IN THE SUPREME COURT OF ZAMBIA APPEAL No. 99/06
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

ALMAZ LULSEGED (FEMALE)
APPELLANT
AND
BRITISH AIRWAYS LIMITED
RESPONDENT

Coram: Sakala, CJ. Chibesakunda and Mushabati JJS.
10th April, 2007 and .....
For the Appellant: Mr A. Wright of Messrs Wright and Company
For the Respondent: Mr M. Kabesha of Messrs Kabesha and Company.

JUDGMENT

Chibesakunda JS, delivered the Judgment of Court.

Cases referred to:

1. **Manal Investment Limited and Lamise Investment Limited (2001) ZLR at page 24.**

Nkhata and Four Others V. The Attorney General (1966) ZLR Page 124.

2. **A.M.I. Zambia and Chibuye, 1999 ZLR at 50**

Air France V. Mwase Import and Export (2000) ZLR 66 AT PAGE 69 LINES 27 TO 34.

3. **Connaught Laboratories v. British Airways (2002) O. J. No. 3421**
4. **Nuvo Electronics Inc. v London Assurance et al (2000) 49 O.R. (3d) 374 (Ont. SC)**

Goldman v. Thai *Airways International Limited (1983) 3 ALL ER 69.*
Sidhu v. British Airways (PLC)(1997)1 ALL ER 193 at page 207.

Georgina Mutale (T/A G.M. Manufacturers Limited) v. Zambia national building Society (2000) ZR 19.

Legislation referred to:

5. **Air Services Act Cap 466**

Carriage by Air Act Cap 447 of the Laws Zambia,.

6. **The Warsaw Convention and the Hague Protocol…..**

This is an appeal against a High Court judgment which was in favour of the Respondent. This matter arose out of a loss of one suitcase, belonging to the Appellant, containing merchandize worthy, US$6,000. This suitcase was one of the pieces of luggage carried by the Respondent on behalf of the Appellant, as consignment from New York via London to Lusaka on the 24th August 2004. The claim by the Appellant was for the amount of US$6,000. This action was framed under Article 25 of the Warsaw Convention as amended by Article 13 of the Hague Protocol. (***The Warsaw Convention will be referred to hereinafter as the Convention and the Hague Protocol will be referred to hereinafter as the Protocol***).

The facts, that are not disputed, are that the Respondents, a British Company, registered in the business of carrying passengers by air, as defined in the **Carriage by Air Act**.(11), sold a discounted fare ticket to the Appellant, who is a business woman of Lusaka and who was a frequent passenger of the Respondent, holding a Silver Card.

On or about 28th June, 2004, she purchased this discounted fare passenger ticket, reference No. 125-

2309404325 at US$1,900, from the Respondent's office at Holiday in, Lusaka. This ticket was Lusaka/ Johannesburg/Istanbul/London/New York and a return trip, New York/London/Lusaka. She successfully made her trip to New York where she purchased these items: one men's suit, jewellery, associated rings, earrings, bracelets; neck chains, gold plated watches – men and women's set and associated goods inter alia worthy U$6,000.00 (US Dollars). She was issued with a receipt for all these items. She, on route back boarded a British Airways flight No. 176/AB255 at JFK International Airport in New York. She checked in and registered four (4) suitcases and two hand luggage consignments. One of these suitcases contained these items purchased in New York, together with a receipt issued to her, on purchasing the items catalogued earlier. All these pieces of luggage were to be forwarded to Lusaka International Airport. The luggage was No. NA 23WHX. The Respondent accepted and took charge of this luggage. On arrival at Lusaka International Airport, the Appellant only received three suitcases and two hand luggage. The 4th suitcase, which contained the items purchased in New York, did not arrive. She reported this missing suitcase to the Respondent immediately and later on, after seven days, she reported in writing to the Respondent this missing suitcase. She made several visits to the Respondent's office at Holliday Inn, in Lusaka, inquiring about the whereabouts of this missing suitcase. The Respondent's office in Lusaka made several contacts

with its counterpart offices in London, Heathrow Airport.

The Appellant's story, which was disputed by the Respondent, is that during her visits to the Respondent's office in Lusaka, one employee, by the name of Beauty, assured her that her suitcase had been found. Her case before the High Court is also that even the correspondence, between the Respondent's office in Lusaka and its office in London, indicated that the missing bag was found. It was at terminal 1 RACK 3 at London Heathrow. She further testified that one of the Respondent's employees called Beauty even called her to assure her that the missing suitcase was found and that she had to travel to London to physically check the contents of the missing bag. (See page 45 – 51 on the record). This luggage was never forwarded. The Appellant's contention therefore was that, since the Respondent communicated to her that this luggage was found and that it would be forwarded to her, it was the Respondents recklessness which caused the suitcase to be lost and as such this conduct comes under the ambit of Article 25 of the Warsaw Convention as amendment by Article XIII of the Protocol as domesticated under the **Carriage *by Air Act Cap 447*** (7) and not Article 22 of the Convention as amended by Article XI of the Protocol.

The Respondents' case, before the High Court, was that the Appellant knew the conditions of her being a passenger on that flight and that these conditions were

set out at the back of her ticket. One of these conditions was about the limitation of its liability, should any of her pieces of luggage go missing. Its case was that the language was lost and as such although liable, their liability was limited to only US$640 as per Article 22 of the Convention amended by Article XI of the Protocol.

The learned trial Judge found as a fact that: (1) the Appellant boarded the Respondent's flight from New York to Lusaka and that upon the arrival at Lusaka, the Appellant discovered that one of her suitcases was missing; (2) that the ticket bought by the Appellant was subject to the conditions and limitations placed on it. Therefore, he concluded that Article 22 of the Convention as amended by Article XI of the Protocol applied, and as such although the Respondent was liable its liability was limited to US$20 per kilo on any lost baggage. As such the Appellant was only entitled to US$640 not US$6,000.00 as claimed. The Appellant, being aggrieved by this decision, has now appealed to this court.

Before this court, the Appellant advanced two grounds of appeal. These are:

1. **That the court below misdirected itself at Law by failing to take into account evidence that, the Appellant's luggage**

was found by the Respondent: but the Respondent deliberately refused to hand over the same to the Appellant.

2. **That the court below misdirected itself at Law by failing to give any reasons justifying any of <u>his</u> findings; particularly the finding that, the**

Appellant is only entitled to US$20.00 per kilo and/orUSD650.00 (sic).

At the hearing of the appeal, Mr Wright Counsel for the

Appellant, argued that the learned trial Judge misdirected himself by failing to take into account the Appellant's evidence that her luggage was found by the Respondents but that the Respondents deliberately refused to hand over the same to the Appellant. Elaborating on this ground, he pointed out that there was common ground on the following facts: (1) that the Appellant was a regular flyer between Lusaka/London/New York and knew the conditions of flying with the Respondents; (2) that the Appellant after realising that the 4th suitcase had not arrived, informed the Respondent, first verbally and then in writing within 7 days as stipulated in the contract; (3) that she made several visits to the Respondent's office in Lusaka at Holliday Inn. (4) that the Respondent provided her with written transcripts of communication between its two offices, (London and Lusaka); (5) that, in addition, the Respondent even listed the contents of the missing suitcase, indicating all the purchased items the Appellant had purchased (see page 51 of the record). He therefore submitted that, although the Appellant accepted that she was aware, that being a passenger with the Respondent, in the event of the luggage being lost, the Respondent's liability was limited, nevertheless, given the circumstances that her suitcase was found, and the fact that the

Respondent did not deliver it to her, therefore Article 22 of the Convention as amended by Article XI of the Protocol, did not apply. Instead Article 25 of the Convention as amended by Article XIII of the Protocol applied. Mr Wright reasoned that this was so because one of the members of staff, by the name of Beauty, at the Respondent's office in Lusaka, firstly, she told her that her missing suitcase was found when she visited the Respondent's office at Holiday Inn Lusaka and then this same lady later telephoned her and assured her that, the missing suitcase had been found and that the Respondent was making arrangements for her to fly to London to physically go and ascertain that the contents were as claimed. He quoted Article 25 of he Convention as amended by Article XIII of the Protocol which says: "**limits of liability in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his 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 an act or omission of a servant or agent, it is proved that he was acting within the scope of his employer**." This line of argument that the missing suitcase was founded on the fact that the Respondent's employee by the name of Beauty told her verbally that the suitcase in question was found, and was even buttressed by the fact that even the correspondence between the Respondent's London and the Lusaka Holiday Inn Offices, indicated that the missing suitcase had been found by the Respondent's employees who described the contents of this missing

suitcase correctly, (see page 46 of the record). He referred to Article 18 of the Convention as amended by Article XI of the Protocol which deals with liability of carriers of registered baggage or cargo, (we will deal with this Article later in our Judgment). He cited three cases, one Zambian, one British and one Canadian in support of his proposition that the Respondent's failure to explain to the High Court how the suitcase which was found, subsequently disappeared, amounted to wilful misconduct and that, the only reasonable inference to be drawn, was that the Respondent's employees stole the suitcase. He cited the case of **AMI Zambia and Chibuye(**3) and quoted Ngulube CJ (as he was then), as having said: "**the Appellant would not have been exempted from their own wrong doing by misconduct of their staff"** He cited the English case of: **Connaught Laboratories v. British Airways** (5). *The case concerned damage to four cartons of vaccines carried by air from Toronto to Sydney, Australia via Heathrow. The cartons bore labels directing that they be kept refrigerated at between 2 and 8 degrees Celsius. A similar direction was printed on the air waybills. At Heathrow, the cartons were not placed in a refrigerated area and, as a consequence, the vaccines were spoiled upon arrival in Sydney.* **The main issue in the case was whether the carrier could limit its liability to approximately $2,500.00 pursuant to Article 22 of the Convention**. *The Plaintiff argued that Article 25 of the Convention applied to disentitle the carrier from relying upon the Article 22 limits. He cited Article 25 which provides that "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his*

servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result". In a thorough and well reasoned judgement, the trial Judge considered the test set out in Article 25. There was, however, no evidence of why the cartons were not stored in a refrigerated area at Heathrow. The Judge noted that it may have been because the relevant person thought no damage would come to the vaccines if not refrigerated or because of mere inadvertence. However, the Judge also noted that it could have been that the relevant person knew there was a risk of damage but simply did not want to bother storing the cargo as directed. ***Such conduct would meet Article 25's test.*** The Judge resolved this issue by drawing an adverse inference from the failure of the carrier to present any evidence as to what actually happened and why. In result, the Plaintiff was entitled to recover. He argued that considering the fact that there were undisputed facts and the evidence from the Appellant that she was told that her luggage was found. Failure to present any evidence as to what actually happened to the luggage, ought to have invited the court to draw a negative inference. According to him the court ought to have held that the Respondent's conduct was wilful and as such it was legally unattainable for it to rely on the Article 22 limitation.

On the second ground, he argued that the learned trial Judge misdirected himself by failing to give any reasons to justify his findings, particularly on his finding that the Appellant was only entitled to US$20.00 per kilo or a total sum of US$640.00. Repeating his argument on ground 1, more or less, he summed up his arguments by adding that the only inference, which ought to have been drawn from all the facts, ought to have been that the Respondent was negligent or vicariously negligent through its servant and or argents by loosing the suitcase in question after it had been found. In his view, the court

was not at liberty to ignore the evidence which the Appellant gave without giving any reasons. According to him given all the evidence on which there was common ground and the evidence which was adduced by the Appellant, this court must hold that there was misdirection on the part of the learned trial Judge. In support of this proposition, he cited the case of ***Manal Investment Limited and Lamise Investment Limited)***(1) where Sakala DCJ (as he was then, now CJ) had this say: "**According to the learned trial Judge, the question of irreparability was not an issue. He did not say why that was so. The ruling of the trial court was too short and gave no reasons. On this ground alone this appeal ought to have succeeded."** He therefore urged this court to adopt this solid reasoning and uphold the appeal.

On ground 1, Mr Kabesha in his written heads of argument counter argued that the learned trial Judge took into account the evidence that was adduced by the Appellant and the evidence adduced by the Respondent before making his findings of facts (see page 5 lines 6 -12). He went on to submit that the learned trial Judge made these findings: (1) that the suitcase was lost; (2) that the air ticket had conditions set out at the back which were binding on the Appellant and the Respondent; (3) that one of these conditions was that, in the event that the Appellant lost any piece of her luggage, the Respondent's liability was to be limited. According to him these findings were supported by evidence on record. He referred to the letter written on 11th January, 2005 in which, the Appellant was informed that the luggage in question was lost and that the Respondents had limited liability and thus offered to give her available compensation, which compensation she refused. He argued that such findings of facts as per well celebrated authorities, cannot be reversed by this court unless it can be positively demonstrated before this court that the court below erred in accepting the evidence before it, or that the court below erred in assessing and evaluating the evidence, by taking into account some matter which ought to have been ignored or failing to take into account something that ought to have been considered, or that the trial Judge did not take proper advantage of having seen and heard the witness. See the case of ***Nkhata and Four Others V. The Attorney General (2)*.** He argued that it is common ground that the provisions of Article 22 of the Convention, as amended by the Protocol were applicable to this appeal. He cited the case of ***Air France V. Mwase Import and Export (2000) ZLR 66 (4)*** where this court invoked **Article 22 of the Warsaw**

Convention as amended by Article XI of the Hague Protocol. He contended that there was evidence by DW1 which evidence was accepted by the Appellant, that the ticket sold to her contained conditions of Carriage by Air, which conditions stipulated, inter alia – that for any loss of any luggage, liability was limited, on the part of Respondent, to US$20.00 per kilo. He went on to say that the Appellant's loss, according to the evidence on record, was 32 kilos. That meant that the sum recoverable was to be US$640.00. He pointed out that, that amount was offered to the Appellant. The appellant rejected that offer. He cited two English cases in support of his argument that the Appellant's claim come under the limits of Article 22 of the Convention as amend by Article XI of the Protocol: ***Goldman v. Thai Airways International Limited*** **(7)**, and ***Sidhu v. British Airways (PLC(8).*** In ***Goldman v. Thai Airways(7),*** the brief facts were that: the Plaintiff was a passenger on a flight from London to Bangkok, aboard an aircraft owned and operated by the defendant airline. Before leaving London the pilot of the aircraft was provided with a weather chart, forecasting two areas of moderate clear air turbulence on the aircraft's path. The defendants' flight operations manual contained instructions for the 'fasten seat belts' sign ordering passengers to fasten their set belts to be lit during all flying in turbulent air and when turbulence could be expected. During the flight the pilot failed to illuminate the seat belt sign when the aircraft entered an area for which moderate clear air turbulence had been forecast. So when server turbulence was encountered in that area, the plaintiff, whose set belt was not fastened, was thrown from his seat and sustained sever injuries. The plaintiff brought an action for damages against the defendants under the Warsaw Convention, as amended by The Hague Protocol of 1955. In this case of **Goldman v. Thai Airways (7),** the main issue before the court was whether or not the carrier could limit its liability to US$2,500.00 pursuant to ***Article 22 of the Warsaw Convention***(12). The other side counter argued that Article 25 of the Convention applied to disentitle the carrier from relying on Article 22 limits. The court held that Article 22 limits applied. Counsel before this court sought reliance on the dictum of O'Connor CJ, where in dealing

with Article 22 and 25 of the Convention, said: "**The provisions shows that the recompense is to be the normal liability, and that the only exceptional wrongdoing is to avoid the limit. It is in this context that the provision 'recklessly and with knowledge that damage would probably result' has to be construed."** Counsel further sought reliance on EveLeigh LJ's dictum in the same case that "Article 25 places the onus on the claimant (in this case the Appellant) to prove:

(1) **that the damage resulted from an act or omission;**

that it was done with intent to cause damage, or
that it was done when the doer was aware that damage would probably result, but he did so regardless of that probability;
that the damage complained of is the kind of damage known to be the probable result."

In the same case, Counsel referred further to the statement of the court that, under Art**. 25 of the Warsaw Convention a plaintiff was not freed from the limitation on the amount of damages imposed by Art. 22(1). In determining whether an act or omission had been done 'recklessly' the court had to consider the nature of the risk involved, and moreover, since the reckless act or omission had to be done 'with knowledge that damage would probably result' from the act or omission if damages were to be at large, the test of recklessness was subjective and the court could not attribute to the defendant knowledge which another person in the same situation might have possessed or which, on an objective basis, he himself ought to have possessed. It followed that in order for the pilot's omission to amount to recklessness, it had to be shown not only that prudent flying required him to switch on the seat belt sign before entering the area of clear air turbulence but also that he had knowledge that injury would probably result from his failure to do so**." In **Sidhu *v. British Airways (Plc) (8),*** the brief facts were that: *The appellants (the three plaintiffs and*

the pursuer) were passengers on a scheduled international flight operated by the respondent airline (BA) which left London on 1 August 1990 for Malaysia via Kuwait. On 2 August the aircraft landed in Kuwait for refuelling several hours after Iraqi forces had begun to invade Kuwait at the commencement of the Gulf War. While the passengers were in the airport terminal, the airport was attached by Iraqi forces who took them prisoner and later removed them to Baghdad. The appellants were released several weeks later and returned to the United Kingdom. On 30th July 1993, which was outside the two year time limit allowed by art 29 of the Warsaw Convention, as set out in Sch 1 to the Carriage by Air Act 1961, for bringing an action for damages but inside the three-year time limit prescribed for common law negligence, the Appellant's brought an action against BA in the county court claiming damages for personal injury alleging that by reason of BA's negligence in landing the aircraft in Kuwait after hostilities had started they had suffered physical and psychological damage and they also claimed for lost baggage. the judge dismissed their claim on the ground that the appellants' sole remedy was under the convention and that any rights they might have had against BA were extinguished by virtue of art 29 of the convention since they had not issued proceedings within the two year time limit. The court of Appeal upheld the decision and the plaintiffs appealed to the House of Lords. The pursuer brought her action in the Court of Session in Scotland claiming, inter alia, damages at common law for breach of an implied condition of the contract that BA would take reasonable care for her safety. The Lord Ordinary held that the convention excluded recourse to any common law remedy and dismissed her action. The pursuer reclaimed but the inner House of the Court Session dismissed her reclaiming motion and she appealed to the House of Lords. The court held that, having regard to the objects and structure of the convention, which was to achieve a uniform international code in those areas with which it dealt, including the

liability of the international carrier, which could be applied by all the High Contracting Parties without reference to the rules of their own domestic law, Sch 1 provided the exclusive cause of action and sole remedy for a passenger who claimed for loss, injury and damage sustained in the course of, or arising out of, international carriage by air notwithstanding that that might leave claimants without a remedy. According, where the convention did not provide a remedy, no remedy was available.

Mr Kabesaha urged this court to adopt this approach of the English and Canadian Courts and to dismiss the appeal as there was no evidence to establish that the Respondent deliberately refused to handover to the Appellant her fourth suitcase. Rather, he argued, the evidence on record tended to support the learned trial Judge's finding that, that missing suitcase was lost. He submitted further that there was no evidence which would have justified the court drawing a conclusion that the Respondent, or its servant and or agent stole the luggage in question.

The Respondent cross-appealed also, raising two grounds. The first ground was that, the learned trial Judge misdirected himself in fact and in law, when he held that the Appellant was only entitled to US$650.00 contrary to his own earlier findings. Counsel argued that, contrary to its earlier findings in the body of the judgment that the Appellant was only entitled to the sum of US$20 per kilo, US$640,00 in total for loss of 32Kgs suitcase, the court below without any justification wrongly found that the Appellant was entitled to the sum of US$650.00 for the total loss of the missing suitcase. The court ordered the Respondent to pay that sum of money. He pointed out that according to the evidence, the total weight of the lost language was 32kg. This meant that the sum for compensating the Appellant ought to have been

US$640.00 and not US$650 as awarded by the court. On the second ground, Counsel argued that the learned trial Judge misdirected himself in law and wrongly exercised his discretion when he ordered that 'each party will bear its own costs' In support, Mr Kabesha cited the case of ***Georgina Mutale (T/A G. M. Manufacturers Limited) v. Zambia National Building Society (9),*** where this court held that "**the discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are explicable or evident and which disclose something blameworthy in the conduct of the case**." Mr Kabesha therefore, contended that, on the evidence before the court, there was nothing which was blame worthy to cause the Respondent to loose its costs. He pointed out that the Appellant was offered a sum of US$640 by the Respondent, as compensation, for the loss of the language which weighed 32kg. She rejected it. So it was not the fault of the Respondent that she was out of that money. Therefore since the Respondent was a successful party, it should have been awarded costs. The Appellant relied on her argument in the main appeal to counter the arguments in the cross appeal.

We have considered all the issues raised in this appeal. We have looked at the evidence on record of appeal and the judgment of the lower court. We will deal with ground 1 and 2 together as they are interrelated. We will also deal with ground 1 and 2 of the cross appeal together as they are equally interlinked. The Appellant's sole contention of the law in this appeal is anchored on the provisions of **Article 25 of the Convention** as amended by **Article X111 of The Protocol** (8)**,**domesticated in **Air Services Act Cap 446 (10)** and **Carriage By air Act Cap 477(11)**. The question before us, which was the question before the lower court, is whether or not, the Appellant's claim came within the ambit of **Article 25 as amended by Art XIII of the Protocol** as opposed to **Article 22 of the Convention** as amended by **Article XI of the Protocol.** As liability was not denied by the Respondent, the sole defence in this action was that the Respondent's liability was limited to US$20.00 per Kg as provided in the limitation clause inserted at the back of the ticket and as per **Art 22 of the Conversion as amended by Art XI of the Protocol.**

It is common cause that the Convention as amended by the Protocol has the application in determining the issues in this appeal. The Convention together with the Protocol and the Guadalajara Convention have been domesticated in Zambia in the two Acts, the **Carriage by Air Act Cap[447 and Air Services Act Cap 446** (11). These two Acts have set out in details the international regimes of regulating the carrying by air passengers, passenger's baggage and cargo in Zambia. It is therefore a correct argument that the provisions of the convention as amended by the Protocol have the force of law in the Republic in relation to any carriage by air to which the convention applies irrespective of the aircraft performing that carriage. Therefore, as the learned authors of Specific Contract in Chitty on Contracts "**Specific Contracts",** 26th edition, have very correctly observed in paragraph 3041 – in relation to the Warsaw Conversion on carriage by air - … "**the rules of the common law are of minimal importance in the law of carriage by air, whether of passengers, baggage or cargo; for international carriage is regulated by international conventions which have been given statutory force**…" Describing the role of the Convention, Ngulube CJ, (as he was then), in the case of **Air France v. Mwase Import & Export Company Limited**(4) said "**the Warsaw Convention of 1929 was drafted in order to remove inconsistencies between the national laws of the different countries and to strike a fairer balance that might otherwise have been the case between carriers and passengers and owners of cargo in respect of their mutual rights and liabilities**" In line with this ratio in **Sidhu v. British Airways PLC**(8), Lord Hope also opined that: **the intention of the drafters of the Convention was to provide a secure regime, within which the restriction on the carrier's freedom to contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the career. Thus, the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to other.** Side by side with this proposition, there is another

proposition relevant to this case, that is that at Common Law it is a fundamental principle, well grounded in commercial transaction that a person is free, unless restricted by statute to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of the contract.
Coming to the issues raised in the appeal, we note that there is common cause on most facts. In dealing with issues raised in this appeal, we will set out in summary the provisions set out in the two Zambian Acts in schedules which are relevant to the issues before the court. In the case before this court, it is common cause that there was a contract between the Appellant and the Respondent as evidenced by the issuance of the tickets. **Article 3 (1) (a) of the air Services Act Cap 446 (11)**, defines a ticket as constituting prima facie evidence of a contract between the carrier and passenger. Part II of **Cap 447** deals with carriage by air, to which the Convention and the Protocol apply. This part decrees that the provisions of the Convention and the Protocol shall have the force of law in the Republic in relation to any carriage by air to which the Convention applies. Part III in the schedule to **Cap 447 of the Carriage by air Act, Section3 (1)**(11) sets out provisions of the Convention as amended by the Protocol which regulate obligations of the carrier to its passengers as well as the rights and instances that the carrier will be held liable. This part comprises of Articles 17 - 30. We will refer in detail to some of these Articles which are relevant to the issues before us. Article 17, in summary concerns carriers liability for death or any injury suffered by a passenger. Article 18 deals with the Carriers' Liability for destruction or loss of or damages to registered luggage or cargo. Article 19 deals with Carriers' liability for any damages occasioned by delay in the carriage by air of passengers, baggage or cargo. These two provisions must be read together with Article 24 which provides that in cases covered by Article 18 - 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention. Article 20 shifts the onus of proof to the carriers to prove on a balance of probabilities that he and or his servants/agents had taken all necessary measures to

avoid damage of the cargo or passenger or that it was impossible for him or them to take any other measures towards the damage. Article 21 deals with cases where damage was caused or contributed to by the negligence of the injured person. The court may, in accordance with the provisions applicable, exonerate the carrier wholly or partly from his liability. Article 22 makes provisions for the limitation of the carrier's liability for each passenger, and or for the registered baggage or cargo. It says: "**In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability"** This Article means, that for any claims under Articles 18–19, a passenger injured either personally or his cargo destroyed, the court can award limited damages without proof of fault. Article 23 provides that any provisions tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provisions does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention. We will revert to Article 25 later in the judgement. Article 28 deals with jurisdiction, restricts the places where an action for damages may be brought, and provides that questions of procedure shall be governed by the law of the court seized of the case. Article 29 provides that the right to damages shall be extinguished if the action is not to be performed by various successive carriers. Lastly Article 25 of the Convention as amended by Article XIII of the Protocol, on which the Appellant anchored her claim which was quoted at J6 deals with circumstances where limits set out in Article 22 do not apply. According to the ratio in ***Goldman Vs Thia Airways International***(7), which ratio we are persuaded to adopt, that is EveLeigh LJ's dictum, Article 25 place the burden of proof on the claimant (the Appellant) to prove the following: (1) that damage resulted from an action or omission of the carrier (the Respondent); (2) that an act or

omission done with intent to cause damage or recklessly and with knowledge that damage would probably result; (3) that it was done when the doer was aware that damage would probably result but did so regardless of the probability; and (4) that damage complained of is the amount of damage known to be a probable result. Coming to the issues before this court we note that most of the facts were on common ground: (1) the Appellant was a constant passenger of the Respondent's Airline; (2) she held a silver card; (3) She was a business person and travelled between New York JFK International Airport and Lusaka International Airport via Heathrow Airport on a number of times; (4) She bought a discounted fare air ticket from the Respondents; (5) She registered her language with the Respondents and that the Respondents took charge of the language; (6) She boarded on her return trip at JFK International Airport; (7) Upon arrival at Lusaka International Airport, she realised that one of her suitcases had not arrived. (8)She reported this immediately; (9) After 7 days she notified the Respondent in writing and took the notice to the Respondent's office at Lusaka Holiday Inn; (10) She was provided with written transcripts between London Heathrow Airport and the Respondent's office in Lusaka; (11) There was limitation of the liability clause inserted at the back of the ticket. The Respondents have disputed the evidence given by the Appellant that during her visits to Holliday Inn, at the Respondent's office, she was told by one of the Respondent's employee, a girl by the name of Beauty that her missing suitcase was found and that it was going to be sent to Lusaka.

We have looked at the inter office communication between the Respondent's London office and the Respondent's Lusaka office. We are satisfied that the disputed piece of evidence by the Appellant that the missing suitcase was found, is supported by the messages sent between London Heathrow Airport and Holliday Inn, office of the Respondent, in particular page 43-50. One of the messages at page 50 says: "-**REFER YOUR ON HOLD LON BA 96993 -SECOND REQUEST PLEASE FORWARD THIS BAG – TO LUSAKA ON BOARD BA 255/10 SEPT LON/LUN -AND ADVISE FORWARDING DETAILS AS HAVE TO ADVICE PASSENGER STP -BEST REGARDS BEAUTY.**" the Respondent have not offered any explanation of this correspondence neither have they refuted the evidence by

the Appellant that their employee by the name of Beauty told the Appellant that her missing suitcase was found and that it was to be sent to Lusaka. Article 20 of the Convention shifts the onus of proof to the carriers to prove on a balance of probabilities that it and or its servants/agents took all necessary measures to avoid damage of the cargo or passenger or that it was impossible for it or them to take any other measures towards the damage.

Given this scenario, we agree with Mr Wright that in line with the case of **Cannaught Laboratories v. British Airways (**5), and Article 20, failure by the Respondents to explain what actually happened to the missing bag, lead irresistibly to an adverse inference that more probable than not, this missing suitcase was stolen by an employee/agent of the Respondent or with the complicity of an employee of the Respondent. This inference would lead to another irresistible inference that, more probable than not the employee/ Argent of the Respondent stole this missing suitcase of the Appellant in course of or under the scope of his employment. This would lead to the conclusion that, such conduct meets the Article 25 test. To buttress this conclusion, we are equally persuaded to adopt the ratio in the Canadian case of ***Nuvo Electronics v. London Assurance(***6) *This matter in this case arose out of the loss of 15 cartons of integrated circuits valued at US1,403,000 and carried by air from San Francisco to Toronto. The shipment left San Francisco on August 10, 1996, and arrived at Toronto on the morning of August 11, 1996. It was then placed in the Air Canada cargo warehouse but was never seen again. The Plaintiff consignee commenced this action for the value of the lost cargo against its cargo underwriter and the air carrier. The air carrier defended the action arguing that the Plaintiff has not proven the value or the contents of the cargo, that it has delivered the goods to a courier for delivery to the Plaintiff and that it was, in any event,* ***entitled to limit its liability pursuant to the Warsaw Convention.*** *The only evidence adduced at trial as to the value and content of the shipment was the air waybill, the packing list and the commercial invoice. The carrier objected to the admission of these documents on the basis that they were hearsay and not properly admissible. The Court, however, held that these documents were admissible to prove the content and value of the shipment. The carrier's second argument, that it has delivered the cargo to a courier, was also rejected by the Court. The Court found as a fact that although the courier driver had signed for the cargo he did not in fact receive the*

cargo as it would not be located by the air carrier. ***The Court next considered whether the air carrier would limit its liability under the Warsaw Convention*** *and held that it could not. There were two reasons advanced by the Court for this decision. First, the Court found that the air waybill was not in conformity with Article 8 of the Convention in that it did not contain the name of the airport departure, the name of the first carrier, whether the weight was in pounds or kilograms and the nature and quantity of the goods. Relying upon American case law, the court held that if an air carrier fails to include the particulars required by Article 8 of the Convention in the air waybill then, pursuant to Article 9, the carrier is not entitled to limit liability. Secondly, (and this is the relevant consideration),) the court held that the Plaintiff had proven that it was more probable than not that the cargo was stolen by an employee of the carrier or with the complicity of an employee of the carrier and that there was an irresistible inference that such employee was in the course and scope of his employment when the theft occurred. Accordingly, the Court* ***held that there was "wilful misconduct" and that the carrier was not entitled to limit its liability****.* The Canadian court drew an inference of '**wilful misconduct'** using a subjective test. Therefore it concluded that the carrier was not entitled to limit its liability. Therefore, relying on these authorities, the answer to the question whether or not the Appellant discharged the burden of establishing on a balance of probabilities that the Respondent's conduct, was a wilful conduct, is in the affirmative. We hold that the evidence before the court created a strong prima facie case that the suitcase in question was found and it was to be forwarded to the Appellant. In the absence of any explanation by the Respondent, we hold therefore that, in line with O'Connor CJ's dictum, already referred to at J22, the gist of which is that Article 25 can only apply when the claimant establish a fault on the part of the carrier, there was a fault on the part of the Respondent and/or its servants or agents. Article 22 which operate in normal circumstances, and which provide for limited recompense as the normal award to any passenger who has been injured or whose luggage has been lost or destroyed, does not apply in this case. Ngulube CJ (as he was then) in the case of **AMI Zambia and Chibuye** put it this way: "**if on facts the Respondents would not have been exempted from their wrong doing by misconduct of their staff, then they can not plead the limitation clause**"

We are therefore satisfied that the Learned trial Judge misdirected himself in drawing a conclusion which flew in the teeth of the all the evidence. We are of the view that

the learned trial Judge failed to evaluate the evidence before him and that he failed to take advantage of observing the witnesses who were before him, because he gave no reasons for rejecting the evidence of the Appellant. Following the case **Manal Investment Limited and Lamise Investment Limited(1),** this court must then disturb the lower court's findings. The appeal therefore succeeds. We quash the lower court's conclusions. Because of this conclusion, we have drawn in the main appeal, the Cross Appeal is therefore dismissed. The costs follow the event.