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

**APPEAL NO. 65/2010**  
**SCZ/8/271/2009**

**BETWEEN:**

NANCY LUTANGU

APPELLANT

**AND**

ZAMBIA REVENUE AUTHORITY  
KELVIN M. DONOVAN-COMMISSIONER GENERAL

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

**CORAM:** Mwanamwambwa, AG. D.C.J, Hamaundu, J.S, Lengalenga, ACT. J.J.S.  
On the 12<sup>th</sup> August, 2014 and 6<sup>th</sup> October 2014.

*For the Appellant:* Mr M. Chitambala of Lukona Chambers.  
*For the Respondent:* Mrs D. B. Goramota, Legal Counsel of the 1<sup>st</sup> Respondent.

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## JUDGMENT

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Mwanamwambwa, J.S., delivered the Judgment of the Court.

### Cases referred to:

1. BANK OF ZAMBIA V. KASONDE (1995-1997) Z.R. 238 (SC).
2. MASAUO ZULU V. AVONDALE HOUSING PROJECT LTD (1982) Z.R. P.172.
3. SITHOLE V. STATE LOTTERIES BOARD (1975) Z.R. 106 (SC).
4. ROSEMARY PHIRI MADAZA V. AWADH KAREN COLEEN (2008) Z.R. 12.
5. LEMMY BWALYA SHULA V. THE PEOPLE (1996) ZR SC.
6. THE ATTORNEY-GENERAL V RICHARD JACKSON PHIRI (1988/89) ZR 121

This is an appeal from the Judgment of the High Court upholding the Appellant's dismissal by the 1<sup>st</sup> Respondent.

The brief facts of the matter are that the Appellant was employed by the 1<sup>st</sup> Respondent, as a Customs Officer. On the 29<sup>th</sup> of November, 1999, the Appellant cleared goods belonging to

a Mr Giddleman. The air way bill presented to the Appellant showed that the goods consisted of 4 boxes weighing 95 Kilograms. Under the nature and quantity of goods, the airway bill indicated that the goods were "second hand phones (personal effects)". The Appellant was approached by a freelance clearing agent called Mr Lambakasa. The Appellant inspected the goods and cleared them. The duty paid for the goods was K247,336. On the receipt, the Appellant indicated that the goods in question were 2 cellular phones and not boxes of cellular phones. The clearing agent, on the other hand stated that of the 4 boxes, 3 boxes contained cellular phones while the other one box contained clothes. He added that the initial duty was K2,000,000 but that after negotiating with the Appellant, the duty was brought down to K247,336. That the Appellant was also given K800,000 gratification as an appreciation for clearing the goods.

Later, officers from the 1<sup>st</sup> Respondent were alerted by an advert in the Zambia Daily Mail newspaper of a bargain sale for cellular phones and accessories. The officers followed the seller to the former Holiday Inn Hotel to find out if duty was paid on the cellular phones. Their investigation revealed that the phones were cleared by the Appellant on the 24<sup>th</sup> of November, 1999 as 2

cellular phones instead of 3 boxes of cellular phones. The seller, who was the importer of the cellular phones also stated that he had given the Appellant K800,000 gratification for clearing the 3 boxes of cellular phones as 2 cellular phones.

As a result, on the 29<sup>th</sup> of December, 1999, the Appellant was charged with the offence of "dishonest conduct." The particulars were that-

**"on the 24<sup>th</sup> of November, 1999, you Nancy Lutangu while acting in your official capacity as a Customs Officer at Lusaka International Airport in General Office acted dishonestly by clearing 2 x boxes of cellular phones on receipt No. 343265 as two units of cellular phones and in turn you received K800,000 as appreciation for your action. You are therefore charged with dishonest conduct in line with clause 7.42 of the ZRA Code of Conduct."**

After the above charge, the Appellant exculpated herself. She appeared before a disciplinary committee which found her guilty of the offence and she was dismissed from employment. She appealed against her dismissal to the 1<sup>st</sup> Respondent's Appeals Committee but her appeal was not successful.

On the 26<sup>th</sup> of September, 2000, she took out this action in the High Court for-

1. a declaration that her dismissal is unlawful and hence null and void;
2. damages arising therefrom, for loss of employment status, advantage;
3. interest;

4. costs; and
5. any other relief the Court may deem fit.

On the 18<sup>th</sup> of November, 2009, the High Court delivered its judgment. It was of the view that the burden of proof in this case was on the Appellant and not the Respondent. That it was the Appellant who had a duty, on a balance of probabilities to prove to the court that her dismissal was unlawful. He added that the Appellant, in her testimony, confirmed that she had been charged, given an opportunity to exculpate herself and was heard by the disciplinary and appeals committee. The court was of the view that it was not called upon to sit as an appellate court or tribunal to review the decision of the Disciplinary and Appeals Committee.

The court below also held the view that it was not in dispute that the 1<sup>st</sup> Respondent had power to met out the sanction that it meted upon the Appellant. That the facts before the 1<sup>st</sup> Respondent, in respect of the charge against the Appellant, supported the decision it took. That this was so because subsequent to being cleared by customs, the importer was found in possession of the goods far in excess of those declared officially. That this was the same importer the Appellant dealt with. The Court stated that the above facts were

sufficient justification for the dismissal. That this was coupled by the Appellant's unacceptable evidence that the wording of the airway bill in respect of the phrase "personal effects", meant second hand clothing. That the airway bill was clear and unambiguous in terms of the contents of the consignment being "second hand phones", described further as "personal effects" in brackets.

The Appellant now appeals against this judgment. There are five grounds of appeal and these are:

**Ground one:**

The lower Court erred in law and fact when it held that there was no burden whatsoever placed on the Respondents to prove the allegation of dishonest conduct as such burden was placed on the Appellant to prove to the lower Court that her dismissal was unlawful.

**Ground two:**

The lower court erred in law and fact when it held that the standard of proof for dishonest conduct in the present case is distinguishable from that set in the *Sithole V. State Lotteries Board* (1975) Z.R. 106 (SC) on which the Appellant relied on in proving that the Respondents failed to prove their case against her for dishonest conduct.

**Ground three:**

The lower court erred in law and fact when it held that the rules of natural justice were inapplicable in the present case as an employment dispute in the present case was centred on discretionary rights enshrined in the disciplinary code rather than mandatory rights.

**Ground four:**

The lower court erred in law and fact when it failed to recognise that the evidence relied upon by the Respondents was at variance with the requirements of section 3(1) of the Evidence Act Cap 43 of the Laws of Zambia.

**Ground five:**

The lower court erred in law and fact when it failed to take into account the contradictory and uncorroborated evidence it relied upon from the Respondents witnesses which evidence the lower court should have treated with caution and excluded from the evidence on record.

In Ground one, counsel for the Appellant submitted that he who alleges must prove the case. That in the case before us, it was the Respondent's duty to lay before the Disciplinary Committee and the lower Court the evidence of how much tax was allegedly evaded. He stated that the evidence of the Appellant was that she was only availed one document at the Disciplinary Committee, that is, the airway bill. That DW1 in her evidence never indicated how much tax was evaded. He relied on the case of **Bank of Zambia V. Kasonde**<sup>(1)</sup> to support his argument.

That in the present case, there was no dispute in the lower court that no evidence was laid before the Disciplinary Committee and lower court showing how much duty was evaded by the alleged act of the Appellant. He added that the

uncontroverted evidence of the Appellant was that upon receipt of the airway bill, she conducted a physical inspection of the contents which revealed old clothing and two cell phones. It was submitted that at the time of inspection, the invoice was not made available and that the Appellant relied on the Airway Bill only to calculate customs duty payable.

In response to the above, counsel for the 1<sup>st</sup> Respondent submitted that the Appellant alleged that she had been unlawfully dismissed by the 1<sup>st</sup> Respondent and as such, the burden of proof lay on the Appellant. That it was the duty of the Appellant to provide evidence to show that the 1<sup>st</sup> Respondent did not act correctly in dismissing her from employment.

In relation to the absence of evidence on the exact amount of additional duty that was paid by the importer, she submitted that the case of dishonest conduct against the Appellant was not centred on quantum of the additional customs duty but rather on the Appellant's dishonest conduct in undervaluing the importer's consignment of cellular phones. That the 1<sup>st</sup> Respondent's issue with the Appellant was in her conduct and having found her guilty of the charge accordingly dismissed her from employment. That DW1 and DW2 stated that the importer consequently paid

the correct duty and the cellular phones, which had been confiscated, were returned to him. That this evidence by the 1<sup>st</sup> Respondent's witnesses proves the fact that contrary to the Appellant's claims that the importer's consignment had two cellular phones, the 1<sup>st</sup> Respondent subsequently discovered that the consignment actually contained 3 boxes of cellular phones.

Counsel added that the case of **Bank of Zambia V. Kasonde**<sup>(1)</sup> relied upon by the Appellant ought to be distinguished from the present case, as in that matter the Court found that the Appellant, Bank of Zambia, had dismissed the Respondent based on insufficient information, such that justice was not carried out. That in the case of **Bank of Zambia V. Kasonde**<sup>(1)</sup>, there was no evidence to justify the charges laid against the Complainant. That there was also no sufficient information to enable the complainant know the details of the offence he was alleged to have committed.

We have considered the evidence and submissions on this ground of appeal. We wish to state from the outset that the offence which the Appellant was charged with was that of dishonest conduct in the manner she undervalued the importer's consignment, as two cellular phones, instead of three boxes of



cellular phones. It had nothing to do with how much tax was evaded by her actions. The charge against her had sufficient information on this issue to enable her defend herself. This case is different from that of **Bank of Zambia V. Kasonde**<sup>(1)</sup>. In the Kasonde case, the employer, Bank of Zambia, did not give the employee sufficient details to enable him defend himself. Details such as the date of the misconduct and what that misconduct was were not given to the employee. In the case before us, all the necessary details were given to the Appellant.

We come to the issue of the burden of proof. The general principle of law is that he who alleges must prove. This principle was confirmed in the case of **Masauso Zulu V. Avondale Housing Project Ltd**<sup>(2)</sup>, where this Court observed that-

“we think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations”.

From the above, it is clear that the person who alleges bears the burden of proof. In this case, it is the Appellant. In the Court below, the Appellant failed to show that her dismissal was unlawful. No burden is placed on the Respondent. For the

reasons we have given above, this ground of appeal is dismissed for lack of merit.

In Ground two counsel for the Appellant submitted that a claim for dishonest conduct and fraud impinge on issues of criminality and that he who alleges must prove on a higher standard of proof than the ordinary balance of probability. He stated that in this case the Appellant is alleged to have acted dishonestly by defrauding the state of customs duty. It was the Appellant's submission that dishonest conduct in this case falls within the ambits of proof of fraud set out in **Sithole V. State Lotteries Board**<sup>(3)</sup>.

On behalf of the Respondent, counsel submitted that the Appellant has refused or failed to appreciate the fact that the burden of proof lies on the party who alleges, who in this instance, as has been set out in the foregoing arguments, lies on the Appellant. That considering the fact that the burden of proof lies on the Appellant and that this is a civil matter, counsel stated that the standard of proof is that of a balance of probabilities.

She submitted that the case of **Sithole V. State Lotteries Board**<sup>(3)</sup> does not apply to this case because the 1<sup>st</sup> Respondent, both in its pleadings and during the proceedings in the lower court, did not accuse the Appellant of fraud but of dishonest conduct. She relied on the case of **Rosemary Phiri Madaza V. Awadh Karen Coleen**<sup>(4)</sup> to support her argument.

We have already stated in ground one that the issue that is in contention in this matter is that of dishonest conduct of the Appellant. The Appellant was dismissed for dishonest conduct and she bore the burden of showing that her dismissal was unlawful. She was not dismissed for fraud. The Appellant needed to prove that her dismissal was unlawful. Therefore, we do not see how the Respondent should come in to prove fraud. The **Sithole V. State Lotteries Board**<sup>(3)</sup> case does not apply. Accordingly, this ground of appeal also fails for lack of merit.

In ground three, counsel for the Appellant submitted that during the disciplinary hearing, the 1<sup>st</sup> Respondent did not call any witnesses to substantiate their claims and allow the Appellant the opportunity to cross examine them. That certain documents relied upon by the 1<sup>st</sup> Respondent were not availed to the Appellant. That this was a breach of natural justice. That to

ensure that these rights are respected, the deciding authority must give the Appellant both the opportunity to prepare and present evidence and to respond to arguments presented by the opposite side.

He argued that under the evidence rule, investigators and decision makers should not base their decisions on mere speculation or suspicion but that they should be able to clearly point to the evidence on which the inference or determination is based. He added that evidence presented by one party must be disclosed to the other party who may then subject it to scrutiny. He cited a number of cases to support his argument.

On behalf of the Respondent, counsel submitted that the Appellant has misconstrued the judgment delivered by the lower court in respect of the principles of natural justice. That at no point did the lower court imply that the principles of natural justice were inapplicable in this case. She submitted that the lower court noted that the wording of clauses 6.11.3(a) and 6.11.5(a) of the disciplinary code left discretion to the 1<sup>st</sup> Respondent as to whether or not it would call witnesses and whether or not the Appellant would be able to question the witnesses. That the lower court found that the 1<sup>st</sup> Respondent's

Disciplinary code, appeals and Grievance Procedure contained discretionary rights which did not entitle the Appellant to question any witnesses brought at the instance of the 1<sup>st</sup> Respondent.

It was submitted that the lower Court found that the 1<sup>st</sup> Respondent, in arriving at its decision to dismiss the Appellant from its employ, took into account all the evidence that had been presented before it, including affording the Appellant an opportunity to be heard both during the Disciplinary Committee hearing as well as at the Disciplinary Appeals Committee hearing. Counsel added that the lower Court, did not at any point find that the principles of natural justice were inapplicable in the present case.

We have looked at the evidence on record and considered the authorities and submissions filed by both parties on this ground. We wish to state that the procedure adopted during a disciplinary hearing is usually provided for in an institutions disciplinary code. This is the case in this case. Clause 6.11.3(c) of the Respondent's disciplinary code gives discretion to the charging officer to call or not to call witnesses. The Court below

found as a fact that this power is discretionary. We agree with this finding.

Further, the Appellant was not precluded from calling witnesses. She exculpated herself, appeared before a disciplinary committee as well as exercised her right to appeal. The Appellant was free to produce witnesses before the disciplinary committee. All this is natural justice. We do not agree with the suggestion by counsel for the Appellant that the Appellant was denied natural justice.

Therefore, we find no merit in this ground of appeal and we accordingly dismiss it

For convenience, we shall deal with grounds four and five together.

In ground four, counsel for the Appellant submitted that the evidence of DW1 and DW2 relied upon by the Respondents was at variance with the requirements of section 3(1) of the Evidence Act Cap 43 of the Laws of Zambia. He submitted that the Respondents did not call the authors of the documents they relied on to come and testify on the issues they raised in their

statements. He added that to admit those statements in evidence, the authors should have produced them into evidence. That as a result, the lower court should not have relied on these statements.

On behalf of the Respondents, counsel submitted that for purposes of Section 3 of the Evidence Act cited above, the oral testimony of DW1 and DW2 as well as the written reports produced during the trial of the matter, and exhibited at pages 183 through to 300 of the Record of Appeal, would be admissible in evidence as the statements alluded to were part of the testimony of DW1 and DW2. In any event, the proviso under section 3(1) allows a statement to be admitted in evidence when the maker of the statement is unavailable and all reasonable efforts have been made to trace his whereabouts but to no avail. She argued that this was the case for DW2 at page 199.

In ground five of the Appeal, counsel for the Appellant argued that according to the Appellant's testimony at page 202, line 10 of the Record of Appeal, payment for duty was on a cheque. That however, the Respondent's witness at page 217 line 5 stated that the payment was in cash clearly showing unreliability on the Respondent's evidence. Counsel argued that

documents at page 183-190 should not have been relied upon as the authors of the documents contradicted each other on vital points. He relied on the case of **Lemmy Bwalya Shula V. The People**<sup>(5)</sup> to support his arguments.

On behalf of the Respondent, it was submitted that in arriving at its decision to dismiss the Appellant's case, the lower Court took into consideration all the evidence that had been presented before it. That the lower Court held that it is not called upon to sit as an appellate body from the 1<sup>st</sup> Respondent's disciplinary proceedings.

We have looked at the evidence on record and considered the submissions filed by both parties on these two grounds. The evidence on record shows that the Appellant cleared the goods in question. That before clearing them, she inspected them and had sight of the airway bill which showed that the consignment consisted 4 boxes of "second hand phones (personal effects)". With these facts, it cannot be argued that a person who decides to clear 4 boxes of the above description as 2 cellular phones as not being guilty of dishonest conduct. The evidence was available before the disciplinary committee as well as before the Court below.



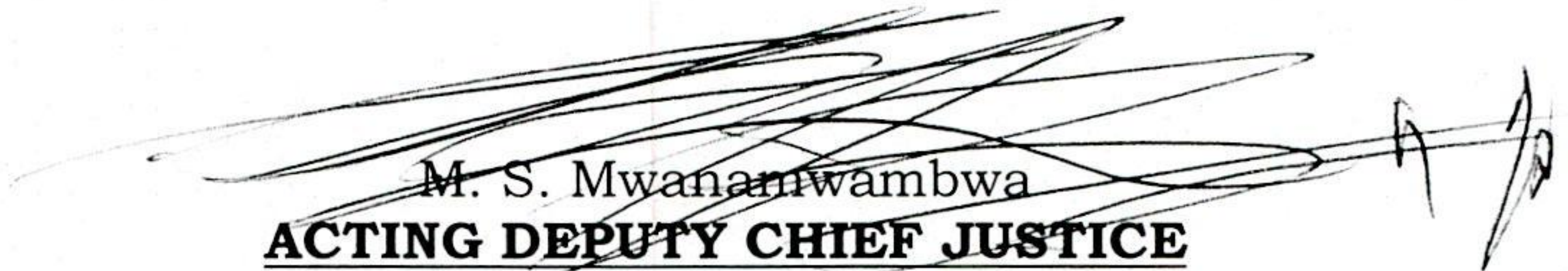
This Court held in **The Attorney-General v Richard Jackson Phiri**<sup>(6)</sup> held that-

“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.”

From the above, it is clear that the role of the court is to check if the correct procedure was followed in dismissing an employee and whether the disciplinary committee had valid powers to do so. The court should not sit as an appellate tribunal of the disciplinary committee. In this case, we are of the view that the disciplinary committee acted properly. The disciplinary committee had had valid powers to conduct the proceeding. The Appellant was given an opportunity to be heard. Therefore, the lower court was justified in arriving at the conclusion it arrived at, in light of the facts of this case.

The court took into account the facts of the case and made a determination that the disciplinary committee was justified to come to the conclusion that the Appellant was guilty of dishonest conduct. We agree with this finding. Therefore, these two grounds of appeal also fail for lack of merit.

All in all, this appeal is dismissed as it lacks merit. We order that each party bears its own costs.



M. S. Mwanambwa  
**ACTING DEPUTY CHIEF JUSTICE**



.....  
E. M. Hamaundu  
**SUPREME COURT JUDGE**



.....  
F. M Lengalenga  
**AG/ SUPREME COURT JUDGE**