REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 60 OF 2000

NGUNJIRI ……. PLAINTIFF

VERSUS

BRITISH AIRWAYS WORLD CARGO…..…. DEFENDANT

JUDGMENT

The plaintiff filed this suit against the defendants, claiming that on 23rd November, 1999, the parties entered into a written agreement and that following the said agreement, the defendant was required to transport ten (10) packages of assorted handicrafts weighing 382 kg, from Jomo Kenyatta International Airport (JKIA) to Raleigh in the USA. That the defendant was under the said agreement, required to deliver the said goods to the plaintiff's agent in the USA, hereinafter referred to as the consignee.

The said goods were for an exhibition which the plaintiff had organized at Raleigh on 3rd December, 1999 and the plaintiff hoped to make huge profits at the said exhibition. She also hoped to procure at the exhibition, orders for the supply of similar goods to customers in the USA. According to paragraph seven (7) of the amended plaint it was a term of the contract, that the defendant would be liable to the plaintiff in damages for any damage caused to the goods or, any delay occasioned during the carriage of the said goods. It is alleged that the defendant failed to deliver the said goods at Raleigh by the 26th November, 1999 as agreed and that they were delivered in a damaged state on or about 22nd December, 1999, long after the exhibition, in which the goods were required. It is against that background that, the plaintiff claims against the defendant special damages amounting to Kshs 9,396,187.20/= arrived at as follows:-

(a) Damages for delay @ 20 US dollars per kg for 328 kg @ Kshs 80/= per US dollar ..... Kshs 611,200.00

(b) Loss of profit occasioned by delayed goods..... Kshs 395,763.00

(c) Expected order profits for Christmas sale from a minimum of 3 wholesalers ..... Kshs 1,187,289.00

(d) Expected business profit for the year 2000 at Kshs

400,000 per month..... Kshs 4,800,000.00

(e) Loss of profits due to delay in finalizing the case and loss of business opportunities in symposiums in

the USA .....Kshs 1,800,000.00

(f) Damage to the cargo ..... Kshs 579,200.00

(g) Telephone charges ..... Kshs 22,735.20

The plaintiff further claims damages for loss of business opportunity, inconvenience and distress.

The plaintiff's case is that she trades as "African Hut", in partnership with her daughter who was the consignee and who is a student in the

USA. PW 1 being desirous of establishing some trade contacts in the USA, purchased an assortment of handicrafts and sent a consignment to her said daughter in the USA and they were sold successfully. Upon realizing that Kenyan products could sell in the USA, PW 1 decided to send a bigger consignment to the said daughter for sale at an exhibition that was to take place at St Augustine's College, Raleigh town in North Carolina. The said exhibition was to take place on 3rd December, 1999. Her said daughter had registered to take part in that exhibition (exhibit 16 refers).

PW 1 bought Kisii soap stone products, Kenyan *kiondos* and Masai wooden crafts, necklaces and belts all weighing 382 kg. All these were bought in Mombasa, Ukambani and at the Masai market in Nairobi. She handed over the goods to a clearing agent by name M/s Contact Freight Limited based at JKIA, on 23rd November, 1999. She explained that the goods were meant for an exhibition scheduled to take place on 3rd December, 1999 and her clearing agent recommended the defendant as a reputable carrier. She had used the defendant before and she approved that the defendant should convey the goods. The agent then packed the goods and handed them over to the defendant on 23rd November, 1999. In return, an air waybill (exhibit 1) was issued by the defendant. As the handicrafts were very fragile, this was indicated on each of the ten carton boxes and the air waybill had the information that the goods were very fragile and should be handled with care. A total of Kshs 96,789/= was paid as freight charges, including Kshs 755/= on account of air waybill fee. (See exhibit 1 and official receipt exhibit 9). According to the itinerary that the defendant provided (Exhibit 2), the goods were supposed to arrive in Raleigh on 26th November, 1999 at 8.00 am, but that was not to be. On 26th November, the consignee advised that the goods had not arrived and on 9th December, 1999, as the whereabouts of the said goods was unknown, the plaintiff's counsel wrote to the defendant demanding that the goods be dispatched immediately, to their destination and notifying the defendant that the plaintiff intended to file suit against it (See exhibit 3). The goods were finally delivered by the defendant to the consignee on 22nd December, 1999, and the said consignee signed a customs document (Exhibit 4) to acknowledge receipt from the defendant. Exhibit 5 shows that the boxes were delivered burst open and crushed and the goods were broken. The plaintiff informed the defendant of the damaged state in which the goods arrived and demanded 9,640 US dollars on account of damage, delay and loss of profit as well as telephone charges to the USA and to the defendant. The damages for delay were calculated at the rate of US dollars 20 X 382 kg making it US dollars 7,640. The basis of that particular claim is paragraph 4 of the conditions on the reverse of the air way bill (Exhibit 1).

By a letter dated 3rd February, 2000, (Exhibit 7) the defendant's London office wrote to the consignee requesting a breakdown of the amount claimed and evidence to support the said amount. This letter was posted to PW 1 by the consignee in Raleigh and a total of 22 receipts were produced (Exhibit 8) for a total of Kshs.74,970/= which is the purchase price of the handicrafts which are in dispute.

The plaintiff made telephone calls to the USA and to the defendant, trying to locate the goods between 1st December, 1999 and 21st December, 1999 and she produced the telephone bill for December, 1999 to show that a sum of Khs 7,216.80 went towards those telephone calls [Exhibit 10 (A)].

The calls made to the USA are clearly shown on it. The consignee in the USA on the other hand, made 34 telephone calls, trying to locate the cargo. They were made to various places eg New York, United Kingdom and Kenya, and that cost her 193/99 US dollars [See exhibit 10 (B)].

For the services which M/s Contact Freight Limited was to render, PW 1 paid a sum of Khs 104,467/= and was issued with the receipt (Exhibit 11). This amount includes the Kshs 96,789.80 which appears on

the air waybill (Exhibit 1). Thirteen photographs were also produced to show the state in which the goods were delivered (Exhibit 14). The wooden carvings and soap stone carvings arrived all broken up. According to the plaintiff, her loss was total. She had hoped that some people would attend the exhibition, like her handcrafts and place orders. She hoped that at least three wholesalers would place orders after the exhibition but that was not be.

She had anticipated a profit of Kshs 395,763/= after the sale, and again, this was not to be. This figure was arrived at taking into account the purchase price of each item that was in the consignment. Each item was given a price in terms of US dollars, once in the USA. Those details are of course lacking from the plaintiff's case. After the exhibition she hoped to establish continuous business with clients in the USA and hoped to earn about Kshs 400,000/= each month so that by the year 2000, she saw herself earning a total of Khs 4,800,000/=. In the absence of evidence on how all these figures have been arrived at, it appears to be very speculative as I do not see any confirmation that the plaintiff was going to be such a successful business lady. I also do not see any confirmation that three wholesale traders in the USA were ready to buy goods from the plaintiff had the cargo arrived on schedule for the exhibition. That too, appears to be more of speculation than the reality. In her testimony, she told theCourt that she hoped to get 7,240 dollars from the sales after the exhibition.

In cross-examination, she conceded that when she sent the cargo in dispute, she dealt with a clearing agent and not with the defendant and that the air waybill does not reflect the value of the goods which form the subject matter of this suit. The goods, she added, were packed by the said agent and his workers in her presence, and it was indicated on the packages that the goods should be handled with care as they were fragile. As a result of the damage to her goods, she said she was not able to continue in business.

The defendant did not call any evidence although it was given an opportunity to do so. On the undisputed testimony of the plaintiff therefore, I find that the following matters are not in dispute:

1. As per exhibit 1, an agent by the name Contact Freight Limited passed onto the defendant a consignment of goods weighing 382 kg in ten carton boxes to be delivered to one, Anne Gathoni at Raleigh in the USA,

2. According to the same exhibit, the plaintiff is the shipper of those goods. Her testimony that the consignee and herself were partners in a business called African Hut, and that each one of them had an equal claim over the goods is not disputed by any evidence from the defendant,

3. Those goods which were to be delivered to the consignee on 26th November, 1999 were not delivered until 22nd December, 1999,

4. The said goods were fragile in nature and were to be handled with a lot of care as is evident from the air waybill (Exhibit 1) but upon delivery, the boxes had been burst open and the contents crushed and broken.

This is clear from exhibit 5, and the photographs produced as exhibit 14.

Counsel for the defendant raised the issue of failure by the plaintiff to call as a witness, the clearing agent who dealt with the defendant, to say the state in which the goods were at the time they were handed over to the defendant. That may be so, but there is no evidence from the defendant to show that when it took possession and charge of the cargo, the goods were in a damaged state. Indeed the air waybill (Exhibit 1), confirms at the top right hand side corner, that the goods were accepted in apparent good order and condition, for carriage. I therefore find that when the defendant took charge of the cargo, the goods were in a good state and that when they were delivered to the consignee, they were broken up, crushed and the boxes had been burst open. They were therefore damaged while in the charge and custody of the defendant.

He also raised the issue of *locus standi*. Article 14 of the Carriage by Air Act No 2 of 1993 clearly entitles the plaintiff to sue. Under Article 14, either the consignor or the consignee is entitled to bring this action.

The air waybill constituted a contract between the plaintiff and the defendant. Under clause 8.1 and 8.2 of the conditions of the contract, the defendant undertook to complete carriage with reasonable dispatch. The cargo which should have been delivered to the consignee on 26th

November, 1999 was not delivered until 22nd December, 1999. Having been handed over to the defendant on 23rd November, 1999, at JKIA Nairobi, the defendant took a total of 29 days to deliver the cargo to the consignee in the USA. This delay is unbelievable and the defendant cannot claim to have acted in accordance with clause 8.1 or 8.2 of the contract of carriage. The defendant obviously acted in breach of those two clauses.

By virtue of clause 9 (nine) of the contract of carriage, the carrier (defendant) is liable for the goods during the period the said goods were in its charge or the charge of its agent. This of course is subject to the conditions set out in the contract. I have earlier found that the goods were damaged while they were in the charge of the defendant or its agents and the question now is, what the plaintiff is entitled to and whether or not the

Warsaw Convention and its provisions are applicable to this case. According to counsel for the defendant, the Warsaw Convention, on International Carriage by Air applies to the case while counsel for the plaintiff in his submissions urged the Court to find that, the Warsaw Convention, respecting the limit of the carrier's liability does not apply. He however concedes that, the said Convention is now part of Kenyan Law as per the preamble to the Carriage by Air Act, 1993. The starting point is the air waybill. On the reverse of the said bill, are conditions of the contract, but above that, there is a notice concerning the carriers' limitation of liability. I shall reproduce that notice below because counsel for the plaintiff relies on the wording of the said notice in urging the Court to find that the said Convention, respecting the limit of the carriers' liability should not apply to this case. The said notice is in the following terms:-

"If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may (underlining mine) be applicable and the convention governs and in most cases limits the liability of the carrier in respect of loss, damage or delay to cargo to 250 French Gold Francs per kilogram ..... The liability limit of 250 French Gold Francs per kilogram is approximately US $ 20 per kilogram ..... "

Because of the use of the words that, "the convention may be applicable", counsel for the plaintiff urged the Court to find that there are situations when the Warsaw Convention may not be applicable. In the alternative, the said counsel urged the Court to find that the convention, on the issue of limitation of carriers liability, does not apply because in the circumstances of this case, the defendant should not be allowed to use the limits of liability as provided in the Warsaw Convention. The preamble to

The Carriage By Air Act No 2 of 1993, provides that it is:-

"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."

It is therefore abundantly clear from the preamble to the Carriage by Air

Act 1993, that the Warsaw Convention, as amended by the Hague Protocol

1955, is part of Kenyan Law on carriage by air and it applies to this case.

Under Article 18 (I) of chapter III of the first schedule to this Act, hereinafter referred to as, the Act, the carrier (defendant) is liable for damage sustained in the event of the destruction or loss of, or of damage to any cargo during the carriage by air. Article 19 also makes the carrier liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

Taking into account the fact that by the time they delivered the cargo to the consignee in Raleigh USA, the ten carton boxes had been burst open and the contents had been crushed and broken up, and further taking into account the fact that the cargo which should have been delivered to the consignee in Raleigh USA on 26th November, 1999, was not delivered until 22nd December, 1999, in the state in which the goods were, and in view of the fact that there is no explanation from the defendant as to what happened, all this is evidence of the gross recklessness with which the defendant and its agents handled the cargo in question. The cargo was clearly fragile and should have been handled with care. The ten cartons were labeled so and the defendant acknowledged that fact and indicated in the air waybill, that the goods were very fragile and ought to be handled with care. With the goods so clearly marked, the fact that they were delivered with cartons burst open and goods crushed and broken, is evidence that the defendant and its agents deliberately refused to follow the instructions and warning on each of the ten carton boxes and handled them recklessly. They knew or ought to have known that the reckless manner in which they handled the plaintiff's fragile goods would lead to damage. The defendant cannot therefore limit its liability to 250 French Francs (20 US dollars) per kilogram.

The evidence by the plaintiff was that her loss was total and as there is no evidence from the defendant to the contrary, I find that as a result to damage to the goods, the plaintiff suffered a total loss. The air waybill, which is the contract document, condition 2.1 of the conditions therein binds the parties and it provides that the carriage was subject to the conditions relating to liability established by the Warsaw Convention when such carriage is not "international carriage" as defined by the Convention. The carriage subject of this suit was international carriage and so, article 22

(a) of the Convention applies. It reads 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 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 supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum ....."

The value of the goods was not declared. This is clear form the air waybill (Exhibit 1). We are here dealing with a case of total damage to the goods and as their value had not been declared, the plaintiff is entitled to is damages at the rate of 20 dollars per kilogram of the cargo. The cargo weighed 382kg X 20 dollars = 7,640 US dollars.

I have earlier found tht the defendant cannot limit its liability herein because with the goods clearly marked as fragile, to be handled with care, the defendant and/or its agents had recklessly handled the said goods knowing very well that, that would lead to damage. Article 22 of the Convention clearly ousts the limit of liability if it is shown that the damage to the goods was as a result of the act or omission of the carrier, his servants or a gents, done with intent to cause damage or recklessly and with knowledge that damage would probably result. The plaintiff is therefore entitled to recover the moneys paid to the agent as freight and agent's fees, at sum of Kshs 104,467/=. She incurred expenses by way of telephone bills for the calls made while trying to trace the cargo. The telephone bill produced was for Kshs 7,216.80. The consignee also incurred telephone expenses trying to trace the cargo. Her bills add to 193.99 US dollars.

The plaintiff is entitled to recover all this. In view of the fact that I have already awarded damages amounting to 7,640 US dollars for damage to the cargo, no award will be made to the value of the goods. The evidence of the plaintiff on loss of profits is speculative and I have found it difficult to see the basis upon which the loss of profit can be calculated. I shall not therefore make any award on loss of profits.

I therefore enter judgment for the plaintiff against the defendant in the following terms:-

1. Damage to the cargo .....$ 7,640

2. Consignee's telephone bill $193.99

U S dollars 7,833.99

3.Freight and Agent's charges Kshs104,467.00

4. Plaintiff's telephone charges .....Kshs 7,216.80 Kshs 111,683.80

According to the Daily Nation newspaper of today the rates fixed by Central Bank of Kenya is Kshs 76.4595 to one US dollar which I will round up to Kshs.76.5. The exchange rate applicable to the judgment is Kshs 76.5 for one US dollar. Therefore US dollars 7,833.99X76.5 translates into Kshs 599,300.23.The final judgment is for Khs 711,084.03 (Seven hundred and eleven thousand, and eighty four cents three).

The defendant shall pay to the plaintiff the costs of the suit and interest at court rates.

Dated and delivered at Nairobi this 3rd day of April, 2003

S.C. ONDEYO

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JUDGE