

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

APPEAL No. 175/2020

BETWEEN:

GILBERT MUTHIYA AND 30 OTHERS

AND

UNIVERSAL MINING AND CHEMICAL

RESPONDENT

CORAM: CHASHI, NGULUBE AND SHARPE-PHIRI, JJA.
On 19th April, 2022 and 4th May, 2022.

For the Appellants: Mr W. Mwenya, Messrs Lukona Chambers

For the Respondent: No appearance



J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Case referred to:

1. *Time Trucking Limited vs Kelvin Kapimpi, CAZ Appeal Number 03/2018.*

Legislation referred to:

1. *The Employment (Amendment) Act Number 15 of 2015*
2. *The Employment Act, Chapter 268 of the Laws of Zambia*
3. *The Employment Code, Act Number 3 of 2019*
4. *The Court of Appeal Act, Number 7 of 2016*

1.0 INTRODUCTION

- 1.1 This appeal is against the Judgment of the High Court delivered by Bowa J, who held that, the appellants were not entitled to gratuity and reversed the decision of the Kafue Subordinate Court.

2.0 BACKGROUND

- 2.1 The brief background to this appeal is that the appellants commenced an action in the Kafue Subordinate Court seeking damages for breach of contracts that were entered into between the appellants and the respondent on different dates, payment of gratuity, payment of two months' salaries for every year served, with interest and costs.
- 2.2 The appellants claimed that they were employed by the respondent in various positions and were paid a daily wage of K33, in comparison with other employees of the respondent in the same positions and doing the same work.
- 2.3 The appellants stated that they had engaged the respondent on several occasions seeking to be placed on permanent employment or have their conditions of employment improved as they worked

under dangerous conditions of employment and needed to have issues regarding their safety at work addressed.

- 2.4 The respondent advised the appellants to resign before they could be employed on new contracts of employment and the appellants tendered in their respective resignations on 3rd May, 2018. However, on 11th May, 2018, the respondent informed the appellants that there was no work for them and then paid them their respective leave days for the five years that they had been in the employ of the respondent.
- 2.5 The appellants claimed that they were entitled to terminal benefits under the general and minimal wages conditions of service. The respondent refused to pay the appellants, arguing that they were not entitled to gratuity or terminal benefits as this was not provided for in their terms and conditions of service. The appellants then commenced an action in the Subordinate Court at Kafue, seeking damages for breach of contract made on different dates with the respondent, payment of gratuity, payment of two months' salary for every year served and costs.
- 2.6 In determining the matter, the Subordinate Court found that the appellants were casual employees who were in the employ of the

respondent for periods in excess of one year. The court opined that in terms of **Section 28A and 28B of the Employment (Amendment) Act¹**, the appellants were, after six months deemed to have served under short term contracts which graduated into fixed term contracts after one year.

2.7 The court was of the view that by virtue of **Section 24(5) of the Employment (Amendment) Act¹**, the respondent as employer was under an obligation to produce records of the contracts of employment but failed to do so. The court stated that the appellants' respective representations on the contents of the agreements was evidence of the terms and conditions. The court came to the conclusion that the oral contracts had provision for gratuity, which was payable from the dates when the status of the appellants changed from casual to employees under fixed term contracts.

2.8 The respondent, dissatisfied with the decision of the Subordinate Court appealed to the High Court, advancing three grounds of appeal couched as follows-

1. ***That the Trial Magistrate misdirected herself in law and in fact when she held that all the 37 Plaintiffs be paid gratuity to be calculated with effect from the time that their status***

changed from casual employee to an employee on a fixed term contract.

2. *That the Trial Magistrate misdirected herself when she only considered the evidence of one out of the 37 Plaintiffs when the circumstances were different.*
3. *That the Judgment by the Trial Magistrate does not set out a clear rationale setting out how the Court arrived at its decision.*

3.0 DECISION OF THE HIGH COURT

- 3.1 The High Court heard the respondent's appeal and reviewed the evidence before the lower court. The court found that there was no evidence that showed that the parties agreed to the payment of gratuity. The court opined that the appellants' claims were based on what they believed they were entitled to as opposed to what was agreed upon between the parties. The court was of the view that there was no evidence that was led on what the rate of gratuity was or when it would be payable. The court held that there was no evidence of an agreement on gratuity and accordingly reversed the findings of the trial court.
- 3.2 The court however went on to agree with the trial court that the appellants served for periods in excess of one year and up to five years and that by virtue of **Section 28(B) of the Employment**

(Amendment) Act, they were deemed to have been on fixed term contracts up to the time of their resignations. The High Court found that the payment of gratuity was a condition of service subject to contract or agreement. The court found no basis for the payment of gratuity and allowed the respondent's appeal.

4.0 THE APPEAL

4.1 The appellants were dissatisfied with the decision of the High Court and appealed to this court, advancing one ground of appeal couched as follows-

1. That the Honourable court below erred both in law and fact when at page J25 and J26 of the Judgment the court held that this was a proper case to reverse the lower court's finding of fact that the appellants were entitled to payment of gratuity by failure to take into account evidence that there was in existence an agreement between the parties on terms and conditions of employment which the respondent failed to produce in the Subordinate Court the basis upon which the Subordinate Court awarded payment of gratuity.

4.2 In arguing the sole ground of appeal, it was submitted that the question of whether or not the appellants were entitled to gratuity can be resolved by placing reliance on **Section 24(1), (3) and (5) of the Employment Act².**

- 4.3 According to the appellants, the obligation to produce a copy of the oral contract lies with the employer and if it fails to produce the said contract, the evidence of the employee shall be relied upon by the court.
- 4.4 The appellants further contended that the application of the **Employment Code**³ is irrelevant to the issues in this matter as the Code has no retrospective effect on employment contracts that were in existence prior to its enactment. The law that was in force at the time was the **Employment Act**².
- 4.5 According to the appellants, the Employment Act provided for situations where an employee relying on an oral contract was protected where the oral contract was not before court. It was submitted that the respondent was under an obligation to prove that the parties did not agree to the payment of gratuity when the matter was tried in the Subordinate Court.
- 4.6 The appellants argue that the lower court misapprehended the import of **Section 24(5) of the Employment Act** together with the case of **Time Trucking Limited vs Kelvin Kapimpi**¹.
- 4.7 At the hearing of the appeal, the Court asked Mr. Mwenya, Counsel seized with conduct of the matter on behalf of the

appellants whether he had obtained leave of appeal from the High Court prior to appealing to this court.

- 4.8 Counsel informed the court that he was not sure whether leave had been obtained but he stated that since Judgment in the High Court was delivered in open court, he did not see the reason for obtaining leave to appeal to this court.

5.0 OUR DECISION

- 5.1 We have carefully considered this appeal and the decision being impugned.

- 5.2 **Section 23 (1) (c) of the Court of Appeal Act⁴**, provides as follows-

“23 (1) An appeal shall not lie-

(c) from a Judgment given by the High Court in the exercise of its appellate or review jurisdiction without the leave of the High Court or if that has been refused, without the leave of a Judge of the court.”

- 5.3 The above captioned section provides that prior to lodging an appeal to this court in a matter in which the High Court has exercised its appellate or review jurisdiction, there is need to obtain leave of the High Court.

- 5.4 At the time of hearing the appeal, we inquired from the Appellant's Counsel as to whether leave to appeal had been granted by the High Court. He was not able to confirm this.
- 5.5 We have perused the record of appeal and unable to ascertain that this was granted. We are of the view that the appellants did not obtain leave to appeal to this court from the High Court prior to lodging this appeal, noting that this was a second appeal. As such, this court does not have jurisdiction to hear this appeal. We accordingly dismiss it as we lack jurisdiction to hear it. Each party to bear its own costs.



J. CHASHI
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE