

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

2023/HPIR/0407

(Civil Jurisdiction)

BETWEEN:

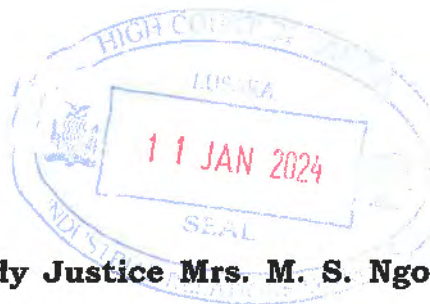
PAUL DAKA

COMPLAINANT

AND

ASMARA HOTEL

RESPONDENT



Coram: Before Hon. Lady Justice Mrs. M. S. Ngoma this 11th Day of January, 2024.

For the Complainant : *In Person*

For the Respondent : *In Person*

JUDGMENT

Case referred to:

1. Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe, SCZ Appeal No. 94/2015.

Other works referred to:

1. Mwenda W.S and Chungu C, A Comprehensive Guide to Employment Law in Zambia (UNZA Press, 2021) at page 242 and 288.

1.0 Background

1.1 The complainant was engaged by the respondent as a security officer on a fixed term contract intended to run from 18th May, 2022 to 17th May 2023.

1.2 On the 20th January 2023, the contract was verbally terminated without notice. Aggrieved by the termination, the complainant instituted this action claiming the following reliefs:

- i. Damages for breach of contract;
- ii. Damages in lieu of notice;
- iii. Damages for loss of opportunity;
- iv. Damages for unfair dismissal;
- v. Any relief the court may deem fit; and
- vi. Costs.

1.3 The respondent filed an answer on 6th June 2023 in which it disputed the claims stating that the complainant resigned on his own volition after he was found sleeping on duty on an unknown date, but between 18th May 2022 and 20th January 2023.

2.0 Complainant's Affidavit Evidence

2.1 In his affidavit in support of complaint the complainant admitted being found sleeping on duty but averred that he was sleeping because he fell unwell around 03:00 hours on 20th January, 2023.

2.2 He further averred that he wrote a letter to the respondent admitting that he had slept on duty. He added that the admission was coerced by the respondent's Human Resource Manager who assured him that the respondent would accept his apology and forgive him. Instead of being forgiven as he expected, he was dismissed verbally after which he was paid K5, 715 in respect of his terminal benefits.

3.0 **Respondent's Affidavit Evidence**

- 3.1 The affidavit verifying answer was deposed to by Mr. Paul Chipasu, the Human Resource Specialist in the respondent company. Mr. Chipasu denied the claims and repeated the respondent's statement that the complainant was indeed found asleep on duty.

4.0 **Summary of Evidence**

- 4.1 At the hearing of the matter held on 2nd October 2013, the complainant testified that on 20th January 2023, while on night shift, he had a stomach upset around 03:21 hours and, on the advice of his fellow security officer who he was working with, he went to sleep in the bus. The boss found him sleeping and reported it to the Human Resource Officer who instructed him to write a letter to management admitting he had been asleep on duty.
- 4.2 He wrote the letter of admission as instructed, whereupon the Human Resource Officer by the name of Paul, told him that he had discussed his issue with the boss named Able and that it had been decided not to allow him to continue working as this would show a bad example to other security personnel.
- 4.3 On the 30th January 2023, he noticed that his account had been credited with his pay. The next day, he went to ask the respondent for the breakdown of the payment and he was told that it was his salary, leave days and all allowances but no payment in lieu of notice.
- 4.4 Under cross examination, he told the court that he was not forced to write a report admitting the charge but that he was assured of leniency if he admitted the charge.
- 4.5 He also admitted being paid service charge and gratuity.
- 4.6 The Complainant did not call any witness.
- 4.7 Mr. Paul Chipasu testified on behalf of the respondent. It was his testimony that on 20th January 2023, he received a report from the Manager on duty that he found two guards who were asleep on duty around 03:00 hours. Before questioning the guards, he watched the

video recording on CCTV which clearly showed when the guards went to sleep in the bus.

4.8 He averred that he then questioned the guards and asked them to write reports of what they had done. Both of them admitted sleeping on duty. The complainant further wrote that he was willing to face any consequences, including termination of contract.

4.9 It was his further testimony that he did speak to management to show the complainant leniency as he was a first offender and that before Management could react to this request, the complainant served the respondent with the notice of complaint and supporting affidavit. Hence, the process was abandoned.

4.10 He contended that the respondent paid the complainant everything due to him and that it was the complainant who was supposed to give the respondent notice as it was he who resigned his job. He also stated that it was a mutual separation.

4.11 Under cross examination, he told the court that the complainant's statement that he was willing to take any consequence including termination of the contract was understood by the respondent to be a resignation.

4.12 The respondent then closed its case and did not call any other witness.

5.0 **Findings of facts**

5.1 **Undisputed facts**

The undisputed facts in this matter are that the complainant entered into a written contract with the respondent under which he worked as a security officer. He was found sleeping on duty on the 20th January, 2023. This incident led to the termination of the employment relationship.

5.2 Disputed Facts

The nature of the termination is disputed. The complainant avers that the respondent terminated his services and hence owes him the reliefs mentioned above. The respondent, on the other hand, avers that the complainant ended the contract via a resignation and that it is he who should have given notice to terminate.

6.0 Determination of Issues

- 6.1 I have perused the contract of employment signed by the parties and exhibited in the Complainant's affidavit. Clause 19 of the contract makes reference to an employee handbook manual which spells out offences and penalties. Neither of the parties produced this handbook or made reference to it to prove or dispel the fact that sleeping on duty for a security officer is a dismissible offence. What is clear is that the complainant seemed to be under a fearful expectation of consequences of sleeping on duty to such an extent that he stated he was willing to accept any consequence including termination of his contract. While I do not accept that this statement is akin to resignation as contended by the respondent's witness, it seems to me that the complainant was in no doubt that for a security officer to be asleep on duty was misconduct and inconsistent with what was expected of him under this contract of employment.
- 6.2 On the totality of the evidence I am prepared to accept that the complainant's contract of employment was terminated by the respondent and not by resignation.
- 6.3 I shall now examine the claims in the light of this finding in the order that seems appropriate to me.

6.4 Whether the Complainant is entitled to damages for unfair dismissal

6.4.1 Unfair dismissal is dismissal that is contrary to statute or based on an unsubstantiated ground. Mwenda W.S and Chungu C, the learned authors of **A Comprehensive Guide to Employment Law in Zambia**, state at page 242 of their book as follows:

“...therefore, unfair dismissal occurs when an employee is dismissed without a valid reason or based on one of the listed grounds of discrimination in section 108(1) of the Industrial and Labour Relations Act and Section 5(2) (a) and 52 (4) of the Employment Code Act. Unfair dismissal also occurs if an employee is dismissed without being accorded an opportunity to be heard. Unfair dismissal focuses on the merits or substance of dismissal.”

6.4.2 In the case of **Konkola Copper Mines Plc. v. Hendrix Mulenga Chileshe**⁽¹⁾, the Supreme Court stated the following with regard to the difference between unfair dismissal and wrongful dismissal:

“Unfair dismissal focuses on ‘why’ the dismissal was effected whereas wrongful dismissal therefore focuses on “how” the dismissal was effected. In considering whether the dismissal is wrongful or not, it is the form to be considered rather than the substance...”

6.4.3 In *casu*, the complainant admitted, in writing, that he was asleep on duty and that he would accept any consequence including termination of his contract. The mention of termination of contract in the circumstances of this case seems to be an admission by the complainant that for a security

officer to be sleeping on duty was an offence leading to termination of employment. The complainant has not proved the contrary. Therefore, I find that the complainant was not unfairly dismissed.

6.5 *Whether or not the Complainant is entitled to damages for breach of contract*

The complainant has asked the court to order the respondent to pay damages for breach of contract. The complainant has, however, not led evidence to substantiate this claim. In the circumstances, this claim fails.

6.6 *Whether the Complainant is entitled to payment in lieu of notice*

Clause 3(b) of the contract of service provides for one (1) month notice or payment in lieu of notice. The respondent did not lead any evidence to show that an employee whose employment is terminated for sleeping on duty is not entitled to notice pay. Consequently, I find for the complainant in this claim.

6.7 *Whether the Complainant is entitled to damages for loss of Opportunity*

The complainant claims damages for loss of opportunity but did not lead any evidence in this regard. Much as this court is a court of substantial justice, litigants must be mindful that this does not mean that the court takes over the prosecution of their actions and they can succeed even without presenting evidence.

7.0 **Conclusion**

- i. The complainant has failed in his claims for damages for breach of contract; unfair dismissal and loss of opportunity.

- ii. The complainant has succeeded in his claim for pay in lieu of notice. I, accordingly, award him the sum of K1, 520 being one month salary in lieu of notice.
- iii. The Judgment sum 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.
- iv. Each party shall bear its own costs.
- v. Leave to appeal is granted.

Delivered this 11th Day of January, 2024



Hon. Lady Justice M.S. Ngoma

HIGH COURT JUDGE