IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO 24 OF 2023
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN

KINGFRED PHIRI **APPELLANT**

AND

LIFE MASTER LIMITED **RESPONDENT**

CORAM: SIAVWAPA JP, MCHENGA DJP, CHASHI, KONDOLO, MAKUNGU, CHISHIMBA, SICHINGA, NGULUBE, BANDA-BOBO, SHARPE-PHIRI, MUZENGA, PATEL AND CHEMBE, JJA

On 21st November and 10th December 2024

FOR THE APPELLANT: MR. M. NSAPATO AND MR. C. CHUNGU, BOTH OF MESSRS NSAPATO & CO ADVOCATES

FOR THE RESPONDENT: NOT IN ATTENDANCE

JUDGMENT

SIAVWAPA JP delivered the Judgment of the Court

CASES REFERRED TO

1. *Alistair Logistics v Dean Mwachilenga, CAZ Appeal No 232 of 2019*
2. *Albert Mupila v Yu Wei, COMP/IRCLK/222/2021*
3. *Tom Chilambuka v Mercy Touch Mission International, SCZ Appeal No 171 of 2012*
4. *Swarp Spinning Mills Plc v Sebastian Chileshe & others (2002) ZR 23 (SC)*

5. *Midlands Milling Ltd v Lloyd Tembo, CAZ Appeal No 297 of 2022*
6. *Zubao Harry Juma v First Quantum Mining & Operations Ltd CAZ Appeal No 102 of 2022*
7. *Redrilza Ltd v Abuid Nkazi & others, SCZ Judgment No 7 of 2011*
8. *Stanbic Bank Zambia Limited v Natasha Patel CAZ, Appeal No 274 of 2022*
9. *Jackson Distribution Ltd v Turn Yeto Inc. Ltd [2009] EWHC 982 QB*

STATUTES REFERRED TO:

1. *Employment Code Act No 3 of 2019*
2. *Minimum Wages and Conditions of Employment (General) Orders 2011, 2012 and 2018, Statutory Instrument Numbers 2 of 2011, 46 of 2012 and71 of 2018*

OTHER WORKS REFERRED TO

1. *A Comprehensive Guide to Employment Law in Zambia, 2021, UNZA Press: Dr Winnie Sithole Mwenda & Chanda Chungu*

0.0 **NOTE:** When we sat to hear this appeal in Ndola, on 21st November 2024, the expanded panel comprised thirteen Judges of the Court. However, two of the Judges who sat, namely, the Honourable Mr. Justice D.L.Y. Sichinga SC and the Honourable Mrs. Justice N.A. Sharpe-Phiri, were not available at the time of delivering the Judgment. This Judgment is therefore, that of the majority Judges that sat to hear the appeal.

1.0 INTRODUCTION

1.1 This appeal is against the Judgment of the Honourable Lady Justice Dr Winnie Sithole Mwenda delivered in the High Court, Industrial Relations Division, on 11th January 2023. By the said Judgment, the Honourable Judge held that the Appellant was unfairly and unlawfully dismissed and awarded him the various amounts as claimed.

2.0 BACKGROUND

2.1 The Appellant entered into an oral contract of employment with the Respondent on 18th August 2018, by which the Respondent employed him as a driver.

2.2 On 23rd June 2021, the Respondent terminated the Appellant's contract of employment verbally without stating the reason. Further to the above, the Respondent did not pay the Appellant his terminal benefits.

2.3 The Appellant reported his circumstances to the Labour Office. The Labour Office in turn computed the Appellant's dues which the Respondent refused to pay.

2.4 Subsequent to the Respondent refusing to pay the Appellant, the Labour Office referred the dispute to the Industrial Relations Division of the High Court. The referral letter is at page 30 of the Record of Appeal and it is dated 28th July 2021.

2.5 Armed with the referral letter stated above, the Appellant filed a Complaint in the Industrial Relations Division of the High

Court on 29th July 2021. He also filed an affidavit in support of the Complaint on the same date.

2.6 In the Complaint and the attendant affidavit, the Appellant sought the following reliefs;

a. Leave days
b. Gratuity
c. Underpayment
d. Unfair and Unlawful Dismissal
e. Salary Arrears for one month which is June
f. Costs and any other benefits the Court may deem fit

3.0 IN THE HIGH COURT

3.1 The Respondent filed an affidavit in opposition to the Complaint on 17th September 2021. In essence, the affidavit deposed to by Josaya Simutowe is to the effect that the Appellant initially worked for Shine Share Limited from 18th August 2018 until 1st October 2020.

3.2 He further averred that the Appellant worked for the Respondent for only nine months and twenty-two days.

3.3 The Respondent denied dismissing the Appellant unlawfully, stating that he perpetually reported for work late and knocked off early without valid reasons.

3.4 The Respondent did not attend the hearing after being served with the Notice a second time. The Learned Judge proceeded to hear the Appellant's Complaint and adjourned the matter for Judgment.

4.0 DECISION OF THE HIGH COURT

4.1 After considering the affidavit evidence, the exhibited documents and the oral evidence tendered by the Appellant, the learned Judge set out to determine whether the Appellant was unfairly and unlawfully dismissed and if he was entitled to the claimed benefits.

4.2 After reviewing the Appellant's evidence and referring to Section 52 (5) of the Employment Code Act No 3 of 2019, (hereinafter, the Act) and the Respondent's failure to attend the hearing, the learned Judge found, as a fact, that the Respondent had failed to discharge its burden to prove that it had dismissed the Appellant for good reasons.

4.3 In dismissing the Appellant's claim that he worked for two years, ten months, the learned Judge relied on the pay schedules exhibited by the Respondent which showed that the Appellant worked for twelve months.

4.4 As for the Appellant's conditions of service, the learned Judge applied the Minimum Wages and Conditions of Employment (General) Orders of 2011, 2012 and 2018 to award the Appellant some benefits in the absence of a written contract.

4.5 The learned Judge rejected the claim for gratuity because the General Orders do not provide for it. However, the learned Judge also adverted to Section 73 of the Act which provides for gratuity at the end of a long-term contract. The learned Judge

however, discounted the claim because the twelve months the Appellant served did not amount to a long-term contract as defined by Section 3 of the Act.

5.0 THE APPEAL

5.1 The Appellant filed the Notice and Memorandum of Appeal on 19th January 2023. The Memorandum of Appeal contains two grounds of Appeal set out as follows;

> 1. *The Court below erred in law and fact when it held that the Appellant was not entitled to gratuity despite section 54 (1) (c) of the Employment Code Act providing the benefit to the Appellant; and*
>
> 2. *The Court below erred in law and fact when it only awarded the Appellant three (3) months' salary as damages in spite of the fact that the Appellant's dismissal was unfair and unlawful, the traumatic manner in which the dismissal was carried out, the mental torture, anguish, stress, inconvenience caused and the Appellant's reduced job prospects.*

6.0 ARGUMENTS IN SUPPORT

6.1 The Appellant filed heads of argument together with the Record of Appeal on 30th January 2023, through Messrs Nsapato and Company Advocates. It is noted that in the High Court, the Appellant prosecuted the Complaint in person.

6.2 The thrust of the Appellant's arguments, in the first ground of appeal, revolves around the interpretation of Section 54 of the Act. The Appellant has tied Section 54 to Sections 3, 53 (6) and 73 of the Act which all refer to long term contracts in relation to entitlement to gratuity.

6.3 The gravamen of the Appellant's argument is that Section 54 (1) (c) of the Act entitles employees on fixed-term contracts whether long-term or otherwise to severance pay.

6.4 The Appellant takes this argument further by riding on our Judgment in Alistair Logistics v Dean Mwachilenga[1], in which we stated as follows:

> *"There is no contract that is indefinite and has an 'until death do us part' clause"*

To that effect, the Appellant argues that all contracts in Zambia are of fixed duration and therefore, covered by Section 54 (1) of the Act.

6.5 Building upon the preceding view that all contracts are of fixed duration, the Appellant introduces the argument that permanent contracts of employment are equally covered by Section 54 (1) of the Act.

6.6 The Appellant has sought to buttress the above view with the opinions expressed by the learned authors of the book titled; A Comprehensive Guide to Employment law in Zambia co-authored by the Hon. Lady Justice Winnie Sithole Mwenda and Mr. Chanda Chungu. The Appellant also referred to the case of Albert Mupila v Yu-Wei[2], a decision of the High Court and an article by Mr. Chanda Chungu published in the SAIPAR case review, commenting on the said case.

6.7 All the above references lead to the Appellant's held view that because permanent and pensionable contracts of employment have a known commencement date and a known retirement time, they fall within the definition of a fixed-term contract and are therefore, covered by Section 54 (1) (c) of the Act.

6.8 In summation, the Appellant's arguments are anchored on the interpretation assigned to Section 54 of the Act by the learned authors of 'A Comprehensive Guide to Employment Law in Zambia' in their academic, scholarly and judicial capacities.

6.9 The Appellant firmly holds the view that severance pay, as provided for under Section 54 of the Act, applies to all employees on fixed and permanent and pensionable contracts of employment.

6.10 In the second ground of appeal, the Appellant has challenged the decision of the Court below to set the quantum of damages at three (3) months on the view that the dismissal was traumatic, and caused mental torture, anguish, stress and inconvenience to the Appellant.

6.11 The issue in this ground is that according to the Appellant, where unfair and unlawful dismissal has been established, the Court, in awarding damages, should depart from the normal measure. The Appellant, through his counsel, Mr. Chanda Chungu, argues that in view of Section 52 of the Act, which requires an employer to give valid reasons for terminating a

contract of employment; the Common Law position equating the normal measure of damages to the employee's salary commensurate with the notice period is no longer tenable.

6.12 The Appellant has backed the argument with reference to the cases of Tom Chilambuka v Mercy Touch Mission International[3] and Swarp Spinning Mills Plc v Sebastian Chileshe & Others[4].

7.0 ARGUMENTS IN OPPOSITION

7.1 The Respondent did not file heads of argument in opposition. As already observed, the Respondent did not attend the hearing in the Court below despite being properly served with the Notice of hearing. It would appear the Respondent had no desire to defend the Appeal.

8.0 THE HEARING

8.1 We heard the Appeal on 21st November 2024, in the absence of the Respondent after satisfying ourselves that it had been duly notified of the date. This did not however, surprise us because it appears the respondent had made up its mind not to participate in the appeal as noted in paragraph 7.1 above.

8.2 At the start of the hearing, we attended to an application by Notice of Motion filed a week before the hearing date. The application was at the instance of the Appellant seeking an order to vary, reverse or discharge two rulings delivered by a single Judge of the Court.

8.3 After hearing Mr. Chungu's arguments in support of the Notice of Motion, which was not opposed, we rendered an *extempore* Ruling dismissing the application. The full text of the Ruling and the reasons for the decision is contained in a separate Ruling under CAZ/8/31/2023, delivered on 28th November 2024, annexed to this Judgment.

8.4 In his opening statement to the appeal, Mr. Chungu summed the two grounds of appeal as relating to the severance pay under Section 54 of the Act and the normal measure of damages for unfair and unlawful dismissal.

8.5 In relation to severance pay, the question is whether an employee dismissed from a permanent and pensionable contract of employment is eligible under Section 54 of the Act.

8.6 Mr. Chungu argues that based on the definition of a permanent contract in Section 3 of the Act that it expires at retirement unless terminated; a permanent contract is therefore, of a fixed duration and covered by Section 54 of the Act. He has also solicited the support of our decision in the case of Mwachilenga (supra), to the effect that there is no indefinite contract of employment.

8.7 Further, Mr. Chungu has relied on Section 54 (3) of the Act which lists the contracts that are excluded from the effect of Section 54 (1) and our decisions in Midlands Milling Limited v Lloyd Tembo[5] and Zubao Harry Juma v First Quantum Milling

& Operations Limited[6] cases. To that extent, he argues that contracts not excluded are included.

8.8 In ground two, Mr. Chungu questions the relevance of the common law measure of damages under the new dispensation. This is in light of Section 52 of the Act which has made it mandatory for employers to furnish reasons for terminating a contract of employment.

9.0 OUR ANALYSIS AND DECISION

9.1 In this appeal, we are once again called upon to interrogate Section 54 of the Act. We have been on this route a few times before and we have rendered our decisions.

9.2 The said Section has generated considerable debate on two fronts namely; whether a dismissed employee is entitled to gratuity in form of severance pay and whether the section applies to an employee who served on a permanent and pensionable contract of employment.

9.3 To settle the debate, it is important to understand what severance pay is as defined by the Act. In that regard, Section 3 of the Act provides as follows;

> *"Severance pay means the wages and benefits paid to an employee whose contract of employment is terminated in accordance with section 54"*

9.4 From the above definition, it means that severance pay should only be understood within the context it is presented in Section 54 of the Act. Importing other provisions of the Act

which do not speak to severance pay would be in breach of the interpretation and the spirit of the Act.

9.5 With the guidance from the definition, we go directly to Section 54 of the Act which is reproduced hereunder for ease of reference.

> *1) An employer shall pay an employee a severance pay, where the employee's contract of employment is terminated or has expired, in the following manner:*
>
> *(a) where an employee has been medically discharged from employment, in accordance with section 38 (5);*
>
> *(b) where a contract of employment is for a fixed duration, severance pay shall either be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period or the retirement benefits provided by the relevant social security scheme that the employee is a member of, as the case may be;*
>
> *(c) where a contract of employment of a fixed duration has been terminated, severance pay shall be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period as at the effective date of termination*
>
> *(d) where a contract of employment has been terminated by redundancy in accordance with section 55, the severance pay shall be a lump sum of two months' basic pay for each year served under the contract of employment; or*
>
> *(e) where an employee dies in service, the severance pay shall be two months' basic pay for each year served under the contract of employment.*

Sub-section (2) is irrelevant for the purposes of this appeal so we go to sub-section (3) which provides as follows;

The severance pay under this section shall not be paid to a casual employee, a temporary employee, an employee engaged on a long-term contract or an employee serving a period of probation.

9.6 The starting point is that Section 54 (1) of the Act, provides in general terms the eligibility criteria for payment of severance pay namely; termination or expiry of an employee's contract of employment.

9.7 In paragraph (a), of subsection (1), the Section provides the first mode of termination, as by medical discharge as prescribed by Section 38 (5) of the Act. Paragraph (b) appears to be linked to the first mode of termination as it provides for the two options of payment of severance pay. This is so because paragraph (a) specifically refers to an employee terminated via medical discharge while paragraph (b) prescribes the two options of severance pay as twenty-five percent of basic pay or retirement benefits where applicable.

9.8 This benefit however, only applies to employees on fixed-term contracts. The two payment options under paragraph (b) clearly mean that if an employee on a fixed-term contract is covered by a social security scheme, then the benefits under the scheme shall comprise the severance pay in lieu of a gratuity computed at twenty-five percent of the basic pay.

9.9 When we come to paragraph(c), the indication is that it covers terminations other than by medical discharge under paragraph (a). This is so because it is separated from paragraph (a) which relates to medical discharge and qualified

by paragraph (b). Further, if paragraph (c) were linked to paragraph (a), it would amount to a repetition of the first part of paragraph (b) thereby serving no purpose.

9.10 Paragraph (d) introduces a second mode of termination, by redundancy as prescribed under Section 55 of the Act and the rate at which severance pay shall be computed.

9.11 The last eligibility criterion is termination by death under paragraph (e) which also provides for the mode of computing severance pay.

9.12 It is noted, and clearly so, that Section 54 of the Act does not speak to a dismissed employee and neither does it refer to an employee on a permanent and pensionable contract of employment. The question then is where do the arguments on the two categories of employees come from in relation to whether or not they are entitled to severance pay under Section 54 of the Act?

9.13 The first argument is based on subsection three which lists the categories of employees not eligible for payment of severance pay upon termination of their contracts of employment. Based on this sub-section, it is argued that since an employee on a permanent and pensionable contract of employment is not listed, it means that such an employee is eligible for severance pay.

9.14 At this point, it is necessary to state that a contract of employment can be terminated in a number of ways and one of them is by summary dismissal. This is important because, in this appeal, the Appellant's contract of employment was terminated by dismissal. On that basis the question whether a dismissed employee is entitled to severance pay under Section 54 of the Act finds legitimacy.

9.15 In the recent past, we had occasion to pronounce ourselves on the same issue in the case of Midlands Milling (2011) limited v Lloyd Tembo (supra). We delivered Judgment on 22nd August 2024. In that case, the Court below found that the Respondent, who had been summarily dismissed from permanent and pensionable employment, was eligible for severance pay under Section 54 of the Act.

9.16 In our Judgment, we held that the natural and ordinary meaning of the Section was that severance pay was only payable to an employee whose contract of employment had either been terminated or had expired.

9.17 We also distinguished termination from dismissal with reference to the case of Redrilza Limited v Abuid Nkazi and Others[7] in which the Supreme Court of Zambia stated that; "------*dismissal involves loss of employment arising from disciplinary action, while termination allows the employer to terminate the contract of employment without invoking disciplinary action.*"

9.18 In view of the guidance by the Supreme Court, we held that since the word "dismissal" is not used in Section 54 of the Act, a dismissed employee was not eligible for severance pay. We also drew from Section 51 of the Act, which sets out the benefits of an employee who has been summarily dismissed from employment. The benefits are stated as; *"wages and other accrued benefits due to the employee up to the date of the dismissal."*

9.19 Yet again, in the same month that we heard and delivered Judgment in the Midlands Milling case, (supra) we had occasion to pronounce ourselves on the import of Section 54 (1) of the Act. This was in the case of Stanbic Bank Zambia Limited v Natasha Patel[8]. In this case, a second limb was added to the issue of a dismissed employee and this was whether, an employee dismissed from a permanent and pensionable contract of employment was eligible to severance pay under Section 54 (1) (c) of the Act.

9.20 The facts in the Natasha Patel case (supra), are that she was employed by the Bank on a permanent and pensionable contract of employment as a teller in 2015. In April 2021, she was charged under the employer's disciplinary code of conduct for a dismissible offence. After the disciplinary proceedings were concluded, she was found liable and dismissed. She commenced an action against the employer, claiming wrongful and unfair dismissal among others.

9.21 The learned Judge in the Court below dismissed the claims after finding that the dismissal was in accordance with the law and procedure. However, she ordered that the Applicant, Natasha, be paid a severance pay under Section 54 (1) (c) of the Act.

9.22 The Bank appealed on two grounds as follows; challenging the lower Court's decision to award severance pay to an employee who was dismissed from a permanent and pensionable contract of employment, that the Court below was wrong to incorporate a fixed contract of employment in the definition of permanent contract of employment under Section 3 of the Act.

9.23 In the Natasha Patel case, (supra) we distinguished between a permanent and pensionable contract of employment and a fixed-term contract as the Respondents argued that they were similar. We then held that Section 54 (1) (c) of the Act does not apply to employees on permanent and pensionable contracts.

9.24 On 18th September, 2024, we delivered yet another Judgment in the case of Zubao Harry Juma v First Quantum Mining & Operations Limited (supra). It is regrettable that this Judgment, which should have been delivered ahead of the Natasha Patel case, was only delivered nearly a month after Natasha Patel was delivered. To make matters even worse, we quoted excerpts from the Zubao case in the Natasha Patel case, which caused anxiety and disappointment among the public.

9.25 The case of Zubao was rather dramatic and unusual in that he was initially employed on a fixed term contract running from 14th September 2014 to 19th September 2016. On 20th September 2016, he was engaged on a permanent and pensionable contract of employment on the same conditions and terms as he served under the fixed term contract.

9.26 On 1st November 2020, the employer notified the employee that his employment would be terminated by redundancy with effect from 30th November 2020. However, on 12th November 2020, the employee was found in unlawful possession and removal of company property. He was charged and ultimately dismissed from employment.

9.27 He challenged his dismissal in the High Court claiming unfair dismissal. The Court below rejected the claims giving rise to the appeal.

9.28 In the appeal, the main issue was that the Court below should have found that he had laid sufficient evidence of entitlement to accrued benefits based on his letter of redundancy and that he was on a fixed-term contract.

9.29 In the case in issue, we separated the two phases of the employee's terms of employment, with the first phase running from 2014 to 2016 under a fixed-term contract. It is noted that the first phase of employment ran its full course. But because the contract subsisted before the enactment of the Act, that

phase was to be dealt with in accordance with the terms of the contract and the law in force at the time.

9.30 We then went on to hold that upon the Act coming into force, existing contracts became subject to Section 127 thereof which provides that where a contract, a collective agreement or a statute provides more favourable conditions to an employee, such conditions shall prevail to the extent to which they are favourable.

9.31 Having held as above, we went on to hold that Section 54 (1) (c) of the Act was applicable to the employee and his benefits fell to be computed thereunder as an accrued benefit. We interpreted severance pay under Section 54 (1) of the Act as an accrued benefit, as read together with Section 51 (1) of the Act which entitles an employee who has been summarily dismissed to accrued benefits.

9.32 Ultimately, we held as follows at J18 of the Judgment;

> *"Our interpretation of the above provision is that employees engaged on a permanent basis are entitled to a severance package under section 54 (1) (c) of the Employment* Code Act."

9.33 This is clearly in contradiction of our earlier held positions in Midlands Milling and Natasha Patel. We therefore, wish to put the record straight through this Judgment and correct the contradiction that has emerged on the applicability or otherwise of Section 54 of the Act to employees who have been

dismissed and those terminated while serving on permanent and pensionable contracts of employment.

9.34 With regard to a dismissed employee, we simply wish to reaffirm our position in the Midlands case that for the reasons we articulated there, an employee who has been dismissed whether from a fixed term contract or a permanent and pensionable contract of employment does not qualify for severance pay under Section 54 of the Act.

9.35 As for an employee on a permanent and pensionable contract of employment, whose contract has been terminated or has expired, in accordance with Section 54 of the Act, the answer lies in the interpretation of Section 54 (1) of the Act and its intention.

9.36 The starting point would be to look at the definition of "contract of employment" in the Act which is set out as follows in Section 3;

> *"Contract of employment" means an agreement establishing an employment relationship between an employer and an employee, whether express or implied, and if express, whether oral or in writing.*

9.37 In that definition, there is no distinction between a fixed term contract and a permanent and pensionable contract. This is also reflected in Section 54 of the Act which does not distinguish between a fixed term contract and a permanent and pensionable contract.

9.38 From the wording of Section 54 (1) of the Act, there is one point to consider, this is that whereas a permanent and pensionable contract of employment can be terminated, it only expires upon the employee attaining the retirement age as stipulated by Section 58 of the Act.

9.39 It follows therefore, that Section 54 of the Act does not apply to a permanent and pensionable employee whose contract has expired by reason of retirement.

9.40 However, on a proper reading and construction of Section 54 of the Act, an employee on permanent and pensionable contract of employment can only qualify for a severance pay if he/she is terminated by reason of redundancy under subsection (1) (d).

9.41 In the previous decisions and the current one, the Appellants have consistently argued, through Mr. Chungu, that an employee on a permanent and pensionable contract of employment is entitled to severance pay under subsection (3). This argument is anchored on the view that if it is not excluded, it is included.

9.42 The Appellant has called in aid the case of Albert Mupila v Yu-Wei (supra), a High Court decision. In that case, the learned Judge pointed to the fact that *"the prohibition in Section 54 (3) has not been extended to employees engaged on a permanent basis"*

9.43 Based on the above referred to case, the Appellant has drawn further inspiration from a view expressed by the learned authors of *A Comprehensive Guide to Employment Law in Zambia*, *(Winnie Sithole Mwenda and Chanda Chungu.)* According to the learned authors, *"a permanent contract of employment is also a contract of fixed duration in the sense that it is certain to expire on the retirement date if not terminated in the various ways specified in the Employment Code."*

9.44 At page 288 of the same book, the learned authors state as follows with reference to Section 54 (3) of the Act;

> *"The foregoing provision proscribes the payment of a severance package to employees engaged on, among others, long term contracts. As such, it would seem that Section 54 (1) (b) and (c) of the Employment Code Act was designed for employees on permanent, short-term and seasonal contracts to receive gratuity when their employment terminates for a reason other than redundancy, medical discharge or death. A contract for a fixed duration includes permanent contracts and thus, although the definition of gratuity provides the entitlement for long-term employees, permanent employees get this benefit in the form of severance pay when their employment terminates for a reason other than redundancy, medical discharge or death."*

9.45 In the Natasha Patel case, we adequately distinguished between a fixed-term contract and a permanent and pensionable contract. We made the point that while a fixed-term contract has a set end date; a permanent and pensionable contract of employment does not. We stand by that decision and the distinction therein.

9.46 In the opinion the leaned authors have expressed through the above cited quotation, a permanent and pensionable employee whose employment has been terminated in any way other than as set out in Section 54 (1) (a), (d) and (e) of the Act, is eligible for a severance pay. In their view, even where the termination is by way of dismissal, Section 54 of the Act applies.

9.47 We do not find the views expressed by the learned authors persuasive at all. We believe that Section 54 of the Act provides sufficient guidance on the parameters within which eligibility for a severance pay applies.

9.48 In view of the similarities of circumstances of the three cases we earlier decided upon, and the position of the law as elucidated above, we have no reason to depart from our decisions in the Midlands Milling case (supra) and the Natasha Patel case (supra).

9.49 Our firmly held position is that employees who are summarily dismissed are dealt with in accordance with Section 50 of the Act and the extent and scope of their benefits are as provided in Section 51 of the Act.

9.50 For avoidance of doubt, employees dismissed from employment for disciplinary reasons and those terminated otherwise from permanent and pensionable contracts of employment are not entitled to a severance pay under Section 54 (1) of the Act.

9.51 The second ground of appeal is an attempt to depart from the long-standing position at law that the normal measure of damages in an employment case is equivalent to the notice period.

9.52 According to Mr. Chungu, the advent of Section 52 of the Act which requires the employer to give proper reasons for dismissing an employee rendered the notice period requirement redundant.

9.53 In our view, the requirement for the employer to give valid reasons for terminating a contract of employment does not nullify the common law measure of damages equivalent to the notice period. This is because there will continue to be contracts that will provide for termination by notice.

9.54 Where a contract does not provide for a notice period, either party may still terminate the contract upon giving reasonable notice. Reasonable notice will depend on the nature of the contract and discernible intentions of the parties on the intended duration of the contract.

9.55 As a matter of fact, this common law principle is now enshrined in Section 53 of the Act. Even where the contract does not provide for a notice period, subsection (2) prescribes notice periods for contracts of various durations.

9.56 In this appeal, the contract was oral and it was terminated orally. It was not a fixed term contract and therefore, deemed

to have been permanent. That being the case it was not covered by Section 53 of the Act.

9.57 In her Judgment, the learned Judge in the Court below found that the Appellant had worked for one year at the time he was dismissed. She then awarded damages equivalent to three months salaries in lieu of notice.

9.58 In the circumstances of the case and the nature of the job of a driver, we accept that three months was reasonable notice. In the English case of Jackson Distribution Ltd v Turn Yeto Inc,[9] the learned Judge held that it was an implied term that either party was entitled to terminate the agreement on reasonable notice to the other party.

9.59 In that case, the parties had negotiated a sole distribution contract which was never formalized. After holding that there was an implied contract, which had run for a period of two and half years, the learned Judge held that six months was a reasonable notice period.

9.60 We therefore, find no merit in the second ground of appeal and dismiss it accordingly.

10.0 CONCLUSION

10.1 Through this Judgment, we re-affirm our position that Section 54 of the Employment Code Act No 3 of 2019, does not apply to an employee who has been dismissed regardless of the type of contract of employment they served on.

10.2 We also re-affirm our position that an employee on permanent and pensionable contract of employment, who is terminated other than through the circumstances set out in subsection (1) (a), (d) and (e) of Section 54 of the Act, is not eligible for severance pay.

10.3 The Appellant in this case was not terminated under any of the above listed circumstances. He was instead summarily dismissed. The appeal therefore, lacks merit in both grounds and we dismiss it accordingly.

10.4 In light of the position we have taken in this Judgment, we hereby depart from our decision in the case of Zubao Harry Juma v First Quantum Mining and Operations – Road Division, (supra), in so far as it holds that employees engaged on a permanent basis are entitled to a severance package under Section 54 (1) (c) of the Employment Code Act.

10.5 This being an appeal from the Industrial Relations Division, we order each party to bear their own costs.

M.J. SIAVWAPA
JUDGE PRESIDENT

C.F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

J. CHASHI
COURT OF APPEAL JUDGE

M.M. KONDOLO SC
COURT OF APPEAL JUDGE

C.K. MAKUNGU
COURT OF APPEAL JUDGE

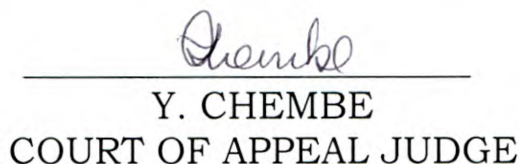
F.M. CHISHIMBA
COURT OF APPEAL JUDGE

P.C.M NGULUBE
COURT OF APPEAL JUDGE

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE

K. MUZENGA
COURT OF APPEAL JUDGE

A.N. PATEL SC
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE