

**IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2017/CRMP/459

BETWEEN:

JACOB MWELWA

PLAINTIFF

AND

GUANJIN INVESTMENT LIMITED

DEFENDANT



JUDGMENT

CASES REFERRED TO :

- 1. KHALID MOHAMED V ATTORNEY GENERAL AND ANOTHER (1982) ZR 49**
- 2. WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT (1982) ZR 172**

The plaintiff issued out of this court a default writ of summons claiming against the defendant a sum of K23,768= being the balance of accrued leave pay, notice pay, service benefits, housing, lunch and transport allowance

In civil cases the standard of proof is on a balance of probabilities and he who asserts the claim must prove it.

In the case of Khalid Mohamed v Attorney General and another (1982) ZR 49 Ngulube DCJ as he was then stated that "..... a plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to judgment".

In Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172 the supreme court stated that " a plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case".

The plaintiff was the only witness who testified that he started working for the defendant on 5th May 2013 that is for 3yrs 5months. In May 2017 they were told that when they sign contracts that would be the end of the 3yrs served that is how the plaintiff refused to sign the new contract and his job was terminated. He then engaged labor consultants who asked him to go back for work. He then went back where he was given a contract to sign for the defendant to give him the money owed he was paid K 1000= which he refused as it was little.

In cross examination he stated that he had worked for the defendant as a general worker from 2013 to 2017 and he was paid a salary. The amount of K 23,768= includes Lunch allowance, Transport allowance and Terminal benefits. They were paid at the end of each month and it was dependant on how one worked. On the payroll for 2015 he signed for the money as it was the procedure. The signature was appended on the attendance sheet if one worked and this was done each month. The rate for the work done was according to the rate multiply by the number of days worked. He was paid K 100 as his contract ended on 5th May

2017. He was working earlier then 2015 though his name was not appearing on the payroll.

There was no re-examination and this was the close of the plaintiff's case.

In their defence the defendant through its commercial manager Nkosana Asing testified that he has worked for the defendant for over 2 yrs and plaintiff was one of the general workers as he joined in March 2015 and stopped in March 2017. The plaintiff used to work for K 30 per day and had been given a standard contract which he signed and before his resignation he was paid his salary.

In cross examination he stated that before the plaintiff resigned he was paid as it was Mr Wu who employed him. According to the records he knows when the company was operating at 10miles,

In re-examination he stated that he was not there when the company first started operating

This was the close of the defendant's case.

Counsel for the defendant further submitted viva voce that the plaintiff had failed to demonstrate when he started work and what he was entitled to therefore the case should be dismissed with costs.

In this case there is no dispute that the plaintiff worked for the defendant for a number of years. There is no dispute that during employment a contract was signed between the plaintiff and the defendant. There is no dispute that the plaintiff was working based on hours worked and was paid his salary every month.

The issue to be resolved by this court is whether the plaintiff is entitled to the claims.

From the evidence on record the plaintiff did not state how much he was entitled to as his basic salary but from the contract exhibited by the defendant it shows in

section 6 that as from 4th May 2017 the plaintiff was entitled to some conditions that needed to be fulfilled by the defendant.

The plaintiff was entitled to K 710= as basic pay with K 210 = as housing allowance and K 120= lunch allowance. An employee is equally entitled to gratuity when the contract is completed as per section 6 (f).

The defendant admits having paid the plaintiff K1000= as his entitlement now the question is was this the correct amount to be awarded. It is unfortunate that none of the parties exhibited the contracts from the time the plaintiff started work to determine whether the contracts had previously ended and if payments were made also the terms. However the defendant did exhibit a terminal benefits form which shows the plaintiff being paid K1000= for a period of 2 years that is from 3rd January 2015 to 5th May 2017. The amount paid does not show the calculations of the lunch, housing, transport nor the basic pay there is only a lump sum figure which I believe is not supposed to be the case. This means that the plaintiff was never paid for the last 2 yrs on the contracts and should be paid.

The plaintiff was entitled to these allowances and it was prudent for the defendant to show how they came up with K 1000= as the terminal figure. I believe the plaintiff was underpaid but not the extent of K23,768=

The defendant must calculate the basic pay, 30% of basic pay for housing allowance, lunch allowance as there was no evidence lead by the defendant that this was provided and including gratuity. In two years plaintiff was not going to accumulate K 1000= based on the contract. The sum to be calculated will attract interest at current Bank of Zambia lending rate from today until liquidation of the debt.

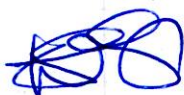
The defendant will re-calculate the figures by showing the entitlement accrued to the plaintiff including leave as its earned and subtract the K 1000= paid to him according to the contracts he had signed as this clearly was an underpayment.

The plaintiff therefore succeeds to the claim of underpayment and should be paid as I have ordered.

Costs are awarded to the plaintiff in default of agreement to be taxed

IRA within 30 days

DELIVERED IN OPEN COURT THIS DAY OF 2017



**IREEN TILISA WISHIMANGA
SENIOR RESIDENT MAGISTRATE**

