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

APPEAL N^o 148/2020

BETWEEN:

AFRICAN BANKING CORPORATON

APPELLANT

AND

BERNARD FUNGAMWANGO

RESPONDENT



CORAM: **Chashi, Makungu and Lengalenga, JJA**
On 26th August, 2020 and 2nd September, 2020.

For the Appellant: Mr. C. Hamwela – Messrs Nchito & Nchito

For the Respondent: Mr. M. Nzonzo – Messrs S L M Legal Practitioners

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court

Cases referred to:

- 1. CARE INTERNATIONAL ZAMBIA LTD v MISHECK TEMBO – SCZ APPEAL N^o 56 OF 2018**
- 2. KAMBATIKA v ZESCO LTD – SCZ APPEAL N^o 186 OF 2000**
- 3. DAKA v ZAMBIA CONSOLIDATED COPPER MINES LTD – SCZ APPEAL N^o 12 OF 2004 (unreported)**

4. **KAFUE DISTRICT COUNCIL v JAMES CHIPULU (1995 – 1997) ZR 190**
5. **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT (1982) ZR 172**
6. **DUNCAN SICHULA & ANOR v CATHERINE MULENGA CHEWE (2000) ZR 56**
7. **SWARP SPINNING MILLS PLC v CHILESHE & ORS (2002) ZR 23**
8. **CHINTOMFWA v NDOLA LIME COMPANY LTD (1999) ZR 172**
9. **JOSEPHAT LUPEMBA v FIRST QUANTUM MINING AND OPERATIONS LTD – APPEAL Nº 120 OF 2017 – (2018) ZMCA 253**
10. **WILLIAM CARLISLE WISE v E. F. HERVEY LTD (1985) ZR 179**
11. **CHILANGA CEMENT PLC v KASOTE SINGOGO (2009) ZR 121**
12. **M^cCALL v ABELESZ & ANOR (1976) 1 ALL ER 727**
13. **R v NELSON GROUP SERVICES (MAINTENANCE) LTD (1998) 4 ALL ER 331**
14. **KAWIMBE v ATTORNEY GENERAL (1974) ZR 244**
15. **ADDIS v GRAMAPHONE CO. LTD (1909) AC 488**

1.0 INTRODUCTION

- 1.1 This appeal arises from Hon Mr. Justice Egispo Mwansa’s judgment dated 17th May, 2019, delivered in the Industrial Relations Division of the High Court.

2.0 BACKGROUND TO THE APPEAL

- 2.1 The background to the appeal is that, the Respondent filed a Complaint against the Appellant in the Industrial Relations Division of

the High Court on 5th August, 2016, in which he claimed the following reliefs:

- 1. Damages for wrongful and/or unlawful dismissal.**
- 2. Interest on any sums awarded to him.**
- 3. Any other relief the Court may deem fit; and**
- 4. Costs.**

2.2 The facts giving rise to the Complaint are that, the Respondent was employed as a cashier in Appellant bank on 1st June, 2008 and rose to the position of Team Leader for Branch Operations and transferred to ABC House. His responsibilities included ensuring that the Automated Teller Machines (ATMs) were reconciled daily and the vault balanced.

2.3 In the course of his employment, the Respondent and other employees complained to their supervisors, via e-mails of their failure to prepare daily ATM reconciliation reports due to the failure to access electronic journals. Consequently, there was a breach of controls resulting in one member of staff stealing money in the sum of K200 000.00 that was for the replenishment of the ATM. Furthermore, ABC House, the branch at which the Respondent

operated, had an excess of coins that required to be secured. According to the Respondent's evidence, the coins were worth K650 000.00 and were packed on the floor as a result of the limited size of the vault at the said branch. There was also evidence that coin counting machines were either non-functional or needed to be replaced.

- 2.4 On 25th May, 2016, it was discovered that there was a shortage in excess of K209 000.00 and a shortage of K17 888.45 in coins at ABC Branch and that on 24th May, 2016, K200 000.00 was withdrawn for purposes of replenishing the ATMs but it was not loaded in any ATM. Consequently, on 3rd June, 2016 the Respondent was suspended pending investigations and on 17th June, 2016, he was charged with gross negligence for failing to ensure that ATM transactions were reconciled and reconciliation reports submitted on a daily basis as required by the Branch Operations Manager in Central Operations. The Respondent was given an opportunity to exculpate himself before appearing before the Disciplinary Committee on 17th June, 2016. He was found guilty and was summarily dismissed. Thereafter, he exercised his right of appeal to the Managing Director

who dismissed the appeal. The Respondent subsequently commenced an action in the Industrial Relations Division of the High Court.

3.0 CONSIDERATION AND DECISION BY THE COURT BELOW

- 3.1 In his judgment in the Court below, after considering the evidence the Hon. trial Judge found that, it was common cause that there were problems in the Appellant bank relating to the ATM reconciliations which were known by the Appellant management personnel who did little or nothing to address them. On the issue of the coins, the Hon. trial Judge found that the problem was also known by the Appellant management as the challenge of the coin counting machines had been communicated to them. He noted that, the evidence on record indicated that the Respondent was charged and went through the disciplinary process.
- 3.2 He, therefore, considered whether the Respondent's dismissal could be termed wrongful and/or unlawful. In so doing, he called in aid the case of **CARE INTERNATIONAL ZAMBIA LTD v MISHECK TEMBO¹** where the Supreme Court gave guidance on what constitutes wrongful and unlawful dismissal. Following the Supreme

Court's guidance, the learned trial Judge stated that, for an employer to succeed in defending a claim for wrongful and/or unlawful dismissal, it must be shown by the employer that they had a valid reason to justify the dismissal and that they acted reasonably.

3.3 In the present case, based on the evidence of various correspondence between the Respondent and the Appellant, the Hon. trial Judge concluded that, the problems of the inavailability of journals from the Information Technology Department that were needed to complete the ATM reconciliations were well known by the Appellant's management. He noted that the evidence indicated that it affected the entire country. He consequently found that the blame could not be placed on the Respondent who had communicated the challenges he faced as well as the solutions needed to address the problems.

3.4 He further relied on the unreported case of **KAMBATIKA v ZESCO LTD²** where the Supreme Court held that a trial court should be concerned to ensure that the disciplinary procedure was properly invoked that is, whether there was a substratum of facts to support

the charge, otherwise, the exercise of disciplinary powers would be regarded as being bad.

- 3.5 In the present case, the Hon. trial Judge found that although the Respondent was duly subjected to disciplinary procedure, there was little he could have done after informing management of the challenges he encountered in the discharge of his duties. Consequently, he concluded that the dismissal was wrongful but that reinstatement is a remedy that is rarely given exceptional circumstances. He, therefore, considered compensatory damages to be more appropriate. He relied on the case of **DAKA v ZAMBIA CONSOLIDATED COPPER MINES LTD**³ in which twenty-four (24) months salary was awarded as damages for wrongful dismissal. He, however, also considered the fact that the said award was made fifteen (15) years before the trial before him, the difficulties associated with finding jobs at the Respondent's level and the strictness of the banking profession. He finally considered that an award of thirty-six (36) months' gross salary as not being excessive.
- 3.6 Under the head of "**any relief the Court may deem fit,**" the Hon. trial Judge relied on the case of **KAFUE DISTRICT COUNCIL v**

JAMES CHIPULU⁴ in deciding that an award of ten (10) months' gross salary was justifiable and befitting as damages for the mental anguish occasioned to the Respondent by his dismissal. The total sum of the award would attract interest at the Bank of Zambia short term lending rate up to date of judgment, and thereafter, at six percent (6%) till the full amount is paid. The Respondent was also awarded costs.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the Court below, the Appellant has appealed to this Court and advanced the following grounds of appeal:

- 1. The Court below erred in law and fact when it found that the Appellant's decision to charge and dismiss the Respondent was unreasonable and wrongful, in the face of evidence of the Respondent's culpability;**
- 2. The Court below erred in law and fact when it found that the Appellant had not addressed deficiencies brought to its attention by its employees thereby failing to take into account the Appellant's evidence regarding other methods available for the Respondent to perform his work;**
- 3. Further and in the alternative, the Court erred in law and fact when it awarded the Respondent thirty-six (36) months' salary as damages for wrongful dismissal which award was excessive in the circumstances; and**

4. **Further and in the alternative, the Court erred in law and fact when it awarded the Respondent ten (10) months' salary as damages for mental anguish when it was neither pleaded nor proved by the Respondent which award was excessive in any event.**

5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

- 5.1 Appellant's Counsel argued grounds one and two together, while grounds three and four were argued separately.
- 5.2 The gist of the Appellant's arguments in support of grounds one and two is that the trial court failed to take into account the evidence on record that there were alternative ways of the Respondent doing his work as the Appellant's sole witness, RW1, Constance Zyamba stated. She stated that the daily reports could be done manually or by reconciling the entries by tallying in the absence of electronic journals on the shared drive.
- 5.3 It was further contended that, therefore, there was no basis upon which the trial court found that the Appellant had not addressed the employees' concerns where there were other methods available for the reconciliations to be done. In that regard it was submitted that the Appellant acted reasonably in charging and dismissing the Respondent for the offence of gross negligence of duty. It was

further submitted that, therefore, the finding by the Court below was perverse and should be set aside based on the authority of **WILSON MASAUO ZULU v AVONDALE HOUSING PROJECT**⁵ in which the Supreme Court held that:

"The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts."

- 5.4 Ground three further and alternatively challenges the award of thirty-six (36) months' salary, as damages for wrongful dismissal, as being excessive. In inviting this Court to interfere with the award, Appellant's Counsel relied on the case of **DUNCAN SICHULA & ANOR v CATHERINE MULENGA CHEWE**⁶ in which the Supreme Court held that:

"An appellate court should not interfere with an award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled."

- 5.5 Further reliance was placed on the case of **SWARP SPINNING MILLS PLC v CHILESHE & ORS**⁷ where the Supreme Court gave guidance that:

"In assessing the damages to be paid and which are appropriate in each case, the court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent."

- 5.6 It was further submitted that the Court further held that an enhanced award of damages such as twenty-four (24) months' salary as was granted in **CHINTOMFWA v NDOLA LIME COMPANY LTD**⁸ is not granted to a party as of right but will only arise in special circumstances, such as, where a party has suffered some form of mental upset or distress caused by the defendant's conduct.
- 5.7 Appellant's Counsel further relied on this Court's decision in the case of **JOSEPHAT LUPEMBA v FIRST QUANTUM MINING AND OPERATIONS LTD**⁹ where it was held that:

"It is important for the trial court to state the reasons or factors it took into account whenever it awards damages above the normal common law measure....."

- 5.8 In the present case, Appellant's Counsel argued that the reasons or justification for awarding enhanced damages was that the Respondent, as Team Leader at the Appellant's branch served at a high level in the banking sector. He further submitted that the reason advanced for the award was not sound and there was nothing in the Respondent's circumstances that suggested that the termination was inflicted in a traumatic fashion that caused him undue distress and he urged the Court to set aside the said award.
- 5.9 In ground four, the Appellant challenges the award of ten months' salary as damages for mental anguish on the basis that it was neither pleaded nor proved by evidence on record. It was argued that the Zambian legal system is adversarial and that parties are bound by their pleadings. Reliance was placed on the case of **WILLIAM CARLISLE WISE v E. F. HERVEY LTD**¹⁰ where the Supreme Court held *inter alia* that pleadings serve the useful purpose of defining the issues of fact and law to be decided.
- 5.10 It was further contended that the Court below could not legally make such an award for damages for mental anguish where an award of enhanced damages had been already made as was guided by the

Supreme Court in the case of **CHILANGA CEMENT PLC v KASOTE SINGOGO¹¹**.

5.11 Therefore, this Court was urged to find that the award of ten months' salary for mental distress was in fact a grave error of law since enhanced damages are meant to be all encompassing and that as such, it was not open to the Court to make any further awards.

6.0 RESPONDENT'S ARGUMENTS IN OPPOSITION TO APPEAL

6.1 In the Respondent's heads of argument in opposition filed on 30th October, 2019, in responding to grounds one and two, it was submitted that the trial court had due regard to all the evidence produced before it and as such, it did not misapprehend the facts when it found that the Appellant did not have a valid reason to charge and dismiss the Respondent. It is the Respondent's contention that the documents on record clearly indicate that most of the Appellant's employees including the Respondent expressed concern over the challenges they faced in discharging their duties properly because of the Appellant's failure to address the deficiencies they complained of. It was further submitted that the evidence adduced from both parties was to the effect that there was a

countrywide fault that affected numerous of the Appellant's automated teller machines, and that the Respondent made reasonable efforts to find solution to enable him to do his work. It was, therefore, submitted that the Court below was on firm ground in finding that the Respondent's dismissal was wrongful, hence null and void in following the case of **CARE INTERNATIONAL ZAMBIA LTD v MISHECK TEMBO.**

- 6.2 With regard to the Appellant's argument that there were other methods that the Respondent could have used, such as tallying, the Respondent referred this Court to his response in cross-examination where he stated that there is only one method of ATM reconciliation and he was not sure of tallying. This Court was further asked to take judicial notice of the fact that the deficiencies experienced by the Respondent and other employees remained unresolved for a period of over one year.
- 6.3 In this regard, it was submitted that the findings by the Court below should stand as they were neither perverse nor made without supporting evidence and this Court was urged to dismiss grounds one and two for being devoid of merit.

- 6.4 With regard to ground three on the award of 36 months gross salary to the Respondent as damages, it was submitted that an award of damages lies within the discretion of the court. It was further submitted that on the authority of **DAKA v ZAMBIA CONSOLIDATED COPPER MINES LTD** and taking into consideration all the facts surrounding the present case, it was reasonable for the Court below to award the 36 months gross salary as a compensatory award. The Court was urged to dismiss ground three as being bereft of merit.
- 6.5 With regard to ground four, the Respondent opposed it on the basis that the award of 10 months salary as damages for mental anguish is justified in view of the Appellant's breach of the Respondent's contract of employment as a result of the wrongful dismissal. The Respondent relied on the case of **ATTORNEY GENERAL D. G. MPUNDU** where the Supreme Court relied on the case of **M^cCALL v ABELESZ & ANOR**¹² where it was held that:

"It is now settled that the court can give damages for mental upset and distress caused by the defendant's conduct in breach of contract."

6.6 In the present case, it was submitted that in view of the Supreme Court's decision in the case of **CHILANGA CEMENT PLC v KASOTE SINGOGO** that awards for damages for torture and mental distress should not be granted where more than the normal measure of common law damages have been awarded, it was befitting for the Court below to have awarded the 10 months salary.

7.0 THIS COURT'S CONSIDERATION OF THE APPEAL AND ITS DECISION

7.1 We have considered the grounds of appeal, respective arguments by the parties, authorities cited, evidence on record and judgment appealed against.

7.2 In grounds one and two, it is contended by the Appellant that there was evidence of the Respondent being culpable and that the Court below did not take it into consideration. The same being that there were other methods that could have been used by the Respondent to do the ATM reconciliation and storage of coins. The argument advanced by the Appellant was that there were other methods available to the Respondent for conducting ATM reconciliations via tallying. To support this argument, reliance was placed on the e-mail

dated 27th April, 2016 by one Bupe Kaunda Sitali to Venasio Mumba which is at page 55 of the record of appeal and states that:

"Kindly take NOTE that I won't be able to attend to the Northmead ATM today but tomorrow as I have been assigned by my manager to attend to failed transactions manually due to system challenge of journals.

Thus Northmead ATM will be attended to tomorrow."

- 7.3 We, note, from the Respondent's evidence in cross-examination at page 181 line 1 to 2 of the record of appeal that he stated that there was only one method of ATM reconciliation and that he was not sure of tallying. He later stated in line 8 that:

"For ATM's with tallyings it was maybe possible to reconcile."

- 7.4 Upon further perusal of the record of appeal and cross-examination of the Appellant's witness, RW1, Constance Zyambo, the Human Resource Practitioner, at page 188 lines 12 to 16 and 18 to 20 where she contradicted the Respondent by stating that:

"I am aware that journals are required to do reconciliations and that there are other ways of reconciling without journals.

I am aware that there was correspondence on the issue of journals not being availed."

"..... ATM reconciliations were problematic. There was a problem with the ATMs at ABC Bank House."

- 7.5 Upon further perusal of the evidence on record and the e-mails sent by the Respondent and the Appellant's other members of staff indicate the challenges they had concerning the non-availability of journals required for their daily ATM reconciliations. From the responses they received, it is evident that no direction was given to them to do manual reconciliation via tallying. An example is a response to a query on the failure to send ATM reconciliations frequently, that Njekwa Masheta of Mongu sent to Elizabeth Daka and others on 28th April, 2016 seeking guidance, which is found at page 48 of the record of appeal where she states that:

**"I seek your knowledge over this issue, we are failing to reconcile because of the journals which are not on shared folder. Kindly advise the best way to identify off us and failed transactions on our ATM without having e-journals pasted on the shared folder.
Your usual guidance will be appreciated."**

- 7.6 Nowhere on the record did we find any response to the challenge that was complained of.

- 7.7 We, however, noted that in a later e-mail dated 1st June, 2016 at page 46 of the record of appeal, Elizabeth Daka complained that the problem of e-journals was still not resolved.
- 7.8 On the same page, she referred to her earlier e-mail of 4th February, 2016 in which she was seeking assistance from the Appellant's IT department on the error they were getting when trying to access ATM electronic journals, which was posing a challenge in terms of the branch ATM reconciliations.
- 7.9 In our considered view, all this demonstrates that without e-journals, the Appellant's staff who were assigned to do ATM reconciliations were having challenges in carrying out their duties and that the said challenges were well known within the Appellant bank. From the evidence on record, we observed that there was no evidence adduced by the Appellant to show that direction was given to the Respondent or any other member of staff for them to do ATM reconciliations via manual tallying or that it was being carried out as a matter of practice or rule in the Appellant bank in the absence of e-journals.

7.10 With regard to the shortage of coins, we noted from the Respondent's e-mail or communication dated 21st September, 2015 at page 59 of the record of appeal that he complained that an increase in the volume of coins being deposited by customers had caused a shortage problem. He attributed the shortage of K17 888.45 to manual counting of the huge volume of coins which they received at the branch and which problem had been communicated to the Head of Operations via e-mails that were exhibited in the record of appeal.

7.11 We, opine therefore, that because of the large amount of coins involved, same said to be K650 000.00, it was possible for miscounting to occur.

7.12 It is trite that an employer must provide a safe system of work and equipment required by employees to effectively carry out their duties.

In the case of **R v NELSON GROUP SERVICES (MAINTENANCE)**

LTD¹³, the English Court of Appeal stated that:

" Moreover it is a sufficient obligation to place on the employer in order to protect the public to require the employer to show that everything reasonably practicable has been done to see that a person doing the work has the appropriate skill and instruction, has had laid down for him safe systems of doing the work,

has been subject to adequate supervision, and has been provided with safe plant and equipment for the proper performance of the work."

7.13 In this regard, we are of the view that it was the Appellant's obligation to provide the Respondent and other staff with the e-journals that were required for ATM reconciliations and the coin counting machines and scales to facilitate the accurate counting of coins in the vault. We, opine that the Appellant having failed to provide those systems of work, cannot hold the Respondent accountable.

7.14 Therefore, in the circumstances, we find that the Court below was on firm ground and cannot be faulted for finding as it did that the Appellant was grossly negligent in failing to address the deficiencies of its electronic system and failing to provide e-journals for daily ATM reconciliations and coin counting machines and scales.

7.15 We, accordingly, find grounds one and two to be devoid of merit and we disallow them.

7.16 In ground three, the Appellant challenges the award of thirty-six (36) months salary as damages for wrongful dismissal to the Respondent on the basis that it is excessive. From the judgment of the Court

below, we note the considerations taken into account in arriving at the award. The learned trial Judge mentioned the difficulties associated with finding jobs at the level the Respondent had reached and the strictness of the banking profession. He also considered the case of **DAKA v ZAMBIA CONSOLIDATED COPPER MINES LTD** in which an award of twenty-four months salary was made over fifteen years ago and he opined that the award needs to reflect the changing times.

7.17 The Appellant has challenged the thirty-six months salary award and contends that since the Respondent was a team leader, he is not entitled to such a high award of damages. It was further argued that the award is not in consonant with the general rule that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice where the contract is silent.

7.18 We call in aid the case of **KAWIMBE v ATTORNEY GENERAL**¹⁴, where the Supreme Court gave guidance that:

"An appellate court should not interfere with the finding of a trial court as to the amount of damages merely because the appellate court is of the view that if they had tried the case in the first instance they would have

given a lesser sum. Before an appellate court interferes with the finding of a trial court as to the amount of damages, it must be shown that the trial court had applied a wrong principle or had misapprehended the facts or that the award was so high or so low as to be utterly unreasonable or was an entirely erroneous estimate of the damages."

7.19 In the later case of **SWARP SPINNING MILLS PLC v CHILESHE**

& ORS, the Supreme Court gave further guidance that:

"In assessing the damages to be paid and which are appropriate in each case, the Court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand. For instance, the termination may have been inflected in a traumatic fashion which causes undue distress or mental suffering; or in any other situation where it is permissible to depart from the rule in **ADDIS v GRAMAPHONE CO. LTD**¹⁵ which generally precludes the award of non-pecuniary damages like exemplary damages for injured feelings"

7.20 In *casu*, we accept that the Respondent was wrongfully dismissed by the Appellant as was held by the Court below and the reasoning for the award of thirty-six months salary. Although the Appellant has argued that the Respondent was merely a branch team leader and

that he did not hold a senior position and that as such, he was not entitled to the award, we have considered the Respondent's grim prospects of finding a job in the banking sector and we find that the Court below properly directed itself in giving the contested award. We are fortified by the Supreme Court's decision in the case of **CHITOMFWA v NDOLA LIME CO. LTD**, in which it held that the rationale for awarding two years' salary as damages for wrongful dismissal is due to the Appellant's grim prospects of finding a job in the future and where the termination was inflicted in a traumatic fashion causing undue distress or mental suffering.

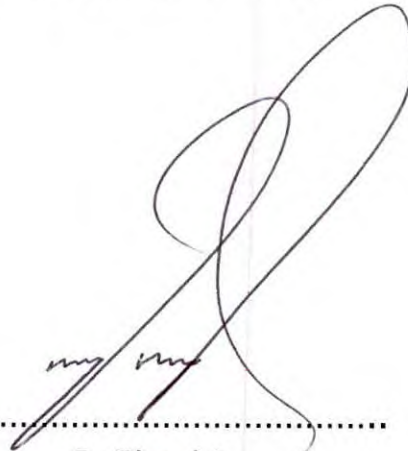
7.21 In the present case, having regard to the Respondent's grim prospects of finding a job in the banking sector, and further being mindful of the constant depreciation of the Zambian currency, we find no justification in interfering with the award by the Court below.

7.22 We turn to ground four in which the Appellant challenges the award of ten (10) months salary as damages for mental anguish. We note that damages for mental anguish was not pleaded or proved. The Appellant has advanced very sound arguments to support this ground and in following the Supreme Court's guidance in the case of

CHILANGA CEMENT PLC v KASOTE SINGOGO, we accept that because of the enhanced award of damages already awarded for wrongful dismissal, the award for damages for mental anguish is not necessary as the mental anguish has already been taken care of.

7.23 In the circumstances, we find ground four to be meritorious and it, therefore, succeeds.

7.24 In conclusion, the Appellant having succeeded only on one ground out of four, the net effect is that the appeal fails and it is, accordingly dismissed. Each party to bear its own costs in this Court and in the Court below.



J. Chashi

COURT OF APPEAL JUDGE



C. K. Makungu

COURT OF APPEAL JUDGE



F. M. Lengalenga

COURT OF APPEAL JUDGE