

IN THE INDUSTRIAL RELATIONS COURT  
HOLDEN AT NDOLA

COMP/121/2015

**BETWEEN:**

DIANE KAUSENI

AND

MR. C. SHANKAR



COMPLAINANT

RESPONDENT

BEFORE: HON. JUDGE DERRICK MULENGA - DEPUTY CHAIRMAN  
HON. J.M. BWALYA - MEMBER  
HON. G.M. SAMUSUNGWA - MEMBER

For the Complainant: In Person

For the Respondent : In Person

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## JUDGMENT

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Case referred to:

1. Khalid Mohamed v Attorney General (1982) ZR 49

Statute referred to:

1. Section 11 of Minimum Wages and Conditions of Employment (Domestic Workers) Order 2011, otherwise Statutory Instrument No. 3 of 2011,

The Complainant lodged a notice of complaint on 30<sup>th</sup> December, 2015 with an affidavit in support of the said notice of complaint, seeking the following relief:

- (a) Damages for unlawful termination of employment;
- (b) Damages for Loss of employment;
- (c) Payment of terminal benefits;
- (d) Payment of lunch and housing allowances
- (e) Payment of leave underpayment
- (f) Payment of salaries from November 2014 to October, 2015.

The Complainant deposed through her affidavit in support that she was employed by the Respondent as a House Maid on 9<sup>th</sup> September, 2012 and was dismissed in October, 2015. That when she started work she serviced only one household but in November, 2014 she also serviced two households as the Respondent got married and moved into another house.

The Complainant deposed further that despite her servicing of two households, the Respondent paid her as though she only serviced one household, also that she was made to work awkward hours and knocked off at 21.00 hours and after but was never paid any overtime.

The Complainant stated that she never went on leave the entire period she worked for the Respondent. That whereas she never received any terminal benefits, she only received an amount of K1, 070.00 from the

Respondent at the Labour Office due to pressure upon loss of employment.

The Respondent filed an Answer and affidavit in support dated 21<sup>st</sup> January, 2016. The Respondent denied ever dismissing the Complainant from employment but that she only stopped reporting for work on her own and that she was paid all her dues at the Labour Office where the matter was closed.

The Respondent via his aforesaid affidavit in support deposed that the Complainant left employment on her own and when he was summoned at the Labour Office he paid the Complainant monies as per documents marked "CS1" and "CS2".

Perusal of "CS1" shows that the same is a letter under the hand of the Labour Officer, dated 15<sup>th</sup> December, 2015, summoning the Respondent to the Labour Office. However, of importance is the entry on the said letter to the effect that the Complainant was paid K1,020.00 as final payment and that there are no further claims from the former employer.

Document "CS2" is a statement of payment of dues on the letter head of the Ministry of Labour and Social Security, Labour Department, Ndola Office.



The Statement of payment otherwise document marked “CS2” shows that on 16<sup>th</sup> December, 2015 the Complainant herein received the sum of K1,020.00 from the Respondent in full as her notice, leave pay and salary for the period she worked, in the right bottom corner of the document there is a breakdown as follows:

Days worked	-	K170.00
Leave Pay	-	K500.00
Notice Pay	-	<u>K400.00</u>
		K1, 070.00
Less		<u>50.00</u>
		<u>K1, 020.00</u>

The document “CS2” was duly signed by the Complainant as recipient and the Respondent as the employer. There is also in the body of the document a statement which in our view is attributed to the Complainant to the effect that her signature is evidence that there are no further claims of dues from the employer to be payable to her. We shall address this issued later in our judgment herein.

The Complainant was her own witness and gave viva voce evidence on 17<sup>th</sup> March, 2016. She told the Court that she started working for the Respondent as a house maid in September, 2012 and her wages were K350.00 per month from September, 2012 to 2013. That she started getting an amount of K500.00 from 2014 to November, 2015 when she was dismissed from employment.

According to the Complainant, in November, 2015 when she reported for work, she was informed by the Respondent that there was no longer work for her, further that when she asked the Respondent whether or not she had committed any offence, the answer was in the negative.

The Complainant also told the Court that when she was employed she serviced one household but later from 2014 to November, 2015 she was made by the Respondent to also service another household of bachelors and that is the time her pay was raised from K350.00 to K500.00 per month.

The Complainant averred that she was not paid lunch and housing allowances, neither for leave days although she did not proceed on leave during the period of her employment with the Respondent. The Complainant wanted to be paid for loss of employment as she did not leave employment on her own but was terminated by the Respondent for no reasonable cause.

In cross-examination by the Respondent, the Complainant told the Court that she was not paid for the leave days but that she used to receive bonus at the end of the year.

In reference to exhibit "CS1" and "CS2" in the Respondent's Affidavit in support of Answer, the Complainant admitted having received the amount of K1, 020.00 the same broken down as:

Days worked - K170.00



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Leave Pay	-	K500.00
Notice Pay	-	<u>K400.00</u>
		K, 070.00
Less	-	<u>K 50.00</u>
		<u>K1, 020.00</u>

The sum of money alluded to herein above was paid to the Complainant at the office of the Provincial Labour Officer at Ndola where she had reported the matter.

The Respondent also gave viva voce testimony. He told the Court that he did not dismiss the Complainant from employment but that she complained against him first at Workers Compensation and that he went there and explained his position. According to Respondent the complainant worked for him on part-time basis as she reported for work at 06.30 hours or 07.00 hours clean the house, then she would remove the clothes for washing. After washing the clothes, the Complainant would knock off only to return at about 17.00 hours to remove the clothes from the line.

The Respondent contended that the Complainant did not work full time as there was no person who remained at home from 09.00 hours to 17.00 hours since every person went for work. The Respondent further told the Court that he paid the Complainant her leave dues every December.

As regards the issue of dismissal of the Complainant from employment, the Respondent told the Court that he never dismissed her and it was a matter which was resolved at Workers Compensation. However, whilst the Complainant was still in employment she went and complained against the Respondent to the Labour Officer at Ndola where she expressed unwillingness to continue working for the Respondent. However, at Labour Officer's Office it was agreed that the matter be resolved by the Respondent paying her as stated in exhibit "CS2" in the Respondent's affidavit in support of Notice of Answer.

The Respondent admitted that the Complainant serviced two households. She serviced the Bachelor's house from November 2012 to 2014 and was paid K350.00 per month. Then she serviced two houses from November, 2014 to December, 2015 and was paid K500.00 per month. However, this was on part time basis as occupants of both houses left for work early in the morning.

In due course, according to Respondent, a new worker was retained to service the bachelor's house on full time basis, she cleaned and cooked and it was for that very reason the Respondent retained the Complainant to work part-time at his house and paid her K350.00. However, she only worked for three months, she went and complained against him to the Labour Officer.

We shall address the other pieces of evidence material to the complaint as we address the Complainant's relief sought.



It is clear that we are called upon to determine whether the Complainant herein is entitled to relief sought.

We address the relief sought as follows

1. Damages for unlawful termination/damages for loss of employment.

The Complainant seeks the above relief as she believes that her services with the Respondent were unlawfully terminated. On the other hand the Respondent contends that the Complainant was not dismissed from employment, in fact at time she complained against him to the Labour Office she was still in employment.

We have critically analysed the viva voce evidence of both parties and have made a finding that at the time the Complainant made a complaint against the Respondent to the Workers Compensation and Labour Office, she was still working for the Respondent, except that as regards one household that is the bachelor's house, a new maid was retained. It is clear from the testimony of both parties that the Complainant was no longer willing to continue working for the Respondent, especially the fact that the Respondent had employed another maid who was retained on full time basis, therefore his argument that he could not employ the Complainant on full time basis for reason aforesaid flies in his own teeth.



The Case in casu falls within the provision of **Section 11 of Minimum Wages and Conditions of Employment (Domestic Workers) Order 2011**, otherwise **Statutory Instrument No. 3 of 2011**, the same provides:

*Where a domestic worker's contract is terminated by any reason other than by resignation or summary dismissal, the domestic worker shall be entitled to separation benefits of not less than one month's basic pay for every two complete year of service and any other dues.*

We have said that the facts in the case in casu falls within the four corners of section 11 of Minimum Wages and Conditions of Employment (Domestic Workers) Order, 2011 because whereas the Respondent denies that he dismissed the Complainant, his own conduct shows that he in fact terminated her services as he employed a new maid on full time, and reduced the Complainant's pay from K500.00 per month to K350.00.

Having made a finding and or determining that the Respondent terminated the Complainant's employment for a reason other than her own resignation or being dismissed for any wrong doing, the Complainant is entitled to one month basic pay for every two completed years of service. We find for the Complainant as provided for under the said Law and for avoidance of doubt we ward the complainant one month basic pay (K500.00) for the period of two years completed, which she served the Respondent, the same being September 2012 to October, 2015.

## 2. Payment of Lunch and Housing Allowances

We have perused the viva voce evidence adduced at the hearing of the matter and we have not found any evidence to the effect that the parties herein had agreed on the issues of Lunch and housing allowances. In the absence of the law making it mandatory that every employer should pay a domestic worker lunch and housing allowances only an agreement to that effect may entitle a domestic worker to make such a claim successfully.

We are also mindful of the hold in the case **Khalid Mohamed v Attorney General (1)** 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. I would not accept proposition that even if the Plaintiff's case has collapsed of its own inanition or for some other reasons or other judgment should nevertheless, be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not need a defence.*

Having the holding of the Supreme Court in the case **Khalid** in mind, we have come to a conclusion that the Complainant herein failed to prove her claim for lunch and housing allowances on the balance of probabilities, therefore, this claim fails and is accordingly dismissed.



3. Payment of leave underpayment, salaries from November 2014 to October 2015 and payment of Notice under payment

We have critically looked at the evidence before us and it is clear from the document before us that when the Complainant took the matter to the Labour Officer at Ndola, she received some payments from the Respondent, the same are narrated on exhibit "CS2" in the Respondent's affidavit in support. The Complainant received K170.00 for the days worked, Leave Pay of K500.00 and Notice Pay of K400.00.

We can only assume that the amount of K170.00 was paid to the Complainant for the days worked in the month when she stopped work and clearly her leave pay was K500.00 for the days accumulated in the year ending 2015. We so assume because the Complainant did not lead any evidence as to how many days she worked in the month when she ceased to be an employee of the Respondent. Equally, the Complainant did not adduce any evidence to prove to Court that she had accumulated more days than for that she was paid. We therefore find that the Complainant has failed to prove her claims as regards payment of salaries for the period November, 2014 to December, 2015 and payment for under payment of Leave dues; these claims are accordingly dismissed.

However, as regard Notice Pay we are at a loss as to why the Respondent decided to pay the Complainant K400.00 when it is an agreed position that her basic pay was K500.00. Since Notice Pay is

premised on the basic pay, we are satisfied that the Complainant is entitled to the difference the same being K100.00. We accordingly find for the Complainant in the same amount.

As regards the contention by the Respondent that the Complainant acknowledged the payment made to her at the Labour Office as final payment and that there are no further claims (to be made by the Complainant) from the employer. The words in parenthesis are our own and for emphasis only.

We wish to categorically state here that such acknowledgment is not a bar to a party to commence an action against an employer.

It should be appreciated that this is a Court of substantial justice and in accordance with section 85 (5) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, it is not bound by the rules of evidence in civil and criminal proceedings but the main object is to do substantial Justice between the parties. We opine also to state that undue legal technicalities should not be used to disadvantage a party to the proceedings.

It is for the said reason that we are not swayed by the said acknowledgment of payment to mean that the Complainant was excluded from lodging and prosecute a complaint against the Respondent.



In summary, judgment is entered in favour of the Complainant regarding termination of her employment for reasons other than her own resignation or summary dismissal for anything wrong doing on her part and we award her K500.00 the same being one month pay per two (2) years completed service and K100.00 the same being underpayment of Notice Pay. The judgment sum of Six Hundred Kwacha (K600.00) shall attract interest at the current bank lending rate from the date of complaint to the date of judgment and thereafter interest shall accrue at 6% per annum until full settlement.

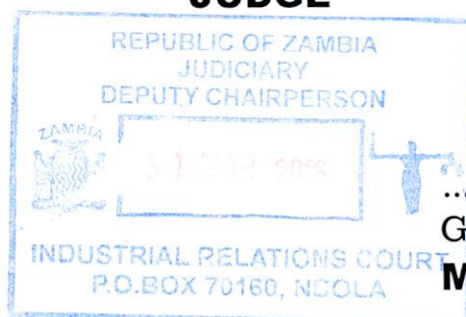
Costs are awarded to the Complainant, to be taxed in default of agreement.

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

Dated at Ndola this **31<sup>st</sup>** day of **March, 2016**.

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D. Mulenga  
**JUDGE**

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J.M. BWALYA  
**MEMBER**



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G.M. Samusungwa  
**MEMBER**