REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 78 of 2005

TRANSWORLD SAFARIS (K) LTD. …………………………. APPELLANT

AND

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

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

in

H.C.C.C. NO. 208 OF 2001)

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JUDGMENT OF GITHINJI, J.A.

This is an appeal from the judgment and decree of the superior court sitting at Kisii (Kaburu Bauni J) dated 18th March, 2004 whereby the superior court awarded a total of Shs.4,326,610/= as damages to the respondent as a result of injuries sustained in a Hot Air Balloon accident.

The cause of action was pleaded in paragraphs 4 and 5 of the plaint dated 19th December, 2001, thus:

"***4. On 12.7.2000 at about 6.00 a.m. at SAROVA MARA LODGE in the Maasai Mara Game Reserve the plaintiff was a lawful passenger in the defendant's Hot Air Balloon when during take off the defendant, his agent and or servant so negligently piloted, managed and or controlled the said Hot Air Balloon registration No. 5Y-BLH that he caused or permitted the same to explode and caught file causing or occasioning serious injuries to the plaintiff.***

5. PARTICULARS OF NEGLIGENCE:

(i) Failing to keep any or proper look out or to have any sufficient regard for the passengers aboard.

(ii) Failing to exercise or maintain any or any proper or effective control of the said Hot air

Balloon.

(iii) Causing or permitting the said Hot air Balloon to explode in a Ball of fire.

(iv) Failing to manage and or control the said Hot air Balloon so as to avoid the accident.

(v) Piloting a defective Hot air Balloon and failing to know that the same was air unworthiness.

(vi) So far as may be necessary the plaintiff will rely on the doctrine of res-ipsa-loquitor".

The appellant filed a statement of defence in which it admitted that it was the registered owner of the Hot Air Balloon registered as 5Y-BLH but denied negligence or that, the respondent was a lawful passenger. In respect of injuries sustained by the respondent, the appellant pleaded in paragraphs 6 and 7:

"***6. In the alternative and without prejudice to the foregoing, the Defendant avers that the injuries alleged by the Plaintiff to have been sustained (which are denied) were sustained notwithstanding the fact that the Defendant took all the measures necessary to avoid the same and/or it was impossible for the Defendant to take measures to avoid, the same.***

7. In the further alternative, and without prejudice to the matters hereinbefore set out, the Defendant avers that if it is liable to the plaintiff which is denied, such liability is limited by the Carriage by Air Act to the sum of Kshs.1,306,286/= or the equivalent of US$ 20,000 ……".

By an application dated 5th February, 2003, the respondent applied for leave to amend the plaint in order to base the action on the ***Carriage by Air Act, 1993*** and other relevant Acts and although the superior court granted leave to the respondent to amend the plaint on 12th March, 2003, nevertheless, the respondent did not file an amended plaint. There is however, a draft copy of an amended plaint which was apparently annexed to the application for leave to amend but the amended plaint was neither formally filed in court nor filing fees paid. The appellant filed an amended Defence pursuant to the leave of the court given on 12th March, 2003.

The respondent gave evidence at the trial and called one witness Dr. Gideon Nyachaki Ragira (PW2). The appellant called two witnesses Allan Shakrasin (PW2), a commercial Balloon pilot, and Gideon Salum – (DW2), a crew/driver employed by the appellant. The following facts emerge from the evidence.

The appellant operates a Hot Air Balloon Registration Number 5Y-BLH for purpose of luxury trips over Masaai Mara Game Reserve for fare-paying passengers particularly tourists.

On 12th July, 2000 at about 6.15 a.m. four tourists and the respondent boarded the balloon at the take off site. The respondent was not a fare – paying passenger. He claimed that he was given a ride by Mark, the pilot. The pilot, Mark, inspected the balloon. The pilot then lit the gas burner to inflate the balloon and when he started the engine, the balloon caught fire and exploded. There was a big fire and the appellant suffered severe burns. He was taken to Nairobi Hospital where he was admitted for 2 weeks. He was thereafter transferred to St. James Hospital and later to Kenyatta National Hospital where he was admitted for treatment for some time. The pilot died as a result of the balloon accident.

According to Dr. Gideon Nyachaki Ragira, the respondent sustained massive burns on both upper limbs leaving massive ugly scars. His left thumb was amputated. He assessed the burns at 22% of the skin surface and permanent disability relating to skin use at 70%. He recommended specialized plastic and reconstructive surgery in California, USA, at estimated cost of Shs.3,000,000/=.

The respective counsel for the parties filed written submissions in the superior court. The respondent's counsel submitted on the law, partly as follows:

"***According to section 2 (1) of the Civil Aviation Act (Cap 394), a Balloon is included in the definition***

of an aircraft. Accordingly, the law relating to aircraft, all treaties and convention applicable under the said Act apply to a Balloon. Section 3 of the carriage by Air Act, 1993 imports into Kenya and applies all the provisions of the Warsaw Convention and or such of its amendments and or convention as shall replace it. The Warsaw Convention of 1929 (by Hague Protocol) was replaced by Montreal Convention 1999 i.e. Convention for the Unification of certain rules for International Carriage by Air.

According to Article 17 (Chapter 111), a passenger can only be compensated ……… if the accident which caused the death or injury took place on board the aircraft as (sic) in the course of any of the operations of embarking or disembarking.

In the instant case, the plaintiff had boarded the aircraft and accordingly he fell within the class of persons entitled to compensation under the said Montreal Convention ……".

The appellant's counsel submitted in his written submissions in the superior court partly, as follows; that the ***Warsaw Convention*** provides the exclusive avenue for the remedy for the accident; that the respondent having failed to bring the suit under the ***Carriage By Air Act, 1993***, (1993 Act) the suit was incompetent; that the respondent failed to prove liability; that a carrier is not liable if he proves that he and his servants or agents had taken all necessary measures to avoid damage or that it was impossible for him to take such measures and that the limit of liability under the ***Warsaw Convention*** is Kshs.1,306,286.00.

The superior court while appreciating that the cause of the accident had not been established, nevertheless, found the appellant liable for negligence apparently under the common law, saying in part:

"***The balloon should have been kept in such a state that it would not explode. Either Mark did not check thoroughly as he should have or the condition of the balloon was not up to standard and that is why it exploded. Either way the defendant was liable as he owed duty to all passengers. Neither DW1 or 2 could explain the cause of accident. I am therefore satisfied that the defendant is 100% liable".***

On the submission that the suit should have been brought under the 1993 Act the superior court held:

"***Strictly there is no requirement that one has to specifically place (sic) the law under which the suit is brought. Even the original plaint was clear. Plaintiff alleges negligence on part of the servant of the defendant which led to an accident in which he was injured. He therefore claimed damages. The plaint therefore is clear and even without going into the International Conventions cited court should, after assessing the injuries be able to award damages".***

The superior court ultimately awarded Shs.4,326,610/= as damages comprising of Shs.326,610/= as special damages; Shs.2,500,000/= general damages and Shs.1,500,000/= for future medical expenses.

The appellant appeals against both liability and the quantum of damages. The memorandum of appeal raises the same factual and legal issues relating to liability and quantum as raised by the appellant in the superior court. The general complaint by appellant being the failure by the superior court to apply the 1993 Act and the ***Warsaw Convention*** in assessing both liability and the quantum damages.

From the definition of "*aircraft*" in ***section 2 (1)*** of The *Civil Aviation Act* (Cap. 394), the Hot Air Balloon which caused the accident is an aircraft. It is clear from the evidence that the accident occurred after the respondent had boarded the balloon for a take off. According to the evidence the appellant was not a fair paying passenger. He was a trainee at Sarova Mara Hotel in Maasai Mara National Park. He claimed that the pilot, Mark, had agreed to give him a free ride in the balloon. There is no doubt that the balloon accident in issue falls within the ambit of the 1993 Act – *Act No. 2 of 1993* which became operational on 1st July, 1993 as per L.N. 161 of 1993.

The 1993 Act ratified the ***Warsaw Convention*** as amended by Hague Protocol, 1955. The ***Warsaw Convention*** is contained in the First Schedule to the 1993 Act and is referred to as ***CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY***

AIR AS AMENDED BY THE HAGUE PROTOCOL 1955 (Convention).

By ***section 3*** of the 1993 Act the Convention has the force of law in Kenya in relation to any carriage by air. The Convention provides for the "*rights and liabilities of carriers, carriers servants, agents, passengers, consignors, consignees and other persons*". By Article 1 of the Convention, the Convention applies to "all International Carriage of Persons, baggage or cargo" performed by aircraft for reward as well as to gratuitous carriage.

However, by the ***Carriage by Air*** *(Application of Convention) Order, 1993, L.N. 162 of 1993*, the provisions of the Act and most of the provisions of the Convention were applied to all non – international carriage by air in Kenya.

As regards liability, Article 17 of the Convention provides that the carrier is liable for death or injury to the passenger if the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, by Article 20 the carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. Furthermore, as provided by Article 21, the court can exonerate the carrier wholly or partly from liability if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person.

Mr. Kerosi, the respondent's counsel, submitted in the superior court that the ***Warsaw Convention 1929*** as amended by Hague Protocol, 1955 was replaced by ***Montreal Convention, 1999*** but as Mr. Mugambi for the appellant correctly submitted before us, the ***Montreal Convention*** has not been domesticated by the Kenya Parliament.

The appellant asserts in the memorandum of appeal that the learned Judge erred in law in failing to appreciate that the respondents failure to plead the cause of action under the 1993 Act was fatal to the claim.

It is clear that the respondent's suit was based on tort of negligence under the common law. Although the respondent applied for and obtained leave to amend the plaint to plead the cause of action under the 1993 Act the respondent, as correctly found by the superior court, did not in fact amend the plaint. The superior court was of the view that it was not necessary to plead the law under which the claim was brought and that it was sufficient that the respondent had pleaded negligence.

In so doing the superior court, with respect, failed to appreciate that the cause of action arising from an aircraft accident was prescribed by the statute – the 1993 Act and the Convention and did not arise from the common law. Indeed, the cause of action was solely founded on the statute. Although, the learned Judge correctly stated the law that there was no requirement that one has to plead the law under which the suit is brought this, in my view, was not merely a case of failing to plead the law but on the contrary, a case where the cause of action pleaded (that is negligence under common law) did not conform with the provisions of the statute which established the cause of action. By basing the claim on the tort of negligence under common law, the respondent pleaded a totally different cause of action from the one created by the 1993 Act and the Convention. Whilst I appreciate that a court of law can take judicial notice of the existence of a local statute and that therefore it is not necessary to set forth a public statute in the pleadings, nevertheless, I am of the humble view that where a cause of action is founded on a statute a plaintiff should specify the statute in the pleadings without of course setting out its material provisions and in addition all facts constituting the cause of action under the statute must be pleaded.

In this case, the omission to do that is not a mere procedural irregularity but a substantive error of law which goes to the root of the action and which renders the action incompetent.

There are two other important grounds of appeal relating to liability. These are broadly, that the superior court erred in fact in finding the pilot negligent and that the court erred in law in failing to find that the appellant was entitled to the statutory defence under Article 20 of the Convention.

Had the respondent brought the action under the 1993 Act and the Convention, all that he would have been required to show at the trial in order to fix liability on the appellant is that the respondent sustained the injury on board the balloon or in the course of any of the operations of embarking or disembarking (see Article 17). If that is established, then the burden of proof shifts to the carrier. (See ***Kihungi & Another vs. Iberia Airlines of Spain S.A.*** [1991] KLR 1). However, the carrier would be exonerated from liability, if it shows either that it took all the necessary measures to avoid damage or that it was impossible to take such measures (see Article 20) or that the injured passenger wholly or partially contributed to the accident (see Article 21).

As Article 24 (2) partly provides, in cases covered by Article 17 (that is death or injury to the passenger), any action for damages, however, founded can only be brought subject to the conditions and limits set out in the Convention. Indeed as Tinyinondi J correctly, in my view, said in the High Court of Uganda case of ***Byabazaire vs. Mukwano Industries*** [2002] 2 EA 353 at page 358, paragraph 1:

"***An action founded on the provisions of a statute must conform to those provisions and a plaintiff cannot look beyond those provisions unless so provided by clear provisions of the statute in question".***

In my view, in a claim founded on the 1993 Act, the claimant is not required to prove that the accident causing death or injury was caused by the negligence of the carrier. In this cases, although there was no evidence to establish the cause of accident or that the gas was leaking from the burner, the superior court speculated that the gas must have leaked and proceeded to make a finding that the pilot did not thoroughly check the balloon. The appellant produced at the trial a Certificate of Airworthiness of the balloon valid from 23rd March, 2000 to 22nd March, 2001 which shows that the balloon was airworthy on 12th July, 2000 – the date of the accident.

The trial Judge grossly misdirected himself in law in basing the liability of the appellant on negligence of the pilot and in finding that the pilot was negligent without any factual basis. There must be good policy reasons as to why the Parliament by the *Civil Aviation Act* (Cap 394) entrusted the duty of investigating aircraft accidents to a specialized authority.

Furthermore, the trial Judge did not consider whether the statutory defence in Article 20 which was pleaded was available to the appellant. In his evidence in cross – examination, the respondent testified in part:

"***I do not know whose fault that the accident occurred. It was not Mark's fault. Mark checked if every thing was okay and told us to get into the balloon. Mark was not negligent. Also the company. Mark only checked to see if everything was okay".***

There was also the evidence of Gideon Salum who was a crew/ driver employed by the appellant and one of the people who prepared the balloon on the fateful day. He stated in part:

"***Four tourists and the plaintiff boarded the balloon. The pilot inspected everything and confirmed all was okay. I saw him do so. Mark had flown the balloon there before. He had done so at least 15 times. There was no incident similar to the one which occurred on the 12th. The company was not the one who caused the balloon to explode. The company ensured everything was okay. The cause of explosion was never established".***

There was thus undisputed evidence that the appellant had taken all necessary measures to avoid the damage.

In conclusion, I find that the learned trial Judge committed three grave errors, namely, failing to appreciate that the suit was incompetent as it was not brought, and, did not disclose a cause of action, under the 1993 Act and the Convention; secondly, in finding the appellant liable for negligence under common law contrary to the provisions of the statute and Convention and when negligence was not established by concrete evidence and thirdly, by failing to consider and avail the appellant the statutory defence. I would for those reasons allow the appeal against liability.

On the quantum of damages, Article 22 (1) limits liability of the carrier for each passenger to 250,000 Francs which is equivalent to Kshs.1,306,286/= or US. Dollars 20,000 whichever is the higher as stipulated by the ***Carriage by Air (currency equivalent) Order, 1993*** *L.N. 189 of 1993*. Thus the superior court had no jurisdiction to award damages of Shs.4,326,610/= which was far above the statutory limit (see ***Kihungi vs. Iberia Airlines of Spain S.A.*** (supra)). Had the appeal against liability failed, I would have allowed the appeal against the quantum of damages and reduced the damages to Kshs.1,306,286/=.

For those reasons, I would allow the appeal, though with great regret, set aside the judgment of the superior court and order that the suit in the superior court be dismissed. I would make no order as to costs of the appeal and suit in the superior court.

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

E. M. GITHINJI

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JUDGE OF APPEAL