

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

GIVEN CHOMBA

APPELLANT

AND

ANTELOPE WHOLESALE MERCHANTS LIMITED

RESPONDENT



CORAM: CHISANGA JP, KONDOLO SC, MAJULA JJA

On 23rd January 2019 and on 11th July 2020

For the Appellant : Mr. D. Tambulukani of Messrs. Derrick Mulenga & Co.

For the Respondent. Mr. J. Msoni of Messrs. J. B. Sakala & Co.

JUDGMENT

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

- 1. The Attorney General v John Tembo (2012) 1 ZR 1**
- 2. Eston Banda v Edward Dalitso Zulu v The Attorney General SCZ Appeal No. 42/2016 (Feb 2019)**
- 3. Care International Zambia Limited v Misheck Tembo Selected Judgment No. 58 of 2018**
- 4. Shilling Bob Zinka v The Attorney-General (1990 - 1992) Z.R. 73**
- 5. Zambia Electricity Supply Corporation Limited v Muyambango (2006) Z.R. 22.**
- 6. Vincent Chimuka v Stanbic Bank Zambia Limited SCZ Appeal No. 122 of 2014 (March 2017)**
- 7. The Attorney General v Phiri (1988-1989) Z.R.272**

8. **Chimanga Changa Limited v Stephen Chipango Ngombe S.C.Z Judgment No. 5 of 2010**
9. **Jonathan Musialela Ng'uleka v Furniture Holding Limited (2008) Z.R. 19**

OTHER WORKS REFFERED TO:

1. **Mwenda W.S. on Employment Law: Cases and Materials (2004) Unza Press, Lusaka**

This Appeal is against the decision of Musona J in which the Appellant's claims for wrongful and unfair dismissal were dismissed. The background is that the Appellant was a Sales Assistant in the Respondent Company. Her duties included verifying physical stock on a daily basis, in the presence of a Cash Collector, and hand over daily cash sales before closing the Day Sales Report (DSR).

According to the Appellant, on ^{15th} December, 2015 at the close of business, she conducted a stock take with one of the Respondent's Cash Collectors and closed off the DSR. The depot continued conducting late sales and the cash collected from the said sales was K9,000 which was placed in the safe. The Appellant, however, left some cash in her desk drawers and, as fate would have it, the Depot was burgled that evening and the cash she left in the drawer was stolen.

The Respondent charged her with gross negligence leading to a loss of K7,347 which according to them, was the sum of money she left in the drawer. The charge read that the Appellant sold products worth a total of K16,347 that day but only put K9,000 in the safe and left K7,347 in her desk drawer. The Appellant was dismissed.

Piqued by her employer's decision to dismiss her, she filed a Complaint in the Industrial Relations Division of the High Court for Zambia. The Complainant recounted the ordeal that led to her dismissal which she labelled wrongful and/or unfair. The Respondent on the other hand refuted the claim stating that the charge was rightly explained to the Appellant, she was heard, the decision to terminate her employment was communicated and that she was informed her of her right to appeal.

During the trial the Complainant called a police officer Detective Sergeant Mwewa CW 1, to testify on her behalf. He told the Court that after conducting an investigation he arrived at the conclusion that it was commodities and not money that was stolen from the depot with the commodities having been taken out through a hole the burglars cut in the roof.

In her testimony, the complainant denied that she had committed the offence. She also complained that during the disciplinary proceedings, the Respondent had produced and relied on forged confession statements allegedly given and signed by her.

RW1 the Respondent's Accountant, testified that the sum of K9,000 was found in the safe the morning after the burglary. In order to ascertain how much was stolen they reconciled the daily sales compiled by the Complainant the day before and found that the total sales on that day were K16,347. The sum of K9,000 found in the safe was subtracted from the total sales and a shortfall of K7,347 was established. The Complainant told him that she had left the K7,347 in the drawer and it had been stolen.

The learned Musona J found that the case before him was not about the theft but about the alleged negligence by the Appellant. He directed his mind to ascertaining whether or not the Appellant was grossly negligent and if that negligence led to loss of the Respondent's money. The trial Judge did not consider the confession statements allegedly made by the Appellant because he found that they were simulated forgeries.

Musona J stated that in order to make a finding for wrongful dismissal, the Appellant needed to show and prove the provision of the Contract which was breached. He further stated that a dismissal without a hearing or on grounds not proved, would amount to unfair dismissal.

After analyzing the evidence, the trial Court found as undisputed facts, that the Appellant was charged with gross negligence; given an opportunity to exculpate herself; and, was given a hearing. The Court further found that there was no unfairness in the disciplinary proceedings because the Appellant did not provide evidence that she had challenged them for being unfair or improper.

Regarding unfair dismissal, the trial Judge made various findings of fact which were tabulated as follows:

- i) ***There was a safe provided in the depot***
- ii) ***The Complainant admitted that she put K9,000 in that safe, some money she did not put in the safe but in the desk drawer***

- iii) When thieves broke into the depot the money in the safe remained safely and was not stolen. It is the money which she left in the desk drawers which as stolen.***
- iv) It is inconceivable that an employee who is provided with a safe in which to deposit money would choose to put some money into that safe but put some in the desk drawers.***
- v) I have seen no reasonable cause for the complainant leaving money in the desk drawers.***

The trial Judge found that the contentious sum of K7,347 actually represented the sum total of the value of the stolen stock and money that was left in the desk drawer. He further found that the amount of money left in the desk drawers by the Appellant was not ascertained at trial because she neither made a note of it nor counted it. The fact remained that the money stolen from the drawer was on account of the Appellant's negligence. On that basis, the lower Court found that the allegation upon which the Appellant was dismissed was proved and upheld the dismissal as fair.

The Appellant disgruntled by the decision of the lower Court, launched an Appeal in this Court based on the grounds stated in the Memorandum of Appeal as follows:

- 1) The learned trial Judge in the Court below erred in both law and fact when he held that he would not consider the disputed documents in determining the case after finding that the disputed signatures on the statements used to dismiss the Appellant were not made by her but that they were simulated forgeries.**
- ii) The learned trial Judge erred in law and in fact when he held with regard to the claim for wrongful dismissal that the Appellant did not show which provision of her contract of employment was breached by that [the] Respondent when they dismissed her and therefore there was no wrongful dismissal in this case contrary to the evidence on record.**
- iii) The learned trial Judge in the Court below erred both in law and in fact when he held that the allegations upon which the Appellant was dismissed were proved and**

therefore the subsequent dismissal was fair contrary to the evidence before Court.

iv) The learned trial Judge in the court below erred both in law and fact when he held that the Appellant never gave evidence to challenge the fairness or propriety of the disciplinary hearing proceedings contrary to the evidence before Court.

v) The learned trial judge in the court below erred in both law and in fact when he held that claim for damages for wrongful and/or unfair dismissal failed contrary to the evidence on record.

On behalf of the Appellant, Mr. Tambulukani relied on the filed Heads of Argument which he augmented *viva voce*. In arguing ground one he noted that the trial Court did not take into account the initial statement allegedly given by the Appellant at Page 41 of the Record of Appeal in which she allegedly accepted that she left the sum of K7,347 in the drawer. He pointed out that the alleged admission was the basis of the dismissal.

He submitted that the Appellant had told the Court that she had left K150 in the drawer to be used for change the following day and

any reasonable business person would leave small change in the drawer for that purpose. He further submitted that there was no rule prohibiting this and there was no negligence at all.

He argued that there was evidence that the depot was broken into and robbed as 2 roofing sheets had been removed and he added that if the space was large enough for a human being to get it then it was large enough to take out even a 25kg bag.

It was his submission that the Respondent's witnesses lacked credibility because they were backing a forged hearing. He elaborated that the lower Court was called upon to consider whether the dismissal was wrongful or unfair based on the evidence before it. The thread of this evidence emanated from the forged statement which the lower Court rightly dismissed for being simulated forgeries. It therefore follows that relying on this piece of evidence to prove the allegations against her was an error. The Respondent did not comply with procedure and the rules of natural justice. We were urged to reverse the findings of fact.

The gist of the argument in ground 2 was that the Appellant was not formally charged but only informed by a Mr. Mulenga during the

disciplinary hearing that she was charged with gross negligence based on the statement given by the security guard. He argued that this evidence was not challenged by any of the Respondent's witnesses. He opined that natural justice requires an employee to be formerly charged and informed in advance of the allegations against them. He opined that despite the Appellant being given an opportunity to appeal, the appeal process itself was flawed because it was equally based on the unsubstantiated claim that the Appellant admitted to leaving K7,347 in the drawer. In support of this argument, Counsel called to aid the case of *The Attorney General v John Tembo* ⁽¹⁾ in which it was held that a holding of wrongful dismissal from employment should be upheld where there was blatant disregard of the conditions of service and the rules of natural justice.

Under ground 3, it was argued that there was insufficient evidence to justify a guilty verdict by the Respondent. The Appellant testified that she did not leave K7,347 in the desk drawer and that this amount was only arrived at after an inventory of the stock was conducted in the morning after the burglary. The amount represented the stock missing and not cash. A report was issued by

CW1 who indicated that it was stock and not cash missing but the Respondent attempted to compel CW 1 to change his report to justify the allegations. It was contended that RW1 retracted his evidence that the K7,347 was a shortfall from cash sales. He instead admitted that the Daily Sales Report (DSR) simply referred to a shortage but did not state whether it was cash or stock. It was submitted that the figure in the DSR, prepared after the theft, clearly showed that it was for a shortage and not cash in the drawer. We were directed to the testimony of RW2, the security officer who, in cross examination, stated that the Appellant told him she left notes of K20, K10, K5 and K2 in the drawer for change the following day and the amount of K7,347 was arrived at after conducting a stock take. The remainder of the argument under this head focused on the evidence leading to the finding that K7,347 was left in the drawer which according to him was the basis upon which she was dismissed without a fair hearing.

It was contended in ground 4 that the Appellant challenged the fairness and propriety of the proceedings. It was contended that she had challenged the presence of the security guard, at the hearing, who admitted that he had added information not given to him. The Appellant challenged the refusal by the Respondent to use her

statement and that of 3 others during the hearing. Due to the unfairness exhibited during the hearing she also refused to sign the proceedings of the hearing. Lastly in ground 5 the Appellant's submissions were directed to the fact that an award for damages in this case was inevitable. The Appellant was dismissed for an offence she did not commit and for this reason, was deserving of damages exceeding the notice period.

The Respondent equally filed in Heads of Argument which he supplemented with oral arguments. In assailing grounds 1, 3 and 5 it was submitted that the Court was on firm ground when it declined to consider the disputed documents and when it found that the Appellant's guilt was proved by other evidence before it.

According to Mr. Msoni, counsel for the Respondent, the evidence of RW 1 and RW4 was to the effect that after the close of business, the Appellant had to leave all the money in the safe and was not permitted to leave any of it in her drawer. He pointed out that the Appellant had, in her own evidence in chief, admitted that she left some money away in the drawers for using as change the following morning. He added that witnesses testified to the shortage of stock and money which was under the control of the Appellant.

In challenging ground 2, Counsel submitted that the Appellant had not proved her case on a balance of probability as she had failed to show or prove the specific breach made by the Respondent against her.

On ground 4, the Respondent submitted that the hearing was conducted fairly because as shown by the Appellant's own evidence, she was suspended from work and asked to exculpate herself after which a hearing was held where the decision to summarily dismiss her was arrived at. He surmised that the Appellant was charged with gross negligence of duty because she should not have left any money in the drawer and that the lower Court upheld her dismissal because the Appellant agreed that she left money in the drawers.

In reply Mr. Tambulukani challenged the argument regarding change being kept in the safe and submitted that there was no reference to any rule or condition. If the charge had been the loss of K150 left for change she should have been charged accordingly and she would have had an opportunity to respond to that and explain why she left it in the drawer. The evidence that the Respondent requested the police officer to change his statement was not

challenged. On the whole, the dismissal was not only unfair but wrongful.

We have carefully read the Record of Appeal, considered the grounds of appeal as well as the spirited arguments by both Counsel.

We note that save for ground 5, the rest of the grounds of appeal are centred on whether or not the dismissal was wrongful and/or unfair.

We shall begin by addressing our minds to ground 2 followed by grounds 1, 3 and 4 which we shall address as one because they all attack the findings of fairness or lack thereof of the dismissal. We shall conclude with ground 5.

In 2019, in the case of *Eston Banda, Edward Dalitso Zulu v The Attorney General* ⁽²⁾ the Supreme Court reaffirmed its earlier holdings that in this jurisdiction there are only two categories of dismissal i.e. wrongful and unfair dismissal. The former is concerned with a breach of a relevant term embodied in a contract of employment between the employer and employee. In its previous decision in *Care International Zambia Limited v Misheck Tembo*

⁽³⁾ Supreme Court with reference to **Selwyn's Law of Employment 6th Edition** acknowledged that the disciplinary Code or disciplinary

rules or staff handbook can have a contractual effect on an employee but added that these rules must be brought to the attention of the employee. A breach of the rules by the employer entitles the employee to launch a claim for wrongful dismissal.

The Appellant claims that contrary to the rules of natural justice, she was not formally charged well in advance of the hearing. We are alive to the principles of natural justice as espoused in the case of *Shilling Bob Zinka v The Attorney-General*⁽⁴⁾. We have carefully looked at the procedure adopted by the Respondent and note that as shown at page 126 of the Record of Appeal, the Disciplinary Code does not give great detail on the disciplinary procedure to be adopted i.e. at what point is an erring employee charged; the turnaround time before a hearing is convened and the composition of the Committee *was reserved for "officials of appropriate responsibility and seniority in accordance with the organization structure"*.

The Appellant's evidence in chief starting at page 199 of the Record of Appeal details what occurred at the disciplinary hearing which resulted in her dismissal. Quite evidently, the Appellant was charged, she was heard, a decision was arrived at and she was granted the right of appeal which she exercised. We therefore find, contrary to the

Appellant's standpoint, that the rules of natural justice were properly observed in the circumstances of this case. We agree with the finding of the learned trial Judge that the dismissal was not wrongful because there was no breach of a term of the contract, in this case the Disciplinary Code. Ground 2 is accordingly dismissed.

What remains to be determined is whether after adhering to its internal procedures, the Respondent's decision to dismiss the Appellant was based on a substratum of the facts placed before it. The Supreme Court in the case of *Care International Zambia Limited v Misheck Tembo* quoted from W.S. Mwenda (*supra*) and gave credence to the principle that in determining whether or not the dismissal was unfair, the courts will look at the reasons for the dismissal.

It is trite that courts are not called on to interpose as an appellate tribunal within the disciplinary procedures and review the decision of the disciplinary tribunal. See *Zambia Electricity Supply Corporation Limited v Muyambango*⁽⁵⁾. This was reaffirmed by the Supreme Court in the recent case of **Vincent Chimuka v Stanbic Bank Zambia Limited SCZ**⁽⁶⁾ in which it was held as follows;

"Where an employee has committed an offence for which he can be dismissed, no injustice arises from failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity."

The court is confined to examining the facts and establishing whether there exists a substratum of facts that provided the employer with a basis upon which to dismiss an employee. In the case of *Attorney General v Phiri* ⁽⁷⁾ the Supreme Court held that if the record does not disclose any evidence to sustain the charge levelled against an employee, injustice would visit the party concerned. We are mindful that as was stated in the case *Chimanga Changa Limited v Stephen Chipango Ngombe* ⁽⁸⁾, an employer need not satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision.

The main issue for determination is as set out in ground 3; whether the dismissal was justified based on the facts before the tribunal and subsequently the lower Court. It was argued that the learned trial Judge erred when he refused to consider the documents that he held

to have been simulated forgeries. We agree with the Appellant to the extent that the learned trial Judge should not have treated the document as though it did not exist. He should have commented on the effect of his finding that it was forged, especially with regard to the fact that the admission therein was the only tangible evidence that the complainant had left ZK7,347 in her drawer. With this in mind, it meant that the document should not have formed part of the evidence used to dismiss the Appellant.

The Charge against her was that she left K7,347 in her drawer and this was clearly based on the statement she allegedly gave to the security guard, which statement was held by the trial Court to be a simulated forgery. We note that RW 1 in cross examination admitted that he told the Respondent that the Appellant left change in the drawer and not K7,347. Further the Appellant's evidence in chief at page 196 of the Record of Appeals shows that she left K150 in the drawer for change for the following morning. Clearly, on the whole, the evidence shows that Appellant left change in the drawer and not some unascertained sum of money as found by the trial Court.

The evidence of RW2, Mathews Nguni, in cross examination at page 225 of the Record shows that the shortage of K7,347 was not just

cash but also included bread flour and mealie meal. The trial Court further accepted this fact. What is clear to us, is that it was not the change of K150 alluded to by the Appellant and not the unascertained sum of money she left in the drawer, referred to by the trial Judge that resulted in the Appellants dismissal. It was the allegation that the Appellant negligently left cash from the late sales amounting to K7,347 in her drawer.

We paid particular attention to the evidence of CW 1, Detective Sergeant Mwewa who investigated the alleged break-in and established that goods worth K7,347 were stolen. He told the trial Court that the Respondent rejected the Report he submitted to them and Mr. Mulenga asked him to alter it and indicate that money instead of goods was stolen.

Based on the fact that the trial Court accepted that the Respondent's witnesses presented a forged statement allegedly given and signed by the Appellant, we consider the police officer CW1 as more credible than the Respondent's witnesses. We therefore find that the trial Court erred when it found that there was evidence supporting the charge against the Appellant. There being fabricated

L evidence against the Appellant, surely, her dismissal cannot be said to have been fair. We uphold grounds 1, 3 and 4.

Lastly in ground 5, we find this case to be deserving of an award for damages beyond the Notice period because the Respondent attempted to dismiss the Appellant on fraudulent claims and even endeavoured to get the police to alter the Police Report. This behaviour is appalling and cannot be condoned. The Respondent's employees went to great lengths to create facts favourable to themselves to support the charge. For this reason alone, we find this case deserving of an award of damages exceeding the notice period, in this case 14 days for hourly paid employees and 1 month for monthly paid employees. In *Jonathan Musialela Ng'uleka v Furniture Holding Limited* ⁽⁹⁾ the Supreme Court held that awards for compensation or damages in employment cases must include allowances and other perks. We therefore award damages equivalent to 24 months' salary inclusive of allowances payable at dismissal. The payable amount shall be assessed by a Deputy Registrar.

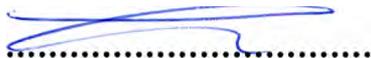
In conclusion, the trial Court erred when it found that there was nothing wrongful or unfair about the Appellant's dismissal. Having found that there was a fraudulent document on whose basis the

employer dismissed an employee, no trial Court acting correctly could reasonably have found that the dismissal was fair. We therefore set aside the Judgment of the lower Court and find that the dismissal was not supported by any substratum of facts to justify the Appellant's dismissal.

Given the circumstances under which she was dismissed, costs in this Court and in the Court below are for the Appellant.



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F.M. CHISANGA
JUDGE PRESIDENT



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M.M. KONDOLO SC
COURT OF APPEAL JUDGE



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B.M. AJULA
COURT OF APPEAL JUDGE