

**IN THE SUPREME COURT OF ZAMBIA**

**Appeal No. 205/2005**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**MR. AND MRS GRAHAM**

Appellants

**AND**

**ERICA NTHALI MAGODI**

Respondent

**Coram:** Chirwa, Chitengi and Silomba, JSS

on 22<sup>nd</sup> May, 2007 and 30<sup>th</sup> May, 2008

**For the Appellant :** Mr. Kongwa and Company of  
Messrs Kongwa and Company

**For the Respondents:** In Person

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**JUDGMENT**

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Chitengi, JS, delivered the Judgment of the Court

In this judgment we shall refer to the Appellants as Defendant and the Respondent as the Plaintiff which is what they were in the Subordinate Court where these proceedings commenced.

The facts of this case can be briefly stated. The Plaintiff was employed by a company called Galaun Holding Limited in 1983 as a domestic servant and assigned to the Defendants who also worked for Galaun Holdings Limited. It appears it was the Defendants' condition of service to have the domestic servant paid for by the employer. According to the evidence the Plaintiff proved to be a good worker and when the Defendants stopped working for Galaun Holdings Limited in 1996 they agreed with their employer to take the Plaintiff with them and agreed with the Plaintiff that they will pay the Plaintiff all her

accrued terminal benefits from 1983 up to the time she would retire. The Defendants wrote a letter to that effect. But when the Plaintiff retired in 2001 the Defendants paid terminal benefits for the period 1996 to 2001 only. Hence, the commencement of this action by the Plaintiff. The Defendants did not give evidence because for unexplained reasons the Defendants did not attend the hearing but their counsel did. Consequently, the learned trial Magistrate wrote and delivered the judgment. The judgment was in favour of the Plaintiff and ordered the Defendants to pay the Plaintiff K9,096,500.00 terminal benefits for the period from 1983, when the Plaintiff started working for Galaun Holdings Limited, to 2001, when the Plaintiff retired while in the employment of the Defendants. Though she did not expressly say so, the learned trial Magistrate found on the document on which the Plaintiff relied authentic.

The Defendants appealed to the High Court which dismissed their appeal and confirmed the judgment of the Subordinate Court. Dissatisfied with the judgment of the High Court, the Defendants now appeal to this court. The Defendants advanced three grounds of appeal.

The first ground of appeal is that the learned Judge erred in law and fact in not finding that the Magistrate's decision to continue hearing the matter in the absence of the Appellant without proof of service of notice of hearing as a denial of the Appellants' right to be heard in defence, to dispute the document on which the learned Magistrate based her decision.

We can dispose of this ground of appeal without even hearing argument on it. We find this ground of appeal startling. In a situation where judgement is obtained without the other party being heard the

correct procedure is to apply to have the judgment set aside and not to appeal. **Order 31 Rule 6 Subordinate Courts (Civil Jurisdiction) Rules Chapter 28 of the Laws** clearly provides for this. Counsel for the Defendant must be aware of this. If an application to set aside was made and refused by the learned trial Magistrate then an appeal would lie to the High Court. This ground of appeal, therefore, fails. In any case the record of proceedings in the Subordinate Court does not show that before the matter was adjourned for judgment, the Defendant applied for an adjournment in order to lead his defence but the learned trial Magistrate refused to do so. In fact the record of proceedings shows that when the matter came for defence and later adjourned for judgment neither the Defendant nor his advocate were present.

The second ground of appeal is that the learned Judge erred in law and fact in holding that the disputed promise by the Appellants led to the loss of the Respondent's accrued terminal benefits for her service with the former employer, Galaun Holdings Limited.

The third ground of appeal is that the learned Judge erred in law and in fact in holding that the Respondent is entitled to benefits under the provisions of the minimum wages and conditions of service Regulations S.I. No. 119 as amended in 2002.

This ground of appeal raises an issue which was not adjudicated upon by the learned appellate Judge. The issue in the appeal before the learned trial Judge was one of Act No. 15 of 1997 which effected some amendments to the **Employment Act Chapter 268 of the Laws of Zambia**. Statutory Instrument No. 119 of 1997 which comes under the **Minimum Wages and Conditions of Employment Act Chapter 276** was not raised and argued in the court below. Therefore, we

cannot rule on it when the court below did not adjudicate on it. In the event, even without considering the argument, this ground of appeal fails.

The result is that we have only to consider ground two.

When we heard the appeal the Plaintiff was present in person but the Defendants and their counsel were absent for an explained reason. Since the Defendants had filed written heads of argument we proceeded to hear the appeal.

The gist of Mr. Kongwa's submissions on behalf of the Defendants is that the learned trial Magistrate should not have relied on the document she said the Defendant wrote and that it is a forgery. In his submissions, Mr. Kongwa said the Defendants first saw the document in court. That is evidence from the Bar. The Defendants did not give evidence.

We have carefully considered the evidence that was before the learned trial Magistrate, the judgment of the learned trial Magistrate and the judgement of the learned appellate Judge and the submissions of counsel. What Mr. Kongwa's submissions bail done to is that the Plaintiff forged the document she relied upon. On the oral and documentary evidence, we do not accept Mr. Kongwa's submissions. We saw the Plaintiff when she came to prosecute her appeal and she struck us as a paradigm of simplicity incapable of committing the forgery being attributed to her. Rather, the position appears to be that the Defendants who are enlightened are trying to take advantage of the simple poor Plaintiff. We are satisfied that on the evidence before her, the learned trial Magistrate was on firm ground when she found that

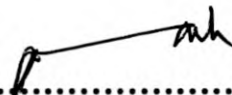
the Defendant took out the responsibility of paying the Plaintiff's retirement benefits and we affirm her judgment and the judgment on appeal in the High Court. In the event, we find that the appeal has no merit and we dismiss it. We award the Plaintiff the **K9,016,500.00** she claimed with interest at the average short term deposit rate from the date of the Writ to date of judgment and after judgment at the average lending rate as determined by the Bank of Zambia until final payment.



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**D. K. CHIRWA**  
**SUPREME COURT JUDGE**



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**PETER CHITENGI**  
**SUPREME COURT JUDGE**



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**S. S. SIOMBA**  
**SUPREME COURT JUDGE**