Civil Aviation Claims

12th February 2025

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THE SUPREME COURT OF NIGERIA DELIVERS A LANDMARK JUDGMENT IN RELATION TO THE DAMAGES RECOVERABLE IN FATAL AVIATION ACCIDENT CLAIMS.

1. Introduction

On Friday, 17th January 2025, the Supreme Court of Nigeria in **SC/CV/1191/2022 – MR. FEMI ANIBABA v. DANA AIRLINES LIMITED & STACY VEOLETTE SELLERS** delivered a landmark judgment in a matter relating to the award of damages in fatal civil aviation accident claims.

The apex court's decision addressed several recondite issues relating to the rights of a party claiming damages for loss arising from a fatal civil aviation accident. The decision of the court resolved the issue as to reverse burden of proof placed upon airlines under the Montreal Convention as adopted into Nigerian law. It resolved the question as to whether the provisions of Article 29 of the Montreal Convention do not permit a Claimant to bring an action for damages arising from the death of an aircraft passenger, pursuant to and under the Fatal Accidents Law of Lagos State and Administration of Estates Law of Lagos State, in addition to a claim under the Montreal Convention. The Court also considered whether a Claimant can seek economic (pecuniary or special) and non-economic (non-pecuniary or general) damages against the airline in a fatal civil aviation matter; and, the date at which damages claimed in foreign currency in civil aviation claims should be converted into Nigerian currency for the purpose of enforcement. The apex court held that the onus is on an airline seeking to limit its liability to $100,000 to prove that the accident that gave rise to the claim was not due to any negligence on its part or that of its employees. The Court also held that while the expansive language of the Montreal Convention leaves no room for

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concurrent or alternative claims outside its framework, its Article 29 permits the application of the Fatal Accidents Law of Lagos State and the Administration of Estates Law of Lagos State to determine the persons who can claim damages and the types of claims such persons can make. It was also held that a Claimant can claim damages for emotional pain, suffering, and loss of companionship and affection in addition to economic (special) damages in a fatal civil aviation accident matter, implicitly overturning previous authorities on the damages available in fatal accident claims in Nigeria. The court finally held that the applicable date for converting damages claimed in foreign currency into local currency under the Montreal Convention is the date of the judgment and not the date of the accident as contended by the defendants.

2. Facts of the Case

The 1st Respondent (Dana Airlines Limited), was the owner and operator of an aircraft which crashed on 3rd June 2012, at the Iju-Ishaga area of Lagos State on its approach into Lagos, resulting in the death of all 153 persons on board, including the deceased (wife of the Appellant). The 2nd Respondent is the personal representative of the Estate of late Peter Simon Waxtan, the pilot of the ill-fated aircraft who was accused of negligence.

Mr. Anibaba had filed the suit at the Federal High Court, Lagos in 2014 to claim economic and non-economic damages under diverse heads of claims which included damages for his pain and suffering; for the pain and suffering and loss of motherly companionship and affection of the deceased's daughter and that of the deceased's parents; cost of the deceased's personal belongings that were in her possession and were lost as a result of the air crash; his future and past loss of earnings; and future dependency on the deceased's earnings; amongst others.

The trial court delivered its judgment on 20th February 2020 wherein it granted the claims in part and awarded both economic and non-economic damages, in the sum of $20,000 for the Claimant's loss of his wife's companionship and affection, the sum of $30,000.00 for the deceased's daughter's pain and suffering and loss of her mother's companionship and the sum of $10,000 for the deceased's parents' pain and suffering due to the loss of their daughter, the sum of ₦6,000 for probate fees and $949.44 for part of funeral expenses; which summed up to about $61,000.00 (Sixty-One Thousand United States Dollars) with post-judgment interest of 10% per annum from the date of judgment until the date the judgment sum is liquidated.

Dissatisfied, Mr. Anibaba filed an appeal to the Court of Appeal, Lagos. In its judgment, the Court of Appeal held that the award of non-economic damages of $20,000

$30,000.00 and $10,000 granted by the trial court did not serve as sufficient recompense to the Appellant for the irreversible loss of the deceased and, in its place, awarded the sums of $100,000.00, $100,000.00 and $50,000.00 to make a total sum of $250,000.00 (Two hundred and Fifty Thousand US Dollars). The Court of Appeal held that these sums should be converted at the prevailing exchange rate on the date of the accident in 2012.

3. The Supreme Court

Further dissatisfied with the Judgment of the Court of Appeal, the Appellant appealed to the Supreme Court of Nigeria. Mr. Anibaba was represented in this matter by a consortium of lawyers known as the Aviation Attorney Group, made up of Prof. Oba Nsugbe, KC, SAN of Pump Court Chambers in the UK; Dr. Babatunde Ajibade SAN, FCIArb, Dr. Kolawole Mayomi, FCIArb and Mr. Peter Olalere, MCIArb of S. P. A. Ajibade & Co; Mr. Ajibola Dalley, SAN, FCIArb of GRF Dalley & Partners and the UK law firm, Irwin Mitchell LLP, represented by its Partner - Tim Annett. Arguing the appeal, Dr. Kolawole Mayomi, contended that the Court of Appeal had misapplied the *"exclusivity principle"* of the Montreal Convention, in that whilst the Convention's primary aim is to create a uniform international framework for airline liability, it does not preclude the application of domestic laws, such as the Fatal Accidents Law and Administration of Estates Law, to determine who has rights and the scope of those rights. The Appellant distinguished this case from **HARKA AIR SERVICES (NIG.) LTD. v. KEAZOR,**[4] emphasizing that the case involved a fatal accident, unlike *Harka*, which dealt with non-fatal injuries. Additionally, the Appellant challenged the Court of Appeal's directive that the sum of $250,000 it awarded as damages should be paid at the exchange rate on the date the cause of action arose (2012), and argued that this sum should be paid at the exchange rate on the date of payment or enforcement.

In their response and cross-appeal, the Respondents argued that by Article 29 of the Montreal Convention, all actions for damages must adhere strictly to the conditions and limits stipulated in the Convention, which only related to economic damages. They submitted that any domestic legislation that is in conflict with a convention is void, as conventions are autonomous bodies of law whose terms and provisions are above domestic legislations, and that the Nigerian Civil Aviation Act 2006 (NCAA) which domesticated the Montreal Convention is the applicable law in this instance. The Respondents urged the court to have strict recourse to the NCAA in the determination of the appeal, and asked the court to set aside the award of $250,000 damages as

[4] (2011) LPELR-1353 (SC).

non-economic or “sentimental” damages which has no place in the Montreal Convention.

4. The decision of the Supreme Court

In its judgment, the Supreme Court held as follows:

i. Section 48(2) of the NCAA which domesticated the Montreal Convention makes it applicable to both international and domestic air carriage and enjoys the same force of law and status as local statutes. Interpreting Article 29, the apex court held that the Montreal Convention explicitly preserves the role of domestic laws in determining the persons entitled to bring claims and their respective rights. Thus, the court found that the Fatal Accidents Law and the Administration of Estates Law do not conflict with the articles of the Convention but rather complement it by addressing issues that the Convention deliberately left open for regulation by domestic law. While the Convention serves as the exclusive framework for establishing liability, domestic laws like the Fatal Accidents Laws and Administration of Estates Law act as a necessary adjunct in determining the procedural and distributive aspects of claims. In so holding, the apex court found helpful persuasion in the judicial precedents from other jurisdictions as cited by the Appellant - **ZICHERMAN v. KOREAN AIRLINES CO**.;[5] **SIDHU v. BRITISH AIRWAYS PLC**;[6] and **EL AL ISRAEL AIRLINES LTD v. TSUI YUAN TSENG.**[7]

ii. The Supreme Court also disagreed with the Respondents’ contention that the only damages allowable under Article 29 are compensatory damages and that damages for pain and suffering, loss of companionship and affection are not compensatory damages. The apex court agreed with our contention and held that the award of damages for emotional pain, suffering, loss of companionship and affection falls under general damages and not under punitive damages contrary to the Respondents’ argument. It is trite law that general damages are awarded to compensate for non-pecuniary losses, which are intangible and subjective in nature. Such damages aim to provide recompense for the pain, suffering, and emotional distress experienced by a claimant. They are distinct from economic losses, which are quantifiable and objectively verifiable. The apex court also relied on its earlier decision in **MEKWUNYE v. EMIRATES**

[5] 516 U.S. 217 (1996).
[6] [1997] 1 ALL ER 193.
[7] 525 U.S. 155 (1999).

AIRLINES[8] which also considered Article 29 on the type of damages recoverable, even though it was not a fatal accident claim.

iii. By necessary implication of this present decision and award of damages for emotional pain, suffering, loss of companionship and affection to the Appellant, the apex court appears to have overruled its decision in the case of **JENYO v. AKINRETI [1990] 2 NWLR**[9] where the apex court had earlier held that there is no question of what may be called sentimental damage, bereavement or pain and suffering in a fatal accident claim. It is a matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. While the old decision of the apex court in **JENYO v. AKINRETI** did not recognize the award of general damages for pain, suffering, and loss of companionship, the present decision delivered by the apex court clearly recognizes the award of damages for pain, suffering, and loss of companionship as compensatory general damages. Although the apex court did not make a specific pronouncement on **JENYO v AKINRETI** in its decision in this case, even though the Appellant invited the court to do so, the apex court has departed from its decision in **JENYO v. AKINRETI** by necessary implication.

iv. The apex court also interpreted the provisions of Article 23 of the Montreal Convention on the applicable date for the conversion of the judgment sum from US Dollar to Naira. The court found that the intention of the State parties to the convention is apparent, and it is that conversions should occur at the exchange rate prevailing at the date of judgment. Consequently, the Court set aside the judgment of the Court of Appeal wherein it held that the award of $250,000 was payable at the exchange rate on the date the cause of action arose in 2012. In its stead, the court awarded the sum of $250,000 in favour of the Appellant at the existing exchange rate on the date the judgment of the trial court was delivered, being 20th February, 2020, with post-judgment interest at the rate of 10% per-annum until the judgment sum is fully and effectively liquidated.

v. In arriving at the date of conversion of the judgment sum, the apex court called in aid the provisions of Article 23(1) of the Montreal Convention which states that *in judicial proceedings, conversion of the sums into national currencies shall be made according to their value in terms of Special Drawing Rights (SDRs) as defined by the International Monetary Fund (IMF) at the date of*

[8] (2019) 9 NWLR (PT. 1677) 191.
[9] (PT. 135) 663 at 678.

judgment. It relied on this to interpret the phrase "at the existing official exchange rate" contained in the Convention to mean the existing official exchange rate “at the date of the judgment."

vi. Resolving the cross-appeal, the apex court emphasized that general damages are awarded to compensate for non-pecuniary losses which are intangible and subjective in nature, as such award are aimed at providing recompense for pain, suffering and emotional distress experienced by a Claimant, as they are distinct from economic losses which are quantifiable and objectively verifiable. The court held that the sum of $250,000 awarded by the lower court falls squarely in the category of general damages. While the law recognizes the inherent difficulty in quantifying non-economic losses it does not deny the right to compensation for such losses where they are established.

5. Conclusion

The decision of the highest Court in Nigeria has provided clear answers to several knotty questions arising from the proper scope and interpretation of Articles 23 and 29 of the Montreal Convention in Nigeria, in relation to fatal air crashes. The law is now as clear as it has been in most other advanced jurisdictions, which are member states of the Montreal Convention like USA, UK, Canada, France etc. Whilst we do not pray for any more fatal air accidents to occur in Nigeria, it is our hope that if they do occur, this decision will provide clarity as to the claims that dependents of the deceased can make and ensure that the process of resolving such claims is quicker. The apex court also took the opportunity to restate the law relating to instances in which parties may seek to rely on domestic laws in aid of interpreting/enforcing the Montreal Convention in Nigeria. The decision of the apex Court will surely serve as a precedent for addressing disputes relating to damages and compensation for families of victims of fatal air accidents in Nigeria.

For further information on this article and area of law,
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