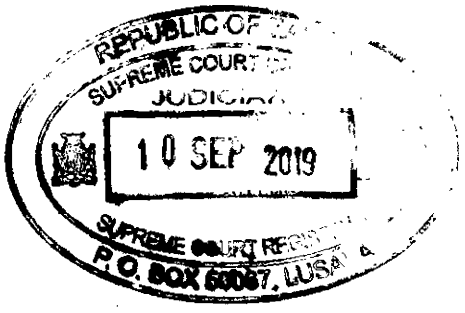
IN THE SUPREME COURT OF ZAMBIA **Appeal No.188/2016**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:



RUHARO LIMITED **APPELLANT**

AND

JAN WILLEM KLOPPERS **RESPONDENT**

CORAM: **Musonda DCJ, Kaoma and Kajimanga JJS**

On 3rd September 2019 and 10th September 2019

For the Appellant: **Mr. C. Kaira of Messrs G M Legal Practitioners, agents for Messrs Chonta Musaila & Pindani Advocates of Messrs Chonta, Musaila & Pindani Advocates**

For the Respondent: **Mr. M. Katolo of Messrs Milner Katolo & Associates**

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Chilanga Cement Plc v Kasote Singogo (2009) Z.R. 122**
2. **Bank of Zambia v Chibote Meat Corporation (1999) Z.R. 103**
3. **Gerardus Adrianus Van Boxtel v Rosalyn Mary Kearney (1987) Z.R. 63**
4. **Zambia Consolidated Copper Mines Limited v Richard Kangwa and others (2009) Z.R. 109**
5. **Attorney General and Another v Gershom Moses Mumba - Appeal No. 50/2002**
6. **Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1**
7. **William Steven Banda v Chief Immigration Officer and Another (1993-94) Z.R. 80**

8. **Sruttons v Midlands Silicons [1962] AC 446**
9. **Shaw and Sons (Salford Limited) v Shaw [1935] 2KB 113**
10. **Atlas Copco Zambia Limited v Andrew Mambwe – Appeal No. 137/2001**
11. **Swarp Spinning Mills Plc v Chileshe and Others (2002) Z.R. 23**
12. **Jacob Nyoni v Attorney General (2001) Z.R. 65**
13. **Zambia Privatisation Agency v James Matale (1995 - 1997) Z.R. 157**

Legislation referred to:

1. **Employment Act, Chapter 268 of the Laws of Zambia, Section 15(1)(i)**
2. **Companies Act, Chapter 388 of the Laws of Zambia, Section 215(10 (Repealed)**

Introduction

1. This is an appeal from the judgment of the High Court (Industrial Relations Division) dated 3rd June 2016 which upheld the respondent's claim against the appellant for wrongful termination of employment.

2. The appeal discusses, among other things, the measure of damages for loss of employment and the leave days applicable under an oral contract of employment.

Background to the appeal

3. The brief facts of the case are that in September 2007, the appellant employed the respondent under an oral contract to manage its farm located in Choma. On 2nd February 2015, the appellant terminated the respondent's employment by giving him

three months' notice due to alleged non-performance at the farm during the 2013-2014 farming season under the management of the respondent. The letter terminating the respondent's employment was on the headed paper of Hever Trust Limited, the appellant's shareholder and signed by a director of both Hever Trust Limited and the appellant. The respondent was ordered to handover to the new manager immediately upon receipt of the letter of termination. At the expiry of the notice period, he left employment.

Pleadings in the court below

4. On 11th August 2015, the respondent filed a notice of complaint against the appellant seeking the following:

    4.1 An order that the appellant pays him terminal benefits at the rate of 3 months' pay for each year served, a sum of US$73,500.00 [and] leave pay at 4 days per month for 7 years for 336 days, a sum of US$39,210.00, all amounting to a total of US$112,700.00;
    4.2 Damages for mental distress, anguish and inconvenience caused by the appellant;
    4.3 Damages for wrongful termination of employment by a shareholder of the respondent;
    4.4 Any other relief the Court may deem fit;
    4.5 Interest;
    4.6 Costs.

5. The basis of the claim was that the notice to terminate his

employment was issued by a third party who he had no contractual relationship with. In addition, the appellant had not paid him any terminal benefits following the termination of his employment. For its part, the appellant denied the respondent's claim. It contended that the respondent's employment was properly terminated by notice and that although the notice was issued on the headed paper of its shareholder, Hever Trust Limited, it was authored by the then director in the respondent company, one Liselotte Marohn. Further, that Hever Trust Limited enjoys as of right, overriding authority over the affairs of the respondent as a shareholder.

Evidence of the parties in the court below

6. The respondent's evidence disclosed that he and Liselotte Marohn were the founder directors of the appellant company at the time it was established and it was agreed between them that he would be the managing director while Liselotte Marohn was to be the marketing director. As managing director, the respondent was promised several privileges which were never reduced to writing as his contract of employment was concluded by a handshake with a

promise that a written agreement would be drawn up later but the same never materialised.

7. He testified that he had taken leave from the time he was employed which consisted of three (3) days to fetch his children for holidays. However, he used to work on weekends and public holidays. Thus, the extra days he worked covered those days he used to pick his children from school. According to the respondent, general farm workers were entitled to two days leave and a further day off which was equivalent to 3 days a month. That as managing director, 4 days a month would not be unreasonable when compared to other general managers who were getting 5 leave days a month.

8. His evidence also disclosed that the letter terminating his employment which he received was not written on the appellant's letterhead but on that of Hever Trust Limited which company he had no connection with. Following his receipt of this letter, the appellant wrote to the Senior Labour Officer of Choma informing him that there was a change of management at the company. He further stated that at the end of the notice period he was only paid his salary for April 2015.

9. At trial, the respondent opted to rely on its affidavit evidence and did not call any witnesses.

Consideration of the matter by the lower court

10. After considering the evidence and arguments by the parties, the lower court found that there were three issues to be determined namely; whether the termination of the contract of employment between the respondent and the appellant by a shareholder of the appellant could amount to wrongful termination; whether the respondent was entitled to payment of leave days at the rate of 4 days per month for the seven (7) years that he worked; and whether the respondent was entitled to damages for mental anguish arising from loss of employment.

11. On the first issue, it was found that shareholders of a company have no relationship with employees of a company. That under the Companies Act, Chapter 388 of the Laws of Zambia (repealed), it is the Board of Directors through the powers given to it that recruits staff for the company and that the power to fire or terminate also rests in them and not the shareholders. Therefore, where a shareholder directly terminates the employment contract of an employee in which that shareholder has stock, he is

operating on the plane of company law which forbids such acts. Further, that although shareholders have overriding rights over the company's affairs, the same has nothing to do with the powers of directors as regards employment issues. Consequently, the decision by Hever Trust Limited to terminate the employment contract of the respondent was found to be invalid.

12. Moreover, the trial court reasoned that since the appellant did not act to correct the mistake made by Hever Trust Limited to terminate the respondent's employment, this called for sanctions against the appellant. This reasoning was based on the fact that on 16th February 2015, the appellant wrote to the Senior Labour Officer at Choma informing him of the change in its management, indicating that the respondent was no longer in employment. As such, the appellant had tolerated the action by a third party to terminate the employment contract of the respondent. It was, therefore, the finding of the court below that the respondent's employment was wrongfully terminated.

13. In the circumstances of the case, the respondent was awarded twenty-four (24) months gross salary as damages for wrongful termination of employment. Guided by the case of **Chilanga**

Cement v Kasote Singogo[1], the trial court declined to exercise its discretion to award the respondent damages for mental anguish after having granted him enhanced damages for wrongful termination.

14. Regarding the issue of leave pay, the lower court found that in the absence of any evidence by the appellant showing that the respondent went on leave for the seven (7) years that he worked for it, the respondent was entitled to two (2) days leave per month in accordance with section 15(1)(i) of the Employment Act. It, therefore, awarded him leave pay for one hundred sixty-eight (168) days.

15. The lower court ordered that the award of twenty-four (24) months gross salary for wrongful termination and leave pay would attract interest at short term commercial lending rate from 19th August 2015 until the date of judgment and, thereafter, at the current lending rate as determined by the Bank of Zambia from time to time until full payment. The respondent was also awarded costs.

The grounds of appeal to this court

16. Aggrieved by the lower court's decision, the appellant has

launched an appeal to this court on the following grounds:

16.1 The [trial court] erred in law and fact when it held that the respondent's employment was wrongfully terminated.

16.2 The [trial court] erred in law and fact by awarding the respondent 24 months damages for wrongful termination of employment.

16.3 The [trial court] erred in law and fact by awarding the respondent leave pay for 168 days

The arguments presented by the parties

17. Both parties filed written heads of argument on which they relied. In support of ground one, the learned counsel for the appellant referred us to the case of **Bank of Zambia v Chibote Meat Corporation**[2] and **Gerardus Adrianus Van Boxtel v Rosalyn Mary Kearney**[3] for the principle that shareholders enjoy, as a matter of right, overriding authority over the company's affairs and even over the wishes of the board of directors. He also relied on the case of **Zambia Consolidated Copper Mines Limited v Richard Kangwa and Others**[4] where, he contended, the Supreme Court accepted that shareholders have overriding authority over the company's affairs including matters relating to employees. As such, there was no legal basis for the trial court to hold that the principle that shareholders have overriding authority over the

company's affairs does not apply to employment issues.

18. Further and in the alternative, it was submitted that the decision to terminate the respondent's employment was communicated to him by one Liselotte Marohn who was a director in both Hever Trust Limited and the appellant. This, counsel argued, should have led to the finding that the appellant through its director Liselotte Marohn had accepted and/or adopted Hever Trust Limited's position on the termination of the respondent's employment. In the premises, the learned trial court's finding that the respondent's employment was wrongfully terminated is unsupported by both the facts and the law.

19. In arguing ground two, counsel submitted that Hever Trust Limited as shareholder of the appellant cannot be said to be a third party on account of the principles stated in the **Richard Kangwa**[4], **Bank of Zambia**[2] and **Boxtel**[3] cases. He also pointed out that the letter of termination shows that the appellant had credible reasons for terminating the respondent's employment, namely, poor performance. Thus, the lower court's departure from the common law measure of damages was unjustified on account of the respondent's poor performance. Our attention was drawn to the

case of **Attorney General and Another v Gershom Moses Mumba**[5] where it was held that:

> **"There is nothing on the record to suggest to us that the Complainant had committed any disciplinary offence or that he was incompetent. It is clear to us that when the Minister took office she did not want to hear about the Complainant being at the Development Bank of Zambia and had to get rid of the Complainant immediately and replace him with another person. The termination was malicious and unwarranted."**

20. It was argued that the termination of the respondent's employment in the present case was neither malicious nor unwarranted. Therefore, counsel submitted, the trial court's departure from the normal measure of damages was an error and should be reversed.

21. In support of ground three, counsel highlighted that section 15(1) of the Employment Act which the learned trial court invoked to award the respondent one hundred sixty-eight (168) leave days provides that an employee shall, after six months' continuous service, be entitled to a holiday with full pay at the rate of two (2) days in respect of each period of one month's service, to be taken at such time as shall be agreed between the parties. He then referred us to the respondent's testimony at page 83 of the record

of appeal where he stated as follows:

> **"I had taken leave from the time I was employed and consisted of three days to go and fetch my children for holidays."**

22. He contended, however, that the trial court's finding of fact on the question of leave was that the respondent had not gone on leave for the seven years that he had worked for the appellant and it then held that the respondent was entitled to two (2) days per month as provided in section 15(1) of the Employment Act, Chapter 268 of the Laws of Zambia. That in view of the respondent's testimony that the leave he used to take to fetch his children for holidays was three (3) days, there was no justification for the trial court to award the respondent one hundred and sixty-eight (168) leave days.

23. According to counsel, the lower court ought in fact to have found that the respondent had taken more leave days than he was entitled to. In the premises, the award of one hundred and sixty-eight (168) leave days was erroneous and ought to be reversed for not being supported by the evidence in the court below. He argued that this court has the power to disturb the findings of fact by a trial court where it is shown that the court fell into error. The cases

of **Attorney General v Marcus Kampumba Achiume**[6] and **William Steven Banda v Chief Immigration Officer and Another**[7] were cited in support. He concluded that this is an appropriate case to disturb the findings of fact on the respondent's entitlement to leave days as the said findings were made in error. We were, accordingly, urged to allow the appeal with costs.

24. In response to ground one, the learned counsel for the respondent submitted that a contract of employment is an individual contract between the employee and the employer and that the doctrine of privity which provides that only parties to a contract can enjoy the benefits and suffer the burden applies to contracts of employment just as it does with other contracts. The case of **Scruttons v Midlands Silicons**[8] was cited in support. Counsel contended that it is an undisputed fact that the contract of employment between the appellant and the respondent does not extend to any third party other than the two contracting parties. Therefore, it is only the appellant and the respondent who can enjoy the benefits and burdens of the contract. Thus, the action by the appellant to allow its shareholder to terminate the contract with the respondent amounted to a breach of contract as Hever Trust Limited was not

privy to the contract and, therefore, did not have authority whatsoever in relation to the employment of the respondent.

25. It was also argued that the trial court was correct in holding that the principle in the **Richard Kangwa**[4] case does not apply in matters of contracts of employment. We were referred to section 215(1) of the Companies Act, Chapter 388 of the Laws of Zambia (repealed), which according to counsel, provides that management of a company shall be exercised by the directors of that company and not shareholders and the only time when shareholders of the company participate in transacting business of the company is when such business requires a resolution by the shareholders themselves.

26. As to the extent of shareholders in management of companies, he referred us to the learned authors of Halsbury's Laws of England (4th Edition) Volume 7(2) who state at paragraph 1085 as follows:

> **"How far controllable by members. If, as usual, the management of the company's affairs is entrusted to the directors by the articles of association, a numerical majority of the shareholders insufficient to alter the articles cannot, in the absence of any provision in the articles reserving appropriate power, impose its will on the directors as regards matters so entrusted to them...where, under the articles, the business of the company is to**

be managed by the directors and the articles confer on them the full powers of the company subject to such regulations, not inconsistent with the articles as may be prescribed by the company in general meeting, the shareholders are not enabled by resolution passed at a general meeting, without altering the articles, to give effective directions to the directors as to how the company's affairs are to be managed, nor are they able to overrule any decision reached by the directors in the conduct of company business..."

27. Our attention was also drawn to the case of **Shaw and Sons (Salford Limited) v Shaw**,[9] where Lord Green stated that:

"A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the Shareholders in the general meeting. If powers of Management are vested in the directors, they and they alone can exercise their powers. The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if an opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove, they cannot themselves usurp the powers which by the articles are vested in the directors more than the directors usurp the powers vested by the articles in the general body of shareholders.

28. Counsel contended that the foregoing authority underscores the fact that shareholders cannot usurp the power of directors and dismiss an employee as was the case in the present case. He emphasized that the management of a company is vested in the

directors of a company and not the shareholders. That such management function as the termination of employment of the respondent can and should have been done by the directors of the appellant company and not Hever Trust Limited which is a shareholder. Further, and in the alternative, he submitted that if Hever Trust Limited wanted to usurp the functions of the directors of the appellant company as submitted by the appellant, that should have been done under the guise of the appellant company and not in the manner in which it was done.

29. He also argued that this court is not bound by its previous decisions and can, therefore, depart from them when there is reason to do so. In this case, counsel contended, there is enough reason for the court to depart from its judgment in the **Richard Kangwa**[4] case. He then referred us to paragraph 7 of the Affidavit in support of the Notice of Complaint in the record of appeal which, according to him, showed that the respondent's employment was terminated for alleged non-performance without being afforded an opportunity to be heard. This, he submitted, was clearly wrongful on the part of the appellant. Reliance was placed on the case of **Atlas Copco Zambia Limited v Andrew Mambwe**[10] where it was

held that:

> **"Having decided to terminate the Complainant's services on the ground of incompetence, the Respondent was by law obliged to afford the Complainant an opportunity to be heard on the charges of incompetence."**

30. It was his contention, therefore, that the respondent's employment having been wrongly terminated by the shareholder and without being afforded an opportunity to be heard on the allegations of non-performance, the court below cannot be faulted in having found that the respondent's employment was wrongfully terminated.

31. In response to ground two, counsel, relying on the cases of **Chilanga Cement v Kasote Singogo**[1] and **Swarp Spinning Mills Limited v Sebastian Chileshe and Others**,[11] submitted that the court can depart from the common law remedy of the notice period where there are circumstances warranting such a departure. That in the present case, there are clear circumstances warranting departure from the common law remedy of notice, such as the fact that the termination of employment was done in a traumatic fashion as confirmed at pages 81 and 82 of the record of appeal. Based on those circumstances, the trial court did not err when it

awarded the twenty-four (24) months damages for wrongful termination. Counsel called in aid the case of **Jacob Nyoni v Attorney General**[13] where this court stated that:

> **"In a case of wrongful termination, the award of damages is rarely computed on the basis of the remaining period of service. Damages awarded range from notice period required under a contract to the equivalent of two years."**

32. Consequently, counsel argued, the award of twenty-four (24) months salary was within the range of damages that can be awarded for wrongful termination.

33. In response to ground three, it was argued that the respondent's testimony does not show that he took three (3) days leave each month; his evidence was that he took three (3) days off at the time of fetching his children for holidays and then he would work extra days to cover for the days he used to pick up his children. Counsel contended that the appellant did not counter this evidence during cross-examination nor did the appellant produce any evidence before the trial court to aid its assertion that the respondent took three (3) days of leave every month during the period he worked for the appellant company.

34. Further, that although the appellant urges this court to disturb the finding of fact by the trial court, it has not demonstrated in any way whether the decision of the trial court was perverse, made in the absence of any relevant fact or made upon a misapprehension of facts in court in line with the decision in the case of **Attorney General v Marcus Kampumba Achiume**[6]; the appellant merely claims without evidence that the respondent took three (3) days leave each month.

35. Counsel contended that according to section 21 of the Employment Act, it is the responsibility of an employer to keep records of all oral contracts and in the absence of evidence to the contrary the court is obliged to rely on the evidence of the employee. Therefore, the appellant should have adduced evidence during trial to show that the respondent did indeed take three (3) days leave each month.

36. Accordingly, counsel submitted that the appellant has not shown cause for this court to disturb the finding of fact by the trial court and urged us to dismiss the appeal.

Decision by this court

37. We have considered the record of appeal, the judgment appealed against and the arguments advanced by the parties.

38. Ground one attacks the lower court's holding that the respondent's employment was wrongfully terminated.

39. The argument advanced under this ground is that shareholders have overriding authority over the affairs of a company including employment matters. The appellant relied heavily on the **Richard Kangwa**[4] case to support this contention.

40. The thrust of the respondent's argument on this ground is that the action by the appellant to allow its shareholder to terminate the respondent's contract amounted to a breach of contract because Hever Trust Limited was not privy to the employment contract between the appellant and the respondent.

41. Critical to the determination of the first ground of appeal is the letter terminating the respondent's employment. For completeness, the letter is reproduced below as follows:

> **"Hever Trust Limited**
> **Box 630358 Choma**

2nd of February 2015

RE: TERMINATION OF WILLIE KLOPPERS EMPLOYMENT CONTRACT

Hever Trust LTD is the shareholder of Ruharo Limited, the company that has recruited and employed Mr. Kloppers in Choma.

On the 25th of October 2013 Mr. Kloppers was given notice that if the farming performance on Duba 7/8 does not improve in the coming season his employment contract will be terminated.

Unfortunately Ruharo's financial figures for 2013 – 2014 season show a loss of USD180,000.00. The outstanding loan to Hever Investment amounted at the end of the financial year (30th of September 2014) in total of United States Dollars 1,017,391.97 (One Million Seventeen Thousand Three Hundred Ninety-One Dollars [and Ninety-Seven Cents]). This amount has been assessed by BDO, the accounting company as of high risk and unrecoverable.

During the time of Mr. Kloppers' employment as managing director of Ruharo the loan balance to Hever Investment increased steadily each year.

The farming performance in 2014 was very poor. 52 ha of tobacco were planted, the yield per ha was 2473 KG with an average price of USD 2.38. The whole Hever group averaged USD 2.90 per KG with a yield per ha of 3191. Ruharo farming performance is clearly an unviable farming performance. The row cropping performance was as well below Hever average.

Hence this letter serves to terminate Mr. Kloppers' employment contract with a three month notice period (February to April,

accumulated leave days will be deducted). The hand over to Mr. Hall is to be done with immediate effect.

The notice of three months will be honoured and linked to a smooth handing over period where Mr. Kloppers fully informs his replacement on all farming issues, state of repairs of the equipment, crop rotation issues, irrigation issues, labour relations and wage reconciliation and payment for the months of January as well as wage record keeping as required during notice period.

Mr. Kloppers also allows L. Marohn access to the computer to do a full back up of all company data.

The handing over will have to be in writing and Hever Trust will sign it off.

Regards

Signed

L. Marohn
Director Hever Trust/Ruharo"

42. The finding by the lower court was that the respondent's termination of employment was wrongful because it was done at the instance of Hever Trust Limited, the appellant's shareholder which had no power to do so as the respondent was employed by the appellant.

43. Firstly, we must start our discourse by rejecting the appellant's assertion which seems to suggest that shareholders have overriding authority over company affairs to the extent of usurping

the power which by statute, is vested in directors, relating to employment matters as this is not supported by law.

44. Secondly, we appreciate the energy exerted by counsel for the respondent in bringing to our attention various authorities that extensively discuss the distinctive roles or powers of the shareholders and directors of a company. The little we can say, however, is that albeit good law, those authorities do not apply to the circumstances of this case.

45. In this case, there is no dispute that the letter terminating the respondent's contract as can be noted in paragraph 41 above is on the letterhead of Hever Trust Limited, the appellant's shareholder. However, it is also plain from that letter that it was authored by Liselotte Marohn who was a director in both Hever Trust Limited and the appellant. In other words, the decision to terminate the respondent's employment was communicated to the respondent by some one he knew was a director of the appellant.

46. The view we take, therefore, is that the fact that the letter was on the letterhead of Hever Trust Limited and not Ruharo Limited is *de minimis*; it does not go to the substance of or invalidate the

termination. We opine that what is cardinal is that it was signed by a director of the appellant who, by virtue of that position, had the necessary power to terminate the respondent's employment.

47. The fact that Liselotte Marohn was a director of the appellant has never been disputed by the respondent. In his own evidence at page 79 of the record of appeal, the respondent said this:

> **"In October 2007 Ruharo Ltd was established and the <u>founding Directors [were] myself and Lilo (Liselotte Marohn)</u>. At this stage Lilo was to be the Marketing Director and sourcing funds, I was the Managing Director with a salary of USD 3,000 per month which was to increase in line with agricultural wages."** [Emphasis added]

48. In view of the narrative surrounding the termination of the respondent's contract of employment we have given in the preceding paragraphs, we have little difficulty in concluding that the trial court took a narrow or simplistic approach in holding that the termination of the respondent's employment was made by Hever Trust Limited and, therefore, wrongful. We hold that the respondent's contract of employment was lawfully terminated by the appellant's director, Liselotte Marohn. From the respondent's

evidence which we have quoted in paragraph 48 above, we are left in no doubt that the respondent knew or ought to have been aware that Liselotte Marohn was communicating the termination of his employment in her capacity as a director of the appellant, the two of them having been founding directors of the appellant. Accordingly, we find merit in the first ground of appeal.

49. Before we leave this ground, we need to comment on the argument by the respondent that his employment was terminated for alleged non-performance without being afforded an opportunity to be heard. Our immediate reaction is that this argument is not worth consideration as the issue of not being afforded an opportunity to be heard was not raised in the court below.

50. In ground two, the grievance is that the lower court erred by awarding the respondent twenty-four (24) months damages for wrongful termination of employment. The contention of the appellant is that the departure from the common law measure of damages namely, the notice period, was unjustified on account of his poor performance.

51. On the other hand, the respondent's position is that the court can depart from the common law remedy of the notice period if circumstances warrant such a departure as in this case, for example, where the termination of employment was in a dramatic fashion. That consequently, the trial court was on firm ground when it awarded the twenty-four (24) months salary for wrongful dismissal as it was within the range of damages that can be awarded for wrongful termination.

52. In considering the first ground of appeal, we determined that the termination of the respondent's contract of employment was not wrongful. It accordingly follows that the twenty-four (24) months salary awarded to the respondent as damages for wrongful termination of employment was a misdirection by the trial court.

53. Moreover, in **Zambia Privatisation Agency v James Matale**[13] we stated as follows:

> **"We are satisfied in the instant case that the termination was lawful and that the measure of damages in the absence of any express terms must be reasonable notice period."**

54. And in the **Kasote Singogo**[1] case, we said that:

> **"When awarding damages for loss of employment, we are always**

mindful that the common law remedy for wrongful termination of a contract of employment is the period of notice. In deserving cases, depending on the circumstances of each particular case, we have awarded more than the common law damages as compensation for loss of employment."

55. So, even assuming that the termination of the respondent's employment was wrongful, the peculiar circumstances of this case could not have warranted a departure from the common law remedy of notice period because it was not a deserving case.

56. In this case, the evidence reveals that the respondent was given three (3) months notice which he served. This is confirmed by his evidence at page 82 of the record of appeal in the following terms:

"The letter talks about the notice period from February 2015 to April 2015 and I continued to work on the farm and was handing over to Mr. Hall."

57. The respondent having fully served his notice period, he could not have been entitled to an award of damages for wrongful termination of employment other than the notice period as it was not a deserving case in the context espoused by the **Kasote Singongo**[1] case. For these reasons, we conclude that the second ground of appeal must also succeed.

58. Ground three alleges error on the part of the lower court in awarding the respondent leave pay of one hundred and sixty-eight (168) days. The gist of the appellant's argument is that there was no justification for the trial court to have awarded the respondent leave pay of one hundred and sixty-eight (168) days when the respondent's testimony was that he would take leave of three (3) days each month to fetch his children for holidays. That in fact, the trial court should have found that the respondent had taken more leave days than he was entitled to.

59. The respondent's contention is that his evidence does not show that he took three (3) days leave each month but that he took three (3) days off when fetching his children during school holidays; and that he would work extra days to cover for the days he used to pick up his children.

60. In his evidence at page 83 of the record of appeal, the respondent stated that:

> **"I had taken leave from the time I was employed and consisted of three days to go and fetch my children for holidays. I am not sure this qualifies as leave as I had workers who were Seventh Day Adventist who worked on Sunday. I used to work on both Saturday and Sunday and public holidays. The extra days I**

worked covered for those days I used to pick my children from school."

61. As aptly submitted by the respondent, his evidence referred to in the preceding paragraph was not challenged. In its judgment at page 17 of the record of appeal, the trial court found as follows:

> **"Leave days are an entitlement that every employee enjoys while in employment. The Complainant was employed under oral contract. The respondent has conceded that the complainant was entitled to two (2) leave days per month in terms of section 15(1)(i) of the Employment Act. The respondent has, however, disputed that the complainant is owed any leave days' pay.**
>
> **We find this argument by the respondent absurd. In one breath it is saying that the complainant was entitled to two (2) leave days in a month and in another it is stating that he had not accumulated leave days. It is the duty of the Employer to provide evidence at trial to the effect that it had kept the records of the complainant's leave days accumulation.**
>
> **The law is very clear under section 21(5) [of the Employment Act] that it is the responsibility of the Employer to keep these records for all oral contracts of service. If the employer fails to do so the court is obliged to receive the statement of an employee as evidence.**
>
> **Without any evidence to the contrary by the respondent ... we find that he is entitled to two (2) days leave per month as per section 15(1)(i) of the Employment Act."**

62. It is on the basis of the lower court's reasoning we have quoted in the preceding paragraph that the respondent was awarded leave pay of two (2) days per month for seven (7) years totalling one hundred and sixty-eight (168) days. In the absence of express terms, we cannot fault the lower court in resorting to section 15(1) of the Employment Act which provides for two (2) leave days per month accruable under oral contracts of employment.

63. The proceedings in the court below show that the respondent's evidence that he took three (3) days leave during school holidays which he covered up by working extra days on Saturdays and Sundays was not gainsaid by the appellant. Therefore, there can be no doubt that the respondent had accumulated leave days during the seven (7) years he worked for the appellant. In the circumstances, the appellant's argument that the trial court should have found that the respondent had taken more leave days than he was entitled to cannot hold.

64. On the facts of this case, we do not find any compelling reason to disturb the finding of the trial court and its award of one hundred and sixty-eight (168) leave days based on section 15(1) of the

Employment Act as the appellant did not produce any evidence in the court below showing that the respondent had exhausted all his leave days. We consequently find no merit in the third ground of appeal and accordingly dismiss it.

Conclusion

65. In the net result, the appeal succeeds to the extent indicated in this judgment. We order that each party shall bear their own costs here and below.

M. Musonda
DEPUTY CHIEF JUSTICE

R. M. C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE