



**Nyaga v Five Forty Aviation Limited (Petition 307 of 2016) [2023] KEHC 22323 (KLR)
(Constitutional and Human Rights) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 307 OF 2016
HI ONG'UDI, J
SEPTEMBER 22, 2023**

BETWEEN

AGNES MITHAMO NYAGA PETITIONER

AND

FIVE FORTY AVIATION LIMITED RESPONDENT

JUDGMENT

1. The petition dated 15th July 2016 is in respect of alleged contravention of Articles 2, 3, 10, 27(1) & (4), 28, 29, 33, 46, 47 and 54 of *the Constitution*. Accordingly the petitioner seeks the following orders:
 - A. A declaration that the failure of the respondent to provide sufficient facilities and equipment to assist persons with disability to ascend the aircraft's steps and the treatment accorded to her was discriminatory, unfair, humiliating and inhuman.
 - B. An order for damages for the contravention of the fundamental rights and freedoms of the petitioner and for the mental anguish she suffered due to the unconstitutional acts of the respondent including the following:
 - i. That the respondent be held liable for general damages including aggravated and punitive damages for the humiliating and degrading treatment that was suffered by the petitioner and for the discrimination she endured at the hands of the respondent.
 - ii. That the respondent be held liable for general, aggravated and exemplary damages for libel and defamation against the petitioner.
 - C. The costs of this petition be borne by the respondent.



The Petitioner's case

2. The crux of the petitioner's case is the alleged degrading and inhuman treatment she received as a person living with a disability as a passenger while on the respondent's flight which was unconstitutional.
3. The petition is supported by the petitioner's supporting affidavit of even date, a supplementary affidavit dated 27th January 2017, a further affidavit dated 24th January 2018 sworn by Sylvester Mbithi a legal officer at the National Gender Equality Commission, and an affidavit by Professor Grace Irimu dated 15th July 2016.
4. The petitioner a medical doctor and specialized pediatrician at Nyeri County and Referral Hospital deposes that on 26th April 2016 she was set to travel from Eldoret to Nairobi using the respondent's flight after attending a three day seminar. Upon arriving at the Airport she enquired whether the respondent had a special chair to assist with boarding of the aircraft. She was informed that there was none but she would be assisted by four male cabin crew members get up the aircraft's steps.
5. At the time of boarding, the petitioner being a priority passenger was given the first opportunity to board by being wheeled to the aircraft. Her walking aids were taken into the aircraft, as four cabin crew members waited to assist her up the stairs. Unfortunately during the process of being carried up she slipped as the stairs were wet from the rain, and her leg got stuck in the staircase. She requested the men to take her back to the first step to enable her regain her balance so as to continue.
6. She deposed that as she was tried to board, the pilot came out of the aircraft and in a humiliating manner remarked that it would take 40 minutes to get her up the stairs. He therefore directed that she be carried down and wait for all the passengers to board the aircraft. She was denied access to her walking aids by the pilot.
7. She deposed that it was at that point that she and the pilot had an altercation over the incident, and he told her that he had a right to decide who would get aboard the aircraft and in fact she would not get on board. Humiliated, the petitioner was wheeled back to the airport waiting lounge. She ended up spending the night at the airport. She averred that the respondent's airline manager did not communicate with her over the incident. She met the airport manager the following morning where she recounted her experience, and he got her a ticket on the jambojet airline to Nairobi.
8. She averred that on 5th May 2016 she shared her experience with the Nation Media for purposes of sensitizing the public on the rights and challenges faced by persons living with disabilities. This was published in the Daily Nation. In response, the respondent also published a story in the same Newspaper dated 7th May 2016 sharing its side of the story. Allegedly the article was intimating that the petitioner's story was shrouded with lies and further twisted the narrative in a defamatory manner. The petitioner's advocates did a demand letter dated 17th May 2016 to the respondent but it was not responded to hence the filing of this petition.
9. During the hearing held on 11th July 2017 the petitioner testified as PW 2. She adopted her affidavits in support of the petition as her evidence, in chief. She explained that her disability was as a result of polio which she contracted as a child and so needed to use 2 walking sticks. She indicated that while boarding aircrafts, the airline check in staff ordinarily ask her whether she is able to board the aircraft unaided or whether she requires assistance. She however sometimes boards unassisted and acknowledged that her disability makes it difficult for her to climb stairs.



10. It was her evidence that upon checking in she is given a wheel chair and wheeled to the aircraft. She indicated that some of the aircrafts have a chair lift or a forklift to enable access. In this case it is the pilot who denied her the use of the forklift.
11. Upon cross examination, she indicated that while booking her ticket she had not informed the agent in advance that she had a disability for the details for special arrangement, to be included. This was because she was always assisted during check in. She informed that the altercation with the pilot begun when she asked for her walking aids. She admitted that during the altercation she used force to push him away as he was not listening to her.
12. She as well admitted that she refused to board the aircraft later on because she had been mistreated, humiliated and discriminated against. When asked whether the respondent's manager was with her on the day of the incident she stated that he was among the persons pushing her wheelchair. On accommodation, she emphasized that she had come to the airport to travel not to sleep and further that she did not trust the respondent on accommodation.
13. In re - examination she said she had not been given the respondent's Terms and Conditions. Further that as a norm in all airports she has visited, she has never been required to give prior information on her check in.
14. Professor Grace Irimu's testified as PW1. She adopted her affidavit as her evidence in chief. She averred that she had attended the conference with the petitioner. When she came to board she found the petitioner in the lounge in a wheelchair. She was wet from the rain and was sobbing. Upon hearing her story she promised to talk to the pilot which she did and explained everything to him. She deposed that the pilot let her know that he was quite annoyed with the petitioner as she had been rude to him hence his decision not to allow her on board.
15. She pleaded with him to allow the petitioner on board which he finally agreed to. She went back outside to tell the petitioner but the petitioner who now had her bags with her refused saying she had been discriminated against and so wanted to report the matter to the Airline Manager.
16. PW1 went back to the aircraft and travelled to Nairobi. On arrival she told the pilot of the petitioner's sentiments and he took her mobile number. She later on received a phone call from an unknown person from Eldoret Airport seeking to speak with the petitioner and asking whether she had been taken to a hotel for the night. She declined to share the information, stating that the petitioner was capable of making decisions and should be contacted directly.
17. During the cross examination, she confirmed that on the fateful day it had been raining and that the flight had been delayed by one hour. She further affirmed that the petitioner had been given priority to board the aircraft. She stressed that the petitioner was not angry rather it was the pilot. She as well stated that as she spoke with the pilot he seemed remorseful as he explained the incident that had occurred.
18. Sylvester Mbithi testified as PW3. He adopted his affidavit as his evidence in chief. He averred that this incident was not unique as one of their clients (Dickson Kosgei) was on 11th May 2014 forced to crawl out of the respondent's aircraft, since the respondent did not have lift off chairs which are used to embark and disembark an aircraft. He averred that their investigations disclosed that the respondent operated an aircraft that was not fitted with special equipment (PAU) to aid mobility of persons with disabilities. The respondent's staff instead offer to carry persons with disability which is considered demeaning and a violation of human dignity.
19. Upon cross examination he stated that he handled Bishop Koskei's case back in 2018, and the parties in the matter negotiated with the assistance of the Commission. He noted that he had received permission



from the Commission to testify in this matter but not from Bishop Koskei and the respondent. He further pointed out that he was not aware whether it was the Kenya Airport's Authority or the respondent who are charged with the mandate to avail the special assistive devices to carry persons with disabilities. He likewise stated that he did not investigate the matter further and only testified to share Bishop Koskei's incident.

20. In re-examination, he stated that other than Bishop Koskei's case, the Commission had not handled a similar case. He stated that Bishop Koskei had been assisted when boarding the aircraft from Kisumu but there was no device to assist him alight from the aircraft when he reached Nairobi. He similarly averred that he was not aware whether the airlines have a policy requiring persons with disabilities to inform them in advance of their condition.

The Respondent's case

21. The respondent in response to the petition filed replying affidavits sworn by Moses Jack Opiyo Odeny, Diana Achieng' K'obala and Edwin K. Chelimo. The affidavits are dated 10th November 2016, 25th November 2016 and 2nd February 2017 respectively.
22. Moses Jack Opiyo Odeny who testified as DW1 adopted his affidavit as his evidence in chief. He stated that he is a pilot with over 20 years working experience and currently working with the respondent. He added that he has worked with persons of various backgrounds including persons living with disabilities.
23. He deponed that on the fateful day, he was flying the evening Nairobi – Eldoret route which was running late. After the aircraft was ready for boarding he gave clearance for the passengers to start boarding with priority passengers such as disabled persons being the first to board. When he noticed that it had been 20 minutes and no passengers had boarded, he left the cockpit to go find out what the problem was. He found the petitioner on the tarmac and there was an ongoing commotion. The petitioner was refusing to be assisted to board and wanted to do it herself. When he suggested that he and the other personnel assist her up the stairway, she violently pushed him away.
24. He averred that all the passengers were to be on board by 9 pm as the airport is to be closed by that time. That the petitioner's unsuccessful attempts to board the aircraft herself was holding up the other passengers. In an attempt to assist the petitioner he requested for a lift up chair from Jambojet. She however refused to use the chair to board.
25. He deponed that since it was raining, he requested that the petitioner be wheeled back to the waiting lounge so that the other passengers could board and she boards last. After all passengers had boarded, he was approached by PW1 the leader of the team of doctors, to allow the petitioner board the aircraft. He informed her that he had no intention of leaving her behind and would ensure she boards the aircraft. He then requested for the flight's departure time to be extended which was granted but the petitioner declined to board saying she had been humiliated.
26. He further deposed that when the respondent's manager offered to book the petitioner at a hotel for the night, she declined. She also declined the Kenya Airports Authority Manager's offer to sit in the VIP lounge. The respondent's manager purchased a ticket for the petitioner via Jambojet the next day.
27. In cross examination he reiterated the contents of his affidavit. He underscored that as the captain he is the one in charge of the aircraft in all its aspects. He noted that facilities to enable persons with disability board the aircraft should be availed by the respondent. He said he witnessed the commotion and manner in which the petitioner was seeking to be assisted on the material day. He instructed the personnel to take her back down to the wheel chair so that he could assist in the process. He however



noted the process was futile as the petitioner wanted things to go her way. As the pilot, he asked that she be taken back to the lounge as it was raining so that the special chair could be brought. In making the decision he considered the closure of the airport and the timing of the aircraft. He refuted the petitioner's claims of him being rude during their encounter.

28. Diana Achieng' K'obala who is an employee of the respondent at the Boarding Section testified as DW2 and adopted her affidavit as her evidence in chief. She stated that as she was boarding the passengers she met the petitioner as she was being wheeled to the aircraft. She deposes that she discerned that the petitioner could not go up the stairs by herself due to her disability and her size. The petitioner did not however want to be touched as they tried to assist her. Further that she was forceful and abrasive wanting to dictate the process. She averred that the petitioner asked her to place her hands below her feet so that she could hoist her up the stairs. In that process due to the wet stairs, the petitioner slipped and fell on her fingers injuring her. The pilot came to assist but the petitioner got angry and pushed him away.
29. In cross examination, she stated that she was called to assist the petitioner on the material day by her supervisor. She confirmed that the respondent at the time did not have the special chairs for disabled persons. She informs that as she tried to assist, the petitioner was dictating the manner in which she was to be assisted. She was not able to single handedly assist so she called four men to help her as the petitioner was heavy. She made known that the petitioner did not want to be touched and deemed her behavior unreasonable since it made assisting her difficult.
30. Edwin K. Chelimo the Station Manager testified as DW2 and adopted his affidavit as his evidence in chief. He averred that at the time of boarding prominence is given to priority passengers who include persons with disabilities. He confirmed that the petitioner had booked a return ticket and arrived in the respondent's aircraft in Eldoret on 25th April 2016. On 29th April 2016 when the petitioner was returning, she was wheeled to the aircraft as the first person. Further that attempts to assist her board the flight were futile since she wanted things done her way. This caused a commotion which resulted in the pilot coming to inquire on the issue.
31. He explained that when the pilot tried to assist her, she pushed him away and informed him that she could board the aircraft herself, despite being notified that other passengers were being delayed. On being told this she got irritated, and was then wheeled to the waiting lounge as it was raining. The other passengers boarded but she declined to board.
32. He deposed that he offered to pay a hotel for her for the night which she refused insisting that she would spend the night at the terminal. He remained with her at the terminal that night until morning. He booked for her a flight with Jambojet the next morning as their flight was fully booked.

The Petitioner's submissions

33. The petitioner's submissions were filed by the firm of Muma and Kanjama Advocates together with a list of authorities dated 22nd July 2022. Counsel identified the issues for determination as follows:
 - i. Whether the petitioner was discriminated on account of her physical disability.
 - ii. Whether the Articles published by the respondent constituted defamatory remarks about the petitioner.
 - iii. Whether the petitioner's constitutional rights were violated and infringed upon by the respondent.
 - iv. Whether the petitioner is entitled to the reliefs sought.



34. Counsel begun by submitting that Section 2 of the *Persons with Disabilities Act*, No.14 of 2003 defines discrimination as according different treatment to different persons solely or mainly as result of their disabilities and includes using words, gestures or caricatures that demean, scandalize or embarrass a person with a disability. This embodies the right as provided under Article 27 of *the Constitution*. In addition, Article 54 of *the Constitution* specifically provides for the rights of persons living with disabilities which entitle them to be treated with dignity and respect and not in a demeaning way. Further that they are to receive reasonable access to all places including public transport and have access to devices that can assist them.
35. In support reliance was placed on the case of Paul Pkiach Anupa & another V Attorney General & Another [2012] eKLR, and Section 21 of the *Persons with Disabilities Act*. The said section provides that, persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility.
36. Counsel submitted hence that the petitioner was discriminated against as a person living with disability in view of the other passengers due to their failure to provide the basic equipment required to assist the petitioner board the aircraft. It was noted that it was the responsibility of private entities as held in the case of Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya) (2012) eKLR to provide assistive devices to persons living with disability. It was noted that the respondent had not demonstrated that it had in place measures to assist persons living with disability access the aircraft. That it was evident from the facts that on both 25th and 29th April 2016 the petitioner was not provided with any assistive devices to assist her embark and disembark the aircraft. Counsel also faulted the respondent’s discriminatory policy restricting carrying of persons whose mobility is reduced due to physical incapacity.
37. Counsel further relied on the cases of: Reuben Kigame Lichete v IEBC and another (Constitutional Petition No.275 of 2022), and Juliet Mwongeli Muema v Smollan Kenya Limited (2019) eKLR among many others. He also relied on a number of international conventions that prohibit discrimination of persons living with disability.
38. It was further submitted that the respondent also discriminated against the petitioner through the use of words and gestures that demeaned, disrespected, scandalized and embarrassed the petitioner as a person living with disability. Reference was made to the remarks made by DW 2 in her replying affidavit and testimony. Counsel contended that the respondent approved the malicious and disrespectful behavior of its employees towards the petitioner which were discriminatory as seen in the case of Silas Rukungu Karanja v TSC (2012) eKLR. There was therefore proof of the nexus between the respondents discriminatory actions and the petitioner’s disability.
39. Turning to the second issue, Counsel submitted that the Court of Appeal in the cases of Musikari Kombo v Royal Media Services Limited (2018) eKLR and Nation Media Group Ltd and 2 others v John Joseph Kamotho and 3 others (2010) eKLR stated that for one to prove defamation one must show existence of a defamatory statement which was published by the defendant and refers to the claimant and that the statement was communicated to at least one person other than the claimant. He submitted that this is what the respondent did in its Article dated 6th May 2016 following the petitioner’s article. He noted that in the article the respondent emphasized that the petitioner had refused assistance to board the aircraft and even an offer to be booked for a hotel for the night. All these averments were deemed false, reckless and defamatory statements.



40. In support reliance was placed on the case of *SMW V ZWM (2015) eKLR* where it was held that a statement is defamatory if the person of whom it is published tends to lower him/her in the estimation of right thinking members of the society generally. This was noted to have been demonstrated as the petitioner received multiple calls inquiring about the incident. Counsel submitted that the respondent's article painted the petitioner as a violent person who had been hostile to the pilot. Further that she had been dishonest in her article and her refusal to accept help made her responsible for her woes. It was stated that the respondent had not demonstrated that the words mentioned were true. Also see: *Nation Newspaper limited v Daniel Musinga T/A Musinga and Company Advocates (2005) eKLR*, *Daniel Muthe Nheere v Nation Media Group Limited and another (2019) eKLR*, among others.
41. Moving to the third issue, on the petitioner's right to dignity under Article 28 of *the Constitution* it was submitted that the respondent through its words and conduct had violated this right which is a core right. Counsel relied on the opinion in the South African case of *S V Makwanyame and another (CCT 3/94)(1995) ZACC3* where it was held that the right to life and dignity are the most important of all human rights and source of all other personal rights. He further referred to the cases of: *Martin Wanderi and 106 others v Engineers Registration Board and 10 others (2018) eKLR*, and *Standard Limited and 2 others v Christopher Ndarathi Murungaru (2016) eKLR* in support.
42. Counsel further submitted that the petitioner's right under Article 29 of *the Constitution* had been violated due to the inhuman and degrading treatment she received following DW2's remarks. Counsel as well submitted that through the publication of the respondent's defamatory article, and its refusal to issue an apology as requested in the petitioner's demand letter dated 17th May 2016, the petitioner's rights under Article 33(3) and 35(2) of *the Constitution*, were violated. He also faulted the respondent's quality of service to the petitioner which violated her right under Article 46 of *the Constitution* and her rights as a person living with disability under Article 54 of *the Constitution*.
43. On the final issue, Counsel submitted that indeed the petitioner was entitled to the reliefs sought. To buttress this point reliance was placed on the case of *Gitobu Manyara & 2 others v Attorney General [2016] eKLR* where the Court of Appeal held that when exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation.
44. Further that an award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award not necessarily of substantial size may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.
45. In view of all this Counsel urged the Court to award the petitioner general damages including aggravated and punitive damages for the humiliating and degrading treatment amounting to Kshs.5,000,000/=; General damages including aggravated and punitive damages for discrimination of the petitioner of Kshs.5,000,000/=; General damages for libel and defamation of Kshs.7,000,000/=; Aggravated damages for libel and defamation of Ksh.2,000,000/= and exemplary damages for libel and defamation by the respondent of Ksh.1 000 000/=.



The Respondent's submissions

46. The respondent's submissions were filed by Mungu, Kimetto and Company Advocates and are dated 13th February 2023, the issues for determination were listed as:
- i. Whether the petitioner was discriminated because of her disability.
 - ii. Whether the Articles published by the respondent constituted to defamatory remarks
47. Counsel answered the first issue in the negative. The reason being that although DW1 and DW2 admitted that there was no special equipment fitted in the aircraft to assist persons with disabilities to board the aircraft, they were ready to borrow one from another airline and also assist the petitioner board the aircraft as a priority passenger. He stressed that the respondent provides reasonable accommodation to persons with disabilities and it is the petitioner who declined the offer. Further that when the respondent's initial suggestion was found uncomfortable for the petitioner, it tried its best to offer an alternative solution which was further declined by the petitioner. In the end the petitioner refused to board the aircraft after the other passengers had boarded.
48. Counsel further refuted the petitioner's allegations that the respondent has restrictions against carrying persons whose mobility is reduced due to physical incapacity. It was stressed that it was evident that the petitioner travelled with the respondent on her arrival date on 25th April 2016. As such, if the allegation were true she would not have been allowed on board on that day and her ticket canceled upon realizing that she is disabled. In light of this Counsel refuted the claim that the petitioner had been humiliated and discriminated against as alleged.
49. On the second issue, Counsel while relying on the case of *Ochieng & 8 Others v Standard Limited*, [2004] 1 KLR 275 submitted that defamation is a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule. Similar reliance was placed on the case of *Machira t/a Machira & Co. Advocates vs. East African Standard* (2001) KLR 638. Referring to the petitioner's Article in the Daily Nation dated 5th May 2016, Counsel submitted that in view of the untrue picture that had been painted by the petitioner, the respondent had a right to have the public hear its side of the story. He stated that there was no malice in the reply since the Article only stated the facts as they were.
50. Counsel submitted that in a defamation case, one must prove that the words spoken or written by the offender are false and that they suffered injury as a result. It was noted that this had not been done. First the petitioner had not proved what was false in the respondent's narrative. Further during her oral testimony she failed to prove which people called to inquire about the incident to prove ruin to her reputation. In support reliance was placed on the case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR where it was held that the elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons.
51. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff who should demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. Additional dependence was placed on the case of *Hon. Uhuru Muigai Kenyatta V Baraza Limited* [2011] eKLR and *Selina Patani & another v Dhiranji V.*



Patani Civil Appeal No. 114 of (2017) eKLR. To that end Counsel submitted that the petitioner had failed to prove defamation and that she suffered injuries from the statements uttered by the respondent.

Analysis and Determination

52. I have considered the pleadings and submissions of the parties herein and the authorities relied on. Consequently the issues that arise for determination are as follows:
- i. Whether the petitioner was discriminated against by the respondent.
 - ii. Whether the respondent violated the petitioner's right against defamation.
 - iii. Whether the respondent in view of (i) and (ii) above violated the petitioner's constitutional rights under Articles 27(1) & (4), 28, 29, 33(3), 35(2), 46 and 54 of *the Constitution*.
 - iv. Whether the petitioner is entitled to the reliefs sought.

Whether the petitioner was discriminated against by the respondent

53. The genesis and crux of this suit is that the petitioner was discriminated against by the respondent following her experience as its passenger living with a disability. The petitioner decried the respondent's lack of an assistive device to enable her board the aircraft. Further was, the respondent's policy that bars persons with disability from using their flight service. The petitioner also faulted DW 2's statements towards her which were deemed discriminatory.
54. The respondent refuted these claims and deposed that the claim for discrimination was unfounded. The respondent informed that, the petitioner had failed to inform her booking agent in advance of her disability, to enable special arrangement for her to embark. Nevertheless it was stated that the respondent did all it could to assist the petitioner board the plane. The respondent through DW 1 and DW 2 testified that this process was frustrated by the petitioner who wanted to do things her own way and additionally refused to use the chair aid that was brought in the end to help her. According to the respondent the claim for discrimination could not stand in light of these facts.
55. The right against discrimination is a fundamental right envisaged under Article 27 of *the Constitution*. The relevant sub –articles read as follows:
- (!) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
-
- 4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
56. The *Persons with Disabilities Act*, 2003 defines discrimination under Section 2 as follows:
- To accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability.



57. The Constitutional Court of South Africa discoursing on this right in the case of *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5 opined as follows:

“

“32. In Dworkin’s words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment.[33] We find support for the approach we advocate in the following passage from the judgment of this Court in *The President of the Republic of South Africa and Another v Hugo*:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of *the Constitution* and should not be forgotten or overlooked.”

58. In the same way, the Supreme Court in the case of *Gichuru v Package Insurance Brokers Limited* (Petition No. 36 of 2019) (2021) KESC12(KRR) (22 OCT 2021) Judgment) expounded and guided on this right in the following manner:

“

“(47) This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied Section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

[49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”



(48) Black’s Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination.”

59. The Court went on further to observe that:

“ [50] In equal measure, we adopt the definition of discrimination in the High Court case of Peter K Waweru v Republic [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”

60. The test for determining whether the petitioner’s claim on discrimination will be successful constitutes showing that there was a link between the negative treatment the petitioner experienced as a passenger as against the fellow passengers. Further that the discrimination was without any objective and reasonable justification.

61. A look at the material before this Court makes apparent the basis upon which the petitioner was allegedly discriminated against. According to the respondent the petitioner being a person with disability was required to follow some different prerequisites. This differentiation was grounded on the fact that the petitioner as opposed to the other passengers was a person living with a disability. The prerequisites were for her to inform in advance that she was a person with disability and would need assistance to board the flight so that special arrangements would be made. Secondly that the petitioner was expected to reasonably comply with the assistance offered by the respondent to help her board the aircraft.

62. *The Constitution* further under Article 54(1) of *the Constitution* provides for the rights of persons with disability as follows:

1. A person with any disability is entitled--
 - a. to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
 - b. to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;



- c. to reasonable access to all places, public transport and information;
- d. to use Sign language, Braille or other appropriate means of communication; and
- e. to access materials and devices to overcome constraints arising from the person's disability.

63. The [Persons with Disabilities Act](#) under Section 2 defines assistive devices as follows:

“assistive devices and services” means implements, tools and specialised services (including the services of qualified interpreters for the deaf and qualified teachers for the blind) provided to persons with disabilities to assist them in education, employment or other activities;

64. It is obvious from the above, that persons with disabilities are entitled to the necessary tools and means to live reasonably and comfortably in our society. This includes the manner in which they can access various places. This was appreciated by the Court in the case of *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya)* (supra) in its opinion as follows:

“I find that Article 54(1) (c) of [the constitution](#) guarantees to persons with disability the right to reasonable access to all places, public transport and information. (Emphasis added)

When read together with Article 2, 20 and 260, Article 54 (1) (c) imposes an obligation on all persons, not just the State, to ensure access by persons with disabilities to all places, public transport and information.

The Respondent has argued that the duty to provide for the needs of the vulnerable and marginalized groups which include persons with disability lies on the state and not on private citizens. Though it is true that the state should bear the greatest responsibility in providing for the needs of vulnerable groups in society, it is my view that private citizens also have a role to play in that regard.

My view on this point is informed by the fact that [the constitution](#) expressly makes it clear that there is both vertical-state to citizen, and horizontal-citizen to citizen application of the Bill of Rights.

The Respondent being a corporate citizen in this country is duty bound to fulfil its own obligations under [the Constitution](#). Can the Respondent for example argue that it cannot provide ramps on its building to enable persons with physical disabilities to access its facilities because it is not the state or a public entity. I think not. Similarly, it is my view that the Respondent cannot be heard to argue that it cannot provide sign language broadcasting for the benefit of children or persons with hearing disabilities because it is not part of the state.”

65. To begin with the petitioner failed to show that the respondent's policy bars persons living with disability from boarding its aircraft. As such the petitioner's reliance on this ground cannot suffice. Similarly, while the petitioner stated that DW 2's statements were discriminatory she failed to show the manner in which this witness spoke about other passengers to ascertain this differentiation.

66. It is evident that none of the other passengers were subjected to the petitioner's requirements since they were not persons living with disability. Article 27 of [the Constitution](#) in simple terms forbids any person or institution from discriminating a person based on a disability that they may have. While



differentiation in and of itself does not amount to actual discrimination, the differentiation must be tested in view of its reasonable justification. The reason I say so because it is expected that the respondent offering the flight services should provide all the necessary means to ensure all of its passengers board and alight from its aircraft safely. As required by *the Constitution* and the Persons with Disability Act it means that the necessary devices should be availed to ensure that persons with disability are able to access the aircraft. In essence all passengers must be able to access the aircraft regardless of their physical status. In the instant case it is plain that the passengers without a disability were provided with the stairway to access the aircraft while the persons living with disability in form of leg mobility were not provided with means to access the flight.

67. It was not for the respondent to argue that the petitioner was being unreasonable for failing to accept their assistance. It was not her responsibility to ensure she gets into the aircraft by all means necessary. It was the obligation of the respondent as per the law to provide the necessary means from the beginning, but it failed to do so.
68. It is reasonable to therefore state that the petitioner plainly demonstrated that the respondent violated her right against discrimination under Article 27 of *the Constitution*. The respondent had the onus of rebutting this allegation by establishing the justification for failing to provide the required assistive devices. This element was neglected by the respondent who instead focused on the manner in which they tried to assist the petitioner.
69. I find that the respondent did indeed violate the petitioner's right against discrimination under Article 27 (1) & (4) of *the Constitution* which in turn violated the petitioner's right as a person living with disability under Article 54(1)(a) of *the Constitution* since the differentiation was based on her disability.

Whether the respondent violated the petitioner's right against defamation

70. The petitioner on 5th May 2016 shared her experience with the respondent in the Daily Nation. In response, the respondent also published a story in the Daily Nation dated 7th May 2016 sharing its side of the story. The petitioner argued that the respondent's response was shrouded with lies which were defamatory to her.
71. The respondent opposed this view stating that it as well had a right to share the facts of the material day. It was argued that the petitioner had failed to prove that the written words were false and caused injury. Likewise, it was contended that the petitioner failed to demonstrate that her reputation had been injured.
72. The Court of Appeal in the case of Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others (supra) listed the elements to prove the tort of defamation as follows:

“For the tort of defamation to succeed the following elements must be proved by the claimant:

- i. The statement must be defamatory.
- ii. It must refer to the claimant, i.e identify him.
- iii. It must be published i.e communicated to at least one person other than the claimant.”



73. Later the Court of Appeal in the case of Musikari Kombo v Royal Media Services Limited (supra) reiterated the principles above and proceeded to observed as follows:

“

“20. 20. The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. ‘The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”

74. The Court went on to state as follows:

“

“23. 23. The next issue that falls for consideration is whether the statements or words used therein were defamatory as against the appellant? As succinctly put by this Court in S M W vs. Z W M [2015] eKLR:-

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

24. 24. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury’s Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

75. I find defamation to be fundamentally the making of a false statement that discredits a person leading to injury of that person’s reputation in the mind of an ordinary reasonable man. Undoubtedly the claimant or petitioner in this case is required to prove the existence of the three elements so as to secure a finding in her favour.

76. A perusal of the material before this Court shows that the respondent published article which was about the petitioner, and this satisfies the two elements. What is in issue is whether the words in the respondent’s article were defamatory. The petitioner was required to demonstrate that the words used in the article were understood as demeaning within the mind of an ordinary person.

77. In the article dated 6th May 2016 the respondent in brief, stated that the petitioner declined assistance from the airline’s staff to board the aircraft, that she had an argument with the pilot and pushed him



away, that she refused to board the aircraft after her colleague spoke to the pilot, that she stayed at the airport in protest and refused help from the respondent to be accommodated in a hotel for the night. The article ended by stating that she travelled back to Nairobi the following day using a different airline. This story was also recapped by the respondent on its platform. These averments were denied by the petitioner who claimed they were false.

78. Two things are made manifest in this issue. First the statements published by the respondent based on the pleadings of both parties, accounted for the events that took place on the material day. The averments were recounted by the petitioner and the respondent in their affidavits. From the evidence on record it is clear that the respondent offered to assist the petitioner and the attempts to have her board her eventually failed. The altercation between herself and the pilot was also admitted to by both parties.
79. Similarly it is evident from PW 1's testimony that she indeed refused to board the aircraft in the end and she pushed the pilot away. While the petitioner tried to avoid answering the question of the accommodation offered, she did not deny the respondent manager's request to put her up in a hotel for the night. It is my considered view that the statements made by the respondent in its article were not false.
80. Secondly, the petitioner failed to tender evidence on how the article affected her reputation in the mind of an ordinary person. While she averred that she received numerous calls over the article there was no piece of evidence to support this claim. There was no phone call record, moreover there was no message, sms, email, whatsapp messages etc to show this assertion.
81. In light of the foregoing, the alleged defamatory nature of the article fails. This was because the statements made were not false and the petitioner failed to prove that an ordinary man understood the article to be defamatory and how her reputation was injured. Further she is the one who provoked the respondent into responding to her earlier publication.

Whether the respondent in view of (i) and (ii) above violated the petitioner's constitutional rights under Articles 27(1) & (4), 28, 29, 33(3), 35(2), 46 and 54 of the Constitution.

82. From the preceding discussion it is plain that the petitioner satisfactorily proved that the respondent violated her rights under Articles 27(1) & (4), 28 and 54 of the Constitution.
83. On the other hand the petitioner failed to prove how her rights under Articles 29, 33(3), 35(2) and 46 of the Constitution were violated by the respondent. Article 29 of the Constitution which in this case is deemed to have been violated owing to the alleged inhuman and degrading treatment was not proved. While the respondent did indeed discriminate the petitioner, its actions did not amount to inhuman and degrading treatment as alleged. Despite its failure to provide the assistive devices, the respondent attempted to assist the petitioner in the best manner it could.
84. Articles 33(3) and 35(2) of the Constitution were cited in view of the right to reputation and deletion of false information with reference to the alleged defamation. As discussed on the second issue, the petitioner was not able to demonstrate how the respondent defamed her. In effect violation of these two rights also stood unproved by the petitioner.
85. With reference to Article 46 of the Constitution on consumer rights, sub –article1 provides that 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.
86. A reading of the facts and evidence on record divulges that the dispute in this matter is not as a result of the general quality of the service rendered by the respondent to its passengers. Instead it is the lack of provision of an assistive device as part of its service to persons living with disability. It is evident that the petitioner had used the respondent's service before without any complaint. The petitioner in no way proved that the services rendered by the respondent were not satisfactory nor harmful to consequently be deemed to have violated her consumer rights. I accordingly find that the petitioner has not proved her case against the respondent in this regard.

Whether the petitioner is entitled to the reliefs sought

87. From the foregoing analysis it is my humble conclusion that the petitioner's rights under Articles 27(1) & (4) & (5), 28, and 54 of *the Constitution* were violated by the respondent and so entitled to the reliefs sought as discussed below specifically the petitioner sought an award of general damages set out at paragraph 45 of this Judgment and I will not rehash them here.

On general damages

88. The principles that dictate compensation to a winning party as granted in constitutional petitions and guided by Article 23 of *the Constitution* have been set out in a number of authorities. The Court of Appeal in the case of *Gitobu Imanyara (supra)* on the topic pronounced itself as follows:

“...the South African Case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

89. Further, the Court in the case of *Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another* [2019 eKLR] held that:

“97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is



discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.”

90. On the factors to be considered while making an award the case of Zipporah Seroney & 5 others v Attorney General noted thus:

“124. Taking into account the cited principles, and considering that the award of general damages is not a mathematical exercise, the best guide is the awards previously made to persons whose constitutional rights were violated in circumstances similar to that of the deceased. This is the only way of determining a just and reasonable compensation considering that the parties did not make any proposals in their submissions on what they think should be the appropriate damages in this case.”

91. Guided by the above decisions that an award of general damages herein shall be adequate to vindicate the petitioner and compensate her for the violation of her constitutional rights.
92. It is manifest that the petitioner has partially succeeded in her case, to the effect that she had been discriminated against as a person with disability with reference to accessibility to board the flight. In the case of Paul Pkiach Anupa & another (supra) the petitioner in the matter also brought a claim against the respondent with regard to his inability to access the building as a disabled person and his employment as a disabled person. The Court therein in view of the petitioner’s two claims which succeeded awarded Ksh.800, 000 as compensation. Being that the petitioner herein only succeeded in the claim for discrimination as a person with disability with reference to accessibility to enter the aircraft, I find a compensatory award of Ksh.400,000 to be sufficient.

On exemplary, aggravated and punitive damages

93. In the English case of Rookes vs. Barnard & Others (1964) AC 1129 it was held that:

“Exemplary damages in tort may be awarded in two classes of cases i.e.

- i) Where there is oppressive arbitrary or unconstitutional actions by the servants of the Government; and
- ii) Where the Defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff

94. In the case of Benedict Munene Kariuki & 14 Others vs. The Attorney General Petition Number 722 of 2009 (2011) eKLR, Majanja, J. stated as follows;

“I am constrained to depart, from the position taken by my learned brother. In my view, these cases under Section 84 of *the Constitution* are cases concerning *the Constitution*. It is unnecessary to consider the element of “unconstitutional action” when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo v Kisumu Municipal Council (Supra) was a case in tort so that the issue of “unconstitutional action” was an additional factor the Court would consider in awarding exemplary damages. I shall therefore not award exemplary damages. “Further, in the case of Wachira Waihere vs. the Attorney General HC Misc. App.No.1184/2003 (O.S.) the Court did not find it appropriate to award aggravated and exemplary damages and stated that;



"In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages."

95. The Court went on to hold as follows:

"170. I need not cite any other authority to show that the general trend in this jurisdiction is to avoid award of exemplary or punitive damages in public law claims. This principle is grounded on two reasons namely that the State has improved in its respect of human rights and that the taxpayer should not be burdened with heavy awards in claims touching on the public purse. I therefore decline to award the estate of the deceased exemplary or aggravated damages. In my view, general damages and special damages shall suffice to right the wrongs suffered by the deceased."

96. I have considered what transpired between the petitioner and the respondent's employees. I have equally noted the fact that there was basically no ill will or ill motive on the part of the respondent exhibited. I therefore do not find the petitioner deserving of the exemplary, aggravated and punitive damages claimed.

97. The upshot of the foregoing and for the reasons set out above, is that the petition dated 15th July 2016 has partially succeeded. I therefore issue the following orders:

- i. A declaration that the failure of the respondent to provide sufficient facilities and equipment to assist persons with disability to ascend the aircraft's steps and the treatment accorded to her was discriminatory, unfair, humiliating and inhuman.
- ii. Prayer B, (ii) seeking damages for libel and defamation is disallowed.
- iii. The petitioner is awarded general damages in the sum of Kshs.400,000/= (Four Hundred thousand shillings) for violation of her rights under Articles 27(1) & (4), 28 & 54 of *the Constitution*.
- iv. Prayer for exemplary aggravated and punitive damages is disallowed
- v. Half (1/2) costs of the petition to the petitioner.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

