REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 601 OF 2002

KLM ROYAL DUTCH AIRLINES..APPELLANT

VERSUS

DOMITILLA ICHA SIMIYU..RESPONDENT

(Being an appeal from the judgment and order of P Gichohi (Mrs.) SPM delivered on 8th October, 2009 in Milimani chief Magistrate's Court Case No. 2517 of 2006)

JUDGMENT

1. The Appellant, Royal Dutch Airlines, was sued by the Respondent, Domitilla Icha Simiyu for general and special damages suffered when the Respondent's baggage went missing while she Respondent was a lawful fare paying passenger in the Appellant's aircraft No. 566 Vol. AF 622 enroute to Bordeau, Paris from Nairobi via Amsterdam. The Respondent blamed the loss of the checked in baggage on the Appellants negligence.

2. The Respondent particularized her special damage claim as Ksh.313.00/= for loss of clothings, two suitcases and gifts. A further Kshs.619,248.06/= was claimed for expenses for purchasing personal effects after her baggage went missing. The Respondent also claimed general damages under the Air Carriage Act, 1993.

3. The Appellant filed a statement of defence and denied the Respondent's claim. The Appellant admitted that the Respondent was their passenger in flight No. 566 but denied the loss of the checked in baggage. It was further stated that if the Respondent lost any baggage, then the loss was not due to the Appellant's negligence. It was further stated that the Appellant's liability was limited by the Carriage by Air Act and the conditions set out in the ticket.

4. During the trial in the lower court, judgment was entered on admission for the sum of 100 Euros on 9th January, 2007. The case than proceeded to the hearing of the rest of the claim. At the conclusion of the case judgment was entered in favour of the Respondent for the sum of Kshs.46,500/= which was the equivalent of 620 U.S dollars as per the provisions of Article 22 of the Warsaw Convention. A further sum of Kshs.290,888.26 was also awarded as special damages.

5. The Appellant was dissatisfied with the judgment in respect of the award of the Kshs.290,888.26 special damages claim. The Appellant appealed to this court on the following grounds;-

> **"1.The learned magistrate erred in failing to hold that the respondent was not entitled to**

recover any sum over and above the amount recoverable under the First Schedule to the Carriage by Air Act.

2. The learned magistrate erred in failing to hold that the First Schedule to the Carriage by Air Act applied to all questions relating to the defendant's liability and the plaintiff did not have access to any other remedies whether under common law or otherwise.

3. The learned magistrate erred in awarding the respondent Kshs.290,888.26 over and above the maximum of kshs.46,500/- recoverable under the First Schedule to the Carriage by Air Act."

6. The appeal was canvassed by way of written submissions. I have considered the submissions and the cited authorities.

7. This being the first appellant court, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)".

8. Looking at the grounds of appeal, they all revolve around the question of what is recoverable under the Carriage by Air Act. It is also common ground that the flight in question was governed by the Carriage by Air Act.

9. The Carriage by Air Act 1993 (hereinafter Act) in it's preamble states as follows:

"An Act of Parliament to give effect to the convention concerning international carriage by air, known as "the Warsaw Convention as amended by the Hague Protocol, 1955." To enable the rules contained in that Convention to be applied, with or without modifications, in other cases and in particular, to non-international carriage by air, and for connected purposes. "

The Warsaw Convention is therefore applicable in the case at land.

10.Section 6 of the Carriage by Air act provides for limitation of liability as stipulated in article 22 of the Warsaw Convention (hereinafter Convention). The first schedule of the said Act provides for Convention for the unification of certain rules relating to international carriage by Air as amended by the Hague Protocol of 1955. Article 22 (2)(a) provides as follows:

"In the carriage of registered baggage and of cargo the liability of the carrier is limited to a sum of two hundred and fifty Francs per kilogramme, 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 supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the passenger's or consignor's actual interest in delivery at destination."

12. My understanding of the above provision is that the liability of the carrier has been limited in terms of the damages payable. The aforestated provisions of the Convention have been the subject of various local

and international decisions. See for example the following cases:-

(a) **Kihungi & another v Iberia Airlines of Spain SA[1991] KLR** where the Court of Appeal stated as follows:-

"On the question of damages Mr. Obura urged that despite provisions of Article 22 if the appellants (plaintiffs) could prove that they had incurred further losses then they could recover the same. The appellants had proved special and general damages and the award of damages, therefore, should not be limited to 125,000 French Francs. There is no merit in Mr. Obura's submission. The trial judge having taken into account limitation on quantum of damages imposed by the provisions of Article 22 of the Convention and section 1(4) of the first schedule to the Carriage by Air (Colonies, Protectorates and Trusts Territories) order, 1953, had in our view correctly assessed the liability to the maximum allowable amount of 125,000 French Francs converted into Kenya Shillings at the rate of exchange as at the date of judgment."

(b) **Sidhu v British Airway PLC [1997] AC 430 page 175** where the House of Lords posited as follows:

"Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention."

13. It is not in dispute that the Respondent's baggage was 31 Kg. The lower court therefore arrived at the correct holding in calculating the Respondent's claim under the Act as 31Kg multiplied by 250 francs which came to 7750 francs. This was then converted to 620 U.S dollars which came to Kshs.46,500/= as the entitlement in respect of the claim for the lost baggage.

14.The trial magistrate's award of Kshs.290,999.26 as special damages was however not established by way of evidence. Article 22 (2) (a) of the Warsaw Convention provides for a special contract wherein a carrier and a passenger may agree on a higher limit of liability. There is no evidence of the parties here having entered into any such contract.

15. The other exception to the limit of liability if found in Article 25 of the convention which states as follows:-

"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

Once again no intent to cause such damage or recklessness was proved by way of evidence. (See for example **Goldman v Thai Airways International Ltd (WLR 1983) CA).**

16. My conclusion is that the Respondent was not entitled to the award of Kshs.290,888.26 special damages awarded. This was beyond the limit set by the Convention. It also amounted to double compensation as the Respondent was compensated for the loss of the baggage then compensated for replacing the lost items!

17. In my view, the circumstances of this case are distinguishable from the case of **Ethiopian Airlines v Alfred Gborie High Court of Uganda at Kampala C.A. No. 32 of 1992** which was cited by the Respondent's counsel. In the said Ugandan Case the baggage was not checked in. It was also not hand

baggage. The baggage had been taken away from the passenger who was issued with a “baggage identification tag.” The judge held that the existence of a separate contract was therefore proved which was not governed by the scope of the ticket or the Warsaw Convention. As analyzed above, the circumstances of the case at hand are different.

16. With the foregoing, I find the appeal has merits and is allowed. Consequently, the judgment of the lower court in respect of the award of Kshs.290,888,26 is set aside. The award of Kshs.46,500/= is upheld less Kshs.9,100/= paid to the Respondent prior to the filing of the suit. The total comes to Kshs.37,400/= plus the costs in the lower court and interest. Taking into account the circumstances of the case, each party to meet own costs of this appeal.

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

B.THURANIRA JADEN

JUDGE