

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

**2023/HPIR/0517**

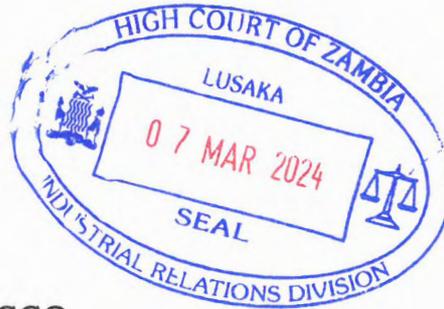
*(Civil Jurisdiction)*

**BETWEEN:**

**ESTELE CHIRWA**

**AND**

**ROLAND IMPERIAL TOBACCO**



**COMPLAINANT**

**RESPONDENT**

**Coram: Hon. Lady Justice Mrs. Mwaka. S. Ngoma this 7<sup>th</sup> day of March, 2024.**

*For the Complainant: In Person*

*For the Respondent: Miss C.K Puta Appearing with Mrs. T Changufu both of  
Messrs. Robson Malipenga and Company*

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## **JUDGMENT**

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**Legislation referred to:**

1. Minimum Wages and Conditions of Employment (General)(Amendment) Order, 2018
2. Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.
3. Employment Code Act No. 3 of 2019.

**Cases referred to:**

1. Nyambe Nyambe and Others Vs. Konkola Copper Mines PLC Appeal No. 2 of 2022
2. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R 172(S.C)
3. African Banking Corporation (Zambia) Limited and Lazarus Muntete Appeal No. 51 of 2001.

4. Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited CAZ Appeal No. 129 of 2017
5. Care International Zambia Limited v Misheck Tembo SCZ Selected Judgment No. 56 of 2018
6. Musonda Chizinga and Capstone Management Company Limited 2022/HPIR/0557 (unreported)
7. Chansa Ng'onga v Alfred H. Knight (Z) Ltd SCZ Selected Judgment No. 26 of 2019
8. Swarp Spinning Mills v Sebastian Chileshe and Other (2002) Z.R 23

**Other works referred to:**

1. W.S Mwenda, in her book Employment Law in Zambia: Cases and Materials (2011), Revised Edition, UNZA Press, Zambia, at page 136

**1.0 Introduction**

The complainant commenced proceedings against the respondent by way of notice of complaint and supporting affidavit on 23rd May 2023 seeking the following reliefs:

- a. Leave days;
- b. Gratuity;
- c. Notice pay;
- d. Unlawful and unfair termination of contract;
- e. Compensation over accident; and
- f. Costs and any other benefits the court may deem fit.

2.0 **Affidavit Evidence in support of Notice of Complaint**

2.1 In her affidavit in support of complaint, the complainant deposed that she was employed by the respondent on 2<sup>nd</sup> December, 2015 as a general worker on an oral contract and, on 19<sup>th</sup> March, 2019, she was promoted to the position of machine operator. This promotion came with her first written contract signed on 20<sup>th</sup> March, 2019. The contract is exhibited as “EC1” in her affidavit. (For ease of reference, this contract shall be referred to as the “**2019 contract**” in this judgment).

2.2 She further deposed that on 6<sup>th</sup> July, 2021, she was involved in an accident whilst on duty and sustained severe injuries as a consequence of which she became disabled. The medical report is exhibited as “EC2”. As a result of her incapacitation, the respondent terminated her employment on 23<sup>rd</sup> March, 2022 and did not pay her any terminal benefits despite her demands. Aggrieved by the respondent’s decision, she commenced this action claiming the reliefs listed above.

3.0 **Affidavit Evidence in Support of Answer**

3.1 The respondent filed an answer and affidavit in support on 8<sup>th</sup> August, 2023. The deponent, Mr. Jack Ngandwe, the human resource officer, averred that the complainant was employed as a general worker up to the date of termination of her employment. He exhibited her contract of

employment made on 1<sup>st</sup> July, 2021 which indicates that she was employment in the capacity of general worker. (This contract shall be referred to as the **“2021 contract”** in this judgment).

3.2 Mr. Ngandwe also deposed that the accident the complainant was involved in did not occur while she was on duty but when she had knocked off and was in Kuku compound as shown in the police report exhibited in his affidavit.

3.3 He further deposed that the complainant was given one month notice of termination of employment effective 23<sup>rd</sup> March 2022 and was paid all her dues as shown in the pay slips exhibited as “JN3”. The notice of termination is exhibited as **“JN2”**.

#### 4.0 **Affidavit Evidence in Reply**

4.1 In her affidavit in reply, the complainant reiterated that the accident did occur while she was on duty as evidenced by the report from Workers’ Compensation Fund Control Board exhibited as “EC 2” in the affidavit.

4.2 She further averred that the doctor who attended to her at the hospital recommended that she be given light duties but the respondent did not adhere to this recommendation and opted to terminate her employment instead. The letter of recommendation for light duties is exhibited as “EC3”.

4.3 The complainant denied being paid gratuity on a monthly basis or, at all, contrary to what was reflected in the pay slips exhibited in the affidavit in support of answer. She stated that the pay slip she exhibited did not indicate any gratuity and that it was only after she commenced this action that the respondent produced pay slips purportedly showing that she was paid gratuity on a monthly basis.

4.4 She also averred that she settled the medical bills related to injuries sustained in the accident without any assistance from the respondent. Exhibited as "EC6", are copies of receipts of the medical expenses incurred following the accident.

## 5.0 **Hearing**

At the hearing commenced on 24<sup>th</sup> August 2023 and continued on 6<sup>th</sup> October, 2023, the complainant gave oral testimony and called one witness while one witness testified for the respondent.

## 6.0 **Complainant's Case**

6.1 The complainant testified that she was employed by the respondent on 2<sup>nd</sup> December, 2015, and that it was not until 2019 that she was given a written contract. She recalled that on 6<sup>th</sup> July, 2021, she was called to work although it was a public holiday. She and two of her co-workers were only permitted to knock off at 18:45 hours after meeting the targets set for them.

The three of them were given a lift in the respondent's motor vehicle. They alighted at makeni mall on Kafue road and crossed the road heading towards embassy mall. A minibus then hit them, killing one of her colleagues and leaving her and the other colleague severely injured and needing hospitalization. The complainant was in hospital for 3 days. X-rays done showed that she had injuries on her knee, shoulder and back.

6.2 It was her testimony that she was only able to return to work in February 2022 and that the doctor attending to her had recommended that she be assigned light duties. To her surprise, instead of being given light duties as per doctor's recommendation, the respondent, on 23<sup>rd</sup> March 2022, gave her one month's notice to terminate her employment. At the end of the notice period, she was not paid her terminal dues.

6.3 It was further her testimony that she had been permanently disabled and was not even able to do chores at home or be intimate with her husband. She asked the court to compensate her for the suffering she had endured as a result of the accident.

6.4 She finally testified that her last salary was K2000, and that she lived far from her workplace.

6.5 Under cross examination, she told the court that she signed the 2021 contract while she was on sick leave after the same was brought to her home by the respondent's employee. She denied being paid gratuity and stated that she was entitled to leave days even if she was on sick leave because leave was her entitlement.

- 6.6 Under further cross examination, she stated that the accident occurred after she had knocked off and gotten off the respondent's vehicle. She further stated that the letter from the doctor recommending light duty was authored in September, 2021 and she only reported for work in February 2022 because she was still feeling unwell. The same doctor had told her she should only return to work when she felt well.
- 6.7 In re-examination, the complainant largely repeated what she earlier told the court in evidence in chief and cross examination. As such, I do not see the need to rehash her evidence here.
- 6.8 The witness called by the complainant was Ms. Eunice Lungu. It was her testimony that she worked with the complainant before the termination of her employment and that she was with the complainant on the day of the accident. Her narrative of how the accident occurred was on all fours with that of the complainant.
- 6.9 It was her further testimony that the bus which hit them was not the respondent's and that she did not know the driver or owner of the bus. She, nevertheless, told the court that the respondent was obliged to compensate them for the accident because they had been called to work on a public holiday.

## **7 Respondent's Case**

- 7.1 The respondent's lone witness, Mr. Jack Ngandwe, the human resource officer, testified that the complainant was given one month's notice prior to the termination of her employment in accordance with her contract.
- 7.2 The witness further testified that when the accident occurred, the respondent provided everything required by the complainant while in hospital and that the complainant stayed away from work for 8 months, during which period she continued getting her salary. That the accident was reported to the Workers' Compensation Fund Control Board.
- 7.3 Under cross examination, the witness told the court that the only question asked by the Workers Compensation Fund Control Board was why it took long to report the matter to them and that the question was answered to their satisfaction.
- 7.4 In re-examination, he stated that the delay in reporting to the Worker's Compensation Fund Control Board was due to manpower challenges in the human resource department of the respondent.

## **8.0 Determination**

- 8.1 I have considered and reflected on the pleadings and the oral evidence by both parties. I have also considered the written submissions filed by counsel for the respondent.

8.2 From the evidence, it is not in dispute that the complainant was employed as a general worker and her employment ended with the respondent giving her one month notice to terminate on 23<sup>rd</sup> March, 2022. The effective date of termination was, therefore, 23<sup>rd</sup> April, 2022. The complainant averred that her employment, in fact, commenced on 2<sup>nd</sup> December 2015 as a general worker. She only signed a contract on 19<sup>th</sup> March, 2019. Although she averred that she was promoted to the position of machine operator in March 2019, the 2019 contract indicates her position as general worker. The 2021 contract also indicates her position as general worker. In the light of this evidence, I find that the complainant was indeed a general worker the whole period of her employment.

8.3 With regard to the commencement of her employment, I am of the view that the complainant's testimony that she was initially employed on an oral contract on 2<sup>nd</sup> December, 2015 and then signed the 2019 contract was not sufficiently challenged. Judging by her demeanor, I am convinced that she was a credible witness and was not backdating the date of commencement of employment just to get more money from the respondent. In addition, it was her testimony that when she took her complaint to the labour office, the labour officer ordered the respondent to pay for the period 2015 to 2019 when she had an oral contract and then, for the period after she signed written contracts to the date of termination of her employment. It was her further testimony that although the respondent agreed to pay as ordered, they did not bring the money at a

scheduled meeting, prompting the labour officer to advise her to commence court proceedings. Again, this testimony was not rebutted. In fact, the respondent completely steered away from making any comment on the complainant's alleged employment for the period 2015 to 2019. In view of the foregoing, I am satisfied that the complainant has proved that she was, indeed, employed on 2<sup>nd</sup> December 2015.

8.4 I shall now determine the specific reliefs sought by the complainant in the order in which they have been listed in the notice of complaint.

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

9.1 In line with my finding above, the complainant was employed on 2<sup>nd</sup> December, 2015 as a general worker on an oral contract. As such, she could not file written conditions applicable to her prior to the written contract being made. As there is no evidence on record of there being a union at the respondent, I hold that she was a protected employee covered by the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018. It is significant to note that even though the Minimum Wages and Conditions of Employment Act, 1982 was repealed by section 138(1) of the Employment Code Act, No.3 of 2019, the ministerial orders enacted pursuant to the same were not repealed and were still applicable for the entire duration of the complainant's employment. Thus, the Minimum Wages and Conditions of Employment

(General) Order, 2011 as amended in 2012 and 2018 Orders applied to the complainant. As a protected employee, the complainant was entitled to the benefits provided in the General Orders.

9.2 Paragraph 5(1) of the General Order provides for leave at the rate of two (2) days per month. Having completed six months' continuous service with the respondent, the complainant was entitled to leave with full pay at the rate of two days per month.

9.3 Under the 2019 contract, the leave days accrued were also 2 for each completed month. The cause titled "CONTRACT DURATION" shows that this contract was for a period of 6 months only. It was the complainant's testimony that she signed other contracts on similar terms in 2020 and 2021. The only other contract on record is the 2021 contract, which also provides for 2 days of leave for each completed month. As such, it is clear to me that from the date of her employment, the complainant accrued leave at 2 days per month.

9.4 The 2019 contract provides that "*Any leave not taken within a period of 12 months shall be deemed to have been forfeited to the company.*" It is to this provision that my attention was specifically drawn by Ms. Puta, counsel for the respondent, in support of her argument that the complainant is not entitled to leave days.

9.5 I have perused the two contracts on record and have noted that the 2019 contract does not have a similar provision. It was not argued that this provision extends to leave days accumulated in prior contracts. In my

view, the 2021 contract cannot be applied retrospectively in the absence of an express provision to this effect. I am fortified in this view by the decision of the Supreme Court in the case of **Nyambe Nyambe and Others Vs. Konkola Copper Mines PLC**<sup>(1)</sup> where the Supreme Court took the position that a law that comes into effect after parties have contracted cannot apply to relations that were consummated previously unless the retrospective effect is clearly intended and explicitly stated. On the basis of this guidance, I am of the view that leave days accumulated in prior contracts cannot merely be wished away by a provision in a later contract. Further, the 2021 contract was made on 1<sup>st</sup> July, 2021 and terminated on 23<sup>rd</sup> April, 2022. Evidently, it was terminated before it clocked 12 months. Consequently, the leave days accumulated under this contract cannot be deemed to have been forfeited on account of not having been taken within a period of 12 months. As such, I find that the complainant is entitled to leave days at the rate of 2 days per month from 2<sup>nd</sup> December 2015 to 23<sup>rd</sup> April, 2022.

Leave pay is calculated using the formula in the fifth schedule to the Employment Code Act No. 3 of 2019 as follows:

$$\text{Leave benefits} = \frac{\text{FP} \times \text{D}}{12}$$

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

I hasten to add that the full pay to be used for the 2021 contract must be one that takes into account the minimal wage as discussed latter below.

10.0 **Whether the complainant is entitled to Gratuity**

10.1 The complainant claims gratuity for the years worked. The respondent denies that it owes her gratuity as the same was paid in advance monthly together with her salary. My attention was drawn to clause 4 of the 2021 contract which reads as follows:

4. *“GRATUITY*

*Contract gratuity will be paid on a monthly basis at 25% of the basic salary earned upon successful completion of the contract. However, this gratuity will be paid in advance on a monthly basis. Should you opt to separate from the company before completion of contract term, the Company shall reserve the right to recover gratuity paid to yourself during the tenure of service.”*

10.2 To support the position that gratuity was paid, the respondent produced copies of the complainant’s pay slips for January 2022 to April 2022, each showing a payment of K150 in respect of gratuity. The complainant, on the other hand, denies being paid gratuity. She too produced a pay slip exhibited as “EC4” in her affidavit in reply which has no evidence of payment of gratuity.

10.3 Other than the 2021 contract, there is no evidence that the parties agreed to payment of gratuity on separation. In the case of **Wilson Masauso Zulu v Avondale Housing Project<sup>(2)</sup>**, the Supreme Court restated the principle of law that he who alleges must prove; and Ngulube DCJ (as he then was), said the following at page 175:

*“...I think it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case.”*

10.4 The Employment Code Act No 3 provides for gratuity at twenty-five percent of the employee’s basic pay at the end of a long-term contract, which has been defined by section 3 as a contract exceeding 12 months. There no evidence on record as to whether the contract signed in 2020 was for a period exceeding 12 months. When asked in cross examination whether the contracts she signed were subject to renewal every year, the complainant responded in the affirmative. The implication is that none of the contracts was for a period exceeding 12 months.

10.5 I am mindful of section 54(1)(c) of the Code which provides for severance pay for a contract of fixed duration. However, the law that applied to the complainant’s employment prior to 9<sup>th</sup> May 2020 was the Employment Act, Chapter 268 of the Laws of Zambia which had no provision for

payment of gratuity or severance pay. In order for an employee to be entitled to payment of gratuity under that Act, the same had to be provided for in the employment contract.

10.6 In view of the above, the complainant's claim for gratuity for the period prior to 9<sup>th</sup> May 2020 cannot be sustained. As guided by the Supreme Court decision in **Nyambe Nyambe**<sup>(1)</sup>, the Employment Code Act cannot apply to relations consummated previously unless a retrospective effect is clearly intended or expressly stated. As no such retrospective effect is stated, I find that from 9<sup>th</sup> May 2020 when the Employment Code Act became effective, to 30<sup>th</sup> June, 2021, the complainant is entitled to a severance pay of 25% of her basic pay pursuant to section 54(1)(c). The basic pay shown in the 2019 contract is K1400 and no evidence was led to suggest that the same was changed. I shall, as such, assume that the basic pay remained at K1,400 until the date of the 2021 contract .

10.7 Coming to the 2021 contract, there is no doubt that it does provide for gratuity, and that the same is payable on a monthly basis. To this end, the respondent exhibited copies of the complainant's pay slips for January 2022 to April 2022 as proof that gratuity of K150 was paid to the complainant for each of these months. The complainant denied receiving any such amounts and pointed out that the gratuity was not on the pay slip she exhibited in her affidavit in reply. I hasten to point out that the pay slip exhibited by the complainant is for the month of August 2020, which was prior to the commencement of the 2021 contract. As such, it

does not support her argument. Be that as it may, it must be noted that there is such a thing as evidential burden (which is the burden of adducing evidence) which is different from the legal burden of proof. The Court of Appeal in **African Banking Corporation (Zambia) Limited and Lazarous Muntete**<sup>(3)</sup> restated that the legal burden of proof in a civil action is borne by the plaintiff. The burden of adducing evidence is generally borne by the party bearing the burden of proof. The Court of Appeal went on to state, at page J26, that:-

*“However, when it comes to adducing evidence, the burden (evidential burden) shifts. The learned authors of **Black’s Law Dictionary** as regards shifting the burden of proof at page 1410 state as follows: -J 27- **“In litigation, the transference of the duty to prove a fact from one party to the other: the passing of the duty to produce evidence in a case from one side to another as the case progresses, when one side has made a prima facie showing on a point of evidence.”**”*

As guided by the Court of Appeal, in my opinion, the evidential burden that the complainant was paid gratuity under the 2021 contract shifts to the respondent. I do not consider a pay slip to be proof of payment. Much as a pay slip, to some extent, provides proof of the monies due to an employee, it falls short of proving that the amounts stated thereon were indeed paid to the employee. In this regard, bank statements would have

terminal benefits payable to the complainant which are based on her basic pay. The complainant, on her part, appears to have been content with the fact that her take-home pay was unaltered.

10.10 As neither of the parties submitted that the 2021 contract was signed under mistake, and hence null and void, I shall proceed to give effect to the contract, save to add that this will be done in the light of provisions of the law. This is because it is not possible for parties to contract out of mandatory provisions of statute. This is as guided by the Court of Appeal in the case of **Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia**<sup>(4)</sup>.

10.11 Further, section 127 of the Employment Code Act provides that:

*“Where a contract of employment, collective agreement or other written law provides conditions more favourable to the employee, the contract, agreement or other written law shall prevail to the extent of the favourable conditions.”*

10.12 I have perused the provisions of the Minimum Wages and Conditions of Employment (General) (Amendment) Order, 2018, which applies to the complainant who is a protected worker and have noted that the basic pay of K600 provided for in the 2021 contract is lower than the minimum wage of K1050 provided for in paragraph 4(1)(a) of the Order. Accordingly, gratuity for emoluments earned under the 2021 contract shall be calculated on the basic salary of K1,050.

10.13 Neither of the parties provided a breakdown of the allowances. As such, I find no basis upon which these can be analysed or interfered with.

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

Clause 8 of the 2021 contract provides for either party to give one month's notice to the other to terminate the contract. By letter dated 23<sup>rd</sup> March, 2022 shown in the affidavit in support of answer, the respondent gave the complainant the requisite notice. Consequently, I find that the complainant's claim for notice pay has no merit and is accordingly dismissed.

12.0 **Whether the termination of the Complainant's Employment was Unlawful and Unfair**

12.1 In order to determine whether or not the termination of the complainant's employment by notice was unlawful and unfair, it is important to begin by defining unlawful and unfair dismissal. According to the learned authors **Winnie Sithole Mwenda and Chanda Chungu**, in their book **A Comprehensive Guide to Employment Law in Zambia: (2021), the University of Zambia Press**, at page 241, "*unfair dismissal is dismissal that is contrary to statute or based on unsubstantiated ground.*"

- 12.2 In **Care International Zambia Limited v Misheck Tembo**<sup>(5)</sup>, the Supreme Court endorsed the view that unfair dismissal is dismissal which is contrary to statute. Unfair dismissal and unlawful dismissal appear to be synonymous, as enunciated by learned Judge Mwenda in **Musonda Chizinga and Capstone Management Company Limited**,<sup>(6)</sup> at page J24 of her judgment, that *“unfair dismissal is essentially unlawful dismissal in that it is dismissal that is contrary to the law”*.
- 12.3 Notwithstanding that dismissal is distinguishable from termination, the definition of “unlawful” or “unfair” equally applies to termination. Consequently, with regard to the question whether the termination was unlawful or unfair, I have to consider whether or not the respondent carried out the termination in accordance with the provisions of the law as I now do.
- 12.4 Section 52(1) and 52(2) of the Employment Code Act provide as follows:
- “52. (1) A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee’s contract of employment; and*
- (2) An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with*

*the capacity or conduct of the employee or based on the operational requirements of the undertaking.”*

12.5 I, again, draw from the wisdom of the learned authors **Winnie Sithole Mwenda and Chanda Chungu**, in their book **A Comprehensive Guide to Employment Law in Zambia**, who in commenting on the above sections, state, at page 228, that *“Where a termination is not carried out in accordance with the law, or where the employer terminates employment without giving a valid reason, such termination will be referred to as unfair termination, and for termination contrary to the contract of employment as wrongful termination.”* (Emphasis mine)

12.6 The Court of Appeal decision in **Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia**<sup>(4)</sup> endorsed that employers must give valid reasons when they terminate by way of notice. The court was clear that:-

*“Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination. What is of critical importance to note, however, is that the reason or reasons given must be substantiated.”*

12.7 In the light of the above, it is established that the position of the law, as contained in the Employment Code Act, is that where the employer initiates termination of the employee’s employment, even if they do so by

invoking the notice clause in the contract of employment, they must give a valid reason.

12.8 The respondent's submission that the termination of the complainant's employment cannot be impugned because sufficient notice as provided in her contract of employment was given flies in the teeth of the law as enunciated above. Consequently, I find that the termination of the complainant's employment was unlawful and unfair.

12.9 Having held as such, I now come to the question of the quantum of damages due to the complainant. In **Chansa Ng'onga v Alfred H. Knight (Z) Ltd**<sup>(7)</sup> the Supreme Court confirmed that the normal measure of damages to be paid to an employee who has been unlawfully, unfairly or wrongfully terminated or dismissed is an employee's notice period in the contract of employment or as provided by law. However, exemplary damages may be awarded depending on how the termination was effected, that is, whether it was oppressive, infringed the employee's rights, inflicted in a traumatic manner, and caused mental anguish or stress and where the prospects of future employment by the employee are bleak.

12.10 Further, the Supreme Court in **Swarp Spinning Mills v Sebastian Chileshe and Other**<sup>(8)</sup> held that the normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering. In this case, the Supreme Court departed from the normal damages.

12.11 In the matter at hand, it has been established that the complainant sustained injuries in an accident which occurred as she returned from work on 6<sup>th</sup> July, 2021. As a result of her injuries, she was unable to work until February 2022. It was her testimony that her doctor recommended that she be given light duties. Instead of implementing this recommendation, the respondent terminated her employment. It was also her testimony that the quality of her life has been diminished as she lives with constant pain from injuries to her knee, back and shoulders and may not be able to find another job as a result of her injuries.

12.12 I am mindful that the complainant did not call a doctor to speak on the extent of her injuries and pain and the prognosis. I did, however, observe that the complainant walked with much difficulty and restricted mobility and was clearly in intense physical pain when she walked from the gallery to the witness stand and back.

12.13 I am also mindful that, as a general worker, the complainant's job prospects would, ordinarily, be relatively higher than someone at a higher level, like a general manager. However, I am under no illusion that with the injuries and pain in her knee, back and shoulder, the complainant's job prospects are bleak as work done by general workers is often quite strenuous and not many employers would hire a person who is not physically fit.

12.14 Thus, taking into account the foregoing and having weighed all the relevant factors, circumstances and evidence, including that the

complainant continued drawing a salary for all the months she was indisposed, and guided by section 85A of the **Industrial and Labour Relations Act No. 269 of the Laws of Zambia**, which provides that a remedy must be just and equitable, I award the complainant twelve (12) months' salary as damages for the unfair and unlawful termination of her employment.

13.0 **Whether the Complainant is entitled to Compensation over the Accident.**

13.1 It was the complainant's testimony that as the accident happened when she was returning home from work, having been called to work on a public holiday, she is entitled to compensation. The respondent contends that no compensation is due to the complainant as the accident occurred after she had gotten off the respondent's vehicle; was not caused by the respondent; and neither did it occur within the respondent's premises.

13.2 How and where the accident occurred is not in dispute. I have reflected upon this claim and have not seen, on the evidence before me, the basis upon which the respondent should be held liable for the loss or pain sustained by the complainant in the accident. Apart from stating that the accident occurred when she was returning from work, the complainant did not adduce any evidence to sufficiently connect the respondent to the accident. Although both the complainant and the respondent's witness

mentioned that a claim was logged with the Workers Compensation Fund Control Board, nothing was stated as to what happened to the claim. Accordingly, this claim fails for lack of merit.

14.0 **Whether the Complainant is entitled to any other benefits the Court may deem fit**

14.1 *Reimbursement of Medical Bills*

- i. The complainant told the court, at the hearing, that she did not receive any support from the respondent after the accident. She bought the medicines, paid all the medical bills and transportation to and from hospital from her own resources. That the respondent told her to submit all receipts and hospital bills for reimbursement, which she did, but she was not reimbursed. Copies of the receipts are attached to her affidavit in reply. The respondent's witness, on the other hand, averred that the respondent supported the complainant from the time she was hospitalized to when she was discharged. He, however, did not state the nature of the support rendered to her.
- ii. Clause 5 of the 2021 contract provides that the respondent would pay up to 20% of the complainant's annual gross salary to a designated private or government health institution. If the respondent had paid this amount, the complainant would not have

been out of pocket to the tune of 20% of her annual gross salary. Although the complainant told the court that the respondent promised to reimburse her for all the medical expenses; she did not adduce any evidence to support her claim that the respondent is liable to reimburse her all her medical bills. I order that the complainant be reimbursed the medical bills as evidenced by the receipts exhibited in her affidavit in reply, but only to the maximum of 20% of her annual **gross** salary because this is what the parties agreed would be paid to private of government health institution.

#### *14.2 Underpayments*

The complainant was paid a basic salary of K600 under the 2021 contract which amount was below the minimum basic pay of K1050 as discussed above. She was clearly underpaid by K450 per month. I, accordingly, award her the sum of K450 per month from 1<sup>st</sup> July 2021, the date of the 2021 contract to the date of termination of her employment.

#### 15.0 **Conclusion and Orders**

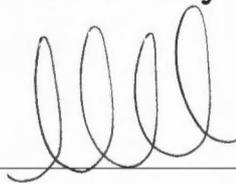
15.1 The complainant has, on a balance of probabilities, proved her case to the extent shown above. All other claims fail.

15.2 For the avoidance of doubt, I make the following orders:

- i. I declare that the termination of the complainant's employment was unlawful on account of the respondent's failure to provide a valid reason for the termination.
- ii. I award the complainant twelve (12) months' salary as damages for unfair and unlawful termination at the rate of K2450 per month. This works out to **K29, 400**.
- iii. Underpayment of salaries at K450 per month from 1<sup>st</sup> July 2021 to the date of termination of the contract, being 23<sup>rd</sup> April, 2022 plus the additional days worked by the complainant in April 2022, up to 30<sup>th</sup> April 2022 (10 months) giving a total of **K4,500**.
- iv. Leave days at the rate of 2 days per month from 2<sup>nd</sup> December 2015 to 30<sup>th</sup> April, 2022, to be computed by the Deputy Registrar.
- v. Severance pay at 25% of the complainant's basic salary of K1400 per month from 9<sup>th</sup> May 2020 to 30<sup>th</sup> of June 2021 to be computed by the Deputy Registrar.
- vi. Gratuity of 25% of the complainant's basic salary of K1050 per month from 1<sup>st</sup> July 2021 to 30<sup>th</sup> April, 2022 to be computed by the Deputy Registrar.
- vii. Reimbursement of actual medical expenses incurred as evidenced by the receipts exhibited in the complainant's affidavit in reply up to a maximum of 20% of the complainant's annual gross salary to be computed by the Deputy Registrar.

- viii. 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.
- ix. Each party shall bear its own costs.
- x. Leave to appeal is granted.

**Delivered at Lusaka this 7<sup>th</sup> Day of March, 2024.**



**Hon. Lady Justice Mrs. M.S Ngoma**

**HIGH COURT JUDGE.**

