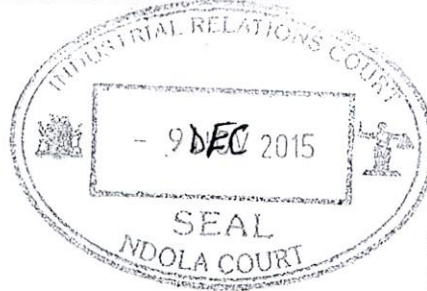


IN THE INDUSTRIAL RELATIONS COURT  
HOLDEN AT NDOLA

COMP/86/2014

BETWEEN:

ELIAS MUSONDA  
JUSTINE MUMBA  
CHRIS MWABA  
ELISHA MWIYA (Administrator of the Estate  
of Late Vernon Mwiya )



1<sup>ST</sup> COMPLAINANT  
2<sup>ND</sup> COMPLAINANT  
3<sup>RD</sup> COMPLAINANT  
4<sup>TH</sup> COMPLAINANT

AND

CARGO MANAGEMENT SERVICES LIMITED

RESPONDENT

BEFORE: HON. JUDGE Dr. W. S. MWENDA - DEPUTY CHAIRPERSON  
HON. J.M. BWALYA - MEMBER  
HON. G.M. SAMUSUNGWA - MEMBER

For the Complainants : In Person

For the Respondent : Mrs P.M. Kapaipi & Mr. D. Libati of Messrs.  
Abha Patel and Associates

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## JUDGMENT

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Cases referred to:

Khalid Mohamed v The Attorney General (1982) Z.R. 49 (SC)

Statute referred to:

The Employment Act, Chapter 268 of the Laws of Zambia

This Complaint was presented by Elias Musonda, Justine Mumba, Chris Mwaba and Elisha Mwiya (Administrator of the Estate of the late Vernon Mwiya) (collectively called "the Complainants") against Cargo Management Services Limited (hereinafter referred to as "the Respondent").

During the trial the 1<sup>st</sup> Complainant Elisha Musonda testified on behalf of all the Complainants as a representative witness except for the 3<sup>rd</sup> Complainant. We shall hereinafter refer to him as "CW1" and the 3<sup>rd</sup> Complainant as "CW2."

The Complainants filed a Notice of Complaint against the Respondent wherein they stated the ground for the complaint as non-payment of dues.

The Complainants are seeking the following relief:

- (a) One month's salary in lieu of Notice.
- (b) Redundancy Packages.
- (c) Housing allowances.
- (d) Transport allowances.
- (e) Leave days.
- (f) Salary arrears for Mr. Chris Mwaba.
- (g) Gratuity for 2012 for Mr. Chris Mwaba.

The complaint was supported by an Affidavit in Support of Notice of Complaint deposed by Elias Musonda, in which details of each Complainant were given.

In rebuttal the Respondent filed an Affidavit in Support of the Respondent's Answer and in Opposition to Notice of Complaint wherein it averred among others, that owing to the period that had elapsed since the Complainants' claims allegedly took place, the records pertaining to the same had been difficult to obtain. The Respondent further gave the employment history of each Complainant and the monies that they received.

The matter was referred to mediation but the mediation attempt failed. Following the failure of the mediation, the matter proceeded to trial.

Elias Musonda and Chris Mwaba both gave evidence under oath, the former as a representative witness for himself and the other two Complainants and the latter in his own behalf.

As already indicated, Elias Musonda shall be referred to as "CW1" and Chris Mwaba as "CW2".

CW1 testified that he was employed by the Respondent as a general worker on 1 January, 2007. It was his testimony that he was told on 1 January, 2007 that he was converted to be a permanent and pensionable worker. His salary was K30 per day.

CW testified that the late Vernon Mwiya started work in 2001 as a gardener. During the course of his employment he fell ill and was given sick leave. His employment was terminated on 14 January, 2014. His salary was K1,270 per month at the time of termination. CW1 testified that



at the time he joined the Respondent Company Vernon Mwiya was a supervisor. He was their boss.

Justine Mumba started work in 2007 as a Machine Operator. His contract was terminated in January, 2014. His salary was K380,000 per month.

It was CW1's testimony that in July, 2008 while working they were given forms to sign and told that whoever did not do so would have his employment terminated.

According to CW1 they asked about the money which they had worked for and were told that they would be paid.

CW1 averred that they were not paid the money and that in 2012 he inquired as to when they would be given the money. He was told that management would sit down, agree on their dues and pay them.

It was CW1's further testimony that in 2014 they were surprised to receive letters informing them that their employment was terminated. They were told to collect their salaries for February, 2014 being one month's salary in lieu of notice.

CW1 averred that they refused to collect the money and claimed their terminal benefits. They were told to collect the one month's salary in lieu of notice while their terminal benefits were being prepared. They waited and a month elapsed. Justine Mumba then wrote to the Respondent inquiring about the money.

After receiving no response from the Respondent the Complainants decided to go to the Labour Office and the Company was summoned. The Human Resource and Operations Manager Mr. Stanley Kunda went to the Labour Office.

According to CW1, the Respondent did not dispute the facts presented at the Labour Office. They were told to go and compute the Complainants' dues after which they should go back to the Labour Office for verification. It was CW1's evidence that the Respondent did not do this and hence the Labour Office calculated the Complainants' dues. They summoned the Respondent again but they did not go to the Labour Office. The Complainants were then referred to this Court. CW1 said he was receiving K1,270 per month as salary and with allowances the total amount was K1,566 per month. The allowances comprised housing and transport allowance.

According to CW1, the late Vernon Mwiya and Justine Mumba were receiving the same salary as himself. The Complainants expected to be paid housing allowance, transport allowance as well as gratuity as terminal benefits.

During cross-examination CW1 stated that at the beginning of his employment he was a casual worker. He was referred to exhibit "EM2" in the Affidavit in Support of Notice of Complaint which was Justine Mumba's pay statement. The pay statement showed a basic pay of K1,092 and reflected transport allowance and housing allowance of K102 and K327.60, respectively. CW1 admitted making a mistake regarding the allowances Justine was getting. He disagreed with the suggestion by



learned Counsel for the Respondent that he was not the best person to give evidence on behalf of the late Vernon Mwiya. He stated that he had indicated in his examination in chief that he did not know how much Vernon Mwiya was being paid as salary when he started working.

CW1 admitted during cross-examination that he had not provided any evidence to show that he had requested for money which was due to him from the company. He denied signing for receipt of payment for leave days. He also said he had not received gratuity.

CW2 testified that he joined the Respondent in 2007 as a Data Collector on permanent and pensionable employment. It was his evidence that he worked up to July, 2008. In 2008, the Respondent brought a form saying they had introduced contracts which they were required to sign and he signed the contract.

CW2 asked about the money they had worked for before the contract. The Respondent told him that the Complainants were still working for the Company and that they would be paid their money. According to CW2, he continued working up to December, 2010 when he was laid off.

It was CW2's further testimony that again he asked for the money he had worked for from 2007 to 2010. The Respondent said they would call him by phone when they were ready.

In February, 2011 he went to enquire about his money and on 4 April, 2011 they phoned him and requested him to go back to the company to resume working.

He continued working from 2011 but was not being paid any salary. According to him, he would ask why he was not getting paid and the Respondent kept saying they would pay him.

CW2 worked for nine (09) months without getting paid. He said the year 2011 elapsed without receiving any salary. The Company started paying him again in March, 2012. He was paid for January and February, 2012 and also for the whole of 2012. At the end of 2012, CW2 went to enquire about his gratuity but continued working all the same. He said he was not paid his gratuity but only his leave days for 2012. CW2 confirmed to the Court that there was no problem in 2013 until 17 January, 2014 when he was told that his employment had come to an end.

During cross-examination CW2 said that he was laid off in December, 2010 but did not have any evidence of the lay off. When asked whether there was any evidence that he resumed work in 2011, he said he had been given a letter but he did not have it in Court.

He confirmed that he received his last salary in January, 2014. He was paid leave days in 2012 and was paid housing and transport allowances from July, 2008 to January, 2014.

This marked the close of the Complainants' case.



The Respondent called its sole witness (RW) Alessandra Valenza, the Managing Director of the Respondent Company, who testified that according to the laws of Zambia they are only required to keep financial records for a maximum of six years and thereafter dispose of the same.

RW said she only found records pertaining to the current financial period. She testified that it was not correct to say that the Complainants were not paid their dues. The Respondent had filed documents which showed that they were duly paid their terminal benefits.

Regarding the first Complainant's claim that he was not paid his final dues RW confirmed payment to Elias Musonda as per exhibit "AV2" dated 4 February, 2014, which was attached to the Affidavit in Support of Respondent's Answer and in Opposition to Notice of Complaint. According to the said exhibit, Elias Musonda signed a statement on 4 February, 2014 confirming that he had received the following payments that were due to him at the end of the contract year 2013:

1. One month's salary notice
2. Wages for days worked
3. Any leave pay owed

With regard to the claim by Justine Mumba the 2<sup>nd</sup> Complainant, that he was not paid gratuity, RW referred the Court to exhibit "AV4" in the Affidavit in Support of Respondent's Answer and in Opposition to Notice of Complaint. The said document indicated that Mr. Justine Mumba received and signed for gratuity for 2012.



RW referred the Court to exhibit "AV 5" in the Affidavit in Support of Respondent's Answer and in Opposition to Notice of Complaint to show that Chris Mwaba received payment for leave days. She said that Chris Mwaba signed to acknowledge receipt of the leave days payment.

On the claim by Elisha Mwiya (Administrator of the estate of the late Vernon Mwiya) that he did not receive gratuity, RW referred the Court to exhibit "AV7" in the Affidavit in Support of Respondent's Answer and in Opposition to Notice of Complaint which showed that gratuity was received and signed for next to the name of the late Vernon Mwiya.

RW testified that it was incorrect to say that the Complainants did not receive transport and housing allowances because she had evidence to show that they were paid, namely exhibits "AV1", "AV3", "AV6" and "AV8" filed as part of the exhibits in support of the Answer.

During cross-examination by Elias Musonda it was put to RW that the Complainants were claiming monies owed to them for the period 2007 to July, 2008. RW did not provide evidence to rebut the claim but testified that she could confirm that she paid everybody. Further, she said that if there had been a problem they (Complainants) should have brought it up during their employment.

During further cross-examination, Chris Mwaba asked RW if the Respondent had given him his benefits, to which she replied that she gave benefits to all her employees. However, she admitted that she did not have the records at that moment.

Chris Mwaba further asked RW whether the Respondent gave him gratuity in 2012 to which RW responded that she did not have the records. RW was further asked why Chris Mwaba was not paid his salary from April, 2011 to December 2011. She responded that she had over 400 employees so she did not know why Chris Mwaba was not paid.

In re-examination RW was asked why there were no records. She said that the period of the claims date back to 2001 and after 6 years they dispose off their records. Further as far as she knew, she always paid her people. She stated that during the tenure of the Complainants in employment, they had the opportunity to bring up any discrepancy through their supervisors or through the Human Resource Department.

This marked the close of the Respondent's case.

At the close of the case, both parties undertook to file written submissions. They did so and we are grateful to them. We will refer to the submissions as need be.

The undisputed facts of this case as they emerge from the record are as follows:-

- (a) It is common cause that the Complainants were in the employ of the Respondent with effect from various dates and in different positions.
- (b) The Complainants were employed as permanent and pensionable employees.
- (c) Later the Complainants were put on contract.
- (d) They were paid housing allowances, transport allowances and leave days.



(e) Apart from Chris Mwaba, the Complainants were paid gratuity for 2012.

(f) The Complainants were also paid one month's salary in lieu of notice.

The question for determination by this Court is whether the Complainants were not paid their dues as claimed and are therefore, entitled to the relief being sought.

It is clear from the evidence before this Court, both oral and written, that with the exception of Chris Bwalya the Complainants were paid their gratuity. It is our view that the Complainants did not qualify for redundancy packages as they had not been declared redundant as provided for in section 26B of the Employment Act, Chapter 268 of the Laws of Zambia. Three of the Complainants were instead paid gratuity which the records before the Court have confirmed.

Concerning Chris Mwaba's claim for salary arrears, the Respondent has not adduced any evidence to rebut the claim that he was not paid his salary for the period April, 2011 to December, 2011. During cross-examination RW told the Court that she did not know why the Complainant was not paid his salary for that period. To us this was an admission on the part of the Respondent that Chris Mwaba was not paid his salary for the period April, 2011 to December, 2011. With regards to gratuity, the Respondent was able to adduce evidence to show that the 1<sup>st</sup>, 2<sup>nd</sup> and the 4<sup>th</sup> Complainants were paid their gratuity for 2012 but failed to provide proof that the 3<sup>rd</sup> Complainant Chris Mwaba was also paid the same.

Learned Counsel for the Respondent has cited the case of **Khalid Mohamed v The Attorney General (1)** wherein the Supreme Court held among other things that:

*A Plaintiff cannot automatically succeed whenever a defence has failed, he must prove his case.*

In the said case the Supreme Court stated that a plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment.

It is our considered view that in the case in casu, Mr. Mwaba will not automatically succeed because of the failure by the Respondent to provide evidence that it had paid him gratuity and salary arrears. We are inclined to find for the 3<sup>rd</sup> Complainant on this claim not because of the failure on the part of the Respondent's defence but because his claim has not been rebutted by the Respondent in the same manner that the Respondent has rebutted the other Complainants' evidence.

Since the Respondent adduced evidence to prove that the other Complainants had been paid, it was incumbent on the Respondent to rebut the 3<sup>rd</sup> Complainant's claim by proving that he was also paid his salary arrears and gratuity especially in view of the fact that the period of the claims in respect of Mr. Mwaba, are for 2011 and 2012 - a period which the Respondents' witness confirmed she had records for.

In view of the foregoing, we find that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Complainants have failed to prove their case on a balance of probabilities against the Respondent and we accordingly dismiss it.



We however, find that the 3<sup>rd</sup> Complainant Christopher Mwaba, has proved his case on a balance of probabilities. We enter judgment in his favour and order as follows:


- (a) he shall be paid salary arrears for the period April, 2011 to December, 2011.
- (b) he shall be paid gratuity for 2012.

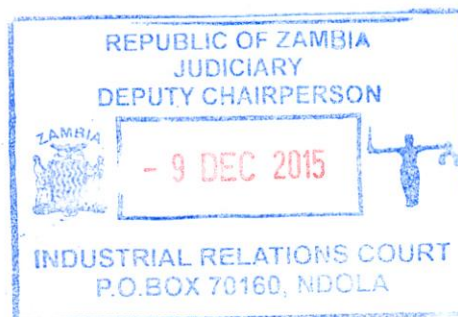
The above awards shall attract interest at the current bank lending rate from the date of the complaint to the date of payment. In addition, costs are awarded to the 3<sup>rd</sup> Complainant to be taxed in default of agreement.

Informed of Right of Appeal to the Supreme Court within thirty (30) days of the date hereof.

Delivered at Ndola the 9<sup>th</sup> day of December, 2015.

  
Judge W.S. Mwenda (Dr)  
**DEPUTY CHAIRPERSON**

  
J.M. Bwalya  
MEMBER



  
G.M. Samusungwa  
MEMBER

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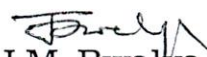
(b) he shall be paid gratuity for 2012.

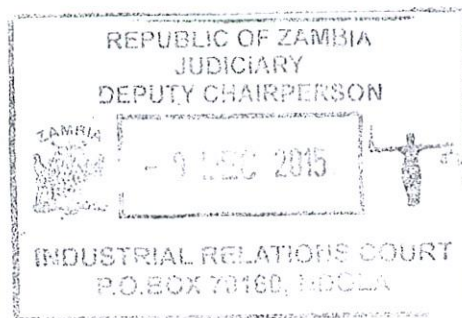
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**DEPUTY CHAIRPERSON**

  
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**MEMBER**



  
G.M. Samusungwa  
**MEMBER**