



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 28 OF 2008

PATRICK KIMATHI

MUCHENA.....PLAINTIFF

VERSUS

KENYA AIRWAYS

LIMITED.....DEFENDANT

JUDGMENT

This suit as I was told by the counsel appearing before me is a kind of test suit for the liability of an Air carrier for the mental anguish and breach of contractual obligations suffered by a passenger.

The Plaintiff is an Advocate of High Court of Kenya and was a passenger on flight No. KQ 311 departing from Dubai at the scheduled time of 2.25 a.m. on 30th January, 2007. He was to fly back to Nairobi. This fact is not disputed. What is disputed is the liability for the claims of contractual breaches by the Defendant, which is a licensed air carrier.

Both sides adduced evidence.

In brief the Plaintiff's case was that in anticipation of the timely departure of the flight he presented himself at the Defendant's counter at Dubai International Airport at 10 p.m. on 29th January, 2007. He was checked in and was advised by way of a note that the flight would be delayed for few hours signed by the Station Manager. The note indicated that the estimated departure time is 4.30 Dubai time. He accepted this initial intimation and checked in. The passengers were invited to have refreshment at Mc Donald/JASAN/LE MATIN/ROUND TABLE PIZZA. While he was taking the refreshment, the public announcement was made to the effect that the flight is further delayed to 6.00 p.m. on 30th January, 2007. He was shocked to get that announcement only within 30 minutes after checking in. He tried to get a staff of the Defendant but could not find any and thus tried to get some information from the DNATA office situate in Dubai Airport. After waiting for an hour or so, he was told that KQ COUNTER IS

CLOSED so they cannot give him any information. After getting the phone number of station manager of the Defendant from a friend in Dubai, he called severally that number without getting any response. He then tried to sleep on the floor of the Airport without much success. In the morning, he called KQ office of Dubai and was promised that someone would be coming to address the issue. That someone (DW1) came at 1p.m. He had to call his Nairobi office to cancel all the appointments. The lady informed them that she was trying to get temporary visa for all the passengers to be taken to Dubai in a hotel. It took them two hours to get visas and at around 3.30 p.m they were taken to a hotel where he was asked to share the room with one Mr. Kamathi. On inquiry from the reception he was told that the Defendant had made the arrangement for sharing. Till that time the passengers were not offered any meal despite the fact that the lady had arrived and talked to them around 1 p.m. He took his meal at the hotel and could not take shower in a shared bathroom as well as he did not carry any change-over for a short flight to Nairobi expecting to be home in the morning. He further stated that he is a frequent flier and had stayed at Crown Plaza Hotel at Dubai. They were taken back to the Air port at around 8 p.m. and flew out around midnight. He complained that he sensed mischief in allowing the passengers to check in despite the expected delay and then to afford him no explanation and treat him with indignity for about 27 hours which he was not expecting or used to. After service of demand notice the Defendant responded that they were investigating. He denied that an offer of U.S. \$100 and a meal voucher was made to him and added that even if it was made, he would have refused. He agreed that the terms and conditions were indicated on the ticket issued and that he did not pay for transport, room and meal provided at the hotel.

He is thus asking for a punitive damages based on the mischief in allowing the passengers to check in, despite the expected delay and then totally ignoring the passengers for the whole night and the next day till 1 p.m. and then as a last stroke to ask him to share a room in a three star hotel.

The Defendant called its Duty Officer at Dubai Airport who is in charge of day to day operations of the KQ flights in and out of Dubai Airport. According to her the delay was due to the technical problem in the aircraft which left Nairobi Airport but had to return. The rectification in technical problem cannot be estimated and the flight was postponed till the next day. According to her the further delay till 6.25 pm was announced at about 3.30a.m. till 6.25 p.m. the next day. Some passengers were transferred to Emirate flight and for others they could not get the Hotels due to unavailability. She said in this kind of eventuality the passengers can also be offered lounge entry at the AIRPORT. She only stated that the staff were supposed to at boarding and transit areas but fell short to state what was the position that night and next day. She further stated that the Hotel was instructed to give a room to the family and sharing could be only with the consent of the passengers. She quoted from flight handling report produced in evidence that the Plaintiff did not collect \$100 despite directed. ***SHE AGREED THAT THE SAID SUM WAS GIVEN JUST TO SAY SORRY.*** She agreed that the passengers were at the Airport for more than eight hours, which is the maximum time the passengers are to be at the Airport after which a passenger is to be moved to a hotel. She agreed that it took time to get the visas and that the passengers could have left around 2 p.m. Even as per her evidence she reached Airport at around 12 p.m. and that she sent her colleague only at around 10 a.m. to check on the passengers and did not confirm that he/she did in fact was at the Airport.

After the close of evidence from both sides the written submissions were filed.

It is common ground that the Defendant being common carrier licensed as per I.A.T.A., is governed by the Carriage by Air Act and Warsaw Convention as well its conditions of carriage.

Articles 19 and 20 of Warsaw Convention are relevant to this case and are relied upon by the Plaintiff. The first provision stipulates ***“The carrier is liable for damages caused by delay in the transportation by air of passengers, baggage or cargo”***. The second one stipulates ***“In the carriage of passengers and baggage and in the case of damage caused by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all the necessary measures to avoid damage, or that it was impossible for them to take these measures”***

Relying on these provisions the Plaintiff submitted that the liability arising from the delay is independent of any negligence or breach of contract. The Defendant has not, apart from the initial reason of ‘operational requirement’, shown any reasons for further delay up to midnight of next day. The

Defendant's witness has not shown any documents to prove the delay of about 27 hours. The defence also has failed to controvert the evidence led by the Plaintiff of his unsuccessful efforts to get explanation and/or to get the right picture for the total negligence of the staff of the Defendant to look after the passengers. The limit of maximum sum of francs 250,000/- was shown as the factor to be considered by the court.

Before I comment on the submissions from the Defendant, I may agree that the onus to prove that damage is suffered lies on the party claiming the same, who is the Plaintiff in this case. I can at the outset find that in this case he has not proved financial loss and I cannot consider the same.

Coming to the issue of physical discomfort, inconvenience, humiliation, embarrassment and mental anguish due to the delay, it is submitted that the long delay in this case is not explained satisfactorily, that from 10 p.m. to 3.30 p.m. the next day the Plaintiff had to suffer anxiety and discomfort without any staff of the Defendant in attendance, that he was not offered any meals till on arrival at the hotel and that too had to share with a stranger so that he could not get any rest.

A portion of Para 603 of Halsbury's Laws of England 4th Edition Volume 5(1) was relied upon which states: **"No damages are recoverable for mere vexation and disappointment caused by the delay, but damages may be recovered for real inconvenience which is appreciable and capable of being specifically stated."**

As against the above submissions the Defendant contended that the delay was due to technical problem which could not be estimated. Condition 9 of the contract was relied upon to say that the time shown on the ticket or elsewhere are not guaranteed. With reason shown as above there was no negligence on the part of the Defendant. The passengers were guided accordingly by the staff at every stage. Although the Defendant relies on the handling report, the same does not give any indication of time of announcements. Further, the witness DW1 was not giving any information from her own knowledge. Apart from saying that she asked her colleague to be at Airport on 10 a.m. The next day she could not say what happened and how the passengers were looked after till she arrived around 12.30 p.m. She did not say whether any meals were provided for and whether her colleague started the formality of taking them out of the Airport. Surprisingly, despite the fact that she was managing the flight operations, she was not aware that the visas were required to leave the airport. These formalities were only undertaken on her arrival delaying the transport to the Hotel. There was no positive or substantial response to the complaint as regards the sharing of the room.

In my view, even though it can be accepted that the delay in the flight including the cancellation of the flight is explained, though not satisfactorily, the way the passengers were handled thereafter was totally a disgrace and inhumane. DW1 could not controvert the detailed version of how the Plaintiff spent the night and day he spent while at the airport and at hotel and I would thus accept the same as credible.

The authorities cited by the Defendant may have weight as per the facts of those case, but in my view, the present case has its own peculiar circumstances which have shown a plight of a stranded passenger without proper care and consideration to his welfare from the air line. The measures taken by the Defendant were neither adequate nor timely. There is nothing to show the unavailability of the Hotel despite the passengers had been at the Airport from 10.00 pm to 3.30 pm next day. Yes the contractual terms could place the limitation on the loss of luggage, cargo etc. but the human factors cannot be limited and I tend to agree that the court cannot be restrained from considering the facts of each case independently and arrive at a just determination. I am also gratified that I have the support from the passage from Halsbury (supra)

I thus find that the mental anguish which the Plaintiff has suffered is not a common trauma or frustration which a passenger normally suffers from the delay in flights, and I do find so.

The question remains is the quantum of the damages which this court should award considering the circumstances of the case. I have been given the maximum limit to the award of damages. I am aware of the principles to be considered while assessing the general damages. I do find that the Plaintiff has not

shown any ascertainable damages and the suffering suffered did not leave a long lasting or permanent effect.

Doing best I can in these circumstances, I award a token award of Kshs.25,000/-to the Plaintiff in general damages for mental anguish and embarrassment. The Defendant shall also pay the costs of this suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this 31st day of **October, 2011**

K. H. RAWAL
JUDGE
31.10.2011