Case Number:	Civil Appeal 170 of 2003
Date Delivered:	17 Dec 2010
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Emmanuel Okello O'Kubasu, Moijo Matayia Ole Keiwua, Joseph Gregory Nyamu
Citation:	Thuita Mwangi v Kenya Airways Limited [2010] eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	2570 of 1994
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, KEIWUA & NYAMU, JJ.A.)

CIVIL APPEAL NO. 170 OF 2003

BETWEEN

THUITA MWANGI ……..... APPELLANT

AND

KENYA AIRWAYS LIMITED ……... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Hayanga, J.) dated 29th September, 2000

in

H.C.C.C. NO. 2570 OF 1994)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Hayanga, J.) delivered on *29th September, 2000* in which the learned Judge dismissed the appellant's suit in the superior court.

The appellant herein, ***THUITA MWANGI***, sued the respondent ***KENYA AIRWAYS LIMITED*** seeking judgment for ***US$6,700*** as special damages, general damages plus interest and costs of the suit. The salient paragraphs of the plaint were as follows:-

"4. In 1992, the plaintiff purchased an air ticket from the defendant being ticket Number 6222:065:770:4 in Nairobi to fly as passenger for reward in the Defendant's aircraft from Nairobi to John F. Kennedy International Airport in New York, U.S.A. via London and the initial date of arrival in New York endorsed on the said ticket was 20th September, 1992.

5. Due to other commitments, the plaintiff requested and the defendant agreed to change or vary the date of arrival in the said ticket to 25th September, 1992.

6. The plaintiff states that the defendant without any request from the plaintiff and without prior notification to the plaintiff unilaterally changed the destination from John F. Kennedy International Airport, New York to Newark International Airport New Jersey which is a completely different airport.

7. The said changes or variations were endorsed in the plaintiff's said air ticket and were in the form of a computer print out the contents of which the plaintiff did not and could not at the material time understand due to their technical nature.

8. The plaintiff states that when he arrived at the said Newark International Airport in New Jersey which was a new place to him and while he was waiting to be connected to his proper destination in New York his luggage was stolen from him and he lost his goods and belongings.

9. The plaintiff further states that he is an employee of the Government of Kenya and at the material time he was travelling on official business to New York where he had made arrangements with the Kenya Mission to the United Nations to pick him up upon arrival at John F. Kennedy International Airport as per the details in his ticket and if the defendant had not made the said error in his ticket as regards his destination, the plaintiff would not have lost his belongings or items as aforesaid.

10. The said loss was occasioned by the defendant's breach of contract and/or negligence."

A defence was filed in which the foregoing was denied and the respondent asked for the dismissal of the suit.

The hearing of the suit commenced before Hayanga, J. on *27th January, 1997* when the appellant testified. While the appellant called no other witness, the respondent called two witnesses – ***Charles Marari Njoroge***, the reservations Manager and ***Daniel Edwin Moseka***, a customer Liaison Executive. Then followed submissions by counsel appearing for the parties. The learned Judge reserved his judgment which, as already stated, he delivered on *29th September, 2000*. In concluding his judgment, the learned Judge stated:-

"Lastly, I agree with Mr. Le pelley that the plaintiff did not state his claim within the time stipulated by article 26 (2) of the Warsaw Convention as intended by and amended by the Hague convention the plaintiff reported the matter to the defendant nine months from the date of the loss. He should have done so in 21 days.

I also find the case time barred and incompetent.

For the reasons above I find that the plaintiff's claim fails and is hereby dismissed each party to bear his own costs."

It is the foregoing that provoked this appeal. The appellant, through his advocates, filed a Memorandum of Appeal setting out the following grounds of appeal:-

"1. The learned Judge erred in law and in fact when he held or found that the Appellant's case was based on breach of contract of carriage and on negligence by the Respondent as a carrier.

2. The learned Judge erred in law and in fact when he failed to find or hold that the Appellant's

case was for breach of contract and/or negligence in the booking of the Appellant's flight.

3. The learned Judge having wrongly found that the Appellant's case was based on breach of contract of carriage further erred when he went on to hold that;

(a) the liability of the Respondent under the said claim was governed by the Carriage of Air Act No. 2 of 1993 and the Respondent's general conditions and the conventions attached thereto particularly the Warsaw Convention.

(b) the Respondent was not liable to compensate the appellant for the loss because the loss occurred outside the respondent's sphere and control as a carrier.

(c) the Respondent had the right to alter the appellant's destination and

(d) the Appellant's claim was time barred under the provisions of Article 26(2) of the Warsaw Convention.

4. The learned Judge erred in his assessment of the evidence and acted against the weight of the evidence on record when he found or held that the loss occurred as a result of the Appellant's negligence.

5. The learned Judge erred in his assessment of the evidence and acted against the weight of the evidence when he found or held that it was not clear whether the appellants left his luggage in Nairobi or whether he carried it.

6. The learned Judge erred in law and in fact when he failed to hold that if the Respondent had not been negligent in changing the appellant's itinerary through wrongful booking the appellant would not have been exposed to the danger or risk of losing his luggage.

7. The learned Judge erred in law and in fact when he failed to find or hold that the Respondent acted wrongfully under the said contract when it changed the appellant's destination from JFK Airport to Newark Airport without notifying the Appellant.

8. The learned Judge erred in law and in fact when he failed to find or hold that the Appellant's loss was a direct or foreseeable consequence of the Respondent's negligence."

The appeal came up for hearing on *23rd September, 2010* when both Mr. D. Oyatsi for the appellant and Mr. Kiragu Kimani, agreed that each of them do file written submissions. It was agreed that after filing the written submissions both counsel would appear before Court on *15th November, 2010* for the purposes of highlighting the written submissions. Both advocates duly appeared on *15th November, 2010* and each of them made brief submissions in addition to the written submissions.

In his brief submissions, Mr. Oyatsi pointed out that there were two activities between the parties – the booking of the ticket and the actual carriage. He pointed out that they were complaining about the first transaction which was the booking of the ticket, and that the Warsaw Convention comes into play in respect of the second activity. It was Mr. Oyatsi's contention that the respondent was negligent.

On his part, Mr. Kimani submitted that there was no basis for splitting the relationship between the parties into two. Mr. Kimani further submitted that the appellant went to the carrier (respondent) and made a booking and then asked for change of dates of travel. Finally, Mr. Kimani submitted that there was no evidence that Newark Airport had apparent risks. He therefore asked us to dismiss the appeal.

This is a first appeal and it is therefore our duty to review the evidence adduced in the superior court in order to determine whether the conclusion originally reached upon that evidence should stand. In ***SHAH V. AGUTO*** [1970] E.A. 263 at p. 265 the predecessor of this Court said:-

"There are numerous decisions of this Court setting out the principles to be followed by a Court on a first appeal and I would quote here from the judgment of Sir Kenneth O'Connor in the well known case of PETERS V. SUNDAY POST, [1958] E.A. 424 at 429 where he said:-

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

I would also refer to the more recent case, of Selle v. Associate Motor Boat Co. Ltd., [1968] E.A. 123 at 126 and to the following extract from the judgment of Sir Clement De Lestang, V.P.:-

"I accept counsel for the respondents' proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it

*should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif v. Ali Mohamed Sholan** (1955), 22 E.A.C.A. 270)."*

The above stated principles continue to be applied by this Court. Fortunately, in this appeal facts are not in any serious dispute. The appellant made a booking and purchased an air ticket from the respondent to travel from Nairobi to New York via London. The original destination of the journey was John F. Kennedy International Airport in New York USA. The respondent's aircrafts fly to London only. From London to New York the respondent has arrangements with other airlines which ferry the respondent's passengers from London to New York and other destinations. The initial date of travel was endorsed on the air ticket as *20th September, 1992*. The appellant however, changed the date of travel from *20th September* to *25th September, 1992*. There was no other change. The respondent agreed to effect the change of date of travel. The changes were effected on a document given to the appellant in the form of a computer print out. The said change was coded so that a layman could not understand it. As it turned out later, the changed date was not restricted to the date of travel but also to the final destination from John F. Kennedy International Airport, New York to Newark International Airport, New Jersey.

At the material time, the appellant was a Government employee attached to the Kenyan Mission at the United Nations in New York. It was the appellant's evidence that from London he was transferred from Kenya Airways flight to United Airlines but when he arrived in the USA he found himself in Newark, New Jersey a 2 hours drive from JFK International Airport. The appellant lost his brief case as he was trying to contact his office for transport. It was the appellant's evidence that he was harassed and distressed since he would have been received by his office staff had he arrived at the JFK airport. In his stolen brief case were official documents, a brief for the General Assembly of the United Nation and ***US$6,500***. He therefore claimed all this from the respondent.

It is to be observed that the appellant lost his briefcase and other valuables when he was already outside the aircraft. It was the appellant's case that the respondent was negligent in changing the destination from JFK airport to Newark International Airport which led to his losing his property as he made a telephone call. In dealing with the issue of negligence, the learned Judge rendered himself thus:-

"While the plaintiff had disembarked and was seeking means of going home and while plaintiff left his bag outside this booth he would himself be responsible for it, it is far fetched to say that the airline would still owe him a duty to have his luggage cared for outside the aircraft when he had already came** (sic) **out of the aircraft it would be too un-realistic and remote."

We respectfully agree with that finding by the learned Judge. It is to be observed that when the appellant boarded the US bound flight in London, he did not check whether there was a connecting flight between Newark and New York.

We have carefully gone over the evidence adduced in the superior court, the findings of the

learned Judge, the submissions by counsel appearing for the parties together with cited authorities in support of these submissions and we are satisfied that the learned Judge cannot be faulted in any way in the manner he reached his final conclusion. Clearly the loss of brief case and other valuables cannot be attributed to any negligence on the part of the respondent.

Even assuming that the respondent was negligent, the appellant was required to make a written complaint to the respondent within 21days from the date of the alleged loss as per ***article 26(2)*** of the Warsaw Convention as applied by our own Carriage by ***Air Act 1993***. Hence, whichever way we look at the appellant's claim it was bound to fail.

In view of the foregoing, we find no merit in this appeal and we order that the same be and is hereby dismissed. As regards costs of the

appeal, we order that each party do bear his/its own costs.

Dated and delivered at Nairobi this 17th day of December, 2010.

E.O. O'KUBASU

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

J.G. NYAMU

……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR