



Amur v Seven Four Eight Air Services Kenya Limited & another (Cause 1461 of 2015) [2023] KEELRC 1285 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1285 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1461 OF 2015**

J RIKA, J

MAY 31, 2023

BETWEEN

NAIM ABDALLAH AMUR CLAIMANT

AND

SEVEN FOUR EIGHT AIR SERVICES KENYA LIMITED 1ST RESPONDENT

GLOBAL AIRLIFT LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 19th August 2015.
2. He states that he was at all material times, employed by the Respondents.
3. The Respondents are air transport companies.
4. He states that he was employed as a Pilot to fly aircraft owned by the 1st Respondent, but on flights operated by the 2nd Respondent.
5. On 17th February 2014, a cargo aircraft registration number 5Y-HAJ, owned by the 1st Respondent and operated by the 2nd Respondent, crashed while landing at Robkona Aerodrome, in the Republic of South Sudan. The Claimant was the captain of the aircraft.
6. He states that he suffered serious injuries and was hospitalized at the Aga Khan Hospital for a long time. He suffered the following injuries: -
 - a. Left periorbital oedema.
 - b. Left shoulder deformity.
 - c. Tenderness over the mid-shaft humerus.
 - d. Generalized brain oedema highly suggestive of axonal injury.



- e. CT facial bone minimally displaced fractures of the bilateral nasal bones.
 - f. Sub-luxation of the left lacrimal bone.
 - g. Fractures of the 3rd and 4th ribs.
 - h. Fractures of the 2nd and 3rd ribs on the right.
 - i. Multiple lung contusions.
 - j. Soft tissue obstruction next to left main bronchus.
 - k. Muroid plug revealed after bronchoscopy done.
 - l. Cerebral oedema.
7. The 2nd Respondent contacted the Hospital, to confirm that the Claimant was its Employee, and to cater for medical bills, which the Respondents partly did, leaving a balance of Kshs. 2,000, 662. 65 at the Hospital.
8. The Claimant prays for the balance specified above.
9. He claims costs he continues to incur as a result of the accident, as well as general damages for pain, suffering and loss of amenities caused as a result of his disabilities. The disabilities are particularized as follows: -
- a. Severe head injury.
 - b. Impaired speech.
 - c. Post-traumatic stress.
 - d. Partial memory loss.
10. The Claimant further pleads particulars of continuous treatment to include: -
- a. Daily tracheotomy site care.
 - b. Speech and language therapy.
 - c. Physiotherapy.
 - d. Occupational therapy.
 - e. Psychological counselling.
11. The Claimant pleads that the Respondents have constructively dismissed him, by refusing to discuss terms of resumption of duty.
12. He prays for Judgment against the Respondents jointly and severally for: -
- a. Special damages at Kshs. 2,000,662.65.
 - b. General damages for pain, suffering and loss of amenities [and] provision of future medical care.
 - c. Damages for unlawful termination of employment.
 - d. Costs and interest.



13. The Respondents filed their Statement of Response on 16th October 2015.
14. They do not concede that the Claimant was their Employee. The 2nd Respondent retains Employees on written contracts of service, with clearly defined terms and conditions of service. It also hires freelance Pilots. Such Pilots are not Employees of any one air transport company; they are independent contractors.
15. The 2nd Respondent engaged the Claimant as an independent contractor, to fly its aircraft from Juba to Robkona in South Sudan, on diverse dates in February 2014.
16. The Claimant took command and operated the 2nd Respondent's aircraft in a reckless and negligent manner. He failed to properly manage / control the aircraft as required under the 2nd Respondent's Standard Operating Procedures. The aircraft crashed while attempting to land at Robkona Airstrip.
17. The particulars of negligence are listed to include: -
 - a. Failure to operate the aircraft in accordance with the Standard Operating Procedures.
 - b. Putting in peril the safety of the aircraft and crew.
 - c. Taking command and flying the aircraft without being in full control of the aircraft.
 - d. Failing to disclose to the 2nd Respondent or the Aviation Authority that he was impaired, and not in a position to take command of the aircraft.
 - e. Failing to insure himself as an independent contractor for any losses that may occur as a result of his own breach or negligence.
18. The 2nd Respondent holds the Claimant wholly responsible for the loss it suffered and is entitled to be indemnified by the Claimant.
19. The 2nd Respondent organized for the repatriation of the Claimant and other crew from South Sudan to Nairobi, and met most of their medical expenses on a humanitarian ground. It was not out of any statutory obligation. Had the Claimant been an Employee of the 2nd Respondent, he would have been covered under the 2nd Respondent's Employees' Insurance.
20. He was discharged from hospital on 16th April 2014, as shown in the discharge summary. His bill on discharge was Kshs. 6,954,354. 83, which was met in full, by the 2nd Respondent. The 2nd Respondent suffered substantial financial loss due to the accident, and was not able to continue contributing to the Claimant's medical costs, after discharge. The 2nd Respondent duly informed the Claimant about this position.
21. On or about 15th to 20th July 2014, the Claimant sought some freelance assignment from the 2nd Respondent. He was asked to avail a Certificate of Medical Fitness and Renewed Licence to be considered for freelance piloting. He did not present any documents and did not contact the 2nd Respondent further.
22. The 2nd Respondent states that the Claimant flew its aircraft under the influence of alcohol. He took alcohol on the night of 16th February 2014, the eve of the flight. He flew the aircraft knowing well that he was under the influence of alcohol.
23. The 2nd Respondent suffered loss and damage, including: -
 - a. Loss of the life of a crew.



- b. 3 crew members including the Claimant, sustained serious injuries.
 - c. The aircraft was completely damaged, occasioning the 2nd Respondent loss for the value in the sum of USD 750,000.
 - d. The 2nd Respondent sustained repatriation costs in the sum of USD 129,163.19.
 - e. 3rd party properties valued at USD 57,606 were destroyed and the 2nd Respondent had to indemnify the owners for the loss.
24. The 2nd Respondent lost a source of revenue, and seeks damages from the Claimant for loss of income.
 25. It seeks reimbursement of the medical expenses incurred at Kshs. 6,954,354.83
 26. The 2nd Respondent counterclaims for loss and damage as particularized above. Its prayer is that the Claim is dismissed, and Counterclaim upheld, with costs.
 27. The Claimant gave evidence on 17th June 2022, while his Witness Rahma Wambui Karanja gave evidence on 4th November 2021, closing the Claimant's case. 2nd Respondent's Director, Samir Mohammed gave evidence on 26th January 2023, when the hearing came to a close. The Claim was last mentioned on 20th April 2023, when the Claimant confirmed filing and service of his Closing Submissions, and the Respondents gave their undertaking the file and serve theirs, within 7 days.
 28. The Claimant adopted the contents of his Statement of Claim, Verifying Affidavit and Witness Statement in his evidence-in-chief.
 29. Cross-examined, he told the Court that he was employed by the Respondents, on and off, from the year 2004 till 2013. He worked for the 1st Respondent 2004-2013. It was not continuous. The 2nd Respondent hired the Claimant in 2014. The crash occurred in February 2014. Technically he was not an Employee of the 1st Respondent. He did not know the relationship between the Respondents.
 30. He did not have a letter of employment issued by either of the Respondents. He did not have a salary slip for any month. By 2014, he had flown for 10 years. He was not instructed by the Respondents how to fly. He did so, based on his own skills. He was paid USD 6,500 monthly. This is not contained in the Statement of Claim, or that of Witness.
 31. He was aware about freelancing in the airline industry. Freelancers are not on the payroll of the airlines. It depends on the airline, whether the Freelancer should insure himself.
 32. He was the captain of the crashed aircraft. He was the senior-most. The buck stopped with him. The crash occurred on 17th February 2014. He was reasonably experienced. He was familiar with Operating Procedures. A Pilot must be alert during flight. Take-off and landing are most technical times in the process. A Pilot must be sober. He must be attentive. He is not allowed to take alcohol. There could be a pilot error, if the Pilot is not sober. Crash took place at 11.45 a.m.
 33. The Claimant did not take alcohol in flight. The aircraft left Juba before 11.00 a.m. He possibly took alcohol on the night of 16th February 2014. He possibly bought alcohol on the night of 16th February 2014. There is a receipt exhibited by the Respondents, in the name of Juba Raha Restaurant. There is a captain's order. It is dated 16th February 2014. It is on the eve of the crash. Table number is not given. Guest is indicated to be Captain Naim [Claimant]. He did not recall if he bought the alcohol on takeaway basis.
 34. The receipt shows that he bought 7 bottles of Heineken and 1 bottle of Gilbeys Gin. He probably took alcohol on the eve of the flight.



35. The Investigations Report on record, states that the Claimant made an error on the runway. There was no other Investigations Report presented to the Court by the Parties. If the Claimant was drunk, he agreed he would have made a reckless decision. He was aware a colleague died in the accident. He was aware that the 2nd Respondent repatriated the injured and the dead. He did not have an insurance cover. Airlines are obligated to take care of freelancers in event of accidents. He was admitted at Aga Khan Hospital. The Hospital needed a cash deposit to admit the Claimant, and keep him there. The Claimant considered his contract to have been constructively dismissed. There was no termination letter. The 2nd Respondent catered for his medical bill. He was not aware how much was paid. He seeks special damages for medical expenses incurred. He does not have receipts showing these special damages.
36. Redirected, he told the Court that he worked for Global Airlift Limited, flying Seven Four Eight aircraft at the time of the accident. He did not know there was distinction in the Respondents' operations. He was not a Freelancer. The receipt from Raha Restaurant did not show what time it was issued.
37. Rahab Wambui Karanja relied on her Witness Statement. She produced a supplementary bundle of documents, consisting receipts on medical treatment, issued to the Claimant.
38. She told the Court that the aircraft was owned by the 1st Respondent, and the flight operated by the 2nd Respondent. She did not have proof of ownership, other than what was stated in the Preliminary Report. The Report came approximately 1 week after the accident took place. The Report says the 2nd Respondent owned the aircraft, while Wambui maintained the 1st Respondent owned the aircraft. She explained that the Claimant is her brother. She is a Lawyer, working for the Law Firm which represents her brother.
39. She was not privy to the contract between the Respondent and any of the Respondents. She did not work for the Respondents. There was no letter of employment issued to the Claimant. She was not in the crashed aircraft. The 2nd Respondent paid part of the hospital bill, while the family paid the rest.
40. She did not know exactly when the 2nd Respondent stopped paying the hospital bill. There was a credit card payment of Kshs. 300,000 by Captain Fahim Mohammed. She did not know him. He was not a member of the Claimant's family. There was another card payment for the sum of Kshs. 200,000. It was by Samir Abow. Wambui did not know him. He was not part of the Claimant's family. She knew he was an Employee of the 2nd Respondent. Invoices of Kshs. 270,000 were paid for by the 2nd Respondent. Other payments by the 2nd Respondent are exhibited, made by cheque. The last payment was on 16th April 2014. Wambui did not agree that all payments were made by the 2nd Respondent. There was a payment made by Michael Karanja, who is the Claimant's and Wambui's father. The 2nd Respondent stopped payment, stating it had paid enough. She did not know that the crashed aircraft, was the lone source of income for the Respondents. She did not have any discussions with the Respondents, concerning her brother. She was not aware of pay slips given the Claimant by the Respondents. She heard that the Respondents claimed to have paid hospital bills on humanitarian ground. She was aware that the Claimant did not have a medical cover. Redirected, she told the Court that she was able to distinguish payments made by her family, and those paid by others.
41. Samir Mohammed adopted his Witness Statement and Documents filed by the Respondents, in his evidence-in-chief.
42. He explained that the 2nd Respondent lost its aircraft. The value is shown in the insurance cover. It was a total loss. There were costs of repatriation. There were medical bills, funeral costs, ambulance costs,



security costs, and costs of movement of personnel at the crash site. 3rd party properties were damaged. The 2nd Respondent had to take responsibility. The 2nd Respondent seeks reimbursement by way of the Counterclaim. It was not obliged to meet the Claimant's costs of hospitalization and treatment. He was not a permanent Employee of the 2nd Respondent. He could not be admitted without a deposit. The 2nd Respondent stepped in and assisted him.

43. Cross-examined, Samir told the Court that he is a Director of the 2nd Respondent. He did not come to Court on behalf of the 1st Respondent. The 2nd Respondent's Directors authorized the presentation of a Counterclaim. The 2nd Respondent did not have authority to make a claim on behalf of 3rd Parties, whose properties were allegedly damaged. The 2nd Respondent claims the value of the lost aircraft. He confirmed that their Insurance only paid 3rd Party claims. He did not have evidence on this.
44. Paragraph 3 of the Statement of Response denies that the Claimant was employed by the Respondents. He was engaged as an independent contractor. The 2nd Respondent did not exhibit before the Court, the independent contract document.
45. The letter dated 3rd March 2014, addressed to the Aga Khan Hospital is by the 2nd Respondent. It states that, ' we are the employer of the above patient.' The letter is signed by 2nd Respondent's Administration Manager, Lynette Ebagole. The 2nd Respondent did not exhibit its Employees' Insurance Cover. The 2nd Respondent informed the hospital that its Insurance required a progressive medical report. By April 2014, the 2nd Respondent had ceased paying the hospital bill. The 2nd Respondent did not continue to pay, to June 2014.
46. Redirected, Samir told the Court that his company covered most of the bills up to 1st April 2014. The Insurance company would pay 3rd party claims. If not the 2nd Respondent would be compelled to pay. The 2nd Respondent was not compensated for loss of the aircraft. The Claimant was engaged orally. He was available to other aircrafts. Lynette stated that the Claimant was an Employee of the 2nd Respondent. He was not. The Insurance company asked for a report from the aircraft captain. The Claimant was bedridden and the 2nd Respondent was compelled to write to the hospital asking for a report. He was discharged on 16th April 2014 as shown in the discharge summaries. All bills had been by the 2nd Respondent.
47. The issues are: -
 - a. Whether the Claimant was an Employee of Respondents, or either of them.
 - b. Whether the aircraft accident was occasioned through the Claimant's negligence, and whether the Respondents are liable to meet special and general damages claimed by the Claimant.
 - c. Whether the Claimant was constructively dismissed, and the Respondents liable to pay him damages.
 - d. Whether the Respondents sustained loss and damage attributable to the Claimant.
 - e. Who should pay the costs of the Claim and Counterclaim.

The Court Finds: -

48. Employee. The Claimant states that he was employed by the Respondents. He did not give evidence on the specific date of his employment. He did not exhibit a pay slip, or a letter of employment. He was not covered under the Respondents' Employee Medical Insurance. He did not exhibit any form of contact of employment.



49. His oral evidence on the subject, did not establish an employer-employee relationship. He stated on cross-examination: -
- “I state I was employed by the Respondents. I was employed from 2004, on and off, till 2013. I worked for the 1st Respondent 2004 to 2013. It was not continuous. The 2nd Respondent hired me in 2013. The crash occurred in 2014. Technically, I was not an Employee of the 1st Respondent. I do not know the relationship between the two. I have not produced a letter of employment issued by either. I have not produced salary slip for any month...the Respondents did not instruct me on how to fly.”
50. In his Statement of Claim, the avoids making any unequivocal statement, on his date of employment, obliquely referring to being an Employee of the Respondents, “at all material times...”
51. He did not state how much he was paid in monthly salary in his Statement of Claim or Witness Statement, but told the Court on hearing, that he was paid USD 6,500 monthly. There was no document to support this.
52. The Claimant stated on cross-examination, that he did not know the relationship between the Respondents. He states at paragraph 5 of his Statement of Claim nonetheless, that the 1st Respondent owned the crashed aircraft, while the 2nd Respondent operated the aircraft.
53. His Witness, Rahma Wambui, who is his Sister, stated that she was not privy to any contract of employment between the Respondents and the Claimant. She did not see any letter of employment, issued to the Claimant by the Respondents. She was not aware of pay slips issued to her Brother. Her Brother did not have a medical cover, taken out by the Respondents.
54. The Claimant’s only document suggesting he was an Employee of the 2nd Respondent, is the letter dated 3rd March 2014, authored by 2nd Respondent’s Administration Manager Lynette Ebagole, addressed to the Aga Khan Hospital, where the 2nd Respondent refers to the Claimant as its Employee.
55. This reference, in light of the 2nd Respondent’s denial subsequently, that the Claimant was its Employee, and in light also, of other evidence on record, is inconclusive. It does not establish that there was an employer-employee relationship, within the meaning of the terms ‘Employer’ and ‘Employee’ under Section 2 of the *Employment Act*.
56. Ebagole authored another e-mail correspondence to Rahma Wambui dated 1st April 2014, stating that the Claimant was a Freelance Pilot, not an Employee of the 2nd Respondent. She states that it is the norm in the aviation industry, that Freelance Pilots are not entitled to any company privileges. They are not entitled to insurance and other benefits.
57. The letter affirming that the Claimant was employed by the 2nd Respondent is therefore not conclusive.
58. The Claimant was at the time the letter was authored, bedridden at the Aga Khan Hospital. The 2nd Respondent’s Witness explained that the Insurance Company was undertaking investigations and required a statement from the flight captain. The Claimant was not in a position to make the statement, and the 2nd Respondent wrote to the Hospital asking for a detailed medical report, including a progressive report, to facilitate investigations. Ebagole may have used the term ‘Employer’ loosely. It was applied in a situation where the 2nd Respondent had assumed responsibility over the Claimant’s hospitalization. Granted that Ebagole also referred to the Claimant as a Freelancer, it is open to the Court to examine the other facts outside the letter by Ebagole dated 1st April 2014, in establishing whether Parties were in an employer-employee relationship.



59. Section 2 of the *Employment Act* refers to the term ‘Employee’ to mean a person employed for wages or salary, and includes an apprentice, an indentured learner. The Claimant did not establish that he was employed by the Respondents for a salary, under this definition. If he was receiving USD 6500 monthly salary, was there not a single document to show this payment? If there was no pay slip issued to the Claimant, did he not have any other record, such as bank statements, capturing payment of the monthly salary of USD 6500? The term ‘Employer’ means any person, public body, firm, corporation or company which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The Claimant has not established that he entered into a contract of service with the Respondents. He did not exhibit a written contract, or lead oral evidence, establishing the presence on an oral contract of employment.
60. He conceded on cross-examination that, “ the Respondents did not instruct me how to fly. I did so, based on my skills. I was not assigned any specific flights...”
61. This evidence, would suggest that the Claimant was not an Employee at common-law. The Respondents did not fully dictate what the Claimant did. He was not under the full control of the Respondents. He did not allude to anyone from the Respondents, who had supervisory control over him. He did not establish any reporting lines, in relation to the conduct of his function. He was not an Employee at common-law. The Respondents were not shown to control or have the right to control the Claimant. There were no employee-type of benefits such as pension plans, insurance, and annual leave. As held in this Court’s decision in *Kenneth Kimani Mburu and Another v Kibe Muigai Holdings Limited* [2014] eKLR, an independent contractor is not entitled to benefits such as health insurance; and is not subject to another’s control, except to the extent permitted under the contract.
62. The Claimant stated on cross-examination that he was technically, not an Employee of the 1st Respondent. Why did he bring the Claim against the 1st Respondent? He has not in the view of the Court, established that he was employed by the 2nd Respondent either.
63. The position held by the Respondents, that the Claimant was a Freelancer Pilot, appears to the Court more persuasive. He had served the Respondents on and off, according to his evidence, from the year 2004. For most of the period, 2004 -2013, he was engaged by the 1st Respondent. He states he was engaged by the 2nd Respondent only in 2013. The accident took place in February 2014. He was not under the full control of either Respondent, and told the Court he was not instructed by the Respondents in piloting. He was not able to show evidence of salary paid to him, or produce pay slip showing that he was subjected to statutory employment obligations such as PAYE. He did not show that he was paid other employment benefits, beyond what he says was a monthly salary of USD 6500. Most of the facts placed before the Court suggest that the Claimant was indeed a Freelancer, an independently contracted Pilot.
64. Negligence. The Court does not think it should dwell on the issue of negligence and liability, having concluded that the Claimant did not show he was in an employment contract with the Respondents. Suffice it say, it was his evidence that he departed Juba for Robkona in Southern Sudan, at 11.00 a.m. on 17th February 2014. The crash took place at Robkona, at 11.45 a.m. The Claimant purchased 7 bottles of Heineken beer and 1 bottle of Gilbeys Gin, on the night of 16th February 2014. He told the Court on cross-examination that, “I probably took alcohol on the night of 16th February 2014.” There is a receipt on record, showing purchase of the drinks from a bar in Juba, called Juba Raha. It is indicated and the Claimant confirmed he did not sit at the restaurant to take his drinks; he took them away. He did not say at what time he consumed the drinks, but given that his flight was at 11.00 a.m. it is not likely that he gave himself sufficient time to sleep, and recover from the effect of the alcohol, before



- taking charge of the flight out of Juba. He stated that he probably took the drinks, and confirmed that the Report from the Insurance Company indicated the accident was due to pilot error. He was not aware of any other Report on the accident, indicating otherwise. “ If I drunk the alcohol, it would have been a reckless decision, ” he told the Court on cross-examination. The Court would agree with the Respondents, that on the balance of probability, the accident was attributable to the Claimant’s negligence, and probable intoxication. It was attributable to pilot error. His prayers for general and special damages arising from the accident have no merit and are declined.
65. Constructive dismissal. This again does not require the detailed examination by the Court, having concluded that the Claimant was not an Employee of the Respondents. To establish constructive dismissal, the Claimant must first establish that he was an Employee of the Respondents. Once it is established that there was an employer-employee relationship, the Claimant would then move on to establish the features of constructive dismissal, laid down in the Court of Appeal of Kenya decision, *Coca Cola East and Central Africa Limited v. Maria Kagai Ligaga* [2015] eKLR. He would be required to show that the Employer created intolerable working conditions; that the Employer was in fundamental breach of the contract of employment and considered itself no longer bound by the fundamental terms and conditions of the contract; that the Claimant could not continue to discharge his contractual obligations under such conditions; and the Claimant therefore resigned, considering himself to have been fired. The Claimant was not constructively dismissed. He was not an Employee of the Respondents, and even if he was, did not establish the principles laid down in the Court of Appeal decision above, on constructive dismissal. He does not merit damages for constructive dismissal.
66. Counterclaim. The 2nd Respondent paid the Claimant’s medical bill in the sum of Kshs. 6,954, 354. It was never the position of the 2nd Respondent on payment, that the amount paid was reimbursable. It was not stated to the Claimant that the money was repayable. The 2nd Respondent met the medical expenses on what it stated, were humanitarian grounds. It was out of its own volition, and was the human thing to do, because the Claimant did not have a medical cover. The 2nd Respondent felt it had an obligation to fill the gap, because the Claimant was injured, while involved in the 2nd Respondent’s business. There was no legal obligation to pay the medical bill, but business morality prompted the 2nd Respondent to pay. Payment was voluntary and humanitarian, and not subject to repayment. The Counterclaim for the medical expenses paid by the 2nd Respondent is declined.
67. Details of damages and loss sustained by the crew were not stated by the Respondents. The Respondents did not show their locus standi, in pursuing damages for persons who are not party to the Claim.
68. Liabilities of USD 129,163 allegedly incurred by the 2nd Respondent in repatriation costs and related expenses were not specifically established. The cost of repatriation of the Claimant, would fall within the same parameters as his cost of hospitalization. It was a cost incurred by the 2nd Respondent out of its feeling of humanitarian responsibility to its crew. It was the human thing to do. It was a matter of reputational and business prudence. It was not a cost that was supposed to be claimable from the Claimant.
69. Property belonging to 3rd Parties was not identified. It was not shown that the 2nd Respondent indemnified any 3rd Party for any loss, sustained as a result of the accident. It was not established that the Claimant was bound to reimburse the 2nd Respondent, for any sum paid to 3rd Parties, who are not identified, and whose damaged property is unknown.
70. Aviation insurance caters for damaged aircraft. The 2nd Respondent would be expected to have insured its aircraft, under the *Civil Aviation [Insurance] Regulations* 2009, pursuant to the *Civil Aviation Act*, Cap 394 the Laws of Kenya. There is no legal basis for demanding that the Claimant pays to the



2nd Respondent the value of the lost aircraft, at USD 750,000. The 2nd Respondent's Witness, Samir Mohammed, confirmed that the aircraft was indeed insured, and that the insurance paid 3rd party claims. Aviation insurance would also provide for the damage, or loss of the aircraft, and if the 2nd Respondent had not taken such a cover, it did not establish why the loss of a full aircraft, should be met by the Claimant. Paragraph 17 of Samir's Witness Statement discloses that the aircraft was insured, and that the 2nd Respondent's expectation was that the Insurer would indemnify the 2nd Respondent for the loss of the aircraft, and related expenses. Samir states that unfortunately, the Insurer went into liquidation and did not settle any claim. The Court does not think that the Claimant should bear personal liability, on account of the 2nd Respondent's Insurer having gone under liquidation, and failing to indemnify the 2nd Respondent.

71. Disposal. In the end, the Court finds both the Claim and the Counterclaim lacking on merit. Parties were engaged in a loose, freelance business relationship. There was no employment relationship, that would enable the Court to enforce any employment obligations. The Claimant took to the skies while under a very strong suspicion of inebriation. He had purchased no fewer than 7 bottles of Heineken beer and 1 bottle of Gilbeys Gin, in what appears to have been, a few hours to the flight. He conceded that he probably took the drinks. The 1st Respondent was not in any relationship, at the time of the accident, with the Claimant. The 2nd Respondent engaged the Claimant as an independent contractor a few months before the tragedy of Robkona. It does not seem to have enquired from the Claimant, at the point of contracting him, whether he was properly insured, to fly its aircraft. The Claimant did not have his own medical insurance cover, or any cover obtained through the 2nd Respondent, to enable him take to the skies assuredly. The 2nd Respondent did not insure its aircraft wisely, having taken up insurance cover with a shaky insurer, who went under, while the 2nd Respondent needed it most. To its credit, the 2nd Respondent did not leave the Claimant in the lurch, when tragedy struck; it followed up on his repatriation from Southern Sudan, and treatment at Nairobi, paying the costs in either process. The Parties ought not to burden each other with legal obligations, imposed by the Court, arising from their freelance relationship, which very unfortunately, ended tragically.

72. Costs: No order on the costs.

It Is ordered: -

- a. The Claim is declined.
- b. The Counterclaim is declined.
- c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY 2023.

JAMES RIKA

JUDGE

