

**IN THE HIGH COURT FOR ZAMBIA  
INDUSTRIAL RELATIONS DIVISION  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2023/HPIR/0419**

**BETWEEN:**

**HENRY MUWANA**

**AND**

**BEIJING HANJIAN HESHAN**



**COMPLAINANT**

**RESPONDENT**

**CORAM: Justice Mrs. M. S. Ngoma this 26<sup>th</sup> day of December, 2023.**

For the Complainant : In Person

For the Respondent : N/A

---

**JUDGMENT**

---

**Legislation Referred to:**

1. *Employment Code Act, No. 3 of 2019.*

**Cases Referred to:**

1. *Robert Simeza & 3 Others V Elizabeth Mzyece (2011) ZMSC 3.*
2. *Kitwe City Council V William Ng'uni SCZ Judgment No. 12 of 2005.*

## **1 INTRODUCTION**

In a Notice of Complaint filed on 25<sup>th</sup> April 2023, the Complainant seeks to recover from the Respondent the following reliefs:

- a) Leave days;*
- b) Gratuity;*
- c) Salary arrears for one month;*
- d) Damages for unlawful and unfair termination of contract;*
- e) Notice pay;*
- f) Costs; and*
- g) Any other relief the court may deem fit.*

## **2. COMPLAINANT'S AFFIDAVIT EVIDENCE**

In an affidavit in support of notice of complaint, the Complainant deposed that he was employed by the Respondent on 11<sup>th</sup> January, 2022 as a driver on contract exhibited as "**HM1**". He was involved in an accident on 17<sup>th</sup> September, 2022 and was robbed by people at the accident scene. The police came to his aid and took him to the police station. The Respondent was called to the police and upon his arrival at the police station, he terminated his contract on the spot. He was not paid his dues.

### **3. RESPONDENT'S ANSWER**

The Respondent did not file an answer.

### **4. SUMMARY OF EVIDENCE**

4.1. At the hearing of the matter on 20<sup>th</sup> July, 2023, the Respondent was absent. The Complainant phoned the Respondent and the Respondent's Human Resources Manager, a Mr. Chaliweme Mbofwana, said he was on his way to court. I, therefore, stood down the matter for 25 minutes to allow him to be present in court. When the matter resumed, Mr. Mbofwana was still not in court. Having satisfied myself that the Respondent was aware of the hearing, I proceeded to hear the matter on the basis that the Respondent was absent from court without any reason. I was fortified in taking this course by the case of **Robert Simeza & 3 Others V Elizabeth Mzyece**<sup>1</sup> in which the Supreme Court guided that no procedural injustice is occasioned when a court proceeds where a party who was aware of proceedings did not appear before Court.

4.2. The Complainant testified that he was employed by the Respondent as a driver on 11<sup>th</sup> January, 2022 although he only signed the contract on 6<sup>th</sup> June, 2022 which was to run to 6<sup>th</sup> June 2023. His employment ended abruptly on 17<sup>th</sup> September, 2022 when the Respondent terminated his

contract of service after he was involved in a road accident. He testified that he was chased from his place of work 'like a dog.' There was no letter of disciplinary proceedings or warning. The Chinese national who signed his contract of employment told him his contract had been terminated. He did not give reasons for the termination.

4.3. He averred that his last salary was K3,500 per month. That he never went on leave during the time he was in employment. As such, he had accumulated 16 leave days.

4.4. The Complainant tabulated his claims as follows:

i. Leave days

$$3500 \times 16 \text{ days} \div 26 = \text{K}2,153$$

ii. Gratuity

$$3500 \times 9 \times 25 \div 100 = \text{K}7,875$$

iii. Salary arrears

The Complainant submitted that since he was left with 10 months before the end of his contract, he is entitled to salaries for the 10 months. The formular he applied was as follows:

$$3500 \times 10 = \text{K}35,000$$

iv. Salary for the Days worked in September, 2022

The contract was terminated on 17 days. He was not paid for these days. He calculated his claim as

$$17\text{days} \times 3500 \div 26 = \text{K}2,288$$

v. Notice pay

One month salary - K3,500

The total amount claimed is K50,817.

4.5. There was no cross examination and this marked the close of the Complainant's case.

**5. ISSUES FOR DETERMINATION**

In light of the Complainant's evidence above, what I need to determine is whether or not the Complainant is owed the reliefs claimed.

**6. DETERMINATION OF ISSUES**

6.1. I have perused the documents filed by the Complainant in support of his complaint. Among the documents is a copy of the contract of employment made between the parties which confirms that the Complainant was employed by the Respondent as a driver. The contract is dated 6 June 2022 and has a duration of one year from 6

June 2022 to 6 June 2023. I note that the Complainant, in his affidavit in support of complaint and his oral testimony at trial, testified that he actually started work on 11<sup>th</sup> January, 2022. He was already working by the time the contract was signed. I observed the Complainant's demeanor during his oral testimony and I am prepared to accept that he was telling the truth when he testified that he was employed in January 2022 and not in June, 2022.

6.2. I have further perused the contract and noted that clause 7 provides an hourly rate of the basic pay. The Complainant, however, testified that his monthly salary was K3,500. I am prepared to accept the Complainant's submission.

6.3. I will, therefore, proceed to determine whether the Complainant is entitled to any of his claims and I shall do so in the order presented in the notice of complaint.

6.4. **Whether the Complainant is entitled to payment for Leave Days**

6.4.1. The Complainant is claiming 16 unpaid leave

days at the rate of 2 days per month from 11<sup>th</sup> January 2022 to 17<sup>th</sup> September, 2022. It was his testimony that he never went on leave while in the employ of the Respondent. Clause 21 of the contract provides that the Complainant was entitled to leave at the rate of 2 days per month. This gives 16 leave days. Leave pay is calculated using the formula in the fifth schedule to the Employment Code Act No. 3 of 2019 as follows:

$$\text{Leave benefits} = \frac{\text{FP} \times \text{D}}{26}$$

Where FP = Full Pay; D = number of accrued leave days

$$\frac{\text{K}3500 \times 16}{26} = \text{K}2,153.84$$

- 6.4.2. I am satisfied that the Complainant has proved his claim for leave days. I, therefore, enter judgment for the Complainant for leave pay for the period of his employment in the sum of K2, 153.84

### **6.5. Whether the Complainant is entitled to Gratuity**

- 6.5.1. The Complainant's second claim is for payment of gratuity.

Clause 8(a) of the contract of employment provides as follows:

***“The employer will pay a gratuity of 25% of basic pay earned during the contract period”.***

6.5.2. On the basis of this clear provision, I find that the Complainant has proved his claim for gratuity at the rate of 25% of his basic pay. The Complainant worked for 8 months and 6 days from 11<sup>th</sup> January, to 17<sup>th</sup> September, 2022 and not 9 months as claimed. I, therefore, enter judgment for the Complainant for gratuity for 25% of salaries earned for 8 months. This gives K7000 and not K7,875 which the Complainant is claiming.

**6.6. Whether the Complainant is entitled to Salary arrears for one month**

6.6.1. It has been averred by the Complainant that upon being verbally dismissed by the Respondent on the 17<sup>th</sup> September, 2022, he was not paid for the days he worked in



September, 2022. Needless to say, since the Complainant worked until 17<sup>th</sup> September, 2022, his salary for that month accrued until 17<sup>th</sup> September, 2022.

6.6.2. The Supreme Court guided, in the case of **Kitwe City Council V William Ng'uni** <sup>(2)</sup> that you cannot award a salary or pension benefits for that matter for a period not worked for because such an award has not been earned and might properly be construed as unjust enrichment. The inverse of this principle is, in my view, true and applicable in this matter. You cannot neglect or take away a benefit or salary that has accrued regardless of what happens subsequent to its accrual. I find, in the light of this, that the Complainant is entitled to his salary for the 17days worked in September, 2022. I cannot fault the Complainant's calculation of his pay for the 17days as below:

$$17 \times 3500 \div 26 = K2,288.00$$

6.6.3. At trial, the Complainant told the court that at the time of the termination of his services, he had remained with 10 months before the conclusion of his contract. As stated above, it was his testimony that he signed the contract in June 2022 and it was to run until June 2023. In view of this, he claims salaries for 10 months which he would have earned had the contract not been terminated prematurely. I hasten to state, however, that the claim for 10 months' salaries was not included in the notice of complaint and appears to have been an afterthought by the complainant as no prior leave to amend the notice of complaint was sought. Be that as it may, I have considered the claim and I am of the view that this claim is devoid of merit. On the basis of the guidance of the Supreme Court in the **Kitwe City Council V William Ng'uni<sup>(2)</sup>** case, awarding the Complainant salaries for the period not worked for will be unjust enrichment. As such, I decline to make

this award and I, accordingly, dismiss the claim.

**6.7. Whether the Complainant is entitled to Unlawful and Unfair Termination of Contract**

6.7.1. In paragraph 5(d) of his notice of complaint, the Complainant claims payment for unlawful and unfair termination of contract. However, he seems to have abandoned this claim at trial as he told the court that what he was claiming under this head was payment for the 17 days he worked for in September, 2022. Since I already dealt with the 17 days above, I shall not engage in a discussion on unlawful and unfair termination as the same is *otiose*.

**6.8. Whether the Complainant is entitled to Notice Pay**

6.8.1. It has been averred by the Complainant that the Respondent should have given him one month notice prior to termination of his contract or paid him one month salary in lieu of notice. The

relevant part of Clause 34 of the contract provides as follows:

**“34. TERMINATION OF CONTRACT:**

***The employer or the employee shall give one (1) month notice in writing to terminate this contract or pay one month gross salary in lieu of notice. ...:”***

In light of this clear provision, I find that the Complainant has proved his claim that he is entitled to K3,500 being one month salary in lieu of notice.

**7. CONCLUSION AND ORDERS**

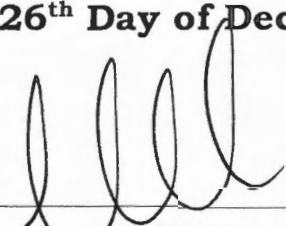
7.1. In sum, the Complainant’s claim for leave pay, gratuity, salary for one month and notice pay has succeeded while that of damages for unlawful and unfair dismissal and salaries for 10 months has failed.

7.2. In view of my conclusion above, I enter judgment for the Complainant for:

- |                          |            |
|--------------------------|------------|
| i. Leave pay for 16 days | K2,153. 84 |
| ii. Gratuity             | K7,875     |

- iii. Salary arrears for 17 days worked in September, 2022 K2,288.00.
- iv. One month's salary in lieu of notice pay K3,500.
- v. The Judgment sums shall attract interest at short term bank deposit rate from the date of the notice of complaint to the date of judgment and thereafter, at current lending rate as determined by the Bank of Zambia from the date of Judgment until full payment.
- vi. Each party shall bear its own costs.
- vii. Leave to appeal is granted.

**Delivered at Lusaka this 26<sup>th</sup> Day of December, 2023.**

  
\_\_\_\_\_  
**Hon. Lady Justice M.S Ngoma**  
**HIGH COURT JUDGE**

