

IN THE SUPREME COURT OF ZAMBIA  
 HOLDEN AT KABWE  
 (Civil Jurisdiction)

Appeal No.219/2015

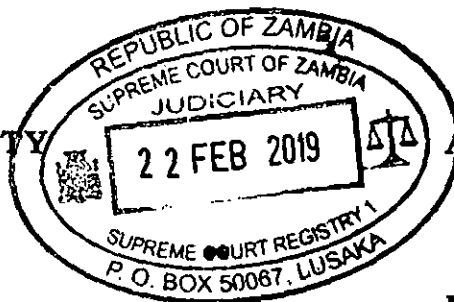
BETWEEN:

ZAMBIA REVENUE AUTHORITY

AND

CHINTU KANGA

(Sued as Administratrix of the Estate  
 of Godfrey Locha) (DECEASED)



APPELLANT

RESPONDENT

CORAM: Mwanamwambwa DCJ, Kaoma and Kajimanga, JJS

On 7<sup>th</sup> August 2018 and 22<sup>nd</sup> February 2019

For the Appellant: Mr. K. Wishimanga, Messrs A. M. Wood & Co.

For the Respondents: No Appearance

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## J U D G M E N T

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Kajimanga, JS delivered the judgment of the Court

Cases referred to:

1. Lukama & Others v Lint Company of Zambia Limited (1998) Z.R. 28
2. Goodwell Malawo Siamutwa v Southern Province Co-operative Marketing Union and Finance Bank (Z) Limited - Appeal No. 114 of 2000
3. Kitwe City Council v William Ng'uni (2005) Z.R.57
4. Ramsden v Dyson [1866] LR 1HL 129
5. Tallfellow Hurton Wishimanga v NIEC - Appeal No. 50 of 2011
6. J. V. Civils Limited v Gerard Anthony Fagan- Appeal No. 66 of 2013
7. James Mankwa Zulu and 3 Others v Chilanga Cement Plc - Appeal No. 12 of 2004

8. **John Paul Mwila Kasengele and Others v Zambia National Commercial Bank Limited (2000) Z.R. 72**
9. **Maamba Collieries Limited v Douglas Siakalanga and Others – Appeal No. 12 of 2004**
10. **Attorney General v Marcus Kampumba Achiume (1983) Z. R. 1**

**Legislation and other works referred to:**

1. **Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia**
2. **The Judgments Act, Chapter 81 of the Laws of Zambia**
3. **High Court Act, Chapter 27 of the Laws of Zambia**
4. **Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 9 (1) paragraph 702 and 1030; Volume 16(2) paragraph 1052**
5. **Chitty on Contracts: General Principles, 27<sup>th</sup> Edition, 1994.**

**Introduction**

1. In the main, the issue in this appeal is whether gratuity payable at the end of a contract should be computed on the basic salary for each year served or on the last drawn salary.
2. The appeal arises from a judgment of the High Court which ordered, among other things, that the deceased's gratuity on the first contract be re-calculated on the basis of the basic salary as reflected on his last pay statement.

**Background to the dispute in this appeal**

3. The deceased was employed by the appellant on 11<sup>th</sup> August 2004 on a renewable fixed five-year term contract as a Legal

Officer. He served the full duration of the contract at the end of which he was paid gratuity, computed for each year served on a month by month salary earned basis. He was later offered a three-year contract which he terminated by resignation in 2011 and was again paid his gratuity.

### **The Pleadings before the High Court**

4. On 18<sup>th</sup> May 2011, the deceased (plaintiff in the court below) issued a writ against the appellant (defendant in the court below) seeking the following:
  - 4.4 **A declaration that the formula used by the appellant when calculating the respondent's gratuity was wrong.**
  - 4.5 **An order that the respondent's gratuity be re-calculated based on the last salary together with all the allowances which he was earning at the end of every month during the tenure of the contract of service.**
  - 4.6 **That he be paid the difference between what was paid based on the wrong formula and what shall be found to be due after the recalculation.**
  - 4.7 **Interest on the said difference at the current bank lending rate from August 2009 up to the date of full and final settlement.**
  - 4.8 **Costs.**
  - 4.9 **Any other relief the Court shall deem fit to award the appellant.**

5. The deceased contended that his gratuity for the first contract should have been computed on his last earned salary plus allowances attached to the salary. Further, that it was wrong for the appellant to compute his gratuity on a month by month salary as the same should have been computed on the last salary earned.
6. For its part, the appellant disputed the deceased's claim and asserted that his gratuity was computed in accordance with the terms and provisions of his contract of employment with the appellant. The appellant also contended that the deceased was estopped from alleging that his gratuity was erroneously calculated for the reason that during the course of his employment, the respondent in his capacity as legal officer rendered legal advice to the appellant on how gratuity was to be paid which advice the appellant relied and acted upon.
7. That the deceased was, therefore, paid his gratuity in accordance with the formula advised by him and he did not at any time during his employment with the appellant object to or raise any issue with the formula employed by the appellant to pay the

deceased his gratuity but only raised the issue about 750 days later in breach of his duties.

8. In its counterclaim, the appellant contended that the deceased was negligent in the discharge of his duties while in the employment of the appellant by failing to file court documents and not attending to matters before court. In addition, the deceased had breached his fiduciary duty to the appellant by failing to discharge his duties to the reasonable implied standard as a qualified professional.
9. The appellant accordingly counterclaimed for the following:
  - 9.1 Damages for negligence**
  - 9.2 Damages for breach of fiduciary duty**
  - 9.3 Costs**
  - 9.4 Any other relief that the Court shall deem fit.**
10. In reply, the deceased denied the allegations contending that had they been true, he should have been charged under the disciplinary code. He further contended that had he been negligent and incompetent, he would not have been awarded for exceeding his targets and neither would he have been awarded a second contract when the first one expired.

**Evidence of the parties in the High Court**

11. The deceased testified that his letter of offer of employment stipulated that he would be paid gratuity at 30% of his salary at the expiry of his contract. When his contract came to an end, the appellant accordingly computed his gratuity and upon seeing the formula used, he challenged the same through his immediate supervisor; the legal counsel, on two points. Firstly, that it was computed on a month by month salary earned basis instead of the last earned salary. Secondly, that the gratuity was computed on the basic salary only instead of the gross salary and allowances, in particular, housing allowance.
12. His evidence also disclosed that during his term of employment, the housing allowance was added to the salary upon which tax was effected. He submitted that since the two were paid and taxed as one, they should be treated as one for the purposes of computing gratuity as well. Upon raising the issues with the legal counsel, he was advised to put it in writing and he proceeded by rendering a legal opinion on the matter.
13. He also testified that management ultimately adopted his legal

opinion when the legal counsel tabled it before management as he noticed from the computation of his gratuity in 2011 when he terminated his second contract. He observed that his second gratuity was computed in accordance with the legal opinion he had rendered on the issue namely, that the gratuity was computed based on the last salary received plus the housing allowance. His claim was, therefore, that the gratuity for his first contract ought to be re-computed using the same formula as that was used to compute gratuity for his second contract and that he be paid the difference.

14. Diana Bunting, the appellant's legal counsel, testified on its behalf. It was her evidence that she found the deceased when she joined the appellant on 1<sup>st</sup> October 2007 with whom she enjoyed a cordial working and personal relationship. She also testified that gratuity for the deceased was to be based on his gross salary as was the case with other employees at that time and that according to the appellant's administrative manual, basic pay was exclusive of allowances and as defined by the conditions of service for non-represented employees of whom the deceased was part.

15. She further testified that gratuity was calculated at 30% of basic salary and the number of years served. According to her, gratuity was not calculated on the last salary drawn but on the basic salary for each year served. She stated that a former employee of the appellant had challenged the computation of his gratuity and that the challenge was forwarded to the legal department for an opinion. The legal department presided over by the deceased as acting legal counsel, deliberated the matter and advised management that gratuity was a contractual matter.
16. The witness accused the deceased of failing to act in the best interest of the appellant and stated that the deceased was never charged with any offence during his tenure of office with the appellant because his deficiencies were only noticed after he had left employment. She said that when she was appointed legal counsel in January 2011, the deceased started reporting to her and that it was then that she discovered his non-rendering of reports and the performance failures. Subsequently, the deceased proceeded on leave and later tendered his resignation without making any handover to her.



17. As to why the respondent's gratuity on his second contract was computed to include allowances and based on his last received salary, she testified that by that time, the terms and conditions had changed to include housing allowance in calculating gratuity with effect from December 2009. She stated that the deceased's second contract was signed on 20<sup>th</sup> August 2009 before the new conditions were approved in December 2009 and that the change did not cover the deceased's first contract. That whereas the deceased's first contract did not include housing allowance in computing gratuity, the second contract was covered by the conditions approved by the Board whose application to his running contract was extended by a circular.

**Consideration of the matter by the learned High Court Judge and decision**

18. The learned trial judge found that the appellant used the correct formula in computing the deceased's gratuity for the first contract when it used the basic salary. He also found that under the first contract, gratuity was to be computed for the whole duration of the contract and not in segments. He opined that the fact that gratuity was expressed as payable at the end

of the contract was an indication that whether or not an employee served the full duration of the contract, the determining factor was the date of termination of the contract.

19. As such, the period served is considered as a whole and the gratuity percentage in this case being 30% of the basic salary for the duration of the contract can only be based on what an employee's basic salary was as on his last pay statement. According to the learned trial judge, segmenting the basic salaries on a yearly basis would be in violation of the contractual terms which view the contract period as a single unit.
20. He found that the appellant had not provided any satisfactory explanation for computing gratuity in a segmented fashion and if the same was to the detriment of the deceased, it could not be allowed to stand. He, therefore, ordered that the deceased's gratuity on the first contract be re-calculated on the basis of the basic salary as reflected on his last pay statement. Further, that the difference between the gratuity paid to the deceased and the amount due upon re-calculation shall be paid to the respondent with interest at the commercial lending rate from

the date of the writ until date of judgment and thereafter, at 10% until final payment.

21. As for the counterclaim, the learned trial judge found it odd that the appellant could raise a claim on negligence and breach of fiduciary duty against the deceased after he had sued it. He found that the deceased had served his first five-year contract in full and that at no time was his performance brought into question.
22. He also found that no evidence had been adduced to prove the allegations of failure by the deceased to properly maintain his diary and to adequately report on the cases pending in court. Further, that the claim based on the respondent's alleged breach of his fiduciary duty had not been proved. In the lower Court's view, the deceased could not be estopped from claiming against the appellant if his rights were violated. He accordingly dismissed the counter-claim in its entirety.

### **Grounds of appeal**

23. It is against this decision that the appellant has now launched

an appeal to this Court on three grounds as follows:

- 23.1 The learned trial Judge misdirected himself in law and in fact when he held that the [deceased's] gratuity be recalculated on the basis of the last drawn basic salary as reflected on the [deceased's] pay statement which holding was contrary to the law and the evidence on the record.
- 23.2 The learned trial Judge misdirected himself in law and in fact when he failed to properly consider the Appellant's defence of estoppel in light of the evidence on the record and the law.
- 23.3 The learned trial Judge in any case, misdirected himself in law and in fact when he awarded interest on the Judgment sum at commercial lending rate from the date of the Writ until the date of Judgment and thereafter, at 10% until final payment which holding was contrary to the law.

#### **The arguments presented by the parties**

24. Both parties filed written heads of argument. In support of ground one, Mr. Wishimanga, the learned counsel for the appellant, submitted that the parties to a written contract are bound by the terms of the contract, whether or not they understood them. According to counsel, the legal basis of employment remains the contract of employment between the employer and the employee and as such all rights, duties and obligations arise from the contract of employment. He referred

us to the learned authors of **Halsbury's Laws of England**<sup>4<sup>th</sup></sup> **Edition, Volume 9** who state at paragraph 68 that:

**"The general rule is that a person who accepts an offer made in a written document by signing and delivering that document is bound by all the terms of that document, whether or not he has read them.... the general rule is that a person is stopped by his signature thereon from denying his consent to be bound by the provision contained in that deed or other document."**

25. He contended that where parties to a contract reduce their agreement into a contract, they are bound by the terms of the contract and that according to the initial contract, the deceased was entitled to payment of gratuity at 30% of his basic salary on completion of the contract period. This matter was to be determined on the interpretation of the initial contract which provided for gratuity as follows:

**"A 30% gratuity based on the basic salary for the contract period would be payable at the end of the contract."**

26. Counsel argued that according to the above wording, gratuity would be paid on the deceased's basic salary for the contract period at the end of the contract at the rate of 30%. It was his contention that consideration must have been had to what the basic salary was and whether the deceased was paid this basic

salary. That the deceased was paid based on his basic salary for the contract period and he cannot, therefore, be said to be entitled to be paid on the last drawn salary as this would offend principles of contract. We were referred to the evidence of the appellant's witness who stated that:

**“The calculation of gratuity was at 30% of the basic salary and the number of years served... gratuity is not calculated on the last drawn salary but on the basic salary for each year served. The basic formula would be  $30/100 \times$  basic salary for each year served which percentages are added up to give the total sum payable.”**

27. Even assuming that the appellant's calculations were wrong, the same result would be arrived at if the basic salary for the entire contract period was subjected to 30%.
28. Counsel went on to refer us to the case of **Lukama and Others v Lint Company of Zambia**<sup>1</sup>, where it was stated that:

**“The appeal has to succeed on this point. It is allowed and there will be judgment for the Plaintiffs for the packages to be worked out on the basis of the increased salaries of 110% more which were applicable by the end of the notice period.”**

29. According to counsel, that case does not state that an employee will be paid on the last drawn salary in all cases but that the

packages were to be worked out on the basis of the increased salaries of 110% more which were applicable by the end of the notice period. This, he submitted, was because the said increased salaries would have been the applicable salaries at the end of the notice period. However, in the present case, the only applicable salary as per the contract was the basic salary and not the last drawn salary.

30. Should this court not agree with the above interpretation, it was Mr. Wishimanga's contention that to order that the deceased be paid on the last drawn salary would amount to unjust enrichment upon which this court frowns. This was anchored on the premise that the deceased would be receiving an extra sum of money for which he did not provide or render any service. In other words, the deceased would be paid on the last drawn basic salary for the entire contract period when in fact during the contract period he was paid varying amounts less than the last drawn salary which would therefore amount to unjust enrichment.
31. Counsel further submitted that to pay the respondent on the last drawn salary would offend principles of contract which

require that there must be consideration provided. He relied on the case of **Goodwell Malawo Siamutwa v Southern Province Co-operative Marketing Union and Finance Bank (Z) Limited<sup>2</sup>**, where this Court stated that:

**“The appellant never rendered any services to the 1<sup>st</sup> Respondent from the time that his services to the 1<sup>st</sup> Respondent were terminated on 20<sup>th</sup> May, 1999, up to the date of Judgment in May, 2002. There would therefore be no consideration for the money which could be paid to the Appellant were such an order to be made. In our view, this would amount to unjust enrichment.”**

32. He also cited the case of **Kitwe City Council v William Ng’uni<sup>3</sup>** where it was held that:

**“It is unlawful to award a salary or pension benefits, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment.”**

33. He, therefore, submitted that paying the respondent’s gratuity on the basis of the last drawn salary in the present case would amount to unjust enrichment because the respondent did not earn the amounts under the last drawn salary throughout the contract period and that the only amount that the respondent ought to receive under the circumstances is that which he worked for, that is, his basic salary.



34. Counsel also argued that by reading into the initial contract terms which were not agreed upon, the Court below offended the principles of freedom of contract. He contended that it was trite law that parties have the freedom to enter into a contract and set out their own terms and the position of the courts is to give effect to the terms of the contract. He drew our attention to the learned authors of **Chitty on Contract: General Principles, 27<sup>th</sup> edition, 1994** who state at paragraph 1-004 that:

**“Conversely the House of Lords has made clear that it will not add to the agreement which the parties have made by implying a term because it would be reasonable to do so, but only where it is necessary, nor will the Courts put meaning on the words of the contract different from that which they clearly express.”**

[Emphasis added by counsel]

35. He submitted that in the present case, the parties had clearly stipulated that the gratuity would be based on the basic salary for the contract period and that this was the gratuity that was paid to the deceased.

36. In arguing ground two, counsel submitted that the crux of this ground was that during the time the deceased was legal

counsel for the appellant, he rendered his opinion to the appellant's board relating to an employee who claimed a recalculation of his gratuity on the same basis that the deceased did in the Court below. It was, therefore, wrong for the learned trial judge to award gratuity on the last drawn salary when in fact the deceased should have been estopped from making a claim for gratuity to be paid on any other formula than that which both parties had since been using.

37. For the general principles of estoppel, we were referred to the learned authors of **Halsbury's Laws of England 4<sup>th</sup> Edition, Re-issue Volume 9(1)** who state at paragraph 702 that:

**"Where there is a dispute between parties as to the terms of an offer and a party has so conducted himself that a reasonable person would believe that he was assenting to the terms as proposed by the other party, the person who has so conducted himself, whatever his real intention may have been, is bound by the contract as if he had intended to agree to the other party's terms. A person will not, in general be permitted to deny his assent to a contract where he has been guilty of carelessness and has thereby misled the other party and induced him to believe that he assented...."**

38. Counsel also referred us to paragraph 1030 which states that:

**“A party who has represented that he will not insist upon his strict rights under the contract will not be allowed to resile from that position.”**

We were further referred to paragraph 1032 where the learned authors opine that:

**“... where however A understands the concession in the only reasonable manner, but B intended it in a different and possible, though unlikely sense, the doctrine may apply.”**

39. Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 16(2) was also cited, where the learned authors state at paragraph 1052 that:

**“Estoppel by representation is not distinguishable in principle from what was sometimes spoken of in courts of equity as equitable estoppel. The principle is one equally of law and equity; the only distinctions seem to be that in equity it was apparently applied only to cases where a person had entered into a contract on the faith of the representations made, which might have been made either by a party to the contract or by a third person; and that, whereas the common law phrase was that the person who made the representations was not allowed to deny their truth, the phrase of equity was that he must make his representations good.”**

40. Further, we were referred to the case of **Ramsden v Dyson**<sup>4</sup> where it was held as follows:

**“Whether you call it proprietary estoppel, estoppel by**

acquiescence or estoppel by encouragement it is really immaterial... it requires a very much broader approach which is directed rather at ascertaining where, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which he has allowed or encouraged another to assume to his detriment than...enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”

41. Counsel, therefore, argued that the deceased was clearly estopped from denying that he made a representation. Our attention was then drawn to the testimony of the appellant’s witness who stated that:

“A similar issue arose with another lawyer in the legal department. He left the employment of the defendant in March 2009 and raised an issue on how his gratuity was to be calculated.

He wrote a letter to the Commissioner General in 2010 and at the time the Plaintiff was the acting Legal Counsel. We discussed it with the Plaintiff and two other lawyers. Looking at the terms of the contract which specifically stated that gratuity is based on the salary we advised that gratuity is a contractual matter based on a term of contract. Thereafter the matter was not pursued further and the former employee was paid based on the basic salary for each year served.”

42. Counsel also contended that evidence disclosed that all communication from the legal department was channelled through the legal counsel and, therefore, if the former employee did not pursue the claim it must have been based on the advice rendered by the deceased in his capacity as acting legal counsel. That even in his own testimony during cross examination, the deceased admitted to having rendered a legal opinion when he stated that:

**“I rendered a legal opinion to ZRA and as such a fiduciary relationship existed. Many people left ZRA between 2004 and 2009 and were paid gratuity but I do not know on what terms as I was not privy to their contracts.”**

43. Counsel accordingly submitted that the learned trial judge should have considered the defence of estoppel and that the deceased should have been estopped from denying the computation of gratuity on a year to year basis.

44. In support of ground three, Mr. Wishimanga submitted that interest should generally be calculated at the average short-term deposit rate prevailing from the date of the writ to the date of judgment and thereafter, at the current lending rate as determined by the Bank of Zambia up to the date of payment.

To support this argument, he cited section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia, Order 36, rule 8 of the High Court Rules, Chapter 27 of the Laws of Zambia and section 2 of the Judgments Act, Chapter 81 of the Laws of Zambia.

45. Counsel also relied on the case of **Tallfellow Hurton Wishimanga v NIEC**<sup>5</sup> where it was held that:

“It was mandatory for the trial Court to order payment of interest on the sum awarded in accordance with the law highlighted above. The trial Judge erred in not doing so. We order that interest be paid by the Respondent at the average of the short-term deposit rate per annum prevailing from the date of the cause of action or writ to date of judgment and thereafter at the current lending rate as determined by the Bank of Zambia from the date of Judgment until the same shall be satisfied.”

46. Further, we were referred to the case of **J. V. Civils Limited v Gerard Anthony Fagan**<sup>6</sup>, where, this Court cited the law on interest applicable to judgments and found that the rate of 12% per annum from the date of writ until final payment ordered by the deputy registrar went against the law and therefore, ordered that the damages would attract interest at the average short term deposit rate prevailing from the date of writ to the

date of judgment and thereafter, at the current lending rate as determined by the Bank of Zambia up to the date of payment.

47. Counsel argued that the learned trial judge in the present case ordered that the difference between the gratuity paid to the respondent and the amount due upon re-calculation shall be paid to the respondent with interest at the commercial lending rate from the date of the writ until the date of the judgment. It was his submission that this order was clearly a misdirection on the part of the learned trial judge as it did not comply with the mandatory provisions of the law and should, therefore, be reversed.

48. Having filed a notice of non-appearance, the learned counsel for the respondent was not present at the hearing. In responding to ground one, counsel for the respondent submitted in the respondent's heads of argument, that the word salary is legally defined to include basic salary and any allowances earned. Therefore, when calculating gratuity as provided in the contract of employment, the formula to be used is to base the 30% on the aggregate of basic salary and

allowances. Counsel relied on the case of **James Mankwa Zulu and 3 Others v Chilanga Cement Plc**<sup>7</sup>, where this Court stated that: -

**“The Complainants raised an issue on the calculations of their terminal benefits to include allowances and the rest of the benefits. The word ‘salary’ is used. There is no debate anymore, that the word ‘salary’ includes allowances that are paid together with the salary on periodical basis by an employer to his employees.”**

49. He also referred us to the case of **John Paul Mwila Kasengele and Others v Zambia National Commercial Bank Limited**<sup>8</sup>, where it was stated that:

**“We allow the appeal and enter judgment for the Appellants for terminal benefits based on merged salaries and allowances, less whatever has been paid....”**

50. Counsel argued that it was only fair that since the appellant used the aggregate of basic salary and allowances when deducting pay as you earn and other taxes, the same should be done when paying gratuity, as the two were clearly treated as one. He drew our attention to the deceased’s testimony in the court below where he stated that:

**“My argument then was that if my salary and housing allowance were being paid and taxed together to come up with the net**



**pay, why separate it when it comes to the payment of gratuity for the period I had served.”**

51. Counsel then referred us to the **Lukama<sup>1</sup>** case where the appellants claimed gratuity based on a salary that took into account an increment of 110% given to their colleague while they were serving a three months' notice of termination of employment.
52. He argued that the appellant's attempt to distinguish the above case was incomprehensible. That the learned trial judge aptly explained the relevance of that case to the present case at page 20 of his judgment when he stated as follows:

**“The relevance of the LUKAMA case to the instant case in relation to the claim is that the Supreme Court having found that the Appellants were entitled to the 110% increment based on computation of the benefits, it ordered that their benefits be worked out based on the increased salaries... In this case the relevant portion of clause 1 of the letter of offer states as follows:- A 30% gratuity based on the basic salary for the contract period. The understanding is that gratuity was to be computed for the whole duration of the contract and not in segments. Besides, the first line of clause 1 makes it very plain that the contract was for an undivided period of five years. This means that the five year period is treated as a unit for the purposes of computing gratuity. The fact that gratuity is expressed as payable at the end of the contract is an indication,**

in my view, that whether or not an employee serves the full duration of the contract, the determining factor is the date of the determination of the contract. The period served is considered as a whole and the gratuity percentage in this 30% of basic salary for the duration of the contract can only be based on what an employee's basic salary was as on his last pay statement. Segmenting the basic salaries on a yearly basis would be in violation of the contractual terms which view the contract period as a single unit."

53. According to counsel, the appellant's arguments that to base gratuity on the last drawn salary amounts to unjust enrichment and that the same would go against the principles of contract which require consideration to be shown, equally fly in the teeth of the **Lukama**<sup>1</sup> case and the learned trial judge's interpretation of the same. Further, it was a misdirection for the appellant to submit that the learned trial judge allegedly read into the contract of employment, terms which did not exist by holding that gratuity was payable based on the last drawn salary. According to counsel, the learned trial judge merely interpreted the contract by holding that gratuity was not to be calculated on what would amount to a segmented contract duration, but as a unit, based on the last drawn salary.

54. It was submitted in response to ground two, that the deceased did not base his claims on the basis of the claim made by a previous employee, but on the basis of his interpretation of the contract of employment between himself and the appellant. Counsel argued that there was no provision in that contract that bound the deceased to an interpretation given whether by himself, or the appellant, to the terms of a third party's contract of employment, as he was not privy to the said contract, and neither was the deceased referring to his own contract, when rendering the said opinion on that third party's contract of employment. That in any event, the deceased's testimony, as accepted by the learned trial judge, was that that was the formula existing in the appellant institution at the time he rendered the legal advice in question.
55. That for these reasons, the learned trial judge was on firm ground when he rejected the defence of estoppel as set up by the appellant and in finding that the deceased had a legal right to make the claim he made, which could not be defeated by the principle of estoppel.

56. In response to ground three, counsel submitted that the Law Reform (Miscellaneous Provisions) Act, the Judgments Act and Order 36 rule 8 of the High Court Rules all clearly state that the Court or judge has a discretion to apportion interest in a manner they see fit. As such, the learned trial judge cannot be faulted on the interest he awarded and in the manner he directed the same to be apportioned as the law allowed him to do so. He accordingly concluded that the whole appeal lacks merit and should be dismissed with costs.

#### **Decision by this Court**

57. We have considered the record of appeal, the judgment appealed against and the arguments of the parties.
58. The first ground of appeal attacks the trial Court's decision that gratuity should be re-calculated on the basis of the last drawn salary as reflected on the deceased's pay statement. According to the appellant, the provision in the deceased's first contract of employment that "a 30% gratuity based on the basic salary for the contract period would be payable at the end of the contract" means that the only applicable salary for purposes of computing gratuity was the basic salary and not the last drawn salary.

Further, that basing gratuity on the deceased's last drawn salary would amount to unjust enrichment.

59. The thrust of the argument by counsel for the respondent is that the trial judge properly interpreted the contract by holding that gratuity was not to be calculated on the basis of a segmented contract duration but as a unit, based on the last drawn salary.
60. We think that the starting point in considering this ground is to look at the meaning of 'gratuity'. The Concise Oxford English Dictionary, Ninth Edition defines 'gratuity' as "money given in recognition of services; at tip." This definition suggests that gratuity is money given to some one after they have performed a service. In the context of gratuity being a provision in a contract of employment, it is money given at the end of an employee's employment contract. To this extent, therefore, it can safely be reasoned that gratuity is a terminal benefit, to be given to an employee at the end of the contract.
61. Authorities abound that offer guidance on the computation of

terminal benefits. In **Maamba Collieries Limited v Douglas Siakalanga and Others**<sup>9</sup>, for instance, we said the following:

**“This Court’s reasoning in the case of Professor Ram Copal (Dr) v Mopani Coppermines Plc was that when computing terminal benefits of any employee, the existing conditions of service at the time of separation have to be used for computing such benefits. In line with that thought, in the case before us, the existing conditions of service at the time of Respondents’ separation from Maamba Collieries Ltd have to be used in computing their terminal benefits ...”**

62. Without doubt, salaries are part of an employee’s conditions of service. In the context of this appeal, it goes without saying that the deceased’s basic salary existing at the time of separation had to be used in computing his gratuity. Therefore, the trial judge was on firm ground when he ordered that the deceased’s gratuity be re-calculated on the basis of the basic salary as reflected on his last pay statement.
63. Counsel for the appellant contrived to distinguish the **Lukama**<sup>1</sup> case from this case by arguing that unlike the former case, the only applicable salary in the latter case as per the contract was the basic salary. We do not see the basis of counsel’s argument. In the **Lukama**<sup>1</sup> case we decided that the packages were to be

worked out on the basis of the increased salaries which were applicable by the end of the notice period.

64. Similarly in the present case, and as aptly concluded by the trial judge, the deceased's gratuity had to be based on the basic salary he was receiving at the time of his separation. The nexus in both cases was the salary which was applicable at the time of separation. Quite clearly, the two cases cannot be distinguished.
65. It was also argued that basing the deceased's gratuity on his last drawn salary would result in an unjust enrichment and reliance was placed on the cases of **Siamutwa**<sup>2</sup> and **Ng'uni**<sup>3</sup>. In sum, the principle we enunciated in these two cases is that it is unlawful to award benefits to an employee who has neither earned nor worked for them.
66. We acknowledge that the two authorities are still good law. However, we have held in paragraph 61 above that the trial judge was correct in ordering that the deceased's gratuity should be re-calculated on the basis of his last drawn salary. It follows from this holding that we are in agreement with the trial

Court that the deceased lawfully earned his gratuity which was based on his last drawn salary. In the circumstances of this case, therefore, the argument that the deceased would be unjustly enriched is untenable as the principle in the **Siamutwa**<sup>2</sup> and **Ng'uni**<sup>3</sup> cases does not apply to the present case.

67. Counsel for the appellant also attempted to sway our minds into believing that the trial Court read into the deceased's contract of employment terms which were not agreed upon, when it held that the deceased's gratuity should be re-calculated on the basis of his last drawn salary. According to counsel, this was contrary to the provision in the employment contract that gratuity would be based on the basic salary for the contract period and that this was the gratuity paid to the deceased.
68. Contrary to the appellant's counsel's assertion, we see nothing in this contractual provision suggesting that gratuity was to be computed on a yearly basis. As we have already stated, this Court has given guidance on the computation of terminal benefits which we repeat namely, that they are to be computed



on the basis of the existing conditions of service at the time of separation. To this end, we find no impropriety in the lower Court's reasoning that the deceased's employment contract of five years was to be treated as a unit for purposes of computing gratuity. Accordingly, the accusation by the appellant that the lower Court read into the deceased's employment contract terms which were not agreed upon is also untenable.

69. Consequently, we find that the first ground of appeal lacks merit and it is accordingly dismissed.
70. Before we leave ground one, we wish to briefly make allusion to an aspect brought out by counsel for the respondent in responding to this ground. It was argued that since the appellant used the aggregate of the basic salary and allowances when deducting pay as you earn and other taxes, the same should be done when paying gratuity, as the two were treated as one.
71. First of all, we note that no argument relating to this issue was advanced by counsel for the appellant which attracted such a response. Secondly, if the deceased was aggrieved by the lower

court's decision that the allowances should not be merged with the salary when computing gratuity, he should have filed a cross-appeal. For these reasons we find that the respondent's argument on this issue is misplaced.

72. The appellant's grievance in ground two is that the lower Court misdirected itself by not considering its defence of estoppel. The thrust of the appellant's argument is that the deceased should have been estopped from denying the computation of gratuity on a year to year basis on the ground that he had rendered an opinion to the appellant's board pertaining to an employee who claimed a re-calculation of his gratuity on the same basis that the deceased did in the lower court. On the other hand, the respondent's contention is that the deceased's claims were not based on the claim made by a former employee but on his interpretation of the contract of employment between himself and the appellant. Further, that the deceased's testimony which was accepted by the trial judge was that, that was the formula which was in existence in the appellant institution when the deceased rendered the legal advice in question.

73. At page 24 of the judgment, the trial judge found as follows:

**“Further, the claim based on [the] Plaintiff’s alleged breach of his fiduciary duty has not been proved. The evidence on record is that the formula on which the Plaintiff’s gratuity was based for his first contract was in existence when he joined the Defendant in 2004. Further, the evidence on record is that the Plaintiff’s position was that of Legal Officer throughout the duration of his first contract and as such he could not have been responsible personally for any legal advice given to the Defendant. The Plaintiff cannot, therefore, be estopped from claiming against the Defendant if his rights were violated.”**

74. As we see it, this ground attacks the findings of fact made by the trial judge. We have stated in numerous authorities that an appellate court will only interfere with the findings of fact of a trial court if the findings were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts, or they were findings which on a proper view of the evidence no trial court acting correctly can reasonably make. (See for example, **Attorney General v Marcus Kampumba Achiume**<sup>10</sup>.)

75. We have read the judgment of the trial judge and the evidence deployed before the lower court. Our conclusion is that there was no impropriety in the finding by the lower court that the

deceased's breach of his fiduciary duty had not been proved as it was based on the evidence adduced by the parties. We accordingly find no merit in this ground and it is also dismissed.

76. The gist of the appellant's discomfort in ground three is that it was a misdirection by the trial judge to award interest on the judgment sum at commercial lending rate from the date of the writ to the date of judgment and thereafter, at 10% until final payment, contrary to the law. In arguing this ground, counsel for the appellant submitted that interest should generally be calculated at the average short-term deposit rate prevailing from the date of writ to the date of judgment and thereafter, at the current lending rate as determined by the Bank of Zambia up to the date of payment. Counsel for the respondent on the other hand agreed with the trial judge, contending that the Law Reform (Miscellaneous Provisions) Act, the Judgments Act and Order 36, rule 8 of the High Court Rules all state that the Court or judge has discretion to apportion interest in a manner they deem fit.

77. We cannot agree more with counsel for the appellant that the trial judge erred by apportioning interest in the manner he did. We reject the argument by counsel for the respondent which gives an impression that the apportioning of interest is at the whims of a judge or court. The apportioning of interest by a judge or Court as can be noted from the legislation, rules and cases highlighted by both counsel is well settled. It is apportioned in two segments namely, at the average short-term deposit rate per annum from the date of writ to the date of judgment and thereafter, at the current lending rate as determined by the Bank of Zambia up to the date of final payment.

78. We, therefore, find merit in ground three. The interest awarded by the trial judge is accordingly set aside. In its place, we order that the difference between the gratuity paid to the deceased and the amount due upon re-calculation shall be paid to the deceased's estate with interest in accordance with the guidance we have given in paragraph 76 above.

## **CONCLUSION**

79. The appellant advanced three grounds in this appeal but only

one ground is successful. This means that the appeal has substantially failed. This conclusion notwithstanding, however, we make no order for costs. In other words, both parties shall bear their own costs.



**M. S. Mwanamwambwa**  
**DEPUTY CHIEF JUSTICE**



**R. M. C. Kaoma**  
**SUPREME COURT JUDGE**



**C. Kajimanga**  
**SUPREME COURT JUDGE**