REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL

AT KISUMU

Civil Appeal 78 of 2005

TRANSWORLD (K) LIMITED ……..……. APPELLANT

AND

ROBIN MAKORI RATEMO ……..……..…… RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Kisii (Bauni, J) dated 18th March 2004

in

H.C. Civil Suit No. 208 of 2001)

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JUDGMENT OF ONYANGO OTIENO, J.A

I have had the opportunity to read and I have read in draft, the judgment of Bosire J.A. I do concur with him.

I may add that in my view, even if the amended plaint was treated as not filed and the matter proceeded in the superior court on the pleadings in the original plaint, that would not have made any difference as the pleadings in that original plaint left no doubt that the plaintiff was indeed proceeding on the basis of **Civil Aviation Act (Cap 394) and Carriage of Air Act – Act No. 2 of 1993.** For what would one make of the pleadings at paragraph 4 of the plaint where it is stated:

"**4. On 12.7.2000 at about 6 a.m. at SAROVA MARA LODGE in the Maasai Mara Game Reserve the plaintiff was a lawful passenger in the defendant's Hot Air Baloon when during take off the defendant, his agent and/or servant so negligently piloted, managed and or controlled the said Hot Air Baloon Registration No. 5Y – BLK that he caused or permitted the same to explode and cought (sic) fire causing or occasioning serious injuries to the plaintiff."**

When that pleading is read together with the definition of an aircraft as provided in Civil Aviation Act, Chapter 394 Laws of Kenya **section 2(1)** which states:

"**aircraft means any machine that can derive support in the atmosphere from the reactions of the air, other than the reactions of the air against the earth surface, and includes all flying machines, aeroplanes, gliders, seaplanes, roto crafts, airships, baloons, gyroplanes, helicopters, ornithopters and other similar machines, but excludes state aircraft."**

one must come to the irresistible conclusion, that save for the omission of the words Carriage by Air Act, the original plaint was for all purposes talking about an accident of a person who was already in a baloon, one of the machines defined as an aircraft and thus the Act was being invoked. In any event, looking at the entire pleadings including the amended defence which directly brought the issue of carriage by air into the dispute, one cannot escape the conclusion that the superior court was left by the parties in their pleadings, evidence and submissions, with that issue to decide upon even if it was not specifically pleaded in the original plaint. In the case of **Shire vs. Thahiti Finance Co. Ltd**, this Court relied on the well known case of **Odd Jobs vs. Mubia (1974) EA 476** and stated as follows:

"**With respect to the learned Judge, that issue does not flow from the pleadings. However, that notwithstanding, a court may base a decision on an unpleaded issue where, as here, it appears from the course followed at the trial, that the issue has been left to the court for decision – see Odd Jobs vs. Mubia (1974) EA 476."**

On my part, even without going into whether the amended plaint was validly on record or not, and going by the original plaint, I would agree with the learned Judge of the superior court in his findings in the judgment where he stated, *inter alia*:

"**However, the main amendment sought was to insert a clause to state that the suit was being brought under The Carriage by Air Act. Strictly, there is no requirement that one has to specifically place the law under which the suit is brought. Even the original plaint was clear."**

There may be cases where the law is specific that the provisions of the Act must be cited but in my mind, even in such cases if the pleading is such as to leave no doubt as to the law being relied upon and if the conduct of the case also leaves the court with that issue, then the court can perfectly decide the case basing its decision on that legal provision.

The next matter I need to comment on briefly is as to whether the appellant was in any way liable to the respondent. It is correct that under **Article 20** of the Convention for the Unification of Certain Rules for International Carriage by Air as Amended by the Hague Protocol 1955, the respondent needed not prove negligence and the appellant needed to demonstrate either that he had taken all possible care to avoid the accident or that there was nothing it could have done in the circumstances. It is also correct that the respondent in his evidence says Mark, the appellant's agent who was piloting the baloon, was not negligent as he checked if everything was okay before he told the respondent and others to get into the baloon. Gideon Salum (DW 2) also said that mark was not the one who caused the baloon to explode and that the company ensured everything was okay. He said in his evidence in chief that the cause of explosion was never established. In his cross-examination however, he said it was one of the gas cylinders that exploded. Salum was only 10ft from the baloon and he claims to have seen everything. I do think the learned Judge came to the conclusion that there could have been a leakage of the gas and that is what caused the explosion, from that evidence of Salum. That might have been his own inference drawn from the evidence before him. It may have been extraneous, but one thing stands out, and that is that the only party who could have been in a position to avoid the accident was the appellant. It did not. Allan Shakrasin (DW 1) gave detailed evidence of the procedure required in checking a baloon before it is set to take off. He also said all baloons need a certificate from the Civil Aviation after the baloon is checked, and produced such certificate in respect of the subject baloon as evidence that it was airworthy and the certificate was valid upto 23rd March 2001 whereas the accident occurred on 12th July 2000. Unfortunately, there was no proper evidence as to what among the items Shakrasin said must be checked were actually checked by Mark on the accident date before he started the engine. In my mind, much as there was a certificate that the baloon was airworthy, that was for general purposes, but there needed to be evidence of thorough check carried out from time to time in between the period of the certificate and on the very day the baloon was to be used. That evidence needed come from the appellant. I do not find

Gideon's evidence that the pilot inspected everything and that he saw him do so as enough without the court being told as to what was actually inspected and found to be in order and the extent and quality of such checking. Clearly, all could not have been in order if few seconds later, the baloon, on being lit, exploded. I do not think the provisions of **Article 20** of the Convention for the Unification of Certain Rules for International Carriage by Air as amended by the Hague Protocol of 1955 would be available to the appellant as it has not been shown that it indeed did everything to avert the accident or that it was not possible for it in the circumstances to take any action to avert the accident. As there is no evidence whatsoever that the respondent contributed to the accident in any way, the appellant was, as rightly found by the learned Judge, 100% liable. Although the law has often been referred to as being an ass, I do not think, the respondent, who was an innocent person invited into the baloon by the appellant's servant and who suffered severe injuries as stated on record should be sent away from court empty handed simply because the appellant, whose servant was in charge of his safety, failed to ensure that safety saying it was not negligent simply because the baloon it was duty bound to maintain and was at the relevant time operating exploded without it knowing the cause of the explosion even upto the date the suit was heard about four years later. That, in my humble view, would be turning a blind eye to realities. Courts of law were never in themselves meant to ignore realities and I would not lend a hand to that approach. The gas cylinder could have exploded either because it was leaking or it was not of the proper standard required in such matters. It was upto the appellant to ensure that a proper gas cylinder was used in the circumstances prevailing on that day.

Save for the above comments, I do agree with my brother Bosire J.A. on other aspects of his judgment including his decision on the quantum of damages to be awarded. I would, on my part, dismiss this appeal with costs to the respondent.

Dated and delivered at Nairobi this 15th day of February, 2008.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR