IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 171/2012

HOLDEN AT NDOLA **SCZ/8/276/2012**

(Civil Jurisdiction)

BETWEEN:

TOM CHILAMBUKA **APPELLANT**

AND

MERCY TOUCH MISSION INTERNATIONAL **RESPONDENT**

Coram: Chibesakunda, Ag. C.J, Hamaundu JS and Lengalenga, Ag.JS on 4th March, 2014 and 13th July, 2017

For the Appellant : In person

For the Respondent: Ms. N.M. Mulenga, Messrs Abha Patel and Associates

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Contract Haulage Limited v Mumbuwa Kamayoyo [1982] ZR 13**
2. **Agholor v Cheesebrough Ponds (Zambia) Limited [1976] ZR 1**
3. **Swarp Spinning Mills Plc v Sebastian Chileshe & Others[2000] ZR 23**

Works Referred to:

1. **W.S. Mwenda, Employment in Zambia (2004) UNZA Press, page 48**

When we heard this appeal, we sat with Madam Justice Chibesakunda, the then Acting Chief Justice. Madam Justice

Chibesakunda has since retired. Therefore, this judgment is by majority.

This appeal is against a decision of the Industrial Relations Court which dismissed the appellant's complaint for wrongful dismissal, save for the component that comprises a claim for lunch allowance.

The appellant was initially employed by the respondent in 2009, on a one-year renewable contract as a caretaker of the respondent's farm. The following year, in 2010, he was given a supervisory role. In April, 2011, the respondent terminated the appellant's employment and paid him some benefits; particularly, a gratuity of one-month salary for the year that he had served in the contract. When the appellant took the dispute to the Labour office, he was paid another month's salary in order to make it two months' salary for the year that he had served.

The appellant was still not happy with the outcome. He, therefore, took the dispute to the Industrial Relations Court. There, he sought a declaration that the termination of his employment was an unlawful dismissal. He also claimed underpaid gratuity and a couple of unpaid allowances.

At the trial, the appellant painted a picture of the respondent being a family enterprise; and that problems with his employment

started when the respondent's President's nephew was appointed Manager of the farm. According to the appellant, the Manager was incompetent; and that was what brought about the differences. In his view, the dismissal was all about those differences. The appellant also gave testimony about some allowances that the respondents had denied him.

The picture painted by the respondent was that the farm fell into a state of neglect because of the problems between the appellant and other workers; as well as between him and the Manager. According to the respondent, it was not the appellant alone whose services were terminated but the Manager's and those of two other workers as well.

The court below found that the appellant's previous contract had come to an end on the 31st March, 2011 and that, as of 1st April, 2011, the parties had entered into a fresh contract of three months. The court went on to hold that the reason given for the termination of the appellant's employment was of a disciplinary nature and that, therefore, there was need to give the appellant a hearing. The court found that during the three months' fresh contract, the respondent did not discuss the appellant's alleged poor performance with him. On that ground, the court found that the appellant was unfairly dismissed. The court, however, pointed out that the normal measure of damages is the salary

covering the period of notice required. In this case, the court found that the appellant was paid a sum of K600,000.00 (un-rebased) as one month's salary in lieu of notice. In its view, therefore, this sufficed as compensation for the unfair dismissal and the appellant was not entitled to any further compensation on this head of claim.

The court considered the appellant's claims for unpaid allowances and dismissed all but one; this was lunch allowance, which the court held that the appellant was entitled to under the **Minimum Wages** and **Conditions** of **Employment (General) Order, 2011**. The court ordered that the appellant be paid K120, 000.00 per month for the duration of his tenure of employment as stipulated by the general order.

The appellant appeals on four grounds, these are:

> "1. **The learned trial judge in the court below erred in law and natural justice in purporting that the K600,000.00 paid to the complainant in lieu of notice constituted damages for loss of employment.**
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> 2. **The learned judge erred in law and in fact by observing that the appellant did not specify the 74 days overtime, ignoring evidence marked TC4.**
>
> 3. **The learned trial judge misdirected himself by choosing to be silent in his judgment as regard the under payment of K600,000.00.**
>
> 4. **The trial judge erred in law, facts and natural justice by choosing to ignore all letters that were written in relation to**

non–availability of job description, job title and conditions of service which issues were so critical during trial."

In his arguments, the appellant lamented the fact that notwithstanding that the court below found that he was unfairly dismissed, it still refused to award him damages. He argued that he was entitled to damages. The appellant argued also that, while the Minimum Wages and Conditions of Service Act entitled him to overtime, the court below just dismissed his claim for the 74 days that he had worked overtime. The appellant further raised issue with the court below for ignoring the numerous letters that he had written to the respondent concerning his conditions of service. In this regard, the court below was accused of not addressing that aspect of the claim at all.

With those arguments, we were urged to allow the appeal.

On behalf of the respondent, it was argued that the court below was on firm ground when it held that the payment of salary in lieu of notice sufficiently atoned for the damages for the loss of employment because the normal measure of damages for any wrongful employment is the period of notice that ought to have been given. We were referred to **Contract Haulage Limited v Mumbuwa Kamayoyo**[1] and **Agholor v Cheesebrough Ponds (Zambia) Limited**[2]. We were also referred to the works

of the learned author **W.S. Mwenda** on the topic **Employment in Zambia (2004) UNZA Press, page 48**. All these authorities emphasize the principle that the giving of notice lawfully terminates a contract of employment and, therefore, that a contract that is wrongfully terminated will be redressed by an award of damages equivalent to the period of notice that should have been given.

Responding to the arguments on overtime, it was argued that overtime allowance is not given to employees unless authorized and approved. Counsel submitted that the burden was on the appellant to prove that the overtime was approved but he failed to discharge that burden.

As for the claim for the under payment of K600,000.00, it was argued on behalf of the respondent that it was not clear as to what the underpayment related to.

We were urged to dismiss the appeal.

As regards the first ground of appeal, we have said in a number of cases, the latest one being **Swarp Spinning Mills Plc v Sebastian Chileshe and others**[3], that unless the dismissal is in very traumatic fashion, the normal measure of damages is the salary for the period for which notice should have been given. In this case, the respondent

terminated the contract by paying salary in lieu of notice. Therefore, even though the appellant was not heard on the reason that was given for the termination, the payment of salary in lieu of notice perfected the termination. The court below was therefore on firm ground when it held that the damages arising out of the unfair termination had already been addressed.

Coming to the claim for overtime, the law merely provides a rate of payment to an employee where such employee has actually worked outside the scheduled working hours. To be entitled to that rate, an employee must perform his work outside the scheduled hours and such work must be recognized and approved by the employer as being outside the scheduled working hours. The approval by the employer is important. For example, an employee who decides to perform the tasks assigned to him after scheduled working hours when he could have performed them during scheduled working hours cannot be entitled to payment of overtime allowance; in such a case the employer will be justified not to approve the claim for overtime payment.

In this case, the court below found that the appellant had failed to prove that the overtime that he claimed had been approved by the respondent. The court went on to hold that the appellant did not even specify the days when he actually worked overtime. In our view, the

appellant's claim was defeated for failure by the appellant to show prior approval, or demand by, the respondent for him to work overtime.

Coming to the ground relating to under payment of K600,000.00, we agree with the respondent that it is not clear as to what the underpayment was. Hence we cannot fault the court below for not addressing it.

As for the last ground raising issue with the non-availability of the appellant's job description and conditions of service, we do not see the relevance of the ground to this appeal. The issue here was about unfair dismissal, which the court below found in favour of the appellant; except that the damages had already been settled by the payment of salary in lieu of notice. The ground is therefore misconceived.

All in all, the appellant's appeal lacks merit. We dismiss it. The parties shall bear their own costs.

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E. M. Hamaundu

SUPREME COURT JUDGE

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F. M. Lengalenga

ACTING SUPREME COURT JUDGE