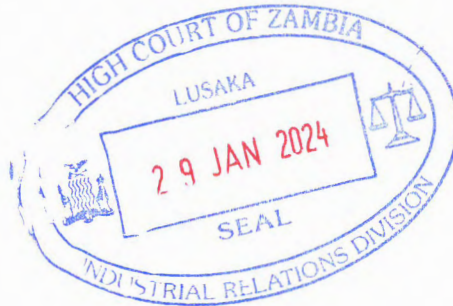


**IN THE HIGH COURT FOR ZAMBIA  
INDUSTRIAL RELATIONS DIVISION  
HOLDEN AT LUSAKA**

**2022/HPIR/0965**

*(Civil Jurisdiction)*



**BETWEEN:**

**FRANK SAKALA**

**COMPLAINANT**

**AND**

**PHILLIP NYIRENDA**

**RESPONDENT**

**Coram: Before Hon. Lady Justice Mrs. M.S. Ngoma this 29<sup>th</sup> day of January, 2024.**

*For the Complainant* : *In Person*

*For the Respondent* : *In Person*

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## **JUDGMENT**

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**Cases referred to:**

1. Alpert Mupila and Yu-Wei comp/IRC/LK 222 of 2021(2022(ZMIC 3 (2March 2022)

**Legislation referred to:**

1. Minimum Wages and Conditions of Employment (General) 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

### 1.0 **Introduction**

In a notice of complaint filed into court on 25<sup>th</sup> November, 2022, the complainant seeks to recover from the respondent the following reliefs:

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

### 2.0 **The Complainant's Case**

2.1 In his affidavit in support of complaint, the complainant averred that he was verbally employed by the respondent as a bus driver in 2015. That he worked for the respondent until 14<sup>th</sup> November, 2022 when he was verbally dismissed from employment without any reason. He was not paid his terminal dues.

### 3.0 **The Respondent's Case**

3.1 In his answer filed on 12<sup>th</sup> January 2023, the respondent admitted that the complainant was indeed employed by him as a driver but denied dismissing him from employment.

3.2 In his affidavit in support of answer, he averred that the complainant in fact abandoned his job when he got employed by someone else without the respondent's knowledge on 15<sup>th</sup> November, 2022, a day after the

respondent took the bus for fitness. The complainant did not contact the respondent about any grievances he had except on 4<sup>th</sup> January 2023 when he went to his house to serve him with court process.

- 3.3 He further stated that on the 4<sup>th</sup> May 2018, his bus Toyota Hiace registration no BAB 8929, which was allocated to the complainant, was involved in an accident while being driven by a conductor employed by the complainant and authorized by the complainant to drive the bus without the respondent's authority. The respondent spent over K24,410 to repair the bus. It took 3 months for the repairs to be completed and, in that period, the respondent lost income amounting to K20,160 which he would have earned had the bus been operating. It was his testimony that he was forced to sell the bus at a very low price as it was not in a good condition as a result of it having been involved in an accident.

#### 4.0 **Hearing**

- 4.1 At the hearing of the matter held on 3<sup>rd</sup> August 2023, both parties were present. It was the complainant's testimony that he worked for the respondent for 7 years and 11 months as a driver for his commercial bus. Sometime in 2022, the fitness for the bus expired and the respondent made arrangements for his nephew by the name of Mashati, to have the fitness renewed. It took Mashati almost a whole week to have the fitness renewed as the renewal could not be done without physical

inspection of the bus. This affected the cashing due to the traffic police impounding the bus for lack of fitness. According to the complainant, the respondent sent his younger brother by the name of Edward Nyirenda, to get the bus from him. The younger brother instructed the complainant to remove all his personal belongings from the bus and ordered him to disembark from it. That was the end of his employment with the respondent. He further testified that his salary was K1,500 per month and that he never went on leave the whole period he worked for the respondent.

- 4.2 Under cross examination, the complainant told the court that he did not call the respondent to inform him that his younger brother had taken the bus from him until after 3 weeks as he did not want to antagonise the respondent's relationship with his younger brother. He did not follow the respondent home to discuss the issue as he had done previously when the two had a disagreement.
- 4.3 Under further cross examination he stated that he recalled the accident that occurred in 2018. He admitted that the bus was being driven by a conductor he had employed to work with him. The conductor was given the keys by someone from the car park where he used to park the bus. According to him, the one who gave the keys to the conductor should be answerable for the accident the conductor was involved in.

- 4.4 Under further cross examination, he conceded that it would be right to say he absconded from work from the time the bus was retrieved from him to the time he served the respondent with court process. He was not aware that absconding from work for 10 days amounts to summary dismissal.
- 4.5 In re-examination, the complainant denied being liable for the cost of repairs and loss of income as he did not cause the accident. Further, he contended that the respondent needed to claim from the insurance company. The complainant closed his case and did not call any witness.
- 4.6 It was the respondent's testimony that he employed the complainant on 26<sup>th</sup> April 2016 as a driver for one of his buses. The complainant worked for him for 7 years and 7 months. In 2018, the bus allocated to the complainant was involved in an accident while being driven by a conductor employed by the complainant. Although the bus was insured, he was unable to recover as the said conductor was unlicensed to drive vehicles. The bus was not operational for 3 months after the accident.
- 4.7 As the complainant had been cashing K200 per day, 3 months of not using the bus meant that he lost income amounting to K20,160. The repairs cost K24,410, bringing the total to K44,570, which amount he counter-claims from the complainant.
- 4.8 It was the respondent's further testimony that he later learnt that the complainant was lazy and would often give the bus to his conductor to

drive while he stayed home. Even the day the accident occurred, the complainant was at home when he called the respondent to inform him of it.

4.9 After cross examination, the matter was adjourned to 3<sup>rd</sup> October 2023 for continued trial.

4.10 On 3<sup>rd</sup> October 2023, the respondent called one witness by the name of Chilufya Ngwata, a 45 year old man of Chunga township, Lusaka. It was the testimony of the witness that he runs a car park in Chunga where the respondent's buses are park for the night. He further testified that in his many years of operating a car park in Chunga, not once were keys given to a person other than the one who parked the bus the previous evening.

4.11 Under cross examination, the witness told the court that there has never been an incident of theft of motor vehicle at his car park.

4.12 The respondent then closed his case.

## 5.0 **Determination of Issues**

5.1 I have carefully considered all the evidence before me. It is not in dispute that the complainant was employed by the respondent as a driver of one of his buses. The duration of the employment and the manner of its termination is disputed.

- 5.2 The other issue for determination relates to respondent's counterclaim for damages for loss of income he would have earned during the time the bus was not operational, as well as reimbursement of the money spent on repairs.
- 5.3 The complainant did not indicate exactly when he was employed save to state that it was in 2015 and that his services were terminated on 14<sup>th</sup> November, 2022. At trial, it was his testimony that he worked for 7 years and 11 months. The respondent, on the other hand, averred that he employed the complainant on 26<sup>th</sup> April, 2016 and that the employment relationship ended around 14<sup>th</sup> November, 2022. According to the respondent, in total, the complainant worked for him for 7 years and 7 months.
- 5.4 As the record shows, the parties are agreed that the complainant's services were terminated on 14<sup>th</sup> November, 2022. They both submitted that he had worked for over 7 years. It was incumbent upon the complainant to show how he arrived at 7 years 11 months. Although the respondent stated that the complainant worked for 7 years 7 months, his math did not add up because the period between 26<sup>th</sup> April 2016, when he said he employed the complainant, to 14<sup>th</sup> November, 2022 gives 6 years 7 months and not 7 years 7 months. This period would only be true if the start date was in 2015 as averred by the complainant and not

2016. Consequently, I am prepared to believe that the start date was actually 26<sup>th</sup> April 2015 and not 26<sup>th</sup> April 2016.

5.5 With regard to the termination of the employment, while the complainant contends that the respondent terminated his services when he sent his younger brother to retrieve the bus from him, the respondent, on his part, denies terminating the contract and contends that the complainant left on his own accord when he got employed by another person. In short, that he absconded from work for more than 10 days, thus entitling him to consider the complainant no longer his employee.

5.6 Under cross examination, the complainant admitted that when the respondent's younger brother went to collect the bus, he neither called the respondent to verify if he had truly sent his brother on such a mission nor did he go to his house to discuss the issue with him as he had previously done when the two had issues to resolve.

5.7 I find it inconceivable that the complainant would have accepted to be dismissed through a third party without verifying with his employer, particularly given that on previous occasions, the complainant went to the respondent's house to see him when he had issues to discuss. What I find more plausible is the respondent's version that the complainant absconded when he was offered employment by someone else.

5.8 I am of the view that the respondent was in order to dismiss the complainant summarily after he absented himself from work without



verifying whether the person who collected the bus from him truly had the respondent's authority to do so. I am fortified by section 50(1)(e) of the Employment Code Act No. 3 of 2019 which permits summary dismissal for continual absence from work without permission of the employer or a reasonable excuse.

- 5.9 Having made this finding, I shall now proceed to determine the individual reliefs claimed by the claimant in his notice of complainant.

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

- 5.10 Having completed twelve months' continuous service with the respondent, the complainant was entitled to annual leave with full pay at the rate of two days per month under section 36(1) of the Employment Code Act No. 3 of 2019. The predecessor of this Act, the Employment Act, Cap. 268 of the Laws of Zambia also provided for two days per month under section 15(1).
- 5.11 Section 36(5) of the Employment Code Act provides that if any leave has been accumulated by an employee whose contract of employment has terminated or expired, the employer shall pay wages to the employee for the period of the accumulated leave. In this case, it was the complainant's testimony that he worked for the respondent without going on leave. The respondent did not dispute this. As such, I find that the complainant has proved his claim for leave days at the rate of 2 days per

month from 26<sup>th</sup> April 2015 to 31<sup>st</sup> October, 2022. This gives 180 days of leave for the period he served the respondent. I have excluded the month of November 2022 because it was not completed. Hence leave did not accrue in that month.

5.12 Leave pay is calculated using the formula in the fifth schedule to the Employment Code as follows:

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

26

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

$$\frac{\text{K1,500} \times 180}{26} = \text{K10,384}$$

26

The claim for leave days, therefore, succeeds.

Whether the complainant is entitled to terminal benefits

5.13 In examining the benefits due to the complainant, I am mindful of section 53(5) of the Employment Code Act which provides that

*“Where an employee refuses to work during the notice period under subsection (2), an employer may deduct, from any money due to the employee on termination, the amount that would have been due to the employee if the employee had worked during the notice period.”*

5.14 This subsection entitles an employer to deduct from money due to an employee who refuses to work during the notice period given to him by his employer. By the same token, an employee who abandons his job without giving notice may forfeit the amount he would have been paid if he had given notice and worked during the notice period.

5.15 In this case, the complainant absented himself and did not give or serve the notice period. As such, in my considered opinion, the respondent is entitled to deduct from the complainant's dues, one month's salary, which is K1, 500.00. The one month's salary is in line with the applicable notice period of 30 days provided for in section 53 (2) of the Employment Code Act.

5.16 With respect to severance pay, the complainant did not lead any evidence at all. It is not uncommon for complainants appearing in this court to neglect to lead evidence to substantiate their claims. I am, however, aware of section 54(1)(c) which provides for severance pay as follows:

*"Where a contract of employment of a fixed duration has been terminated, severance pay shall be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period as at the effective date of termination."*

5.17 The complainant was a permanent employee and neither party adduced any evidence as to its end date. A permanent contract of employment has been defined in section 3 of the Employment Code Act as a contract which, if not terminated in accordance with the Act, expires on the employee's attainment of the retirement age specified under a written law.

5.17 The question whether a permanent contract is a contract of fixed duration as envisaged under section 54(1)(c) of the Employment Code Act was answered in the affirmative by Hon Lady Justice Dr. W.S Mwenda in the case of **Alpert Mupila and Yu-Wei**<sup>1</sup>. In that case, the learned Judge held that a permanent contract is also a contract of fixed duration in the sense that it is certain to expire on the retirement date if not terminated in the various ways specified in the Employment Code Act. The learned Judge further went on to state that section 54(3) only proscribes the payment of severance pay to casual employees, temporary employees, employees engaged on long term contracts or employees serving on probation. The prohibition has not been extended to employees engaged on permanent basis.

5.18 I have carefully analysed this judgment together with section 54(3) of the Employment Code Act. I agree that employees engaged on permanent basis are on a fixed duration with the end date being the attainment of the employee's retirement age. As such, they too are entitled to severance

pay when their contracts of employment are terminated for a reason other than redundancy, medical discharge or death.

5.19 By virtue of Statutory Instrument No. 48 of 2020, expatriate employees and management employees are exempted from payment of severance pay. The complainant was neither an expatriate nor in management. Consequently, he is entitled to 25% of his basic pay earned during the period of his employment. I hasten to mention that since the entitlement to severance pay does not apply retrospectively, the severance pay is payable from 9<sup>th</sup> 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 his engagement, but only from 9<sup>th</sup> May, 2020 until the date of the termination of his employment, that is, 14<sup>th</sup> November, 2022.

*Whether the Complainant is entitled to any other relief that the court may deem fit.*

5.20 The complainant stated that his salary was K1,500 per month. He did not state whether or not he was enjoying any allowances. As such, I find no basis for determining what allowances should have been paid to him under the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018, which I believe was applicable to him, or indeed any other written law. Consequently, I do not see any other relief that the complainant may be entitled to.

## 6.0 **The Respondent's Counterclaim**

- 6.1 In his counter-claim, the respondent has implored this court to order the complainant to pay the sums of K24,410 and K20,160 in respect of repair costs and loss of earnings during the period the bus was off the road undergoing repairs, respectively. It was his testimony that it took 3 months for the repairs to be completed. It was his further testimony that since the accident was occasioned by the complainant's conductor who was unlicensed as a result of which he could not recover from the insurer, the complainant should be ordered to compensate him.
- 6.2 A counterclaim, just like any other claim before court, must be proved by the claimant. In this case, the respondent bears the burden of proving what he has alleged in his counter-claim.
- 6.3 It has not been disputed that the respondent's bus was involved in an accident while being driven by the bus conductor employed by the complainant. The complainant denies authorizing his conductor to drive the bus and has blamed it on the owner of the car park who he said gave the keys to the conductor without his knowledge. The owner of the car park, Mr. Ngwata, called by the respondent, told the court that the keys for the bus could not have been given to someone other than the one who parked the bus in the garage the previous evening.
- 6.4 I have considered the evidence of both parties in this regard. I am mindful that this accident occurred in 2018, about four years before the

complainant left the employ of the respondent. Curiously, the respondent does not seem to have taken any administrative action against the complainant in 2018 for negligence or whatever offence may have been appropriate in the circumstances. If such a process was undertaken, neither party made mention of it. It would have helped the respondent's cause had he shown that he allowed due process in this regard and informed the complainant that the cost of repairs and loss of earnings would be recovered from his terminal benefits. As it is, the respondent appears to want this court to resolve what should have been undertaken administratively. This is not the role of this court. In my view, the counterclaim appears to be an afterthought aimed at depriving the complainant of his terminal benefits. As such, I am not satisfied that the respondent has proved his claim on a balance of probability. Consequently, the counterclaim is dismissed for lack of merit.

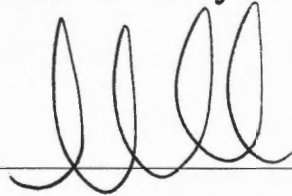
#### 7.0 **Conclusion and Orders**

In conclusion, the complainant has succeeded in his claim for leave days and severance pay. Judgment is entered for the complainant for the following:

- i. Leave days at the rate of 2 days per month from 26<sup>th</sup> April 2015 to 14<sup>th</sup> November, 2022 giving a total of K10,384.

- ii. Severance pay, being 25% of the complainant's basic salary of K1,500 per month from 9<sup>th</sup> May 2020 to 14<sup>th</sup> November, 2022 giving a total of K2,274.
- iii. The respondent shall deduct one month's salary being K1,500 from the complainant's dues in respect of notice to terminate the contract.
- iv. 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.
- v. Each party shall bear its own costs.
- vi. Leave to appeal is granted.

**Delivered at Lusaka this 29<sup>th</sup> Day of January, 2024**



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

