**(1)**

**IN THE SUPREME COURT OF ZAMBIA Appeal No. 4/2010**

**HOLDEN AT KABWE SCZ JUDGMENT NO. 1 OF 2012**

**(Civil Jurisdiction)**

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

**THE ATTORNEY GENERAL APPELLANT**

**AND**

**JOHN TEMBO RESPONDENT**

***Coram: Sakala, CJ., Chibesakunda and Chibomba JJS.***

 ***10th August, 2010 and on 8th January, 2012.***

*For the Appellant: Mrs. N. Siansima, Senior State Advocate, Attorney*

 *General’s Chambers.*

*For the Respondent: Mr. M. Lisimba of Lisimba & Company.*

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

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

**Cases referred to:-**

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

2. Glynn vs. Keele University and Another (1971) 2 ALL ER

3. National Breweries vs. Philip Mwenya (2002) Z. R. 118

4. Ward vs. Bradford Corporation Limited (1971) 70 LR 27

5. Wilson Masauso Zulu vs. Avondale Housing Project Limited (1982) Z. R. 172

6. Barclays Bank Zambia PLC vs. Zambia Union of Financial Institution and Allied Workers (2007) Z. R. 106

7. The Attorney General vs. Richard Jackson Phiri (1988-89) ZR 121

**Legislation referred to:-**

1. The Employment Act, Chapter 268 of the Laws of Zambia

2. The General Orders

 **(2)**

The appellant appeals against the Judgment of the High Court at Lusaka, in which the learned Judge held that the respondent was wrongfully dismissed from employment as he was not charged before he was dismissed.

 The facts of this case are that the respondent was employed by the Government of the Republic of Zambia as Principal Registry Officer at the Ministry of Home Affairs. He was dismissed amid allegations that he was absent from work without official leave for a period of more than 10 days following the allegation that he had leaked a letter copied to the Minister of Home Affairs to the Post Newspaper. The respondent was told to report himself to the police where he was interrogated over the leakage and then told to go home pending completion of the investigations. He was, however, not called back by the police. He later, received a letter from the Ministry of Home Affairs transferring him to the Ministry of Communications and Transport in the same capacity. This letter is dated 5th June 2001. He reported to the latter Ministry. Shortly thereafter, he was sent back to the Ministry of Home Affairs over the allegations that he was facing disciplinary charges at the former

 **(3)**

Ministry. He received the dismissal letter from the Ministry of Home Affairs a year after it was sent and this was after his transfer to the latter Ministry. Although the dismissal letter is dated 17th April, 2002, the effective date was 25th March, 2002.

The respondent commenced an action in the High Court, in which he claimed for a declaration that his purported dismissal from employment on 25th March 2002, was wrongful. He also claimed damages for wrongful dismissal and defamation of character, interest and costs.

 The sum total of the respondent’s evidence in chief was that although he had classified the letter in question together with the other letters, he did not leak the letter to the Post Newspaper. And that after interrogating him, the police told him to go home and not to report for work the next day and to await further instructions. That, however, he later received a letter transferring him to the Ministry of Communications and Transport where, he was later directed to go back to his former Ministry as he was facing a disciplinary charge there. Further that he received the dismissal

 **(4)**

letter a year after it was written and that no reasons were given for dismissal.

 In Cross examination, the Plaintiff said the letter he was alleged to have leaked was among the mail in his “in” tray and that after he classified the mail, he gave Registry Clerks to distribute. He said the letter in question was already open when he classified it. And that he did not tell his employers what the police told him because it was the Ministry which sent him to the police for investigation. He maintained the position that he did not receive the charge letter.

The sum total of the appellant’s witness’ evidence in chief was that the respondent was referred to the police for investigation over the allegation that he had leaked a confidential letter to the Post Newspaper. After interrogation, the respondent did not report back for work for a continuous period of more than ten days. The respondent was charged with absenteeism. The charge letter was delivered to his home but that the respondent did not respond and so he was dismissed. However, that Public Service Management

 **(5)**

Division (PSMD), transferred the respondent to the Ministry of Communications and Transport.

Further that proper procedure was followed in dismissing the respondent as he was charged and asked to exculpate himself but that he did not respond. This evidence was given by DW1, who was Assistant Secretary in the Ministry of Home Affairs.

 In Cross-examination, DW1 told the Court below that a letter which is marked “**Confidential**”, may be opened by the addressee or the Registry. And that the letter in question was already endorsed by the Minister to the Deputy Minister by the time it was leaked to the Post Newspaper. DW1 said none of the letters to the respondent were sent by registered mail as required by General Order No. 67(e).

 On the basis of this evidence, the learned Judge came to the conclusion that the respondent was wrongfully dismissed and he awarded him 24 months salary as damages for wrongful dismissal with all other prerequisites.

 **(6)**

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

**“1. The learned trial Judge in the Court below misdirected himself in law and in fact when he held that the respondent’s dismissal was wrongful thereby entitling the respondent to damages.”**

In support of this ground of appeal, the learned Counsel for the appellant, Mrs Siansima, relied on the arguments in the Appellant’s Heads of Argument. The major contention is that the learned Judge should not have found that the respondent did not absent himself from work deliberately. That, however, the appellant expected the respondent to continue reporting for duty after interrogation instead of staying away and that therefore, the respondent’s continued absence from work for more than ten days without leave was not justified as it was unreasonable and did not show a sense of responsibility towards his work. And that that if the police directed him to stay away from work, then it was the respondent’s duty to notify his employers instead of staying away from work.

 **(7)**

Therefore, that under General Order No. 67, the appellant was entitled to dismiss him as he was absent from work without official leave for a period of more than ten days.

General Order No 67 provides that:-

“***67(a) An officer shall not absent himself from duties without leave or reasonable excuse. Any unauthorized absence by an officer from his place of work constitutes misconduct unless and until he produces evidence which satisfies his supervising officer that his absence was fully justified and that he was prevented from obtaining prior authority for it.***

***(c) An officer who is absent from duty without leave for a continuous period of ten days or more shall be liable for dismissal.***

***(e) Before submitting a recommendation that an officer who is absent without leave for a continuous period of ten days or more should be dismissed, the responsible officer of the Ministry or Province concerned shall first attempt to inform the officer of the action he proposes to take, by sending a registered letter to the officer’s last known address. The letter shall give the officer a time in which to submit representations why he should not be dismissed and no further action may be taken until the period of time has elapsed.”***

It was further contended that although the respondent claimed that he did not receive the charge letter and that he only received the dismissal letter one year after it was issued, the respondent acknowledged receiving the transfer letter on the same date that it was written. However, that the transfer letter was sent

 **(8)**

to him in the same manner as the other letters - by personal delivery to his residence.

It was contended that although it was conceded that the charge letter was written after the respondent was transferred to a different Ministry, the former Ministry had power to discipline him for offences committed whilst at that Ministry and that the charge related to the period when he was under the former Ministry.

Further that although it was conceded that the procedure in General Orders 67, 91 and 92, was not followed as the letters were not sent by registered mail, the practice of the employer was to serve documents on a concerned officer by personal delivery at the officer’s residence and that this is what transpired. And that General Orders 91 and 92 did not apply as this was not a criminal proceeding.

It was contended that ***Section 26(A) of the Employment Act,***  did not apply to the respondent as he had a written contract and that although the appellant admits that there were some lapses on the procedure, the dismissal was nevertheless lawful and for a just

  **(9)**

cause as the respondent was absent from work for more than ten days. And that even though the respondent was not heard, this did not exonerate him from the punitive measures as the misconduct was punishable by dismissal.

In support of this argument, the case of **Zambia National Provident Fund vs. Yekweniya Mbiniwa Chirwa1** was cited in which we stated that:-

“**Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for dismissal or declaration that the dismissal is a nullity.”**

The case of **Glynn vs. Keele University and Another2**, was also cited in which the Court in England ruled that although the Plaintiff was not heard, he did not suffer any injustice in that it was not in dispute that he committed the offence. It was pointed out that this court reiterated this position in the case of **National Breweries vs. Philip Mwenya**3 in which we held that:-

**“Where an employee commits an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity**.”

 **(10)**

Further that this court referred to the case of **Ward vs. Bradford Corporation Limited4**, in which Lord Denning, stated that the Courts must not force disciplinary bodies to become introverted in nets of legal procedure so long as they act fairly and justly their decisions should be supported.

It was contended that since the respondent was absent from work for a continuous period of more than ten days without leave, his dismissal was not wrongful even though procedure was not strictly complied with. We, were accordingly, urged to hold that the failure by the appellant to follow the correct procedure did not make the dismissal wrongful as the respondent was guilty of the offence which is punishable by dismissal.

On the other hand, the learned Counsel for the respondent, Mr. Lisimba, relied on the arguments in the respondent’s Heads of Argument and Supplementary Heads of Argument. It was contended that the learned Judge was on firm ground when he held that the respondent’s dismissal was wrongful as there was overwhelming evidence to support this finding. Therefore, that the Court below was on firm ground when it found that the appellant

  **(11)**

did not comply with the provision of General Order No. 67(e) as the charge letter was not sent by registered mail to the respondent’s last known address. Further that the appellant did not comply with the procedure in General Orders No. 90, 91 and 92.

It was further contended that the finding that the respondent did not absent himself from work deliberately is a finding of fact, it is trite that this court will not reverse a finding of fact unless it is shown that the finding was perverse or made in the absence of any relevant evidence or upon a misapprehension of facts as was held in the case of **Wilson Masauso** **Zulu vs. Avondale Housing Project Limited5**. However, that in the current case, the appellant has not established that this finding was perverse or made without any relevant evidence.

It was pointed out that in **Barclays Bank Zambia PLC vs. Zambia Union of Financial Institution and Allied Workers**6, this Court made it clear that Section 26 applies only to oral contracts but that the respondent had a written contract.

 **(12)**

Further that the cases of **Zambia National Provident Fund vs. Yekweniya Mbiniwa Chirwa**1, **Glynn vs. Keele University and Another2**, **National Breweries vs. Philip Mwenya**3, and **Ward vs. Bradford Corporation Limited4**, should be distinguished from the current case in that in the earlier cases, the parties concerned had committed serious offences while in the current case, the learned Judge made a finding of fact that the respondent had not absconded or deliberately absented himself from work. And that in the case of **The Attorney General vs. Richard Jackson Phiri7**, this Court made it clear that:-

**“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 power will be regarded as bad if there is no substratum of facts to support the same**.”

That, however, in the current case, apart from not complying with provisions of General Orders No. 62, 90, 91 and 92, no offence was committed by the respondent and that as such, there was no substratum of facts upon which the disciplinary action was/would be based. Therefore, that this appeal should be dismissed for want of merit with costs.

  **(13)**

We have seriously considered this appeal together with the arguments advanced in the respective Heads of Argument and the authorities cited therein. We have also considered the Judgment by the learned Judge in the Court below.

The sole ground of appeal raises the question whether or not the respondent’s dismissal from employment was wrongful. This hinges on the interpretation of the respondent’s conditions of service and in this particular case, certain provisions of the General Orders. In this case, the employer sent the respondent to the police for interrogation over the allegation that he had leaked a confidential letter to the Post Newspaper. After the police interrogated him, the respondent was told to go home and not to report for work the following day as they needed to screen his office. The respondent did not report for work. He, however, received a letter from the appellant transferring him from the Ministry of Home Affairs to the Ministry of Communication and Transport. He reported for work at the latter Ministry. However, shortly thereafter, he was told to go back to the former Ministry as he was facing disciplinary charges in that Ministry. The respondent claimed that

 **(14)**

he received the dismissal letter one year after it was written and that he did not receive the charge letter.

General Order No. 67 which was part of the respondent’s conditions of service clearly provides that an officer who absents himself from duty without leave for a continuous period of ten days or more shall be liable for dismissal. It however, also provides important checks and balances as it stipulates that before recommending dismissal, the responsible officer shall first inform the officer of the action he proposes to take by sending a registered letter to the officer’s last known address and that the letter shall give time within which the officer should show cause why he should not be dismissed. This provision, therefore, enshrines the natural justice principles.

In this case, although the appellant has argued that the respondent was charged and asked to exculpate himself before he was dismissed, it is a fact that the appellant did not comply with the provision of General Order No. 67 which requires that such mail be sent by registered mail. Contrary to this provision, the charge letter was allegedly delivered to the respondent’s residence by

 **(15)**

personal delivery. The respondent, however, claimed that he did not receive this charge letter.

There is no tangible evidence on record to show that the respondent received this letter. In the circumstance, we take Judicial Notice that whenever mail is delivered by personal delivery, an entry is made in the book and the recipient signs in that same book as proof of receipt of the letter or document.

In the current case, the appellant did not produce any such book or record to confirm that indeed, the charge letter was personally delivered to the respondent. We, therefore, agree that there was maladministration as the respondent was neither charged nor given an opportunity to exculpate himself over the allegations that he had absented himself from work without official leave for a continuous period of ten days or more.

Therefore, the cases of **Zambia National Provident Fund vs. Yekweniya Mbiniwa Chirwa**1, **Glynn vs. Keele University and Another2**, **National Breweries vs. Philip Mwenya**3, and **Ward vs. Bradford Corporation Limited4** cited by the learned Counsel for

  **(16)**

the appellant should be distinguished from the facts of the current case as this case shows a blatant disregard of the respondent’s conditions of service and the rules of natural justice.

We, therefore, uphold the decision by the learned trial Judge as he was on firm ground when he held that the respondent’s dismissal from employment was wrongful and when he awarded 24 months salary with all the prerequisites as damages.

This appeal therefore fails. The same is dismissed with costs to the respondent to be taxed in default of agreement.

………………………………………..

E.L. SAKALA

**CHIEF JUSTICE**

………………………………………. ………………………………..

L.P. CHIBESAKUNDA H. CHIBOMBA

**SUPREME COURT JUDGE** **SUPREME COURT JUDGE**