IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP NO. IRC LK/185/2017

B E T W E E N:

NALISHEBO F. MALUKE **COMPLAINANT**

AND

HOTEL MANAGEMENT SERVICES ZAMBIA LIMITED **RESPONDENT**

CORAM:

Hon. E. MWANSA Esq : JUDGE

APPEARANCES:

For the Complainant : *In Person*

For the Respondent : *Mr. J. Katati – Messrs. Dove Chambers*

JUDGMENT

Authorities referred to:

1. ***Section 85 (4) Rule 9 Industrial and Labour Relations Act, Chapter 269.***
2. ***Chilambuka -V- Mercy Touch Mission International Appeal No. 171/2012 (2017).***

The Complainant reached this Court by way of a Notice of Complaint filed on the 19th May, 2017.

She sought:

(a) Overtime

(b) Costs and any other benefits the Court may Order.

Brief facts in the matter were that, in a contract dated 5th January, 2015, the Complainant was employed as Front of House Manager by the Respondent at its Restaurant trading in the name and style of John Dory's. the contract period was for two years, from the inception of the business operations.

Under clause 8 of the said contract, the Complainant was to work a total of 48 hours a week. Any authorized overtime worked would be paid on a pro-rata basis of the basic monthly salary or a rest period would be given in lieu of overtime payment, as at clause 10.

It appears that at the start of the business operations, the Respondent offered breakfast which service was discontinued as it was not popular. So, the shifts for the Respondent and others changed. The morning shift which was from 08:00 hours to 16:00 hours; would start from 10:00 hours and end at 16:00 hours. While the afternoon or evening shift remained from 16:00 hours to 22:0 0 hours.

The change described above happened just after one month of operation.

In her evidence, the Complainant, without mentioning names of which Managers, alleged that when these Managers went to South Africa for training, she was made to do double shifts. She did not produce any evidence to back this position. She alleged that in November, 2015 to March, 2016 when the demand for service was at peak, she was instructed by her Senior Manager to do double shift in Order to cover up for another Manager who was on leave. Once more there is only her word for this without real evidence in form of authority as required by clause 10 in her contract. Again, in August to about November 2016, her Senior Manager went to South Africa for training and she together with other Managers were instructed to do double shifts.

She further alleged that at the labour office, the Respondent was instructed to pay overtime. But the exhibit produced by herself on NFM4, a letter from the Department of Labour and signed by Tamala N. Namakobo states that:

> ***"This office has had challenges to resolve the matter because there is no record to show that overtime was worked".***

Indeed, the only evidence produced as authority for overtime to be worked is an exhibit at NFM6 which is a schedule of work for three (03) working weeks. This time table, closely looked at shows that the Complainant was off every Tuesday of the three weeks.

Even though, Complainant could not properly explain or interpret to the Court the time table or schedule, one thing was clear that she had a Tuesday 'off" every week. I suppose that off took care of the overtime she could have worked in the week, as properly provided in her contract of employment. That provision being clause 10 on overtime, and stating that overtime worked as authorized will be paid for on pro rata basis of the basic salary; or in lieu of that payment, some days of rest will be availed to the employee.

Further, I have been at pains to find express authority for overtime to be worked, when is a pre-requisite for working extra hours.

Surely, he who alleges must prove. The Complainant in our case has fallen short of the required standard to prove that she had prior authority to work over time and that she actually worked overtime. Approval is important, or at least a demand to do so.

In ***Chilambuka -V- Mercy Touch Mission International***[1] the Court directed as follows, I quote here under in extensia;

> ***"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***

1. Appeal No. 171/2012 (2017)

scheduled hours and such work must be recognized and approved by the employer as being outside the scheduled working hours

<u>The approval by the employer is important</u>.
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.

<u>In this case, 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</u> (Emphasis ours)".

Failure on the part of the Complainant to prove that she had authority to prove that she had authority to work overtime and she so worked it, goes beyond what has been said above. She could not even state how many hours she did this overtime, let alone the actual dates.

The claim for overtime must fail as it now does.

On consideration of the totality of the evidence before me, I find no other relief that may properly be extended to the Complainant.

All said, this suit fails in toto.

I make no Order as to costs.

Delivered this.....day of ....., 2018.

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E. MWANSA
JUDGE