REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ANAIROBI (MILIMANI LAW COURTS)

Civil Case 335 of 2010

GICHUHI N. MACHARIA ……...…….……...…….……... 1ST PLAINTIFF

DORITA LASINDER MACHARIA …… 2ND PLAINTIFF

VERSUS

VIRGIN ATLANTIC AIRWAYS LIMITED……...……...……...…….DEFENDANT

JUDGMENT

1. Article 19 of the convention for the Unification of certain Rules Relating to International Carriage by Air as amended by the Hague Protocal of 1955 the Warsaw Convention (hereinafter **"the convention")** provides:-

"The carrier is liable for damage occasional by delay in the carriage by air of passengers, luggage or goods." (Emphasis added)

Article 22 provides:-

"In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs ……. However by special contract, the carrier and the passenger may agree to a higher limit of liability."

The Convention is applicable to Kenya and is part of our laws vide the Carriage By Air Act No. 1 of 1993 and Article 2(6) of the Constitution of Kenya 2010.

2. In or about April, 2008, the Plaintiffs who are man and wife entered into a contract of carriage by air with the Defendant for a business-cum-Holiday Business trip. According to e-ticket No.932-2154349075-1 the flight(s) was/were as follows:-

Nairobi – London= London – Frankfurt=Frankfurt-London-London – Montego-bay=Montego-bay-Baltimore=Newwark=London and the London=Nairobi. That trip was through five (5) countries i.e. Kenya, United Kingdom, Germany, Jamaica and the United States of America. The contract was entered into at Nairobi. The Sectors London-Frankfurt and Montego-bay-Baltimore were to be operated by Lufthansa Airlines and Air Jamaica, respectively. The said trip was delayed from 14th April, 2008 to 17th May, 2008 as the 2nd Plaintiff had first to undergo treatment for knee Arthritis.

3. Whilst the Nairobi-London sector was eventless, on arriving London, the Plaintiffs were denied

boarding into the Lufthansa Airlines flight No. LH4737 to Frankfurt. The denial from boarding was for the reason that they had not been booked into that flight by the Defendant. The Plaintiffs were made to shuttle between Lufthasa Airlines terminal, terminal 4 and the Defendant's terminal 3 at Heathrow Airport London without success. They were forced to sleep in a hotel to which they booked between 1.00 a.m. to 5.00 a.m. of 18th May, 2008. In total they lost in London a total of 23 hours. The 1st Plaintiff was in torn trousers as the Plaintiffs left for Germany. As a result of the delay, the Plaintiffs were unable to attend a business meeting with tour companies in Germany.

4. There was no problem in the sector Frankfurt – London – Montego-bay. Problems arose when the Plaintiffs sought to leave Montego-bay for Baltimore on 1st June, 2008. The Plaintiffs once again found that they were not booked with Air Jamaica and they had to change their flight to the 2nd June, 2008 and instead of heading to Baltimore, they took a flight to Philadelphia as there were no flights to Baltimore. They had to travel by road from Philadelphia arriving Baltimore nearly 24 hours later than originally expected. As a result of the delay, the Plaintiffs did not attend on Alumni group members on a holiday tour nor a conference – cum meeting in New York. To the Plaintiffs the whole trip to the United States was a wasted one as the sole purpose of going to New York was to attend the alumni meeting. They also contended that it was the direct result of the actions and omissions of the Defendant that they were unable to achieve any or all of the objectives of heir holiday trip.

5. The Plaintiffs therefore contended that the Defendant was in breach of contract, which breach had led the Plaintiffs to suffer loss and damage. They incurred hotel expenses paid out of their pockets for the flights London-Frankfurt and Montego-bay – Philadelphia. That they were unable to attend the business networking meetings at Frankfurt and New York which resulted in loss of potential income. They also suffered mental anguish and stress for the aforesaid delay and abandonment by the Defendant at London and Montego-bay, Jamaica. The Plaintiffs therefore claimed a total sum of US$80,000, Euros2,400, US$87 for Hotel expenses at Frankfurt and general damages. They also sought costs and interest on their claim.

6. The Defendant contested the Plaintiff's claim. It contended that it had only contracted to carry the Plaintiffs in the flights operated by itself i.e. Nairobi – London, London – Montego-bay, Newark – London and London –Nairobi. That the flights between London – Frankfurt, Frankfurt –London, Montego-by – Baltimore were to be operated by Lufthansa Airlines and Air Jamaica, respectively. That the Defendant issued tickets for the latter flights only as an agent of the aforesaid carriers. That the Defendant therefore only owed the duty of care to the Plaintiffs only on flights operated by itself. That the relationship between the Defendant and Lufthansa Airlines and Air Jamaica was governed by Multilateral Interline Traffic Agreements whereby the Defendant was only an agent of those carriers.

7. The Defendant further contended that the contract of carriage between the Plaintiffs and itself was subject to the Defendant's conditions of carriage which incorporated Regulation (EC) No. 261/2004 which placed liability on the operating air carrier to compensate a passenger denied boarding. That the Defendant was under no obligation to offer the Plaintiffs any refreshments or compensate them for being denied boarding by Lufthansa Airline. That the Defendants had offered the Plaintiffs as compensation, two round trip tickets Nairobi – London - New York – London – New York – London Nairobi, a total sum of Kshs.85,792,17 for unused tickets for London – Frankfurt and Montego-bay – Baltimore sectors and Kshs.65,645/- for damage to the Plaintiff's suit case and suit which occurred during the flights operated by the Defendant.

8. On 5th December, 2011, the parties recorded judgment on liability but agreed that they will address the court on the issue of quantum. The parties filed their respective submissions and the Counsels hi-lighted the same on 17th September, 2012.

9. Since the Plaintiff filed an application for security for the reason that the Defendant was closing its offices in Kenya on 24th September, 2012, the Court ordered that the submissions on quantum be finalised and this judgment be delivered before then. From the outset, it does not fall in the mouth of the Defendant to seek to show that the Plaintiffs suit does not disclose a cause of action against the

Defendant, Judgment on liability having been entered by the consent of the parties as aforesaid, my view is that the submissions of the Defendant trying to show that the Defendant is not liable for whatever happened during the flights operated by Lufthansa Airlines and Air Jamaica is unwarranted. I hold this view notwithstanding the provisions of Article 30 of the Warsaw Convention. I will therefore not deal with the issue of whether this was a delay or non-performance. I will proceed on the basis ,that the Defendant having admitted liability or judgment on liability having been entered, the only issue for determination is whether damages are payable and if so how much.

10. It is clear from a careful reading of Article 19 of the Convention that a carrier is liable for damage occasioned by delay and what Article 22 does is to limit such liability to a maximum of two hundred and fifty thousand francs for each passenger. In my view, since liability is already settled, damages are payable for the delay unless the Defendant shows that the incident in question is excepted under the convention. These exclusions are set out in Articles 20 and 21 of the convention and they relate to the carrier showing that it took all the necessary measures to avoid the damage or that it was impossible to take such measures or that the damage was caused or contributed to by the person injured in the case of injury. In the present case, there is no evidence to show that after entering into the contract for carriage by air with the Plaintiffs, the Defendant made any effort to notify the Lufthansa Airlines and Air Jamaica of the Plaintiffs bookings or book the Plaintiffs to the aborted flights. In any event, judgment on liability having been entered, I do not think the issue of whether damages are payable does arise. The valid issue as far as I am concerned in this matter is the quantum of such damages.

11. The Plaintiffs contended that they suffered delay of twenty three (23) hours in the London- Frankfurt flight and twenty four (24) hours delay in the Montego-bay – Baltimore flight, that they missed their booking made at the Savoy Hotel in Frankfurt on the 18th May, 2008 and that they were unable to attend a lucrative business networking venture on the 19th May, 2008. Their business trip to Frankfurt became a Cropper. The Plaintiffs were also unable to attend a business meeting in New York as well as an alumni event thereat. They paid UK£179 each for the London Frankfurt flight and US$700 for the Montego-bay Philadelphia flight and US$170 for an extra night spent in Jamaica. This evidence on the part of the Plaintiffs was uncontested. It is on this basis that they claimed a total of US$80,000 under the convention and an additional sum of Euros 2400 under the Defendant's customer relations policy.

12. The Defendants submitted that the Plaintiffs had to prove that they had suffered damage before they can be awarded any such damages.

13. My reading of Article 19 of the convention is to the effect that the liability of the carrier is for **"damage occasioned".** Damage MUST be occasioned in the carriage by air before the liability of the carrier can attach. In the text **Contracts Of Carriage By Land and Air Second Edn By Prof Malcolm Clarke,** the learned writers have observed of Article 22 of the convention at page 359:-

"Article 22, central to the liability regime, affords the carrier a monetary limit on the liability established under Articles 18 and 19. Article 22 sets limits not tariffs. Each claimant must prove actual loss up to the relevant limit." (Emphasis added)

14. This obviously means that the amounts of compensation, set out in Article 22 of the convention are not fixed compensation but a limit for which a claimant should prove the extent he has suffered in the event of a claim.

15. The same writer Malcolm Clarke has also written in the text **Carriage by Air LLP 2002** at page 139 when commenting on Article 22 of the convention.

"***These provisions limit the liability of the carrier-not to fixed levels or tariffs but limits, nonetheless to recover against a carrier every claimant must prove the actual amount of loss suffered." (Emphasis added)***

16. In the text **Shawcross and Beaumonts** on **Air Law 4th Edn**, Vol1 Butterworths 1977 at paragraph 331, the learned writers observe that:-

"Under the convention it remained a fault-based liability, but would be assumed on <u>proof of damage</u> ……." (Emphasis supplied)

17. In the Kenya case of **Ngunjiri –vs- British Airways World Cargo (2003) KLR 222** which was relied on by both the Plaintiffs and the Defendant, in a claim for damage to cargo under (Article 22(3)of the Convention Kasango J held:-

"The evidence of the Plaintiff on loss of profits is speculative and I have found it difficult to see the basis upon which the loss of profit can be calculated."

18. My view is that, the cumulative effect of all these authorities is that the amounts set out under Article 22 of the convention are not awardable as a matter of cause, the passenger must prove the damage he has suffered before he can be awarded such loss and/or damage which cannot however exceed the set amount of 250,000 francs. It is not an issue of strict liability, loss must be proved.

19. The issue therefore is, have the Plaintiffs proved that they have suffered loss? In paragraph 11 above, I have set out what the Plaintiffs had established by way of evidence through their witness statements and bundle of documents. The actual loss tabulatable are UK£358 (London Frankfurt) US$700 (Montego-bay – Philadelphia) US$170 one (1) night in Jamaica and US$87 hotel booking loss in Frankfurt. These are the only strictly proved losses/damage that the Plaintiffs established by way of evidence. As regards US$80,000, there is no evidence to show that the Plaintiffs suffered damage up to that extent and if they suffered, no evidence was produced to prove that fact. Further, I do accept that the Plaintiffs trip was business cum holiday. In particular I do accept that their trip to Frankfurt Germany was for business networking venture. However, they failed to produce any projected loss that arose as a result of their failure to attend thereat. As regards the Baltimore trip –the Plaintiff stated in their witness statements at para 29 thus:-

"29. All in all we felt that the trip was a wasted one since the sole purpose of us going to New York was to attend the Alumni meeting."

There was no evidence tendered to show of what monetary value the

Alumni meeting was to the Plaintiffs. Neither, was there any evidence to show the extent of loss in monetary terms that failure to attend the Alumni meeting costed the Plaintiffs. For that reason, it is not possible to quantify the loss, if any, that was suffered for the delay and/or failure to attend the aforesaid Alumni meeting.

20. I hold that the compensation under Article 22 is not strict liability but is subject to prove of damage. Accordingly, the claim for US$80,000 under the convention fails.

21. As regards the claim for Euros 2400, the Plaintiffs case is that the Defendants have represented in their website that they will compensate each passenger up to Euros600 for delay. The Defendants contention is that its representation is subject to European Union's Regulation (EC) No. 261/2004. The Defendant attempted to show that under the said Regulation, no liability attaches to the Defendant, but as I have already held there is already judgment against the Defendant for liability. The offer of Euros 600 is not made subject to prove on its website. In view thereof, since the wording in the Defendant's website do not connote and/or require an obligation on the part of the passenger to prove damage, I am satisfied that the plaintiffs are entitled to the said claim of Euros 2400 for delay.

22. As regards general damages, it is trite law in Kenya that general damages are not awardable in cases of breach of contract. See **<u>Habib Zurich finance (K) Ltd –vs- Muthoga & Anor (2002) 1 EA 81 CAK.</u>** Further, the Defendants produced persuasive authorities to show that even in England general damages will only be awarded in cases of breach of contract where the subject matter of the contract or duty in tort is to provide peace of mind or freedom from distress – **<u>Hayes & Anor –v-s James & Charles Dodd (1990) 2 All ER 815.</u>** I am persuaded that the contract between the Plaintiff and Defendant was not in the nature of providing peace of mind or freedom from distress. I reject this claim

23. As regards the claim for US$87, this is part of the expenses in which the Plaintiffs themselves admitted at paragraph 32 of their witness statements that they had been refunded their expenses. For this admission, the amount of US$170, for overnight stay in Jamaica US$700 for airfare to Philadelphia and UK£358 to Frankfurt proved is also not recoverable.

24. Accordingly, the Plaintiffs' suit is allowed partially and I enter judgment for the sum of Euros 2400 together with interest thereon from the date of filing suit until payment in full. I also award the Plaintiff costs of the suit on the successful claim. The rest of the Plaintiffs' suit is dismissed. Because of the anguish and hardships the Plaintiffs suffered, I will not award any costs to the Defendants for the dismissed portion of their suit.

It is decreed accordingly.

DATED and DELIVERED at Nairobi this 20th day of September, 2012.

…….

A. MABEYA

JUDGE