



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 922 OF 2003

MIDLANDS GEM LIMITED.....1ST APPELLANT

STEPHEN GITONGA MBAABU.....2ND APPELLANT

VERSUS

AIRSPACE FORWARDERS LIMITED.....1ST RESPONDENT

BRITISH AIRWAYS WORLDCARGO LIMITED.....2ND RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of the lower court vides Milimani CMCC EJ 131 of 1999 delivered on 25th November 2003 by Honourable T.W.C. Wamae, Senior Resident magistrate.

The appellants herein were the plaintiffs in the lower court whereas the respondents were the defendants. By an amended plaint dated 14th May 1999, the appellants Midland Gems Ltd and Stephen Gitonga Mbaabu sued the respondents Airspace Forwarders Limited and British Airways World Cargo Limited for recovery of kshs 417,200, costs of the suit, interest and any further or better relief the court may deem fit to grant. It was alleged that on or about the 13th day of December 1997 the plaintiff/appellants or their agent delivered 3 packages of 225 kilograms of baggage consisting of assorted carvings (consignment) to the 1st respondent to be air freighted from Nairobi to Los Angeles to one Jane Wangari Kariuki on or before 17th December 1997 as the consignee of the said goods was to depart from Los Angeles thereafter.

That the respondent agreed to air freight the said consignment and undertook through their agents to ensure delivery of the said consignment to Los Angeles on or before the said 17th December 1997 at a consideration of USD 3.20 per kilogram. However, it was alleged that due to the negligence on the part of both the respondents, their servants and or agents jointly and severally the goods were not delivered within the specified time on or before 17th December 1997 and that upon such failure to deliver the said goods/consignment by the said date of 17th December 1997 as aforesaid, the appellants called on the 1st respondent to air freight back the said goods to the appellants in Nairobi as the consignee was no longer available in Los Angeles to clear and take delivery of the said goods. It was further averred that the 1st respondent orally undertook to the appellants and or their agents to bring back the consignment to Nairobi but they defaulted hence the suit.

The appellants specifically stated the particulars of the respondent's negligence as:-

- a. Failing to deliver the said goods within the required time and or at all.
- b. Allowing the said goods to be lost and or stolen.
- c. Failing to provide adequate security for the said goods or at all.
- d. Failing to re-ship the said goods to the plaintiff and /or at all.

The appellants therefore claimed for the value of the said consignment all totaling kshs 417,200.

Both respondents entered appearance and filed separate defenses denying the plaintiffs/appellants' claim. The 1st respondent only admitted the receiving and delivery of the consignment to the 2nd respondent as per the Airway Bill No. 125-79996803 but denied the allegation by the plaintiffs/appellants as to the consignment's departure time and that neither did it ensure delivery of the consignment on or before 17th December 1997. It also denied particulars of negligence attributed to it, and or that it was liable for the value of the consignment as quantified by the appellants.

The 1st respondent however admitted in paragraph 8 of the amended defence dated 21st June 1999 that it received the appellant/plaintiffs instructions to airfreight back the consignment to the plaintiff which it promptly notified the 2nd respondent of the appellant's request within reasonable time and contended that if there was any delay then it was caused by or contributed to by the 2nd respondent. The 2nd respondent also relied on its trading conditions exempting it from liability. That it being a common carrier, it could not be held liable for loss, delay or damage to the goods to be forwarded. The 1st respondent also pleaded that the conditions of contract between it and the appellants was subject to the Warsaw Convention of 12th October 1929 as amended by the Hague Protocol of 1955 and the limitations therein and prayed for dismissal of the appellant's suit with costs.

The 2nd respondent filed defence dated 21st April 1999 denying the appellant's claim against it and more particularly, it denied being the agent of the 1st respondent receiving any consignment for delivery to Los Angeles on 17th December 1997; being negligent in failing to deliver the alleged goods; being asked to return the goods to Nairobi or any other undertaking. It also pleaded that there was no privity of contract between it and the appellants, capable of being breached. It denied any loss, delay or damage and relied on Article 26 of the Warsaw Convention applied to Kenya by the Carriage by Air Act, 1993 and contended that in any event, any liability that it bore if any would be limited to USD 20 per kilo of the consignment but nonetheless prayed for dismissal of the appellant's suit with costs.

The case was heard inter parties and in her judgment delivered on 25th November 2003 Honourable T.W.C. Wamae (Mrs) Senior Resident Magistrate dismissed the appellant's suit with costs to the respondents. It is that dismissal order that is subject of this appeal. The appellants have set out in their Memorandum of Appeal dated 15th December 2003 filed on the same day six(6) grounds of appeal challenging the decision of the trial magistrate namely:-

1. That the Learned trial magistrate erred in law and fact in holding that the 1st appellant had no locus standi to sue in this matter.
2. The Learned Magistrate erred in law and fact in failing to establish that the 2nd appellant existed in the name of Stephen Gitonga Mbaabu.
3. The Learned Magistrate erred in law and fact in holding that the 2nd appellant had locus standi to sue in this matter.
4. The Learned Magistrate erred in law and fact in failing to hold that the question of the right to sue had been determined by an earlier application in favour of the appellants.
5. The Learned magistrate erred in law and fact in writing an eligible (sic) and unreadable proceedings and judgment incapable of being typed hence occasioning a miscarriage of justice to the appellants.
6. The Learned Magistrate erred in law and fact in writing her judgment without having regard to the court exhibits which were reported missing during the trial hence occasioning a mistrial

and miscarriage of justice.

The appellants prayed that the judgment be quashed and set aside and a new trial be ordered a fresh.

The appeal herein was admitted to hearing on 31st July 2009 by Honourable Okwengu J (as she then was) who also gave directions under Section 79C of the Civil Procedure Act on 20th November 2009. The parties' advocates agreed on 24th November 2010 before Honourable Maraga J to dispose of the appeal by way of written submissions. On 24th February 2011 the parties advocates made skeletal submissions before Honourable Joyce Khaminwa J (as she then was) while relying entirely on their written submissions and the learned Judge reserved her judgment for 14th June 2011, which judgment was never delivered and this court is now called upon to consider the appeal on its merits and make its pronouncement which I hereby do.

The appellant's submissions dated 23rd November 2010 were filed on the same day. The 2nd respondent filed theirs on 9th December 2010. They are dated 9th December 2010 together with authorities annexed thereto. The 1st respondent did not make any written submissions for purposes of this appeal. The court will therefore only rely on their oral submissions, the record and the submissions made orally in court on 24th February 2011 before Honourable Joyce Khaminwa (RIP) and in writing as filed by the appellants and the 2nd respondent.

In the appellant's submission dated 23rd November 2010, it is contended that there are five issues for consideration. The first issue raised is whether the appellants had a locus standi to sue for loss of goods.

According to the appellants, it is them who delivered the 225 kilograms of consignment for shipment to their client in Los Angeles upon the understanding that their clients could only receive the goods on or before 17th December 1997. Further, that the goods never arrived in Los Angeles as agreed and that even then, the consignee had left the United States of America after 17th December 1997 hence it was the appellants who suffered loss as a result of the non delivery of the consignment hence they were the proper parties to sue.

The appellants also urged the court to note that they had not sued on the basis of the Airway Bill Ex 12 but for negligence for the defendants/respondents' failure to deliver the consignment to its intended destination as at December 17th 1997. According to the appellants, the consignees could not sue for non delivery of the consignment since they were not parties to the agreement between the defendants/respondents on the shipment of the consignment to Los Angeles.

The appellants faulted the trial magistrate for finding that it was the consignee who should have sued instead of the plaintiffs/appellants who dealt directly with the defendants.

On the second issue of whether or not there was a contract between the plaintiffs/appellants and the defendants/respondents to air freight the consignment to Los Angeles by a specific date, the appellants submitted that the evidence on record revealed that there was an understanding between the parties that the consignment ought to have been delivered to the consignee by the 17th December 1997 after it was delivered to the 1st defendant/respondent on 13th December 1997 for onward delivery to the USA to reach the customer by 17th December 1997.

Further, that DW1 admitted receiving the goods on 13th December 1997 from PW2 and that the consignee had indicated that she would not be in Los Angeles after 17th December 1997. That the same witness DW1 testified that they delivered goods to the 2nd respondent for air freighting to Los Angeles and notified them of the necessity to have the goods delivered by 17th December 1997 to ensure that the goods reached the USA by that date.

The appellant further submitted that according to the 2nd respondent's witness evidence at page 98 of

the record of appeal, the Airway Bill was issued on 13th February 1997 and that he confirmed that naturally the goods should have reached the intended destination within 48 hours from 13th December 1997. That he admitted the delay which was not caused by the 2nd respondent as it was caused by operational constraints which made them put the consignment in a different flight other than the one confirmed. The appellant urged this court to find that there was a common understanding between the parties that the goods were to be delivered to the intended destination on or before the 17th December 1997.

On the third issue of whether the goods reached the destination on the agreed dates and if not who was to blame, the appellants submitted that the evidence on record was clear that the goods did not reach the intended destination in time albeit there was no conclusive evidence on the exact date that the goods reached the intended destination but nonetheless they did not reach on 17th December 1997 as agreed but on 18th December 1997 or 1st January 1998 and that the 2nd respondent having admitted the delay in delivery of the consignment, they were to blame.

On the fourth issue of whether the appellants suffered loss for non delivery of goods to the intended destination, it was submitted that it was not in dispute that the goods never reached the consignee within the stipulated time hence the consignee who had left Los Angeles could not pick them and therefore the appellants asked the respondents to air freight it back but the defendants did not, on account that the charges had not been paid, which excuse is not plausible considering that the appellants did not even pay freight charges to Los Angeles since the consignee would be the one paying the charges on collecting the goods according to DW2. It was therefore submitted that in view of the testimony of a common practice that freight charges are normally paid by the consignee collecting goods, and since the goods never arrived at the intended destination within the stipulated time, the 2nd respondents should have air freighted the goods back and charged the appellants. That it was failure by the 2nd respondents to return the goods that the goods were seized by the US Customs Department and destroyed while in custody of the 2nd respondent which destruction caused the appellant loss and they should therefore be compensated.

The fifth issue is whether the appellants are entitled to compensation. The appellants submitted that Article 26 of the Warsaw Convention which applied to Kenya by virtue of the Carriage by Air Act 1993 limited the liability of the carrier in whose hands goods are lost, and or destroyed to USC 20 per kilogram of the consignment unless a higher value is declared by the shipper and a supplemental charge is paid. The appellants submitted that they never claimed for a higher value hence the trial magistrate should have awarded them kshs 315,000. The appellants urged this court to set aside the judgment dated 25th November 2013 and substitute it with an order entering judgment for the appellants for kshs 315,000/- plus interest at court rates, costs and refund of costs paid to the respondents with interest at court rates. The appellants did not rely on any case law in their submissions.

In the 1st respondent's submissions made by Mr Odhiambo advocate before Honourable Joyce Khaminwa on 24th February 2011, it was submitted that the appellants were not privy to the contract of consignment. That they did not consign the goods to the destination hence they had no locus standi and therefore there is no cause of action against the 1st respondent. That since the contract was governed by the signed Airway Bill as between the parties, the appellant could not stretch into a contract entered into for services which is different. Mr Odhiambo urged the court to find that the Warsaw Convention was applicable and particularly the fact that the time limit within which the cause of action was to accrue had passed. He urged the court to uphold the trial court's decision and dismiss the appeal.

In the 2nd respondent's submissions termed skeletal yet very detailed submissions filed on 9th December 2010, the 2nd respondents through the firm of Hamilton, Harrison and Mathews submitted that albeit there were 6 grounds of appeal, two issues were disclosed. The first issue covered grounds 1-4 of the Memorandum of Appeal and related to the error of law and facts regarding the Locus standi of the appellants.

The second issue covered grounds 5-6 of the Memorandum of Appeal and relates to the error of law and fact in the process of writing of the judgment.

On the first issue as framed, the 2nd respondents maintained that the suit was predicated on the Airway Bill and that the appellants had no locus standi to sue since they were neither the senders/consignors nor the consignees according to that Airway Bill which formed the contract as governed by the carriage by Air Act hence, the appellants not being privy to the contract could not sue or seek to benefit from it and therefore their claim did not lie.

It was also submitted that the contract as per the Airway Bill was between the 2nd respondents and the consignee Mungai Jane Kariuki and not the present appellants who were not parties to the Airway Bill and therefore no rights or obligations accrued to them. Further, that even if the claim was predicated on negligence, the appellants had failed to prove that the 2nd respondents owed them a duty of care and or that that duty of care duty was breached.

According to the 2nd respondent, it only dealt with the 1st respondent and not the appellants. They relied on **Agricultural Finance Corporation V Lengetia Ltd (1985) KLR 765** where the court held that a third party has no locus standi to sue on a contract and on the basis of the decision in **Kenindia Assurance Company Ltd V Otiende [1991] KLR 38** it was submitted that where a party purports to enforce a contract by way of a suit, as the appellants herein did, the court is divested of jurisdiction to deal with the matter. The 2nd respondents therefore fully supported the trial magistrate's finding that there was no contract between the appellants and the 2nd respondent which could entitle the appellants to recover damages as sought. The 2nd respondents also submitted that the appellants had no cause of action because:-

Condition 12.1.3 of the Airway Bill stipulated that in case of delay in delivery of baggage, the consignee would make a written complaint to the 2nd respondent within 21 days from the date the goods are placed at her disposal, which condition was similar to Article 26(2) of the Warsaw Convention as applied by the Carriage by Air Act, 1993. Reliance was placed on **Edher Ahmed V The General, East African Railways and Harbours Administration** where the court held in relation to Section 92 of the defunct East African Railways and Harbours Act, which is similar to Article 26(2) of the Carriage by Air Act that where a party had failed to comply with the mandatory complaint procedures, the party would not be entitled to compensation even if he had a cause of action.

Further, that under Article 14 of the Warsaw Convention, only the consignor or consignee could/can sue for compensation for any loss. In this case, it was submitted that neither the sender nor the consignee were enjoined to the suit and that the consignor was named in the Airway Bill as 1st respondent. It was submitted that since none of the appellants for the description of the consignor or consignee, their cause of action was patently misconceived and therefore they are not entitled to any compensation even if the 1st respondents were their agents because they remained third parties.

On the issue that the appellant's action was time barred, the 2nd respondent submitted, referring to the affidavit sworn on 10th October 2000 by the consignee wherein she alleges that she asked the 2nd respondent to take the baggage back to Nairobi. It was contended that the consignee did not supply any evidence of such communication. That she neither went to collect the baggage nor communicated with the 2nd respondent on what to do with the said baggage. As a result thereof, and the failure to pay custom clearance charges, the Government of the USA destroyed the baggage. Further, it was submitted that even if freight charges would have been paid, the 2nd respondent would not have been able to carry back the luggage as it had been confiscated and destroyed by the USA Government. It was further contended that the consignee was obliged to lodge a complaint to the 2nd respondent within 21 days from the date when the baggage was placed at her disposal as clearly indicated as a condition in the Airway Bill and a statutory requirement under Article 26 of the Warsaw Convention as applied by the carriage by Air Act, 1993 which provides that:

1.
2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage and at the latest, within 7 days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within 21 days from the date on which the baggage or cargo have been placed at his disposal.
3. Every complaint must be made in writing upon the document of carriage or by separate notice in writing dispatched within the times aforesaid
4. Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

In the instant case, it was submitted by the 2nd respondent that neither the consignee nor the consignor lodged any complaint to the 2nd respondents within 21 days as required by law and as set out in the Airway Bill hence, the case of **Edher Ahmed V The GM,EAR & H Administration** (supra) applied.

The next issue raised by the 2nd respondent for determination by this court is whether there was an agreement between the parties to air freight the consignment to Los Angeles by a specific date. The 2nd respondent submitted that albeit the appellant claimed that there was a contract to deliver the consignment to Los Angeles by 17th December 1997 as the consignee was scheduled to leave the city, clause 8.1 of the Airway Bill was clear that the 2nd respondent undertook to complete the carriage with reasonable dispatch.

Further, that it was well known to the parties to the contract that the carrier could not possibly guarantee a specific delivery timeline, due to the unpredictable nature of travel including inclement weather, re-routed and delayed flights. In addition, that in any event, the 2nd respondent had no interaction with the appellants and could therefore not have given that undertaking.

The 2nd respondent also recalled that PW1's evidence was clear that there was no contract between the appellants and the 2nd respondent but that there was a verbal contract, and that the witness admitted that there was an Airway bill which stipulated the conditions of carriage, and that he also admitted that there was no written condition that the baggage would be delivered to the consignee before 17th December 1997.

The 2nd respondents further submitted that the appellants were not entitled to introduce new terms to the written contract through alleged verbal undertakings. They relied on **Kinyanjui and Another V Thande & Another [1995-98] EA 159** where the Court of Appeal held that an agreement which is by law required to be in writing cannot be amended or varied by oral representations. The same position was taken in **Matiri & sons V Nithi Timber Co-operative Society Ltd [1987] LLR 1512 and Deposit protection Fund Board V Sunbeam Supermarket Ltd & 2 Others [2004] I KLR 37** here the court held that Section 98 of the Evidence Act is clear that parole evidence shall not be admitted to vary the terms of a document which is required to be in writing.

The 2nd respondent further submitted that Article 10 of the Warsaw Convention places the obligation of ensuring accuracy of the Airway bill on the consignor (the 1st respondent) and in that regard the Article provides that:-

- The consignor is responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the Airway bill.
- The consignor shall indemnify the carrier against all damage suffered by him, or any other person to whom the carrier is liable, by reason of the irregularity incorrectness or incompleteness of the particulars and statements furnished by the consignee.

According to the 2nd respondent, it was the duty of the consignor to ensure that the information on when the baggage was to arrive at its destination with the consignee was included as a condition on the Airway bill and that such failure to include time of delivery in the airway bill would be attributed

to the 1st respondent who is under statutory duty to indemnify the 2nd respondent in the event that the appeal herein is allowed, adding that Article 15 of the convention was clear that the conditions of carriage by air as set out in Article 12,13,14 can only be varied by express provisions in the Airway bill, which provision, it was contended, settled the debate on whether the terms of the Airway bill and the conditions of carriage could be varied or added to by verbal agreement.

Further, that therefore since there was no agreed date when the goods would reach their destination, the issue of whether they reached on the agreed date does not arise since the 1st respondent had no control over or of the flights of the 2nd respondent hence it could not give any undertaking on behalf of the 2nd respondent.

On nonpayment of freight charges, the 2nd respondent argued that the appellants could not be heard to seek for return of the goods as they had not paid the freight charges.

On the ground that the trial magistrate wrote ineligible notes incapable of being typed hence causing miscarriage of justice, the 2nd respondent submitted that no submissions were made in that regard hence the ground should be assumed to have been abandoned. Furthermore, that the appellants had not shown which parts of the proceedings were missing or ineligible.

On the allegations that the trial court failed to refer to exhibits reported to have been missing, it was submitted that the claim was misplaced as all exhibits produced in the lower court had been produced in the record of appeal and the supplementary record of appeal.

The 2nd respondent therefore submitted that it was not liable for the delay/loss of the goods and that even if the court was to find them liable, the liability would only be limited to the extent set in the Warsaw Convention as applied by the carriage by Air Act. They relied on the case of **Western Digital Corporation & Others V British Airways PLC [2000] 2 LLR 142 page 35** where it was held that the Warsaw Convention was a complete code in relation to matters falling under it, and the issue of liability of the carrier was one such matters. Further, that the court held that in carriage by air, any action for damages, however founded, whether in contract or in tort, can only be brought subject to the conditions and limits of liability set out in the Warsaw Convention. The 2nd respondents therefore submitted that this appeal was without merit and urged the court to dismiss it with costs.

Analysis and determination

I have carefully considered the appeal herein as prosecuted by the appellant in proposition and the serious and vehement opposition thereto, by way of detailed written submissions by all the parties' advocates. I have also considered the authorities relied on by the parties' advocates where applicable.

As is required by Section 78 of the Civil Procedure Act, this being a first appeal, this court is under a duty to reconsider, re-evaluate and reexamine the evidence and the law and exercise as nearly as possible the powers and duties of the trial court and come to its own independent conclusion, bearing in mind it neither saw nor heard the witnesses as they testified in the subordinate court and therefore give an allowance to that. This principle was interpreted by the Court of Appeal in the case of **Sielle V Associated Motor Boat Company Ltd [1968] EA 123**. In addition this court as an appellate court will only interfere with the trial court's findings if they are predicated on wrong principles of fact and or law as fortified by the court of Appeal in the case of **Mkuba V Nyamuro [1983] KLR 403** where the Court of Appeal stated that;

“ A Court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have demonstrably to have acted on wrong principles in reaching his conclusions.”

The Court of Appeal in the above Mkuba case further held that the appellate court, nonetheless is not bound by the trial court's finding of fact if it appears that either it failed to take into account particular

circumstances or probabilities or if the impression of a witness is inconsistent with the evidence generally. (See also **Mbogo V Shah & Another (1968) EA 93**).

Applying the above established principles of law to this appeal, I proceed to re-evaluate the evidence as adduced in the subordinate court before settling on the main issues for determination.

PW1 Stephen Gitonga Mbaabu the 2nd appellant herein testified that he was the 1st appellant's Managing Director. He was also an advocate of the High Court of Kenya. That sometime in 1997 his company the 1st Appellant received an order from Miss Njeri Kariuki and another trading as the Village from California, USA who wanted an assortment of arts and craft which the 1st appellant company was trading and dealing in. The goods were to be purchased and delivered to the individuals placing the order on or before 17th December 1997. That the order was subject to that condition as the goods were required then for exhibition to be held in California on 18th December 1997 and he promised to see that the goods were delivered on time. PW1 then called his agent Artmarc Curios through Mercy Kihara and requested her to organize for the purchase of the items and to ensure that they were delivered to the clearing and forwarding agents who were the 1st defendants (1st respondents herein). He also instructed Artmarc Curios to ensure they only ship the goods on condition they would be delivered in time as required. The goods were valued at kshs 417,200 and he paid for them as the agents said they had no money to pay for the order and it was confirmed that the goods were delivered to the 1st defendant (1st respondent herein). The 2nd appellant then contacted a Mr Gitonga of the 2nd respondent Airline who assured the 2nd appellant that the goods would be delivered to their destination on or before the date mentioned. PW1 then received a phone call from the consignee that the goods were never delivered to their destination on time, and that she went to the airport 100 miles away and was told the goods had not arrived. Further, that the consignor explained why the goods did not arrive on time. He produced P exhibit 1 a letter dated 5th January 1998 addressed to the 1st respondent urging them to instruct the 2nd respondent to return the goods to the plaintiffs as the consignee had said she would not accept the goods due to the delay. PW1 also wrote another letter requesting that the goods be returned to Nairobi since the consignee did not want the goods. He received a letter dated 16th February 1998 addressed to the 2nd respondent by the 1st respondent copied to the appellants. The 1st respondent then asked the 2nd appellant for an itemized claim to pass to the 2nd respondent for payment after it became clear that the goods were neither returned nor delivered to the consignee, while apologizing for the mistake. The 2nd respondent however made it clear that it could not offer compensation on delayed goods.

PW1 maintained that the 1st respondent was to obtain a commitment from the airline that goods were to leave immediately and to reach the destination on time and that a Mr Gitonga of the 2nd respondent airline confirmed that the goods would be delivered on or before 18th December 1997. PW1 further stated that the contract with the 1st respondent was verbal on telephone and that goods were to arrive before 17th December 1997 as verbally communicated to the 1st respondent. He admitted that there was no value declared in respect of the goods and that he was to pay freight charges not at the destination. He also confirmed that he knew carriage of goods is subject to certain terms and conditions and that Jane Kariuki and George Mungai were the consignees. In re-examination PW1 stated that the consignees were never interested in the goods which were never delivered.

The plaintiffs/appellants also called PW1 Mercy Mukwa Mugo Kibara who testified that she traded as Artmerk. She is the one who sold the goods/curios to the plaintiffs/appellants for delivery to the USA to reach their customer by 17th December 1997 and she charged shs 471,200 which they paid. Airspace packaged them. There was a verbal contractual condition that the goods were to reach the destination by 18th December 1997. She was issued with an Airway Bill and she notified PW1 that she had delivered the goods and that they would arrive safely. She received an invoice from Airspace forwarders and she sent it to Mr Mbaabu (PW1). Later she received information that the goods were never delivered. She confirmed in cross examination that no delivery date was included in the Airway bill because of the trust as they had previously dealt with Airspace.

The 1st defendant/respondent called one witness DW1 James Chege Maina, its employee- Operations Manager who confirmed that they dealt with the plaintiffs through Mr Mbaabu on 13th December 1997. They received goods for delivery to United States which they packed in 3 packages and prepared an Airway Bill for taxation and customs entry. The value for the declared goods was shs 26,070 as per the export entry and they delivered the goods to the appellant herein informing them that they had to be in Los Angeles by 17th December 1997 and the airline promised to ensure delivery by that date. That the goods reached the destination on 18th December 1997. Another piece arrived on 21st December 1997. The consignee had indicated she would not be in Los Angeles after 17th December 1997 and later they were informed that the goods were destroyed by customs in the United States of America.

That they wrote to the appellants on 16th February 1998 telling them the shipments did not leave London on time and the airline responded to say they were sorry but could not pay compensation for the delay and DW1 informed their clients. In cross examination DW1 stated that they indicated they were liable to pay and that they advised their client to avail an itemized claim. He confirmed that the conditions of carriage were in the Airway bill. He also confirmed that the delivery date was never made a condition and neither did the appellant give the undertaking in writing. He confirmed that no claim was made within 21 days by him as the shipper and that there was a large difference of price in the invoice and the declaration i.e. 417,200 and 26,070. He admitted that the claim was time barred according to the clause in the Warsaw Convention. He confirmed that the Customs Department of airports destroys goods due to storage and security.

The 2nd respondent herein who was the 2nd defendant called one witness DW1 Michael Muriithi Nyamu its Customer Service Executive. He testified that the Airway bill only bound the defendants. That the plaintiff was a stranger to the Airway bill and that the conditions are clearly indicated on the reverse. That they contracted the consignees who never picked the goods in Los Angeles. Notice of seizure was sent to the consignee 15 days later but there was no response from them hence the United States Customs seized and destroyed the goods. He denied that they received any claim within 21 days as required under clause 12 of the Warsaw Convention. That although the 1st defendant/respondent claimed but goods could not be reshipped from Los Angeles to Nairobi since they were not paid freight charges by the consignee. He stated that they had no contract with the plaintiffs/appellants and that it was never shown on the Airway bill the date when the goods were to reach the destination. In cross examination, the 2nd respondent's witness stated that goods were delivered on 1st January 1998 in Los Angeles and that due to technical reasons such as delayed aircraft the airline may be unable to meet date lines. Further, that if the consignee is not happy with the delivery, they can complain to them within 120 days. That he was not aware of the complaint by the consignees. In re-examination the witness stated that the airway bill was made on 13th December 1997 and that there was no instruction as to when the goods could have reached their destination although naturally they could have reached within 48 hours. He admitted that there was delay on their part which they apologized. He stated that the United States Customs confiscated the goods of which they had no control.

DW2 Fred Mwangi Gitonga, the 2nd respondent's commercial Manager for East Africa testified that it is the Airway bill that forms the contract between parties. He denied that the airline gave any assurance that the goods could be received by 17th December 1997 although they confirmed that space for transportation of the cargo had been secured for shipping of the goods. However, that due to operations constrains the goods were put in another flight other than the one confirmed. That they did not guarantee that goods would be received on a certain date. He stated that charges/freight charges would be paid by consignees who have never complained that goods were never received.

In cross examination DW2 stated that they could not assure customers of the date of arrival of goods and in this case, that although they were informed that goods be received at a particular date, they were unable to deliver due to operational constrains and that the agents were aware that goods would not be delivered as agreed. That though time was of essence to the contract, the reverse side of the Airway bill deals with conditions of the contracts. In re-examination he stated that aircrafts could be delayed and goods may not be connected to a flight it was expected.

In her judgment, the trial magistrate found that the 1st defendant was an agent of the plaintiffs for purposes of forwarding the consignment to the 2nd defendant and that the evidence showed that the 1st defendant did what was required of it hence no blame could be assigned to it.

The trial magistrate also found that there was no written agreement between the defendants or between the plaintiff/appellant and 2nd defendant that the consignment would be delivered by 17th December 1997. She also found that the charges for freight were not paid and that no negligence was proved. Further, that the Airway bill P exhibit 12 which formed the basis of the contract was a contract between the consignees and the defendants/respondents and that the fact that 1st respondent were the appellant's agents did not make appellants parties to that agreement hence the appellants could not enforce a contract to which they were not parties .

The trial court also found that there was no complaint for non delivery of goods within 21 days that failure by the consignees to make and complaints to the 2nd defendant as provided for under Article 26 of the Carriage by Air Act, the action did not lie. Further that in any event, assuming the plaintiffs/appellants were entitled to delivery of goods their first written complaint to the 2nd defendant/respondent on 10th March 1998 was about 3 months from the date of the of the Airway bill hence their action would still be time barred. She also found that even if the appellants were the right plaintiffs their claim was limited to USD 20 per kilograms of goods in accordance with clause 4 of the Airway Bill conditions; and that as the consignment weighed 225 kilograms , taking the value of the dollar to be shs 78 the amount due would be shs 351,000 not shs 417,600 as claimed. Nonetheless, on the basis that the plaintiffs/appellants had no locus standi in the matter, she dismissed their suit with costs to the respondents herein.

From the above revaluation and reexamination of the evidence both oral and documentary, submissions and authorities relied on by the parties respective advocates, the issues for determination in this appeal are:-

1. Whether the appellants were the rightful parties to claim for the delay/ loss of the consigned goods, and therefore whether there was privity of contract between the appellants and the carrier of the goods .
2. Whether the carrier was in breach of any terms and conditions of carriage by failing to deliver the goods on or before 17th December 1997.
3. Whether the appellant was entitled to compensation for the delay and eventual loss of the consignment and if so, what was the limit of compensation?
4. Whether the claim for delay, loss or damage was statute barred.
5. What orders should this court make?
6. Who should bear costs?

On the 1st issue of whether or not the appellants had locus standi in this matter and therefore whether there was privity of contract between them and the 2nd respondent carrier capable of enforcement.

The appellants strongly submitted that they are the ones who delivered the goods weighing 225 kilograms for shipment through the 1st respondent packers. On the other hand, the 2nd respondent seriously resisted that submission and contention and maintained that there was no privity of contract between them and the appellants hence the appellants had no locus standi to sue them and that only the consignor or consignees could sue on that contract. They relied on several authorities in support thereof whereas the appellants submitted generally.

The answer to that question lies in the provisions of Carriage by Air Act No. 2 of 1993 which imports the Warsaw Convention as amended by the Hague Protocol of 1955 and which is part of the Laws of Kenya by dint of Article 2(6) of the Constitution of Kenya 2010 which enact that any treaty or convention ratified by Kenya shall form part of the Law of Kenya under the Constitution.

Article 14 of the Warsaw Convention as amended by 1995 Hague Protocol is clear that both the consignor and consignee of goods can sue, in recognition of the fact that a consignor may simply be an agent of the consignee and therefore the latter cannot lose their right of entitlement where the former has no claim or interest in the consigned goods. The Article states:

“ The consignor and the consignee can respectively enforce all the rights given them by Article 12 and 13 each in his own name, whether he is acting in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.”

Stroud’s Judicial Dictionary, 4th Edition has a quotation from the case of **Mason V Lick Barrow 1 B1.H. 359** in which Lough Borough C.J. Stated:

“A bill of lading is the written evidence of a contract for the carriage and delivery of goods, sent by sea for certain freight. The contract, in legal language, is a contract of bailment. In the usual form of the contract, the undertaking is to deliver to the order, or assigns, of the shipper. The endorsement of the bill of lading is simply a direction of the delivery if the goods.”

The above quotation citing a bill of lading can be likened to an Airway Bill which is a legally binding contract between a consignor and the carrier and for which the consignee has a right to sue the carrier for enforcement.

The Airway bill dated 13th December 1997 was clear as to who the consignor and consignees were. P exhibit 12 is the Airway bill No. 125-7999 6803. The consignees /shippers are Airspace Forwarders Ltd P.O. Box 19101 Nairobi Kenya A/C Mbaabu. The consignees are George Mungai/Jane Kariuki, 2657 Normandale Apartments 2K California, and USA.

In **Western Digital Corporation and Others V British Airways PLC [1999] LLR Vol 2 Q.B(Com. ct)** David Steel J held inter alia:-

“.....(4) so far as damages to cargo was concerned , any action for damages must by virtue of Article 24(1) be subject to the conditions of the Convention including by reference from Article 24(2) the identity of the person having the right to bring proceedings. These persons were prescribed by Article30(3) namely the consignor or the consignee who was entitled to delivery. The latter being the person required to make timeous complaint pursuant to Article 26.

(6) The owner of consignment who was not the consignor or the consignee named in the Airway bill (or a person to whom the consignor was ordered the delivery to be affected) was not able to make a claim against the carrier under Article 18.

(7) Article 30(3) referred to the consignee who is entitled to delivery; thus the right of action accrued to the person to whom delivery was ordered to be effected under Article 12 that being the same person entitled to delivery under Article 26 and thus required to give notice of complaint

(8) The mere fact that the plaintiff was an undisclosed principal of the consignee did not accord title to sue.The important criteria was that the carrier must know the identity of the person or organization with which it was dealing not least for the purposes of effecting delivery; the Convention focused on the consignor being the person making out the Air way bill and signing it as consignor, and on the consignee being the person named in the Airway bill, only if the consignor nominated a new person to whom delivery was to be made was someone other than the consignee named in the Airway bill entitled to bring to delivery and thereby to bring suit.

(9) As a matter of analysis,authority (and practicality) the Convention did confine cargo loss

and damage claims to proceedings instituted by the consignor or the consignee entitled to delivery.”(Emphasis added).

The Learned Judge further at page 385 stated that:

“ Nor am I able to accede to the plaintiff’s submissions that the Convention, while expressly dealing with rights of action by consignors and consignees is nonetheless leaving open all rights of suit by others, with, say, a proprietary interest, but who are not consignors or consignees.” (Emphasis added).

From the above persuasive and very relevant authority, it is clear that no court of law can rewrite a contract for parties and imply parties that were never privy to the contract by carriage. The 1st respondent was the consignor and therefore only it or the consignees could bring action for any delay, loss or damage to the consigned goods.

In **Raoul Colinvaux’s Carver’s Carriage by Sea, VOL 2 (London: Stevens 1971) Page 46-47 paragraph 56, 57**, it is persuasively stated as follows:

“ When goods are delivered to a carrier without any specific contract being made, the right to sue for breach of duty on the carrier’s part appears to be in the person to whom the goods at the time of the bailment, or who is to bear the risk of the transit. If the actual sender if acting on the owner’s instructions, the latter is regarded as the contracting party, and he becomes entitled to sue for the goods, and is liable to pay the freight, and otherwise to perform the implied contract. But when a special contract it made with the carrier, its terms must be looked at, and If it appears that the shipper was himself the contracting party, he is the person able to sue, and liable upon the contract, although he may have been acting for the benefit of another, and may have no interest in the goods.”

In the instant case, the goods were delivered/consigned by the 1st respondent to the 2nd respondent. The 1st respondent is listed in the Airway Bill as the consignor/shipper. The Airway Bill is the legally binding contract between the two defendants. The Consignee is by law entitled to sue on that contract. The appellants herein, though interested in the goods, were not parties to that contract which is governed by a specific legal regime, the Carriage by Air Act of 1993 importing the Warsaw Convention as amended by the Hague Protocol, 1995. That contract, being a voluntary legal burden created by parties for themselves, the court’s role is only, upon being moved by a party to see to the play of the governing rules and in this case, the governing rules are the Warsaw Convention and the Carriage by Air Act.

From the foregoing, therefore, it follows that the rightful parties to claim on that Airway Bill which is a binding contract is the consignor 1st respondent and or the consignees and no other. To find otherwise would be to re-write the law relating to contract a between the parties thereto by introducing strangers. What the appellants have heavily submitted on is general common knowledge which, regrettably, is not supported by law and therefore inapplicable in the circumstances of this case. As by law established, it matters not that the appellants had proprietary interest in the consigned goods. They had an opportunity to instruct the 1st respondent who prepared the Airway Bill to indicate who the consignor was, and the consignor is clearly indicated as the 1st respondent. That being the case, and in the absence of any amendment to the Airway Bill, the appellants herein remain strangers to that contract of carriage with the 2nd respondent. I hasten to add that it clearly appears that the 2nd appellant who is an advocate of the High Court of Kenya and Director of the 1st appellant did not read the Carriage by Air Act and or the Warsaw Convention regarding such contracts before instituting such suit.

The law is clear that necessary parties before the court are the ones that confer jurisdiction to the courts to determine a dispute and when proper parties are not before the court, the court lacks jurisdiction to hear and determine a dispute. See **Football Kenya Federation V Kenya Premier League Ltd HCC 69/2015 e KLR**. Proper parties before a court of law are those to whom rights and obligations accrue as may be decided by the court. The above rule of law, though breeding hardships and inconveniences remain

unmitigated. It has been so uniformly pronounced that despite its logical imperfection and actual inconvenience. This court is not about to disturb it with a view to upsetting the status quo as it has not been moved to do so, with sufficient material, in light of its universal application by the courts globally. In other words, there must be a suable party before a court, as it is that suable party who is essential to the jurisdiction whether by compulsory or by voluntary submission (See **Baskins V United MineWorkers [1921] 150 ARK,398,406,234 S.W. 464,461 quoted in 33 Yale Law Journal 383[1924]**).

It is for the above reasons that I agree with the trial magistrate that the appellants herein had no locus standi in the suit and that there was no privity of contract between them and the 2nd respondents.

On the second issue of whether the carrier was in breach of any terms and conditions of carriage by failing to deliver the goods on or before 17th December 1997, the appellant vigorously and with some support from the 1st respondent submitted that there was an oral contract between the parties that goods were to be delivered by 17th December 1997 since the consignee was to leave/depart from Los Angeles by that date. However, there was no endorsement on the Airway Bill that the goods had to reach Los Angeles by 17th December 1997. Article 11 of the Warsaw Convention provides that:

“1. the Airway Bill or the receipt of the cargo is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein”.

Under Article 8 of the Warsaw Convention: ***“The airway bill and the receipt for the cargo shall contain:***

- a. ***An indication of the places of departure and destination.***
- b. ***If the places of departure and destination are within the territory of a single high contracting party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place, and***
- c. ***An indication of the weight of the consignment.”***

The above clauses do provide for time of delivery but give an allowance for the goods being carried by other means and by another carrier and via intermediate stopping places which the carrier deems appropriate.

The above position is also fortified by Article 5 of the Warsaw Convention which states that:

“ The impossibility of using at points of transit and destination, the other means which could preserve the record of the carriage referred to in paragraph 2 of the Article does not entitle a carrier to refuse to accept the cargo for carriage.”

In this case, there was no evidence that the Airway Bill was varied by another contract and if there be any such variation indicating the time of delivery then it had to be in writing. This is so, for, as correctly submitted by the 2nd respondent’s counsels, an oral contract cannot vary the terms of a contract which is required by law to be in writing.(See **Kinyanjui & Another V Thande & Another (supra); Matiri & sons V Nithi Timber Co-operative Society Ltd (supra) and Deposit Protection Fund Board V Sunbeam Supermarket Ltd & 2 Others (supra)** which espouse the above stated principle.

Accordingly, I find that there was no breach of contract by the non- delivery of the consignment on or before the 17th December 1997 as there was no such contract that time was of essence. The purported oral assurances given by the 1st and 2nd respondents were unenforceable in the circumstances of this case. They were in my view, mere marketing strategies which did not form part of the contract and neither could they vary a written contract of carriage by air.

On the issue of whether the claim for delay/loss or damage was statute barred, the 2nd respondent submitted that the appellant’s suit was statute bared, assuming it was the right plaintiff and so did the trial court find. Under clause 12:1:3 and 12:1:4 of the contract of carriage on the reverse of P exhibit No.

12 it stipulates that:

“A person entitled to delivery must make a complaint to the carrier in writing in case of;-

- 1. Delay- within 21 days of the date the goods are placed at his disposal and of non delivery of the goods within one hundred and twenty (120) days from the date of issue of the airway bill.”***

According to the 2nd respondent, no complaint was made by the person entitled to delivery and **in writing within** 21 days from the date the goods were expected to be delivered. Thus, neither the consignee nor the consignor complied with the above clauses in the Airway bill, which is also a statutory provision under Article 26 of the Warsaw Convention as imported into the carriage by Air Act, 1993. The Article provides that:

“1.

- 2. In the case of damage, the person entitled to delivery must complaint to the carrier forthwith after the discovery of the damage, and, at the latest, within 7 days from the date of receipt in case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty one days from the date on which the baggage or cargo have been placed at his disposal.***
- 3. Every complaint must be made in writing upon the document of carriage or by separate notice in writing dispatched within the time aforesaid.***
- 4. Failing complaint within the time aforesaid, no action shall lie against the carrier , save in the case of fraud on his part.”***

The consequences of non compliance with the above clause are clear- that no action lays. This position was stated in the case of **Edher Ahmed V. The General Manager of EAR & H Administration** (supra) where it was held that:

- i. Section 92(1) of the East African Railways and Harbours Act regulates the procedure to be followed in order to be entitled to compensation and prescribes the steps to be taken for seeking compensation for non-delivery of goods; failure to comply with the prescribed steps and within the time limit deprives the person concerned of his right to compensation, but not, his right of cause of action;***
- ii. The plaint disclosed a cause of action but the plaintiff was not entitled to compensation since he had failed to comply with the provisions of Section 92 (1) of the Act.”***

Section 92 of the East African Railways and Harbours Act is similar to clause 12 of the Airway Bill terms and conditions of carriage and Article 26 of the Warsaw Convention . The said section 92 provided thus:

“ 92(1) No person shall be entitled to compensation for non-delivery of the whole of a consignment of goods, or of any separate package forming part of the consignment, accepted by the administration of carriage or warehousing unless a claim in writing giving such particulars as may reasonably be necessary is given to the commissioner within six months of the date upon which such goods were accepted by the administration.”

In that case of **Edher Ahmed V. The General Manager of EAR & H Administration** , the court found that although the goods carried were ruined and lost by reason of the negligence of the defendant’s servant, the plaintiff’s suit was dismissed because the defendant was protected by the contract in writing which the plaintiff’s entered into with them and therefore that, there being no breach of that contract in the sense that the plaintiffs did not observe it themselves and make their claim in the proper time, within the contract time, judgment must be for the defendants.

In the instance case, assuming that the appellants are the right claimants against the respondents, the 1st letter written to the 1st respondent (consignor) not carrier as stipulated in the Convention and the

conditions of carriage contained in the Airway Bill, is one dated 5th January 1998 referring to the numerous telephone conversations that had not elicited any responses from the 1st respondent consignor, 19 days after the date the baggage was to be delivered. That letter indicates that it was copied to the British Airways World Cargo Limited, the 2nd respondent and asking the 1st respondent to instruct the 2nd respondent to return the goods to the appellants as the consignee had rejected them due to the delay. The next letter which was written by the consignor/1st respondent to the carrier is dated 16th February 1998 about one month from the date when the goods ought to have been delivered as claimed. The 1st respondent was communicating that the shipper had requested the shipment back due to the delay and stating "despite our several request to return the shipment back to Nairobi." However, as at that date, there is no evidence that the consignor or consignee had in writing complained of the delay to the carrier in writing as stipulated in the Convention. Furthermore, as I have stated earlier, the Consignor or Consignees are not the claimants in the instant case.

Then the appellants on 9th March 1998 wrote to the 1st respondent for failure to deliver goods to Los Angeles on or before 17th December 1997 as a result of which the consignee had suffered irreparable loss and damage and asking for reshipment back to Nairobi.

The above letter of 9th March 1998 was not written or copied to the carrier. It was accusing the consignor (shipper) who ought to be lodging a claim and neither was it responsible for carriage and therefore a claim that it returns the goods was frivolous. In my view, such communication was misdirected communication since a consignor could not be responsible for the non delivery where it consigned to the carrier. Only the carrier could be asked to account for the goods or for the delay thereof, assuming that the appellants are the right claimants.

The above said letter was followed by the letter dated 10th March 1998 written to the 2nd respondent carrier wherein the claimant was Midland Gems Ltd through its advocates S.G. Mbaabu & Company Advocates threatening legal action for breach of contract of carriage and demanding immediate reshipment of the consignment. All the other correspondence were by the 1st respondent and outside the stipulated complaints period.

On the issue of whether the appellants were entitled to compensation for the delay and eventual loss of the consignment and if so, how much was the limit of compensation, first and foremost, the entitlement to compensation was subject to the proper party suing for damages for delay/loss. I have already found the appellants were by law strangers to the contract of carriage. They are incapable of suing to enforce that contract as they were never privy to it. But assuming that they were proper parties with locus standi in the matter, their entitlement would further be subject to their complaining in writing within the statutory/contractual stipulated period as per Article 26 of the Convention and Clause 12 of the Airway Bill (conditions of carriage). Having found that their claim was statute barred, it follows that they could not be compensated for the delay/loss or damage. But assuming that they complained within the statutory/contractual period and claimed within the statutory period, then they would in this case, be entitled to compensation for the loss only if they proved that the consignment was not delivered within a reasonable period or unless there was fraud. In this case, it is clear that there was no contract for delivery of the goods on or before 17th December 1997. There was therefore absolutely no basis upon which the claimant would seek to enforce a contract that was nonexistent, regarding time of delivery. There is evidence on record that some goods arrived on 18th December 1997 while others arrived on 21st December 1997 but there was no consignee to receive them. In my view, even if the goods were expected to be received by 17th December 1997 delivery on 18th and 21st of the same month was not unreasonable in the circumstances and therefore in the absence of any specific contract on time of delivery, I hold that the 2nd respondent would not be liable for the delay. On loss, there is evidence by the 2nd respondent that the consignees were contacted for collection of the goods as soon as they arrived in Los Angeles. The consignees were nowhere. They did not collect the goods and as a result the United States Customs Department confiscated and destroyed them.

Assuming the appellants were entitled to compensation for the delay and or loss of the goods, their claim

would be limited to USD 20 per kilogram of 225 kilograms and no more. This is premised on the condition of the contract of carriage limiting liability, the shipper having failed to declare a higher or actual value of the carriage on the Airway Bill and or paying a supplemental charge, which would have increased such limitation of liability.

The above position is fortified by the provisions of Section 6 of the carriage by air Act, 1993 which provides that:

- i. Limitation of liability.
- ii. The limitations on liability in Article 22 of the Convention shall apply whatever the nature of the proceedings by which liability may be enforced and, in particular.
 - a. Those limitation shall apply where proceedings are brought by a tortfeasor to obtain contribution from another tort feasor; andunder Article 18 of the Carriage by Air Act, the carrier is liable for damage sustained in the event of the destruction or loss of or of damage to, any registered baggage or cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.”

In addition, Article 22(2) of the Convention provides that the carriage registered baggage and of cargo, the liability of the carrier is limited to 250 Francs per kilogram unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplemental 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 sum is greater than the consignor’s actual interest in delivery at destination.

- b. In the case of loss, damage or delay of part of registered package, cargo or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier’s liability is limited shall be only the total weight of the package.

Pursuant to Article 24 of the convention any action for damages can only be brought subject to the conditions and limits set out in the convention.

In addition, Article 24 (1) of the Act and 24(2) of the Convention are clear that such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

The contract of carriage as per the relevant airway bill is very clearly printed at the extreme right side of the first page that “ ***the shipper’s attention is drawn to the notice concerning carrier’s limitation of liability. shipper may increase such limitation of liability by declaring a higher value of carriage and paying a supplemental charge if required.***”

The notice concerning carrier’s limitation of liability is at the back (reverse) side of the Airway bill. It limits the carriers’ liability to USD 20 per kilogram for any claim for loss of the goods. It is for that reason that I wholly agree with the 2nd respondent’s counsel’s submissions that the appellant would in any event be entitled to USD 20 per kilogram thus USD 20 x 225 kilograms the convertible sum at the time as provided for in Article 22(5) of Convention Act. However, as the appellants were fatally none suited, they get nothing.

The appellants also complained that the proceedings were not eligible and that the exhibits were missing. However, this court has read all the proceedings as certified by the court below. They are legible and coherent. This court has also seen and perused all the exhibits produced in the lower court in their original format and as contained in the Supplementary record of Appeal dated 16th October, 2009 which also contained the submissions by the defendant. The challenge by the appellants is therefore misplaced and accordingly dismissed.

In the end, I find that the trial magistrate’s judgment was sound in law and fact. I uphold it and proceed to

dismiss the appellant's appeal herein with costs to the 2nd respondent only since the 1st respondent did not make or file any submissions in this appeal.

Dated, signed and delivered at Nairobi this 23rd day of February 2016.

R.E. ABURILI

JUDGE