IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No.136/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

OCCUPATIONAL HEALTH AND SAFETY INSTITUTE **APPELLANT**

AND

LUBINDA CHAINDA **RESPONDENT**

Coram: Kondolo, Makungu and Ngulube, JJA
On the 15th day of June, 2023 and the day of 30th June, 2023

For the Appellant:	*Mr. S.A.G Twumasi of Kitwe Chambers & Bupe Katebe In-house Counsel for the appellant*
For the Respondent:	*Mr. Daniel Mwaba of James & Doris Legal Practitioners*

JUDGMENT

Makungu, J.A delivered the judgment of the Court.

Cases referred to:

1. *Lubunda Ngala & Jason Chulu v The Anti-Corruption Commission Selected Judgment No. 4 of 2018*
2. *Levy Mwale v Zambia National Broadcasting Corporation 2020/CCZ/0012*
3. *Khalid Mohamed v The Attorney General (1982) Z.R 49 (S.C)*
4. *Wilheim Roman Buchman v The Attorney General (1994) S.J 76 (S.C)*
5. *Anderson Mwale & Others v Zambia Open University 2021/CCZ/001*

Legislation referred to:

1. *The Constitution of Zambia, chapter 1 of the Laws of Zambia.*

1.0 INTRODUCTION

1.1 This is an appeal against the decision of Davies C. Mumba J of the High Court, Industrial Relations Division dated 9th April, 2021, in favour of the respondent. The respondent was awarded the total sum of K773,004.44 as accrued benefits, with interest. Both parties were ordered to bear their own costs.

2.0 BACKGROUND

2.1 On 28th February, 2020, the complainant (now respondent) commenced an action in the High Court, Industrial Relations Division against the respondent (now appellant) by Notice of Complaint accompanied by an affidavit, seeking the following reliefs;

a) A declaration that the complainant's employment with the respondent was unlawfully, unfairly and/or wrongfully terminated.

b) 36 months' salary as damages for unlawful and/or wrongful termination and loss of employment.

c) An order that the complainant be paid accrued benefits which should include gratuity on pro rata basis, leave days and repatriation.

d) A further order that the complainant be retained on the payroll until payment of the gratuity.

e) Any other relief the court may deem fit.

f) Interest on all sums found due.

g) Costs.

2.2 We shall refer to the parties by their designations before this Court.

3.0 RESPONDENT'S AFFIDAVIT EVIDENCE

3.1 The facts of the matter as set out in the respondent's affidavit filed on 28th February, 2020 were that; In July, 2014 he was employed by the appellant as a Manager of Finance on a three-year fixed term contract. Sometime in August, 2017 the contract ended but was renewed by operation of law for a further period of 3 years from 2017 to 2020. By letter dated 3rd January 2019 from the Board Chairperson to the

appellant, the appellant was informed that the Board ratified his contract at the first extraordinary Board meeting held on 10th December, 2018 hence, the duration of the contract was from 1st August, 2017 to 1st August, 2020.

3.2 Sometime in 2019, the appellant's management which included the respondent, increased salaries for non-unionised employees for the year 2019. Management also facilitated for payment of increased salaries to Melissa Banda following her successful lawsuit against the appellant. The decision to pay her was based on the legal advice received from the Principal State Advocate to the effect that the matter was unlikely to succeed on appeal. Management further approved the salary increments for the year 2020.

3.3 On 6th January, 2020 the appellant, through its Board Chairman Dr. Victor Mukonka charged the respondent with the offence of misconduct contrary to Clause 13 of his contract of employment. Details of the charge were given as follows:

1. You facilitated salary increments for the non-unionised staff for the year 2019 and started making payment

towards the same without supporting documentation including approval from the board.

2. You facilitated payment to Mrs. Melissa Banda following her successful lawsuit against the Institute without the approval of the Board contrary to the Boards decision to appeal the matter.
3. You failed to provide guidance on the implications of proceeding to approve salary increments for the year 2020 conditions of service and approving salary increments for the year 2020 without approval of the 2020 budget by the Board.

3.4 A disciplinary committee chaired by, Cecilia Mulindeti Kamanga, Director Human Resource and Administration in the Ministry of Agriculture was constituted. The matter was heard on 17th January, 2020. Whilst waiting for the outcome of the disciplinary hearing, the respondent's employment was terminated by letter dated 8th February, 2020, authored by Dr. Victor Mukonka the Chairperson of the Board. The effective date of termination was 10th February, 2020.

3.5 The respondent claimed that the disciplinary committee was constituted in contravention of the appellant's Disciplinary Code of Conduct. That clause 2.6.1 (vi) of the Disciplinary Code

provided that in the event that a charge was raised against a member of management, like the complainant, the disciplinary committee ought to be comprised of the Human Resource Manager who would sit with two other persons in managerial positions. That in the event of dissatisfaction with the outcome of the disciplinary hearing, an employee would then have the right of appeal to the respondent's board. That the whole process established under the disciplinary code of conduct was abrogated with impunity when the Board Chairperson Dr. Victor Mukonka decided to be the charging officer thereby overriding the power of the director who was the respondent's immediate supervisor.

3.6 That the manner in which the respondent's employment was terminated was wrongful, unfair and unlawful as it offended the contract and tenets of natural justice.

3.7 He further claimed that the allegations levelled against him were false and a mere front to the appellant's intentions to terminate his contract.

3.8 That as a professional accountant who was regulated by a professional body, that body took note of his termination of

contract for alleged misconduct and would use the same against him in future.

3.9 That he might face stigma at the hands of prospective employers who might refuse to employ him on the basis of unfounded yet serious allegations that were levelled against him.

3.10 That the appellant's actions caused him and his family undue distress, trauma, financial difficulties and mental anguish.

3.11 That jobs were hard to find especially at managerial level and the abrupt termination of his employment greatly inconvenienced his career path.

3.12 He further stated that he had acquired a car loan which he was likely to fail to service for lack of means.

4.0 APPELLANT'S AFFIDAVIT EVIDENCE

4.1 The appellant filed an answer to the complaint and two affidavits. One of the affidavits was sworn by Richard Mtonga the Acting Manager Human Resource and Administration and the other was sworn by Cecilia Mulindeti Kamanga, a board member of the Disciplinary Committee which dealt with the respondent's matter.

4.2 In its answer to the said complaint, the appellant confirmed the renewal of the respondent's contract of employment after its expiry in 2017. It also confirmed that the respondent was charged with the aforementioned offence.

4.3 It was confirmed that a disciplinary committee was constituted and that the matter was heard on 17th January, 2020, save to add that the whole senior management which included the respondent as the head of the department of finance had been charged with various offences. That under the circumstances, the procedure under clause 2.6.1 of the disciplinary code, which required that the disciplinary committee be constituted by the Human Resources Manager and two other persons from management could not be adopted.

4.4 Therefore, it was reasonable and justifiable for the board chairperson to charge the respondent.

4.5 That the respondent was given a chance to exculpate himself and informed of his right to appeal to the Minister of Health since the board had been constituted as the disciplinary committee.

4.6 The appellant denied that the termination of the respondent's employment was wrongful, unfair or unlawful.

4.6 The appellant further stated that the Chairperson Victor Mukonka had acted in accordance with paragraph 2.6.7 of the disciplinary procedure code when he terminated the respondent's employment. That the respondent did not suffer any prejudice when the board chairperson who signed his contract of employment also terminated his employment on behalf of the appellant.

4.7 The appellant also claimed that the charges against the respondent were proved as indicated in the minutes of the meeting held by the disciplinary committee. That, the respondent was given a fair hearing in accordance with the disciplinary code. Further that, the composition of the disciplinary committee made it impossible to pre-determine the termination of the complainant's employment as it was comprised of independent professional people whose qualifications were in line with the disciplinary code. That at no time did the respondent object to the constitution of disciplinary committee.

5.0 RESPONDENT'S VIVA VOCE EVIDENCE AT TRIAL

5.1 At trial, the respondent denied all the allegations levelled against him. As regards the issue of facilitating salary increment for non-unionised staff for the year 2019 without authority, he explained that there was a supporting document, from the Human Resource Manager to his office, instructing him to pay salary increments for the year 2019 That there was also an approval made by the Board for salary increments to non-unionised employees in 2014 to be implemented in five years.

5.2 That the Ndozo Agreement" on salary increments in 2014 was entered into after negotiations that took place at Ndozo Lodge between the appellant's management and the Civil Servants and Allied Workers Union of Zambia.

5.3 It was his testimony that the Ndozo agreement was for purposes of rationalisation and harmonisation of the salaries. That approved salary structures were provided for under clause 5.0 of the agreement. That the Board had approved the said salaries and never reversed its resolution. The respondent also referred to the Minutes of the 2nd Extra Ordinary Board Meeting where a Mr. Chibuye had suggested

that the starting point of increments was the Ndozo Agreement since it was already in existence and that there was no need for negotiations.

5.4 As regards the question of facilitating payments to Mellissa Banda following her successful lawsuit against the appellant without approval of the Board contrary to the Board's decision to appeal the matter, the respondent stated as follows:

5.5 There were no minutes of the Board meeting which showed that the Board had made a resolution to appeal the matter and also that there was no instruction from the Board to management to appeal the matter.

5.6 The respondent denied the allegation that he failed to provide guidance to management on the implications of proceeding to hold a meeting with union representatives to discuss 2020 conditions of service, and approving salary increments for the year 2020 without approval of the 2020 budget by the Board. The respondent explained that the 2020 budget was first presented to the Board in July, 2019 for approval and it was approved as per the minutes of the joint meeting of Human

Resource and Administration Committee/Finance Committee held on 27th November, 2019, under clause 9.2.

5.7 The respondent further testified that he was claiming for gratuity amounting to K550,583.25 which was 35% of his total income in accordance with clause 14.5 of the Occupational Health Management Board Terms and Conditions of Service for Non-unionised Employees. He was further claiming for leave days and repatriation as computed under paragraph 12 of his affidavit in reply.

5.8 The respondent further stated that he was charged with 'misconduct' but his contract was terminated for a different offence of 'gross misconduct' for disregarding directives and resolutions of the board.

6.0 APPELLANT'S VIVA VOCE EVIDENCE AT TRIAL.

6.1 Evidence on behalf of the appellant was given by Cecilia Mulindeti Kamanga, the Director-Human Resource and Administration in the Ministry of Agriculture. The witness served as a Board member of the appellant as well as Chairperson of the Sub-Committee on Human Resource and Administration. She was appointed as Chairperson of the disciplinary committee that sat on 17th January, 2020 to hear

the cases for three top management employees including the respondent on the charges levelled against them. That the disciplinary committee received evidence from the respondent. After deliberations and looking at his submissions, the disciplinary committee decided to find him guilty as charged. That the committee concluded that the respondent and the other officers had committed serious misconduct.

6.2 With regard to the question whether the respondent had facilitated salary increments for non-unionised staff for 2019 & made payments without the approval of the board, Cecilia Mulindeti Kamanga, testified that management had gone against the Board resolution to reverse the salary increments for non-unionised staff and top management. She stated that management had automatically started paying the salary increments after the union bargained for salary increments with management according to their collective agreement. That the Board had directed management to reverse the salary increments as they had no authority from the Board but they failed to do so. When referred to an Internal Memorandum appearing at page155 Record of Appeal (ROA).

she explained that the Memorandum was from the Manager Human Resource Administration to the Finance Manager advising the Finance Manager to reverse the 2019 salary increments awarded to top management only. That was because the increments were against the Board resolution.

6.3 The said witness stated that, considering the fact that management still went ahead to make payments against the board's resolution, the respondent who was the Finance Manager was held accountable. The committee considered this to be a serious breach of the respondent's obligation to the Board as he was directly responsible for reporting to and advising the board on financial matters.

6.4 On the issue of settlement of judgment debt owed to Melissa Banda, the witness stated that the Board resolution on the matter was to the effect that the Board was waiting for an opinion from the principal state advocate on whether to appeal against the judgment in Mellissa Banda's case. However, on 20th December, 2019 management informed the Board that they had already effected payments based on an opinion received from the Principal State Advocate. She further stated that the said opinion had been addressed to

the sub-committee chairpersons but neither the sub-committees nor the Board had chance to make a decision. That, in any case, all decisions of the sub-committees were subject to the board's approval.

6.5 On the allegation that the respondent failed to provide guidance to management, the witness was referred to the Minutes of the 4th Ordinary Board Meeting that took place on 11th October, 2019, particularly item 13.2. Commenting on the said minute, she stated that the same was not an approval of the 2020 budget but just information on how the grant had been reduced and what was expected at the presentation of the 2020 budget. That at the time, the board was informed that management had already negotiated salary increments for the 2020 budget, but issues of the 2020 budget had not yet been concluded by the Board.

6.7 That the fear by the Board was that the budget component on salaries would be distorted by negotiations because they would not know what parameters the negotiations would take.

6.8 That this was also a serious breach on the part of the respondent as he should have advised management on the

risk of committing the appellant to pay salary increments when the Board had not yet approved the 2020 budget.

6.9 When referred to the Collective Agreement between the appellant and the Civil Servants and Allied Workers Union of Zambia. Cecilia Mulindeti Kamanga stated that the agreement was for the period 1st January to 31st December, 2014. That the Ndozo agreement was an agreement between the Ministry of Health and the parastatals under the Ministry of Health to harmonise salaries. It was a 'working document' which was supposed to be used by parastatals based on the principle of ability to pay.

7.0 DECISION OF THE LOWER COURT

7.1 The lower court began by resolving two preliminary issues. The learned trial judge firstly considered the question whether the chairman of the Board had the power to charge the complainant.

7.2 The Judge, was of the view that considering the fact that the respondent's contract of employment was signed by the Board Chairperson, it was clear that the Board chairperson had the mandate to implement the decisions of the appellant's Board and to deal with the cadre of staff to which

the respondent belonged. Therefore, the board chairman properly charged the respondent.

7.3 That the fact that top management staff including the Director, Deputy Director and Manager- Human Resource and Administration had been charged with various offences meant that the respondent's immediate supervisor who was also facing a charge could not charge the respondent. Therefore, the respondent's contention that the disciplinary code of conduct had been breached in this regard was found not to have merit.

7.4 Secondly, the Court below dealt with the issue whether the appellant's Board was the proper and competent disciplinary authority to hear and determine the complainant's case.

7.5 The learned trial Judge observed that, clause 2.6.1 (vi) and (vii) of the respondent's disciplinary and grievance procedures was followed. Since all the top management staff had been charged with various offences, the appellant was on firm ground when it constituted its Board of directors as the disciplinary committee to hear and determine the cases against them.

7.6 The trial Judge held the view that the principle of natural justice namely; *nemo judex in causa sua* (no one shall be a judge in his own cause) was not breached as the Board chairperson who had charged the complainant never took part in the deliberations of the disciplinary committee.

7.8 Coming, to the substantive issues, the lower court deciphered the issues for determination as follows:

1. Whether the respondent complied with the procedure laid down in its disciplinary code and the rules of natural justice in dismissing the complainant.
2. Whether there was a substratum of facts to support the charge that was levelled against the complainant.

7.9 As regards the first issue mentioned above, the learned trial Judge observed that the respondent was formally charged for the subject offence. He was given an opportunity to exculpate himself, which he took. He was heard by the disciplinary committee which found him guilty of the offence he was charged with. Subsequently he was dismissed from employment.

7.10 The Judge found that the appellant complied with the respondent's contract of employment, its disciplinary code,

the rules of natural justice and the law when dismissing the respondent. The claim for wrongful and unlawful dismissal was accordingly dismissed.

7.11 In answering the second question mentioned above, the Judge dealt with the particulars/details of the charge as stated in the charge letter appearing at pages 73- 74 of the ROA.

7.12 As regards the first allegation of the complainant facilitating salary increments for non-unionised staff for the year 2019 and started making payments without approval from the Board, the Judge found that the salary increments for non-unionised staff were not approved by the respondent's Board and that management had been instructed to reverse the increments that they had effected. That the respondent and the Manager Human Resource and Administration attended the Board meeting in question and were aware of the Board's decision. On 12th August, 2019, the Manager-Human Resource and Administration issued an Internal Memorandum to the respondent informing him of the reversal of the salary increments for all non-unionised staff but the respondent did not reverse the salary increments. On

the basis of the above facts, the Judge found that the appellant's disciplinary committee properly charged the respondent with the offence of misconduct.

7.13 On the second allegation that the respondent facilitated payment to Mrs Melissa Banda following her successful lawsuit against the appellant, without approval of the Board, contrary to the Board's decision to appeal the matter; the judge found that the respondent misconducted himself by effecting the said payment without the Board's resolution.

7.14 On the third claim that the respondent failed to provide guidance to management on the implications of proceeding to hold a meeting with the union representatives to discuss the 2020 conditions of service and approving salary increments for the year 2020 without approval of the 2020 budget by the Board, the Judge accepted the respondent's evidence that the 2020 budget was approved by the Board as evidenced by item number 9.2 of the Minutes for The Joint Human Resource and Administration/Finance Committee meeting held on 27th November, 2019. Hence, there was no cogent evidence before the disciplinary committee which could have led to the finding that the complaint/respondent was guilty.

7.15 However, the Judge was satisfied on the particulars of the offences numbered 1 and 2 that the appellant properly found the respondent guilty of serious misconduct as prescribed under clause 13 of the respondent's contract of employment. Consequently, the respondent's claim that the dismissal was based on unsubstantiated evidence was dismissed.

7.16 Further, the judge found that the respondent was entitled to payment of gratuity at the rate of 35% of the total annual basic salary as provided under clause 10.0 of his contract of employment. The judge therefore, entered judgement in favour of the respondent for the sum of K550,583. 25 based on his unchallenged evidence and the appellant's admission that the gratuity had not yet been paid.

7.17 The learned Judge also ordered the appellant to pay the respondent salaries from 10th February, 2020 being the date he was dismissed from employment, until the gratuity is paid in full in line with **Article 189 (1) and (2) of the Constitution of Zambia**.

7.18 The learned judge further entered judgment in favour of the respondent for the claim of payment of leave commutation for

108.5 accrued leave days valued at K211,762.79 and repatriation in the sum of K10,658.40.

7.19 The total sum due to the respondent was K773,004.44 with interest at the average short term deposit rate from the date of the Notice of Complaint to the date of Judgment and thereafter at the current lending rate as determined by the bank of Zambia until full settlement of the judgment debt.

8.0 GROUNDS OF APPEAL

8.1 The grounds of appeal as per Memorandum of appeal on record are as follows:

1. ***The learned trial court erred in law and fact when it held and directed that the respondent shall pay the complainant the salaries from 10th February,2020 being the date he was dismissed from employment, until the gratuity is paid in full when the complainant's gratuity did not and does not qualify as a pension benefit defined by the Constitution of Zambia, Cap 1 of the Laws of Zambia.***
2. ***The learned trial court erred in law and fact when it held that the complainant is entitled to gratuity of K550,583.25 without analysing and assessing the said***

claim in respect of the period of service served by the complainant in the contract of employment.

3. ***The learned trial court erred in law and fact when it held that the complainant is entitled to accrued leave days of K211,762.79 without analysing and assessing the said claim in respect of the period of service served by the complainant in the contract of employment.***
4. ***The learned trial court erred in law and fact when it referred to the complainant's affidavit in reply filed on the trial date of 5th October, 2020 which said affidavit was never served on the respondent and was never referred to at trial of the matter in respect of the calculation of gratuity and leave pay.***

9.0 APPELLANT'S ARGUMENTS

9.1 The appellant filed heads of argument on 18th June, 2021. In support of the first ground of appeal, counsel for the appellant referred us to the case of **Lubunda Ngala & Jason Chulu v The Anti-Corruption Commission**[1] on the interpretation of the term pension benefit.

9.2 Counsel submitted that the respondent is not a retrenchee or retiree to be entitled to be retained on the payroll of the

appellant until his gratuity is paid in full. That the gratuity of the respondent cannot be regularly paid as it is a one-off lumpsum payment. Further, that not all terminal benefits that arise from the termination or end of contract are the same as pension benefits. Counsel was of the view that, article 189 was never intended to retain dismissed employees on the payroll of employers.

9.3 We were also referred to the case of **Levy Mwale v Zambia National Broadcasting Corporation**[2] on the rationale for enacting article 189 of the Constitution, that;

> ***"The wording of article 189 (2) is clear. This, to put blatantly, is that, pay the employee his pension benefit on his last working day. If not, retain him on payroll until you pay his pension benefit. In Lubunda Ngala and Mayapi cases we pronounced ourselves on the rationale behind the enactment of article 189 which is that the provision is meant to cushion pensioners and retrenches from the hardship they were experiencing as a result of delayed payment of their pension money or gratuity."***

9.4 In light of the above authority, counsel submitted, that a summary dismissal is not akin to retirement or retrenchment. That the respondent was on a fixed term contract and not on permanent and pensionable basis

9.5 It was further submitted that the retention of the respondent on the appellant's payroll when he has not provided a service to the appellant would amount to unjust enrichment. In support of this submission, the case of **Kitwe City Council v William Nguni**[3] was cited.

9.6 The gist of the submission on ground 2, was that the respondent was entitled to the payment of gratuity at the rate of 35% of the total annual basic salary as provided under clause 10.0 of his contract of employment and not the amount of K550,583.25 awarded by the court which was based on the purported total annual gross salary. Counsel contended that, the court contradicted itself when it awarded the respondent the above stated amount whilst holding that gratuity was to be based on the annual basic salary.

9.7 Counsel also cited the case of **Khalid Mohamed v The Attorney General**[4] in furtherance of the argument that the burden of proof lay on the respondent to prove that he was

entitled to gratuity in the sum of K550, 583.25 even in the event that the respondent did not bring a successful defence

9.8 He further pointed out that the respondent did not prove his entitlement to the said amount and the judgment clearly does not show how the gratuity amount was arrived at.

9.9 Counsel went on to make computations of how much the respondent is entitled to, but we take note that those computations were not submitted before the lower court in rebuttal of the respondent's figures. Therefore, we shall not reproduce them here.

9.10 However, we take note of the point made by counsel that the lower court should have referred the issue of determination of gratuity payable to the respondent for assessment before the registrar of the High Court as opposed to accepting the purported uncontested evidence as presented by the complainant.

9.11 On ground 3, counsel submitted that the lower court should have ordered for an assessment of the leave pay due to the respondent as opposed to just accepting the amount claimed by the respondent.

9.12 On the 4th ground of appeal, counsel submitted that the lower court erred when it referred to the complainant's affidavit in reply filed on the trial date of 5th October, 2020 which affidavit was not served on the appellant's advocates by the respondent and was never referred to at trial of the matter in respect of the calculation of gratuity and leave pay.

10.0 RESPONDENT'S HEADS OF ARGUMENT

Counsel for the respondent was precluded from filing the respondent's heads of arguments on the date of hearing of the matter as he did not give sufficient reason for making the application two years out of time.

11.0 ANALYSIS AND DECISION

11.1 Having prudently considered the record of appeal (ROA) and the appellant's arguments, we have decided to deal with grounds 1 and 4 separately. Grounds 2 and 3 will be dealt with together as they are connected.

11.2 The issue raised in the first ground of appeal is whether the lower court erred in ordering that the respondent be retained on the appellant's payroll from 10th February, 2020 being the date of his dismissal until full payment of his gratuity.

11.3 In order to resolve this issue, we shall begin by considering the relevant provisions of the Constitution of Zambia.

11.4 **Article 189 (1) and (2) of the Constitution of Zambia, Cap 1 of the Laws of Zambia** provides as follows:

> ***"(1) A pension benefit shall be paid promptly and regularly.***
>
> ***"(2) where a pension benefit is not paid on a person's last working day, that person shall stop work but the person's name shall be retained on the payroll, until payment of the pension benefit based on the last salary received by that person while on the payroll".***
>
> ***"(266) Pension benefit, includes a pension, compensation, gratuity or similar allowance in respect of a person's service."***

11.5 The above provisions were considered by the Constitutional Court, in the case of **Lubunda Ngala & Jason Chulu v The Anti-Corruption Commission**[1]. The brief facts were that the applicants resigned from employment and claimed inter-alia that they be retained on the payroll until their terminal

benefits which included accrued leave days, settling in and uniform allowance were paid.

11.6 The Constitutional Court of Zambia in considering whether the appellants in that case could be retained on the payroll pending payment of their benefits, stated as follows;

> ***"Our firm view is that it would be wrong to say that all terminal benefits simply because they arise from termination or coming to an end of employment contract, should be considered or interpreted to be the same as a pension benefit.***
>
> ***Further article 189 (1) uses the terms 'promptly' and 'regularly' which we consider to be the catch words in that article and can only relate to a pension and not to the type of terminal benefits claimed by the applicants. Moreover, the word promptly used in article 189 (1) means that the benefit must be paid without delay while regularly means that it must be paid to the beneficiaries when due and not intermittently. The question therefore is, considering the nature or type of terminal benefits the applicants are claiming as a***

basis upon which they should have been retained on their employer's payroll, can these be said to qualify to be paid promptly and regularly? The answer is that they cannot as correctly conceded by the applicants at the hearing because while they can be paid promptly, they cannot be regularly paid as these are one-off payments.

"That, it would be folly to ignore the preparatory works that formed the background to the enactment of Articles 189 and 266 when clearly, the legislature did not at all envisage the inclusion of accrued leave days, settling in and uniform allowances when the articles in issue were enacted while the mischief behind the enactment of article 189 is plain and the intention is clear, namely to cushion pensioners and retrenchees from the hardship they were experiencing as a result of delayed payment of their pension money or gratuity.

The applicants are not pensioners nor are they retrenches who would be entitled to a gratuity

which would have entitled them to remain on the employer's payroll until these benefits are paid."

11.7 The above authority clearly describes the type of terminal benefits which fall under Article 189 of the constitution.

11.8 In casu, to answer the question whether the respondent's gratuity qualifies as a pension benefit to entitle him to remain on the payroll, we need to consider the facts of the case and the applicable law. The facts are that the respondent was dismissed from employment for the offence of gross misconduct contrary to clause 13 of his contract of employment.

11.9 The lower court found that there was sufficient evidence to support the respondent's dismissal for the offence of misconduct based on the facts presented before him. The claim for gratuity is based on the letter of termination appearing at 118 of the ROA which reads that he is entitled to accrued salary and benefits less advances or loans obtained from the institute.

11.10 In the case of **Anderson Mwale & Others v Zambia Open University**[5], the Constitutional Court, stated inter-alia that:

"The issue is not whether gratuity is included in the definition of pension benefit in article 266. Rather, the issue is whether the particular gratuity claimed by the petitioners in this case, and which is in issue, is a pension benefit for purposes of articles 187 and 189 of the constitution. It is settled law that when interpreting the constitution, all the provisions touching on the subject for interpretation must be considered together and that no provisions should be read in isolation from other provisions.

Therefore, in this case, the definition of pension benefit should be interpreted in light of the substantive provisions of articles 187 and 189 of the constitution. Article 187 (3) sheds clear light on what pension benefits the framers of the constitution intended to provide for in articles 187 to 189. The plain language of article 187 (3) reveals that the provisions of the constitution relating to a pension benefit must be read together with the relevant pension laws. This is because article 187

(3) makes it plain that there is a law to be applied to a pension benefit referred to in clauses (1) and (2) of article 187 and clearly states which law that is in paragraphs (a) and (b) of clause 3 of article 187... it follows that for an employee to be retained on the employer's payroll under article 189 (2) of the constitution, the pension benefit which is not paid to an employee on the last day of work should be a pension benefit granted by or under the relevant pension law or other law applicable to that employee's service."

11.11 Applying the principles enunciated in the preceding authority, we are of the view that apart from the respondent's circumstances not being akin to retirement or retrenchment, it would be contrary to the legislative intent to have a person who was dismissed from employment due to misconduct to be retained on the employer's payroll. The purpose of article 189 (2) of the constitution is clear as observed by the Constitutional Court in the cases of **Anderson Mwale & others v Zambia Open University and Lubunda Ngala & Jason Chulu v Anti-Corruption Commission supra**

Further, there is no pension law that the respondent could rely on to entitle him to be retained on the employer's payroll under article 189 (2) of the constitution.

11.12 Under the circumstances, retaining the respondent on the appellant's payroll was not justifiable.

11.13 For the foregoing reasons, we find merit in the first ground of appeal and accordingly set aside the order by the lower court that the respondent be retained on the payroll until his gratuity is paid in full.

11.14 We shall proceed to consider grounds 2 and 3 together:

11.15 The appellant's protestation is that the lower court made the awards for gratuity and leave days without interrogating how the amounts were arrived at.

11.16 The appellant contends that gratuity should have been calculated at 35% of the total annual basic salary as provided by clause 10.0 of the respondent's contract of employment. That the amount of K550,583.25 awarded to the respondent as gratuity was based on the purported total annual gross salary. The appellant claims to have computed the gratuity and leave days. However, we take note that these calculations

or figures were not produced before the lower court to counter the figures stated by the respondent. Therefore, the tabulation in the submissions amounts to production of evidence at the bar which cannot be allowed. It is trite that a matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal, see the case of **Wilheim Roman Buchman v Attorney General**[6].

11.17 The lower court in its judgment at page J48 (page 55 of the ROA) held as follows;

> ***"Regarding the claim for gratuity, it was uncontested that the complainant was entitled to the payment of gratuity at the rate of 35% of the total annual basic salary as provided under clause 10.0 of his contract of employment. In his unchallenged evidence, the amount which the complainant claimed was K550,583.25 for the period served."***

11.18 Clause 10 of the respondent's contract of employment appearing at page 71 of the ROA provides as follows:

"Gratuity of 35% of total annual basic salary of each period served shall be paid annually on prorate basis or at the end of the contract."

11.19 Clause 14.5 of the Conditions of Service for the respondent provided as follows:

"Gratuity shall be paid to all non-unionised/retired employees on all contracts. All first contracts other than special contracts, for which no gratuity should be paid, shall be a period of not less than 36 months inclusive of the end of the contract leave. On renewal, a further contract of not less than two years may be entered into by mutual agreement. Gratuity will be at the rate of 35% of total salary earnings subject to these terms and conditions of service."

11.20 It is clear from the preceding paragraphs that the rate of gratuity was 35% of the total annual basic salary provided under clause 10.0 of the respondent's contract of employment.

11.21 As it was not shown how the K550,583.25 was arrived at, the court below should have referred the matter to the

Registrar or Deputy Registrar of the High Court for assessment of gratuity as opposed to accepting the evidence presented by the respondent merely because it was not objected to. As a Court of substantial justice, the Judge should have verified the amount claimed. Clearly the said award did not take into consideration any amounts that were probably owed to the appellant by the respondent. The letter of termination states that the respondent is entitled to accrued salaries and terminal benefits **less what he owes the appellant**.

11.22 Even though the amount presented by the respondent for his accrued leave days was unchallenged, the respondent still had the onus of proving that he was entitled to that amount. We are fortified by the case of **Khalid Mohamed v the Attorney General[4],** where it was held that:

> ***"A plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case."***

11.23 In our considered view, a judge should not merely accept evidence because it is unchallenged without having regard to its veracity.

11.24 In sum, we find merit in both grounds 2 and 3. Consequently, we set aside the awards for gratuity and leave days made by the lower court and order that the Registrar or Deputy Registrar of the High Court should assess the gratuity and leave days payable to the respondent. The respondent will suffer no prejudice due to assessment as he will be entitled to interest on the amount found due.

11.25 In light of what we have held above, ground 4 becomes otiose.

12.0 CONCLUSION

12.1 On a final note, the appeal has merit. We accordingly set aside the award of the sums of K550,583.25 as gratuity and K 211,762.79 for leave days, and order for assessment of the gratuity and accrued leave days due by the Registrar or Deputy Registrar of the High Court.

12.2 This being a matter that was commenced in the Industrial and Labour Division of the High Court, **Rule 44** of the **Industrial Relations Court Rules**, which sets out when costs should be inflicted on a party in the Industrial Relations Court applies. The rule is that only a party who is guilty of

unnecessary delay, and improper conduct during the proceedings should be condemned in costs.

12.3 In casu, neither party is guilty of misconduct and we accordingly order each party to bear its own costs.

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M.M. KONDOLO
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....

P.C.M.NGULUBE
COURT OF APPEAL JUDGE