**IN THE SUPREME COURT OF ZAMBIA Appeal No 139/2009**

**HOLDEN AT NDOLA**

**(Civil Jurisdiction)**

**B E T W E E N:**

**FORSTINOL NKANDU APPELLANT**

**AND**

**V S CARGO MANAGEMENT SERVICES LIMITED RESPONDENT**

**Coram: Mambilima, DCJ, Chirwa and Chibomba, JJS.**

 **On 7th September, 2010 and On 10th August, 2012.**

*For the Appellant: Mr. V. K. Mwewa of V. K. Mwewa & Company.*

*For the Respondent: No Appearance.*

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

**Chibomba, JS, delivered the Judgment of the Court**.

**Cases and Other Materials referred to:-**

1. Zambia National Provident Fund vs. Yekeniya Mbiniwa Chirwa (1986) Z.R. 70

2. Zinka vs. Attorney General (1984) Z. R. 44

3. Kanda vs. Government of Malaya (1962) A. C. 322

**Legislation referred to:-**

1. The Employment Act (Act No. 15 of 1997).

The appellant appeals against the Judgment of the Industrial Relations Court at Ndola, in which the Court below held that the appellant was not wrongfully dismissed from employment on ground that there was no need to charge the appellant with a specific offence.

The facts leading to this appeal are that the appellant was employed by the respondent as a driver. He was dismissed from employment following the allegation that he had overloaded the employer’s motor vehicle contrary to instructions given to all the drivers not to overload.

Following his dismissal, the appellant filed a Complaint in the Industrial Relations Court claiming that his dismissal was unlawful, wrongful, illegal and null and void as he was merely victimized, unfairly treated and dismissed for no justifiable reason at all. He also claimed that he was neither charged with any specific offence nor given a chance to exculpate himself and that this is contrary to the Rules of Natural Justice. The appellant, sought the following reliefs from the respondent:-

**“(a) An Order and declaration that the purported summary dismissal of the Complainant was unlawful, illegal, wrongful and null and void.**

**(b) Damages for unlawful, illegal, wrongful and null and void.**

**(c) An Order that the Complainant be paid his salary arrears and other entitlements due herein.**

**(d) Interest on the amount due.**

**(e) Any other relief**

**(f) Costs.”**

 In his testimony in the Court below, the appellant testified that on 10th November 2006, he picked up workers and that on arrival at the Company premises, he found the General Manager, Mr. Febio Valenza who started shouting at the workers and intimated that he would fire him. He was thereafter, summoned to the General Manager’s office where he over-heard the General Manager telling his Secretary to write a letter of dismissal.

It was his further evidence that he was neither charged nor given an opportunity to exculpate himself as he was just given the letter of dismissal. He testified that there was no regulation pertaining to the number of employees to be carried in the vehicle. He also expressed ignorance of the Memorandum dated 17th July, 2008 issued to all drivers on the number of employees to be carried in the vehicle.

On the letter written by Chief Inspector Dominic Linyiko who complained of overloading on the motor vehicle that the appellant was driving, the appellant admitted to having driven the motor vehicle in question. He, however, said that he was seeing the letter for the first time in Court. And that his dismissal was unfair and unlawful as he was not given an opportunity to defend himself against the complaints made against him.

In Cross examination, the appellant told the Court below that he never discussed Company rules with his supervisor on the use of Company vehicles. He insisted that there was no limit on the number of employees to be carried on the motor vehicle and that it was a lie to say that he was restricted to carrying 3 employees at any given time. He, however, said among the employees that he carried that day, was his supervisor, Mr. Nicodemus Musonda.

In Re-examination, the appellant told the Court below that one of the supervisors that he ferried that day, namely, Brian Lwando, lodged the complaint about the number of workers that he had carried.

On the other hand, the respondent called two witnesses. The sum total of RW1’s evidence was that the appellant’s duties were similar to his. And that the category of employees that the appellant was allowed to carry were supervisors and that he could only carry other employees with the consent of the General Manager, Mr. Febio Valenza. RW1 stated that the number of employees to be carried at the time was 3 unless there was authorization from the General Manager even though the rules did not contain those provisions. Further, that the consequence of overloading was suspension or dismissal after several warnings.

RW2’s evidence was that on that particular day, apart from picking him, the appellant also picked Nicodemus Musonda and Nixon who were supervisors. And that enroute to the Industrial Area, the appellant also picked other employees who were running late. And that on arrival at the plant, the General Manager cautioned them about the number of passengers in the vehicle. And that Musonda explained that he had authorized other employees to be carried in the vehicle. He testified that Musonda and the appellant were called to the General Manager’s office and that he later learnt that the appellant had been dismissed.

After hearing and evaluating the evidence before it, the Court below came to the conclusion that the appellant was not wrongfully dismissed and that there was no need to charge him with a specific offence and that consequently, he was not prejudiced by the failure to charge him as he was in breach of the standing instructions not to overload the motor vehicle. The Court below also held that the appellant acted in breach of the instructions on the number of employees to be carried which carried summary dismissal.

Dissatisfied with this decision, the appellant appealed to this Court advancing two grounds of appeal as follows:-

**“1. The honourable Court erred in law and in fact when it held that there was no need to charge the appellant with a specific offence and that he was not prejudiced by the decision not to charge him.**

**2. The honourable trial Court erred in law and in fact by holding that the breach of the standing instruction on the number of employees to carry warranted summary dismissal despite evidence that supervisors could instruct a driver to carry more than the allowed number of passengers.”**

The learned Counsel for the appellant, Mr. Mwewa, relied on the appellant’s Heads of Argument. In support of the first ground which attacks the Court below’s finding that there was no need to charge the appellant with a specific offence and that consequently, the appellant was not prejudiced by the decision not to charge him, reference was made to page 15 of the record where the Court below stated that:-

“**Turning to the issue of the failure to afford the Complainant an opportunity to be heard we adopt the reasoning in the case of *Zambia Provident Fund vs. Yekeniya Mbiniwa Chirwa1* which stated that where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with procedure in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity**.”

Our attention was drawn to the Court below’s observation that the appellant could not have been prejudiced by the decision not to charge him with any specific offence as he did not dispute the fact of overloading. It was pointed out that there is no dispute that the appellant was dismissed on disciplinary grounds for which he was neither charged nor asked to exculpate himself nor did he appear before any Disciplinary Committee. That, this is contrary to **Section 26A of the Employment Act** which provides that an employer shall not terminate the services of an employee on grounds related to conduct or performance of the employee without affording an employee an opportunity to be heard. Therefore, that the failure to charge him was a clear breach of the rules of natural justice embodied in **Section 26A of the Employment Act.** Andthat in **Zinka vs. Attorney General2**, it was held that:-

**“A presumption that natural justice must be obeyed will arise more readily where there is an express duty or where a decision entails the determination of disputed questions of fact and law. Prima facie moreover, a duty will arise in the exercise of a power to deprive a person of his legal status where that status is terminable at pleasure, or to deprive a person of liberty or property rights or any other legitimate interest or expectations or to impose a penalty**.”

The case of **Kanda vs. Government of Malaya3**, was also cited in which **Lord Denning** stated that:-

**“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the Accused to know that which is made against him. He must know what type of evidence has been given and what statements have been made affecting him and he must be given a fair opportunity to correct or contradict them**.”

It was pointed out that although the Court below properly addressed itself to the questions as to the difference it would have made to the appellant’s story if he had been charged and whether the failure to charge him prejudiced him, the Court however, came to the conclusion that the appellant was not prejudiced as this could not have changed the story that he had over-loaded the motor vehicle. It was argued that to the contrary, the failure to charge the appellant with any specific offence prejudiced his case as he was denied an opportunity to call witnesses to testify in his defence before the decision to dismiss him was made. It was contended that although the appellant had committed an offence which carry summary dismissal as punishment, he ought to have been heard as a hearing could have changed the course of events.

In support of the second ground of appeal, it was argued that the Court below erred in law and in fact by holding that the breach of the standing instructions on the number of employees to carry warranted summary dismissal. That this was contrary to the evidence that Supervisors could instruct a driver to carry more than the allowed number of passengers. To support this argument reference was made to page 12 of the R/A where the Court below stated that:-

“**We find as a fact that there was a Standing instruction contained in an internal memorandum dated 13th May, 2009 which stipulated the authorized number of employees to be carried. We do note that there were contradictions in terms of how many people were authorized to be carried by the witnesses. However, a perusal of the Internal Memorandum clearly indicates the authorized number. In any event the Complainant did concede to the fact that he carried more passengers than he was authorized by the Supervisor who was in the vehicle at the time. The question that arises then is could the Supervisor override a Standing Instruction? The reason for carrying other workers was that the group of other workers was running late for work. It is our view that the decision was purely made on humanitarian grounds. That notwithstanding we subscribe to the view that there was a breach of the Standing instruction and the Supervisor was equally party to the breach and should have also been disciplined.”**

It was submitted that it is precisely this finding and the nature of the evidence on record which would have changed the entire perspective had the appellant been charged or given an opportunity to call witnesses and defend himself. Our attention was drawn to RW1’s evidence in Cross-examination where he stated that:-

“**If I needed to carry more than 3 workers I had to get consent from the General Manager. The General Manager used to knock off at 17:00 hours. If the Supervisor says carry more than 3 you carry and he is not the General Manager.**”

It was pointed out that RW2 also gave vital evidence when he told the Court below that it was the Supervisor, Nicodemus Musonda who instructed the appellant to carry more passengers. That the appellant’s evidence and that of this witness was that there were about 5 of them in his motor vehicle. And that the appellant reiterated this evidence in Cross-examination and that he went further to explain that despite the Supervisor trying to explain, the General Manager would not hear it and dismissed the appellant. That therefore, it is this evidence which would have absorbed the appellant had the General Manager been prudent enough to afford the appellant an opportunity to call witnesses. Therefore, that this appeal should be allowed with costs.

 The respondent did not appear at the hearing nor were Heads of Argument filed on their behalf.

We have seriously considered this Appeal together with the arguments in the appellant’s Heads of Arguments and the authorities cited therein. We have also considered the Judgment by the Court below. The major question raised in this appeal is whether the failure to charge the appellant or give him an opportunity to exculpate himself amounted to wrongful dismissal of the appellant by the respondent.

To ably resolve this issue, the facts as established by the evidence in this case must be borne in mind. These are that the appellant did not dispute overloading the motor vehicle on the date in question. There is also no dispute that one of the supervisors did authorize the appellant to carry more than the authorized number of workers in the motor vehicle that day.

However, the appellant’s explanation as to why he carried more than the authorized number of workers was that the supervisor allowed him as the workers were running late for work. It is however, also a fact that the appellant was aware or he must have been aware of the standing Instruction by the General Manager not to overload the motor vehicles. He must also have known of the consequences of failure to comply with the standing Instructions by the General Manager to all drivers not to overload motor vehicles. The sanction, as spelt out in the internal Memorandum dated 13th May, 2008 at page 26 of the record of appeal, is instant dismissal. It states in part as follows:-

***“THIS SERVES TO REMIND YOU THAT MISUSING THE COMPANY VEHICLES UNDER THE FOLLOWING GUIDELINES SHALL RESULT IN INSTANT DISMISSAL”.***

The internal Memorandum also states that it was a reminder to the drivers.

Therefore, although it has been argued that the appellant was prejudiced by the respondent’s failure to charge him with an offence before dismissing him and that he was thereby denied the right to be heard and to exculpate himself and that this was contrary to Section 26(A) of the Employment Act, it is also a fact that the sanction for overloading as stipulated in the internal Memorandum is instant dismissal. Therefore, the appellant cannot hide behind the claim that he was authorized by a senior officer to carry more than the authorized number of passengers on his Motor vehicle. Since the appellant was aware of this guideline and the sanction of instant dismissal, he cannot now turn around and say that he was wrongfully dismissed. The fact that a senior officer may have authorized him to overload the Motor vehicle did not absolve him from blame for breaching the guideline. The appellant, as driver, he had the option to refuse as he knew that the sanction for overloading was instant dismissal. We, therefore, find no merit in the first ground of appeal. We dismiss it.

With regard to the second ground of appeal, we believe that we have already answered the issues raised in this ground above. We, however, wish to emphasize here that as much as we agree with the authorities cited in the appellant’s Heads of Arguments as these are sound principles of Law, in the case of **Zambia National Provident Fund vs. Yekweniya Mbiniwa Chirwa1**, we however, made it clear that where an employee is guilty of an offence punishable by dismissal, the failure to comply with procedure in the contract does not amount to wrongful or unlawful dismissal.

Therefore, since in this case, the sanction for carrying more than the authorized number of passengers on the motor vehicle, was instant dismissal, the Court below cannot be faulted for finding that the appellant was not wrongfully dismissed even though he was not charged with any offence. We find no merit in the second ground of appeal.

The sum total is that this Appeal has failed on ground that it has no merit. The same is dismissed.

In the circumstances of this case, we order that each party bear own Costs.

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I. C. MAMBILIMA

**DEPUTY CHIEF JUSTICE**

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D. K. CHIRWA

**SUPREME COURT JUDGE**

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H. CHIBOMBA

**SUPREME COURT JUDGE**