



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E020 OF 2021

HON.SENATOR MAKORI BEATRICE KWAMBOKA.....PETITIONER

VERSUS

KENYA AIRWAYS LIMITED PLC.....RESPONDENT

JUDGMENT

1. The petitioner filed a petition dated 18th January 2021 under Articles 2, 3, 19, 20, 21, 22, 23, 27, 28, 40, 46, 47, 159, 165, 258 and 259 of the Constitution for the alleged contravention of her right to fair administrative action and consumer rights as envisaged under the Consumer Protection Act No.46 of 2012 and the Fair Administrative Actions Act No.4 of 2015.

2. The petition accordingly seeks the following orders:

i. A declaration that the respondent's decision to unilaterally transfer the petitioner from business class of its aircraft to the economic class despite her prior booking and payment of the airfare demanded and the receipt issued in that regard is wholly discriminative of her as against other passengers, an affront to the petitioner's consumer rights, unfair, unreasonable and unjust exercise of administrative action as provided and guaranteed under Articles 27, 46 and 47 of the Constitution.

ii. A declaration that the unilateral decision to transfer the petitioner from the business class of its aircraft to the economic class is not only in dignifying as it offends the social status of the petitioner but it is also illegal exploitation of the petitioner's right to property as provided for under Article 28 and 40 of the Constitution.

iii. An order directing the respondent to compensate the petitioner for the violation of her rights and fundamental freedoms under Articles 27,28,40,46 and 47 of the Constitution.

iv. An order of mandamus pursuant to Section 16(2) Consumer Protection Act No.46 of 2012 compelling the respondent to reimburse the petitioner the excess or the difference in airfare chargeable to persons that were travelling on the 28th December 2020 in economic class compared to those traveling in the business class of its aircraft.

v. The court does make an order directing the respondent to pay to the petitioner exemplary and/or punitive damages or such other relief as the court considers proper in the circumstances.

vi. Costs of this petition and the interest be provided for at court rates.

3. The petitioner's case as premised on the petition dated 18th January, 2021 and supported by the averments in her affidavit of even date is that the petitioner booked and paid for a flight from Nairobi to Mombasa for herself and her children on 6th December 2020. The respondent issued her with electronic tickets numbers QSBBTH, ORZ9HZ and QRZ9HZ which indicated the departure date to be 28th December 2020 at 1300 hours.

4. The petitioner avers that on the material day (28th December 2020), she was unable to utilize her business class ticket. She claims that her seat was sold and that no apology or alternative was offered. She moreover adds that the respondent's action of transferring her from business class to economy class was not justified as she had already paid in advance, and she was not consulted when the decision was taken. She avers that the respondent's actions violated her right to fair administrative action, was discriminative and humiliated her.

5. The petitioner depones that the respondent has failed to reimburse the excess air fare she paid for her business class ticket. Further that due to the excess air fare paid, she expected to receive better service while on board. According to her this directly affected her consumer rights,

and has sued the respondent for violating her rights under Articles 27, 28, 40, 46 and 47 of the Constitution.

6. The respondent made a response opposing the petition vide a replying affidavit sworn by its Customer Relations Manager, Amy Odindo on 24th May 2021. He avers that in providing its services the respondent guided by the Passenger Handling Manual (PHM) as approved by the Kenya Civil Aviation Authority. It is further mandated to adhere to international procedures while handling passengers.

7. The respondent's account is that flight KQ606/28 scheduled to depart from Nairobi to Mombasa on the said date at 1300hrs developed a technical hitch. As a result, it had to downgrade the equipment assigned to this route from Embraer 90 configuration 12J/84M to Embraer 90 configuration 9J/88M. The decision was taken out to avoid cancelling the whole flight. The original flight had 12 business class seats and 84 economy class seats while the replacement had 9 business class seats and 88 economy class seats. In essence according to Clause 5.3.4 of the PHM, 3 business class passengers had to be downgraded.

8. It is deposed that due to these changes the respondent's check in controller called the petitioner in an attempt to inform her of the changes but the calls were not answered. The controller then left a text message. When the petitioner arrived the check in controller explained the situation and offered her the available options. First, was a comfortable seat in economy class with a downgrade form for a refund or an upgrade in the next flight. Secondly, she could be transferred to the next flight KQ610 due for travel the same day at 1700 hrs as all others were full. The deponent averred that the petitioner declined both options.

9. The respondent further averred that the petitioner proceeded to buy a new ticket on flight KQ610 despite being advised against it by the check in controller. This was due to the ramifications on the status of her current ticket and penalties it would attract.

10. It is however deposed that the Customer Relations Manager vide an email dated 5th January 2021 to the petitioner apologized for the inconvenience and informed her that her ticket had been left open. Further, that any additional penalties that would have accrued had been waived. She was also told that the option for a refund of the difference in fare was still available. This communication was not responded to.

11. The deponent stated that the decision to downgrade the petitioner from business class to economy class was grounded on reasons beyond its control. Further, the decision was made in the best interest of all passengers scheduled to fly on KQ606. It is hence their case that the petition is an abuse of the court process, since it is based on a contractual relationship and not public interest, and it fails to raise and frame the constitutional issues in a precise manner.

12. The petitioner filed written submissions dated 17th September 2021 through Musyoki Mogaka & Co. Advocates. Counsel listed the issues for determination as: (i) whether the petitioner's consumer rights were violated (ii) whether the respondent's actions amount to fair administrative action.

13. On the first issue, counsel submits that the respondent's decision to give the petitioner's business class seat to another and transferring her to economy class was an infringement of her right as envisaged under Article 46 of the Constitution. Additionally he submits that the petitioner has not been compensated in line with Article 46(1) (d) of the Constitution. In support reliance was placed on the case of **CIS V Directors, Crawford International School & 3 others [2020] eKLR** where it was held that:

“The strong party in a contractual relationship should not be allowed to steamroll over the weaker party. This is in line with the prevailing jurisprudential trajectory that requires constitutional values to be infused into contracts. If this was not so, the Kenyan people would not have found it necessary to include Article 46 of the Constitution and follow it with the enactment of the CPA to specifically protect the rights of consumers.”

14. On the second issue counsel contends that the respondent's decision to give her seat to another person without first seeking her opinion and continuing to benefit from the paid airfare is unjust, and its action was arbitrary. To buttress this point counsel relied on the case of **Pashito Holdings Ltd & another v Paul Nderitu Ndungu & others, Civil Appeal No. 138 of 1997 [1997] 1 KLR** where it was held that:

“A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice.”

Counsel also relied on the case of **Judicial Service Commission v Mbalu Mutava & another (2014)eKLR** with reference to Article 47 of the Constitution.

15. The respondent filed written submissions and a list of authorities dated 15th October 2021 through Triple OK Law LLP Advocates. Counsel identified the issues for determination to be:

(i) *Whether the suit meet the standards requisite of a constitutional petition,*

(ii) *Whether the petitioner's constitutional rights have been violated and whether the petitioner is entitled to the prayers sought.*

16. On the first issue counsel submits that the petitioner has failed to state with a degree of precision the rights which have been violated and the manner in which they were violated as echoed by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others(2014) eKLR** where it was held that:

“...although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental

rights has been violated, denied or infringed a party invoking this Article has to show the rights said to be infringed as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement.”

17. Likewise, the respondent submits that not all claims that arise from constitutional provisions amount to constitutional claims. In light of this it is its submission that the petition herein does not raise any constitutional issues as the matter is purely contractual in nature.

18. Furthermore, it submits that the principle of constitutional avoidance requires a court not to determine a constitutional issue when a matter may properly be decided on another basis. This was echoed in the cited case of **Communications Commission of Kenya** (*supra*) where the Supreme Court cited the case of **S v. Mhlungu 1995(3) SA 867 (CC)** with approval as follows:

“I would lay it down as a general principle that where it is possible to decide any case civil or criminal without reaching a constitutional issue that is the course which should be followed.”

Further reliance was placed on the case of **Bernard Murage v Finserve Limited & others [2015] eKLR**

19. Similarly, the respondent submits that owing to the contractual relationship between the parties, there are no unconscionable bargains proved to justify this court’s interference. To support this argument counsel cited the Court of Appeal case in LTI **Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft (‘Deg’) & others [2011] eKLR** where it was noted that a court can only interfere with a contract where it is shown that the bargain was oppressive, that the victim suffered from certain types of bargaining weakness and that the stronger party took advantage of the victim.

20. Counsel on the second issue submits that with regard to consumer rights the respondent is required while offering its services to follow pre-set international procedures of handling passengers. These procedures are not unique to the respondent but observed the world over in the aviation industry. What is more, this procedure was explained to the petitioner by the respondent’s check in personnel. The claim therefore that the business class seat was sold to another when other business class members went through the same is unfounded and intended to unduly sensationalize the matter.

21. To support this argument reliance was placed on the case of **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018)eKLR** where it was held that

“consumer rights litigation is not a game of win or lose in which winners must be identified for reward and loser for punishment and rebuke. It is a process in which litigants and courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.”

22. On the right to fair administrative action, counsel submits that the petitioner was informed of the technical hindrance that led to the change of the aircraft necessitating the downgrade. Besides this, the available options were made known to the petitioner but she declined, pick any of them. Owing to these facts, it is submitted that the petitioner’s rights to fair administrative action were not infringed. He cited two cases to support this argument namely (i) **Charles Kaindo Kuria & 20 others v Technical University of Kenya [2019] eKLR** (ii) **Victoria Mutai & 28 others v Kirinyaga University [2020] eKLR**.

23. Further on the right to equality and freedom from discrimination under Article 27 of the Constitution counsel submits that the petitioner has failed to prove how she was discriminated against other passengers. It is contended that the petitioner ought to have clarified the manner in which she was discriminated as observed in the case of **Emmah Muthoni Njeri v Nairobi Women’s Hospital [2021] eKLR**.

24. On the final issue counsel submits that the petitioner has not been candid with the court. This is with regard to the circumstances surrounding the case and the respondent’s willingness to give her a refund. The counsel relies on the Court of Appeal case of **Mohammed Shally Sese (Shah Sese) v Fulson Company Ltd and another [2006] eKLR** where it was held that:

“equity calls to those seeking its aid to come before it with clean hands and also do equity.”

To support this, counsel further relied on the case of **John Njue Nyaga v Nicholas Njiru Nyaga & Another [2013] eKLR**.

25. Counsel submitted that the petitioner had failed to prove infringement of her rights under Articles 27, 28, 40, 46 and 47 of the Constitution as alleged and the petition should be dismissed with costs to the respondent.

Analysis and determination

26. Upon perusal of the pleadings and submissions by the parties herein, the issues that arise for determination are:

(i) Whether the petition invokes the principle of constitutional avoidance.

(ii) Whether the petitioner’s rights under Articles 27, 28, 40, 46 and 47 of the constitution were violated.

Issue (i) Whether the petition invokes the principle of constitutional avoidance

27. It is prudent to first determine whether the matter before this court invokes this doctrine as it relates to the justiciability of this case. The argument in light of this is that not all claims that arise from constitutional provisions amount to constitutional claims.

28. De Waal, Johan, Iain Currie, and Gerhard Erasmus in their book, *The Bill of Rights handbook*, Lansdowne: Juta & Co. 2001 offer insight that while dealing with the bill of rights its entitlement calls for both direct and indirect application as follows:

i. **Indirect application:** *The Constitution and the Bill of Rights establish an "objective normative value system," a set of values that must be respected whenever the common law or legislation is interpreted, developed or applied. This form of application is termed the "indirect" application of the Bill of Rights. When indirectly applied, the Bill of Rights does not override ordinary law or generate its own remedies. Rather, the Bill of Rights respects the rules and remedies of ordinary law, but demands furtherance of its values mediated through the operation of ordinary law.*

ii. **Direct application:** *In disputes in which the Bill of Rights applies as directly applicable law, it overrides ordinary law and any conduct that is inconsistent with it. To the extent that ordinary legal remedies are inadequate or do not give proper effect to the fundamental rights, the Bill of Rights generates its own remedies. The methodology for the conduct of direct-rights litigation is applicable.*

29. The Supreme Court in the case of Communications Commission of Kenya (*supra*) observed as follows on this issue of constitutional avoidance:

"[256] The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 [1936])."

30. Likewise the court in the case of C O D & another v Nairobi City Water & Sewerage Co. Ltd [2015] eKLR with regard to this principle noted as follows:

"11. Similarly, in Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

"All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof." (emphasis added)

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by Bahadur [1986] LRC (Const) the Court expressed itself as follows at page 307:

"The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62).

13. It was further observed in the case of Minister of Home Affairs vs. Bickle & Others [1985] LRC (Const) (per Georges C.J);

"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."

31. Similarly, the court in the case of Council of County Governors v Attorney General & 12 others [2018] eKLR expressed itself as follows:

"59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard,

the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

60. In the South African case of S v Mhlungu, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 [1936], the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.”

32. What is clear from the above examination is that this doctrine necessitates that this court avoids making determinations on constitutional issues that have their foundations in existing statutory laws which are sufficient and adequate mechanisms to deal with the specific issue. The doctrine is to the effect that where a dispute is one which can be determined under another area of law other than under the Constitution, then it is best for it to be so determined and pure constitutional issues left to be determined as such.

33. The petitioner claims that the respondent violated her rights under Articles 27, 28, 40, 46, and 47 of the Constitution due to the manner in which it handled her booking to travel aboard its aircraft on 28th December 2020. While this is the narrative, the facts of the case point to a premise of a contractual relationship. This relationship was formed when the petitioner booked an air ticket with the respondent. At that point the respondent was obliged to ensure that the petitioner secured a business class seat while the petitioner was obliged to pay for the seat. The obvious question to answer would therefore be whether the petitioner and respondent performed their obligations under this contract.

34. Embracing the findings in the cited authorities it would be reasonable to infer that at the core of this petition lies a question that involves the indirect application of the bill of rights. I say so because there already exists an alternative mechanism under the civil law that deals with breach of contractual relationships. In my view, the petition does not raise a constitutional claim as the petitioners right is well covered under civil law.

Issue (ii) Whether the petitioner’s rights under Articles 27, 28, 40, 46, and 47 of the Constitution were violated

35. While it is obvious that this case invokes the principle of constitutional avoidance, I will nevertheless, proceed to consider the substance of the petitioner’s issues for completeness of the matter. The question that follows is whether the petitioner’s rights under Articles 27, 28, 40, 46, and 47 of the Constitution were violated. The respondent submits that the petitioner has failed to state with a degree of precision the rights which have been violated and the manner in which they were violated.

36. The threshold for proving constitutional cases is now well settled and reiterated in law. In the case of Husus Mugiri v Music Copy Right Society of Kenya & another [2018] eKLR it was stated:

“18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in Anarita Karimi Njeru vs. Republic [1979] eKLR. That is, the applicant must specify which specific provisions of the Constitution that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”

37. The standard of proof as set out in the case of Anarita Karimi Njeru (supra) places the onus of proof on the petitioner. In this case, the petitioner is required to prove the elements that constitute the violation of the cited rights to justify a finding that her rights were indeed violated. I must point out that the petitioner with regards to Articles 27 and 28 only lists the rights but fails to demonstrate the manner in which their elements were violated. In essence the petitioner has failed to satisfy the set standard of proof in constitutional petitions, by way of evidence, on these two Articles, allegedly violated.

38. Turning over to the other allegedly violated rights, it is a fact that the respondent while carrying out its duty must comply with the dictates of fair administrative practices as envisaged under Article 47 of the Constitution. The petitioner did indeed show that she paid for the ticket which was admitted by the respondent. The payment which constitutes her property is covered under Article 40 of the Constitution. Article 47 of the Constitution provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

39. The Court of Appeal in the case of Judicial Service Commission v Mbalu Mutava & another (supra) while appreciating the importance of this right noted as follows:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

40. A reading of the facts and evidence on record shows that the respondent in dealing with this inconvenience sought to inform its passengers of the technical hindrance and proceeded to give the business class passengers who were downgraded, alternatives and a refund if the alternatives were not viable. This was further communicated to the petitioner by an email dated 5th January 2021. Taking into consideration these details it is my view that the respondent did not violate the petitioner's rights under Article 40 and 47 of the Constitution.

41. Additionally, this court is beholden to interrogate whether the petitioner's consumer rights under Article 46 of the Constitution were violated which is the subject of prayer 4 in the petition. The Constitution entrenches the right to consumer protection under Article 46(1) where consumers are protected from unfair market practices from services and goods providers. This Article states as follows:

Consumers have the right--

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

42. In the case of **Leonard Otieno v Airtel Kenya Limited [2018] eKLR**, the Court on violation of consumer rights stated as follows:

“46. I have severally stated that although issues of consumer rights affect only the parties, ‘their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.

47. The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove. Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important. Differently put, the onus lies on the Petitioner to prove every element constituting his cause of action. This includes sufficient facts to justify a finding that his consumer rights were violated.

48. If, in contested proceedings, the consumer asserts that his rights have been violated, the court must make a finding whether, the consumer's allegations are true...”

43. Consideration of the facts and evidence on record reveals that the dispute in this matter is not as a result of the respondent's quality of the service rendered but its resolution to downgrade the petitioner from business class to economy class. Even so the petitioner has in no way proved that the quality as stipulated in Article 46 of the Constitution was not reasonable or satisfactory.

44. The respondent as discussed above has demonstrated that the downgrade was necessary and supplied the information necessary for the petitioner to make a decision on the options that were available in line with element 1(b) and (c) of Article 46. Additionally, while the petitioner alleges that the respondent's actions failed to protect her economic interests, the option to receive a full refund by the respondent has remained open this far. As it stands, the petitioner has failed to discharge her burden of proof to support the claim that her consumer rights were indeed violated.

45. Taking into account, the analysis above I find that if there was any breach it was a contractual one which should have been filed under civil law. I have not detected any violation of the petitioner's rights as claimed. The respondent tried its best to mitigate the challenges it faced when it was forced to use an aircraft whose carriage capacity was smaller than what had been initially booked. I therefore find the petition not to be merited and I dismiss it with costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 16TH DAY OF DECEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT