

(Civil Jurisdiction)

BETWEEN:

SAMSON KATENDE - 1ST PLAINTIFF

CROSBY BERNARD - 2ND PLAINTIFF

AND

NCF AFRICA MINING PLC - DEFENDANT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court this 28th day of January 2011

For the Plaintiffs: Mr. K. Chishimba – Katongo & Co.

For the 3rd Defendant: Mr. W.M. Forrest – Forrest Price & Co.

J U D G M E N T

Cases referred to:

1. Attorney General v Richard Jackson Phiri (1988/89) ZR. 121
2. John Kunda v Konkola Copper Mines Plc - Appeal No. 48 of 2005

The plaintiffs Samson Katende and Crosby Bernard by their writ issued on 15th May 2009 are claiming against the defendant NCF Africa Mining Plc damages for unfair and/or wrongful termination of employment contract, interest, any other relief the court may deem fit and costs. The writ is accompanied by the statement of claim at pages 3 and 4 of the Bundle of Pleadings. On 29th May 2009 the defendant delivered the defence at pages 6 to 8 of the Bundle of Pleadings denying each and every allegation of fact made in the statement of claim except as therein specifically admitted. On 11th June 2009 the plaintiffs delivered the reply to the defence which is at page 10 of the Bundle of Pleadings.

Both plaintiffs have given evidence. PW1 is Samson Katende aged 45 years and at the moment unemployed. He testified that he joined the defendant on 22nd November 2000 as a driver and in August 2001 he was promoted as transport supervisor, a position he held until 26th May 2009 when his contract was terminated. He said that he was renewing the contract every three years until 22nd November 2007 when he signed the oral contract of service at page 6 of their Bundle of Documents. He said that his duties were to ensure that all company vehicles were roadworthy in terms of insurance, fitness and road tax. He said that he also was in charge of all company buses and was to ensure that the buses had enough fuel for taking employees from their destinations to their places of work and back and that they had a system of fuel records every month.

He said that Mr. Ren the assistant manager of engineering services department was in charge of collecting fuel records every month end, that on 18th December 2008 Mr. Ren demanded for fuel records before he had completed all the records for the month of December, and that Mr. Ren remained with the records for December 2008 and January 2009. He said that the documents at pages 15 to 36 of the defendant's Bundle of Documents are yellow cards from the filling station and were found at the filling station in the plant site and everyone who was drawing fuel was supposed to sign the yellow card and white sheet which was also found at the filling station. He said that when he went back to Mr. Ren to ask for the records the latter told him that he was doing the job himself.

He said that the yellow card at page 15 was found at the filling station and that the one at page 16 was their record and that Crosby Bernard, his assistant was the one writing the figures and that when the latter was not around he did the work. He testified that they were getting their information from the yellow card which was remaining at the filling station, that on the yellow card are signatures for the drivers drawing fuel, and that at the end of the day his role was to collect the yellow card from the filling station and to transfer the information on that document onto his record which was the white sheet. He said that when Mr. Ren said that he would be doing the job himself, at the end of January 2009 they stopped doing the job.

He testified that on 6th April 2009 he was called to the mine police office and told that he made a loss to the company of fuel amounting to 10,001 litres valued at K68,482,670.00, an allegation he denied. He said that he gave a statement and was suspended; that he was called on 4th May 2009 for case hearing; and that the case was handled by Mr. Christopher Hara a senior staff and he was dismissed and given the summary dismissal letter at page 4 of their Bundle of Documents. He said that he appealed to Human Resources department by the document at page 10 of the defendant's Bundle of Documents and was called for the hearing on 6th May 2009.

He said that he was taken to the Deputy Chief Executive Officer Mr. Xu Ruiyong, who after explanation told him that the executive said he should be fired and his contract terminated. He said that the document at page 5 of their Bundle of Documents is his second dismissal letter and states that his contract was terminated for failing to account for company property and negligence of duty. He said that since that was the last appeal he decided to bring the matter to court and that he did not accept liability for the charge leveled against him. He said that he was not paid anything of what was promised in the letter at page 5 of their Bundle of Documents and that he stands by his claim in para 13 of the statement of claim.

In cross-examination by Mr. Forrest counsel for the defendant, he said that he did not see the report at pages 7 and 8 of the defendant's Bundle of Documents before he came to court. He admitted that the report was completed before he was charged and that he gave evidence to various members of staff investigating the case, but disputed the correctness of the findings. He admitted that the disciplinary hearing was conducted in accordance with the rules, that the document at pages 4 and 5 of the defendant's Bundle of Documents is a correct record of the inquiry whose decision was to dismiss and that he was given an opportunity to appeal which resulted in the appeal at page 10 of the same Bundle. He said that he put those grounds of appeal because he wanted to continue working; that the punishment was too harsh for him; and that he was pleading for leniency. He said that the result of the appeal at page 14 of the defendant's Bundle of Documents was that the summary dismissal was lifted and he was dismissed on the usual condition.

He said that he was not paid his terminal benefits in accordance with the letter at page 37 of the same Bundle of Documents, and that he was not paid anything. He insisted that Mr. Ren told him that he was doing the job himself and reiterated that he would make the entries in the absence of Crosby Bernard; and that the entries at pages 15 to 36 of the defendant's Bundle of Documents are correct records of what he did.

In re-examination he disagreed with the findings in paras 3.1 to 3.3 of the report at page 7 of the defendant's Bundle of Documents. He said that he does not know where the defendant got the figure of 10,002 litres of diesel which also appears at page 5 of the same Bundle and that there was no proof of the allegation. He denied that he accepted liability in his application for appeal and said he put up the three grounds of appeal because he wanted to continue working. He insisted that he was not paid anything that was stipulated in the notice of dismissal at page 37 of the same Bundle of Documents.

Bernard Crosby is PW2. He is 54 years old and also unemployed. He too had signed an oral contract with the defendant on 18th January 2007 which is at page 1 of their Bundle of Documents, as assistant supervisor–transport. He testified that in December 2008 he noticed some deductions on his payslip amounting to K671,403.65 and upon inquiry from the finance department he was informed that their manager Mr. Xu wrote to them alleging that he had siphoned fuel from a bus he was driving. He testified that his role was to allocate transport to various departments upon request, that if he was in the plant he used to monitor the refueling of pool vehicles, and that after the fuel attendants had finished recording the figures on the daily sheet and the yellow cards, he would pick the same figures and transfer them on their own office file.

He confirmed that the documents at pages 15 to 36 of the defendant's Bundle of Documents are copies of original documents and that at page 15 is a copy of the yellow sheet which was found at the filling station. He said that the signatures are for the people that drew the fuel, who should also enter their mine number and that his role was to pick the same figures and to transfer them to their file and that there was no need for them to sign on their file.

He also confirmed that at page 16 is a copy from their file which was recorded according to what was on the yellow sheet. He said that he did not play any part in what happened at the filling station as there were other people employed to refuel the vehicles and that Mr. Ndhlovu and Mr. Musonda were the actual fuel attendants. He testified further that after the discovery of the anomaly on the payslip, in the same month between 15th and 18th December 2008, Mr. Ren collected records from their office and kept them for almost two months, and that Mr. Ren went to the filling station and started getting figures himself. He said that during that period and in January 2009 they did not record because Mr. Ren had kept the file and was doing the work himself.

He testified that in April 2009 he was picked by mine police who informed him that there was an allegation that he had stolen 10,002 litres of diesel worth about K68,400,000.00. He said that he gave a statement in which he denied the allegation and he was suspended, but the decision was cancelled by the Deputy Chief Executive Officer and he was asked to continue working. He said that on 15th he was called for a case hearing and a statement of the charge was read to him which he denied. He referred to the complaint form at pages 4 and 5 of the defendant's Bundle of Documents and said he was not shown any document regarding litres of missing diesel. He said that he was also given the summary dismissal letter at page 2 of their Bundle of Documents.

He said that he was given two days within which to appeal and he did so on 6th May 2009 as appears at pages 12 and 13 of the defendant's Bundle of Documents. He said that he was called on 7th May for the appeal hearing by the Deputy Chief Executive Officer Mr. Xu who just told him that from the amount of fuel stolen it was quite substantial and that he could not spare him because that was management's decision and he was dismissed as appears at page 3 of their Bundle. He said that the reason given in the letter of dismissal was failing to account for company property and negligency of duty and that he does not accept the reason given. He said that it was a planned move to get rid of him and is wrongful dismissal and amounts to defamation of character. He said that he was not paid what was tabulated in the letter and that he stands by the claims in para 13 of the statement of claim.

In cross-examination he said that he was seeing for the first time the report at page 7 of the defendant's Bundle of Documents and denied that he caused loss of diesel valued over K68,400,000.00. He said that from page 2 of the same Bundle of Documents the result of the hearing was "summary dismissal-gave false information which led to loss of fuel 10,002 litres." He admitted from page 14(a) of the same Bundle that his employment was terminated. He said that to date he has not been paid what is tabulated in the document at page 3. He said that the terminal benefits were put forward by the defendant, so there was no need for him to re-write the whole thing and that he did not accept the deduction from his December 2008 salary. He said that the allegation by his manager Mr. Zhang was that he had siphoned fuel from the bus that he was driving; and that his answer was that he did not steal any fuel from the bus.

In relation to pages 15 and 16 of the defendant's Bundle of Documents, he said that the entries on the yellow card were done by fuel attendants, that his job was only to pick those figures and not to control the flow of diesel, and that he was comparing the figures on the yellow and white sheets both which were found at the filling station and that if the figures tallied he would transfer the information onto his file. He admitted that it was part of his duties to check the entries; and that the first, the third and the last entries at page 15 have no drawer's name number or signature. He denied that he was negligent with the performance of his work. He said that he may have been in Lusaka with the bosses at the time and that there is no white sheet which can tell the truth as the defendant cannot rely on page 17 from their file to prove that he was negligent.

In re-examination he said that the findings at paras 3.1 to 3.3 at page 7 of the defendant's report are false because Mr. Ndhlovu and Mr. Musonda the fuel attendants were responsible for putting fuel in all the vehicles. He reiterated that his only role was to pick the figures indicating the fuel they had put in the vehicles and to transfer the figures in their file which they did not sign because it was their record. He said that they could not have inflated the figures because the yellow and white sheets were kept by the fuel attendants.

He disagreed that he gave false information which led to loss of 10,002 litres of fuel and stated that there has been no complaint from supplies department which deals with the flow of diesel that they had incurred such loss. He said that he would have agreed with the reason given in the letter at page 3 of their Bundle of Documents for termination of contract for failing to account for company property and negligency of duty if there was a complaint by supplies department. He said that the document at page 15 of the defendant's Bundle is a yellow sheet kept by the fuel attendants and that whenever a driver refuels his vehicle he was supposed to put his mine number and signature as per instructions from Mr. Zhang. He insisted that he did not play any role when the drivers were refueling or signing the yellow sheet, that his role was to copy the information entered by fuel attendants, and that it was the responsibility of the two fuel attendants to ensure that a driver put the mine number and signature.

DW1 is Timothy Nkhata. He is the head of corporate affairs at the defendant company. In April 2009 he was working as a mine police officer in investigations section. He testified that on 7th April 2009 he received a complaint from the manager engineering services Mr. Zhang that there was a shortage of fuel amounting to 10,002 litres at the mine garage and that he had assigned Crosby Bernard one of his transport supervisors to monitor the consumption of fuel for all garage vehicles. He said that Crosby Bernard revealed to him that his role was to go to the garage and lift all the figures for the fuel issued and to compare the figures.

He said that he retrieved all the documents or bin cards where the readings of the fuel issued was recorded and the forms where Mr. Crosby was recording his information; and that after comparing the two sets of documents he discovered that there were a number of irregularities in terms of the figures. He said that he wrote the report at page 7 of the defendant's Bundle of Documents based on what he had found. He said that the two employees were charged and the docket forwarded to human resources for disposal, that he made the complaint at pages 2 to 3 and 4 to 5 on behalf of the company; and that the result was summary dismissal. He said that he is familiar with the writing and signature of Mr. Xu Ruiyong who signed at the bottom of pages 14 and 14a of the defendant's Bundle of Documents.

He testified further that during his investigations he referred to the documents at pages 15 to 36 of the same Bundle, that the document at page 15 marked F1 was prepared by the fuel attendants and that those were the figures for which Mr. Crosby was given responsibility to lift and that the figures were given by the fuel attendants. He said that when he compared the two documents F1 and G1 he discovered that 22 litres were in excess and contrary to what the fuel attendant issued and that on G2 at page 17 the information from 31st December 2008 to 11th February 2009 was missing. He said that according to the explanation by Mr. Crosby and Mr. Katende the records were taken away, so they could not complete the records. He said that the records taken away were those filled in and that they were supposed to continue recording the information on a new form. He said that there were a number of omissions in the documents by Mr. Crosby and Mr. Katende as compared to what was at the filling station. He said that he was not involved in the writing of the dismissal letters to the plaintiffs.

In cross-examination by Mr. Chishimba counsel for the plaintiffs he said that he prepared the defendant's report on the loss of 10,002 litres of diesel; that the procedure followed is at clause 2.2; and that he and sergeant Mulenga retrieved fuel consumption sheets compiled by Mr. Katende and Mr. Crosby marked G1 to G16 and fuel issuance forms from supply department marked F1 to F16. He said that he compared F1 with G1, that the shortage was for December 2008 and January 2009 and that the first entry on F1 was not signed for and was omitted on G1. He admitted that G1 does not show that the quantum of fuel had been reduced or inflated.

He said that G2 is at page 17 and admitted that there is no F2 on the Bundle, that F4 and G4 are missing, that G5 is at page 21 but F5 is missing, and that he has failed to show how he came up with 10,002 litres of diesel as missing because part of the information is not before court. He stated further that according to clause 2.4 at page 7 of the defendant's Bundle of Documents, D1 and DW1 were used in investigations but are not on the Bundle and that statements marked A1 and A11 were recorded from Mr. Katende and Mr. Crosby but are also not before court. He insisted that he is still standing by his findings in the report.

In re-examination he stated that the remark "31-12-08-11/02/09 missing" at page 17 means that the information was missing; that entry 5 for 150 litres at page 18 was not accounted for because no one signed, so were the entries for 27th November 2008, 2nd December 2008, 9th December and 23rd December 2008. He said that at page 20 the entries 251667 for 50 litres, 251856 for 46 litres and 252660 for 46 litres were not accounted for. He said that these dates are missing at page 22 and were not accounted for and that it was the duty of the plaintiffs to show that these dates were accounted for. He said further that all the entries at page 25 were not accounted for and that two dates 9th December 2008 and 23rd December 2008 are missing, that all the figures at page 27 were unaccounted for, that the last five figures at page 30 were unaccounted for; that except for entry 4 all other entries at page 31 were not accounted for and that no entry was accounted for at pages 32 to 36. He said that the persons responsible were the ones responsible for lifting the figures.

DW2 is Zhang Shiquiao section manager in engineering services, responsible to set the budget, show profits and report to top management. He had worked with the plaintiffs since 2007. He testified that the plaintiffs had to report the usage of fuel every month and that at the end of December 2008 and in January 2009 they had about 10,000 litres of diesel and kerosene missing. He said that at the beginning of 2009 top management informed him that the report from the plaintiffs was different from the documents received from the supply department and tasked him to look investigate. He asked his assistant Mr. Ren to check the records for the months of March and April 2009 while he checked the months of December 2008 and January 2009 and found a shortage of about 10,000 litres.

He said that they carried out an internal inquiry by checking the records from supply and what they had, that the documents at pages 15 to 36 of the defendant's Bundle of Documents and at pages 5 to 9 of the defendant's Supplementary Bundle of Documents were prepared by Mr. Crosby and checked by Mr. Ren, and that he does not know who made the entries at page 36. He said that after comparing these documents they found the shortage of 10,000 litres and reported to Mr. Xu, who discussed with the plaintiffs.

He said that the industrial tribunal recommended that the plaintiffs be dismissed, but they appealed and the Chief Executive Officer decided to terminate their contracts immediately. In cross-examination he said that Mr. Mweshi was the plaintiffs' immediate supervisor while Mr. Ren was the assistant manager, that Mr. Crosby and the officer at supply department had the documents for December 2008 and January 2009, and that Mr. Crosby was the one recording the fuel at the filling station and that if his supervisor was not there he would issue fuel. He said that the documents at pages 15 to 36 of the defendant's Bundle of Documents are issuing reports, that Mr. Crosby prepared these documents, but he is not too sure, and that they used the report by supply department to come up with the shortage of 10,000 litres.

He said that the documents from supply department are at pages 18 to 20, 26 and 29 and that at pages 5 to 9 of the supplementary Bundle of Documents only pages 7 and 9 are not from supply department as these were prepared by garage. He said he does not know who prepared the documents between the two plaintiffs, which they used to come up with the shortage of 10,000 litres except that the documents came from their department. He stated that the writing in Chinese on top of the documents was done by Mr. Ren after he got the report from the plaintiffs and that he knew because the plaintiffs used to report to Mr. Ren every month. He admitted that the reports at pages 15 to 36 of the main Bundle and at pages 5 to 9 of the supplementary Bundle are incomplete, so he could not use them to come up with the 10,000 litres. He said that some reports are from mine security and some from Mr. Ren and that he did not check any of the reports.

Ren Han Ping is DW3. He testified that he has been working for the defendant for two years and that he conducted an investigation on the allocation of fuel. He said that a comparison of pages 15 and 16 of the defendant's Bundle of Documents shows that a couple of entries are missing at page 15, and that after calculating 433 litres are missing. He said that page 15 is the report from the filling station and at page 16 is the report from the garage. When asked by the court to clarify how he arrived at 433 litres as missing, he stated that at page 15 is fuel for January 2009 to 9th February 2009, but there is no such information at page 16 which has only entries for December 2008.

He reiterated that page 15 is a report from the filling station while page 16 is a report from the garage. He said that the writing in Chinese at page 15 means filling station and at page 16 it means garage record. He stated that there is 1052 litres missing from the garage report at page 21 when compared with the filling station report at page 20; that the last entry at page 21 is 01.01.09 252380 while at page 20 there are a lot of entries in January 2009 which are not shown at page 21; and that the shortage is 1052 litres. He stated that at page 24, 140 litres are missing for 2nd December 2008 and 6th January 2009, that at page 26, 1603 litres are missing compared to the garage report at page 27. He said that at page 27 entry No. 143407 was the last entry while at page 26 there are other entries which are not showing on the garage report, meaning that a lot of entries are missing in the garage report amounting to 1603 litres.

He went on to state that page 29 should be compared with page 30, that the last four entries at page 29 are not reflected on the garage report at page 30 and that the amount of diesel missing is 121 litres, and that the total amount of diesel missing on these five pages is 3 329 litres. He testified further that Mr. Katende was the one responsible for keeping the records in the garage, that Mr. Crosby was his assistant, and that the filling station is under supply department. He said that he would not know whether Mr. Crosby was keeping the records if Mr. Katende was not there and that he does not know the effect of the shortage on the company or the value of the missing diesel but it is over US\$3000.

In cross-examination he said that he conducted investigations for November 2008 to February 2009. He reiterated that page 15 is from the filling station and that he does not know who prepared the record at the filling station or whose signatures are on the document. He said that he is also not sure as to who prepared the document at page 16 which he used to compare with the one at page 15. He said that he wrote the words in Chinese when he was conducting the investigations to differentiate the two reports, for example page 20 was prepared by the filling station while page 21 was from the garage. He said that he does not know who prepared the report at page 21.

He stated further that the bottom part at page 24 came from the filling station and the top part from the garage, but he does not know who at the garage prepared the top part. He said that he also compared page 26 which came from the filling station with page 27 which came from the garage; that he also compared pages 29 and 30, but again he does not know who between the plaintiffs prepared the reports at the garage. He reiterated that the plaintiffs were responsible for handling the reports, that Mr. Zhang was their boss while he was their supervisor. He refused that he was the one keeping the records for December 2008 and January 2009 as pleaded in para 7 of the statement of claim. He said that he got them for only one or two days to look at and that he was going to give them back to the plaintiffs.

He reiterated that from his calculations the total amount of missing fuel was 3,329 litres and refused knowledge that the plaintiffs were dismissed on allegations that they failed to account for 10,002 litres of diesel. He was not sure that the plaintiffs were involved in the actual distribution of fuel and could only tell from the reports that some litres of diesel were missing. In re-examination he said that the documents he has referred to are part of the records of the filling station and the garage for the stated period.

I have received written submissions from the learned advocates for the parties. In brief Mr. Chishimba has submitted that on the evidence the plaintiffs' contracts of employment were terminated by the defendant for failing to account for company property and negligence of duty; that according to the defendant's report at pages 7 and 8 of the defendant's Bundle of Documents, 10,002 litres of diesel worth K68,482,670.00 was lost during the months of December 2008 and January 2009 which loss was attributed to the plaintiffs' negligence and failure to account. Counsel submits that the defendant's witnesses lamentably failed to show the court how they came to the conclusion that due to the plaintiffs' failure to account and/or negligence of duty the defendant lost 10,002 litres of diesel. He contends that DW1 has totally failed to prove the allegations when he authored the report in question; and that it is quite clear from his evidence that DW2 does not know anything about the allegations against the plaintiffs as he referred all queries to DW3.

Mr. Chishimba further contends that DW3's testimony leaves a lot to be desired as one cannot tell how he was coming up with the missing figures; that the comparative differences and/or shortages were not clearly shown and that most of the documents on record are for November and October 2008 and not December 2008 and January 2009. Counsel also contends that DW3 does not know who prepared the documents he was using to come up with the missing diesel, and that the Chinese writing on top of the documents allegedly prepared by the plaintiffs is DW3's which proves that he kept the fuel records for December 2008 and January 2009 and as such he prepared or took over the plaintiffs' duties of data entry for fuel. He has referred me to *Attorney General v Richard Jackson Phiri* (1) and *John Kunda v Konkola Copper Mines Plc* (2).

He submits on the basis of these authorities that the defendant had no evidence to prove the allegations which were the reasons forwarded for terminating the plaintiffs' employment and that the termination of the plaintiffs' employment was unfair and unwarranted. In conclusion he submits that the defence did not offer any evidence to prove the allegation that the plaintiffs owe the defendant K14,847,877.80 and K10,002,269.00 respectively as pleaded in para 11 of the amended defence and that there was no evidence to prove that the plaintiffs were paid their benefits and one month in lieu of notice as alleged in para 10 of the defence.

Mr. Forrest submits that the letters of summary dismissal were amended to notice of dismissal as shown at pages 14 and 14a of the defendant's Bundle of Documents; that both plaintiffs acknowledged that their record keeping was inadequate and led to loss of company property and has cited page 10 of the same Bundle; that DW1 gave evidence of the report at pages 7 and 8 of the same Bundle which confirmed that the plaintiffs were negligent in the performance of their duties; and that they had a duty to ensure that fuel issues were properly recorded, and that as a result of their poor record keeping this was very difficult. He submits also that DW2 confirmed that he made fuel checks every month for December 2008 and January 2009 and found shortages amounting to K66 million or about 10,000 litres of diesel and that DW3 too made a check on fuel consumption and found losses of 3,329 litres for the same two months as DW2.

Mr. Forrest contends further that the plaintiffs failed to complete the process of collecting their terminal benefits as they were terminated by notice and not by way of summary dismissal; that they also left employment owing money to the company as set out in para II of the amended defence; and that paras 4.3 and 4.4 of document 7 in the defendant's Bundle shows that the plaintiffs were given an opportunity to exculpate themselves, and that they were not charged with criminal offences but negligence in the performance of duty resulting in a loss to the defendant. He has referred me to Smith & Wood: Industrial Law, 4th Edition page 211 on "Dismissal for Cause" and urged that the plaintiffs were in gross dereliction of the contracts and conditions of service and that they were paid out their entitlement in full including payment in lieu of notice.

Having considered the evidence and submissions the real question in this case is really whether the plaintiffs' contracts of employment were unfairly and/or wrongfully terminated. In my view there can be no dispute that both plaintiffs had oral contracts of service with the defendant. From the document at page 6 of the plaintiffs' Bundle of Documents Samson Katende's oral contract of service commenced on 22nd November 2007 as supervisor-transport at Grade L3 with a starting basic salary of K1,346,112.00 per month, and from a similar document at page 1 of the same Bundle of Documents Crosby Bernard's oral contract of service commenced on 18th January 2007 as assistant supervisor-transport at Grade L4 with a starting basic salary of K1,076,889.60 per month. Therefore, it cannot be true as pleaded in para 4 of the defence that the contract for services of the 2nd plaintiff was entered into on 18th January 2008.

It does seem to me to be clear that both plaintiffs were working at the garage. In the 1st plaintiff's words his duty was to ensure that all the company vehicles were roadworthy in terms of insurance, fitness and road tax. He was also in charge of all company buses to ensure that the buses had enough fuel for taking employees from their destinations to their places of work and back and for their duties. It is also plain that they had a system of having fuel records every month. I accept that there were yellow sheets or cards which were found at the filling station in the plant site and that the plaintiffs had their own file records called white sheets.

It is quite clear for instance that the document at page 15 of the defendant's Bundle of Documents is the yellow card found at the filling station and that the document at page 16 is the white sheet which was the plaintiffs' record. I accept that the 2nd plaintiff who was the 1st plaintiff's assistant was the one writing the figures at page 16 and other garage records and that in his absence the 1st plaintiff did the work. This is confirmed by the 2nd plaintiff who said that his role was to allocate transport to various departments upon request and to monitor the refueling of pool vehicles and that after the fuel attendants had finished recording the figures on the daily sheet and yellow cards he would pick the same figures and transfer them on their office file. He too admitted that the document at page 15 is a copy of the yellow card which was found at the filling station and that the document at page 16 is from their file.

Admittedly DW3 does not know who between the plaintiffs prepared the garage records nor does he know who at the filling station prepared the filling station records and some documents referred to in the defendant's report are not produced. However, the plaintiffs do not dispute that they prepared the garage records in question. This is fortified by paras 5 and 6 of the statement of claim which read as follows:

- “5. The plaintiffs were tasked with supervising the defendants fuel attendants by verifying the amount of fuel given to the defendants drivers.
6. The verification aforesaid in the last preceding paragraph herein was done by looking at the fuel attendants records (Yellow Cards), thereafter confirming the same with the Drivers and finally recording the data in the plaintiffs records (the daily white sheet).”

I accept that on the yellow cards found at the filling station the drivers that drew fuel were required to sign and enter their mine numbers. But I do not agree with the 2nd plaintiff's evidence that he did not play any part in what happened at the filling station or that his role was simply to transfer information found on the yellow card to his records. He has admitted that he used to monitor the refueling of pool vehicles and going by their statement of claim both were tasked with supervising the defendant's fuel attendants by verifying the amount of fuel given to the defendant's drivers. This also supports DW2's evidence that the 2nd plaintiff used to record the fuel issued out and that if the supervisor was not there they would issue fuel.

It is common cause from the documents at pages 3 to 4 and 5 to 6 of the defendant's Bundle of Documents that both plaintiffs were charged with failing to account for the shortage of 10,002 litres of diesel worth K68,482,670.00 between December 2008 and January 2009 and negligence of duty by submitting wrong information. The complaint was initially made by Mr. Zhang Shiquiao, DW2 to mine police as stated in the document at page 6 of the defendant's Bundle by Wilson Sichilima, Head Mine police to Deputy Chief Executive Officer dated 21st April 2009. It seems to me that thereafter DW1 conducted an investigation into the matter and compiled the report at pages 7 and 8 of the same Bundle of Documents (although he did not personally sign the reports).

The report indicates in para 3. 2 under 'Findings' that Messrs Katende and Crosby as transport supervisors were responsible for collecting fuel issuance data for garage vehicles from the filling station; in para 3.3 that there were a lot of omission and some cases actual figures of fuel issued were inflated or reduced contrary to what the fuel attendants were recording; and in para 4.3 and 4.4 under conclusion that both plaintiffs had failed to give a satisfactory explanation on the shortage of 10,002 litres of diesel and furthermore neglecting their duties by furnishing management with wrong information and that both had been charged for negligence to duty and failing to account for company property (10,002 litres of diesel). There is no documentary evidence that the 2nd plaintiff was alleged to have siphoned fuel from a bus he was driving and the letter purportedly written by Mr. Xu to the finance department is not before me. In my judgment both plaintiffs were charged with failing to account for the shortage of 10,002 litres of diesel worth K68,482,670.00 between December 2008 and January 2009 and negligence of duty by submitting wrong information.

It is common cause that following disciplinary proceedings both plaintiffs were summarily dismissed. The summary dismissal letters appear at pages 2 and 4 of the plaintiffs' Bundle of Documents and also on the defendant's Bundle. It is also common ground that both plaintiffs appealed and that their summary dismissal was reversed by the Deputy Chief Executive Officer Mr. Xu Ruiyong. Instead their service was terminated by a one month notice from the day following the appeal hearings.

The documents at pages 14 and 14 (a) of the same Bundle state that the employee, as the transport supervisor failed to conduct his role of monitoring consumption of fuel and instead provided wrong figures to management, that the offence was aggravated by his position and responsibility, and that for the aforesaid reasons, his appeal was dismissed. Both documents further state that considering his long service in the company, his service is terminated by one month notice. The plaintiffs were written to as shown by the letters at pages 3 and 5 of their Bundle of Documents. The letters also provide for payment of benefits inclusive of 1 month pay in lieu of notice, 3 months' pay at current salary rate per completed year of service or prorata for a lesser period, leave pay for accrued leave days up to the last shift, salary for shifts worked only up to the last shift before service of the notice and repatriation within Copperbelt Province.

However, it seems to me that these benefits have not been paid to the plaintiffs contrary to the defendant's plea in para 11 of the defence that the plaintiffs were paid all their terminal benefits plus one month's salary in lieu of notice. It is also clear to me that the defendant only paid the amounts of K9,081,112.00 and K7,757,931.00 into court on 2nd June 2010 being the terminal benefits payable to the plaintiffs respectively on termination of employment and which they alleged the plaintiffs have refused or neglected to accept from the defendant.

The question is still whether the termination was unfair and/or wrongful given the facts of this case. In *Attorney General v Richard Jackson Phiri* (1) referred to me by Mr. Chishimba the Supreme Court held, inter alia, as follows:

- “(i) Once the correct procedures have been followed the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same.
- (ii) The court cannot be required to sit as a court of appeal from the decision of the Public Service Commission to review its proceedings or to inquire whether its decision was fair or reasonable. The court ought to have regard only to the question whether the Public Service Commission had valid disciplinary powers and, if so, whether such powers were validly exercised”

As I have already said Mr. Chishimba has also referred me to *John Kunda v Konkola Copper Mines Plc (2)* where he says it was held as follows:

“he who alleges must prove the allegations. This principle is so elementary, the Court has had on a number of occasions have to remind litigants that it is their duty to prove their allegation. Of course it is a principle of law that he who alleges must prove the allegations.”

In the present case the plaintiffs have not alleged that the defendant or the disciplinary tribunal had no valid disciplinary powers and admittedly the disciplinary procedures up to appeal stage were followed. But from Mr. Chishimba’s submissions, the burden seems to be on the defendant to prove that the plaintiffs were guilty of the charges laid against them which according to him the defendant has lamentably failed to do. I think that Mr. Chishimba has misapprehended the point made in *John Kunda v Konkola Copper Mines Limited (2)* and other cases on the point. I do not think that the burden is on the defendant to prove that the termination of the plaintiffs’ contracts of employment was not unfair and/or wrongful. The plaintiffs have alleged that the termination of employment contracts was unfair and/or wrongful. Therefore, the burden is on them to prove that allegation, for them to be entitled to damages.

As submitted by Mr. Forrest the issue is not really that the plaintiffs stole the 10,002 litres of diesel, but that their record keeping particularly between December 2008 and January 2009 led to a loss of company property, thus the charges of failing to account for the 10,002 litres of diesel and negligence of duty. Of course, as urged by Mr. Chishimba, DW1 insisted that there was a shortage of 10,002 litres of diesel, but before me he failed to show on the documents available how he came up with the 10,002 litres of diesel as missing. He clearly indicated that he had failed to do so because part of the information was not before court. DW2 did not personally check the records, but DW3 who did come up with 3,329 litres of diesel as missing. Admittedly he was not aware that the plaintiffs were dismissed on allegations that they had failed to account for 10,002 litres of diesel. But as the Supreme Court has said the question is whether there were some facts established to support the disciplinary measures, since any exercise of power will be regarded as bad if there is no substratum of fact to support it.

Perhaps I should go back to the fuel records from the filling station and the garage that were used to arrive at the figures of 10,002 litres and/or 3,329 litres of diesel as missing. It is in evidence that F1 at page 15 of the defendant's Bundle of Documents was prepared by the filling station and that G1 at page 16 was prepared by the garage or the plaintiffs. According to the explanation by DW3 the entries at page 15 are not included at page 16 meaning that all the fuel issued on F1 was not accounted for by the plaintiffs on G1 and that the first and last entries on F1 were not signed for. On the other hand the plaintiffs are alleging that DW3 collected their file and kept it in December 2008 and January 2009 and in fact took over their job of lifting the figures from the filling station records. Admittedly in the report at page 7 of the defendant's Bundle of Documents in para 3.4 DW1 was informed by the 2nd plaintiff that Mr. Peng Han Ping assistant manager engineering services was holding on to his file from time to time making him to submit wrong information to management.

I believe that the Peng Han Ping referred to in the report is one and the same person as DW3. It seems to me from that report that the 2nd plaintiff was admitting submitting wrong information to management. The 1st plaintiff's evidence is that DW3 collected fuel records on 18th December 2008 and kept them for the rest of December 2008 and January 2009 and that when he went back to DW3 to ask for those records, DW3 told him that he was doing the job himself. The 2nd plaintiff's evidence is that DW3 who had just come from China collected the records between 15th and 18th December 2008 and that during that period in December 2008 and January 2009 they did not record because DW3 had kept the file and was doing that job. DW3's evidence on the other hand is that he collected the records to look at for only two days and that he meant to give them back and that the plaintiffs should have continued the job using other records.

In my judgment it is agreed that the records marked F are from the filling station and the ones marked G are from the garage. A scrutiny of G1 shows that the plaintiffs made entries between 20th and 24th December 2008 for Rosa ABK 1285. A scrutiny of G2 also shows that the plaintiffs made entries from 18th December to 29th December for vehicle ABJ 6710.

On G5 they made entries for Rosa Bus AAX 8586 between 18th December and 1st January 2009 and the last entry is incomplete while other entries that appear on F5 were not entered. On G6 they again made entries for Isuzu AAX 6651 on 24th and 26th December. On G8 entries between 9th and 23rd December are missing. On G4 which is on the Supplementary Bundle of Documents there is a clear entry for 30th December for Tata Bus AAZ 5086. On G9 there are entries again between 17th December and 30th December and 1st January 2009 to 9th January 2009 and the last entry is 143407, but on F9 there are several other entries after 143407. G11 also has an entry No. 57142 for 24th December for L200 ABJ 5837, but F11 has four other entries that are not included on G11. G12, G13, G14 and G15 also have entries after 18th December 2008.

In his evidence in cross-examination the 1st plaintiff clearly admitted that the entries at pages 15 to 36 of the defendant's Bundle of Documents are a correct record of what he did. Therefore, the argument by Mr. Chishimba that Mr. Ren made the entries because of the Chinese writing on top of the document cannot be sustained. In my view the meaning of the entries after 18th December 2008 is that the plaintiffs were still able to record the figures during the period they allege that DW3 kept their fuel records or file. It also means that they are not being truthful when they say that they did not make the entries because DW3 told them that he would do the job himself.

From the documentary evidence it is very clear that the plaintiffs were submitting wrong information and that in the circumstances they were unable to account for the fuel for which they had failed to enter figures. As the plaintiffs have disclosed in their statement of claim, as transport supervisor and assistant respectively they were tasked with supervising the fuel attendants by verifying the amount of fuel given to the drivers and the figures on the yellow cards and to confirm the same with the drivers. On the evidence I am persuaded that the defendant had facts to support the disciplinary measures taken against the plaintiffs. I am also convinced that it was because the plaintiffs submitted wrong information on their records that the 1st plaintiff in his grounds of appeal pleaded for leniency as a first offender and his personal record had been clean since he joined the company in 2000 and the punishment was too harsh for him.

I do not think that he put up these grounds of appeal only because he wanted to continue working. As submitted by Mr. Forrest he was acknowledging that their record keeping was inadequate and led to a loss of company property. I am positive that the 2nd plaintiff also wanted to continue working, but in his grounds of appeal he continued to deny the allegations. On the whole matter it may be true that only 3,329 litres and not 10,002 litres of diesel, was unaccounted for as testified by DW3. In my view the quantity of missing diesel may be less, but that does not absolve the plaintiffs of wrong doing or the charges levelled against them. I think that the termination of the contracts of employment by notice would still be lawful on the facts of this case. As held by the Supreme Court in *Attorney General v Richard Jackson Phiri (1)* the court cannot be required to sit as a court of appeal from decisions of administrative tribunals to review its proceedings or to inquire whether its decision was fair or reasonable and that the court ought to have regard only to the question whether the tribunal had valid disciplinary powers and, if so, whether such powers were validly exercised.

I have perused Smith & Wood: Industrial Law on "Dismissal for Cause" referred to me by Mr. Forrest and I am grateful to counsel for the annexed copy. The text makes it clear that at common law an employer may dismiss an employee summarily (i.e. without notice) if he has sufficient cause to do so. The learned author states at page 213 that:

"The advent of the new statutory rights for employees has of course had an effect on summary dismissal, but usually indirectly, since the presence or absence of notice is a procedural matter and as such only of paramount importance in a common law action for wrongful dismissal; the statutory action for unfair dismissal requires an examination of the substantive fairness of the dismissal, and so any question of the presence or absence of notice will be of secondary importance..... However the existence of the unfair dismissal legislation is likely to make employers more wary of dismissing summarily and may perhaps make them more likely to punish this conduct by action short of dismissal (e.g. suspension) or by dismissal by notice after exhausting a set procedure of warnings and a hearing; this might particularly be the case where the case for dismissal is incompetence or negligence..... Moreover, the advent of the unfair dismissal action has placed new emphasis on procedures, and so an employer might be advised to exercise his rights to dismiss summarily in the light of modern personnel management techniques, in particular the desirability of such matters as laying down in the company's rules what conduct may warrant summary dismissal, ensuring that the decision to dismiss is taken at a reasonably high level (certainly higher than immediate superiors), and providing for an appeal structure."

In my judgment disciplinary procedures were followed in respect of both plaintiffs, there is no allegation of breach of rules of natural justice and there is no suggestion that the offence of failing to account and negligence to duty cannot lead to termination by notice under the defendant's disciplinary code. On the totality of the evidence I am not satisfied on a balance of probabilities that the termination of the plaintiffs' oral contracts of service was unfair and/or wrongful. The plaintiffs' main claim for damages for unfair and/or wrongful termination of employment contracts fails and is dismissed.

Nevertheless, it is clear that the plaintiffs have not been paid their benefits as stipulated in their notices of dismissal. On 14th July 2010 the defendant obtained leave to amend the defence and as urged by Mr. Chishimba the defendant has pleaded in para 11 of the amended defence that the plaintiffs owe the company K14,847,877.80 and K10,002,369.00 respectively but no evidence has been offered to prove that allegation. Copies of the pay statements for April 2009 on the plaintiffs' Supplementary Bundle of Documents do not show any outstanding loan for the 1st plaintiff and for the 2nd plaintiff only a loan balance of K220,000.00 appears. In the absence of proof that the plaintiffs owe the said amounts in form of unpaid loans, I dismiss this aspect of the defence.

Further, I award interest on the benefits due to the plaintiffs at the average of the short term bank deposit rate per annum from the date of writ to the date of judgment and thereafter at the current bank lending rate as determined by the Bank of Zambia from time to time until full payment. However, should the benefits be within the figures paid into court then the interest will accrue only up to 2nd June 2010 when the amounts of K9,081,112.00 and K7,737.931.00 were paid into court. On costs, although the plaintiffs' main claim has failed, they have succeeded under any other relief for payment of their terminal benefits. Accordingly I award them costs to be taxed if no agreed.

Delivered in Open Court at Kitwe this 28th day of January 2011

R.M.C. Kaoma

JUDGE