IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 78 OF 2005

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

AND

ROBIN MAKORI RATEMO …….. RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

Nakuru Bauni J.) delivered on 18th March 2004

In

HCCS NO. 208 OF 2001)

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JUDGMENT OF BOSIRE J.A

This appeal is from the judgment and decree of the superior court (Bauni J.) dated 18th March 2004 in its Civil Case number Kisii High Court Civil Case No. 208 of 2001. The Plaintiff in that suit Robin Makori Ratemo, the respondent in this appeal was awarded damages of Kshs. 4,326, 610/= for injuries he sustained in a Hot Air balloon accident. The defendant in that suit, Transworld Safaris (K) Ltd, is the appellant in this appeal. In its Memorandum of Appeal the appellant raises issues of both fact and law, and both challenge the appellant's liability and quantum of damages.

The main issue of law raised is worded in the following terms.

"The learned Judge having taken cognizance of the fact that the accident is governed by the provisions of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Warsaw Convention) are expressly applied to Kenya, and consequently:

(i) in failing to appreciate that the Plaintiff's failure to properly plead the cause of action was fatal to the claim in the terms of Article 24 (1) of the Warsaw Convention.

(ii) In the alternative to 1(a) (i) above, in failing to appreciate or appreciate sufficiently submission by Counsel for the Appellant that the failure of the Plaintiff to file and serve an amended plaint either within the time allowed by the court order of 12th March 2002, or at all, was material to the cause and no damages were recoverable.

(iii) In the further alternative, in failing to appreciate that the appropriate course of action was pleaded

out of time without leave and therefore no damages were recoverable in accordance with Article 29 of the Warsaw convention."

It is important to outline the facts giving rise to the above grounds for a better appreciation of the appellant's complaint.

The respondent was a trainee in Hotel Management at the Sarova Mara Hotel as at the date of his injury on 12th July 2000. The appellant was operating a hot air balloon from the same hotel. It was a luxury balloon which was operated on hire by mainly tourists. It was the respondent's case that he was invited into the balloon by the pilot, one Mark, who was his friend, so that he could have a ride in the air balloon along with other passengers. However, unlike the other passengers he did not pay for the ride. At take off the balloon exploded and caught fire. The pilot died in the course of the explosion and the respondent sustained serious injuries. He was hospitalized at the Nairobi Hospital for two weeks, and was then transferred to St. James Hospital., and later still to Kenyatta National Hospital.

In his aforesaid suit he pleaded his claim as follows:

"On 12.7.2000 at about 6 am 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-BIK that he caused or permitted the same to explode and caught (sic) fire causing or occasioning injuries to the Plaintiff."

The respondent then set out the particulars of negligence which included the doctrine of **res ipsa Liquitor**. He also set out the particulars of the injuries he sustained and special damages.

In its defence the appellant while admitting ownership of the hot air balloon and the fact of the accident denied the claim. It denied the respondent was a lawful passenger in the balloon and also that there was any negligence on its part leading to the accident. The appellant then averred in paragraph 6 and 7 as follows:

"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 subject to the matters set out in paragraphs 3, 4, 5 and 6 above".

Paragraph 3 of the written statement of defence avers that the luxury trips in the hot air balloon were for fare paying passengers, the Plaintiff was not one and his presence in the balloon was as a stowaway whom the defendant owed no contractual or other legal obligation, and his presence therein was with a view to defrauding the defendant. Paragraph 4 contains a denial of particulars of negligence set out in the plaint and that the doctrine of **res ipsa Loquitur** had any application to the case. In paragraph 5 the defendant denies the particulars of injuries the respondent alleges in the plaint to have sustained.

Apparently counsel for the respondent was not aware of the existence of the Carriage By Air Act, because upon being served with a copy of the written statement of defence he moved the superior court by summons for leave to amend the plaint. The leave was granted by consent and the respondent was granted 14 days to file an amended plaint. The Chamber Summons application had a draft amended plaint, annexed to it, but as there was no prayer for it to be treated as duly filed it cannot be taken as having been filed pursuant to that leave. The 14 days passed but no amended plaint was filed. The plaintiff neither filed any amended plaint nor sought any extension of time within which to file one. Eventually the suit was set down for hearing. At the hearing by order of the Judge, the appellant was

given 5 days to file an amended defence. The trial Judge apparently treated the draft amended plaint as the amended plaint.

In his evidence the respondent stated that he boarded the hot air balloon at the request and authority of the pilot, one Mark. As he was entering the balloon, a co-pilot to Mark stopped him as he had not made payment, but Mark intervened and confirmed he had authorized the respondent to board the hot air balloon. It was his further evidence that he saw Mark checking the balloon before he attempted to start it. However when he tried to start it the hot air balloon exploded and caught fire. It was in the course of that explosion that he sustained serious injuries and the pilot died. The co-pilot like himself sustained serious injuries. The respondent denied knowledge of the exact cause of the explosion.

Dr. Gideon Nyachaki Ragira, testified on the respondent's injuries and assessed his post burns scars at 22% of skin surface.

The appellant called two witnesses. Allan Shakrasin testified that he was a commercial balloon pilot, a teacher, examiner of balloons, and also performs balloon maintenance duties. He testified further that a hot air balloon like an ordinary aircraft requires a Certificate of Airworthiness and produced one dated 22nd March 2000, for the accident balloon which was due to expire on 22nd March 2001.

Gideon Salum, was the second witness. His evidence was that he was present when Mark checked the balloon before take off as he used to do before. However the balloon exploded as he tried to start it. He was not sure what caused the explosion.

It was common ground at the trial that the Convention for the Unification of Certain Rules for International Carriage By Air applied. Mr. Kerosi for the respondent stated as much in his written submissions on behalf of the respondent. Mr. Mboya for the appellant as defendant in the suit submitted as much and urged the Court to strike out the respondent's suit as incompetent on the ground that the respondent did not properly plead his case to bring it within the ambit of the Convention.

Before I deal with the issues of liability and quantum of damages raised in the Memorandum of Appeal, I would like to consider the legal points which were raised before both the trial and this Court regarding the competence of the respondent's suit. It was contended before both courts that the Plaintiff having failed to file an amended plaint within the time he was allowed, his suit became incompetent for failure to plead the statute upon which the claim was anchored.

At page 30 of the record of appeal appears part of the proceedings for 16th June 2003 when the suit was first scheduled to come for a hearing. Proceedings for 19th November 2003 and part of proceedings for 26th January 2004 also appear on that page. The appearances for 16th June 2003, show that Mr. Kerosi appeared for the Plaintiff /applicant and Mr. Nyamurongi for Mogambi for the defendant /respondent. The Judge was Wambilyangah J. Mr. Nyamurongi is recorded as having applied for an adjournment . The reasons for that application are not stated. Mr. Kerosi is recorded as having stated "Give time to file a defence". The learned Judge then made an order as follows: " **Court:** The defence is allowed 5 days to file amended defence." The case was then adjourned. It is not clear from the record at whose instance the appellant was given time to file an amended defence. Nor is it clear when the draft amended plaint was treated as the amended plaint. Be that as it may, it is clear that the court treated the draft amended plaint as the amended plaint and hence the order giving the appellant time to file an amended defence, which it filed 4 days later.

In the amended defence, the appellant averred among other things that the amended plaint was "incompetent, incurably defective and ought to be dismissed. In particular, the Defendant avers that the plaintiff has failed to comply with the terms of the Order of the Court of 12th March 2003". The Order of 12th March 2003 is the order which granted the respondent leave to file an amended plaint.

It is noteworthy that although the appellant was unhappy with the order requiring it to file an amended defence, it did not appeal against it. The Judge who made that order is not the Judge who finally heard

the suit. Nor was the issue raised before the latter at the time he commenced the hearing of the case.

What is clear from the record, therefore, is that the trial court, **suo motu**, treated the draft amended plaint which was on record as duly filed and asked the appellant to respond to it. The appellant did so and the case was heard on the basis of the amended pleadings. The approach the court took was irregular but I cannot say that it invalidated the respondent's suit.

In **Odd Jobs v. Mubia** [1970] EA 476 Duffus P. while considering the question whether an unpleaded issue can form the basis of a decision, rendered himself as follows:-

"Generally speaking pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."

Wambilyangah J. is the one who made the order of 12th March 2003, and he is the same Judge who directed the appellant as the defendant in the suit to file an amended defence. It was a matter within his powers and the mere reason that he did not closely follow the procedure laid down in the Civil Procedure Rules did not of itself without more render his action invalid. By that order he, in effect, regularized the filing of the amended plaint.

Moreover even assuming Wambilyanga J. had not taken that step, the parties did proceed with their case on the basis that The Carriage By Air Act, 1993, applied; they submitted on it and a decision was given with it in mind. The court of Appeal for East Africa, in the case of **Odd Jobs v. Mubia** (supra), considered the issue and held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision. The same court in **Dhanji Ramji v. Rambhai &*COMPANY* *[1970] EA 515*** adopted the same view where a statute upon which a certain defence was based was not pleaded. That Court [Law JA] rendered itself, in pertinent part, as follows:-

"I consider the failure to plead facts justifying the application of S. 40(1) of the Partnership Act was an irregularity, and a serious irregularity, but one which is not fatal to the judgment pronounced in this case, because it was cured by the cause of events taken at the trial, which as it proceeded was fought out on a basis which shifted from the pleaded cause of action of actual membership to the unpleaded cause of action of apparent membership, a shift which did not in my view cause prejudice to the appellant as he had obviously come prepared to meet that unpleaded cause of action and was largely responsible for making that unpleaded cause of action an issue in the suit."

Duffus P., in the same case rendered himself thus:

"The respondent would, in all probability, have pleaded the benefit of the provisions of S.40(1) in reply if the appellant had, as he should in my opinion have done, properly pleaded that he had retired from the partnership on 1 January, 1967, in his defence. I entirely agree with Law JA that at the trial the applicability of S. 40(1) had become one of the issues in the case as there was undoubtedly sufficient evidence to justify the trial judge's findings."

Likewise in the matter before us, it is my view, that on the assumption that there was no amended plaint filed, there is no doubt that the Carriage By Air Act, Act NO. 2 of 1993 was, by the course of events at the trial, made part of the matters for consideration by the court, and both parties were given an opportunity to and did address the court fully on the matter. The trial court gave judgment and considered its application on the respondent's suit. It is my view that the appellant was not prejudiced as it had ample notice before the trial commenced, that the said Act would be considered.

Having come to the foregoing conclusions, the submission by Mugambi for the appellant that the failure to specifically plead in the plaint the Carriage By Air Act as the basis of the plaintiff's claim was not fatal to the respondent's claim. I agree with the trial Judge that there is no specific requirement that

the above Act be specifically pleaded, but will add that it was imperative for the respondent to plead facts bringing his claim within the ambit of the Act. In my view the manner in which the respondent pleaded his claim sufficiently disclosed facts which showed that the accident hot air balloon was an aircraft within the meaning of the Carriage By Air Act. Consequently I would hold that the respondent appropriately pleaded his claim.

Akin to the issue of pleadings is the issue of limitation. *Mr. Mugambi* for the appellant as also *Mr. Mboya* before him, urged the view that the plaint was amended long after the period of limitation prescribed under the Carriage By Air Act, had expired and the respondent's claim was therefore time barred. This submission does not avail the appellant because leave to amend was given with its consent. It waived reliance on such defence.

In his judgment ***Kaburu Bauni J.*** held that although there was no clear evidence of negligence on the part of the appellant, the fact of the accident was not in dispute. He accepted the evidence of the respondent and his witness as proving that the respondent sustained serious injuries resulting in 70% total disability. In his view the respondent did not sneak into the hot air balloon. He had been invited by the pilot to take a ride with him. Consequently, he said, the appellant owed him a duty of care as he did the other passengers. In his view the fact that the hot air balloon caught fire and exploded immediately the pilot lit the gas to warm and inflate it was sufficient proof that the gas must have leaked. In his view although the pilot checked the balloon before take off it did not mean that everything was in order. If it were so, he said, an explosion would not have occurred. He concluded that either the pilot did not check the balloon properly as he should have done or that the balloon was not up to standard. On that basis he found the appellant 100% liable to the respondent in damages for negligence. He assessed damages at Kshs.4,326,610/= made up of Ksh.326,610 as special damages, Kshs.2,500,000 as general damages and Kshs.1,500,000 for future medical expenses.

The appellant was aggrieved and lodged this appeal. I have already dealt with the first part of the first ground of appeal relating to whether or not the respondent's suit was incompetent. The second part of that ground relates to the finding on negligence. I have considered this ground carefully. I have no doubt in my mind that the trial Judge correctly evaluated the evidence on the cause of the accident. Accidents don't just happen. The balloon did not take off. It exploded before doing so. The facts speak for themselves. Had the defendant taken all necessary steps to ensure its safety, the balloon would not have exploded. Negligence can be inferred from the facts and circumstances of the case. Liability under the common law and under the Carriage By Air Act, is based on negligence. There was no evidence adduced to show the respondent contributed to the accident. He was invited into the balloon, and is not shown to have done anything which contributed to the accident. Article 20 of the Convention for the Unification of Certain Rules for International Carriage By Air, as Amended by the Hague Protocol of 1955 provides that the carrier is not liable if he proves that he had taken all necessary measures to avoid the damage or that it was impossible for him to take such measure. The appellant could not, in the circumstances of this case, take advantage of that Article. It cannot be said that the appellant took all possible steps to avoid the accident. The balloon was stationary. The checking by the pilot before take off cannot be accepted as the reasonable steps the appellant took in accordance with the Article. Were the steps reasonable he would have detected the fault which ultimately caused the accident. It is my view that Article 20, above does not avail the appellant anything.

What I have stated above covers ground 2 of the Memorandum of Appeal, as well. That ground in general deals with findings of fact with regard to the cause of the accident.

The third ground deals with the finding by the learned trial Judge that the appellant was 100% liable to the respondent in damages. I find no basis for faulting the learned trial Judge on this. I have already held that there is no evidence on record to show any contributory negligence on the part of the respondent. That ground likewise fails.

The last ground of appeal attacks the quantum of damages. On that ground the appellant contends that the award of damages exceeded the statutory maximum sum of Kshs.1,306,280 prescribed under paragraph 2 of the Carriage By Air Act, (Currency Equivalent) Order 1993 Legal Notice NO. 189 of

1993. The relevant paragraph of that Legal Notice provides as follows:-

"The equivalent in Kenya currency of 250,000 gold francs under Article 22 of the Convention and in particular paragraph (5) of that Article is one million three hundred and six thousand two hundred and eighty six shillings or twenty thousand US dollars, whichever is the higher**."**

That legal notice was published, on 9th July, 1993. The decision in this case was given on 18th March, 2004. It is absurd to argue that the same figure in the Legal Notice, would apply in 2004, as the figure represents the conversion rate as it was on the date of the Legal Notice. I would take Judicial notice of the fact that the exchange rate varies almost on daily basis. I have no evidence to show that the rate shown in the Legal Notice would remain unalterable indefinitely.

Article 22(5) to which the Legal Notice refers, provides, in pertinent part, as follows:-

"22(5) The sums mentioned in francs in this Article…… shall in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."

The value as of the gold francs to the shilling, or vice versa, at the date of judgment was not given in evidence. Nor did the appellant avail it to us. In the circumstances I find no basis for holding that the damages awarded exceed the statutory Maximum.

In the result, I would dismiss the appellant's appeal with costs.

As my Lord Onyango Otieno J.A, has come to the same conclusion for the foregoing among other reasons stated in his judgment, it is ordered that this appeal be and is hereby dismissed with costs to the respondent.

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

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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

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. <u>PARTICULARS OF NEGLIGENCE</u>:

(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