



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROB

CIVIL CASE NO. 3527 OF 1992

GEORGE GAITI.....PLAINTIFF

versus

GULF AIR.....DEFENDANT

JUDGMENT

The plaintiff herein was booked to travel as a passenger for reward on the defendant's aircraft from Nairobi to New York. The date of departure was 26th July, 1991.

The plaintiff was issued with an apex ticket whereby one cannot book but one books and pays at the same time and the dates of travel cannot be changed.

It is the plaintiff's case that on the said 26th day of July, 1991 he arrived at the airport, Nairobi, two hours before departure time but when the flight arrived from Dar es Salaam it was full and so he missed a seat.

The plaintiff contacted his agent and the defendant's manager and with their help managed to travel on 27th July, 1991 by another airline, Kenya Airways but not before he paid an extra Kshs. 15,000/-.

In London he had only 15 minutes to connect to New York and as a result he was unable to obtain travel coupons which would have enabled him to travel cheaply.

It is also the plaintiff's case that he was going for a trade show and had shipped his merchandise from Kenya to the United States of America. As a result of the delay in departure from Nairobi he arrived in New York a day late and was unable to display his goods.

As a result of the foregoing the plaintiff said he was put into considerable trouble, inconvenience and expense and suffered loss and damage.

The plaintiff has given particulars of special damages in paragraph 6 of the plaint. These are kshs. 15,000/- paid to travel on the following day, loss of travel coupons kshs. 33,000/-. Loss in business due to late travel kshs. 70,000 and Return ticket kshs. 23,000/-. he has also claimed general damages, costs and interest.

The plaintiff gave evidence in support of his pleadings and was cross-examined by the learned counsel for the defendant. I expected the defendant to call evidence to dispute some assertions made by the plaintiff under some assertions made by the plaintiff under cross-examination. This was not the case. But that is not to say that the defence did not make any impact at all.

Both learned counsel have made their respective submissions. the defendant has submitted that no seat was guaranteed and the endorsement on the ticket expressly says so. Proof is on a balance of probabilities. the evidence of the plaintiff on an Apex ticket remains uncontroverted and the exclusion clause does not aid the defence much when no evidence was called so that it could be tested under cross-examination.

I am satisfied that the plaintiff did not travel on 26th July, 1991 not because he was late to report at the airport but because the flight arrived full from Dar-ex-salaam.

That the plaintiff paid an extra kshs. 15,000 to travel at regular commercial rate has been admitted by the defendant in paragraph 8 of the defence but the defendant says that was occasioned by the plaintiff's failure to report at the airport on 26th July, 1991. The evidence of the plaintiff which says otherwise is unchallenged.

I agree with the learned counsel for the defendant that special damages must not only be specifically pleaded but must be strictly proved. The payment of kshs. 15,000. I believe passes that test as it features in both the plaintiffs case and that of the defendant. I have not been given any evidence as to loss of travel coupons and how the figure of kshs. 33,000 was arrived at. That also applies to the claim for loss of business for late arrival.

The plaintiff pleaded the cost of the return ticket. It is his evidence that he did not return on the scheduled dates as he had to delay and sell his goods which he could not due to late arrival at the show. That reason appears plausible. Exhibit 1 is the original ticket issued by the defendant to him. The last leaf return ticket is in situ. I believe he must have paid some money for his return and kshs. 23,000 pleaded has not been seriously disputed. I shall grant that prayer.

In my judgment therefore special damages proved amount to kshs. 38,000/-.

On the issue of general damages, I believe the plaintiff was inconvenienced going by his evidence as a whole. I believe he is entitled to some damages to some extent. I award him a modest sum of kshs. 50,000/- general damages.

In the end there shall be judgment for the plaintiff in the sum of kshs 38,000/- special damages plus kshs. 50,000/- general damages. The plaintiff shall also have the costs of the suit and interest at court rates. Orders accordingly.

Dated and delivered at Nairobi this 5th day of November, 1998.

MBOGHOLI MSAGHA

JUDGE