

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

APPEAL NO. 228/2022

(Civil Jurisdiction)

BETWEEN:

SYDNEY NGOMA

AND

NATIONAL PENSION SCHEME AUTHORITY



APPELLANT

RESPONDENT

CORAM: MCHENGA, DJP, NGULUBE AND MUZENGA, JJA.

On 21st June, 2024 and 31st July, 2024.

For the Appellant : Mr. C. Sianondo, Messrs Malambo and Company

For the Respondent : Mr. K. Mwondela and Ms. J. Ngandu, Messrs Kaumbu Mwondela Legal Practitioners

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Supabets Sports Betting vs Baluke Kalimwawa Selected Judgment No. 27/2019*
2. *Bank of Zambia vs Joseph Kasonde (1995-1997) Z.R. 28.*
3. *Gloryson Laki vs Zambia Sugar Plc Appeal No. 153/2007*
4. *The Attorney General vs Marcus Kampumba Achiume (1983) Z.R. 1*

5. *Care International Zambia Limited vs Misheck Tembo SCZ Appeal No. 57/2016*
6. *Kamfwa vs Zambia Electricity Supply Corporation Limited (2013) Vo. 2 Z.R. 92*
7. *Zambia Airways Corporation vs Gershom Mubanga (1992) S.J. 24 (S.C.)*
8. *Bank of Zambia vs Joseph Kasonde (1996) S.J. (S.C.)*
9. *Zambia Telecommunications Company Limited vs Shabwanga & Others Appeal No. 78/2016, Appeal No. 81/2016*
10. *Augustine Katongo vs Club Secretary and Ndola Senior Police Club (COMP/30/2014)*
11. *Caroline Tomaidah Daka vs Zambia National Commercial Bank (2012) Z.R. 8 (H.C.)*
12. *Zambia Consolidated Copper Mines Limited vs James Matale (1996) S.J. (S.C.)*
13. *Turner vs Wadham Stringer Commercials (Port mouth) Limited [1974] ICR 277, NIRC*
14. *The Attorney General v Richard Jackson Phiri (1988-1989) Z.R. 121 (S.C.)*

Legislation referred to:

1. *The Employment Code Act No. 3 of 2019*

Other works referred to:

1. *Mwenda W.S. "Employment Law in Zambia: Cases and Materials (2011)*
2. *Oxford Dictionary of Law 9th Edition*
3. *Chitty on Contracts: Specific Contracts Volume 2, page 37 to 155*
4. *Smith and Keenan's English Law 16th Edition, page 721.*

1.0 INTRODUCTION

1.1 This appeal originates from the decision of the High Court-Industrial Relations Division delivered by Makubalo, J. dated 26th January, 2022. The appellant's claims for damages for unlawful and wrongful dismissal and reinstatement were dismissed by the Court below.

2.0 BACKGROUND TO THE DISPUTE IN THIS APPEAL

2.1 The brief background to the matter is that the appellant (the complainant in the Court below) commenced a matter seeking among other reliefs:

- i. An Order that the dismissal was illegal, unlawful and wrongful;*
- ii. An Order of reinstatement;*
- iii. General damages;*
- iv. Damages for mental anguish and anxiety;*
- v. In the alternative, 48 months salaries and perks for the loss of employment;*
- vi. Damages for breach of contract of employment;*
- vii. Costs; and*
- viii. Any other relief the Court may deem fit.*

- 2.2 A brief summary of the facts of this case is that the appellant was employed by the respondent on 4th October, 2016 as a Project Manager, on permanent and pensionable basis.
- 2.3 On 30th September 2020, the appellant was charged with abuse of office, corruption and defrauding or attempting to defraud the respondent. He was asked to exculpate himself in writing, after which he received a letter dated 6th October, 2020 inviting him for a disciplinary hearing which was held on 8th October, 2020. He was dismissed from employment on the charges proffered against him by letter dated 13th October, 2020. The appellant appealed against his dismissal and his appeal was not successful but the appeals committee set aside the charge of defrauding or attempting to defraud the company.
- 2.4 The appellant's dismissal was because he supposedly engaged himself in some acts for exchange of personal, monetary and material gain and abuse of his office. These charges were proffered against the appellant because of the meeting he had with third parties who among them was a developer of the respondent's properties but did not inform his superiors.
- 2.5 According to the respondent, the appellant was charged for the offences after investigating the allegations thoroughly in accordance

with the respondent's disciplinary code. That the appellant went through the disciplinary process and was initially found guilty of abuse of office, corruption and defrauding or attempting to defraud the respondent. That the disciplinary committee recommended that the appellant be dismissed from employment and the appellant appealed against his dismissal but his appeal was unsuccessful.

3.0 DECISION OF THE LOWER COURT

3.1 The learned trial Judge considered the evidence before her and found that the appellant's dismissal was neither wrongful and unlawful nor illegal. She was of the view that the respondent followed the disciplinary code and the appellant was given an opportunity to be heard by the disciplinary committee. The lower Court further observed that the opportunity to be heard was not given by the Director General of the respondent but by the disciplinary committee. It was noted further that there was reasonable cause to charge the appellant because there was improper and unprofessional and dishonest conduct on his part because he did not disclose the meeting to his superiors, in the face of evidence that it was not his duty to meet with the respondent's stakeholders.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment of the Court below, the appellant launched an appeal in this Court advancing the following five grounds-

- 1. The Court erred in law and fact when it held that procedure was followed in the dismissal of the appellant;**
- 2. The Court erred in both law and in fact in evaluating the evidence as at no time did Mr. Mushinge ever complain to the Director General and thereby the Court misappropriated the procedure under the disciplinary code leading to a wrong conclusion that the disciplinary code was followed;**
- 3. The Court erred in law in stating that the meeting revealed that the appellant had been paid and the lower Court made assumptions which are unsupported by the evidence on record;**
- 4. The Court below failed to appreciate the explanation given by the appellant during the meeting and thereby reaching an erroneous analysis; and**
- 5. The Court erred both in law and fact when it found that the dismissal of the appellant was lawful and legal without establishing the substratum of facts as the appellant never interfered with the developer or third parties and neither was he involved in corruption.**

5.0 THE ARGUMENTS

- 5.1 Both parties filed Heads of Arguments into Court. Grounds one and two were argued concurrently while grounds three, four and five of the appeal were argued collectively.
- 5.2 In support of grounds one and two, learned Counsel for the appellant submitted that wrongful dismissal is where a dismissal is carried out in a manner contrary to procedure in the disciplinary code. To buttress this argument, we were referred to the cases of ***Supabets Sports Betting vs Baluke Kalimwawa***¹ and ***Bank of Zambia vs Joseph Kasonde***.²
- 5.3 It was submitted that there were procedural flaws in the manner the disciplinary action was taken. That firstly, clause 5.1.6 of the respondent's disciplinary code provides that the appellant's supervisor should raise the charge and refer it to the Human Resources Directorate in writing to facilitate investigations. Counsel argued that in casu, the Director General of the respondent was involved in the process from the beginning when he called the appellant to his office and later requested the appellant's supervisor to ask the appellant to render a report. Counsel argued further that the disciplinary code does not provide for the involvement of the

Director General for the obvious reason that the head of the respondent should not influence the disciplinary proceedings.

- 5.4 Counsel submitted further that there was no reference made to the Directorate of Human Resource in writing to carry out the investigations which is the responsibility of the charging office in accordance with clauses 5.4.1 and 5.4.2. That the matter was not investigated as they were no statements from witnesses especially from Mr. Kabuswe who met with the appellant.
- 5.5 Counsel submitted that there was a serious omission by the disciplinary committee because the minutes of the committee did not show that there was a vote before the decision to dismiss the appellant was reached, which violated clause 5.5.3 of the disciplinary code.
- 5.6 In support of ground three, four and five, it was submitted that an illegal or unlawful dismissal is one which is based on unsubstantiated grounds. That therefore the Court ought to look at whether the reasons for the dismissal were justifiable or not.
- 5.7 It was submitted further that the lower Court's finding that the appellant was charged on the basis of convening a meeting which was for payment due to persons who brokered the contract for the respondent's project was erroneous because the respondent

witness stated that the award of the contract was done through an open tender.

5.8 Further, Counsel submitted that the definition of the offences the appellant was charged with in the disciplinary code all relate to obtaining personal, monetary and material gain. That the respondent did not point to any personal or material gain attributed to the appellant. The witness who testified at the disciplinary hearing stated that the appellant was quiet and acted as an observer during the meeting which led to the charge proffered against him. That even the said witness did not seem to believe that that appellant committed the alleged offences. It was argued that the appellant's dismissal was also unfair and there is no evidence upon which the charges against the appellant could be anchored. To support this argument we were referred to the cases ***Supabets Sports Betting vs Baluke Kalimwawa (supra)*** and ***Gloryson Laki vs Zambia Sugar Plc.***³

5.9 In relying on the case of ***The Attorney General vs Marcus Kampumba Achiume***,⁴ it was submitted that there was no evidence to support the finding that the appellant received a benefit or any evidence to show how the appellant was expected to interact

with the entities that had a subsisting relationship with the respondent.

5.10 Counsel urged this Court to set aside the Judgment of the lower Court and find in favour of the appellant.

5.11 In the heads of arguments filed on behalf of the respondent, it was submitted that in order for a dismissal to be termed as illegal or unlawful, the employer must have breached a statutory provision while wrongful dismissal relates to dismissal which breaches the employee's contract of employment. To support this argument, Counsel made reference to a plethora of authorities which include the cases of **Care International Zambia Limited vs Misheck Tembo**⁵ **Kamfwa vs Zambia Electricity Supply Corporation Limited**,⁶ **Zambia Airways Corporation vs Gershom Mubanga**,⁷ **Bank of Zambia vs Joseph Kasonde**,⁸ **Zambia Telecommunications Company Limited vs Shabwanga & Others**⁹ and the High Court case of **Augustine Katongo vs Club Secretary and Ndola Senior Police Club**.¹⁰

5.12 It was accordingly submitted that the dismissal was not unlawful because the appellant was dismissed after being found guilty of misconduct in accordance with Section 50(1)(f) of the Employment

Code. It was also submitted that the dismissal was not wrongful because the respondent adhered to its disciplinary code.

5.13 It was submitted further that there was no breach of clauses 5.1.6 and 5.1.9 because the appellant was placed on suspension two days after being charged and the Human Resource Directorate was consulted for the investigations of the alleged misconduct as per clause 5.1.10 of the disciplinary code.

5.14 That further, clauses 5.4.1 to 4.4.10 provide that investigations are the responsibility of the charging officer in conjunction with security personnel. That investigations were conducted as evidenced at the disciplinary hearing. The charge form shows that the charging officer was Mr. Phillip Muyumbana who also authored the letters investigating the incident. The witness statement were duly signed and the appellant was informed of right to call witnesses at the disciplinary hearing. Counsel submitted that the disciplinary committee and the appeals committee were also duly constituted.

5.15 In response to grounds three and four, Counsel submitted that the lower Court arrived at the correct conclusion that the dismissal was not wrongful.

- 5.16 In response to grounds three and four, Counsel submitted that the lower Court did not err in determining that the appellant was not wrongfully dismissed because it examined the procedures the respondent used in arriving at its decision to dismiss the appellant.
- 5.17 In response to ground five, Counsel submitted that unfair dismissal relates to the merits or the reasons for the dismissal. That the lower Court considered the facts which led to the appellant being charged with the alleged offences and correctly concluded that they were justified because there was unprofessional behavior, misconduct and dishonest conduct for non-disclosure of the call he received and the meeting he attended. To buttress this argument we were referred to a plethora of authorities that discuss unfair dismissal which include the cases of ***Caroline Tomaidah Daka vs Zambia National Commercial Bank***,¹¹ ***Zambia Consolidated Copper Mines Limited vs James Matale***¹² and ***Turner vs Wadham Stringer Commercials (Port mouth) Limited***.¹³ Further, reference was made to various material which include ***Mwenda W.S. "Employment Law in Zambia: Cases and Materials (2011), Oxford Dictionary of Law 9th Edition, Chitty on Contracts: Specific Contracts Volume 2, page 37 to 155*** and ***Smith and Keenan's English Law 16th Edition, page 721***.

5.18 Counsel urged us to dismiss the appeal for lack of merit.

6.0 THE HEARING

6.1 At the hearing of the appeal, Counsel relied on the grounds of appeal and the heads of argument filed with brief argumentation.

7.0 CONSIDERATION OF THE APPEAL AND DECISION OF THIS COURT

7.1 We have prudently considered the record of appeal, the grounds of appeal and the Judgment appealed against. The grounds of appeal can be considered in the manner they have been argued by the appellant. We shall therefore consider grounds one and two together while grounds three, four and five shall be considered collectively.

7.2 The grievance in grounds one and two is that the Court erred when it found that the respondent followed procedure in dismissing the appellant and that therefore the dismissal was not wrongful.

7.3 As guided by the Supreme Court of Zambia in the case of **Care International Zambia Limited vs Misheck Tembo (supra)**, wrongful dismissal relates to the form or manner of the dismissal. We therefore have to consider whether there was procedural impropriety in the manner in which the disciplinary machinery had

been set in motion against the appellant. The appellant's Counsel argued that the respondent's disciplinary code indicates that the first point of call should have been the appellant's supervisor to raise the charge and refer it to human resource for investigations. It was contended that the Director General of the respondent influenced the disciplinary process from the beginning when he called the appellant to his office. It was contended further that the fate of the appellant was not put to the vote of the disciplinary committee members.

7.4 In arriving at the conclusion that the appellant was not wrongfully dismissed, the lower Court stated that the Director General's involvement was because he received a complaint from Mr. Mushing. The appellant contends that there was no evidence to support this finding.

7.5 There is no evidence to suggest that Mr. Mushing made the complaint but what is clear from the evidence was that the Director General had received information concerning the appellant's dealings with Mr. Mushing and the appellant was made aware when he went to the Director General's office. In his own testimony, the appellant stated that Mr. Mushing talked to his supervisor

while he was at the meeting with him. It was therefore not a surprise that the Director General called the appellant to his office.

7.6 Despite this evidence, it is clear from the record that the appellant submitted his report to his supervisor, who also authored the charge form as per the respondent's disciplinary code. The Human Resource Director received the charge sheet as provided for in the disciplinary code. The appellant was informed of the charges against him and he was given an opportunity to exculpate himself and was dismissed after a disciplinary hearing. He was informed of his right to appeal which he duly exercised. The penalty for the offences the appellant was charged with is summary dismissal as per the disciplinary code.

7.7 Therefore, because of the foregoing reasons, we do not find fault in the lower Court's finding that the appellant was not wrongfully dismissed as the respondent adhered to the disciplinary code. Grounds one and two therefore fail.

7.8 The grievance in grounds three, four and five is that there was no substratum of facts to support the charges made against the appellant. The question therefore is whether the appellant was unfairly dismissed or whether the reasons given for the appellant's dismissal were justified. We have noted that unfair dismissal was

not one of the reliefs sought by the appellant in the lower Court but the appellant averred in his affidavit in support of the notice of complaint, that there was no substratum of facts upon which he was charged.

7.9 In the case of ***The Attorney General v Richard Jackson Phiri***¹⁴ the Supreme Court guided that-

“Once the correct procedures have been followed the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same.”

7.10 It is therefore proper to consider whether there was a substratum of facts to charge the appellant. He was charged and found guilty of the offences of abuse of office and corruption which are clearly defined in clause 14.0 of the disciplinary code on page 101 of the record of appeal. Clause 14.01 defines abuse of office as-

“Use of one’s position, authority and office resources for personal, monetary and/or material gain.”

7.11 Clause 14.09 of the disciplinary code defines corruption as-

“An act done in exchange for personal monetary and material gain. Some of these are:-

- ***Giving some money or valuables in return for a favour***
- ***Abuse of one’s official position for some gain or benefit***
- ***An act or practice marked by dishonesty and abuse of one’s position or power***
- ***Misuse of public office for personal or selfish gain***
- ***Misconduct***
- ***Mal-administration.”***


7.12 The above provisions of the disciplinary code show that for the appellant’s conduct to constitute abuse of office and corruption, there should be personal, monetary and/or material gain. We have meticulously perused the record and as correctly noted by the lower Court, it was not in dispute that the appellant met with third parties some of whom conducted business with the respondents and were awaiting payment from the respondent. However, there is no evidence to show that the appellant made any personal or material benefit from this meeting. In fact Mr. Mushingi was called as a witness during the disciplinary hearing and aside from the revelation that the appellant was the one who called him for the meeting, his testimony did not show that the appellant received any benefit from the person he met to the detriment of the respondent.

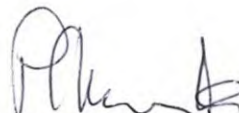
The lower Court's finding that the appellant had been paid by third parties was therefore not supported by any evidence on record.


7.13 It therefore follows that there was no substratum of facts upon which the appellant was charged. Grounds three, four and five of the appeal accordingly succeed.

8.0 CONCLUSION

8.1 In view of the foregoing, we are of the firm view that the appeal partially has merit and it accordingly succeeds. We award the appellant six months' salaries in damages. We make no order for costs.


C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


P. C. M. NGULUBE
COURT OF APPEAL JUDGE


K. MUZENGA
COURT OF APPEAL JUDGE