

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

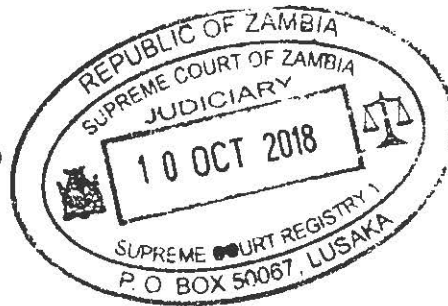
APPEAL NO. 30/2016
SCZ/08/253/2015

BETWEEN

QUICKSAVE LIMITED

AND

SARAH MUBAMBE



APPELLANT

RESPONDENT

Coram: Mambilima, CJ, Kaoma and Kajimanga, JJS

On 2nd October, 2018 and 10th October, 2018

For the Appellant: N/A

For the Respondent: N/A

J U D G M E N T

Kaoma, JS, delivered Judgment of the Court.

Cases referred to:

1. **Mususu Kalenga Building Limited and another v Richmans Money Lenders Enterprises - S.C.Z. Judgment No. 4 of 1999**
2. **Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) Z.R. 172**

Legislation referred to:

1. **Minimum Wages and Conditions of Employment Act, Cap 276, sections 3 and 4**
2. **Minimum Wages and Conditions of Employment (Shop Workers) (Amendment Order, 2012) (Statutory Instrument No. 47 of 2012)**

This appeal is only against the award of overtime to the respondent by the Industrial Relations Court, in a judgment delivered on 13th August, 2015.

The undisputed facts as are relevant to the appeal are that the respondent was employed by the appellant on 1st November, 2011 on Quicksave Limited Conditions of Service. The conditions of service did not provide for over-time or commission. On 25th April, 2014, the respondent's employment was terminated by giving her a notice of termination. This came after an audit was conducted at her work place on 3rd April, 2014.

On 19th May, 2014, she filed a complaint in the Industrial Relations Court seeking, among other reliefs, overtime accrued from working on weekends and public holidays. She asserted in her affidavit in support of complaint that she had never been paid. The appellant filed an answer and affidavit in opposition asserting that the respondent was employed as a sales lady and was being paid commission on sales; and that there was no provision for payment of overtime as alleged in view of the commission paid.

The court below heard evidence from the parties and received submissions from counsel. The court observed that the issues of overtime and commission were not part of the terms of the agreed conditions and took the view, that sales commissions are sales

related payments and usually a sum payable to an agent in return for his or her performing a particular service and that circumstances in which a commission is payable depend on the terms of the contract between a principal and an agent. In contrast, the court said overtime related to excess hours worked by an employee above the normal eight hours working shift.

The court further observed that the respondent worked from 07:00 hours to 22:00 hours on certain occasions and hence accrued excess hours, thereby entitling her to payment of overtime but she did not specify the actual number of hours worked in excess of the company's normal and regulated working hours.

Therefore, the court ordered that the total number of hours worked by the respondent should be agreed upon and should the parties fail to reach an agreement, the matter should be referred for assessment by the Assistant Deputy Registrar.

Dissatisfied with this decision, the appellant has appealed on one ground only that the court below erred in law and fact when it ordered that the respondent be paid overtime. Both parties filed heads of argument and notices of non-appearance and did not attend the hearing of the appeal.

Counsel for the appellant submitted that the issue of overtime work and payment is regulated by the **Minimum Wages and Conditions of Employment Act, Cap 276**, which applies to protected employees specified in the schedule. Particular reference was made to **sections 3 and 4** of the Act. It was argued that the Act does not apply to the respondent as she was in management. To buttress this argument, counsel also cited the **Minimum Wages and Conditions of Employment (Shop Workers) (Amendment Order, 2012) (Statutory Instrument No. 47 of 2012)**.

The gist of the response by counsel for the respondent is that she was entitled to overtime from her date of engagement, as sales lady, to 19th February, 2013 when she was appointed as depot manager and that the above Act and related Statutory Instruments were applicable to her during that period.

We have considered the record of appeal and arguments by the parties. It was undisputed at trial that the respondent was employed by the appellant on 1st November, 2011 on the Quicksave Limited conditions of service; that operating hours for depots was 8 hours a day; that at times, employees exceeded the set hours; and that the conditions of service did not provide for overtime.

The issue for our decision is whether or not the respondent was entitled to remuneration for the overtime worked, and if so, whether she was remunerated. The appellant's evidence was that even if overtime was not provided for in the written conditions of service, in practice, employees worked overtime and were remunerated by payment of commission of 1% on the total sales.

Although the conditions of service did not explicitly mention overtime or commission, clause 12 provided for bonus in the following terms:

"BONUS

Employees shall normally be paid performance bonus together with the salary/wage on the last day of the month. The Managing Director shall determine the amount each employee is supposed to be paid after considering efficiency, quality, additional time worked and discipline of an individual employee. Additional criteria used in calculating bonuses and bonus deductions will be the sole prerogative of the Managing Director" (Underlining is ours for emphasis).

On the basis of this clause, we are satisfied that the respondent was entitled to remuneration in form of a bonus for additional time worked which plainly is the same as overtime. On whether or not she was remunerated, her evidence was that she used to receive a bonus of 1% on the volume of sales. However, she did not explain the basis of that 1% bonus.

On the contrary, the appellant's testimony was that employees who chose to work overtime were on commission of 1% of their total sales; that employees in depots could work up to midnight for extra sales which translated into more money; and that the respondent was receiving the commission with her salary which was more than the aggregate of her basic salary and allowances. It was also the appellant's testimony that this was an arrangement that still existed and had been accepted by employees.

We find it difficult to understand why the trial court glossed over this clear evidence and chose to make a distinction between commission and overtime which was not even alluded to by the parties in their respective testimony. Whether the word used is 'bonus' or 'commission', the respondent was being paid 1% of total or volume of sales and clause 12 of the conditions of service, shows that additional time worked was part of bonus.

As a result, we are satisfied that the respondent was being remunerated for the overtime worked by payment of bonus together with her salary and allowances as shown in the pay slip for February, 2014 at page 40 of the record of appeal. Hence, her claim for overtime had no basis and the order by the court that the total

number of hours worked by her should be agreed and in default the matter be referred for assessment by the Assistant Deputy Registrar was wrong and we set it aside.

Before we conclude, we have noted that the appellant cited the **Minimum Wages and Conditions of Employment Act** and the related statutory instrument to show that the respondent was not entitled to overtime payment as she was in management. Conversely, the respondent argued that she was entitled to overtime from the date of engagement to the date of variation of her contract.

Apparently, the respondent did not base her claims on the **Minimum Wages and Conditions of Employment Act** or lead evidence to show that she was a protected employee. She served under written conditions of service which she did not allege were not attested by a Labour Officer. In **Mususu Kalenga Building Limited and another v Richmans Money Lenders Enterprises¹**, we held that where an issue was not raised in the court below, it is not competent for any party to raise it on appeal.

Moreover, evidence which should have been adduced at the trial was introduced in the heads of argument. The court was denied the opportunity to consider this evidence and did not refer to

the **Minimum Wages and Conditions of Employment Act** or the statutory instruments cited in awarding the respondent overtime.

We also observe that the court did not make any finding of fact on whether the respondent was employed as sales lady or depot manager. Even if it were true that she was employed as sales lady, we have already found that she was remunerated for any overtime she worked. As we held in **Wilson Masauso Zulu v Avondale Housing Project Limited**², a plaintiff who has failed to prove his or her case cannot be entitled to judgment whatever may be said of the opponent's case. The appeal has merit and we allow it with costs of the appeal to be taxed if not agreed.



I.C. MAMBILIMA
CHIEF JUSTICE



R.M.C. KAOMA
SUPREME COURT JUDGE



C. KAJIMANGA
SUPREME COURT JUDGE