



REPUBLIC OF KENYA

IN THE NATIONAL CIVIL AVIATION ADMINISTRATIVE REVIEW TRIBUNAL AT NAIROBI

COMPLAINT NO. 2 OF 2018

CHARLES VICTOR OKUMU..... 1st COMPLAINANT

MARY YUANITA OKUMU.....2nd COMPLAINANT

VERSUS

KAYLAN TOURS AND TRAVEL.....RESPONDENT

JUDGEMENT OF THE TRIBUNAL

INTRODUCTION

This is a claim for reimbursement of amounts paid to the respondent company for air ticket bookings brought by the complainants against the Defendant/respondent. The Defendant/respondent is a Tours and Travel Agency whose services were procured by the complainants to acquire various flight tickets in the year 2016. The first ticket was for the complainants daughter for a flight from Nairobi to New York and thereafter from New York to Free Town; which the Complainants claim that their daughter was not allowed to use from New York to Free Town. The second Complainant then had to purchase a new ticket for her daughter to facilitate her travel. The second ticket was that of their other daughter, for flights from Johannesburg to Amsterdam, Amsterdam to New York, back to Amsterdam and lastly to Johannesburg. This ticket was refused at boarding while at New York heading to Amsterdam forcing the Complainants to pay for new tickets to enable her complete her trip. The third ticket was booked for the Second complainant for December 2016; a flight from Nairobi to Johannesburg. The Second complainant claims that the Respondent used her personal information to access her Flying Blue account and acquire the ticket through the KLM Royal Dutch Airlines air miles loyalty award programme referred to as Flying Blue; for which the Defendant still claimed fees.

Based on these facts, the complainants by way of Complaint dated 19th January 2018 moved to the Tribunal seeking the following prayers against the respondent company:

- a. *USD 2752*
- b. *Costs of the suit*
- c. *Aggravated, exemplary and general damages for embarrassment*
- d. *Interest on (a) and (b) above*
- e. *Such other relief the court may see and deem fit to grant.*

The Defendant /Respondent by way of Defence and Counterclaim dated the 16th of October 2018 denied the allegations set forth in the Complaint. It admits to receiving instructions from the Second complainant to book flights for her and her family – a total of three

tickets. The respondent however wanted proof that the Second complainant had to acquire new tickets for each of the complainant's daughters in the two instances and denied having accessed the Second complainant's loyalty award points as it did not have her security details to log into her account. It made a counterclaim for the following orders:

a. USD 2752 for services offered

b. Any other reliefs the court may deem fit.

The matter was referred to the National Civil Aviation Administrative Review Tribunal on the 17th of August 2018 by consent from both parties signed in open court who expressed their wish to have the case concluded within a short period.

At the hearing before the Tribunal the Complainants evidence was tendered by *Charles Victor Okumu (PW1)*, *Violessa Apeople Nekesa Okumu (PW2)*, *Robert Mugo Mwangi (PW3)* as witnesses in support of their case while *Victor Muli (DW1)* was the Defence witness. After hearing the Complainants and Respondent submitted their written submissions dated 5th of December 2018 and 14th of December 2018 respectively.

COMPLAINANTS' CASE

The First complainant is the husband to the second Complainant who is an employee of United Nations Women. She is a frequent flier but delegates booking of airline tickets for herself and her family due to her intensive work schedule. She would seek the services of the Respondent who would book tickets which she would pay for thereafter. The complainants family learnt about Victor through *Violessa Okumu*, their daughter, who met him through her friend Maureen Mary. The First complainant testified that in 2016 the Respondent booked a number of tickets for their family, including that of *Violessa*. Her flight was to be from Nairobi to New York and thereafter from New York to Free Town using Qatar Airways and Royal Air Maroc; for which the complainants produced a copy of a ticket booked by the Respondent. She was however not allowed to board her flight from New York, which she later found out from the counter was because her ticket had simply been booked and not paid for. The second complainant was forced to part with close to USD 2000 to purchase a new ticket to facilitate her daughters travel out of New York.

In the same month the Second complainant instructed the Respondent Company to book her a flight from Nairobi to Johannesburg using Kenya Airways. The ticket stated the departure day as 29th December 2016 and return on 23rd January 2017, a copy of which she produced as MYO3. Upon enquiry from Kenya Airways she found out that the ticket was booked using her loyalty points from the Flying Blue loyalty program for which the complainants produced a printout copy of the email as MYO10 dated 9th January 2018. Through a phone call they also found out that the only payment the Respondent had made was that of KSHS 10, 000 to reschedule the said ticket.

The Respondent procured another ticket for Ezrin Priscilla Nafoyo, another daughter of the complainant, for a flight from Johannesburg to Amsterdam, Amsterdam to New York, New York to Amsterdam and from Amsterdam to Johannesburg for the 9th to the 30th of December 2016. The flights were on board KLM Royal Dutch Airlines for which the complainant produced a copy of the ticket as CVO4. This ticket was used by Ezrin Nafoyo to go to New York but she was denied boarding at JFK while trying to leave for Amsterdam. The reason she was given for this is that she could not use the Kenya Airways ticket on KLM flight as there was no code sharing agreement between the two airlines on that particular ticket. PW1 and his wife proceeded to KLM Offices in Johannesburg then later to the Kenya Airways offices in Oliver Tambo Airport, Johannesburg where they were situated at the time, to find out why their daughter could not use the same ticket. It was there that a Kenya Airways representative informed them that it was irregular to use a Kenya Airways ticket on a KLM flight as Kenya Airways did not fly to New York at the time. They further proceeded to the KLM customer offices in Johannesburg where they were informed that it was unlawful for Kenya Airways to issue a KLM ticket. The ticket could therefore not be accessed by the KLM staff through its system.

In January 2017, the complainant's daughter PW2 and PW3 reported the matter to the Police Station at the Nairobi Area Criminal Investigations Department Headquarters where Victor Muli, a director of the Respondent company, was called to explain his side of the matter. It was here that Victor admitted to not being fully honest in his dealings with them and agreed to reimburse what they had spent, namely USD 334 and KSH. 25,500. PW 2 and PW produced a copy of the agreement allegedly signed at the police Station between them and the Defendant as VAN03 and RMM1.

As the complainant waited for reimbursement from the Respondent, they received a series of letters from advocate representatives

of the Respondent demanding that they settle the USD 2752 allegedly owed; copies of letters were produced as CVO5. Upon receiving these demand letters, the complainants proceeded to contract M/S Samuel Nyambane & Co. Advocates to respond to the letters, the response was produced as CVO6. For a while it seemed the Respondent was quiet on the matter until he sent another letter to the second complainant, produced as CVO7, stating that he would list the complainants with Metropolitan Credit Service Bureau if she wouldn't pay up. The Complainants then engaged M/S K.N Mburu and Associates who wrote to the Respondent asking him to cease and desist from harassing the Complainants' family. A copy of this letter was produced as CVO8.

After a while they received an email from a Charles Mwando who stated that he had been authorized by the Respondent to collect the money owed to him from the Complainants, a printout copy of the email was produced and marked as CVO9.

PW2, Violessa further testified that in July 2016 she bought a return ticket to Lagos, Nigeria for KSH 75000, money that she wired to Robert Mwangi, PW3 who then paid the Respondent. On the day of departure, she was however informed that she merely had a booking and not a ticket for the flight. She then called the Respondent who sent her approximately Kshs. 56,000/= and assured he would pay for the return leg. The Respondent however did not pay as promised which caused Violessa to procure a new ticket on Kenya Airways, from Fly Air Limited for USD 1410, a copy of which was produced as VAN01.

The complainants relied on the various air tickets, email communications, WhatsApp excerpts, an agreement as exhibits in this case.

RESPONDENT'S CASE

The Defendant/Respondent company was represented by Victor Muli its director; who testified that he was indeed instructed by the Second complainant on different dates between 2016 and 2017 to book several tickets for her and her daughters. He admitted to having an arrangement with the Second complainant where he would book the flight tickets and then get paid by her later. He admitted to booking tickets amounting to USD 2752 for his client and her daughters to various destinations. He disagreed that Violessa had been denied boarding from New York stating that there was no evidence of the newly purchased ticket instead that she wanted to change her flight without paying the requisite fees. He further denied that Second complainant had to purchase a new ticket for her daughter Ezrin for her flight from New York, stating that if the ticket was invalid as she claimed, it would have been impossible for her to use it to initially travel there. He produced excerpts of text messages between him and the second complainant marked as VM2 in support of his testimony that her daughter arrived safely. The Respondent denied having used the Second complainants' Flying Blue loyalty programme points as he did not have the necessary log in security details to access her account.

DW1 stated that he requested the second complainant to pay him after a while but she instead took him in circles, promising to pay but never fulfilling the same. He admitted that several demands had been made to get the USD 2752 to no avail, and that he had contracted the services of Charles Mwando a debt collector to try and recover this money from the complainants for services he alleges to have delivered. He challenged the complainants to produce evidence on various claims including the purchase of the new tickets as well as the access of the second complainants Flying Blue loyalty programme account thus her points. The Defendant denied having knowledge of the matter being reported to the Police Station stating that the respective station had not been specified nor had the occurrence book number and the steps taken by the police upon the complainant daughter PW2 reporting. He denied allegations that he harassed the Second complainant and her family stating that he was simply asking her to pay for the services he had provided. He further stated that the application was unfounded as the Second complainant had undertaken to pay the amount due to which he produced a copy of emails marked VM3. He also stated that he had not had any previous dealings with the First complainant.

Parties then filed written submissions which we have considered.

The Complainants felt that they have proven all of their averments through the Complaint and submissions while the Respondent was yet to prove that he was owed any monies and as such called on the Court to grant their prayers according to the Plaintiff.

The Complainants in submissions dated 5th December 2018 framed a number of issues which they believed if resolved would determine the case herein. These include:

- a. Have the Complainants presented a prima facie case"
- b. Whether there were services provided to the Complainants by the 2nd Respondent"

- c. Were the services provided by the Respondent done so in good faith"
- d. Whether the Complainants are entitled to the prayers as per the Plaint/ Complaint"

In submissions dated 14th December 2018, the Respondent raised the following issues for determination:

- a. Whether the Complainants have proved their case"
- b. Whether the Complainants proved fraud/ illegality as pleaded"
- c. Whether the counterclaim should be allowed"
- d. Costs of this suit

The Respondent in a counterclaim dated 8th October 2018, subsequently amended on 16th October 2018 stated that it was indisputable that he was instructed to provide services of ticket booking by the Second complainant for her two daughters; he provided the said services to her satisfaction in that they arrived at their destinations and that he was not paid for the tickets he booked despite the complainants using them. He further stated that there was proof of the demand letters sent to the Second complainant demanding the USD 2752 upon which upon demand no payment was made. He felt that the suit was an attempt at evading the payment for services he rendered and as such it should be dismissed with costs to the complainants as they have failed to prove their case and the counterclaim allowed.

Having considered the evidence and the exhibits produced together with the submissions it is our view that the following issues emerge for resolution:

1. Whether there was a relationship between the complainants and Defendants/Respondents
2. Whether the Respondent company was contracted to provide services and whether they were provided satisfactorily
3. Whether the Complainants are entitled to USD 2752
4. Whether the Respondent is entitled to USD 2752 as per the Counterclaim

Whether there was a relationship between the Complainants and Respondent

In resolving this issue, the complainant through the 1st Complainant told the Court that his wife (Second complainant) had contracted the Respondent for ticketing services, The Respondent through its witness also confirmed that it had been contracted to procure ticketing services for the complainant's family. The various tickets herein and the various demand letters sent by each of the parties to this dispute confirm that there was an agency relationship. What however is difficult to discern from all the communication is what the terms of the relationship were. From the various email conversations, it would appear that the complainants would place instructions for tickets and then pay later. It is our finding that there exists an agency relationship between the complainants and Defendants/Respondents.

Whether the Respondent was contracted to provide services and whether they were provided satisfactorily

The complainants allege that they contracted the Respondents to procure certain tickets to various international destinations in the year 2016. However, in utilizing the said tickets provided by the Respondents, they encountered many challenges ranging from denied boarding, and or just finding that there was no booking at all. In trying to consider the various complaints we shall handle the bookings for each party independently.

Under **Section 107** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Sections 108** and **109** of the *Act* further provide that

the evidential burden is cast upon any party with the burden of proving a particular fact which he desires the Court to believe in its existence. It is also well established that the standard of proof in civil claims is on the *balance of probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable (see *Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007] eKLR*). In this case therefore the burden lies with the complainants to convince us that they indeed requested for the tickets, paid for them and failed to utilize them for one reason or another and largely because of the Respondent. In our discourse therefore we shall weigh the evidence tendered against the threshold under Sections 107 and 109 of the Evidence Act.

Violessa Okumu

She alleges that she was booked from Nairobi to New York and then to Freetown using Qatar Airlines and Royal Air Maroc, that in the process of changing the flights she was denied boarding from New York to Freetown. She told the Court that as a result, the mother who is the 2nd complainant was forced to obtain a ticket for her from New York to Freetown. She produced a copy of the ticket she had been given by the Respondent. She also complained that she again in the month of July 2016 booked a flight from Nairobi to Lagos and on reaching the airport she was shocked to find that the ticket was not paid for and she subsequently called the Respondent who then arranged for her one-way ticket and she had to spend a further USD 1410. We have perused the documents presented to us and there is no evidence that she travelled to Lagos or that she had sent money to Robert Mwangi. Even the passport which was evidence for travel does not bear the port entry stamps to Lagos. In addition, there was no proof of travel from New York to Freetown and even if a new ticket was bought then, either the receipt or the ticket that she had travelled on a different ticket than that provided by the Respondent, should have been provided as evidence. There are also no stamps on the passport to show that she indeed had travelled at that time. In a nutshell we are not able to find for *Violessa* since the evidence given to the Tribunal is scanty.

Ezrin Priscilla

She claimed to have booked from Johannesburg to Amsterdam, Amsterdam to New York, New York to Amsterdam and Amsterdam to Johannesburg. She claimed the flights were booked for 29th December and 30th December 2016 and they were on board Kenya Airways and KLM. She told the court that she was denied boarding in a KLM flight from New York to Amsterdam on the ground that there was no code sharing between KLM and Kenya Airways on that route. We have evaluated the evidence presented by the evidence that she bought another ticket as claimed, no evidence of any complaint to Kenya Airways of the denied boarding. What we have noted is the proof of travel from the tickets presented and no other evidence. It is also our view that if the ticket had been used to travel from Amsterdam to New York on KLM, then there is no way she would have been denied travel on the return trip. In our view the complainant Ezrin Priscilla have not sufficiently proved that indeed she had been denied boarding on KLM and that claim also fails.

Mary Yuanita Okumu

The third complaint relates to Mary Yuanita Okumu the 2nd complainant who tells the Court that her complaint is that she paid for ticket from Nairobi to Johannesburg and paid for the same. She however later found out that the Respondent had accessed her KLM Flying Blue air mile loyalty points and used the same to make a booking for her. She alleges that this was fraud since she does not know how he was able to access her secret log in details. The respondent through Victor Muli has confirmed that it did not use the loyalty miles. Further to that assertion, the 2nd Complainant asserted that she then took upon herself to make inquiries from Kenya Airways who have confirmed in an email that indeed the loyalty miles were used for that ticket. The Respondent's argument was that there was a ticket discount offer and that he utilized that offer. No tickets were produced in court as exhibits. We have analyzed the evidence and indeed we are convinced that the Defendant booked the ticket using the air miles loyalty programme; we are also convinced that it was done without the permission of the 2nd complainant and hence it was done fraudulently and or without authorization. To that extent the claim for that trip has been proved. There is no evidence as to how much was paid as the fare by the complainant but having established fraud, the complainant is entitled to a refund. We have tried to find out how best to estimate the fare to Johannesburg from Nairobi aboard a Kenya Airways Flight. The booking is estimated from the Kenya Airways online booking platform and one wishing to travel on 1st December 2019 which is peak season (as was December 2016 when the Second complainant ticket was procured) would have to pay Kshs. 55,110/=, if the booking was to be done now. This in our view is a fair estimate in terms of compensation to the 2nd complainant which we hereby award.

Whether the complainant is entitled to USD 2752; no evidence has been tendered to warrant this amount and subsequently that claim is dismissed.

The Respondent filed a counterclaim also seeking USD 2752. It has neither given any evidence to confirm that the amount is owed; nor did it not offer any tabulation or state how it arrived at that amount. There is no proof of payment and no-account statement. In our view this is a figure that was plucked from somewhere, unbeknownst to us and placed in the pleadings. We would have expected that the Respondent would have produced a table showing the money received, paid and the tickets booked. On a balance of probability, the Respondent has not proved the same and in our view that claim fails.

The complainants also sought general and exemplary damages for fraud. She has successfully proved that her secret passwords to her air miles loyalty programme account were accessed. However, as regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of *Halsbury's Laws of England*, as follows: -

“Exemplary damages should be awarded only in cases within the following categories:

- (1) Oppressive, arbitrary or unconstitutional action by servants of government;**
- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the complainants; or**
- (3) Cases in which the payment of exemplary damages is authorized by statute.**

The Second complainant has successfully proved that the Respondent accessed her secret passwords with the intention to profit itself and this would exceed compensation to the Second complainant in terms of the fare she used to Johannesburg.

We have considered the totality of the evidence and we are of the view that an award of Kshs. 100,000/= as exemplary damages would be adequate.

We are also of the view that each party herein shall bear their own costs and interest on damages awarded shall be at court rates from the date of judgment till payment in full.

Summary

Exemplary damages Kshs. 100,000/=

Refund of Air Ticket (Nairobi to Johannesburg) Kshs. 55,110/=

It is so ordered.

Dated signed and delivered in Open Court this 19th day of February 2019

Hon P. Muholi..... Chairperson

A. Owuor.....Member

E. Waithaka..... Member

K. Waithaka..... Member

J. Ochieng.....Member

Court Assistant: D. Asiago



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)