



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MUSINGA & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO.274 OF 2010**

**BETWEEN**

**SAUDI ARABIAN AIRLINES.....APPELLANT**

**AND**

**KODAK (K) LIMITED.....1<sup>ST</sup> RESPONDENT**

**KENYA AIRFREIGHT HANDLING LTD.....2<sup>ND</sup> RESPONDENT**

**LYNDALIAN AIRFREIGHTERS & FORWARDERS LTD....3<sup>RD</sup> RESPONDENT**

*(Appeal from the judgment and decree of the High*

*Court of Kenya at Nairobi (Kimaru, J.), dated 19<sup>th</sup>*

*November, 2008 in H.C.C.C. No.1221 of 1999)*

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**JUDGMENT OF THE COURT**

1. This is an appeal from the judgment of Kimaru, J. delivered on 19<sup>th</sup> November, 2008 in which the court entered judgment in favour of the 1<sup>st</sup> respondent, (who was the plaintiff in the High Court suit), against the appellant in the sum of **Kshs.906,670.50** together with interest thereon at 12% per annum from the date of filing of the suit as well as costs.

2. The 1<sup>st</sup> respondent's claim arose from the loss of a consignment of photographic material weighing 665 kilograms (the consignment) that was supposed to be airfreighted from Nairobi to Asmara, Eritrea, by the appellant. The consignment was delivered through the 3<sup>rd</sup> respondent and was received, stored and handled by the 2<sup>nd</sup> respondent as the ground handling agent for the appellant. The 1<sup>st</sup> respondent averred that the consignment was lost while in the custody of the 2<sup>nd</sup> respondent.

3. In its defence, the 3<sup>rd</sup> respondent pleaded that the said consignment was lost while in the custody of the 2<sup>nd</sup> respondent and denied any liability for the loss.

4. The 2<sup>nd</sup> respondent averred that it was an agent of a disclosed principal, the appellant, and therefore in the event that judgment was to be entered against it, it was entitled to be indemnified by the appellant; that there was no contractual relationship between it and the 1<sup>st</sup> respondent; that the carriage of the said consignment was governed by the terms of the **Carriage by Air Act, 1993**, and the **IATA Standard Ground Handling Agreement**, whereby its liability (if at all) is limited to **US\$20** per kilogram of the lost goods.

5. Lastly, the 2<sup>nd</sup> respondent contended that if the 1<sup>st</sup> respondent suffered any loss, an action could only lie against the appellant as the carrier and its disclosed principal under the terms of the **Carriage by Air Act** and the **IATA Standard Ground Handling Agreement**.

6. The appellant also filed a defence and denied the 1<sup>st</sup> respondent's claim. It argued that the 1<sup>st</sup> respondent had failed to give the requisite notice to it as required by the **Carriage by Air Act**, which ought to have been served within fourteen (14) days from the date of airlifting the cargo.

7. After a full hearing, the learned judge established, as a matter of fact, that the consignment got lost while in the possession of the 2<sup>nd</sup> respondent and that is why it could not be airlifted to its intended destination. There was evidence that on 18<sup>th</sup> November, 1998 the consignment had been loaded into the appellant's aircraft but had been offloaded due to overbooking and was scheduled to be airlifted on 20<sup>th</sup> November, 1998, which was further pushed to 24<sup>th</sup> November, 1998 but in the interim period the consignment went missing, having been returned to the 2<sup>nd</sup> respondent's warehouse.

8. The trial court therefore had to determine, who between the appellant and the 2<sup>nd</sup> respondent, was liable for the loss, in light of the defence raised by the two parties.

9. The court held that under **Article 18(1) of the Convention for Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention, 1929)**, a carrier is liable for damage sustained in the event of destruction or loss of, or damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air. **Article 18(2) of the Convention** defines carriage by air as follows:

**“The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.”**

10. Regarding the issue of indemnity that was raised by the 2<sup>nd</sup> respondent, the learned judge cited **Article 8.1 of the IATA Standard**

**Ground Handling Agreement** which provides that:

**“Except as stated in Sub-Article 8.5, the Carrier shall not make any claim against the Handling Company and shall indemnify it (subject as hereinafter provided) against any legal liability for claims or suits, including costs and expenses incidental thereto, in respect of:**

- a. delay, injury or death of persons carried or to be carried by carrier;**
- b. injury or death of any employee of the Carrier;**
- c. damage to or delay or loss of baggage, cargo or mail carried or to be carried by the Carrier, and**
- d. damage to or loss of property owned or operated by, or on behalf of, the Carrier and any consequential loss or damage; arising from an act or omission of the Handling**

***Company in the performance of this Agreement unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death delay, injury or loss would probably result.***

**PROVIDED THAT all claims or suits arising hereunder shall be dealt with by the Carrier; and..."**

11. Further, the learned judge considered the provisions of **Article 8.5 of the Convention** which exempts the carrier from liability if it is established that the loss or damage was occasioned by negligent operation of ground support equipment by the handling company. The proviso to that Article states:

**“for the avoidance of doubt, save as expressly stated, this Sub-Article 8.5 does not affect or prejudice the generality of the provisions of Sub-Article 8.1 including the principle that the Carrier shall not make any claim against the Handling Company and shall indemnify it against any liability in respect of any and all consequential loss or damage howsoever arising.”**

12. The trial court held that the 2<sup>nd</sup> respondent was an agent of a disclosed principal, the appellant; that the appellant was liable for the breach of the carriage contract between the 1<sup>st</sup> respondent and the appellant committed by the 2<sup>nd</sup> respondent; and that the appellant failed to establish that the loss of the consignment was as a result of negligent operation of ground support equipment by the 2<sup>nd</sup> respondent. The court therefore entered judgment for the 1<sup>st</sup> respondent against the appellant in the sum of **Kshs.906,670.50** as earlier stated. However, the court directed that the amount awarded, including costs, should not exceed **\$13,300**, in view of the limitation placed by **sections 6(1)(b) and 6(2) of the Carriage by Air Act** which requires the damages payable to be limited to **US\$20** per kilogram of the lost consignment.

The court dismissed the 1<sup>st</sup> respondent's suit against the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.

13. Being aggrieved by the said judgment, the appellant preferred an appeal to this Court. The memorandum of appeal raises four (4) grounds which are as follows:

**“1. The honourable trial judge erred in law in finding that the only way the 3<sup>rd</sup> defendant could avoid liability is if it established that the loss or damage occasioned by the 2<sup>nd</sup> defendant to the plaintiff was as a result of negligent operation of ground support equipment;**

**2. The honourable trial judge erred both in law and in fact in finding that though the loss was due the 2<sup>nd</sup> defendant's negligence, the same was not enough to hold the 2<sup>nd</sup> defendant liable;**

**3. The honourable trial judge erred in law by failing to consider the provisions of the Ground Handling Agreement between the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant which agreement governed the relationship between the parties;**

**4. The honourable trial judge erred in law and in fact in applying the applicable law in the circumstances. (sic)”**

14. When the appeal came up for hearing, **Ms. A. Wasike** appeared for the appellant while **Mr. E. O. Makori** represented the 2<sup>nd</sup> respondent. The 1<sup>st</sup> and the 3<sup>rd</sup> respondents were unrepresented.

15. Ms. Wasike made brief submissions on the second and third grounds of appeal. She chose to leave the first and the fourth grounds to the Court. Counsel submitted that the notice that was served upon the appellant by the 1<sup>st</sup> respondent was not sufficient as per the requirements of the Warsaw Convention; that no evidence was tendered against the appellant by the 2<sup>nd</sup> respondent; that the learned judge only considered whether the 2<sup>nd</sup> respondent was negligent, he did not consider whether the 2<sup>nd</sup> respondent was

reckless in handling the consignment. She urged the Court to find that the learned judge erred in holding that the 2<sup>nd</sup> respondent was not liable.

16. On his part, Mr. Makori opposed the appeal and submitted that **Article 18(1) of the Warsaw Convention** stipulates that only the carrier and not his agent is liable for loss of the consignment.

17. Counsel further submitted that there was no evidence of recklessness on the part of the 2<sup>nd</sup> respondent and so there was no basis for disturbing the trial court's judgment. Lastly, counsel submitted that the appellant had not filed any claim against the 2<sup>nd</sup> respondent. He urged this Court to dismiss the appeal with costs.

18. This being a first appeal, this Court is under duty to reconsider and re-evaluate the evidence that was tendered before the trial court and come to its own conclusion. See **SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123**. In addition, the Court can only interfere with the trial court's findings if they are predicated on wrong principles of fact or law. The Court so held in **MKUBE V NYAMURO [1983] KLR 403**.

19. Applying the above established principles of law to this appeal, we now proceed to consider each of the four grounds of appeal that were raised by the appellant. The first ground is whether the learned judge erred in law in finding that the only way the appellant could have avoided liability was by establishing that the loss of the consignment was due to negligent operation of ground support equipment by the 2<sup>nd</sup> respondent.

20. According to evidence tendered by **Stanley Kiplang'at Rono**, who was the 2<sup>nd</sup> respondent's Duty Cargo Officer, the consignment was lost while in their custody but there was no negligence on their part. The 2<sup>nd</sup> respondent cited the provisions of **Article 8 of IATA Standard Ground Handling Agreement** which we have earlier reproduced. Under that Article, the appellant could not make any claim against the 2<sup>nd</sup> respondent and the appellant is under an obligation to indemnify the 2<sup>nd</sup> respondent against any legal liability for claims or suits in respect of loss of property arising from an act or omission of the 2<sup>nd</sup> respondent unless the act or omission was **"done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result."** (Emphasis added).

21. The appellant's counsel submitted before the High Court that the 2<sup>nd</sup> respondent handled the consignment in question recklessly and with the knowledge that damage would probably result. However, the evidence tendered by the appellant's single witness, **Yassim Abdulrahman**, did not point to any recklessness on the part of the 2<sup>nd</sup> respondent.

22. A close reading of the evidence adduced by the 2<sup>nd</sup> respondent's witness did not establish recklessness on their part. There may have been a certain degree of negligence on the part of the 2<sup>nd</sup> respondent which resulted to loss or non delivery of the consignment. However, it cannot be said that the 2<sup>nd</sup> respondent was negligent or reckless in its handling of the consignment and knew that the loss would occur. There is a difference between negligence and recklessness. The difference is the intentionality or attitude of the doer with regarding to the latter. **BLACK'S LAW DICTIONARY, Ninth Edition**, defines recklessness as follows:

**"1. Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk.**

**2. The state of mind in which a person does not care about the consequences of his or her actions."**

It was not demonstrated that there was recklessness by the 2<sup>nd</sup> respondent.

23. Further, **Article 8.5** provides as follows:

**“Notwithstanding sub-Article 8.1(d), the Handling Company shall indemnify the carrier against any physical loss of or damage to the carrier’s aircraft caused by the Handling Company’s negligent operation of ground support equipment...”**

There was no evidence that the loss of the consignment was occasioned by negligent operation of ground support system by the 2<sup>nd</sup> respondent. We must therefore dismiss the first ground of appeal.

24. The second ground of this appeal is unsustainable, in view of our finding that **Article 8.1** provides for loss occasioned by recklessness of a handling company, and not negligence. **BLACK’S LAW DICTIONARY** states that recklessness involves a greater degree of fault than negligence but a lesser degree of fault than an intentional wrongdoing.

25. Besides, **Article 8.1 of IATA Standard Ground Handling Agreement** as well as **Article 19(1) of the Warsaw Convention** are explicit that only the carrier, and not his agent, can be liable for loss of consignment. In **SIDHU V BRITISH AIRWAYS [1977] 2 LLOYD’S LAW REPORTS 76**, the House of Lords held that the **Warsaw Convention** is a complete code and it excludes recourse to any common law remedy, and therefore where the Convention has not provided a remedy, no remedy is available. We respectfully agree with that holding.

26. The learned judge rightly observed that under **section 3 of the Carriage by Air Act, 1993**, the rights and liabilities of carriers, carrier servants and agents, consignors, consignees and other persons, as provided by the **Warsaw Convention** and the amendments by **The Hague Protocol, 1995**, subject to the provisions of the Act, shall have the force of law in Kenya in relation to any carriage by air which the convention applies, irrespective of the nationality of the aircraft performing the carriage.

27. The third ground of appeal faults the learned judge for failing to consider the provisions of the Ground Handling Agreement between the 2<sup>nd</sup> respondent and the appellant. With respect, that ground is misplaced. In the impugned judgment the learned judge cited and considered all the relevant provisions of the IATA Standard Ground Handling Agreement and we have highlighted that in this judgment. The ground of appeal is for dismissal, which we hereby do.

28. As we understand it, the last ground of appeal states that the learned judge failed to apply the applicable law in the circumstances. The appellant did not specify the relevant law that the learned judge allegedly failed to apply. In their submissions before the trial court, counsel referred to various provisions of the **Carriage by Air Act**, the **Warsaw Convention**, the **IATA Standard Ground Handling Agreement** and case law. The learned judge cited in his judgment all the relevant portions of the above laws and Agreement and applied them accordingly.

29. We do not see how the learned judge can be faulted for his diligence in interpretation of the relevant law and therefore this ground of appeal must also fail.

30. Having carefully considered the entire record of appeal and submissions by counsel, we find no merit in this appeal. Consequently, the appeal is dismissed in its entirety. The appellant shall bear the 2<sup>nd</sup> respondent’s costs of the appeal

**Dated and delivered at Nairobi this 19<sup>th</sup> Day of January, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**