



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, GITHINJI & VISRAM, J.J.A)

CIVIL APPEAL NO. 275 OF 2002

BETWEEN

KENYA AIRFREIGHT HANDLING LTD.....APPELLANT

AND

KENITAL SOLAR ENERGY LTD.....1ST RESPONDENT

AIR FRANCE.....2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J) dated 27th September, 2000

in

H. C. C. No. 2351 of 1996)

JUDGMENT OF THE COURT

By a plaint dated 17th September, 1996 and filed in the superior court on 18th September, 1996, the 1st respondent, ***Kenital Solar Energy Ltd (Kenital)*** (plaintiff in the superior court) claimed from the appellant, ***Kenya Airfreight Handling Ltd (KAH)*** (1st defendant in the superior court) and the 2nd respondent, ***Air France*** (2nd defendant in the superior court) the sum of Kshs.2,055,876/= being the value of goods comprising invertors packed in a pallet weighing 313 kg lost while in the care and custody of KAH. Kenital also claimed loss of profits amounting to Kshs.1,155,876/=.

The material facts are not in dispute. On 13th October, 1995, Kenital ordered a consignment of goods comprising two pallets of invertors weighing 620 kg from the United States of America. It contracted Air France to transport the same to Nairobi, and to have them delivered to it in Nairobi. Air France did so, and duly delivered the same to KAH, its ground handling agent on 25th October, 1995. After taking delivery of the goods, KAH arranged to store them in its warehouse at the Jomo Kenyatta International Airport, Nairobi. The relationship between Air France and KAH was governed by a ground handling agreement dated 1st September, 1976 which required KAH, among other things, to provide services “with due regard to safety, local and international regulations and the requirements of the carrier (Air France) and in such a manner that the general public is given the best impression of air transport.”

Evidence adduced before the superior court shows that the goods were stored in very secure premises, with guarded entrances and exits, with very limited access to the premises, and almost no access for

members of the public, and finally with a staff of some 20 people working within the premises. Despite all these fairly immaculate controls, one of the two pallets of goods, comprising 313 kg of invertors, described in evidence as almost the size of the witness box in the court, disappeared. No one could explain how it disappeared. KAH, in whose possession and control the goods were placed, offered absolutely no explanation of how the goods went missing, and admitted before us, through Mr. Kimani Kiragu, its learned counsel, that the matter was not reported to the police, nor were any investigations carried out, certainly no investigating agency was commissioned to inquire into the disappearance of the goods.

Kenital, as we said before, sued both KAH and Air France. In its defence KAH denied liability on the grounds that it had no contractual relationship with Kenital; denied it was negligent; and claimed indemnity from Air France. In any event, KAH argued that its liability, if any, was limited to USD \$20 per kilo in accordance with the Warsaw Convention and the IATA Standard Ground Handling Agreement.

Air France, in its defence, claimed that it was not liable for the loss on the ground that clause 8.2 of its ground-handling agreement with KAH stipulated that the carrier (Air France) shall not be liable for the negligence of the handling company (KAH) where the negligence is caused by wilful misconduct or wilful breach of duty of the handling company, its servants or agents acting within the scope of their employment or agency. Air France, in turn, sought indemnity from KAH, should it be found liable to Kenital.

On those facts, the learned trial Judge (Ang'awa, J) found for Kenital, holding that KAH, and not Air France, was liable to Kenital. Here is how she delivered herself:

“The advocate for the 1st defendant conceded that only one parcel of goods was released instead of two. This was not negligence per se. The 2nd defendant had failed to call evidence to show that there was wilful misconduct and or a duty of care. The defendant No. 1 pray to be indemnified by the defendant No. 2.

Where a large cargo is received into a warehouse of a total of not more than 20 staff; where one of the parcel is not found after being received, I would hold that there was a wilful breach of duty on the part of the 1st defendant.

When the plaintiff had ordered his cargo in the airway bill, the manifest did not disclose the amount or value the goods were worth. In fact what was disclosed was the words NVD “No value declared.” By stating so in its airway bill manifest the plaintiff is bound to be compensated to US \$ 20 per kilo according to the Warsaw Convention.

I find the plaintiff is entitled to the prayers sought. He is not entitled to loss of profits as he failed to prove this in evidence.”

Being aggrieved by that decision, KAH is before us in this appeal, with five grounds of appeal, as follows:

“1. There were no grounds for finding that the second respondent Air France is entitled to an indemnity from the appellant.

2. The 2nd respondent Air France did not prove willful (sic) misconduct/breach of duty and it did not discharge the burden imposed on it by the Evidence Act.

3. Having found that the appellant was the agent of the second respondent, Air France, the learned Judge should have found the remedy lay only against the principal and not the agent.

4. The learned Judge erred in holding that there had been willful (sic) neglect of duty on the part of

the appellant for failure to deliver one parcel to the first respondent. There was no basis for this holding.

5. The learned Judge should have given effect to the contract between the appellant and the second respondent and in particular to Clause 8.2 of the said contract and not directed that the appellant indemnifies the second respondent.”

The single most important issue in this appeal is who, as between KAH and Air France, is liable to Kenital. There is no dispute that Kenital was entitled to compensation for the loss it suffered in the amount found by the superior court. The issue is whether the “principal” (Air France) or the “handling agent” (KAH) pays the compensation. To determine that issue, it is common ground that we look at clause 8.2 of the ground handling agreement, which states as follows:

“8.2 Notwithstanding any negligence on the part of the Handling Company, its servants or Agents, the Carrier agrees to Indemnify the Handling Company from and against all liabilities, claims, proceedings, costs, losses, damages, charges, expenses and such other disadvantages which the Handling Company may sustain, incur or pay by reason or arising out of any service rendered or performance of obligation by the Handling Company under the provisions of this Agreement unless caused by wilful misconduct or wilful breach of duty on the part of the Handling Company, its servants, acting within the scope of their employment or its agents acting within the scope of their agency.” (emphasis added).

Mr. Kimani Kiragu, learned counsel for KAH, argued before us that neither Kenital nor Air France had called any evidence in the superior court to show how the loss was occasioned by KAH’s wilful misconduct or wilful breach of duty on its part. Indeed, he argued that Air France had offered no evidence at all, a burden that it carried in civil cases, to show that KAH had been negligent, let alone that such negligence was occasioned by “wilful misconduct” or “wilful breach of duty”.

According to him, it was not enough to say that KAH had the custody of the goods, so it was liable. In order to invoke the aforesaid clause 8.2, Air France was required to adduce evidence of such wilful breach of duty on the part of KAH. He relied on **sections 107 and 108** of the Evidence Act to argue that the burden of proof lay on the person who alleged a given fact. Relying on “*Words and Phrases Legally Defined*” (Vol. 5, 2nd Ed.) Mr. Kimani argued that “wilful misconduct” went beyond negligence, and was intentional or deliberate conduct. He relied on **Lewis vs the Great Western Railway Company (1877) QB 195** where it was held that:

“‘Wilful misconduct’ means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful.”

Mr. Kimani also cited the cases of **Horabin vs BOAC (1952) 2 AER 1016** for the proposition that each act must be looked at independently to determine whether together they amounted to “wilful misconduct”, and **East Africa Airways Corporation vs. National Bank of Commerce (1976) LLR 356** for the proposition that it was necessary to adduce evidence to show wilful misconduct.

Mr. K. Nyaencha, learned counsel for Kenital, supported the superior court in its judgment that where a huge case of goods, weighing 313 kg, disappear from a secure warehouse built of stone and corrugated iron sheets, where the public is not allowed, that in itself is an act of wilful misconduct on the part of the person in control of those premises.

Mr. K. Marete, learned counsel for Air France, likewise argued that in the absence of any explanation on the part of KAH, the superior court was entitled to make an inference on the facts, and to hold KAH guilty of wilful misconduct on a balance of probability. He invited us to review the case of **Horabin (supra)** which, he argued, applied an objective test to determine “wilful misconduct”.

Having reviewed the evidence on record before the superior court, and having heard argument and considered the cases and authorities cited before us, we are of the considered view that the learned Judge

was correct in inferring “wilful misconduct” on the part of KAH and its servants or agents, and in coming to the conclusion that it was liable on a balance of probability. We agree with the submissions made by Mr. Marete and Mr. Nyaencha that when a large case of goods, weighing some 313 kg disappears from your premises, you certainly have an obligation to provide some explanation of what happened. KAH’s case, as expounded by Mr. Kimani, is that in civil cases the burden is on he who alleges, that the defendant has no obligation to say or do anything, and that here, in this case, Air France offered no evidence at all, and cannot now claim that KAH was guilty of wilful misconduct.

However, it was KAH who received the goods safely and deposited the same in its warehouse. The warehouse was built of stone and corrugated iron sheets. It had some 20 people assigned to guard the premises. The public had absolutely no access to it. All the four gates – the entry and exit points were guarded, and yet the goods just vanished. What is more telling is that KAH simply did nothing about it – it neither reported the matter to the police, nor commissioned any investigation. This indicates a state of mind that leads us partly to the conclusion that it went beyond being reckless, and were possibly guilty of wilful misconduct. And it offered absolutely no explanation of the loss to anyone. It continued to claim in the superior court, as it did before us, that the onus was on Air France to call evidence and prove its case. What possible evidence could Air France call? It had parted with the goods, and knew nothing of what happened. Whatever happened was only within the knowledge of KAH, and it certainly had an obligation to offer an explanation as to what happened. **Section 112** of the Evidence Act states as follows:

“S. 112: In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

In our view KAH failed to explain a fact which we believe was especially within its knowledge, and failed to take any steps to inquire into the missing goods, and the learned Judge was entitled to infer wilful misconduct on its part given the facts of this case. In the ***Horabin case (supra)*** cited to us by Mr. Kimani, Barry, J expressed himself thus:

“If you find that any of the servants of the defendants - either the pilot, or any of the ground staff - committed any of the acts of misconduct which have been alleged in this case, you have next to consider the, perhaps, more difficult question of whether that act of misconduct was wilful. In order to establish wilful misconduct the plaintiff must satisfy you that the person who did the act knew at the time that he was doing something wrong and yet did it not-withstanding, or, alternatively, that he did it quite recklessly, not caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers for which and for whom he was responsible. That is something quite different from negligence or carelessness or error of judgment, or even incompetence, where the wrongful intention is absent. All these human failings - errors of judgment, carelessness, negligence, or incompetence – may give rise to acts which in the judgment of ordinary reasonable people may amount to misconduct, but the element of wilfulness is there missing. The element of wilfulness is essential in the present case if the plaintiff is to recover more than the £3,000 odd to which he is admittedly entitled.

You may think that what was actually done matters less than the intention or state of mind of the person who did it. The same act may amount on one occasion to mere negligence, and on another to wilful misconduct. Two men driving motor cars may both pass traffic lights after they have changed from yellow to red. In both cases there are the same act, the same traffic lights, the same cross-roads, and the same motor cars. In the first case the man may have been driving a little too fast. He may not have been keeping a proper look-out, and he may not have seen the lights (although he ought to have seen them) until he was too close to them and was unable to stop, and, therefore, crossed the roads when the lights were against him. He was not intending to do anything wrong, to disregard the provisions of the Road Traffic Act to endanger the lives of anyone using the road, but he was careless in not keeping a proper look-out and in going too fast, and as a result, without intending to do anything wrong, he committed an act which was clearly an act of misconduct. The second driver is in a hurry. He knows all about the lights, and he sees in plenty of

time that they are changing from yellow to red, but he says to himself: "Hardly any traffic comes out of this side road which I am about to cross. I will go on. I am not going to bother to stop." He does not expect an accident to happen, but he knows that he is doing something wrong. He knows that he should stop, and he is able to stop, but he does not, and he commits exactly the same act as the other driver. But in that frame of mind no jury would have very much difficulty in coming to the conclusion that he had committed an act of wilful misconduct. Of course, he did not intend to kill anyone or to injure anyone coming out of the side road. He thought that in all probability nobody would be coming out of the side road. None the less, he took a risk which he knew he ought not to take, and in those circumstances he could be rightly found to have committed an act of wilful misconduct. In the present case, there is no direct evidence of the state of mind or the intentions of the various persons said to have committed acts of wilful misconduct. The unfortunate pilot is dead. It may have been impossible- we do not know-to trace the person in the map dispatch department or the person from the staff of the line who was responsible for compiling the route book. But we have not seen them here, and there can be no direct evidence as to their state of mind. You are not, however, confined to direct evidence. You are entitled to look at the whole of the facts and to draw an inference from those facts as to the state of mind and the intentions of the person who does some particular act." (emphasis added).

We believe that the learned Judge was entitled to look at all of the facts, and to draw an inference as she did, and we are unable to fault her for the same.

For those reasons we dismiss this appeal with costs to both the respondents.

Dated and delivered at Nairobi this 11th day of March, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR