IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

HON. JUDGE HIGH COURT NO. 13

COURT CLERKS: T. P. SALLAH & ORS

DATE: 13/05/2020

FCT/HC/CV/0744/18

BETWEEN

DR. ISA B. MODIBBO .... PLAINTIFF

AND

ARIK AIR .... DEFENDANT

JUDGMENT

The instant suit was commenced by the Plaintiff vide writ of summons and statement of claim filed on 25th January, 2018 by which the Plaintiff seeks the following reliefs against the Defendant:-

(i) A Declaration that the Defendant's acts of keeping the Plaintiff from morning hours to evening hours at the Nnamdi Azikwe International Airport, Abuja has amounted to breach of the contract entered into between the Plaintiff and the Defendant.
(ii) An Order of this Honourable Court ordering the Defendant to pay the Plaintiff the sum of N30,000,000.00 (Thirty Million Naira) only general damages for breach of contract.
(iii) 10% interest on the judgment sum from the date of judgment until the said sum is fully liquidated.
(iv) Cost of this *suit.*

The Defendant entered appearance and filed its statement of defence with leave of this Honourable Court granted on 23rd January, 2019. Thus, pleadings having been filed and exchanged between the parties and issues thereby joined, trial of this suit began.

The Plaintiff himself testified in support of his own case as PW1 while one John WamilduJilantikiri testified in support of the Defendant's defence. Both witnesses adopted their witness statement on oath as their evidence in support of their respective cases and thenthey were subjected to cross-examination by Counsel to respective parties. The following documents were tendered and admitted in evidence at trial through PW1.

1. Exhibit 1:- EMS receipt.
2. Exhibit 2:- Certificate of compliance.
3. Exhibit 3:- Electronic ticket of Arik Air.
4. Exhibit 4 and 4A:- Two SMS text messages
5. Exhibit 5:- Medical report dated 24th February, 2017 issued by Jos University Teaching Hospital Jos.
6. Exhibit 6:-Plaintiff's solicitor's letter dated 27th December,2017.
7. Exhibit 7:- Bundle of documents containing Conditions of Carriage of Arik Air Limited and
8. Exhibit 7A:- Certificate of compliance as to computer generated documentswere admitted in evidence through DW1 on behalf of the Defendant.

At the close of trial on 23rd January, 2019, final written address was ordered to be filed pursuant to which the Defendant filed its Counsel's final written address as well as Reply on points of law on 8TH February,2019 and 11th March, 2019 respectively. The Plaintiff's Counsel final written address was filed on 28th February,2019. On 18th March, 2019 parties adopted their respective final written address and the case was adjoined to 23rd May, 2019 for judgment. Judgment could not however be delivered within the

statutory period due to the engagement of the trial judge in RTC Training in Accra Ghana, the annual vacation and the Covid -19 pandemic until recently, when the Chief Justice of Nigeria and Chairman National Judicial Council issued guidelines that sensitive matters and time bound cases be heard and disposed off within the period of the covid-19 pandemic.

Be it as it may, the brief facts and evidence of the Plaintiff's case as contained in his pleading and witness statement on oath isthat on 13th December,2017 he booked a flight to depart on 16th December,2017 from Abuja to Sokoto on the Defendant's website (arikair.com). Exhibit 3 was tendered and admitted in evidence at trial as a copy of the online ticket. According to the Plaintiff' that the agreement he had with the Defendant as per the online ticket was for 10:30am departure time and 11:40am arrival. He testified that this was because he had to see his Medical Doctor in Sokoto for consultation in respect of his diabetes. Exhibit 5 was admitted in evidence as a Medical report dated 24th February, 2017 issued by Jos University Teaching Hospital Jos in proof of his said medical condition. The Plaintiff testified that he arrived at the NnamdiAzikwe International Airport, Abuja by 9:30am for the 10:30am flight. After the scheduled 10:30am however, the Plaintiff got a text message (SMS) from the Defendant rescheduling the flying time from 10:30am to 1:50pm. A copy of the message in print form was admitted in evidence as Exhibit 4. It is the Plaintiff's testimony that he got another message at the expiration of the said time informing him that the flight had again been rescheduled for 4:45pm. All this while his physician was waiting for him in Sokoto. Exhibit 4A is a printed copy of this subsequent message. Exhibit 2 is a certificate of compliance in respect of Exhibits 4 and 4A.

It is further the Plaintiff's case that he waited at the Airport till around 6:00pm at which time the departure eventually took place and he arrivedSokoto at almost 8:00pm on 16th December,2017. He testified that his appointment with his

doctor was consequently cancelled and he had to go about other activities which were not his primary purpose for visiting Sokoto. That it was very difficult for him to have waited the whole day for a flight at the instance of the Defendant considering his old age of 71 years and his health situation.
On 27th December,2017 the Plaintiff instructed his lawyers to write to the Defendant informing it of the trauma it subjected him to and demanded for compensation for the damages he suffered. Exhibit 6 is a copy of the said letter while Exhibit 1 is receipt of Courier service. It is the Plaintiff's case that the Defendant did not respond to the said letter. The Plaintiff testified that the Defendant's acts of delaying his flight had made him to suffer anxiety, psychological trauma and loss of very important appointment fixed for that day. That he came all the way from Jos, Plateau State to board the Defendant's flight but was left helpless at the NnamdiAzikwe International Airport Abuja, as a result of the Defendant's negligence. In conclusion PW1 urged the Honourable Court to grant his claims.

The Defendant in its pleadings, admitted that the Plaintiff on 13thDecember,2017booked a flight to depart on 16th December,2017from Abuja to Sokoto on the Defendant's website. The Defendant admitted having an agreement with the Plaintiff for the departure of the flight by 10:30am and arrival by 11:40am vide the online ticket purchased by the Plaintiff. The Defendant also admitted receiving a letter from the Plaintiff's Counsel. The Defendant however denied liability for the Plaintiff's claim.

DW1 is the Abuja Station Manager of the Defendantand he testified that the Defendant entered into a Contract of Carriage by air with the Plaintiff on 13th December,2017wherein the Defendant agreed to carry the Plaintiff aboard its aircraft from NnamdiAzikiwe International Airport, Abuja to SadiqAbubakar III International Airport,

Sokoto on 16thDecember,2017. It is the Defendant's defence that it fully performed the contract when it carried the Plaintiff aboard its aircraft from Abuja to Sokoto on the said 16th December,2017. DW1 testified that the contract was subject to terms and conditions which the Plaintiff was privy to before signing up by virtue of booking the flight online and purchasing the ticket therefrom. Exhibit 7 was tendered and admitted in evidence as a printed copy of the terms and conditions of the contract of carriage between the Plaintiff and the Defendant. It is the Defendant's defence that by Articles 9 and 15 of the said terms and conditions of Contract of Carriage, departure and flight times are stated as not being guaranteed and that same may be delayed or cancelled owing to operational reasons or unusual or unforeseen circumstances. DW1 testified that the aircraft scheduled to airlift the Defendant's passengers (including the Plaintiff) to Sokoto was a MJH Aircraft that required Ground Power supply upon landing in Sokoto. That in the early hours of 16th Dcember,2017 however, the Station Manager of the Sokoto Airport reported to the Defendant's Operation Control Centre in Lagos that the Ground Power Unit at the Sokoto Airport run by SAHCO a third party (independent of the Defendant) would be available by 1:30pm as it had technical problems and was undergoing servicing. The Defendant was consequently constrained to reschedule the flight to 1:50pm and duly notified all its passengers including the Plaintiff via mobile numbers provided well before 10:30am.

It is further the Defendant's defence that the repairs of the Ground Power Unit at Sokoto Airport was however not completed at 1 :30pm as earlier indicated by SAHCO and the Defendant deployed its best effort to avoid the delay by immediately searching for another aircraft with a functional inbuilt Auxiliary Power Unit within its fleet and other airlines operating in Nigeria to operate the Sokoto route. DW1 testified that the Defendant eventually got an MJF Aircraft which it had to deploy from Lagos to airlift its passengers to

Sokoto on 16th December,2017. It is the Defendant's defence that itthus deployed its best efforts and took all reasonable steps to avoid the unforeseen operational reason for the delay in its Sokoto bound flight scheduled for 16th December,2017. DW1 testified that the Defendant promptly communicated the operational reason for the delay as well as the rescheduled flight time to the Plaintiff well ahead of the scheduled time. The Defendant denied being negligent or breaching the contract of carriage with the Plaintiff. It specifically pleaded and relied on the Civil Aviation Act, CAP C 13, Laws of the Federation of Nigeria 2004. At the close of the Defendant's case, DW1 urged me to dismiss the case of the Plaintiff.

The Defendant having closed its case, final written address was ordered to be filed and exchanged between the parties. The learned Counsel to the Defendant formulated the following sole issue for determination thus:-

> *"Whether the contract of carriage of passenger by air between the claimant and the Defendant was breached such as to entitled the claimant to reliefs sought."*

The Plaintiff adopt the Defendant's sole issue for determination of the instant suit.

Thus, arguing the sole issue for determination learned Counsel to the Defendant submitted that the contract of carriage by air entered as between the Plaintiff and the Defendant pursuant to the purchase of ticket online by the Defendant was subject to terms and conditions, express and implied. He referred this Court to Exhibit 7 and the Third Schedule to the Civil Aviation Act. He contended that although the contract of carriage between parties was to be performed at 10:30am on 16th December,2017, under Article 9.2.1 of Exhibit 7 between parties, the specified departure time was subject to change for 'operational reasons' or unusual or unforeseen circumstances. He submitted that the Defendant pleaded and led evidence that the delay of its flight scheduled for departure from Abuja Airport to Sokoto Airport on 16th December,2017at 10:30am

was on account of operational reasons reported to its Lagos Operation Control Centre that the Ground Power Unit at Sokoto Airport run by a third party had technical problems and was undergoing servicing but would be available by 1:30pm. Counsel posited that this piece of evidence was neither contradicted nor discredited by the Defendant and urged this Court to accept same. He argued that credible evidence shows that the Defendant did all within its reach to promptly airlift the Plaintiff along with other passengers scheduled for the 10:30am flight to Sokoto on 16th December,2017 including providing a MJH Aircraft and promptly informing the Plaintiff of the rescheduling of flight time due to operational reasons.He submitted that there could not be any breach of the contract as the governing contract of carriage exempts the Defendant from liability arising from a delay in circumstances.It is further his position that the Plaintiff who had the option under Exhibit 7 to repudiate the contract elected not to do so and therefore cannot now complain that his flight was delayed. Counsel also referred this Court to Article 19 of the Third Schedule to the Civil Aviation Act which he contended completely releases the Defendant from any liability resulting from damages occasioned by delayed flights in so far as the Defendant shows that it took all reasonable measures that could be required to avoid the delay or damage or that it was impossible to take such measures. Counsel argued that the claim for damages for breach of contract must therefore fail as there is no breach established against the Defendant. He posited that assuming there is a breach of the contract of carriage by the Defendant, the amount recoverable as damages by the Plaintiff has been limited by statute to USD4150 which is N1,272,805. He relied on the provisions of Articles 22 and 23 of the Third Schedule to the Civil Aviation Act. In conclusion, therefore, the DefendantCounsel submitted that the Plaintiff is not entitled to any damage and even if he is, he can only be entitled to nominal damages having failed to show any real damage.

Arguing *par contra*, learned Counsel to the Plaintiff submitted in his address that it is not in dispute that the Plaintiff entered into a contract of carriage by air with the Defendant and the flight was delayed. He urged this Court discountenance DW1's evidence about the events that caused the delay as hearsay evidence and he relied on the case of ***FRN V USMAN (2012) LPELR 78818(CA****)*. He then contended that the proper witness to explain the delay of the flight is the Defendant's staff at its Lagos operation centre who received the information about the cause of the delay. It is learned Counsel's argument that having kept the Plaintiff, a diabetic and an aged person, waiting for seven hours at the airport is enough to warrant the grant of general damages in favour of the Plaintiff. He submitted that the sum of N30,000,000 is reasonable in the circumstances. It is his submission that Exhibit 7 is not admissible in lawbecause it was neither pleaded nor referred to by the Defendant's witness. Relying on the case of ***OBA OYEDIRAN V. OBA ALEBIOSU II& ORS (1992) LPELR-2868(***SC), Counsel posited that documents not pleaded go to no issue. He said Exhibit 7 is a bunch of documents dumped on the Court without being linked to the Defendant case. He submitted further that the explanation DW1 tried to offer in order to justify the delay is a mere afterthought. He posited that the Defendant is liable as a carrier under Article 19 of the Civil Aviation Act, Laws of the Federation and the burden is on the Defendant to show with cogent evidence that it has taken reasonable steps to avert the delay in the flight. He submitted that the Defendant failed to show this.It is Counsel's further contention that clause 9.2.1 of Exhibit 7 cannot be used as a shield to cover the Defendant from liability in view of Article 26 of the Civil Aviation Act. He finally submitted that the Plaintiff has proved his case and is entitled to the reliefs sought.

Replying on points of law, Counsel to the Defendant submitted that DW1 gave evidence as the Defendant's Abuja Station Manager and as such his evidence cannot be reduced

to hearsay without basis. He contended that Exhibit 7 was clearly and unequivocally pleaded in the Defendant's Statement Defence. He further posited that Exhibit 7 was admitted in evidence without objection and as such cannot be expunged at this stage. He argued that the Defendant relied on specific portions of Exhibit 7 in DW1's statement on oath and so the contention that the document was dumped on the Court is unfounded. He said flight delays were contemplated by Exhibit 7 between parties and expressly permitted and excused especially on operational grounds.He submitted that the Plaintiff failed to controvert the Defendant's evidence. Counsel argued that the Defendant did not plead the issue of validity of clause 9:2.1 of the contract of carriage (Exhibit 7) and it is too late for the Defendant to challenge same.

As I said earlier both the Defendant's Counsel and the Plaintiff's Counsel filed final written address. The Defendant's Counsel submitted the following sole issue for determination:-

> *"Whether the contract of carriage of passenger by air between the claimant and the Defendant was breached such as to entitle the claimant to the reliefs sough?"*

The Plaintiff's Counsel adopted the above sole issue for determination as nominated by the Defendant's Counsel. I equally adopt the same sole issue to determine the issues canvassed in this suit.

Now after giving due regard to the pleadings and evidence adduced by both parties in this case, I want to point out thatthe position of the law is that the general burden of proof principally lies on a plaintiff as the initiator of a claim i.e he who asserted must prove.See the case of ***IZE-IYAMU V. ALONGE (2007) 6 NWLR (PT.1029) P. 84***, ***GODWIN IHEANACHO V LAMBERT IHEANACHO, (2018) LPELR 44124 (CA) and GENEVA V AFRIBANK (NIG) PLC, (2013) LPELR 20662(SC)***) It is also trite law that the

Plaintiff in the instant case, who seeks declaratory relief, must succeed on the strength of his own case. – see the case of ***MRS. OLORUNSHOLA GRACE & ORS V. OMOLOLA HOSPITAL & ANOR (2014) LPELR-22777(CA).MTN (NIG) COMMS LTD V EZUGWU EMMANUEL ANENE, (2018)LPELR 44447 (CA).***However, there is an exception to the general rule to the effect that where the facts of the Defendant's case supports the Plaintiff's case, in such a situation the Plaintiff can capitalise on same to prove his case. See***SOSANYA V ONADEKO & ORS (2000)21 WRN page 43 and EDOKPOLO V ASEMOTA, (1994)7 NWLR (pt356)p.314***

From the facts pleaded by parties, it appearsthere is no dispute that the Plaintiff entered into a contract with the Defendant on 13th December,2017(when the Plaintiff booked an online ticket on the Defendant's website) for the Defendant to carry the Plaintiff by air from Abuja to Sokoto on 16th December,2017. It is not in dispute that the agreed departure time from the NnamdiAzikiwe International Airport, Abuja was 10:30am on the said 16th December,2017and arrival time was 11:40am in Sokoto. The Plaintiff's case which is not disputed by the Defendant is that he arrived at the NnamdiAzikiwe International Airport, Abuja for the 10:30am flight as agreed but the Defendant sent him a text message informing him that the flight had been rescheduled from 10:30am to 1:50pm and then another message rescheduling to 4:45pm. The Plaintiff was eventually transported around 6:00pm and arrived Sokoto at almost 8:00pm on 16th December,2017. All these facts were admitted by the Defendant and are accordingly deemed established in law. In the case of ***BARO V THE EXECUTIVE GOV. OF DELTA STATE, (2018)LPELR 44192***,the Court of Appeal held thus:- " the law is settled that a fact admitted by a party does not need further proof by or from the adverse party"
See also ***AISHA JUMMAI ALHASSAN V DARIUS ISHAKU & ORS (2016)LPELR 40083(SC).***

The claim of the Plaintiff in the instant case is essentially for breach of contract of carriage by air from Abuja to Sokoto within Nigeria.It does not appear to be in dispute amongst parties (particularly their Counsel) that the applicable law to the instant case is the Civil Aviation Act. I quite agree with both Counsel. For avoidance of doubt, **Section 48(2) of the Civil Aviation Act** provides as follows:-

> *"48.*
> *(2) The provisions contained in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Montreal on 28th May 1999 as has been modified and set out in the Third Schedule of this Act and as amended from time to time, shall from commencement of this Act have force of law and apply to non-international carriage by air within Nigeria, irrespective of the nationality of the aircraft performing the carriage, and shall, subject to the provisions of this Act, govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons."(Underline is mine for emphasis)*

Article 1 Paragraph 1 of the Third Schedule to the Civil Aviation Act (which contains the Modifications to the Convention for the Unification of Certain Rules Relating to International Carriage by Air) provides thus;

> *ARTICLE 1*
> *1. This Convention applies to all carriage of persons, baggage or cargo performed by aircraft for reward within Nigeria. It applies to gratuitous carriage by aircraft performed by an air transport undertaking.(underline mine for emphasis)*

Now under Article 3 Paragraphs 1 and 2 of the Third Schedule to the Civil Aviation Act, a ticket (or some other document) indicating such information as the places of departure and destination is required to exist as between parties to the contract of carriage by air.

In the instant case, as I said earlier, it is not in dispute that the Plaintiff bought an online ticket for his carriage by the Defendant by air from Abuja to Sokoto. The Defendant clearly admitted the existence of the contract between it and the Plaintiff at paragraphs 3, 4,6,7 and 8 of its statement of defence of the facts averred by the Plaintiff at paragraphs 3,4,8,9,10 and 11 of his statement of claim.

Thus,the Defendant having admitted in its pleadings the fact that the Plaintiff booked an online ticket from its website for a flight from Abuja to Sokoto at 10:30am on 16th December,2017.Hence exhibits 3,4,4,4(a) and 6 further strengthen the case of the Plaintiff. Even without exhibits 3 and 6, the case of the Defendant supports the case of the Plaintiff of the existence of a contract of carriage. Apart from the principle of law that facts admitted need no further proof, by **Article 3 Paragraph 5 of the Third Schedule to the Civil Aviation Act**, the inexistence of a ticket shall not affect the existence or the validity of a contract of carriage which shall nonetheless be subject to the Convention (**Third Schedule**) particularly on liability.

The Defendant in the instant case admitted rescheduling the Plaintiff's flight from Abuja to Sokoto which was originally scheduled for 10:30am on 16th December, 2017. In other words, the Defendant has admitted the delay in its flight time which it had agreed with the Plaintiff. Part of its defence is that its contract of carriage by air with the Plaintiff was subject to terms and conditions which the Defendant tendered in as Exhibit 7. Counsel to the Plaintiff however has posited in his final address that Exhibit 7 is

inadmissible in evidence as it was not pleaded. He further said that Exhibit 7 is a bundle of documents dumped on this Court. Exhibit 7, there is no doubt is a bundle of documents containing conditions of carriage of the Defendant.

By the record of this Court, Exhibit 7 was admitted in evidence without any objection to its admissibility from the Plaintiff's Counsel at the time the document was tendered. The position of the law however is that where inadmissible evidence such as an unpleaded document is received or admitted in evidence by a trial court, it is its duty when it comes to consider its judgment to treat such inadmissible evidence as if it had never been admitted, i.e. expunge it from the records even when no objection had been raised to its admissibility. – see the case of ***HASHIDU V. GOJE (2003) 15 NWLR (PT.843) P. 352***. This Court can therefore consider the issue of admissibility of Exhibit 7 at this stage on grounds of whether it is a pleaded document irrespective of the fact that it was admitted without objection. The law is that the Court cannot *nolensvolens* act on legally inadmissible evidence even with parties' agreement or consent.

I have carefully read through the Defendant's statement of defence. Not only were the facts relevant to Exhibit 7 pleaded by the Defendant under the heading 'The Terms and Conditions' and 'Limitation Laws' (by paragraphs 10 and 11), the document was specifically mentioned therein. I therefore hold the view that Exhibit 7 was copiously pleaded by the Defendant in its statement of defence. Furthermore, in giving evidence, the Defendant (through DW1) mentioned specific clauses of Exhibit 7 upon which part of the Defendant's defence to the Plaintiff's claim is based. I also hold the view that Exhibit 7 was not dumped on this Court by the Defendant. Hence therefore pursuant to the foregoing, I find Exhibit 7 to be not only pleaded but also relevant in the circumstances. The document was therefore properly admitted inevidence and the Plaintiff's Counsel's

contention as to its inadmissibility ought to be discountenanced and it is accordingly discountenanced.

Exhibit 3 are terms and conditions which the Defendant pleaded and testified that the Plaintiff agreed to when booking his online ticket/flight in respect of the contract of carriage (subject matter of this suit) between parties. The Plaintiff did not file a reply pleading addressing this new issue. Neither did he cross-examine the Defendant's witness (DW1) when he testified in respect of the issue of Exhibit 7 which was produced before this Honourable Court. The Plaintiff having failed to cross-examine DW1 on this material fact of Exhibit 7 or adduced contrary evidence, the only conclusion this Honourable Court can reach is that the Plaintiff does not contest the fact of Exhibit 7 and I hold same as the terms and conditions governing the parties and I so hold. Thus,the position of the law undoubtedly is that where a party testifies on a material point, his adversary ought to cross-examine him or show that his testimony is untrue and where neither is done, the court would readily conclude that the adverse party does not dispute the fact. See the Supreme Court's decision in the case of ***CAMEROON AIRLINES V. OTUTUIZU (2011) 4 NWLR 512; (2011) LPELR-827(SC)***.

Now Exhibit 7 contains the conditions for the contract of carriage between the Plaintiff and the Defendant. The Defendant's defence is that by clauses 9 and 15 of Exhibit 7, parties had agreed that departure and flight times are not guaranteed and may be delayed or cancelled owing to operational reasons or unusual or unforeseen circumstances. It is the Defendant's defence that since it eventually carried the Plaintiff from Abuja to Sokoto by air on 16th December, 2017 after the delay in flight time, it had fully performed its obligations to the Plaintiff under the contract of carriage and there was no breach.

By **Article 27 of the Third Schedule to the Civil Aviation Act**, parties to a contract of carriage may enter into conditions of carriage which must not conflict with the provisions of the **Third Schedule to the Civil Aviation Act** (henceforth simply referred to as the Third Schedule). Parties to this suit are therefore free to bind themselves vide the terms and conditions set out in Exhibit 7 in so far as those terms are not in conflict with the provisions of the Third Schedule.

For avoidance of doubt, the relevant provisions of Article 9 of Exhibit 7 are reproduced hereunder:-

> *"ARTICLE 9*
> *9:1 Schedules*
> *9.1.1 The flight times shown in timetables may change between the date of publication and the date you actually travel. We do not guarantee them to you and they do not form part of your contract of carriage with us.*
> *9.1.2 Before we accept your booking, we will notify you of the scheduled flight time in effect as of that time, and it will be shown on your Ticket. It is possible we may need to change the scheduled flight time subsequent to issuance of your ticket. If you provide us with contact information, we will try to notify you of any such changes.*
> *9.1.3 If, after you purchase your Ticket, we make a significant change to the scheduled flight time which is not acceptable to you, you will be entitled to an involuntary refund in accordance with Article 10.2.*
> *9:2 Cancellation, re-routing, delays etc.*
> *9:2:1 Departure and flight times are not guaranteed. For operational reasons or unusual or unforeseen circumstances, delays may occur, but we will take all reasonably necessary measures to avoid delay in carrying you and your Baggage. In*

the exercise of these measures and in order to prevent flight cancellation, at our discretion we may arrange for a flight to be operated on our behalf by an alternative carrier and/or aircraft.

Further to the above, by Articles 10.2 of Exhibit 7, if the Defendant fails to operate a flight reasonably according to schedule, the amount of refund to which a passenger is entitled is a full refund of the fare paid, if the ticket has not been used, or the difference thereof if the ticket has been used. Article 15 provides for the general application of the Warsaw Convention or the Montreal Convention where applicable regarding the Defendant's liability.

In one breadth, Exhibit 7 appears to exclude flight times and schedules from being an essence of the contract of carriage between the Plaintiff and the Defendant. Exhibit 7 appears to put avoidance of delays in flight times and schedules at the discretion of the Defendant. In another breadth, Exhibit 7 limits the amount of compensation for delays in flight times and schedules to just a full refund of the fare paid or part thereof.

Article 19 of the Third Schedule however provides as follows:-

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures."

Article 26 provides:-

"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in

this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

It would therefore appear that agreed flight times and schedules are implied terms of the contract of carriage between the Plaintiff and the Defendant and the Defendant's liability for damages occasioned by delays in agreed flight times is guaranteed under the law. Failure to abide by the agreed flight time and schedule amounts to a breach of a fundamental term of the contract which generally guaranteed the Defendant's liability for damages suffered due to delays in flight times. The only exception to such general liability under the law is specifically spelt out under the law. I shall come to this later.Suffice it to say that provisions of Exhibit 7 which seem to specifically exclude agreed flight times and schedules from terms and conditions of the contract of carriage by air between parties is therefore of no moment. The law is that a party guilty of breach of a fundamental term will not be availed clauses excluding his liabilities as no Court of justice will aid the party in the wrong to escape his liability for his wrong doing. Exempting clauses, no matter how wisely they are expressed, only avail the party when he is carrying out his contract in its essential respects. – see the Supreme Court's decision in the case of ***MEKWUNYE V. EMIRATES AIRLINES (2019) LPELR-46553(SC)***.

Now the Plaintiff pleaded and testified that he was made to wait at the airport in Abuja from 10:30am on 16th December, 2017(which was the scheduled time agreed with the Defendant for his flight from Abuja to Sokoto) till around 6:pm when he was eventually airlifted due to the delay caused by the Defendant rescheduling the flight. He testified that this was particularly difficult and inconveniencing for him considering his old age of 71 and his medical condition of diabetes. Exhibit 5 is a medical report from the Jos

University Teaching Hospital, Jos stating that the Plaintiff is a known diabetic patient. The Plaintiff testified that due to the delay occasioned by the Defendant rescheduling his flight, he missed a scheduled appointment with his doctor in Sokoto for which he had booked his flight with the Defendant. The Plaintiff's foregoing evidence was not materially discredited under cross-examination nor did the Defendant adduce contrary evidence to contradict same. This Honourable Court is therefore entitled to act on these pieces of evidence as facts established. Seethe decision of the Supreme Court in ***NIGERIA SOCIAL INSURANCE TRUST V. KLIFCO NIGERIA LIMITED (2010) LPELR-2006(SC)*** on this principle of law where it held thus:-

"*The law is settled that evidence that directly affects the matter in controversy and that is neither attacked nor successfully discredited is good and credible evidence that can be relied upon by the Court. See also* ***OMOREGBE V LAWANI, (1980)3-4 page 108 (SC), BELLO V EMEKA, (1981) 1 SC101 and OFORLETE V STATE, (2000)12 NWLR (PT 681) page 415.***

The Plaintiff has shown that he suffered some form of inconveniences (albetdamages) as a result of the delay in his agreed flight time to Sokoto due to the Defendant rescheduling same. By virtue of the law (**Article 19 of the Third Schedule**) the Defendant is ordinarily liable to the Plaintiff in damages. The onus therefore shifts to the Defendant to establish the only exception recognized by law to such liability otherwise the Defendant shall be found liable for damages for breach of the contract of carriage by air between parties.

In order to avoid liability for breach of contract, the Defendant has to establish before this Court that it took all measures that could reasonably be required to avoid the damage occasioned by the delay or that it was impossible for it to take such measures. See **Article 19 of the Third**

Schedule. The pertinent question to ask is this; has the Defendant in this case been able to establish this?

It is not in dispute that the Defendant had sent the Plaintiff text messages rescheduling the Plaintiff's flight (originally scheduled for 10:30am on 16th December, 2017) for later in the day "due to operational requirements".See Exhibits 4 and 4A.

DW1 testified that the Defendant's aircraft scheduled to airlift the Plaintiff to Sokoto was a MJH Aircraft that required Ground Power supply upon landing in Sokoto. Before the scheduled time, the Station Manager of the Sokoto Airport reported to the Defendant's Lagos Operation Control Centre that the Ground Power Unit at the Sokoto Airport run by SAHCO a third party (independent of the Defendant) would be available by 1:30pm as it had technical problems and was undergoing servicing. The Defendant was consequently constrained to reschedule the flight to 1:50pm and duly notified the Plaintiff via the mobile number he had provided. The repairs of the Ground Power Unit at Sokoto Airport was however not completed at 1:30pm as earlier indicated by SAHCO and the Defendant deployed its best effort to avoid the delay by immediately searching for another aircraft with a functional inbuilt Auxiliary Power Unit within its fleet and other airlines operating in Nigeria to operate the Sokoto route. DW1 testified that the Defendant eventually got an MJF Aircraft which it deployed from Lagos to airlift its passengers to Sokoto on 16th December, 2017.

The Plaintiff's Counsel has posited that DW1's evidence on the causes of the delay in the Plaintiff's scheduled flight is inadmissible hearsay evidence. Counsel's position is that it is the Defendant's staff from its Lagos Operation Control Centre who got the information of the cause of the delay that ought to have been called to testify about the matter. I however disagree with the position that DW1's said evidence

amounts to inadmissible hearsay evidence in view of the facts and the circumstances of this case.

There is no doubt that the position of the law is that evidence of a witness who is not giving evidence of what he knew or did personally but of what he was told by another person amounts to hearsay and the general rule is that hearsay evidence is inadmissible. – see the cases of ***OKHUAROBO V. AIGBE (2002) 9 NWLR (PT. 771) P. 29*** *and* ***OJO V. GHARORO (2006) 10 NWLR (PT. 987) P. 173***. This general rule however admits some exceptions. One of such exceptions is evidence admitted on the principle of corporate personality. – see the cases of ***KATE ENT. LTD. V. DAEWOO (NIG) LTD. (1985) 21 NWLR (PT. 5) P. 116,SALEH V. BANK OF THE NORTH LTD. (2006) 6 NWLR (PT. 976) P. 316, COMET S.A. (NIG.)LTD. V. BABBIT LTD. (2001) 7 NWLR (PT.712) P. 442***.In the case of ***SALEH V B.O.N LTD (supra)*** *the Supreme Court of Nigeria* held thus:-

> *"I entirely agree with the opinion of the Court below that the mere fact a bank staff was not around when a customer's bank account was opened was not enough to prevent the staff from testifying or giving evidence on customer's account."*

See also***ANYAEBOSI V R.T. BRISCOE (NIG) LTD (1987) 3NWLR (PT.59) page 84*****and S.T.B. LTD. V. *INTERDRILL NIG. LTD. (2007) ALL FWLR (PT. 366) P. 757***all these cases deal withevidence admitted on the principle of corporate personality as an exception to the general rule of inadmissible hearsay evidence and that is why I disagree with position of the Plaintiff's Counsel on DW1's evidence as it relates to the information passed to the Defendant's Lagos operation control centre.

DW1 is a staff of the Defendant and its Station Manager in Abuja (where the cause of action in this case occurred). DW1 is competent to testify on behalf of the Defendant on

the matter of the cause of the delay of the Plaintiff's flight operated by the Defendant even though information about the said cause came to the Defendant's knowledge through its Lagos office. DW1's testimony on such matters therefore does not amount to inadmissible hearsay evidence. The weight to be ascribed to each aspect of his evidence is another matter however. It is trite that a piece of evidence may be admissible but the weight to be ascribed to it is a different matter.

Under cross-examination, DW1 stated at trial as follows:-

> *"It is correct to say all operations of our airlines are documented. I have no evidence now to show that it was MJF Aircraft that lifted the Plaintiff to Sokoto and not MJH."*

It would appear that the Defendant sought to rely solely on the *ipse dixit* of DW1 in proof of facts showing that it had good reasons for the delay in operating the Plaintiff's flight as originally scheduled and should not be held liable in damages to the Plaintiff for breach of the contract of carriage. There is nothing wrong in law in relying on mere *ipse dixit* of a party to prove facts. The only issue is where the nature of the case requires further proof of facts beyond mere *ipse dixit*, such *ipse dixit* will be insufficient to prove such facts. See the case of***DEBS V. CENICO LTD. (1986) NWLR (PT. 32) 846, (1986) LPELR-934(SC*)** where the Supreme Court held per Oputa JSC (of blessed memory) as follows:-

> *"There can be no question that a "mere ipse dixit" is admissible evidence but it is evidence resting on the assertion of the one who made it. Where there is need for further proof "a mere ipse dixit" may not be enough."*

So as not to lose sight of the nature of burden of proof on the Defendant, it is necessary to reiterate that the law (**Article 19 of the Third Schedule**) places the onus on the Defendant to establish before this Court that it took all measures that could reasonably be required to avoid the damage occasioned by the delay or that it was impossible for it to take such measures.

I have critically weighed the testimony of DW1 in the circumstances. Aside of the rather vague 'operational requirements' given in Exhibits 4 and 4A by the Defendant as cause for the rescheduling which caused the delay in the Plaintiff's flight, no further explanation was offered to the Plaintiff at the material time for the delay. Not even when the Defendant subsequently received the Plaintiff's Counsel's letter of demand (Exhibit 6) detailing the Plaintiff's grouse and claim against the Defendant. The undisputed fact is that the Defendant did not even deem it fit to respond to Exhibit 6.

The effect of such a failure to respond to exhibit 6 was well captured in the case of ***FAM- LAB (NIGERIA) LTD V JAHMARCO(NIG) LTD,(2018) LPELR 44730****, the Court of Appeal* held thus:-

> *"At any rate, the document, exhibit D was addressed to the second Appellant who acknowledged receipt of it. The document, deducible from its content, is not a social correspondence. It exhibits all features of a business letter. The Appellants failed to reply to it. The failure is a costly one in the province of the law. The law imputes admission of its contents in the glaring absence of response to it to the Appellant*."

See also ***TRADE BANK V CHAMI, (2003)13 NWLR (pt 836)page 158, CAP PLC V VITAL INVESTMENT LTD, (2006)6 NWLR (pt976) page 226, RAMFC V ONWUEKWEIKPE, (2009) NWLR (PT1165)and CDB PLC V EKANEN, (2009)16 NWLR (pt1168)page 585.***

The Defendant thus denied itself the opportunity of putting on record at the earliest opportunity the facts which it is now

relying on for its defence. PW1's testimony on information of repairs of certain equipment thus smacks of afterthought in the circumstances. I would therefore be forgiven for taking DW1's mere *ipse dixit* evidence on the repairs of equipment by an independent third party, the MJH Aircraftmeant to airlift the Plaintiff and the provision of an MJF Aircraft to airlift the Plaintiff with a lot of circumspection. These appear uncannily convenient and DW1's testimony without more is simply insufficient to convince this Court about such matters.

Counsel to the Defendant appears to realize the insufficiency of DW1's testimony as Counsel has in his final address attempted to explain the Defendant's operational reasons for the delay, unusual and unforeseen circumstances by explaining what Ground Power Unit is. See paragraphs 20 to 24 of Counsel to the Defendant's final address. These explanations however did not constitute part of DW1's oral evidence and appears to be evidence being introduced by Counsel through his address. The position of the law is trite that address of Counsel no matter how brilliant cannot take the place of evidence. – see the case of ***OKWEJIMINOR V. GBAKEJI (2008) 5 NWLR (PT. 1079) P. 172, ZUBAIRU MOHAMMED V MODU GBUGBU & ORS (2018) LPELR 44494 (CA) and KAREEM OLATINWO V THE STATE, (2013)LPELR 19979 (SC)***

I find that the Defendant has failed to establish,by sufficient credible evidence, its defence that the delay in the Plaintiff's flight was occasioned by the necessity to reschedule same due to repairs to equipment run by an independent third party. The Defendant has thus failed to establish before this Court that it took all measures that could reasonably be required to avoid the damage occasioned by the delay (or that it was impossible for it to take such measures). The Defendant has failed to discharge this onus placed on it by law in order to avoid liability for the damage occasioned by its delay of the Plaintiff's flight. The Defendant thus

breached the contract of carriage it had with the Plaintiff having failed to carry the Plaintiff from Abuja to Sokoto by air at the agreed scheduled flight time of 10:30am on 16th December, 2017 but at a later time. A breach of contract occurs not only when a party fails entirely to perform the contract but also when he performed it not in accordance with the terms thereof. See the case of ***PAN BISBILDER (NIG.) LTD V. F.B.N. LTD. (2000) 1 NWLR (PT. 642) P. 684***. In the instant case, the Defendant performed the contract of carriage not in accordance with its terms (compliance with flight time and schedule) and as such breached a fundamental term of the contract (albeit implied by law). The Plaintiff is entitled to the grant of the first relief of his statement of claim and it is accordingly granted.

By the second relief of the statement of claim, the Plaintiff in this case seeks the sum of N30,000,000.00 against the Defendant for breach of the contract of carriage. The position of the law is that once breach of contract is established, damages follow and general damages are presumed by law (it need not be pleaded or proved)as losses that flow naturally from the adversary. – see the cases of ***CAMEROON AIRLINES V. OTUTUIZU (SUPRA)*** *and* ***MEKWUNYE V. EMIRATES AIRLINES (SUPRA*****)** which are decisions of the Supreme Court on breach of contracts of carriage as in the instant case.

The applicable law appears to set some limitations to the liability of the Defendant for damages occasioned by delays in operating flight times and schedules. **Article 22 Paragraphs 1, 5 and 6 of the Third Schedule to the Civil Aviation Act** provides as follows:-

> *"ARTICLE 22*
>
> 1. *In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the*

carrier for each passenger is limited to 4150 United States Dollars.

……

5. *The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servants or agent was acting within the scope of its employment.*

6. *The limits prescribed in Article 21 and in this Article shall not prevent the Court from awarding, in accordance with its own rules of procedure in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the Plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, including Court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the Plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later."*

By virtue of **Article 23 of the Third Schedule**, the sum of 4150 United States Dollars set as limit of liability "shall be converted to Naira at the existing official exchange rate". The existing official rate is N389 to 1USD. This invariably means that the amount of the Defendant's liability is limited to no more than N1,614,350.

However, circumstance may exist where the Plaintiff would be entitled to a sum higher than N1,614,350.00 where the Plaintiff proves that the Defendant's act of delaying his flight

was done with intent to cause damage or recklessly and with knowledge that damage would probably result. In such circumstances the aforementioned limit set by the law will not apply to the Plaintiff's claim. See again **Article 22 Paragraphs 5 of the Third Schedule**. In other words, where wilful misconductof the Defendant/Air-carrier is established, the limit set by law will no longer be applicable. See the cases of ***CAMEROON AIRLINES V. OTUTUIZU (SUPRA), MEKWUNYE V. EMIRATES AIRLINES (SUPRA)****and* ***BRITISH AIRWAYS V. ATOYEBI (2014) LPELR-23120(SC)****.*

In the instant case the first relief of the Plaintiff has been granted on the credible evidence adduced by the Plaintiff and supported by the case of the Defendant. And as I said where a breach of contract is established as in the instant case against the Defendant damages flows irrespective of whether the Plaintiff claim same or not. I have also found that the ipse dixit of DW1 did not sufficiently explained the reasons for the delay and DW1's evidence is viewed by this Honourable Court as an afterthought and with circumspection in their attempt to avoid liability. I have also stated and held that the testimony of DW1 is vague. And it is trite law that a claim or evidence that is vague is lacking in certainty.

In the case of ***OCTS EDUCATIONAL SERVICES LTD V PADSON IND LTD & ANOR, (2012) LPELR 14069,*** the Court of Appeal on the meaning of vague states thus:-

> *"The adjective "vague" means" not clearly grasped in the mind, not precise in explanation, not firmly determined, not clearly perceived, not clearly formulating or expressing ideas"*

See also the new Webster's dictionary of the English language, International Edition, page 1085.

In the instant case, although negligence has been established against the Defendant, by exhibits 4 and 4(a), the Defendant tried to offer explanation that the delay was caused," due to operational requirements." Then the Plaintiff by his solicitor's letter, exhibit 6 submitted a written

complaint over the flight delay and requested for compensation from the Defendant. By exhibit 6 to the Defendant, the Plaintiff wrote as follows:-

> *"On that day (16th December, 2017) our client was at the NnamdiAzikwe International Airport, Abuja earlier than 10:30am to enable him depart to Sokoto for Medical Consultation with his personal physician who came from Niger Republic to see our client by 2:00pm. This is because our client is diabetic and he was to see the doctor for further diagnosis. The copy of the medical report from Jos University teaching Hospital (JUTH) evidencing our client's state of health is attached for your notice."*

Exhibit 6 read further:-

> *"When it was after the scheduled time, 10:30am our client got an SMS to the effect that the flight was re-scheduled to 13:50hrs and there and then, our client called his doctor and pleaded for 4:00pm which the doctor agreed."*

By exhibit 6, the Plaintiff states further that while waiting for the 13:50hrs flight, he got another message that the flight was no longer possible it was rescheduled once again to 16:45hrs and the Plaintiff immediately once again called his doctor and pleaded that the appointment be re-scheduled for 6:00pm. The Defendant's flight failed to take off at the re-scheduled time of 16:45hrs until 6:00pm when the Plaintiff was re-scheduled to meet with his doctor. Exhibit 6 then further reads:-

> *"To the disappointment of our client, the flight only got ready around 6:00pm and on arrival in Sokoto our client's doctor had swallows his disappointment and left."*

Consequently, our client could not see the doctor in spite of the money our client spend to book for an appointment with the doctor and to get him arrived in Nigeria."

Exhibit 6 concluded by demanding a formal apology and the sum of N20,000,000.00 compensation for the damages suffered as the result of the Defendant's negligence.

The Defendant admitted having received exhibit 6 of the Plaintiff. However, the Defendant refused failed or neglected to reply or respond to the Plaintiff's exhibit 6. By exhibit 6, the Defendant have ample opportunity to respond to the Plaintiff's letter by giving full explanation of the contents of exhibits 4 and 4(a) and position of its aircraft MJH and MJF. In otherwords, by the Defendant's failure to respond to exhibit 6, the Defendant has admitted the contents of exhibit 6. See***FAM-LAB (NIG)LTD V JAHMARCO (NIG) LTD (supra), TRADE BANK V CHAMI (supra) etc***.

Thus, by the action of the Defendant towards exhibit 6, the action of the Defendant amounts to wilfully misconduct, arrogance and impunity as exhibit 6 has clearly brought to the attention of the Defendant the flight of the Plaintiff, one of its passengers on board its flight. Instead of the Defendant reacting to exhibit 6, it failed or refused todo so.

Thus, by exhibit 6 and the evidence of PW1 a 71 year old diabetic patient and the trauma he went through as a result of the Defendant's action, I hold the view that the Plaintiff is entitled to the general damages for breach of contract in the sum higher than the amount provided by exhibit 7 and I so hold. According, the sum of N10,000,000.00 is hereby awarded to the Plaintiff as general damages against the Defendant.

In respect of the third and fourth reliefs for 10% interest and cost of this suit, Article 23 paragraph 6 of the third schedule, in addition to awarding damages, the Court is empowered to order cost of litigation. In the same breath by order 39 Rule 4 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018, this Court has jurisdiction to grant post-judgment interest at arate not less than 10% per annum.

Accordingly therefore, 10% interest is hereby awarded on the judgment sum per annum from today the 13th May, 2020 until final liquidation of the entire judgment sum by the Defendant. Cost of this suit is hereby assessed at N50,000.00 against the Defendant in favour of the Plaintiff.

Before I draw the curtains in this case, I want to thank and appreciate both Counsel, OgunmuyiwaBalogun Esq for the Defendant and Bashir S. Ahmad Esq for their brilliant performance and dexterity in prosecuting their respective cases. Their quality of legalcontribution has immensely assisted the Honourable Court. I also want to observe that it appears the claimant is not keen on the monetary consideration but is interested in entrenching respect for contracts entered generally by parties to respect same and that is the only way the Country (Nigeria) would move forward.

In conclusion, the sole issue is hereby resolved in favour of the Plaintiff and against the Defendant.And that is the judgment of this Honourable Court

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HON. JUSTICE D.Z. SENCHI
(PRESIDING JUDGE)
13/05/2020

Parties:- Plaintiff Absent.
Ogunmutiwa:-Defendant Absent.
Bashir S. Ahmed:-For the Plaintiff.
Godwill N. Iwuajoku:-With me is BabatundeIge for the Defendant.

Sign
Judge
13/05/2020