**Ethiopian Airlines v Motunrola**

**Division:** Court of Appeal of Uganda at Kampala

**Date of judgment:** 5 September 2005

**Case Number:** 30/03

**Before:** Mukasa-Kikonyogo DCJ, Mpagi-Bahigeine and Kitumba JJA

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*[1] Evidence – Extrinsic evidence – Applicability of extrinsic evidence – Extrinsic evidence where there*

*is documentation.*

*[2] International law and conventions – Applicability of the Warsaw Convention to contracts of*

*carriage.*

**JUDGEMENT**

**Mukasa-Kikonyogo DCJ:** This appeal is instituted by Ethiopian Airlines, which hereinafter I shall refer

to as the appellant. It is brought against the judgment and orders in High Court civil suit number 917 of 1997 dated 25 September 2002 and passed in favour of Olowu Motunrola, the respondent. Briefly, the background of the appeal is that at the material time the respondent was a passenger/client of the appellant as a frequent flier Lagos Entebbe route. On 5 February 1999, the respondent was a passenger on the appellant’s aircraft from Lagos via Addis Ababa and Nairobi to Entebbe Airport. Before boarding the aircraft she duly checked in all her luggage and identified it. It was tagged and subsequently loaded on the aircraft. On arrival at Entebbe Airport, her final destination on 6 February 1999, she noticed that part of her luggage was missing. It was lost and/or had been converted by the servants of the appellant working in the course of their employment. The respondent made and produced a list of the lost items, valued at US$ 3476. Further, she explained that, with the permission of the area manager of Lagos Airport, Smeili Shabira, she paid 10kg as excess luggage. Immediately after the respondent discovered the loss of her second piece of luggage, she lodged a complaint with Kampala area manager at that time, Solomon Debebe. The said manager issued her with a document headed “Loss Baggage Questionnaire”. A copy thereof was annexed as annexure A. Although the respondent acted promptly to fill the questionnaire and returned it to the office of the area manger, her missing bag was not recovered. Further, despite repeated demands and reminders the respondent was not paid US$ 3746 (being the value of her lost property). It was contended for her, that as a common carrier, the appellant had a duty to safely deliver her luggage at Entebbe Airport which was not done. The failure to do so was seen as gross negligence on the part of the appellant. For the aforesaid reason, the respondent instructed her counsel to sue the appellant for recovery of US$ 3476 or its equivalent in Ugandan shillings. She also prayed for general damages for the inconvenience and suffering due to the loss of her bag as well as costs. The appellant denied any liability. As far as it was concerned, the respondent was not entitled to any relief in the alternative and without prejudice, if given any relief,, such would be limited under the terms of contract of carriage with the appellant (*sic*). Besides, the respondent on 5 February 1999 checked in 30 kilograms of luggage at Lagos, which on arrival at Entebbe was found to be more by 25 kilograms. In the premises the appellant would not accept to pay for loss of goods that had not been declared. The appellant relied on the testimony given by their area manager, Mr Wamala and the Warsaw Convention governing the contractual relationship between the parties. Judgment was passed in favour of the respondent, against the appellant, as follows: (*a*) US$ 600 being the value of 30 kilograms of the lost piece of luggage (*b*) Uganda shillings 3 million, for the inconvenience and suffering (*c*) Costs under Article 22(*a*) of the Warsaw Convention Dissatisfied with the decision of the High Court, the appellant instructed its counsel, Katende Ssempebwa and Company Advocates to lodge the appeal to this Court. The appeal is based on the following four grounds. “1 The learned Judge erred in law and fact when she relied on the oral testimony of the respondent (PW1) to vary the terms of the contract of carriage on the question of contractual weight of luggage in question. 2. T he learned Judge erred in fact in holding that the respondent checked in two pieces of luggage, weighing 30 kilograms each, thereby coming to wrong conclusion. 3. T he learned Judge erred in law and fact in the award of US$ 600 as special damages to the respondent for loss of baggage. 4. T he learned Judge erred in law in the award of general damages of UShs 3 million for inconvenience to the plaintiff and that it was inequitable to grant that remedy when the respondent had come to court with unclean hands (*sic*). ( *a*) T his Court was prayed as follows: to allow the appeal and set aside the judgment and orders of the High Court. ( *b*) I n the alternative and without prejudice, this Court finds that the respondent could not have lost the awarded kilograms of baggage in contractual weight. ( *c*) I n the further alternative, that this Court finds that the award of UShs 3 million to the respondent in general damages is inequitable in the circumstances of the case. ( *d*) C osts of the appeal. At the hearing of this appeal the appellant was represented by Mr *Madrama* whilst Mr *Furah* appeared for the respondent. Mr *Madrama* presented his submissions orally. On the other hand, on application, Mr *Furah* filed written submissions. Although Mr *Madrama* had opted to argue the four grounds separately in that order he apparently did not strictly conform to it because his submissions on ground 1 covered ground 2 too. He intimated to court that on ground number 2, he decided to adopt his submissions on ground 1. He was justified for there is a lot of overlapping between the two. *Ground 1* Mr *Madrama*’s contention on ground number 1 is that the learned trial Judge erred in law when she relied on the oral evidence of the respondent to vary the terms of the contract of carriage on the question of contractual weight of luggage checked in by the respondent on the appellant’s aircraft on 5 February 1999 at Lagos Airport. Mr *Madrama* pointed out that from the air ticket (exhibit P2) and excess baggage ticket (exhibit P3) the respondent checked in and paid for 2 pieces of luggage both weighing 30 kilograms. The air ticket (exhibit P2) entitlement was 20 kilograms and the paid up excess baggage weight was 10 kilograms. It is, hence, not disputed that both tickets, exhibit P2 and exhibit P3, showed the total weight of the baggage checked in by the respondent on boarding the plane at Lagos as 30 kilograms. However, on arrival at Entebbe Airport, the respondent received 55 kilograms which was in excess of the total checked in baggage, namely exhibits P2 and P3. Contrary to documentary evidence, exhibit P2 and P3, the respondent in her evidence-in-chief testified that when her 2 bags were weighed at Lagos, the check point, she had 62 kilograms of baggage. She, however, said she did not know the weight of each bag separately, because they were weighed together. Believing her testimony the learned Judge came to the following conclusion: “Both the air ticket (exhibit P2) and the excess baggage ticket show that the plaintiff checked in two 30 kilogram pieces of luggage. Exhibit P3 shows that she paid US dollars 6637-10 for excess weight. She has explained that the manager allowed her to pay 10 kilograms instead of all the excess weight above her 20 kilograms allowance. The luggage weighs 62 kilograms. She is not to blame if they rendered only 60 kilograms. In the absence of any contrary evidence, I believe the plaintiff’s version and find that the luggage was checked at Lagos Airport in the manner described in the plaint and in plaintiff’s testimony.” Relying on sections 91 and 92 of the Evidence Act, the Warsaw Convention and *Uganda Revenue Authority v Steven Mabosi* Supreme Court civil appeal number 26 of 1995 Volume II (1996) KALR 1, Mr *Madrama* submitted that the oral testimony the learned Judge believed was inadmissible. It was erroneous for her to admit oral evidence of the respondent to vary the tickets to admit the weight of 62 kilograms. With regard to ground number 2, counsel criticised the learned trial Judge for holding that the respondent checked in 2 pieces of luggage weighing 30 kilograms each and thereby came to a wrong conclusion. In reply on ground 1, it was submitted for the respondent that it was far fetched. The area manger of Lagos as a representative in course of his employment would be stopped from denying that he committed the appellant to another contract other than that contained in the tickets which constituted the contract between parties. Counsel vehemently argued that “the excess baggage ticket” is an addendum to the air ticket which impliedly can be read together. As far as he was concerned, the learned trial Judge was justified to rely on the respondent’s testimony so far as it was not rebutted or controverted by DW1, Wamala Suleiman, the appellant’s representative in Uganda. Surprisingly, he confessed he did not know what had transpired at Lagos Airport on 5 February 1999. In the alternative and without prejudice, counsel for the respondent submitted that the learned Judge’s reliance on the oral testimony of the plaintiff did not and does not have the effect of amending/altering and or varying the contract of carriage. To him it is vital in assisting the court to establish that the air ticket (pursuant) to Article 3(2) of Warsaw Convention as amended by The Hague (1935) was *prima facie* evidence of the conclusion and conditions of the contract of carriage. Counsel, further, argued that the appellant’s manager in Lagos, acting in the course of his employment expanded the terms of carriage both by oral agreement and through an excess baggage ticket. For the aforesaid reason, he submitted, that the learned trial Judge could not be faulted for admission and reliance on that evidence especially as counsel for the appellant did not lead any evidence in rebuttal. Counsel prayed the court to dismiss this ground. On ground 2, counsel for the respondent corrected counsel for the appellant that the learned trial Judge made no finding to the effect that the pieces of luggage checked in by the respondent weighed 30kg each. She, therefore, did not reach an erroneous or wrong decision. He explained that the learned trial Judge found as a fact that: “Both the air ticket (exhibit P2) and excess baggage ticket, show that the plaintiff checked in two 30kg pieces of luggage…she explained that the manager allowed her to pay 10 kilograms instead of all the excess weight above her 20 kilograms allowance. The luggage weighed 62 kilograms … the judgment” In any case in the absence of separate weights of each bag the learned trial Judge could not be faulted for the findings she made. Counsel prayed court to reject this ground too. For convenience and due to overlapping I proposed to consider the two grounds together. The answer to the issues and arguments advanced by both counsel for the parties will not be hard to find. This is because most of them involve points of law. First and foremost it is not disputed by the parties that the contract of carriage between them is governed by the Warsaw Convention. Article 1 provides as follows: “1 This Convention applies to all international carriage of persons, luggage or goods performed by air crafts for reward. It applies equally…” Article 3(1) of the convention makes it clear that the Warsaw Convention provides passengers’ tickets delivered to a passenger shall contain notice that the Warsaw Convention may be applicable and that the convention limits liability to carriers for death or personal injury and in respect of loss or damage to baggage. Article 3(2) further provides that “the passenger’s ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage”. Clearly under Article 1 the Warsaw Convention is applicable to all international flights by a carrier. The respondent in this case was covered. She was bound by the Convention when she decided to travel with the appellant’s aircraft. Counsel cannot be right to suggest that the reliance on the respondent’s oral evidence by the learned Judge assisted to establish the applicability of the Convention to the contract between the parties. It was not necessary. For example, it is a well known fact that as a passenger travelling in economy class, the respondent’s entitlement was 20kg as indicated on the ticket itself. That she had never been informed so by the appellant is immaterial. All the information regarding the provisions of the Convention is written on the air ticket. In any case ignorance of the law is not a defence. Other relevant Articles applicable to this appeal include 18, 19, 22 and 24. I, therefore, accept Mr *Madrama*’s submissions that the terms of the contract in this appeal and the liabilities between the parties are governed by the Warsaw Convention. Mr *Furah*’s submissions that the first ground of this case is far fetched is not supported by evidence. On the contrary, I find it pertinent. With due respect in the circumstances of this case, the learned trial Judge should not have relied on the respondent’s evidence to vary the provisions of the convention relating to this matter. The air ticket and excess baggage ticket contained the necessary information regarding the weight of the bags checked in. There was no justification for the respondent’s oral evidence to account for the figures of 60 and 62 kilograms which the respondent claimed to be the total weight of her luggage at the check in point at Lagos Airport. The law is very clear on admission of intrinsic evidence. In this regard, I am fortified by the provisions sections 90 and 92 of the Evidence Act and the holding of Karokora JSC in *Uganda Revenue Authority v Steven Mabosi* Civil appeal number 26 of 1995. I agree with the said justice that extrinsic evidence cannot be used to vary, alter the contents of a written document. This holding is in line with the principle laid down in sections 90, 91 and 92 of the Evidence Act (*supra*). Section 91 reads as follows: “When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contracts in cases in which secondary evidence under the provisions herein before contained.” I appreciate the point raised by counsel for the respondent in respect of the role played by the area manager at Lagos, who authorised payment of 10 kilograms excess luggage. It is true he was and is a representative and agent of the appellant and he would commit the appellant in appropriate cases. In the instant appeal, however, even if the manager was acting in course of his duty as a representative of the appellant, he could not have committed the appellant because this Court cannot sanction what is illegal. The commitment, in view,of the position of the law on the matter, would be of no effect. Once an illegality is brought to the attention of the court, it overrides all questions of pleadings including admissions made therein. Similarly the doctrine of estoppel raised by the learned Counsel for the respondent would not apply for the same reasons. I accept the submission of Mr *Madrama* that had the learned trial Judge not admitted the respondent’s oral testimony she would have come to a different conclusion. For the aforesaid reasons this ground must succeed and I find it is sufficient to dispose of the appeal. On ground number 2 a lot of the evaluation above is also applicable to it. Firstly without the admission of the oral evidence by the respondent, there is no way the learned Judge would have reached the decision she did in the case. She believed the respondent that her luggage weighed 60 kilograms. Apparently she assumed that each piece of luggage weighed 30 kilograms hence the award of special damages of US$ 600 for the lost bag. I am unable to accept the submission of Mr *Furah* that the learned Judge did not make a finding to that effect. Apparently she based her decision on that proposition cited by counsel which in essence was a finding that each piece of luggage weighed 30 kilograms. For the reasons already stated above the omission by counsel for the appellant to adduce evidence in rebuttal was not detrimental to his case. Further, even if it was true each piece weighed 30 kilograms there is the problem of the received bag having excess weight of 25 kilograms. The bag weighed 55 kilograms instead of 30 kilograms. As it was rightly calculated by counsel for the appellant, the respondent in those circumstances would be entitled to US$ 100 only for a balance of 5 kilograms. However, tainted with illegality the respondent would not be able to recover that amount. The court will not condone an illegality and base a decision on it. As the record stands before the court, this ground must also succeed. In result the remaining two grounds cannot stand as these two grounds would dispose of the appeal. This appeal would, hence, be allowed. I would set aside the judgment and orders of the High Court. Bearing in mind the circumstances of this appeal I would order each party to bear its own costs. Since Mpagi-Bahigeine and Kitumba JJA hold similar views, by a unanimous decision of this Court this appeal is allowed. Each party will bear its own costs.

Mpagi-Bahigeine and Kitumba JJA concurred in the judgment of Mukasa-Kikonyogo DCJ.

For the appellant:

*Mr Madrama*

For the respondent: