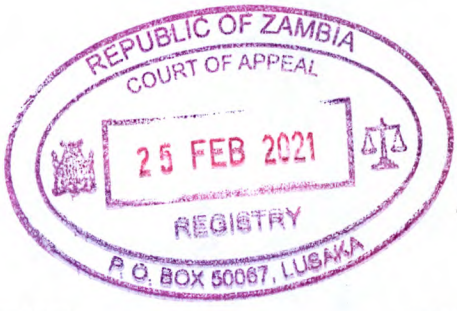
IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 185/2019
HOLDEN AT NDOLA

(Civil Jurisdiction)



B E T W E E N:

NEPHAT CHIMBWE **APPELLANT**

AND

CONSERVATION FARMING UNIT **RESPONDENT**

CORAM: Kondolo, Makungu and Majula, JJA
On 19th February 2021 and 25th February 2021

For the Appellant : *Mrs. I. E. Suba of Suba Tafeni & Associates*

For the Respondent : *Ms. S. Siansumo of Malambo and Company*

J U D G M E N T

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Zambia Airways Corporation Limited vs Greshom B. Mubanga (1990 – 1992) ZR 152*
2. *Attorney-General vs Achiume (1983) ZR 1*
3. *Zambia National Provident Fund vs Yekweniya Mboniwa Chirwa (1986) ZR 70*
4. *Buchman vs The Attorney-General (1993-1994) ZR 131*
5. *Undi Phiri vs Bank of Zambia (2007) ZR 186*

6. *Robson Sikombe vs Access Bank Zambia Limited (SCZ Appeal No. 240/2013)*
7. *Ngorima & Another vs Zambia Consolidated Copper Mines Limited and Another (SCZ Appeal No. 121/2014)*
8. *Communications Authority vs Vodacom Zambia Limited (2009) ZR 196*
9. *Chilanga Cement Plc vs Venus Kapito (SJ No. 61 of 2017)*
10 *Collet Vs. Van Zyl Brothers Limited (1966) ZR 75*
11 *Scherer vs. Counting Investments Limited (1986) 1 WLR 615*
12 *Matale James Kabwe vs Mulungushi Limited (SCZ Appeal No. 90/1996)*

1. INTRODUCTION

1.1 The appellant has approached us for the purpose of challenging the entire judgment of the High Court (delivered by Wanjelani J) dated 1st October 2018 in which the court dismissed all the appellant's claims after a determination that he was not wrongfully dismissed from employment by the respondent.

2. BACKGROUND

2.1 The appellant's case in the court below was that in the year 2000, he was employed by the respondent as a field technician. Over the years, he rose through the ranks to the position of District Supervisor, the position he held until termination of his employment.

2.2 Sometime in March 2015, the appellant's supervisor, Yvonne Nakachinda, summoned him to attend a meeting in Lusaka which he later discovered was a disciplinary hearing. At the

meeting, he was quizzed about whether he had obtained authority before drawing fuel from the respondent into his private vehicle.

2.3 On 19th March 2015, the appellant received a letter from the respondent terminating his employment by way of summary dismissal. Aggrieved by the dismissal, the appellant issued a writ of summons against the respondent alleging wrongful dismissal. Further, the appellant sought the High Court to order the respondent to pay him gratuity and accrued leave days in accordance with the terms of his contract of employment. He also claimed for damages for inconvenience and emotional stress plus interest and costs.

2.4 The appellant's claim was vehemently opposed by the respondent witnesses who instead claimed that the appellant was called upon to exculpate himself from his conduct of irregularly withdrawing the respondent's fuel for his personal use. The allegations were made to him at the disciplinary hearing which was chaired by the Regional Manager, Ms. Yvonne Nakachinda. He was thereafter accorded 48 hours within which to respond to the allegations, which he failed to do.

2.5 It was the respondent's case that after the disciplinary hearing, the appellant admitted to having withdrawn fuel for private purposes but failed to show proof of authority from the Director of Finance and Administration. This is what led to

his summary dismissal as it was an offence under the respondent's Human Resource Administration Policy Manual.

3. THE DECISION OF THE TRIAL COURT

3.1 The lower court having heard both sides, framed the issues for determination as being whether the appellant had committed an offence warranting dismissal and whether there was substantial evidence to prove the offence.

3.2 The learned judge found, based on the evidence on record that, although the disciplinary procedure was not followed to the letter, the appellant committed an offence whose prescribed punishment is dismissal. In that regard, the learned Judge declared the appellant's dismissal as not being wrongful.

3.3 In relation to the claim for payment of accrued leave days and gratuity, the learned Judge found that the appellant had only served three months from his three-year contract which entailed that he had accrued six days equivalent to K916.00. This amount was used to offset the sum of K5,000.00 which the appellant owed the respondent. His claim for payment of leave days was thus dismissed.

3.4 The prayer for gratuity was rejected on the basis that clause 5 of the appellant's contract of employment only provided for a person to receive gratuity upon successful completion of the contract. In a nutshell, the lower court held that since his

contract was terminated *via* a summary dismissal, he was consequently not entitled to be granted gratuity.

3.5 With regard to the claim for compensation under the Workers Compensation Act for injuries sustained whilst on duty, the lower court was of the view that this claim could not be entertained on account of the facts that, firstly, it was not pleaded and secondly it was statute-barred. The accident occurred in 2008 but the appellant only commenced the present action in 2015.

3.6 The long and short of the court's decision was that the appellant's action was destitute of merit. It was accordingly dismissed in its entirety.

4. GROUNDS OF APPEAL

4.1 The appellant was displeased with the decision of the High Court and has fronted the following grounds of appeal:

"1. The Honourable court below erred in law and fact when it held that a disciplinary hearing was held prior to the appellant's dismissal.

2. The Honourable court below erred in law and fact when it held that the appellant was heard.

3.A The Honourable court below erred in law and fact when it held that the appellant did draw fuel for his personal motor

vehicle on more than one occasion but that there was no evidence to show that he was authorized to do so.

3.B The Honourable court below erred in law and fact when it held that the appellant should reimburse the total amount of fuel that he put in his personal motor vehicle registration No. ABX 7262 without the respondent's authorization which amounted to K1,148.00

4.A The Honourable court below erred in law and fact when it held that the appellant's dismissal was not wrongful.

4.B The Honourable court erred in law and fact by failing to award the appellant damages for wrongful dismissal.

5. The Honourable court below erred in law and fact when it held that the appellant was not entitled to payment of gratuity.

6. The Honourable court below erred in law and fact by holding that the respondent did pay the appellant for his injuries and or by failing to appreciate that such compensation if received was according to his conditions of service inadequate.

7. The Honourable court below erred in law and fact when it did not award costs to the appellant."

5. APPELLANT'S ARGUMENTS

5.1 In relation to grounds one and two, the appellant's counsel submitted that the lower court misdirected itself when it held

that a disciplinary hearing was held and that the appellant was heard. That this is on account of the fact that firstly the disciplinary procedure was not followed.

5.2 Secondly, the appellant's supervisor who authorized the appellant to draw fuel was the one chairing the meeting. It was alleged that an interested party therefore chaired the meeting.

5.3 The third reason proffered was that the appellant was never charged with any offence but was merely asked if he had gotten authority to withdraw fuel. Counsel argued that this meant that he was not given an opportunity to exculpate himself. We were referred to the case of ***Zambia Airways Corporation Limited vs Greshom B. Mubanga***[1] as authority for this submission.

5.4 The appellant further fervidly disagreed with the lower court's finding of fact that the appellant was given 48 hours to exculpate himself. That this was in view of the fact that (DW2) Collins Nkatiko's evidence should not have been relied upon as it was illogical, since the appellant was not charged. The appellant's counsel accordingly rehashed the point that the lower court's finding of fact was perverse and made in the absence of evidence making it liable to be set aside. He relied in this connection on the case of ***Attorney-General vs Achiume***[2] as authority for his proposition.

5.5 Turning to ground three, the appellant stoutly criticized the lower court for finding that the appellant drew fuel for his personal vehicle on more than one occasion. He argued that the reliance on the pleadings by the trial Judge was a misdirection as there was no other independent evidence adduced. We were thus called upon to overturn this finding of fact in line with the case of ***Attorney General vs Achiume.***[2]

5.6 The thrust of the arguments in relation to grounds four and five was that in view of the fact that the disciplinary procedure was not followed, the lower court should have found that there was wrongful dismissal which should have entitled the appellant to an award of damages. To buttress this argument, counsel called in aid the case of ***Zambia National Provident Fund vs Yekweniya Mboniwa Chirwa***[3] where the court held that a breach of contract could give rise to a claim for damages for wrongful dismissal.

5.7 In relation to ground seven, the submission was that the appellant ought to have been granted costs on the premise that he was wrongfully dismissed by the respondent. We were implored to allow the appeal with costs to the appellant.

6. RESPONDENT'S ARGUMENTS

6.1 In opposing grounds one and two, learned counsel for the respondent pointed out that on 16th March, 2015 the appellant attended a disciplinary hearing where he was questioned

regarding the unusual drawing of the respondent's fuel. He was subsequently given an opportunity to respond. He admitted drawing the respondent's fuel into his personal vehicle and stated that he was given verbal permission by his supervisor, Yvonne Nakachinda. It was contended that this was contrary to the respondent's policies which provided that only the Director of Finance and Administration could authorize drawing of fuel into a private vehicle under special circumstances. Counsel submitted that it was therefore erroneous for the appellant to conclude that he was never given an opportunity to exculpate himself.

6.2 Regarding the issue of whether or not Yvonne Nakachinda had an interest to serve or was conflicted when she chaired the disciplinary hearing, counsel forcefully argued that this issue was never raised in the court below, hence it cannot be raised on appeal. For this proposition reliance was placed on the case of ***Buchman vs The Attorney-General[4].***

6.3 Counsel further submitted that the lower court was perfectly entitled to make a finding of fact that the appellant was given 48 hours by the disciplinary panel within which to exculpate himself from the allegations of drawing fuel into his personal vehicle. That this finding was supported by the evidence of Collins Nkatiko. We were accordingly urged not to reverse the finding of fact.

6.4 Regarding the assertion that the appellant only drew fuel once, counsel submitted that in December 2014, the appellant admitted to having drawn 30 liters of fuel which he put into his personal vehicle. This evidence is on page 194 of the record.

6.5 Further on 1st February, 2015, the appellant withdrew fuel worth K228.00 which he put into his personal vehicle. It was contended that the finding, therefore, that the appellant drew fuel more than once was supported by the evidence on record.

6.6 Additionally counsel pointed out that in March 2015, the respondent deducted K228.00 from the appellant's salary in order to recover what the appellant unlawfully obtained. Thus the respondent is entitled to recover money equivalent to 30 liters of fuel that the appellant subsequently withdrew without authority.

6.7 Responding to the submission that the appellant's dismissal was wrongful, on account of failure to follow disciplinary procedure, counsel called in aid the cases of ***Zambia National Provident Fund vs Yekweniya Mboniwa Chirwa***[3] ***Undi Phiri vs Bank of Zambia***[5] ***and Robson Sikombe vs Access Bank Zambia Limited.***[6] The principle articulated in these cases is that where an employee commits an offence whose punishment is dismissal, no injustice results from a failure to adhere to the disciplinary procedure laid down in a contract.

6.8 Counsel argued that in the present case the appellant admitted to having committed an offence whose punishment was dismissal. Thus, his dismissal was justified.

6.9 It is on the basis of this point that his appeal concerning gratuity and damages cannot be allowed. As authority for this proposition we were referred to clause 5 of the appellant's contract of employment wherein it is stated that an employee forfeits his gratuity if his contract is not completed successfully as a result of resignation or termination.

6.10 The thrust of the submissions in respect of ground seven was that the appellant having failed in his claims could not have been awarded costs.

7. HEARING OF THE APPEAL AND ARGUMENTS CANVASSED

7.1 At the hearing of the appeal, learned counsel for both parties indicated that they would rely entirely on the heads of argument filed on behalf of their respective client's case.

8. CONSIDERATION AND DECISION OF THE COURT

8.1 Disciplinary hearing

8.1.1 In the first and second grounds of appeal which in our view should just be one ground, the grievance emanates from the disciplinary hearing which the trial court found was held. The appellant has gone to great lengths to explain why he considers this finding to be flawed. Three

reasons have been advanced, firstly that an interested party was chairing the meeting. Secondly, that he was never charged with any offence, and thirdly the failure to charge him means that he was not given an opportunity to exculpate himself.

8.1.2 The arguments on these three aspects appear to be combined. In relation to not being charged and therefore not being heard, a perusal of the record reveals that on 16th March 2015, the appellant was called to attend a meeting chaired by Yvonne Nakachinda, and attended by the Logistics Manager and Accountant, Juma. It was at this meeting that the appellant was asked to exculpate himself regarding the unusual withdrawals of fuel. It was on the basis of this evidence which fell out of the horse's mouth that the Judge based his finding that a disciplinary hearing was held. This was subsequently followed by a dismissal letter dated 19th March, 2015.

8.1.3 The appellant did not dispute that he withdrew fuel for personal use. His only defence in the hearing was that he got permission from Yvonne who was at the time chairing the meeting.

8.1.4 The court below cannot be faulted for relying on the evidence on record in arriving at the finding that a disciplinary hearing was held. This is against the backdrop that he was questioned by a panel of three

management officials regarding the drawing of fuel and he was given an opportunity to explain himself which he did. A hearing denotes outlining the allegations being leveled against you and being given an opportunity to respond.

8.2 Interested/Conflicted party chairing

8.2.1 In ground two, another issue the appellant is moaning about regarding the disciplinary procedure is that his supervisor who authorized him to draw fuel was the one chairing the meeting and that this automatically negates the notion that he was heard.

8.2.2 In support of this argument, our attention has been drawn to the case of ***Zambia Airways Corporation Limited vs Gershom B. Mubanga***[1] where the Supreme Court held as follows:

> *"Having considered the arguments put before us and considered all the evidence before this court and the court below, we are satisfied that the learned trial Judge correctly found that the appellant failed to comply with the correct procedure in the purported dismissal of the respondent. Despite Mr. Kinariwala's argument, it cannot be accepted that the correct procedure was followed in substance and in spirit. We find that the learned trial Judge did not*

misdirect himself in this respect at all nor was he wrong in finding that the inclusion of two interested parties in the disciplinary committee showed that the principles of natural justice were not followed." *(Emphasis ours).*

8.2.3 The respondent on the other hand has contended that this particular issue on whether or not any of the parties on the panel conducting the hearing had an interest to serve or was conflicted to act as a chairperson was never raised in the court below and therefore could not at this stage be raised, bearing in mind the case of ***Buchman vs The Attorney-General***[4]. That as a consequence the case of ***Zambia Airways Corporation Limited vs Gershom B. Mubanga***[1] sought to be relied upon is inapplicable.

8.2.4 Our quick response after studying the record is that indeed as counsel has stated this aspect was never raised in the court below. On multiple occasions, the Supreme Court has chided legal practitioners as well as litigants to desist from raising matters which were not raised in the lower court. A case in point is the aforecited case of ***Buchman vs The Attorney-General***[4] where it was observed as follows:

"Matters not raised in the lower court cannot be raised in a higher court as a ground of appeal."

8.2.5 In 2014, this position was reaffirmed in ***Ngorima & Another vs Zambia Consolidated Copper Mines Limited and Another***[7].

8.2.6 All said and done, we decline the invitation to entertain this ground as it was not raised in the court below, taking heed of the foregoing authorities. The case of ***Zambia Airways Corporation***[1] that has been adverted to is immaterial to the case at hand.

8.3 Drawing fuel for personal use without authorization

8.3.1 In ground three, the trial Judge is being condemned for holding that the appellant drew fuel for his motor vehicle on more than one occasion without authorization in the absence of evidence to support this finding. An examination of the record reveals that the appellant did expressly admit that he drew 30 liters of the respondent's fuel for personal use in December, 2014. Further on 1st February, 2015 fuel worth K228.00 was pumped into his personal vehicle.

8.3.2 The question that begs an answer is was he authorised to draw fuel for his personal vehicle? The answer is to be found in the respondent's transport policy, specifically **Clause 7.0** which for ease of reference we shall reproduce hereunder:

"7.0. The use of private vehicles for official business is not encouraged. However, in the exceptional circumstances that a CFU vehicle may not be available and with prior approval of the Director of Finance and Administration, the following rules shall apply.' (underlining ours for emphasis).

8.3.3 It is crystal clear from the foregoing provision that there was a requirement that prior approval of the Director of Finance and Administration must be sought before a personal vehicle can be used for official business.

8.3.4 We have combed the record and have seen no such authorization by the Director of Finance and Administration. So on what basis would the trial court have found otherwise, in the absence of authorization to support the contention that the drawing of fuel was done with the respondent's authorization?

8.3.5 The court below was therefore on *terra firma* when it found that the appellant drew fuel without authorization, as this was based on the available evidence deployed before it. As has been stated in a plethora of authorities an appellate court can only reverse findings of fact made by a lower court if it is satisfied that the findings of fact were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which on a proper view of

evidence no trial court acting correctly can reasonably make. The cases of ***The Attorney-General vs Achiume***[2] and ***Communications Authority of Zambia vs Vodacom Zambia Limited***[8] are among a chain of authorities that articulate this position.

8.3.6 In light of what we have stated in the preceding paragraphs, we find ground three to be devoid of merit and dismiss it accordingly.

8.4 Dismissal not wrongful

8.4.1 In the fourth and fifth grounds of appeal, the appellant is disappointed with the fact that his dismissal was held not to be wrongful. The second limb which is tied to this finding is the frustration with the failure by the trial court to award gratuity and damages for wrongful dismissal. Having analysed the evidence and arguments by both parties on these two grounds, our view is that grounds four and five are anchored on the success or otherwise of grounds one, two and three.

8.4.2 It has been strongly contended that the appellant's dismissal was not wrongful because the disciplinary procedure was not adhered to. According to him, there was no evidence that he had committed an offence and he was neither charged nor given an opportunity to exculpate himself.

8.4.3 Regarding the disciplinary process which we discussed earlier in this judgment, perhaps what bears repeating is that it remains an uncontroverted fact that the appellant attended a disciplinary hearing on 16th March, 2015. This was pertaining to the misdeed of drawing of fuel without authorisation. At the hearing, the appellant was unable to produce any evidence of authorization. His defence during the hearing was that he had obtained verbal authorization in 2014 from Yvonne Nakachinda who was not the Director of Finance and Administration. Suffice to state that the transgression had been established by the disciplinary committee.

8.4.4 The law in our jurisdiction was spelt out in 1986 in the celebrated case of ***Zambia National Provident Fund vs Yekweniya Mboniwa Chirwa***[3] where the apex court stated thus:

> *"Where the procedural requirements before disciplinary action are not statutory but merely form part of the conditions of service in the contract between the parties, a failure to follow such procedure would be a breach of contract and could possibly give rise to a claim for damages for wrongful dismissal but could not make such dismissal null and void."*

8.4.5 The Supreme Court maintained this position of the law in ***Undi Phiri vs Bank of Zambia***[5] in 2007. Further in ***Robson Sikombe vs Access Bank***[6], the Supreme Court did not prevaricate from the stance it took in the ***Zambia National Provident Fund vs Chirwa***[3] case. It went a step further by guiding that:

> *"We must, however, stress that the position that we have taken with regard to an employer's failure to follow procedural imperatives, is predicated on the commission by the employee of a dismissible offence or a transgression which the employee admits or is otherwise established by unimpeachable evidence. Where an employee has not committed any identifiable dismissible wrong, or such wrong cannot be established, the employer shall not be allowed to find comfort in the principle expounded in the* ***Zambia National Provident Fund vs Chirwa***[3] ***case.***" (emphasis ours).

8.4.6 There have been a multitude of cases espousing the principle that an employer has a legal right to summarily dismiss an employee if he has committed a dismissible offence. It is pertinent to note that the appellant did admit the misconduct. It is irrelevant that there was a deduction from his salary by the respondent. The standard of proof is not that of a criminal trial of proof

beyond reasonable doubt but the employer must act reasonably when coming to a decision. We are fortified in this regard by ***Chilanga Cement Plc vs Venus Kasito[9].***

8.4.7 Reverting to the facts of this case, we ask ourselves, was there sufficient substratum of facts to justify the dismissal? The drawing of fuel it has already been established was without authorization. That being the case it follows that the employee had committed an offence. The next issue to be determined is whether this offence was so serious as to warrant the punishment of dismissal.

8.4.8 A scrutiny of the Human Resources Administration Policy Manual under the schedule of offences and penalties clause 6, offence listed as 32, "deliberate misuse of CFU funds, assets, manpower for personal use attracts the penalty of summary dismissal".

8.4.9 What this means, therefore, is that the offence the appellant was charged with was a dismissible one. In this instance the appellant is placing great store on what he considers failure by the respondent to follow laid down procedures cannot hold water on account of the holdings in ***ZNPF, Undi Phiri, Robson Sikombe*** which we have alluded to. It follows, therefore, that no claim on a ground for wrongful dismissal can be sustained.

8.4.11 The ground advanced therefore that the appellant's dismissal ought to have been found to be wrongful has no legal leg to stand on and suffers the fate of dismissal. It follows therefore that damages for wrongful dismissal cannot be awarded having failed to establish the same.

8.5 Payment of gratuity

8.5.1 The appellant has attacked the court below for not awarding him gratuity. The question of gratuity is tied or linked to the finding of whether or not the appellant was wrongfully dismissed. The simple reason is this; the employment relationship between the appellant and the respondent is governed by a contract of service. In the said contract of service, specifically **Clause 5** on gratuity it provides so far as is relevant, as follows:

> *"Subject to satisfactory completion of his/her contract and to the provisions set out in sections 2 and 12 hereinafter, the employee shall be entitled to the equivalent of 25% of his/her basic annual salary as a gratuity payment payable within 30 days of completion of the contract. However, the employee shall forfeit all of his/her gratuity if his/her contract is not completed due to resignation or termination."* (emphasis ours).

8.5.2 It is critical to note from the foregoing clause that gratuity is payable subject to satisfactory completion of one's contract. If however, one fails to do so either due to

resignation or termination, he forfeits his gratuity. The appellant's contract came to an end by summary dismissed. It only behoves us to state that he is caught up in the provision of his employment contract, particularly clause 5. This ground is therefore found to be destitute of merit and must fail.

8.6 Compensation For Injuries

8.6.1 In the sixth ground of appeal, the appellant has taken great exception to the holding by the trial court that the respondent paid him for his injuries. No arguments were advanced in support of this ground and we concluded it was abandoned. It is accordingly dismissed.

8.7 Costs

8.7.1 The long and short of the appellant's argument in relation to ground seven is that he should have been awarded costs as he was wrongfully dismissed and his claims were erroneously dismissed in the court below.

8.7.2 As correctly pointed out by counsel for the respondent, costs follow the event. We ought to add that the **costs are within the discretion of the court.** There are a number of authorities on this principle for example in ***Collet Vs. Van Zyl Brothers Limited,***[10] the Court of Appeal held:

"The award of costs in an action is at the discretion of a trial judge, such discretion to be exercised judicially".

"A trial judge, in exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what was the substantial result. Where he does not do so, the Court of Appeal is entitled to review the exercise of his discretion".

8.7.3 The principles governing the award of costs were considered further by Dudley LJ, in the case of ***Scherer vs. Counting Investments Limited[11]:***

"The normal rule is that costs follow the event. The party who seems to have unjustifiably brought another party before the court or given another party cause to obtain his rights, is required to recompense that other party in costs, but; the Judge has unlimited discretion to make what order as to costs he considers that the justice of the case requires. Consequently, a successful party has a reasonable expectation of obtaining an order to be paid the costs by the opposing party but has no right to such an order for it depends upon the exercise of the court's discretion".

8.7.4 The above holding was adopted by the Supreme Court in the case of ***Matale James Kabwe vs Mulungushi Limited.[12]***

8.7.5 In the case before us, the Judge ultimately concluded that the appellant had failed to prove his claims on a

balance of probabilities and dismissed them in their entirety. It is, therefore, quite puzzling that the appellant expected the trial Judge to award him costs. This most definitely would have been in contradiction of the principle relied upon of costs following the event. Having been unsuccessful, one wonders how the Judge could have awarded costs. She used her discretion judiciously by ordering each party to bear its costs. She cannot be faulted in this regard.

9 CONCLUSION

9.1 All in all we hold that all the seven grounds of appeal lack merit and we dismiss them accordingly.

9.2 We order that the parties bear their own costs in the court below and in this court.

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M.M. Kondolo
COURT OF APPEAL JUDGE

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C.K. Makungu
COURT OF APPEAL JUDGE

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B.M. Majula
COURT OF APPEAL JUDGE