



**Dhanji v Kenya Airways Limited (Complaint 4 of 2019)
[2019] KEMC 1 (KLR) (16 December 2019) (Judgment)**

Neutral citation: [2019] KEMC 1 (KLR)

**REPUBLIC OF KENYA
IN THE MILIMANI COMMERCIAL CHIEF MAGISTRATE'S COURTS
COMPLAINT 4 OF 2019
P. MUHOLI, CHAIR
DECEMBER 16, 2019**

BETWEEN

GOPAL DHANJI PLAINTIFF

AND

KENYA AIRWAYS LIMITED DEFENDANT

JUDGMENT

1. The Claimant Gopal Dhanji Patel filed suit originally in the Chief Magistrates' Court at Milimani which was later transferred to this Tribunal.

The claim was filed on September 14, 2016 seeking the following reliefs;

1. A sum of USD 1,555 being the cost of Respondents flights missed by the Claimant.
 2. A sum of USD 1,850,000 being additional flight charges incurred by the Claimant on Qatar Airways ticket.
 3. General damages
 4. Costs of claim
 5. Interest
2. The Respondent company was served and they filed Response (Now response) dated October 28, 2016 in which they denied the Claimant averments in the Plaint/Claim.

Parties having complied with the pretrial directions, the case was set down for hearing.

Claimant's Case

3. The Claimant testified as PW1 on 4/10/2019. The claimant alleges that he booked a flight with the Respondent's airline in the month of March 2016 intending to travel to India on a very important



medical examination. On March 17, 2016, he entered into a contract of carriage by passenger ticket number ETKT 706 93947214xxxx. He was to fly to Mumbai in India on flight number KQ210 ON March 24, 2016.

4. It was his testimony that the flight was scheduled to depart Jomo Kenyatta International Airport Nairobi at 0745 hrs. However, when he checked in, he was informed that the flight had been delayed and would board at 0830hrs. He was then issued with a boarding pass and informed that he would board from gate 19.

He told the Tribunal that at about 0820hrs, he proceeded to gate 19 and on presenting his boarding pass, he was informed that the flight had departed for India. He told the Tribunal that he was shocked and when he enquired nobody from the Respondent seemed to have an explanation of what might have happened. He considered the action to have been of gross negligence and reckless. He says that because of this delay, he would miss the connecting flight in India from Mumbai to Ahmedabad.

5. He was subsequently asked to wait by the respondent and be booked on a flight that was to leave the following day by the respondent, he however, could not wait since that meant he would miss his Hospital appointment. He therefore, booked another flight on Qatar Airways upon which he spent USD 1,850 to procure a ticket. Ticket Number 15793xxxxxxx-818 was issued for a flight to board at 1135 hrs. and depart at 1220 hrs aboard flight No. QR 13xx on the same day.

He told the Tribunal that the actions by the Respondent company caused him mental anguish, stress that he could not even undergo the scheduled treatment. He also told the Tribunal that the actions denied him the enjoyment of his privileges accorded to the Flying blue Platinum members.

6. On cross-examination, he told the Tribunal that he is a frequent flier and that when he checked in he went to the respondents business lounge and in that lounge they do not announce when flights are leaving. The claimant told the Tribunal that he checked in and therefore the system showed that he was at the business lounge. He further told the Tribunal that in as much as he made it to the hospital in India, he was late and he could not be treated. The Claimant closed his case.

Defence case

- . The Respondents did not call any witness and closed their case.
Parties have filed submissions which we have considered.

Claimant's Submissions.

- . The claimants filed their submissions on 18/10/19. They identified 3 issues for determination which are:
 1. Whether there was a contractual relationship between the claimant and the Respondent.
 2. Whether there was a breach of the contract by the Respondent.
 3. Whether the Claimant is entitled to the reliefs sought.
- 5. We have considered the arguments presented under each of the issues and we do not wish to reproduce them but shall consider the same during our arguments.

Respondents Submissions

6. The Respondents Advocates filed their submissions on 1/11/2019. The respondents also identified 3 issues which are similar to those by the claimant. We have considered the parties pleadings, oral



evidence, exhibits and the issues and their arguments and the issues in our view for determination are as follows:

1. Whether there was a contract between the claimant and the Respondent.
2. If the answer to (1) above is in the affirmative yes, whether that contract was breached by either the claimant or Respondent.
3. Whether the claimant is entitled to the reliefs sought.

Whether there was a contract between the claimant and respondent

7. The claimant submitted that Article 3(2) of the [Warsaw Convention](#) as read with Article 3(5) of the [Montreal Convention](#) provides:

“The passenger’s ticket shall constitute prima facie evidence of the conclusion of the contract of carriage....”

8. The Respondent on the other hand stated that the claimant had failed to prove the existence of a contract.

The claimant in this case stated that he booked an air ticket on March 17, 2016 from Kenya to India and was to travel on March 24, 2016, under ETN 706 93947XXXXX aboard a KQ flight No 210. He produced a copy of the ticket as well as a boarding pass and luggage tag which were all not challenged. Once the respondent issued an E-ticket and even issued a boarding pass, a contractual relationship was created and that is our finding. As per article 3(2) of the [Warsaw Convention](#) as read with article 3(5) of the [Montreal Convention](#).

Whether the contract was breached by the Claimant or Respondent.

9. The claimant’s evidence was that he booked an Air Ticket and was scheduled to travel from Nairobi to Mumbai, when he got to the Airport at 5 am, he was informed that his flight had been delayed and would depart at 0900hrs instead of 0745hrs. he was expected to board at 0830hrs. When he went to board, he was informed that the flight had already departed.

10. When the claimant purchased an air ticket, a contract was created, he expected that he would be flown from Kenya to Mumbai India.

The claimant’s evidence was that he was required board at 0830hrs, however, the news that the flight had departed at 0745hrs was a miscommunication by the respondent and in his view this constituted a breach of the contract.

The ticket indicated that he would depart at 0745hrs, he presented himself to the airport on time and checked in, the boarding pass presented to him indicates that he was to board at 0830hrs through gate 19 and departure time was indicated as 074hrs. These confusion in the time made the claimant present himself at gate 19 at 8.30am only to be told the flight had departed. It is therefore a confusion not occasioned on the part of the claimant. The Respondent communicated wrong information to the claimant. No evidence was presented to rebut his assertions that there was a delay of the scheduled flight.

Had the respondent called a witness, it would have shed light on how it ended up providing a boarding pass with wrong timings, but they chose not to do so.

11. Superior courts have held that where a Respondent has filed defence, fails to call any witness to give factual evidence, the defence as filed remains mere allegations, the case of [Motex Knitwear Limited v](#)



Gopitex Knitwear Mills Limited (2009) e KLR is illustrative on what happens when the Respondent fails to call any evidence on the circumstances in issue.

In our view, and on a balance of probability, the claimant has established that there was breach. The boarding pass and the ticket are evidence of the confusion in timings that was occasioned by the Respondent. There is no doubt that the claimant did not travel on the booked flight. The claimant alleges that he had booked into the business lounge and he would have expected that the staff of the respondent would have gone further and located him and their failure to do so was evidence of carelessness on their part. There is no evidence that the claimant breached the terms of the contract. We therefore make a finding that the Respondent breached the contract of carriage.

Whether the claimant is entitled to the reliefs sought.

(a) A sum of USD 1,555.00.

12. The claimant states that he bought the ticket but due to the breach, he did not travel. He produced a ticket which indicated that he had paid USD 1,555.00. This was the contractual amount. Though the respondent state in their submission that the claimant is not entitled to the amount since he did not travel to India. That would be a wrong philosophy to apply here. Yes he travelled, but not with the Respondent. The claimant never travelled as booked, he never utilized the funds. He is therefore entitled to a refund. We shall therefore order a refund of USD 1,555.00.

(b) A sum of USD 1,850.00. The Qatar ticket

13. On this head, it is our finding that he is not entitled to a refund of this ticket since he had already been compensated for the one he missed. However, the evidence tendered shows that the claimant spent an additional USSD 295 for the second Ticket over and above the amount he had booked the Initial ticket. In our view he is entitled to the difference. Consequently we will award him USD 295.

(c) General damages for breach of contract

14. Article 19 of the *Warsaw Convention* and Article 22 of the *Montreal Convention* provide that the carrier is liable to pay damages unless it shows that the damage was not as a result of their carelessness and that it took all measures to avoid.

Article 22 paragraph 1 had restricted the compensation to 4,150 Special drawing rights however, the said article had a proviso that it shall not apply if the omission of the carrier occasioned the damage. The said special drawing rights has been amended to 4,694.

The damage herein was solely occasioned by the carrier and therefore it is our finding that the provision of the convention shall not be applicable.

15. In determining the quantum to be paid, we are guided by the Respondents submissions that the claim of an award of this nature is to put the claimant in the same position he was in prior to the breach. The cases cited by the respondent of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* (2015) eKLR, *Kenya Tourist Development Corporation v Sundowner Lodge Limited* (2015) eKLR are illustrative.

The claimant was going for medical attention, He was at the airport on time, it would appear that no one from the Respondent was willing to offer an explanation regarding the miscommunication on the timings. To date it would appear no apology has been given, and if it was it has not been exhibited. He was a flying blue member, which means he was a valued customer and a frequent flier. He was in the business class, which means, he had paid so as to enjoy a certain class of comfort. It would appear



that he had to spend an additional USD 1,850.00 for a Qatar Airways ticket. This is money he would not have spent had he not have been inconvenienced. It is this inconvenience that this Tribunal must reward. Consequently, we are of the view that an award of USD 5000 is adequate compensation as general damages.

16. The claimant shall be entitled to costs of this claim.

Interest on USD 1,555 and USD 295 making a total of USD 1850 shall be from the date of filing of the claim and on general damages from date of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2019 BY

PETER MUHOLI-CHAIRPERSON

ALICE OWUOR-VICE CHARIPERSON

KURIA WAITHAKA-MEMBER

ENG PATRICK OCHIENG-MEMBERS

EUTYCHUS WAITHAKA-MEMBER

Donald Asiago – Court Assistant

