Kakay v Kenya Airways Limited (Civil Appeal 227 of 2020)
[2024] KEHC 7835 (KLR) (Civ) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 227 OF 2020

DAS MAJANJA, J

JULY 2, 2024

BETWEEN

MOHAMED KAKAY ..... APPELLANT

AND

KENYA AIRWAYS LIMITED ..... RESPONDENT

(Being an appeal against the Judgement of the National Civil Aviation Administrative Review Tribunal at Nairobi dated 22nd April 2020 in Complaint Case No. 1 of 2019)

JUDGMENT

Introduction and Background

1. On 23.07.2018, the Appellant filed suit in the Subordinate Court claiming that on 06.09.2017, he engaged the Respondent to ship his personal items; 6 suit cases and 1 flat screen TV ("the luggage") from Freetown in Seirra Leone to Brazzaville in the Republic of Congo. He stated that the luggage was delivered and received by the Respondent and that after the same was weighed, counted and confirmed, the Appellant filled in an air waybill dated 06.09.2017 ("the Air Waybill") containing information about inter alia the number of pieces composed of the luggage. The Appellant contended that the luggage was delivered to Brazzaville on 22.09.2017 but that 1 suit case containing valuable and sentimental items was missing. Upon inquiry the Appellant was informed that only 6 items as opposed to 7 were registered in the system and that it was impossible to search for the missing suit case. The Appellant accused the Respondent of breach of contract on account of the loss of the suit case which items he valued at US$ 40,000 and thus sought the same together with costs of the suit and interest.

2. In its response, the Respondent denied the claims against it. It stated that the Appellant only handed over 6 and not 7 items to the Respondent, consisting of 5 suit cases and the television set and that the same were duly delivered to the Appellant, thus, the Respondent stated it fulfilled its contractual

obligations. It denied the loss suffered by the Appellant and averred that if indeed he suffered loss and/or damage, then the Appellant did not declare the contents and the value of the luggage at the time of handing over the same for transportation. That the Appellant did not make a special declaration of interest in the delivery of the luggage as required under Article 22 of the *Convention for the Unification of Certain Rules for International Carriage* by Air-Montreal, 28 May 1999 ("the *Montreal Convention*").

3. The Respondent averred that if there was any liability on its part, then it was limited to 17 Special Drawing Rights per kilogramme as provided in the terms and conditions of the Carriage and Article 22(3) of the *Montreal Convention*. The Respondent thus urged the subordinate court to dismiss the suit against it.

4. At the pre-trial stage, the Subordinate Court transferred the matter, suo moto, to the National Civil Aviation Administrative Review Tribunal ("the Tribunal"). The matter was set down for hearing where the Appellant (Pw 1) testified on his own behalf. The Respondent did not call any witness and thereafter, the parties filed written submissions. After the Tribunal analyzed and evaluated the evidence, it rendered a judgment on 22.04.2020. It found that the Appellant had established that he handed over 7 items of the luggage and not 6 as contended by the Respondent, that the Appellant did not declare the contents of the missing suit case and that the Appellant did not prove the purchase of the items alleged to have been lost in the missing suit case.

5. The Tribunal concluded that the Respondent was wholly liable for the part loss of the luggage and that upon establishment of liability, then Article 22 of the *Montreal Convention* kicks in which the Tribunal interpreted that the consignor will only recover the full amount for the lost luggage if the same had been declared at the time of handing over the package. Otherwise, the Tribunal agreed with the Respondent that the only remedy was the sum of 17 Special Drawing Rights per kilogramme but that this was revised on 28.12.2019 to 22 drawing rights and this is what the Tribunal held the Appellant was entitled to. As such, the Tribunal stated compensation was limited to the weight shown in the air waybill dated 06.09.2017 where the total weight was indicated as 164 kilograms. However, the Tribunal noted that the actual weight of the missing suit case was not recorded and thus, the Tribunal adopted an average of the 7 bags which was approximately 23.42 kilograms and then applied the limit of liability translating to 22 x 23.42 making a total of 515.24 SDR. It applied the IMF conversion rate of 1SDR = 1.3729 US$ and computed the same as 515.24 x 1.3729 = 707.37US$ rounded off to US$ 707 translating to Kshs. 75,564.00 as per the CBK dollar rate which was awarded.

6. Being dissatisfied with the Judgment, the Appellant now appeals based on the grounds contained in the memorandum of appeal dated 21.05.2020. The court directed that the appeal be disposed by of written submissions but only those of the Appellant are on record. I will not rehash the same but make relevant references in my analysis and determination below.

Determination

7. The jurisdiction of the court in determining an appeal is set out under section 77 of the *Civil Aviation Act* (Chapter 394 of the Laws of Kenya). In determining this appeal, this court as the first appellate court is guided by the principle that it is its duty to re-evaluate the evidence independently and reach its own conclusion as to whether to uphold the judgment of the Tribunal. In doing so, the court must make an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).

8. The Appellant's appeal is largely on the sum awarded by the Tribunal. I do not think it is in dispute that this was in respect of the items in the missing suit case the Appellant claimed were purchased by

him and he pleaded that they were worth US$ 40,000. So essentially, this was a special damages claim. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177 explained that, 'Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.'

9. The Appellant does not dispute that even if he proved the purchased items in the missing suit case, the Respondent's liability was subject to Article 22 of the *Montral Convention* which provides for the Limits of Liability in Relation to Delay, Baggage and Cargo by a carrier such as the Respondent. Article 22(3) thereof provides as follows:

> In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the 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 it proves that the sum is greater than the consignor's actual interest in delivery at destination.

10. The Appellant stated that he was verbally informed by a representative of the Respondent, a Ms. KS, that he did not need to declare the items in the suit case that had valuables but that he insisted that he needed to declare. However, during cross-examination, he stated that he did not know that he had an obligation to declare the same. The Appellant did not also dispute that the Air Waybill had a term that the Appellant had to make a declaration for purposes of increasing the liability limit failure to which would leave any loss or damage subject to the compensation provided by the Montreal Convention.

11. From the record, it is evident that the Appellant never made any declaration of the items in the missing suit case in writing thus it is irrelevant that he made it verbally to the said Ms. KS. I agree with the Tribunal that the Appellant failed to make a declaration as required by the Air Waybill and the *Montreal Convention* and as such, the Respondent's liability for the loss of the missing suit case was limited to a sum of 17 SDRs per kilogramme. It was therefore immaterial to determine whether the Appellant had proved the purchased items in the suit case as the same, even if proved, were limited to 17 Special Drawing Rights per kilogramme as computed by the Tribunal.

12. The Tribunal's conclusion that the Appellant failed to declare the items in the missing suit case as sound and this disentitled him from the full cost of the items in the said suit case. The Tribunal rightly applied the limitation in the *Montreal Convention* on the Respondent's liability and I find no reason for the court to interfere as the Tribunal's decision was not perverse and was based on the law and evidence on record.

Conclusion and Disposition

13. The appeal lacks merit. It is dismissed with costs assessed at Kshs. 20,000.00.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JULY 2024.

D. S. MAJANJA

JUDGE