



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 460 OF 2012

AIR CONNECTION LIMITED.....PLAINTIFF

- VERSUS -

SCAN EXPRESS SERVICES LIMITED.....1ST DEFENDANT

QATAR AIRWAYS.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff, **AIR CONNECTION LIMITED**, has sued the defendants for compensation in respect to losses suffered by the plaintiff when its consignment of 93 cartons of fresh cut flowers were damaged.
2. The 1st defendant, **SCAN EXPRESS SERVICES LIMITED** is an airline Sales and Cargo Agent, based in Nairobi.
3. The 2nd defendant, **QATAR AIRWAYS**, is an International Air Carrier, with operations in Kenya and elsewhere in the world.
- 4 It is common ground that there was a contract between the plaintiff and the airline, pursuant to which the airline was to carry a consignment of Fresh Cut Flowers by air, from Nairobi to Amsterdam.
5. It is further common ground that the consignment was first delivered to the 1st defendant, in its capacity as the agent of the airline. The said delivery was made on 14th February 2011.
6. The consignment was ferried to Amsterdam, where it arrived on 15th February 2011.
7. It is the plaintiff's case that upon arrival, the consignment was damaged and that it was declared a total loss.
8. The plaintiff attributes the damage to the flowers to the acts or omissions of the airline's servants or agents. It was asserted that the said servants or agents did their work in such manner as would be deemed to reflect an intention to cause damage or that they were so reckless, yet they knew that damage would result.
9. The plaintiff specified the following particulars of the conduct complained of;

“a. Failure to maintain the proper temperature in the belly hold of the aircraft transporting the consignment.

b. Keeping the consignment in adverse weather conditions while awaiting a connecting flight to Amsterdam while at Doha.

c. Mishandling the consignment and failing to have regard to the delicate nature of the consignment during the carriage by air.

d. Failing to take reasonable or appropriate measures to ensure that the consignment is not exposed to adverse weather conditions particularly high temperatures”.

10. Based on those particulars of the defendants conduct, which the plaintiff described as having been intended to cause damage to the consignment of flowers, the plaintiff sought compensation, as follows;

i) Market Value of the flowers - 19,944.7 Euros and - 4,758.30 USD.

ii) Cost of Transportation from Nairobi to Amsterdam - 4,758.30 USD

iii) Cost of Destroying the damaged consignment - 642.43 Euros

iv) Cost of Inspection of damaged consignment - 1,017.43 Euros.

11. The plaintiff also claimed interest at Court Rates, together with the costs of the suit.

12. In answer to the claims, the defendants denied any responsibility for what may have befallen the consignment. The defendants challenged the plaintiff to strictly prove the particulars which it had attributed to the defendants.

13. It was defendants’ case that they carried out their obligations diligently.

14. As regards the temperatures at which the consignment was kept, the defendant said the same were maintained at the limits recommended for perishable goods.

15. The defendants pointed out that there was no change of aircraft, as alleged by the plaintiff.

16. Indeed, not only was the plaintiff’s consignment handled as per standard handling procedures, but the defendants insist that the consignment was delivered and received in good order and condition.

17. The defendants denied the value which the plaintiff ascribed to the consignment, as no such value had been declared in the contract.

18. In the circumstances, the defendants asserted that if any compensation was payable to the plaintiff, it would be calculated on the basis of the weight of the consignment, pursuant to the Montreal Convention as read together with the airline’s Conditions of Carriage.

19. But the defendants emphasized that they were not to blame for the losses sustained by the plaintiff.

20. At the trial, one witness testified for the plaintiff, and one witness testified for the defendants.

21. **PW1, PATRICK SHIVERENJE MWASHI**, worked with the plaintiff since 2000. He testified that the Fresh Cut Flowers which they transported through Qatar Airways had been declared fit for export.

22. He explained that the consignment was first put on flight **No. QR 6533**, which left Nairobi on 14th February 2011. The said flight is said to have stopped over in Doha, where the consignment was

transferred to flight **No. QR 6057**, which then flew to Amsterdam.

23. Upon arrival of the consignment in Amsterdam, the flowers were found to have been damaged, due to high temperatures. As a consequence, the whole consignment was destroyed.

24. PW1 testified that the cost of Inspection was 642.43 Euros, whilst the cost of destruction was 1,017.43 Euros.

25. PW1 said that the airline was liable for the damage because it failed to maintain the proper temperature in the belly hold of the aircrafts which ferried the consignment from Nairobi to Amsterdam.

26. During cross-examination, **PW1** said that he had vast experience in cargo transportation.

27. He was aware that Qatar Airways was a member of **IATA** and that there are **IATA** Perishable Cargo Regulations which would govern cargo such as the flowers which the airline was ferrying.

28. He then explained that there were a number of factors which could lead to the loss of ornamental value of flowers. He said that those factors included delay; missing cargo or loss of cargo.

29. It was interesting to note the plaintiff's witness state that factors such as the age of flowers and temperature were not a factor in respect to the loss of ornamental value.

30. The person who was shipping perishables ordinarily issues instructions on how the said perishables are to be handled. And Mwashhi said that the instructions would be spelt out on the air waybill.

31. In compliance with the said practice, the plaintiff did specify, in the air waybill, the temperature range within which the flowers were to be kept. They specified that the flowers had to be maintained at temperatures between 4 ° and 6 ° degrees, Celsius.

32. He further explained that it is within the belly-hold of the aeroplane, where the flowers are ferried, that the temperatures had to be maintained.

33. When he was asked if he had any evidence to show that the consignment was kept in weather which was adverse, Mwashhi answered in the negative.

34. He also told the court that he did not have any evidence to prove the particulars set out in paragraph 7 of the plaint.

35. And although the optimum temperatures were said to range between 4 ° and 10 ° Celsius, Mwashhi told the court that when the flowers in issue were obtained from the warehouse, before being shipped, the temperature was 10 ° C.

36. And when he was asked about the temperature at the time when the flowers were handed over to the defendants, Mwashhi said that he did not have evidence of the said temperature.

37. But when the consignment reached Amsterdam, the temperature was found to be between 22.4 ° C and 50 ° C. And the survey Report showed that the cause of the damage to the flowers was adverse conditions.

38. According to the persons contracted by the plaintiff to conduct the survey, it was the Air Carrier who was to be held responsible for the damage to the consignment.

39. During re-examination, Mwashhi said that the plaintiff received the flowers when they had already been packaged.

40. He also said that he did not have evidence to show that the temperature in the belly hold of the plane was not maintained.
41. After Mwashu testified, the plaintiff closed its case.
42. **DW1, HUMPHREY SLADE ALUANGA**, testified that he was well versed with the practice and procedure relating to the air transportation of cargo and consignments.
43. He testified that the consignment in issue was required to be kept at cold temperatures ranging between 4 ° C and 6 ° Celsius.
44. Once the consignment in issue was loaded onto the plane, Aluanga says that it was not removed until the consignment reached its destination in Amsterdam.
45. He said that there were 4 consignments which the airline ferried to Amsterdam, and that it was only the consignment in issue which was reportedly damaged, yet all the 4 consignments were maintained in the same cargo Hold throughout the transportation.
46. During cross-examination, Aluanga said that the consignment was never removed from one plane to another one, at Doha. He explained that the change in the flight number, (*from QR 6533 to QR 6057*) was not because the plane was changed. His explanation was that it is a requirement in regulations of air transport, that when any plane was passing through its mother-country, it had to change its flight number before proceeding.
47. But as he was not in Doha when the plane in issue ferried the consignment, Aluanga conceded that he did not have evidence to affirmatively show that the consignment was not removed from one plane to another.
48. The witness said that he did not have any document to show what the temperature was when the consignment was received in Amsterdam.
49. However, he also said that the temperature cited in the survey report was the temperature when the flowers were outside the plane.
50. On the other hand, the airline's responsibility was to maintain temperature within the belly-hold.
51. And, according to Aluanga, the temperature in the belly-hold of the plane does not impact on the temperature within the packaging of the consignment.
52. In this case, the airline said that it was never invited to participate in the survey which was done by the plaintiff's agent in Amsterdam.
53. After Aluanga testified, the defendants closed their case.
54. During submissions, the plaintiff asserted that there was no issue that the consignment was actually damaged while in transit. But the correct position is that the defendants disputed that contention.
55. Having analysed the evidence tendered by the parties, I find that the plaintiff has established that the consignment of Fresh Cut Flowers was damaged and was therefore a total loss.
56. The question that follows is whether or not the damage occurred during the period when the said consignment was being carried by air. That question must be linked to the plaintiff's contention that the damage was done due to the acts and omissions of the servants and agents of the airline.
57. In my understanding, the plaintiff did not simply assert that this was a case of strict liability. The plaintiff attributed the damage to specific acts and omissions of the airline.

58. In the case of **CONSOLIDATED BANK of KENYA LIMITED Vs. SECURICOR SECURITY SERVICES KENYA LIMITED**, Hccc No. 594 of 2003, the defendant had been contracted by the plaintiff to ferry a consignment of money from **MAUA to NAIROBI**.

59. The consignment was lost whilst on transit, and the plaintiff sued the defendant for compensation.

60. After a full trial, Kimondo J. granted judgement in favour of the plaintiff. In arriving at that decision, the learned trial Judge observed that the evidence tendered disclosed the negligence by the defendant. Indeed the defendant's own witness conceded some elements of negligence.

61. This is what the court said;

“The totality of that documentary and oral evidence and circumstances point suspiciously at the defendant’s crew. They were charged for the criminal offences I highlighted earlier. I am unable to say from the evidence, that the defendant can be said to have taken all reasonable precaution or that it properly performed the contract in question. The particulars of negligence pleaded at paragraph 7 of the plaint are thus proved. They have not been disproved by the defendant. The failure of duty of care owed to the plaintiff is the defendant’s failure to take reasonable care of the bailor’s goods”.

62. In particular, the defendant's crew deviated from the designated route, and they also failed to have armed escort. It was in those circumstances that the court refused to turn a blind eye to the negligence of the defendant.

63. Meanwhile, in the case of **ROYAL INSURANCE COMPANY of EAST AFRICA & ANOTHER Vs SUPERFREIGHTERS LTD & 4 OTHERS** Hccc No. 2983 of 1994, the court held the transporter liable for the loss of 34 bags of Simlaw seeds.

64. A total of 240 bags were received by the transporters in Mombasa. But when the consignment reached its destination in Nairobi, there were 206 bags.

65. As the bags were delivered in 2 securely locked containers which had not been tampered with, the court held that;

“The 34 bags must therefore have been lost when the consignment was in the possession of the transporter in their own premises between the time the containers was stripped of 80 bags and the subsequent loading of the goods for transport to Nairobi”.

66. Having made a finding that the 34 bags were lost whilst in the possession of the transporter, the learned trial Judge invoked the rule of evidence *res ipsa loquitur*, and said;

“In the absence of any explanation as to how the loss occurred, the court must presume that it was as a result of the transporter’s negligence, for goods in the possession of a bailee do not just disappear in thin air without some intervening human act or omission”.

67. Those are the 2 authorities which the plaintiff relied upon to back its case.

68. The plaintiff then submitted that on a balance of probability, the 2nd defendant mishandled the plaintiff's goods, resulting in the loss.

69. The court was asked to hold the defendants liable, as the defendant had failed to explain how the plaintiff's goods were damaged in the hands of the defendants.

70. But the defendants countered that submission by pointing out that the agents of the plaintiff, who surveyed the flowers in Amsterdam concluded thus;

“CAUSE OF DAMAGES

The damage was probably to be attributed to the flowers wholly or partly having been under adverse conditions at some time”.

71. Therefore, the evidence does not specify the point in time when the flowers were kept in adverse conditions.

72. The plaintiff had suggested that the flowers were transferred from one plane to another, in Doha. However, the plaintiff did not prove that suggestion.

73. Secondly, the plaintiff suggested that the temperature in the belly-hold of the plane was not maintained within the range which the plaintiff had specified.

74. However, the plaintiff did not discharge the burden of proof.

75. On the other hand, the airline said that the temperature in the belly-hold was maintained within the required range. However, the defendants did not specifically prove the temperatures which were maintained in the belly-hold.

76. Nonetheless, the defendants explained that there were 4 consignments in the same plane, but it was only the plaintiff’s consignment which was damaged.

77. In the light of that evidence, I find that it was more probable than not that the damage to the flowers was attributable to factors other than the alleged failure to maintain the temperature in the plane’s belly-hold.

78. I so find considering that when the flowers landed in Amsterdam, the temperature was 40 ° C. That fact was stated in the Report of Survey dated 15th February 2011.

79. Thereafter, when the survey was conducted, it was noted to range from 22.4 ° C and 50 ° C.

80. In effect, even after the consignment landed in Amsterdam, the temperature continued changing. And the plaintiff did not attribute such continued changes in temperature to the airline’s failure to maintain the temperature in the plane’s belly-hold.

81. In conclusion I find as follows;

1) The consignment was damaged, but it was not proved that the damage occurred during the carriage by air.

2) The plaintiff did not prove any acts or omissions of the airline’s servants or agents, which caused the damage.

3) The plaintiff failed to prove that the damage was done with the intent to cause damage or recklessly and with knowledge that damage would probably result.

4) The plaintiff did not prove any of the particulars of defendants conduct which was done with intent to cause damage to the consignment.

5) As a result, I find that the defendants are not liable for the loss occasioned by the damage to the plaintiff’s consignment.

6) The defendants have no obligation to compensate the plaintiff for the loss.

82. In the circumstances, the plaintiff's claim fails, and is dismissed, with costs to the defendants.

DATED, SIGNED and DELIVERED at **NAIROBI** this **29th** day of **March** 2017.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Miss Kariuki for the Plaintiff

Sumba for the 1st Defendant

Sumba for the 2nd Defendant

Mr. C. Odhiambo, Court clerk.