IN THE SUPREME COURT OF ZAMBIA **Appeal No. 038/2013**
HOLDEN AT KABWE
(Civil Jurisdiction)

B E T W E E N :

ZAMBIA BREWERIES PLC **APPELLANT**

AND

WILSON MWAMBA **RESPONDENT**

Coram: **Phiri, Wood and Malila JJS, on 11th August, 2015 and 29th September, 2020**

For the Appellant: Mr. L. Zulu, Tembo Ngulube & Associates

For the Respondent: In person

J U D G M E N T

Phiri JS, delivered the majority decision of the court.

Cases referred to:

1. *Zesco v. David Muyambango (SCZ Judgement No. 7 of 2000 at page 70)*
2. *Shillings Bob Zinka v. Attorney General (1990-92) ZR 73*
3. *Edna Nyasulu v. Attorney General (1993) ZR 105*
4. *Fawaz & Another v. The People (SCZ/9/49/94)*
5. *Attorney General v. Kakoma (1975) ZR 216*
6. *Patrick Makumbi & 25 Others v. Greytown Breweries Ltd. & 3 Others (SCZ Appeal No. 032/2012)*

Legislation referred to:

1. *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*
2. *Employment Act, Chapter 268 of the Laws of Zambia*

Other works referred to:

1. *Selwyn's Law of Employment*

This appeal is from a judgement of the then Industrial Relations Court (IRC) (now Industrial and Labour Division of the High Court) given on 11th December, 2012.

The respondent filed a complaint in the IRC pursuant to section 85(2) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia claiming:

1. **A declaration that the complainant's dismissal was unlawful, wrongful and therefore null and void.**
2. **Damages for wrongful and unfair dismissal**
3. **Any other relief that the court may deem fit.**

The respondent's claim was predicated on a series of events that he recounted in his supporting affidavit and in his testimony in the court below. He was employed by the appellant on 1st May, 2005 as a Material Handling Clerk. While on duty at the appellant's depot he was arrested by the police on allegations that he had stolen and sold

preforms (used in the manufacture of soft drinks) belonging to the appellant. The allegation was that the respondent had partnered with a work colleague called John Ngoma in the stealing enterprise which apparently had been going on for a while. It is the said John Ngoma who implicated the respondent.

The respondent was questioned by the police and in the process admitted having stolen some preforms. He, however, maintained that the admission was involuntary as he was coerced to make it following heavy beating by the police.

The respondent was subsequently charged with theft of company property. He appeared before a disciplinary committee which found him guilty. He was ultimately dismissed.

The respondent's case in the IRC was that there was no evidence that he had stolen the preforms; that a key witness called by the respondent, Siboel Patel, denied ever buying preforms from the appellant; that the admission to the police that he had stolen was made under duress.

The appellant on the other hand maintained that the respondent had been implicated in the preform thefts by his colleague John Ngoma and that they complied with the company's disciplinary procedure at the conclusion of which the respondent was found guilty.

The IRC considered the evidence deployed before it. It held that the case against the appellant was not properly investigated. Reliance on the evidence of one co-worker of the respondent, John Ngoma, whose narrative conflicted with that of the appellant's own witness, Siboel Patel, was ill-advised. The court also believed the respondent's testimony that the confession to the police was given under duress. The court thus held that the dismissal of the respondent was wrongful. It ordered the appellant to pay the respondent six months salary as damages for wrongful dismissal. That award was to attract interest at Bank of Zambia short term lending rate from the date of filing the complaint to the date of judgment and thereafter at simple rate to date of payment. The court also awarded costs to the respondent.

Unhappy with the judgment of the IRC, the appellant launched the present appeal on three grounds structured as followed:

GROUND ONE

The court below erred both in law and in fact when it held that the appellant did not properly investigate and handle the respondent's allegation of having stolen preforms from the appellant's company, contrary to overwhelming evidence on the record that clearly showed that reasonable grounds existed to justify the dismissal.

GROUND TWO

The court below erred in law and in fact when it held that the confession statement made by the respondent was obtained under duress when there was no such credible and sufficient evidence on record to prove this assertion.

GROUND THREE

The court below erred in law and in fact when it held that in arriving at its decision in finding the respondent guilty of the disciplinary offence for which he was charged, the appellant had relied on the evidence of one co-worker, John Ngoma, without taking into account the fact that the appellant had also relied on the other surrounding circumstances and evidence that clearly pointed to theft of preforms by the respondent.

Both parties filed their heads of argument well ahead of the hearing. At the hearing, Mr. Zulu, learned counsel for the appellant intimated that he would rely on the heads of argument filed. He, however, recorded his misgivings on the contents of the respondent's

heads of argument which he said alleged had "hints of malice" on the part

of the appellant.

Ground one of the appeal impugned the lower court's finding that the appellant did not adequately investigate the allegations against the appellant. Counsel contended that the court erred when it purported to have determined the matter as if it were sitting as a criminal court. Although it pointed out in its judgment that it was not sitting as a criminal court, it in fact applied the standard of proof required in criminal matters.

Counsel contended that the lower court correctly made reference to **Selwyn's Law of Employment** which states that an employer is not under an obligation to prove beyond reasonable doubt that an offence has been committed because that is a matter for trial. The employer must merely genuinely believe that the employer was guilty of the conduct in question and must have reasonable grounds for such belief. Counsel submitted that the appellant company satisfied this test.

The learned counsel went to great lengths to set out the chronology of events leading to the arrest and charging of he respondent. More importantly, he laid out the basis upon which the appellant was interrogated and charged and that he was afforded due process.

Counsel referred us to the case of *Zesco v. David Muyambango*[1] where we stated the role of the court in relation to disciplinary committees determining disciplinary case, as follows:

> **The duty of the court is to examine if there was no necessary disciplinary power and if it was done in due form.**

The learned counsel also submitted that the appellant, in dealing with the respondent's disciplinary case, complied with the principles of natural justice as were explained in *Shillings Bob Zinka v. Attorney General*[2] and as set out in section 26A of the Employment Act, Chapter 268 of the Laws of Zambia. The latter directs that an employer shall not terminate the services of an employee on grounds related to conduct or performance of the employee without affording the employee an opportunity to be heard.

We were on the basis of these submissions urged to uphold ground one of the appeal.

In regard to ground two of the appeal, the appellant criticized the lower court for holding that the confession statement was obtained under duress. Counsel submitted that there was no credible and sufficient evidence on record to prove that assertion. The case of *Edna Nyasulu v. Attorney General*[3] was cited by the learned counsel for the appellant. In particular, he reproduced a passage in that judgment where the court stated that:

> **I think it is acceptable that where a plaintiff alleges that he has been wrongful or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment whatsoever may be said of the opponent's case.**

The learned counsel entered into a long analysis of what transpired before and after the confession statement of the respondent at the police station. The clear intent of these submissions was to impeach the credibility of the respondent as regards his testimony that the confession he made was extracted under duress.

Counsel submitted that any reasonable tribunal placed in the position of the trial court would have found the respondent guilty. The learned counsel further submitted that the lower court fell into grave error in accepting the respondent's allegation in the absence of sufficient evidence as proof that his confession statements were a fabrication. Counsel prayed that we uphold ground two.

Turning to ground three of the appeal it was argued on behalf of the appellant that it was an error of law on the part of the lower court to have come to the holding that the appellant's basis for finding the respondent guilty was the evidence of the respondent's co-worker, John Ngoma. In doing so the court did not take into account the fact that the appellant also relied on the other surrounding circumstances and evidence that pointed to the respondent as the mastermind of the theft of the preforms.

Counsel contended that the evidence adduced by the police was sufficient to establish a strong *prima facie* case against the respondent. The evidence of Ngoma merely buttressed the independent evidence stablished through investigations undertaken

by both the State and the appellant. We were urged to uphold this ground of appeal too.

Counsel prayed that the whole appeal be upheld.

Mr. Mwamba, who appeared in person, also intimated that he was relying on the heads of argument as filed. In those heads of argument, he submitted in respect of ground one, that the investigations that were done against him were done by the police and not the appellant. In his submission before us the respondent essentially put up a case that the evidence against him in the lower court was false and that he had effectively countered it. He urged us to dismiss ground one of the appeal.

Under ground two, the respondent supported the holding of the trial court. He contended that the evidence of torture by the police to extract a confession from him could not be controverted and that he had even shown evidence of physical torture to members of the disciplinary panel. What is clear is that the respondent was dwelling on factual matters totally divorced from the law.

In regard to ground three of the appeal, Mr. Mwamba submitted that the lower court cannot be faulted. Although the appellant relied on the information supplied by John Ngoma it did not call him as its witness at trial to substantiate the allegations.

To an intent not very clear to us the respondent cited the case of *Fawaz & Another v. The People*[4]. Again, the appellant's submissions were more factual than legal. He urged us to uphold the appeal.

We perceive the criticism of the lower court's judgment by the appellant as being principally evidentiary in substance. Under ground one, for example, the complaint of the appellant is that the court found that the appellant did not properly investigate and handle the respondent's disciplinary issues appropriately.

Ground two raises an evidentiary question too, namely whether the evidence before the trial court was sufficient to justify the conclusion that the court came to. The court below concluded that the confession statement made by the respondent at the police station was obtained under duress. The court was thus satisfied that on the evidence before it, the confession was procured through

duress. The appellant submits that there was not enough evidence to support such a conclusion.

We have in numerous case authorities articulated the position that we, as an appellate court, do not have reason to disturb the lower court's assessment of the evidence adduced before it by various witnesses. In *Attorney General v. Kakoma*[5] we stated as follows:

> **...a court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard witnesses giving evidence.**

We reiterated this position in *Patrick Makumbi & 25 Others v. Greytown Breweries Ltd. & 3 Others*[6]. For this reason, grounds one and two have no merit and they are dismissed.

Ground three equally raises an evidentiary issue, namely, whether the evidence relied upon by the judge to find the respondent guilty was sufficient or not. The court concluded that it was not. The appellant thinks it was.

We reiterate what we have stated under grounds one and two that assessment of the evidence is in the domain of the trial judge. It does not lie here. Ground three equally has no merit. It is dismissed.

The upshot is that the whole appeal is without merit and it is dismissed with costs to the respondent.

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G. S. Phiri
SUPREME COURT JUDGE

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A. M. Wood
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE