

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

APPEAL NO. 71 OF 2005

B E T W E E N:

CHILANGA CEMENT PLC
AND
ENOS ALEX SIWALE

APPELLANT

RESPONDENT

CORAM: **LEWANIKA, ACJ, SILOMBA AND MUSHABATI, JJS.**

On the 9th September, 2005 and 26th January, 2007.

For the Appellant: Mr. E. Banda, MNB

For the Respondent: Mr. D. Mulenga, Derrick Mulenga and Company.

J U D G M E N T

SILOMBA, JS, delivered the judgment of the court.

Cases referred to:-

1. **Contract Haulage Limited -Vs- Kamayoyo (1982), ZR 13.**
2. **ZCCM Limited -Vs- Eddie Zulu (1999), ZR 80.**
3. **Association of Copper Mining Employers and Another -Vs- Mineworkers Union of Zambia, Appeal No. 129 of 1998.**

The delay in the delivery of this judgment is deeply regretted.

This appeal is against the judgment of the High Court dated the 6th September, 2004. The facts of the case were that the respondent, by a writ of summons and statement of claim, sought a declaration that his dismissal

from employment was null and void *ab initio*. He accordingly prayed for an order of reinstatement and damages for wrongful dismissal with interest and costs. The position of the appellant, in its defence, was that the respondent was lawfully dismissed on account of dishonest conduct and that he was not entitled to the relief sought.

The respondent worked for the appellant and his appointment at the time of dismissal was that of stores controller. On the 9th December, 1999, G.K.C. Limited delivered one extension rod to the appellant, which was received by the respondent's junior clerk by the name of Grandy Ntumbo. When it was later discovered that the extension rod was not alright, the respondent instructed Ntumbo to retrieve the supporting documents from accounts. Instead of doing just that, Ntumbo took the documents relating to the extension rod to the Finance Manager.

It was apparent that Ntumbo was not conversant with the procedures in stores because he had been with the appellant company for only one and half months. In terms of procedures, the supporting documents should have been approved by stores before sending them to Accounts for payment. With the anomaly already committed, other senior members of the respondent prevailed on the respondent to normalize the situation personally. When the respondent examined the delivery note of 9th December, 1999 he noticed that G.K.C. Limited had changed the quantity from 1 to 4 extension rods without his authority. He queried them and the quantity was reversed to one.

After the transaction was normalized the appellant suspended the respondent for forgery. He gave a written explanation, following which he was charged with negligence of duty and dishonest conduct. He denied the charge as he was not the one who signed the goods received voucher (GRV),

which ordinarily was supposed to be signed by him as stores controller. There was no payment for the extension rod because the respondent stopped the payment.

The counter-evidence of the appellant was that invoice No. 41, the subject of the disciplinary action against the appellant, was altered from four drill rods to one by G.K.C. Limited with the authority of the respondent; that Ntumbo prepared the GRV in contention and as a receiving clerk he was the person who was supposed to take the documents to accounts after signing the GRV in the column "received by." The appellant confirmed that Ntumbo was not experienced and that he did not know what an extension rod looked like. The appellant confirmed also that it was in fact the respondent who stopped payment.

From the investigations conducted by the appellant, the respondent denied signing the GRV, which had no stores stamp and bore no signature of anyone in stores. As regards the disciplinary process, the evidence of the appellant was that it complied with procedure and in fact allowed the respondent, as a non-union represented employee, to bring someone along to witness the proceedings.

The foregoing evidence of the respondent and the appellant was duly considered by the learned trial Judge and the question before him, whether the respondent's dismissal was wrongful and, therefore, null and void, was answered in the positive. The learned Judge arrived at this decision because there was no evidence, documented or otherwise, from the appellant to pin down the respondent. In fact, he found that the appellant's witnesses (DW1 and DW2) vindicated the respondent and if there was anyone to blame it was Ntumbo who was inexperienced and did not know how an extension rod looked like.

While the learned trial Judge found for the plaintiff and declared his dismissal null and void he ruled out reinstatement because such a remedy was ordered in very rare circumstances. He found damages to be an appropriate remedy and ordered the appellant to pay 24 months salary as damages with 30% interest from the date of the writ to the date of judgment and thereafter at current bank lending rate. He also ordered the appellant to pay terminal benefits up to the date of dismissal.

Being dissatisfied with the two orders, the appellant has advanced two grounds of appeal. These are:-

1. **The learned High Court Judge erred in law when he awarded the respondent 24 months salary and interest thereon at 30% for wrongful dismissal, which dismissal he declared null and void.**
2. **The learned trial Judge erred further in awarding the respondent terminal benefits in addition to damages of 24 months salary.**

In his submission, counsel for the appellant, relied on the heads of argument. He argued both grounds of appeal together. He submitted that the learned trial Judge erred in awarding damages for wrongful dismissal for 24 months salary plus terminal benefits. He submitted that the awards were contrary to the decided cases of *Contract Haulage Limited -Vs- Kamayoyo* ⁽¹⁾ and *ZCCM Limited -Vs- Eddie Zulu.* ⁽²⁾ He said that the case involved a person in middle management and what was awarded went beyond the level of middle management.

On the other hand, the respondents' counsel also relied on the filed heads of argument, including additional heads of argument. He submitted on the basis of what was contained in the additional heads of argument and pointed out that the learned Judge was on firm ground to award 24 months

salary with interest for wrongful dismissal. Counsel said that terminal benefits were an accrued right and referred us to the case of *Association of Copper Mining Employers and Another -Vs- Mineworkers Union of Zambia*.⁽³⁾ He urged us to find that the respondent was entitled to accrued rights in terms of terminal benefits.

We have carefully examined the evidence tendered in the court below and the findings of the learned trial Judge. We have also carefully considered the submissions made before us and the authorities cited to us. We note that the appeal is based on whether the learned trial Judge was right to award damages for 24 months with 30% interest plus terminal benefits covering the period up to and including the date of dismissal.

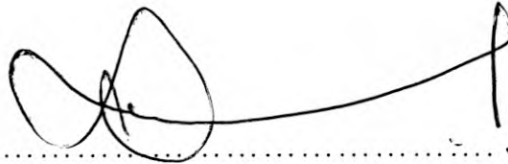
We further note that the respondent pleaded damages for wrongful dismissal as an alternative remedy to reinstatement and the learned trial Judge awarded him 24th months salary with 30% interest in lieu of reinstatement. We also note that the payment of terminal benefits was never pleaded and even if it were we would have not been keen to uphold the learned trial Judge's order in view of the earlier order for damages. The award of terminal benefits is accordingly set aside and quashed.

In the case of *ZCCM Limited -Vs- Eddie Zulu*⁽²⁾ which counsel for the appellant cited to us, we held that:-

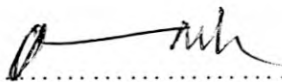
Where the dismissal is held to be null and void and where reinstatement might have been ordered if feasible within the strict principles discussed in the various well known cases on the subject, the Supreme Court has approved of such damages over a period of twelve (12) months, which has been considered sufficient for most middle level positions of the kind the respondent held in this case.

The appellant's counsel seemed to suggest in his written heads of argument that since we, in the foregoing case of ZCCM Limited -Vs- Zulu,⁽²⁾ reduced the award of damages from 24 months to 12 months we could likewise do the same to this case. From the cited case of Eddie Zulu and in the circumstances of this case, we are not averse to an award of 24 months.

The appeal has succeeded on ground two and has failed on ground one. There will be no order for costs; each party will pay its own costs.



D. M. Lewanika,
ACTING CHIEF JUSTICE.



S. S. Silomba,
SUPREME COURT JUDGE.



C. S. Mushabati,
SUPREME COURT JUDGE.