

Inside KCAA's 14-judge, 11-year long meandering chase for Sh2.6b compensation

Yesterday we narrated how the battle between the government and African Commuter started after the January 2003 plane crash. In our second installment, **KAMAU MUTHONI** reveals how the company and the Kenya Civil Aviation Authority fought for years, moving from one court to another up to the Supreme Court.

After losing the case before the High Court, the AG and KCAA moved to the Court of Appeal.

They raised 56 grounds, challenging Justice Roselyn Nambuye's verdict. In their appeal, they claimed, among other things, that she failed to find that African Commuter Services was required to confirm the condition of Busia Airstrip before its pilots flew the ill-fated airplane.

After hearing rival arguments, Justices Wanjiru Karanja, Daniel Musinga and Kathurima M'iroi added Sh362 million on top of the Sh900 million that had been awarded by the High Court. The bill now rose to Sh1.4 billion.

In their verdict, they awarded the airline 50 per cent of the cost of the case in the High Court and Court of appeal. This was on February 7, 2014.

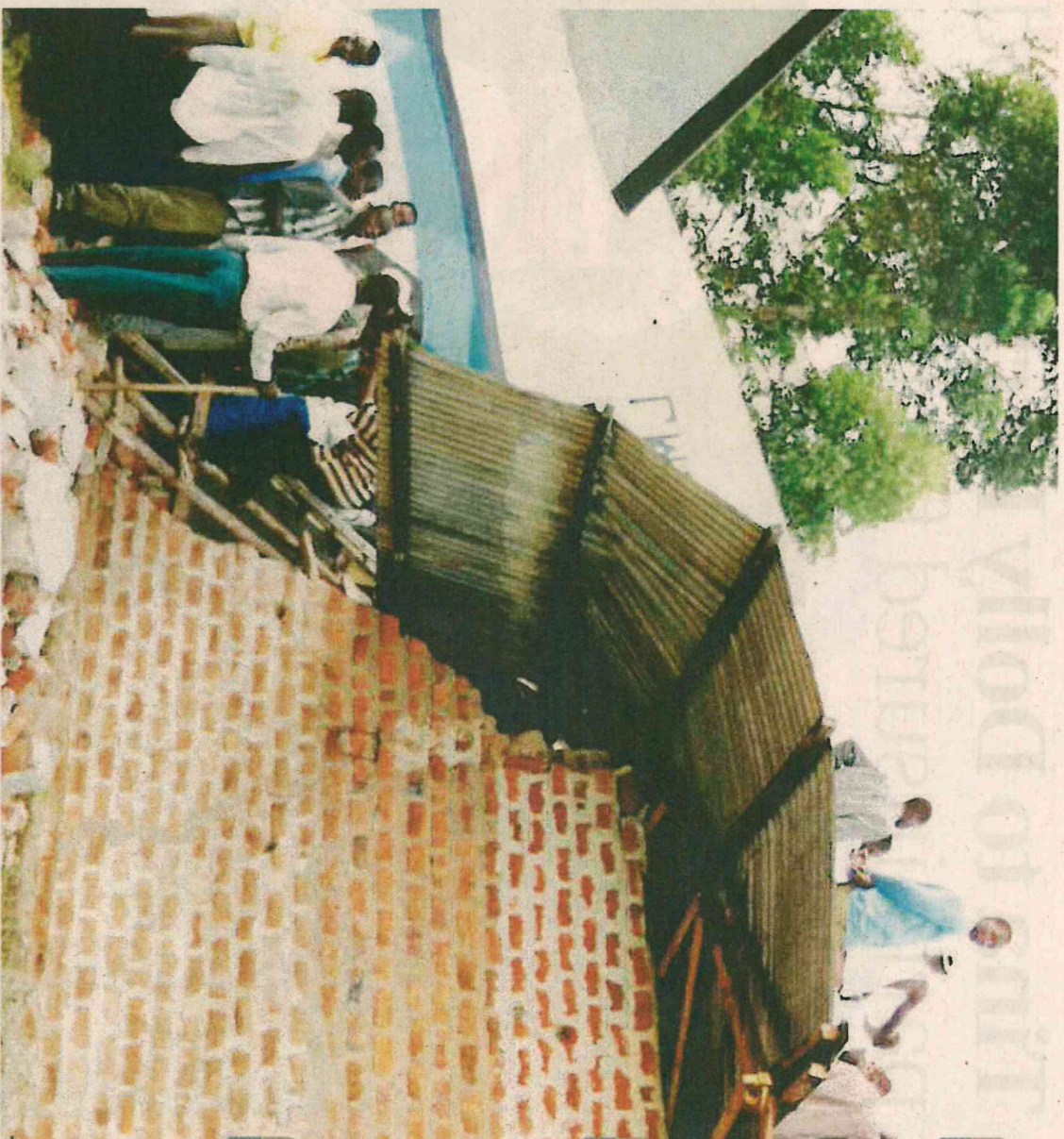
The appellate judges said that after considering other airplane crashes, it was clear that KCAA discriminated African Commuter.

"We agree with this witness and the finding of the learned Judge that the respondent was not accorded equal treatment with other operators who had been faced with similar circumstances," the judges ruled.

"He was clearly discriminated against, purely in our view, because of the status of the passengers involved. There is no doubt that the "permanent" suspension of the respondent's Air Operator Certificate was capricious, punitive and retributive."

Ismael Mohamed Jibril, the owner of African Commuter Service, stated that 5Y-EMJ crashed in Busia while the second one, 5Y-EMK which was also on lease agreement was repossessed and taken back to South Africa.

Africa Commuter Service then sold plane 9L-LCP (9XR-AL) by the end of



2003 and the fourth plane was also repossessed.

The sixth one was sold off to Bukavu the same year, while the seventh one was parked somewhere in Congo for two years.

The remaining one, a 9XR-AB was sold in 2004 as KCAA stuck to its gun that it would not reinstate the license.

Besides Jibril, African Commuter Services called Captain Joe Mutungi as its other witness. Mutungi is one of the pioneer African pilots.

When asked about the suspension of the firm's license following the accident, Mutungi stated that for the 30 years he had been in the aviation industry, he had never come across a situation where an airline's certification was cancelled because of an air accident.

He gave an example of the Kenya Airways accident in Cameroon, the Bluebird jet accident in Kitui in 2004, and the 2000 Kenya Airways accident in Ivory coast.

Despite the accidents, he said, the licenses of the pilots and the airlines were never suspended nor cancelled.

The firm also called an accountant as its third witness. The accountant narrated that his employer ran into losses after the license was cancelled.

To demonstrate this, he explained that between 2002 and 2003 before the license was cancelled the company was making profit.

On the other hand, KCAA called its Director General Chris Kuto and its then manager air traffic services Samuel Henry Odoyo Nyikuli.

Nyikuli admitted that he authored the note to suspend African Commuter's license.

He told the court that the director called him at around 11pm, the day the accident happened, and instructed him to suspend it.



Justice Joseph Sargon, Judge

"In any event, the respondent was not candid with the court. It only alleged that the monies in the subject bank accounts are operating capital."

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MILLION. Amount KCAA claimed it owed African Commuter Services, while seeking to have the court review the Sh1.4 billion decree.

KCAA also called Benjamin Enyenze, its deputy director in charge of air transport department.

However, judges found that his evidence had no value and was not relevant to the dispute.

Justices Wanjiru, Musinga and M'iroi put to task Nyikuli for addressing the wrong company. He was also on the spot why his boss (Kuto) did not sign the latter.

"As stated earlier, it is addressed to the wrong person so the respondent could easily have disowned it; not that it would have changed anything given the minister's directive.

"Secondly, it is not signed by the Director General himself but by one S. H. Nyikuli. Is this countenanced by the Civil Aviation Act," judges observed.

KCAA also claimed that it acted on public interest. Judges were of the view that there was no evidence by KCAA that the Director General delegated his powers to Nyikuli.

They said: "This was a very delicate situation whereby by a stroke of the pen the respondent's entire aviation business was to be grounded to an abrupt halt. It called for more serious consideration and strict compliance with the relevant laws and regulations.

"It definitely needed much more than an improperly addressed, handwritten missive dispatched by way of fax in the middle of the night and signed by a person who had clearly no authority to do so for lack of proper delegation."

The appellate court was of the view that there was no reason to act in haste as the accident had already happened. The judges stated that it was pru-

dent to wait the following day visit the accident scene with experts, collect basic facts on what happened and if need be, suspend the license.

"That way, the blunders of having an unauthorised person purport to suspend the license could have been avoided. The long and short of this is that the Director General did not exercise his discretion prudently as he is enjoined by law to do," the court stated.

The three judges sealed KCAA's fate on February 7, 2014.

Their judgment then stoked up another application before another Bench of the same court.

This time, KCAA asked Justices GBM Kariuki (now retired), Festus Azangalala and Jamila Mohammed to certify their application as that of public importance.

This was a ticket to the Supreme Court. However, the three judges on May 29, 2015 dismissed the application.

Aggrieved, the authority moved to the Supreme Court. Among its arguments was whether it was fair for the public to pay Sh1.4 billion to African Commuter Services following KCAA Director General's delegation of his work to his juniors.

In total, the authority raised 14 grounds that it felt were crucial to the case.

However, the Bench led by Chief Justice David Maraga (now retired), and Justices Jackson Ojwang (retired), Smolkin Wanjira, Njoki Ndung'u and Isaac Lenaola unanimously dismissed the application on December 7, 2018. They found that the law was clear



How KCAA acted after other air crashes

- 5 May 2007** KQ accident in Cameroon. Its license was not suspended or cancelled.
- 2004** Blue Bird jet accident in Kitul. Licence was neither suspended nor cancelled.
- 2003** East Aviation Safari Airways aircraft crash in Lokichogio. The license was neither suspended nor cancelled after the plane ran off the runway and was written off.
- 2001** Aircraft Leasing Services lost an aircraft at JKIA. They were working in partnership with Kenya Airways. Their license was never suspended or cancelled.
- 2000** KQ crash in Ivory Coast. Kenya Airways license was never suspended or cancelled.

What happened to Africa Commuter Services planes

- 5Y-EMJ** - is the one that crashed in Busia.
- 5Y-EMK** which was on lease hire agreement was repossessed and taken back to South Africa.
- 9L-LCP 9XR-AL** was sold by at the respondent end of 2003
- 3D-ACH** - Skyvan was under a lease agreement from a 3rd party and it was repossessed at the end of the same year, 2003.
- ER-AJA** was sold off to Bukavu end of 2003.
- 9XR-EL** - as at the time of trial was parked somewhere in Congo where it had been for two (2) years. He had tried to work with it there and it did a few hours. It may have operated for 900 hrs at the rate of 950 Dollars an hour.
- 9XR-AB** was sold in 2004.

Justice Serгон found the government agency was lying.

He noted that African Commuter Services had waited for 11 years to be paid, adding that even when the Court of Appeal ordered it to pay, it had not paid a dime.

"In any event, the respondent was not candid with the court. It only alleged that the monies in the subject bank accounts are operating capital.

"To my mind, if the respondent was candid enough, it should have disclosed all the bank accounts that it operates apart from the two garnished and the respective balances thereon or if not, state to the court whether the two accounts are the only accounts it holds," argued Justice Sergon.

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Coming tomorrow

African Commuter Services employee reveals how he helped his company win billions of shilling in court award; and the intriguing story of the firm's owner.

JUSTICE

Why court ordered student, 23, to forfeit over Sh130m gift from boyfriend to State

In early 2021, Felesta Nyamathira Njoroge was just like any other college student at Nairobi Technical Training Institute going about her studies in anticipation of a brighter future.

In the midst of her studies, lady luck smiled on her face when she met Belgian businessman Marc De Mesel who became her instant boyfriend before they moved in together at a house in Garden City Estate along Thika Road in Nairobi.

Between August 4 and August 6, 2021, De Mesel decided to make Ms Njoroge a multi-millionaire when he gifted her more than Sh130 million for her personal use and to take care of their family.

De Mesel transferred the first tranche of USD 914,967 (Sh126,494,187) to Ms Njoroge's account at Co-Operative Bank and the second tranche of Sh5 million to her account at Stanbic Bank.

Ms Njoroge's sudden riches and millionaire status has however come tumbling down after High Court Judge Esther Maina declared that the money was proceeds of crime acquired through money laundering which must be forfeited to the State.

"The court is satisfied that the amounts held in the two accounts are proceeds of crime acquired through money laundering and which are liable for forfeiture to the State. It is obvious that the money was tainted since they could not explain the source," ruled Maina.

Justice Maina ruled that both Ms Njoroge and De Mesel were given opportunity to explain the source of the funds but they could not give any plausible explanation.

According to the judge, Ms Njoroge stated that she acquired the money from the Belgian who when asked only stated that he trades in digital currency but could not say where he got the total of Sh131,494,187 he gifted her.

As a further punishment, Justice Miama ordered Ms Njoroge and De Mesel to pay the Asset Recover Agency (ARA) the costs of fil-

ing and prosecuting the case against them. "Ms Njoroge's defence was that she got the money from De Mesel but an analysis of the bank transaction does not show the source of his money. He should have explained where he got the money instead of just saying he trades in digital currency," ruled Maina.

ARA in its suit against Ms Njoroge claimed that she is part of an international ring of fraudsters engaged in complex money laundering schemes with individuals from various countries where she received the money on their behalf to disguise and hide the source of the funds.

According to the agency, De Mesel who is believed to be a crypto-currency dealer had indicated in the bank declaration form that Ms Njoroge was "free to use the gifted money to secure financial security for their future children" and to use the balance on anything she wished to do.

ARA stated that when they summoned Ms Njoroge for questioning over her sources of funds, she escaped to Tanzania by crossing the Naman-ga border as a pedestrian on October 2, 2021 before fleeing to Belgium with De Mesel.

The agency told the court that Ms Njoroge was part of young girls aged between 19 and 26 years who De Mesel recruited into his money laundering scheme by transferring more than Sh650 million into their account before the money was hurriedly siphoned to other countries.

"They are suspected to be part of a syndicate of complex money laundering scheme involving foreign nationals where their bank accounts are used as a conduit of the illicit funds. The scheme is designed to conceal and disguise the nature and source of the funds," said ARA.

Ms Njoroge true identity remained a mystery throughout the case when two sets of law firms fought to represent her, with one side claiming she is in the country while the other stated that she was in Belgium.

The 23-year-old student in her defence accused the Agency of a witch hunt and invasion of her privacy, stating that she is an adult with constitutional rights to do business and earn such huge amounts of money. [Paul Ogenba]

