IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 102/2012
SCZ/8/172/2012

BETWEEN:

RICHARD NDASHE CHIPANAMA Appellant

And

KAWAMBWA TEA COMPANY LIMITED Respondent

CORAM: **Chibesakunda, Ag CJ, Kaoma, JS and Lengalenga, AG JS**
On 10th October, 2013 and 31st March, 2015

For the appellant : In Person

For the respondent : Mr. F. Muma – Messrs Chitabo Chiinga Advocates

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J U D G M E N T

LENGALENGA, Ag JS, delivered the Judgment of the Court.

Cases referred to:

1. **RODGERS B. MUSONDA AND OTHERS v ZAMBIA RAILWAYS LIMITED IRC/COMP No. 82 OF 2001**
2. **PETER NG'ANDWE & OTHERS v ZAMOX LIMITED & ZAMBIA PRIVATISATION AGENCY (1999) ZR 90**
3. **CHILANGA CEMENT PLC v KASOTE SINGOGO (2009) ZR 122**

4. **JOHN KASANGA & 2 OTHERS v IBRAHIM MUMBA & 2 OTHERS (2006) ZR 7**
5. **ROBERT MWEWA & OTHERS v ZAMBIA RAILWAYS LIMITED**
6. **ZAMBIA PRIVATISATION AGENCY v MATATE (1995 – 1997) ZR 157**
7. **ZAMBIA REVENUE AUTHORITY v DOROTHY MWANZA & OTHERS – SCZ JUDGMENT NO. 18 OF 2010**
8. **MIKE MUSONDA KABWE v BP (ZAMBIA) LTD (1997) SJ 42 (SC)**
9. **BUCHMAN v ATTORNEY-GENERAL (1993 - 1994) ZR 131 (SC)**
10. **NKHATA AND FOUR OTHERS v THE ATTORNEY-GENERAL (1966) ZR 124 (C.A.)**

Legislation referred to:

1. **The Employment Act 15 of 1997, Cap 268 – Section 26B(3)(b)**
2. **The Employment Act, Cap 268 of the Laws of Zambia – Section 48**
3. **The Subordinate Court Rules, Cap 28 – Order XXXV Rule 8**
4. **The Companies Act, Cap 388 of the Laws of Zambia – Section 272**
5. **Judicial (Code of Conduct) Act No. 13 of 1999 – Section 6(2)**

Other works referred to:

1. **RICH, EDWARDS AND MEAD ON UNFAIR DISMISSAL, 8TH EDITION at pages 245 – 246, & 255**

When this appeal was heard, we sat with the Honourable Lady Justice Chibesakunda who has since retired. This judgment therefore, is by the majority.

This is an appeal against the judgment of the Ndola High Court delivered on 29th February, 2012. By that judgment, the trial court allowed the appeal by the respondent whilst the cross appeal by the appellant failed on the ground that the lower court had misdirected itself by relying on section 26B of the Employment Act.

The history of the case is that the appellant herein filed a default writ of summons in the subordinate court claiming the sum of K25,437,081.00 from the respondent for salaries, allowances, leave pay and terminal benefits, from April, 2008 to August, 2008. In its judgment, the subordinate court found that the appellant's termination of employment was by way of redundancy pursuant to section 26B of the Employment Act. That court further found that the appellant was entitled to be paid his salaries up to the time his benefits were paid in accordance with section 26(3)(b) of the Employment Act. The respondent raised six grounds of appeal namely:

1. **That the learned trial magistrate erred in law and fact when she held that there was a redundancy situation in the appellant company as there was no evidence of this**

2. **That the learned trial magistrate erred in law and fact when she held that the post of human resource manager had been down-sized as there was no evidence to support this finding**

3. **That the learned trial magistrate erred in law and in fact when she held that the mere engagement of Nerol Katwishi in the position of personnel officer amounted to down-sizing of the post of human resource manager as this is contrary to the evidence on record**

4. **That the learned trial magistrate erred in law and fact when she held that the plaintiff was repatriated on 23rd April, 2009 as there had been no need to do so because he had, three weeks prior to his termination, moved to Ndola where he had been recruited from**

5. **That the learned trial magistrate erred in law and fact when she held that the letter of offer of employment did not provide for termination of contract**

6. **That the learned trial magistrate misdirected herself when she held that the plaintiff had proved the existence of a redundancy situation in the appellant company as this was not supported by evidence.**

In the cross-appeal, the appellant raised two grounds as paraphrased from his heads of argument as:

1. **Repatriation of a former employee was a terminal benefit paid at the end of employment either in cash or by physical transportation**

2. **Supreme Court had made interest uniform, payable at short term deposit rate up to date of judgment and thereafter at lending rate.**

By consent of the parties, the appeal and cross-appeal were determined solely on the record and heads of argument. The respondent argued grounds one and six, two and three together whilst grounds four and five were argued separately.

With respect to the appeal, the Honourable Judge noted from the arguments advanced by both parties that the main issue for determination was whether or not the lower court was correct in finding that the appellant's termination of employment was by way of redundancy by virtue of the provisions of section 26B of the Employment Act, Nº 15 of 1997. The section was reproduced for ease of reference as follows:

> **"The contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to –**
>
> **(a) The employer ceasing or intending to cease to carry on business by virtue of which the employee was engaged; or**
>
> **(b) The business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern."**

The Honourable Judge noted that the learned trial Magistrate found that the appellant's job was down-sized because the respondent employed Miss Katwishi as personnel officer when the appellant was terminated from

employment. He observed that based on that finding, she erroneously concluded that the said down-sizing amounted to a redundancy in terms of section 26B of the Act without any supporting evidence. He further observed that the respondent's services were terminated without reasons being given. He stated that, therefore, it was not open to the trial court to impute redundancy in the termination. The Honourable Judge found that the learned trial Magistrate fell into error and misdirected herself when she found that the appellant's termination of employment was by way of redundancy. Having so found, he did not find it necessary to address the respondent's argument in the alternative that section 26B of Act Nº 15 of 1997 does not apply to written contracts.

On the question of whether or not the appellant was repatriated, he observed that section 13 of the Employment Act makes it mandatory for the employer to meet all expenses relating to repatriation of a terminated employee from his station to the place of recruitment. The Judge dismissed as irrelevant the respondent's argument that at the time of his termination the appellant was at his home in Ndola, as what counts is the formal termination date and not the location of the employee at that time. He, however, noted that the appellant was actually repatriated on 23rd

April, 2009 after his termination on 17th July, 2008 following the payment of his terminal benefits.

Further, in view of the Honourable Judge's dismissal of the learned trial Magistrate's finding that the appellant was terminated on account of redundancy, he found that it followed that section 26B(3) of the Employment Act which provides for the continued payment of salaries to an employee terminated on account of redundancy, is not applicable to the respondent.

In relation to ground five, the court below found as a fact that paragraph 3 of **"GM1,"** the letter of offer of employment, provided for termination by either party by giving a month's notice for a confirmed employee.

The appeal was allowed and the judgment by the Subordinate Court was set aside.

On the cross-appeal, ground one wherein the respondent sought payment of salaries from date of termination up to the date when his terminal benefits were paid, failed based on the court's finding that the termination was by a contractual clause.

In ground two, the respondent sought to have interest paid at the short term deposit rate from the date of the writ until judgment and thereafter at the lending rate. The Honourable Judge observed that the learned trial Magistrate exercised her discretion as provided in Order 35, Rule 8 of Subordinate Court Rules which provides:

> **"Where a judgment or order is for a sum of money, interest at six per centum shall be payable thereon, unless the court otherwise orders."**

He declined to interfere with that discretion. Ground two equally failed and the cross-appeal was accordingly dismissed with costs for the successful party.

Dissatisfied with the judgment of the Ndola High Court delivered on 29th February, 2012, the appellant appealed to this Court on the following grounds:

1. **The Court below erred both in law and fact to dismiss and set aside the whole judgment of the Subordinate Court on the ground that there was no redundancy situation in Kawambwa Tea Company Limited, when in fact there was clear evidence on record to show that there was a clear redundancy situation.**

2. **The court below erred in both law and fact to state that the appellant was correctly entitled to subsistence allowance under the Employment Act, Cap 268 section 13 clause 2 (b).**

3. **The court below erred in both law and fact to hold that the position of Human Resources Manager was not being down-sized because there was clear evidence on record to show that it was actually being down-sized.**
4. **The court below erred both in law and fact to do away with both laws in its judgment, Employment Act Cap 268 Section 13 clause 2 (b) and section 26B clause 3 (b).**

5. **The court below erred both in law and fact not to recognize the fact that the termination of the Appellants employment was at the instance of the employer and as such payment of all terminal benefits was supposed to be paid on the termination date and repatriation to be effected immediately failure to which the Employment Act Section 13 (2)(b) or section 26B should take effect.**

6. **The court below erred both in law and fact to allow the Honourable learned Judge in the court below to preside over the case of appeal when the lawyer for Kawambwa Tea Company Limited, (who were the appellants) worked with the honourable Judge as a member at Industrial Relations Court at Ndola.**

7. **The court below erred both in law and fact for its failure to recognise and uphold their own judgment passed earlier at Industrial Relations Court on the same or similar case of RODGERS B. MUSONDA AND OTHERS v ZAMBIA RAILWAYS LIMITED[1] .**

On 16th October, 2012 and 23rd October, 2013 respectively, the appellant filed into court, heads of argument and supplementary heads of

argument. The respondents also filed their heads of argument into court on 4th October, 2013.

In the preamble to the appellant's heads of argument, he gave a brief background of the case. Thereafter, he alleged that the Honourable Judge in the court below appeared not to have read the huge voluminous court record and hence arrived at a wrong conclusion in the judgment being appealed against.

In arguing grounds one and three, the appellant went into definitions of redundancy and its effects and he submitted that that was the exact situation in the respondent company, Kawambwa Tea Company Limited where it would not pay salaries and allowances to workers until they sued the company. He submitted that on 17th July, 2012, the entire workforce of the respondent company went on indefinite strike and all company operations ceased and the company closed.

With respect to ground two, the appellant submitted that the Honourable Judge in the court below made a clear finding that the respondent must comply with section 13 of the Employment Act, Cap 268, but he failed to make the necessary court order in his favour. He submitted further that the Subordinate Court was on firm ground when it

ruled in his favour whilst the High Court judgment was written in conflict with the appellant's own phraseology and hence making it difficult to understand. The appellant urged this Court to set it aside and uphold the Subordinate Court's judgment.

He contended that the major reason for his termination of contract was occasioned by breach of contract on the part of the employer for failure to pay monthly salaries and allowances to him and other workers. The appellant submitted that this was a breach of section 48 of the Employment Act.

With respect to grounds five and six he submitted that his termination of employment was both at the instance of the employer and on account of redundancy due to lack of funds. He argued that, however, that termination does not excuse the respondent from complying with sections 13, sub-section 2(b) and section 26B, sub-section 3(b) of the Employment Act. The appellant confirmed that he was repartriated but on the wrong date of 23rd April, 2009 instead of 18th July, 2008. He contended that therefore monthly emoluments should be paid for the period in between.

In ground seven, the appellant contended that the Honourable Judge in the court below should have recused himself from handling the case because he is too close to the respondent Counsel, Mr. Faustin Muma of Messrs Chitabo Chiinga. He pointed out that they worked together at the Industrial Relations Court. He alleged that the judgment appealed against was unfairly passed in the respondent's favour.

In respect of ground eight, the appellant relied on the judgment in the case of **ROGERS B. MUSONDA AND OTHERS v ZAMBIA RAILWAYS LIMITED.** He submitted that the authority referred to is the same as his case and he expected the same judgment, as the law should be applied uniformly. He argued that for as long as he was entitled to repatriation, he was entitled to subsistence allowance or monthly pay until repatriation took place.

He concluded by submitting that this case was a matter of law. He submitted that redundancy had been proved beyond reasonable doubt.

The appellant prayed that this Court sets aside the judgment of the court below and in its place make a favourable one for him. He also prayed for interest and costs in the Court below and in this Court.

In response to the appellant's arguments in respect of grounds one and three, Mr. Muma, for the respondent, submitted that the court below was on firm ground in finding as a fact that there was no redundancy situation in the respondent company and setting aside the entire judgment by the learned trial magistrate. He submitted further that redundancy occurs where the employer has stopped or, is about to cease carrying on business in the place or for the purposes for which the employee in question was employed or where the requirements of the business for work of a particular kind or in a particular place, have ceased or diminished or are likely to do so. He referred us to section 26B(1) of the Employment Act.

Counsel for the respondent submitted further that the undisputed evidence that the appellant was terminated in accordance with his conditions of employment as he admitted in his evidence on record. He fortified this by submitting that even the appellant's letter of termination clearly states that this termination was by paying him salary in lieu of notice.

Mr. Muma noted that the appellant argued that liquidity problems in the respondent company should equal to a redundancy situation. He

disagreed that that is not the criterion given by section 26B of the Employment Act Nº 15 of 1997. Counsel submitted that the appellant acknowledged under ground 3, of his appeal that the proper remedy is to petition for liquidation of the Company under section 272 of the Companies' Act, Cap 388 of the Laws of Zambia, if the company is unable to pay its debts.

He contended that there was no evidence that the respondent company was ceasing or intending to cease to carry on the business or reducing the requirement of the appellant as Human Resources Manager, the job for which he was employed. He argued that the respondent company has remained a viable going concern and that the appellant's employment was terminated because he had abandoned his duty station at Kawambwa Tea Estates and that efforts to persuade him to go back failed. He referred us to the judgment of the Subordinate Court on the record of appeal.

Mr. Muma further submitted that it is instructive that both the Subordinate Court and High Court found that the appellant's termination was by notice. Based on that finding, he respectfully submitted that on this ground alone, the appeal should be dismissed.

With respect to the appellant's argument in ground two that he is entitled to payment of subsistence allowance under section 13(2)(b) of the Employment Act, Cap 268, Counsel for the respondent submitted that he is not entitled to be paid such allowances. He relied on section 13(1) of the Act which makes it mandatory for the employer to pay expenses of repatriating the employee to the place of his recruitment. Counsel submitted, therefore, that there is no general obligation imposed on the employer to repatriate employees under circumstances other than those specified in section 13(1) of the Act.

In the alternative, he submitted that the respondent had no obligation to pay travelling expenses and subsistence expenses or rations because the respondent had provided transport in accordance with section 13(2)(a) which exempts an employer who had provided transport from paying reasonable travel expenses and subsistence expenses or rations during the journey. He drew the Court's attention to the appellant's evidence where he stated that the respondent provided him with a van and he went and collected his belongings from Kawambwa.

Further, Mr. Muma rejected the appellant's contention that upon having his services terminated, he should have been paid his termination

benefits immediately and that the respondent's failure to do so, entitled him to be paid monthly salaries until the date of repatriation. According to Mr. Muma, this argument is a misconception of the law as section 13(2)(b) of the Act makes no such provision for payment of monthly salaries. He quoted the said section which provides:

> **"Section 13(2)(b) provides as follows:-**
> **(2) The expenses of repatriation shall include:**
> **(b) reasonable subsistence expenses or rations during the period, if any, between the date of termination of the contract of service and the date of the start of journey."**

He drew our attention to the fact that this subsection provides for payment of **"reasonable subsistence expenses or rations"** and not salaries as submitted by the appellant. He further pointed out that subsection 13(2)(b) is not read together with section 26B (a) and (b) of the Employment (Amendment) Act Nº 15 of 1997. Mr. Muma explained that the purpose of the sub-section is to enable employees to be returned to place of recruitment at the employer's expense and that while travelling, reasonable subsistence expenses or rations be provided to the employee. He submitted that this ground should be dismissed for being totally without foundation in law.

With regard to ground four, it is the respondent's contention that the court below was on firm ground when it held that the appellant was terminated in accordance with paragraph three of the offer of employment letter which provided for giving of a month's notice by either party or payment of a month's salary in lieu of notice.

Counsel for the respondent equally contended that the definition of redundancy under section 26B does not include **"downsizing or down grading."** He submitted that, however, changes in major conditions of service may lead to an employee being deemed to have been declared redundant. He stated that these may include a situation where an employee is demoted, that employee can refuse that offer and claim for redundancy benefits if he is dismissed because of his refusal. To support this proposition, he relied on the case of **PETER NG'ANDWE AND OTHERS v ZAMOX LIMITED AND ANOTHER**[2] and distinguished it from the appellant's case where he was lawfully terminated by being paid a month's salary in lieu of notice.

Mr. Muma submitted that employment of a third party, Nerol Katwishi, in the position of Personnel Officer, after the appellant's termination, is clearly, **"events after the fact"** as the court below found.

He submitted further that the appellant's position of Human Resources Manager for the respondent company was not abolished as it is so crucial.

In response to the appellant's argument that his conditions of service on redundancy provided for giving of one month's notice and that that was the same notice given to him in the letter of termination, Mr. Muma submitted that there is no proof that the conditions of service appearing in the record of appeal actually apply to the appellant. He argued that the letter of offer of employment exhibited in the record of appeal does not refer to or incorporate any other conditions of service other than those contained in the letter. He further submitted that the two notices are totally different. The notice in the termination letter is an ordinary notice relating to the employee of a particular date when the contract of employment will end whereas the redundancy notice is specific to the termination by redundancy. Counsel submitted that the appellant appeared to think that the two notices were the same. He referred to the case of **CHILANGA CEMENT PLC v KASOTE SINGOGO**[3] wherein this Court distinguished the two notices by holding that ordinary termination of a contract of service by notice cannot be equated to notice of redundancy.

In relation to grounds five and six, Counsel for the respondent submitted that it was difficult to state whether the two grounds are premised on a point of law or mixed law and fact. Ground five states:

> **"The court below erred both in law and fact to do away with the laws in its judgment."**

Ground six reads:

> **"The court below erred both in law and fact not to recognise the fact that the termination of my employment was at the instance of the employer."**

Mr. Muma submitted further that the appellant appears to argue that since the respondent owed him money in salary arrears on the date of termination on 17th July, 2008, he should have remained on the respondent's pay-roll until date of payment of salary arrears and allowances. His response to that is that there is no provision under the employment laws for continued payment of salaries and allowances after an employee's services have been terminated. He, however, submitted that only section 26B(3)(b) of the Employment (Amendment) Act № 15 of 1997 makes provision for continued payment of salary to a separated employee where an employer is unable to pay the redundancy benefits on the last day of duty of the employee.

He further submitted that in the appellant's case, he admitted that he was terminated in accordance with conditions in his letter of appointment.

On ground seven, the appellant contended that the Honourable Judge in the court below should have recused himself from handling the appeal on the basis that Mr. Muma, had worked with him on the bench of the Industrial Relations Court. Mr. Muma responded to this ground of appeal by submitting that the appellant was aware of this information when he appeared before the Honourable Judge in the High Court. He submitted that they even proceeded to sign a Consent Order agreeing that the Court would determine the appeal solely on the basis of the record and heads of argument. Counsel for the respondent concluded that the appellant raised this issue because the appeal was not determined in his favour, and he wondered if he would have raised the issue had the appeal been decided in his favour.

He further submitted that he had examined the provisions of section 6(2) of the Judicial (Code of Conduct) Act Nº 13 of 1999. He found nothing that makes the mere fact that he worked or sat together with the Hon Judge in the Industrial Relations Court a source of concern to the

appellant. He relied on the case of **JOHN KASANGA & 2 OTHERS v IBRAHIM MUMBA & 2 OTHERS**[4] in which this Court reasoned that:

> **"If Judges were to recuse themselves because any lawyer was known to them people or society would not get justice. We do not think it was the intention of the legislature in enacting the Judicial (Code of Conduct) Act that any relationship between a Judicial Officer and Counsel representing any party should make a Judicial Officer disqualified from adjudicating in the matter."**

Counsel for the respondent concluded by submitting that although it is the individual perception of business which is crucial, the appellant had shown no reasonable grounds on which his perception is based.

With respect to ground eight, Mr. Muma submitted that the Court was on firm ground in declining to order payment of salaries to the appellant, as that would have amounted to unjust enrichment when he had not worked for it. He further submitted that the cases of **ROGERS MUSONDA & OTHERS v ZAMBIA RAILWAYS LIMITED** and **ROBERT MWEWA & OTHERS v ZAMBIA RAILWAYS LIMITED**[5] cited by the appellant to support his claim, are distinguishable from the appellant's case. His reasoning was that in those cases the complainants were declared redundant whereas in the appellant's case, his services were terminated in accordance with his contract of service.

In conclusion, he submitted that this appeal lacks merit and ought to be dismissed with costs to the respondent in all three Courts.

We have considered the grounds of appeal filed in this case, the arguments by both parties, the authorities cited and the judgment appealed against. Eight grounds of appeal were filed. We will deal with grounds one, three and four together, grounds two, five and six together, as they raise similar issues and thereafter ground seven and ground eight.

In grounds one, three and four the appellant's major contention was that the Court below erred both in law and fact by finding that there was no redundancy in the respondent Company.

We had occasion to peruse the evidence of witnesses in the Subordinate Court proceedings. We observed that PW2, Lucus Monde Kapila testified that he was Marketing and Public Relations Manager and he recalled that on 17th July, 2008, the appellant's contract of employment was terminated and he was paid terminal benefits. He testified further that Kawambwa Tea Company was operational. The respondent's witness DW1, Elijah Chenyika, General Manager of the respondent company also confirmed that the appellant's services were terminated on 17th July, 2008 by paying him one month's pay in *lieu* of notice and that a termination

letter was given to him. We noted from the record that in cross-examination, DW1 stated as follows:

> **"Plaintiff was not declared redundant. Plaintiff took up appointment and worked for six months."**

Therefore, from the foregoing, we accept Counsel for the respondent's argument that there was no redundancy situation at the respondent company, and that the appellant's former position as Human Resources Manager was not down-sized as alleged and that the appellant's services were terminated by paying him one month's salary in *lieu* of notice as indicated by DW1.

In those circumstances, therefore, we find that the Court below was on firm ground when it found as it did and set aside the judgment of the Subordinate Court. Grounds one, three and four accordingly fail for lacking merit.

We turn to grounds two, five and six.

Counsel for the respondent's response to ground two was that the appellant is not entitled to payment of subsistence allowance under section 13(2)(b) of the Act. The said sub-paragraph provides:

> **"(2) The expenses of repatriation shall include –**

(b) reasonable subsistence expenses or rations during the period, if any, between the date of termination of the contract of service and the date of the journey."

Based on the foregoing, we accept Mr. Muma's argument that the respondent has no obligation to pay travelling expenses and subsistence expenses or rations since the appellant was provided with transport in accordance with section 13(2)(a) of the Act. This sub-paragraph provides:

"(a) reasonable travelling expenses, unless the employer provides transport as provided in subsection (1) of section fourteen, and subsistence expenses or rations during the journey."

The appellant stated that although section 13 of the Act does not state the amount payable, it was supplemented and implied in the Act, section 26B read together, into monthly salaries. Simply stated, the appellant's claim in this ground two was that he was entitled to monthly salaries from date of termination of his services to date of repatriation. We perused section 13(2)(b) of the Act and section 26B (a) and (b) of the Employment (Amendment) Act Nº 15 of 1997 relied on by the appellant. Section 13(2)(b) of the Act provides for payment of reasonable subsistence expenses or rations before and during the journey during repatriation while

section 26B of the Amendment Act relates to redundancy. Counsel for the respondent had argued that the two legal provisions cannot be read together and we accept his argument. Our reasoning is based on the fact that the appellant was not declared redundant but that his services were terminated pursuant to his contract of service. We, accordingly, find that section 26B of the Amendment Act does not apply to the appellant.

Further, on his claim for monthly salaries, we found no provisions in the Act for payment of salaries until repatriation to a person whose employment was terminated. For these reasons we find that ground two lacks merit and it, accordingly fails.

In ground five, the appellant contended that the court below erred both in law and fact to do away with the laws in its judgment. We accept learned Counsel for the respondent's observation that the two grounds are rather ambiguous. We are also of the considered view that ground five is vague.

In ground six, the appellant contended that his termination of employment was at the instance of the employer and on account of lack of funds.

We note, however, that Counsel for the respondent adequately addressed these two grounds. He argued that there is no provision under the employment laws for continued payment of salaries and allowances after an employee's services have been terminated. In the appellant's case, he admitted that he was terminated in accordance with conditions in his letter of appointment.

Although the appellant claimed to have had his services terminated at the instance of the employer, we found evidence of the appellant's desertion of his work station in the testimony of DW1 on the record. According to DW1's evidence the appellant left the tea estate in Kawambwa without getting permission and went to Ndola where he stayed for three weeks until his services were terminated. We, however, note that the appellant argued that he was terminated by way of redundancy, which turned out to be untrue, considering DW1's evidence and the letter of termination of contract exhibited in the record. It is interesting to note that there was no mention of redundancy in that letter of 17th July, 2008. The issue of the alleged termination by redundancy on which the appellant based his claims, has therefore been resolved. We, accordingly, find that

the appellant's services were terminated pursuant to contractual provisions contained in his letter of offer of employment dated 25th January, 2008.

We find that grounds five and six lack merit and that the court below was on firm ground in holding as it did.

In ground seven, the appellant contended that the Court below erred both in law and fact to allow the Honourable Judge to preside over the appeal case because the lawyer for Kawambwa Tea Company Limited, Mr. Muma worked with the Honourable Judge, as a Member at the Industrial Relations Court in Ndola.

It was the appellant's contention that the Honourable Judge should have recused himself from handling this case because he was too close to Counsel for the respondent.

Counsel, however, responded by submitting that the appellant was aware of the position when he appeared before the Honourable Judge in the High Court. We note from the record that the parties had even signed a Consent Order agreeing that the Court would determine the appeal solely on the basis of the record and heads of argument as pointed out by Counsel.

We have looked at the said Consent Order dated 22nd December, 2011 and we are satisfied that the Honourable Judge in the court below determined the appeal with consent of both parties and hence the written Consent filed in court. In the circumstances, we find that this ground lacks merit and we dismiss it accordingly.

We turn to ground eight in which the appellant alleged that the court below erred both in law and fact for its failure to recognise and uphold their own judgment passed earlier in the Industrial Relations Court on the same or similar case of **ROGER B. MUSONDA & OTHERS v ZAMBIA RAILWAYS LIMITED** in which they ordered the employers (the respondents therein) to pay the former employees in accordance with the provisions of the Employment Act, Cap. 268, section 13 clause 2(b).

We have considered the appellant's contention that the authority cited is similar to his case and that he expected the same judgment as the law ought to be applied uniformly.

Considering the circumstances in the appellant's case we accept Counsel for the respondent's argument that that would have amounted to unjust enrichment when he had not worked for it. We accept Mr. Muma's submission that only section 26B(3)(b) of the Employment (Amendment)

Act provides for continued payment of salary to a separated employee where an employer is unable to pay redundancy benefits on the last day of duty of the employee. We also note that he distinguished the cases cited by the appellant, from the appellant's case on the ground that in those cases the complainants were declared redundant whereas in the appellant's case, his services were terminated in accordance with contractual terms and conditions.

Section 26B(3)(b) of the Amendment Act only applies to those whose services are terminated by way of redundancy. However, in the appellant's case, we have found that the appellant's services were not terminated by way of redundancy. Consequently that provision does not apply to him so as to entitle him to claim salaries and allowances on the same footing as the complainants in the cited cases.

In the circumstances, we find that the court below was on firm ground when it held as it did. We, accordingly, find no merit in ground eight.

All in all, we find no merit in this appeal and we dismiss it with costs. The same to be taxed in default of agreement.

Retired

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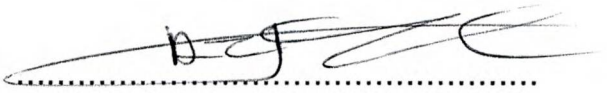
L. P. Chibesakunda

ACTING CHIEF JUSTICE



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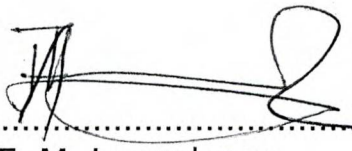
R. M. C. Kaoma

SUPREME COURT JUDGE



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F. M. Lengalenga

ACTING SUPREME COURT JUDGE