



REPUBLIC OF KENYA



KENYA LAW
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**Prosel Limited v Musyimi (Appeal E148 of 2011)
[2022] KEELRC 13541 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13541 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E148 OF 2011
B ONGAYA, J
DECEMBER 15, 2022**

BETWEEN

PROSEL LIMITED CLAIMANT

AND

PATRICK MAKAU MUSYIMI RESPONDENT

(An appeal from the Judgment of Hon. D.O. Mbeja (Mr.), Principal Magistrate delivered on 29.10.2021 in Employment Cause No. 1820 of 2019 in Magistrates' Court at Milimani, Nairobi)

JUDGMENT

1. The appellant filed the memorandum of appeal on November 29, 2021 through Obel & Company Advocates. The appeal is against the judgment delivered by Honourable D O Mbeja, Principal Magistrate in the suit filed by the respondent against the appellant. In the statement of claim filed on October 2, 2019 and amended on August 31, 2020 the respondent pleaded as follows. He was employed by the respondent as a bending machine operator from March 1, 2014 as a casual and later as a permanent employee. He worked continuously for 5 years and 5 months without a warning or disciplinary action. On February 13, 2015 the respondent sustained a very grievous chest injury while on duty and the appellant neglected to provide him proper medical attention. The fractured rib took long to heal and the respondent suffered a secondary ailment of inflamed lungs. The respondent was not accorded compensation under [Work Injury Benefits Act, 2007](#) (WIBA). He was given a termination letter on July 2, 2019 without payment of terminal dues. The respondent's Amalgamated Union of Kenya Metal Workers intervened and the claimant was reinstated. Shalom Community Hospital recommended that the claimant be retired on medical grounds. That was during a routine visit at the hospital. The respondent was sent home for 18 days to allow for processing of his retirement benefits. The respondent's case is that he was not subjected to an independent medical examination to determine his continued fitness to work for the appellant. On July 31, 2019 he received unsigned letter of retirement and salary for July 2019 and terminal dues were not paid at all. The respondent's case was



that the termination was contrary to section 41 of the [Employment Act, 2007](#) because he was not given a hearing and reason for the termination, he was frustrated and mistreated out of job (amounting to constructive termination), and, he was not paid the salary for July and terminal dues. The respondent prayed for judgment against the appellant for:

- a) A declaration that the claimant was unlawfully and unfairly terminated.
 - b) Kshs 22, 184.00 as one-month salary in lieu of notice.
 - c) Kshs 22, 184.00 as unpaid July 2019 salary.
 - d) Kshs 266, 208.00 12 months' salary in compensation for wrongful termination.
2. The appellant filed the statement of defence on November 14, 2019 and amended on October 14, 2020 through Obel & Company Advocates. The appellant admitted employing the respondent but not on permanent basis and that the respondent did not have a clean record of service because he was issued with warning letters. The appellant further pleaded as follows. The respondent was not liable for the accident as alleged by the respondent. That all the days the respondent was not at work with or without the doctor's sick off letter, the appellant paid the full salary. In July 2019 the appellant gave the respondent an opportunity to consult an orthopaedic doctor at Kenyatta National Hospital and offered to pay all medical expenses until the respondent fully recovered although the injury had not been job related. The respondent rejected the offer. The retirement on medical grounds by the letter dated July 31, 2019 was upon a recommendation by the respondent's doctor by letter dated July 9, 2019. The termination was with due procedure and with payment of terminal dues. In an earlier termination by letter dated July 2, 2019, the union had intervened at a conciliation meeting of July 1, 2019 and respondent agreed to cancel the termination on account of indiscipline and misconduct. Further the respondent resisted going for medical examination at Kenyatta National Hospital despite the appellant's and union's advisory to do so. He opted to see his own doctor and who recommended retirement on medical grounds. In retiring the appellant, provisions of the [Employment Act, 2007](#) were complied with. The appellant prayed that the suit be dismissed with costs.
3. The trial court delivered the judgment on October 29, 2021 for the respondent against the appellant with orders:
- a) A declaration that the claimant was unlawfully and unfairly terminated.
 - b) Kshs 22, 184.00 as one month's salary in lieu of notice.
 - c) Kshs 22, 184.00 unpaid July 2019 salary.
 - d) Kshs 226, 208.00 as 12 month's compensation for wrongful termination.
4. The appellant has appealed against the whole judgment upon the grounds summarised as follows as follows:
- a) The trial court erred in awarding one-month salary Kshs 22,184.00 in lieu of notice without due evidence and a further award of Kshs 22,184.00 July 2019 salary whereas the evidence was that the salary had been payed to the respondent.
 - b) The trial court erred in finding that the termination was unfair whereas the evidence was that it was upon medical grounds based on the recommendation of the claimant's own doctor.
 - c) Provisions of sections 49 and 50 of the [Employment Act, 2007](#) had not been taken into account by the trial court in awarding quantum of damages for 12 months' salaries.



- d) The trial court erred in not finding that the amount awarded was subject to statutory deductions.
 - e) The trial court erred in failing to consider the submissions by the appellant's counsel.
 - f) The trial court erred in finding that the respondent had proven his claim of alleged wrongful retirement and awarded costs to the respondent.
5. The appellant prayed for orders as follows:
- a) That the appeal be allowed and the award or judgment and decree of the trial court be set aside and substituted with an order dismissing the respondent's case in the subordinate court.
 - b) The appellant is awarded costs of the appeal and lower court's proceedings.
 - c) In alternative the court to grant such orders as it may deem fit and just in the circumstances of the case.
6. This being a first appeal the court will reevaluate evidence and arrive at its findings with caution that it did not by itself take the testimonies by witnesses as was done by the trial court. The court has also considered the submissions by the parties.
7. The 1st issue for determination is whether the trial court erred in granting one-month payment in lieu of termination notice and payment for July 2019. While granting the two awards, the judgment by the trial court does not show that the trial court addressed the issues whether the notice pay and July salaries were due on the basis of the evidence before the court. The letter dated July 31, 2019 by the appellant sets out the itemised final dues being service pay from July 31, 2018 to July 31, 2019 for 1 year, leave travel allowance for 2019 and there is no indication for notice payment. The court finds that by that evidence the cheque for Kshs 25,019.00 dated July 30, 2019 did not include the pay in lieu of notice. The evidence was that the termination was on July 31, 2019 and salary for July 2019 had been paid – a fact admitted in submissions for the respondent. Further, the termination was abrupt without due notice per section 35 of the *Employment Act*, 2007 requiring notice. The court returns that the evidence is that the respondent was entitled to notice payment. For avoidance of doubt, the one-month termination notice dated July 2, 2019 was revoked by the appellant at the meeting of July 6, 2019 and no other termination notice was issued prior to termination on July 31, 2019. The grounds of appeal on the two awards are determined accordingly.
8. The evidence is that the respondent was recommended for retirement on medical grounds by Dr Nguku's letter dated July 9, 2019. There was no evidence to controvert that fact. Discussing the issue, the trial court stated that the respondent had requested for retirement on health grounds but the appellant had denied him that opportunity. By that evidence the court finds that the reason for termination as at termination had been established to be genuine per section 43 of the *Act* and it related to the respondent's capacity, compatibility, and the appellant's operational requirements as envisaged in section 45 of the *Act*. It was not an unfair reason for termination.
9. On procedural fairness, the evidence is that the doctor recommended retirement by the letter dated July 9, 2019 and the retirement followed by the letter dated July 31, 2019. The respondent discussed the issue with the Human Resource Manager on July 11, 2019 who was also RW5. His statement was that the claimant agreed to retire on medical grounds at the meeting of July 11, 2019. The claimant signed the retirement letter on August 2, 2019. On a balance of probability, there is no reason to doubt that the claimant agreed to retire on medical grounds. Other than for the one-month notice found due, it cannot be said that the procedure adopted by the respondent to retire the appellant was unfair. The court therefore finds that the award of 12 months' salaries in compensation was in error.



In any event, the respondent had been unwell for a long time between the date of the injury to the date of retirement and on full monthly payment. The court considers that the appellant had acted fairly beyond the statutory minimum requirements on payment during sick leave. Taking all circumstances into account, the appellant had not acted unfairly.

10. The court has considered parties' margins of success and each to bear own costs of the appeal and the appellant will pay only 50% of the costs of the trial proceedings.
11. In conclusion judgment is hereby entered for the parties for:
 - 1) Setting aside of the trial court's judgment and decree.
 - 2) The appellant to pay the claimant Kshs 22,184.00 being in lieu of termination notice.
 - 3) Each party to bear own costs of the appeal and the appellant to pay only 50% of the costs of the suit before the trial court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 15TH DECEMBER, 2022

BYRAM ONGAYA

PRINCIPAL JUDGE

