IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 159/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

GILDAH NGOMA AND OTHERS **APPELLANTS**

AND

WORLD VISIONS ZAMBIA **RESPONDENT**

CORAM: MCHENGA DJP, NGULUBE AND SIAVWAPA JJA

On 23RD SEPTEMBER 2020 and 28TH JANUARY 2021

FOR THE APPELLANTS: MR. B. GONDWE OF BUTA GONDWE AND ASSOCIATES

FOR THE RESPONDENT: MRS S. N. KABEKA OF NCHITO AND NCHITO

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Anthony Khetani Phiri v Workers Compensation Control Board SCZ Judgment No. 2 2003*
2. *Mike Musonda Kabwe v B.P. Zambia Limited (1997) SCZ 42*
3. *Kasote Singogo v Chilanga Cement PLC (2009) ZR 122.*
4. *Mike Musonda Kabwe v B.P. Zambia Limited SCZ Appeal No. 115 of 1996*

5. *Peter Ngándwe and Others and Zamox v Zambia Privatization Agency (1999) ZR.*

Legislation:

1. The Employment Code Act No. 3 of 2019

1.0. **INTRODUCTION**

1.1. This is an appeal against the Judgment of the Hon. Mr. Justice E. L. Musona sitting as Judge of the Industrial Relations Division of the High Court. The Judgment was delivered on 22nd March 2019.

1.2. The learned Judge dismissed the Appellant's complaint by which they sought declarations that their terminations were unlawful and in breach of their conditions of services and that the terminations amounted to redundancies.

1.3. In the alternative they claimed that they were discriminated against.

2.0. **BACKGROUND**

2.1. The Appellants were all employees of the Respondent deployed in different parts of the country as Area Development Program Managers. They were employed at different times on renewable one year fixed term contracts.

2.2. At the time the cause of action arose; the Appellants were serving one year contracts which were due to expire in September 2006. The Respondent then wrote to the Appellants offering them contracts whose duration would be specified in the contracts to be signed.

2.3. The Appellants were served with letters offering them 3 month contracts of employment in October 2006 to run up to December 2006. The contracts were stated to be subject to the World Vision Zambia Standard Conditions of Service as contained in the Employee Manual.

2.4. In November 2006, the Appellants were informed that their positions would be opened up through advertisements and that as holders; they were at liberty to apply for the same positions.

2.5. The Appellants applied for the positions and following interviews that were conducted, the Appellants were informed that they were not successful.

2.6. The Appellants were displeased with the turn of events and sought interventions from higher offices which culminated into a proposed meeting with the Southern Regional Director in May 2007. However instead of the proposed meeting, the

Regional Director instead called one of the Appellants whom he advised to just "move on".

3.0. **THE COMPLAINT BEFORE THE HIGH COURT**

3.1. The Appellants filed a complaint in the Industrial Relations Division of the High Court whose thrust was that the Respondent had unilaterally varied their conditions of service by introducing interviews and reducing their contracts to three months from one year instead of using the performance appraisal system as the criteria for renewal of contract.

3.2. The Appellants drew comfort from Clause 6 of the Operations Manual which provided that performance appraisal was the only criterion for renewal of contracts. On that basis, they argued that they had been rendered redundant in that their positions had been upgraded to require additional skills which they did not possess.

3.3. The Appellants called into aid the case of *Anthony Khetani Phiri v Workers Compensation Control Board*[1] *and* Section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia.

4.0. **THE COURT'S DECISION**

4.1. The learned Judge considered the claims and the arguments by both sides and came to the conclusion that the contracts of

the Appellants were not terminated as the Appellants served their full terms.

4.2. Secondly, the learned Judge also formed the view that Clause 6 of the Operations Manual did not provide for automatic renewal of contracts as it was based on mutual consent of the parties.

4.3. Thirdly, the learned Judge was of the view that the reason the Respondent awarded three months contracts to the Appellants was on the understanding that their positions would be opened up for advertisement. He therefore concluded that there was no variation of the Appellants' conditions of service.

4.4. The learned Judge dismissed the claim for redundancy as the criteria were not met and the Appellants had consented to the reduced contract period of three months.

4.5. As regards the claim in the alternative, the learned Judge found that the alleged discrimination did not fall within the ambit of Section 108 (1) of the Industrial and Labour Relations Act.

5.0. **THE APPEAL**

5.1. There are two grounds advanced as follows;

1. That the Court below erred in law and in fact when it held that there was no redundancy in the way the Complainants' (Appellants) contracts were terminated.
2. That the Court below also erred when it held that the Complainants' conditions were not breached and denied them an order for damages.

5.2. We observe from the filed Heads of Argument that the two grounds were argued together. The Appellants' have argued that by upgrading the qualifications for the position held by the Appellants, the Respondent declared the Appellants redundant in terms of Section 55 of the Employment Code Act No. 3 of 2019.

5.3. It is further argued that although Section 26 B of the repealed Employment Act only applied to oral contracts; the same has been re-enacted under Section 55 (1) (b) of the Employment Code Act No. 3 of 2019 and therefore, instructive.

5.4. In support of the above position, the Appellants sought the aid of the case of *Mike Musonda Kabwe v B. P. Zambia Limited*[2] with reference to the holding that;

> ***"Any conditions that are introduced which are to the detriment of the workers do not bind the workers unless they consent to them."***

5.5. In that regard the Appellants argued that they did not consent to interviews in place of the appraisal system used before.

5.6. In ground two the argument is that by conducting interviews, the Respondent was in breach of its own rules as set out in the Operations Manual and the Employee Manual.

5.7. Two provisions of the two documents were adverted to firstly page 16 of the Operations Manual which provides as follows;

> ***"All staff shall be on contract renewable yearly upon satisfactory performance. To this end job performance standards are to be developed for each position to ensure the evaluations undertaken to renew or not to renew the contracts are professionally done without undue disadvantage to anybody. Job performance standards are to be agreed upon by the superiors and their subordinate. Any changes made to the standards are to be agreed upon by both parties."***

5.8. Secondly, Clause 11-16 of the Employee Manual provides as follows;

> ***"All positions, except that of National Director will be filled by promotion, unless such skills as***

required are not available within the National Office".

5.9. In view of the above provisions of the two Manuals, it is the Appellants' argument that the Respondent's alleged breach of its own rules and procedures leading to the exit of the Appellants entitled the Appellants to damages.

6.0. **OUR CONSIDERATION AND VIEWS**

6.1. We have carefully examined and considered both the Judgment of the Court below and the arguments advanced by the Appellants in support of their two grounds of appeal. We note accordingly that in support of the first ground, they have largely sought to rely on Sections 26B (i) (b) of the repealed Employment Act and Section 55 (i) (b) of the Employment Code Act No. 3 of 2019.

6.2. Although the Appellants concede that Section 26 B (i) (b) was only applicable to oral contracts, they have sought to employ some ingenuity to link the provision from the repealed Act to the new Act which contains a similar provision that now applies to written contracts. The Appellants however, failed to acknowledge the non-applicability of Act No. 3 of 2019 for want of retrospective applicability to a matter that was commenced in 2007.

6.3. The Appellants also made reference to the case of *Mike Musonda* (Supra) in which the Supreme Court held that a contract of employment had terminated by virtue of the Respondent's (employer) unilateral decision to reduce the Appellant's salary. The Supreme Court however, found that the Appellant was entitled to early retirement even though his conditions of service provided for redundancy because the parties had agreed on early retirement.

7.0. **REDUNDANCY**

7.1. It was settled law, prior to the enactment of the Employment Code Act No 3 of 2019 that Section 26B of the then Employment Act Chapter 268 of the Laws of Zambia did not apply to written contracts. This was as held in the case of *Kasote Singogo v Chilanga Cement PLC*[3]. The issue of redundancy in written contracts was to be specifically provided therein.

7.2. Secondly, in the case of *Attorney-General v Chibaya and 4 others* [4], the Supreme Court stated as follows;

> ***"It is settled that an employee on a fixed term contract is not entitled to pension or redundancy pay as such employee can only be entitled to gratuity at the end of his contract. If the contract is wrongfully terminated before it ends by effluxion of***

time, all the employee may be entitled to are damages for breach of contract."

8.0 **THE APPELLANTS' CONDITIONS**

8.1. The record shows that all the Appellants served on fixed term contracts of service of one year duration. The said contracts were stated to be renewable upon agreement between the parties. The contracts also contained the following provision;

"In addition to the terms contained in this offer, you will be subject to World Vision Zambia Standard Conditions of Service, as contained in the Employee Manual".

8.2. The above Clause in the Appellants' contracts informed the trial Judge's rejection of the Appellants' argument that their conditions had been unilaterally altered to their detriment pursuant to Clause 6 of the Operations Manual which the learned Judge found to be inapplicable.

8.3. Our view is that the learned Judge was on firm ground as the Operations Manual was not expressly incorporated in the Appellant's Conditions of Service.

8.4. We would however, go further to state that in our considered view, the Manual serves as guidance to management on how

to run the organization and its employees. It does not form part of the conditions of service for its employees.

8.5. In the case of *Mike Musonda Kabwe v B. P. Zambia Limited* the Supreme Court of Zambia held that;

> ***"Where an employer varies the basic conditions, without the consent of the employee, then the contract of employment terminates and the employee deemed to have been declared redundant on the date of such variation and must get redundancy payment if the conditions of service do provide for such payment".***

8.6. If the conditions of service provide for early retirement and not redundancy, then the employee should be deemed to be placed on early retirement.

8.7. This position was re-affirmed by the Supreme Court in the case of *Peter Ngándwe and Others and Zamox v Zambia Privatization Agency*[5].

8.8. It is clear from the cited case law that in a written contract of employment unilateral variation of basic conditions of service attracts a redundancy package or early retirement if one or the other is a condition of service.

8.9. In this case, the Appellants did not demonstrate that redundancy was a condition of their contracts of employment by reason of which there could be no automatic redundancy even if their conditions of service had been varied without their consent, which was not the case.

8.10. The other aspect from the Supreme Court Judgement is that the remedies of redundancy and early retirement only apply to employees on permanent and pensionable contracts of employment. This position is confirmed by the case of *Attorney General v Chibaya and Others* (Supra).

8.11. In light of what we have said in the proceeding paragraphs, ground one of this appeal cannot succeed and we dismiss it accordingly.

9.0. **DAMAGES FOR BREACH OF CONDITIONS OF SERVICE**

9.1. The starting point is that the Appellants were all employed on fixed but renewable contracts of employment. The claim for breach is premised on the earlier cited Clauses of the Operations Manual and the Employee Manual.

9.2. We have dismissed the claim based on the Operations Manual for not being part of their conditions of service.

9.3. The argument that the Appellants are entitled to damages on account that the Respondent breached its Operations Manual in so far as it provides in Clause 6, that ***"any changes made to the standards are to be agreed upon by both parties"*** is not tenable.

9.4 This is so because the same Clause provides for ***"yearly renewable contracts upon satisfactory performance".*** This part of Clause 6 refers to job performance standards for each position for the purposes of evaluation for the purposes of renewal or non-renewal of a contract.

9.5. In our considered view, the exercise that the Respondent carried out in 2006 and 2007 which brought to an end the contractual relations with the Appellants was not a breach of the Operations Manual, in particular, Clause 6.

9.6. When the Appellants' contracts came to an end in September 2006, they were offered three months contracts which they accepted. They were subsequently informed that their positions would be subjected to applications and interviews and that they were at liberty to apply if they so desired.

9.7. The above stated facts are critical because Clause 6 relied upon by the Appellants provides that any changes made to the standards are to be agreed upon by both parties.

9.8. It can therefore, be safely held that the changes made to the evaluation method was agreed to by both parties in this case. It can also be held that the said changes were not related to performance as envisaged by Clause 6 and therefore, placed no obligation upon the Respondent to seek the Appellants' consent. We therefore opine that either way, the Appellants have not founded a case for damages for breach of contract.

10.0. **TERMINATION OF CONTRACT**

10.1. Throughout the proceedings both here and in the Court below, the Appellants have argued that their contracts were terminated by reason of which they claimed redundancy payment and damages in the Court below. They have renewed the same arguments before us.

10.2. In the *Chibaya* case earlier referred to in this Judgement, it is very clear that a fixed term employee is only entitled to a gratuity at the expiry of the contract period as terminal benefits.

10.3. However, if the contract is terminated before it runs its full course, then such employee is entitled to damages for breach of contract.

10.4. There is no argument that the Appellants' one year contracts terminated by effluxion of time in November 2006 and they were paid their gratuity. They then accepted shorter term contracts of three months to run from October to December 2006 which also ran their full course and terminated by effluxion of time. They were equally paid for that period.

10.5. We are therefore, in agreement with the learned trial Judge's position that the Appellants' contracts were not terminated but came to an end by effluxion of time.

11.0 **CONCLUSION**

11.1. We believe that the Appellants ought to have sensed an end to their relationship with the Respondent at the time they were offered three month contracts instead of the usual one year contracts when their one year contracts expired in November 2006.

11.2. By accepting the three month contracts, the Appellants forfeited their right to challenge that decision. Further, by accepting to take part in interviews, they accepted the fact that the outcome might be success or failure.

11.3. The fact that they were unsuccessful caused them frustration and sought to rely on inapplicable provisions of the law to mount a challenge to the process that led to the end of their

relationship with the Respondent. We doubt that they would have challenged the Respondent's alleged breaches of the two Manuals had they been successful at the interviews.

11.4. We therefore find no merit in the whole appeal and we dismiss it accordingly with parties to bear their own costs.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE