

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
Civil Jurisdiction

2015/HK/872

BETWEEN:

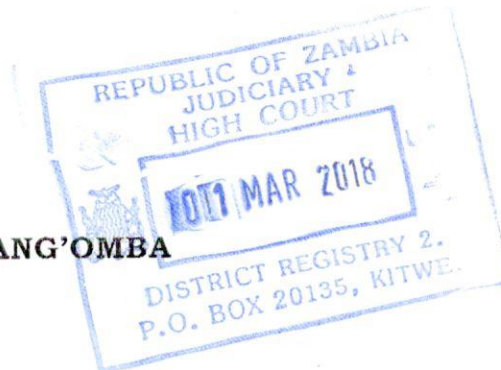
WIDIAS KANG'OMBA

PLAINTIFF

AND

NFC AFRICA MINING PLC

DEFENDANT



Before the Hon. Mrs. Justice C. B. Maka - Phiri

For the Plaintiff: Mr. M. Mulenga of Messrs Iven Mulenga and Company

For the Defendant: Mr. A. Imonda of Messrs A. Imonda and Company

J U D G M E N T

Cases referred to:

- 1. Zambia Airways Corporation Ltd v Gershom Mubanga (1990-1992) Z.R. 149 (S.C)**
- 2. Attorney General v. Richard Jackson Phiri (1988 - 1989) Z.R. 121 (S.C)**
- 3. Chimanga Changa Limited v. Stephen Chipango Ngombe S.C.Z No.5 of 2010**

The Plaintiff's claims as indorsed on writ of summons dated 3rd December, 2015 are as follows;

- (i) A declaration that the Plaintiff was wrongfully and unfairly dismissed from employment by the Defendant Company.**

(ii) Damages for wrongful and unfair termination of employment.

(iii) Interest and costs

The Plaintiff's averment as contained in the statement of claim that he was employed by the Defendant Company as a Security Officer in 2003 is not in dispute. The Plaintiff was promoted to the position of Inspector in 2010 and he was dismissed from employment on 21st August, 2015. It was further not in dispute that as a Security Officer, the Plaintiff would also serve as a Driver and was responsible for deploying his fellow security officers to their various work stations or bits.

The Plaintiff averred that on 25th July, 2015, he was deploying security officers to their various bits during day shift when on his way back from the Open Pit Mine the motor vehicle he was using developed a mechanical fault and was involved in an accident. The Motor Vehicle was damaged and consequently the Plaintiff was charged with negligent damage to company property and subjected to a disciplinary hearing held on 21st August, 2015. The Plaintiff was summarily dismissed from employment after the hearing.

The Defendant filed defence on 5th February, 2015 wherein it was averred that the Plaintiff was driving the Defendant's Motor Vehicle Mitsubishi Sportero Double Cab Registration No. ABM4775 ascending the access portal. In the process the Plaintiff lost control of the vehicle and it rolled back and detour off the main road. The

vehicle subsequently rammed into the bench wall before flying over and landing onto its side by the road way causing extensive damage to the vehicle. The particulars of damage to the vehicle were specified as follows: shattered windscreen; both left doors damaged, deformed roof, both side view mirrors damaged and broken suspension spring

It was the Defendant's contention that the said accident was caused by the negligence or carelessness of the Plaintiff. The particulars of negligence were as follows:

- a) **Failing to exercise due care, caution and diligence when driving the vehicle.**
- b) **Failing to correctly and safely drive the vehicle up the access ramp as the Plaintiff used the wrong gear selection (high gear) when ascending the access ramp (uphill direction) as evidenced by the operating gear lever which at time of investigations at scene of accident was found engaged in the fifth (5th) notch position, which is the highest speed gear for travel.**
- c) **Driving at a speed exceeding the speed limit in the area contrary to standing instructions which state that *"No light vehicle shall exceed the speed limit of 20km/h when descending or ascending the ramp so as to accord the driver of the vehicle to safety negotiate along the same without any incidence since that is a safe and controllable speed in relation to any ramp terrain."***

The Defendant denied assertions that the motor vehicle had developed a mechanical fault at the time of the accident and relied on facts established after investigations.

At the trial of the matter, the Plaintiff testified that he was employed by the Defendant in April, 2003 as a mine police officer and rose to the rank of inspector in 2010. On 25th July, 2015 whilst on duty, he was driving the Defendant's motor vehicle from Porto 6 and as he was ascending in gear 2, he saw smoke in the cabin of the vehicle and it failed to pull. The engine sound of the vehicle changed and its brakes of the same vehicle also failed. It was at that time that the vehicle started rolling down and when he attempted to switch off the engine he heard a sharp sound. **Noah Yenga**, the person who was with the Plaintiff in the vehicle jumped off the vehicle. The vehicle kept on rolling down until it hit into the wall and overturned. The Plaintiff came out of the vehicle and observed that he was injured and was taken to Sinozam Hospital.

The Plaintiff reported back for work after three days and was subsequently charged by his supervisor for damaging the vehicle. He later gave statements of what had transpired to the industrial officer – Mr. Zuze and the safety officer – a Mr. Singogo. He attended a disciplinary hearing on 21st August, 2015 after which was he was found guilty of the charge and dismissed from his employment. The dismissal letter was shown in the Plaintiff's

bundle of documents. He appealed against his dismissal at two levels but his appeal was unsuccessful.

It was the Plaintiff's contention that according to clause 4.7 of the disciplinary code, he unfairly treated and severely punished, hence he decided to bring the matter to court. That having served his punishment for a similar offence that he committed in 2012, the Defendant should have given him a suspension and not a summary dismissal. It was the Plaintiff's plea that he should be paid for the monies that he worked for so that he could settle in farming. He denied assertions that he had drove the vehicle in gear 5 and in high speed as ascended after Porto 6

When cross-examined, the Plaintiff confirmed that he was the driver of motor vehicle, Registration No. ABH 4775 which was involved in an accident and got damaged. Consequently, the Safety Department prepared a Road Traffic incident investigation report shown in the Defendant's bundle of documents. According to the said report, the vehicle was mechanically sound. He further stated that he was charged with the offence of negligent damage to company property and he was given an opportunity to exculpate himself on the 21st day of August, 2015. He admitted that his first accident was in 2012 and he was severely warned for damaging company property.

This marked the close of the Plaintiff's case as the Plaintiff did not call any witness.

The Defendant called three witnesses. DW1 was **Readson Singogo**, a safety officer in the employ of the Defendant Company. He testified that on the 25th July, 2015 he was informed that there was an accident along the access ramp going to Porto 8 and 6. He rushed to the scene and found a Mitsubishi Sportero Registration Number ABM 4775 that was involved in the accident. His observation at the scene was that the vehicle had slipped on the side benches of the wall on the ramp and the vehicle had slipped and tilted. He checked the steering condition and found that the gear was engaged in gear 5. DW1 prepared a report shown in the Defendant's bundle of documents which he submitted to management. His conclusion was that the motor vehicle was over speeding at the time of the accident and it had no mechanical problem before the accident. He concluded by stating that this was not the first accident that the Plaintiff was involved in with the Defendant's motor vehicle.

When cross-examined, DW1 stated that he was not aware that the vehicle was involved in a road accident three weeks prior to the accident involving the Plaintiff and that it was in the garage for three to four weeks. He was further not aware that a night before the accident, the same vehicle had a mechanical problem.

DW2 was George Zimba, a mechanic in the employ of the Defendant. He testified that he worked on the Defendant's motor

vehicle in issue on the 3rd of July, 2015 when it developed a timing belt problem. He tested the vehicle after repairing it and found it road worthy. He released the vehicle to the police on 22nd July, 2015 and on 25th July, 2015; he heard that it was involved in an accident.

When cross-examined, DW2 stated that he was not aware that the vehicle broke down after it came out of the garage and a night before the accident.

DW3 was **Francis Mulenga**, a Security officer in the Defendant Company and the Plaintiff's former supervisor. He testified that on the 25th day of July, 2015, around 09:00 hours, the Plaintiff informed him via phone that he was involved in a road accident. DW3 read through the report that was prepared by the Safety Officer and found that the Plaintiff had caused damage to the Vehicle. DW3 proceeded to charge the Plaintiff with the offence of negligent damage to company property. The charge form was exhibited in the Defendant's bundle of documents. The Plaintiff was dismissed from employment after a disciplinary hearing.

When cross-examined, DW3 informed the court that the Plaintiff was involved in a similar accident in 2012 and he was severely warned. He reiterated that his role in this matter was simply to raise the charge and not to administer the case. It was therefore the

administering official who could explain he came to the punishment of summary dismissal

This marked the case of the defence case.

Both parties filed written submissions. The Plaintiff's submission was that he was not careless and negligent when the said accident occurred. Further that the Defendant's disciplinary committee did not validly and properly exercise its powers as there was no substratum of facts established before it that warranted the Plaintiff's dismissal. Counsel's contention was that there were no facts supporting the charge.

It was further submitted that even if the Plaintiff had previous records of a similar offence in 2012 which he served, the proper punishment when he committed an offence in 2015 according to the code of conduct was supposed to be a final warning and not summary dismissal.

On the other hand, the Defence submitted that the Plaintiff was properly charged and the disciplinary procedure was followed. He was heard and properly dismissed and as such his dismissal was justified. It was the Defendant's contention that the Plaintiff has failed to prove his case on the balance of probabilities and as such this case must be dismissed with costs.

I have considered the evidence adduced in this matter and the written submissions on record. The facts not in dispute are that the Plaintiff was employed by the Defendant as a Security Officer in 2003. He rose through the ranks to the position of Inspector, the position he held until 2015 when he was dismissed from employment.

It is further not in dispute that on 25th July, 2015, the Plaintiff was involved in an accident when he was driving the Defendant's vehicle motor, a Mitsubishi Spotero, registration number ABM 4775 up the open pit access ramp. Following the accident, the vehicle was extensively damaged as follows; a shattered windscreen, damaged left doors, a deformed roof, damaged side view mirrors and a broken suspension springs. The safety department investigated the accident as per procedure and produced a Road Traffic Incident Investigation Report shown in the Defendant's bundle of documents. DW1, Readson Singogo was the author of the said report. The conclusion in the report regarding the said incident was that the Plaintiff **"failed to exercise due care, caution, diligence when driving the vehicle by failing to correctly and safely drive the vehicle up the access ramp as he used the wrong gear selection when ascending the access ramp as evidenced by the operating gear level which at the time of investigations at the scene of the accident was found engaged in the fifth notch position which is the highest speed gear for travel....."**

It is further not in dispute that the Plaintiff was charged with the offence of negligent damage to company property contrary to clause

3.2.2(b) of the disciplinary code. The Plaintiff attended a disciplinary hearing and thereafter he was dismissed from employment. He appealed against the dismissal but the appeal was unsuccessful.

The questions for determination based on the facts of this case are twofold; firstly, whether the Plaintiff's dismissal was wrongful and secondly, whether the Plaintiff's dismissal was unfair.

Wrongful dismissal only arises when an employee's contract of employment has been terminated by the employer in breach of the terms of the contract of employment which includes the disciplinary code. The learned author of the Book, Employment Law in Zambia, Cases and Materials 2011, (Revised Edition) wrote at page 105 that:-

“Wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether the dismissal is wrongful or not, the form rather than the means of the dismissal must be executed. The question is not why but how the dismissal was effected. “

The learned author further notes on the same page that:-

“Another form of wrongful dismissal is one that involves a legal challenge on the basis of procedural error. Where the right procedure in effecting the dismissal has not been followed, the employee may challenge the said procedure with the intention of asking the court to declare the whole

dismissal null and void in which case the employee may be entitled to damages as well as reinstatement.”

In the case of Zambia Airways Corporation Limited v Gershom Mubanga ⁽¹⁾, the court held that:-

“Since the Appellant (Zambia Airways) failed to comply with the correct procedure in the purported dismissal of the Respondent (Gershom Mubanga), the dismissal was wrongful.”

In the case in casu, it is not in dispute that the Defendant followed the requisite procedure as prescribed in the disciplinary code in dealing with the Plaintiff's case. The Plaintiff as already stated was formally charged with the offence of negligent damage to company property contrary to clause 3.2.2 (b) of the Disciplinary Code. He was given an opportunity to exculpate himself in writing which he did by a memorandum dated the 14th day of August, 2015 and thereafter he attended a disciplinary hearing held on the 21st day of August, 2015. The Plaintiff was dismissed from employment after the disciplinary hearing. The Plaintiff was accordingly informed of his right of appeal which he unsuccessfully invoked.

From the foregoing, I am satisfied that the Defendant complied with the requisite procedures as outlined in the Disciplinary Code and did not breach the Plaintiff's contract of employment in that regard. The Plaintiff's claim for wrongful dismissal cannot therefore be sustained.

On whether or not the dismissal was unfair, I am guided by the decision of the Supreme Court in the case of **The Attorney General v. Richard Jackson Phiri** ⁽²⁾ where it was held that:

i) **Once the correct procedures have been followed the only question which can arise for the consideration of the court, based on the facts on the case, would be whether there are facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no subtraction 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 into 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.”**

Further in the case of **Chimanga Changa Limited v. Stephen Chipango Ngombe**⁽³⁾, the Supreme Court held that:

“An employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision.”

From the above authorities, it is clear that when considering the question of unfair dismissal the Court will look at the reasons for the dismissal and determine whether the dismissal was justified or

not. The Court has to further determine the reasonableness of the employer's decision to dismiss the employee. The employer must thus show the principal reason for the dismissal and that it was one that would justify the dismissal of the employee holding the position which that employee held.

In casu, the reason why the Plaintiff was dismissed is because he was found guilty of negligent damage to company property. The Defendant came to this decision after a disciplinary hearing of the Plaintiff's case and concluded that the vehicle was being over driven as its gear lever was found in notch five at the scene during the investigations of the case. It is my considered view that the Defendant's finding was based on facts and it quite rightly proceeded on the reason that the Plaintiff did cause damage to company property. It is my considered view that the Defendant's decision to dismiss the Plaintiff was reasonable

It should be noted that in such case, the Defendant need not prove beyond reasonable doubt that the Plaintiff committed the offence in question. Furthermore it is not the function of the court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done. The Court should simply examine if there was the necessary disciplinary power and if it was exercised in due form and all the procedures followed. It should be noted that in casu, the administering officer is given discretion to impose appropriate punishment depending on

the circumstances of the case. The schedule of offences and applicable punishments is not cast in concrete. The Plaintiff's submission therefore that the punishment imposed was excessive and contrary to clause 4.7 of the disciplinary code cannot be sustained. I am satisfied that the dismissal had merit and consequently negates unfairness on the part of the Defendant. The Plaintiff's claim for unfair dismissal cannot be sustained.

With the foregoing, I come to the inevitable conclusion that this action has no merit and it is hereby dismissed.

Each party will bear its own costs.

Leave to appeal is hereby granted.

Delivered in open Court at Kitwe this 1st day of March, 2018



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C. B. MAKA - PHIRI (MRS.)
HIGH COURT JUDGE