Kihungi & another v Iberia Airlines of Spain SA

REPUBLIC OF KENYA

Court of Appeal, at Nairobi

January 18, 1991

Nyarangi, Masime & Cockar JJ A

Civil Appeal No 6 of 1989

(Appeal from the Judgment of the High Court at Nairobi, Aragon J, dated

22nd September 1988 in HCC Suit No °2159 of 1988)

Carriage By Air *– carriers liability – commencement of liability in respect of an airline passenger – article 17 Warsaw Convention and Carriage by Air Act.*

Carriage By Air – *requirements of article 17 of the Warsaw Convention – once met the burden shifts on the airline to prove the contrary.*

The Appellants sued the respondent airline in the superior court seeking damages for fatal injuries sustained by their deceased son who was a passenger for reward in the respondent's airline.

The superior court dismissed the claim relying entirely on hearsay evidence of the respondent that at the time the deceased met his death he was not under the control and direction of the airline. The Court admitted in evidence testimony by one of the respondent's witnesses that he was told by a janitor that the deceased met his death as a result of a fall from the 7th floor of a building at No 21 Calle Genova in Madrid Spain. The Court thus ruled that when the fatal fall occurred the deceased was not a guest of the airline and therefore it was not duty bound to look after his safety. There was however no clear evidence as to where the deceased had met his death as evidence showed that despite his baggage being tagged with "wait-listed" labels, he had been issued with a boarding pass and his name entered in the passenger manifest for those traveling on the scheduled airline. Morever, his luggage had arrived on the said flight without him.

Held:

1. The deceased's death took place after he had come under the control and direction of the Airline and was engaged actively in operations of embarking.

2. The requirements of Article 17 of the Warsaw Convention having thus been satisfied, the carriers was liable for damages sustained by the appellants on account of the death of the deceased unless the carrier could show that at the time the deceased met his death he was engaged in operations other than those of embarking.

3. The carrier had failed to discharge its onus of proof.

Appeal allowed.

Cases

No cases referred to.

Statutes

1. Carriage By Air Act 1932 [UK]

2. Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953

International Instruments

Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (Warsaw Convention) Articles 17, 22

Advocates

Mr Obura for the Appellants.

Mr Osmond for the Respondent.

January 18, 1991, the following Judgment of the Court was delivered.

Briefly the facts relating to this claim which was dismissed by the High Court after a trial and which dismissal is the subject matter of this appeal, are that the 23 years old deceased Peter Mathenge Kahiga was on or about 30th July, 1985, a passenger for reward on the respondent's (defendant's) aircraft Iberia Airlines flight No IB 970 from Montreal in Canada which arrived in Madrid in Spain on 31.7.85 where he stayed up to 2nd August, 1985.

According to the 1st appellant (the 1st plaintiff and father of the deceased) the deceased had informed him by the phone from Canada of his expected arrival from Canada in Nairobi on 3rd August, 1985, by the Airlines flight Number IB 913 Y. This flight arrived at Nairobi JK International Airport on the night of 3 - 4 August, 1985, at about 12.30 am. The deceased was not in the flight although his name was in the passenger's list (Ex 13). By next day two items of his baggage (Ex 2 & Ex 3) also had been traced having arrived by the said flight. About three weeks later on or about 23rd August 1985, the father learnt that the deceased had met his death in Madrid. On 4th September, 1985 the body arrived at Nairobi. A post mortem examination was done by Dr JN Kaviti (PW 4) who said that the injuries found by him were consistent with the deceased having fallen from a great height except that there were not as many injuries on the head as he would have expected. In his post mortem report (Ex 10) the cause of death was attributed to internal haemorrhage and multiple fractures following blunt injuries. In due course the deceased's travelling documents such as passport, air tickets, used and unused boarding passes and other personal documents all listed in the judgment of the High Court (P 51 of record) were recovered and produced as exhibits.

The claim for general and special damages was based on negligence and breach of common law duty of care which the Airlines owed the deceased to ensure his safety during the period he was entrusted to its care as its passenger and guest, that is between 31st July, 1985, and 2nd August, 1985, in Madrid, Spain where he stayed upon the schedule and instructions of the Airlines and while embarking on its aircraft. The plaintiffs (appellants) also pleaded in the plaint reliance on the doctrine of *res ipsa loqiutor*, the provisions of Warsaw convention, 1929, and the Carriage by Air (Colonies and Protectorates and Trust Territories Order, 1953.

In addition to pleading a denial of the above allegations relating to lack of care while embarking and *res ipsa loqiutor* the defence attributed the injuries and death to a fatal fall at a place about 20 kilometres away from Madrid Airport. While conceding that the deceased was registered as a passenger on the Airlines said flight No IB 913Y the defence pleaded that being only a "wait-listed" and not a confirmed passenger the deceased travelled from Canada to Spain with a risk that he might not obtain an onward connection to Nairobi. The deceased's stay in Madrid was his own responsibility and at his own expense. Liability under the Warsaw Convention and the Carriage by Air Act as applicable to Kenya arose only if the accident took place on board the aircraft. The Airlines had counter-claimed in the sum of Shs 52,670/30 cts being the cost of transporting the body from Madrid to Nairobi. The counter-claim was not pursued as it appeared that the Airlines had been reimbursed by the Kenya Government.

The trial judge had found that the deceased had died as a result of a fall from the 7th floor of the building situated at No 21 Calle Genova. He also found that at the time of his said fatal fall he was not a "guest" of the Airlines nor was he at that time engaged in the course of any of the operations of embarking or disembarking. The fatal fall had occurred during the period when the Airlines were not duty bound to look after his safety. The trial judge therefore dismissed the suit.

Of the fifteen grounds of appeal Mr Obura abandoned the first and the eleventh grounds. The thrust of the remaining thirteen grounds of appeal was against admission of hearsay evidence, misinterpretation or narrow interpretation of Article 17 of the Warsaw Convention and the doctrine of *Res Ipsa Loquitor,* and treatment of Mr Nieto's evidence as an expert on the issue of "embarking". There is also criticism in respect of bias on the part of the judge, of bringing in extraneous and other matters not testified upon in his judgment and of his acceptance of limitation of damages to only 125,000 francs under Article 22 of the Warsaw Convention.

After having listened to Mr Obura's elaboration of his grounds of appeal and Mr Osmond's submissions in reply, in our view there are two main issues on which hinge the fate of this appeal, viz; the place of death and whether or not prior to his disappearance the deceased had been in the course of any of the operations of embarking.

The only evidence relating to the place where the deceased is supposed to have met his death was that given by Mr George Kingori (PW 3) who was at the time stationed in the Kenya Embassy in Paris as an Assistant Education Attache and was directed to go to Spain to enquire into the death of the deceased, by whose authority the body was buried, to ensure that the body arrived in Kenya by 30.8.85, to collect his personal documents and to contact certain people who might be expected to be of assistance. So the witness went to see one Mr Ramon at Suzgad Subtraction in Madrid on 29.8.85 who told him that the deceased who had fallen from the 7th floor of a building at Calle Genova was still alive when taken to the Hospital. While Ramon was giving the witness copies of medical and police reports a police inspector came and gave them the exhibits. These were produced in court during the trial. Later on Saturday Mr Kingori went to the building from which the deceased was alleged to have fallen but was unable to see the Janitor who was alleged to have been on duty at the material time as he was ill in hospital. The janitor whom he met is alleged to have told the witness that on 2.8.85 the deceased had come to that building holding the air ticket in his hand. On being directed, he went to the office of the Iberian airlines across the road. On Sunday the next day he was shown by a janitor where the deceased was alleged to have fallen at about 2.00 pm in 31 Calle Genova. The janitor told him that the air ticket was found on him.

This part of the evidence given by Mr Kingori is hearsay. Neither Ramon nor the janitor was called to give evidence. It is indeed surprising how the trial judge who had at one stage prevented Mr Kingori from testifying as to the comments alleged to have been made by one Mr Carlos on the medical and police reports on the ground that the same were hearsay, had allowed in all the above evidence which was so patently hearsay on such a vital issue without first ascertaining whether or not the persons who had supplied all the above information to Mr Kingori were going to be called as witnesses.

Mr Osmond for the respondent had stressed that Mr Kingori was the appellant's (plaintiffs) witness called to produce the exhibits on which the appellants were relying to prove their case. So Mr Obura for the appellants either accepts or does not accept the evidence of his own witness. He contended that the judge

had disabused his mind of hearsay. In support he referred to two passages in the judgment one on P 49 and the other on P 50 of the record. The passage on page 49 refers to the evidence of the father (PW 1) which is of no concern to the matters we are dealing with.

On page 50 of the judgment which runs into page 51 the judge had the following to say.

> "the evidence of the main witness for the plaintiffs as to what happened in Madrid was unfortunately a lost almost hearsay. That witness was Mr George Kongori who is employed at present by the Ministry of Education as an education officer and who in 1985 was stationed at the Kenya Embassy in Paris as an Assistant Education Attaché and also as an Assistant Permanent Delegate to UNESCO on behalf of the Government of Kenya. He was directed to go to Spain and make enquiries into Peter's death. He obtained various information but it was all of course, hearsay. I do very much appreciate the plaintiffs' difficulty in obtaining direct evidence from Spain as well as the enormous costs involved but nevertheless the rules of the law of evidence are peremptory and mandatory. Hearsay is not admissible."

Having so strongly emphasized the inadmissibility of hearsay evidence the trial judge then proceed to admit the same hearsay evidence justifying its admission as follows:

> "To the extent which Mr Kingori's evidence is cogent and admissible it appears therefore that Peter had, according to the Spanish Authorities, fallen from the 7th floor of the building situated at No 21 Calle Genova. Mr Kingori also testified that various items were found either in Peter's Pocket or lying on the ground next to where he fell ..."

This constitutes a grave misdirection on the part of the trial judge. The only cogent admissible part of Mr Kingori's evidence was his producing the exhibits on the admission of which there was no dispute at all. The rest of his evidence and particularly what Ramon and the janitor had told him or showed him and as to where the exhibits were recovered from by the Spanish Authorities is hearsay, of no value at all, and ought to have been expunged or considered deleted when it became apparent to the Court that none of the informants or eye-witnesses was intended to be called to give evidence, and should have been ignored by the trial judge all together. In our view there was no proper or acceptable evidence before the lower court for it to have made the finding that the deceased had met his death at No 21 Calle Genova. Mr Osmond complained that Mr Obura for the appellants (plaintiffs) had deliberately shut out vital evidence, by refusing to produce the death certificate which would have helped considerably the issues relating to the death. If that was so then there was nothing to stop Mr Osmond to have obtained certified copy or copies of the document or documents in question and produced them himself.

It will be observed that if the hearsay part of Mr Kingori's evidence is rejected then there is no evidence at all on record on which the lower court could have made a proper and acceptable finding as regards the exact time and site or place where the deceased had met his death in relation to the air port. This very vital question, we find, remained unsolved at the conclusion of the trial.

We now come to what we consider to be the second main issue and that is what steps the deceased had already taken in order to embark prior to his disappearance. It is common ground that the deceased and checked in at the Air-port on 2.8.85 in preparation to board the flight from Madrid to Nairobi. His luggage was accepted though tagged with "wait-listed" labels. That was so because as Mr Nieto (DW 1), the duly constituted attorney and employee, since 1964, of Iberian Airlines in Kenya.

That the deceased had also been given a boarding card (Ex 8a) the significance of which is shown in the evidence of Mr Nieto when referring to the labels tagged to the luggage, the air ticket (ex 7B) and the boarding card (ex 8a) Mr Nieto explained that these documents showed that the deceased had been directed that he had to go through the passport control to gate 15 (circled on the boarding card) one hour before departure. Until that time he was free to do as he wished. It is clear that the deceased at this stage was no longer a "wait-listed" passenger but had been definitely accepted for the flight. Earlier in his evidence Mr Nieto had said (Quote):

> "If it is an ok ticket the passenger is automatically accepted for the flight. He is given a boarding ticket in the shape of an envelope in which a leaf taken out from the ticket is put ..."

That shows that the boarding ticket or card is issued only after a passenger is accepted for the flight. So the issuing of the boarding card to the deceased was evidence that he had been accepted for the flight. That is why Mr Nieto later said (Quote – p 40 of the record):

> "In the case of Peter Kahiga he was given a boarding pass and his luggage taken because Iberia was 98 per cent sure he would be accepted. We can assume he was accepted ..."

So it is well established from the evidence of Mr Nieto that the deceased though originally a "wait listed" passenger was in fact accepted for the flight after he checked in at the air-port. That is the reason why the name of the deceased appeared in the list of passengers which according to Mr Nieto is prepared during the half hour between closure of flight and departure time from the list made out at the checking-in counter containing all bookings minus passengers not accepted.

We observe here that Mr Nieto was not present when the deceased checked in at the Madrid Airport. His evidence was in fact an interpretation by him of the travelling documents produced to him based on his experience in matters pertaining to passenger air-flights. His statement that the deceased was told, after being given the boarding card and the directions regarding reporting at the gate, that he was free to do as he wished so long as he presented himself at the gate one hour before departure is hearsay and cannot be accepted as evidence. It may or may not have been the normal practice to so inform the accepted passengers but there is no evidence as regards the time at which the deceased had reported (Mr Nieto did not give any evidence on that from the documents before him), nor as to what precise directions, if any, the deceased received when he was given the boarding card. If we ignore this part of Mr Nieto's evidence as being hearsay as urged then in accordance with his interpretation of the boarding card and in particular the circling thereon of gate 15 with all that it implies, the deceased after checking in and handing in his baggage must be presumed, as per directions, to have proceeded to gate 15. After all he had earlier phoned his father (PW 1) to meet him at JK International Airport, Nairobi, on the night of 3rd – 4th August 1985. He had arrived at the airport, therefore, to fly out to Nairobi.

We have ourselves independently evaluated this part of the evidence because the trial judge had not directed his mind on this issue at all. The trial judge had found that the deceased never went beyond being a "wait-listed" passenger. In making this finding he had relied mainly on the fact the luggage tags on the baggage had even after their arrival at Nairobi still carried the labels marked "wait-listed", and that his passport did not bear the immigration exit stamp, thereby signifying that the deceased had not gone through immigration and passport control. According to the trial judge the time when the movements of a passenger were under the control of a carrier, at least for the purposes of embarking, began once he had passed through customs, immigration and passport control. At that stage he could be said to have become a "guest" of the Airline.

The trial judge had accepted the evidence of Mr Nieto in its totality. But as we observed earlier he had not directed his mind on the light thrown by Mr Nieto's interpretation of the deceased's travel documents on the latter's movements inside the airport prior to his death and, in our view, the trial judge thereby erred in his above findings. Mr Nieto had as we pointed out earlier, conceded in no certain terms that the deceased though earlier a "wait listed" passenger had in fact been accepted for the flight. So he was no longer in the category of a "wait listed" passenger as erroneously found by the trial judge.

Authorities that were cited are not relevant because in the instant case there is no evidence as to the precise time or place of the death. These have remained a mystery. In our view the trial judge erred in holding that the operation of embarkation commenced only after the formalities relating to customs, immigration and passport control had been complied with. Mr Nieto by his interpretation of the deceased's travel documents has established that after the deceased had checked in, he was accepted as a passenger for the flight. He then came under the directions of the Airlines. He was issued with the boarding card and directed to report at gate 15. His baggage also was directed to be loaded in the plane. On the Airline's directions his name was included in the list of passengers. As far as the plaintiff's

(appellant's) case is concerned it had been established that the deceased had put himself under the control and direction of the Airlines. He was directed to report at gate 15. The deceased we find was engaged actively in operations of embarkation. Also established is death resulting from physical injuries compatible with a fall from a great height except that the injuries to the head were not as numerous as would have been expected. Death took place after the deceased had come under the control and direction of the Airlines and was engaged actively in operations of embarking. Requirements of Article 17 having thus been satisfied the carrier that is the respondent Airlines is liable for damages sustained by the appellants (plaintiffs) on account of the death of the deceased unless the carrier can show that at the time the deceased met his death he was engaged in operations other than those of embarking.

The respondent (Airlines) had pleaded that the deceased had not sustained severe and fatal injuries whilst embarking but had committed suicide or sustained a fatal fall in Genova Street about 20 kilometres from the Madrid Airport in that he had jumped from a high window and had subsequently died from his injuries in hospital. If that was so then it was up to the Airlines to have brought evidence to prove that it had pleaded in its defence. We quote below the passage from the judgment of the trial judge which we agree correctly, shows how the onus shifts:

> "From the Treatise on Air Law by Shawcross and Beamount, 3rd Edition at pages 373 and 374, it appears that the doctrine only applies where there is an accident to the aircraft and a particular passenger was on board and sustained injuries or died during that time. In other words so long as a passenger is on board the aircraft or during the time when his movements are under the control of the carrier, then if an accident occurs during that time, the burden of proof shifts from the plaintiff to the defendant, when it is the latter's turn to prove that the injury or death consequent upon the accident did not occur as a result of a breach of duty by the carrier.

The evidence, as we have found earlier, established how the movements of the deceased had come under the control of the Airlines after he had checked in. To avoid liability thus arising under Article 1 7 of the Convention it was now up to the Airlines to bring evidence to prove what it had pleaded in its defence that at the time of his death the deceased had by his acts put his movements beyond the control of the Airlines. This onus the Airlines failed to discharge. As we observed earlier there is no proper and legally acceptable evidence to prove what is alleged by the Airlines in its written statement of defence in regard to the circumstances surrounding the death. So the liability of the Airlines under Article 17 of the Convention remains as established by evidence. 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 Franchs. 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 Trust Territories) Order, 1953, had in our view correctly assessed the liability to the maximum allowable amount of 125,000 French Franchs converted into Kenya Shillings at the rate of exchange as at the date of judgment.

In the final result the judgment of the Superior Court dismissing the suit is set aside and is substituted by a judgment in favour of the appellants against the respondent Airlines in the sum of 125,000 French Francs converted into Kenya Shillings at the rate as at to-day's date with interest calculated from today. Costs are awarded to the appellants against the respondent.

Orders accordingly.