IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CONSOLIDATED CIVIL APPEAL NO. 264 OF 2021

(Originating from the decision of the District Court of Ilala at Kinyerezi, in Civil Case No. 35 of 2019, by Hon. Kinywafu-RM dated 29th day of April, 2021)

JACOB KIJYOMBO ..... APPELLANT

VERSUS

ETHIOPIAN AIRLINES ..... RESPONDENT

JUDGMENT

4th July, & 20th July, 2022

ISMAIL, J;

The trial proceedings from which the instant appeal emanated was founded on an allegation of breach of contract that culminated in the non-delivery of a luggage to the intended destination. The allegation by the plaintiff is that the appellant, a businessman, went to Guangzhou, China for shopping of assorted items. They were packed into three pieces of luggage ready for travel back to Tanzania. Having checked in on Ethiopian Airlines

and after payment of requisite fees he boarded a plane, believing that all his baggage had also been consigned into the plane.

On arrival, only two or the three pieces of the appellant's luggage were cleared for delivery. On enquiry, he was informed that the other piece had been retained in China on the ground that the same contained dangerous materials. Further engagements culminated into the appellant's undertaking that he would ask his colleagues to go and meet the Chines Authorities and resolve the matter. No feedback was given on this undertaking.

Believing that the respondent was responsible for the loss, the appellant instituted a suit claiming for special damages and general damages to the tune of TZS. 34,000,000/- and TZS. 40,000,000/-, respectively.

The respondent protested her innocence, pointing a finger at the appellant for failing to followup on the matter and provide a feedback as promised.

Hearing of the matter saw the appellant marshal the attendance of three witnesses against one for the defendant. Finding no merit in the suit, the trial court dismissed the claim. In making the finding that the appellant's case was devoid of any merit, the learned trial magistrate drew the

conclusion that the plaintiff's case was not established on the balance of probability.

Irked by the decision of the trial court, the appellant has preferred the instant appeal, containing four grounds of appeal, reproduced as hereunder:

1. *That the Honourable trial Magistrate erred in law and facts by his failure to hold that the Appellant had committed no any fault for his undelivered luggage;*

2. *That the Honourable trial Magistrate erred in law and facts by his failure to hold that there was no any proof that the Appellant's luggage was retained in China on allegations that it contained dangerous goods; and*

3. *That the Honourable trial Magistrate erred in law and facts by basing his judgment on unknown procedures in the airline industry on undelivered luggage.*

The appeal hearing was through written submissions, preferred by Messrs Alphonce Katemi and Gerald Nangi, learned counsel for the appellant and respondent, respectively. Mr. Katemi enjoyed the usual privilege of addressing the Court ahead of his counterpart.

On the first ground, the contention by Mr. Katemi is that the appellant committed no fault. He argued the appellant paid for his ticket and boarded the plane with his three pieces of luggage which were fully tagged by the respondent, cleared and travelled to Dar es Salaam. It was on arrival that the said luggage went missing and that his back and forth movements in tracing the whereabouts proved futile and without any plausible answers. Learned counsel submitted that after enlisting the services of a lawyer that the respondent stated that the luggage was retained in China because it contained dangerous materials.

In Mr. Katemi's view, the respondent was under obligation to meet her part of the bargain by ensuring that it delivers the luggage she contracted to deliver. In this case, he argued, the respondent reneged on her undertaking and kept quiet, only to wake up and cook stories after she had been served with a demand notice. Mr. Katemi argued that the trial court erred when it failed to appreciate the fact that the respondent committed a breach of contract.

With regards to ground two, the argument by the appellant's advocate is that no semblance of a testimony was adduced to substantiate the contention that the appellant's baggage was retained in China on account of

the fact that it contained dangerous goods. Mr. Katemi argued that, in the absence of such testimony, the respondent failed to prove her case, and it was wrong for the trial court to shift the burden of proof to the appellant. It was for the respondent to state as to why there was no delivery of the luggage destined to Dar es Salaam. Learned counsel argued that it remained a fact that the luggage was either stolen or deliberately or negligently misplaced, making her culpable for the loss.

With regards to ground three of the appeal, the view held by Mr. Katemi is that the instruction by the respondent that the appellant should go and clear his luggage in China was of the respondent's own creation as neither the law nor the industry practice or norms provide for that. Mr. Katemi argued that the respondent cited none when she advised the appellant. In the absence of anything to validate the respondent's contention, the trial court acted on unverified statements that had no basis. This was an error, learned counsel retorted.

In his rebuttal submission, Mr. Nangi took the view that the appeal is lacking in merit. With respect to ground one, Mr. Nangi's rebuttal submission was premised on two points. ***One***, that through the testimony of PW1, PW2, PW3 and DW1, proved that the appellant's luggage was left behind because

of the safety issues, it contained dangerous goods whose carriage was prohibited by the Chinese authorities. ***Two***, that the question of breach of contract did not feature as an issue during trial. Mr. Nangi submitted in addition, however, that the contract between the parties was subject to rules and regulations governing air transport industry and strict adherence to country's security measure. He argued that, in this case, the Chinese authorities had the mandate of determining what was to be transported by air. To buttress his contention on the introduction of a new issue, the respondent's counsel cited a couple of decisions. These are ***Flora Christopher v. Violet Maglan***, HC-Land Appeal No. 5 of 2019; and ***Remigious Muganga v. Barrick Bulyanhulu Gold Mine***, CAT-Civil Appeal No. 47 of 2017 (both unreported), in which the settled principle to the effect that a matter which did not arise in lower should not be entertained on appeal, was restated.

Regarding ground two of the appeal, the argument by the respondent is that the trial court did not err in its decision because the testimony of the appellant's witnesses corroborated that of DW1, and concluded that the luggage had batteries which were dangerous contents. Mr. Nangi argued

that the appellant was on record as saying that he sent his friends to remove batteries from the luggage, a testimony of the whereabouts of the luggage.

Expounding on the burden of proof that is alleged to rest on the shoulders of the appellant, he cited the Court of Appeal of Tanzania's decision in ***Tanzania Cigarette Company Limited v. Mafia General Establishment***, CAT-Civil Appeal No. 118 of 2018 (unreported), wherein it was held that the burden of proof on a certain fact lies on the person alleging it.

On the third ground, the argument by the respondent's advocate is that the trial court relied on testimonies of both, the appellant's witness and that of the respondent's witness. The respondent quoted part of the impugned judgment's excerpt that justified the conclusion that the appellant ought to have followed the procedure for reclaiming the goods. The respondent argued that citing of the law was not necessary as that was a question of fact. She argued that the appellant was aware of the procedural requirements, and that that explained why he enlisted the assistance of a China based friend to retrieve the luggage.

The respondent urged the Court to dismiss the appeal with costs.

In his rejoinder, Mr. Katemi reiterated his contention that it took the demand notice for the respondent to act. He maintained that the respondent was duty bound to provide sound evidence to justify the contention. In the absence of such testimony, the impression is that such luggage was deliberately left by the respondent.

Citing the decision of the Court of Appeal of Tanzania in ***Qatar Airways & 2 Others v. George Sokoine Mwalingo***, CAT-Civil Appeal No. 106 of 2017 (unreported), in which liabilities of the air carriers were expounded, learned counsel argued that the limitation of liability to air carriers in the Montreal Convention, 1999 (MC 1999) is only with respect to loss, damage, delay or destruction of the luggage and not in reckless incidents like the instant matter.

He maintained that the issue of existence of batteries was an unsubstantiated contention that was intended to cover up the respondent's recklessness, arguing that sending a fried to check the luggage would not justify the wrongs done by the respondent. Mr. Katemi argued that the respondent's admission that she left the baggage in China was a clear case of the respondent's culpability. He took the view that no evidence was tendered to prove that the said luggage was retained by security officers in

China. He maintained that the respondent retained the burden of proving that the luggage was retained by security authorities.

The appellant urged the Court to allow the appeal.

The broad and singular issue for determination is whether the trial court's decision was erroneous. I will start the analysis of the appeal with ground two of the Memorandum of Appeal. The question is whether the case for the plaintiff was proved to the required standard.

As stated by counsel for the parties, proof of a case in civil proceedings requires the alleger to meet the legal threshold set by law, which is proof on the balance of probabilities. Glancing at the facts of the case, the obvious point that required the appellant to lead testimony on was whether he instructed the respondent to carry his luggage. The answer here in the affirmative and the respondent has also admitted as such. Through DW1, the respondent has admitted that the luggage was paid for but the respondent, for what she contends to be reasons beyond her control, they did not get the luggage on board. The appellant has attributed such failure to recklessness of the respondent's staff.

In my considered view, proof by the appellant entailed showing that the said luggage was:

(i) checked in for onward boarding;

(ii) it was not delivered to its intended destination; and

(iii) the appellant never recovered any of that.

In my view, the testimony of the appellants who featured for the appellant proved the prevalence of these three sets of facts. It implies that the case for the appellant was made out, and the respondent's testimony did not come up with any different factual setting, apart from the fact that the luggage contained dangerous goods, it being the reason for Chinese authorities to pounce on and withhold. The respondent laid bare the fact that the appellant was to send his friends to find out the truth of the matter.

Since it was intended that the respondent's version should constitute the basis for her defence, and it was an allegation levelled by her, then this is a fact whose proof constituted the respondent's obligation. It was intended that this serves as an exculpating account which would let her off the hook. To demand that the appellant should prove if the said luggage contained dangerous goods, or that Chinese authorities countermanded its transport is an allegation made by the respondent, and it does not cease to be so merely because the appellant took upon himself to consult a few of his friends and enlist their assistance. I agree with Mr. Katemi that it was erroneous for the

trial court to hold that the appellant had failed to prove his case based on the failure to bring a feedback from the emissaries he sent to China. I find merit in this ground.

Ground one and three have taken an exception to the trial magistrate's failure to hold that the appellant had committed no fault in the events that led to non-delivery of the goods. In his view, the trial magistrate's decision was informed by unknown procedures in the airline industry.

I will begin by restating the established principle which is to the effect that, under the common carriage law, a person shall be liable as a common carrier of goods where he holds himself out, either expressly or by a course of conduct, as willing to carry for reward, so long as he has room, the goods of all persons who entrust such goods to him to be carried at a reasonable price. This position has been amplified in numerous pieces of literature and it stems from the provisions of Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention, 1999), passed on 28th May, 1999. The Convention stipulates, under Article 17 (2) and (3) as follows:

> *"(2) The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the*

destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable it and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

(3) If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the rights which flow from the contract of carriage."

Placing emphasis on the position enshrined in the above quoted provisions, the Secretariat of the United Nations Conference on Trade and Development (UNCTAD), issued a Report, dated on 27th June, 2006, wherein the following remarks were made, under the title: ***Presumed liability of the carrier for loss or damage during carriage by air***:

"*105. A fundamental tenet of all the international air conventions is the presumed liability of the air carrier for all loss or damage during air carriage. Thus, the claimant whose goods are lost or damaged does not need to prove that the carrier*

was at fault. In this respect, the relevant provisions of the international air conventions are substantially the same, with minor semantic differences for the Montreal Convention 1999, which are here indicated within brackets, as appropriate.

106. *All the international air conventions provide that the air carrier is liable if* ***"the occurrence (event) which caused the damage …. Took place during the carriage by air"****.*

107. *The period of* ***"carriage by air"*** *is defined, in all the international air conventions, as the period during which the goods* ***are "in the charge of the carrier"****. The additional phrase* ***"whether in an airport or on board an aircraft, or, in the case of landing outside an airport, in any place whatsoever"****, which is included in the relevant provisions of the Warsaw-system convenient, was omitted from the text of the Montreal Convention 1999.*

108. *Therefore, the central question for determining the liability of the carrier during the* ***"carriage by air"*** *is whether or not the goods in the* ***"charge of the carrier"****. The carrier must be in a position to control*

> *the situation and protect the goods. In the United Kingdom it has been held that the goods must be effectively in the* ***"safe keeping, custody, [and] care"*** *of the carrier. The air waybill, or cargo receipt may be decisive in determining when the cargo first came into the carrier's charge. Further, the period of the carrier's responsibility should normally end when the goods have been delivered to the consignee."* [Emphasis is supplied]

Thus, as stated above, the general presumption is that the air carrier bears a liability in case of loss or damage to the cargo and for any delays in delivery. The law provides for a life line, through several defences which may be accepted, subject to the carrier's successful pursuit thereof. These defences are provided under Article 18 (1) and (2) of the Montreal Convention (supra), read together with Clause 3 (120), (121) of the UNCTAD Report (supra). It lists down the defences to include the following:

(a) defence of "all necessary measures";

(b) defence of negligent pilotage";

(c) defence that the claimant was "contributory negligent";

(d) inherent defect, quality or vice of the goods;

(e) defective packing of the goods;

(f) act of war; and

(g) ***act of public authority****."* [Emphasis added]

The respondent alleged that the Chinese Authorities stopped the carriage of the appellant's baggage because it contained some dangerous materials. If proved, this would constitute a specific defence under the last head (g) of the defences listed above. Unfortunately, however, the respondent, on whose shoulders the burden of proving such contention rested, did nothing to prove that, indeed there was an intervention by the Chinese Authorities, as an act of public authority; and that that was a sole reason as to why the baggage was not taken on board and carried to the point of destination. Absence of such testimony leaves the respondent's contention unsupported, and the appellant is right to contend that the trial court was not justified in its conclusion that exonerated the respondent from the blemishes.

It is my settled view that the decision by the trial court on the respondent's conduct is flawed and I find both of the grounds are meritorious and I allow them.

On how much constitutes the appellant's recompense for the loss or non-delivery of the luggage, my position mirrors that which was held in

Qatar Airways & 2 Others v. George Sokoine Mwalingo (supra), in which the upper Bench invoked Article 22 (2) of the MC 1999. The provision has capped the carrier's liability to 1,000 Special Drawing Rights (SDRs). This is because, as in the cited case, the appellant did not, at the check in time, make a special declaration of value of the baggage in question. He did not pay a supplementary sum, either, in respect of the declared interest. As it is, the sum of TZS. 34,000,000/- claimed by the appellant, as quoted in the plaint, is not pegged to any of the stated alternatives. It is unknown, as well, if the said sum is the equivalence of the 1,000 SDRs allowed by the MC 1999.

As I order a reduction of the claim of TZS. 34,000,000/- to the sum equivalent of 1,000 SDRs, I also award general damages to the tune of TZS. 10,000,000/-, to redress the appellant for the inconveniences and all other sufferings experienced during this whole period. The sum constituting the aggregate of the awarded general damages and the SDRs shall attract interest at the current commercial rate from the date the luggage went missing to the date of the decision. The appellant will also have his damages.

In sum, the appellant's appeal succeeds as shown above.

Order accordingly.

Rights of the parties have been explained.

M.K. ISMAIL,

JUDGE

22/07/2022

DATED at **DAR ES SALAAM** this 22nd day of July, 2022

M.K. ISMAIL,

JUDGE

22/07/2022