



**Muli v Performers Rights Society of Kenya (PRISK) & another (Cause 1544 of 2018) [2024] KEELRC 1904 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1904 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1544 OF 2018  
BOM MANANI, J  
JULY 25, 2024**

**BETWEEN**

**BRIAN KELI MULI ..... CLAIMANT**

**AND**

**PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK) ..... 1<sup>ST</sup> RESPONDENT**

**KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP) .. 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant contends that on 3<sup>rd</sup> February 2014, the two Respondents separately hired his services as a Legal Officer. The two jointly paid his salary for the duration of his contracts of service with them. He contends that on exit from employment, he was earning Ksh. 115,000.00.
2. The Claimant avers that he served the Respondents diligently until 5<sup>th</sup> September 2017 when they terminated his contracts of service. It is his case that the Respondents did not provide him with justification for their decision. Neither did they accord him fair procedure in terminating the contracts. As such, he claims for compensation for unfair termination of his employment.
3. The 1<sup>st</sup> Respondent admits that it entered into a contract of service with the Claimant on 3<sup>rd</sup> February 2014 through which the latter was appointed as a Licensing Officer. It is the 1<sup>st</sup> Respondent's case that on 30<sup>th</sup> July 2017, a Sunday, the Claimant was captured by CCTV cameras entering into its offices on an unknown mission.
4. The 1<sup>st</sup> Respondent asserts that on 31<sup>st</sup> July 2017, its office assistant noticed that some records in the office had been shredded. This led to the 1<sup>st</sup> Respondent's officers undertaking preliminary investigations which revealed that the Claimant and one other employee had visited the office the



- previous day. As such, it was suspected that it was either of them who had shredded the records in question.
5. The 1<sup>st</sup> Respondent further contends that despite the Claimant showing up at the office on 30<sup>th</sup> July 2017, he failed to report to work on 31<sup>st</sup> July 2017. He stayed away until 4<sup>th</sup> August 2017.
  6. Although the Claimant did not initially seek permission to be away on the above dates, he later availed medical documents which showed that he had been unwell. As such, the Respondents treated his absence from work as having been due to justifiable reasons.
  7. The 1<sup>st</sup> Respondent avers that between 7<sup>th</sup> August 2017 and 11<sup>th</sup> August 2017, its offices remained closed to enable its employees to go to vote in the national and county elections. As such, the Claimant did not report on duty during this period.
  8. However, when work resumed on 14<sup>th</sup> August 2017, the Claimant did not report back. This remained the position until 31<sup>st</sup> August 2017.
  9. The 1<sup>st</sup> Respondent contends that efforts to get the Claimant to resume duty proved futile. When the 1<sup>st</sup> Respondent's management confronted him about his persistent absenteeism, he sent an email on 31<sup>st</sup> August 2017 purporting to request for extension of his leave by thirty (30) days. However, this request was declined since he had not been on leave in the first instance.
  10. The 1<sup>st</sup> Respondent avers that on 5<sup>th</sup> September 2017, it issued the Claimant a letter terminating his services. Through the letter, the Claimant was informed to clear with it (the 1<sup>st</sup> Respondent) and collect his terminal dues.
  11. It is the 1<sup>st</sup> Respondent's case that despite this communication, the Claimant did not undertake the clearance process. As a consequence, his terminal benefits are yet to be released to him.
  12. The 1<sup>st</sup> Respondent asserts that the decision to terminate the Claimant's contract was for valid reasons. As such, the instant suit ought to be dismissed with costs.
  13. On its part, the 2<sup>nd</sup> Respondent admits that the Claimant was hired by both the 1<sup>st</sup> Respondent and itself. However, it (the 2<sup>nd</sup> Respondent) contends that the 1<sup>st</sup> Respondent was the Claimant's primary employer whilst it (the 2<sup>nd</sup> Respondent) was his secondary employer.
  14. The 2<sup>nd</sup> Respondent avers that the two shared the obligation to pay the Claimant's salary since he was a shared resource. Each one of them was paying approximately one half of the Claimant's emoluments.
  15. The 2<sup>nd</sup> Respondent avers that it learned that the 1<sup>st</sup> Respondent had terminated the Claimant's contract on 5<sup>th</sup> September 2017. As such, it became difficult for the Claimant to continue in its (the 2<sup>nd</sup> Respondent's) service on what would technically be half of his salary.
  16. In view of the foregoing, the 2<sup>nd</sup> Respondent contends that its management entered into an agreement with the Claimant through which his services were to be terminated. The 2<sup>nd</sup> Respondent avers that it is on this basis that it issued the Claimant the letter dated 6<sup>th</sup> September 2017 terminating his employment.
  17. The 2<sup>nd</sup> Respondent denies that the decision to terminate the Claimant's services was irregular. According to it, the decision was arrived at through mutual agreement of the parties.
  18. The 2<sup>nd</sup> Respondent avers that the Claimant was to clear with it and collect his terminal dues. However, he did not do so. Instead, he proceeded to issue a demand through his lawyers alleging unfair termination of his contract which was followed by institution of the instant action.



## Issues for Determination

19. After evaluating the pleadings and evidence on record, I reach the conclusion that the following are the questions that require determination in the suit:-
  - a. What was the nature of the employment relation between the Claimant and the Respondents?
  - b. Did the Respondents terminate the relation irregularly?
  - c. Is the Claimant entitled to the reliefs that he seeks in the Statement of Claim?

## Analysis

20. On the first question, it is apparent that the parties to the action had an employment relation. Although it is unusual for an employee to be in two concurrent employment relations, it does appear that the two Respondents agreed to enter into such a relation with the Claimant.
21. The 2<sup>nd</sup> Respondent produced two letters of appointment both dated 3<sup>rd</sup> February 2014. One of the letters was issued to the Claimant by the 1<sup>st</sup> Respondent appointing him as its Licensing Officer under a fixed term contract for one year with effect from 1<sup>st</sup> February 2014. The other letter was issued to the Claimant by the 2<sup>nd</sup> Respondent appointing him to a similar position under a fixed term contract with effect from 3<sup>rd</sup> February 2014. In effect, the two Respondents separately but concurrently engaged the services of the Claimant as their Licensing Officer for a fixed term of one year.
22. Whilst the contract between the 1<sup>st</sup> Respondent and the Claimant did not provide for renewal, the contract between the 2<sup>nd</sup> Respondent and the Claimant provided for renewal. It is unclear whether the parties negotiated renewal of the two contracts once they lapsed in February 2015. However, it is apparent that they continued in their respective employment relations. As such, it is clear that the contracts between them were renewed by conduct.
23. The 2<sup>nd</sup> Respondent contends that it was only a secondary employer of the Claimant with the 1<sup>st</sup> Respondent standing in the position of the primary employer. However, the two contracts produced in evidence do not speak to this stratification. A look at the instruments suggests that they were distinct employment contracts in their own right. Further, the Claimant produced pay slips to demonstrate that the two Respondents were paying him separately.
24. The Respondents contend that since they have interlinked mandates, they considered it appropriate to share the services of the Claimant. As such, they issued him with the two contracts.
25. Having regard to the evidence on record, I arrive at the conclusion that the Respondents separately hired the services of the Claimant. Although the two were utilizing the Claimant's services jointly, they nevertheless had distinct contracts of service with him which established distinct legal relations.
26. On the second question, it is apparent that the two Respondents issued the Claimant with letters dated 5<sup>th</sup> September 2017 and 6<sup>th</sup> September 2017 terminating his services. The question the court has to determine is whether the Respondents' decisions were legally justified.
27. Under sections 43 and 45 of the *Employment Act*, an employer who terminates the services of an employee must demonstrate that he had valid reasons to support his decision and that he followed fair procedure in making the decision. Sections 41 and 44 of the Act identify some of the reasons why an employer may terminate an employee's employment. These include: misconduct; poor performance; and physical incapacity.



28. Section 41 of the Act obligates the employer to notify the employee of the accusations against him in the presence of a co-employee or a trade union official (if the employee elects) before taking further disciplinary action against him. Further, the employer must accord the employee an opportunity to respond to the accusations and call witnesses in support of his defense.
29. By virtue of sections 43 and 45 of the Act, if the employer is unable to demonstrate that he processed the employee's release in the manner that is prescribed by law, the resultant decision shall be deemed unlawful. In effect, the burden of proof lies with the employer to justify the lawfulness of his action.
30. I have considered the evidence on record in the context of the foregoing. It is apparent that the 1<sup>st</sup> Respondent had two grievances against the Claimant. First, it accused the Claimant of having shredded its records on 30<sup>th</sup> July 2017. Second, it accused the Claimant of having absconded duty between 14<sup>th</sup> August 2017 and 31<sup>st</sup> August 2017.
31. With respect to the first grievance, the 1<sup>st</sup> Respondent avers that the Claimant visited its offices on 30<sup>th</sup> July 2017, a Sunday and used that opportunity to shred some of its records. However, the 1<sup>st</sup> Respondent admits that on the material date, there was another employee in the office alongside the Claimant. Therefore, it was not possible to determine who between the two was responsible for the shredding.
32. Importantly, the 1<sup>st</sup> Respondent did not give specifics of the records that were allegedly shredded. Without this information, it is difficult to penalize the Claimant for having purportedly shredded undisclosed records. As such, I find that the purported shredding of the 1<sup>st</sup> Respondent's records did not provide a valid reason for the decision by the 1<sup>st</sup> Respondent to terminate the Claimant's employment.
33. As regards the second grievance, the 1<sup>st</sup> Respondent contends that the Claimant absented himself from duty from 14<sup>th</sup> August 2017 to 31<sup>st</sup> August 2017 without permission. In response, the Claimant appears to suggest that he had the permission of the 1<sup>st</sup> Respondent to be away from duty on those days. The Claimant argues that he had applied for and been granted leave to be away during that period. He maintains that records regarding the leave request are with the 1<sup>st</sup> Respondent.
34. The Claimant's argument is not convincing. I appreciate that both section 10(6) and 74 of the [Employment Act](#) place the duty of maintaining employment records on the employer. As such, whenever there is a dispute with regard to a specific issue in the relation, the employer will ordinarily be obligated to provide records to prove or disprove the issue by virtue of section 112 of the [Evidence Act](#).
35. However, I do not think that the Claimant's case is covered by the above provisions of statute. In the instant case, the Claimant is asserting that the 1<sup>st</sup> Respondent had approved his leave for the duration that he was absent from work.
36. An employee will only know that his leave application has been approved if and when the employer communicates the approval to him. Therefore, such employee is ordinarily expected to have evidence of the approval in his possession before he proceeds on leave. This is critical because in the event of a dispute with respect to the legitimacy of the employee's absence, he will be able to produce the leave approval to show that he had been allowed to be away.
37. The Claimant contends that the 1<sup>st</sup> Respondent had approved his application for leave for the period he was away. This implies that he had the leave approval with him. Therefore, when the legitimacy of his absence from duty was questioned by the 1<sup>st</sup> Respondent, it was expected that he would produce the leave approval in his possession to corroborate his contention that he was away from work with



- the approval of the 1<sup>st</sup> Respondent. However, he did not. This tends to support the 1<sup>st</sup> Respondent's contention that there was no such approval for leave.
38. Accordingly and based on the material before me, I am satisfied that the Claimant's absence from duty between 14<sup>th</sup> August 2017 and 31<sup>st</sup> August 2017 was without the permission of the Respondents or lawful reason. It is so declared.
  39. Despite the fact that the 1<sup>st</sup> Respondent was entitled to terminate the Claimant's contract on the grounds of absenteeism under section 44 of the *Employment Act*, it was still required to offer him a chance to be heard as dictated by section 41(2) of the Act. There is no evidence that the 1<sup>st</sup> Respondent complied with this procedural requirement of the law. As a matter of fact, the 1<sup>st</sup> Respondent's witness confirmed during cross examination that the 1<sup>st</sup> Respondent did not hold a disciplinary hearing for the Claimant. Consequently, I arrive at the conclusion that the 1<sup>st</sup> Respondent's decision to terminate the Claimant's contract was procedurally flawed.
  40. The 2<sup>nd</sup> Respondent contends that the decision to terminate the Claimant's contract was mutual. However, this is not what its (the 2<sup>nd</sup> Respondent's) letter of 6<sup>th</sup> September 2017 suggests. A reading of the letter leaves no doubt that the decision to terminate the contract between the Claimant and the 2<sup>nd</sup> Respondent was unilaterally made by the 2<sup>nd</sup> Respondent. The letter does not suggest that it was communicating a shared position to terminate the contract between the parties. As such, the court rejects the 2<sup>nd</sup> Respondent's assertion that the parties mutually agreed to separate.
  41. The 2<sup>nd</sup> Respondent's position is that it terminated the Claimant's contract because it was not going to be tenable to keep him in its employment after his contract with the 1<sup>st</sup> Respondent had been terminated. According to the 2<sup>nd</sup> Respondent, to keep the Claimant in employment after he had lost his employment with the 1<sup>st</sup> Respondent would have meant that he was going to be retained at half salary since he was a shared resource.
  42. The reason advanced by the 2<sup>nd</sup> Respondent to justify its decision to end the employment relation with the Claimant is not one which the law recognizes. As indicated earlier, the law contemplates poor performance, misconduct or physical incapacity as some of the reasons for terminating a contract of service under sections 41 and 44 of the *Employment Act*. Others include redundancy under section 40 of the Act or insolvency or death under Part VIII of the Act. Absent evidence of mutual agreement to separate, the employer has no right to terminate a contract of service outside the reasons that are enumerated above.
  43. As such, the 2<sup>nd</sup> Respondent has not demonstrated that it had valid reason to terminate the Claimant's contract. It is so declared.
  44. It is also apparent from the evidence on record that the 2<sup>nd</sup> Respondent did not comply with the procedural requirements under sections 40 and 41 of the *Employment Act* before it terminated the Claimant's services. There is no evidence that it notified the Claimant of the infractions that he was accused of. There is no evidence that it subjected the Claimant to a disciplinary process before his contract was terminated. There is no evidence that it took him through the redundancy process under section 40 of the *Employment Act*. As a consequence, I declare the 2<sup>nd</sup> Respondent's decision as unlawful.
  45. I should point out that since the two Respondents had chosen to simultaneously employ the Claimant, they bore concurrent obligations in law to ensure that he was subjected to due process before his contract could be terminated. As such, they had the liberty to hold a joint disciplinary session for



him before they arrived at their decisions to end his employment. As the record shows, they did not do so. As such, they jointly fell into the trap of acting illegally against the Claimant. It is so declared.

46. The last issue for determination is whether the Claimant is entitled to the reliefs that he seeks in the Statement of Claim. The Claimant has sought the following reliefs against the Respondents:-
  - a. Salary for one month in the sum of Ksh. 115,000.00 in lieu of notice to terminate his contracts.
  - b. Payment in lieu of leave for 36 days amounting to Ksh. 197,143.00.
  - c. Service pay of Ksh.172,500.00.
  - d. Compensation for wrongful termination of his employment in the sum of Ksh. 1,380,000.00.
  - e. Interest on the above amounts.
  - f. Costs of the case.
47. The court has already declared the Respondents' actions against the Claimant as unlawful. Therefore and in terms of section 49 of the Employment Act, he is entitled to compensation for unfair termination of his employment.
48. However and as has been demonstrated above, the Claimant's unexplained absence from work between 14<sup>th</sup> August 2017 and 31<sup>st</sup> August 2017 contributed to the 1<sup>st</sup> Respondent's decision to terminate his services. Under section 49 of the Employment Act, the court is obligated to consider whether the employee's conduct contributed to his misfortune whilst assessing the quantum of damages to award him. Having regard to the foregoing, I award the Claimant compensation that is equivalent to his salary for five (5) months, that is to say, Ksh. 575,000.00.
49. By virtue of section 35 of the Employment Act, the Claimant was entitled to twenty eight days' notice to terminate his employment. However, the letters terminating his contracts show that the decisions were to take effect immediately. As such, he was entitled to pay in lieu of the notices to terminate his contracts in terms of section 36 of the Employment Act. Accordingly, the court enters judgment for him for Ksh. 115,000.00 being payment in lieu of notice to terminate his contracts.
50. The Claimant has claimed for service pay. However, there is evidence that he was a contributor to the National Social Security Fund. Thus and by virtue of section 35(6) of the Employment Act, he is not entitled to pursue this remedy. Accordingly, this request is declined.
51. The Claimant has claimed for the balance of his accrued leave benefits for thirty six (36) days. The evidence on record shows that he made a request for thirty (30) days in his emails of 31<sup>st</sup> August 2017 to the Respondents. However, the Respondents remained mute about the request.
52. That notwithstanding, the 1<sup>st</sup> Respondent filed a tabulation of what it admits as the balance of the Claimant's leave days. The tabulation was tendered in evidence as part of the 1<sup>st</sup> Respondent's exhibits.
53. In the tabulation, the 1<sup>st</sup> Respondent concedes to outstanding twenty two (22) leave days. Accordingly, I enter judgment for the Claimant for the sum of Ksh. 84,666.40.00 on account of twenty two (22) accrued leave days.
54. I award the Claimant interest on the sums awarded at court rates from the date of this decision.
55. The award is subject to the applicable statutory deductions.
56. I award the Claimant costs of the case.



## Summary of the Award

57. After evaluating the evidence on record, the court makes the following findings and orders:-
- a. The Respondents were both employers of the Claimant albeit under distinct but concurrent contracts of service.
  - b. The Respondents unlawfully terminated the Claimant's employment.
  - c. The Respondents are ordered to pay the Claimant compensation for unfair termination of his contracts of service in the sum of Ksh. 575,000.00.
  - d. The Respondents are ordered to pay the Claimant the sum of Ksh. 115,000.00 being payment in lieu of notice to terminate his employment.
  - e. The Respondents are ordered to pay the Claimant the sum of Ksh. 84,666.40.00 on account of accrued leave.
  - f. The claim for service pay is declined.
  - g. The Respondents are ordered to pay the Claimant interest on the amount awarded at court rates from the date of this decision.
  - h. The award is subject to the applicable statutory deductions.
  - i. The Respondents are ordered to pay the Claimant costs of the case.

**DATED, SIGNED AND DELIVERED ON THE 25<sup>TH</sup> DAY OF JULY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

**JUDGE**

