IT

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO.123/2014
SCZ/8/243/2013

BETWEEN:

MOSES MWAANGA — APPELLANT

AND

KONKOLA COPPER MINES PLC — RESPONDENT

CORAM: Mambilima, CJ and Kaoma and Kajimanga, JJS

On: 6th April, 2017 and 13th April, 2017

For the Appellant: Mr. G. Nyirongo – Nyirongo and Co

For the Respondent: Ms. G. Kumwenda – ECB Legal Practitioners

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JUDGMENT

Kaoma, JS delivered the Judgment of the Court

Cases referred to:

1. **Glynn v Keele University and another (1971) 2 All E.R 89**
2. **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa SCZ Judgment No. 18 of 1986**
3. **Ndongo v Moses Mulyango and another (2011) 1 Z.R. 187**
4. **Albert Mwanaumo and others v NFC Africa Mining PLC and others (2011) 1 Z.R. 30**
5. **Attorney-General v Richard Jackson Phiri (1988-89) Z.R. 121**

Works referred to:

1. **Halsbury's Laws of England, 4th Edition, Volume 16, paragraph 573**
2. **Employment Law in Zambia, W.S. Mwenda (Revised Edition)**

The appellant was employed by the respondent in November, 2007 as a Chemical Technologist. In June, 2010 he was dismissed from employment. At the time of his dismissal, he held the position of Furnace Operator. The dismissal arose from an e-mail he wrote to those responsible, to ensure that hot area and furnaces personnel, were using appropriate personal protective equipment (PPE). The e-mail was circulated to supervisors and managers of the respondent. The appellant resorted to writing the said e-mail because he thought that the respondent had neglected to provide him and other employees with personal protective equipment.

Following the circulation of the e-mail, the appellant was charged with the offence of gross indiscipline and inciteous behaviour. He went through the laid down disciplinary procedure and was summarily dismissed. He appealed at two levels but both appeals failed. Disgruntled by the dismissal, he issued a writ of summons in the High Court seeking for, inter alia: damages for breach of contract and wrongful dismissal; and a declaration that his dismissal was null and void and wrong at law.

The respondent's position was that the appellant was lawfully dismissed on account of the e-mail which it termed derogatory and

contrary to its policy and procedure on the use of e-mail facility and for dealing with unsafe conditions in the work place.

On the evidence before him, the learned High Court Judge found nothing wrongful about the basis of the charges levelled against the appellant and the process employed to dismiss him and dismissed the action for lack of merit with costs.

Dissatisfied with the decision, the appellant initiated this appeal raising three grounds in his memorandum of appeal. However, he has abandoned ground 1, leaving grounds 2 and 3 which we have renumbered as grounds 1 and 2 and read as follows:

1) **The lower court erred at law and fact when it failed to find that at law an employee was justified in terminating his employment and refusing to go on further with his work if he had reasonable apprehension of danger to life or personal injury as a result of continuing work.**

2) **The lower court erred at law and fact when it found that the appellant had failed to prove that his dismissal was wrongful and that he had failed to establish that there was no reasonable basis or foundation to dismiss him when in fact the plethora of evidence on record speaks to the contrary.**

In support of the appeal, counsel for the appellant filed written heads of argument on which he relied. He also relied on the submissions that were filed in the lower court, which submissions are in fact the same as the written heads of argument before us. Counsel argued the two grounds of appeal together.

First, he gave an evaluation of the evidence given in the lower court, which we do not intend to restate. However, he argued that there is a very clear silver thread running through the maze and fabric of the evidence which clearly shows that the respondent does acknowledge that the issues raised in the e-mail were of critical importance but alleged that '**bad language**' was used to communicate the alleged issues; and yet the alleged bad language in the e-mail has not been highlighted.

Counsel cited **Halsbury's Laws of England, 4th Edition, Volume 16, paragraph 573**, where the learned authors state that:

> **"An employee is justified in terminating his employment and refusing to go on further with his work (1) if he has a reasonable apprehension of danger to life or personal injury as a result of continuing work, and this includes cases where he has been misled into anticipating the provision of precautionary measures rendered reasonably necessary by the nature of the work ..."**

It was submitted that the above quote is on all fours with the circumstances of this case; that the respondent has consistently acknowledged that the appellant raised important issues on personal protective equipment; and that therefore, he was fully justified to raise the e-mail in the manner he did as he had

reasonable apprehension of damage to his life or personal injury as a result of continuing work.

It was also argued that in the e-mail, the appellant raised the possibility of accident on more than three occasions, and therefore, he clearly had his safety at heart and that of others, albeit, instead of terminating his employment or refusing to go on further with work, he opted to communicate to management in writing and he did not cause any industrial unrest.

Counsel also referred to the case of **Glynn v Keele University and another**[1] which we cited with approval in the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**[2] where we held that procedural lapses would not render a dismissal a nullity if there is evidence that the employee had committed an offence for which he was dismissed. Counsel strongly disputed that the e-mail gave rise to the alleged offence to warrant the charges and subsequent dismissal of the appellant. We were urged to set aside the judgment of the lower court as it finds that the appellant improperly wrote the e-mail and as such was due for dismissal.

Counsel for the respondent also filed heads of argument on which she entirely relied. Responding to ground 1, she submitted

that the appellant's argument that the lower court failed to find that he was justified in terminating his employment and refusing to go on further with his work if he had reasonable apprehension of danger to life is a wrong interpretation of the court's finding and an attempt to mislead this Court. That the lower court did not make a finding on whether or not the appellant was justified in terminating his employment and refusing to work because the appellant had not, at any point, terminated his employment or refused to work.

It was contended that the lower court found that the appellant did not follow procedure in raising the issues of safety and that the respondent was correct in finding that the appellant's actions amounted to gross indiscipline and inciteous behaviour. That therefore, there is no need for this Court to interfere with the finding of the lower court. Citing the case of **Ndongo v Moses Mulyango and another**[3], on when an appellate court will reverse findings of fact made by a trial court, counsel argued that the trial Judge properly analysed the evidence before him and that his findings are supported by the evidence on record.

With regard to ground 2, counsel for the respondent submitted that the lower court was on firm ground when it found that the

appellant had failed to prove that his dismissal was wrongful as he had failed to establish that there was no reasonable basis to dismiss him. Counsel cited a text from a book by W.S. Mwenda titled **Employment Law in Zambia, (Revised Edition)** regarding what constitutes wrongful dismissal. He also cited a High Court case of **Albert Mwanaumo and others v NFC Africa Mining PLC and others**[4], where the case of **Attorney-General v Richard Jackson Phiri**[5] was applied which held that:

> **"It is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done, and that the duty of the Court is to examine if there was necessary disciplinary power, and if it was exercised in due form".**

Counsel disagreed with the appellant's contention that the e-mail did not give rise to any offence to warrant the charge and subsequent dismissal. It was argued that the appellant's actions were contrary to the disciplinary code and grievance procedure and amounted to an offence; and that since the respondent acted correctly, within the provisions of the disciplinary code and grievance procedure, the lower court was on firm ground in dismissing the appellant's claim for wrongful dismissal. We were invited to dismiss the appeal, with costs.

We have considered the record of appeal and the arguments by learned counsel. We shall deal with the grounds of appeal separately. We accept right away that the respondent had in place a Safety Procedure known as KCM-PL-36 which provided for the employees' right to refuse to work due to imminent danger to their person. The Introduction to KCM-PL-36 states as follows:

> "**In order to enhance safety and health of the employees, protection of the environment and customer satisfaction by quality of the final product, the site shall have an internal process for addressing employees' right to refuse work on the grounds of SHEQ concerns.**
>
> **This process is not an employee complaint or suggestion program, nor is it a disciplinary procedure process. It is a site specific process to ensure employees are not forced to perform work in unsafe/hazardous manner or under unsafe/hazardous conditions**".

The objective of KCM-PL-36 states that:

> **"This procedure is meant to ensure that employee SHEQ concerns are properly investigated and that no restrictions or recriminations take place against the employee for refusing to do work on the ground of SHEQ concerns.**
>
> **The flow chart in 4.3 shall be followed whenever a worker has perception that a work situation is likely to cause serious harm to endanger himself, another person and damage to equipment or the environment"**.

The scope of KCM-PL-36 states as follows:

> **"This procedure is applicable to all employees and contractors within KCM and is therefore mandatory on the following grounds:**
>
> - **During the RAMP.K Safety Awareness Course, employees and contractors are informed of their right to refuse work on SHEQ grounds.**

- **Regulatory requirement under Mining Regulation No. 404, which states:**

"If any person complains to the person in charge of his working place or any other official that such place is dangerous, such person in charge or other official shall take immediate steps consistent with safety to confirm such danger and then, if it so confirmed, take immediate steps to rectify such danger or prevent access to such working place"".

Further, regarding responsibility, KCM-PL-36 states that:

> **"It shall be the responsibility of all supervisory staff to ensure that the requirements of this procedure are protected from abuse. Management, supervisors and employees of KCM as well as contractors shall ensure effective implementation and compliance to this procedure".**

Now, coming to ground 1 of this appeal, alleging that the Judge failed to find that at law an employee was justified in terminating his employment and refusing to go on with his work if he had reasonable apprehension of danger to life or personal injury as a result of continuing work, our view is that this ground is not properly formulated and is actually flawed.

First, there can be no doubt from the above excerpts that the appellant, as an employee of the respondent, had a right to refuse to do work on the ground of safety concerns and the learned Judge was aware of this right. However, as conceded by counsel for the appellant, the appellant did not refuse to work on account of torn gloves or other personal protective equipment and the undisputed

evidence of DW1 was that he had discussed the issue with the appellant at the start of the shift and they had resolved to work with the equipment available at that particular time.

Secondly, there was a mandatory procedure to follow to address the safety concerns raised by the appellant which applied to all employees. Admittedly, the appellant was dismissed from employment for gross indiscipline and inciteous behaviour as he ignored the established procedure for addressing safety concerns. In addressing this issue, the Judge stated at page J5 as follows:

> "**However, in the instant case the defendant had put in place the procedure to be followed for an employee to exercise his right to refuse to work in case of imminent danger. This was known by the Plaintiff and he identified it at page 4 of the Defendant's Bundle of documents.**
>
> **In summary the policy stipulated that an employee had to report the danger to his supervisor; the supervisor was required to make a primary assessment of danger in the presence of the worker; if the employee agreed with the supervisor's assessment that there was no danger, he was to return to work; if the employee did not agree with the supervisor's assessment as to safety, he was entitled not to resume work and further proceedings would be undertaken involving other personnel until the danger was corrected and the job determined safe.** (Underlining ours for emphasis only)
>
> **Clearly, the plaintiff did not follow that procedure. In my view, he could not be said to have properly exercised his rights when he resorted to circulating the e-mail in issue. It was contrary to the laid down procedures for resolving safety concerns. And the appellant did admit to not having followed the said procedure during the case hearing. The Defendant, through its internal disciplinary tribunals determined the plaintiff's actions to be gross indiscipline and inciteous behaviour. In the circumstances of this case, I accept that there were reasonable grounds for that determination".**

We agree with the learned Judge that whilst the appellant raised serious issues which bordered on safety concerns, in actuality, he did not follow the established procedure for addressing such concerns. DW2 testified to the procedure that the appellant should have followed instead of circulating an anonymous e-mail to top management which was copied to two control rooms, using what the respondent termed 'abusive language'. Therefore, we find no merit in ground 1 and we dismiss it.

In respect of ground 2, the contention by the appellant is that the learned Judge misdirected himself when he found that the appellant had failed to prove that his dismissal was wrongful. Clearly, the learned Judge had rejected the appellant's argument that the e-mail did not give rise to any offence. The Judge found as a fact that it did because it was an improper way of dealing with the perceived safety concerns and the subject e-mail was addressed to people other than the appellant's supervisor.

The Judge also believed DW1's evidence that he raised the charge because the e-mail could have caused industrial unrest. On the evidence before him, the Judge had no cause to doubt the

respondent's assessment that the appellant was inciting employees who had access to the control rooms and to the computer there.

The Judge had further observed and properly so, that the documentary evidence showed that even at the case and appeal hearings, the appellant's tone was of admission of wrong doing and he was apologetic and was told that his actions were unacceptable as they could have resulted in industrial disharmony. Counsel for the appellant cannot argue that although the appellant was apologetic, he continued to deny any wrong doing. Our view is that the findings made by the learned Judge were supported by the evidence on record.

We are satisfied that the respondent had established that the appellant had committed the offence for which he was dismissed; and that it had valid disciplinary powers which were properly exercised. As we have said countless times before, it is not the function of the court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done; the duty of the court is to examine if there was necessary disciplinary power, and if it was exercised in due form.

Therefore, the learned Judge was on firm ground when he held that the appellant had failed to prove that his dismissal was wrongful. As a result, we find no merit in ground 2 of the appeal.

In all, we dismiss the appeal with costs here and below.

I.C. MAMBILIMA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE