ANNARD CHIBUYE v ZAMBIA AIRWAYS CORPORATION LTD (1985) Z.R. 4 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND SAKALA, AG. J.S.
24TH JANUARY, 1985
(S.C.Z. JUDGMENT NO 2 OF 1986)

Flynote
Civil Procedure - Evidence - Acquittal - Evidence of - Admissibility as proof in civil proceedings.
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Headnote
The appellant was employed by the respondent and was dismissed for misappropriating money. He sued the respondent for wrongful dismissal and at the trial it was found that the allegation that he had misappropriated money had been substantiated so that his dismissal was not wrongful. It was argued at the trial and in the appeal that as the appellant had been acquitted of a criminal charge arising out of the same transaction such acquittal should have been taken note of and that it should have been found that the appellant had not misappropriated money.

Held:
Following *Kabwe Transport Ltd. v Press Transport* (1975) Ltd (1984) Z.R. 43, the result of a criminal trial cannot be referred to as proof of a fact which must be established in a civil court; and this applies whether the criminal trial resulted in a conviction or in an acquittal.

Case referred too:
(1) Kabwe Transport Ltd. v Press Transport Ltd. (1984) Z.R. 43

For the appellant: Mr M.S. Banda, of Martin Banda and Company.
For the respondent: Mr N. Kawanambulu of Shamwana and Company.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

This is an appeal against the dismissal by the High Court of the appellant's action for wrongful dismissal. The learned trial judge found that an allegation that the appellant had misappropriated sum of K3,265 had been made out by the respondent against the appellant,

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and that for that reason the dismissal was not wrongful. The appellant had given evidence in support of his claim, in which he had denied misappropriation of the money in question, while on the other hand, the respondent also called some witnesses, the main one being DW.1, who was then

Area Manager of the respondent.

Briefly stated, the allegation against the appellant was that he had received some cash representing sales of tickets and at the same time he had received a cheque from AMI in respect of cargo which the appellant should have passed on to the appropriate department. The appellant was accused of having altered the relevant documents reflecting the actual sales and of having substituted the cheque from AMI for the cash.

On behalf of the appellant, Mr Banda has argued that the appellant ought to have succeeded in his claim. It is his contention that the evidence given by the appellant was free from serious deficiencies while that from the respondent has so many Haws that their witnesses ought not to have been believed. The major argument advanced by Mr Panda in this connection has been that since the documents surrounding the transaction were not produced before the learned trial judge, the appellant had been impeded in his cross-examination of the defence witnesses and that in any case, their evidence which concerned facts arising out of such documents was insufficient to establish the alleged misappropriation. On the other hand, Mr Kawanambulu relies on the fact that DW.1 was deposing to a conversation that he had with the appellant when the latter was confronted by the former to explain what had become of the cash and what use had been made of the cheque from AMI.

We have persued the judgment of the learned trial judge and observed that he had in fact addressed his mind to the quality of the evidence presented by the respondent in proof of the allegation that the appellant had misappropriated the sum of money and hence his being lawfully and properly dismissed. He made it quite clear in the judgment that, in the absence of the relevant documents, (which had been produced in a criminal trial and in respect of which no effort appears to have been made to retrieve the same for the purposes of the civil trial), then the said absence of such documents made it impossible for him to say that there was sufficient evidence led in chief to prove the misappropriation by the appellant. If we understood him correctly, Mr Kawanambulu did not seriously dispute that reference by the witnesses to allegations which were contained in the documents and which were put to the appellant in fact amounted to secondary evidence for which no proper foundation had been laid. In the circumstances, we agree with the learned trial judge that such evidence, to the extent that it emerged in the examination-in-chief of DW1 could not have been relied upon by the respondent. However, as appears from paragraph 1594 of Phipson on evidence, 12th edition, secondary evidence becomes admissible against the cross-examiner and is let in by cross-examining a witness on such documents. This is precisely what the learned trial judge found in this case, when he held that the cross-examination of DW.1 by counsel for the appellant on the

documents let in the secondary evidence. That evidence was to the effect that the appellant had been confronted by DW.1, with the sales returns the appropriate banking slips, and other documents; that the appellant was told the respondent was alleging mix-appropriation against him; in addition to alleging that the appellant had altered his copy of the sales return in order to disguise the mix-appropriation by substitution of the cheque for the cash. The appellant, while not having specifically admitted the charges, had only said at the time that he would explain later. As had been

conceded by Mr Banda, if we understood him correctly, and as was pointed out by Mr Kawanambulu, the appellant has since never in fact explained what had happened in the matter. It follows therefore that the conclusion that the dismissal was not wrongful is one which there would be no basis for us to interfere with.

It was also argued on behalf of the appellant that as he had been acquitted on a criminal charge arising out of the same transaction and in respect of the same sum of money, the learned-trial judge ought to have taken note of such acquittal and ought to have found that the appellant had not misappropriated the money. While we can understand the awkwardness of the position where one judge in a criminal trial may say one thing, while another judge in a civil matter subsequently says a different thing, it is now settled, following our decision in *Kabwe Transport Limited v Press Transport* (1975) Ltd. (1), that the judgment in a criminal trial cannot be referred to and taken note of in a civil trial. This is so whether the criminal trial resulted in a conviction, as was the case in the *Kabwe Transport* case, or in an acquittal. We agree that for the reasons stated in that case, the acquittal of the present appellant in the criminal matter was quite properly not taken into account in the civil case now before us.

It follows also that the submission, that the acquittal should remove any right of set-off which the respondent may have and which we understood to be an administrative right, (since this was not part of the case) cannot be upheld. It follows from what we have said that the argument based on the dismissal of the claim for wrongful dismissal is not upheld.

The second ground of appeal was to the effect that the learned trial judge erred in not awarding certain pecuniary claims which the appellant had contended, and contends, were payable in any event. Mr Kawanambulu has conceded, and we agree, that the learned trial judge ought not to have disentitled the appellant from recovering his dues in respect of accrued leave days. This ground of appeal, insofar as it relates to the appellant's leave days, will be upheld. There was also argument as to whether or not the appellant should be entitled to receive benefits under the pensions scheme. We note that the learned trial judge had in fact already determined this issue in favour of the appellant and indeed it is quite clear to us that Clause 8 of the Pensions Scheme entitles the appellant to receive not only what he had contributed but also that part of the fund representing the employer's contribution.

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The result of this appeal is that the appeal is dismissed on the main issue of wrongful dismissal; but it is upheld on the question of terminal benefits. As a result of such determination, and since the appellant has been successful on one limb of his case, and in all the circumstances of this case, we feel that the appropriate order for costs is that each side should bear its own costs and we so order.

Appeal allowed in part.