



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 251 OF 2017**

**UNIGLOBE NORTHLINE TRAVEL LIMITED.....APPLICANT**

**VERSUS**

**AGNES KAGURE KARIUKI.....RESPONDENT**

***(Being an appeal from the entire judgement of Hon. Muholi SRM***

***delivered on the 26<sup>th</sup> April 2017 in Nairobi CMCCC no. 4298 of 2014)***

**JUDGEMENT**

1) Agnes Kagure Kariuki, the respondent herein, filed an action against Uniglobe Northline Travel Ltd, the appellant herein, before the Chief Magistrate's court whereof she sought for compensation for inconveniences, damages for breach of contract, damages for breach of statutory duty plus costs and interest. Hon. P. Muholi, learned Senior Resident Magistrate heard the suit and entered judgment in favour of the respondent by awarding her general damages plus costs and interest.

2) Being dissatisfied with the decision of the learned Senior Resident Magistrate delivered on 26<sup>th</sup> April 2017, the appellant preferred this appeal and put forward the following grounds:

***The learned magistrate erred in law and fact by wrongfully evaluating evidence and law before him thereby arriving at the wrong conclusion.***

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

4) I have re-evaluated the evidence presented before the trial court.

I have further considered the rival written submissions plus the authorities cited by both parties. Though the appellant put forward a total of 11 grounds of appeal those grounds may be disposed of by two main grounds.

5) The first main ground is to the effect that the trial magistrate failed to evaluate the evidence, therefore erroneously coming to the conclusion that there was a contract between the parties, that the appellant was an intermediary and was in breach vicariously. The second ground is to the effect that the trial magistrate erred in awarding general damages for inconvenience and in awarding costs.

6) On the first substantive ground, it is the submission of the appellant that there was no contract between it and the respondent hence the trial court erred. It is pointed out that the trial court erred when it concluded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants before the trial court were employees or representatives of the appellant yet there was no credible evidence to prove that.

7) The appellant further argued that the fact that the respondent's agent, a Mr. Kariuki had a discussion with a Mr. Nyalori did not in itself create any link between her and the appellant. Its further the submission of the appellant that since the appellant did not channel payments through mpesa paybill no. 971910 platform the appellant was not liable.

8) The appellant also argued that the trial court erred when it found that the appellant was an intermediary yet there was no evidence tendered in support of the finding. In response the appellant's submissions, the respondent urged this court to dismiss the appeal stating that the trial court came to the correct decision in finding that there existed a contract between the parties which the appellant breached. The respondent also stated that there were credible evidence which established the existence of a contract and its breach.

9) The record shows that the 1<sup>st</sup> defendant testified before the trial court stating that he was aware that the appellant's agent contacted the 2<sup>nd</sup> defendant over the booking of the respondent's ticket to travel to Bujumbura in Burundi. It is apparent that there was confirmation that the appellant and or its agents spoke to the respondent's agent and agreed to enter into a contract with the respondent to get her a ticket to fly to Bujumbura.

10) The record shows that on 29<sup>th</sup> May 2014, the respondent bought from the appellant who then issued her with a ticket and booking to travel to Bujumbura and back to Nairobi. I am satisfied that there was sufficient evidence to show that there existed a contract between the appellant and the respondent.

11) The respondent tendered evidence to the effect that she was invited as chief guest to an event hosted by the Association of Kenyans living in Bujumbura and produced a letter of invitation as an exhibit in evidence.

12) The respondent further stated that she travelled to Kenyatta International Airport only to be told that her ticket had been cancelled by the appellant. The appellant also tendered evidence showing she paid for her ticket via mpesa through paybill no. 971910 which amount was acknowledged by the appellant. It is clear from my re-evaluation of the evidence that a contractual relationship was established actually and or by implication. I am convinced that the learned Resident Magistrate came to the correct decision.

13) In respect of the second main ground, the appellant argued that the relief for general damages for inconvenience was awarded yet the same was not pleaded by the respondent. It is also argued that no evidence was tendered in support of the claim save for the mention of consequential damages, therefore award on damages should not have been given. In response, the respondent is of the submission that the trial magistrate looked at the nature of the contract and how the loss occurred and assessed the damages awarded.

14) I have looked at the factors the learned trial magistrate took into account in assessing damages and I am convinced that the trial court cannot be faulted in the manner he dealt with the issue on damages.

15) The respondent has raised a preliminary issue which I think deserve to be determined. It is the respondent's submission that the firm of Abidha & Co. Advocates are improperly on record having replaced the firm of Ndungu Njoroge & Kwach Advocates after judgement without seeking for prior leave.

16) It is apparent that the firm of Ndungu Njoroge & Kwach advocates represented the appellant before the trial court until judgment was delivered. It is also apparent that the firm of Abidha & Co. Advocates filed this appeal on behalf of the appellant. There is no evidence that the firm of Abidha & Co. Advocates came on record in the trial court's file. The provision of order 9 rule 9 of the Civil Procedure Rules applies to the case before the trial court but not on appeal. No leave is required by a new law firm to file an appeal on behalf of an appellant who has not instructed his or her advocate who represented him or her before a trial court to file an appeal. I therefore find the respondent's preliminary objection to be without merit.

17) In the end, I find no merit in this appeal. The same is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE RESPONDENT**

..... **FOR THE APPELLANT**