



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, GATEMBU & J. MOHAMMED, JJ.A.)**

**CIVIL APPEAL NO. 102 OF 2012**

**BETWEEN**

**KENYA OIL COMPANY LIMITED.....1<sup>ST</sup> APPELLANT**

**KOBIL PETROLEUM LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**KENYA PIPELINE COMPANY.....RESPONDENT**

*(BEING AN APPEAL AGAINST THE JUDGMENT & ORDER OF THE HIGH COURT OF KENYA AT NAIROBI (D.K. MUSINGA & G.K. KIMONDO, JJ.) DATED 26<sup>TH</sup> JANUARY, 2012*

*IN*

*H.C.C.A. NO. 13 OF 2010)*

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**JUDGMENT OF THE COURT**

1. This appeal arises from the Judgment of the High Court (**D. K. Musinga, J.** (as he then was) and **G. K. Kimondo J**) delivered on 26<sup>th</sup> January 2012 by which that court allowed the respondent's appeal against the appellants under section 39 of the Arbitration Act and set aside an arbitral award made on 10<sup>th</sup> December 2009 in which the arbitrator awarded to the respondent:
  - a. Damages to the appellants in the amount of US\$43,290,085.7 and Kshs. 2,000,000,000.00 amongst other reliefs.
  - b. Kshs. 133,505,216.60.

The High Court further ordered the matter to be remitted back to the arbitrator for reconsideration.

2. Aggrieved by the decision of the High Court, the appellants filed the present appeal complaining that the High Court erred in setting aside the award; that the court wrongly granted reliefs that were not prayed for; that the High Court conferred on itself jurisdiction, which it does not have, to retry and re-evaluate the evidence; that the High Court erred by holding that the arbitrator erred in

- assigning liability for delays in the berthing of ships to the respondent; that the court erred in holding that the arbitrator's views were coloured by a non-party to the reference; that the High Court erred in erroneously relying on and applying the principles in the decision of **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88)1 KAR 1**; that the High Court erred in its interpretation of its powers under section 39 of the Arbitration Act; that the court misapprehended its role and ought to have proceeded on the basis of the principles and legal test enunciated in **Geogas S. A v Trammo Gas Ltd (The "Balears") [1993] 1 Lloyd's L R 215** with regard to what constitutes questions of law and in failing to find that none of the complaints taken by the respondent before the High Court were issues of law; and that the learned judges of the High Court erred in interfering with the arbitrator's award.
3. On those grounds the appellants pray that the appeal be allowed, the decision of the High Court set aside and the final award of the arbitrator be reinstated.

## **History**

4. The respondent, a state corporation under the State Corporations Act, Chapter 446 of the Laws of Kenya as owner and operator of a system of pipeline storage and ancillary facilities, entered into a transport and storage agreement dated 10<sup>th</sup> May 1999 ("the agreement") with numerous oil shipping and marketing companies, including the appellants, under which the respondent agreed to accept petroleum products tendered by the appellants and to transport the same through its system and deliver the same to specified delivery points on the terms and conditions set out in the agreement.
5. According to the appellants, the respondent breached the agreement and was fraudulent by:
  - a. Allowing or colluding with Triton Petroleum Limited (Triton) and Glencore U.K. Ltd to use the respondents system as storage of its products thereby denying the appellants their fair share of ullage in the pipeline system.
  - b. Concealing information so as to allow unfair allocation of ullage in its system.
  - c. Fabricating and distorting records with regard to stock positions in the pipeline system.
  - d. Refusing or declining to offer the appellants services under the contract on 7<sup>th</sup> February 2006 in breach of a court order.
  - e. Declining or deliberately delaying to accept shipment of appellants' products from ships on diverse dates.
  - f. Refusing to pay compensation for ascertained loss.
  - g. Unilaterally increasing tariffs.

As a consequence, the appellants contended that they suffered substantial loss and damage.

6. The respondent denied the appellants' claim and contended that it adhered to the agreement and that the usage of the respondent's system by the appellant was subject to the conditions set out in the agreement as well as trade usage and practice in the oil industry in Kenya and that the appellants had an obligation to adhere to the procedure laid under the agreement; that the shortage of ullage and or storage space was a result of limited capacity, increased demand for space by shippers and abuse of the ullage allocation system by shippers including the appellants.
7. The respondent further contended that subsequent to the execution of the agreement, the number of shippers increased from 18 to 24 due to new entrants allowed under the agreement with the result that the total requirement of all shippers far exceeded the respondent's system capacity; that in view of constraints on the respondents system, ullage allocation is a matter of coordination between the shippers and the respondent at a monthly coordination meetings based on a needs assessment.
8. The respondent further contended that the shortage of storage space or ullage in its system was a result of the system capacity being far less than the requirement of all shippers and the effect of Legal Notice 47 of 2005 issued pursuant to the Customs and Excise Act which significantly affected Kipevu Oil Storage Facility (KOSF) operating procedures on evacuation of products and that in 2006 there were unusual circumstances including the need to provide special ullage for emergency power generation which exerted further pressure on the respondent's system capacity.

9. The respondent also denied that it concealed any information from the appellants or that it gave fraudulent preference to Triton in the allocation of ullage. It was also the respondent's case that it did not decline or delay to accept the appellants' shipment of products and that vessels are scheduled by Kenya Ports Authority on first come first serve basis.
10. The respondent counterclaimed for USD 16,759,145,38 and Kshs. 274,523,444.88 as at 17<sup>th</sup> June 2009 in respect of services rendered; unlawful demurrage deductions of Kshs. 126,487,117.66 and USD 9,803,829.19.
11. Under clause 22.0 of the agreement, the parties made provision for reference of disputes arising under the agreement to arbitration. By an agreement dated 12<sup>th</sup> June 2009 the parties appointed Mr. Ahmednassir Abdullahi (the arbitrator) as sole arbitrator to finally determine the liabilities or otherwise of the parties in relation to the disputes or differences under the agreement. The agreement to appoint the arbitrator contained a provision that "*the parties shall be at liberty to make application to a court to determine any question of law arising in the course of the arbitration and to prefer an appeal to a court on any question of law arising out of the award.*"
12. The arbitrator entered upon the reference and made his award dated 10<sup>th</sup> December 2009. Aggrieved by that award, the respondent appealed to the High Court invoking section 39(1)(b) of the Arbitration Act, 1995, section 79G of the Civil Procedure Act chapter 21 of the Laws of Kenya and Order 41 of the Civil Procedure Rules. The grounds of appeal were: that the arbitrator failed to consider the dispute in accordance with the contract between the parties; that the arbitrator exhibited bias against the appellants; that the arbitrator exceeded his jurisdiction by considering and making findings on matters not referred to him; that the arbitrator failed to treat the parties with equality contrary to section 19 of the Arbitration Act by undertaking research on behalf of the appellants and denying the respondent full opportunity to comment on or respond to the new materials generated by the arbitrator's research; that the arbitrator misdirected himself with regard to trade usage; that the arbitrator erred in failing to appreciate the effect of Kenya Airports Authority Act on the responsibility of docking and berthing of vessels; that the arbitrator misdirected himself on the provisions of the agreement; that the arbitrator erred in failing to assess the probative value of documents placed before him by the appellants as evidence of loss suffered and that the arbitrator erred in his assessment of damages.
13. After hearing the advocates for the parties, the High Court allowed the appeal partially set aside the award and remitted the matter to the arbitrator for reconsideration taking into account the findings of the court. The basis on which the High Court intervened was that the parties reserved the right to appeal against the award under section 39 of the Arbitration Act; that the complaints by the respondent involved points of law; that in keeping with the principles in **Bashir Ahmed Butt vs. Uwais Ahmed Khan** (supra) the court could interfere with an award of damages if either it reflects an entirely erroneous estimate, or where it is shown that the arbitrator proceeded on the wrong principles or misapprehended the evidence in some material respect and so arrived at an erroneous decision. Accordingly the court held that it was "*properly seized of jurisdiction to look at the merits of the arbitrator's award and to make appropriate orders in terms of section 39(2)(b) of the [Arbitration] Act.*"
14. The appellants are aggrieved by that decision of the High Court and have preferred the present appeal before us. The respondent has cross-appealed the decision of the High Court to the extent that it set aside the award in favour of the respondent on the counterclaim.

### **Submissions by Counsel**

15. Before us, learned counsel for the appellants Mr. D. Oyatsi who appeared with Mr. Wananda submitted that the respondent's appeal challenging the arbitral award in the High Court was made under section 39 of the Arbitration Act which allows appeal on point of law; that having regard to the principles enunciated in **United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] KLR 898**, the High court misdirected itself in law, misapprehended facts and took into account factors that the court should not have taken into account.
16. The first misdirection by the High Court, according to Mr. Oyatsi, is that despite acknowledgment by that court that it could not grant relief that was not sought, the court proceeded to do exactly that; that the prayers that the court granted are not the prayers the respondent sought in the memorandum of appeal in the High Court and that contrary to law, the court went on to set aside

- the award when there was no prayer to do so.
17. The second misdirection by the lower court according to the appellants' counsel is in relation to section 39 of Arbitration Act. According to Mr. Oyatsi, section 39 of the Arbitration Act is akin to section 22 of the repealed Arbitration Act under which provision was made for stating a case to the court for purposes of determination of a point of law; the question or questions of law for determination by the court must therefore be framed.
  18. Referring to the Memorandum of Objectives in the Arbitration Bill that preceded the enactment of the Arbitration Act 1995, counsel went on to say that the objects of the 1995 Arbitration Act include limited recourse to the courts as borne out by section 10 of the Act and expeditious disposal of disputes; that there is a distinction between an application for setting aside an award under section 35 and an appeal under section 39; that under section 35 the person applying to set aside an award must provide evidence to prove the grounds set out under that section and that there is a marked difference in approach between an application under that section and an appeal under section 39.
  19. According to Mr. Oyatsi, the respondent's complaints against the arbitral award in the High Court were not complaints on matters of law and the proper way of framing issues of law was also not adopted under section 39. Counsel went on to say that the threshold of what amounts to a question of law is discussed in the case of **Geogas S. A v Trammo Gas Ltd (The "Balears")** (supra) and that the complaint before the High Court by the respondent that there was no evidence to support the award on damages is not a question of law; that the case before the High Court was conducted on the basis of pleadings and submissions and no evidence was tabled before High Court; that the principles enunciated in **Geogas S. A v Trammo Gas Ltd (The "Balears")** (supra) are captured in our Arbitration Act in that under Section 20(3) the powers of the arbitrator include the power to determine admissibility, relevance and weight and the High court does not have power to intervene and substitute its own findings with those of the arbitrator and in doing that the High Court misdirected itself; that the High court took it upon itself the task of substituting findings of the arbitrator, without evidence or the record before the arbitrator; that the High court erroneously relied on case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan** (supra); that the powers and function in that situation are opposite to powers of the court under section 39 in that Section 39 is premised on acceptance of facts and the High court has no business in interfering with findings of fact.
  20. To support his arguments, Mr. Oyatsi cited the decision of this Court in case of **Anne Mumbi Hinga vs. Victoria Njoki Gathara Civil Appeal No. 8 of 2009**, which underscores the limited role of the court under section 10 of the Arbitration Act.
  21. Regarding the interpretation by the High Court on grounds of public policy, counsel submitted that public policy can only be raised under section 35 of the Arbitration Act and is not a question for consideration under section 39.
  22. Mr. Oyatsi also submitted that the arbitrator duly considered the pleadings and the evidence before rendering the award and the High Court had no justification in interfering with the award and coming up with its own version of findings.
  23. With regard to the award of damages made by the arbitrator, counsel submitted that the dispute leading to the arbitration was triggered when the managing director of the respondent locked out the appellant from the pipeline system with the result that the appellants fuel stations were deprived of and ran out of fuel leading to massive losses for which damages were correctly awarded by the arbitrator and the amount awarded was not plucked by the arbitrator from the air. For those reasons counsel for the appellants urged us to allow the appeal and reinstate the arbitral award.
  24. Opposing the appeal, learned counsel for the respondent Mr. J. Ohaga submitted that consistently with the principle of party autonomy in arbitration, the parties in the agreement to appoint an arbitrator reserved the right to prefer an appeal to court on any question of law arising out of the arbitral award and therefore the appeal by the respondent to the High Court was proper under section 39 of the Arbitration Act; that the grounds on which the respondent appealed to the High Court as borne out by the amended memorandum of appeal are matters of law and none of those grounds deal with matters of fact and neither did the High Court in its judgment stray into matters of facts.
  25. Turning to complaints in the memorandum of appeal Mr. Ohaga submitted that the High Court

- properly exercised its jurisdiction and correctly resolved the question of reliefs; that the High Court properly applied itself on the question of liability for demurrage charges based on the provisions of the Kenya Ports Authority Act and the decision of this Court in **Mediterranean Shipping Co. SA v Wheat Board of Kenya The MV Pantera [1988] KLR 80** also as the arbitrator erred in law holding the respondent responsible for delays in birthing.
- 26.Regarding the complaint by the appellant that the High Court erred in disturbing the arbitrator's award of damages without looking at the evidence, Mr. Ohaga submitted that the appellant is blowing hot and cold at the same time as on the one hand the appellant submitted that it was not open to the High Court to re evaluate evidence while on the other hand the appellants are complaining that the High Court did not look at the evidence before setting aside the award on damages. Counsel further submitted that having considered the arbitrator's process of reasoning in line with the decision in **Vinava Shipping Co. Ltd v Finelvet A.G (The"Chrysalis") [1983] 1 Lloyd's L R 503** the High Court correctly disturbed the award of damages as it had no legal basis. Counsel further submitted that the High Court had no choice but to interfere with the award having regard to the arbitrator's concession in the award that he was not addressed by the parties on the nature of alleged breach and the effect and nature of damages that can be awarded.
- 27.Mr. Ohaga further submitted that the High Court correctly applied the principles in **Bashir Ahmed Butt vs. Uwais Ahmed Khan** (supra) regarding the circumstances under which an award of damages may be interfered with and asserted that it is open to the court to consider the principles on which the arbitrator proceeded and if the principles are wrong, then the award must be disturbed. In the circumstances of this case, counsel went on to say, the High was impelled to disturb the award, as there was an error in principle on the part of the arbitrator in awarding damages without a basis. Counsel submitted that the approach taken by the High Court was guided by the principle in **Geogas S. A v Trammo Gas Ltd (The "Balears")**(supra) and the award was correctly disturbed for lack of foundation.
- 28.As regards the contention that the High Court erroneously approached the matter before it as though it was dealing with an application for setting aside the award under section 35 of the Arbitration Act, Mr. Ohaga submitted that the issue does not arise as the respondent's appeal to the High Court was based on section 39 and not section 35 and the attempt to distinguish between section 35 and 39 is not relevant to this appeal. Concluding his submissions, counsel submitted that the arbitrator's the award did not have any legal basis and the High Court was right to intervene and to disturb the award.
- 29.Turning to the cross-appeal, Mr. Ohaga submitted that the respondent had a counter claim that faced no challenge before the arbitral tribunal and neither was the issue of the award on the counterclaim before the High Court; that the interference by the High Court with the award under the counter claim was clearly erroneous; that the respondent's claim under the counterclaim is a claim for a liquidated amount and the error made by the arbitrator in awarding damages to the appellant did not affect the respondent's claim for liquidated damages. Counsel accordingly urged us to allow the cross appeal and reinstate the award on the counterclaim.
- 30.Finally counsel for the respondent complained that the arbitrator on his own motion undertook extensive research, on behalf of the appellants, without granting the respondent an opportunity to make submissions on the material he came up with and the High Court should have upheld the objection that it was not right for the arbitrator to do so and that it was incumbent upon the arbitrator to seek counsels' representations relating to those matters of law.
- 31.In his brief reply, Mr. Oyatsi reiterated that the role of the court when dealing with an appeal is specified under section 39(2) of the Arbitration Act and that role is to determine questions of law; that the reliefs the court can grant under that provision is either to set aside or remit the award and not both and accordingly the court erred in setting aside the award and then remitting the reference back to the arbitrator; that the principles enunciated in **Geogas S. A v Trammo Gas Ltd (The "Balears")**(supra) are contradictory to those in **Bashir Ahmed Butt vs. Uwais Ahmed Khan** (supra) and implicit in the respondent's concession that the principles in **Geogas S. A v Trammo Gas Ltd (The "Balears")** are applicable is a concession that the High Court erred in applying the principles in **Bashir Ahmed Butt vs. Uwais Ahmed Khan**; that having regard to the provisions of section 20 of the Arbitration Act the arbitrator did not err in assessing and awarding damages and the High Court was wrong to interfere with the award of damages which is based on documentary evidence presented before the arbitrator (and referred to there as CB-6) and that as a

- matter of fact the arbitrator gave a lower figure than the figure that was pleaded and proved and the appellant should be the one complaining about the award; and finally, that the award of damages is within the exclusive jurisdiction of the arbitrator under section 20(3) of Arbitration Act.
32. On the application of Kenya Ports Authority Act, counsel submitted that underpinning the application of that statute was a question of fact which the arbitrator had to determine and indeed found as a fact that the respondent prevented the appellant from discharging fuel and on that basis awarded damages.
33. Counsel concluded by submitting that there was no question of law for determination by the High Court and that none of the grounds of appeal before the High Court fell under section 39 of the Arbitration Act.

### **Analysis and determination**

34. Although the appellants framed 17 grounds of appeal the central issue for our determination is whether the High Court erred in its appreciation and application of section 39 of the Arbitration Act in allowing the respondent's appeal from the arbitral award. Related to that are two other questions: (i) under what circumstances should the High Court interfere with an arbitral award under section 39 of the Arbitration Act, and (ii) did the High Court in this case apply the right standards and in that regard what is the interplay between the principles in **Geogas S. A v Trammo Gas Ltd (The "Balears")**; **Vinava Shipping Co. Ltd v Finelvet A.G (The "Chrysalis")** and **Bashir Ahmed Butt vs. Uwais Ahmed Khan** (supra)? With regard to the cross appeal, the question is whether the High Court was right in setting aside the arbitrator's award in favour of the respondent on the counterclaim.
35. Having considered the appeal and the submissions by counsel, we take the following view. The Arbitration Act, 1995 adopted the Model Law on International Commercial Arbitrations that was adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL)[1]. In addition to improving, simplifying and harmonizing practices in international commercial arbitration, the Act recognizes the principle of party autonomy and limits the role of the courts in commercial arbitration.
36. The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend strictures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had.
37. Against that background, the parties in this appeal chose arbitration as the means by which they would resolve disputes between them. They also chose, as noted earlier, to reserve in express terms, a specific role for the court in the following terms: "*the parties shall be at liberty to make application to a court to determine any question of law arising in the course of the arbitration and to prefer an appeal to a court on any question of law arising out of the award.*"
38. The parties envisaged that there might be need, in the course of arbitration, to frame and refer questions of law to the court for determination or to appeal to court the decision of the arbitrator upon conclusion of the reference. Invoking that provision in the agreement and section 39 of the Arbitration Act, the respondent after the conclusion of the reference and the rendering of the award successfully appealed the award to the High Court.
39. In addressing the question whether the High Court erred in its appreciation and application of section 39 of the Arbitration Act in allowing the respondent's appeal from the arbitral award, we think the principles discussed in the case of **Geogas S. A v Trammo Gas Ltd (The "Balears")** offer useful guidance. In that case, as is the case here, the question arose as to whether it was permissible to review as an error of law a finding of fact by arbitrators, which is challenged on the ground that there was no evidence to support it.
40. The court in that case was dealing with an appeal under section 1 of the English Arbitration Act, 1979. It is necessary to quote at length the words of Lord Justice Steyn, who, while addressing the limits of the jurisdiction of the court hearing an appeal under that Act, had this to say:

***"The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of***

*the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."*

41. The principle captured by Lord Justice Steyn in that passage in relation to section 1 of the English Arbitration Act is in our view applicable under section 39 of our Arbitration Act. In effect having agreed to submit their disputes to arbitration, the parties to this appeal must accept and honour the result of the arbitrator's findings of fact.

Lord Justice Steyn went on to emphasize the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's finding of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged.

42. Concerning the critical matter of whether a question of law on which the arbitrators erred was identified in that case, it is again necessary to quote at length the words of Justice Steyn. He stated:

*"It is often difficult to decide what is a question of law, or a question of mixed law and fact, rather than a pure question of fact. In law the context is always of critical importance. The enquiry "is it a question of law" must therefore always be answered by the counter enquiry "for what purpose?". What is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitration. In short the closest attention must always be paid to the context in order to decide whether a question of law arises. Given the fact that the resolution of this preliminary issue determines whether the court has jurisdiction to substitute its view for the view of the tribunal, freely chosen by the parties of full contractual capacity, there is in my view no sensible reason for adopting an enlarged view of what constitutes a question of law."*

43. In **Geogas S A vs. Trammo Gas Ltd** and the decision of this Court in the case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan** on which the High Court relied when interfering with the arbitral award. In **Geogas S A vs. Trammo Gas Ltd**, the English Court of Appeal was concerned with the question of the jurisdiction of the court when dealing with an appeal, on a question of law, under section 1 of the Arbitration Act, 1979. In the case before us, the High Court relied on the principles enunciated by this Court in **Bashir Ahmed Butt vs. Uwais Ahmed Khan** regarding the circumstances under which an appellate court might disturb an award of damages by a lower court, and concluded that on application of those principles, the arbitrator had made errors of law in the award of damages.
44. Given that context, we are not persuaded by the submission by counsel for the appellants that there is an inconsistency between the two decisions. (Decision by the English Court of Appeal).
45. Counsel for the appellants also drew our attention, to the English case of **Vinava Shipping Co. Ltd v Finelvet A.G (The "Chrysalis") [1983] 1 Lloyd's L.R 503** in which Mr. Justice Mustill of the Queen's Bench division, when dealing with an appeal from an interim arbitral award, suggested how an award can be shown to be wrong in law. He proposed that the arbitrator's reasoning process should be divided into three stages. First, that the arbitrator ascertains the facts by making findings on any facts in dispute. Secondly, the arbitrator ascertains the law and thirdly the arbitrator reaches a decision in light of the facts and the law. In his view, the second stage of ascertaining the law is the proper subject matter of an appeal. He stated that:

*"The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of*

***law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator arrived at another: and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct-for the court is then driven to assume that he did not properly understand the principles which he had stated.***”

46. We find the above pronouncements by Lord Justice Steyn and Mr. Justice Mustill persuasive. An enquiry as to whether questions of law were raised before the High Court and whether the decision of the High Court was based on issues of law therefore requires consideration. In other words were there, in the matter before us, questions of law before the High Court on the basis of which the High Court could interfere with the arbitrator’s award? In addressing that question it is important to look at the findings by the arbitrator, the challenges to those findings in the High Court, and the High Court’s determination with regard those challenges.
47. The arbitrator’s award was in two parts. In the first part, the arbitrator dealt with the issue of liability. In the second part of the award, the arbitrator dealt with the award of damages. On liability the arbitrator, after reviewing the material that was placed before him, made specific findings that the respondent breached the agreement. The incidents of breach as found by the arbitrator include breach of clause 2 and 27 of the agreement by giving preferential treatment to Triton Petroleum Limited; breach of the agreement by the respondent by permitting Triton to use the respondents pipeline system as a storage; breach of the clause 2 and 9.5 of the agreement by the respondent in refusing to deliver services to the appellant; breach of clause 10.4 of the agreement by the respondent by keeping separate records in relation to stock levels; breach of clause 8.2.1 of the agreement; breach of clause 14.1 of the agreement by the respondent by failing to increase the pipeline capacity; breach of clause 14.2 of the agreement by failing to prorate the available pipeline capacity between the shippers and breach of clause 15.4 of the agreement by the respondent by reviewing tariffs before the conditions precedent to such review were fulfilled.
48. In the second part of his award, the arbitrator dealt with damage and loss as a consequence flowing from the breaches. The arbitrator awarded:
- a. USD 11,290,085.67 for “*loss or damage...suffered as a result of their [claimants] ships being delayed in off loading the cargo.*”
  - b. USD 47,433,067 and Kshs. 2,582,267,508 for breach of clause 8.2.1 of the agreement, which in exercise of discretion he reduced to an award of USD 30,000,000.00, and Kshs. 2,000,000,000.
  - c. USD 11.98 million for “*loss of consumer and investor goodwill*” based on report prepared by Vista Capital Limited from which he then stated “*I deducted USD7.98 million and leave an award of USD2 million*” which he considered adequate and fair compensation as “*the claimants have quickly recovered...from the loss in terms of customers and goodwill...*”
49. With regard to the respondent’s counterclaim, the arbitrator awarded the respondent:
- a. USD 333,131.7 with interest at court rates representing rebates which the appellants had awarded themselves less an amount of Kshs. 3,454,559.11 apparently conceded.
  - b. Kshs. 130,050,657.56 and USD 5,047,075.13 for unpaid invoices.
50. On appeal, the High Court held that it had jurisdiction based on the agreement of the parties under clause 2 of the agreement appointing the arbitrator and section 39 of the Arbitration Act to “*look at the merits of the arbitrator’s award and make appropriate orders in terms of section 39(2)(b) of the [Arbitration] Act.*”
51. Having regard to clause 2 of the agreement appointing the arbitrator and section 39 of the Arbitration Act there is no doubt in our minds that the High Court had the mandate to entertain an appeal from the arbitral award. Clause 2 of the agreement and section 39 of the Act did not however give the High Court the mandate, carte blanche, to interfere with findings of fact made by the arbitrator. The mandate was restricted to points of law. We do not, for instance, consider that

the High Court could rightly interfere with the findings, principally findings of fact, by the arbitrator on the basis of which the arbitrator found that liability against the respondent was established. Before reaching his findings on liability, the arbitrator had at his disposal, as is evident from the award, material that was not available to the High Court or to this Court.

52. Having said that, we are persuaded that the High Court was right to interfere with the arbitrator's award of damages as, in our view, the arbitrator fell into an error of law in his consideration of the question of the measure of damages to award. Some of the pertinent holdings by the High Court on the basis of which it considered it had the mandate to intervene and disturb the arbitrator's award include holdings that:

- a. In an arbitration by documents, the mere presentation of documents by a party is not conclusive as to the fact sought to be proved. It remains incumbent on the arbitrator to be satisfied as to the probative value of those documents or reports particularly in the absence of cross-examination.
- b. The arbitrator wrongly awarded an amount of USD 11.98 million merely on the basis of a report by Vista Capital Limited.
- c. That having found that he was not fully addressed by the parties on the nature of alleged breaches or damages, it was not clear on what basis the arbitrator proceeded to award damages.
- d. It was open to the arbitrator, under rule 8 of the Arbitration Rules of the Chartered Institute of Arbitrators of Kenya which were applicable to the reference, to order the parties to produce other documents or to address him further on the pivotal matters of the or damages.
- e. The arbitrator failed to take into account the Kipevu Oil Storage Facility Operating procedures and clause 3.6 of the agreement with the result that he "*outwent the boundaries of the contract*" and erred into assigning liability for delays to the respondent and in condemning it to damages.
- f. The arbitrator failed to apply the provisions of the Kenya Ports Authority Act which reserves to Kenya Ports Authority the discretion to decide when and which ship will occupy which berth with the result that he "*failed to apply the provisions of the Act...and the agreement of the parties on the responsibility and liabilities for arrival, docking and berthing of respondent's shippers (sic) at the port of Mombasa.*"
- g. The arbitrator undermined the foundation of his liberal award by discounting his award without clear basis.
- h. The arbitrator failed to take into account provisions of the Energy Act.
- i. The arbitrator erroneously alluded to the concept of special relationship and thereby imported tortious liability in a matter of contract on the basis of which he then awarded damages with the result that he re wrote the contract for the parties.
- j. The award was not faithful to section 29(5) of the Arbitration Act, which mandates the arbitrator to decide the matter in accordance with the terms of the contract taking into account the usages of trade applicable to a particular transaction. The arbitrator therefore exceeded his jurisdiction in going outside the boundaries of the contract and the trade or usages applicable.
- k. Some of the consequential and tortious damages awarded are not available in contract.
- The counterclaim was equally tainted.
- m. The award is inordinately high and "*the arbitrator proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.*"

53. We think the complaints in the High Court on above holdings are matters within the province of appeal as matters of law. Holdings a) to b) above for instance speak to the question whether the loss and damage claimed by the appellants and awarded by the arbitrator was proved to the requisite standard. That in our view is a legal question. The arbitrator was himself alive to the legal burden the appellants had to discharge in order to succeed in their claims. He stated in the introductory part of this award, correctly in our view, that *“the success or failure of [the appellants] case depend entirely on whether or not they prove the same before this tribunal on a balance of probability.”*
54. Later on in the award, the arbitrator (at paragraph 33 of his award) laments that the parties failed and overlooked to address the arbitral tribunal on an issue of pivotal importance regarding the alleged breach of the agreement, effect of that breach and the nature of damages that can be awarded. The dearth of material at the disposal of the arbitrator in addressing the question of loss and damage is immediately clear from the award itself. While the arbitrator undertook detailed analysis on the question of liability, (he used 114 pages and 224 paragraphs of his award on the question of liability) his award of USD11, 290,085.67 was made without regard, in our respectful view, to whether the legal burden of proof was discharged. For instance in making the award of USD11,290,085.67 the arbitrator simply states that *“I hold and find that the claimants to the satisfaction of this tribunal have proved this claim. The evidence adduced in CB-1 at pages 816 and 841 clearly prove the loss suffered by the claimant and the demurrages reimbursement or losses charged. CB-7 pages 1850 to 1911 again clearly show that the claimants have suffered the loss relating to demurrage charges and are thus entitled to reimbursement.”*
55. When awarding USD 47,433,067 and Kshs. 2,582,267,508 for breach of clause 8.2.1 of the agreement, which he reduced to an award of USD 30,000,000.00, and Kshs. 2,000,000,000 in exercise of discretion, the arbitrator stated, without more, that *“the evidence adduced in CB-6 at pages 158 to 1740 proves the contention of the claimants.”*
56. In relation to the award for damage for loss of consumer and investor goodwill, the arbitrator awarded USD 11.98 million on the basis of a report by Vista Capital Limited that *“states that the claimants have suffered loss to the tune of US\$11.98 million.”* We do not think that a statement in such a report could in the circumstances, by itself without more, be a basis for establishing loss in the nature claimed to the required legal standard of balance of probabilities.
57. We are therefore in agreement with the High Court when it stated in its judgment that *“even admitting that the arbitrator is the master of the facts, we hold the view that in an arbitration by documents, the mere presentation of documents by a party is not conclusive as to the fact sought to be proved. It remains incumbent on the arbitrator to be satisfied as to the probative value of those documents or reports particularly in the absence of cross-examination.”*
58. The arbitrator, who in the conduct of arbitration must remain, in accordance with the letter and spirit of section 20 of the Arbitration Act, the master of procedure, appears to have considered himself constrained by the fact that he was presiding over “documents only” arbitration. Documents only procedure is most clearly appropriate where all the evidence relevant to the dispute is contained in documents, including expert reports, and there is no need for evidence from witnesses to supplement the documents. It can also be used where the dispute involves simple issues of fact and opinion.
59. A document only arbitration does not mean that the arbitrator is obliged to accept, without consideration, the documents submitted as establishing the facts sought to be proved. The arbitrator must act judicially in the conduct of the arbitration; it is his duty to consider the weight of material placed before him and give reasons for the decision arrived at. Having regard to the fact that the parties in their agreement to appoint an arbitrator adopted the Arbitration Rules of the Chartered Institute of Arbitrators of Kenya, we agree with the High Court that it was open to the arbitrator to invite the parties to address him further or to produce other documents in relation what he considered pivotal matters on damages.
60. In light of the conclusion to which we have reached, it is not necessary to consider whether the High Court was wrong in rejecting the argument that the arbitrator manifested bias by undertaking research and basing his award on that research without according the parties an opportunity and also regarding the impact, if any of the Constitution 2010, on the principle of party autonomy and the conduct of arbitration proceedings.
61. In the result, we are satisfied that the High Court, proceeded on the correct principle by disturbing

the arbitral award and by remitting the matter to the arbitrator for reconsideration in accordance with section 39 of the Arbitration Act.

62. The High Court, in allowing the appeal and “*setting aside part of the award*” stated “*we will not therefore set aside the award in its entirety*”. The High Court then ordered that the matter be remitted “*to the arbitrator for consideration, taking into account the findings of this judgment.*”

63. In our view, the extent to which the High Court could rightly disturb the award is in relation to the awards for loss and damages. The High Court could not in the circumstances of this case interfere with the arbitrator’s findings of fact. The parties are therefore bound by the arbitrator’s findings of fact on liability and the matter could only be remitted back to the arbitrator for reconsideration on the question of assessment of loss and damage.

64. As the award in favour of the respondent on its counterclaim is inextricably linked to the appellants claim, the arbitrator should reconsider the same alongside the appellants claim for damages.

65. The result of the foregoing is that the appeal fails and is dismissed. The respondent’s cross appeal also fails and is also dismissed.

66. We think, in all the circumstances, the appropriate order as regards costs of the appeal and of the cross appeal is that each party shall bear its own costs.

***DATED and DELIVERED at Nairobi this 31st day of January, 2014.***

***P.N. WAKI***

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***JUDGE OF APPEAL***

***S. GATEMBU KAIRU***

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***JUDGE OF APPEAL***

***J. MOHAMMED***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**

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[1] See the Memorandum of Objects and Reasons, The Arbitration Bill, 1995