

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

Appeal No 105/2023

**BETWEEN:**

**NIMBLE RESOURCES LIMITED**

**APPELLANT**

**AND**

**ALEX KATAMFYA**

**RESPONDENT**



**CORAM: Kondolo, SC, Majula and Muzenga, JJA**  
**On 27<sup>th</sup> March 2025 and 5<sup>th</sup> December 2025**

For the Appellant: Mr. R. K. Malipenga, Ms. C. Puta, Messrs Robson Malipenga & Co.

For the Respondent: Mr. C. Chungu, Messrs Nsapato & Co, under LAZ Probono Scheme

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## **J U D G M E N T**

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**MUZENGA JA, delivered the Judgment of the Court.**

Cases referred to:

- 1. Ndola Energy Company Limited v. Lamamuda Limited – SCZ Appeal No. 62 of 2014**
- 2. Holmes Limited v. Buildwell Construction Company Limited (1973) ZR 97**
- 3. Amiran Limited v. Bones – Appeal No. 42 of 2010**
- 4. National Airports Corporation Limited v. Reggie Ephraim Zimba and Another (2000) ZR 154**

5. **Zambian Breweries Plc v. Betternow Family Limited – Selected Judgment No. 48 of 2016**
6. **GDC Logistics Zambia Limited v. Kanyanta and Others – SCZ Selected Judgment No. 17 of 2017**
7. **Zambia National Commercial Bank Plc v. Jason Mweemba – SCZ Appeal No. 92 of 2015**
8. **Mofya Mfungo and Others v. Local Authorities Superannuation Fund – CAZ Appeal No. 225 of 2021**
9. **Sarah Aliza Vekhnik v. Casa Dei Bambini Montesorri Zambia – CAZ Appeal No. 129 of 2017**
10. **Dennis Sakala and Others v. Zambia Breweries Plc – CAZ Appeal No. 121 of 2022**
11. **Emporium Fresh Foods Limited T/A Food Lovers Market and Gourment Market Limited v. Kapya Chisanga – CAZ Appeal No. 44 of 2021**
12. **Moses Choonga v. ZESCO Recreation Club – SCZ Appeal No. 168 of 2013**
13. **Wilfred Weluzani Banda v. Medical Council of Zambia and the Attorney General – SCZ Appeal No. 116/2012**
14. **Jacob Nyoni v. The Attorney General (2001) ZR 65**
15. **Alistair Logistics (Z) Limited v. Dean Mwachilenga – CAZ Appeal No. 232 of 2019**
16. **Zambia National Commercial Bank Plc v. Joseph Kangwa – Appeal No. 54 of 2008**
17. **Chilanga Cement v. Kasote Singogo – SCZ Judgment No. 13 of 2009**
18. **Kafue District Council v. James Chipulu (1997) SJ 13**
19. **Josephat Lupemba v. First Quantum Mining and Operations Limited – CAZ Appeal No. 120/2017**
20. **AB Bank Limited v. Benjamin Nyirenda – CAZ Appeal No. 58 of 2020**
21. **William David Wise v. E. F. Harvey Limited (1985) ZR 179**
22. **Mazoka and Others v. Mwanawasa (2008) ZR 138**
23. **Chate v. Chungu (2014) 2 ZR 216**
24. **Admark Limited v. Zambia Revenue Authority (2006) ZR 42**
25. **Atlantic Bakery v. ZESCO – Selected Judgment No. 61 of 2018**
26. **Savenda Management Services v. Stanbic Bank – Selected Judgment No. 10 of 2018.**
27. **Boart Longyear (Zambia) Limited v. Austin Makanya – SCZ Appeal No. 176/2013**

- 28. Supabets Sports Betting v. Kalimukwa – Selected Judgment No. 27/2019**
- 29. Kennedy Born Kauka v. Lusaka Apex Medical University Limited – CAZ Appeal No. 192/2019**
- 30. Jackson Mwape & 61 Others v. ZCCM Investment Holdings Limited Plc – SCZ Judgment No. 23 of 2014**
- 31. Standard Chartered Bank Plc v. Celine Meena Nair – CAZ Appeal No. 14/2019**
- 32. Swarp Spinning Mills Plc v. Sebastian Chileshe and Others – SCZ Judgment No. 6 of 2002**

Legislation referred to:

- 1. Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.**
- 2. Employment Code Act No. 3 of 2019.**

Other works referred to:

- 1. J Duddington Employment Law, 2<sup>nd</sup> Edition, 2007.**

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the judgment of Davies C. Mumba J, delivered on 22<sup>nd</sup> day of November 2022 in which the lower court found that the respondent had succeeded in his claims for damages for wrongful and unfair dismissal.

## **2.0 BACKGROUND**

- 2.1 By way of notice of complaint, the respondent commenced this action against the respondent on 24<sup>th</sup> December 2021. With leave

of court, the notice of complaint and the affidavit in support were amended on 31<sup>st</sup> March 2022, with the following reliefs endorsed:

- i) Compensation for wrongful dismissal;**
- ii) Payment of accrued salaries from 1<sup>st</sup> September 2021 to 7<sup>th</sup> October 2021; accrued leave days and gratuity;**
- iii) Payment of a salary in lieu of notice;**
- iv) Any other relief which the court may deem fit;**
- v) Costs of and incidental to this action.**

2.2 The respondent averred that he was employed as a Truck Driver on 26<sup>th</sup> May 2020 on a one year contract at an initial pay of K1, 511.55 which was later increased to K3,934.50 from January 2021 to October 2021. He avowed that in July 2021, he was sent to Congo with a Mr. Peter Masheka to transport copper from Congo to Mozambique. When he arrived in Mozambique, he fell ill whilst on duty and he communicated with his supervisor, Mr. Chris Kasapato, the appellant's Freight Manager and the Manager as he sought medical attention in Mozambique.

2.3 The respondent returned to Zambia with the assistance of the appellant and despite being sick, he reported for work a few days after his arrival and continued communicating with his supervisor updating him on his illness. He averred that he continued receiving his salary until September 2021 month-end when he

noticed he had not been paid. On 7<sup>th</sup> October 2021, he was served a letter of dismissal by the appellant.

2.4 On 21<sup>st</sup> January 2022, the appellant filed its answer and later, on 31<sup>st</sup> August 2022, with leave of court, filed an amended answer with an affidavit in support. The appellant averred that the respondent was employed as a Truck Driver on 26<sup>th</sup> May 2020 for a period of 12 months with a basic pay of K2,300.00. When the contract expired, it was never renewed and he was subsequently engaged on oral contracts on temporal and casual basis and paid some international allowance and salary.

2.5 It was the appellant's avowal that the respondent was engaged for the transportation of goods to Mozambique but upon his return, he absented himself from work for more than 90 days without providing any medical certificate and he was consequently charged and given an opportunity to exculpate himself. The appellant averred that the company rules provided that absence without leave for more than ten consecutive days was a dismissible offence and in the absence of a notice, a salary of one month was to be paid. The appellant denied ever unlawfully and wrongfully dismissing the respondent on 7<sup>th</sup> October 2021 but that the contract expired by effluxion of time.

### **3.0 DECISION OF THE COURT BELOW**

3.1 The trial court found that the respondent's dismissal from employment was both wrongful and unfair, and that he was accordingly entitled to the payment of compensation for his unwarranted loss of employment. Having considered all the circumstances of the case, he found that this was an appropriate case to award the complainant damages beyond the normal measure of damages based on the notice period and proceeded to award him 12 months basic pay as damages. The court thus found that the respondent had succeeded in his claims for damages for wrongful and unfair dismissal, payment for accrued leave days, gratuity and the salary for the period 1<sup>st</sup> September to 7<sup>th</sup> October 2021.

### **4.0 GROUNDS OF APPEAL**

4.1 Unsettled by the decision of the court below, the appellant launched before this Court the appeal on the following grounds:

- 1) The lower court misdirected itself in fact and in law when it awarded damages for unfair dismissal which was never claimed by the respondent;**
- 2) The lower court misdirected itself in fact and in law when it awarded damages for wrongful dismissal when the complainant was dismissed in accordance with the contract of employment;**

- 3) **The lower court misdirected itself in fact and in law when it awarded a payment for leave days for a period the employee was not reporting for work;**
- 4) **The lower court misdirected itself in fact and in law when it awarded costs to the respondent;**
- 5) **The lower court misdirected itself in fact and in law when it awarded excessive damages for 12 months more than the remainder of the contract duration;**
- 6) **The lower court misdirected itself in fact and in law when it awarded excessive damages.**

## **5.0 APPELLANT'S HEADS OF ARGUMENT**

- 5.1 In relation to ground one, the appellant referred to **Section 108 of the Industrial and Labour Relations Act** which provides grounds for unfair dismissal which include race, sex, marital status, religion, political opinion or affiliation, tribal extraction or social status of the employee. It was submitted that the respondent did not prove any of the above through his complaint.
- 5.2 Our attention was drawn to the learned author of **Employment Law, 2<sup>nd</sup> Edition, 2007** at page 46 where it is stated that a claim for unfair dismissal needs to be served on an employer and in the present circumstances, a claim for unfair dismissal was not served on the appellant by the respondent. Reliance was also placed on the case of **Ndola Energy Company Limited v. Lamamuda**

**Limited**<sup>1</sup> where the Supreme Court overturned the lower court's judgment on the basis that the trial judge had awarded a party what it had not claimed in its pleadings.

- 5.3 In ground two, it was argued that because the contract of employment expired on 26<sup>th</sup> May 2021, it then became an oral contract. Reference was made to **Section 20 of the Employment Code Act** which provides that:

**"In the absence of any agreement to the contrary, an oral contract of employment shall be a contract for the period by reference to which wages are calculated, except that where wages are calculated by reference to any period of less than a day, then, in the absence of any agreement to the contrary, the oral contract shall be a daily contract."**

- 5.4 It was submitted that the respondent was absent for more than the period extended to him by the appellant. The appellant dismissed the respondent for the period that the respondent did not provide any documentation as to why he was absent from work. It was argued that it was a misdirection on the part of the lower court to go against what the parties had agreed in their contract.
- 5.5 In relation to ground three, the appellant referred us to the case of **Holmes Limited v. Buildwell Construction Company Limited**<sup>2</sup> where it was held that where parties have embodied the terms of their contract in a written document, extrinsic evidence is not

generally allowed to add, vary, subtract from or contradict the terms of the written contract. It was submitted under this ground that the respondent was already on sick leave and it was therefore a misdirection on the part of the lower court to award him leave days as a person who is not working cannot accumulate any leave days.

- 5.6 The appellant's contention in ground four is that the court should not have awarded costs to the respondent in the absence of evidence on record that the appellant offended **Section 44 of the Industrial and Labour Relations Act**. That the appellant did not make any attempts to delay proceedings in any way and costs should not therefore have been awarded to the respondent. Reliance was placed on the case of **Amiran Limited v. Bones**.<sup>3</sup>
- 5.7 In relation to ground five, we were referred to the case of **Reggie Ephraim Zimba v. National Airports Corporation Limited**<sup>4</sup> where the Supreme Court varied the quantum of damages of the court below by ordering that the respondent was only entitled to damages relating to the period of three months' salary and prerequisites and any other accrued benefits, such as gratuity over that period. The Supreme Court stated that if they awarded damages equating to remaining part of the contract, such sum of damages would be too extravagant and unconscionable, as the role

of the courts is to award the greatest loss that could conceivably be proved to have followed from the breach which is to put the innocent party in the position they would have been but for the loss. The case of **Zambia Breweries Plc v. Betternow Family Limited**<sup>5</sup> was also relied on in this regard. It was argued that the law is clear on the objective of damages which is not to punish the guilty party but rather, compensate the innocent party only for the extent of the loss, taking into consideration that they can terminate the contract.

5.8 In ground six, reliance was placed on the case of **Zambia Breweries v. Betternow Family Limited** *supra* where it was stated that the objective of damages is not to punish the guilty party but rather, compensate the innocent party only for the extent of the loss. It was contended that the lower court misdirected itself in fact and in law when it awarded excessive damages.

5.9 In conclusion, we were urged to allow the appeal in favour of the appellant with costs.

## **6.0 RESPONDENT'S ARGUMENTS**

6.1 In responding to ground one, the respondent relied on the case of **GDC Logistics Zambia Limited v. Kanyanta and Others**<sup>6</sup> where the Supreme Court held in terms of **Section 85A(d) of the Industrial and Labour Relations Act** that the court is mandated

to make any order or award as it may consider fit to underscore the point that the court must consider all circumstances to award a just and equitable remedy that is necessary to ensure justice is achieved. The respondent also referred to the case of **Zambia National Commercial Bank Plc v. Jason Mweemba**<sup>7</sup> for the argument that pleadings cannot stand in the way of the Industrial Relations Court doing justice between the parties notwithstanding the remedy of unfair dismissal not having being pleaded, the court was entitled to examine if the dismissal was fair or not. Further reliance was placed on **Section 85A of the Industrial and Labour Relations Act and Rule 55 of the Industrial and Labour Relations Rules** for the argument that the court had the jurisdiction and power to grant a remedy which is justified and reasonable.

- 6.2 It was submitted that unfair dismissal is dismissal contrary to the law based on invalid and unsubstantiated grounds and the giving of a reason is not enough as noted by this court in **Mofya Mfungo and Others v. Local Authorities Superannuation Fund**.<sup>8</sup> That the giving of the purported reason by the respondent was not enough as it ought to have been substantiated and supported by the necessary facts and evidence which were not present.

- 6.3 It was argued that as can be gleaned from page 38, line 37 of the record of appeal, the respondent pleaded unlawful dismissal that is contrary to statute as the reason was invalid and unsubstantiated. Counsel referred us to our decision the case of **Sarah Aliza Vekhnik v. Casa Dei Bambini Montesorri Zambia**<sup>9</sup> in this regard.
- 6.4 Referring to our decisions in **Dennis Sakala and Others v. Zambia Breweries Plc**<sup>10</sup> and **Emporium Fresh Foods Limited T/A Food Lovers Market and Gourment Market Limited v. Kapya Chisanga**,<sup>11</sup> it was submitted that for summary dismissal the employer must comply with disciplinary rules by charging an employee and giving an opportunity to be heard based on **Section 52(3) of the Employment Code** prior to any summary dismissal and the appellant's failure to do so in this case rendered the dismissal unlawful.
- 6.5 In relation to ground two, it was argued in line with **Moses Choonga v. ZESCO Recreation Club**<sup>12</sup> that because the respondent continued to work beyond the expiration of his contract, it was deemed that his contract of employment was automatically renewed on the same terms and conditions. That wrongful dismissal relates to bringing employment to an end contrary to the laid down

contractual procedures. It was argued that as the respondent was still serving on the fixed term contract, the appellant was bound by the contract and clause 14.0, 14.2 of the contract wherein the respondent could only be dismissed in accordance with the grounds of termination under the law and clause 15.0 of the contract which gives the grounds for summary dismissal. It was contended that the failure to carry out any investigation, disciplinary process or give the respondent any opportunity to be heard rendered the dismissal wrongful. We were urged to dismiss ground two of the appeal.

- 6.6 The gist of the respondent's argument in ground three is that **Section 38(2) of the Employment Code** provides for six months' sick leave with the first three months at full pay and the next three months at half pay. That an employee on sick leave is therefore legally away from work and even continues to accrue annual leave. That as the law provides for both sick and annual leave, an employee who proceeds on sick leave is entitled to annual leave and where his days accrue, he must be paid the balance of the days in accordance with **Section 36(5) of the Employment Code** which provides that:

**"Despite subsection (1), an employer may, with the agreement of the employee, pay wages to the employee in lieu of any annual leave due to the**

**employee under that subsection, and if any leave has been accumulated by an employee whose contract of employment has terminated or expired, the employer shall pay wages to the employee for the period of the accumulated leave.”**

- 6.7 It was contended that an employee cannot thus forfeit his leave days for being on sick leave and the respondent was correctly awarded the salaries and wages for the period of the leave he accumulated.
- 6.8 Relying on the case of **Amiran Limited v. Bones** *supra*, it was contended in relation to ground four that costs in disputes before the Industrial Relations Courts are only awarded where a party is guilty of vexatious, unreasonable and improper conduct and that as there was no such conduct, we were urged to uphold and allow this ground of appeal.
- 6.9 In relation to ground five, it was argued that the period of service remaining under the contract of employment is irrelevant in determining the quantum of damages. Reliance was placed on **Wilfred Weluzani Banda v. Medical Council of Zambia and the Attorney General**<sup>13</sup> and **Jacob Nyoni v. The Attorney General**.<sup>14</sup>
- 6.10 It was argued that damages depend on the circumstances of each case and not influenced by the duration of the contract in

accordance with our decision in **Alistair Logistics (Z) Limited v. Dean Mwachilenga<sup>15</sup>** and **Zambia National Commercial Bank Plc v. Joseph Kangwa.<sup>16</sup>**

6.11 It was argued that the court below was thus on firm ground when it awarded twelve months salary as damages given the infringement of the respondent's rights, dismissal without a valid reason, the mental anguish and lack of employment. Reliance was placed on **Chilanga Cement v. Kasote Singogo<sup>17</sup>** and **Kafue District Council v. James Chipulu.<sup>18</sup>**

6.12 Relying on our decisions in **Josephat Lupemba v. First Quantum Mining and Operations Limited<sup>19</sup>** and **AB Bank Limited v. Benjamin Nyirenda,<sup>20</sup>** we were implored to confirm that where an employee has been unlawfully, unfairly or wrongfully dismissed, such as the respondent, judicial notice can be taken of the fact that such conduct would disturb peace of mind and freedom from distress which justifies an award of damages.

6.13 In sum, we were urged to dismiss the entire appeal.

## **7.0 HEARING OF APPEAL**

7.1 At the hearing of the appeal, learned counsel for the appellant placed full reliance on the documents filed. The learned counsel for

the respondent also relied on the documents filed and briefly augmented.

## **8.0 DECISION OF THE COURT**

8.1 We have earnestly considered this appeal together with the accompanying documents and the impugned judgment of the trial court.

8.2 In ground one, the appellant takes issue with the fact that the lower court awarded damages for unfair dismissal when the same was never claimed by the respondent.

8.3 Unquestionably, the purpose and function of pleadings is to give parties fair notice of the claims that they are to meet; to define the issues for the court to adjudicate and once the pleadings are closed, the parties are bound by their pleadings as illustrated in **William David Wise v. E. F. Harvey Limited**,<sup>21</sup> **Mazoka and Others v. Mwanawasa**<sup>22</sup> and **Chate v. Chungu**.<sup>23</sup>

8.4 This position was restated in **Admark Limited v. Zambia Revenue Authority**<sup>24</sup> where the Supreme Court stated the purpose of pleadings is to ensure that in advance of trial, the issues in dispute between the parties are defined.

8.5 To that effect, the general position is that a court cannot grant a relief not pleaded or prayed for as in **Atlantic Bakery v. ZESCO<sup>25</sup>** where the Supreme Court stated as follows:

**".... the learned judge made an order which violates a fundamental rule of civil procedure, namely that evidence can only be considered where a plea which the evidence supports has been put forward in the pleadings. A court is not to decide on an issue which has not been pleaded. Put differently, a court should confine its decisions to the questions raised in the pleadings. It can thus not grant relief which is not claimed. Litigation is for the parties; not the court. The court has no business extending or expanding the boundaries of litigation beyond the scope defined by i.e. parties in their pleadings. In other words, a court has no jurisdiction to set up a different or new case for the parties."**

8.6 In arriving at the decision it did, the learned trial judge formulated the issues for determination at **J20** as follows:

- i) whether the dismissal of the complainant was wrongful and unfair thereby entitling him to damages.**
- ii) Whether the complainant is entitled to the payment of a salary for the period 1<sup>st</sup> September to 7<sup>th</sup> October 2021; payment for accrued leave days; gratuity and a salary in *lieu* of notice.**

8.7 The trial court considered the claim for unfair dismissal on the basis that the respondent was dismissed for failure to produce any medical documentation in support of his absence from work for seventy-four days from 10<sup>th</sup> July to 23<sup>rd</sup> September 2021. The

learned judge found that the respondent had, as a matter of fact, submitted medical reports to the appellant which were blatantly ignored. He formed the view that the reason given by the appellant for the dismissal of the respondent was unsubstantiated.

8.8 The fundamental principle is that evidence can only be considered where a plea which the evidence supports has been put forward in the pleadings. We are in this regard very much alive to the position presented by the Supreme Court in **Savenda Management Services v. Stanbic Bank**<sup>26</sup> that our adversarial court system shackles the judge to the pleadings and evidence presented before him.

8.9 Be that as it may, **Section 85(5) of the Industrial and Labour Relations Act** provides that:

**"The Court shall not be bound by rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it."**

8.10 **Section 85(5) of the Act** has been a subject of judicial interpretation in a plethora of decisions and it is clear that the import of this provision is that when faced with a situation which demands the observance of the rules of evidence, the court has to interrogate the demands of justice in the case and justice between the parties

is what carries the day as illustrated in the case of **Boart Longyear (Zambia) Limited v. Austin Makanya**.<sup>27</sup> The Industrial Relations Court is thus meant to administer substantial justice.

8.11 The respondent did not plead the relief of unfair dismissal, the court however was of the view that from the pleadings and evidence deployed, the remedy of unfair dismissal was revealed. In administering substantial justice between the parties, we cannot fault the learned trial judge for considering and granting the remedy of unfair dismissal even when the same relief was not pleaded or sought by the respondent. We therefore agree with the arguments by learned counsel for the respondent in this regard.

8.12 In ground two, the appellant takes issue with the fact that the learned trial court awarded damages for wrongful dismissal when the respondent was dismissed in accordance with the contract of employment.

8.13 Wrongful dismissal is a product of the common law and at the instance of the employer that is contrary to the terms of the employment. The Supreme Court in **Supabets Sports Betting v. Kalimukwa**<sup>28</sup> stated regarding wrongful dismissal that;

**"... wrongful dismissal looks at the form of the dismissal and refers to dismissing an employee in**

**breach of contractual terms, such as non-compliance with the disciplinary procedure. Further, that the essence of complying with a disciplinary procedure is to ensure the determination of disciplinary offences in a fair, transparent manner and to protect employees from unwarranted loss of employment."**

8.14 By way of distinction, wrongful dismissal, unlike unfair dismissal looks at the form of the dismissal, this is dismissing an employee in breach of contractual terms such as non-compliance with the disciplinary procedure. The rationale for placing emphasis on compliance with the disciplinary procedure is to ensure the determination of disciplinary offences in a fair and transparent manner in order to protect employees from unwarranted loss of employment.

8.15 The court below, having canvassed what amounts to wrongful dismissal went on to state as follows at J21:

**"In *casu*, I have found no evidence on record indicating that the respondent had formally charged the complainant for the alleged offence of failure to produce any medical documentation in support of his absence from work from 10<sup>th</sup> July to 23<sup>rd</sup> September 2021 for which he was dismissed. By not charging the complainant with the offence for which he was dismissed, the respondent denied him an opportunity to defend or exculpate himself contrary to the rules of natural justice and Section 52(3) of the Employment Code Act No. 3 of 2019."**

- 8.16 Having stated that, the learned judge found that because the appellant did not comply with the principles of natural justice and the provisions of the **Employment Code Act**, the respondent had, on a balance of probabilities, proved that his dismissal was wrongful, entitling him to damages.
- 8.17 We also stated in the case of **Kennedy Born Kauka v. Lusaka Apex Medical University Limited**,<sup>29</sup> that a dismissal is wrongful where the employee is not given an opportunity to be heard, contrary to the rules of natural justice.
- 8.18 The evidence on the record is clear that having found that the respondent was not reporting for work for about seventy-five (75) days, the appellant went ahead to dismiss him for failure to produce medical documentation in support of his absence from work. The respondent was not charged for the alleged offence and consequently denied an opportunity to defend or exculpate himself contrary to the rules of natural justice and **Section 52(3) of the Employment Code Act**. We are therefore reluctant to interfere with or reverse the findings of the learned trial judge in this regard as the facts and evidence reveal that the respondent's dismissal was wrongful and he is entitled to an award of damages at law.

- 8.19 We agree with learned counsel for the respondent that this ground too, lacks merit and we accordingly dismiss it.
- 8.20 In ground three, the appellant contends that the court below misdirected itself when it awarded payment for leave days for a period the employee was not reporting for work.
- 8.21 The evidence on record is that the respondent did not report for work for a period of about seventy-five (75) days. Clause 6.7 of the contract of employment provided that an employee was to inform the employer if he was absent by reason of sickness in excess two days, and provide a medical certificate for the sickness. The respondent contended that he had several phone conversations with RW1 regarding his sickness and sent him medical reports on WhatsApp and that despite being sick, he would still report for work and go to the hospital. That RW1 would be informed every time he went to the hospital. The appellant's evidence however was that the respondent only brought the medical certificate after 2 months and 10 days of being sick and that was why his contract was terminated. The trial court found that the medical report dated 23<sup>rd</sup> September 2021 was issued by Ndola Teaching Hospital and submitted to RW1 confirming the respondent was a patient requiring weekly reviews and scheduled for surgery on 27<sup>th</sup> September 2021.

The court was of the view that the appellant was, as a matter of fact, aware of the reason for the respondent's absence from work. The court thus awarded the respondent a total of 32 days for the 16 completed months of service from 26<sup>th</sup> May 2020 to 25<sup>th</sup> September 2021.

8.22 **Section 38 of the Employment Code** allows an employee to proceed on sick leave on production of a medical certificate from a health practitioner while **Section 52(4)(e) of the Code** proscribes the termination of an employee's contract on reasons relating to temporary absence from work during sick leave or injury.

8.23 It is therefore apparent that leave days accrue as an incident of employment notwithstanding that the employee was already on sick leave. The respondent, being an employee of the appellant until the time his contract was terminated in September 2021, was accruing leave days and therefore entitled to the payment thereof. We remain guided by the case of **Jackson Mwape & 61 Others v. ZCCM Investment Holdings Limited Plc**<sup>30</sup> where it was held that an employee is always entitled to their accrued benefits. The respondent, having had accrued leave days by reason of being the appellant's employee, is entitled to the accrued leave days. We have already noted that the appellant was aware of the reason for the

respondent's absence from work, having repatriated him back to Zambia from Mozambique where he fell ill whilst on duty, and having held *supra* that his dismissal was wrongful, he continued to accrue his entitlements until the date of his dismissal. Further, the learned trial court found as a fact that the respondent submitted his medical certificate concerning his illness to the appellant. We find no reason to interfere with this finding as it was based on credibility.

8.24 We find no merit in this ground of appeal and we accordingly dismiss it.

8.25 We now move to consider ground four, which assails the lower court's decision to award costs to the respondent in the absence of evidence on record that the appellant offended **Rule 44(1) of the Industrial Relations Court Rules**. We are grateful that learned counsel for the respondent graciously conceded and urged us to allow this ground of appeal.

8.26 For the avoidance of doubt, **Rule 44 of the Industrial Relations Court Rules** provides that:

**" (1) Where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexations or unnecessary steps in any proceedings, or of other unreasonable conduct, the Court may make an order for costs or expenses against him."**

8.27 The Supreme Court, in the earlier decision of **Amiran Limited v. Bones** *supra* guided regarding costs that:

**“With regards to costs, Rule 44 of the Industrial Relations Rules, Chapter 269 of the Laws of Zambia provides that, in matters before the Industrial Relations Court, costs can only be awarded against a party if such party is guilty of unreasonable delay, of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct.”**

8.28 Relying on **Amiran Limited v. Bones** *supra*, our position in the case of **Standard Chartered Bank Plc v. Celine Meena Nair**<sup>31</sup> still stands. There was no evidence before the trial court suggesting that the appellant had occasioned unreasonable delays or taken vexatious steps in the proceedings so as to warrant them being condemned to costs. We find no reason therefore to belabour on this aspect save to agree with learned counsel for the appellant and the respondent that the award of costs under the circumstances was unwarranted. This ground of appeal succeeds.

8.29 Grounds five and six are interrelated and we wish to consider them together for that reason. It was contended that the court should not have awarded damages for 12 months more than the remainder of the contract duration and was excessive.

8.30 Having found that the respondent was entitled to compensation for the unwarranted loss of employment, the lower court found that this

was a case deserving to be awarded beyond the normal measure of damages based on the notice period as the respondent lost employment in an abrupt manner and for no reason at all.

8.31 Regarding the measure of damages, the Supreme Court held in **Swarp Spinning Mills Plc v. Sebastian Chileshe and Others**<sup>32</sup> that:

**“Unless the dismissal is in very traumatic fashion, the normal measure of damages is the salary for the period for which the notice should have been given.”**

8.32 The authority above is instructive as to the normal measure of damages being the salary for the period for which notice should have been given or reasonable notice where the contract is silent. The general principle in contracts of employment is that the purpose of damages is to put the innocent party in the position in which he would have been had the contractual obligations been performed in so far as it is possible to do this by monetary award.

8.33 The Supreme Court held, in **National Airports Corporation Limited v. Reggie Ephraim Zimba and Another** *supra*, that:

**“We find and hold the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositions by Lord Dunedin in Dunlop Pneumatic Tyre Co. v. New Garage and Motor CO. especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in**

**comparison with the greatest loss that could conceivably be proved to have followed from the breach."**

8.34 The rationale or objective for awarding of damages is thus not punitive, but compensatory for the loss suffered. We are therefore of the view that the award of damages of 12 months seems to be extravagant and unconscionable in comparison with the loss he would have suffered had he worked for the remainder of the contract. The remainder of his contract was about 8 months. We form this view, bearing in mind that the basis of calculating damages is rarely the remainder of the period or duration of one's contract or services as espoused in **Jacob Nyoni v. The Attorney General** *supra*.

8.35 While we agree that the respondent suffered loss as a result of the wrongful dismissal and the actions of the appellant we find that the amount awarded is excessive, even though we agree with the lower court that this is an exceptional case where more than the normal measure of common law damages would have been awarded as espoused in the case of **Chilanga Cement Plc v. Kasote Singogo** *supra*.


8.36 We therefore set aside the lower court's award of 12 months basic pay and in its place award damages equivalent to 8 months' basic pay. Grounds five and six partially succeed.

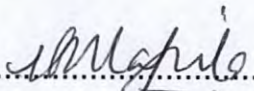
## **9.0 CONCLUSION**


9.1 Having found no merit in ground one, two and three of the appeal, they are accordingly dismissed. We allow ground four of the appeal and set aside the award of costs by the lower court to the respondent.

9.2 Grounds five and six having partially succeeded, we set aside the award of 12 months basic salary and in its place award 8 months basic salary as damages.

9.3 Each party will bear its own costs.

  
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M. M. KONDOLO, SC  
**COURT OF APPEAL JUDGE**

  
.....  
B. M. MAJULA  
**COURT OF APPEAL JUDGE**

  
.....  
K. MUZENGA  
**COURT OF APPEAL JUDGE**