IN THE SUPREME COURT OF ZAMBIA **Appeal No. 156/2014**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
06 MAY 2021
SUPREME COURT REGISTRY
P.O. BOX 50067, LUSAKA

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPELLANT**

AND

RICHARD CHIWISHA **RESPONDENT**

CORAM: Wood, Kajimanga, and Kabuka JJS
On 9th August 2016 and 6th May 2021

For the Appellant : Mr. B. Gondwe of Buta Gondwe & Associates and Mr. M. Sakala of Corpus Legal Practitioners

For the Respondent : Mr. M. Mutemwa, SC of Mutemwa Chambers

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

[1] Maamba Collieries v Douglas Siakalanga and Others - Appeal No. 51 of 2004
[2] Henry Nsama and Others v Zambia Telecommunications Company Limited-Appeal No. 21 of 2012
[3] James Mankwa Zulu and Others v Chilanga Cement-Appeal No 12 of 2004
[4] John Paul Mwila Kasengele v Zambia National Commercial Bank-Judgment No. 11 of 2000
[5] Jonathan Musialela Nguleka v Furniture Holding Limited (2006) Z.R. 19
[6] Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172

[7] Dickson Zulu and Others v Zambia State Insurance Corporation Limited Appeal-No. 203 of 2008
[8] William David Carlisle Wise v E. F. Hervey Ltd. (1985) Z.R. 179

Legislation referred to:

Supreme Court Act, Chapter 25 of the Laws of Zambia, Rules 61(1), 61(3) and 76

Authorities referred to:

Chitty on Contracts Volume 1, 27th Edition; paragraph 12-040 at page 581

The Court regrets the delay in delivering this judgment. The delay was occasioned by the heavy workload.

Notice of Motion for leave to file a cross-appeal

[1] When this appeal came up for hearing, we decided to first hear the notice of motion for leave to file a cross-appeal filed by the respondent pursuant to rule 61(3) of the Supreme Court Rules Chapter 25 of the Laws of Zambia. The notice of motion was supported by an affidavit sworn by the respondent. He deposed that he was desirous of filing a cross-appeal in this matter against the judgment of the learned judge in the court below as per the draft notice of appeal attached to the affidavit. He had been unable to do so on time because he could not pay the required deposit demanded by his previous advocates as having

been unemployed for a considerable period of time, he was virtually a man of straw. Since his new advocates, Messrs Mutemwa Chambers, have on compassionate terms agreed to represent him in this matter, he humbly requested that he be granted leave to file his cross-appeal. That the delay in filing the cross-appeal was neither willful nor deliberate.

[2] In his oral submissions, Mr. Mutemwa, SC argued that under normal circumstances, the application should have been made much earlier. It was his humble submission that there were compelling reasons to allow the application so that the respondent may be heard on his complaints relating to the lower court's judgment. State Counsel submitted that our overriding criterion has been to determine whether there are legitimate reasons in order to do justice to the case. Further, that any inconvenience or embarrassment that may be suffered by the appellant can be atoned for by an award of costs.

[3] In opposing the application, Mr. Gondwe submitted that prejudice would be occasioned to the appellant and that delaying the matter further had cost implications. Augmenting Mr. Gondwe's submissions, Mr. Sakala submitted that rule

61(3) does not provide for the extension of time. That the application was incompetent and alternatively, the delay was inordinate.

[4] We gave an *ex tempore* ruling dismissing the application. We indicated that we would give our reasons in this judgment, which we now do.

[5] Rule 61 of the Rules of the Supreme Court deals with circumstances where a respondent intends to lodge a cross-appeal. Rule 61(1) enacts that:

> *"It shall not be necessary for a respondent to give notice of cross-appeal, but if a respondent intends upon the hearing of the appeal to contend that the judgment of the court below should be varied he may, at any time after receiving notice of appeal, but not more than fourteen days after the service on him of the record of appeal, give notice of cross-appeal, specifying the grounds thereof, to the appellant and to any other respondent named in the notice of appeal who may be affected by such cross-appeal (whether or not such other respondent has filed notice of address for service), and shall file in the Registry within the period five copies of such notice".* [Emphasis added]

And Rule 61(3) provides that:

> *"If the respondent fails to give such notice within the time prescribed he shall not be allowed, except by leave of the court, to contend on the hearing of the appeal that the judgment appealed against should be varied:*

Provided that the court may in its discretion hear any such contention and may, if it thinks fit, impose terms as to costs, adjournment, or otherwise". [Emphasis added]

[6] According to rule 61(1) a respondent intending to lodge a cross-appeal must file a notice to that effect within fourteen days from the date of service of the record of appeal. Under Rule 61(3) this Court has discretion to grant leave to a respondent who fails to give notice within the prescribed period. Needless to emphasise, the Court can only grant such leave if the respondent has advanced reasonable and compelling grounds.

[7] The reason given by the respondent for failing to file a notice of cross-appeal within the prescribed period, according to his affidavit evidence, is that he could not pay the required deposit demanded by his previous lawyers because he was a man of straw, having been unemployed for a long time. We do not think that impecuniosity constitutes a compelling ground which should find favour with the Court. We say so because the respondent was at liberty to invoke Rule 76 of the Rules of the Supreme Court, to obtain leave as a poor person and proceed to lodge his notice of cross-appeal within the prescribed period. Furthermore, the record of appeal in this matter was filed on 24th

September 2014. The application for leave to file a cross-appeal was only made on 22nd July 2016, almost two years later. Under these circumstances, we cannot agree more with the appellant that the delay in making the application was inordinate and prejudicial to the appellant.

[8] In conclusion, we hold that there are no compelling reasons to make us exercise our discretion in favour of granting leave to the respondent. The respondent's notice of motion is accordingly dismissed for lacking merit.

[9] We now turn to the appeal before us.

Introduction

[10] The appeal is against the judgment of the High Court (Sikazwe, J) delivered on 31st January 2014 which upheld the respondent's claims against the appellant. The trial Judge held that the respondent was underpaid as his terminal benefits did not include allowances.

[11] The appeal focusses on whether on the facts of this case, the respondent's terminal benefits were inclusive of allowances.

Background

[12] The brief facts of this case are that the respondent was employed as head of human resources and training at the appellant bank. On 9th January 2008, his contract of employment was terminated and he was subsequently paid his terminal benefits. He, however, disputed the computation of his benefits by the appellant and later commenced an action claiming:

[13.1] Payment of the sum of K2,030,101,823.59 [unrebased] being the underpayment of his terminal benefits which sums are due and payable based on the correct computation of benefits;

[13.2] Interest;

[13.3] Costs.

[13] The basis of the respondent's claim was that instead of being paid for the remaining contractual period amounting to 11 months, he was only paid for 8 months resulting in an underpayment of 3 months. Further, that the appellant omitted to include his allowances when computing the amount which was due to him. The respondent contended that all his monetary allowances payable on the last day of his contract of employment should have been incorporated into one figure and that had the appellant done so, it would have arrived at the amount being

demanded by him.

[14] In response, the appellant filed a defence denying that there was an underpayment to the respondent or that they applied the incorrect principle in computing his benefits. The appellant asserted that the computations and payments made in respect of the respondent's terminal benefits were consistent with his conditions of service.

Evidence of the parties in the court below

[15] The respondent's evidence in the court below was that he had worked for the appellant bank for 15 years before his contract was terminated. Initially, he was employed on a permanent and pensionable basis until November 2002 when he was engaged on a 3-year contract which ended on 26th November 2005 and was paid terminal benefits based on his basic salary only. During his employment, he enjoyed a number of allowances such as housing allowance at 60% per annum, fuel allowance of 250 litres per month, annual leave allowances, subsistence allowance when he was outside the station on duty both local and abroad, acting allowance, responsibility allowance,

Christmas bonus and three copies of newspapers per day. All these perks were not included in his terminal benefits.

[16] His testimony also disclosed that he was promoted to the position of head of human resource and training manager on 27th November 2005 and put on a fixed term contract which was to expire on 26th November 2008. However, his contract was terminated on 26th January 2008, eleven months before its expiry date. He was once again paid his gratuity exclusive of the allowances he enjoyed while in employment. He notified the appellant's management about the underpayment and they entered into negotiations. It was agreed that the allowances would be computed to form part of his terminal benefits. The appellant's management later refused to pay the respondent or merge his allowances together with his basic salary.

[17] On behalf of the appellant, Sonny Katowa's evidence was that based on his personal reasons, the respondent approached him with the view of separating from the bank before the end of his contract on 26th November 2008. He was let go and paid as per his contract of employment. Specifically, the respondent was paid his gratuity based on his basic pay and accrued leave days

only. He stated that gratuity does not include allowances but was only calculated at 30% of the last basic pay.

[18] The witness testified that even though the contract had not yet come to an end and eleven months remained before its expiry, the respondent was paid up to 26th November 2008 as if he had completed his contractual term. He was also paid three months' salary in lieu of notice and the remaining eight months were also paid to him. According to the appellant's witness, the respondent was paid correctly and in full. Further, that the respondent was entitled to housing and fuel allowance. Christmas bonus was paid once a year if management was happy with the whole bank's performance and decided to pay its employees. Entertainment allowance and allowance for papers were not included on the payslip as they were paid directly by the bank and not to individuals.

Consideration of the matter by the High Court

[19] After considering the evidence and submissions of counsel, the learned trial judge found that both parties were silent on what conditions of service the respondent was placed when he was on

permanent and pensionable employment. Having looked at the schedule of the computations, he found that the respondent was paid the sum of K5,237,614.96 (unrebased) as terminal benefits for his past service taken as nine years but there was no indication of any payment of allowances to the respondent which he enjoyed. The learned trial judge held that it was an oversight by the bank to leave out these taxable allowances as they were part of his emoluments and should be calculated together with the basic pay and paid to him.

[20] With regard to the first fixed term contract of employment as head of human resource and training, the learned trial judge found that the respondent was paid the sum K51,128,997.61 after taking into account only his basic salary. However, the respondent was entitled to fuel and housing allowances and the same should have been included when computing his benefits.

[21] With regard to the second contract, the learned trial judge held that the respondent's gratuity should have included the allowances in respect of fuel and housing even though the rate had gone up by 30%. He also awarded interest on the monies he found to be owed to the respondent from the time of the end

of his permanent and pensionable term of nine years and for the two, three year contracts at the rate of 6% per annum from the date of contract up to the date of judgment.

The grounds of appeal to this Court

[22] Dissatisfied with the lower court's judgment, the appellant has appealed on two grounds, namely:

[22.1] The trial judge erred in law and in fact when he held that the respondent was entitled to allowances on his terminal benefits for the period he served prior to 25th November 2002 when there was no evidence on record of such allowances being part of the respondent's entitlement.

[22.2] The trial judge erred in law and in fact when he held that the respondent was entitled to allowances on his gratuity when the contract of service clearly stipulated that gratuity would be calculated on the respondent's basic pay.

The arguments presented by the parties

[23] In arguing ground one, the learned counsel for the appellant, Mr. Gondwe, submitted in the appellant's written heads of argument, that the judgment delivered by the lower court was not based on the evidence that was submitted by way of the contract of employment and conditions of service. The pertinent conditions applicable to the respondent were in the fixed

contract of employment in respect of which he last served, which the trial court paid a complete blind eye to. The gist of his argument was that the respondent executed the contract of service and as such he was bound by the conditions therein. Counsel argued that a contract of employment is like any other contract and both the employer and employee are to be governed by the said contract. The case of *Maamba Collieries v Douglas Siakalanga and Others*[1] was cited in support. We were also referred to the case of *Henry Nsama and Others v Zambia Telecommunications Company Limited*[2] where we stated that employees are bound by the bargain they strike with their employers.

[24] Counsel accordingly argued that it was clear in the present matter that the court below completely disregarded the provisions of the contract applicable to the respondent which states in part that:

> *"9.7.1 The employee shall be paid a contract gratuity at the rate of 30% of the last monthly basic salary taxable, for the duration of the contract upon successful completion of the contract or for such period the contract has been served in case of premature termination, in which case gratuity payable shall be calculated on a pro rata basis.*

9.7.2 Where the employer terminates the contract other than on reasons of performance and/or conduct, the contract gratuity shall be paid as if the whole contract had been served."

[25] We were further referred to the conditions of service in the record of appeal and specifically clause 2.2 which states that:

"BASIC PAY" means an employee's basic salary not including allowances of any kind."

[26] It was therefore submitted that the judgment was wrong in both law and fact and flew in the teeth of very clear and unambiguous express provisions of the respondent's contract of service executed in 2002 and renewed in 2005 and conditions of service from 1996 which governed the parties.

[27] In support of ground two, it was submitted that according to the contract of service, gratuity payable to the respondent would be calculated at 30% of the last monthly basic salary taxable for the duration of the contract. Counsel contended that the calculations were done in accordance with the respondent's conditions of service. As such, there was no basis for the respondent to have brought this action claiming for allowances without any enabling or entitling term in the contract. The court

below was therefore wrong and misdirected itself by holding on page J6 of the judgment that:

> *"It was an oversight by the Defendant if it left out these taxable allowances as they were part of his [emoluments] and should be calculated together with the basic pay and paid to him. He earned those allowances if he was entitled to and I order accordingly."*

[28] It was argued that the trial court had no justification in finding as it did and that the decision was at variance with the Supreme Court decisions cited in ground one of the appeal as well as the decision in the case of *James Mankwa Zulu and Others v Chilanga Cement*[3] where we held that:

> *"...the word 'salary' is used, there is no debate anymore that the term 'salary' includes all allowances that are paid together with the salary on periodical basis by an employer to his employees."*

[29] Counsel submitted that in the present case, the term 'basic monthly salary' is used and specifically defined in the general conditions and identified in the respondent's contract. The case of *Henry Nsama and Others v Zambia Telecommunications Limited*[2] was cited in aid. Counsel therefore, prayed that this appeal succeeds and that the judgment of the court below be set aside.

[30] For the respondent, it was submitted by Mr. Mutemwa in the respondent's heads of argument, that the first segment of the respondent's employment was from 15th March 1993 - 26th November 2002 when he served on a permanent and pensionable basis. Between 1993 – 1996, he was on ZIMCO conditions of service whilst for the remainder of the period, he served on the appellant's own conditions of service introduced in 1996. State Counsel contended that the present case falls under the realm of the case of *John Paul Mwila Kasengele v Zambia National Commercial Bank*[4] where it was held that former bank employees be paid their terminal benefits together with allowances. According to State Counsel, on the basis of the *Kasengele case*[4], the respondent was entitled to payment of terminal benefits complete with allowances, between 1993 and 1996 although the order of the judge is limited to allowances on the payslips.

[31] For the period 1996 - 2002, he argued, the respondent enjoyed the appellant's own conditions of service which were effective from 1st December 1996. He drew our attention to documents in the record of appeal which, according to him, contained a

host of allowances enjoyed by the respondent, some of which were appearing on the respondent's payslip for December 2002. It was State Counsel's contention that there was no mention in these conditions of service that terminal benefits should be calculated on the basic pay. He referred us to the case of *Jonathan Musialela Nguleka v Furniture Holding Limited*[5] and submitted that the allowances ordered by the court below, though inadequate, are due and payable. Further, he argued that there was also uncontroverted evidence of the respondent having enjoyed various allowances ranging from housing, fuel, responsibility, acting, kilometre, annual leave, Christmas bonus and newspapers, on all three contracts.

[32] In response to ground two, State Counsel conceded that in the fixed term contracts running from 2002 - 2008, the respondent was entitled to gratuity which was to be calculated at a percentage of the basic pay. He however, contended that housing and fuel allowances were integrated on the payslips and were paid and taxed together. It was his submission that basic pay, therefore, for the purpose of gratuity, was inclusive of allowances paid together with it, as they had been integrated.

According to State Counsel, this position was similar to the *Kasengele case*[4] and that the only difference is that in that case, the integration of salary and allowances was a deliberate action by the shareholder, while in the present case it was by conduct or operation of the law.

[33] In response to the respondent's heads of argument, Mr. Gondwe argued, in respect to ground one, that the court below dealt with the issue of allowances in the period 1993 – 2002 and that it was clear from its award that the court was confusing the allowances that were due and payable under the respondent's fixed term conditions to those he enjoyed when he was on permanent and pensionable ZIMCO conditions. This particular finding, he contended, was not borne out by any payslip to be able to show that these were the allowances that were then obtaining and payable to the respondent. Counsel argued that the respondent pointed to the document in the record of appeal indicating car allowances, meal allowances, water and electricity allowances. However, it was argued, this is not helpful as focus ought to have been as at 2002 when the respondent was paid his terminal benefits for the service period

of 9.71 years which is for the period of March 1993 to December 2002.

[34] Counsel, submitted that the allowances payable are the ones due to an employee at the time of separation. As such, it was wrong for the trial judge to superimpose the allowances applicable in the fixed term contract to the period when the respondent was under the permanent and pensionable conditions. Counsel contended that in any event, the material consideration should be the last payslip within that period which payslip was not tendered in evidence nor was it proved by the respondent. Therefore, he argued, it was wrong for the court to rule as it did as there was no evidence to support the ruling. According to counsel, this was clearly a finding in *vacuo* which had no basis on facts that were established at trial. There should have been proof upon which the judge in the lower court should have based this finding of fact. We were referred to the case of *Wilson Masauso Zulu v Avondale Housing Project*[6] to support his argument.

[35] With regard to the respondent's arguments relating to ground

two, Mr. Gondwe submitted that the fixed term contracts were standalone contracts which had clear and unambiguous provisions. Clause 7 [of the first contract] indicated that the payment of gratuity was to be based on the monthly basic salary. This was in contrast to gross pay which is defined under clause 11 as monthly pay and recurrent allowances. Counsel argued that the same is observable on the second contract, which in clause 5 refers to monthly basic salary in contrast to allowances which are defined in clause 8. Further, that the operating clause on gratuity is clause 9.7.

[36] It was further contended that where the conditions in the contract are explicit and unambiguous, it is the duty of the court to give a clear meaning or interpretation. Counsel referred us to the learned authors of *Chitty on Contracts Volume 1, 27th Edition, paragraph 12-040 at page 581* where they state that:

> *"If the parties have themselves furnished the key to the meaning of the words used it is not material by what material they convey their intention".*

[37] Counsel argued that in determining the terminal benefits due to an employee on termination, reference had to be made to the

conditions of service the employee served under on the date of the termination. He relied on the case of *Dickson Zulu and Others v Zambia State Insurance Corporation Limited*[7] particularly at pages J34 to J35 where this Court stated that:

> *"...we wish to point out from the onset that this is a settled principle that conditions of service applicable at the time of separation are to be applied in computing terminal benefits. We espoused this principle in the case of Maamba Collieries Limited v Douglas Siakalonga and Others where we made it clear that when computing terminal benefits of any employee, the existing conditions of service at the time of separation have to be used. We also stated that not all benefits enjoyed by an employee during his period of service must be integrated in the basic salary before computing the employee's terminal benefits except where the conditions of service so state".*

[38] Counsel, therefore, submitted that employees are bound by their conditions which have come into effect during their service as these were the ones which governed their relationship with the employer. That the respondent executed contracts of employment and these are what bound him regarding payment of his gratuity. He further argued that the cases of *Dickson Zulu*[7] and the *Maamba Collieries*[1] are now the position of the law and supersede the *Kasengele case*[4]. The respondent was accordingly entitled to gratuity at 25% and 30% of his basic salary under

his first and second contract respectively.

Consideration of the matter by this Court and decision

[39] The issue for consideration in both grounds of appeal is simple and straightforward. The sole issue is whether the respondent's terminal benefits were inclusive of allowances. As such we will determine both grounds of appeal together.

[40] The grievance in ground one is that it was wrong for the trial judge to hold that the respondent was entitled to allowances on his terminal benefits for the period he served prior to 25th November 2002 in the absence of evidence of such allowances being part of his entitlement. The argument being that the judgment of the trial judge was not based on the evidence submitted, to wit, the contract of employment and the conditions of service.

[41] On the other hand, the respondent's position is that between 1993 – 1996, the respondent was on ZIMCO conditions of service and for the remainder of the period, he served on the appellant's own conditions of service introduced in 1996. That on the basis of the *Kasengele case*[4], the respondent was entitled

to payment of terminal benefits with allowances, between 1993 and 1996 although the order of the trial judge was limited to allowances on the pay slips. Further, that for the period 1996 – 2002 the respondent enjoyed the appellant's own conditions of service effective from 1st December 1996 which did not mention that terminal benefits should be calculated on the basic pay.

[42] Ground two assails the trial judge for holding that the respondent was entitled to allowances on his gratuity when his contract of service clearly stipulated that gratuity would be calculated on the respondent's basic pay. The argument is that the respondent executed a contract of service and he was therefore bound by its terms. That the judgment of the trial judge was against the clear and express terms of the respondent's contract of service executed in 2002 and subsequently renewed in 2005. The respondent's position is that while conceding that his gratuity was to be calculated at a percentage of the basic pay under the contracts of service running from 2002 – 2008, housing and fuel allowances were integrated on the pay slips and paid and taxed together with the

salary. Therefore, according to the respondent, basic pay for the purpose of gratuity included allowances paid together with it and that this was by conduct or operation of the law.

[43] In our considered view, a better starting point in determining this appeal is to examine the pleadings settled by the parties in the trial court. Quoting relevant paragraphs only, the respondent's statement of claim stated that:

> *"1. ...*
>
> *2. ...*
>
> *3. On or about 9th January, 2008 the Defendant terminated the Plaintiff's Contract of Employment.*
>
> *4. That subsequently the plaintiff was paid his terminal benefits however, the computation of the same was wrong.*
>
> *5. The plaintiff will aver that he was underpaid by the Defendant in that instead of being paid for the contractual period, which according to our client's contract had to end on 26th November 2008, which amounted to 11 months, he was only paid for 8 months. Therefore, there was an underpayment by 3 months.*
>
> *6. The plaintiff will aver that he was further underpaid in that, the defendant omitted to include his allowances when computing the amount which was due to him, in that all his monetary allowances obtaining and payable on the last day of his contract of employment should have been incorporated into one figure.*

7. *The plaintiff will aver that had the defendant applied the correct [principle] of using the one lump sum figure which includes all monetary allowances which accrued value as at the last date of employment, it would have [come] to the conclusion of the amount being demanded.*

8. ...

9. ...

10. ..." [Emphasis added]

The appellant's defence alleged that:

"1. ...

2. ...

3. ...

4. *The defendant will state that the plaintiff was paid his terminal benefits and the computation thereof was correct.*

5. *The defendant denies that the plaintiff was underpaid. The defendant will state that adherence to clause 4.2 of the plaintiff's Contract of Employment rendered clause 4.1(ii) redundant.*

6. *The defendant denies that the plaintiff was underpaid and will aver that all payments were consistent with the plaintiff's Conditions of Service.*

7. *The defendant denies that it applied the incorrect [principle] in computing the plaintiff's benefits and that such computation was consistent with the plaintiff's contract of employment.*

8. ...

9. ...

10. ...

11. ..." [Emphasis added]

[44] The respondent settled a reply to the appellant's defence in the following terms:

> *"1. The plaintiff will aver that the Contract of Employment was terminated by the defendant Bank vide letter dated 8th January 2008 purportedly pursuant to clause 4.2 of the Conditions of Service, and not as is being averred in paragraph 3 of the defendant's defence.*
>
> *2. With regard to paragraph 4, the defendant states that it thereafter embarked on computation of the terminal benefits payable to the plaintiff which it did but that it proceeded on the wrong principle in computing terminal benefits thereby resulting into an underpayment.*
>
> *3. With regard to paragraph 5 of the Defence, the plaintiff will aver that he was underpaid by the defendant in that instead of being paid for the remaining contractual period which was to end on 26th November 2008 amounting to 11 months, he was only paid for 8 months thereby resulting into an underpayment of 3 months.*
>
> *4. The plaintiff will further aver that the underpayment was necessitated by the defendant's failure to take into account all his allowances due to him when computing the terminal benefits which included all monetary allowances payable to him up to the last day.*
>
> *5 Further and with regard to paragraph 5 of the Defence, the plaintiff will aver that his Contract of Employment was*

terminated pursuant to clause 4.2 as such there is no nugatory implication on clause 4.1 and that clause 4.2 is clear and categorical as to the terminal benefits payable to an employee whose services have been terminated by the employer.

6. ...

7. ...

8. ...

9. ...

10. ..." [Emphasis added]

[45] From the paragraphs of the pleadings we have quoted above, it is beyond question that the pleadings settled by both parties were anchored on the benefits paid to the respondent upon termination of his contract on 26th November 2008. It is also clear that the pleadings did not, remotely or otherwise, touch on the period prior to 2002 when the respondent served under permanent and pensionable conditions of service. The record shows that the respondent raised the alleged under payment of his terminal benefits for the said period for the first time in his testimony at trial.

[46] At page J4 of his judgment, the trial judge stated that:

"The main question that requires resolving in this case is whether the plaintiff was fully paid his terminal benefits using the right formula. As stated by both litigants there are three legs of engagement of work with the plaintiff. In the first nine (9) years the plaintiff was on

permanent and pensionable conditions of service and I shall first deal with it.

When management on its own accord changed the mode of engaging its staff, the plaintiff was paid terminal benefits after nine (9) years. It is silent both from the plaintiff and the defendant on what conditions of service he was placed when he was on permanent and pensionable [conditions of service"].

And after tabulating the terminal benefits paid to the respondent for his first nine (9) years of service, the trial judge stated at page J6 of the judgment as follows:

"On these calculations there is no indication of any other payments or allowances to the plaintiff which he enjoyed. Thus it will be taken that he never enjoyed any and that he was properly paid in full his terminal benefits for the nine years he worked.

However, I have come across in the plaintiff's bundle of documents a statement by the Bank in the preamble of the contract of employment... which started running from 27th November to 26th November 2005, that the plaintiff was employed by the defendant in the capacity of ASSISTANT MANAGER – HUMAN RESOURCES, EMPLOYMENT services under the Bank's permanent and pensionable conditions of service for non-represented staff. If at all he was enjoying any allowances which were taxable on his pay slip, then they ought to have been inclusive on the computations of his terminal benefits and be paid to him. It was an oversight by the defendant if it left out these taxable allowances as they were part of his emoluments and should be calculated together with basic pay and paid to him. He earned those allowances if he was entitled to and I order accordingly'. [Emphasis added]

[47] We, observed earlier that the claim for underpayment of allowances relating to the period prior to 2002 was not pleaded by the respondent but only sprang up in his testimony at the hearing. The trial judge therefore fell into error in making findings based on unpleaded allegations. The purpose of pleadings was aptly explained by this court in the case of *William David Carlisle Wise v E. F. Hervey Limited*[8] where we stated at page 179 (citing the headnote) that:

> *"(1) Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended".*

[48] We therefore, agree with the appellant that the trial judge fell into error by holding that the respondent was entitled to allowances on his terminal benefits for the period served prior to 25th November 2002 as this was not anchored on any pleadings. We also do not think that the *Kasengele case*[4] is applicable to this case whose circumstances relate to terminal benefits arising from a contract of employment.

[49] The second limb relates to the computation of benefits on

termination of the contract of employment. The provisions of the two contracts of service executed by the respondent are as clear as crystal in relation to the payment and calculation of gratuity. The contract of employment for the period 25th November 2002 to 24th November 2005 and renewed up to 2008 provided for the payment of gratuity in the terms quoted in paragraph 24 above. And according to the appellant's CONDITIONS OF SERVICE/GRIEVANCES AND DISCIPLINARY PROCEDURE CODE DHR/12/96 FOR NON-REPRESENTED STAFF, 'BASIC PAY' was defined in clause 2.2 as *"... an employee's basic salary not including allowances of any kind"*. [Emphasis added]

[50] From the foregoing discourse, it is beyond doubt that the basic salary on which the respondent's gratuity was to be calculated expressly excluded allowances. The trial judge therefore, fell into error by holding that the respondent's gratuity should have included fuel and housing allowances as such a finding was not backed by any evidence.

Conclusion

[51] For the reasons we have stated above, we conclude that both grounds of appeal have merit. We accordingly allow this appeal.

We award costs here and in the court below to the appellant, to be taxed in default of agreement.

A. M. WOOD
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE