SINGUMBE KEITH MUTUPO AND B.P. ZAMBIA LIMITED

SUPREME COURT
SAKALA, A.G.
1ST AUGUST 2000 AND 24TH NOVEMBER, 2000
(S.C.Z. APPEAL NO. 13/2000)

Flynote
Employment Law - Reduction in Salary without employee's consent -Employee deemed to be declared redundant or an early retirement from that date.

Headnote
The respondent had reversed a general salary increase, which resulted in the appellants salary being reduced to the level prior to the increase. The appellant opted to apply for early retirement and the respondent offered him a retirement package which was based on his salary prior to the increase. The appellant brought an action against the respondent seeking a declaration that he was entitled to the package calculated on his increased salary. He referred to the Kabwe V. B.P. case as his authority. The court dismissed his claim and attempted to distinguish this matter from the Kabwe case.

Held:
(1) This case was on all fours with the Kabwe V. B.P. case.
(2) If an employer varies a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service provide for such payment.
(3) If the conditions of service provide for early retirement and not redundancy then the employee should be deemed to be on early retirement.
(4) The appellants contract of employment was therefore terminated on the date his salary was decreased and his benefits ought to have been calculated on the increased salary applicable to him then.

Cases referred to:
1. Kabwe v B.P. (Z) Ltd. (1995 - 1997) Z.R. 218.
2. Marriot v Oxford and District Co-operative Society Ltd. (1969) 3 ALL E.R. 1126.

For the Appellant, W. Mubanga, Permanent Chambers.
For the Respondent, A. Shonga, Shamwana & Co.

Judgment
SAKALA, A.G. D.C.J, delivered the judgment of the court.

This is an appeal against a judgment of the High Court dismissing the appellant's claims: for arrears of salary increments, from 1st July, 1994 to 31st August, 1994, with interest on the said arrears at the rate of 120 percent from August 1994 until payment, a declaration that the plaintiff's terminal benefits be calculated as per statutory instrument No. 99 of 1994 and on the revised salary, and a declaration that the plaintiff buys his personal-to-holder vehicle in terms of clause 2 of a letter dated 3rd June 1993 and for damages for breach of contract.

The facts of the case are that the appellant was employed by the respondent from 1st December to 1981 to 30th August, 1994. During this period, he worked in various capacities until he reached the position of Senior Human Resources Manager, the post he held until his early retirement. He served under Management Team Conditions of Service dated 1st April 1993. In 1994, there was a general salary increase for all employees of the respondent. By a letter dated 13th May 1994, the respondent's Managing Director advised the appellant of the increase of his annual basic salary to K35,437,500 million with effect from 1st April 1994. The revised increased salary was paid for the months of April and May but on 9th June, 1994, the increment was reversed. On 26th August, 1994, the appellant opted to go on early retirement and to accept early retirement package discussed with the Managing Director that included the purchase of a Patrol Nissan Vehicle. The appellant's request was accepted on the same day. The terminal benefits were then worked out on the basis of the old salary and was sold his personal-to-holder car not in terms of the Conditions of Service. This displeased the appellant. He then took out a writ of summons seeking various claims and declarations. He lost his case in the High Court, hence this appeal.

There is no serious dispute that the facts of this case are on all fours with the facts in the case of *Kabwe -Vs- B.P. (Z) Ltd. (1)* in which, following the *Marriot case (2)* we made several holdings, among them, that the fact that the appellant continued working after his salary was reduced cannot be said that he accepted the new conditions and that the contract of employment between the parties terminated on 9th June 1994, when the respondent reduced the appellant's salary without his consent.

In a 59 paged judgment, the learned trial High Court Commissioner considered the oral and documentary evidence. He cited at great length numerous passages from this court's judgment in the case of *Kabwe (1).* But at great pains the learned Commissioner attempted to distinguish the *Kabwe case (1)* while acknowledging that the decision was binding and that he could only depart from it if the facts were different. According to the learning High Court Commissioner, one of the facts in the present case distinguishing the *Kabwe case (1)* was that a document of computation of Mr. Lishomwa's benefits was not produced in the *Kabwe case (1)* yet Mr. Lishomwa gave oral evidence in the *Kabwe* case (1) which was not the position in the present case.

On the basis of the computation sheet of Mr. Lishomwa's benefits, who was not called as a witness, the learned Commissioner accepted the argument that Mr, Lishomwa was paid his terminal benefits on the basis of the reduced salary. The court also found as a fact that the appellant in the instant case consented through discussions he had with the Managing Director to have his terminal benefits computed on the basis of his old or reduced salary. The court also found that the appellant had used the Nissan Patrol vehicle for only one day which was not the case in the *Kabwe* case**.** The court also found that the *B.P. Africa Allowance and Calendar Special Allowance* were not paid on a pro rata basis.

Finally, the learned trial High Court Commissioner dismissed all the claims of the appellant with costs. Both learned counsel, filed detailed heads of argument based on seven grounds namely; that the learned trial High Court Commissioner erred in both law and fact when he found that the appellant accepted and consented to have his terminal benefits or separation package computed on the basis of his reduced or old salary; that the court misdirected itself when it found that Mr. Lishomwa's terminal benefits were computed on the basis of a reduced salary; that the learned trial Commissioner erred in law and fact when he held that the appellant had the use of the Nissan Patrol vehicle, Registration No. AAL 9572 for one day only and therefore

not entitled to purchase the same at Book Value; that the court misdirected itself when it held *that B.P. Africa and Calendar Special Allowances* were never paid on a pro rata basis and therefore that the appellant was not entitled to the same; that the learned Commissioner erred in both law and fact when held that the appellant was estopped from denying the existence of a separation package agreement made between himself and the then Managing Director; that the learned trial Commissioner erred in both law and fact that the appellant did not prove his case on the totality of the evidence; that the learned trial Commissioner misdirected himself in both law and fact when he held that the present case was distinguishable from the decision of this court in the *Kabwe* case; and that the learned trial Commissioner was biased in favour of the respondent and failed to favourably consider or refer to the evidence and submissions of the appellant. We take note that the advocates in the present appeal were the same advocates who argued the appeal in the Kabwe case. Indeed, similar submissions were also advanced in the *Kabwe case***.** We are satisfied that the oral and documentary evidence in the present case is no different from that adduced in the *Kabwe Case.*

We have examined the learned High Court Commissioner's judgment. In our view, the learned Commissioner's judgment is substantially a reproduction of the *Kabwe* judgment but with a different result. We are satisfied that the learned High Court Commissioner totally misunderstood our decision in the *Kabwe* case.

Indeed, the reproduction and use of Mr. Lishomwa's evidence as presented in the *Kabwe* case, when in the present case he did not give evidence was totally wrong and a serious misdirection. The present case is the *Kabwe* case all over again. The facts are the same.The principle in the *Kabwe* case was not one of the fact but one of law namely; what is the effect of varying a fundamental term of a contract by an employer? It was most futile, in our view, to attempt, as the learned High Court Commissioner did, to distinguishing the *Kabwe* case on the basis of the documentary evidence of computation of Mr. Lishomwa's benefits.

As was pointed out in the *Kabwe* case, the minutes of Management meetings established that Management did not agree or resolve to reverse the salary increments. The minutes of a special meeting of the Board of Directors of the respondent also established that the Board of Directors took it upon themselves to reverse the salary increments after Management had failed to make a decision. It was clear in the *Kabwe* case, as in the present case, that the Board of Directors took the decision of reversing a decision of salary increments on account of government pressure and not because the increments were without approval. Indeed, we said in the *Kabwe* case that on these facts we were unable to support the court's finding that the appellant had assented to the reduction of his salary.

We are equally unable to accept the finding that the appellant had agreed, accepted and consented to have his terminal benefits or separation package computed on the basis of his reduced salary. We agreed with the decision in the *Marriot case (2)* that if an employer varies basic conditions of employment without the consent of the employee then the employee is deemed to have been declared redundant and must get a package based on redundancy payment if the conditions do provide for such. The learned Commissioner attempted, in vain, to distinguish the *Kabwe case (1)* and so did the_respondent's advocates in his spirited submissions. The present case is indistinguishable from the *Kabwe case (1)*. The employment between the appellant and the respondent was terminated on 9th June, 1994 when the respondent reduced the appellant's salary without his consent. We rejected Mr. Shonga's submissions in the *Kabwe case (1).* We find no basis to depart from our decision in the *Kabwe case (1).* We also reject the submissions on behalf of the respondent here. We hold that the appellant's benefits ought to have been calculated on the basis of the increased salary applicable to him at the time of termination on 9th June, 1994. On this ground, this appeal must succeed.

On the question of personal-to-holder car, there was ample evidence that the appellant had not been in use of this car for a period of five years to be considered to purchase it at book value. The appellant 's claim to purchase this vehicle at book value can not therefore succeed. On the other claims, including those relating to B.P. Africa Allowances, we affirm our decision in the *Kabwe case* and allow those claims too. Apart from the claim based on the Nissan Patrol car which cannot succeed, this appeal is allowed with costs to the appellant in this court and in the court below to be taxed in default of agreement.`
