IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

APPEAL NO. 8 OF 2017

FASTJET AIRLINES LIMITED.....APPELLANT

Versus

SHADRACK BUSALI.....1ST RESPONDENT
TANZANIA CIVIL AVIATION AUTHORITY.....2ND RESPONDENT

(Appeal from the decision of the Tanzania Civil Aviation Regulatory Authority in Complaint No. 3 of 2017 dated 22nd day of May, 2017)

JUDGMENT

In this appeal, there is one fascinating legal issue to be resolved: -

Whether the second Respondent erred in law and facts by awarding the quantum of general damages at the tune of USD 4000 to the first Respondent.

Before we go into the details of the appeal, it is useful to give a brief account of the case. The first Respondent had three travel connections. He purchased a return ticket from the Appellant to travel on 16th day of May, 2016 from Mwanza to Dar es Salaam at the tune of TZs 290,000/=. The first Respondent also purchased a return air ticket from the Appellant to travel on the same day from Dar es Salaam to Harare-Zimbabwe at the tune of TZs

822,000/=. The Appellant had further purchased a bus ticket from Harare to Johannesburg at the tune of 550 Rands.

The first trip, that is, the fight from Mwanza to Dar es Salaam, which was scheduled to depart from Mwanza at 1720hrs was cancelled and the first Respondent was booked to another flight which was to depart at 2215hrs. The timing of the flight caused the first Respondent to miss a connecting flight to Harare. The first Respondent had to ask for the way forward from the Appellant's official at Mwanza Airport who promised the first Respondent that he would be refunded for the Dar es Salaam-Harare flight upon arrival at Dar es Salaam.

The refund was later declined by the Appellant. The first Respondent had to spend two unplanned days in Dar es Salaam and had to purchase another air ticket to Johannesburg at the tune of USD 404.70. As the first Respondent was denied a refund, he decided to lodge a complaint to the second Respondent. After hearing the complaint, the Appellant was ordered to refund the first Respondent full costs incurred due to the flight cancellation as follows:

Fast jet ticket	TZs 822,800/=
Kenya Airways ticket	USD 404.70
Tax cost	TZs 23,000/=
Accommodation cost	TZs 100,000/=
General damages	USD 4000

Aggrieved with the decision of the 2nd Respondent, the Appellant lodged its appeal to this Tribunal with main one ground of appeal, namely; -

> *That, the Chairperson of the Committee of the Tanzania Civil Aviation Authority on the Consumer Complaint erred in law and facts by awarding an excessive quantum of general damages and compensation to the first Respondent.*

The Appellant, therefore, prayed for the following relief(s); -

1. That, this Hon. Tribunal be pleased to allow this appeal and set aside the award granted to the first Respondent by the Chairperson of the Committee of the Tanzania Civil Aviation Authority on the Consumer Complaint.
2. Costs of this Appeal to be borne by the Respondents.
3. Any other relief(s) that this Hon. Tribunal deems fit and proper to grant.

At the oral hearing of the appeal, the Appellant was dully represented by learned Counsel Ntemi E. Masanja while the first and second Respondents were advocated by Iddi Mrema and Patricia Chenga learned Counsels respectively.

Advocate Masanja told the Tribunal that the Appellant does not dispute other awards and the only ground of appeal is on awarding general damages of USD 4000 to the first Respondent. To back up his case, Mr. Ntemi cited to us various cases including the case of **Hadley vs Baxendale (1854) 9 Ex 354** and the case of **Fast Jet Airlines Limited vs John Mnaku Mhozya**

Civil Appeal No. 96 of 2016 (unreported). Such case laws will be considered at the later stage of this Judgment.

In expounding further the ground of appeal, Mr. Masanja acknowledged that there was a contract of carriage between the Appellant and the first Respondent as such the relationship between them was purely contractual. It was his contention that in addition to the Civil Aviation law, the parties' contractual relationship is governed by Part VII of the Law of Contract, Cap 345 (hereinafter referred to "LC") that deals with the consequences for breach of contract.

He argued that Section 73 (1) of LC stipulates that compensation for loss or damage caused by breach of contract must naturally arise in the usual course of things while Section 73 (2) of LC stipulates that compensation is not to be given for any remote and indirect loss or damage. According to Mr. Masanja the award of USD 4000 was contrary to the principles of Section 73 of LC since the parties' contract was a contract of carriage whereby there was a reasonable expectation that the 1st Respondent will be carried from one point to another as per the route of transportation. He contended that damages should arise from the Appellant's failure to transport the Respondent to his destination and not otherwise.

Mr. Masanja pointed out that Rule 25 of the Civil Aviation (Carriage by Air) Regulations, 2008 provides for the ceiling of awarding damages. It states: -

"In case of damage caused by delay as specified in regulation 22 in the carriage of persons, the liability of the carrier for each passenger is limited to the equivalent in Tanzania Shillings of United States Dollars 5000."

According to Mr. Masanja the parties' contract was a contract of carriage, then the second Respondent had to abide by the rules of contract and not award damages by willing and fancies. The counsel further commented that the second Respondent did not provide reason and justification in its decision for awarding USD 4000. Mr. Masanja argued that the award of 4000 USD was in addition to other damages, which the first Respondent was fully compensated by the Appellant. The counsel contended that if this will be left to stand, it will adversely affect the airline industry especially the Appellant. To the counsel's view, the award of USD 4000 was not to restore the first Respondent but a benefit to him. Mr. Masanja, therefore, requested this Tribunal to vary or set aside the decision of the second Respondent.

In rebuttal, the first Respondent's Counsel Iddi Mrema averred that the general damages were awarded in accordance to Rule 25 of the Civil Aviation (Carriage by Air) Regulations, 2008 in that the Authority did abide with the law. He contended that Section 73 of the Law of Contract Act does not provide an amount to be paid and the only law which provides for the ceiling of USD 5000 is Rule 25 of the Civil Aviation (Carriage by Air) Regulations, 2008. It was further replied that the second Respondent considered the circumstances of the case and this is found at page 1 Paragraph 2 and 6 of

the typed decision. The counsel further told this Tribunal that the first Respondent tried to meet with Fast Jet but the Appellant did not respond and it was for this reason that prompted the first Respondent to take the matter to the second Respondent. Counsel Iddi maintained that the Appellant did not only breach the Contract but also failed to attend the first Respondent on his action.

In winding up his submission, Mr. iddi stated that bringing this appeal is a disturbance because the Appellant has to pay the amount as ordered by the second Respondent. He therefore prayed for this Tribunal to dismiss the appeal with costs.

Counsel Patricial Chenga begun her submission by praying to adopt their skeleton arguments and further submitted that there was a contract of carriage by air and not normal contract, in line with regulatory regime. Counsel Chenga averred that carriage by air regulation has set the upper limit of awarding damages which is USD 5000. Therefore she maintained that the second Respondent did not award excessive damages. Regarding giving reasons, she said the second Respondent gave its justification at page 3 last paragraph of its decision. She argued the second Respondent went through the facts, analyzed the law and then decided. The counsel averred that general damages were not in addition to other damages but rather it was a refund of actual costs combined with general damages. Counsel Chenga maintained that it is not true the damages are impairing other airlines. She viewed the first Respondent as a poor passenger

who was waiting to be transported by the Appellant but was forced to go back and find a way to get to his destination. With these submissions, counsel Chenga prayed for the appeal to be dismissed in its entirety and the Appellant be ordered to pay costs.

In rejoinder, Counsel Masanja insisted that, if general damage is totaled with refund, then the sum will be almost equals to USD 5000 which he argued that it is excessive given the circumstances of the case. He maintained that the general damages awarded to the first Respondent benefited him rather than compensating. Concerning Regulation 25, the counsel rejoined that the said Regulation only provides for a ceiling but it does not provide for a procedure of awarding it. He thus insisted that resort to Section 73 (1) and (2) of LC had to be made.

From the afore rival arguments of the parties, we do agree with counsel Masanja that in Tanzania the principles for the assessment of quantum of damages for breach of Contract is rooted deeply in the rule stated in 19th Century English case of **Hadley Vs Baxendale (1854) 9 Ex 354**. The principles enunciated are such that: -

(a) may fairly and reasonably either arising naturally i.e according to the usual course of things from such breach of contract itself, or
(b) may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

It is, therefore, true as argued by Counsel Masanja that the doctrine of damages aims at restoring an innocent party claiming damages for breach of Contract to the position he would have been if the breach had not occurred. It restores him to his prior position. Such compensation of awarding principle is found in Latin maxim *restitutio in integrum*. So the person cannot recover damages which are too excessive or too remote.

At equal footing of reasoning, we do agree with Counsel Masanja that regulation 25 of the Civil Aviation (Carriage by Air) Regulations, 2008 provides a threshold of equivalent to USD 5000 and that it does not lay down principles to be considered in assessing the quantum of breach of contract. In that regard, regulation 25 (supra) has to be read in conjunction with Section 73(1) and (2) of LC.

Before we rest our answer as to whether awarding the quantum of general damages at the tune of USD 4000 to the first Respondent was in excess and benefitted him; we find appropriate to reproduce the second Respondent's decision which is under attack. It reads:-

> *"The Committee after hearing both parties and going through information, analyzed the law relating to compensation and; decided that the complainant is entitled to full refund of the cost he incurred due to cancellation as follows*
>
> *(i) Refund of his Fast Jet ticket TZs 822,800*

(ii) Refund of Kenya Airways Ticket USD 404.70

(iii) Tax cost TZs 23,000/=

(iv) Accommodation cost at Transit Motel Ltd TZs 100,000/=

(v) General damages equivalent to USD 4000"

From the above-reproduced part of the decision, the second Respondent reached its decision after hearing parties' arguments, considering the information and analyzed the law. In the case of **Tanzania Air Services Limited vs Minister for Labour, Attorney general and the Commissioner for labour, Misc. Civil Application No. 1 of 1995 (1996) T.L.R 217** Samatta J (as he then was) faced among others with an issue as to whether there is a duty for decisions made by public authorities to have reasons, stated: -

"(i) Under common law there is no general requirement that public authorities should give reasons for their decision but that position has been under criticism;

(ii) The interests of justice call for the existence, in common law, of a general rule requiring public authorities to give reasons for their decisions;

(iii) Under S 2(2) of the Judicature and Application of Laws Ordinance, Cap 453, the High Court has power to vary the common law to make it suit local conditions; the conditions of the people of Tanzania make it a fundamental requirement of fair play and justice that parties should know at the end of the day why a particular decision has been taken....."

In the same case, Hon. Samatta, J (as he then was) went on to quote with approval **the book of Sir Alfred Denning** titled **"The Road to Justice"** in which he discussed the importance of a judge giving reasons for his decision and said: -

> *"The judge must give reasons for his decision: for by so doing, he gives proof that he has heard and considered the evidence and arguments that have been produced before him on each side: and also that he has not taken extraneous consideration into account. It is of course true that his decision may be correct even though he should give no reasons for it even give a wrong reason: but in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reasons; and that can only be seen if the judge himself states his reasons. Furthermore, if his reasons are at fault, then they can afford a basis on which the party aggrieved by his decision can appeal to a higher court. No judge is infallible, and every system of justice must provide for an appeal to a higher court to correct the errors of the judge below. The cry of Paul "I appeal unto Ceasar" represents a deep-seated human response. But no appeal can properly be determined unless the appellate Court knows the reasons for the decision of the lower Court. For that purpose, if for no other, the judge who tries the case must give his reasons."*

In **Hamis Rajabu Dibagula vs The Republic, Criminal Appeal No.53 of 2001 Court of Appeal of Tanzania at page 15** Samatta, CJ (as he then was) stressed on the need to observe the importance of giving reasons in decision making when he said;

> *"The necessity for Courts to give reasons cannot be over emphasized. It exists for many reasons, including the need for the Courts to demonstrate their recognition of the facts that litigants and accused persons are rational beings and have the right to be aggrieved..."*

Samatta, CJ (as he then was) further quoted with approval the decision in the Indian case of **Rupan Deol Bajaji and An vs Kanwar Pal Singh Gill and An (1995) sup 4 S.C.R, at page 258** whereby M.K. Mukherjee, J held; -

> *"Reasons introduce clarity and minimize chances of arbitrariness"*

We are much alive that the Committee is not composed of a judge, but the same parity of reasoning can be applied in the matter at hand. We say so because the second Respondent is an administrative regulatory body it is obligated to determine objectively the facts and draw conclusions since its decision is likely to affect legal rights and duties of persons. The decision given by the second Respondent fell short of the requirements of a sound decision because it has insufficient information on how it arrived at USD 4000. We have difficulties in agreeing with the counsel Chenga that the second Respondent considered the circumstances of the case. Though it is indicated at page 2 of the typed decision that the second Respondent heard

the parties, went through information, and analyzed the law but such decision fell short of reasons. It would appear that the second Respondent never utilized its power of mind to think, understand and form decision logically in accordance to the available facts evidences and law. If the Committee did, such logical reasons were not recorded in the decision.

Having resolved that point, we now move to consider the issue whether awarding the quantum of general damages at the tune of USD 4000 to the first Respondent was in excess and benefitted him.

One of the issues determined before the High Court of Tanzania in the cited case of **Fast Jet Airlines Limited vs John Mnaku Mhozya Civil Appeal No. 96 of 2016 (unreported)** was: -

> *whether the Resident Magistrate Court of Dar es Salaam at Kisutu erred in law and facts for awarding against the Appellant at the sum of TZs 30 million as general damages for breach of transportation contract and consequential losses.*

The brief sequence that lead to that case can be summarized as follows. On 27th day of August, 2013, the Respondent, a practicing advocate purchased from the Appellant a return air ticket from Dar es Salaam to Mwanza for 23rd day of October, 2013 and 30th October, 2013 respectively. The Respondent did not travel with the Appellant on his return on 30th October due to the Appellants' act of cancelling the trip without prior notice to the Respondent.

On the same date the Respondent managed to get an alternative transport by another airline.

At the trial Court, the Respondent was awarded general damages at the tune of TZs 30 million. On appeal, the Appellant had argued inter alia that the trial Court erred for awarding such an astronomical figure without any evidence to justify such amount. The Appellant argued that there was no proof of disturbance as a result of the flight cancellation to the Respondent in attending to his client and important meetings. The Respondent flew back to Dar es Salaam on the same date.

In reply, the Respondent argued that the act of moving from one corner to the other at the airport carrying a travelling bag and fish sack subjected him to considerable stress, anxiety, mental anguish and trauma. In view of the Respondent, such factors been taken into account were sufficient for the trial court to exercise its discretion of awarding the disputed quantum of general damages.

In his decision, Hon. Mwandambo J while citing the decision of **Cooper Motor Corporation Ltd vs Moshi Arusha Occupation Health Services (1990) TLR 96** stated at page 15 among other things that; -

> *"...whilst I appreciate the fact that the Respondent is indeed an advocate of this Court and thus the flight cancellation might have subjected him to some anxiety and stress, I do not find any justification*

in the amount awarded. For whatever reason, that award was not only punitive as against the Appellant but also it meant to put the Respondent in far better financial position than he was immediately before the breach of Contract contrary to the spirit behind the award of general damages namely; restitution in integrum. That award is accordingly set aside. I have considered the conduct of the Appellant in cancelling the flight without notice prior to and after the date scheduled for the travel and subsequent thereto together with the degree of anxiety the Respondent was subjected to on the said date and I think a sum of Tshs 5,000,000/= will meet the justice of the case as general damages in the circumstances of the case...."

It follows then that a flight cancellation can subject a person to some anxiety and stress. However, an award of general damages must not be in a form of punishment and must not benefit a person financially than he was before prior to the breach of Contract.

In our instant case it is clear that the Appellant cancelled the trip without prior notice to the first Respondent. Such cancellation obviously caused inconvenience, anxiety and stress to the first Respondent. It is from such cancellation, the first Respondent had to spend two unplanned days in Dar es Salaam. Indeed, he was not refunded for the Dar es Salaam-Harare flight upon arrival at Dar es Salaam. This should have added more stress and much wastage of time. All of these are evidences that the first Respondent suffered

damages arising naturally out of the Appellant's breach of the Contract by Air.

One of the major differences between the Cooper Motor Corporation's case and our present case is that, despite of trip cancellation without notice, the complainant in Coopers' case managed to travel within the same day. That was one of the reasons, which made the Court to award general damages at the tune of TZs 5 million instead of TZs 30 million. There was no much wastage of time and so the torture or anxiety was not much. In our case, the complainant wasted two days unplanned on the way to his destination. Considering all these, we find that the award of USD 4000 was and is still reasonable.

In the final analysis, we are of the settled mind that the appeal is devoid of merits and it is hereby dismissed. Taking into account that Mr. Ntemi Masanja Counsel did his homework properly, we award no costs.

Dated at Dar es Salaam this 17th January 2018.

Judge Barke M. A Sehel – Chairperson

Mr. Yose J. Mlyambina – Member

Mrs. Butamo K. Phillip - Member

17/01/2018

Delivered this 17th day of January, 2018 in the presence of the Ms Beatrice Mpepo Advocate for the Appellant, Mr. Frank Muta Advocate holding brief of Mr. Ali Iddi Mrema Advocate for the 1st Respondent and in the absence of the 2nd Respondent.

Judge Barke M. A Sehel – Chairperson

Mr. Yose J. Mlyambina – Member

Mrs. Butamo K. Phillip - Member

17/01/2018