

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)**

APPEAL NO 87/2015

BETWEEN:

KONKOLA COPPER MINES

APPELLANT

AND

JIM KALEYA

RESPONDENT

**CORAM: MAMBILIMA CJ, MWANAMWAMBWA, DCJ and
MUTUNA JS; on the 5th and 8th days of June, 2018**

**For the Appellant : Mr. T. Chibeleka, of ECB Legal
Practitioners**

For the Respondent : In person

JUDGMENT

MAMBILIMA CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. **BANK OF ZAMBIA V JOSEPH KASONDE (1995-1997) ZR 238**
2. **NATIONAL BREWERIES LIMITED V PHILLIP MWENYA (2002) ZR 118**
3. **CAROLINE TOMAIDA DAKA V ZAMBIA NATIONAL COMMERCIAL
BANK (2012) ZR 8 VOL 3**
4. **THE ATTORNEY GENERAL V RICHARD JACKSON PHIRI (1988-1989)
ZR 121**
5. **KAMBATIKA V ZESCO LIMITED APPEAL NO. 186/2000
UNREPORTED**
6. **CHIMANGA CHANGA V STEPHEN CHIPANGO (2010) ZR 208 VOL 1**
7. **JEFFREY TEMBO V STANBIC BANK ZAMBIA LIMITED APPEAL NO.
153/2011 UNREPORTED**
8. **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED
(1982) ZR 172**

9. NDONGO V MOSES MULYANGO AND ROOSTICO BANDA (2011) ZR 187
10. SAMSON KATENDE & CRABY BERNARD (2011) ZR VOL. 2 112

WORKS REFERRED TO:

- a. EMPLOYMENT LAW IN ZAMBIA, W.S. MWENDA page 48
- b. BLACK'S LAW DICTIONARY 10TH EDITION BRYAN A. GARNER THOMSON REUTER MINNESOTA USA 2014

This appeal is from the decision of the High Court, dated 23rd February, 2015 in which the Respondent was awarded 12 months' salary and allowances as damages for wrongful dismissal.

The facts leading to this litigation are substantially not in dispute. The Respondent and four other employees of the Appellant Company were arrested on 13th August, 2010 in connection with the theft of 27,771 tonnes of export copper cathodes valued at US \$190,322.73 from Konkola Copper Mine (KCM). The Respondent and his co-accused made four appearances in court but they were subsequently discharged on 9th February, 2011 when the state entered a ***nolle prosequi*** in the criminal case.

During the time that the Respondent was facing criminal charges, the Appellant commenced its own internal inquiry into the theft. The Respondent was, consequently, placed on suspension from 17th August, 2010 to pave way for investigations. Upon

completion of the inquiry, the Respondent was written to and given 48 hours in which to show cause why disciplinary action should not be taken against him for fraud; falsifying, uttering and giving false evidence in contravention of clause 2.4.6 (a) (ii) of the Appellant's disciplinary code. The said letter under the hand of Mr. Amol Menza; head, Marketing and Logistics, read as follows:-

"Dear Jim,

Re: Falsifying and Uttering Disciplinary Code 2.4.6 (a) (ii)

Following investigations carried out by KCM security into the allegation of fraud on your part in which KCM lost 29,771 tons (16 bundles) of export copper cathodes valued at US\$190, 33.73 which was stolen from Nkana plant on 27th July 2010, you originated loading permit number 28681 which facilitated the above mentioned theft.

- On 26th July 2010 you prepared and signed loading permit number 28681 from a forged loading schedule order number 314 which was falsely prepared, purporting that truck registration number ABJ 1214; trailer number ABB 6097, being driven by Mr. Vherem Nyikayaramba, passport number 16893 of Cross Country (hauler) was genuinely authorised by Access Freight to come and load export copper cathodes from KCM Nkana to Durban, when in fact not.**
- On the basis of the loading permit you prepared, the mentioned truck was loaded, the loading list and customer invoice documents prepared and the copper was taken out of the plant to unknown destination.**
- Investigations conducted at Road Traffic and Safety Agency (RTSA) in Lusaka established that registration number ABJ 1214 which was on the fictitious truck was for a Nissan Sunny car in Lusaka, and Access Freight denied having sent the truck in question to come and load copper on their behalf.**
- The said truck, the driver and the 29,771 tons of export copper cathodes has not been traced and is believed to be stolen.**

In view of the above, you should show cause why disciplinary action cannot be taken against you for fraud (falsifying and uttering and giving false evidence) involving the theft of 29,771 tons copper cathodes valued at US \$190,322.73 which was stolen from KCM Nkana plant within 48 hours.”

Upon receipt of this letter, the Respondent wrote to exculpate himself but the Appellant was not satisfied with his explanation. It proceeded to formally charge him. A disciplinary hearing was conducted on 30th September, 2010 after which the Respondent was summarily dismissed. He appealed to the Group Manager-Safety but his appeal was rejected. He launched a second appeal to the Head Process- New Smelter who handled the matter on behalf of the Chief Financial Officer. It was also unsuccessful. He was finally summarily dismissed on 30th December, 2010.

The Respondent contested his dismissal in the High Court. He took out a Writ of Summons against the Appellant on 25th March, 2011 in which he sought the following reliefs-

- 1. Damages for false imprisonment**
- 2. Damages for malicious prosecution**
- 3. Damages for wrongful and unlawful dismissal or termination of employment**
- 4. Any other relief the court deems fit**
- 5. Interest and costs**

Among the particulars pleaded, for purposes of this appeal, were loss of employment and all entitlements as well as loss of retirement benefits.

The Respondent contended, in his Statement of Claim, that he was wrongfully charged with falsifying and uttering, and that subsequently, he was unlawfully dismissed from the Appellant's employment. That he had no reason to doubt the authenticity of the loading schedule from which he prepared the loading permit. That in any event, the entire process of loading was recorded by a video camera and the video footage would have shown the role played by each employee in the loading section. That it was not reasonably practicable for the Respondent to detect fraud on the loading schedule.

The Respondent's testimony in the Court below was that on 25th July, 2010 he prepared loading permit No. 28681 for a truck, registration no. ABJ 1214, based on an order that he found in the in-tray on his desk. He told the Court that he was alerted by one, Julius Chinyama, an employee of a transporting company called Bridge Shipping, that a Mr. Mvula Kanyifwa of Access Freight had

dropped off the order because his (Mvula Kanyifwa's) computer had a problem.

It was the Respondent's evidence that since the loading permits were pre-approved by his superior, Mr. Master Chirwa, he took the permit to his supervisor Mr. John Kaongolo for authorisation. He explained that he did not hand over the permit to security the same day as required because the truck on which to load the copper was not physically available. That on 26th July, 2010 he decided to date stamp the permit and hand over copies to security and the Loading/Shipping Department, in the hope that the truck would eventually show up. That he learnt that the truck had in fact loaded and had disappeared with the load when the police picked him up on 13th August, 2010.

The Respondent told the Court that normally, it was only after a permit is handed over to the security and the Loading/Shipping Department, that copper is loaded onto the truck. That after loading, security counterchecks the details of the truck and captures the driver and truck on closed circuit television (CCTV) cameras. The truck is only released after the driver signs for the copper and a checker from the transporter confirms the details. The

exceptional circumstances, such as when there is an internet link failure, that an order could be delivered by hand and even then, the order has to be signed and stamped by the transporter. That in the event that an order comes without a stamp, it will have to be verified by phone with the transporter.

DW 2 further testified that after receipt of a loading permit from the transporter, a loading permit is prepared, counter-checked and approved by the supervisor before it is taken to a senior officer for authorisation. After this, a copy is taken to security and loading Department. Details of the truck and the driver are counter-checked before the truck is allowed into the plant to load.

(DW3) Patrick Mwamba, a Human Resource Officer told the Court that the Appellant followed the procedure prescribed in the disciplinary code when it dealt with the case of the Respondent. That he (the Respondent) was accused of falsifying a company document and asked to exculpate himself, by his immediate supervisor. The supervisor was not satisfied with his exculpatory statement and formally charged him. Investigations were carried out which culminated in a disciplinary hearing. At the end of the hearing, the Respondent was found guilty and dismissed from

employment. He appealed twice but in each case he was unsuccessful.

After considering the evidence that was before him, the learned trial Judge formulated the following issues for his determination:-

- 1. Whether the Respondent was entitled to damages for false imprisonment and malicious prosecution; and**
- 2. Whether or not the Respondent's dismissal from employment was wrongful.**

The learned Judge dismissed the claims for false imprisonment and malicious prosecution. He, however, found that the Respondent's dismissal was wrongful and awarded him 12 months' salary and allowances in form of compensation. This finding seems to have been anchored solely on the absence of the video footage of the loading of the copper. This piece of evidence was not produced during the disciplinary hearings and neither was it availed before the lower Court. According to the Judge, it was clear, from the evidence before him, that the shipping of copper ore from Konkola Copper Mines (KCM) premises began from the time that a truck with the relevant documentation arrives, and ended when the truck left. The Judge was of the view that the charge

levelled against the Respondent was based on only one stage of the process. This, in the learned Judge's opinion, could not prove the charge against the Respondent. Consequently, he held that the Respondent's summary dismissal was wrongful. He relied heavily on our decision in the case of **BANK OF ZAMBIA V JOSEPH KASONDE**¹. In that case, the Respondent, as in the case in casu, was summarily dismissed but in the case of **KASONDE**; we upheld the lower Court's finding that allegations of dishonesty had not been proved on the basis that important invoices on which the charges were based were not produced during the disciplinary hearing or before the High Court.

The Appellant, who was the losing party in the lower Court has now escalated this matter to this Court, advancing five grounds of appeal formulated as follows:-

1. **That the court below erred and misdirected itself in law and fact when it found as follows-**

"According to page 21 of the Plaintiff's bundle of documents there is a very important issue raised, that of the video footage. This evidence was not produced during the disciplinary hearings nor was it brought before court. From the evidence before me, it is clear that the shipping of copper ore from Konkola Copper Mines premises beginning (begins) from the time a truck with the relevant documentation arrives and leaves. The charge was based on only one stage of the process. This in my view cannot prove that the Plaintiff's

charge was proved. In conclusion, I find that his dismissal was wrongful and accordingly award him damages in the sum of 12 months of what he was entitled of his monthly salary and other allowances, being K70,657.30 as shown at page 9 of the Plaintiff's Bundle of Documents".

2. That the Court below erred and misdirected itself in law and fact in finding that the fact that there was no video footage means that there was insufficient evidence to prove the charge of uttering and falsifying a document when in fact the charge was proved because the Respondent did not follow the correct procedure when raising a loading permit.
3. That the Court below erred and misdirected itself in law and fact when it disregarded the evidence on record and proceeded to hold that since the video footage was not produced, the charge was based on only one stage of the process when the evidence on record attests otherwise.
4. That the Court below erred in law and totally misapprehended the facts before it in holding that the Respondent was wrongfully dismissed when in fact there was evidence of wrongdoing on his part. In his finding that the video footage should have been produced before him, the Court constituted itself into a disciplinary body.
5. That the Court below erred and misdirected itself in law and fact when, contrary to well established principles that disciplinary bodies must not be forced into becoming instrumented in nets of legal procedure so long as they act fairly and justly, their decisions should be supported, it totally usurped the charge of uttering and falsifying a document by the Appellant's Disciplinary Committee by demanding that other evidence should have been produced."

When we heard the appeal on 5th June, 2018, the learned Counsel for the Appellant relied on the heads of argument filed in

support of the appeal on 15th June, 2015 in which the five grounds of appeal were argued together.

Counsel's argument, in the main, is that contrary to the trial Court's findings, the charge against the Respondent of uttering and falsifying documents was proved. That the charge emanated from the fact the Respondent prepared and signed a loading permit from a forged loading schedule purporting that truck registration number ABJ 1214 was genuinely authorised by Access Freight to uplift copper cathodes from KCM Nkana to Durban. That according to the Appellant's disciplinary code, the offence of uttering and falsifying a document is described as **"deliberately giving untrue, erroneous or misleading information or testimony whether verbally or in writing"**.

Counsel submitted that the Appellant followed procedure because the Respondent was given an opportunity to exculpate himself before he was charged, and, he was given an opportunity to give his side of the story during the disciplinary hearing after which he was dismissed summarily. He was allowed to appeal twice before he was finally terminated.

Citing from the learned authors of **EMPLOYMENT LAW IN ZAMBIA**^{a)}, Counsel submitted that when dealing with wrongful dismissal, the question is not why but how the dismissal was effected. That this concept has been widely accepted to mean that determination is not on the substance but the form. He submitted further that where a dismissal is done according to procedure, no claims for wrongful dismissal should be entertained. Further, that where it is clear that an employee has committed an offence in an employer/employee relationship or has committed an act or omission which is in breach of the contract of employment, any dismissal resulting therefrom cannot be held to be wrongful or null and void ab initio.

To support his argument, Counsel referred us to the case of **NATIONAL BREWERIES LIMITED V PHILIP MWENYA**², where we held that-

“Where an employee has committed 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 is a nullity”

Counsel also invited us to look at the case of **CAROLINE TOMAIDA DAKA V ZAMBIA NATIONAL COMMERCIAL BANK**³

which illuminates a myriad of principles on wrongful dismissal. According to Counsel, the two important questions which the lower Court ought to have determined in relation to the claim for wrongful dismissal were:-

- a. **Whether the facts disclosed at trial disclose an offence with which the Respondent was charged; and**
- b. **Whether the Appellant's disciplinary committee properly exercised their powers in deciding to dismiss the Respondent and uphold the dismissal.**

Counsel argued that it was wrong for the Court below to have opined on what evidence ought to have been produced at the disciplinary hearing, adding that it was not the function of the trial Court to sit as an appellate tribunal to the disciplinary hearing. To support this position, he cited the cases of **THE ATTORNEY GENERAL V RICHARD JACKSON PHIRI⁴** and **KAMBATIKA V ZESCO LIMITED⁵**. In the case of **THE ATTORNEY GENERAL V RICHARD JACKSON PHIRI⁴** we 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."

In the case of **KAMBATIKA V ZESCO LIMITED⁵** we stated:-

"As we have said in many cases in the past, it is not the function of the Court to interpose itself as an Appellate Tribunal within

domestic disciplinary procedures to review what others have done. The duty of the Court is to examine if there was necessary disciplinary powers and if this had been exercised in due form. Where natural justice is expected, the Court examines if this was satisfied. Of course, the Court will also be concerned to see that the disciplinary procedures were properly invoked that is to say that there was in fact a sufficient substratum of fact to support their invocation since otherwise, the exercise of disciplinary powers will be regarded as bad.”

According to Counsel, the Court below constituted itself as a court of appeal from the disciplinary committee when it should have concerned itself with the four elements that were laid down in the **KAMBATIKA**⁵ case; that is, the jurisdiction or powers of the Appellant’s disciplinary committee; secondly, the exercise of those powers in due form; thirdly, fulfilment of natural justice; and lastly, sufficient substratum of facts to warrant the invocation of the disciplinary committee’s jurisdiction. He stated that in this case, the Appellant’s Disciplinary Code requires that the immediate supervisor should first investigate the matter and then charge the employee; that if charged, the employee should be asked to reply to the charge, and, thereafter, the case is further investigated before an employee is subjected to a case hearing. If found guilty, the employee is allowed two appeals. Counsel submitted that in this case, the Appellant satisfied all these elements and did not breach

the contract of employment. He concluded by urging us to uphold the appeal and reverse the learned Judge's finding of fact.

The Respondent filed written heads of argument in which he also argued the grounds of appeal together. He augmented the heads of argument with oral submissions. He submitted that the Court below was on firm ground when it found that he was wrongfully dismissed on the ground that pertinent evidence, in form of the video footage, was neither produced at the disciplinary hearing nor before the Court. He referred us to a portion of the judgment on page 17 of the record of appeal in which the Judge said:-

“The charge was based on only one stage of the process. This, in my view, cannot prove that the Plaintiff's charge was proved.”

He argued that while a court must look at the form rather than substance when dealing with matters of wrongful dismissal, it is not precluded from looking at substance when it is brought to its attention that some pertinent evidence was not availed to the disciplinary hearing or the Court for purposes of finding a fact. For this submission, the Respondent also referred us to the case of

ATTORNEY-GENERAL V JACKSON PHIRI⁴, and in particular, our holding that:-

“Once the correct procedure has 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 powers will be regarded as bad if there is no substratum of facts to support the same.

To buttress his point further, the Respondent also cited the case of **SAMSON KALENDE AND CROSBY BERNAND**¹⁰, a High Court decision, in which the learned Judge held that **“...any exercise of power will be regarded as bad if there is no substratum of fact to support it.”** He contended that the video footage was cardinal evidence and without it, the Appellant had no basis to institute a disciplinary hearing. That the Court below acted within the ambit of the law when it found itself bound by the decision in the case of **BANK OF ZAMBIA V KASONDE**¹. He urged us to dismiss the appeal as it lacks merit.

In his oral arguments, the Respondent echoed his position that the charge that he was facing could not be proved without the CCTV footage being availed to the Court. He lamented that the compensation which was awarded to him by the lower Court was not enough but he was reminded by the Court that he had not

cross appealed against the judgment of the Court below. He, however, conceded that he was involved, together with two others, in the preparation of the documents from which the loading permit was generated. That they were all suspended but his colleagues were later reinstated.

We have considered and given thought to the evidence on record, the arguments by the parties and the Judgment appealed against. Like the parties before us, we shall also deal with all the grounds of appeal together. Arising from the said grounds of appeal and the submissions of the parties, the main issue that we have formulated for our determination is whether the learned trial Judge was correct to find that the Respondent was wrongfully dismissed on the basis that the video footage of the loading of the truck was not produced before the disciplinary hearings and the trial Court; and to hold, consequently, that the charges levelled against the Respondent were not proved.

The gravamen of the Appellant's argument before us is that the Respondent was properly charged for failing to follow procedure when he issued the loading permit in issue on a forged loading order. That the charge was proved and the disciplinary procedure

was followed and hence the Respondent has no claim against his summary dismissal. The Respondent, on the other hand, has argued that, lack of the video footage showing the loading of the truck in question could have provided the necessary substratum of facts to support the dismissal.

It is trite that in proceedings for wrongful termination of employment, the role of the court is to determine whether the correct procedure was followed when dismissing an employee and where applicable, whether the disciplinary committee had valid disciplinary powers. The Court may also have to consider whether there is a substratum of facts to support the disciplinary measures. This position, which we espoused in the case of **THE ATTORNEY GENERAL V RICHARD JACKSON PHIRI**⁴, and has been cited to us Counsel for the Appellant and the Respondent, is still good law. In the case in casu, there appears to be no contention on the procedure adopted to dismiss the Respondent; and, whether the Appellant's disciplinary body had valid powers to dismiss. The contention, it would appear, is on whether there was a substratum of facts to support the disciplinary measures.

A perusal of the record shows that the Respondent was charged with uttering and falsifying a document under clause 2.4.6 of the disciplinary code. Counsel for the Appellant gave us the definition of uttering and falsifying of documents as provided for in the Appellant's disciplinary code and grievance procedure. We note, however, that the disciplinary code was not on record. According to **BLACK'S LAW DICTIONARY**, falsifying a record means "***the crime of making false entries or otherwise tampering with a public record with intent to deceive or injure or to conceal wrongdoing***". Uttering means "***the crime of presenting a false or worthless instrument with intent to harm or defraud***".

We note, from the record, that when the Respondent was charged, he exculpated himself by letter, in which he basically did not deny the charge that he prepared and signed the loading permit in issue. During his case hearing and while pursuing his appeals however, the Respondent gave contradictory statements. He contradicted himself as to who gave him the loading order and on the steps that he took to verify the origin of the order. This is evident from the Respondent's exculpatory letter dated 2nd September, 2010, appearing on page 51 of the record of appeal. He

indicated in that letter that the loading order was given to him on instructions from Mr. Donald Simbeye, a workmate. However, in his letter of 4th October, 2010 to the Human Resource Manager (appearing on page 55 of the record of appeal) appealing against the dismissal, he said that:-

“I was made aware about the loading order by Bridge Shipping Transporter guys whom I found in the office and said to me that the other guy by the (name) of Kanyifwa left it as there was no one.”

On the steps that the Respondent took to verify the loading order, there are also some discrepancies between the documents. For example, his statement during investigations was that-

“I wanted to ring Kanyifwa Mvula to confirm if it was him who had sent the order, but my phone was left at home. I did not inform Mr John Kaongolo about the specific order for truck No ABJ 1214.”

But in the letter of 28th October 2010, relating to the second appeal the Respondent stated, inter alia that-

“I tried to call Kanyifwa from my office but there was no air time...While in the office I briefed him (Mr. Kaongola) on the general status and again tried to call Kanyifwa from Mr. Kaongola’s office since his phone had air time but Mr. Kanyifwa’s phone was off.”

Going by the evidence of DW2, however, it is evident that, the Respondent did not follow procedure when he went ahead to prepare the loading permit for an order, which according to him, he just found lying on his desk, without verifying with Access Freight,

the transporter. The procedure for preparing the loading permit as outlined by DW2 was that the loading orders are received through email and it is only in rare circumstances that an order can be delivered by hand. That even then, the transporter has to verify by signing and stamping the order. It is clear that the Respondent did not comply with the procedure when he prepared the loading permit without verification. The Respondent's excuse of being new in the department did not hold water because according to the testimony of DW2, orientation was conducted when staff were moved from one department to another.

Having prepared and signed the loading permit from a forged loading schedule, the Respondent was charged and he appeared before the disciplinary committee on 30th September, 2010. After the hearing, he was summarily dismissed and given the right to appeal within two days which he did. His appeal was rejected on 26th October, 2010 on account that he did not provide any grounds to substantiate the appeal other than state that he was innocent. The Respondent made a final appeal on 2nd November, 2010 which was also rejected. He was finally terminated on 30th December, 2010.

From the foregoing, we agree with Counsel for the Appellant that the Company followed disciplinary procedure in the Respondent's case. Further, although the disciplinary code was not on record, we are satisfied that Appellant's disciplinary body had valid powers to act, and that they exercised those powers validly while observing the rules of natural justice.

On the argument that the learned trial Judge erred when he found that the charge against the Appellant was not proved because of the absence of a video footage showing the loading of the copper, we are of the view that the evidence of the video footage did not go to the root of the matter. According to the evidence of DW1 (the police officer) the video footage would have captured the whole loading process, including the registration of the truck and the identity of the driver. This was confirmed by the Respondent who stated that the details of the truck and the identity of the driver are captured by close circuit cameras.

It is not in dispute that a truck load of copper was stolen on the strength of documents which were prepared by the Respondent. The documents were used to load the cargo on to the truck. The case brought against the Respondent was that he started the

process that led to the theft of copper cathodes by raising the loading permit using a forged order. Further that he failed to disclose where he got the fictitious order and that the people from whom he alleged to have gotten the order denied his assertion. The report of the disciplinary appeal hearing held on 26th October, 2010 appearing on page 122 of the record of appeal states:-

“The Chairman told the appellant that as much as he was new in the section he was the one found with a forged order. He said the forged order was actually the beginning of the process of the missing copper. He said that it was unfortunate that he failed to trace the origins of the forged order. As such, it was very difficult for management to believe that he was innocent.”

In addition, the investigation report submitted by Robby Mumba, Assistant Group Manager (Intelligence and Investigations) appearing at page 94 of the record of appeal found that:-

“After loading permit no. 28681 had been signed by all the signatories, three copies of the permit were given to security, without the forged loading schedule order number 314 being attached, and on the basis of this document the truck was allowed to proceed for loading in the plant...”

The events referred to in these excerpts could not have been captured on CCTV as the CCTV was only restricted to the loading area. It cannot, therefore, be seriously argued that the mere showing of the loading process, the registration numbers of the truck and the trailer, and the identity of the driver would erode

evidence gathered from the documents and case hearings which were outside the reach of the CCTV cameras.

From the foregoing, it is our considered view that the learned Judge misdirected himself when he premised his decision that the Respondent was wrongfully dismissed solely on the absence of the CCTV footage, as such footage would not have captured the preparation of the documents on the basis of which the truck was loaded. There was enough evidence from the documents on record to support the institution of disciplinary proceedings against the Respondent. Further, by insisting on the video footage, the trial Judge shifted the burden of proof of the case from the Respondent to the Appellant. It was incumbent upon the Respondent, as the Plaintiff in the Court below, to produce the video footage or compel the Appellant through an appropriate application, to produce the footage if he was of the view that it was critical to his case. There is nothing on record to show that any attempt was made to source the video footage.

We pronounced in the case of **CHIMANGA CHANGA V STEPHEN CHIPANGO NGOMBE⁶** 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.”

Thus, in an employer/employee relationship, the onus of proving that the employee was wrongfully terminated lies on the employee. The burden does not shift to the employer. This is aptly stated in the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED**⁸ where we said:-

“Where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as any other case where he makes an allegation, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent’s case.”

As we have stated above, the video footage in this case would not have been helpful to the Respondent’s case. Other than capturing the loading of the truck, its registration number and the face of the driver, it is not plausible that the close circuit cameras would have been able to detect the activities that led to the forgery and the preparation of the documents on the basis of which the loading permit was prepared.

Another aspect that the learned Counsel for the Appellant has raised is that the lower Court constituted itself as an appellate tribunal to the Appellant’s disciplinary body and usurped its powers

by demanding production of more evidence. We have stated earlier in this judgment that when dealing with cases of wrongful termination of employment, the role of the court is to determine whether the correct procedure was followed when dismissing the employee; whether the disciplinary committee had valid disciplinary powers and where the issue arises, whether there is a substratum of facts to support the institution of disciplinary proceedings. The Judge stated on page 17 of the record of appeal that **"...there is a very important issue raised that of the video footage. This evidence was not produced at the disciplinary hearings nor was it brought before this Court...This in my view cannot prove that the Plaintiff's charge was proved.** By insinuating that the disciplinary Committee needed to have had the video footage in order to prove the charges against the Respondent, the Court went beyond the principles that we have enunciated a plethora of cases including that of **THE ATTORNEY GENERAL V RICHARD JACKSON PHIRI**⁴, where we also held in that it was not the function of the Court to sit as an appellate tribunal for the disciplinary committee.

The Court below however, heavily relied on the case of **BANK OF ZAMBIA V JOSEPH KASONDE¹** to overturn the Respondent's summary dismissal. We stated that in the case of **KASONDE¹** that **"...important invoices were not produced in the disciplinary hearing or in the High Court. The allegation of dishonest conduct was not proven and the dismissal was therefore wrongful."** The decision in the case of **KASONDE¹** can be distinguished from the case in casu. In that case, the lower Court's findings that allegations of dishonesty levelled against the Plaintiff were not proved, were not challenged on appeal. We found that particulars and details of the offence to enable the Plaintiff to defend himself against the charges were not availed to him. We stated:-

"Even the charge of dishonest conduct lacks particulars and details to enable him to defend himself. It does not give the date(s) of the misconduct and what the misconduct was. It is alleged that investigations revealed that the Plaintiff fraudulently raised false invoices purporting to have paid for petrol for Bank of Zambia vehicles. What are those invoices? Details such as dates, invoice numbers and the amount involved are not given...it seems it was a fishing expedition by the defendant...the disciplinary code was not followed; it was a straight forward wrongful dismissal."


Thus, the whole charge of dishonesty against the Appellant in the case of **KASONDE¹** rested on the invoices. Clearly, there was no

substratum of facts to support the disciplinary charges and the disciplinary code was not followed. The same cannot be said about the Respondent in this case. The Respondent knew exactly what case he had to meet. The Appellant followed the disciplinary procedure in dismissing him from employment. The Court below was in a position to assess whether the Respondent was treated fairly and whether, on the whole, there was a substratum of facts to support the charges. By insisting that the CCTV footage ought to have been produced before the disciplinary hearing, the Judge strayed into the substantive issues before the disciplinary committee thus clothing the Court with appellate status.

Arising from what we have said above, the finding by the trial Judge, that the charge levelled against the Respondent was based **'on only one stage of the process'** due to lack of the video footage cannot be upheld. The shipping of the copper was done on the strength of a loading order which was supported by a forged document. The Respondent was implicated in the procurement of that order. By the time that the copper was being loaded, the offence had already been committed. The video footage, as we have stated above would not have changed anything. The learned

Judge's finding was therefore perverse and not supported by the evidence on record.

On the totality of the evidence on record, we find that there is merit in this appeal. It is allowed. We nullify and set aside the decision by the Court below that the Respondent was wrongfully dismissed. It follows that the award of 12 months' salary and allowances that the Respondent was awarded as compensation for loss of employment falls away. The Appellant shall have its costs both in this Court and in the Court below to be taxed in default of agreement.



I.C. Mambilima
CHIEF JUSTICE



M.S. Mwanamwambwa
DEPUTY CHIEF JUSTICE



N.K. Mutuna
SUPREME COURT JUDGE