Editorial Note

Section 3(1) of the Judicature Act was erroneously cited as section 3(3) in the original judgment.

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Masime & Kwach JJA)

CIVIL APPEAL NO 29 OF 1989

ALITALIA AIRLINES .....APPELLANT

VERSUS

SHAKA ZULU ASSEGAI.....RESPONDENT

JUDGMENT

(Appeal from the judgment/ decree of the High Court at Nairobi, Amin J,

in

HCCC No 2630 of 1986, dated 17th October 1988)

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September 26, 1989 the following Judgment of the court was delivered.

This suit has had the unfortunate history of being heard and reheard on three separate occasions by three separate judges in the superior court. The facts disclosed at the hearing are quite simple and straight forward. This appeal arises from the decision of Amin J dated October 17, 1988.

Shaka Zulu Assegai (hereinafter referred to as “the respondent”) travelled on the appellant airlines’ aircraft on December 5, 1985 from Tripoli through Rome to Nairobi. At the start of his journey he had handed in to the appellant his suitcase of personal effects but on disembarking in Nairobi he did not find the suitcase and after investigations the appellant declared it lost. The respondent accordingly put in a claim for compensation for the loss of his suitcase and its contents which he valued at a total sum of shs 126,260.

The appellant in effect conceded that the respondent had handed in his suitcase to it, that it had lost the

suitcase and that the respondent was entitled to compensation for the loss of the suitcase and its contents. The appellant however disputed the nature and value of the respondent's goods allegedly lost and contended that in any case its liability to compensate the respondent was limited by the Warsaw Convention 1929 and the Hague Protocol 1955 which it contended governed the contract of carriage between the parties.

On a very careful analysis and evaluation of the evidence the superior court found that the respondent had checked in his luggage with the appellant but that the appellant had neglected or failed to record the number and weight of that luggage. Subsequently the appellant lost that luggage by its negligence. The court further found that the contract of carriage was governed by the Warsaw Convention 1929 (see *Shawcross and Beaumont on Air Law* – 4th edd ch 9) but that the Hague Protocol 1955 did not apply as the Republic of Kenya was not a signatory to it.

Under the terms of the Warsaw Convention 1929, the appellant was by article 18(1) made liable for damage sustained in the event of the destruction or loss of or damage to any registered baggage or any goods if the occurrence which caused the damage so sustained took place during the carriage by air. And by article 4(3) the convention mandatorily requires the carrier to record the number and weight of the luggage: failure to do so disentitles the carrier from availing itself of the limitation of liability provided by article 22(2) of the Convention.

On the evidence before the court the learned trial judge held that the appellant had failed to record the number and weight of the respondent's luggage and that consequently it was disentitled to claim a limitation of its liability under the Warsaw Convention. The court therefore held that the appellant was liable to compensate the respondent for the actual loss of his suitcase and its contents: he assessed the compensation in the sum of shs 36,000. He also awarded general damages in the sum of shs 3,000.

It is the above findings that have prompted this appeal.

The memorandum of appeal contains five grounds of appeal and in summary this court is required to determine:

(1) What was, on the evidence before the trial court, the proper law of the contract between the parties" If there was a conflict of laws should Kenya Law prevail"

(2) Was the Hague Protocol 1955 applicable so as to limit the respondent's entitlement to compensation to the sum of US $ 400 or its equivalent in Kenya currency"

(3) What was the value of the respondent's baggage and its contents on the recorded evidence"

(4) Was there any basis for the trial courts' award of general damages"

As regards the first issue learned counsel for the appellant submitted that the parties were free to incorporate the terms of any foreign law in their contract. While it is well established under English common law that such a right of incorporation may be freely exercised (see *Chesire: Private International Law*, 5th Ed 1957 Ch 8 pp 205 – 221) the position in Kenya is different. Neither in the pleadings nor in the trial was the jurisdiction of the Kenyan courts to entertain the suit contested. And a litigant who submits to the jurisdiction of the Kenyan courts must, *ipso facto*, submit to the statutory restrictions on the exercise of that jurisdiction. Section 3(3) of the Judicature Act (cap 8 of the Laws of Kenya) provides that the jurisdiction of the courts

“shall be exercised in comformity with

(a) the Constitution;

(b) subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited in part I of the schedule to this Act, modified in accordance with part II of that Schedule;

(c) ……..

So despite the fact that the contract of passenger carriage between the parties had points of contact with Libyan and Italian Laws references to such laws are excluded by the Judicature Act. It follows that the proper law of the contract is Kenyan Law. The learned trial judge found the Warsaw Convention of 1929 applied to the contract while the Hague Protocol 1955 did not. We agree with the learned trial judge. We would further agree that on application of the articles of the Warsaw Convention 1929 to the evidence adduced in this suit the appellant was not entitled to rely on its claim to limitation of liability to the respondents. (see O Kahn – Freund: *The Law of Carriage by Inland Transport* 4th ed 1965, for a discussion of circumstances in which a carrier is liable for loss of a passengers’ luggage). The respondent was therefore free to plead and prove any amount in special damages.

The next issue then is the nature and value of the respondent’s luggage and its contents. The learned trial judge carefully analysed and evaluated the evidence adduced before him by both parties, and made findings on it as required by law. We have similarly scrutinized the evidence and upon doing so have come to the conclusion that there was evidence on which the trial judge properly valued the respondents’ loss at shs 36,000. We therefore find no error to justify this courts’ interference with this valuation. We have not however found any reason to justify the learned trial judges’ award of the sum of shs 3000 by way of general damages to the respondent. We set aside that award. To that extent only this appeal succeeds. Otherwise we find no merit in the appeal and the cross appeal and order that both shall be dismissed with costs.

Dated and Delivered at Nairobi this 26th day of September, 1989.

J.O NYARANGI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR