

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

(Civil Jurisdiction)

BETWEEN:

REUBEN KAUNDA

BELINA CHANDA

AND

OCTOPUS SECURITY SERVICES

RESPONDENT

**Coram: Before Hon. Lady Justice Mrs. Mwaka. S. Ngoma this 27th day
of February, 2024**

For the Complainant : *In Person*

For the Respondent : *In Person*



JUDGMENT

Legislation referred to:

1. Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018.
2. Industrial Relations and Labour Act. Cap 269 of the Laws of Zambia
3. Employment Code of Zambia Act No. 3 of 2019
4. The Employment Act, Cap 268 of the Laws of Zambia

1.0 Introduction

The complainants commenced on action on 3rd March 2022 seeking the following reliefs:

- a. Leave days
- b. Gratuity
- c. Payment in lieu of notice
- d. Meal, Transport and Housing allowances
- e. Underpayments
- f. Uniform bonds
- g. Funeral grant package
- h. Night shift allowances
- i. Allowances of all gazetted public holidays
- j. Over time allowances
- k. All mother's days not taken to be converted into cash
- l. Costs and any other benefits the court may deem fit

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

- 2.1 The affidavit in support of complaint was sworn by Reuben Kaunda. He deposed that he and Ms. Belinda Chanda were employed by the respondent as security officers on contract basis. They both worked well until one day they were both accused of being absent from the location they had been assigned to guard. They were summoned to the respondent's office and were each handed a letter of termination of employment. The letters are exhibited in his affidavit as "RK1"
- 2.2 The complainants were not paid any terminal benefits despite them involving the Labour Office and the respondent being summoned to the Labour Office for a meeting.

3.0 **Respondent's Answer and Affidavit**

- 3.1 The respondent filed an answer and supporting affidavit on 11th may, 2022. The deponent, the operations supervisor, Mr. Alick Amukusana Mulawa, averred that the complainants were indeed employed by the respondent as uniformed security officers. Their contracts are exhibited in the affidavit as "AAM1".

- 3.2 He deposed that the complainants breached the disciplinary code of conduct when they abandoned their posts at a time they were supposed to be on duty. Both were issued with warning letters but they re-offended within a month. This led to them having their services terminated for the offence of 'abandoning post' on 16th September 2020 and 5th October 2020 for the 1st and 2nd complainants, respectively.
- 3.3 He also deposed that the offence of abandoning post under the disciplinary code provides for a final written warning on 1st breach followed by termination on 2nd breach and that the procedure was fully complied with by the respondent.
- 3.4 He further deposed that the respondent availed itself to the Labour Office when summoned but the meeting yielded nothing in favour of the complainants, hence, the institution of this action. He stated that as the contracts of employment will show, the complainants are not entitled to any of the reliefs set out in the affidavit in support of complaint.

4.0 **Hearing**

Mr. Reuben Kaunda testified on his own behalf and on behalf of Ms. Belina Chanda, while one witness testified for the respondent.

Complainants' Case

- 4.1 Mr. Kaunda testified that he was employed by the respondent on 7th September 2018 as a night guard while Ms. Chanda was employed on 20th September 2018 as a day guard. They both worked from the same post. They were told that they would sign two-year contracts before month-end of September 2018 but this was not to be. After the said month-end, they inquired from their supervisor as to when the signing of the contracts would be done and were told that the Operations Manager, a Mr. Simwanza, had signed on their behalf since the number of employees who needed to sign contracts was big, as such, it was decided that the Operations Manager signs for them all. Copies of the contract

were not given to them despite them requesting for the same on numerous occasions.

- 4.2 It was his testimony that on the 18th August, 2020, their supervisor by the name of Alick Mulawa came to their post around 09:00 hours for patrols. He did not find Ms. Chanda at the post. He did not call her to find out where she was. He indicated in the occurrence book which was in the guard room that both of them must report to the office the following day.
- 4.3 The next day they both went to the office where Ms. Chanda was asked where she was at the time her supervisor went to the post and she said she had gone to the toilet, but the supervisor did not believe her. To his surprise they were both given final warning letters which stated that their services would be terminated should they abandoned their post again. As they were dissatisfied with the way they had been treated, they sent a text message to the Managing Director complaining about this incident and other issues. When their supervisor and operations manager learnt of it, they summoned them to their office on 3rd October, 2020 where they handed them termination letters which they refused to sign because the offence indicated was not related to sending text messages to the Managing Director but was that of abandoning site, an offence for which they had already been issued with warning letters. It was his testimony that although they demanded for the presence of union representatives, the same were not called in.
- 4.4 It was his further testimony that on the 16th October 2020, they were again summoned to the supervisor's office for a meeting. To their surprise, they only found the same people who had fired them and the union representatives were not present. Their superiors demanded that they hand over their uniforms, which they did, and then signed the termination letters as they did not want to argue any further. They took the matter to the Labour office but did not find any joy there, hence, the institution of this action.

- 4.5 It was his further testimony that they both got a monthly salary of K959; that they never went on leave and had both only commuted 24 leave days. He stated that even when Ms. Chanda lost her father, the respondent did not give her days off to go and mourn him. She was also not allowed mother's day, even when she requested.
- 4.6 He further testified that they were both paid below the minimum wage. That they did not receive meal, housing and transport allowances. That he lived about 7km from his work place while Ms. Chanda's lived about 9 to 10 km away from the work place; that he worked from 17:00 hours to 7:00 hours but was never paid any overtime allowance.
- 4.7 When cross examined, Mr. Kaunda stated that he used to request for over time and each time his supervisor said it would be added to his salary but this was never done. He further told the court that although he knew his union representatives, he never engaged them about his entitlements. Mr. Kaunda had nothing to say in re-examination.

Respondent's Case

- 4.8 The respondent's one witness, Mrs. Fanscar Tembo Mukaya, the head of human resources, testified that on 17th August 2020, Mr. Kaunda was charged with abandoning the post he was tasked to man after his supervisor discovered that he was not at his post. This led to him being given a final warning. Hardly a month later, on 15th September 2020, Mr. Kaunda was again not found at his post when the supervisor went for patrols around 22:10 hours. This second offence led to his contract being terminated on 16th September 2020.
- 4.9 It was her further testimony that, in a similar vein, Ms. Chanda was not found at her post on 18th August, 2020 at 16:03 hours when her supervisor conducted patrols. She was charged with abandoning her post and given a final warning on 19th August 2020. Less than a month later, on 15th September 2020, around 07:00 hours, her supervisor again discovered that she was not at her post. She was charged for the offence

and had her employment terminated. It was her testimony that the complainants did not appeal the decision to terminate their employment as there was no evidence of appeals on their files.

- 4.10 She admitted that the respondent had not settled the complainants' leave days and that they each had 24 leave days; that the gratuity for the 2 years they worked had also not been paid; and neither had the uniform bond been refunded. She denied owing them any payment in lieu of notice as they had both been issued with final written warnings prior to the termination of their employment. With regard to the claim for underpayment, it was her testimony that when the complainants were employed, they were paid a housing allowance of K105; transport allowance of K52 and meal allowance of K52. In the course of time, the union successfully negotiated for higher salaries and agreed with management to drop the allowances on account of the increased salaries.
- 4.11 With regard to the contention by the complainants that Ms. Chanda was not assisted by the respondent when her father died, it was Ms. Mukaya's testimony that Ms. Chanda was not eligible to receive funeral grant as her contract stated that funeral grant was only payable if she lost her spouse or biological children. Parents were not covered.
- 4.12 Ms. Mukaya ended her evidence in chief file by stating that Ms. Chanda's file had no evidence that she ever applied to take mother's day and was denied. This was not accrued and cannot be taken in arrears.
- 4.13 Under cross examination, Ms. Mukaya stated that the complainants were called to answer charges separately; that the salaries were increased to the levels negotiated by the union; and that it was the union's responsibility to explain to their members what their entitlements were.
- 4.14 Still under cross examination, she told the court that she did not know that the complainants were not being given pay slips and neither was she aware that they were not availed with copies of their contracts.

5.0 **Determination**

- 5.1 I have considered and reflected on the pleadings and the oral evidence by both parties.
- 5.2 From the evidence, it is not in dispute that Mr. Kaunda was employed by the respondent on 7th September 2018 and his employment was terminated on 16th September 2020 while Ms. Chanda was employed on 20th September 2018 and her employment was terminated on 5th October 2020. It is also not in dispute that prior to the termination of their services, the complainants were issued with final warning letters for the offence of abandoning post. Mr. Kaunda's warning letter was issued on 19th August 2020 and is marked "AAM3" in the affidavit in support of answer. Ms. Chanda's final warning letter is contained in the notice to produce filed on 16th August 2022. There is a paragraph in both warning letters stating that the warning was valid for 6 months.
- 5.3 About a month later, it was alleged that both complainants had re-offended, and this led to termination of their employment. Aggrieved by the decision to terminate their employment, the complainants commenced this action seeking the reliefs listed in this judgment above.
- 5.4 Before I come to the determination of the issues raised, I have to determine the conditions of service applicable to the complainants. On the one hand the complainants contend that they were told about the existence of written contracts but they did not sign them and neither were they given copies of the same. On the other hand, the respondent contends that the complainants were both employed on contract. Copies of the contracts are exhibited and marked "AAM1". I have examined the contracts and I agree with the complainants that they were not signed by them because the signatures on the letters of final warning and termination are different from what appears on the exhibited contracts. The exhibits appear to be conditions applicable to employees in general. The respondent's witness stated that it was the union's responsibility to explain applicable conditions of service to its members, including the

complainants. While I do not entirely agree with this position because the employment relationship is between the complainants as employees on the one hand and the respondent as employer on the other hand and, therefore, the employer must explain what is on offer, I am of the view that for employees represented by a union to allow themselves to be ignorant of their conditions of service for as long as 2 years is inexcusable. If the conditions exhibited were not applicable, the complainants should have stated what conditions the union negotiated for on their behalf. I, therefore, find that the conditions of service contained in the documents exhibited as "AAM1" were, indeed, applicable to the complainants.

5.5 Having made the above finding, I shall now proceed to determine the individual reliefs claimed.

6.0 **Whether the Complainants are entitled to Leave Pay**

6.1 The complainants submitted that they never went on leave and that they only commuted 24 days. The complainants' conditions of service provided for leave at the rate of 2 days per month. Since they each worked for two years, the total leave days was 48, half of which were commuted to cash, leaving a balance of 24 days. The respondent does not deny the record of leave days. Ms. Mukaya, on behalf of the respondent, conceded that the leave days for each complainant are 24 days.

6.2 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.

The claim for leave days, therefore, succeeds.

7.1 **Whether the Complainants are entitled to Gratuity**

The complainants did not adduce any evidence as to the basis of their claim for gratuity. The respondent, on its part, made a bare denial in the answer. At the hearing, Ms. Mukaya, in evidence in chief, did not dispute owing the complainants gratuity. She stated that "*with regard to gratuity, indeed the company has not yet paid it for the 2 years that they worked.*" In addition, I have noted that the clause on gratuity contained in the conditions of service exhibited in the respondent's affidavit provides for gratuity at the rate of two months basic salary during the contract period. Sub paragraph 3 proscribes the payment of gratuity to an employee who resigns or is dismissed under the disciplinary code. The complainants did not resign, neither were they dismissed. Their employment was terminated. As such, I find that they are both entitled to gratuity at the rate of two months basic salary.

8.0 **Whether the Complainants are entitled to Payment in Lieu of Notice**

8.1 Section 53(1) of the Employment Code Act entitles an employee whose contract of employment is intended to be terminated to a period of notice or compensation in lieu of notice unless the employee is guilty of misconduct of a nature that it would be unreasonable to require the employer to continue the employment relationship.

8.2 I have noted from the disciplinary code that the offence of Abandoning Post which the complainants were found guilty of provides for termination of employment for the second occurrence. In the light of this clear provision, I find that it was reasonable for the employer to end the employment relationship. As such, I find that the complainants are not entitled to notice. Consequently, the claim for notice pay fails.

9.0 **Whether the Complainants are entitled to Meal, Transport and Housing Allowances and Compensation for Underpayments**

9.1 It was the complainants' testimony that they never got any allowances for meals, transport and housing. In response, Ms. Mukaya, on behalf of the respondent, stated that although the complainants were initially paid these allowances, the same were merged into the basic pay after the union and management negotiated for the merging. In other words, the allowances fell off and the basic salaries rose to K1,050.

9.2 Further, it was the complainants' contention that their emoluments were below the minimum wage. They, however, did not state the basis of this contention. I have perused the **Minimum Wages and Conditions of Employment (General) Order, 2011** and as **amended in 2012** and **2018**, which provides for minimum wages for employees engaged in the nature of work that the complainants were engaged in. Paragraph 2(1)(d) of this Order provides that it does not apply to employees in any occupation where wages and conditions of employment are regulated through the process of collective bargaining conducted under the **Industrial Relations and Labour Act**. As earlier stated, it is not disputed that the complainants were represented by a union. In view of this, the applicability of the Minimum Wages and Conditions of Employment (General) Order is untenable. Consequently, I find that the complainants' claim for these allowances and for underpayment has failed for lack of merit.

10.0 **Whether the Complainants are entitled to Uniform Bonds**

The complainants listed the refund of uniform bonds among the reliefs sought. Both parties did not submit any oral evidence in this regard. I have, nevertheless, noted that the contracts submitted by the respondent have a clause titled 'Refundable Security Bond' where it is stated that a specified amount shall be deducted, on a monthly basis, from the employee's pay and returned to the employee on termination of

employment provided that the uniform is returned in its entirety in a clean and tidy condition. It was Mr. Kaunda's testimony that their former supervisor requested them to hand over the uniforms, which they did, on 16th October 2020. As the respondent did not raise any issue with regard to the condition of the uniforms, I take it they were returned in their entirety, in a clean and tidy condition. Consequently, I find that the complainants have proved that they are entitled to the amounts deducted from their salaries in respect of uniform security bond.

11.0 Whether the 2nd Complainant is entitled to a Funeral Grant

11.1 It was the complainants' testimony that while still in the employ of the respondent, Ms. Chanda lost her father and she did not get any assistance from the respondent in form of a funeral grant or compassionate leave. The respondent contended that according to the conditions of service, a funeral grant was only given where an employee lost a spouse or biological child. The condition did not extend to loss of a parent.

11.2 The paragraph that deals with this issue in the conditions of service is titled "Funeral Grant and Benefits". It supports the testimony of Ms. Mukaya that the benefit is not extended to an employee on loss of a parent. It states that "the funeral grant and benefits apply to spouse or children under eighteen years of age, who must be listed on the Octopus employment application form to qualify."

11.3 I am aware of section 39 of the **Employment Code Act No. 3 of 2019 of the Laws of Zambia** which provides that;

"An employee is entitled to compassionate leave with full pay for a period of at least twelve days in a calendar year where that employee has;-

- a. Lost a spouse, child or dependent , or*
- b. A justifiable compassionate ground."*

11.4 Although the complainants did not state exactly when Ms. Chanda's father died, I was able to glean the year of death from a letter written to Tazara by the village headman informing Tazara of the death of Mr. Chanda Ngosa which it was stated happened in 2018. This letter is produced in the complainants' notice to produce filed on 16th August 2022.

11.5 I hasten to mention that the Employment Code Act became effective on 9th May 2020 when the transition period in which to comply with it expired. This Act cannot be applied retrospectively. The Employment Act, cap 268 of the Laws of Zambia which was applicable at the time of Ms. Chanda's father's death did not have a similar provision. Consequently, I find that the complainants' claim for funeral grant has not been substantiated and it fails for lack of merit.

12.0 Whether the 1st Complainant is entitled to Night Shift and Over Time Allowances

Mr. Kaunda testified that his shift was from 17:00 hours to 07:00 hours and, hence, he was entitled to night allowances and overtime allowances. He, however, did not state the basis of these allowances and, as such, the claim must fail for lack of merit.

13.0 Whether the Complainants are Entitled to Allowances for working on Gazetted Public Holidays

13.1 It was the complainants' testimony that they worked on gazetted public holidays but were never paid any allowances.

13.2 Ms. Mukaya, on behalf of the respondent, did not deny that the complainants worked on gazetted public holidays. Her only comment was that the complainants had not stated the specific public holidays referred to.

13.3 Section 15(3) of the now repealed Employment Act provided for payment to an employee who works on a public holiday at such rate as may be agreed under a collective agreement or contract of service. As the complainants have not adduced any evidence as to what rate was agreed by the parties for working on public holidays, even if I was to believe that they did, indeed, work on public holidays, I would be constrained to award anything for the period from commencement of their employment to 9th May, 2020 when the Employment Code Act, became effective. The Employment Code Act, in section 75(3), provides for payment of an employee's hourly rate of pay to an employee who works on a public holiday where the public holiday does not form part of the employee's normal working week, double the employee's hourly rate of pay. **(Underlining mine for emphasis)**

13.4 The complainants fell short of demonstrating that the gazetted public holidays referred to fell outside their normal working week. Consequently, I find no basis for awarding them the relief claimed. Consequently, the claim is dismissed for lack of merit.

14.0 **Whether the 2nd Complainant is entitled to Conversion of Mother's Days to Cash**


The complainants' contention that Ms. Chanda did not take mother's day has not been sufficiently rebutted. It was stated, on behalf of the respondent, that there was no evidence on file that she was denied mother's day. That a female employee is entitled to one day's absence from work each month without having to produce a medical certificate or give reason to the employer cannot be debated. Section 47 of the Employment Code Act states this clearly. Its forerunner, the Employment Act, in section 54 (2) has a similar provision with almost identical wording. However, both statutes do not provide for conversion of mother's day to cash. This is, consequently, refused for lack of merit.

15.0 Conclusion and Orders

In conclusion, the complainants have succeeded in their claims for leave pay, gratuity and uniform bonds. The rest of the claims have failed. Judgment is entered for the complainants for the following:

1. Leave pay of K969 for each complainant.
2. Gratuity of two months' basic salary giving a total of K2, 100 for each complainant.
3. Refund of all sums deducted from the complainants' salaries in respect of uniform bond. The figures shall be determined by Deputy Registrar.
4. The Judgment sum shall attract interest at short term bank deposit rate from 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.
5. Each party shall bear its own costs.
6. Leave to appeal is granted.

Delivered at Lusaka this 27th Day of February, 2024.


Hon. Lady Justice M.S Ngoma

HIGH COURT JUDGE

