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

APPEAL No. 101/2014
SCZ/8/97/2014

BETWEEN

SIMON SAKALA **APPELLANT**

AND

MPONGWE MILLING LIMITED **RESPONDENT**

CORAM: Mwanamwambwa, DCJ, Hamaundu and **Kajimanga, JJS**

On 8th December, 2016 and 12th December, 2016

FOR THE APPELLANT: Mr. J. Nyirongo of Messrs Nyirongo & Co.

FOR THE RESPONDENT: Mr. S. A. G. Twumasi of Kitwe Chambers

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

This is an appeal from a judgment of the High Court at Kitwe delivered on 20th March 2014, allowing the respondent's appeal against a judgment of the Subordinate Court of the Second Class, which decided that the respondent had breached the contract of employment and awarded damages to the appellant.

The background to this appeal as can be discerned from the evidence adduced in the Subordinate Court, is that on 11th May,

2010 the appellant and the respondent executed a fixed term contract of employment by which the appellant was employed as an Assistant Accountant for twenty-four months, to end on 10th May, 2012. Clause 3 of the contract stated that:

> **"Your probation period will be 3 months during which either side may give 24 hours' notice of termination or payment in lieu of notice by either party. When the employee is successful, the employer will confirm the substantive appointment in writing. Probationary period may be extended to a maximum period of six (6) months, or alternatively probationary period may be waived if in the management's opinion the employee does not warrant to serve a trial period and the employee will be communicated to in writing."**

On 30th November 2010 the respondent wrote to the appellant as follows:

> **"Re: Termination of Contract**
>
> **The above subject refers.**
>
> **After six months of your probation period with Mpongwe Milling, management would like to inform you that your probationary period has not been successful, hence hereby giving notice of 24 hours..."**

The appellant contended that he ought not to have been treated as an employee on probation because he had qualified to the status of a full-time employee. He also contended that since he had served for more than six months he ought to be treated as having completed

the probation and that in the circumstances, his dismissal was unlawful. Further, that since the respondent did not confirm the appointment or dismiss him at the expiry of the probationary period, the employment should be deemed to have been confirmed. The trial magistrate accepted the appellant's evidence and held that he had proved his case. He then awarded him damages for breach of contract as claimed. Dissatisfied with this decision the respondent appealed to the High Court.

After considering the evidence from the court below which the advocates for the parties agreed to rely on, the learned trial judge noted that one of the grounds of appeal raised on behalf of the defendant was that the trial magistrate erred in law and fact when she held that the respondent had breached clause 3 of the employment contract. He then opined as follows:

> **"In my opinion, and guided by the decision of the Supreme court in the case of Isaac R. C. Nyirenda v Kapiri Glass Products Limited (1985) ZR 167, on a proper construction of Clause 3 of the contract, it cannot be said that the plaintiff's employment was automatically confirmed when he served beyond the six months period. In the Nyirenda case cited above, the operative words in the probationary clause of the contract were "until this confirmation is given the employment shall be deemed to be probationary employment." The**

Supreme Court said at page 169 ... that those words were "intended to cover the situation... where the employer does not either confirm the appointment or dismiss the employee within (the probationary period), in which event the probationary employment is deemed to continue. Without this construction, the words would be otiose. As the probationary employment continued it follows that it could be lawfully terminated by twenty-four hours' notice in writing."

In the instant case, the operative words are:

"When the employee is successful the employer will confirm the substantive appointment in writing."

Those words are reinforced by the following words:

"If in the management's opinion the employee does not warrant to serve a trial period the employee will be communicated to in writing."

The learned trial judge then held that since the employment was not confirmed in writing, and even though the appellant had worked beyond six months, the employment remained probationary and it could, therefore, be lawfully terminated by twenty-four hours' notice. He accordingly allowed the respondent's appeal and set aside the judgment of the trial magistrate.

The appellant is particularly dissatisfied with the portion of the judgment of the trial judge to the effect that ... "since the employment

was not confirmed in writing, and even though the plaintiff had worked beyond six months, the employment remained probationary. It could, therefore, be lawfully terminated by twenty-four hours' notice" and he appeals on one ground of appeal as follows:

> **"The lower court erred at [in] law and facts [fact] when it found that the verdict in the case of Isaac R. C. Nyirenda v Kapiri Glass Products (1985) Z. R. 167 was applicable to the case in casu when in fact not."**

Both parties filed heads of argument. In the appellant's heads of argument, Mr. Nyirongo submitted that the *ratio decidendi* of the court below as appears at page 8, lines 8-10 of the record of appeal where it says "In the **Nyirenda** case cited above, the operative words in the probationary clause of the contract as reads **"until this confirmation is given the employment shall be deemed to be probationary employment,"** should actually have been resolved in the appellant's favour. This is because on the same page in lines 10 – 14 the learned trial judge went on to say that "the Supreme Court said at page 169 ... that those words were ***"intended to cover the situation... where the employer does not either confirm the appointment or dismiss the employee within (the probationary period), in which event the probationary employment is deemed***

to continue...". The learned counsel submitted that in the case in casu, those ***"operative words"*** were not inserted into the contract between the appellant and the respondent as appears at pages 24 – 28 of the record of appeal. As a matter of fact, counsel contended, clause 3 of the contract at page 24 of the record of appeal provided *inter alia*, that **"Probationary period may be extended to a maximum period of six (6) months..."**.

The learned counsel also submitted that on the basis of the above excerpt from the contract of employment, it is clear that the parties agreed not to extend the probationary period beyond six months. In the instant case the appellant worked for more than six months. In the premises, counsel submitted, the holding in the **Nyirenda** case cannot be said to be against but for the appellant. It was, therefore, his humble prayer that we should find that the lower court erred in the way it applied the **Nyirenda** case to the circumstances surrounding this case and further, that the appellant was not properly terminated in his employment as he was not on probation.

In the respondent's heads of argument, Mr. Twumasi submitted that the learned trial judge was on firm ground when he held that the appellant's employment remained probationary and it could, therefore, be lawfully terminated by twenty-four hours' notice.

The learned counsel contended that the trial court properly relied on the **Nyirenda** case. That the argument which was rejected by this court in the **Nyirenda** case is the same one which the appellant wishes to advance in this case. The learned counsel submitted that in the **Nyirenda** case this court stated at page 169, lines 12 – 13 that:

> **"... he also argued that at the time when the appellant was dismissed he had worked for more than three months and that clause 2.2 of the contract should be construed as meaning that, if the company did not confirm the appointment or dismiss the employee at the expiry of three months, the employment could be deemed to be confirmed. This was so argued by Mr. Mwanawasa because he said that by the terms of that clause the employment must be confirmed or dismissed by the end of the period of three months, after that date he argued, the probationary period could not continue. This argument ignores the words "until this confirmation is given the employment shall be deemed to be probationary employment". Some meaning must be given to these words and in our view their meaning is clear. They are intended to cover the situation, as in this case, where the employer does not either confirm the appointment or dismiss the employee**

within three months, in which event the probationary employment is deemed to continue. Without this construction, the words would be otiose. As the probationary employment continued it follows that it could be lawfully terminated by twenty-four hours' notice in writing under clause 24. This ground of appeal must therefore fail."

Mr. Twumasi submitted that in the same way, the appellant herein makes an attempt to argue that since he worked over an extra period of three weeks he should be presumed to have been confirmed. According to the learned counsel, this argument goes against the decision of this court in the **Nyirenda** case. He contended that the operative words in the probation clause are very clear that:

"When the employee is successful the employer will confirm the substantive appointment in writing."

The learned counsel submitted that in this case the appellant was not written to, to confirm his appointment. According to Mr. Twumasi, the words quoted above are very clear that an employee's employment to the substantive position would only be in writing. He contended that the wording is so clear that there is no room to presume anything else. The learned counsel submitted that the wording in the probation clause further states that:

"... alternatively, probationary period may be waived if in the

management's opinion the employee does not warrant to serve a trial period and the employee will be communicated to in writing."

It was Mr. Twumasi's contention that these further operative words show that communication for confirmation of an employee's position was to be in writing. The learned counsel also submitted that the wording, **"... probationary period may be extended to a maximum period of six (6) months"** which the appellant seeks to rely upon does not in any way take away the intentions of the probationary clause, that confirmation in the substantive position must be in writing only.

At the hearing of this appeal, both counsel briefly augmented their heads of argument with oral submissions. For the appellant, Mr. Nyirongo submitted that the **Nyirenda** case is distinguishable from the case in casu and the point of distinction is on the operative words. He argued that in the **Nyirenda** case the operative words were **"until this confirmation is given the employment shall be deemed to be probationary employment"** but the operative words in the case in casu are **"probationary period may be extended to a maxium period of six (6) months..."** According to the learned counsel these operative words mean that the intention of the parties was that the appellant's probationary period would not go beyond six months. It was Mr.

Nyirongo's contention that having worked for more than six months, the appellant should be deemed to have been confirmed and on that basis, the termination of his employment was improper. However, the learned counsel did not cite any authority to support this argument.

For the respondent, Mr. Twumasi submitted that the **Nyirenda** case cannot be distinguished from this case. He argued that the lapse of a few days could not take away the words in the contract that the confirmation of employment shall be in writing. The learned counsel referred us to the letter of termination of contract at page 29 of the record of appeal indicating that the appellant's probationary period had not been successful. Mr. Twumasi submitted that this appeal has no merit and he accordingly urged us to dismiss it with costs.

We have considered the record of appeal, the judgment appealed against, the heads of argument and the oral submissions of counsel. As we see it, the sole question for determination in this appeal is whether at the time of termination of his contract of employment, the

appellant was deemed to have been confirmed. In our view the answer lies in the proper interpretation of clause 3 of the contract.

The sum and substance of the appellant's contention is that since the respondent did not confirm his appointment or dismiss him at the expiry of the probationary period, he should be deemed to have been confirmed. In his heads of argument, the appellant interprets the words, **"Probationary period may be extended to a maximum period of six (6) months..."** in clause 3 of the contract to mean that the parties agreed not to extend the probationary period beyond six months. That having worked for more than six months, the appellant's employment was not properly terminated as he was not on probation. Further, that the holding in the **Nyirenda** case cannot be said to be against but for the appellant.

The operative words in clause 3 of the contract which are relevant to the determination of this appeal are as follows:

> "**When the employee is successful, the employer will confirm the substantive appointment in writing. Probationary period may be extended to a maximum period of six (6) months, or alternatively probationary period may be waived if in the management's opinion the employee does not warrant to serve a trial period and the employee will be communicated to in writing."** (underline our emphasis).

The words, "in writing", were an indispensable requisite for the confirmation of the appellant's employment. From the record, we find that the respondent never communicated to the appellant in writing, either that his probationary period was successful or that it had been extended. The only communication in writing from the respondent to the appellant was the letter of termination of contract dated 30th November, 2010 appearing at page 29 of the record of appeal. As can be noted from the contents of that letter, the appellant was being expressly informed that his probationary period was unsuccessful, hence the termination of the contract by giving him 24 hours' notice since he had been on probation. In our view, it is immaterial that the appellant worked for more than six months. Contrary to Mr. Nyirongo's contention, this fact alone could not amount to a confirmation of the appellant's employment in the absence of written communication to that effect. We, therefore, agree with the finding by the learned judge that since the appellant's employment was not confirmed in writing, and even though he had worked for more than six months, the employment remained probationary. In the circumstances, the argument by the learned counsel for the

appellant that the appellant's employment was not properly terminated because he was not on probation cannot hold.

The appellant also assails the finding by the learned judge that the **Nyirenda** case was applicable to the case in casu. According to the learned counsel for the appellant, the operative words in the probationary clause of the **Nyirenda** contract were not inserted in the appellant's contract. For completeness, we restate the operative words in the probationary clause of the **Nyirenda** contract which are that:

> **"The company will before the end of that period either confirm the appointment in writing or dismiss the employee. Until this confirmation is given the employment shall be deemed to be probationary employment."**

Similarly, we repeat the operative words in the appellant's contract which are that:

> **"When the employee is successful, the employer will confirm the substantive appointment in writing. Probationary period may be extended to a maximum period of six (6) months, or alternatively probationary period may be waived if in the management's opinion the employee does not warrant to serve a trial period and the employee will be communicated to in writing."**

We find that although the wording in the two clauses may not be exact, their import is the same. They both mean that the employment shall remain probationary until it is confirmed in writing. The learned trial judge properly relied on the **Nyirenda** case because it is on all fours with this case. We are, therefore, amazed that the learned counsel for the appellant can argue that the holding in the **Nyirenda** case cannot be said to be against but for the appellant.

In the final analysis, we conclude that this appeal lacks merit. It is accordingly dismissed with costs which shall be taxed in default of agreement.

M. S. Mwanambwambwa
DEPUTY CHIEF JUSTICE

E. M. Hamaundu
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE