IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 106 OF 2017

(CORAM: NDIKA, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

1. QATAR AIRWAYS
2. PRINT CHIBOLE ..... **APPELLANTS**
3. BHASI MAVATH

VERSUS

GEORGE SOKOINE MWALINGO ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Muruke, J.)

dated the 10th day of May, 2013
in
Civil Appeal No. 15 of 2012

JUDGMENT OF THE COURT

13th August & 23rd September, 2021

MWAMPASHI, J.A.:

Brought to us in this appeal are issues related to a carrier's liability under a contract of carriage by air, particularly on financial limitation of carrier's liability in cases where a luggage is lost in the carrier's hands. Briefly, the background to the appeal, which we think need to be given, is as follows; On 25th July, 2009, the respondent, a businessman and a frequent flyer, while on his normal business trips from Hong Kong to Dar es Salaam via Doha, boarded, in business class, flight No. QR81A7 belonging to the 1st appellant. During check in procedures at Hong Kong, the weight of the respondent's baggage

comprising four (4) pieces/boxes was found to be of 66kgs in excess of 50kgs which is the allowable free luggage weight for passengers in his class. USD 420.00 being overweight baggage fee was therefore paid by him for the said extra baggage and the baggage remained in the appellant's custody. It is alleged that the 1st appellant was notified by the respondent that the baggage contained fragile items and that the baggage was thus labelled with a"*Handle with Care*" sticker.

On arrival at JK Nyerere International Airport, Dar es Salaam, one piece/box allegedly containing cell phones was missing. Efforts to trace and find it having proved futile and the respondent having refused the sum offered by the 1st appellant, he decided to sue the appellants in the Resident Magistrates' Court of Dar es Salaam in Civil Case No. 264 of 2009 for the following: **One**, a declaration that the appellants breached the contract of carriage by handling negligently and/or recklessly the respondent's baggage; **two**, payment of Tshs. 26,000,000/= or USD 20,152 as compensation of the loss suffered by the respondent as a result of the appellants' negligence/reckless acts which caused the loss of the baggage; **three,** general damages to the tune of Tshs. 3,600,000/=; **four**, interests on items (2) and (3) above at commercial rate from the date of judgment until payment in full; **five**, costs of the suit; and **finally**, any other relief(s) the Honourable Court deems just to grant.

In their defences and in particular in the 1st appellant's defence, the fact that the respondent had an excess baggage and that one piece of his checked baggage got lost was not denied by the appellants. The appellants, however, disputed the amount claimed by the appellant on the ground that the respondent neither disclosed the contents of the said lost piece of baggage nor did he disclose its value. The appellants maintained that their liability was limited to the amount specified by the relevant law and regulations. It was insisted that the respondent was not entitled to any payment over and above to what is provided by the law.

At the commencement of the hearing, the trial court framed four issues as follows: **one,** whether the appellants did breach the contract of carriage; **two**, whether the appellants were duty bound to deliver the baggage to the respondent; **three**, whether the appellants mishandled the respondent's claim and **lastly**, what reliefs are the parties entitled to.

The respondent was the sole witness for his case and he testified as PW1. It was testified by him that at the time of boarding the 1st appellant's flight at Hong Kong, he had 60kgs excess baggage for which he paid USD 420 being charges for the said excess baggage. He also told the trial court that he had informed the 1st appellant's staff

at the airport that his baggage contained cell phones and that the baggage was labelled with a "*Handle with Care*" sticker to that effect. PW1 further testified that his baggage was comprised of four (4) pieces/boxes but it was only one piece/box containing cell phones worth USD 20,152.00, that got lost. A ticket, receipts, delivery notes and invoices were tendered by PW1 and collectively received in evidence as Exhibit P.1. He also admitted that at first, the 1st appellant offered him USD 550.00 as compensation for the lost piece of baggage and that the amount was later reduced to USD 500.00. He maintained that the total weight of his baggage was 120kgs and that he let the staff know that the baggage contained fragile items hence the sticker "*Handle with Care*" on the baggage. PW1 did lastly tell the trial court that he was not informed of any other terms and conditions about the contract of carriage in regard to the baggage.

As it was for the respondent, the appellants did also feature only one witness in their defence. Mr. Bhasi Mavath, the 3rd appellant and the 1st appellant's Service Manager, testified as DW1 explaining to the trial court that where a baggage is lost, claims for the said lost baggage are settled in accordance with the Warsaw Convention 1929 to which Tanzania is a signatory. He also explained that if a passenger has a property of high value, he must make a declaration to that effect and he must also pay a supplementary fee. In regard to the case at hand,

he testified that the respondent checked four (4) pieces of baggage at Hong Kong but on arrival at Dar es Salaam it was reported that one piece of the baggage was missing. He told the trial court that the total weight of the four pieces of baggage was 116kgs and the missing piece of baggage had 30kgs. DW1 contended that the respondent did neither make a declaration for the baggage nor did he pay a supplementary fee.

It was further testified by DW1 that the parties to the contract of carriage in question were bound by the Warsaw Convention 1929 as referred to in the ticket that was issued to the respondent. He further contended that according to that Convention, USD 20 is paid for every 1kg of the lost baggage and that, this was the reason the appellants were ready to pay USD 516 for the 30kgs lost piece of baggage but the respondent refused demanding to be paid the value of the lost items which was not even proved. He lastly testified that according to electronic record the missing piece of baggage was loaded at Doha and it reached Dar es Salaam but physically it was not seen at Dar es Salaam. To him this was an accident and there was no negligence or recklessness on part of the appellants. As on the sticker, it was DW1's stand that the baggage was so labelled as a notification to whoever handled it that it contained fragile items.

At the end of the trial the case was decided for the respondent and he was awarded Tshs. 26,000,000/= or USD 20,152.00 as compensation for the lost piece of baggage and Tshs. 3,000,000/= as general damages. In its judgment, the trial court found that the appellants breached the contract of carriage and that they failed to deliver the lost piece of baggage to the respondent. It was also found by the trial court that the appellants were liable to fully compensate the respondent because the ticket that was issued to the respondent was incomplete as the terms and conditions of the Warsaw Convention 1929 were not part of it and further that such terms and conditions were never brought to the attention of the respondent. It was also found that the respondent was not informed or asked to make any declaration. The trial court lastly found that the appellants' readiness to pay USD 500 was an admission and sufficiently proved that they mishandled the respondent's baggage.

The appellant's appeal to the High Court was unsuccessful save for an award of Tshs. 3,000,000/= as general damages which was set aside. First and foremost, the High Court Judge recognized the application of both the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May, 1999) (the MC199) and the Civil Aviation (Carriage by Air) Regulations, 2008 (the Regulations) on issues pertaining to international carriage by air and to

the case at hand in particular. The Judge did also agree that by virtue of regulation 26(1) of the Regulations, unless the passenger declares his/her baggage in terms of the Regulations, the liability of the carrier is limited to the amount set out in the Regulations. Labelling the luggage with '*'Handle with Care"* was found not to be a declaration in terms of regulation 26 of the Regulations. It was emphatically held by the Judge that 'a special declaration' for purpose of compensation entails declaration of the value of the baggage, among others.

Notwithstanding the finding that the respondent had made no special declaration as required, the learned Judge found that the appellants could still not benefit from the limitation of liability specified by regulation 26(1) of the Regulations because the provision is not applicable. She reasoned that the fact that the baggage in question got lost due to the appellants' omission and recklessness as it is provided by regulation 27(3) of the Regulations, then regulation 26(1) of the Regulations could not apply. Further, the judge was of a view that the fact that the baggage was labelled '*'Handle with Care"* was in itself a sufficient notification to the appellants that the baggage needed to be handled with extra care. It was also found that the baggage was not handled with the required extra care but that it was treated as other ordinary baggage. The appellants were also found reckless and liable to pay compensation in full because they did not lead any evidence to

establish that they were not reckless and that they handled the baggage with extra care. The learned Judge also found that the air ticket had no indication or notice on limitation of liability. It was further held that although there was no direct evidence of recklessness on the part of the appellants, there was circumstantial evidence to that effect. In the final analysis, the High Court, upheld the trial court decision emphasizing that the appellants cannot benefit from the limitation of liability but that they should fully compensate the respondent by paying him Tshs. 26,000,000/= or USD 20,152.00 being the value of the lost piece of baggage.

Still aggrieved, the appellant has filed this appeal raising seven (7) grounds of appeal which are in the following form: -

(i) That the learned High Court judge erred in law in not holding that the trial magistrate should have taken judicial notice of the relevant Conventions and laws in the carriage by air industry thereby erroneously holding that the trial magistrate cannot be blamed for disregarding the provisions of the Warsaw Convention.

(ii) That the learned High Court judge erred in law in not finding that the failure on the part of a passenger, the Respondent, to

make a special declaration of interests of his baggage makes him entitled to the limited amount provided by the law only.

(iii) That the learned High Court judge erred in law in holding that the Appellant is deemed to have abandoned a ground of appeal as to whether there was a proof of contents of the lost baggage while the Appellant submitted on all the grounds except ground number four which related to existence of the contract of carriage.

(iv) That the learned High Court judge erred in law in holding that there is circumstantial evidence to prove that the Appellant was reckless in handling the lost baggage thereby falling within the exceptions on the limitation of liability while there were no such allegations made by the Respondent and proved as required by law.

(v)That the learned High Court judge erred in law in shifting the burden of proof of the alleged recklessness and or negligence to the Defendant/Appellant contrary to the law on burden of proof.

(vi) That the learned High Court judge erred in law in not holding that Exhibit P-1 is not credible evidence in proof of a lost baggage in as much as contract of carriage of baggage by air is concerned and

(vii) That the learned High Court judge erred in law in upholding the trial Court's finding that the Respondent is entitled to the sum as value of the lost baggage as claimed while there was no proof of the contents in the lost baggage and their value thereof at the standard of set by the law.

When this appeal was called on for hearing, the appellants were represented by Mr. Rosan Mbwambo, learned counsel, whereas the respondent enjoyed the services of Mr. Godwin Mussa Mwapongo, also learned counsel.

Apart from their brief oral submissions, the learned counsel for the parties adopted their respective written submissions for and against the appeal. The counsel for the appellant did also, in addition, adopt the list of authorities he had earlier filed and he, at the outset, abandoned ground (i) of the appeal. It should also be pointed out, at this very stage, that though we do not intend to reproduce each and everything the counsel have submitted to us, in determining this appeal, we have considered and duly given the deserving weight to the submissions made by the counsel. We also commend them for the job well done.

From the historical background of the case and the findings of the two lower courts which we have endeavoured to give and also from our dispassionate consideration of the submissions made by the

counsel and further from our examination of the record of appeal, we think that this appeal can be disposed of on a single narrow issue on the amount of compensation the respondent is entitled to. The issue is whether the respondent is entitled to the full value of the lost piece of baggage or to the limited amount as specified by the governing law. Consequential to the above issue, is a minor but a very important issue on what is the governing law. We should also remark at this very stage that, fortunately, the issue we have proposed is not new. This issue was in fact dealt with by the two lower courts and is one of the complaints contained in the appellant's grounds of appeal particularly in grounds (ii), (iv) and (v).

We are of the considered view that the only issue calling for our determination is on the amount of compensation the respondent is entitled to, because in our observation, up to this point, most of the material facts pertaining to the dispute between the parties have been settled either from the pleadings or by the findings of the two lower courts. At this point, it is no longer in dispute, for instance: **one**, that the parties had entered into a contract of carriage by air for the appellants to deliver the respondent's four (4) pieces of baggage from Hong Kong to Dar es Salaam; **two**, that the appellants had contractual obligation to deliver the baggage to the respondent at Dar es Salaam; **three**, that one piece of the respondent's baggage got lost and

therefore that the appellants are liable for the lost piece of baggage; and **four**, that the respondent had not declared interest on the lost piece of baggage.

Beginning with the issue on what is the governing and applicable law, it is our observation that owing to the fact that the contract of carriage between the parties was on an international flight then the contract between the parties falls within the ambit of the MC1999. It is also worthy observing that in determining the applicability of the MC1999 and particularly in situations involving international carriage by air, one has to determine two major factors; **first**, whether the carriage in question comes within the meaning of 'International carriage" with reference to places of departure and destination (see Article 1(2) of the MC1999). **Second**, whether the States (Countries) of departure and destination are contracting states to the Convention in question.

In the instant case, as we have alluded on earlier, there is no doubt that the contract of carriage, the parties had entered into, was an international carriage by air contract within the meaning of Article 1(2) of the MC199. It is also a common ground that the MC1999 is in force both in Hong Kong which is a place of departure and in the United Republic of Tanzania a place of destination. Apart from the fact that Hong Kong is a semi-autonomous part of China which became an

effective member State to the MC1999, on 31st July, 2005, Hong Kong by itself did on 15th December, 2006 put the MC1999 into force as a law through the Carriage by Air (Amendment) Ordinance 2005 (see *https://www.info.gov.hk*). It should also be noted that even Qatar, where the 1st appellant is domiciled, is one of the member States of the MC1999 since 14th January, 2005. As for the United Republic of Tanzania, the MC1999 was ratified on 11th February, 2003 and it came into force on 04th November, 2003 replacing the old Warsaw Convention, 1929. Since the MC1999 is in force both in Hong Kong as the place of departure and in the United Republic of Tanzania as the place of destination, then it is the MC1999 that governs the terms of the contract and the liabilities between the parties to the case at hand.

We have also noted that in her judgment, the High Court Judge recognized the existence of the MC1999 but applied the Civil Aviation (Carriage by Air) Regulations, 2008 (the Regulations) made under S. 12 of the Civil Aviation Act, 1977 (Act No. 13 of 1977). Fortunately, the Regulations domesticated the MC1999 and have similar provisions to that of MC1999 on issues of carrier's limitation of liability in contracts of carriage by air. We are however of a considered view that under the circumstances of this matter, and for the reasons we have given above, it is the MC1999 that ought to have been applied. It should be restated that apart from the factors demonstrated above, the MC1999 applies to

the case at hand because it provides for a simplified liability regime for baggage and air cargo and it caters for international carriage of passengers and goods by air.

Having settled the issue on the applicable law, let us now turn back to the fundamental issue on what amount in compensation, is the respondent entitled to, for his lost piece of baggage. At this juncture we find it proper to first, reproduce Article 22(2) and (5) of the MC1999 which caters for limits of liability when a baggage is damaged, destroyed, lost or delayed. It is provided by Article 22(2) and (5) of the MC1999 that:-

> "Article 22(2) *In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at the destination.*
>
> (3) *[Omitted]*
>
> (4) *[Omitted]*

(5) *The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment".*

It is our observation that Article 22(2) of MC1999 fixes the limit of the carrier's liability to 1,000 Special Drawing Rights (SDRs) but gives a room for a passenger whose baggage is destroyed, lost, damaged or delayed to be paid a larger sum than the amount so fixed, on two conditions; **first**, if at the time of check-in, the passenger makes a special declaration of interest (value) on the baggage in question and **second**, if he pays a supplementary sum in respect of that declared interest as required. The other situation where the passenger can avoid being trapped into the limitation of liability provision is provided under Article 22(5) of the MC1999. The passenger can be compensated over and above the fixed amount if it is proved that the damage, destruction, loss, or delay in question resulted from an intended act or omission of the carrier, its servants or agents or

from their recklessness with knowledge that the damage, destruction or loss would probably result.

On whether Article 22(5) of the MC1999 was rightly applied for the respondent or not, we are firstly inclined to agree with the argument by Mr. Mbwambo, and also with the finding of the High Court Judge, that the respondent neither made a special declaration of interest on the lost piece of baggage nor did he pay any supplementary sum in respect of the same. We are not convinced by the argument by Mr. Mwapongo, that tends to suggest that the declaration was made because the baggage was allegedly labelled by a '*'Handle with Care*'' sticker.

A declaration of interest in carriage by air, entails a disclosure, at check-in point, of the value of the baggage or cargo that a baggage or cargo has a significant or special interest or value. Such a declaration is normally made at the time of checking in fragile, perishable or valuable items where the declared items must be inspected and seen by a designated officer of the carrier in order to verify its status. It is also deserving mentioning here that making a special declaration of interest on a baggage or cargo is not mandatory but it is a right exercised at the option of the passenger who thinks that the value of his baggage or cargo is over the maximum limit set by the applicable law. The

declaration is an equivalent of insurance of the value of the baggage or cargo with the airline whereby extra charge or supplementary fee may be paid for purposes of ensuring the passenger that in case the baggage is lost, delayed, destroyed or damaged in whatever manner, he can be compensated in full and above the amount fixed by the applicable law.

We are of settled mind that the respondent did not make the required declaration of interest and that the alleged '*'Handle with Care''* sticker on the lost piece of baggage cannot, under the circumstances of this case, be equated to a special declaration envisaged under Article 22(2) of the MC1999. Apart from the fact that a special declaration is made by means of a special baggage excess value declaration form, there is no evidence, in the case at hand, that the items in the lost piece of baggage and their value were disclosed or indicated on the said sticker/label. As it was also correctly observed by the High Court Judge, a special declaration of interest for the purpose of compensation entails, among other things a declaration of the weight and the value of the baggage in question. The respondent did also not pay any supplementary sum. The USD 420.00 he paid was for excess baggage and not otherwise.

It is therefore our conclusion that the respondent, having failed to comply with the requirements of Article 22(2) of the MC1999 he could not resort or take refuge to the exception under Article 22(5) of the MC1999. Basing on the evidence on record, we are of the view that the exception under Article 22(5) of the MC1999 cannot be available for the respondent.

Another complaint by the appellants was that in applying the Article 22(5) of the MC1999 the High Court Judge wrongly shifted the burden of proof to the appellants. On this, we entirely agree with Mr. Mbwambo that looking at how Article 22(5) of the MC1999, is crafted, it was a misdirection on part of the High Court Judge to have held that the appellants failed to prove that they were not reckless. By so holding, the High Court Judge wrongly shifted the burden of proof to the appellants. Apart from the general principle that whoever alleges must prove, Article 22(5) of the MC1999 places the burden of proof on the passenger who desires for the limits of liability under Article 22(2) of the MC1999 not to apply for the carrier. It is the passenger who has the burden to prove that the carrier, its servants or agents intentionally occasioned the damage, destruction, delay or loss or that they were reckless. If it is for servants or agents, the passenger must also prove that they so acted or omitted to act while within the scope of their employment. We emphatically hold that when it comes to the

application of Article 22(5) of the MC1999, the burden of proof is upon the passenger and not the carrier.

In the instant case, besides the fact that recklessness was not specifically pleaded, as correctly complained by Mr. Mbwambo, there was no any evidence from PW1 that suggested that the appellants were reckless. The High Court, in its judgment on page 184 of the record of appeal, admitted and found, to our view, correctly, that there was no direct evidence of recklessness on the part of the appellants and/or their agents or servants. The High Court, however, misdirected itself when it found that there was circumstantial evidence proving recklessness. With due respect, we do not think that the mere fact that the baggage which had been labelled "*Handle with Care*" got lost in the hands of the appellants, is, under the circumstances of this case, sufficient to infer recklessness on part of the appellants. In any case, as we have alluded to above, it was upon the respondent to prove that his piece of baggage got lost due to an intended act or omission of the appellants, their servants or agents or due to their recklessness. The respondent failed to lead any evidence to that effect and he cannot therefore, rely on Article 22(5) of the MC1999.

There was also an argument for the respondent, which was accepted by the two lower court, that the provisions on the limitation of

liability are not binding upon the respondent because the same were not made known to him at the time the contract of carriage between the parties was made. The force of this argument is based on the fact that a party to a contract cannot be bound to strange conditions and terms not known to him. With due respect, we disagree with this argument. There is a difference between terms and conditions of a contract and terms and conditions set by the law. In the case at hand limitation of liability is provided by the law to which every person including the respondent, a frequent flyer, ought to be knowledgeable about. Ignorance of law is no defence. Dealing with the like issue the Court of Appeal of Uganda in **Ethiopian Airline v. Motunrola** [2005] 2 EA 57, held among other things that:-

> *"That the respondent was not informed of the conditions and terms is immaterial. All the information regarding the provisions of the conditions is written on the air ticket. In any case ignorance of law is not a defence".*

In the premises, having found that the respondent's checked baggage got lost while in control and charge of the appellants and further that the respondent had not made a special declaration of interest on the said lost piece of baggage and therefore that the appellants are liable to the limit set by Article 22(2) of the MC1999, we find no pressing need to dwell on the remaining grounds of appeal as

the findings and observations above are sufficient to dispose of this appeal.

In fine, we find the appellants liability limited, in terms of Article 22(2) of the MC1999, to 1,000 Special Drawing Rights (SDRs) (see *https//www.icao.int*). Consequently, the appeal is allowed and the award passed by the High Court is set aside. It is ordered that the respondent is entitled and the appellants are liable to the extent above explained. Taking into consideration of the circumstances of this case we order that each party bears its own costs.

DATED at **DAR ES SALAAM** this 10th day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered on 23rd day of September, 2021 in presence of Mr. Ndano Emmanuel, learned counsel for the appellants and Mr. Godwin Mussa Mwapongo, learned counsel for respondent is hereby certified as true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL