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**IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA**

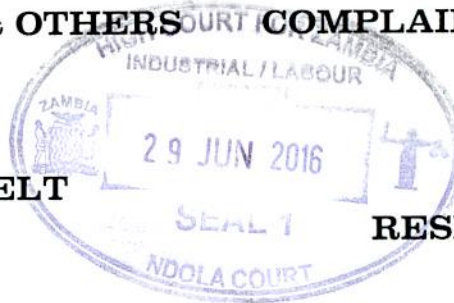
COMP/51/2015

BETWEEN:

HELLEN KALUBA SIWALE & OTHERS COMPLAINANTS

AND

**COUNCIL OF THE COPPERBELT
UNIVERSITY**



RESPONDENTS

BEFORE:

Hon. E.L. Musona - Judge

MEMBERS:

**Hon. W.M. Siame
Hon. J. Hasson**

For the Complainants : Mr. C. Tafeni of Messrs Suba, Tafeni and Associates

For the Respondents : Mr. S.K. Mumba in-house Counsel for the Respondents

JUDGMENT

Date : 29th June, 2016

Cases referred to:

- 1. Wilson Masauso Zulu v Avondale Housing Project (1982) ZR**

Statutes referred to:

- 1. Section 26B of Act No. 15 of 1997**

2. Section 13(1) of the Employment Act, Chapter 268 of the Laws of the Republic of Zambia.

This Complaint was filed by F/Hellen Kaluba Siwale and Others. The Complaint was filed against the Council of the Copperbelt University. We shall, therefore, refer to F/Hellen Kaluba Siwale and Others as the Complainants and to the Council of the Copperbelt University as the Respondents which is what the parties to this action actually were.

The Complainants' claim is for the following relief:

- (a) a declaration that the Complainants are entitled to be paid by the Respondents gratuity, redundancy and repatriation benefits;
- (b) gratuity payments;
- (c) redundancy benefits;
- (d) repatriation allowances;
- (e) damages;
- (f) such other order the court may consider appropriate;
- (g) interest on the sums found due;
- (h) costs.

The duty for this court is to ascertain whether or not the Complainants have proved their claims.

The Complainants called two (2) witnesses. We shall refer to these witnesses as CW1 and CW2.

CW1 was M/Nicholas Banda. The evidence for CW1 was that he was employed as a General Worker by the Respondents on 2nd February, 2010 on a three (3) year contract. He served under many contracts after that.

In December 2014 the Complainant was shocked when he was told that his contract would not be renewed. He was told that his contract would not be renewed because the Respondents had no money. According to CW1 himself, his contract used to be renewed and that, this is what made his employment with the Respondents to be of a continuous nature. CW1 stated that, this is what happened to other Complainants.

CW2 was F/Hellen Kaluba. CW2 elected to rely on her Affidavit in Support of Notice of Complaint and consequently gave no viva voce evidence.

The Respondents called two (2) witnesses. We shall refer to these witnesses as RW1 and RW2 respectively.

RW1 was M/Jairos Ngulube who is Special Assistant to the Vice Chancellor of the Respondents. RW1 told this court that at the time when this complaint arose he was Deputy Registrar for the Respondents whose duty, inter alia, was recruitment.

The evidence for RW1 was that each of the Complainants worked for the Respondents on one (1) year contracts. He stated that none of

them qualified for payment of gratuity. RW1 emphasized that for employees to qualify for gratuity they must work for a minimum of two (2) years. All the Complainants herein worked on renewable one (1) year contracts. RW1 further added that the contracts for all the Complainants had no provision for gratuity payment because they were short term contracts of only one (1) year. The contracts also did not have a provision for repatriation.

RW2 was F/Tamara Simwinga Nyirenda. The evidence for RW2 was that she worked as Accountant for the Respondents. She stated that gratuity appears on the payslips for employees who were on one (1) year contract when it should not be. RW2 added that the appearance of gratuity on the payslips for employees who were on short term contracts was a system error. Copper net who are the system providers were called to rectify the error and they did but it keeps reappearing. Having considered the evidence for both parties we must now consider the relief sought.

- (a) A declaration that the Complainants are entitled to be paid by the Respondents gratuity, redundancy and repatriation benefits

The items upon which this court is being called to make a declaration are payments for gratuity, redundancy and repatriation. The Notice of Complaint shows that these items have also been pleaded individually. It follows, therefore, that the declaration sought can only be pronounced after the court has considered the individual items upon which the declaration is sought. We propose to do just that.

(b) Gratuity payments

The basis of the Complainants' claim for the payment of gratuity is that gratuity was shown on some of the Complainants' payslips. We have seen on some of the Complainants' payslips gratuity is shown as 50%, on some is shown the actual amounts but no gratuity is shown on payslips for some of the Complainants.

We have seen the contracts of employment which were exhibited by the Complainants. These were exhibited as "HKS1" and "HKS2". These were one year short term contracts. We have seen no clause providing for payment of gratuity in the contracts of employment. We have seen no document providing for payment of gratuity.

The Respondents' evidence was that they out-sourced the payroll system and that it was a system error that gratuity was shown on the payslips of some of the Complainants. The Respondents further added that as the contracts of employment show, all the Complainants were on one year short term contracts. The Respondents argued that they do not provide gratuity to employees on short term contracts as all the Complainants were, and that, that is why their contracts of employment did not have a provision for gratuity.

On those basis we have found that the claim for payment of gratuity has not been proved. We, therefore, dismiss this claim.

(c) Payment for redundancy benefits.

The law on redundancy is clear. The law on redundancy is contained in Section 26B of Act No. 15 of 1997. However, this S. 26B of Act No. 15 of 1997 only applies to oral contracts. This means that this section does not apply to the within Complainants because none of them has shown that they were on oral contracts. The witnesses who testified for the Complainants alluded to written contracts.

However, the practice of the courts is to order redundancy payment if the employee has exited employment because the job for which he was employed has finished and there is no alternative job for him, or the organization which employed him has wound up or has scaled down on operations. The Complainants have not proved that they were redundant or that they exited employment under circumstances which amount to redundancy. What we have seen is that all the Complainants were on one year short term contracts of employment. They all worked the full life of their contracts. When the contracts expired they were not renewed. We have already explained what amounts to redundancy. Non-renewal of a contract of employment does not amount to redundancy.

On those basis, the claim for payment of redundancy fails.

(d) Repatriation allowances

The law on repatriation is found in S. 13(1) of the Employment Act, Chapter 268 of the Laws of the Republic of Zambia. The law is that when an employee has been brought for a place within Zambia to a place of employment by the employer, the employer shall pay expenses of repatriating the employee to the place from which he was brought.

The Complainants showed that they were all employed by the Respondents. The Respondents are based in Kitwe. None of the Complainants showed that they were employed from somewhere within Zambia and then brought to the place of employment in Kitwe. The evidence available is that they were all recruited from Kitwe and all of them worked in Kitwe. Having been recruited from Kitwe, there is nowhere to be repatriated to.

This claim, therefore, fails.

(e) Damages

We have looked at all the paragraphs of the Affidavit in Support of Notice of Complaint and have seen no paragraph relating to the claim for the payment of damages.

We have looked at the Complainants' viva voce evidence and have seen nowhere where the Complainants' witnesses alluded to the claim for damages. Put simply, the Complainants' witnesses

did not give any evidence in support of the claim for damages. In the absence of the witnesses' evidence to support this claim for payment of damages the court has been left in a dilemma. The dilemma is that the court does not know what the Complainants suffered for which they should be awarded the damages claimed. A Complainant who sues for payment of damages must state in what respect the damages sought are for, and must prove that claim for payment of damages.

We have looked at the case of **Wilson Masauso Zulu v Avondale Housing Project (1)** where the Supreme Court stated that a Plaintiff who does not prove his case cannot be entitled to judgment whatever may be said of the opponents' case. We have been well guided. The Complainants have failed to prove their claim for damages. The claim for payment of damages, therefore, fails.

(f) Such other order the court may consider appropriate

We have seen no other order to consider appropriate in the circumstances of this case.

The net result is that the whole complaint has failed and we dismiss it in its totality.

We shall not order any costs.

Leave to appeal to the Supreme Court within 30 days from today is granted.

Delivered and signed at Ndola this the 29th June, 2016.



E.L. Musona
JUDGE



Hon. W.M. Siame
MEMBER



Hon. J. Hasson
MEMBER