IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 168/2013**

HOLDEN AT NDOLA

(*Civil Jurisdiction*)

BETWEEN:

MOSES CHOONGA **APPELLANT**

AND

ZESCO RECREATION CLUB, ITEZHI TEZHI **RESPONDENT**

On 1st March, 2016 and 7th March, 2016.

Coram: Mambilima, CJ, Wood and Malila, JJS.

For the Appellant: *In person.*

For the Respondent: *Mr. A. Sike, In-House Counsel.*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

CASES REFERRED TO:

1. *Wilheim Roman Buchman v Attorney General (1994) Z.R. 76.*
2. *Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises (1999) Z.R. 27.*
3. *The Attorney-General v Marcus Kampumba Achiume (1983) Z.R.1.*
4. *Anderson Kambela Mazoka and two others v Levy Patrick Mwanawasa and two others (2005) Z.R. 138.*
5. *Indo Zambia Bank Limited v Mushaukwa Muhanga (2009) Z.R.266.*

6. *Edward Mwango and two others v ZESCO Limited 2010/HN/120.*
7. *Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga (1997) Z.R. 35.*

LEGISLATION REFERRED TO:

The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.

OTHER WORKS REFERRED TO:

Halsbury's Laws of England, Volume 9(1), 4th Edition and Volume 16, 4th Edition, Re-issue.

This is an appeal against a judgment of the Industrial Relations Court dismissing the appellant's complaint that he was unfairly and unlawfully dismissed.

The facts of this appeal are that on 1st August, 2000, the appellant was offered employment by the respondent as a cleaner. He was confirmed in this position on 1st November, 2000, after completion of the 3 months' probation period. The letter of offer of employment was silent on whether the appellant was employed on permanent basis or on fixed term contract. Even the letter of confirmation of employment dated 30th January, 2001, was silent on this aspect. However, on 30th June, 2010, the respondent offered the appellant a two year contract of employment as a

gardener/cleaner from 1st July, 2010 to 31st July, 2012. The contract was subject to the successful completion of a three months' probation period. Either party could terminate the contract upon giving one day notice of termination. The contract also required the employee to indicate in writing if they accepted the terms of the contract. The appellant did not accept the contract in writing as required, but continued to perform his duties in the usual manner.

During the subsistence of the fixed term contract of employment, the appellant applied for the position of sales person at the respondent club. In a letter dated 31st August, 2012, the respondent wrote to the appellant informing him that his application for employment as a sales person at the respondent club was unsuccessful and on that account, they would not be renewing his contract of employment. Following the termination of his contract of employment, the respondent wrote to the appellant on 17th September, 2012, giving him three months' notice to vacate the respondent's house. The appellant's appeal to the respondent to rescind its decision went unheeded. As a consequence, the

appellant filed in a complaint on 3rd December, 2012. In it, the appellant alleged that he had been unfairly and unlawfully dismissed from employment on 31st August, 2012, and was demanding payment of long service bonus, one month pay in lieu of notice, salary in respect of the number of days worked and any other relief the court may deem fit. In the affidavit in support of the complaint, the appellant attributed the decision to dismiss him to a charge of failure to follow lawful instructions leveled against him on 21st April, 2008.

In its answer, the respondent averred that the appellant was not entitled to any of the reliefs he was claiming on grounds that he was not unfairly and unlawfully dismissed as he was employed on a two year contract which expired due to effluxion of time. The respondent also stated that the appellant could not be employed as a sales person because he did not meet the requirements of the position he applied for. It was admitted that the initial contract of employment dated 1st August, 2000, was on a permanent basis, but that the appellant requested that he be placed on contract as was the case with the respondents other employees. The respondent

stated that from the time the appellant was placed on contract, he continued to perform his duties on the understanding that he was now engaged on a two year contract of employment. The respondent contended that it was wrong for the appellant to now assert that his implied contractual arrangement was unlawfully and unfairly terminated.

In its judgment, the Industrial Relations Court found that the complaint lacked merit. The Court relied on the ZESCO Recreation Club Staff Conditions of Service effective from 1st August, 2000, and concluded that the appellant was employed on contractual basis. The court also took into account the contents of the contract of employment dated 30th June, 2010, and concluded that the appellant was not unfairly or unlawfully dismissed, but that his contract expired due to effluxion of time. With regard to the respondent's rejection of the appellant's application for the position of sales person, the Industrial Relations Court found that there was nothing untoward about the respondent's refusal to offer the appellant the position, as it was within their prerogative to do so.

The appellant was not satisfied with the decision of the Industrial Relations Court and filed in six grounds of appeal. He argued grounds 1 and 6 of the appeal as they appear, while grounds 2, 3, 4 and 5 of the appeal were argued together. The appellant did not appear at the hearing of this appeal, having filed in a notice of non-appearance pursuant to *Rule 69(1) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia,* in which he indicated that he would entirely rely on the heads of argument filed on 4th September, 2013.

Ground one of the appeal was that the Industrial Relations Court erred in law and fact when it failed to distinguish that the appellant was employed by ZESCO Recreation Club and not by ZESCO Limited.

In this ground of appeal, the appellant submitted that the Industrial Relations Court did not consider that ZESCO Recreation Club and ZESCO Limited are two different entities and that the appellant was employed by the former and not the latter. He contended that ZESCO Recreation Club has its own employees and operates independently of ZESCO limited. The appellant pointed out

that he was employed under the ZESCO Recreation Club terms and conditions of service prevailing as at 1st August, 2000, which show that he was employed on a permanent basis.

In reply to ground one of the appeal Mr. Sike submitted that ZESCO Recreation Club remains under the exclusive control and supervision of ZESCO Limited and does not have a distinct legal personality as envisaged by the law. He contended that it was untrue and inaccurate for the appellant to assert that the two bodies do not correlate in their daily functions. He submitted that the appellant did not demonstrate the independence he was alleging in his submissions by way of documentary evidence. Mr. Sike argued that in any event, the issue of ZESCO Limited being separate from ZESCO Recreation Club was not raised in the Industrial Relations Court and was now being raised by the appellant as an afterthought.

We have considered the arguments raised in ground one of the appeal. We do agree with Mr. Sike that the issue of ZESCO Recreation Club being a separate legal entity from ZESCO Limited was not raised by the appellant in his complaint or in evidence at

the hearing of the matter. We are therefore, precluded from considering the issue on appeal. We take this position in view of the many authorities in which we have stated that where an issue was not raised in the court below, it is not competent for a party to raise it on appeal. This is what we held in the cases of *Wilheim Roman Buchman v Attorney General*[1] and *Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises*[2]. This ground of appeal lacks merit.

We will now deal with grounds 2, 3, 4 and 5 of the appeal. Ground 2 of the appeal was that the Industrial Relations Court erred in holding that the appellant was not employed on a permanent basis but on contract, when there was no evidence regarding such contracts from the date of engagement. In ground 3, it was contended that the court below erred when it found as a fact that the respondent wrote to the appellant on 31st July, 2012, to inform him of the expiration of the contract of employment by effluxion of time, when no such evidence was before the court. Ground 4 of the appeal was that the Industrial Relations Court erred when it refused to award the appellant damages for loss of

employment and erroneously concluded that the only issue the respondent agreed to at the labour office was to pay the appellant for the period worked for in August, 2012. Ground 5 of the appeal was that the Industrial Relations Court erred when it ignored evidence showing that the respondent tricked the appellant into applying for the position of sales person and later terminated his employment after failing to offer him the position of sales person.

Hereunder, the appellant contended that the Industrial Relations Court misdirected itself when it held that the appellant was not a permanent employee of ZESCO Recreation Club but rather that he served on contracts starting from 1st August, 2000, and that these contracts were renewable. The appellant wondered how the court could accept that he worked on renewable contracts without evidence of the duration of the alleged contracts of employment. On the authority of *The Attorney-General v Marcus Kampumba Achiume*[3], the appellant urged us to interfere with this finding of the Industrial Relations Court as it was perverse and not supported by evidence.

The appellant contended that he served the respondent from 1st August, 2000, without any break in service and was never informed that his employment status had changed from that of a permanent employee to being on a fixed term contract. He submitted that as at the date of his dismissal, there was no evidence that he signed any renewable contract of employment to warrant the Industrial Relations Court to conclude that he was serving on renewable contracts of employment, the last of which expired by effluxion of time. He denied being bound by the 2 year contract of employment of 30th June, 2010, as he did not sign it. The appellant also submitted that if his contract of employment terminated due to effluxion of time, then it should have ended on 31st July, 2013 and the respondent should not have allowed him to work in August and September as it did. Furthermore, the appellant asserted that the respondent's decision to convert his contract of employment from permanent to fixed term contract amounted to a unilateral variation of his conditions of service entitling him to damages.

While accepting that it was within the respondent's discretion not to offer him the position of sales person, the appellant contended that his failure to secure the position of salesman did not in any way warrant his dismissal as cleaner/gardener. He in fact went further to suggest that the respondent had enticed him into applying for the higher position as a way of getting rid of him.

In response, Mr. Sike submitted that the documentary evidence exhibited by the appellant clearly showed that the appellant was employed on contract and not on a permanent basis. In support of his submission, Mr. Sike referred us to the ZESCO Recreation Club Conditions of Service effective from 1st August, 2000, whose preamble reads as follows:

> *"The conditions of service which are effective from 1st August, 2000 shall apply to all Itezhi-Tezhi Recreation Club employees who do not serve under the ZESCO permanent salaried conditions of service."*

Mr. Sike contended that the respondent's conditions of service for the period 1st April, 2007 to 31st March, 2009 and for the period 1st April, 2011 to March, 2013 which the appellant was now relying on to argue that he was employed on a permanent basis were not

produced before the Industrial Relations Court and could not be relied upon on appeal.

Mr. Sike also argued that the letter of 31st August, 2012, was merely informing the appellant that his contract had expired due to effluxion of time. He contended that what may be in issue is that there was an inadvertent typographical error on the date on which the letter was issued. Mr. Sike submitted that the letter was actually written on 31st July, 2012, as correctly noted by the Industrial Relations Court and not on 31st August, 2012. He contended that after 31st July, 2012, there was no contractual relationship between the appellant and the respondent.

In respect of the claim for damages, Mr. Sike submitted that the Industrial Relations Court did not err by not awarding the appellant damages for loss of employment, as the appellant did not plead for damages in his complaint. He contended that the Industrial Relations Court directed its mind, and rightly so, towards the claims before it, which did not include the claim for damages.

In support of this argument, Mr. Sike cited the case of *Anderson Kambela Mazoka and two others v Levy Patrick Mwanawasa and two others*[4], in which we held *inter alia* that:

> *"The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such."*

Mr. Sike emphasised that the appellant was paid all his dues under the contract of employment he served under and was not entitled to any damages as the contract expired due to effluxion of time.

With regard to the appellant's complaint that the court did not consider all the documentary evidence before it in arriving at its decision, Mr. Sike submitted that the Industrial Relations Court did consider all the documents filed by the appellant. However, it was within the court's right to consider only documents which added value to the appellant's claim for consideration. Mr. Sike also denied that the appellant had been tricked into applying for the position of sales person. He submitted that the respondent exhibited good faith by inviting the appellant to apply for a higher

position, but he unfortunately failed the interview. He denied that the appellant's contract of employment was terminated by any of the reasons advanced by the appellant because it expired due to effluxion of time.

We have considered the arguments in respect of grounds 2, 3, 4 and 5 of the appeal. Contrary to the finding by the Industrial Relations Court that the appellant was, from inception employed on fixed term contracts, the ZESCO Recreation Club staff conditions of service effective from 1st August, 2000, show that the appellant was employed on a permanent basis. The relevant portion states that:

> *"All appointments will begin with 3 months' probation after which the employee may be confirmed as a permanent staff, such confirmation shall be at the discretion of the executive committee."*

The ZESCO Recreation Club terms and conditions of service prevailing at the time the appellant was offered employment were drafted by the respondent itself. In the case of *Indo Zambia Bank Limited v Mushaukwa Muhanga*[5], the Court was called upon to interpret the appellant's terms and conditions of service for management staff and decide whether the respondent was employed on permanent and pensionable service or on fixed term

contract for purposes of receiving a gratuity payment. In interpreting the contentious clause in the appellant's terms and conditions of employment, we held that:

> *"Moreover, this document on "terms and condition of employment" was prepared by the appellant itself. If the insertion of the words "permanent and pensionable" was as a result of careless drafting, then the appellant surely shot themselves in the foot. Under the "contra proferentem" doctrine, the document has to be construed against them and in favour of the respondent."*

There is no mention of fixed term contract in the respondent's terms and conditions of service. Therefore, the respondent cannot successfully argue that the appellant was, from the onset, engaged on contract basis as opposed to a permanent basis as argued by the appellant. We accordingly set aside the finding by the Industrial Relations Court that the appellant was employed on contract basis from 1st August, 2000, as this finding is not supported by evidence in the record of appeal before us.

The record of appeal however, shows that the appellant was placed on a two year fixed term contract of employment from 30th June, 2010 to 31st July, 2012. As already stated, the circumstances which necessitated the change in the appellant's employment status

remain unclear. The respondent's only witness, Mr. Joachim Luputa, who is the respondent's Senior Human Resource Assistant, confirmed that the respondent placed all its employees on two year contracts from the year 2010. He confirmed that these employees were not paid anything for the period they were on permanent and pensionable basis, but had their leave days carried forward. This testimony supports the appellant's argument that he was initially employed on permanent and pensionable basis.

The fact that the appellant did not consent to being placed on a two year contract in writing is not in dispute. He, however, continued to work under the conditions stipulated in the fixed term contract of employment until it was terminated. The learned authors of *Halsbury's Laws of England, Volume 9(1), 4th Edition,* have stated the following in *paragraph 701* on consent:

> *"A party may be taken to have assented if he has so conducted himself as to be estopped from denying that he has assented."*

The conduct of the appellant after he was placed on a fixed term contract of employment, in our view, shows that he impliedly acquiesced to the change in his status of employment from permanent to fixed term contract. The change in employment status

also does not seem to have adversely affected the appellant's conditions of service. The unchallenged evidence of Mr. Joachim Luputa to the effect that the employees' leave days were carried forward upon the change in their employment status shows that the unilateral variation of the appellant's employment status was not to the appellant's detriment.

The main question in this appeal, however, is whether the appellant was unlawfully and unfairly dismissed. The documentary evidence in the record of appeal before us shows that the appellant's two year contract of employment terminated due to effluxion of time on 31st July, 2012 and not on 31st August, 2012, when the respondent wrote to him. In this regard, we do not accept Mr. Sike's submission that the date on the letter of termination was a typographical error as this defence was not advanced at trial and cannot now be advanced on appeal for the reasons we have given in ground one of the appeal. In any event, the letter was referring to the interview for sales person which took place on 30th August, 2012, a day before the letter was written. It therefore, could not

have been written on 31st July, 2012, before the interview it was referring to took place.

Since the respondent allowed the appellant to continue his duties for one month after the contract expired due to effluxion of time on 31st July, 2012, it can be implied and properly, so that the contract of employment was extended for the same period and on the same conditions as those contained in the expired fixed term contract of employment. In the case of *Edward Mwango and two others v ZESCO Limited*[6] which the Industrial Relations Court relied on, the learned trial Judge held that:

> *"...the defendant having continued to employ the plaintiffs on the same terms and conditions when their contracts expired, the defendant is deemed to have renewed the plaintiffs' temporary contracts for a like period to the ones that had expired by effluxion of time and this periodic renewal is deemed to have continued until the contracts were terminated. This view is fortified by the fact that the plaintiffs continued to work on the same terms and conditions as stated in their temporary contracts....."*

In the letter dated 31st August, 2012, the respondent expressly stated that it was not renewing the appellant's contract of employment because his application for the position of sales person was unsuccessful. Clearly, the respondent terminated the

appellant's contract of employment because he had failed his interview for the position of sales person. The conduct of the respondent was unfair and unlawful because the reason given for the termination of the contract was not related to the capability or qualifications of the employee in performing his duties as a cleaner. The following is stated in *Paragraph 323 of Halsbury's Laws of England, Volume 16, 4th Edition, Re-issue* on fairness of dismissal:

> *"In determining whether the dismissal of an employee was fair or unfair, it is for the employer to show:*
>
> *(1) what was the reason, or if there was more than one, the principle reason for the dismissal, and*
> *(2) that it was a reason which:*
> *(a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
> *(b) related to the conduct of the employee;……."*

Our view is that the appellant's dismissal was unlawful and unfair as the interview for sales person was unrelated to the position he held for over 10 years.

Mr. Sike's argument that the appellant cannot be awarded damages because he did not include them in his claim before the Industrial Relations Court also lacks merit. This is in view of the

jurisdiction of the Industrial Relations Court which does not allow the court to be fettered by rules of evidence in doing substantial justice. Flawed pleadings, therefore, cannot stand in the way of the Industrial Relations Court in its exercise of its powers. In particular, *Section 85(5) of the Industrial and Labour Relations Act* states that:

> *"The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it."*

Further, in the case of *Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga*[7], we rejected the appellant's argument on pleadings when we stated that:

> *"While, undoubtedly, it would be desirable that a recognisable cause of action should be manifest in the originating documents including the affidavits in order that the opponent may have reasonable notice of the case to be met and so prepare adequately, nonetheless, it is not wrong for a court of substantial justice to entertain a complaint however inadequately couched-especially by a lay litigant - and to make a decision or give an award on the merits of the case, once it is heard. The hearing is frequently a summary one and there is no need to depart from such practice. It follows that we do not accept the argument based on the "pleadings," such as they are."*

In view of the foregoing, we hold that the appellant is, entitled to damages for unfair and unlawful dismissal from employment by

the appellant. The appellant's claim for long service bonus lacks merit because neither his contract of employment nor the respondent's conditions of service support this claim. His claim for 1 month's pay in lieu of notice suffers the same fate on account of the one day notice required under his previous contract of service. We accordingly set aside the finding by the Industrial Relations Court that the conduct of the respondent did not amount to unfair or unlawful dismissal. Taking into account the manner in which the appellant was treated by the respondent, we award him 12 months' pay as damages for the unlawful and unfair dismissal. In addition, the appellant is to be paid his accrued leave days from 1st August, 2000 to 31st August, 2012 as well as the salary for the period he worked for but was not paid. These amounts are to be paid with interest at the average short-term deposit rate from the date of the complaint up to the date of this judgment and thereafter, at the average lending rate as determined by Bank of Zambia up to date of payment. This combined ground of appeal succeeds in the main.

Ground 6 of the appeal was that the Industrial Relations Court failed to discharge its duty to do substantial justice as required

under *The Employment Act, Cap 269 of the Laws of Zambia* as the appellant was not informed of his right to give evidence or call witnesses in support of his complaint and that the record was not a proper reflection of the respondent's testimony.

In ground 6 of the appeal, the appellant submitted that the Industrial Relations Court did not afford him an opportunity to give evidence and call witnesses in support of his case. The appellant complained that being a lay litigant, the court ought to have explained to him the importance of giving evidence and calling witnesses in support of his case. The appellant also complained that some of the questions put to the respondent's witness in cross-examination were not recorded by the court. In this regard, the court did not do substantial justice as required under *Section 85(5) of the Industrial and Labour Relations Act.*

In reply, Mr. Sike contended that the Industrial Relations Court discharged its duty diligently as the appellant was sufficiently guided by the court on how to conduct the litigation, in a manner which assisted the court arrive at a just decision. Mr. Sike's

argument was that the court has no duty to show biasness in favour of an unrepresented litigant.

We have considered the submissions in respect of ground 6 of the appeal. The appellant's claim that the Industrial Relations Court did not discharge its duty to do substantial justice lacks merit. We hold this view because the record of appeal clearly shows that when the matter came up for trial on 24th April, 2013, the appellant was called upon to give evidence in support of his claim. His response was that:

> *"The club chairperson is supposed to be my witness but he is not before court. We can proceed to hear evidence from the respondent."*

The record of appeal also shows that the appellant was given an opportunity to cross examine the respondent's only witness and at the close of the respondent's case, the appellant opted to rely on the evidence on record. The record of appeal shows that the court did give the appellant ample opportunity to present his case and he chose to rely on the evidence before the court, which the court duly considered. This ground of appeal accordingly fails.

The net result is that this appeal succeeds in part with costs to the appellant both here and in the court below to be taxed in default of agreement. For the avoidance of doubt, such costs are limited to the disbursements and out of pocket expenses incurred, if any, by the appellant.

.....

I.C. MAMBILIMA
CHIEF JUSTICE

.....

A.M.WOOD
SUPREME COURT JUDGE

.....

M. MALILA SC
SUPREME COURT JUDGE