

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA**
(Industrial Relations Division)

2022/HN/IR/69

BETWEEN:

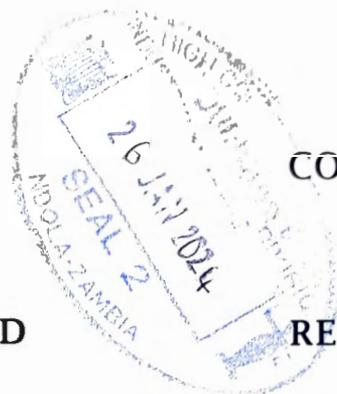
KINGSLEY CHISANGA

COMPLAINANT

AND

NICE PRODUCTS LIMITED

RESPONDENT



Before the Hon. Mr. Justice Davies Chali Mumba in Chambers on the 26th day of January, 2024.

For the Complainant: Mrs K. Chisala-Bwalya, Messrs Legal Aid Board

For the Respondent: In Person

JUDGMENT

Cases referred to:

1. Eston Banda and another v The Attorney-General, Appeal No. 42 of 2016.
2. Chilanga Cement v Venus Kasito, Appeal No. 86 of 2015.
3. Bethel Mumba and another v Africa Super Market (Trading as Shoprite Checkers), Complaint No. IRC/ND/80/2015.
4. Sarah Aliza Vekhnik v Cash Dei Bambini Montessori Zambia Limited, Appeal No. 129 of 2017.
5. Zambia China Mulungushi Textile (Joint Venture) Limited v Gabriel Mwami (2004) Z.R. 244 (S.C.).
6. Josephat Lupemba v First Quantum Mining Operations Limited, Appeal No. 20 of 2017.
7. Chilanga Cement Plc v Kasote Singogo (2009) Z.R. 122 (S.C).
8. Barclays Bank of Zambia Plc v Weston Lyuni and Suzyo Ngulube, SCZ Appeal No. 07/2012.

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. W.S Mwenda, Employment Law in Zambia: Cases and Materials: UNZA Press, Lusaka, 2004.
2. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. Lusaka, 2021.

1.0. INTRODUCTION

1.1. By notice of complaint supported by an affidavit filed into Court on 20th September, 2022, the complainant commenced this action against the respondent seeking the following reliefs:

- 1.1.1. An order for damages for wrongful and unlawful dismissal;
- 1.1.2. An order for payment of salary arrears as a result of the underpayment of his salaries;
- 1.1.3. An order for payment for accrued leave days less the amount already paid;
- 1.1.4. An order for payment of one-month salary in lieu of notice;
- 1.1.5. An order for payment of severance pay;
- 1.1.6. Costs of and incidental to this action;
- 1.1.7. Any other relief deemed fit by the Court.

1.2. The respondent opposed the complainant's claims and in doing so, filed into court an affidavit in opposition on 28th November, 2023 sworn to by Gregory Maistrellis, Director of the respondent company. It was argued that the complainant had been confrontational upon being cautioned several times against getting salary advances more than once in a month as per the respondent's policy. That the complainant was dismissed for violating clause 1.1q of the respondent's disciplinary code.

2.0. THE COMPLAINANT'S CASE

2.1. In his affidavit in support of the notice of complaint and at trial, the complainant testified that he was employed by the respondent on 2nd December, 2015 as a General Worker as shown by his letter of appointment, 'KC1'. That his monthly salary was K1,132.00 which he was getting until March, 2016 when the respondent reduced it to K500.00 per month. That he was not told the reason why his salary had been reduced. That prior to the salary being reduced, he was being given pay slips but when his salary was reduced, the respondent started giving him cash only. That the respondent continued to pay him a salary of K500.00 from April, 2016 until January, 2018. From February, 2019, his salary was further reduced from K500.00 to K200.00 which he was being paid on a weekly basis until October, 2019. That he did not know why his

salary was further reduced. That when he asked his boss, Eric why his salary was reduced, he was told that he was not employed on permanent basis but he was a casual employee who was not entitled to a monthly salary. He was also immediately dismissed without the commission of any offence or any misconduct. That he was not even charged or subjected to a disciplinary hearing. Thereafter, he went to see the Human Resource Officer, Henry Sumaili who advised him to go to his home and report back the next day.

- 2.2. He testified that he went back to work the next day but decided to see his boss before he could start working. That, however, his boss repeated the same words he had used the previous day. That he then went back to the Human Resource Officer and informed him that the boss had maintained his stance; and he was consequently advised to go to the Labour Office since he had a letter of appointment. That he went to the Labour Office where the Human Resource Officer was summoned. That the Senior Labour Officer asked the Human Resource Officer as to why his employment was terminated. In response, the Human Resource Officer indicated that he did not know the reason for the termination of his employment; and that the owner of the company was better placed to state the reasons. That upon being summoned by the Senior

Labour Officer, his boss declined to go there on two occasions. Thereafter, he was referred to the court.

- 2.3. The complainant stated that according to his letter of appointment, 'KC1', he was entitled to two leave days per month but he never went on leave during the entire period he worked for the respondent. That when the respondent terminated his contract, he was paid K850.00 for accrued leave days. However, he was not sure if that was what was due to him for accrued leave days. That he was not paid any other terminal dues. He also stated that he was never paid for the underpayment of his salaries.
- 2.4. He prayed the court to grant him all his claims.
- 2.5. During cross-examination, the complainant confirmed that he was employed by the respondent. He admitted that he was given a letter of appointment and he signed it. He also admitted that he used to receive pay slips upon being paid his wages. He stated that his salary was reduced to K500.00 in April, 2016. That in January, 2018, his salary was reduced to K200.00. When referred to his pay slips in the respondent's notice to produce at pages 1 and 2, the complainant stated that the salary of K1,132.00 was what he was getting at the beginning of his employment. He admitted that the pay slip at page 1 was his salary for May, 2018 in the sum of K1,132.00 which was his gross salary.

Further, he confirmed that, shown at page 2, was his gross salary for the month of May, 2017 in the sum of K1,132.00. Furthermore, on the same page aforesaid, he admitted that the pay slip for the month of June, 2017 showed a gross salary of K1,132.00. He denied testifying, in his evidence in chief, that his salary was K500.00. When referred to page 4, lines 2-5 of the record of proceedings, the complainant still denied testifying that his salary was reduced to K500.00. When referred to page 4, line 15 of the record of proceedings, the complainant admitted having stated that his salary was reduced to K200.00 in January, 2018. That, however, the pay slip showed that he received the full salary of K1,132.00 for which he signed.

- 2.6. When referred to the letter titled 'separation benefits' at page 4 of the respondent's bundle of documents, the complainant admitted that the signature on the document was his signature and the document contained his separation benefits. He confirmed that he was paid for his accrued leave days.
- 2.7. When re-examined regarding the payment of his salary of K1,132.00 which he was receiving; and the respondent's reduction of his salary from K500.00 to K200.00 in April, 2016, the complainant stated that it was from January to April, 2016 when he was getting K500.00. When further pressed, he stated that he was only given a full salary in

May, 2018. That, however, in the previous months from January, 2016 to April, 2018, he was being paid K500.00.

3.0. THE RESPONDENT'S CASE

3.1. RW1 was Henry Sumaili, Human Resource Manager in the respondent company. The witness informed the court that the complainant joined the respondent in 2015 and he was given the offer letter exhibited at pages 1-2 of the respondent's bundle of documents. That the complainant accepted the offer of employment by signing the aforestated letter. That according to the said contract of employment, the basic pay was K700.00; housing allowance was 30% of the basic pay; transport allowance was K104.00 per month; and lunch allowance was K120.00 per month. That during the course of his employment, the complainant was being paid all the aforestated amounts. That the complainant, just like any other employee, enjoyed the facility of salary advance which would be deducted from an employee's salary on the pay day.

3.2. It was the witness's testimony that they worked well with the complainant but sometime in 2018, the respondent differed with him and dismissed him. That upon his dismissal, they calculated what was due to the complainant and it amounted to K862.00 and paid him.

That the complainant acknowledged receipt as shown by the document at page 4 of the respondent's bundle of documents. That on the said document, the complainant acknowledged that it was his full payment, therefore, the respondent did not owe him anything.

3.3. During cross-examination, the witness stated that employees never used to fill in forms when requesting for a salary advance but they used to sign at the time of being paid to acknowledge receipt. That the document at page 11 of the respondent's bundle of documents showed when the complainant got and signed for the salary advances. He admitted that the document did not show that it was a salary advance form. That it also did not show the year within which the sums were obtained but it just showed the months. That he did not write to the complainant about the money owing because he did not owe the company any money.

3.4. He admitted that the respondent terminated the complainant's employment. He stated that he had worked as a Human Resource Manager for 10 years although he did not have qualifications of a Human Resource Practitioner. That he was aware that if an employee had breached the disciplinary code, the employee was supposed to be charged and allowed to respond to the

charge. That after the response, a disciplinary hearing was supposed to be held where if found guilty, then write to the employee terminating employment. He stated that he did not write a letter to the complainant. He admitted that he was once summoned by the Labour Office and went to attend the meeting in his capacity as Human Resource Manager. That, therefore, the Directors of the respondent were aware of the complainant's grievances. He denied that the complainant approached him to complain about the underpayments of K500.00 and K200.00. He denied that the reason the complainant was dismissed was because he complained about the underpayments. He admitted having written to the complainant's Lawyers offering to pay the complainant K7,000.00. He also admitted that he had not informed the court why the respondent terminated the complainant's employment. The witness confirmed that the complainant used to get his salary on a monthly basis. That he had not produced any documents to show that the complainant used to get his salary on a monthly basis.

- 3.5. In re-examination, the witness stated that the reason he did not come with all of the complainant's pay slips was because the letter of offer of employment indicated that he was to be paid his salary on a monthly basis. That the

complainant had agreed that he used to get paid every month but claimed that he was under paid.

- 3.6. RW2 was Greg Naistrellis, Director for the respondent company. He testified that the complainant was employed on 2nd December, 2015 as a General Worker. That he used to work well but the problem the respondent had with him was that he used to request for salary advances every week. That the complainant used to receive multiple salary advances every month which used to be recorded in the advance book as per company procedure. The witness stated that according to company procedure, only one or two salary advances were allowed but the complainant used to get multiple advances per week. That the complainant was warned verbally by the witness and RW1 but despite the verbal warnings, the complainant continued getting the salary advances. That that led to his salary being less in net upon deductions. That that habit continued and the complainant got to a stage where he would not accept when the witness refused to give him the salary advances. That the complainant would in fact get aggressive and intimidating which conduct led to his dismissal. The witness testified that according to company policy, where there was aggression or intimidation to any employee or management, it would result in instant dismissal.

- 3.7. It was the witness's testimony that the complainant was a good and an intelligent person despite not having formal education. That he could read and speak English as well as speak Greek. That, therefore, the complainant was lying when he stated that he did not know why he was being under paid. That the complainant knew why he was getting the salaries that he was getting and that was why he did not complain. That the reason why the witness only brought a few pay slips to court was to prove that the complainant was lying.
- 3.8. RW2 testified that the complainant had worked for the respondent until June, 2018; and that he had received his full separation benefits as shown by the document that he had signed. That the complainant was not telling the truth when he stated that he worked up to October, 2019. The witness stated that the Labour Office had advised the respondent to pay the complainant K17,727.50 without explaining the reasons for that payment; and the witness was not given a chance to offer any explanation as the matter came straight to court. That as for K7,000.00 that was offered to the complainant, the witness was advised to pay it to his lawyers on a without prejudice basis to avoid unnecessary costs.

- 3.9. During cross-examination, the witness admitted that RW1 had attended a meeting at the Labour Office regarding the complainant's complaints. That he did not accompany RW1 as he was not summoned. That RW1 went to the Labour office on behalf of the company. That a letter of termination of employment was written to the complainant but it did not indicate the reason why the complainant's employment was terminated. He stated that the complainant was charged for being aggressive and intimidating. However, he did not produce the said letter to the court. That disciplinary hearings were held many times relating to the same offence. That he did not show the court the findings of the disciplinary hearings. He stated that the complainant never approached him to complain about the underpayments of K500.00 and K200.00. He stated that he only produced three pay slips to prove that the complainant was a liar. That he had not produced the book for salary advances but only produced a page. He admitted that the said page did not show the years when the complainant took the salary advances and it did not show that it was extracted from the salary advance book. When referred to page 4 of the respondent's bundle of documents, the witness denied that he told the complainant that he was not going to get K862.00 if he did not sign the document. He stated that the respondent did not write to the employee when he

took the salary advance but the money would just be deducted from the salary. That in case of any queries they could just check in the book, the reason why they used to sign upon receiving the salary advance.

- 3.10. The witness admitted that in 2018, he employed the complainant as a Domestic Servant at his house. He denied telling the complainant that he was no longer a Domestic Worker but a Casual Worker in June, 2018.

4.0. FACTS NOT IN DISPUTE

- 4.1. The only fact which is common cause in this matter was that the complainant was employed by the respondent on 2nd December, 2015 as a General Worker as shown by his letter of appointment, 'KC1.'

5.0. ANALYSIS OF THE EVIDENCE AND THE DECISION OF THE COURT

- 5.1. From the evidence on record, the questions for determination are:
 - 5.1.1. Whether the complainant's dismissal from employment was wrongful and unfair thereby entitling him to the payment of damages.

- 5.1.2. Whether the complainant used to be underpaid his salary.
- 5.1.3. Whether the complainant is entitled to the payment for accrued leave days; payment of one month's salary in lieu of notice; and to the payment of a severance package.
- 5.2. I will start with the first issue, which is, whether the complainant's dismissal from employment was wrongful and unfair thereby entitling him to the payment of damages.
- 5.3. Under paragraph 5 of the notice of complaint, the complainant claims for an order for payment of damages for wrongful and unlawful dismissal.
- 5.4. In the case of **Eston Banda and Another v the Attorney General**¹, the Supreme Court has guided that:

“There are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. ‘Wrongful’ refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of a term for which the employee is engaged; whilst ‘unfair’ refers to a dismissal in breach of a statutory provision where an employee has a statutory right not to be dismissed. A loose reference to the term ‘unlawful’ to mean ‘unfair’ is strictly speaking, in employment parlance, incorrect and is bound to cause confusion. The learned author, Judge W.S. Mwenda, clarifies on the two broad categories, in her book *Employment Law in Zambia: Cases and Materials*, (2011), revised edition UNZA

Press, Zambia at page 136. She opines that, in our jurisdiction, a dismissal is either wrongful or unfair, and that wrongful dismissal looks at the form of the dismissal whilst unfair dismissal is a creature of statute."

5.5. On the above authority, I am of the firm view that the relief that the complainant is seeking is that his dismissal from employment was wrongful and/or unfair, and I will proceed to determine his claim as such.

5.6. I will begin with the complainant's claim that his dismissal from employment was wrongful.

5.7. It is settled that for an employee to successfully bring and maintain an action for wrongful dismissal, it must be shown that the employer breached the disciplinary procedures under the contract of employment, the rules of natural justice and/or indeed the procedure outlined under the Employment Code Act no. 3 of 2019. Hon. Judge Dr. W.S. Mwenda, learned author of the book entitled '**Employment Law in Zambia: Cases and Materials**' states at page 18 that:

"The concept of wrongful dismissal is the product of common law. When considering whether a dismissal is wrongful or not, the form, rather than the merits of the dismissal must be examined. The question is not why, but how the dismissal was effected."

5.8. Further, in the case of **Chilanga Cement v Venus Kasito**², the Supreme Court held that:

"The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question."

- 5.9. The above authorities have provided enough guidance as to what amounts to wrongful dismissal.
- 5.10. In *casu*, in support of his claim, the complainant averred that upon complaining about being underpaid by the respondent, he was instantly dismissed without any misconduct or commission of any offence. That he was not even charged or heard for any alleged offence.
- 5.11. On the other hand, the respondent argued that the complainant used to receive multiple salary advances per week contrary to company procedure which allowed for only one or two salary advances per month. That the complainant was warned verbally by RW1 and RW2 over the same but despite the verbal warnings, the complainant continued getting the salary advances. That that led to his salary being less in net upon deductions. That the habit continued and the complainant got to a stage where he would not accept when RW2 refused to give him the salary advances and would eventually get aggressive and intimidating. That that led to his dismissal because according to company policy, where there was aggression or intimidation to any employee or management, it would result in instant dismissal.

- 5.12. In cross-examination, RW1 admitted that he never wrote any letter to the complainant regarding his conduct. RW2 stated that a letter of termination had been written to the complainant but it did not indicate the reason for the termination. He also stated that several disciplinary hearings relating to the same offence were held.
- 5.13. I have considered the arguments from both parties.
- 5.14. According to RW2, the complainant got aggressive and intimidating when warned over the multiple salary advances he had been getting. That this was an offence under the respondent's disciplinary code, clause 1.1q in particular, and the penalty was instant dismissal. The offence under said clause 1.1q was termed as "*fighting, assault, threats and intimidation involving management and/or members of staff during and out of working hours.*" Despite the offence having been alleged to have been committed by the complainant, he was never formally charged with it.
- 5.15. I have perused the respondent's disciplinary code exhibited at pages 5 and 6 of the respondent's bundle of documents as well as the addendum to the disciplinary code exhibited at page 9. I note that there are no provisions relating to the disciplinary procedure to be

followed in an event that an employee commits an offence. However, it should be stressed that there is always the need for an employer to formally charge an employee prior to his/her dismissal on disciplinary grounds. Section 52(3) of the Employment Code Act No. 3 of 2019 prohibits an employer from terminating an employee's contract of employment for reasons related to an employee's conduct before the employee is accorded an opportunity to be heard.

- 5.16. In the case of **Bethel Mumba and Another v Africa Market (Trading as Shoprite Checkers)**³, it was held that:

“In industrial and labour matters, the need for an employer to charge an employee with a disciplinary offence and to give such an employee an opportunity to be heard before any sanction can be imposed cannot be over-emphasised as the same is the hallmark procedural and legal requirement in dealing with disciplinary process in employment matters.”

- 5.17. Further, in the case of **Sarah Aliza Vekhnik v Cash Dei Bambini Montessori Zambia Limited**⁴, the Court of Appeal observed that:

“In English law, natural justice is a technical terminology for the rule against bias (*nemo iudex in casua*) and the right to a fair hearing (*audi alteram partem*), put simply it is the ‘duty to act fairly.’ The right to a fair hearing requires that individuals should not be penalised by decisions affecting their rights of legitimate expectation unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case.”

5.18. Furthermore, the requirement for the rules of natural justice to be complied with in order for a dismissal to be deemed fair was re-affirmed in the case of **Zambia China Mulungushi Textile (Joint Venture) Limited v Gabriel Mwami**⁵ where it was held that:

“Tenets of good decision-making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard.”

5.19. In the present case, the evidence on record has revealed that the complainant was not formally charged with the alleged offence or indeed any other offence before he was dismissed. Further, although RW2 claimed that several disciplinary hearings had been held against the complainant, there was no evidence produced to prove that such disciplinary hearings were held. Therefore, I am satisfied that the complainant was also not given an opportunity to exculpate himself or to be heard.

5.20. In the result, therefore, I find that the failure by the respondents to formally charge the complainant; invite him to exculpate himself; and to accord him a hearing before his dismissal culminated in the breach of section 52(3) of the Employment Code Act No. 3 of 2019 and the rules of natural justice. Consequently, the complainant

has, on a balance of probabilities, proved his claim that his dismissal from employment was wrongful and he is entitled to damages accordingly.

- 5.21. The complainant has also complained that his dismissal from employment was unfair.
- 5.22. The learned authors, Judge Dr. W.S. Mwenda and Chanda Chungu in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, state at page 241 as follows:
- “Unfair dismissal is dismissal that is contrary to the statute or based on unsubstantiated ground. For unfair dismissal, the Courts will look at the reasons for the dismissal for the purpose of determining whether the dismissal was justified or not. In reaching the conclusion that the dismissal is unfair, the Court will look at the substance or merits to determine if the dismissal was reasonable and justified.”**
- 5.23. On the above authority, unfair dismissal is one where a specific statutory provision has been breached by an employer when dismissing an employee or one where a dismissal has been based on unsubstantiated reasons.
- 5.24. Pursuant to section 52(5) of the Employment Code Act No. 3 of 2019, the employer bears the evidential burden of proving that the dismissal of an employee from employment was fair and for a valid reason.
- 5.25. In the present case, it is not in issue that the complainant was dismissed from employment for allegedly committing

the offence of issuing threats and intimidating RW1 and RW2. It is alleged that the complainant became aggressive and intimidating upon being verbally warned for getting too many salary advances.

- 5.26. As I have already found above, the complainant was not charged with any offence before he was dismissed thereby denying him an opportunity to defend himself. Had the respondent charged the complainant and accorded him an opportunity to exculpate himself before dismissing him from employment, it could have satisfactorily established whether or not he had committed the alleged offence for which he was dismissed. This follows that the reasons for dismissing the complainant from employment were not substantiated. In the circumstances, therefore, I hold that the complainant's dismissal from employment was unfair and he is accordingly entitled to damages.
- 5.27. In summary, I am satisfied that the dismissal of the complainant was both wrongful and unfair.
- 5.28. I now come to the assessment of the quantum of damages to which the complainant is entitled to for both the wrongful and unfair dismissal.
- 5.29. In the *Eston Banda and Edward Dalitso Zulu* case, the Supreme Court guided that the general measure of

damages where there is nothing extra ordinary is an amount equivalent to the notice period provided in the contract or in the absence of such provision, a reasonable period. From the foregoing, it is settled that the normal measure of damages that applies is the contractual length of notice or the notional reasonable notice where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand.

- 5.30. In discussing the factors that warrant departure from the common law measure of damages in the case of **Josephat Lupemba v First Quantum Mining and Operations Limited**⁶, the Court of Appeal referred to two leading cases of **Chilanga Cement Plc v Kasote Singogo**⁷, and **Barclays Bank (Z) PLC v Weston Lyuni and Suzyo Ngulube**⁸, decided by the Supreme Court. The Court of Appeal observed at page J5 of the judgment that:

“We note that in the two cases, the Supreme Court guided on the factors to be taken into consideration to award damages beyond the common law practice of notice period. Some of the considerations are future job prospects, inconvenience, stress and abruptness of termination. In so guiding, the emphasis was that the trial Court should consider all the circumstances of each case and where it considers that a particular case is deserving, it should go beyond the common law measure of damages.”

- 5.31. In the present case, I am satisfied that the complainant was abruptly and unwarrantedly dismissed from

employment. Therefore, considering the circumstances of this case, I have decided to depart from awarding the complainant damages equivalent to the notice period. Consequently, I award the complainant damages equivalent to nine months full pay.

- 5.32. According to the complainant's pay slips produced before court, his full pay was K1,132.00 per month. That amount multiplied by nine months gives a total of K10,188.00. Therefore, I enter judgment in favour of the complainant in the sum of K10,188.00 being damages for wrongful and unfair dismissal.
- 5.33. I now turn to the second issue for determination, which is whether the complainant used to be underpaid his salaries.
- 5.34. Before, determining this issue, I wish first to determine the preliminary issue raised by the respondent that the complainant was dismissed on 30th June, 2018 and not in October, 2019 as claimed. It was the respondent's evidence that due to his persistent pleas after his dismissal, the complainant was employed as a Domestic Servant on 8th October, 2018 by RW2 in his personal capacity and not by the respondent.

- 5.35. I have considered all the evidence before me. I note that on 30th June, 2018, the complainant signed the letter termed '**SEPARATION BENEFITS**' exhibited at page 4 of the respondent's bundle of documents. In the said letter, the complainant acknowledged receipt of the sum of K862.00 as his final payment.
- 5.36. Further, the complainant did not dispute having been employed as a Domestic servant by RW2, in his personal capacity. Therefore, I find that the complainant's employment relation with the respondent terminated on 30th June, 2018. As such, the complainant is not entitled to any claims against the respondent beyond that date.
- 5.37. I now come back to the question for determination. It is not in dispute that the complainant's salary was K1,132.00 as per his contract of employment, 'KC1'. The complainant alleged that he was getting that salary until March, 2016. That from April, 2016 to January, 2018 the respondent reduced his salary to K500.00 per month without any explanation. That in January, the respondent further reduced his salary to K200.00 up to October, 2019. That when he asked why his salary was reduced he was told that he was not employed on permanent basis but he was a casual employee and he was supposed to be getting paid a daily salary as opposed to a monthly salary.

- 5.38. On the other hand, the respondent argued that the complainant used to request for salary advances every week and would receive multiple salary advances every month which used to be recorded in the advance book as per company procedure. That according to the company procedure, only one or two salary advances were allowed but the complainant used to get multiple advances per week. That the complainant was warned verbally by RW1 and RW2 over the same but despite the verbal warnings, the complainant continued getting the salary advances. That that situation led to his salary being less in net after deduction of the salary advances. That the complainant knew why he was getting the amount of the salaries he was getting and that was why he did not complain during his employment.
- 5.39. I have considered the parties' arguments in support of their respective claims.
- 5.40. During cross-examination, the complainant admitted that the pay slip exhibited at page 1 of the respondent's notice to produce was his salary for the month of May, 2018 and it showed a gross salary of K1,132.00. He also admitted that the first pay slip exhibited at page 2 of the said notice to produce was for the month of May, 2017 and it showed

a gross pay of K1,132.00 while the second pay slip was for the month of June, 2017 and it also showed a gross salary of K1,132.00. The foregoing evidence clearly shows that the respondent had not reduced the complainant's salary to K500.00 in April, 2016 and later to K200.00 in January, 2018. Had that been the case, the complainant would not have received full salaries in the above stated months.

- 5.41. Further, I have noted from the document at page 11 of the respondent's bundle of documents, which the respondent said was an extract from the book where they used to record salary advances, that the complainant had signed for several cash advances. This supports the respondent's evidence that the complainant used to get several salary advances which would lead to him getting less pay upon deducting the salary advances.
- 5.42. It is noteworthy that it was the duty of the complainant to adduce cogent evidence in support of his claim or allegation. He had failed to discharge the said burden of proof.
- 5.43. On the above evidence, I find that the complainant has not proved, on a balance of probabilities, his claim for payment of salary arrears by virtue of salary

underpayments. Therefore, his claim cannot stand and is accordingly dismissed.

- 5.44. I now turn to the third issue, which is whether the complainant is entitled to the payment for accrued leave days; payment of one month's salary in lieu of notice; and to the payment of a severance package.
- 5.45. Regarding his claim for the payment for accrued leave days, the complainant stated that according to the complainant's letter of appointment, 'KC1', he was entitled to two leave days per month. That, however, he never went on leave during the entire period he worked for the respondent. That when the respondent terminated his contract, he was paid K850.00 for accrued leave days. However, he was not sure if that was what was due to him for accrued leave days.
- 5.46. The respondent, on the other hand, argued that the complainant was paid for all his leave days and he acknowledged receiving the payment as his final payment by signing the letter exhibited at page 4 of the respondent's bundle of documents.
- 5.47. As alluded to above, the complainant had worked for the respondent from 2nd December, 2015 to 30th June, 2018.

This gives a total of 31 months. According to his letter of appointment, 'KC1', he was entitled to two leave days per month. This means that the complainant had accrued a total of 62 leave days. There is undisputed evidence on record that the complainant had never gone on leave during the entire period that he had worked for the respondent. Therefore, using the formular provided for in the Employment Code Act No. 3 of 2019, the amount of K1,132.00, full pay multiplied by 62 accrued leave days divided by 26 equals to K2,699.38. According to the letter dated 30th June, 2018 exhibited at page 4 of the respondent's bundle of documents, the respondent only paid the complainant the sum of K862.00 for 32 accrued leave days. This means that the complainant was underpaid by the sum of K1,837.38. In this regard, I enter judgment in favour of the complainant in the sum of K1,837.38 being payment for the balance of accrued leave days.

- 5.48. With regard to the complainant's claims for one month's pay in lieu of notice and for the payment of severance benefits, I find that the complainant is not entitled to the payment of one month's salary in lieu of notice and severance benefits since his mode of separation with the respondent was a dismissal and not a termination.

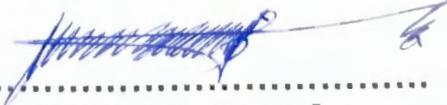
Therefore, these claims cannot stand and are accordingly dismissed.

5.49. In summary, the complainant has succeeded in his claims for the payment of damages for wrongful and unfair dismissal in the sum of K10,188.00 and payment for accrued leave days in the sum of K1,837.38. The total sum of K12,025.38 shall attract interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complaint to the date of the judgment and thereafter, at 10% per annum until full settlement.

5.50. I make no order for costs

5.51. Leave to appeal is granted.

Delivered at Ndola this 26th day of January, 2024


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Davies C. Mumba
HIGH COURT JUDGE