



Amudala v African Bush and Beach Adventures & another (Cause E007 of 2024) [2025] KEELRC 203 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 203 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E007 OF 2024
M MBARÚ, J
JANUARY 30, 2025**

BETWEEN

LEVI MUYONGA AMUDALA CLAIMANT

AND

AFRICAN BUSH AND BEACH ADVENTURES 1ST RESPONDENT

KERSTIN AMUDALA NEE KERSTIN GEYER 2ND RESPONDENT

JUDGMENT

1. The claimant is a male adult. The 1st respondent is a limited liability company. The 2nd respondent is a female adult in charge of the 1st respondent.
2. The claim is that the 1st respondent employed the claimant as the managing director on 1 February 2015 because he and the 2nd respondent were directors/shareholders at a 20%/80% ratio. The 2nd respondent remained the estranged wife to the claimant and on account of which, he was employed by the 1st respondent.
3. The claim is that the claimant was employed by the 1st respondent until 31 July 2023. His duties were the day-to-day running of the business since the 2nd respondent is a foreign national from Australia on a dependency pass guaranteed by the claimant.
4. The claim is that the claimant and the 2nd respondent agreed that he would be paid Ksh.200, 000 per month as salary but was paid Ksh.120, 000 per month but on 31 July 2023 when he reported working his employment was verbally terminated by the 2nd respondent.
5. Termination of employment was without notice, hearing, or justification. The claim is that there was underpayment of salaries from February 2015 to January 2023. Instead of the agreed Ksh.200, 000 per month, the 2nd respondent paid ksh.120, 000 leaving balances of ksh.8, 160,000.



6. The claimant remained at work during all days of the week without a rest day as provided for under the law. He was not compensated and is claiming payment in lieu of taking rest days from February 2015 to July 2023.
7. The respondents failed to remit statutory dues to NSSF and NHIF hence service pay is due at Ksh.800,000.
8. The claimant did not take his annual leave entitlement under the law. In total, he had accrued leave days for 7 years at Ksh.1, 20,000.
9. The claimant remained at work during public holidays. Each public holiday is tabulated and in total, over 7 years he worked for 100 days claiming ksh.1, 173,333.
10. The claimant worked overtime at a minimum of 2 hours each day for 7 years and accumulated 4418 hours and Ksh.6, 442,916.66
11. The claimant was not given accommodation or paid a house allowance and for 7 years claimed Ksh.3, 060,000.
12. The claim is that there was unfair termination of employment contrary to Section 45 of the Employment Act and compensation is due at 12 months at ksh.2, 400,000.
13. The refusal by the respondents to pay the claimant his dues violates sections 18(4) and (5) of the Employment Act. The claimant is seeking payment of the following;
 - a. A declaration that employment was terminated wrongfully, unlawfully and unfairly;
 - b. Underpayments ksh.8,160,000;
 - c. 12 months compensation Ksh.2,400,000;
 - d. Notice pay ksh.200,000;
 - e. Service pay Ksh.800,000;
 - f. Unpaid leave Ksh.1,120,000;
 - g. Public holidays Ksh.1,173,333;
 - h. Overtime Ksh.6,442,916.66;
 - i. House allowance Ksh.3,060,000;
 - j. Certificate of service;
 - k. Costs of the suit.
14. The claimant testified in support of his case that he is married to the 2nd respondent with whom they have two issues, Alina Injairu Amudala born in 2017 and Levi Wendo Amulada born in 2022. The claimant and the 2nd respondent are the directors and shareholders of the 1st respondent company in the ratio of 80%:20%.
15. Both the claimant and the 2nd respondent established the 1st respondent, where the claimant was employed as a managing director running the company's day-to-day affairs. The claimant was to be paid a salary of Ksh.200, 000 per month but was only paid Ksh. 120,000 per month. The salary was also not remitted in full.



16. The claimant testified that on 31 July 2023, the 2nd respondent verbally and forcefully terminated his employment and directed him to get out of the business premises. There was no notice, reason or justification.
17. There were payments made through his bank account but these related to charitable work that the respondents were undertaking within the community. He was required to use such money to make purchases and support the community members. This was not meant to be a salary as alleged by the respondent.
18. Upon cross-examination, the claimant testified that while working for the 1st respondent he was residing with the 2nd respondent as his wife. He is not professionally trained as a manager but he was undertaking duties of managing director for the 1st respondent company at a salary of ksh.120, 000 per month. The filed bank statements show the deposits made by the respondents.
19. There was no contract of employment. The respondents did not sign the contract dated 19 January 2019. It was sent by email. It has no company seal or letterhead. The 2nd respondent made PAYE, but no pay slips were issued. The payments to the bank account are inconsistent, and the purpose is not indicated. As husband and wife, the claimant and 2nd respondent had no joint account;
 - There is a payment of Ksh.224, 000;
 - There is a payment of Ksh.900, 000;
 - There is the payment of Ksh.218, 000;
 - The purpose and reasons for these payments are not stated.
20. In response, the respondents denied ever employing the claimant as alleged. From 1 February 2015, the 1st respondent could not employ the claimant. The 2nd respondent owned the 1st respondent with her mother in the ratio of 10:90%, but the mother pulled out as a shareholder in 2019, and she included the claimant as a shareholder thereof who never participated in the management of the company.
21. The second respondent admitted that she is the lawful wife of the claimant but denied employing him as the managing director. There was no oral or written contract of employment, as alleged. The only relationship between the parties is strictly matrimonial.
22. The claims made are without merit. The second respondent maintained a work permit and ran businesses in Kenya even before meeting the claimant. The second respondent operated with the first respondent during her mother over the years before her marriage. No employment was negotiated with the claimant as alleged or an agreed pay of Ksh.200 000 per month. There is no employment contract upon which such a claim is based.
23. No employment was offered to the claimant on 1 February 2015. The claimant runs his company/ business, Buddy's Bar & Restaurant. The claim that there was an arrangement to pay the claimant a salary of Ksh.120, 000 is without evidence.
24. Without any employment contract between the parties, the claimant could not have been attending work until 31 July 2023. The 2nd respondent could not terminate his employment as no such relationship existed. Where there was such termination of employment as alleged, the same arose out of gross misconduct. Such gross misconduct arose out of;
 - a. Misappropriation of funds;
 - b. Failing to attend to his designated duties affected;



- c. Negligence in executing designated duties subjecting the 1st respondent to unwarranted losses.
25. The response is also that the respondents never employed the claimant as the general manager and hence could not terminate employment on the alleged domestic fallout. Without there being an employment relationship, the 2nd respondent could not issue a warning notice, hearing or reasons. Such a matter was not applicable between the parties. The particulars of underpayments, accrued leave, and statutory payments all fall within an employment relationship which did not apply to the parties. The respondents had no obligations to address the matters as claimed. The claim is filed in abuse of court process and should be dismissed with costs.
26. In evidence, the respondent called the 2nd respondent who testified that she is resident in Kenya guaranteed by the claimant as her husband upon marriage in the year 2016. She provided for the family with children and the claimant who did not have a job. As the director of the 1st respondent, registered in 2012, the company employed Alex Mokora Obare to assist in managing the day-to-day activities and did not employ the claimant as a managing director as alleged. Due to financial challenges, the claimant proposed to be involved in the affairs of the 1st respondent but the 2nd respondent declined on account of their domestic relationship. She offered him Ksh.1, 000,000 which he used to establish his business, Buddy's Bar & Restaurant. The 2nd respondent paid for all items and services for the claimant's business. She made back payments through his account.
27. The 2nd respondent testified that she did not employ the claimant and there is no employment contract. The claimant was not the managing director of the 1st respondent since he has been running his company and business.
28. The respondent called Alex Mokora Obare who testified that the 1st respondent is a tour company and has been working for it as the manager since 2013. He is aware of the claimant who got married to the 2nd respondent in 2016 while he was serving as the manager of the 1st respondent. The claimant is not involved in the business of the 1st respondent which is strictly in tours, and hotels and he runs his business at Buddy's Bar & Restaurant in Ukunda away from the 1st respondent.
29. Obare testified that he had worked closely with the 1st respondent and was issued with a letter of employment. The respondents facilitated his various training and issued him with a visa application letter to Egypt. He is still an employee of the respondents.
30. The respondents also called Shaban Juma Mwaramu a driver who testified that he is aware of the respondents who source him as a tour company to drive guests to various destinations. He has worked for the 1st respondent since 2012 through contracts with the 2nd respondent as the director. From the time he started working with the respondents, he has interacted with other employees of the 1st respondent and the claimant is not the manager but Alex Mokora Obare. He has known the claimant as the spouse to the 2nd respondent and has never seen him working for the 1st respondent since he runs his business at Ukunda.
31. He is not an employee of the respondents but is sourced on a needs basis. Obare calls him whenever there is work. He is paid based on each task done. Payments are made by Obare as the manager.
- At the close of the hearing, both parties filed written submissions.
32. The pleadings, evidence and extensive written submissions are analyzed and the issues which emerge for determination can be summarized as follows;

Whether there was an employment relationship between the parties;

Whether the remedies sought should be issued;



Who should pay the costs?

33. The claimant has defined the parties as directors/shareholders of the 1st respondent. His case is that he was employed on 1 February 2015 at an agreed salary of Ksh.200, 000 but he was paid Ksh.120, 000. The claimant filed the following records as proof of his employment;
- a. Kenya Revenue Authority payment details;
These are returns required for the 1st respondent company and not employment contracts;
 - b. Divorce proceedings;
These are not necessary for an employment claim but confirm parties were in a marriage relationship;
 - c. Bank statements;
These start from 2 January 2019 with a cash deposit of Ksh.200, 000 by the claimant into his account;
A cash deposit on 7 January 2019 of Ksh.100, 000 by the claimant into his account;
4 March 2019 a cash deposit of Ksh.500, 000 done by the claimant into his bank account;
3 June 2019 a cash deposit of Ksh.300, 000 by the claimant into his account;
1 September 2023, a deposit of Ksh.243, 753 followed a general claim and the claimant was the beneficiary.
34. The listed transactions in the bank account have no given pattern in an employment relationship. All the deposits are by the claimant to his bank account. They are cash deposits save for the deposit on 1 December 2021 by Maji Moto Scholl Clinic through an internal transfer.
35. The records filed by the 2nd respondent confirm that the 1st respondent was owned by herself and a third party until 2019.
There is no employment contract between the parties.
36. The fact that the claimant is the director and manager of Buddy's Bar & Restaurant which he operates was not challenged in any material way.
Was there an employment relationship between the parties?
37. What comes out is that within a marriage blessed with two issues, both the claimant and 2nd respondent became shareholders of the 1st respondent upon the exit of the third party in 2019. Out of the relationship, the claimant had banked various amounts in his bank account as evidenced by the statements filed in court. He deposited these monies in his account. There is nothing to demonstrate that there were payments from the respondents as a salary. There are no specific patterns to demonstrate that there was a payment of Ksh.120, 000 per month or 200,000 in the form of salary. The payments are staggered as one would expect in a family business where both wife and husband run joint affairs for the well-being of the family. Within the marriage, there are no losses but cumulative consolidation of benefits, for the family. There is no payment of PAYE but a general application of resources for the benefit of the family.
38. The fact that the 1st respondent was solely owned by the 2nd respondent and her mother until 2019 is not challenged. If that was the case, employment alleged to have commenced in the year 2015 ought to have been between the claimant and the respondents plus the third party, mother to the 2nd respondent.



39. With the marriage of the claimant to the 2nd respondent in 2016, the series of events that followed do not speak to an employment relationship. The fact that Mr. Obare was the manager of the 1st respondent from inception and he has never worked with the claimant is sufficient proof that he was not the general manager.
40. These events as outlined in the claim, the fact of non-payment of salaries for over 7 years, not taking annual leave, and non-remittances of statutory dues, cumulatively, the evidence demonstrate a domestic relationship unlike an employment relationship. The focus was a business relationship under which the claimant was running Buddy's Bar & Restaurant while the 2nd respondent was running the affairs of the 1st respondent.
41. In *Abraham Gumba v Kenya Medical Supplies Authority* [2014] eKLR the court held that;
- The employment relationship is not commercial, but a special relationship, which must be insulated from the greed associated with the profit-making motives, inherent in commercial contracts. ...
40. This position is affirmed by the Court of Appeal in *Barclays Bank of Kenya Ltd & Africa Group (S.A) Ltd v Gladys Muthoni & 20 others* [2018] KECA 718 (KLR).
42. In the case of *Velani & 6 others v Naran & 2 others* [2021] KEHC 75 (KLR) the court observed that unlike an employment relationship where shareholders have a dispute, recourse is to the Articles of Association;
- Fairness is judged in the context of a commercial relationship, the contractual terms of which are, in the main, set out in the Articles of Association of the company and in any shareholders agreement. The starting point is therefore to ask whether the conduct of which the shareholder complains is in accordance with the Articles and the powers which the shareholders have entrusted to the board. The best protection for a shareholder is appropriate protection in the articles themselves. Therefore, if the conduct is in accordance with the Articles, to which the shareholder has agreed, it will be more difficult to succeed with an unfair prejudice petition.
43. Within the shareholding of the business and 1st respondent, the claimant stake can be capitated and quantified. However, that cannot be done within employment and labour relations. It can only be addressed within a commercial claim outside the jurisdiction of this court. The typical scenario demonstrated to the court is a family dispute escalated as an employment case. This cannot hold.
44. The claimant must return to his business, Buddy's Bar & Restaurant as he seeks his take within the 1st respondent. This cannot be addressed within these proceedings. There exists no employment relationship. The court is denied the mandate to address this further. Without the requisite jurisdiction, this being a commercial dispute, the court must down its tools.

Accordingly, the suit is struck out. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

