IN THE SUPREME COURT OF ZAMBIA **APPEAL NO 106/2015**
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

BETWEEN:

JOSEPH MWANZA **APPELLANT**

AND

CNMC LUANSHYA COPPER MINES PLC **RESPONDENT**

CORAM: MAMBILIMA CJ, MALILA AND MUSONDA JJS;
on 6th March, 2018 and 13th March 2018

For the Appellant	**:**	**In person**
For the Respondent	**:**	**Mr. K. Bota, of William Nyirenda and Company**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **KUNDA V KONKOLA COPPER MINES PLC APPEAL NO 48 OF 2005**
2. **ZAMBIA NATIONAL PROVIDENT FUND V YEKWENIYA MBINIWA CHIRWA (1986) ZR 70**
3. **ZESCO LIMITED V DAVID LUBASHI MUYAMBANGO (2006) ZR 22**
4. **BARCLAYS BANK ZAMBIA LIMITED V MANDO CHOLA AND IGNATIUS MUNTANGA (1997) SJ 35**
5. **KHALID MOHAMMED V THE ATTORNEY GENERAL (1982) ZR 49**
6. **MUSUSU KALENGA BUILDING LIMITED AND WINNIE KALENGA V RICHMAN'S MONEY LENDERS ENTERPRISES (1999) ZR 27**

LEGISLATION REFERRED TO:

a. **SUPREME COURT RULES (SCR) CHAPTER 25 OF THE LAWS OF ZAMBIA, RULE 58 (3)**
b. **INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA SECTION 97**

This is an appeal against a decision of the Industrial Relations Court (IRC), delivered on 27th April, 2015, dismissing the Appellant's claim, seeking an order declaring the termination of his contract of employment as unfair, wrongful and unreasonable.

Facts leading to this litigation are substantially not in dispute. The Appellant was an employee of the Respondent Company. On 10th July, 2013, he and another employee, Samuel Kasalama, were arrested in connection with theft of tyres. The theft is believed to have occurred at the Respondent's Surface diesel workshop on 9th July, 2013. The Appellant was arrested and charged with theft. He was released on police bond on 15th July, 2013 and began appearing before the Subordinate Court on 17th July, 2013. At the conclusion of the trial, on 13th February, 2013 he was acquitted. By that time, he had been dismissed for being absent from work in excess of 10 days, effective 20th July, 2013. The Appellant's letter of termination read as follows:–

"23 July, 2013

Mr Joseph Mwanza
Mine No. 092702
Underground Mining

Dear Mr Mwanza,

TERMINATION OF EMPLOYMENT

Management has decided to terminate your contract of employment effective 20 July, 2013 for absence in excess of 10 days.

You have the right to appeal against this decision and should you wish to do so, you can write to the Assistant Chief Executive Officer – Human Resources giving an explanation for your absence.

Yours sincerely

Loti Chola
Vice Manager Human Resources"

The Appellant did not appeal. He, instead, sued the Respondent in the IRC. In his Notice of Complaint, the Appellant was seeking the following reliefs -

1. **An order declaring that the termination of his contract of employment by the Respondent on 20th July, 2013 is unfair, wrongful and unreasonable and devoid of any legal justification.**
2. **Compensation for loss of employment**
3. **Damages**
4. **Interest and costs; and**
5. **Payment of one month (salary) in lieu of notice**

He filed an affidavit in support of the Notice of Complaint in which he contended that the termination of his employment by the Respondent was illegal and should be declared null and void. Further, that the allegations levelled against him were wrongful as he was cleared by the Subordinate Court on 13th February, 2014.

In his testimony before the Court below, the Appellant stated that during the period that he was said to have stayed away from

work, he was actually in police custody. That the said incarceration was at the instigation of the Respondent. That because the Respondent knew his whereabouts, the days he spent in custody and appearing in court from 10th to 17th July, 2013 should be discounted, so that in effect, he was absent from work for only three days. He further testified that he attempted to report for duty on 18th July, 2013 but was prevented from doing so by his supervisor, Mr. Godfrey Paina Mumbi, who told him that he (Mr. Mumbi) was under instruction not to allow him to work until his criminal case had been disposed of. He stated that he was again turned away on 22nd July, 2013 by mine police, who even confiscated his identity card.

The Appellant claimed that he only became aware of his dismissal when he saw his last pay statement for July 2013. In September 2013, the Respondent wrote to Mukuba Pension Trustees Limited asking them to facilitate the payment of his pension. He stated that on 18th February, 2014, he wrote to the Respondent and attached the notice of acquittal from the Court but was met with a negative response.

The Appellant contended that when dealing with his case, the Respondent did not follow the procedure for dealing with criminal offences as outlined in clause 2.11.1 of the Disciplinary Code and Grievance Procedure for General Pay Roll Employees (hereinafter referred to as the 'Disciplinary Code'). The said clause provides as follows:-

> **"In cases of a criminal nature, statements should be taken and if practical the case disposed of and the matter reported to Zambia Police immediately."**

The Appellant also contended that he was not formally charged with the offence of unauthorised removal of company property; that no disciplinary hearing was held and neither was he laid off in line with clauses 2.1 and 2.4. of the Disciplinary Code. Clause 2.1 outlines the action to be taken by a supervisor when an offence is committed or reported, while Clause 2.4 outlines circumstances when an employee may be laid off. The Appellant argued that he was entitled to be reinstated following his acquittal in accordance with clause 2.2.2. of the Code.

The Appellant's only witness was his father, Mr. Samuel Mwanza (CW2). He, too, argued that the Appellant was not a deserter because the Respondent was responsible for, and knew,

his whereabouts during the time that he was not reporting for work. CW2 told the Court that the Respondent wanted the Appellant to write a letter of apology, admitting the charge of theft before he could be reprieved but he, and his son, strongly objected.

The Respondent filed an answer in response to the Appellant's Notice of Complaint in which it contended that contrary to the Appellant's claim that he was dismissed for theft of company property, his contract was terminated for being absent from work for over ten consecutive days without permission.

The Respondent called two witnesses, one of whom was Mr. Loti Chola (RW1). RW1 testified that after the Appellant was released from police custody, he did not report for work. That he only showed up when he was acquitted and by that time, he had already been dismissed for desertion. According to RW1, the Appellant had an opportunity to exculpate himself in accordance with clause 3.9.1 (c) of the Disciplinary Code but he did not do so. The said clause 3.9.1 (c) reads:-

> **"3.9.1. Summary Dismissal is the final sanction and should be used -**
> **(a) ...**
> **(b) ...**
> **(c) when an employee is absent from work without permission for ten (10) consecutive days, his/her service shall be deemed as having been terminated by his/her**

breach thereof. If an employee subsequently produces a satisfactory explanation for his/her absence, the Company shall in its discretion reinstate the employee without break in service."

Mr. Godfrey Paina Mumbi was called as RW 2. According to this witness, the Appellant was expected to seek permission to attend to his criminal case. He denied the Appellant's assertion that he (RW2) had told the Appellant not to report for work until his case was disposed of.

Upon considering the evidence that was before it, the Court below decided that the issues for determination in the case were twofold; namely, whether the Respondent had power under the Disciplinary Code to terminate the Appellant's employment in the manner that it did; and, whether in the circumstances of this case the termination was unlawful, wrongful or unreasonable. The Court was of the view that a determination of these two issues would lead to a decision as to whether the Appellant was entitled to the reliefs sought.

On the evidence that was before it, the Court below found as a fact, that the Appellant's employment was terminated with effect from 20th July, 2013 for desertion and that in accordance with clause 3.9.1 (c) of the Disciplinary Code, the Appellant's

employment contract was deemed to have been terminated by his breach. The Court also found as a fact that the Appellant was detained by Zambia Police for a period of five days and that he did not take any steps to obtain leave to be absent from work from the Respondent after his release. That although the Appellant claimed that he reported for duty but was turned away, he did not provide any evidence to support this assertion thereby falling short of the fundamental principle of law that it is the one who alleges who must prove a fact. We restated this principle in the case of **KUNDA V KONKOLA COPPER MINES PLC**[1] when we said:–

> **"The principle is so elementary that the Court has had on a number of occasions to remind litigants that it is their duty to prove their allegations. Of course, it is a principle of law that he who alleges must prove the allegations."**

On the assertion by the appellant that the disciplinary procedure was not followed, the Court below was satisfied that the Appellant was dismissed for desertion under clause 3.9.1 (c), and not theft. The Court noted that an employee who has been summarily dismissed under that clause can be reinstated upon giving a satisfactory explanation for his/her absence. That the Appellant was given such an opportunity to give a satisfactory explanation for his absence so that the company could exercise its

discretion and consider reinstating him without a break in service when he met the Vice Manager-Human Resource, but the Appellant refused to do so. That in any event, the Appellant was terminated for a dismissible offence, and, therefore, no injustice would have been occasioned to him even if the Respondent did not follow the laid down procedure. To support this position, the court relied on our decision in the case of **ZAMBIA NATIONAL PROVIDENT FUND V YEKWENIYA MBINIWA CHIRWA**[2]. In that case, we held that-

> **"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is nullity."**

At the end of the day, the Court below found that the termination of the Appellant's contract of employment was not unlawful, or wrongful or unreasonable because the Respondent was entitled to dismiss him summarily, for desertion pursuant to clause 3.9.1(c) of the Disciplinary Code. The Appellant's case was, consequently, dismissed in its entirety.

Aggrieved by this determination, the Appellant has now launched this appeal before us, advancing 19 grounds of appeal in a memorandum of appeal filed on 21st May, 2015. He also filed

heads of argument on 14th July, 2015. The said heads of argument do not contain a narration of any arguments but are, in effect, couched in form of grounds of appeal. The nineteen grounds of appeal contained in the memorandum of appeal are stated as follows:-

"1. **The court erred when it allowed the respondent's witness RW 1 in court before he could testify and tempered with the evidence given by CW 1 when my witness were not allowed until their time to testify came.**
2. **The court erred when it failed to establish the circumstances on the 9th and 10th July 2013 which lead to my absence exhibited by LC3 and JM4 and further omitted clause 2.1.2. which should have applied according to page 24 and 25 of LC4**
3. **The court erred when it considered I deserted when in fact I was picked by the respondent security officers in presence of my supervisors who later handed me over to state police and had me detained for six (6) days, without following the lead down procedure on page six (6) clause 2.4.2.4.1(d)**
4. **The court erred when it considered the evidence in the matter of theft on the 9th and 10th July 2013 from the respondent security officers**
5. **The court misdirected itself that I a absent without authority when it was the wish of respondent to hand me over to the state without following the disciplinary procedure in accordance with LC4 page 4 clause 1.2. a,b,c and page 5 section 2 clause 2.1.2, 2.1.3, 2.2.1**
6. **The court erred when it relied on clause 3.9.1.c. as this was not applicable exhibit LC3 shows the evidence from the respondent security personnel which was over looked**
7. **The court misdirected itself when it relied on exhibit LC1 letter of termination which lacked merit as there was no proof who delivered and the recipient and there was no address, further the court failed to prove a report on which RW1 acted upon to show I was absent as he alleged it was prepared by Mr Masebela**
8. **The court misdirected itself when it failed to establish the facts exhibited by JM4 alluding to the fact that the satisfactory explanation was given. Further the court erred when it alleged I was given an opportunity to produce a satisfactory explanation**

when it was the wish of the respondent that I write a letter to admit all the allegations for them to consider reinstatement

9. **The court ignored clauses which the respondent should have applied in addressing the matter on 9th and 10th July 2013**
10. **The court erred when it failed to consider the bleach caused by the respondent in line with LC4 on which the spirit of the code book was ignored**
11. **The court misdirected itself that I expected a charge for theft when in fact that was the case , exhibited by LC3 in which the investigations were instituted**
12. **The court overlooked the fact that the respondent knew about the theft case and failed to apply to the procedure required**
13. **The court erred in law and fact when it ruled there was no proof regarding the ceased identity card when this is the property of the respondent and the respondent did not decline as the card JM as the card is retrieved upon terminating employment**
14. **The court misdirected itself stating CW2 and CW1 was advised to do wrong thing when in fact the respondent wanted a letter to admit that CW1 stole and was absent for 10 days in the role to be considered to which CW1 declined exhibit JM4 gives an explanation to that effect**
15. **The court erred in failing to hold the respondent accountable when it failed to follow the procedure in criminal cases page 8 clause 2.11.1**
16. **The court erred in failing to consider reliefs prayed for in paragraph 5 considering the difficulties and hard times I was subjected to during the criminal trial up to the time the matter was in the industrial relations court where I was seeking justice**
17. **The court erred when it stated I did not take steps to leave when in fact attempts were made despite the disciplinary code book having no provisions to this effect when an employee is subjected to criminal proceedings**
18. **The court erred when it stated there was nothing wrong about the dismissal when in fact the respondent was well aware of the consequence in the case I was wrongly accused and the curt overlooked how my record of employment has been affected and to my prospects**
19. **The court when it ruled I conceded clause 3.9.1(c) when this was heard in my testimony that it was not applicable."**

Several of these grounds of appeal raise similar and sometimes overlapping issues. We will, therefore, in some instances group them as opposed to dealing with them seriatim.

In his heads of argument, the Appellant restates the first ground of appeal which is that the Court below erred when it allowed the Respondent's witness, RW1, to remain in court before he testified and that this witness **"tampered with the evidence given by CW1"**, while the Appellant's witness was not allowed to do so until his time to testify. There is no evidence showing how the witness tampered with the testimony of CW1.

The second, third, fourth, sixth, eighth, eleventh, thirteenth, fourteenth, seventeenth, eighteenth and nineteenth grounds of appeal, collectively raise issue with the Court's finding that the Appellant was dismissed for absenteeism, and not theft. In support of this position, the Appellant has contended among others, that the Court below disregarded evidence showing that he was picked up by police in full view of his supervisors and detained for theft. That the Respondent's security was investigating him for being an accomplice to theft of tyres and that despite his exculpatory letter of 18th February, 2014, the Respondent wanted him to admit the charge of theft before he could be reprieved. Further, that the Court erred when it found that the Appellant did not take any steps to obtain leave from the Respondent to attend to his criminal case

and to find that he did not provide proof that his identity card was seized.

In the fifth, ninth, tenth, twelfth and fifteenth grounds of appeal, the Appellant is contending that the Court below misdirected itself when it found that the Respondent followed the disciplinary procedure when terminating his contract of service when in fact the Respondent breached clause 2.11, dealing with criminal offences.

In the seventh ground of appeal, the Appellant contended that the Court below misdirected itself when it relied on a letter of termination which was not properly served on the Appellant as it had no physical address of the recipient. According to the Appellant, there was no proof that the letter was delivered or received by the recipient.

Finally, the Appellant restated the sixteenth ground of appeal, which is that the Court failed to consider the reliefs prayed for, taking into account the difficulties that he had to endure from the criminal trial up to the action in the IRC.

As stated earlier, the Appellant's heads of argument filed on 14th July, 2015 on which he is relying are in essence a set of eleven

paragraphs, all reading like grounds of appeal. There are no arguments advanced in support of the grounds. At the hearing, the Appellant invited us to consider all the nineteen grounds of appeal. He stated that the heads of argument were just a summary. It would appear, therefore, that the Appellant did not intend that his heads of argument should be an amendment of his memorandum of appeal, which, if it were, would have required leave of this Court under Rule 58(3) of the **SUPREME COURT RULES**.

The Appellant augmented his **'heads of argument'** with oral submissions. The thrust of his argument was that the Respondent did not follow the procedure stipulated in the Disciplinary Code when dealing with his case. He argued, spiritedly, that the Respondent ignored the criminal case of theft that he was facing and instead, relied on his absenteeism. He contended that the letter of termination was not even served on him. He denied that he deserted his workplace. According to the Appellant, the Respondent knew where he was as he was detained in connection with the suspected theft of tyres.

In response, the learned Counsel for the Respondent filed heads of argument on 23rd October, 2017 on which he relied

entirely. He responded to all the nineteen grounds of appeal as contained in the memorandum of appeal. To avoid getting lost in the maze of the numerous grounds of appeal and the Respondent's answer to each one of them, it will be easier and neater if we restate each ground followed by the Respondent's answer.

Reacting to the Appellant's first ground of appeal, that RW1 was in Court and listened to the testimony of the Appellant and his witnesses before he (RW1) testified, Counsel submitted that this ground should not even be entertained because the Appellant did not raise any objection, in this respect, before the trial Court.

In the second ground of appeal, the Appellant contends that the Judge in the Court below did not consider the circumstances which led to his absence for ten consecutive days but instead placed him in contravention of Clause 3.9.1(c) of the Disciplinary Code on desertion and that the Judge omitted to consider the procedure under Clause 2.1.2 of the code which was applicable in instances when employees are accused of committing criminal offences. In response to this ground of appeal, learned Counsel for the Respondent submitted that the Appellant's incarceration by the police only lasted for five days and yet he did not report for work in

the remaining five days. He further submitted that the Respondent had no knowledge of the Appellant's whereabouts during the time that he was incarcerated and therefore had no option but to mark him absent. That the Respondent could not invoke the process set out in Clause 2.1.2. of the Disciplinary Code because the Appellant was found wanting on a case of absenteeism and not theft.

In the third ground of appeal, the Appellant raised issue with the Court's finding that he had deserted from his work place. He contended that he was in fact picked by the Respondent's security officers in the presence of his supervisors. That they later handed him over to the state police, who in turn, detained him for five days. The Respondent's Counsel's response to this ground of appeal was that the Appellant in fact, deserted from his work because he was absent without leave. That the Appellant did not seek formal authorisation or leave to attend to his case of theft at the police. That while the Appellant's supervisors witnessed his collection from his workplace by security officers, the Respondent did not have any formal notice of the incident or any formal application from the Appellant to request for leave to attend to his criminal matter. That

in any case, the Appellant was only detained for five days before he was released on bail.

Coming to the fourth ground of appeal, which is that the Court erred when it considered the Respondent's evidence relating to the Appellant's absenteeism which led to his dismissal, and not the evidence relating to theft, Counsel submitted that the Judge was on firm ground to have considered that evidence and not the circumstances relating to the theft. That there was no charge of theft laid against the Appellant and as such, the incident of theft was separate, independent and irrelevant to that of the Appellant's dismissal. He argued that regardless of the reason behind the Appellant's five days incarceration, the point is that he did not seek leave or due authorisation from the Respondents.

The fifth ground of appeal invited the Court to delve into circumstances which led to the dismissal of the Appellant. The Appellant contended that the lower Court misdirected itself when it found that he was absent without authority when it was the Respondent who handed him over to the state police without following the disciplinary procedure in the Disciplinary Code. In response to this ground of appeal, Counsel repeated his

submissions in response to the fourth ground of appeal, that the Appellant's dismissal was on account of his absenteeism and not theft. He referred us to, among others, the case of **ZESCO LIMITED AND DAVID LUBASHI MUYAMBANGO**[3] in which we held, among others, that it was not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures. That the duty of the Court is to examine if there was the necessary disciplinary power and if it was exercised properly. Counsel also submitted that in this case, the Court should only be concerned with the disciplinary procedure followed by the Respondent in relation to the dismissal of the Appellant on the grounds of absenteeism. On the contention that the Court erred when it relied on Clause 3.9.1(c) and overlooked the evidence of incarceration of the Appellant, Counsel reiterated and repeated his submissions in respect of the fourth ground of appeal and submitted that it is Clause 3.9.1(c) of the Code which was applicable to the Appellant's case.

Coming to the seventh ground of appeal, that the lower Court misdirected itself when it relied on the letter of termination which, according to the Appellant, lacked merit as there was no proof of

the letter having been delivered to him; Counsel submitted that the letter was delivered to the Appellant by the Human Resource Officer. That the Appellant, upon receipt of the letter authorizing him to collect his pension, referred to himself as a former employee, indicating that he had a letter terminating his employment. According to Counsel, there was, therefore, nothing invalidating the letter of termination, either in substance or form or by way of ineffective service.

On the eighth ground of appeal, the Appellant contends that the Court misdirected itself when it alleged that he was given an opportunity to provide a satisfactory explanation to the charge of desertion. Counsel submitted that the offence of absenteeism is not in any way negated by the availability of an explanation as to the whereabouts of an employee. According to counsel, it is only the acquisition of permission, or the lack thereof which places an employee in a position of compliance or non compliance with the Disciplinary Code. He reiterated that the Appellant did not seek the necessary permission requiring him to absent himself from work. That the contention by the Appellant that the Respondent requested him to admit that he was absent and seek the Respondent's

forgiveness in order to be reinstated was not proved. Counsel submitted that the Respondent merely requested the appellant to write an exculpatory letter which the Appellant refused to do.

In respect of the ninth ground of appeal, under which the Appellant is contending that the trial Judge neglected to apply Clause 2.1.2. relating to the charging of employees who are accused of committing a crime, Counsel's short response was to refer this Court to his submission in respect of the second ground of appeal.

In the tenth ground of appeal, the Appellant is contending that his absenteeism from work was caused by the Respondent in that it ignored 'LC4' which was a memorandum from the Head of Security to the Vice Manager, Human Resource on the implication of the Appellant in a case of theft. Counsel has submitted, in response, that the failure by the Appellant to seek leave or permission to be away from work during the time that he was detained on suspicion of theft cannot be attributed to the Respondent. That the wrong doing in this case was not the fact that the Appellant was detained at the police station, but the fact that he failed to seek permission to be away from work in order to attend to investigations by police.

Counsel argued the eleventh and twelfth grounds of appeal together. In the eleventh ground, the Appellant is contending that the Court below misdirected itself when it stated that he expected a charge of theft because that was in fact the issue because there were criminal investigations instituted against him. In the twelfth ground of appeal, the Appellant contends that the Court overlooked the fact that the Respondent knew about the case of theft and failed to invoke the applicable procedure under the Disciplinary Code. In response to the two grounds of appeal, Counsel referred us to his earlier submissions in support of the second and fourth grounds of appeal, which, in the main, is that the Appellant was not facing a charge of theft but absenteeism.

On the thirteenth ground of appeal, that the Court below erred **"when it ruled that there was no proof regarding the seized identity card",** the response by Counsel was that the Appellant's testimony relating to the seizure of his identity card by the Mine Police officers and his purported ejection from the Respondent's premises was not substantiated at trial. He stated that the Court could not therefore have erred because the allegations by the Appellant were not proved.

On the fourteenth ground of appeal which is that **"the Court misdirected itself stating CW2 and CW1 was advised to do a wrong thing when in fact the Respondent wanted a letter to admit that CW1 stole and was absent for 10 days in the role to be considered to which CW1 declined to. Exhibit JM4 gives an explanation to that effect."**(sic) Counsel for the Respondent submitted that this ground ought not to stand because the Appellant was never told to admit any wrong doing.

The fifteenth ground of appeal is that the court below failed to hold the Respondent accountable when it (the Respondent) failed to follow the procedure in criminal cases as outlined in Clause 2.11.1. of the Disciplinary Code. Counsel's short answer was that no procedure relating to a criminal matter was in issue or at all.

The sixteenth ground of appeal was that the lower Court failed to consider the reliefs that the Appellant prayed for, considering the difficulties and hard times that he encountered during the criminal trial up to the hearing of his case in the IRC. Counsel's response was that there was no evidence led by the Appellant on the 'purported' difficulties and hard times that he was subjected to during his criminal trial and that these matters were not in issue at

all. He submitted that the role of the Court was to make a decision on the merits of the case. To support his argument, Counsel referred us to a passage in the case of **BARCLAYS BANK ZAMBIA LIMITED V MANDO CHOLA AND IGNATIUS MUNTANGA**[4] where we said:-

> **"It is not wrong for a Court of substantial justice to entertain a complaint however inadequately couched – especially by a lay litigant – and to make a decision or give an award on the merits of the case, once it is heard.**

Counsel stated that the lower Court could not be expected to award the reliefs sought when the claim lacked merit.

The seventeenth ground of appeal is that the Court erred when it stated that the Appellant **"did not take steps to take leave when in fact attempts were made despite the disciplinary code book having no provisions to this effect when an employee is subjected to criminal proceedings."** Counsel submitted that the Appellant's evidence, that he attempted to re-enter the Respondent's premises, was unsubstantial and unproven. That the Disciplinary Code required leave to be sought before one is absent from work. That consequently, the Appellant is mistaken to contend that the Code contains no provision requiring leave to be sought during periods of absence from work.

On the eighteenth ground of appeal, the Appellant contends that the lower Court erred when it stated that there was nothing wrong about his dismissal when the Respondent was well aware of the circumstances of the case in that he was wrongly accused. The Appellant also contended that the Court overlooked how his record of employment had been affected. In response to this ground, Counsel referred us to our decision in the case of **ZAMBIA NATIONAL PROVIDENT FUND VS YEKENIWA N. CHIRWA**[2] in which we held that where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure in the contract and such an employee has no claim on that ground for wrongful dismissal. Counsel pointed out that the Appellant's absence without leave has not been contested and the Disciplinary Code clearly states that such misconduct warrants the sanction of dismissal.

On the nineteenth and last ground of appeal, the Appellant states: **"The Court erred when it ruled I conceded Clause 3.9.1(c) when this was heard in my testimony that it was not applicable."** Counsel submitted in response, that the Appellant has not specified where, in the judgment of the Court below, the

Judge ruled that the Appellant had conceded to Clause 3.9.1(c) being the applicable provision. According to Counsel, it is clear that the Appellant is contesting the applicability of Clause 3.9.1(c) to this case, and, as such, the Respondent was at a loss for words to respond to this ground.

We have carefully considered the evidence on record, the Appellant's grounds of appeal, the submissions by the parties, as well as the Judgment appealed against. Notwithstanding the numerous grounds of appeal advanced, it is our view that most of the grounds raise similar and overlapping issues. After all is said and done, the main issue is whether the Appellant's dismissal from employment was unlawful or wrongful or unreasonable and offended the provisions of the Disciplinary Code. We will, therefore, not address each and every ground as outlined in the memorandum of appeal, but according to the issues raised, as stated earlier in our judgment.

In the first ground of appeal, the Appellant complains that RW1 was allowed to sit in court while his witness, CW2 was not allowed until it was his time to testify. In this ground, the Appellant also seems to suggest that RW1 tampered with the

evidence given by the Appellant. As pointed out by the learned Counsel for the Respondent, there is no objection on record to the presence of RW1 in court as the Appellant was calling his case. This means that the Appellant is raising this objection for the first time in this Court. In the case of **MUSUSU KALENGA BUILDING LIMITED AND WINNIE KALENGA V RICHMAN'S MONEY LENDER'S ENTERPRISES**[6], we held that if a matter was not raised in the trial Court, it is not competent for a party to raise it in the appellate Court. Be that as it may, there is no rule of law or procedure which precludes a witness of a party to sit in Court as the opponent is conducting his/her case. Thus, even if an objection had been raised, it would have suffered a fatal blow. This ground of appeal therefore has no merit and it is dismissed.

The kernel of the Appellant's arguments with regard to the second cluster of grounds of appeal, that is, the second, third fourth, sixth, eighth, eleventh, thirteenth, fourteenth, seventeenth, eighteenth and nineteenth, is that contrary to the Court's finding, that the Appellant was dismissed for absenteeism, there was evidence on record which suggested that his dismissal was related to the theft charge. The Respondent, on the other hand, argued in

response to most of these grounds that the Appellant's arrest for theft was not in contention. That the issue was that the Appellant was absent from work for a period in excess of ten days without permission and hence his summary dismissal under clause 3.9.1 (c) for desertion.

The evidence on record conclusively established that the Appellant's contract of employment was terminated because he was absent from work for more than ten days. The letter of termination which we have reproduced earlier in our judgment is to this effect and it also gave the Appellant time to appeal against the dismissal. In the relevant portion, the letter states:-

> **"Management has decided to terminate your contract of employment effective 20 July, 2013 for absence in excess of 10 days.**
>
> **You have the right to appeal against this decision and should you wish to do so, you can write to the Assistant Chief Executive Officer – Human Resources giving an explanation for your absence."**

It is not in dispute that the Appellant was arrested and detained on 10th July, 2013 in connection with the theft that occurred at the Respondent's premises. He was released from police custody on 15th July, 2013. The evidence on record also conclusively establishes that the Appellant did not report for work

after he was released from custody and neither did he make an effort to appeal or exculpate himself over his absence from work until he was acquitted of the charge of theft in February 2014.

In our view, the Appellant chose to ignore the letter of termination and this worked to his detriment. We agree with Counsel for the Respondent that the Appellant's theft case, which was being prosecuted by state police, was not the issue. At the time that he was charged with the criminal offence, the Appellant was not facing any administrative disciplinary action nor was he on suspension from work. He was still an employee of the Respondent Company and, as such, he was expected to report for normal duties or apply for leave of absence, notwithstanding the court case.

The Appellant did argue that he tried to report for work but he was advised by DW2 to report after his criminal case was concluded. It is on record that DW2 denied ever having given the Appellant such advice. The Court found that this allegation by the Appellant was not proved. We cannot fault the lower Court for this finding because, clearly, this allegation was not proved.

In his quest to link his dismissal to the charge of theft, the Appellant alleged that the Court below ignored his letter of 18th

February, 2014. In this letter, the Appellant seems to be explaining the circumstances that led to his arrest and his absence from work. He gave the Respondent 14 days in which to respond on the way forward following his acquittal. In our view, this **"exculpatory letter"**, came too late in the day. By the time that the Appellant was returning, armed with the notice of acquittal, he had long been dismissed from employment for absenteeism.

It would appear to us that the Appellant was labouring under the mistaken impression that he needed to clear himself of the theft charge in order to be reprieved. This lends credence to the observation of the Court below when it said:–

> **"It is clear from Complainant's evidence that he expected, albeit mistakenly, to be charged for theft or unauthorised removal of company property, subjected to disciplinary proceedings and reinstated in his job after the acquittal. Proof of this fact is that in re-examination the Complainant stated that he would like the Court to grant him the relief that he has prayed for because he has been acquitted of the offence of theft. However, as we have stated above, the evidence before us shows that the Complainant's employment was not terminated due to the alleged theft but for desertion as indicated in the letter of termination of 23 July, 2013. For this reason, his acquittal on the theft charge had no bearing on his dismissal for desertion."**

The overwhelming evidence on record clearly shows that the Appellant was dismissed on a charge of desertion and not theft. Consequently, we find that all the grounds of appeal considered

under this part, that is, the second, third, fourth, sixth, eighth, eleventh, thirteenth, fourteenth, seventeenth, eighteenth and nineteenth have no merit and they are dismissed.

The issue raised by the Appellant in the fifth, ninth, tenth, twelfth and fifteenth grounds of appeal, is that the Court below erred when it found that the Respondent followed the disciplinary procedure when terminating the Appellant's contract, when in fact the Respondent breached clause 2.11 dealing with criminal offences.

It is clear from the record, that the Respondent charged the Appellant under clause 3.9.1(c). Clause 3.9.1 (c) provides that when an employee is absent from work without permission for ten consecutive days, his service is deemed to have been terminated. In the case in casu, it is not in dispute that the Appellant was absent from work for more than ten days. Clause 3.9.1(c) gave the Appellant an opportunity to explain his absence so that the Respondent could reconsider his case, but he did not do so. As such, the charge remained unanswered.

From the foregoing, we find no reason to upset the trial Court's finding that the Respondent followed the disciplinary

procedure in terminating the Appellant's services. The termination of the Appellant's contract of employment cannot be said to have been unlawful or wrongful or unreasonable. The fifth, ninth, tenth, twelfth and fifteenth grounds of appeal have no merit and they are dismissed.

In the seventh ground of appeal, the Appellant raises the issue that the letter of termination was invalid as there was no proper service. The letter in question is dated 23rd July 2013. It bears the Appellant's name, Mine Number and Department. According to the Appellant's testimony, he came to know about his termination at the end of July, 2013 when he went to ask for his payslip. Going by this evidence, the Appellant knew that he had been terminated by the end of July 2013. Whatever can be said of the mode of conveyance of the message cannot invalidate the letter containing the message. We find that the argument by the Appellant is neither here nor there. This ground of appeal too, has no merit and it is dismissed.

The sixteenth ground was that the Court below failed to grant the reliefs sought. Having found that the Appellant's termination was not wrongful or unlawful, it followed that he was not entitled to

any of the reliefs sought. In fact, the Court found that the Appellant had failed to prove his case on a balance of probabilities. After considering the evidence that was before the Court below we cannot fault this finding.

All the grounds of appeal having failed, the appeal is therefore dismissed. We will not make any order as to costs.

I.C. Mambilima
CHIEF JUSTICE

M. Malila
SUPREME COURT JUDGE

M. Musonda
SUPREME COURT JUDGE