



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 224 OF 2010

DEBONAIR TRAVEL LIMITED.....APPELLANT

VERSUS

1. ERASTUS GITONGA

2. CAROLINE KIBIRU

3. ROMANTIC HOTELS.....RESPONDENTS

*(Appeal from the original judgment and decree of Ms. A. Ireri (R.M.) in Milimani Commercial Courts
CMCC No. 1332 of 2006 delivered on 24th May, 2010)*

JUDGMENT

1. The 1st and 2nd Respondents sued the Appellant seeking the following:-

- a) General and aggravated damages.
- b) Special damages of KShs. 10,200/=.
- c) Costs of this suit.
- d) Interest at court rates on prayers (a) (b) and (c).

2. The 3rd Respondent was enjoined as a third party to the trial court's proceedings. It was the 1st and 2nd Respondents' (**'Respondents'**) claim that they sometime in the month of October, 2005 contracted the Appellant to organise and arrange travel and hotel bookings for their honeymoon in Lamu in December, 2005. It was agreed that the Respondents pay the Appellant the road travel costs from Mombasa to Lamu town and back plus accommodation fee at a prime luxurious hotel in Lamu town. The Respondents made full payment as agreed and obtained receipts thereto. On the day of the trip to Lamu, the Respondents learnt that the Appellant made no reservations as agreed forcing the Respondents to make alternative substandard arrangements at their own costs.

3. The 1st Respondent (PW1) testified that he paid KShs. 36,800/= for the trip whereupon he was issued with a receipt No. 9032 dated 19th December, 2005 (P. Exhibit 2 (b)). On the date of the travel, the Respondents tried to trace Lamu Tawakal Bus on which they were to travel aboard but were informed that their reservation had been cancelled. They then boarded another bus on which they travelled on standing. On reaching Malindi they were given soda crates to sit on. The Respondents were to be picked at a place called Mukowe but because there was no one to do so, they hired a boat. In Lamu the Respondents hired a

donkey cart to transport their luggages. On arriving at New Lamu Palace, they were received well but were informed that no reservations had been made for them. He stated that they had to pay the costs of travel and hotel accommodation since the Appellant failed to make payments as agreed. For the journey from Mombasa to Malindi, they were charged KShs. 300/= each, KShs. 1000/= each from Malindi to Lamu and KShs. 1000/= for hire of a boat. He stated that the journey was six (6) hours long and occasioned him severe back ache for which he sought treatment at a cost. He produced a Medical Report by Dr. Kirugo S.N. and a receipt thereof for KShs. 3,000/= (P. Exhibit 3 (a) and 3(b)). On cross examination PW1 stated that he made payments in two instalments of KShs. 20,000/= then paid the balance on 19th December, 2005. He stated that for the payment he was only given the voucher and the only details he had were the information indicated on the voucher. He admitted to not knowing the name of the bus they were to board. He however stated that at Mwembe Tayari, he was directed to Tawakal Bus Terminus only to find the last bus. He had no complaints about the hotel but took issue with the travel arrangements. On re-examination he stated that the agreement was between him and the Appellant and not the 3rd Respondent. He also stated that he called a Mr. Paul from the Appellant at 8:00 am to inquire about the bus.

4. The 2nd Respondent (PW2) more or less reiterated what was stated by the 1st Respondent and would be a repetition.

5. The Appellant denied the Respondents' claim. It contended that while it was making the booking for the Respondents, the hotel offered to arrange for the Respondents' transportation to the hotel from Mombasa and issued it with a voucher dated 19th December, 2005 confirming the bookings for the Respondents accommodation and transport. That the said bookings costed KShs. 43,740/=. That the manager of Lamu Palace Hotel confirmed to him in writing that the Respondents arrived to the hotel as scheduled and that the Respondents where to find the bus that would pick them up. That the Respondents missed the bus but were accommodated in another bus. The Defendant termed the Respondents claim as a fabrication for extortion of money and laid blame on them stating that they failed to arrive at the bus station in good time, failed to be responsible honeymooners and allowed themselves to be overcome with euphoria, anxiety, disorganization and confusion over their honeymoon thereby failing to have due regard for their travel arrangements.

6. Kennedy Chege (DW1), the Managing Director of the Appellant testified that the Respondents paid a down payment of KShs. 20,000/= which the Appellant forwarded to the 3rd Respondent and the balance of KShs. 14, 740/= was paid on 19th December, 2005. He stated that the package entailed transport form Mombasa to Lamu and three (3) days accommodation at the 3rd Respondent. That the Respondents were given seat numbers but the seat numbers are not indicated on the voucher. He stated that he confirmed the booking when he received a written confirmation from the 3rd Respondent. He also stated that the Respondents knew the pick-up point from Mombasa. He blamed the Respondents for missing their bus.

7. Lydia Moraa (DW2), the 3rd Respondent's General Manager testified that the 3rd Respondent agreed to assist the Appellant to book the bus from Mombasa to Lamu but that the 3rd Respondent purely deals with hotel and accommodation and not transportation. She stated that two (2) seats were booked with Tawakal Bus Services and the departure time was 10 O'clock as appears in D. Exhibit 2 and that the bus company called the 3rd Respondent informing them that the Respondents had missed the bus.

8. Upon hearing the matter, the learned trial magistrate found in favour of the Respondents and entered judgment in the following terms:

General damages (50,000/= for each Respondent)	KShs. 100,000/=
Special damages	KShs. 10,200/=
Total	KShs. 110,000/=

9. Being dissatisfied with the decision the Appellant filed this appeal on the following grounds:-

- a. The Learned Magistrate erred in law in awarding general damages.*
- b. The Learned Magistrate erred in law in disregarding the law relating to contractual claims.*
- c. The Learned Magistrate erred in law in awarding unproven special damages.*
- d. The Learned Magistrate erred in law and fact in dismissing the suit against the third party without just cause and without considering the evidence adduced against the third party.*
- e. The Leaned Magistrate erred in law in making erroneous findings of fact contrary to the evidence adduced.*
- f. The Learned Magistrate erred in law and in fact by disregarding the evidence confirming the satisfaction by the Appellant of all its contractual obligations to the Respondents.*
- g. The Learned Magistrate erred in law and fact in failing to appreciate that the Respondents were the sole authors of or substantial contributors to their own misfortune.*
- h. The Learned Magistrate erred in law and in fact in failing to consider the written submissions of the Appellant in arriving at her judgment.*

10. This appeal was canvassed by way of written submissions. It was the Appellant's submission that the Respondents did not prove negligence against the Appellant that could attract an award of general damages notwithstanding that such an award would be contrary to the law since an award of general damages is not available in a claim arising out of a contract. It was submitted that the principle applicable in a contract claim is 'restitution in intergrum' and the Appellant cited **Dharamshi v. Karsan (1974) E.A. 41**. It was submitted that the Appellant met its contractual obligation by making payments and ensuring bookings have been made. The Appellant cited the case of **Hann v. Singh (1985) KLR 716** and stated that it was erroneous for the trial magistrate to award special damages yet it was not proved. It was held as follows in **Hann** (supra):-

“special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particular proof required depends on the circumstances and nature of the acts themselves.”

11. It was further submitted that it was erroneous for the trial magistrate to dismiss the suit against the 3rd Respondent since the evidence on record confirmed that the Appellant made arrangements and informed the Respondents on the same. That it was not considered that the Appellant was acting as an agent of the 3rd Respondent. On this point, the Appellant quoted **Friendship Container Manufacturers Ltd v. Mitchel Cotts (K) Ltd (2001) 2EA 338** where it was held that:-

“a person who acts as another's agent in a transaction with the knowledge of the Plaintiff is not liable to the Plaintiff in respect of that particular transaction.”

12. The Appellant disputed admission of treatment documents produced indicating that they were merely marked for identification and not produced.

13. The Respondents on the other hand disputed the Appellant's submissions on the issue of award for general damages in relation to contractual claims and the reference to **Dharamshi** (supra). It was submitted that where there is a contract and a breach is occasioned by one party to the detriment of the other, then the other has a remedy in damages. The Respondents cited **C. Mehta Co. Ltd v. Standard Bank Ltd (2014) e KLR**. In this case it was held that:-

“The principle as to payment of damages in cases of breach of contract as cited in the case of V. R. Chande and Others v. E.A. Airways Corporation (1964) E.A. 78, which was quoted with approval in Francis Namatai Obongitia v. Cooker Printers and Designer Ltd where the court held:-

“...Now we think a proper rule in such a case as the present is this; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e according to the usual course or things from such a breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contracts the probable result of the breach of it.”

14. What is required of this court as the first appellate court was set out in **Selle – Vs – Associated Motor Brat Company (1968) E.A. 123** where it was held that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither heard witnesses and should make due allowance in this respect. However, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif – Vs – Ali Mohammed Sholan (1955), 22 EACA 270)”

15. From my analysis of the evidence on record the Appellant did not controvert two salient issues raised by the 1st Respondent. These are that the 1st Respondent made a call to an officer of the Appellant at 8:00 am to inquire about their bus and DW2’s evidence that the 3rd Respondent was not responsible for the Respondents’ travel arrangement or that they engaged in transportation of their guests. It was in fact clear from DW2’s evidence that they merely assisted the Appellant in making those arrangements.

16. An agent is defined in the legal dictionary ‘the free dictionary’ as a person who is authorised to act for another (the agent’s principal) through employment, by contract or apparent authority. The agent can bind the principal by contract or create liability if he/she causes injury while in the scope of the agency. Who is an agent and what is his/her authority are often difficult and crucial factual issues. In view of the foregoing, the 3rd Respondent and was acting as an agent of the Appellant to which the Appellant is to be found responsible. It is trite law that in case of known principal and agent, no liability attaches on an agent.

17. As for the issue on special damages, it is clear that special damages were not proved. The upshot is that this appeal is partly allowed to the extent that the special damages awarded by the trial court are set aside. Each party shall bear its own costs.

Dated, Signed and Delivered in open court this 13th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Shah h/b for Gathu for the Appellant

Kagu h/b for Gitonga for the Respondents