

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2015/HP/1378

**B E T W E E N:**

LLOYDWIN NKHATA

PLAINTIFF**AND**

WCE (ZAMBIA) LIMITED

DEFENDANT

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 6th day of June, 2017

For the Plaintiff : Mr. M. Chitundu, Messrs Barnaby & Chitundu Advocates
For the Defendant : Ms. V. Oputa, Mesdames Theotis, Mataka & Sampa Legal Practitioners

J U D G M E N T

Case Authorities Referred To:

1. *Zambia National Provident Fund v Yekweniya Mboniwa Chirwa* (1986) Z.R 70
2. *Wilfred Weluzani Banda v Medical Council of Zambia and The Attorney General* SCZ Appeal No. 116/2012

Legislation Referred To:

1. *Employment Act, Chapter 268*
2. *Halsbury's Laws of Zambia, 4th Edition, Vol. 16*

By Writ of Summons and Statement of Claim, the Plaintiff seeks the following reliefs:

- (i) *A declaration that the Plaintiff was unlawfully and unjustly dismissed from employment.*
- (ii) *An order for payment of the sum of K175,000.00 being unpaid salaries for the seven (7) months of 2014.*
- (iii) *An order for the Defendant to pay the Plaintiff the sum of K50,000.00 being gratuity for the Plaintiff's first contract of employment.*
- (iv) *An order for payment of the sum of K200,000.00 being the amount the Plaintiff would have been paid as salaries for remainder of the second contract had it not been for the wrongful termination of the contract.*
- (v) *An order for payment of the sum of K50,000.00 being the amount the Plaintiff would have been paid as gratuity for the second contract had it not been for wrongful termination of the contract.*

The particulars given in the Statement of Claim are that the Defendant offered the Plaintiff employment as an Assistant Resident Engineer - Western Province. The contract was to run for a year with an effective date of 6th January, 2014. The Plaintiff was offered a basic monthly salary of K25,000.00 among other terms and conditions of service.

The Plaintiff claims that he was not paid salaries for the months of January, February, March, April, June, July and August 2014, and is owed K175,000.00. Further, despite the contract of employment providing gratuity equivalent to two months of his basic salary of K25,000.00, he was not paid gratuity of K50,000.00.

The Plaintiff states that after the expiration of his first contract he was given a second one based on the same terms as the first. He also states that that he served the Defendant diligently, honestly and competently until 24th April, 2015, when his contract was terminated on alleged grounds of incompetency. The Plaintiff claims that he was never charged with incompetency nor given an opportunity to exculpate himself before his dismissal.

The Plaintiff further claims that the Defendant owes him K46,154.00 in respect of 48 leave days. Further, had it not been for his wrongful termination, he would have satisfactorily completed his second contract and received salaries in the sum of K200,000.00 and K50,000.00 as gratuity. As a result of the Defendant's action, the Plaintiff claims that he has suffered serious loss, inconvenience and damage in respect of his career, earnings and reputation.

The Defendant settled an Amended Defence where it admits the circumstances of the Plaintiff's employment. It avers that the Plaintiff began to work for it in April, 2014, and not 6th January, 2014. The Defendant also avers that the Plaintiff was incompetent because he exhibited a lack of basic engineering knowledge, including simple

engineering terminology. The Defendant states that it received a number of complaints from its Client assaulting the Plaintiff's competency.

The Defendant denies that it owes the Plaintiff ZMW175,000.00 as unpaid salaries for the months of January to August, 2014. The Defendant contends that the Plaintiff was paid all his monthly salaries up to the time his contract was terminated in April, 2015. The Defendant states that the Plaintiff was not paid his gratuity due to incompetency and his contract was never renewed.

The Defendant avers that the Plaintiff was employed on the strength of his Engineers' Registration Board of Zambia (ERB) Certificate, Engineering Institution of Zambia (EIZ) Certificate and his Higher National Certificate in Civil Engineering tendered as his highest qualification. The Defendant further avers that the Plaintiff's employment was terminated in accordance with the terms and conditions of contract. The Defendant states that the Plaintiff took leave from 2nd December, 2014 to 13th March, 2015. In sum, the Defendant states that the Plaintiff is not entitled to the reliefs sought.

In its counterclaim, the Defendant states that sometime in November, 2013, the Plaintiff attended interviews where he held himself to be a properly qualified registered engineer when in fact not. The Plaintiff also held himself as a registered engineer who had a degree in civil engineering when in fact not. The Defendant avers that the Plaintiff's Curriculum Vitae which states that he has a Diploma Engineering in Engineering Management, from South Kent, Ashford, UK, a Higher Diploma in Civil Engineering from Canterbury, UK and Certificate in Structural Engineering, Northern Technical College, Ndola, are a misrepresentation of his qualifications. In short, the Plaintiff fraudulently represented himself to the Defendant.

The Defendant counterclaims:

- (i) *The sum of Three Hundred and Eighty-Seven Thousand Five Hundred Kwacha (ZMW387,500.00) being the total income paid by the Defendant as a result of the Plaintiff's employment by way of basic salary inclusive of deductions paid by the Defendant on the Plaintiff's behalf;*
- (ii) *Interest on the amount awarded;*
- (iii) *Costs; and*
- (iv) *Any other relief as the Court may deem fit.*

When the matter came up for trial, the Plaintiff **Lloydwin Nkhata** testified as **PW1**. He stated that he applied for employment at the Defendant Company and was interviewed between October and November, 2013. He was subsequently offered employment as

an Assistant Resident Engineer Western Province executed a contract on 29th November, 2013, with the Defendant who was represented by Mr. E. M. Haazele. His first contract ran from 6th January, 2014 to December, 2014 and was subject to renewal. He referred the Court to pages 1 - 6 of his Bundle, which show his offer letter of employment and contract. He stated that he was to be paid a salary of K25,000.00 on the last day of each calendar month.

PW1 testified that he was entitled to gratuity in terms of clause 5 of his contract and at the rate of two months basic salary, for each completed contract year, based on the last drawn salary. PW1 testified that he started work on 6th January, 2014, and the pay statements prepared by the Defendant Company's Accountant at pages 13-16 of his Bundle confirmed the position.

PW1 told the Court that his duty as Assistant Resident Engineer was to supervise the works of the Contractor in Western Province. However, at the time, he was employed he was assigned to work in Luapula Province. Prior to his relocation, he was tasked to supervise works in Lusaka, which included those of AVIC International in Makeni and Lilayi townships.

PW1 testified that he was not paid salaries for the months of January, February, March, April, June, July and August, 2014, even though he was given pay statements. He stated that the Defendant attributed the non-payment of his salaries to insufficient funds and not incompetency. At page 9 of his Bundle, PW1 stated that he was paid K16,782.00 as his salary in May, 2014. Similarly, at page 10, he was paid salaries on 16th September, 2014, 29th September, 2014, 28th October, 2014 and 27th February, 2015.

PW1 testified that whenever he expressed anxiety over his unpaid salaries, the Defendant Company would inform him that it had no funds. PW1 testified that at the completion of his first contract, he expected payment of his gratuity and leave days, which remain outstanding. Irrespective of the circumstances, PW1 was offered a second contract by the Defendant in Luapula Province. He accepted the contract and stayed in the Defendant's employment from January to March 2015.

PW1 stated that Mr. Haazele called him to Lusaka in March, 2015, for a meeting with the Defendant's client, the Ministry of Local Government and Housing, regarding the contractor's performance.

After the meeting, PW1 testified that he never returned to Mansa and worked at the Defendant's Lusaka office, till he was handed his termination letter on 24th April, 2015, at page 37 of his Bundle. According to PW1, the letter terminated his second contract.

PW1 testified that in as much as the Defendant had the right to terminate his employment under clause 9.1 of the contract, it did not follow the correct procedure. It was his testimony that he was not charged with an offence nor given an opportunity to defend or explain his position. Further, the Defendant never raised the issue of incompetency at any forum and was surprised to learn of the allegation after the termination of his contract. PW1 insisted that he never went on leave except for the annual Christmas break, which all staff members took at the Defendant Company's expense.

PW1 testified that after the Christmas break, he returned to site in mid-January, 2015, up to March, 2015. It was his evidence that when Mr. Haazele interviewed him for his position, he submitted his Higher National Certificate (HNC) Diploma in Civil Engineering, Engineering Institute of Zambia Practicing Certificate and a British Institute of Civil Engineers Certificate as part of his credentials. He

referred the Court to his Curriculum Vitae at pages 43 - 48 of his Bundle, which summarise his professional and educational qualifications as well as his work experience. PW1 contended that he was a properly qualified engineer and in all his working life, his qualifications had never been challenged. He went on to assert that the Defendant Company offered him a job on the basis of his qualifications and wondered how they were later queried.

PW1 testified that he is a Technician Engineer in the Civil Engineering category and is registered with the Engineering Registration Board of Zambia (ERB). He also has a Registration Certificate from the Engineering Institute of Zambia (EIZ). In reference to his documents at pages 1 - 4 of the Defendant's bundle, PW1 stated that ERB issued him a certificate based on his academic training. At page 2 of the Defendant's Bundle, PW1 stated that the BTEC National Certificate was awarded to him in June, 1992, after he attended training for three years. At page 3 of the Defendant's Bundle, PW1 stated that he was membered by ERB, on 18th September, 2003, while the Certificate at page 4, designated him as a Registered Engineer.

PW1 dismissed the Defendant's counterclaim stating that his claims were based on the terms of contract. He contended that the Defendant's issue with his academic and professional qualifications were false and had no basis. Further, his termination letter did not question his academic or professional qualifications. PW1 stated that he did not coerce the Defendant Company into employing him but it did so on merit. He concluded with a prayer beseeching the Court to grant him the reliefs sought.

In **cross examination**, PW1 maintained that he used the documents at pages 1-4 of the Defendant's Bundle during his job interview. He testified that the conditions for renewal of his first contract were stated in clause 2.1. Further, he was not given renewal forms after the first contract but was given verbal instructions to continue work. PW1 testified that his first contract ended in December, 2014. He also testified that he held meetings with Mr. Haazele over his unpaid entitlements and maintained that he did not go on leave from December, 2014 to March 2015, on account of the rainy season.

PW1 stated that he returned to site in early January, 2015 to ensure that the Contractor had mobilized. He insisted that his end of year leave was separate from the leave contemplated in clause 6.1 of his contract. PW1 stated that the second contract was not written and he never had discussions with Mr. Haazele on his alleged incompetency. He denied that he falsely represented himself as an engineer to the Defendant but submitted credible documents of his competencies at the time of interview.

In **re-examination**, PW1 maintained that he was on site from mid-January to March, 2015, supervising the Contractor in Mansa. The Contractor was tasked to clear some roads during the rainy season. It was PW1's evidence that the Defendant's letter of termination was issued on his second contract and that the discussions at page 37 of his Bundle did not affect him but the Contractor. He also stated that based on the qualifications he presented to the EIZ, he was deemed fit to be registered as a Registered Engineer considering that his qualifications were equivalent to a degree.

The Defendant's only witness was **Eugene Milambo Haazele** who testified as **DW1**. He stated that PW1 applied for employment with the Defendant Company in November, 2013. PW1 presented his Curriculum Vitae (CV) and practicing certificate from the ERB during the interview. After reviewing PW1's rather impressive CV and practicing licence, DW1 offered him employment as an Assistant Resident Engineer.

DW1 stated that he and PW1 executed a contract in November, 2013 with an effective date of 6th January, 2014. According to DW1, PW1 reported for work in January, 2014 and was to be posted to Senanga, Western Province but for unforeseen circumstances, he was sent to the Defendant's project in Luapula Province. DW1 stated that PW1 was employed during the rainy season when contractors do not traditionally construct roads.

According to DW1, PW1 reported for work in Mansa sometime in April, 2014, and in July, 2014, he started to receive complaints about PW1's performance on site. He called PW1 to discuss the issue which rested until the complaints persisted. The complaints were

initially received from PW1's junior staff, and around September, 2014, escalated to the Client's Engineer on site.

DW1 testified that the complaints alleged that PW1 did not have a basic understanding of engineering and he decided to investigate the matter. According to DW1, his investigations revealed that PW1 did not possess a Diploma in Civil Engineering as alleged at page 43 of his Bundle. Further, he did not possess a Diploma in Engineering Management but had a Certificate in Structural Engineering appearing at page 2 of the Defendant's Bundle.

DW1 denied that the Defendant owed the Plaintiff ZMW175,000 because he was paid all his salaries. He stated that there were delays in paying PW1 his money just like the other staff in the Defendant Company were affected. DW1 admitted that PW1 was not paid gratuity due to his incompetency but instructed PW1 to continue working after his first contract, because it coincided with the Contractors' contract, which commenced in April, 2014. DW1 maintained that PW1 did not competently discharge his duties and his contract was consequently terminated.

DW1 testified that PW1 went on leave on 2nd December, 2014 to 31st March, 2015, as there were no works during the rainy season. DW1 asserted that the Defendant Company was not indebted to PW1 given that his leave exceeded his entitlement. DW1 asserted that PW1 was not owed salaries for the terminated period because he was no longer in employment. He prayed to the Court to dismiss PW1's claims.

On the counterclaim, DW1 testified that the Defendant engaged PW1 on the strength of his Curriculum Vitae and expected a good service. At page 1 of the Defendant's Bundle, DW1 wondered how PW1 obtained his Certificate as a Registered Engineer when he was lowly qualified. DW1 stated that for a person to be designated as a Registered Engineer, one had to hold a degree in engineering or equivalent according to the Engineering Institute of Zambia Act. He concluded with a prayer to the Court entreating it to award the Defendant damages resulting from PW1's employment.

In **cross-examination**, DW1 maintained that PW1 was paid all his salaries on the first contract and was insincere when he testified

to the contrary. DW1 testified that PW1's salaries were paid by bank transfer and that the records were kept by the Defendant Company. DW1 stated that the pay statements in the Defendant's Bundle confirmed the payments made to PW1 even though the bank transfer statements were not produced in Court. DW1 stated that PW1 was entitled to salaries for the months of January to March, 2014.

DW1 testified that after the first contract, PW1 was given a second contract, which was subsequently terminated by the letter at page 37 of the Plaintiff's Bundle. He stated that the second contract had the same terms as the first one. According to DW1, the first complaints of PW1's incompetency surfaced in July, 2014, midway the first contract. Notwithstanding, the Defendant Company allowed PW1 to work till the end of his first contract and was subsequently granted a second one. DW1 conceded that he did not charge PW1 with incompetency. Further, that under the first contract, PW1 was entitled to twenty-four leave days and there was no proof before Court to show that PW1 went on leave.

DW1 conceded that the Engineers' Registration Board (ERB) is the only body responsible for grading engineers and that it issued PW1's certificate at page 1 of the Defendant's Supplementary Bundle. DW1 stated that the ERB equated PW1's qualifications to a degree. DW1 stated that at the time of interviewing PW1, he was convinced that PW1 held the qualifications in the Curriculum Vitae even though he did not present them during the interview. He also stated that he never wrote to any institution challenging PW1's qualifications.

In **re-examination**, DW1 maintained that PW1 was untruthful when he testified that he was owed salary arrears contrary to the pay statements at pages 6-19 of the Defendant's Bundle. According to DW1, PW1 did not successfully complete his first contract because he was incompetent.

DW1 testified that he allowed PW1 to continue working because he did not want to get rid of him. However, he got to a point where he had to terminate PW1's contract. DW1 testified that he kept all his discussions with PW1 verbal because he did not want to create paper trail, which would have damaged the Defendant Company's

business. DW1 stated that as an employer, he was able to assess PW1's capabilities and that the documents at pages 1- 4 of the Defendant's Bundle were the only documents PW1 submitted to the Defendant at the time of interview. DW1 also stated that he never wrote to the ERB to verify PW1's academic qualifications because it was not common to the Defendant Company's operations.

At the close of trial, I invited the parties to file written submissions. At the time of writing of the judgment, none of the parties did so.

I have paid the closest attention to the evidence adduced and the pleadings herein. It is not in dispute that the Defendant initially executed a contract of employment with the Plaintiff for a period of one year from 6th January to December, 2014. In that contract, the Plaintiff was entitled to the remuneration listed in the following clauses:

"4.1 A basic salary applicable to the employee's position and responsibilities in WCE Zambia. The monthly basic salary at the commencement date of the contract shall be ZMW25,000.00.... payable in arrears on the last day of every calendar month or such other time as may be mutually agreed from time to time. All remuneration and any other payments

shall be fully subject to the Laws of the Republic of Zambia in respect of taxation, pension or other statutory deductions.

- 4.2 *In addition, the employee shall also be entitled to the following:*
- 4.3 *The employee's remuneration may be subject to appraisal and review from time to time. Any such increases or bonuses so awarded from time to time shall be at WCE Zambia's sole discretion.*
- 5.0 *Gratuity/Terminal Benefits: The employee shall be entitled to a Contract Terminal Gratuity on successful completion of the employment period at the rate of Two (2) months basic salary per completed contract year, based on the last drawn salary. In the event of the employee terminating the contract before the automatic expiry date, WCE will not be bound to pay any benefits in respect of gratuity for termination of employment.*
- 6.1 *The employee shall be entitled to two (2) working days leave per completed month served (exclusive of public holidays) to be taken at such times as WCE Zambia considers convenient having regard to the specific operational duties and responsibilities of the employee. The employee shall be required to take a specified number of their leave days (13 days) during the annual close down unless otherwise specifically notified by WCE Zambia."*

The Plaintiff was subsequently awarded a second contract after the expiration of the first one on the same terms and conditions. However, before the expiration of the second contract, the Plaintiff's services were terminated on the grounds of incompetency.

The issue that arises for determination in my view, is therefore, very narrow, and it is whether the Plaintiff is entitled to the remuneration stated in his claim?

I understand the Defendant's contention to be that the Plaintiff misrepresented his academic and professional qualifications during his interview. Consequently, he was offered a job under false representation. According to the Defendant, the Plaintiff turned out to be incompetent as he lacked basic engineering knowledge and this prompted the Defendant to terminate the Plaintiff's contract of employment. The Defendant counterclaims all the salaries paid to the Plaintiff.

On the other hand, the first declaration sought by the Plaintiff is that he was unlawfully and unjustly dismissed from employment. The Plaintiff's contract of employment and in particular clause 9.0 remarkably provides that:

"WCE shall have the right to terminate the employee's contract without liability for compensation or damages or contract gratuity upon the occurrence of any of the following events:

9.2 Forthwith, if the employee is guilty of any gross negligence or incompetence in the performance of his/her duties hereunder or misconduct prejudicial to the interest of WCE."

The Learned Authors of **Halsbury's Laws of England 4th Edition, Vol. 16** at page 392 paragraph 425 state that:

“Employment may in general be terminated at common law either by dismissal or by resignation. If it is terminated by dismissal, that dismissal may at common law be either lawful or wrongful; and a dismissal whether lawful or wrongful, may be challenged as being unfair by statute.”

The right of either party to terminate a contract of employment is codified in the Employment Act, which in Section 36 provides that:

“ 36. (1) A written contract of service shall be terminated –
(a) by the expiry of the term for which it is expressed to be made; or
(b) by the death of the employee before such expiry; or
(c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise.”

Under subsection 36 (1) (c), of the Employment Act, the law recognises that there are other circumstances not stated in sub clauses (a) and (b) in which a contract of employment may be terminated. The Employment Act requires the termination of contract to be lawful otherwise wrongful or unfair termination condemns an employer to damages.

According to the Learned Authors of **Halsbury's Laws of England 4th Edition Volume 16** at paragraph 447:

“An employer has a common law right to dismiss an employee without notice on the ground of the employee's gross misconduct and

such a dismissal is not wrongful... alternatively gross misconduct justifying summary dismissal may be seen as conduct so undermining the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment... the power of summary dismissal is not removed or directly altered by the modern employment protection legislation, either as to minimum periods of notice or as to the statutory action for unfair dismissal..”

In the case of **Zambia National Provident Fund v Yekweniya Mboniwa Chirwa**¹, the Supreme Court held that:

“procedural rules were part of the condition of service... and that where it is not in dispute that an employee has committed an offence for which the appropriate action is dismissal and he is dismissed, no injustice arises from failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.”

After carefully considering the Plaintiff's contract of employment, I find that it did not contain a notice period for termination. In other words, the termination clause was drafted in a way that the Plaintiff could be summarily dismissed. The Plaintiff's letter of termination is reproduced herebelow:

“24th April, 2015

Lloydwin Nkhata,
Plot No. 779
New Avondale
P O Box 325X
Lusaka

Dear Lloydwin

TERMINATION OF CONTRACT- YOURSELF

Our various discussions and representations from our associate project partners (Allione Consulting Engineers) and the Client (Ministry of Local Government and Housing) refer. This letter serves to inform you that your Contract of Employment is terminated forthwith as a result of your incompetence. This is in accordance with Sub-Clause 9.1 of your conditions of employment.

**Yours faithfully,
For and on behalf of WCE (Zambia) Ltd**

**Eng. Eugene M. Haazele
Managing Director "**

DW1 testified that he informed PW1 of the complaints regarding his incompetency and followed it with a meeting. PW1 denied that he ever met DW1 to discuss his alleged incompetency but only met him to discuss the concerns on the Contractor's performance.

As opined by the Learned Authors of Halsbury's Laws of England, summary dismissal may be seen as conduct which undermines the trust and confidence inherent in a particular contract. After considering the contested positions of the parties, I form the view that the Defendant did not follow laid down procedure

in terminating the Plaintiff's contract. However, this does not render the Plaintiff's dismissal unlawful and unjust because it resonated with the principles of summary dismissal. In other words, I find that the Plaintiff's dismissal was lawful. Having so determined, I refuse to declare that the Plaintiff was unlawfully and unjustly dismissed from employment.

The second relief sought by the Plaintiff is for the payment of the sum of K175,000.00 representing unpaid salaries under the first contract. The Plaintiff adduced evidence of his Bank Statement, which shows the salaries remitted by the Defendant. On the other hand, DW1 contended that the exhibited pay statements for the Plaintiff in the Defendant's Bundle proved that he was paid salaries and is not owed any money. I do not find any merit in the Defendant's submission because the Plaintiff's Bank Statements, in my view, provided neutral and cogent evidence, which was to the effect that the Plaintiff only received five salaries. The other seven salaries were not paid. I therefore, have no hesitation in holding that the Defendant is indebted to the Plaintiff in the sum of K175,000.00 for the unpaid salaries and must settle the same forthwith.

The Plaintiff seeks to recover gratuity of K50,000 on his first contract and the evidence led is that he successfully completed his first contract. The evidence of DW1 on the other hand, was that the Plaintiff was not paid gratuity because he was incompetent. In the same breath, DW1 testified that PW1 was offered a second contract on the same terms and conditions as the first one.

I have no doubt from the evidence adduced, that the Plaintiff successfully completed his first contract and was awarded a second contract. The Defendant has no basis whatsoever for denying PW1 his gratuity. The terms of contract were clear and the fact that PW1 served his first contract without incidence entitles him to the payment of K50,000.00 gratuity. Accordingly, I hold that the Defendant should pay PW1 his gratuity forthwith.

The Plaintiff seeks relief for the payment of 48 leave days at K46,154.00. Clause 6.1 of the Plaintiff's Contract provides that:

" The employee shall be entitled to two (2) working days leave per completed month served (exclusive of public holidays) to be taken at such times as WCE Zambia considers convenient having regard to the specific operational duties and responsibilities of the employee. The employee shall be required to take a specific number of their leave

days (13 days) during the annual close down unless otherwise specifically notified by WCE Zambia.”

PW1 testified that he did not go on leave as stated in clause 6.1 but went on a Christmas break at the Defendant Company's expense, from mid December 2014 to early January, 2015. On the other hand, DW1 testified that PW1 went on leave from 2nd December 2014, to 31st March, 2015. He contended that the Contractor also went on break on account of the rainy season. PW1 nevertheless, testified that he returned to site to supervise the Contractor in January, 2015.

I am disclined to PW1's evidence that he returned to site during the rainy season. It is perplexing that he would have made that decision to return to site when his employer was on industrial break. Be that as it may, I understand Clause 6.1 to mean that PW1 was obliged to take 13 leave days during the annual close down. PW1 accumulated a total of 24 leave days during his first contract. According to Clause 6.1, PW1 was required to take 13 of those leave days during the annual close down. The remaining 11 days could be taken at any time during the life of the contract. In my view, neither party adduced evidence to show whether PW1 went on leave other

than the Christmas Break. I therefore find in PW1's favour and hold the Defendant must pay PW1 for the 11 leave days, which were not taken during the annual industrial break.

I have not lost sight of the fact that PW1 was offered a second contract based on the same terms as the first one. Consequentially, my finding on the first contract affects the second as follows:

- (i) If PW1 has any salary arrears on his second contract, then the arrears must be paid from January to 24th April, 2015.
- (ii) Gratuity must be calculated on a pro rata basis from January to 24th April, 2015.
- (iii) Leave days, if not taken circa 8 days must be paid to PW1.

I now turn to the Plaintiff's claims for the lost opportunity to salaries worth K200,000, gratuity K50,000 and leave days for the remainder of the second contract. The Plaintiff claims that if it had not been for the wrongful termination of his contract, then he would have been paid for the remainder of his second contract. He claims that he has suffered serious loss, inconvenience and damage in respect of his career, earnings and reputation. The Defendant denies these claims.

In the case of **Wilfred Weluzani Bnada v Medical Council of Zambia and The Attorney General**, the Supreme Court held that:

“the general rule is that the normal measure of damages is usually computed based on the notice period required under a contract on the notional reasonable notice, in cases where the contract is silent on the notice period.”

Quoting the case of *Swarp Spinning Mills Limited v Sebastian Chileshe and Other* (2002) Z.R. 23, the Supreme Court went on to state that:

“... the Court can only depart from the normal measure of damages where the circumstances and the justice of the case so demand.... The Court will usually consider situations where the termination is inflicted in a traumatic fashion which causes undue distress or mental suffering. Loosing employment opportunities is considered...”

The Supreme Court went on to hold that:

“There is also no substance in the argument that the Appellant has very slim chances of finding another job considering his age, because age is a natural consequence of life. And we have noted that the Appellant was well over the retirement age. In effect, he was in the twilight of his career. In our view, this was something that could not justify any departure from the normal measure of damages. Similarly, we are disinclined to the argument that the trial Court should have considered the Appellant’s remaining period of service. We say this because, authorities show that in cases of this nature, the award of damages is rarely computed on the basis of the remaining period of service.”

After reviewing the evidence on record, I find that there are no justifiable reasons to award the Plaintiff salaries, gratuity and leave days on the balance of the second contract. Doing so, would be

entitling him to unjust enrichment to money he has not worked for. I accordingly, dismiss the Plaintiff's claims.

I award the Plaintiff interest to be paid from the date of Writ of Summons to the date of payment at the short term deposit rate and interest from the date of judgment to the date of full payment at the rate determined by the Bank of Zambia.

I find no merit in the Defendant's counterclaim for the sum of K387,500.00 being salaries paid to the Plaintiff for the reasons given above. In any event, the Plaintiff served the Defendant up to the time that his contract was terminated. Therefore, the Plaintiff is entitled to the remuneration that he accrued as an incidence of his employment. It is wrong for the Defendant to seek compensation when it acquiesced the working relationship it had with the Plaintiff up to the time of termination. For the avoidance of doubt, the counterclaim fails in its entirety.

I award costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 6th day of June, 2017.


M. Mapani-Kawimbe
HIGH COURT JUDGE