balance of probabilities, the respondent proved the loss incurred and that the appellant accepted the loss in its letter dated 17th December, 2012 to the respondent.

19. The respondent's Counsel argued that the spares in question did not belong to any of the categories listed under the Rwand Air Conditions of Carriage No. 9.1.3. He submitted that valuable cargo is defined by IATA as goods valued at over \$1,000.00 per Kilo and that the baggage herein was 16 Kilos as per the appellant's letter of 17th December, 2012. He stated that would have been USD 16,000.00 which would have been far beyond the USD 9676 being claimed herein, hence the spares were not valuables.
20. Mr. Maundu submitted that the respondent has proved the loss of USD. 14,676.00 and Kshs. 50,920.00 as per the evidence before the Trial Court. He relied on Article 22.2.(a) of the Convention which limits liability to a sum of 250 francs (17 Special Drawing Rights) per Kilogramme and submitted that the said Article is not applicable under Article 25 of the said Convention, if the loss was due to recklessness as was the case herein.
21. On the allegation that the Trial Court did not consider the appellant's submissions, he expressed the view that a Court is not bound to reproduce parties' submissions and authorities in its Judgment and that no prejudice was occasioned by failure to reproduce the appellant's submissions and authorities in the Judgment of the Court since even those by the respondent were not reproduced.
22. In a rejoinder, Ms. Ndirangu submitted that the documents and receipts produced in Court in support of the respondent's claim, were in the name of Synergy Gases Kenya Limited who is not a party to the suit herein and there was no evidence to show the nexus between the respondent and Synergy Gases Kenya Limited. She stated that no explanation was given as to why the respondent was relying on receipts and documents that were not in his name. She stated that at no time did the appellant admit liability, and that no evidence was tendered to support such a contention.

Analysis And Determination.

23. This Court being the 1st appellate Court has a duty to analyze and re-evaluate the evidence adduced before the lower Court and reach its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact. In the decision in *Peter M. Kariuki v Attorney General* [2014] eKLR, the Court of Appeal held inter alia-

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui -vs- Republic* [1984] KLR 729 and *Susan Munyi -vs- Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”

24. The issues that arise for determination in this appeal are as follows-
 - i. Whether the suit in the lower Court was time barred; and
 - ii. Whether the respondent was entitled to damages.
Whether the suit was time barred.



25. This Court has re-examined the entire Record of Appeal and given due consideration to the rival written submissions filed by the Counsel for the parties herein. It is not disputed that the suit in the lower Court was filed on 21st November, 2014 vide a plaint dated 25th July, 2014. The appellant submitted that the cause of action arose on 18th November, 2012 when the respondent lodged his claim, therefore, the claim herein having been filed after the lapse of the mandatory two years was filed out of time. The respondent on the other hand submitted that the air ticket which was produced as exhibit No. 11, constituted the contract of carriage between the appellant and the respondent and that the contract of carriage ran between 18th November, 2012 and 24th November, 2012, thus the contract of carriage did not end until the 24th November 2012. The respondent contended that since the suit before the Trial Court was filed on 21st November, 2014, the same was filed within two years and it was not time barred.
26. The contract between the appellant and the respondent herein was regulated by the *Carriage by Air Act* No. 2 of 1993 and the *Convention for the Unification of Certain Rules for International Carriage by Air - Montreal* 28th May, 1999. Section 7(1) of the *Carriage by Air Act* No. 2 of 1993 provides as hereunder-
- “(1) No action against a carrier’s servant or agent which arises out of damage to which the Convention relates shall, if he was acting within the scope of his employment be brought after more than two years, reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”
27. Article 35(1) of the *Convention for the Unification of Certain Rules for International Carriage by Air - Montreal* 28th May, 1999 provides that -
- “The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”
28. In light of the foregoing provisions, it follows that no action can be brought after the expiry of a period of two years from the date of the passenger’s arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. It is not in dispute that the respondent was issued with an electronic ticket number 4592889543584 dated 15th November, 2012 by the appellant. The respondent alleged that on arrival at the Moi International Airport, Mombasa on 18th November, 2012, his cargo could not be traced. It is worth noting that on 18th November, 2012, the respondent filled the Property Irregularity Report (PIR). The respondent also alleged that the ticket which is the prima facie evidence of the conclusion and conditions of the contract of carriage shows the contract of carriage ran between 18th November, 2012 and 24th November, 2012 thus the contract did not end until the 24th November, 2012, the break in between notwithstanding.
29. This Court has perused ticket number 4592889543584 dated 15th November, 2012 and found that the respondent was expected to leave Dubai International Airport on 18th November, 2012, to Moi International Airport, Mombasa through Kigali International Airport. He was expected to arrive at the Moi International Airport, Mombasa on 18th November, 2012. The respondent was thereafter expected to leave Moi International Airport, Mombasa on 23rd November, 2012 to Dubai International Airport through Kigali International Airport. He was expected to arrive at the Dubai International Airport on 24th November, 2012.



30. A reading of section 7(1) of the *Carriage by Air Act* No. 2 of 1993 and Article 35(1) of the Convention for the *Unification of Certain Rules for International Carriage by Air - Montreal* 28th May, 1999 provide that the right to damages shall be extinguished if an action is not brought within a period of two years. The said time starts running from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
31. It is evident that the respondent arrived at his destination, the Moi International Airport, Mombasa on 18th November, 2012 which is also the date that the aircraft ought to have arrived. It is this Court's finding that by virtue of the respondent having filed the Property Irregularity Report (PIR) on 18th November, 2012, the conclusion to be drawn is that the carriage stopped on 18th November, 2012. This Court therefore holds that the cause of action between the parties herein arose on 18th November, 2012. As such, the suit before the Trial Court ought to have been filed on or before the 18th of November, 2014. However, since the suit herein was filed on November 21, 2014, the same was filed out of time.
32. In the present appeal, the applicable international law is article 35(1) of the Convention for the *Unification of Certain Rules for International Carriage by Air - Montreal* 28th May, 1999. It extinguishes the right to damages if an action is not brought within two years. The said time is computed from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. Article 2 sub-article 5 of *the Constitution* of Kenya, 2010 provides that the general rules of international law shall form part of the law of Kenya. The said Convention therefore forms part of the law of Kenya.
33. The Court of Appeal in *Transworld Safari (K) Ltd. vs. Somak Travel Ltd.* [1997] eKLR, while dealing with the question whether the Court can extend time in cases where a cause of action is extinguished expressed itself as follows-
- “The course of action based on negligence of the pilot of an aircraft (a balloon in this case) in the employment of the appellant (if there be such cause of action as pleaded) is not time-barred in the sense of the words “time barred”. Under the relevant legislation applicable to Kenya, the 1953 *Carriage by Air Act* (Application of Provisions) (Colonies, Protectorates & Trust Territories Order), the right to claim damages is extinguished (not time-barred) as per article 29 of that order. Extending time under the Act can apply to ordinary negligence, which results in death or causes bodily injury to the claimant. But once a cause of action is extinguished it cannot be revived”.
34. In *E.M.S v Emirates Airlines* [2012] eKLR, the Court held as follows-
- “It is clear therefore that the two legal regimes (the limitation statute and the Convention) do not apply interchangeably. Whereas one only bars the bringing of a claim after expiry of a certain period of time without necessarily extinguishing the claim, the other regime expressly extinguishes the claim.”
35. From the analysis made by this Court, it is my finding that the respondent's suit before the Trial Court was time barred and the same should have been dismissed. In light of my finding herein above, this Court shall not deal with the issue of whether or not the respondent was entitled to damages as I do not wish to engage in an academic exercise.
36. The upshot is that the appeal herein is merited and I accordingly allow it. The Trial Court's Judgment delivered on June 28, 2019 is hereby set aside and in its place, the respondent's suit against the appellant



in the lower Court is hereby dismissed. The costs of the lower Court case and this appeal are awarded to the appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the Judgment herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms P.M. Kamau holding brief for Ms S. Ndirangu for the appellant

Mr. Achoka holding brief for Mr. Maundu for the respondent

Mr. Oliver Musundi – Court Assistant

