Frontier Optical Networks Limited v Ethiopian Airlines & 2 others (Civil Case 205 of 2019) [2021] KEHC 142 (KLR) (Commercial and Tax) (7 October 2021) (Ruling)

Neutral citation: [2021] KEHC 142 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 205 OF 2019

F TUIYOTT, J

OCTOBER 7, 2021

BETWEEN

FRONTIER OPTICAL NETWORKS LIMITED ..... PLAINTIFF

AND

ETHIOPIAN AIRLINES ..... 1ST DEFENDANT

AFRICA CARGO HANDLING LIMITED ..... 2ND DEFENDANT

KENYA REVENUE AUTHORITY CUSTOMS DEPARTMENT .... 3RD DEFENDANT

Nature of damages recoverable from an airline company where goods were damaged while under the charge of the airline company.

Reported by Kakai Toili

Aviation Law *- carriage of goods by air - air carrier liability for lost goods - where damages were sought for lost goods and for consequential losses that included loss of revenue - whether an airline that transported the goods could be held liable for the loss and particularly the consequential losses - Constitution of Kenya, 2010, article 2; Carriage by Air Act (Act No. 2 of 1993), section 3; Montreal Convention, 1999, articles 18, 22 and 29.*

Aviation Law *– damages - damages recoverable from an airline company - whether an airline company was liable for damage of goods during the period when it was under the charge of the airline company - what was the nature of damages recoverable from an airline company where goods were damaged while under the charge of an airline company – Constitution of Kenya, 2010, article 2; Carriage by Air Act (Act No. 2 of 1993), section 3; Montreal Convention, 1999, articles 18, 22 and 29.*

Brief facts

The 1st defendant (Ethiopian Airlines) was the carrier of some head-end equipment, the property of the plaintiff. The plaintiff (Frontier Optical Networks Limited) delivered the consignment to the 1st defendant on August 20, 2017. The following day the consignment left Los Angeles USA designation, Nairobi Kenya but

through Addis Ababa Ethiopia. The plaintiff's case was that the consignment was due to arrive in Nairobi on August 24, 2017, yet when the 1st defendant's flight arrived in Nairobi, it could not be traced. It was claimed that the 1st defendant and the 2nd defendant (Africa Cargo Handling Limited) were adamant that the consignment never arrived on Kenyan soil. It later turned out that the consignment became items of sale by the 3rd defendant (Kenya Revenue Authority Customs Department). The plaintiff claimed that the consignment was delivered to the 3rd defendant by the 2nd defendant.

The plaintiff sued the three defendants for the loss it suffered. The plaintiff claimed against the defendants, jointly and severally, not just the monetary value of USD 95,296 of the lost consignment but also consequential loss of Kshs.128,496,060 said to be loss of revenue. The 1st defendant filed the instant application and sought orders that the portion of the plaint that related to the plaintiff's claim for:- USD 76,876 being part of the value of the contract which the plaintiff was allegedly implementing (claim D); Kshs.288,878 being freight clearance charges allegedly incurred by the plaintiff (claim E); and Kshs.128,496,060 being the loss of revenue anticipated by the plaintiff (claim F) be struck out.

The plaintiff argued that compensation for loss and damage to cargo was solely governed by the Montreal Convention, 1999, and the Carriage by Air Act, 1993. Further, pursuant to article 18 of the Montreal Convention damages were only recoverable for the loss of cargo where the loss took place during the carriage by air. The 1st defendant resisted what it saw as incidental and consequential losses, which it asserted were not available under the Montreal Convention and Carriage by Air Act, 1993. The plaintiff opposed the application and stated that the damages sought to be recovered were contemplated under the Montreal Convention.

Issues

i. What was the nature of damages recoverable from an airline company where goods were damaged while under the charge of an airline company?

ii. Whether an airline company was liable for damage of goods during the period when it was under the charge of the airline company.

Held

1. The Montreal Convention modernized and consolidated the Warsaw Convention and related instruments and was part of Kenya's law not just by dint of article 2 of the Constitution of Kenya, 2010, but also the express provisions of section 3 of the Carriage by Air Act. Although paragraph 1 of article 18 of the Montreal Convention envisaged liability in regard to damage sustained during the carriage by air, paragraph 3 of the same article clarified that carriage by air comprised the period during which the cargo was in the charge of the carrier. In so far as the plaintiff's case was that the loss it sustained in respect to its consignment was incurred during the period when it was under the charge of the 1st defendant, the 1st defendant could be liable under article 18 of the Montreal Convention.
2. Article 22 of the Montreal Convention set out the limits of liability of a carrier in respect to destruction, loss, damage, or delay of baggage and cargo. It also set out limits of liability for damages caused by delay in the carriage of persons. Paragraph 3 of article 22 was specific to cargo and was relevant for the matter at hand. An objective of the Montreal Convention was to ensure the protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution. From a reading of article 22, the scheme of the Montreal Convention was to limit liability rather than define the categories of damages that were actionable. That became clearer when one gave regard to article 29 of the Montreal Convention.
3. Article 29 of the Montreal Convention spoke to any action for damages, however founded, so that the category of damages was open-ended. Article 29 expressly barred an action for punitive, exemplary or non-compensatory damages. That seemed to be the only constriction on the type of damages that an aggrieved consumer could pursue.
4. Rather than limiting the type of damages recoverable, the parties to the Montreal Convention placed a ceiling on the amount of proven damage that could be recovered. The alternative would result in

recovery of different elements of damage depending upon the country in which the action for breach was instituted and uniformity could soon be lost.

5. The principle of forbidding recovery of consequential damages in contract cases rested on the theory that the consideration given for the contract had to be taken into account the risk exposure in case of breach. The impugned heads of damages seemed to be either compensatory in nature or consequential. None was punitive, exemplary or non-compensatory. The three, if proved, could be recoverable within the old principle of forbidding recovery of consequential damages in contract cases as they could have been foreseeable losses. Whether the damages sought exceeded the limit set by article 22 of the Montreal Convention would have to await trial, and any sum above that limit would be disallowed.

Application dismissed with costs.

Citations

Cases

United Kingdom

Hadley v Baxendale (1854) 9 Exch 341; (1854) 156 Eng Rep 145; 1854] EWHC Exch J70 - (Mentioned)

United States

Saiyed v Transmediterranean Airways 509 F Supp 1167 (WD Mich 1981) - (Explained)

Statutes

Kenya

1. Carriage By Air Act, 1993 (Act No 2 of 1993) section 3 - (Interpreted)
2. Constitution of Kenya, 2010 article 2- (Interpreted)

Regional Court

East African Community Customs Management Act, 2004 In general - (Cited)

Instruments

1. Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), 1999 articles 18, 22(3); 29; paragraph 1, 3
2. Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)

Advocates

None mentioned

RULING

1. An issue arising in this dispute is whether the liability, if any, of Ethiopian Airlines (the 1st defendant or Ethiopian) is limited under the provisions of the *Convention for the Unification of Certain Rules for International Carriage by Air* Montreal May 28, 1999 (the Montreal Convention, 1999).

2. Ethiopian was the carrier of some head end equipment, the property of Frontier Optical Networks Limited (Frontier or the plaintiff). Frontier delivered the consignment to the Airline on August 20, 2017. The following day the consignment left Los Angeles USA designation Nairobi Kenya but through Addis Ababa Ethiopia.

3. Frontier's case is that the consignment was due to arrive in Nairobi on August 24, 2017, yet when Ethiopian Flight No ET 308 arrived in Nairobi, it could not be traced. That both Ethiopian and Africa Cargo Handling Limited (ACHL), providers of ground handling at JKIA Nairobi, were adamant that the consignment never arrived on Kenyan soil .It later turns out that the consignment became items

of sale by the Kenya Revenue Authority Customs Department. Frontier asserts that the consignment was delivered to the revenue authority by ACHL.

4. Frontier sues the three for the loss it suffered. Confining myself, for now, to the allegations of liability as against the Airline, Frontier avers that given the circumstances in which its consignment was declared lost or missing, it holds the Airline liable for gross negligence in handling of the plaintiff's consignment. The particulars of negligence are listed in paragraph 18 of the plaint dated August 22, 2019:-

> " 18.1 Failure and or refusal to notify the plaintiff of the fact that its consignment had arrived;
>
> 18.2 Failure to ensure proper follow up of the plaintiff's consignment from the point it was off-loaded from ET 308, and taken to the 2nd defendant and later taken to the 3rd defendant's warehouse;
>
> 18.3 Failure to notify its agent the 2nd defendant of the particulars of the owner and their contact details for them to liaise with the plaintiff to collect their consignment;
>
> 18.4 Improperly, and with intent to deceive the plaintiff, informing them that the consignment has been lost and advising them to claim for loss, while in fact the consignment was with their agent the 2nd defendant who later took them to the 3rd defendant for sale by auction;
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> 18.5 Failing to maintain adequate and proper records of the movement of cargo once they arrived the destination;
>
> 18.6 Failure to carry out proper, and thorough search for the plaintiff's consignment once notified of its unavailability.
>
> 18.7 Causing the plaintiff's consignment to be sold despite having sufficient information about the plaintiff as the consignee on the consignments package."

5. In that plaint, Frontier claims against the defendants, jointly and severally, not just the monetary value of USD 95,296 of the lost consignment but also consequential loss of Kshs 128,496,060.00 said to be loss of revenue. These two are among the losses claimed.

6. In its defence, Ethiopian concedes that Flight ET 308 arrived in Nairobi on August 23, 2017 and states that upon arrival, ACHL took charge of the consignment for onward delivery to the Frontier or its agent pursuant to a ground handling agreement. The Airline's defence is that ACHL handed over the consignment to the Revenue Authority as un-manifested cargo yet the consignment was identifiable. In a word, the Airline blames ACHL for any loss suffered by Frontier.

7. But as an alternative defence, the Airline cites the provisions of the Montreal Convention. It argues that the contract of carriage between it and Frontier was governed by the Montreal Convention and the Airline's liability, if any, is limited to 17 Special Drawing Rights (SDR) per kilogram as provided in the terms and condition of carriage and article 22(3) of the Convention.

8. As regards consequential and incidental losses, the Airline thinks it to be without legal basis on account of the provisions of the *Carriage by Air Act 1993* and the Convention.

9. On its role in this misadventure, ACHL states that on or about August 24, 2017 it received several consignments from the Airline, some of which the consignees or owners were not identified on the

consignments themselves, flight manifest or airways bill. On August 24, 2017 it issued a discrepancy report to the Airline regarding 6 pieces of unidentified and un-manifested cargo. The report was accompanied with photographs of the cargo. Somehow, on September 6, 2017, the Airline requested for photographs of the 6 pieces and these were sent (again, presumably) to the Airline by ACHL on September 7, 2017. That notwithstanding the discrepancy report and remainders, the Airline failed to give ACHL any additional information on the 6 pieces of un-manifested cargo.

10. In compliance with section 35 of the East African Community Customs Management Act, ACHL through a want of entry list dated October 19, 2017 surrendered the 6 pieces of un-manifested cargo to the revenue authority.

11. Riding on its statement of defence, the Airlines filed a notice of motion dated 10th July 2020 for the following orders:-

    1. The portion of the plaint that relates to the plaintiff's claim for:-

        a. USD 76,876 being part of the value of the contract which the plaintiff was allegedly implementing (Claim D).

        b. Kshs288,878/- being freight clearance charges allegedly incurred by the plaintiff (Claim E).

        c. Kshs 128,496,060 being loss of revenue anticipated by the plaintiff (Claim F) be struck out.

    2. The plaintiff does pay the 1st defendant the costs of this application.

12. It argues that compensation for loss and damage to cargo is solely governed by the *Montreal Convention, 1999* and the *Carriage by Air Act, 1993*. Further, that pursuant to article 18 of the Montreal Convention, 1999 damages are only recoverable for the loss of cargo where the loss took place during carriage by Air. The Airline resists what it sees as incidental and consequential losses which it asserts are not available under the Montreal Convention and *Carriage by Air Act, 1993*.

13. Frontier opposes the application. In a sum, it states that the damages sought to be recovered are contemplated under the *Montreal Convention*.

14. The Montreal Convention modernized and consolidated the *Warsaw Convention* and related instruments and is part of our law not just by dint of article 2 of the *Constitution* but also the express provisions of section 3 of the *Carriage by Air Act* (Act No 2 of 1993). The statutory provision reads:-

> " Convention to have force of law
>
> The provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, carriers servants and agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in Kenya in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage."

15. It is common ground that prayers D, E and F in the plaint of August 22, 2019 are for incidental or consequential losses as said to arisen from for the loss of the consignment.

16. Paragraph 1 of article 18 of the *Convention* reads:-

> " The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air."

17. Although this provision envisages liability in regard to a damage sustained during the carriage by air, paragraph 3 of the same article clarifies that carriage by air comprises the period during which the cargo is in the charge of the carrier. In so far as the plaintiff's case is that the loss it sustained in respect to its consignment was incurred during the period when it was under the charge of the Airline, the Airline could be liable under article 18. This will be a matter to be decided at trial on the evidence available.

18. The more decisive matter is whether incidental and or consequential loss is envisaged by the provisions of the Convention. Frontier thinks them to be excluded, the Airline takes a contrary position.

19. Article 22 sets out the limits of liability of a carrier in respect to destruction, loss, damage or delay of baggage and cargo. It also sets out limits of liability for damages caused by delay in carriage of persons. Paragraph 3 is specific to cargo and is relevant for the matter at hand. It reads:-

> " 3. 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."

20. An objective of the *Montreal Convention* is to ensure "protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution." From my reading of article 22, the scheme of the convention is to limit liability rather than define the categories of damages that are actionable. This becomes clearer still when one gives regard to article 29 which reads:-

> " (29) In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

21. This article speaks to any action for damages, however founded, so that the category of damages is open-ended. That said article 29 expressly bars an action for punitive, exemplary or non-compensatory damages. That seems to be the only constriction on the type of damages that an aggrieved consumer can pursue. On this debate whether the Convention forbids recovery of certain damages, I identify

with the following statement of Benjamin F Gibson in *Saiyed v Transmediterranean Airways*, 509 F Supp 1167 (WD Mich 1981):-

> "The common law principle of forbidding recovery of consequential damages in contract cases was first expressed in *Hadley v Baxendale*, 9 Exch 341, 156 Eng Rep 145 (1854). The principle rested on the theory that the consideration given for the contract must take into account the risk exposure in case of breach. So too the parties to the Convention sought to set limits on liability in order that the airlines might establish reasonable rates for carriage considering potential risk exposure. Rather than limiting the type of damages recoverable, however, the parties to the Convention placed a ceiling on the amount of proven damage which could be recovered. The alternative would result in recovery of different elements of damage depending upon the country in which the action for breach was instituted and uniformity could soon be lost."

22. That being my appreciation of the law, it now falls for examination whether the impugned heads of damages are in the nature of punitive, exemplary or non-compensatory damages so as not to be recoverable in terms of article 29. Claim D is for USD 76,876 being part of the value of the contract which the plaintiff was allegedly implementing. Claim E is of Kshs 288,878 being freight clearance charges and claim F is Kshs 128,496,060 being total loss of revenue. All these seem to be either compensatory in nature or consequential. None is punitive, exemplary or non-compensatory. The three, if proved, could be recoverable within the old principle of *Hadley vs Baxendale* 9 Exch 341, 156 Eng Rep 145 (1854) as they may have been foreseeable losses. Whether the damages sought exceeds the limit set by article 22 will have to await trial, and needless to say any sum above that limit will be disallowed.

23. I come to the inevitable conclusion that the notice of motion of July 10, 2020 is without merit and is hereby dismissed with costs.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT: