

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPEAL NO. 039/2019

BETWEEN:

AGRIVISION ZAMBIA LIMITED

APPELLANT

AND

JOHN CHITINDI

RESPONDENT

CORAM: CHISANGA, JP, SICHINGA AND NGULUBE, JJA.
On 22nd January, 18th February and 26th February, 2020

For the Appellant: *Mr D. Tambulukani, Messrs Derrick Mulenga and Company.*

For the Respondent: *No appearance.*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Contract Haulage vs Mumbuwa Kamayoyo* (1982) Z.R.13
2. *Attorney-General vs Richard Jackson Phiri* (1988 - 1989) Z.R.121
3. *AEL Zambia Plc vs Swift Simwinwa*, Appeal Number 223 of 2015
4. *Zesco vs David Lubasi Muyambango*, SCZ Judgment Number 7 of 2006
5. *Attorney-General vs Marcus Kampumbu Achiume* (1983) Z.R.1
6. *National Breweries Limited vs Philip Mwenya* (2002) Z.R. 78
7. *Ward vs Bradford Corporation* (1971) 70 L.G.R27
8. *Chimanga Changa Limited vs Stephen Chipango Ngombe* (2010) Vol 1 Z.R. 208
9. *Aghora vs Cheeseborough Ponds Limited* (1976) Z.R.1
10. *Zambia National Provident Fund vs Chirwa* (1986) Z.R. 70
11. *Gerald Musonda Lumpa vs Maamba Collieries Limited* (1988-1989) Z.R.217
12. *Mulungushi Investments Limited vs Grandwell Majumba*, S.C.Z Appeal Number 141 of 1997
13. *Undi Phiri vs Bank of Zambia* (2007) Z.R. 186

INTRODUCTION

1. This appeal is against a Judgment of the Industrial Relations Division of the High Court, delivered by Musona, J, in which the court found that the respondent was dismissed on allegations which were not proved against him and went on to declare that the said dismissal was wrongful. The court awarded the respondent three months' salary as damages for wrongful dismissal.
2. In essence, this appeal calls for a discussion on whether the respondent's dismissal was wrongful.

BACKGROUND TO THE DISPUTE IN THIS APPEAL

3. The respondent was employed by the appellant in 2006 on a fixed term renewable contract and in 2016, he held the position of Arable Technical Services Manager. His last contract of employment was for two years, from August, 2014 to August, 2016. On 26th April, 2016, the respondent was dismissed from employment by the appellant on allegations that he was negligent, did not obey instructions and abused his power. Prior to his dismissal, the respondent was suspended from employment on 20th April, 2016 and

responded to the allegations that were made against him in a letter dated 21st April, 2016. He appeared before a disciplinary committee of the appellant on 26th April, 2016, which found him liable of the offences as charged.

4. The respondent appealed against his dismissal but this was unsuccessful. Aggrieved by the decision, he commenced proceedings against the appellant before the Industrial Relations Division of the High Court.

THE RESPONDENT'S CLAIMS AND THE APPELLANT'S ANSWER IN THE COURT BELOW

5. The respondent's claims were for:
 - a) An order that the termination of his contract of employment was unfair and wrongful;
 - b) Damages for wrongful and unfair termination of contract;
 - c) An order for the payment of overtime pay for the hours that the respondent worked in lieu of off duty days which were not compensated by payment of gratuity;
 - d) Payment of interest at the current bank lending rate; and
 - e) Costs.

6. The basis upon which the respondent made the claims was that his dismissal from employment was wrongful as the reasons for the termination of his employment were fabricated and created to victimize him. He averred that he was unfairly treated and that consequently, he lost his gratuity, suffered emotional loss and personal hardship.
7. The appellant denied the claims and contended that the respondent's dismissal was not wrongful as there was sufficient evidence that the respondent neglected his duty and disobeyed instructions when he contacted Abraham Mwansa during his suspension, while investigations were being carried out, contrary to the instructions that were given to him by the appellant.
8. The appellant further averred that there was sufficient evidence that the respondent abused his power when he interfered with investigations and detained Abraham Mwansa's relatives at his home against their will in relation to the alleged theft of fuel. The appellant averred that the respondent admitted and pleaded guilty to the charges that were levelled against him and asked for leniency from the appellant.

9. The appellant contended that it followed the laid down procedure and that the termination of the respondent's employment was fair and lawful as he was accorded a fair hearing and was dismissed after his appeal to the General Manager was unsuccessful.

EVIDENCE BEFORE THE INDUSTRIAL RELATIONS COURT

10. The respondent's evidence in the court below was that on 7th April, 2016, he assigned work to his subordinates and went to work in an area of the farm where wheat was being planted. He knocked off at 17:00 hours and went home. At 19:00 hours, the respondent received a phone call from Goodson Mundongu, a security officer contracted by the appellant, who informed him that security guards had apprehended Abraham Mwansa who was found stealing diesel. The respondent then drove to the scene and found Abraham Mwansa, a truck driver, handcuffed.
11. Goodson Mundongu, the said security officer then removed the handcuffs from the suspect and asked him to drive and park the truck at the designated place. However, when Abraham Mwansa approached the place where he was supposed to park, he stopped

the truck in the middle of the road, jumped out and ran away. He was apprehended later that night.

12. The respondent was interrogated on 20th April, 2016 and was suspended on allegations of theft of diesel. He was charged with the offences of negligence, disobedience and abuse of power. A disciplinary hearing that was held on 26th April, 2016 found him guilty and accordingly dismissed him from employment. The appeal that he lodged to the general manager was also dismissed.
13. The evidence of CW2, Moba Mulenga was that on 7th April, 2016, he was on duty in the night shift at the appellant's premises as a security guard in the employ of Cobra security. At 19:30 hours, trucks that ferried soya beans left the field but he noticed that one of the trucks went in another direction. He and other security guards trailed the truck and found the driver, Abraham Mwansa siphoning diesel from the truck into a twenty litre plastic container.
14. He was apprehended and handcuffed and the security officer was called. He arrived at the scene in the company of the respondent and he then removed the handcuffs from the suspect and asked him to drive the truck and park it in the parking area. Abraham Mwansa

drove the truck unaccompanied and on the way, he jumped out and ran away into the bush but was later apprehended.

15. The appellant called four witnesses. The evidence of RW1, Jack Ilunga the appellant's human resources manager was that on 20th April, 2016 at 07:00 hours, he received a report from a security supervisor that the respondent was implicated in a case of theft of diesel by Abraham Mwansa, a driver who the respondent supervised. Investigations were accordingly instituted and the respondent was subsequently suspended and cautioned not to meet or talk to Abraham Mwansa. RW1 testified that the respondent was charged and that after a disciplinary hearing was held, he was dismissed.
16. The evidence of RW2, Kennedy Kalunga Ngosa, the appellant's irrigation manager was that he accompanied the respondent to the disciplinary hearing at the respondent's request. He stated that the respondent exculpated himself and denied the charges but that later during the hearing, he admitted the charges that were levelled against him.
17. RW3, Christopher Mpondamali testified that on 6th April, 2016 at 21:00 hours, the respondent called him on phone and asked him to

meet him outside the house. He did so and the respondent told him that Abraham Mwansa, RW3's nephew had been apprehended for taking diesel but that he ran away. On 20th April, 2016, RW3 went to the respondent's house at his request and was asked to tell Abraham Mwansa not to reveal that the respondent sent him to steal diesel but that he should implicate one King instead, as he was not an employee of the appellant but was a mere contractor.

18. On 21st April, 2016, RW3 went to the respondent's house at his request at about 21:00 hours but did not find him home. On the way back, he met the respondent at the market and he complained that Abraham Mwansa had switched off his phone. The respondent requested that they go to RW3's house to look for Abraham Mwansa. On 22nd April, 2016 the respondent called RW3 on his wife's phone to ask if he had spoken to Abraham Mwansa but he denied doing so.
19. RW4, Abraham Mwansa's testimony was that on 6th April, 2016, the respondent told him that he wanted diesel. On 7th April, 2016, the respondent gave him two empty containers and told RW4 that he would find two men waiting by the roadside who he would give the two containers of diesel.

20. At 19:00 hours as RW4 drove from work, he saw two men at the road side who stopped him. He started siphoning fuel from the truck and in the process, three security guards from Cobra Security arrived at the scene and apprehended him. When the security officer arrived, RW4 was freed and instructed to drive the truck to the parking point. As he drove unaccompanied, he stopped on the way and ran away. He then called the respondent and informed him what happened and the respondent told him not to worry and that he would help him to find another job.
21. RW4 was later apprehended and he then confessed to the human resource manager RW1 about the theft of diesel in the presence of the Chief Security Manager. Later that day, the respondent called him to complain that the appellant had withdrawn the duty vehicle and the radio from him. The respondent also called him on 21st April, 2016 and told him that the case relating to the theft of diesel was still pending.

CONSIDERATION OF THE MATTER BY THE LOWER COURT

22. After considering the evidence of the parties, the learned trial court found that the issues that fell for determination were whether the

termination of the respondent's contract of employment was a result of unfair or wrongful dismissal. On the unfair dismissal, the court found that the respondent was given a hearing and that there was no irregularity in the manner that the hearing was held as there was no breach of the disciplinary procedure. The court accordingly dismissed the claim for unfair dismissal. Regarding the claim for wrongful dismissal, the court found that no contractual term in the contact of employment was breached.

23. The court went on to find that the allegations upon which the respondent was dismissed were not proved against him and that this amounted to wrongful dismissal. The court was of the view that there was no evidence that the respondent asked RW4 to steal diesel from the truck for the purposes of giving it to the respondent. The court referred to a confession that RW4 made at church in which he did not say that he was sent to steal diesel by the respondent. The court also found that no evidence was tendered to prove that the respondent met Abraham Mwansa's relatives or associates during the period of his suspension.

24. The court concluded that the respondent was dismissed on allegations that were not proved and declared the dismissal wrongful. It awarded the respondent three months' salary for wrongful termination of his contract of employment.

THE GROUNDS OF APPEAL TO THIS COURT

25. Dissatisfied with the lower court's decision, the appellant now appeals to this court on two grounds as follows-

1. The learned trial Judge in the court below erred both in law and in fact when he held that the allegations upon which the respondent was dismissed were not proved against the respondent and therefore the subsequent dismissal was wrongful, contrary to the respondent's admission to the charges and evidence before court.

2. The learned trial Judge in the court below erred both in law and in fact when he awarded the respondent three months' salary as damages for wrongful dismissal and costs, contrary to the evidence on record.

THE ARGUMENTS PRESENTED BY THE APPELLANT'S ADVOCATES

26. The appellant filed written heads of argument. In support of ground one, the learned counsel for the appellant submitted that the court erred in law and in fact when it dealt with the reason why the respondent was dismissed instead of looking at how the respondent was dismissed. The appellant's counsel further submitted that the appellant terminated the respondent's contract of employment in accordance with his conditions of employment and that contrary to the findings of the court, there was evidence on record to show that the disciplinary charges levelled against the respondent were admitted by the respondent before the disciplinary panel and that they were proved by way of "admission or acceptance of charges".
27. Counsel submitted that because the respondent admitted the charges against him and pleaded for leniency, there was no need for the disciplinary panel to proceed by calling evidence to prove the allegations which were established during the fact finding investigations and the report was presented to the disciplinary committee.

28. Counsel submitted that when considering whether a dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined and that the question is not why but how the dismissal was effected. Counsel relied on the case of **Contract Haulage vs Mumbuwa Kamayoyo**¹ in which the court held that –

“In a pure master and servant relationship, there cannot be specific performance of contract of service and the master can terminate the contract with his servant at any time and for any reason or for none; if he does so in a manner not warranted by the contract he must pay damages for breach of contract.”

29. It was counsel’s contention that wrongful dismissal looks at the terms of the contract and tries to ascertain whether or not they have been followed when a person is dismissed. He submitted that the court below misdirected itself when it focused on why the respondent was dismissed, that the allegations upon which he was dismissed were not proved against him when the respondent admitted to the

allegations during the disciplinary hearing as opposed to looking at the mode in which the termination was effected.

30. Counsel referred to the case of **Attorney General vs Richard Jackson Phiri**² where the Supreme Court stated that-

“.....we agree 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 facts established to support the disciplinary measures since it is obvious that any exercise of power will be regarded as bad if there is no substratum of facts to support the same. Quite clearly, if there is no evidence to sustain charges levelled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedure.”

31. Counsel relied on the case of **AEL Zambia Plc vs Swift Simwinwa**³, in which the Supreme Court stated that-

“It is clear from the Richard Jackson Phiri case that there are two elements that must be proved before a disciplinary committee decision can be considered to have been validly made. These are (1) whether the disciplinary panel had valid disciplinary powers and (2) whether the powers were validly exercised.”

32. According to counsel, the question for determination is whether there was evidence on record to sustain charges levelled against the respondent in disciplinary proceedings. Counsel submitted that the respondent was formally charged with three offences, these being negligence of duty, contrary to Clause 5.4, abuse of power, contrary to Clause 5.24 and disobedience, contrary to Clause 5.9 of the Disciplinary Code.
33. Regarding the charge of negligence of duty, it was submitted that the respondent let Mr. Mundongo who was a contractor take charge when Abraham was apprehended and made the decision to remove the handcuffs from the suspect who was allowed to drive the truck that he was found siphoning fuel from. On the way, the suspect escaped.

34. Counsel submitted that the respondent was negligent as he failed to secure the company property at the scene of crime and allowed Mr. Mundongo to take charge of the situation. It was contended that the court's finding that the allegations upon which the respondent was dismissed were not proved was erroneous.
35. Regarding the charge of disobedience of instructions, which was that the respondent disobeyed instructions and made several attempts to contact Abraham by phone and also contacted Abraham's relatives, Counsel submitted that there was sufficient evidence during the disciplinary proceedings to sustain the allegations that the respondent had disobeyed the instructions not to contact Abraham during the period of his suspension. Accordingly, Counsel submitted that the holding by the court that the allegations against the respondent were not proved was erroneous.
36. On the charge of abuse of power, the particulars were that the respondent summoned and took Abraham Mwansa's relatives to his house, which fact was established during the fact finding investigations before the disciplinary hearing. Counsel submitted that the disciplinary committee had sufficient evidence on the charge

of abuse of power by the respondent, contrary to the lower court's finding that the facts upon which the respondent was dismissed were not established.

37. Counsel submitted that the respondent admitted the charge of negligence on duty and further admitted the charges of disobedience of instructions and abuse of power. It was argued that the record of appeal indicates that the respondent admitted all the charges and asked for forgiveness from management through the committee so that he could return to work. It was contended that the finding by the lower court that the allegations upon which the respondent was dismissed were not proved against him was perverse and made in the absence of consideration of the relevant evidence that was before the court and also due to a misapprehension of the facts. We were referred to the case of **Attorney - General vs Marcus Kampumbu Achiume⁴** and were urged to reverse the erroneous findings of fact by the lower court.

38. We were referred to the case of **Zesco vs David Lubasi Muyambango⁵**, in which the Supreme Court held that-

“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 duty of the court is to examine if there was the necessary disciplinary power and if it was exercised properly.”

39. Counsel submitted that the court interposed itself as an appellate tribunal which was beyond its mandate. We were also referred to the case of **National Breweries Limited vs Philip Mwenya**⁶ where the Supreme Court cited with approval the statement by Lord Denning in the case of **Ward vs Bradford Corporation**⁷ when he said-

“we must not force disciplinary bodies to become intrumented in nets of legal procedure. So long as they act fairly and justly, their decisions should be supported.”

40. It was contended that the learned trial Judge in the court below erred when he reviewed the proceedings of the disciplinary hearing and substituted their views with his own on what was sufficient evidence

to sustain the allegations against the respondent during the hearing.

We were referred to the case of **Chimanga Changa Limited vs Stephen Chipango Ngombe**⁸ where the court held that–

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

41. Counsel submitted that the respondent’s admissions of guilt and the evidence on record were sufficient to uphold the dismissal. We were referred to the case of **Aghora vs Cheeseborough Ponds Limited**⁹ and counsel emphasized that provided misconduct is proved against an employee, even though the manner the dismissal was done is found to be unfair, the employee has no remedy at law as the law imputes no injustice in such circumstances.

42. Counsel referred to the case of **Zambia National Provident Fund vs Chirwa**¹⁰, where the court stated that–

“where an employee has committed an offence for which he can be dismissed, no injustice arises for

failure to comply with the procedure 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.”

43. It was submitted that there was overwhelming evidence from the investigations undertaken that the respondent was negligent and disobeyed instructions by contacting Abraham Mwansa and abused his powers by summoning Abraham Mwansa’s relatives to his house. As such, the disciplinary committee was justified in reaching the decision to dismiss the respondent on the evidence before it. We were urged to uphold ground one of the appeal and reverse the lower court’s findings of fact which were arrived at erroneously.

44. On ground two, Counsel submitted that there is a difference between termination of a contract of employment and dismissal. We were referred to the case of **Gerald Musonda Lumpa vs Maamba Collieries Limited**¹¹ in this regard, where the court stated that-

“we would also disagree with the appellant’s argument that there is no difference between dismissal and termination of service and that in any

event an employee who is dismissed after disciplinary action will receive one months' salary regardless of his culpability.”

45. According to Counsel the respondent's dismissal was not wrongful and that he is therefore not entitled to damages for wrongful dismissal. The said dismissal was occasioned by his own misconduct and having been found guilty of the charges levelled against him, he forfeited the right to any notice and to a number of other benefits, including the right to be awarded damages for wrongful dismissal and costs. We were urged to overturn the lower court's finding that the respondent's dismissal was wrongful. Counsel prayed that the appeal be allowed with costs.
46. The respondent did not file arguments in response to the appellants grounds of appeal and heads of argument. On 22nd January, 2020, the matter was adjourned to 18th February, 2020 to allow the respondent file his response, but he still did not do so.
47. The court decided to proceed to hear the appeal because the respondent was served with the grounds of appeal and heads of

argument in March, 2019 but did not file any arguments up to the time when the matter was scheduled for hearing.

CONSIDERATION OF THE MATTER BY THIS COURT AND DECISION.

48. We have considered the evidence on record, heads of argument, submissions by counsel and the case law to which we were referred. Ground one attacks the lower court's finding that the allegations upon which the respondent was dismissed were not proved and that his subsequent dismissal was wrongful. From the evidence on record, it is not in dispute that the respondent was charged with three offences, these being negligence of duty, abuse of power and disobedience, contrary to clause 5.4, 5.24 and 5.9 of the Disciplinary code.
49. There is also evidence on record that at the disciplinary hearing, the respondent admitted the charges that were levelled against him and pleaded for leniency. The trial court found that the respondent was given a hearing and that there was no breach of the disciplinary procedure. The court accordingly dismissed the claim for unfair dismissal, but went on to find that the allegations upon which the

respondent was dismissed were not proved against him and that this amounted to wrongful dismissal.

50. After correctly making the findings from the evidence and determining that the appellant had followed its disciplinary process when it charged the respondent and giving him a fair hearing, the trial court misdirected itself when it went on to find that the charges that were levelled against the respondent were not proved, and that he was wrongfully dismissed.
51. In the case of **Attorney-General vs Richard Jackson Phiri (supra)**, the Supreme Court held 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 it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same.”

52. It is not in dispute that in *casu*, the respondent as arable technical services manager was called upon to account for three offences, namely negligence of duty, abuse of power and disobedience as per the appellant's disciplinary code. At the hearing of the disciplinary committee, the respondent admitted the charges of negligence on duty, abuse of power and disobedience. He went on to ask for forgiveness. The appellant however rejected the respondent's plea for forgiveness and he was dismissed.
53. Granted these circumstances, the court misdirected itself when it found that the allegations upon which the respondent was dismissed were not proved and that this amounted to wrongful dismissal. The substratum of facts, in our view supported the decision reached by the appellant to dismiss the respondent for offences whose penalty was dismissal.
54. The Supreme Court has stated this position in a plethora of cases, such as **Mulungushi Investments Limited vs Grandwell Majumba¹²**, **National Breweries Limited vs Philip Mwenya (supra)** and **Undi Phiri vs Bank of Zambia¹³**, among others. As was stated in the Chirwa case, when it is established that an employee has

committed an offence for which the appropriate punishment is dismissal, there is no injustice that will arise from a failure by the employer to comply with the disciplinary procedure laid down in the contract and such employee has no claim on that ground for wrongful dismissal. For those reasons, we find merit in ground one of the appeal and we uphold it.


55. Regarding ground two, having found that the respondent did not suffer any wrongful dismissal, the lower court misdirected itself when it awarded the respondent three months' salary as damages for wrongful dismissal and costs. We allow ground two of the appeal.
56. Both grounds of appeal having succeeded, we accordingly allow the appeal. We make no order for costs.



F. M. CHISANGA
JUDGE PRESIDENT - COURT OF APPEAL



D.L.Y. SICHINGA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE