

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

2022/HPIR/0338

BETWEEN:

AGNESS CHAVULA

AND

MICHAEL SILUMBE



COMPLAINANT

RESPONDENT

**Coram: Before Hon. Lady. Justice Mrs. Mwaka. S. Ngoma this
8th day of December, 2023.**

For the Complainant : *In Person*

For the Respondent : *In Person*

JUDGMENT

Legislation referred to:

1. Minimum Wages and Conditions of Employment (Domestic workers) order, 2011 as amended in 2012 and 2018.
2. The Employment Code Act, No. 3 of 2019
3. The Employment Act, Cap 268 of the Laws of Zambia
4. The Minimum Wages and Conditions of Employment Act Cap 276 of the Laws of Zambia

Text Referred to:

1. Mwenda, W.S and Chungu, A Comprehensive Guide to Employment Law in Zambia (UNZA Press, 2021) at page 288

1.0 **Introduction**

In a notice of complaint filed into court on 31st March 2023, the complainant seeks to recover from the respondent the following reliefs:

- i. Leave days;
- ii. Terminal benefits ;
- iii. notice pay;
- iv. Costs; and any other benefits the court may deem fit.

2.0 **Complainant's Affidavit Evidence**

In her affidavit in support of complaint, the complainant averred that she worked for the respondent as a housemaid from 13th September 2014 until 10th October, 2020 when her services were terminated. She stated that she was not paid her terminal benefits.

3.0 **Respondent's Answer**

The respondent did not file an answer.

4.0 **Hearing**

- 4.1 At the hearing of the matter held on 5th October 2023, both parties were present. In her oral testimony, the complainant testified that she was employed by the respondent on 13th September, 2014 as a housemaid until 10th October 2020 when her services were terminated after the respondent accused her of listening to his former wife. It was her testimony that at the time of the termination, her monthly basic salary was K1000 and that she did not get any allowances. She was a live-in maid, that is, she lived with the respondent and his family. She asserted that for the whole period she worked for the respondent, she never went on leave.

- 4.2 In cross-examination, she stated that although she was employed by the respondent's wife, Ms. Vutiwe Manda, she worked for the family. Her duties included cleaning the house and doing other chores. There was another housemaid who used to look after the respondent's children. She further stated that even when schools were closed, she would not go on leave and that the only days on which she was off were public holidays.
- 4.3 It was her further testimony that after the respondent and his wife divorced, she stayed on with the respondent for 4 months taking care of the children as they were left by their mother.
- 4.4 When asked where she was working, the complainant responded that she was working part-time at the respondent's former wife's house where she only goes to work on Fridays, when schools were open. When asked who between the respondent and his former wife used to pay her salary, she stated that, in some months, the salary was paid to her by the respondent while in other months it was given to her by his wife. She added that regardless of who gave her the money, she always took it that the respondent used to pay her salary.
- 4.5 There was no re-examination and this marked the close of the complainant's case.
- 4.6 It was the respondent's testimony that he was not the one who employed the complainant but his former wife. As such, he had no details of the complainant's conditions of service as he did not know what was agreed upon between them.
- 4.7 It was his further testimony that his former wife was responsible for paying the complainant's salary and that he only paid it when his former wife had financial challenges.

4.8 He testified that he and his then wife divorced in June 2020 and that it was only normal that the complainant carries on working for the one who employed her.

5.0 **Finding of Facts**

5.1 **Undisputed facts**

The undisputed facts in this matter are that the complainant worked for the respondent's household from 13th September, 2014 to 10th October 2020. She had no written contract. Her services were terminated verbally by the respondent. The respondent did not dispute the reliefs sought by the complainant and simply said he did not know what was agreed.

5.2 **Disputed facts**

Although the respondent does not dispute that the complainant worked in his household from September 2014 to October 2020, he, nevertheless, disputes that he employed her, and consequently, he does not owe her any terminal benefits.

6.0 **Issues For Determination**

In light of the disputed facts above, what I need to determine is whether or not the complainant is owed terminal benefits by the respondent, and if so, the nature of the benefits.

7.0 **Determination Of Issues**

7.1 What is clear from the respondent's testimony and line of cross-examination is that he, while not denying that the complainant worked in

his household, denies that he was her employer. He asserts that the complainant was employed by his former wife. He further asserts that the complainant's salary was paid by his former wife and he only assisted in paying the salary when his former wife had financial challenges.

- 7.2 It is noteworthy that from the time of the complainant's employment and almost the entire period of her employment, save for the last 4 months, the complainant worked in the matrimonial home of the respondent. According to her testimony, she was also a member of the respondent's household. The respondent and his then wife lived together as husband and wife. I am of view that the respondent, as a beneficiary of the complainant's services, cannot deny liability for her terminal benefits simply on the grounds that his former wife employed her. His former wife may, indeed, have been the one who contacted the complainant and discussed terms with her but the respondent was under no illusion as to what the complainant was doing in his home. He, himself, testified that he paid the complainant's salary when his former wife had financial challenges. Further, when the former wife left the matrimonial home, he asked the complainant to stay on, which she did for a period of 4 months. As such, I find that the respondent, together with his former wife, were the employers of the complainant.
- 7.3 Having determined that the respondent was the complainant's employer, I now proceed to examine whether the complainant has proved her case for the benefits sought in her notice of complaint.
- 7.4 The law in Zambia has set minimum standards and basic conditions of employment for workers in the **Employment Act, Cap 268** (and now in the **Employment Code Act, No.3 of 2019**. In addition to the Employment Act, specific groups of vulnerable workers have ministerial orders in the form of statutory instruments that provide specific basic conditions of

employment. Under the now repealed Minimum Wages and Conditions of Employment Act, the minister of labour issued statutory instruments to give effect to minimum standards for protected groups of employees who were not adequately covered by any effective mechanism of regulating wages and other terms and conditions of employment. I must hasten to add that even though the Minimum Wages and Conditions of Employment Act was repealed by section 138 (1) of the Employment Code Act, the ministerial orders enacted pursuant to the same were not repealed and are still applicable until expressly repealed. Thus, the Minimum Wages and Conditions of Employment (Domestic workers) order, 2011 as amended in 2012 and 2018 which applies to domestic workers such as housemaids and gardeners applies to the complainant and covers her terms and conditions such as annual leave, benefits, etcetera.

7.5 The complainant has come to this court to claim leave pay, terminal benefits, notice pay and costs incidental to these proceedings.

7.6 Section 15(1) of the Employment Act makes provision for holidays with full pay (paid leave) after 6 months' continuous service at the rate of two (2) days per month to be taken at such times as agreed by the parties.

7.7 Section 15(5) of the Employment Act provides that where leave has been accumulated by an employee whose contract has terminated, the employer shall pay wages to the employee for the period of such accumulated leave. In *casu*, the complainant worked for the respondent from 13th September 2014 to 10th October 2020. She is, accordingly, entitled to 144 days. Leave pay is calculated using the formula in the fifth schedule to the Employment Code Act No. 3 of 2019 as follows:

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

26

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

$$\frac{K1000 \times 144}{100} = \underline{5,538.46}$$

26

The complainant's claim for leave days, therefore, succeeds.

7.8 With regard to terminal benefits, neither of the parties adduced any evidence as to the agreed duration of the complainant's contract. What is clear is that had it not been terminated as provided by the Employment Code Act, the employment contract would have expired on the complainant's attainment of the retirement age specified in a written law. This is in line with the definition of a permanent contract provided in section 3 of the employment Code Act. Since a permanent contract of employment is also a contract of fixed duration as it is certain to expire on retirement date if not terminated in the various ways specified in the Employment Code. Therefore, permanent employees also get severance pay provided for in section 54(1) (b) and (c) of the Employment Code Act. I am fortified in this view by the learned authors Mwenda and Chungu who state at page 288 of their book thus:

"A contract for a fixed duration includes permanent contracts and thus, although the definition of gratuity provides the entitlement for long term employees, permanent employees get this benefit in the form of severance pay when their employment terminates for a reason other than redundancy, medical discharge or death".

7.9 In view of the aforesaid, the complainant is entitled to severance pay. However, since the entitlement to severance pay does not apply retrospectively, the severance pay is payable from 9th May, 2020 when the transition period in which to comply with the Employment Code Act expired. Thus, the complainant is not entitled to this benefit from the date of her engagement, but only from 9th May, 2020 to the date of the

termination of her employment, being 10th October, 2020. The applicable rate is 25% of 5 months' basic salary.

7.10 With regard to the earlier years served by the complainant prior to the enactment of the Employment Code Act, the provisions of the Minimum Wages and Conditions of Employment (Domestic Workers) Order, 2011 shall apply. Section 11 of this order provides for a separation package of not less than one month's basic pay for every two completed years of service. Since the complainant served 5 years and 8 months prior to 9th May, 2020, it means that she only gets two months basic salary for each of the two completed years.

7.11 With regard to the claim for notice pay, section 53 (2)(c) of the Employment Code Act provides for 30days notice to terminate a contract of employment of more than 3 months. Consequently, the complainant's claim for notice pay succeeds.

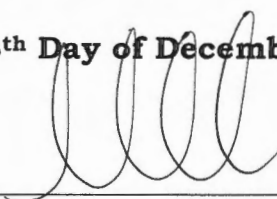
8.0 **Conclusion and Order**

From the evidence on record, I am satisfied that the complainant worked for the respondent as a housemaid on a permanent basis from 13th September, 2014 until 10th October 2020 when her services were terminated without notice. I find that the complainant has proved her claims against the respondent on a preponderance of probabilities. Therefore, judgment is entered for the complainant for the following:

- i. Leave days at the rate of 2 days per month from 13th September 2014 to 10th October, 2020 : **K5,538.46**
- ii. Severance pay prorated from 9th May 2020 to 10th October 2020 calculated in terms of section 54(1)(c) of the Employment Code, that is, 25% of 5 months basic salary: 25% of K5000 is **K1,250**

- iii. Terminal benefits calculated at one month's salary for every 2 years' service: **K2000**
- iv. One month's salary in lieu of notice: **K1000**
- 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.

Delivered at Lusaka this 8th Day of December, 2023.



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

