

COURT OF APPEAL  
LAGOS DIVISION  
18TH JULY, 2002. CA/L/46/2001  
CORAM:- G. A. OGUNTADE, P. O. ADEREMI,  
C. M. CHUKWUMA-ENEH, JJCA

CAMEROON AIRLINES ..... APPELLANT  
AND  
MISS JUMAI ABDUL KAREEM ..... RESPONDENT

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PLEADINGS - Contracts - Warsaw Convention - Point of law - Parties cannot by consent - Preclude court from expounding the law - Onus of showing exceptions that take this case out of the Warsaw Convention - Rests on respondent (H1)

ACTIONS - Damages - Applicable law - Where a common law right - Has been enacted into statutory provision - The statute not common law will now be applicable - Trial court erred in applying common law (H2)

CONTRACTS - Carriage by air - Conditions of contract in this case - Are as contained in the Warsaw Convention - Which is not ousted because of weight and value issues (H3)

STATUTES - Applicability - Warsaw Convention Art. 22 & 25 - Carriage of goods by air - For damages awardable to be at large - Mere recklessness of the carrier is not sufficient - Wilful misconduct must be shown (H4)

CARRIAGE BY AIR - Damages - Pleadings - Loss of luggage - Proof - Burden of proving the carrier's wilful misconduct - For computation of damages to be at large - Is on the plaintiff who failed to discharge the burden (H5)

CARRIAGE BY AIR - Loss of luggage - Weight - As computation of damages is based on weight - Burden of proving the weight is on plaintiff -

Since he who claims special damages - Has to prove it strictly (H6)

STATUTES - Activating a provision - Carriage by air - Warsaw Convention Art. 22 (2) - What plaintiff must show for the Article to apply - Which includes special declaration of value of luggage - Was not complied with (H7)

CARRIAGE BY AIR - Loss of luggage - Compensation for - Where its computation must be based on weight of the luggage - Failure to prove the weight - Removes proper basis for computing damages (H8)

### **FACTS**

Before the Federal High Court Lagos, plaintiff/respondent claimed against defendant/appellant the sum of N4 million as damages for loss of three luggage and their contents, freighted by air carriage on defendant's flight from Jedda, Saudi Arabia to Lagos. Plaintiff also claimed interest at the rates of N21%, and 6% per annum. Plaintiff was a trader in fashion wear, resident in Lagos. She bought a return ticket from defendant for a journey to Saudi Arabia. During her return on 18-8-1995, she boarded defendant's flight with a carton and three big bags for which she paid excess luggage. The contents include men's wear, women's wear, jewelry, hand-bags and caps. Upon arrival from Jeddah to Lagos Airport, it was discovered that the three bags were lost during the flight. The defendant could not trace the bags, hence this action.

The matter went to trial and both parties called witnesses. The trial court wrongfully felt that the common law and not the Warsaw Convention is applicable to the parties' carriage by air contract. In its judgment of 30-3-2000, the trial court found in plaintiff's favour and awarded the sum of N3 million to her as damages. Being dissatisfied, the defendant has now appealed to the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"1. Whether the court below was right in holding that the case between the plaintiff and the defendant was not governed exclusively by the provisions of the Warsaw Convention 1929 (as amended by the Hague Pro-*

*tocol, 1955).*

2. *Whether the court below was right in awarding damages at large in excess and far beyond the limit of the carrier's liability for loss of registered luggage when the defendant/appellant had not lost its right to rely on the limits to its liability under the Warsaw Convention, as provided under Article 25 of the Warsaw Convention (as amended at the Hague, 1955) applicable in Nigeria under the carriage by air (Colonies, Protectorates and Trust Territories) Order, 1953, Vol. XI, Laws of the Federation of Nigeria and Lagos, 1958.*

3. *Whether the plaintiff had satisfactorily discharged her responsibility in her claim for loss of her registered luggage as provided under Article 22(2) of the Warsaw Convention (as amended at the Hague, 1955)."*

**HELD** (Unanimously allowing the appeal per **CHUKWUMA-ENEH JCA**)  
***PLEADINGS - Contracts - Warsaw Convention***

1. The appellant referred to the pleadings at paragraph 8 of the statement of claim and paragraph 10 of the defence to show that notwithstanding the findings the parties had acknowledged in their pleadings that the contract was subject to the provisions of the Warsaw Convention as amended by the Hague Protocol, 1955. I must snappily say that even though that may be so the parties cannot by their consent on a point of law preclude the court from expounding what the law is on the point. It does not seem to me that the respondent can not seriously be heard to contend that on the facts of this matter that the matter does not come within ambit of the Warsaw Convention as amended by the Hague Protocol, 1955. The onus of identifying the exceptional circumstances to take the matter out of the Warsaw Convention rests on the respondent. In other words, that where the action is instituted under the Warsaw Convention he must come properly.  
(p. 4084 F)

***Damages - Applicable law***

2. The question that arises in the context of the facts here is whether the respondent is at liberty to choose as between the Warsaw Convention and the common law for her remedies against the appellant in respect of the

damages aforesaid. In my view the answer to the poser is in the negative; that is to say, that the claim has to be determined under the Warsaw Convention *stricto sensu*. In a situation akin to this matter i.e. in *Patkun Industries Ltd. v. Niger Shoes Manufacturing Co. Ltd.* (1988) 5 NWLR (Pt. 93) 138 at B 152 the Supreme Court said:

“It is well settled law that where a common law right has been enacted into statutory provision, it is to the statutory provision so made that resort must be had for such rights and not in the common law.” per Karibi-Whyte, JSC.

The court below having chosen to consider the claims under the common law, this court I have to observe is not obliged to follow suite but must go ahead to examine the matter aright and so apply the pertinent provisions of the Warsaw Convention being the applicable law in computing the compensation due and payable to the respondent. (p. 4086 C)

### ***Carriage by air - Conditions of contract in this case***

3. The appellant has by tendering it sought to show the conditions under which the parties entered into the contract of carriage by air albeit subject to the conditions as contained in the Warsaw Convention as it was in international carriage. I agree that the appellant did contract subject to those terms and conditions under the Warsaw Convention. I do not buy the argument that the Warsaw Convention has been ousted in this matter by the peculiar nature of the instant claim which was founded not on the weight of the lost luggage coupled with a declaration of value. As I contemplated in this judgment the respondent’s remedies in such matter as this one lie exclusively within the conditions and limits of the Warsaw Convention - no more no less. (p. 4087 C)

### ***STATUTES - Applicability***

4. To throw more light into the interplay of these two Articles (i.e. 22 and 25) I refer to the case *Goldman v. Thai Airways International Ltd.* in construing the application of the two Articles, it stated as follows:

“for damages awardable against the carrier to be at large in accor-

*dance with the provisions of Article 25 of the Convention, as amended at the Hague, it is not sufficient for the act or omission that is relied on to have been done recklessly:*

*‘It must also be shown to have been done "with knowledge that damage would probably result.’ Thus where a pilot did not know that damage would probably result from his omissions, the court is not entitled to attribute to him knowledge which another pilot flight have possessed or which himself should have possessed.”*

The foregoing cited passage has explained the implication of the phrase “wilful misconduct” in a matter as the instant one. (p. 4088 F)

### ***Damages - Pleadings - Loss of luggage***

5. There was no pleading or evidence to this effect before the court below so that the money limit in Article 22 should prevail. In other words there is no question of damages being at large. I think that in the consideration of this issue the more relevant Articles are Articles 22(2)(a) and (b) and 25. The onus of proof of the elements prescribed in Articles 25 i.e. wilful misconduct of the appellant and that the damage was caused by the servants of the appellant in the course of their employment rested squarely on the respondent. See: section 135 of the Evidence Act, 1990. True enough, the appellants’ servants have been negligent in not re-weighing the only retrieved luggage. This cannot *ipse facto* constitute wilful misconduct within the phrase as expounded in *Goldman v. Thai Airways International Ltd.* (1983) AER 693. (p. 4089 A)

### ***As computation of damages is based on weight***

6. The court below placed the onus of adducing evidence of the weight of the luggage on the appellant. This cannot be right. The implication of the finding that since the weight of the luggage were not ascertained by the appellant’s servant who carried out the weighing, damages had to be at large. Damages in respect of actions under Articles 18 and 19 are computed based on the weight of the passenger’s luggage.

I do not subscribe to the respondent’s argument that the onus of proof on this point is on the appellant as it would make nonsense of the principle

that he who asserts has to prove. Special damages must be pleaded and strictly proved. (p. 4089 F)

***STATUTES - Activating a provision***

B 7. Under Article 22(2) the plaintiff is required in order to activate the provision to show as follows:

(i) that there was a special declaration of the value of the registered luggages made at the time when the luggages were handed over to the appellant.

C (ii) that evidence of a special declaration of value of the luggage was presented in the court below by way of evidence, and

(iii) that the supplementary sum as required under Article 22(2)(a) was paid.

D The respondent has alleged oral declaration and the appellant's masterly inactivity to the declaration. I do not think the argument is worth giving any serious consideration when the declaration has not met the three aforementioned requirements. The implication of my reasoning above is that the  
E respondent has not complied with requirement of Article 22(2). (p. 4090 B)

***Loss of luggage - Compensation for***

8. To compute the compensation in this regard the weight of the luggages  
F must be ascertained. It has been a serious bone of contention between the parties. The weight of the luggages was not ascertained. Notwithstanding that the total weight of the luggages has been put at 92 kilograms for the 3 luggages and 1 carton, it remains suspect, this is because the weight of the retrieved luggages was not ascertained. The issue as to the weight of the  
G lost luggages remains speculative. I must point out that the onus to supply the information was clearly on the pleading placed on the respondent. It was not discharged.

It is my conclusion that there is no proper basis of computing the  
H award of damages in the matter within the provisions of the Warsaw Convention. (p. 4090 F)

**REPRESENTATION**

A. Agbabiaka for the Appellant

Taiwo Abegunle for the Respondent

### **CASES REFERRED TO**

Oshevire v. British Caledonian Airways Ltd. (1990) 7 NWLR (Pt. 163) 489 B

Joseph Ibidapo v. Lufthansa Airlines (1994) 8 NWLR (Pt. 362) 355

R. v. Hancock and Shankland (1986) AC 455, (1986) 1 AER 641

Bakare v. A.C.B. Ltd. (1986) 3 NWLR (Pt.26) 47

Balogun v. Labiran (1988) NSCC Vol. 19 (Pt.1)

C

Ebba v. Ogodo (1984) 1 SCNLR 372, (1984) 4 SC 84 at 98

Ojukwu v. Onwudiwe (1984) 1 SCNLR 247, (1984) 2 SC 15 at 83

Ekpoke v. Usilo (1978) 6 - 7 SC 187, (1977/78) NSCC (Vol. 11) 413

Goldman v. Thai Airways International Ltd

Patkun Industries Ltd. v. Niger Shoes Manufacturing Co. Ltd. (1988) 5 D

NWLR (Pt. 93) 138 at 152

Ibidapo v. Lufthansa Airlines (1994) 8 NWLR (Pt. 362) 355 at 374

Kabo Air Ltd. v. Oladipo (1999) 10 NWLR (Pt. 623) 517

E

### **STATUTES REFERRED TO**

Warsaw Convention 1929 (as amended by the Hague Protocol, 1955) Art.

1 (1) & (2), 18 (1), 19, 24, 25, 22, 8 (c), 4 (2), 5 (1), 9, 2 (1)

Carriage by Air (Colonies, Protectorates and Trust Territories) Order

F

1953, Vol XI, Laws of the Federation of Nigeria and Lagos, 1958

Evidence Act 1990 s.135

### **LEAD JUDGMENT BY CHUKWUMA-ENEH JCA**

G

In the Federal High Court, Lagos the plaintiff/ respondent claimed against the defendant/appellant the sum of N4 million as damages for the loss of three luggage and their contents freighted by air carriage on the defendant/appellant's flight No. UY708 from Jedda, Saudi Arabia to Lagos (Nigeria).

H

The plaintiff/respondent also claimed interest at the rate of 21% p. a. from 18/8/95 until judgment and at the rate of 6% p. a. until the final payment. The matter went to trial and both parties called evidence. The court

below in its judgment of 30/3/2000 awarded the sum of N3 million in favour of the plaintiff/respondent as damages.

Dissatisfied with the decision the defendant/appellant filed a notice of appeal and therein raised four grounds of appeal: I shall come to them anon.

B The facts of this matter, the plaintiff was a trader in fashion wear resident in Lagos. She bought a return ticket from the defendant/appellant to enable her travel to Saudi Arabia. On 18/8/95 she boarded the defendant/appellant's flight No. UY708 from Jeddah (Saudi Arabia) to Lagos (Nigeria) on the return journey with a carton and three big bags. The bags were C registered as UY0026220, UY0026222 and UY0026226. She paid excess luggage for the bags. The contents of the three bags include men's wear, women's wear, jewellery, hand-bags and caps. Arriving in Lagos Airport from Jeddah it was discovered that the three bags were lost during the D flight to Lagos. The defendant/appellant could not trace the three bags. Hence the plaintiff/respondent brought this action.

To follow up the appeal, parties filed and exchanged briefs of argument and therein identified issues for determination. The appellant listed three issues E as follows:

F *"1. Whether the court below was right in holding that the case between the plaintiff and the defendant was not governed exclusively by the provisions of the Warsaw Convention 1929 (as amended by the Hague Protocol, 1955).*

G *2. Whether the court below was right in awarding damages at large in excess and far beyond the limit of the carrier's liability for loss of registered luggage when the defendant/appellant had not lost its right to rely on the limits to its liability under the Warsaw Convention, as provided under Article 25 of the Warsaw Convention (as amended at the Hague, 1955) applicable in Nigeria under the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, Vol. XI, Laws of the Federation of Nigeria and Lagos, 1958.*

H *3. Whether the plaintiff had satisfactorily discharged her responsibility in her claim for loss of her registered luggage as provided under Article 22(2) of the Warsaw Convention (as amended at the Hague, 1955)."*

The respondent listed five issues as follows:

*"1. The respondent adopts issue number 1 in sub-paragraph 3.1 of the appellant's brief, but would contend that the following issues as adumbrated below are issues arising out of the appeal.*

*2. Whether the proof of wilful misconduct as contained in Article 25 B of the Warsaw Convention as amended is the only ground upon which the limit of liability of the appellant can be excluded when no evidence is shown by the appellant that Articles 5 and 9 of the Warsaw Convention are complied with in order for the appellant to be entitled to the full benefit of Article 22(2) of the Warsaw Convention (as amended by Hague Protocol).* C

*3. On whom lies the burden of proof of weight of registered luggage/ baggage having regard to the provision of Article 22(2) of the Warsaw Convention (as amended by Hague Protocol) when facts of loss and delay have been admitted by appellant (carrier) and evidence of appellant having weighed and found that respondent have excess luggage and charged therefor are before the court.* D

*4. Whether the defendant/appellant can be entitled to benefit from the provision of Article 22(2)(a) and (b) of Warsaw Convention (as amended) E when evidence of oral declaration of interest in the delivery of the plaintiff's baggage have been made and the defendant appellant failed to make additional charges therefor.*

*5. Whether or not the rules of common law (as applicable to carriage F by air) will be applied where the Warsaw Convention (as amended by Hague Protocol) does not make adequate provision to meet loss suffered by a consignor by reason of a carrier's act or omission when facts of such loss is admitted by the carrier."*

The appellant with regard to issue one argued that the court below G ought not on the facts admitted by the parties to have relied on local rules, law and regulations in determining the rights and obligations of the parties. Reference was made to the pleadings, that is, paragraph 8 of the statement of claim and paragraph 10 of the defence and they showed that the parties H agreed that the instant carriage by air was subject to the provisions of the Warsaw Convention as adopted by our law *vide* Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, Vol. XI, 1958, Laws of

the Federation of Nigeria. The relevant Articles are 1(1) and (2), 18(1), 19 and 24 of the Warsaw Convention. Their respective provisions were examined to show that the Convention applied here to the effect that all claims for damages for destruction, loss or damage of registered luggage or damage occasioned by delay (covered by Articles 18 and 19) can only be brought under the conditions and limits set under the Warsaw Convention as provided by Article 24. In further support of the applicability of the Warsaw Convention the appellant relied on exhibit A - the ticket issued to the respondent. Warsaw Convention it was submitted means the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw 12/10/29 or Convention as amended at the Hague 28/9/55. It has to be examined to determine if its rules governed the conditions in the instant contract of carriage by air. It was submitted that the provisions of the Warsaw Convention as amended at the Hague 1955 was the applicable law. See: *Oshevire v. British Caledonian Airways Ltd.* (1990) 7 NWLR (Pt. 163) 489 per Ogundare, JCA at pp. 519-520 H-B also *Joseph Ibidapo v. Lufthansa Airlines* (1994) 8 NWLR (Pt. 362) 355.

On issue two: as regards the condition of awarding damages at large against a defendant carrier and thus deny it the right to rely on the limits to its liability as a common carrier under the provisions of the Warsaw Convention as in this matter. The appellant referred to Articles 24 to show that all actions brought under Articles 18 and 19 are subject to the limits set under the Warsaw Convention and Article 25 limits the liability of a carrier where willful misconduct in the context of Article 25. See: *R. v. Hancock and Shankland* (1986) AC 455, (1986) 1 AER 641. It was submitted that the action of the appellant could not amount on the facts to wilful misconduct to be encompassed under Article 25 and so make the appellant liable to damages at large.

On issue three: On whether the respondent discharged by way of proof the onus as envisaged by Article 22(2) of the Warsaw Convention H 1929 (as amended at the Hague, 1955): That is to say as regards the total weight of the luggage, the appellant posited that such evidence was before the court. It went on to show the allowable luggage weight to be 20 kilos and the excess luggage weight of 72 kilos i.e. a total of 92 kilos and

submitted that there was no justification for granting damages at large. The notice of baggage liability limitations on the ticket was referred to show appellant's liability to damages under Article 22(2) of the Warsaw Convention.

The appellant submitted that excess payment made was for excess luggage and had no bearing to making supplementary sum referred to in Article 22(2) of the Warsaw Convention. So that the two conditions under Article 22(2) were not satisfied. Again, the appellant submitted that only the total weight of the registered luggage had to be taken into account in determining the limit of the carriers liability under Article 22(2) of the Warsaw Convention. See: *Bland v. British Airways Board* (1989) Lloyds Rep. 289. C

Having submitted that no basis existed for awarding damages beyond the limits of 20 US Dollars per kilo for the total weight of 92 kilos for the registered luggage it urged the court to allow the appeal. D

The respondent took on its own issue five along with the appellant's issue one. She contended that the rules of common law applied to this matter and even as the basis for the provisions of the Warsaw Convention (as amended by Hague Protocol, (1955)). From so submitting she posited and also referred to namely (1) Article 22(2)(a) i.e. with regard to the failure to state whether a declaration of interest or value has to be in writing or oral. (2) the nature of the instant claim which was not based on weight of the luggage and so outside the ambit of the Warsaw Convention, and, (3) the Convention which did not make provision for damages for delay of goods. These, it was submitted took the matter outside the Warsaw Convention. Arguing in the alternative the respondent contended that Article 22(2)(a) and (b) was not applicable to this matter and so limit the appellant's liability. The inapplicability of the Convention was, in addition, premised on the appellant's failure to comply with Article 5 - that is on consignment note which the appellant should have requested from the respondent. She also submitted that it was by that way she would be obliged to declare the nature of her interest and value of the luggage. For non-compliance with Article 5 the carrier's liability cannot be limited under Article 22(2), she submitted. See *Westminster Bank v. Imperial Airways* H

*Ltd.* (1936) 2 AER 890. Again, she submitted that Article 5 excluded Article 22(2) for non-compliance with Article 8(c) of the Warsaw Convention as the information under it was wanted to satisfy the requirement of Article 22(2)(a). It was submitted finally that the court below acted rightly in proceeding under the common law and so the *Oshevire's case (supra)* and *Ibidapo's case* did not apply as they did not deal with the carrier's liability under Article 22(2)(a) and (b) of the Warsaw Convention.

On issue two on the proof of willful misconduct under Article 25 of the Warsaw Convention that is, it was described as the means by which the plaintiff/respondent could be granted damages at large. The respondent in rebutting the appellant's argument on this point submitted that the way of wilful misconduct was not the only way of excluding the provisions of Article 22(2)(a) and (b) and remarked that Article 4(2), 5(1), 9 and 25 did just that. She suggested that the manner of declaration under Article 22(2)(a) was not precisely spelt out. The court was then asked to depart from the case of *Westminster Bank Ltd. v. Imperial Airways Ltd.* (1936) 2 AER 890 as inapplicable.

The respondent posited that in this matter negligence had been established as the baggages entrusted in the appellant's care were lost without excuse and therefore the appellant should not be allowed to plead want of declaration of interest or value to welsh out of its liability. The respondent then submitted that the burden of proof under issue three was on the person who would fail having regard to Article 22(2)(b) if no evidence was called. See: section 136 of the Evidence Act. In this respect, the respondent submitted that the admission of the loss of the luggage by the appellant having been admitted the limit of the liability under Article 22(2)(a) and (b) became inoperative. It was submitted that the onus was on the appellant otherwise its liability would be without limit. On the weight of the luggage it urged the court to place the onus on the appellant as the carrier as the weighing was carried out by its servants. To support the submission she referred to *Bakare v. A.C.B. Ltd.* (1986) 3 NWLR (Pt.26) 47, (1986) NSCC Vol. 17 (Pt. 1) 634 at 635 ratio 3. See also *Balogun v. Labiran* (1988) 3 NWLR (Pt.80) 66, (1988) NSCC Vol. 19 (Pt. 1) ratio 1. The respondent then expatiated on the point that the court ought not lightly to

interfere with the findings of the court below as they were not perverse see also *Balogun v. Labiran* (1988) NSCC Vol. 19 (Pt.1) ratio 1; *Ebba v. Ogodo* (1984) 1 SCNLR 372, (1984) 4 SC 84 at 98 per Eso, JSC, *Ojukwu v. Onwudiwe* (1984) 1 SCNLR 247, (1984) 2 SC 15 at 83 per Eso, JSC, *Ekpoke v. Usilo* (1978) 6 - 7 SC 187, (1977/78) NSCC (Vol. 11) 413, and section 135 of the Evidence Act, 1990. B

On the provision of Article 22(2)(a) and (b) of the Warsaw Convention and oral declaration of interest in the delivery of the luggage and failure of the appellant to raise additional charges the respondent referred to and relied on paragraph 4 of the statement of claim and paragraphs 2 and 7(i), (ii) and (iii) of the reply to the defence and the evidence in proof of the point at the trial. The defence relied on paragraph 8 of the defence to disclaim the averments. The respondent also submitted that on proper construction of Article 22(2)(a) of the Warsaw Convention that she pleaded special declaration of interest in delivery albeit orally but was not asked to pay a supplementary sum and so it should be inferred that the appellant did not require the payment. It was emphasized that having failed to ask for the payment of a supplementary sum the appellant could no longer exclude or limit its liability under Article 22(2)(a) and (b) of the Warsaw Convention. On the appellant's submission that the nature of the respondents claim was not covered by Article 22(2)(a) and (b) of the Warsaw Convention, the respondent replied that it was misconceived as the luggage had been lost during the flight to Lagos. Therefore the carrier was liable. It urged the appeal to be dismissed. C D E F

The appellant in the reply brief dwelt on the issue of exclusivity of the provisions of the Warsaw Convention to such subject matters as the instant matter. In support cited the *Oshevire v. British Caledonia Airways Ltd.* (1990) 7 NWLR (Pt. 163) 489; *Ibidapo v. Lufthansa Airlines* (1994) 8 NWLR (Pt. 362) 355 at 374. G

On the burden of proof of the weight of the registered luggage the appellant relied on the case of *Kabo Air Ltd. v. Oladipo* (1999) 10 NWLR H (Pt. 623) 517 to submit that it was squarely on the respondent to plead and prove the point.

On Article 22(2)(a) and (b) and whether it was a declaration of inter-

est or a declaration of value that was provided under the said Article the appellant referred to the said Article to show that what was required was a declaration of the value and not a declaration of interest. The appellant adverted to the requirements under the said Articles in order to activate it.

B The appellant once again urged the court to allow the appeal

Having read the parties' briefs and so speaking from an overview of the parties' cases as projected in their respective briefs I think that since both set of issues for determination as formulated by the parties are substantially similar and geared towards achieving the resolution of the matter in controversy in the appeal, it didn't matter which of the two sets of issues is adopted. However, I have adopted to be guided by the issues as formulated by the appellant and I intend to deal with them seriatim.

C At the trial the court below heard the trial and in its judgment made the following finding that:

*"the contract under which this action arose being an international carriage of goods and passengers was governed exclusively by the provisions of Warsaw Conventions 1979 as amended by the Hague Protocol, 1955 ... in Vol. II, Laws of the Federation, 1958."*

E The court below had applied the rules of common law to the suit. In the process it found that the appellant was a common carrier that admitted the loss of the three baggages delivered to it. And that the baggages got lost in its possession and that there was no defence on the facts and so that non-declaration of value in delivery did not avail the appellant.

**The appellant referred to the pleadings at paragraph 8 of the statement of claim and paragraph 10 of the defence to show that notwithstanding the findings the parties had acknowledged in their pleadings that the contract was subject to the provisions of the Warsaw Convention as amended by the Hague Protocol, 1955. I must snappily say that even though that may be so the parties cannot by their consent on a point of law preclude the court from expounding what the law is on the point. It does not seem to me that the respondent can not seriously be heard to contend that on the facts of this matter that the matter does not come within ambit of the Warsaw Convention as**

**amended by the Hague Protocol, 1955. The onus of identifying the exceptional circumstances to take the matter out of the Warsaw Convention rests on the respondent. In other words, that where the action is instituted under the Warsaw Convention he must come properly.** I shall come to the question whether the onus was discharged anon. B

I think the provision of Article 1(1) and (2) has tried to lay to rest this contention and it provides as follows:

*“1. This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.”* C

*2. For the purpose of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a trans shipment, are situated either within the territories of two high contracting parties or within the territory of a single high contracting party if there is an agreed stopping place within the territory of another State, even if that State is not a high contracting party. Carriage between two points within the territory of a single high contracting party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.”* The whole picture cannot be complete without having a recourse to Article 24 of the Warsaw Convention also very material in the context and it states: D E F

*“1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this schedule.”* G

Articles 18 and 19 of the Warsaw Convention have dealt with the nature of actions contemplated under Article 24. To be precise Article 18 deals with “damages sustained in the event of the destruction or loss or of damage to any registered baggage or any cargo.....”, while Article 19 simply H says that, “The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.”

Article 24(1) also is worth considering in this respect as it wraps

it up with regard to the actions arising as in the foregoing Articles that is, 18 and 19, they have to be determined not under the common law but by reference to the conditions and limits within the Warsaw Convention.

B One thing that can be said of the provisions of these Articles duly set out above is that they are plain and unambiguous and have to be given their ordinary or plain meaning.

C Articles 18(1) and 19 appear to govern the situation in this matter and Article 24 has made it conclusive where such is the case to make it mandatory to institute the action subject to the conditions and limits of the Warsaw Convention. **The question that arises in the context of the facts here is whether the respondent is at liberty to choose as between the Warsaw Convention and the common law for her remedies against the appellant in respect of the damages aforesaid. In my view the answer to the poser is in the negative; that is to say, that the claim has to be determined under the Warsaw Convention *stricto sensu*. In a situation akin to this matter i.e. in *Patkun Industries Ltd. v. Niger Shoes Manufacturing Co. Ltd.* (1988) 5 NWLR (Pt. 93) 138 at 152 the Supreme Court said:**

F *“It is well settled law that where a common law right has been enacted into statutory provision, it is to the statutory provision so made that resort must be had for such rights and not in the common law.”* per Karibi-Whyte, JSC.

G The court below having chosen to consider the claims under the common law, this court I have to observe is not obliged to follow suite but must go ahead to examine the matter aright and so apply the pertinent provisions of the Warsaw Convention being the applicable law in computing the compensation due and payable to the respondent. I shall come to consider whether the measure of damages is amenable to the conditions of the Warsaw Convention as alternatively submitted.

H The appellant referred to exhibit A that is the air ticket particularly to the provision on it and it states thus:

*“Notice: If the passenger’s journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Con-*

*vention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.” See also notices headed “advice to international passengers on limitation of liability” and “notice of baggage liability limitations.”*

The respondent did not in the brief positively react to this aspect of the matter. Exhibit A is in respect of the flight ticket of the respondent and her baggages to Lagos - Jeddah (return). The respondent never disputed knowledge of the said notice.

**The appellant has by tendering it sought to show the conditions under which the parties entered into the contract of carriage by air albeit subject to the conditions as contained in the Warsaw Convention as it was in international carriage. I agree that the appellant did contract subject to those terms and conditions under the Warsaw Convention. I do not buy the argument that the Warsaw Convention has been ousted in this matter by the peculiar nature of the instant claim which was founded not on the weight of the lost luggage coupled with a declaration of value. As I contemplated in this judgment the respondent’s remedies in such matter as this one lie exclusively within the conditions and limits of the Warsaw Convention - no more no less.**

The corollary of my reasoning above automatically takes me to the next question of the propriety of awarding damages at large that is in excess or beyond the limit of the carrier’s liability for the loss of the registered luggage.

The court below awarded the sum of N1.5 million to purchase the items of her trade and another sum of N1 .5 million as profit after sales. The appellant has challenged the factors that informed the award as they do not constitute the condition as prescribed in Article 25 of the Warsaw Convention. It has to be noted that the damages claimed here naturally come under Articles 18 and 19 of the Warsaw Convention. Article 24 has made actions brought under Articles 18 and 19 subject to the limits stipulated in the Warsaw Convention.

For a liability to be at large it must be shown that the damage was

caused by wilful misconduct. Wilful misconduct has been provided for in Article 25 of the Warsaw Convention. Before determining whether Article 22 of the Warsaw Convention (i.e. limiting the carrier's liability) or whether Article 25 (leaving the carrier's liability wide open without limit) has to govern the situation here it is proper first, to scrutinize Article 25 much further. Article 25 states as follows:

*"1. The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by wilful misconduct or by such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct.*

*2. Similarly the carrier shall not be entitled to avail himself of the said provisions if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment."*

The above provision under Article 25 is to checkmate the carrier relying on wilful misconduct on the limitation of its liability.

I have found that the Warsaw Convention applies to this matter to the exclusion of the common law, meaning that for the respondent to be entitled to the huge damages awarded her, the instant claim must come within the exception as provided under Article 25 of the Convention. This can be done by showing that the said loss suffered by the respondent was intentionally provoked by the agents of the appellants thereby excluding the application of Article 22(2)(a) and (b) of the Warsaw Convention.

**To throw more light into the interplay of these two Articles (i.e. 22 and 25) I refer to the case *Goldman v. Thai Airways International Ltd.* in construing the application of the two Articles, it stated as follows:**

*"for damages awardable against the carrier to be at large in accordance with the provisions of Article 25 of the Convention, as amended at the Hague, it is not sufficient for the act or omission that is relied on to have been done recklessly:*

*'It must also be shown to have been done 'with knowledge that damage would probably result.' Thus where a pilot did not know that damage would probably result from his omissions, the court is not entitled to*

*attribute to him knowledge which another pilot flight have possessed or which himself should have possessed.”*

The foregoing cited passage has explained the implication of the phrase “wilful misconduct” in a matter as the instant one. There was no pleading or evidence to this effect before the court below so B that the money limit in Article 22 should prevail. In other words there is no question of damages being at large. I think that in the consideration of this issue the more relevant Articles are Articles 22(2)(a) and (b) and 25. The onus of proof of the elements prescribed C in Articles 25 i.e. wilful misconduct of the appellant and that the damage was caused by the servants of the appellant in the course of their employment rested squarely on the respondent. See: section 135 of the Evidence Act, 1990. True enough, the appellants’ servants have been negligent in not re-weighing the only retrieved luggage. D This cannot *ipse facto* constitute wilful misconduct within the phrase as expounded in *Goldman v. Thai Airways International Ltd.* (1983) AER 693. See also *R. v. Hancock and Shankland* (*supra*).

The next issue has to do with whether the respondent truly dis- E charged the burden of proof on her in the claim with regard to the loss of the registered luggage *vis-a-vis* the provisions of Article 22(2)(a) and (b) of the Warsaw Convention, 1929 as amended by the Hague Protocol, 1955. The provisions of Article 22(2)(a) and (b) are quite clear.

The court below placed the onus of adducing evidence of the F weight of the luggage on the appellant. This cannot be right. The implication of the finding that since the weight of the luggage were not ascertained by the appellant’s servant who carried out the weigh- G ing, damages had to be at large. Damages in respect of actions under Articles 18 and 19 are computed based on the weight of the passenger’s luggage. The appellant had attempted to show that there were enough evidence for the compensation so found to be based on the weight of the luggage. It was submitted that the respondent was allowed 20 kilos by H virtue of the flight ticket, while 72 kilos was for excess luggage paid by the respondent making a total of 92 kilos on the whole and so challenged the claim for want of evidence. Also exhibit A bears a notice of baggage

liability limitations as approximately US\$9.07 per pound (US\$20.00 per kilo) for checked baggage and US\$400 per passenger for unchecked luggage. **I do not subscribe to the respondent's argument that the onus of proof on this point is on the appellant as it would make**  
B **nonsense of the principle that he who asserts has to prove. Special damages must be pleaded and strictly proved. It has been noted that**  
**under Article 22(2) the plaintiff is required in order to activate the provision to show as follows:**

C (i) that there was a special declaration of the value of the registered luggages made at the time when the luggages were handed over to the appellant.

(ii) that evidence of a special declaration of value of the luggage was presented in the court below by way of evidence, and

D (iii) that the supplementary sum as required under Article 22(2)(a) was paid.

The respondent has alleged oral declaration and the appellant's masterly inactivity to the declaration. **I do not think the argument is**  
E **worth giving any serious consideration when the declaration has not met the three afore-mentioned requirements. The implication of my reasoning above is that the respondent has not complied with require-**  
**ment of Article 22(2) which has limited the liability of the appellant to the**  
F **loss or damages of the luggage that is, to the sum of 250 Francs per kilo-**  
**gram.**

**To compute the compensation in this regard the weight of the luggages must be ascertained. It has been a serious bone of conten-**  
G **tion between the parties. The weight of the luggages was not ascer-**  
**tained. Notwithstanding that the total weight of the luggages has been put at 92 kilograms for the 3 luggages and 1 carton, it remains sus-**  
**pect, this is because the weight of the retrieved luggages was not ascertained. The issue as to the weight of the lost luggages remains**  
H **speculative. I must point out that the onus to supply the information was clearly on the pleading placed on the respondent. It was not dis-**  
**charged.**

**It is my conclusion that there is no proper basis of computing**

**the award of damages in the matter within the provisions of the Warsaw Convention.** I have already found that the action fell within the ambit of the Warsaw Convention and erroneously decided under the common law. Article 2(1) of the Warsaw Convention claims is clear on such cases as the instant one. They can only be maintained under the Warsaw Convention. B  
In the light of the above reasons there is no way the judgment of the court below can stand having resolved all the issues in the appellant's favour. Accordingly, I uphold the appeal as successful. I allow it and set aside the judgment of the court below. The respondent's claim is hereby dismissed C  
with N3,000.00 costs to the appellant.

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**OGUNTADE JCA**

I read before now a copy of the lead judgment by my learned brother, D  
Chukwuma-Eneh, JCA. I agree with his reasoning and conclusion. I would also allow this appeal with N3,000.00 costs in favour of the appellant.

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**ADEREMI JCA**

I agree with my learned brother, Chukwuma-Eneh, JCA whose reasons for judgment I had the privilege of a preview that the appeal is meritorious. I would also allow it and set aside the judgment of the court below and con- F  
sequently dismiss the plaintiff/respondent's claim in its entirety.

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