

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 61 OF 2002

THE AREA MANAGER EGYPT AIR APPELLANT

VERSUS

**ALBERT RAYMOND t/a SAFARI
BIRDS TRAPPERS & EXPORTERS } RESPONDENT**

J U D G M E N T

ORIYO, J.:

The parties in the suit entered into a contract whereby the appellant shipped a consignment of respondent's live birds to a consignee of the respondent in Amsterdam, Holland. Due to unfavourable climate, the flight was rerouted and by the time it flew into Cairo, the connecting flight to Amsterdam had departed. The consignment was returned to the respondent in Tanzania after seven days. On arrival back in Dar es Salaam it was discovered that over 70% of the birds were dead. The respondent claimed from the appellant compensation for breach of contract and consequential losses. The appellant denied liability but was prepared to compensate the respondent a sum of USD.1163. The respondent considered the sum as inadequate and instituted Civil Case No.

170/98 at the Resident Magistrates Court at Kisumu for the following orders:-

- (a) USD 6480 being value of the birds which died
- (b) USD 811.85 prepaid freight charges
- (c) Shs 4,000,000/= as general damages
- (d) Interest
- (e) Costs

The appellant denied any liability. At the end of the trial, judgment was entered in favour of the respondent as prayed under (a) and (b) with interest. General damages was reduced to shs.2,000,000/= without interest. The respondent was also awarded costs of the suit.

Aggrieved, the appellant appealed on three grounds. In Ground 1, the appellant complained against the trial court's refusal to consider the issues framed by the appellant through the final written submissions filed in Court.

At the commencement of the trial, 3 issues were, at the instance of parties, agreed upon and framed as follows:-

1. Whether the defendant was negligent
2. If so what was the extent of liability

3. To what reliefs are the parties entitled.

However, in the final submissions the appellant, **suo mottu** decided to frame 5 issues purportedly under the provisions of Order XIV rule 3 and 5 of the Civil Procedure Code as follows:-

- (i) What was the number and value of birds shipped?
- (ii) Whether the Airway bill admissible is Annexure "A" of the Complaint or Annexure "D1" of the Defence
- (iii) Whether the defendant was liable in negligence
- (iv) What is the carriers limitation of liability, if any
- (v) To what reliefs are the parties entitled.

With due respect, the provisions of Order XIV rule 3 and 5 above give discretion to the court, and not to parties, on the materials from which issues may be framed and the power to amend, add or strike out issues. The appellant here was attempting to step into the shoes of the court. Even if it is assumed for the sake of argument that parties to a suit can invoke the relevant provisions of the law; it would still be improper for the appellant to introduce new and/or modified **issues** through written submissions. It is trite law

that submissions are mere arguments of parties and are not pleadings. Had the appellant intended to seek the court's indulgence to introduce new issues and/or modify some, it would have done so through the appropriate and legally acceptable course. Under these circumstances, the trial court was entitled to reject the appellant's framed issues as it did. The first ground fails and is dismissed.

In the second ground, the appellant complained that the trial court erred in finding the appellant liable in negligence. The appellant argued that the respondent did not testify on the type of negligence and/or particulars of such negligence. Due to such an omission; the court was asked to reject the allegations of negligence against the appellant. A further argument was that the appellant did all it could and as allowed by the International Air Transport Association (IATA) Regulations; such as the status of times of departure and arrival which are merely indicative of the approximate times but do not form part of the contract; Delivery to consignee, etc. The appellant submitted that there was no negligence on its part.

On this ground the respondent submitted that the appellant was negligent. An example of negligence given was the death of most of the birds for lack of food. The respondent argued that the death could have been avoided by making arrangements to ship the birds through other connecting flights to Amsterdam; or to return

them to Dar es Salaam immediately or to feed the birds. The respondent further submitted that under the circumstances the exclusion Clauses to exempt the appellant from liability were not applicable in a situation as the one in this case. It is of interest to note here that the appellant did not controvert the respondent's arguments made in ground 2 of appeal.

In ground 3 of appeal, the appellant complained that the damages awarded to the respondent were excessive and/or illegal. The appellant submitted that since the appellant had not acted negligently and was not liable for the death of birds; there was no basis to award damages to the respondent. Further argument was that even if the appellant was found liable in negligence; liability for damages is limited to USD 20 per kilogramme of dead birds; as provided for in the Contract signed by parties.

I will deal with grounds 2 and 3 of appeal together. I am inclined to go along with the appellant in that there was some plausible explanation why the delay which led to the death of the birds. It was stated that due to bad weather, the flight was rerouted to another airport and by the time it was permitted to fly to Cairo, the connecting flight to Amsterdam had left. At the time, the appellant, Egypt air, had only a single flight to Dar es Salaam each week; and could not have brought back the birds earlier. But the appellant failed to explain why it did not use the services of other

airlines to salvage the situation and serve the birds lives? On this account the appellant cannot escape liability of some negligence.

On damages awarded, it is trite law that an award of general damages must be assessed as being the direct, natural or probable consequence of the wrongful act, [See this Court's decision in the case of TANESCO vs IBRAHIM FORD, C/A 99/99 Dar es Salaam Registry (unreported) and Court of Appeal decision in the case of AFRICAN MARBLE Co. LTD vs TANZANIA SARUJI CORPORATION, C/A 38/93 (unreported)]. The respondent asked the court for general damages against loss of customer and loss of business. In assessing the general damages there was no evidence tendered on the period of time within which the respondent and the consignee had been carrying on the business and the size of earnings from the business. I am aware of the legal principle that in order for an appellate Court to interfere with an award of damages by a lower court, it must be shown that it acted on wrong principles or that the amount was too excessive in the circumstances (See this Courts decision in MBARAKA WILLIAM vs ADAM KISSUTE AND ANOTHER (1983) TLR 358), The trial court awarded general damages of shs.2,000,000/= without stating the basis of the award. Taking into account the fact that there is no material on record on the size of business and earnings lost, I will substitute the award of shs.2,000,000/= with that of shs.500,000/= as adequate under general damages.

On special damages awarded under (a) and (b); there must be proof by evidence (see Court OF Appeal decision in the case of COOPER MOTORS CORPORATION (T) LTD vs ARUSHA INTERNATIONAL CONFERENCE CENTRE (1991) TLR 165). Exhibit "P5" was an Invoice No. 0178 dated 14/11/97 showing total value of the consignment to be USD 6480. Part of the consignment did not perish. Therefore the respondents claim under (a) is USD 6480 less the value of the birds which did not perish. There is no proof that USD 811.85 was paid to the appellant as prepaid freight charges. The claim of USD 811.85 is therefore rejected, under the circumstances.

All said and done, the appeal is partly allowed and the trial courts decision is varied to that extent.

I have taken into consideration the circumstances of the case and I am of the view that each party shall bear own costs.

It is so ordered.

(K.K. ORIYO)
JUDGE
29/12/2005

1,426 Words