REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 33 OF 2018

ETHIOPIAN AIRLINES LTD.....APPELLANT

VERSUS

DANIEL TANUI AND 11 OTHERS.....RESPONDENTS

J U D G M E N T

1. Before trial court, the Respondent, as plaintiff, sued the current appellant, as defendant, seeking the recovery of special damages in the sum of USD 24,980/= as well as general damages, costs and interests.

2. As pleaded the Respondents claim at trial was based on the fact that having chosen to travel by the Appellant airline from Kenya to Malasyia, via Addis Ababa, the plaintiff party purposed to travel together between Addis Ababa and Kuala Lampur. It was their case that the journey was bungled when some members of the group of comprising two children and one adult being checked in on standby boarding passes a fact that forced the entire group not to travel as planned, were forced to spend the night at the airport before being taken to a Shanty Hotel in Addis Ababa but by that time their itinerary at the destination had been disrupted and moneys spent lost by fact of ***no show.***

3. As a consequence of delay and disruption of the planned tour they were forced to spend a sum of USD 24,980/= which they blamed on the Appellant and sought recovery.

4. For the Appellant, a defence was filed in which the disruption of the journey was admitted but attributed to late arrival by the plaintiffs at the check-in counter in Addis Ababa. It was further pleaded that three passengers on standby boarding passes agreed to their status and that the other 7 members freely and on own volition agreed not travel on time in solidarity with the three for which the Appellant should not be held liable. Overnight stay at the airport was admitted and the standard of hotel offered was said to have been the standard for the economy class the Respondents booked.

5. All the particulars of negligence and breach of duty of care and contract were all denied and the plaintiff put to start proof. Even the particulars of special damages and loss were all denied it being asserted that the Respondents were not entitled to any remedies against the Appellant. It was then pleaded that the contract of carriage between the parties was governed by the Warsaw and Montreal conventions as coded in Kenya in The Carriage By Air Act which limited liability and that in case of misconnect of a flight at transfer point, compensation has a formula for calculation which compensation the Appellant was ready and willing to afford to the Respondent but was declined by the respondents. It was then admitted rather rudely that the demand letter was received but the Appellant considered it unfit of a response as the Respondent did not seem to understand and appreciate the conditions of carriage.

6. After the pleadings closed, the trial proceeded by each side calling a single witness who then produced the documents filed and being cross examined. Some of the documents produced included air-tickets boarding passes and payment receipts including payment for alternative accommodation between Singapore and Malaysia. There was also a trail of email correspondence exchanged. For the Appellant the conditions of carriage were all exhibited and the limitations thereby imposed.

7. In his judgement, the trial court having considered the pleadings, evidence and submissions offered did find for the Respondent and awarded to each of the Respondents **Kshs.200,000/=** in general damages plus the pleaded special damages of **USD 24,980/=.**

8. In finding from the Respondent on liability, the trial court isolated for itself some three issues for determination. Of the three issues the one that touched on liability was whether the Appellant knew that the Respondents were travelling in a group to Malaysia. In answering and determining that issue the trial court rendered himself as follows:-

> **"The 1st plaintiff made the travel arrangements through Didi Agency which then communicated with the defendant. The invoice from Didi agency dated 30/9/2013 signed by Dinesh Shah indicated that what the 1st plaintiff was paying for "cost of package for land arrangements in Singapore and Malaysia for the group" consisting of the Mr. Daniel Tanui family, Mr. and**

Mrs Tek family and Mr. Githinji family. (see plaintiff's exhibit 3). <u>There is an email dated 14th December 2013 from the Defendant's employee by the name Fasika addressed to the 1st plaintiff which leaves no doubt that the defendant knew or ought to have known that all the plaintiffs in this case were travelling as a group. The email was produced as plaintiff's exhibit 6 and it reads as follows;</u>

<u>Thank you for choosing the Ethiopian Airlines. Our Airport staffs are already communicated to prepare the voucher in advance for all of you by collecting the necessary lay over cost USD 50/head. As you are Kenyans, there is no need for Visa requirement at Addis Ababa and no visa charge of USD 20.</u>

We thank you Henan as well for creating this opportunity to introduce our office with your esteemed company. We are very glad indeed to meet your expectation. We hope that you will have a very good enjoyable time with friends and families."

9. It is the judgment flowing from that finding which has aggrieved the appellant thus inviting the current appeal in which some 10 grounds have been raised in the Memorandum of Appeal dated 5/3/2018. Even if so framed, my reading of the grounds leads me to group same into 5 grounds as:-

i. The trial court erred in law in disbelieving the Appellants evidence in support of its defence (*grounds 1, 2 & 10).*

ii. The trial court erred in law and fact in misapprehending the contract of carriage by air and its terms *(Ground 3 & 4).*

iii. The trial court erred in finding that the plaintiffs tickets were booked as a group and that their travel was confirmed all the way from Kenya to Malaysia *(Grounds 5, 6 & 7)*

iv. The award of USD 24,980 was in error because the same had not been specifically (sic) strictly proved.

v. The award of general damage was in error and without justification.

10. I propose to deal with the said grounds seriatim in the order set out even though I appreciate that analysis of some of the grounds would run into and have a bearing on the others.

11. In undertaking this determination, I am cognizant that my task, as a first appellate court, is in the nature of a retrial and include and must entail re-evaluation of the entire evidence on record with a view to coming to own conclusions.

<u>Did the trial court disbelieve or disregard the Appellants evidence at trial?</u>

12. The evidence tendered on behalf of the Appellant was by one Fedeku Kebebe who works for the appellant as the traffic sales manager and confirmed to know the 1st Respondent as a customer. He confirmed that the Appellant issued several tickets from the Respondents for travel between Kenya and Malaysia through Ethiopia and that in Ethiopia three members of the party were put on standby boarding passes and were therefore accommodated and given the next available flight. He also said that they complied with the Warsaw convention, article 9, and were each offered compensation of 300 USD or cash 150 USD but the Respondents rejected the offer. He however confirmed that the ticket were issued by his colleague and further that the plaintiff were delayed in reaching their destination.

13. In his judgment, the trial court had the chance to consider that very evidence of page 28 of the Record of Appeal. In the judgment the court said:-

"The Defendant's witness Fekadu Kebebe (DW 1), told the court that although 3 of the passengers were on standby tickets from Addis Ababa to Malaysia, the tickets were confirmed for travel between Kenya and Malaysia. That statement in my view sounds contradictory. It appears DW 1 wants to confirm that although the trip was confirmed from Kenya to Malaysia, it had not been confirmed in respect of 3 passengers. DW 1 further confirmed that for passengers on standby tickets they accommodate them and give them the next available flight according to the Warsaw Convention. He did not however explain why there was no attempt to offer any of the passengers the said accommodation once they arrived in Addis Ababa. The other thing that makes the evidence of DW 1 unbelievable is the while the defendant contends that the passengers were treated very well is the no explantion has been given as to why the passengers were left at the airport without care of consideration until the following day.

Lastly, DW 1 told the court he was not privy to the communication between the plaintiffs and Fasika. In my view, the cannot be in a position to dispute the version of events as narrated by the 1st plaintiff before the trip and what arrangements were there before the plaintiffs arrived in Addis Ababa"

14. This to me was a very candid, detailed and deep regard and consideration of the evidence offered and there cannot be justification for this court to hold otherwise. The court did find, I hold properly so, that there was no explanation why passengers holding confirmed tickets were to be put on standby. He then posed the question why the Respondents were never accommodated for the night leading to then spending the night at the airport. Those two issues then led the court to find the Appellant to have been at fault and proceeded to enter judgment against it. In my finding, the finding of facts on breach were well founded on the evidence led and are devoid of any error or misapprehension of both law and evidence. Those grounds fail and are dismissed.

<u>Did the trial court mis-apprehend the contract between the parties?</u>

15. The evidence led about the contract of carriage by air was that the Respondent booked a flight between Kenya and Malaysia on definite days with time set for departure and that for arrival estimated. That contract was evidently governed by the carriage by air Act which domesticates the Warsaw convention and the Hague protocol. That statute does provide for the remedies available between the parties in case of a breach. In the instant case there was indeed a clear breath for which the trial court awarded what was sought and pleaded as special damages as well as general damages for breach of contract. A perusal of the record at trial does not reveal to me any misapprehension of the terms of the dealings between the parties and even in the submissions offered none was pointed out. Without demonstration of misapprehension, no basis exists to interfere with the decision thereby reached. Even these grounds cannot succeed but are hereby dismissed.

16. The third issue and which ties with the forth is whether the Appellant was aware that the Respondents were booked and confirmed to travel all the way from Kenya to Malaysia. On those grounds the Appellant contends that the tickets were brought by an agent and all the itinerary between Malaysia and Singapore were outside its knowledge just as much as it was unknown to it that the plaintiffs were travelling as a group or a party. In my view the Appellant cannot escape from liability on the basis that he was not aware that the parties were trucking together.

17. To start with DW 1 was unequivocal that the tickets were issued by an employee of the Appellant one Mr. Fasika and that he was not conversant nor privy to the discussion between the Respondents and the said Mr. Fasika. The fact is that the tickets were issued on behalf of the Appellant by a confirmed employee against whom there is no allegation of having overshot mandate. He must be deemed to have been acting within the scope of his authority for which liability is shouldered by the employer.

18. The second reason is that the Respondents were, in the words of DW 1, confirmed to travel between Kenya and Malaysia. When that confirmation on definite date was disrupted there was breach by the Appellant which then culminated in the obvious interference with the Respondents itinerary culminating in the loss and expenses incurred to arrange alternative travel between Malaysia and Singapore on a pre-arranged tour. That loss was wrongfully occasioned to the Respondents by the breach on the part of the Appellant. It cannot thus pass to be said by the Appellant that the tickets were not confirmed all the way from Kenya to Malaysia when its witness said so on oath. That fault on the court cannot be true on the evidence adduced and if not true cannot be the basis to overturn the decision reached by the trial court.

19. Having found that the Appellant was wrongful in its handling of the Respondents travel arrangements the trial court then awarded to the Respondents, the sum of USD 24,980 based on the receipts produced at trial. That sum was specifically pleaded and particularized into three items which add to the sum awarded. One may only add that in evidence the receipts were indeed produced to show the expenses incurred but for which services could not be enjoyed by the Respondents on account of delay.

20. The ground of appeal actually seeks the court to interfere with the trial courts factual findings at trial. The law in this area is clear and trite that such can only be done where the findings are based on no evidence at all or when the same is contrary to the evidence led[1]. Here I find that there was sufficient evidence to support the finding and there is neither reason nor justification for the court to interfere.

21. Lastly, was the award of general damages justifiable? In his submissions before court he counsel cited to court the decision in ***GICHUHI MACHARIA VS VIRGIN ATLANTIC AIRWAYS LTD [2012] eKLR*** for the proposition that general damages are not awardable on breach of contract. That submission to this court was an inappropriate one or just misleading. The general rule is that general damages are normally not available for breach of contract in addition to quantified damages[2]. It is not a blanket rule that general damages **can never** be awarded for breach of contract. I find it expressed to be that an award of damages for breach of contract is subject to the duty to mitigate losses and intended to put the claimant as far as possible as he would have been had to breach not occurred. This is the principle I see to emerge from the Court of Appeal in not very few case[3] of those many cases one may cite ***Consolata Anyango Ouma vs South Nyanza Sugar Company Ltd [2015] eKLR*** where the court said:-

> **"As a general, principle the purpose of damages for breach of contract is, subject to mitigation of loss, that the claimant is to be put as far as possible in the same position he would have been had the breach not occurred. This principle is encapsuled in the Latin maxim/phrase, *restitutio integram*".**

22. There is to me therefore no firm basis in law that in Kenya no damages are awardable for breach of contract. What the Court of Appeal said in **Kenya Tourism Development Corporation vs Sundowner Lodge Ltd [2018] eKLR** was that there is a general rule but with exceptions.

23. For this appeal, I do find that there having been a breach, the Respondent were entitled to damages. This is not alien to Kenya but is a general principle of the law of contract. The author of Anson's Law of Contract, 24th Edition writes on the principle of Law as follows:-

> **"Every breach of contract entitles the injured party to damages for the loss he or she has suffered, Damages for breach of contract are designed to compensate for the loss damage or injury the claimant has suffered through that breach. A claimant who has not, in fact suffered any loss by reason of that breach, is never the less entitled to a verdict but the damages recoverable will be purely nominal".**

24. I understand the position of the law to be that he who claims damages for breach of contract must prove that loss in certain terms and that breach does not, *Ipso factor*, attract damages. When juxtapose the principles of award of damages against the facts in this case, I have failed to find my error of principle upon the trial court when it did render himself in the following terms:-

> **"In the present case, the plaintiffs spent the night at the airport. There was no communication as to what arrangements the defendant was making on the accommodation until the following day when they were taken to a hotel. The plaintiffs asked the defendant's agents to allow them to access their bags but their request was rejected. <u>As a result, the plaintiffs had to incur more expenses in clothing and toiletries while in Addis Ababa</u>.**

In the case of Patrick Kimathi (supra) Justice R.K. Rawal made the following observation before awarding the general damages:-

"…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 airline. The measures taken by the defendant were neither adequate nor timely. There's nothing to show the unavailability of the hotel despite the passengers having been at the airport from 10pm to 3:30pm the next day...

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".*

Equally in this case it's my finding that the plaintiffs were left stranded and without proper care or consideration form the defendant. The provision of a hotel on the morning of the following day after the plaintiffs had spent the night at the airport could not have helped the situation. Some of the plaintiffs in this case are children who must have gone through a lot of anxiety when they were left stranded at the airport. Their experience at the airport cannot be said to be the normal frustration which a passenger suffers from delay in flights.

Finally, the court has to determine how much should be awarded to each of the plaintiffs for the trauma and frustration they underwent while at the hands of the defendant. In my view, general damages of Kshs.200,000/= to each of the plaintiffs would be adequate compensation".

25. That, is the kind of damages the law envisages under the Carriage By Air Act which must be seen and taken to domesticate article 19 to 23 of the convention. Articles 19 and 20 provide:-

Article 19: "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

Article 20: The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that is was impossible for him or them to take such measures".

26. The statute actually imposes statutory liability which can only be displaces by the carrier proving non-fault or that the injury was contributed to or solely occasioned by the passenger. In fact the measure of damages are regulated in that under article 23 any term in the contract of carriage that seeks to relieve the carrier of liability or limiting the same below the sums provided by article 22 is deemed null and void.

27. On the basis of the fact that damages are specifically provided for under the statute, and the sum awarded being within the parameters provided by the statute and do not answer to the description of being too high as to amount to outright erroneous estimates, I do find that the decision by the trial court was sound and well-founded cannot be upset or interfered with on the grounds disclosed. Having so found it is the appeal that I find and hold to be lacking in merits and I thus I order that it be dismissed with costs.

Dated and delivered at Mombasa this 8th day of November 2019.

P.J.O. OTIENO

JUDGE

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[1] *Selle and Another V. Associated Motor Boat Co. Ltd & Others (1968) EA 123*

[2] *Dharamshi Vs. Karsan [1974] Ea 41,*

[3] Kenya industrial Estates vs Lee Enterprises Ltd [2009] eKLR

Peter Umbuka Muyaka vs Henry Sitati Mumbasu [2018] eKLR