

IN THE SUPREME COURT OF ZAMBIA

APPEAL No. 149/2013

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

EDGAR MUSUPILA

APPELLANT

AND

COPPERBELT UNIVERSITY

RESPONDENT

Coram: Mambilima, CJ, Wood and Malila, JJS.

On 1st March, 2016 and 9th March, 2016.

For the Appellant: In Person.

For the Respondent: Mr. S.K. Mumba- Legal Counsel.

JUDGMENT

Wood, JS, Delivered the judgment of the Court.

CASES REFERRED TO:

- 1. Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R.70.*
- 2. Undi Phiri v Bank of Zambia (2007) Z.R.186.*

LEGISLATION REFERRED TO:

The Supreme Court Rules, Chapter 25 of the Laws of Zambia

This is an appeal against a judgment of the High Court dismissing the appellant's claim for damages for unfair or wrongful dismissal. The brief facts of this case are these. The appellant joined the respondent on 2nd October, 1990 as a driver. On 18th May, 2002, he reported for work at 09:00 hours and was assigned by the Dean of the School of Business to ferry people who were scheduled to attend a professional talk using one of the respondent's vehicles. The professional talk was subsequently cancelled and around 12:00 hours, the appellant was instructed to park the motor vehicle at the university premises.

In disregard of the instructions to park the motor vehicle, the appellant proceeded on personal errands. Unfortunately, the appellant was involved in a road traffic accident around 19:00 hours of the same day and he reported the matter to the police as well as the respondent's security department. The following day, he reported the matter to the office of the Registrar of the respondent University. On 20th May, 2002, the appellant wrote an exculpatory letter in which he essentially admitted that he was returning from a personal errand when he got involved in the accident with an

unidentified vehicle that fled the scene of the accident. On 27th May, 2002, the appellant was suspended from work to facilitate investigations into the accident. He was placed on half salary for the duration of the suspension.

On 12th August, 2002, the Secretary to the Registrar's Departmental Disciplinary Committee (RDDC) invited the appellant to appear before it on 21st August, 2002, to answer to the following charges:

- (a) Disobeying lawful instructions contrary to clause 1.10;
- (b) Misuse of university property-motor vehicle No. AAR 8839 contrary to clause 1.20;
- (c) Damage to a university vehicle contrary to clause 1.12 and
- (d) Dishonest conduct contrary to clause 1.20.

The appellant appeared before the RDDC on 21st August, 2002. He was found guilty of all the charges upon his own admission. The RDDC then referred the matter to the respondent's Main Disciplinary Committee for consideration. The Main Disciplinary Committee, however, failed to consider the case on grounds that the RDDC did not make any specific findings or

recommendations with regard to the hearing and consequently referred the matter back to the RDDC. At its meeting held on 20th November, 2002, the RDDC maintained that the recommendations made to the Main Disciplinary Committee were clear in that the appellant admitted to all the charges leveled against him. The RDDC by-passed the main disciplinary committee and in its memorandum dated 21st August, 2002, addressed to the Registrar of the University, the RDDC indicated that the appellant had been found guilty on all the charges and recommended his dismissal. Acting on this report, the Registrar, on 27th November, 2002, wrote to the appellant dismissing him from employment with effect from 30th September, 2002.

The appellant was not satisfied with this decision. On 2nd December, 2002, he appealed to the office of the Vice-Chancellor on grounds that the dismissal was communicated to him five months after he was charged, contrary to clause 22.6 of the respondent's conditions of service. He also argued that in any case, the damaged vehicle was fully insured and had since been repaired by the Insurance Company. The Vice-Chancellor refused to reverse the

dismissal on grounds that the appellant had admitted his guilt before the RDDC. He renewed his appeal before the Vice-Chancellor in a letter dated 15th July, 2003. One of the grounds of the renewed appeal was that after the Main Disciplinary Committee sent the matter back to the RDDC, the RDDC did not report back to the Main Disciplinary Committee, but instead reported its findings and recommendations directly to the Registrar. In so doing, he was denied an opportunity to appear before the Main Disciplinary Committee. On 6th November, 2003, the Vice Chancellor rejected the renewed appeal on grounds that his predecessor in office had already reviewed the case and upheld the decision of the Main Disciplinary Committee.

The appellant was not satisfied with the manner of his dismissal and filed in a writ of summons claiming damages for wrongful, unlawful and unfair dismissal, as well as payment of salary arrears. His main contention was that he was denied an opportunity to present his case before the Main Disciplinary Committee. The appellant also averred that the respondent had breached clause 22.6 of the conditions of service which states that

suspension of any nature shall run for five months. Should the employer fail to establish the charge during this period, the employee shall be reinstated. His argument was that the respondent communicated his dismissal in 27th November, 2002, six months after he was placed on suspension. In its defence, the respondent contended that the appellant was heard by the RDDC which found him guilty of the charges leveled against him upon his own admission. In arriving at its decision, the RDDC also relied on the police report on the road traffic accident as well as the statement taken from the Dean of the School of Business, who was the appellant's supervisor.

In his judgment, the learned trial Judge dismissed the appellant's claim. He found that the appellant had been accorded an opportunity to be heard as evidenced by his appearance before the RDDC. He also found that the RDDC in its minutes dated 20th November, 2002, clearly stated that the appellant had been found guilty of all the charges leveled against him. The learned trial Judge concluded that the failure by the RDDC to re-submit the case to the Main Disciplinary Committee did not in any way infringe upon the

appellant's right to be heard. The learned trial Judge also found that the respondent was not in breach of clause 22.6 of the conditions of service. Even though the dismissal was only communicated to the appellant on 27th November, 2002, the decision took effect on 30th September, 2002, four months after the suspension. The learned trial Judge was of the view that even if he were to find that the respondent was in breach of its procedural rules, the appellant would not have suffered any injustice since he committed the offences for which he was dismissed. He relied on the case of *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa*¹, in which we held 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 wrongful dismissal or a declaration that the dismissal is a nullity.”

The Judgment was delivered on 19th November, 2008. On 2nd April, 2013, the appellant filed in summons for leave to file notice of appeal out of time together with an accompanying affidavit. On 28th May, 2013, the court granted the order for leave to file the notice of appeal out of time. The appellant subsequently filed in his notice of

appeal and memorandum of appeal on 20th June, 2013. He filed in his heads of argument on 12th August, 2013.

On 4th October, 2013, the respondent filed in a notice to raise a preliminary objection pursuant to *Rule 19 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia*. The respondent advanced two grounds of objection namely:

- (i) That the appeal was improperly before the Supreme Court as leave to appeal out of time was obtained without the application being served on the respondent as required under *Rule 50 (2) of the Supreme Court Rules*; and
- (ii) That the notice of appeal did not state whether the whole or which part if any, of the judgment of the lower court was being appealed against as required under *Rule 49 (4) of the Supreme Court Rules*.

When this appeal came up for hearing, Mr. Mumba abandoned the preliminary issue raised on 4th October, 2013. It is accordingly dismissed.

The appellant filed in four grounds of appeal. Ground one of the appeal was that the learned trial Judge erred in law and fact when he failed to find that the conduct of the respondent was in breach of the principle of *audi alteram partem* as the appellant was not given an opportunity to be heard by the main committee. In ground two, it was argued that the learned trial Judge erred when he failed to consider the fact that the letter of dismissal was backdated to 30th September, 2002, to the appellant's detriment. Ground three of the appeal was that the learned trial Judge erred when he refused to consider the fact that the decision by the respondent to backdate the appellant's letter of termination to 30th September, 2002, was intended to circumvent clause 22.6 of the conditions of service. Ground four of the appeal was that the learned trial Judge erred by disregarding the fact that the findings of the Registrar's Departmental Disciplinary Committee were not conclusive on account of exaggerations in the security guard's report.

The appellant argued all the four grounds of appeal at once. In support of his appeal, the appellant submitted that the respondent

breached the *audi alteram partem* rule because the appellant was not accorded an opportunity to be heard by the respondent's Main Disciplinary Committee, after the decision by the RDDC to dismiss him. The appellant contended that his right to be heard did not only include his appearance before the RDDC, but extended to presenting his case before the respondent's Main Disciplinary Committee. The appellant also argued that the respondent breached clause 22.6 of the conditions of service which reads as follows:

"Suspension of any nature shall run for a period of up to five (5) months after which period the employee shall be reinstated if the employer fails to establish that the employee is guilty."

He pointed out that the letter of dismissal was written on 27th November, 2002, one month after the expiry of the five months period provided for in clause 22.6. Even though this letter backdated the appellant's dismissal to 30th September, 2002, there were no minutes showing that the decision to dismiss him was arrived at on 30th September, 2002. He argued that the manner in which his letter of dismissal was couched was meant to circumvent clause 22.6 of the conditions of service.

The appellant also challenged the decision of the RDDC on grounds that it was based on a faulty report rendered by the respondent's security guard. He also complained that the learned trial Judge erred when he accepted documents from the respondent, on which the comments of the secretary to the Main Disciplinary Committee were deliberately rubbed off. In this case, there was no way of knowing what the main committee's true recommendation was. We must here state that the appellant raised these two issues for the first time on appeal. We have stated in a number of authorities that where an issue was not raised in the court below, it is not competent for a party to raise it on appeal. We are therefore, precluded from considering these two issues which have been raised for the first time on appeal.

In response, Mr. Mumba denied that the respondent breached the principle of *audi alteram partem* in the manner it dismissed the appellant. In support of his argument, Mr. Mumba pointed out that the appellant was summoned to appear before the RDDC on 12th August, 2002, and he did appear before the committee on 21st August, 2002. He contended that according to the evidence of Mr.

Allan Ilunga, the respondent's Registrar, it was not always necessary for a matter to be considered by the Main Disciplinary Committee. Mr. Ilunga also testified that the appellant was accorded an opportunity to appeal to the Vice-Chancellor's office, which he did.

Mr. Mumba denied the appellant's claim that the letter of 27th November, 2002, was intended to circumvent clause 22.6 of the respondent's conditions of service. He contended that what was of importance was the fact that the appellant was found guilty by the RDDC at its sitting of 21st August, 2002, less than three months after the appellant was suspended.

In what appeared to be an alternative argument, Mr. Mumba submitted that in the event that we found that the respondent breached the laid down procedure in dismissing the appellant, the circumstances of this case do not warrant a finding in favour of the appellant. This, he argued, was because the offence of dishonest conduct which the appellant was found guilty of was a dismissable offence. In support of his argument, Mr. Mumba cited the case of *Undi Phiri v Bank of Zambia*² in which we held that:

“Procedural rules are part of conditions of services and not statutory and that where it is disputed that an employee committed an offence for which the appropriate sentence is dismissal, no injustice arises for failure to comply with the laid down procedure in the contract of service and the employee has no claim on that ground for wrongful dismissal or a declaration that a dismissal is a nullity.”

We have considered the arguments advanced in respect of this appeal as well as the judgment appealed against. The appellant has argued that the respondent denied him the opportunity to be heard by the Main Disciplinary Committee and that his dismissal contravened clause 22.6 of the respondent's conditions of service.

The evidence in the record of appeal before us shows that at a meeting held on 14th November, 2002, the Main Disciplinary Committee considered the appellant's matter after it was concluded by the RDDC. However, the matter was sent back to the RDDC on grounds that there were no specific findings and recommendations made by the RDDC. At a meeting held on 20th November, 2002, the RDDC maintained that the recommendations made to the Main Disciplinary Committee were clear in that the appellant admitted to all the charges leveled against him. Instead of referring the matter back to the Main Disciplinary Committee as it did in the first place,

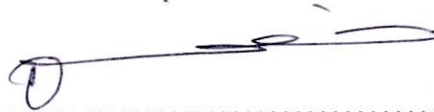
the RDDC directed its secretary to draft a letter addressed to the Registrar recommending the appellant's dismissal, and he was accordingly, dismissed. On 2nd December, 2002, the appellant appealed to the respondent's Vice-Chancellor against his dismissal. In a letter dated 10th January, 2003, the Vice-Chancellor indicated that there was no merit in the appeal as the appellant had been found guilty of all the charges leveled against him upon his own admission. The Vice-Chancellor advised the appellant to appeal to the Chairperson of the University Council if he was not satisfied with the decision. There was a change in the office of the Vice-Chancellor and instead of appealing to the Chairperson of the University Council as advised, the appellant renewed his appeal before the office of the Vice-Chancellor on 15th July, 2003. In a memorandum dated 24th July, 2003, the Vice-chancellor tasked a two person committee to review the appellant's case. On 6th November, the Vice-chancellor reminded the appellant that his predecessor in office had reviewed the case on appeal on 10th January, 2003 and the guilty verdict had been upheld. He found no reason to overturn that decision.

The internal memorandum dated 21st August, 2002 sent from the Secretary of the RDDC to the Registrar clearly shows that the appellant was found guilty of all the charges leveled against him. Even though the RDDC did not refer the matter back to the Main Disciplinary Committee, it is clear from the correspondence between the appellant and the office of the Vice-Chancellor that his case was considered extensively on appeal. Having been found guilty of the dismissable offence of dishonest conduct, we do not think that the appellant suffered any injustice as a result of his case not being considered by the Main Disciplinary committee. We take this view in light of our decision in the case of *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa*¹, which decision we reaffirmed in the case of *Undi Phiri v Bank of Zambia*² cited by Mr. Mumba.

Further, the appellant's argument that his case was not determined within the period of five months stipulated under clause 22.6 of the conditions of service also lacks merit. This is because the memorandum dated 21st August, 2002, shows that the RDDC found the appellant guilty of all the charges on 21st August, 2002,

but the decision was only communicated to the appellant on 27th November, 2003.

In view of the foregoing, we find no merit in this appeal and dismiss it. We accordingly award the costs of this appeal to the respondent, to be taxed in default of agreement



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I.C. MAMBILIMA
CHIEF JUSTICE



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A.M. WOOD
SUPREME COURT JUDGE



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M. MALILA SC
SUPREME COURT JUDGE