

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/0617



BETWEEN:

NATASHA BWALYA CHUNGA

PLAINTIFF

AND

ACCESS BANK (ZAMBIA) LIMITED

DEFENDANT

Before: Honourable Lady Justice C. Chinyanwa Zulu

For the Plaintiff: Mr H. B Hantumbu – Muleza Mwibu & Company

For the Defendant: Mr I Siame & Ms A. Mwansa – TMS Legal Practitioners

JUDGMENT

CASES REFERRED TO:

1. Rosemary Ngoma & Others V ZCCM Appeal No. 87/2000;
2. Attorney General V Richard Jackson Phiri (1988/89) ZR 121;
3. Laws V London Chronicle (indicator Newspaper) Limited (1959) 2 All ER 285;
4. Earl V Slater & Wheeler (Airlyre) Limited;
5. Justin Mwengwe V Examination Council of Zambia Appeal No. 212/2015;
6. Zinka Attorney General 1991 ZR SC 73;
7. Contract Haulage Limited V Kamayoyo (1982) ZR 13;
8. Gerald Musonda Mumba V Maamba Colliers Limited (1988, 1989) ZR 217 SC;
9. Zambia National Provident Fund V Yekweniya Mbiniwa Chirwa (1986) ZR 70 SC;
10. Pamodzi Hotel V Godwin Mbewe (1987) ZR 56 SC
11. Agholor V Cheesbroug Ponds Zambia Limited 1976 ZR 1;
12. Undi Phiri V Bank of Zambia;
13. Hildah Sakala Silungwe V Konkola Copper Mines SCZ
14. Appeal No. 83/2008;
15. Mumba V Telecel SCZ Appeal No. 156/2015;
16. Sitali V Central Board of Health SCZ Appeal No. 178/1999;

17. **Moses Choonga V ZESCO Recreation Club & Another SCZ No. 168/2013;**
18. **Khalid Mohammed V the Attorney General;**
19. **Wilson Masuaso Zulu V Avondale Housing Project Limited;**
20. **Munsanje V Family Health Trust Registered Trustee Selected Judgment No. 27 of 2017;**
21. **Zambia National Commercial Bank PLC V Jason Mweemba Appeal No. 92/2015;**
22. **Swarp Spinning Mills V Sebastain Chileshe & Others 2002 ZR 23 SC;**
23. **Chilenga Cement PLC V Kasote Singogo (2009) ZR 122;**
24. **Zambia National Building Society V Nayunda SCZ Judgment No. 11 of 1993**
25. **Livingstone V Rowards Coal Co (1880) 5 AC;**
26. **Dennis Chansa V Barclays Bank of Zambia PLC SCZ/8/128/2011;**
27. **Wilfred Weluzani Banda V Attorney General Appeal No. 116/2012;**
28. **Jonathan Musialela Ng'uleka V Funiture Holding Limited;**
29. **Joseph Chintomfwa V Ndola Lime Company Limited (1999) ZR 172;**
30. **Wise Silumbu V Barclays Bank Zambia PLC & African Bank Corporation V Bernard Fungamwango;**
31. **Philip Mhango V Dorothy Ngulube & Others (1983) ZR 61**
32. **Mohamed V Attorney General (1982) ZR 49;**
33. **Wilson Zulu V Avondale Housing Project Limited (1982) ZR 172;**
34. **Care International Zambia Limited V Misheck Tembo selected Judgment No. 56 of 2018;**
35. **First Quantum Mining and Operations Limited V Obby Yendamoh Appeal No. 206/2015 (SCZ/8/3-7/2015);**
36. **Mukansemu Shambweka Nyirenda (Mrs Suing as the Administratrix of the Estate of the late Elijah Nyirenda V Zambia Forestry and Forest Industries Corporation Limited Appeal No. 127/2013;**
37. **Attorney General V Paul Chilosha SCZ Appeal No. 220/2016;**
38. **Konkola Coper Mines PLC V Hendrix Mulenga Chileshe Appeal No. 94/2015;**

39. **Standard Chartered Bank Zambia PLC V Kasote Singogo;**
40. **Aaron Mwiya & 6 Others V Trade Kings (Z) Limited;**
41. **Kitwe City Council V William Ng'uni SCZ Judgment No. 12 of 2005;**
42. **Indeni Petroleum Refinery Company Limited V.G Limited**

LEGISLATION AND OTHER WORK REFERRED TO:

1. **Black's Law Dictionary, 9th Edition, 2009 at page 537;**
2. **The Employment Code Act, 2019**

The delay in delivery of the Judgment is regretted.

1.0 BACKGROUND AND CONTEXT

1.1 The Plaintiff in this matter is a former employee of the Defendant. She was dismissed from employment following the discovery of fraudulent fictitious transactions that resulted in the Defendant Bank incurring financial loss and injury to its reputation.

1.2 An appeal against the dismissal proved futile.

1.2 It is based on the foregoing that the Plaintiff commenced this action on 28th March 2018 by Writ of Summons and Statement of Claim seeking the following reliefs:

1. **Payment of the Plaintiff's terminal benefits in full as if she had completed her full service and retired at the age of either fifty five, sixty or sixty five years as the case may be;**
2. **Damages for unlawful, wrongful and unfair dismissal;**
3. **Damages for inconveniences, undue distress, suffering, embarrassment and loss of employment opportunities;**
4. **Any other relief the Court may deem fit;**
5. **Interest; and**
6. **Costs.**

2.0 STATEMENT OF CLAIM

2.1 The Statement of Claim filed narrate that the Plaintiff was at all material times an employee of the Defendant from 2009 to 2nd

November 2017 when her employment services were terminated. On the other hand, the Defendant is and was at all material times a registered commercial bank incorporated under the Companies Act, Chapter 388 of the Laws of Zambia.

- 2.2 The Defendant employed the Plaintiff as a Transactions Officer in August 2009, a position she held until her dismissal. Her duties included credit card application and processing, debiting and card repayment, and processing ATM uploads for the Bank.
- 2.3 In addition to the foregoing, the Plaintiff was given further duties, namely posting E-business transactions on the system. Between 16th May 2016 and 17th March 2017, she received uploads from Edwin Musonda who was the initiator for all off-us transactions.
- 2.4 The Plaintiff received a suspension letter pending investigations in relation to the off-us transactions and the department in general. Upon suspension, she was charged with committing an act and/or omission that resulted in loss, damage and/or injury, as well as conspiracy in fraud and/or fraudulent transaction or activity. Further, following her suspension she was called in for interrogation where she was informed that she connived with Edwin Musonda to steal money from the Defendant Bank.
- 2.5 On 19th October 2017 a hearing for her case before the Disciplinary Committee was held. Despite her explanation that she did not connive with Edwin Musonda, the person solely responsible for initiating all off-us transactions in the bank, the Defendant went ahead and summarily dismissed her for an offence she never committed. She appealed against the decision of the Disciplinary Committee on 6th November 2017. Her appeal was heard on 22nd November. The Defendant did not avail the findings of the appeal until it received a letter demanding that the same be availed to the Plaintiff. The

Defendant's response was that the decision of the Disciplinary Committee was upheld.

- 2.6 The Plaintiff averred that she was unfairly treated because the other members of her department who were also charged only received warnings as opposed to the summary dismissal she was subjected to. That the Defendant imposed the harshest sanction when the prescribed sanction in the code provides for a first and final warning before termination of employment. Further, that the Defendant failed to adhere to its own laid down disciplinary procedures and the law. Therefore, that her dismissal was unfair, unlawful and wrongful. And by reason of the foregoing, she has suffered loss, damage and injury.

3.0 DEFENCE AND COUNTERCLAIM

3.1 DEFENCE

- 3.1.1 In its defence, the Defendant stated that on 13th September 2017, Edwin Musonda, its former employee, who at the material time was employed under the Electronic Business Unit Department, confessed to his supervisor a Mr. Alfred Ackon of fraudulent transfers consummated from an Automated Teller Machine (ATM) acquired General Ledger (15240000) into 2 fictitious customers' accounts. This prompted the Defendant Bank to institute an investigation.
- 3.1.2 The investigation revealed that there were fictitious and fraudulent ATM transactions that were posted from 17th December 2014 to 21st July 2017 into fictitious accounts amounting to K5,176,110.00. A review of the off-us ATM transactions posted to an Account receivable-Acquired Cash General Ledger between December 2014 and September 2017 showed that 39 fictitious transactions totaling K2,012,700 were negligently initiated and posted by the Plaintiff as a result of which the Defendant suffered financial loss in the said sum.

The Defendant posited that the Plaintiff was mandated to post daily transactions to the ATM General Ledgers but instead posted the same to personal accounts.

3.1.3 The Defendant stated that based on the foregoing, the Plaintiff was placed on suspension with pay on 20th September 2017. The suspension was later extended for a further two weeks by a letter served on the Plaintiff on 5th October 2017. The Plaintiff was later charged with the offence of committing an act and/or omission that results in loss, damage and/or injury and conspiracy under the Defendant's disciplinary code of conduct and grievance procedure.

3.1.4 By way of a letter dated 11th October 2017, the Plaintiff was accorded an opportunity to write an exculpatory letter. The exculpatory letter was taken into consideration by the Defendant at the subsequent disciplinary hearing held on 17th November 2017. The Disciplinary Committee found the Plaintiff guilty of the charge of committing an act or omission that results in loss, damage and injury. It recommended that the Plaintiff be summarily dismissed. The Disciplinary Committee's decision was upheld on appeal.

3.1.5 The Defendant proffered that the Plaintiff's conduct was negligent. The particulars of her negligence were set out as follows:

- i. **Failing to ensure that files given to her to upload were not fictitious because the Plaintiff as an inputter in the Defendant's system ought to have known that the entries she was uploading were fictitious. The Plaintiff owed the Defendant a duty of care to ensure that the files given to her to upload were not fictitious.**
- ii. **Failing to review and check the files in question before uploading information into the Defendant's Banking system as the same were in an excel application.**

3.1.6 The Defendant posited that as a banker with more than 8 years experience, the Plaintiff understood the duty placed on her to take care of depositors' money. Instead, she willfully breached this duty by failing to review and check that the files she was uploading were being uploaded to genuine ledgers. That the Plaintiff uploaded the files on her own accord onto the Defendant's central system and her failure to diligently discharge her tasks resulted in the Defendant Bank suffering financial loss.

3.1.7 The Defendant averred that while the charge of conspiracy was dropped by the Disciplinary Committee, the Plaintiff was still found guilty of the offence of committing an act and/or omission that results in loss, damage and/or injury and was dismissed accordingly. This decision was upheld by the Appellate Committee.

3.1.8 The Defendant denied the Plaintiff's assertion that she was unfairly treated because other members of her department who were also charged only received warnings as opposed to summary dismissal. The Defendant posited that it was within its preserve to summarily dismiss the Plaintiff in light of the gravity of the offence and the loss it incurred. Consequently, that the Plaintiff is not entitled to any of the reliefs sought in the Statement of Claim.

3.2 COUNTERCLAIM

3.2.1 The Defendant counterclaims for the following:

- i. The sum of K2,012,700.00 the same being the loss occasioned to the Defendant on account of the Plaintiff's fraudulent and negligent discharge of her duties as an inputter in the Defendant's Core Banking System;**
- ii. Interest; and**
- iii. Costs.**

3.2.2 The Defendant placed reliance on the facts narrated in its Defence. That by reason of the said facts, the Defendant has suffered financial and reputational loss. This is because the incident was reported in the Daily Mail Newspaper with the result that customers approached by the Defendant Bank to do business declined its credit card business/facility.

4.0 REPLY AND DEFENCE TO COUNTERCLAIM

- 4.1 In reply, the Plaintiff stated that she only processed uploads created by Edwin Musonda between 16th May 2016 to on/or about 13th September 2017. That the said uploads were never separated into individual account uploads but were in batches of about 500 transactions. Further, that her role at this stage was to ensure that these uploads were balancing and reconciled. She then processed them to the supervisor with audit and compliance in copy. That during the period she worked with Edwin Musonda the only transactions that were fictitious amounted to K1,651,720.00 as some of them were reversed.
- 4.2 She denied the assertion that she posted daily transactions to personal accounts instead of the ATM General Ledgers. It is her position that she processed the batches from an encrypted file created by Edwin Musonda and authorized by the supervisor Mr. Sakulani. Further in this regard, that she could never have known that some of the accounts were fictitious accounts created by Edwin Musonda because the files she was processing were encrypted. That only Edwin Musonda and the supervisor Mr Sakulani had the privilege of accessing the encrypted files and knew which individual accounts the batched transactions were going to.
- 4.3 The Plaintiff reiterated that the said excel application was created and encrypted by Edwin Musonda and that she did not have access to it. She added that in her 8 years of experience as a banker, she had always

discharged her duties diligently. However, that without access to the encrypted files she had no way of knowing that Edwin Musonda was stealing from the Defendant bank. She insisted that she only picked files from the Employee Central system after Edwin Musonda had posted them and that her role was to merely ensure that the debits and the credits balanced. They would then proceed to the next level for authorization by the supervisor who had access to all encrypted files, and knew which accounts the transactions were going to. Further, that the only loss the bank suffered following Edwin Musonda's fraudulent transactions in the period that the Defendant worked with him, that is between 16th May 2016 to on/or about 13th September 2017, is K1,651,720.00 as some of the transactions were reversed within the same period.

- 4.4 In conclusion, the Plaintiff posited that the Defendant's financial and reputational loss are a result of Edwin Musonda's fraudulent actions which he confessed to, was charged for and underwent criminal trial where he admitted everything and was accordingly sentenced to 6 years. Therefore, that the said fraudulent activities and losses cannot be attributed to the Plaintiff. Consequently, the Defendant is not entitled to any reliefs sought in the counterclaim from the Plaintiff but from Edwin Musonda.

5.0 TRIAL

- 5.1 The Plaintiff called one witness. **PW1** was **Natasha Bwalya Chunga** the Plaintiff herein. It was her testimony that she started working for the Defendant Bank in 2009 as a Transaction Officer under branch services. Her supervisor at the time was a Mumba Ngulube. Her job description required her to post transactions on the banking system, Flexcube, and to attend to customer queries. She also worked at the customer service desk.

- 5.2 The Defendant Bank made some reshuffles between 2012 and 2016. The Head of Department of the Electronic Banking Services Department who was the Country Cooperating Officer, Mr. Gammyi Sammy, requested Mumba Ngulube to move from branch services to Electronic Banking. The Plaintiff was also given the privilege to work in Electronic Banking Services in 2012. She was still a transaction officer and her duties were to manage all debit card requests for the Defendant's customers, that is, a customer would send an application using a standard bank document requesting issuance of a new card which may have been lost or expired. Her other duties were to attend to all debit card related queries in correspondence with the parent company, Access Bank Plc in Nigeria. Further, she also posted electronic banking uploads for settlements for all change backs/disputes, processed all credit card applications repayment settlements as well as any disputes and correspondence with Access Bank Plc, and processed credit card applications from customers as well as posted transactions for repayments for customers' credit card. She referred the Court to her job description on page 5 of the Plaintiff's Bundle of Documents.
- 5.3 It was her evidence that she had other colleagues in the Electronic Banking Department who were also transaction officers namely: Vusi Jere and Agatha Zulu in charge of Access pay and ZRA tax payments, Daniel Kaluba in charge of debit card issuance, Edwin Musonda in charge of Automated Teller Machines (ATM) settlements between banks and Access bank respective branches. They also reported to the supervisor, Mr. Alfred Ackon. They all had posting rights on the Flexcube banking system on their respective computers. The computers were provided by the Defendant Bank to each individual and each person had their own password.

- 5.4 She testified that she was also assigned to prepare a net profit and loss for the Defendant's customer database on the Access pay platform and was a custodian for all credit cards and debit cards that were yet to be delivered to the Defendant's customers after issuance. She was also tasked with preparing a report from the Defendant's General Ledger for all credit card repayments that were posted on Flexcube and to ensure that the General Ledger was balancing and transactions authorized were correct. The General Ledger was to remain at zero balance at the end of each day which meant that all payments on customers' credit card accounts were posted correctly.
- 5.5 It was her evidence that in 2016 during the Department's weekly meeting with their supervisor Alfred Ackoni, they were informed of a briefing that he had with the Director Tunde Bolagun that the Electronic Banking Department would all be disabled from posting on Flexcube. That their posting rights would be ceased by compliance in the same week. They were informed that all their processes and postings would be taken up by the Central Processing Department which was headed by Catherine Chali. They were required to prepare the required documents of what was to be posted on the Flexcube banking system and the transaction officers in the Central Processing Department would post all their transactions. They would then be taken for authorization and at the end of the day, per requirement, once authorization was done a call-over report would be printed listing in detail what was posted and authorized. The said report was printed by the Information Technology Department and once printed she would go over her work and it would be sent to the supervisor.
- 5.6 She went on to testify that at a weekly meeting during their briefing from Alfred Ackoni, they realized that the turnaround time for customer transactions as well as authorization was affected. Alfred

Ackoni informed them that he would address the issue with the Managing Director Tunde Balogun and that he would reconsider enabling one or two individuals to post on the Flexcube system. The Managing Director gave approval for two people from the Department to be posting on Flexcube. A memo was done allowing Edwin Musonda and the Plaintiff to post on Flexcube and only one person could post at a time. The other person would only post upon the other proceeding on leave.

- 5.7 It was her evidence that Edwin Musonda and her other colleagues would prepare all bank documents for what needed to be posted on the Flexcube system. That Edwin Musonda was responsible for ATM settlements of off-us transactions for the Defendant Bank's branches and other banks' off-us transactions that did not impact on the banking system that is the ATM General Ledger as the customers transacting on Access Bank ATMs were from other registered banks. That this means that for the transaction to be on the general ledger, it required to be posted manually onto the system. That Edwin Musonda would receive the file report through Access Bank Plc Nigeria from an identified external party, Unified Payments, who managed all payments through Visa on the Defendant bank's ATMs.
- 5.8 She went on to testify that the said file report was password protected and was sent through email to the supervisor Alfred Ackoni with Zambia Electronic Banking, Zambia Compliance and Zambia Audit Department in copy. That Edwin Musonda would open the file and populate a report for all ATM off-us transactions and send an upload containing all the transactions on another banking system called Employee Central. This upload would be identified by a batch number, a general ledger account number to be debited, and a second ledger account number to be credited for posting. That Edwin Musonda

would prepare documents which she would receive for posting and she would identify a batch number on the Flex Cube System, compare the total debit and total credit with the general number to be correct and they would go for authorization on the Flexcube system. The documents prepared by Edwin Musonda on Employee Central as an upload for posting on Flexcube were ATM off-us transactions, total credits and total debits.

- 5.9 It was her evidence that the documents prepared by Edwin Musonda were signed by him and the supervisor Alfred Ackoni. That they had a batch number given by Edwin. That when the number is picked from the Flexcube system, it would show and indicate who created the batch, the general ledger number, the account name of the general ledger and if the amount total in credit and debit were exactly the same in the documents signed and the system.
- 5.10 It was her testimony that she would confirm that everything was correct and balancing in the transactions she uploaded on the Flexcube system and they would be sent for authorization to their supervisor in the Central Processing Department, Catherine Chali. When the said supervisor was not available, other supervisors whom she named as Sakulani Tembo, Bwalya Bwalya and Chibale Chipulu were available to do so. That once the documents were authorized, it was the same process as required for a call-over to be done by Edwin Musonda himself as well as the authorizers to confirm all that was posted. Correct attestation was signed against the call-over. This was done by the supervisor and documentation was bundled for further review and in this case could be an audit done quarterly or monthly. She would equally call-over her work which was credit cards repayments, have attestation signed by the supervisor and supporting documents were also bundled for review and audit.

- 5.11 It was her evidence that sometime in 2017 Alfred Ackonni informed her and her colleagues of Edwin Musonda's confession over fictitious transactions that he uploaded and were sitting on the Flexcube banking system. He stated that a review was concluded on the said transactions by Alfred Ackonni and a team member from the Compliance Department. Alfred informed them that Edwin Musonda made the confession to him. Alfred also informed them that investigations had already begun in the Electronic Banking Department. He asked them to await further instructions. She went on to state that after a few days, they were informed that investigations had been escalated to Zambia Police Service Crime and Investigations Department.
- 5.12 The following week she was locked out of the Flexcube system of which she immediately informed Alfred. The Head of Compliance informed her that it was a directive from Esther Susi, the Head- Human Resource. The Plaintiff proceeded to see Esther Susi who advised her that she had been placed on suspension for two weeks and a letter to that effect was given to her which appears on page 11 of the Supplementary Bundle of Documents.
- 5.13 During the suspension period, she received a call from Joshua Kaluba the head of the Audit Department to report at the Head Office. In aid of the ongoing investigations, he asked her to demonstrate to him how she retrieved a batch prepared by Edwin Musonda for ATM settlements on the Flexcube system. She demonstrated how to pick the batch number and how to identify the general ledger account number as well as total credits and debits. She also mentioned to him during the demonstration that all the itemized entries posted were encrypted on the system and that it was an upload which had signed supporting documents by Edwin who created the batch and the authorizer who were either Catherine Chali, Sakulani Tembo, Bwalya Bwalya or

Chibale Chipulu. Further, that an encrypted upload was only known by the creator, in this case Edwin Musonda. That from her end on Flexcube she could only identify the batch number of the general ledger, account name and the total credits and debits.

- 5.14 She testified that after a few days she received another call from Andrew Mwendabai who was also a member of the Audit team asking her to report to Head Office. That when she got there, Andrew and a compliance officer from the Group Office asked her if she could identify the amounts on a printed ledger presented to her. She requested for clarification and was informed that they were amounts uploaded and authorized by various authorizers. She was further requested to do a report on the postings on Flexcube and the role she played.
- 5.15 She went on to testify that her suspension was extended for another two weeks and she was given a letter to this effect. The second suspension letter appears on page 12 of the Plaintiff's Supplementary Bundle of Documents. A day later, she received a charge letter from the Country Operations Officer. She was charged with two offences, namely committing an omission that led to loss and damage to the bank and conspiracy to commit fraud, for which she was given 24 hours to exculpate herself. The charge letter is on page 7 of the Plaintiff's Bundle of Documents. She referred the Court to her exculpatory letter on pages 10 to 11 of the Plaintiff's Bundle of Documents. That the Defendant Bank responded to her informing her that she would appear before its Disciplinary Committee. She appeared before the Disciplinary Committee accompanied by a union representative.
- 5.16 A few days later she received a call from Esther Susi to report herself for another meeting with the Audit Department. When she got to the Bank, she was introduced to a Zambia Police officer, a Sergeant Mwanza, who asked her to accompany him to the Zambia Police

Service Crimes Department for investigations, which she did. That she was questioned the whole day as they could not find a charge for the allegations made by the Defendant Bank. That Sergeant Mwanza was advised by his supervisor, in her presence, to warn and caution her and to inform her that she would be contacted if need for further investigations arose. She referred the Court to the following documents in her Bundle of Documents: The statement she gave to the Zambia Police Service on the role she played during her time with the Defendant Bank which is on pages 21 to 24; Edwin Musonda's written confession on his role and activities from 2012 to 2017 on pages 25 to 26; The court summons for her to be a witness in the criminal action against Edwin Musonda on page 27; and, The proceedings in the said criminal action in which Edwin Musonda was ultimately convicted on page 28 to 35.

- 5.17 She testified that a few days later she received her third suspension letter which appears on page 13 of the Plaintiff's Supplementary Bundle of Documents. During that period, she received a letter of dismissal which is on page 13 of the Plaintiff's Bundle of Documents. She noted that only one of the two charges led to her dismissal namely, omission resulting in loss and damage to the Defendant Bank. The letter of dismissal also stated that she could appeal in writing within 5 days. The Plaintiff appealed and requested that further investigations be conducted on the alleged omissions. The appeal against dismissal is on page 14 to 15 of the Plaintiff's Bundle of Documents. The Defendant's response to her request was that she appears before the Disciplinary Committee which she did, represented by a union representative. That at the close of the meeting she was told to wait for their response and the final decision of the Defendant.

- 5.18 About two days later she received a call from the Drug Enforcement Commission (DEC). DEC requested her to attend a meeting at their offices to aid investigations into allegations of fraud conspiracy reported by the Defendant, which she did. She was interrogated for hours over the said allegations after which DEC could not link her to the allegations. The officer who interrogated her advised her to write a report on the role she played on the Flexcube system and that she would be contacted if need be. She testified that neither the Zambia Police Service nor DEC had gotten back to her as of the date of the trial.
- 5.19 She went on to testify that months passed without a response to her appeal from the Defendant Bank. She engaged the law firm Mwiimbu and Company in February 2018 to intervene. The firm wrote a letter of demand to the Defendant Bank to which it responded that the Appeals Committee agreed with the decision of the Disciplinary Committee that she be dismissed from employment on the charge of committing an omission resulting in loss to the Bank. The letter of demand and the Defendant's response appear on pages 16 to 17 and page 18 of the Plaintiff's Bundle of Documents respectively.
- 5.20 It was her testimony that paragraph 6.1.8 of the Defendant's Disciplinary Code which provides for the charge she was dismissed for provides that the penalty for a first offender is a first and final recorded warning. The Disciplinary Code is on page 1 of her Supplementary Bundle of Documents.
- 5.21 As regards her claim that she was discriminated against, it was her testimony that she was not the only employee investigated and interrogated. All the authorizers were only given a warning for the charge that led to her dismissal. She was the only one that was dismissed.

- 5.22 As regards the Defendant's counter-claim, she testified that she did not commit the alleged offence. That it was committed by Edwin Musonda who was the inputter and creator of the fictitious and fraudulent transactions. That he confessed to the same; and, that she was not his supervisor, thus had no authorization privileges, rather his work was attested to as correct by Edwin Musonda himself, his supervisor Alfred, the Compliance Department and the Audit Department.
- 5.23 In cross examination, PW1 stated that she, Daniel Kaluba and Edwin Musonda used to post transactions on Flexcube and that they had identical posting rights. That they would upload files onto the platform biweekly and before the monthend closes. She went on to state that when she would go on leave, Daniel Musonda would post transactions on the said platform and vice versa. When Edwin Musonda would go on leave, he would still initiate the file to be uploaded. That he would also ensure that all his general ledgers were balanced before going on leave.
- 5.24 When referred to the memo on page 19 of her Bundle of Documents she stated that it showed that they had identical inputter rights and also that when a person went on leave, their log-in rights would be deactivated. She stated that when uploading files on Flexcube, one would not have access to the general ledger personal accounts as all accounts are encrypted. When referred to pages 8 to 9 of her Bundle of Documents, PW1 confirmed that some of the fictitious transactions were uploaded by her however, she did not have the ability to check if the transactions were being deposited in genuine accounts. When referred to her job responsibilities on page 5 of her Bundle of Documents, she confirmed that it was her responsibility to process card repayments efficiently and accurately on Flexcube. She, however, went

on to state that her postings on pages 8 to 9 were not credit card repayments.

- 5.25 She stated that as she and Edwin Musonda had identical inputter rights, she had no access to his uploaded files on Employee Central. When referred to page 2 of the Defendant's Supplementary Bundle of Documents she confirmed that the account for Arthur Chisama Lyampesha was one of the fictitious accounts she deposited money into. She equally confirmed the same for the account on page 135 of the same Bundle under the name Grace Luwisha. Further, that according to page 156 in the same Bundle, the total loss to the Defendant was K2,012,700.00. She also confirmed that such a loss would bring the image of the Defendant Bank into disrepute.
- 5.26 She further confirmed that the other individuals given lesser penalties worked in departments different to hers. She also confirmed that their level of involvement, relating to uploading files on the Flexcube platform, was different. That it was the E-business department that she was under that did the uploads. She confirmed that she and Edwin were in the same department and received similar punishments from the Defendant Bank.
- 5.27 In re-examination, she reiterated her evidence in chief.
- 5.28 The Plaintiff closed her case.
- 5.29 **DW1** was **Alfred Ackon** the Defendant's Head- Electronic Business. He testified that in 2017 the Defendant discovered some fraudulent transactions that had occurred over a period of time. That the investigations that followed revealed that the Plaintiff's profile was used to perform some of the said fraudulent transactions. That following further investigations and disciplinary proceedings per standard procedure of the Defendant Bank, the Plaintiff was dismissed.

- 5.30 He testified that the fraudulent transactions were supposed to be ATM settlement transactions. That the people involved uploaded a set of transactions that were mixed with fraudulent transactions and diverted funds from the general ledger of the Defendant to two unknown accounts belonging to an Arthur Lyapesha and a Grace Kalili Luwisha. They then used ATMs to withdraw the money from the said accounts.
- 5.31 DW1 testified that it was not true that the Plaintiff did not have the power to initiate the transactions. That she has always had access to the post transactions system of the Defendant, Flexcube. He explained that there are two systems for uploading transactions used by the Defendant. The first being Upload Central and that from there transactions go into Flexcube which is the second. He testified that he created the Upload Central system and that the Plaintiff could view the files uploaded to Flexcube through the central upload system. That the said files were not encrypted but rather were normal excel documents with no password or encryption. Further, that anyone who had access to the files could read them.
- 5.32 He went on to explain that the documents would be uploaded onto the system by the person that created them. He also explained that after an excel file has been uploaded in Flexcube there is an option for the initiator to view the content that has been uploaded into the banking system. He referred the Court to page 1 of the Defendant's Supplementary Bundle of Documents which is a screenshot of the interface used to initiate uploading of bulk transactions in Flexcube. That the label "Upload Status" when opened shows the contents of the excel document uploaded to Flexcube, the account number, and the amounts.
- 5.33 DW1 also referred the Court to the memo on page 19 of the Plaintiff's Bundle of Documents. He testified that it was an internal document of

the Defendant Bank in which approval was being sought to deactivate Daniel Kaluba and Edwin Musonda from having access to Flexcube. That the instruction contained thereon directing that Edwin's ID be deactivated until the Plaintiff goes on leave was given by the Managing Director at the time. That the background to this was that the Managing Director wanted only one person at a time to have active rights on Flexcube. That his guidance was that the Plaintiff would be the primary person, Daniel Kaluba was to be removed completely and Edwin Musonda was supposed to be deactivated and only activated whenever the Plaintiff went on leave.

5.34 He went on to testify that it was not true that Edwin Musonda encrypted files and handed them over to the Plaintiff. That none of the files were ever encrypted nor had a password. Thus, anyone who wanted to do due diligence on the contents of these files had the ability to do so. It was his testimony that when a file is uploaded through Upload Central into Flexcube, at that point there is no financial impact on any of the accounts involved. That the transactions would have to be initiated on Flexcube and authorized by a second person for them to have any impact on the accounts involved. Therefore, that even if Edwin Musonda had initiated the said transactions, the Plaintiff would still need to initiate the documents on Flexcube before they could have any financial impact. That Edwin Musonda would not have been able to do this unless the Plaintiff shared her password with him. DW1 testified that the Plaintiff's failure to conduct due diligence led to the Defendant losing at least K2 million and suffering reputational damage as this was published in the newspapers.

5.35 In cross-examination, DW1 confirmed that the events he alluded to happened while he was the Plaintiff's supervisor. He, however, explained that there was a period when even though he was the

supervisor, he was not directly involved in all the transactions. That he did not select which transactions to be or not be involved in. He attributed this to his being new at the time and that that was the process he found. He denied being involved in the transactions posted by the Plaintiff.

5.36 He confirmed that transactions will only have a financial impact when authorized by the supervisor in Flexcube. He also confirmed that the Plaintiff was not a supervisor but an initiator. He further stated that Edwin Musonda's confession on pages 25 to 26 of the Plaintiff's Bundle of Documents shows that he opened the account held under the name Andrew Lyampesha. He confirmed that Edwin Musonda confessed that he created files and dupped his supervisors into the said files being uploaded into the system. He also confirmed that the confession shows that Edwin Musonda was the only one who knew about the transactions and that the authorizer could not see what was in the upload. He, however, denied the assertion that an authorizer could not see what was in the upload. He went on to state that he was unable to tell the extent of the Plaintiff and Edwin Musonda's respective involvement however that the confession does not entail that the Plaintiff was not involved. He agreed that there was a possibility that the Plaintiff was equally duped by Edwin Musonda.

5.37 He confirmed that the transactions in the table attached to the charge letter on pages 8 to 9 of the Plaintiff's Bundle of Documents do not amount to the claimed sum of K2,012,700. He explained that the difference was on account of the amounts in the table not reflecting all the transactions as they were merely samples. He conceded that the authorizers were also equally to blame for authorizing the transactions. He admitted that he was also found negligent but that he wasn't disciplined because he was still new and not fully involved.

- 5.38 In re-examination, DW1 reiterated what was already on record.
- 5.39 DW2 was **Esther Susi Mpunzi**. She was the Defendant's Head of Human Resources at the material time. It was her testimony that the Plaintiff was charged following an audit report that revealed that K5 million was sent to wrong accounts and that 39% of the transactions were effected by her. The Plaintiff was dismissed after a disciplinary hearing and the said dismissal was upheld on appeal. She was paid her terminal benefits.
- 5.40 DW2 testified that the Appeal Committee reached its decision upon considering the Plaintiff's experience and the number of years she had worked for the Defendant Bank. It also considered the banking system's provision for reviewing entries and the loss to the Defendant in sum of over K2 million of which 39% was attributable to the Plaintiff. Further, the Committee considered the clause in her contract which stated that it would be terminated for failure to follow instructions and failure to perform in accordance with the Defendant's expectations. She went on to testify that the Committee took the position that her case did not warrant a first and final warning on account of the huge loss suffered by the Defendant Bank and the number of clients it lost due to the incident.
- 5.41 DW2 referred the Court to the notification of charge letter, the Plaintiff's exculpatory letter, the Plaintiff's invitation for a disciplinary hearing, the minutes of the disciplinary hearing, the Plaintiff's letter of summary dismissal, the Plaintiff's appeal against dismissal and, the Internal Audit Unit's report on fraudulent postings which appear on pages 5, 6, 8, 1, 9, 10 and 13 of the Defendant's Bundle of Documents respectively.
- 5.42 In cross examination, DW2 confirmed that the Disciplinary Code was part of the Plaintiff's contract of employment and was binding on the

parties. She stated that the Disciplinary Code was not restrictive, and the Committee had discretion to choose what punishment to met out. She relied on paragraph 3.1.2 (b) which is on sitting of the Disciplinary Committee on page 165 of the Defendant's Bundle of Documents. In this regard, that the fact that decisions of the Committee are based on the majority vote shows that the Committee has discretion. Further, that had the subject matter been the Plaintiff's first transaction, the Committee may have considered giving her a first and final warning but there were several transactions involved.

- 5.43 DW2 did agree that the Disciplinary Code serves as a uniform way for meting out discipline. She confirmed that that it provides for a final written warning for a first offender for the offence she was charged with. However, that the other considerations by the Appeals Committee such as negligence carry a penalty of dismissal.
- 5.44 When referred to clause 8.2 on page 19 of the Defendant's Bundle of Documents she stated that she was not sure whether Sakulani Tembo and Bwalya Bwalya were still with the Defendant Bank at the time of the internal audit report. That she was only sure of Alfred Ackoni as he was not charged because he was not an employee but a consultant.
- 5.45 She went on to confirm that the decision of the Appeals Committee was only communicated to the Plaintiff in February 2018. That this was because the Managing Director had family issues that necessitated her to travel to Ghana. She did not know whether the Defendant's response was prompted by the Plaintiff's lawyers' demand letter. She confirmed that the Defendant's response which appears on page 18 of the Plaintiff's Bundle of Documents does not contain the reasons why the Appeals Committee upheld the decision of the Disciplinary Committee. She explained that such letters never provide reasons, they simply refer to and uphold what was found by the lower committee.

However, when referred to page 173 of the Defendant's Supplementary Bundle of Documents she confirmed that clause 7.3.5 provides that the chairperson is required to provide reasons where an appeal is upheld and that page 158 provides that the procedure prescribed in the Disciplinary Code should be followed.

5.46 DW2 stated that the incident happened when Edwin Musonda was on leave and that for other transactions he posted, and the Plaintiff authorized. When referred to clause 8.2 of the internal audit report which appears on page 19 of the Defendant's Bundle of Documents, she confirmed that it shows that the Plaintiff was an inputter. She could not remember who the authorizers were at the point when the financial losses happened. She confirmed that the Plaintiff was reported to the police, but she did not know the outcome of the investigations.

5.47 In re-examination, DW2 referred the Court to the preamble of the Disciplinary Code on page 158 of the Defendant's Supplementary Bundle of Documents. That it provides that the Code is a guide. Therefore, that the Disciplinary Committee is at liberty to discuss and come up with the best verdict depending on the circumstances of the case. She also referred the Court to Appendix 1 which contains the Table of Offences and Penalties which is on page 177 of the Defendant's Bundle of Documents. That it is equally meant to merely give guidance in the handling of disciplinary cases in the Defendant Bank.

5.48 This marked the close of the Defendant's case.

6.0 SUBMISSIONS

6.1 The Plaintiff filed her submissions on 28th July 2022 while the Defendant filed their submission on 11th August, 2022.

6.2 Counsel for the parties outlined the issues for this Court's consideration as follows:

1. Whether the Plaintiff's employment was wrongfully, unlawfully or unfairly terminated?
2. Whether the Plaintiff was discriminated against by the Defendant in dismissing her from employment?
3. Whether the Plaintiff has proved that she is entitled to the other reliefs claimed and if she is entitled to damages?

6.3 Whether the Plaintiff's employment was wrongfully, unlawfully or unfairly terminated?

6.3.1 Counsel for the Petitioner began by addressing the question whether the Plaintiff was wrongfully dismissed. Counsel referred the Court to the definition provided by the **Black's Law Dictionary, 9th Edition, 2009 at page 537** that dismissal means to release or discharge a person from employment. Further reference was made to the learned author W.S Mwenda guidance in the book **Employment Law in Zambia** that dismissal can either be wrongful or unfair. In this regard, that dismissal is wrongful if an employer fails to comply with the law and the conditions of a contract. An example given was failure to give notice when so required by law or conditions of a contract. Further, that dismissal is also wrong if the right procedure for effecting a dismissal has not been followed. The Court was referred to page 105 of W.S Mweenda's book **Employment Law in Zambia** where she states:

“when considering whether a dismissal is wrong or not, the form rather than the merit of the dismissal must be examined.”

6.3.2 It was Counsel for the Plaintiff's submission that the court needed to focus not only on whether the procedure set out as part of the contract was followed but also on whether facts were established to support the disciplinary action that resulted in dismissal. That is, whether the

Defendant in dismissing the Plaintiff from employment established the acts that violated the disciplinary code and complied with it in effecting the dismissal. The Court was referred to the case **Rosemary Ngoma and Other v ZCCM Appeal No. 97/2000** for the binding nature of a contract.

6.3.3 Counsel referred the Court to N. Selwyn's book **Law on Employment, 13th Edition, Oxford University Press, 2005** wherein it was submitted that the author states, *'the question is not whether or not the employee was guilty or would have been guilty if tried, but whether it was reasonable to dismiss, taking into account all the circumstances of the case.'* He also cited the author of **Employment Law in Zambia: Cases and Materials, Revised Edition** as follows:

Wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether a dismissal is wrongful or not, the form, rather than the merits of the dismissal must be examined. The question is not why but how the dismissal was effected. Once the employee successfully challenges his dismissal, he will be awarded damages. The remedy for wrongful dismissal, therefore, is an award of damages calculated on the basis of what the employee would have received had the necessary notice been given.

6.3.4 It was Counsel's submission that the Plaintiff and Defendant's employment relationship was governed by her letter of offer of employment which appears on pages 1 to 6 of her Bundle of Documents and the Disciplinary Code and Grievances Procedure on pages 158 to 203 of the Defendant's Supplementary Bundle of Documents. That this position was confirmed by DW2, Esther Susi. Consequently, any disciplinary action against the Plaintiff would be per the Disciplinary Code and Grievances Procedure for uniformity.

6.3.5 Counsel submitted that the two offences levelled against the Plaintiff in the letter of Notification of Charge appearing on page 7 of the Plaintiff's

Bundle of Documents are contained in the Disciplinary Code as well as their prescribed punishments. That the evidence laid before Court shows that the Plaintiff was a first offender and according to the Disciplinary Code entitled to a first and final warning for the offence she was found guilty of. Further, that the Defendant's second witness testified that the Appeals Committee had the discretion to dismiss for any reason. However, that when the said witness was asked to point out the provision to this effect in the Code, she failed to do so but only stated that the Committee considered the Plaintiff's experience and her duration of employment with the Defendant Bank. The Court was referred to the learned authors of **Cross on Evidence, 6th Edition** pages 615 to 616:

Extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or transaction.

3.3.5 Therefore, that the reasons given by the Defendant's second witness for the dismissal of the Plaintiff are invalid as they do not form part of the Disciplinary Code which was binding between the parties. Consequently, that it was against the established procedure of the Defendant to dismiss the Plaintiff from employment for reasons that were not prescribed by the internal disciplinary rules. Thus, the dismissal of the Plaintiff was wrong and unfair.

6.3.6 Counsel went on to refer the Court to DW1's testimony on Edwin Musonda's confession and his confession statement on pages 25 to 26 of the Plaintiff's Bundle of Documents. Counsel quoted the following extract from the said confession statement:

**I was the only one that knew about these transactions as the authorizer did not have any ability to see what was in the upload...
I am not aware of anybody that has been doing this apart from me.**

6.3.7 Counsel went on to submit that the Plaintiff exonerated herself before the Disciplinary Committee of the charges levelled against her. That she testified that the fictitious transactions she posted were given to her by Edwin Musonda and she could not see the individual transactions as they were encrypted. Further, that the Plaintiff was reported to the Zambia Police Service and the DEC for the subject offences but was not found culpable. Counsel pointed out that it is trite that in criminal investigations or offences, the proof of liability is higher than in civil matters. Consequently, that where there is no contrary evidence to rule out the confession of Edwin Musonda, it is taken as the truth of what happened. Reliance was placed on the case **Attorney General v Richard Jackson Phiri (1988/89) Z.R. 121** wherein the Supreme Court stated:

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.

6.3.8 Further, Counsel for the Plaintiff submitted that the evidence before Court showed that the internal investigations at the time revealed that the Plaintiff was not the only one found negligent of her duties. Reference was made to the report which appears on pages 18 to 20 of the Defendants' Bundle of Documents which Counsel stated shows the levels of contribution of each officer towards the fictitious transactions. That no evidence was adduced to show what disciplinary action was taken against the recommendations of the report. That it was only the Plaintiff who was dismissed from employment and all the others who were disciplined received lesser punishment or none at all. That even Alfred Ackoni the supervisor though found to be negligent was not charged. And that his evidence that he was not charged because he was new in the Department was contradictory to the Plaintiff's evidence

which shows that he was her supervisor from 2016. Further, that the punishment for the offence of supervisory negligence recommended in the investigative report if found guilty is summary dismissal. Therefore, that Alfred Ackoni was a witness with an interest to serve whose testimony cannot be taken seriously. It was Counsel's contention that there was no reason whatsoever to justify the Plaintiff's dismissal. Reliance was placed on the case **Laws v London Chronicle (Indicator Newspaper) Limited (1959) 2 All ER 285** wherein it was held:

...since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.

6.3.9 Counsel submitted that no evidence was led against the Plaintiff showing that she had knowledge of the fictitious transactions. That it was also confirmed by the witnesses that it is possible to have files encrypted. Further, that the record will show that the Appeals Committee that heard her appeal did not furnish her with its reasons for upholding her dismissal. That this is contrary to the Disciplinary Code which provides under Clause 7.3.5 that it is mandatory that a reason be given. The Appeals Committee's letter dated 8th June 2018 on page 18 of the Plaintiff's Bundle of Documents gave no reasons thereby breaching its rules. Further, that the Defendant only gave the Plaintiff its verdict after her advocates wrote the letter on page 16 of the Plaintiff's Bundle of Documents.

6.3.10 It was Counsel's submission that the evidence on record and the evidence given by Alfred Ackoni was categorical that the activities of the Plaintiff had no financial impact on the Defendant bank. That it was Alfred Ackoni's evidence that her activities only had financial impact once the authorizer had checked and approved the transactions

posted into the banking system. Yet, the Plaintiff was punished for the wrongs that had no financial impact and they were used as a scapegoat for the Defendant to discriminate against her. That Edwin Musonda's confession dated back to fictitious transactions posted in 2016 and the Plaintiff only became an inputter in 2016. Further, that it was not a coincidence that the accounts affected were all from ATM settlements of which Edwin Musonda was in charge up to the time he was arrested and convicted.

6.3.11As regards the claim for unfair dismissal, Counsel submitted that this Court must and should go behind the mere fact that the Plaintiff was granted an opportunity to be heard on the charges levelled against her. That the critical issue to be determined is whether any reasonable person in the Defendant's position would have dismissed the Plaintiff considering the glaring evidence that clearly showed that she was innocent of the offences. The Court was referred to the case **Earl v Slater and Wheeler (Airlyre) Limited** which was cited with approval by the Supreme Court in the case **Justin Mwendwe v Examination Council of Zambia Appeal No. 212/2015** wherein it was held:

... in considering whether the dismissal is fair or unfair, or the employer acted reasonably or unreasonably, the tribunal should adopt a broad approach of common sense and common fairness, eschewing all legal or other technicality.

6.3.12Further reference was made to the case **Zinka v Attorney General 1991 ZR SC 73** wherein it was submitted it was held that the rules of natural justice are implicit in the concept of fair adjudication that an adjudicator shall be disinterested and unbiased.

6.3.13It was Counsel for the Plaintiff's submission that the Defendant acted unfairly without due regard to the rules of natural justice or logic. That it dismissed her so as to be seen to have handed out a punishment. That

this can be seen from the fact that, the offence the Plaintiff was found guilty of is not dismissible for a first offender; Edwin Musonda's confession, that the Plaintiff was not found culpable by the Zambia Police Service, DEC and the Anti-Money Laundering Unit and, that she was the only one dismissed from employment while her colleagues received lesser punishment as prescribed by the Disciplinary Code. Further, that there was no financial impact that was occasioned by the Plaintiff posting on the banking system to warrant the amount the Defendant is claiming. That the Defendant's actions prove its vindictiveness against the Plaintiff as they are based on a fraud that was not proved.

6.3.14 In response, it was Counsel for the Defendant's submission that the Plaintiff is not entitled to damages for wrongful dismissal. In this regard, that in order for a plaintiff to succeed in a claim for wrongful dismissal, he must show that his contract of employment was breached or that procedure was not followed or that there was some breach of the employment law or other statutory requirements. It was Counsel's submission that none of the foregoing occurred in the case in casu. Rather, the Defendant dismissed the Plaintiff in accordance with the procedure prescribed and complied with the law. The Court was referred to the book **Employment Law in Zambia: Cases and Materials** at page 48 where it is stated:

Wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether a dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined.

6.3.15 Other authorities referred to were the case **Contract Haulage Ltd v Kamayoyo (1982) ZR 13** wherein it was stated:

In a pure master and servant relationship there cannot be specific performance of contract of service and the master can terminate the

contract with his servant at any time and for any reason or for none; if he does so in a manner not warranted by the contract he must pay damages for breach of contract.

6.3.16 The case **Gerald Musonda Mumba v Maamba Collieries Limited (1988 1989) ZR 217 (SC)** wherein it was stated:

In an ordinary master and servant relationship the master can terminate the contract with his servant at any time and for any reason or for not whatsoever. If a master gives a reason for termination, he is not obliged to substantiate it. It is the giving of notice or pay in lieu that terminates the employment.

A reason is only necessary to justify summary dismissal without notice or pay in lieu.

6.3.17 The case **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R. 70 (SC)** wherein it was held:

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 a nullity.

6.3.18 It was Counsel for the Defendant's submission that the Plaintiff's employment contract under '*Misconduct*' outlined that the Defendant would be entitled to exercise its power of summary dismissal if at any time she refused to comply with orders/instructions. That the Plaintiff was dismissed from employment for committing an act and omission that resulted in loss, and it is on this basis that the Defendant decided to summarily dismiss her. Therefore, the termination of the Plaintiff's employment was not wrongful.

6.3.19 Counsel went on to submit that an employee cannot claim wrongful dismissal where the employer terminates a contract with no notice or with inadequate notice if the employer is justified in summarily dismissing the employee. In this regard, that the law permits summary dismissal on condition that a reason or disciplinary cause must always

support a dismissal. The Court was referred to the case **Pamodzi Hotel v Godwin Mbewe (1987) ZR 56 (SC)** wherein it was held:

We agree with Mr. Dzekedzeke that the state of drunkenness to justify the dismissal of any hotel employee is not the same as the state which renders a person incapable of having proper control of a motor vehicle. In this respect the learned trial judge did not have his attention drawn to the words in clause 29(b) of the agreement which indicate that it is sufficient to justify dismissal if there was drunkenness as evidenced to by the supervisor and one witness. We agree with Mr Dzekedzeke that the effect of these words is to justify instant dismissal if an employee is drunk in the opinion of the supervisor and one witness. In our view, if there is evidence of such opinions the decision of the employer to dismiss cannot be questioned unless there is evidence of malice or if no reasonable person could form such an opinion. In this case there was evidence that the chief security officer called DW1 because of the drunkenness of the respondent, and that DW1 was of the opinion that the Plaintiff was drunk to the extent that his behavior justified instant dismissal.

6.3.20 Further reliance was placed on the case **Agholor v Cheesbroug Ponds (Zambia Limited) (1976) ZR 1** wherein it was held that where a master dismisses a servant, he terminates the contract summarily without any notice on the grounds of misconduct, negligence, or incompetence. It was Counsel's submission that the Defendant followed the procedure in banking practice and under its Code of Conduct when it dismissed the Plaintiff. In this respect, that the disciplinary hearing was held on 19th October 2017 and during the said hearing the Plaintiff was found guilty of omission that results in loss, damage and/or injury in accordance with Clause 6.18 of the Disciplinary Code. The Court was referred to the minutes of the disciplinary hearing which appear on page 1 of the Defendant's Bundle of Documents. Reliance was placed on the case **Undi Phiri v Bank of Zambia** wherein the Supreme Court held:

Procedural rules are part of conditions of service and not statutory and that where it is not disputed that an employee committed an offence for which the appropriate sentence is dismissal, no injustice arises for failure

to comply with the laid down procedure in the contract of service and the employee has no claim on that ground for wrongful dismissal or declaration that a dismissal is a nullity.

6.3.21 The Court was referred to Section 50(1) of the Employment Code Act No. 3 of 2019 which provides as follows:

An employer shall not dismiss an employee summarily except in the following circumstances:

- (a) where an employee is guilty of gross misconduct inconsistent with the express or implied conditions of the contract of employment;
- (b) for willful disobedience to a lawful order given by the employer;
- (c) for lack of skill which the employee, expressly or impliedly, is warranted to possess;
- (d) for habitual or substantial neglect of the employee's duties ;
- (e) for continued absence from work without the permission of the employer or a reasonable excuse; or
- (f) for a misconduct under the employer's disciplinary rules where the punishment is summary dismissal.

6.3.22 The Court was also referred to Section 52(2) of the Employment Code Act which states as follows:

An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with capacity and conduct of the employee or based on the operational requirements of the undertaking.

6.3.23 Further reliance was placed on the case **Hildah Sakala Silungwe v Konkola Copper Mines SCZ Appeal No. 83/2008** which was fortified with the case **Pearce v Forester** wherein it was held that:

...if a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies summary dismissal.

6.3.24 It was Counsel's submission that in view of the foregoing, the summary dismissal of the Plaintiff was not wrongful.

6.3.25 As regards the Plaintiff's claim that her dismissal was unlawful, it was Counsel's submission that a dismissal is unlawful if the employer has breached a statutory provision such as a provision of the Employment Act. Counsel for the Defendant posited that the Plaintiff in her testimony failed to show how she is entitled to damages for unlawful dismissal. That the Defendant did not breach any statutory provision. Therefore, the Plaintiff is not entitled to damages for unlawful dismissal.

6.3.26 As regards the Plaintiff's claim for damages for unfair dismissal, it was Counsel's submission that unfair dismissal relates to a situation where the employer dismisses an employee contrary to the provisions of employment legislation or the rules of natural justice. That DW2 testified that the Defendant followed the fair procedure outlined under Section 52(3) of the Employment Code Act which provides that:

An employer shall not terminate the contract of employment of an employee for reasons related to an employee's conduct or performance, before the employee is accorded an opportunity to be heard.

6.3.27 It was Counsel's submission that upon the Plaintiff being charged, she was accorded an opportunity to write an exculpatory letter. Further, that the Plaintiff was given a chance to be heard and to appeal the Disciplinary Committee's decision in accordance with the rules of natural justice. Reliance was placed on the case **Mumba v Telecel SCZ Appeal No. 156/2015** wherein the Supreme Court held that there is no prescribed formula for how an employer should ensure fair procedure prior to dismissing an employee. Further reliance was placed on the case **Sitali v Central Board of Health SCZ Appeal No 178/1999** wherein it was held:

Hearing for the purpose of disciplinary proceedings is not confined to physical presence of an accused ... what is important is that a party must be afforded an opportunity to present his or her case or a defence either orally or in writing...

6.3.28 Counsel also referred the Court to the case **Moses Choonga v ZESCO Recreation Club and Another SCZ No. 168/2013** wherein it was held:

Unfair dismissal occurs when an employee's contract is terminated in breach of any statutory provision linked to the protection of the right of employment and the promotion of fair labour practices that require employers to terminate contracts of employment on substance of dismissal.

6.3.29 In conclusion on this point, it was Counsel's submission that there was no statutory breach and the Plaintiff's dismissal was justifiable and reasonable. That her dismissal was due to her misconduct which resulted in the Defendant Bank incurring loss.

6.4 **Whether the Plaintiff has produced sufficient evidence that she is entitled to the reliefs prayed for**

6.4.1 It was Counsel for the Plaintiff's submission that the Plaintiff's testimony and the evidence adduced show that there was malice on the part of the Committee that heard her disciplinary case. That this is because no reasonable person would have arrived at its decision. Therefore, their findings were unreasonable. Reliance was placed on the case **Pamodzi Hotel v Godwin Mbewe (1987)** wherein it was held that the decision to dismiss cannot be questioned unless there is evidence of malice or if no reasonable person could form such an opinion. Counsel relied on the facts of the sequence of events set out in its submissions under 6.3.

6.4.2 Counsel for the Plaintiff submitted that the Plaintiff showed before this Court how traumatic, embarrassing and distressful the dismissal was for her. Therefore, that she had satisfied the test set out in the cases **Khalid Mohamed v The Attorney** and **Wilson Masauso Zulu v Avondale Housing Project Limited** that he who alleges bears the burden of proving what he alleges. Counsel also referred the Court to the Plaintiff's testimony that all members of the Department had access

to the Flexcube system and that she demonstrated to the compliance department how she was posting the transactions into the system. On the other hand, that the Defendant failed to demonstrate how one of the files posted by the Plaintiff was not encrypted. That even DW1 conceded in cross examination that any file can be encrypted by the creator.

6.4.3 As regards the claim for damages for mental distress, it was Counsel's submission that this a proper case for this Court to use its discretion to make a reasonable award. That the mere fact that the Defendant repeatedly claimed that the Plaintiff was fraudulent in her dealings caused her a lot of distress, mental anguish and embarrassment yet there was no evidence both criminal and civil to justify such humiliation. Further, that notwithstanding the Defendant's own disciplinary committee failing to find her guilty of fraud or otherwise, the Defendant without evidence and justifiable cause counterclaims against her on a charge that was not proved by it or the investigative wings. Consequently, that damages should be awarded in order to place her as an injured person, in the position she would have been in had she not sustained the wrong. Reliance was placed on the case **Munsanje v Family Health Trust Registered Trustee Selected Judgment No. 27 of 2017.**

6.4.4 It was Counsel for the Plaintiff's submission that one need not specifically plead for damages as they are presumed to be a natural consequence of a breach. That all the Court is concerned with is whether the party claiming proved any loss suffered on account of the Defendant's conduct. That this position is well settled in a plethora of authorities including the case **Zambia National Commercial Bank Plc v Jason Mweemba Appeal No. 92/2015.**

6.4.5 Counsel went on to reference the case **Swarp Spinning Mills v Sebastian Chileshe and Others 2002 ZR 23 (SC)** wherein the Court described evidence of abrupt loss of employment and scarcity of finding a new job as aggravating factors that justify awards beyond the notice period. It was Counsel's contention that evidence of the Plaintiff's humiliation went unchallenged at trial. Further, that the termination was done in a traumatic and distressful manner as she was dismissed on allegations that were not proved and all evidence exonerating her was completely ignored. In this regard, that guidance was given in the **Swarp Spinning Mills Limited** case that the Court will usually consider situations where the termination is inflicted in a traumatic fashion that causes undue distress or mental suffering. Furthermore, that the undisputed evidence on record shows that the Plaintiff had been out of employment for over four years at the time of the trial following the dismissal. Consequently, that she has experienced great difficulties during this period on account of lack of employment opportunities especially in the banking industry on account of her public dented record. That this Court should enhance the damages to be awarded in this case to encompass the inconvenience and distress suffered by the Plaintiff as a result of the loss of a job. Reliance was placed on the case **Chilanga Cement Plc v Kasote Singogo (2009) ZR 122**.

6.4.6 Counsel went on to fortify his argument for damages by placing reliance on the following cases: The case **Zambia National Building Society v Nayunda SCZ Judgment No. 11 of 1993** wherein the Supreme Court guided that *"the essence of damages has always been that the injured party should be put as far as monetary compensation can go in about the same position, he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched."*

6.4.7 The case **Livingstone v Rowyards Coal Co (1880) 5 AC** for the argument for an award of damages for inconvenience and mental distress wherein it was stated:

You should as nearly as possible get at that sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

6.4.8 Counsel for the Plaintiff went on to submit on the principle of law that places a duty on a party claiming a special loss to prove the loss and to do so with evidence which makes it possible for the Court to determine the value of the loss with a fair amount of certainty. In this respect, Counsel referred the Court to the case **Dennis Chansa v Barclays Bank of Zambia Plc SCZ/8/128/2011** wherein it was submitted that the Court expressed the need for awards to increase because the scarcity of employment gets higher by the day on account of deterioration of the global economy. Counsel contended that this is the case in the present matter, more so that the Plaintiff worked in the banking sector where trust and honesty with client's money is a paramount consideration. That the Plaintiff had been out of employment for over 4 years on account of her image having been dented because of the Defendant's actions. It was Counsel's contention that the justice of this case demands a departure from the normal measure of damages as held by the Court in the case **Wildfred Weluzani Banda v Attorney General Appeal No. 116/2012**. Further, that in applying this principle, the Supreme Court in the case **Jonathan Musialela Ng'uleka v Furniture Holding Limited** awarded the Plaintiff 24 months' salary including all allowances and other perks he was entitled to at the time of the termination. Equally, in the case **Joseph Chintomfwa v Ndola Lime Company Limited (1999) ZR 172** the court awarded 24 months' salary to compensate for the loss of employment opportunities. Further, that

in the cases **Wise Silumbu v Barclays Bank Zambia Plc** and **African Bank Corporation v Bernard Fungamwango** the High Court and Court of Appeal granted 36 months' salary for unfair dismissal and in the **African Bank Corporation case** the Court of Appeal stated that it considered the Respondent's grim prospects of finding a job in the banking sector.

6.4.9 Counsel urged this Court to grant all the reliefs as prayed for by the Plaintiff. Further, that the Defendant's Counterclaim be dismissed for being frivolous and vexatious with costs to the Plaintiff.

6.4.10 In response to the question that the Plaintiff was discriminated against by the Defendant when it dismissed her from employment, the following are Counsel for the Defendant's submissions. It was Counsel's submission that the Disciplinary Committee applied the rules of natural justice and found the Plaintiff guilty of one of the charges levelled against her. That the actions of the Disciplinary Committee were not only fair but also considered the employee's contract of employment on conditions of service, the regulations published under the labour laws, and principles of law particularly in criminal cases and civil cases where the Bank is directly affected. That the Defendant's domestic rules on the operational, safety and financial regulations were also all followed.

6.4.11 It was Counsel's submission that DW2's testimony shows that all the inputters and authorizers who posted the transactions were put under investigation and most of them exited the Bank on their own terms. Further, that Edwin Musonda equally lost his job after confessing to defrauding the Defendant. That although the Plaintiff testified that others were given lesser penalties, in cross-examination her evidence was that among those charged was Chibale Chipulu who was from the Domestic Department which was a different Department from the E-

Business Department. Further, that the investigations revealed that out of the eleven (11) batch tickets of the Plaintiff, a cumulative sum of K2,012,700.00 was missing.

6.4.12 In conclusion, it was Counsel's submission that the Plaintiff had failed to demonstrate how the Defendant's actions demonstrated a lack of reasonable and just cause contrary to the provisions of Section 52(4)(d) of the Employment Code Act. Therefore, that she is not entitled to any of the reliefs she is claiming for discrimination.

6.4.13 Further, it is Counsel for the Defendant's submission that the Defendant has not breached any duty to the Plaintiff hence she is not entitled to claim for mental anguish nor has she shown any proof. That the Defendant suffered financial loss in the sum of K2,012,700.00 due to the Plaintiff's negligence of failing to ensure that files given to her to upload were not fictitious and her failure to review and check the files in question before uploading them into the Defendant's system. Therefore, that the Plaintiff's dismissal was justified considering the gravity of the offences she committed and as such she is not entitled to any of the reliefs she is claiming.

7.0 DECISION

7.1 I have carefully considered the evidence on record and the submissions made by Counsel. It is not in dispute that the Plaintiff was employed by the Defendant as a Transactions Officer in August 2009. In addition to her duties, the Plaintiff was given further responsibilities of posting E-business transactions on the banking system. The Plaintiff was charged under Sections 6.18 and 7.5 of the Defendant's Disciplinary Code of Conduct following a former employee's confession to fraudulently posting fictitious transactions and an internal audit report. It is further not in dispute that the Plaintiff was summarily dismissed

on 2nd November 2017 after a disciplinary hearing and that the Plaintiff's appeal against dismissal was unsuccessful.

- 7.2 The issue for determination is whether the Plaintiff is entitled to the reliefs she seeks. The law in force at the time of the Plaintiff's dismissal was the repealed Employment Act, Chapter 268 of the Laws of Zambia. Therefore, that is the applicable law in this action.
- 7.3 It is trite law that he who asserts the existence of facts has the burden of proof. In civil matters, the standard is on a balance of probabilities. In the case **Philip Mhango v Dorothy Ngulube and Others (1983) ZR 61** Ngulube, DCJ as he then was guided as follows:

It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent's case.

- 7.4 Also see: **Mohamed v Attorney General (1982) ZR 49** and **Wilson Zulu v Avondale Housing Project Ltd (1982) ZR 172**.
- 7.5 The Plaintiff's contract of employment was terminated on account of allegedly committing an act and/or omission that resulted in loss, damage and/or injury in breach of section 6.18 of the Defendant's Disciplinary Code of Conduct. The Plaintiff's claims in this action all hinge on whether she was unlawfully, wrongfully and unfairly dismissed by the Defendant. Therefore, that is the first legal issue I will address.
- 7.6 The Supreme Court in the case **Care International Zambia Limited v Misheck Tembo Selected Judgment No. 56 of 2018** has guided that:

In the theory and practice of Employment/Labour/Industrial law, terms or expressions such as 'dismissal', 'employment termination', 'unlawful dismissal', 'unlawful termination' of employment mean or connote different things, even though they all relate to the cessation of the employer-employee relationship.

...

... We have also said in numerous cases that the mode of an employee's exit from employment will invariably determine what, if at all, relief they would be entitled to.

...

Sprack John, an employment law jurist, has stated in his book, *Employment Law and Practice*, 1st edition, at P. 117 that:

"Wrongful dismissal... essentially is a dismissal which is contrary to the contract and its roots lie in the common law. The remedy is usually limited to payment for the notice period... [In contrast] unfair dismissal is dismissal contrary to statute... Unfair dismissal is, therefore, usually a much more substantial right for the employee and the consequences for the employer of dismissing unfairly are usually much more serious than those which attend a wrongful dismissal."

The same learned author has written that:

"It follows from the distinction between unfair and wrongful dismissal that a dismissal may be:

(a) Wrongful but not unfair;

(b) Unfair but not wrongful;

(c) Unfair and wrongful;

(d) Lawful, in the sense that it is neither unfair nor wrongful" (at P. 117)

Mwenda, W.S. (2004) has also written, in her book *Employment Law in Zambia: Cases and Materials*, that:

"Unlike wrongful dismissal, unfair dismissal is a creation of statute... Unlike wrongful dismissal, which looks at the form [of the dismissal] unfair dismissal looks at merits [or substance] of the dismissal and the form is only supportive of the whole merits [of] the dismissal... Under unfair dismissal, the courts will look at the reasons for the dismissal [for the purpose of determining] whether the dismissal was justified or not."

- 7.7 In the case **First Quantum Mining and Operations Limited v Obby Yendamoh Appeal No. 206/2015 (SCZ/8/3-7/2015)** the Supreme Court guided that unfair dismissal addresses the genuineness or otherwise for a dismissal. The Supreme Court put it this way in the case **Mukansemu Shambweka Nyirenda (Mrs) (Suing as the Administratrix of the estate of the late Elijah Nyirenda) v Zambia**

Forestry and Forest Industries Corporation Limited Appeal No.
127/2013:

A review of the law on unfair or wrongful dismissal establishes that whether a particular dismissal is unlawful or unfair will depend on whether, in the circumstances of the case, the employer acted reasonably in treating the factor that led to the dismissal of the employee as a sufficient reason for dismissing the employee. The author of 'SELWYN'S LAW OF EMPLOYMENT, has stated that there are two stages in the process of determining whether or not a dismissal is fair. The first is the means whereby the decision is reached; that is, the procedures followed by the employer before arriving at the decision to dismiss the employee. The second stage is the actual decision taken; whether the employer acted reasonably in dismissing the employee. This Court has had occasion to pronounce itself on these principles. In the case of ATTORNEY GENERAL V. RICHARD JACKSON PHIRI, we said that-

"In a case such as this, the court ought to have regard only to the question whether there was power to intervene, that is to say, the question whether the Public Commission had valid disciplinary powers and, if so, whether such powers were validly exercised

We agree 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 it is obvious that any exercise of powers will be regarded as bad if there is no substratum of fact to support the same. Quite clearly, if there is no evidence to sustain charges levelled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures."

7.8 Section 36 of the repealed Employment Act as amended by the Employment (Amendment) Act, 2015 provides for the termination of contracts of employment. It reads as follows:

36.(1) A written contract of service shall be terminated-

- (a) by the expiry of the term for which it is expressed to be made; or
- (b) by the death of the employee before such expiry, or

(c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise except that where the termination is at the initiative of the employer, the employer shall give reasons to the employee for the termination of that employee's employment.

(3) The contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking.

(4) ...

7.9 The Supreme Court guided as follows on Section 36 of the repealed Employment Act in the case **Attorney General v Paul Chilosha SCZ Appeal No. 220/2016:**

The net result is that where the provisions of Section 36(3) were invoked by an employer, the recourse which an employee had was to institute proceedings challenging the validity of the reasons. If the Court found, as the Judge found, the reasons to be justifiable, it was obliged to dismiss the claim. If, however, it found the reasons unjustifiable, it upheld the claim and found the termination to amount to unlawful dismissal for want of compliance with the statutory provision requiring the employer to provide valid reasons.

7.10 The learned author WS Mwenda puts it this way at page 171 of the book *A Comprehensive Guide to Employment Law in Zambia:*

“... the employer must give a valid reason that is substantiated after according the employee a right to be heard. This is important because the substratum of the facts and evidence must support the holding that an employee committed misconduct or performed poorly and as such the decision taken by the employer must be reasonable and fair in the circumstances.”

7.11 It is clear from the foregoing that an employer is required to furnish a valid reason(s) for terminating a contract of employment. The reason must relate to either the employee's capacity or conduct or the

employer's operational requirements. Therefore, where a termination at the instance of an employer does not give valid reasons, it is unlawful and unfair.

7.12 Further, the Supreme Court has guided in the case **Care International Zambia Limited v Misheck Tembo Selected Judgment No. 56 of 2018** on the obligations of an employer in arriving at a decision to dismiss an employee as follows:

According to Selwyn's Law of Employment, 6th Edition:

"The employer is not obliged to conduct a full scale trial..." (at P. 201)

We must pause here to confirm that we did adopt Selwyn's postulation in Chimanga Changa Limited v Stephen Chipango Ngombe when we said, at P. 220:

"The appellant... believed, from its investigations, that the respondent was responsible for the loss... [The] employer does not have to prove that an offence [was committed] or 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 rationale behind this is clear: an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens. In this case we satisfied that the appellant carried out its investigations on the basis of which the respondent was dismissed. We do not find the dismissal wrongful.

Turning to the matter at hand, the evidence which was laid before the trial court clearly revealed that the appellant undertook the necessary investigations around the allegations which had formally been raised against the respondent.

I am guided.

7.13 I find it necessary to recount the contents of the cardinal documents exchanged between the parties leading up to the Plaintiff's dismissal

from employment. The *Notification of Charge* letter reads in part as follows (appears on page 7 of the Plaintiff's Bundle of Documents):

RE: Notification of Charge

A review of the off-us ATM transactions posted to Account receivable – Acquired Cash GL between December 1, 2014 and September 20, 2017 showed that 39 fictitious transactions totaling ZMW2,0127,700 were initiated by you. These entries were debited to the GL and credited to Arthur Chisama Lyampesha – 0011511152621 and Grace Kalilo – 0011511293781 in the course of settling branches. See the table below for examples.

As an inputter, you are expected to validate all entries before posting into FCR.

In view of the above evidences, kindly explain why you should not be charged under section 6.18 and 7.5 of the Bank's disciplinary code of conduct.

- 6.18. Committing an act and/or omission that results in loss, damage and/or injury.
- 7.5 Conspiracy in fraud and/or fraudulent transaction or activity.

You are hereby required to respond to this charge and send your response to Head, Human Resource and others in copy of this mail within 24hrs.

Yours faithfully

ADESIPE OLOGUN
COUNTRY OPERATING OFFICER

7.14 The Plaintiff refuted the allegations levelled against her in an exculpatory letter dated 11th October 2017. It appears on page 10 of the Plaintiff's Bundle of Documents. The relevant portion of the letter reads as follows:

RE: EXCULPATORY LETTER

The above subject matter refers.

The following is an exculpation and official response to your letter of charge dated 6th October 2017, which I received on 10th October 2017 at 13:30 hours indicating that I have been charged with the following:

1. 6.18. Committing an act and/or omission that results into loss, damage and/or injury.
2. 7.5. Conspiring in fraud and/or fraudulent transaction or activity.

I have read and understood the two charges above and hereby refute the above charges for the reasons stated below:-

- I had not at any time conspired with any of the stated people Arthur Lyampesha and Grace Kalilo for the alleged amount of K 2,012,700 stated in the charge letter, neither did I also conspire with Edwin Musonda. To prove my innocence on the charge I will be more comfortable if the mentioned people confessed in my presence over the above allegations.
- On the 26th of September 2017, I was taken to Lusaka Central Police Station where I gave my statement and the police officers did not find any wrong doing and could not charge me based on the above charges. I was therefore released on a warned and cautioned to that effect.
- I also learnt while at the station that Edwin Musonda had given a full confessionary statement and confirmed that I was not involved in his wrong doings. In this regard, I hereby request that a written/recorded statement be obtained from Mr Edwin Musonda and be used in the determination of this case.
- In the process of uploading transactions, Mr Edwin Musonda was responsible for initiating the process on employee central uploads for the ATM off-us transactions. They would then be transferred to me for Flexcube to be processed for authorization and Mr. Sakulani Tembo would then authorize the transaction. In the process flow I would have access to Mr. Edwin Musonda's work after he creates an encrypted file on the system which I would then process and pass on to the authoriser. The authoriser would then determine that the transaction was in order with the printed hard copy entailing what was actually in the system. Therefore the authorisation was the preserver of the authoriser.
- The Flexcube only shows anomalies when the transactions are not balancing and such transactions would be redone to ensure that the entry was balancing. All the off-us transactions from Mr. Edwin Musonda were balancing, and thus there was no way of determining that there were any anomalies.
- Mr. Edwin Musonda created files at the initiation of every transaction process and I would only come in at the second stage of the process. I had no way of knowing if fictitious entries had been made.
- Whenever Mr. Edwin Musonda was on leave, the supervisor would call him to come in and create files for processing. He would not hand over any of his work to me to make or create files in his absence.

I remain committed and cooperative in this process and look forward to a comprehensive and fair resolution of this matter.

Yours sincerely,

Natasha Bwalya Chunga

Cc: General Secretary – ZUFIAW

Cc: Country Operations Officer

7.15 The Defendant issued the Plaintiff with a dismissal letter on 2nd November 2017. The letter reads in part as follows:

We write to inform you that following the disciplinary hearing that was held on 19th October, 2017, the Committee found you guilty of Omission that results in loss, damage and/or injury in accordance with clause 6.18 of the provisions of the Banks disciplinary code of conduct and grievance procedure.

You are hereby summarily dismissed from employment with effect from 2nd November, 2017. Kindly note that terminal benefits due to you will be paid after clearance with the Bank and any money owed to the Bank shall be deducted from these terminal benefits.

...

In addition, kindly be advised that you have the right to appeal against the decision of the Disciplinary Committee by writing to the Head of Human Resources within five (5) working days from 3rd November, 2017 setting out full grounds of appeal.

7.16 The Plaintiff exercised her right of appeal by way of a letter to the Defendant dated 6th November 2017. The letter reads in part as follows:

Dear Madam,

RE: Appeal Against Unfair Summary Dismissal

The above subject matter refers.

I hereby write to your office as Chairperson of the appeals committee, over my unfair dismissal from the bank. This follows the letter dated 2nd November 2017, which indicated that the Disciplinary Committee had found me guilty on grounds of omission which resulted into loss, damage and injury to the bank, in accordance with clause 6.18 of the provisions of the bank's disciplinary code of conduct and grievance procedure, which attracts first written warning, second written warning and then dismissal. This process was not followed and the committee just proceeded to dismiss me.

My notice of charge dated 6th October 2017 stated 2 charges of which I was requested to also appear before the Disciplinary Committee and for reference there was a full recording of proceedings done on the same.

I base my appeal on the following grounds;

- 1. The Disciplinary Committee did not prove beyond reasonable doubt that I omitted to notify the bank of the activities of Edwin Musonda: I wish to categorically state that I was not the inputter to any of the ATM off-us transactions as these were done by Edwin Musonda himself, who would execute on employee central and I would only process the encrypted file on flexcube and I had no jurisdiction whatsoever to dis-encrypt and verify files on the system.**

This goes to show that the Disciplinary Committee misguided itself by upholding this charge and finding me guilty on grounds of omission.

2. IT Department showed the steps and process of off-us transactions demonstration before the Disciplinary Committee and clearly demonstrated that I had followed procedure during the uploads: In the hearing, it was brought to the attention of the committee by IT personnel, who demonstrated the clear steps and process flow for the uploads. He also clarified at this stage with screenshots for the uploads upto the final stage of authorization. It was then that the Committee came to learn and be made aware of the process flow for the uploads. This again can be confirmed by my supervisor that the uploads were encrypted and that I had no way of seeing any irregularities on the part of Mr. Musonda. The supervisor is the one that reviews the uploads and ensure that reconciliations are done and are in order. I was of the view that this was a security feature put in place by the bank. The committee still overlooked these facts and still upheld the charge.
3. No forensic expert was brought to ascertain my omission: In the hearing, I requested for forensic experts to be brought in and determine my alleged omission and I am still of the firm view that it is unfair to dismiss me without fully establishing the validity of my alleged guilt. The bank can still engage forensic experts to carry out investigations and produce evidence of my alleged offence. The whole process between our department and back end core banking authorisers, has two other verification departments (authoriser and the compliance/audit department) which could have established irregularities on my part, had there been any. The forensic experts shall help to determine who exactly executed the transactions at each stage and whether he/she had any irregularities.
4. Need to reconcile all the disputed transactions: I am confident that the bank will reconcile the 26 transactions that were submitted to Lusaka central police during investigations and that the 39 transactions stated in my charge letter, as this shall help to resolve some of the issues raised during this whole case.
5. Edwin Musonda confessed to the crime and did not implicate me in any wrong doing: Surely the controversy and guilt lies with Edwin Musonda who has since confessed to acting alone and what he did to evade detection. Further questions arise over the participation of Arthur, Grace and the Pastors of the recipient church (Christ Embassy). If an independent investigative wing was engaged to re look at the case to look into the bank's transactions and the culprit's accounts, then the bank can recover the money for clients. Further both internal and external auditors with the compliance department would be able to also tell that there has been no omission on my part as initially charged.
6. My proven track record: Access bank is an institution that prides itself on loyalty, hard work and integrity. I have shown these qualities during my time in the institution and was awarded CEO awards as 2016 BRAND AMBASSADOR. I have diligently served the institution since 2009, with top heavy transactions accumulating to over one thousand transactions and I served

with dignity until my unfair dismissal. This by normal circumstances supersedes anyone's experience and no negligence or loss related has ever been recorded on my part before this charge of omission.

I am hopeful that the explanation stated above, I provide enough grounds on which to reverse this unfair dismissal from the bank. This verdict was harsh and unfair and I am fully confident that an independent panel such as the appeals committee shall be able to look at this matter judiciously.

By copy of this letter, my Union- ZUFIAW has been notified of this appeal. I remain committed and cooperative in this process and look forward to a comprehensive resolution of this matter.

Thank you,

Natasha Bwalya Chunga

Cc. General Secretary- ZUFIAW

- 7.17 The Plaintiff was accordingly granted an appeal hearing of her case. The *Invitation to Disciplinary Committee Hearing-Appeal Case* appears on page 12 of the Plaintiff's Bundle of Documents. The Plaintiff acknowledged receipt of the letter on 21st November 2017. The letter informed the Plaintiff that the hearing of her matter would be held on Wednesday 22nd November 2017. The appeal was not successful.
- 7.18 The Plaintiff's offer of employment which appears on page 1 of the Plaintiff's Bundle of Documents states under the Conditions of Employment Clause that "*Your employment shall also be governed by the terms and conditions in the staff handbook amended from time to time and any other policy(ies) that may be in place in the Bank.*" The Disciplinary Committee and Appellate Committee that presided over the Plaintiff's case are provided for under Section 3 of the Defendant's Disciplinary Code and Grievance Procedure manual. A review of the said manual also shows that they had the requisite power to employ the procedure they did. Therefore, I find that the correct procedure was followed. However, the question of whether or not the verdict was justified will be addressed below.

- 7.19 While an employer does not have to prove beyond reasonable doubt that an employee committed the act in question, it is incumbent that the employer acts reasonably in arriving at the decision to dismiss. Therefore, the cardinal question is, did the Defendant act reasonably in arriving at its decision to summarily dismiss the Plaintiff. Put differently, was there a substratum of facts established before the Disciplinary and Appellate Committees to warrant the dismissal of the Plaintiff from employment.
- 7.20 The letter dated 2nd November 2017 dismissing the Plaintiff merely stated that the Plaintiff was found guilty of “*Omission that results in loss, damage and/or injury in accordance with clause 6.18 of the provisions of the Banks disciplinary code of conduct and grievance procedure.*” The letter dated 12th February 2018 which communicated the outcome of her appeal merely stated that the Appeals Committee upheld the decision of the Disciplinary Committee. Both letters did not explain the reasoning behind her being found guilty. I must state that this was not a departure from the Defendant’s Disciplinary Code of Conduct as it only requires the Defendant to inform an employee of the verdict.
- 7.21 Having said this, the reasoning of the Disciplinary Committee which was upheld by the Appeal Committee is contained in the Minutes of the hearing. I have reviewed the *Minutes of the Disciplinary Committee Hearing Meeting* held on Thursday 19th October 2017 (appears on page 1 of the Defendant’s Bundle of Documents). The sections covering the deliberations of the meeting and the findings are recast below:

Deliberations of the meeting:

The charge and the accused’s response to the charge was read out by the Secretary.

Reference was made to the accused’s response where she stated that Edwin was the one who was in charge of creating the upload files and even in the event of

his absence because of leave, the supervisor of the unit would call him to come and create the files for the upload.

The accused was asked who was left in charge during the time that Edwin was on leave and had left the country to which she responded that she was not sure when Edwin had gone on leave and left the country but if he did then he left everything balancing and she did not touch the files. She stated that she was not in charge of 'off-us' transactions and her supervisor could confirm that.

The accused stated the systems of the Bank should be able to log when Edwin was around and when he was out on leave, and if a check was to be done, it would show that Edwin was only out of the country for days and not long periods of time therefore if the supervisor permitted him to go on leave, then Edwin would leave everything in order and come and pick up what he left off on his return.

The accused was asked how often ATM 'off-us' transactions were settled in the unit to which she responded that her understanding was that it was done at least bi-weekly because Edwin would take leave for short periods and come and do the settlements when he returns.

The accused was asked to explain the process flow of settling 'off-us' transactions. The accused stated that there was no process flow per say, but the Group office would send the FEP report to the E-business unit and her understanding was that this report was sent at least weekly. Edwin would then create an upload file based on the FEP report sent and he would encrypt and upload the file via employee central. After he uploads the file he creates, she would then log into flexcube on process it for authorization in flexcube. She explained that if he (Edwin) has flexcube rights, he would log into flexcube and process the file uploaded for authorization.

The accused explained that before Edwin's user rights for flexcube were disabled, he used to carry out the entire process alone, from upload central up to flexcube for authorization. This was until a directive came through to have his user rights disabled is when she took up the flexcube part of the process. So Edwin would initiate the transaction from upload central and she would pick it up from flexcube after the file has been uploaded. She further explained that the directive from the Managing Director, Tunde Balogun, was to have the user ID's of all staff of E-business disabled but this brought inefficiencies in the unit when they had to depend on the Central Processing Center to process all its transactions as some of their processes were time-bound.

So the unit raised a memo to this effect and it was approved that only one person in the unit should have rights on flexcube and she was granted the flexcube user rights. The accused explained that when she proceeds on leave, Edwin's user ID in flexcube would be enabled and he would carry out the entire process of settling ATM 'off-us' transactions from upload to flexcube by himself, when she

returns. Edwin's flexcube user rights would be disabled and if he had any pending transactions that required flexcube to process, she would process them.

The accused was asked if she used or was provided with any supporting documentation when carrying out settlements for the ATM 'off-us' transactions on flexcube after the upload is done to which she responded that there is a printout that is used. The accused was asked to inform the panel the details that the print out would have to which she responded that the print out would have information of the account number, narration, amount and if the transaction is a debit or credit. The accused stated that the print out would not have the account name.

The accused was asked if she was familiar with the pattern of account numbers of the Bank (sequence, pattern) to which she responded that she was not sure what the pattern was. The accused was asked what verification process she used when uploading the transactions that were given to her by Edwin to which she responded that she looked at the transaction amount and whether it was a debit or credit and if the amounts were balancing and she would proceed. She also stated that Edwin had a boss and the transactions uploaded also had an authorizer and the authorizer had rights to either approve or decline the transactions.

The accused was asked if she had anything else to say to which she stated that she felt she had said everything that needed to be said but she wanted to add that everything was posted by Edwin. He had access to the FEP report which she didn't and the upload report that she received was encrypted.

There being nothing else to discuss, the meeting came to an end.

Findings:

The accused was found to have performed a very important task that she handled very negligently. Her response to if she verified what she was uploading were unsatisfactory as she expected the buck to stop with the final authorizer of the transactions when she should have been the first line of defence had she reviewed her work.

The committee also confirmed that upload files are simple excel sheet files that do not have any encryption. Had the accused performed her functions with due diligence, there are high chances that she would have noticed that there were accounts that were presented as GL codes or that some GL codes were different and/or longer than others.

It was also confirmed that upload files cannot be uploaded in the system and made to stay for the long period of time without authorization. This seemed to point that it was not possible for Edwin to have made the upload in advance. The accused was therefore found guilty of committing an act of negligence that lead to the loss of money for the Bank.

Recommendations:

It was recommended that the charges in line with the disciplinary code of conduct for the charges raised, the accused should be summarily dismissed from employment.”

- 7.22 The Plaintiff's explanation of the process of uploading transactions on the Defendant's banking system per the *Exculpatory Letter* dated 11th October 2017 and the *Letter of Appeal against Dismissal* dated 6th November 2017 in summation is that Edwin Musonda was responsible for initiating the process of ATM off-us transactions and inputting on Employee Central. The said transactions would then be transferred to her in an encrypted file to input on Flexcube for them to be processed for authorization by Mr. Sakulani Tembo. She only had access to Edwin Musonda's work after he created the encrypted files on the system. That she would process the same and pass them on to the authoriser. The authoriser would then determine that the transaction was in order with a printed hard copy. That the authorization was the preserve of the authoriser. Further, that she had no jurisdiction to decrypt and verify files on the system nor did she have the means of knowing if fictitious entries had been made.
- 7.23 DW1's testimony corroborated the Plaintiff's explanation of the process flow to the extent that a file uploaded through Employee Central into Flexcube had no financial impact on any of the accounts involved. That an initiator would have to log on Flexcube, initiate the transaction and a second person would have to authorise these transactions before they could have any impact on the accounts involved. In cross examination DW1 also confirmed that he authorised the transactions and that it is upon such authorization that the transactions had financial impact. I find the fact of the process flow and that the transactions only had financial impact once authorised to have been proven.

7.24 The Plaintiff testified that whenever Edwin Musonda was on leave, the supervisor would call him to come in and create files for processing. That he would not hand over any of his work to her to make or create files in his absence. The explanation proffered by the Plaintiff is given credence by the *Internal Memo* dated 26th January 2016 which appears on page 19 of the Plaintiff's Bundle of Documents. The Memo was authored by the Plaintiff and has the concurrence of an Alfred (E-business), Chigo (Compliance) and an individual named Yemi. The subject matter of the memo is "*Deactivation of user rights- Daniel Kaluba and Edwin Musonda.*" It reads in part as follows:

Kindly deactivate Edwin Musonda – xxxx from Flex cube. He will only be activated when advised as all transactions will be processed with the Central processing Unit.

Daniel Kaluba – xxxx should be deleted and will not have any rights on Flex cube. He will be mainly dealing with Card production and Support.

Only Natasha Bwalya – xxxx should be active with flex cube rights and will only be deactivated when on leave from work.

7.25 Next to the concurrence granted by Compliance on the Memo there is a note that reads "*Please get Yemi's concurrence*". At the bottom of the Memo is a note endorsed by Yemi which reads: "*Please note that Natasha and Edwin should have identical inputter rights on Flexcube. Edwin ID will be deactivated and will only be active when he relieves Natasha during her leave.*"

7.26 The foregoing shows that Edwin Musonda was sometimes able to perform the function of inputter on both Employee Central and Flexcube. This was also corroborated by DW1's evidence. He testified that the background to the Memo was that the Defendant's Managing Director wanted only one person, at a time, to have active rights on Flexcube. That the Managing Director's guidance was that the Plaintiff would be the primary person and Edwin Musonda was to be activated

whenever she went on leave. In addition, the Plaintiff and Edwin Musonda had identical inputter rights. Consequently, drawing a distinction between who inputted which transaction is a plausible challenge.

7.27 In cross examination, DW1 confirmed that he was the supervisor of the Plaintiff's unit at the material time. He also confirmed that he was found negligent but was not disciplined on account of being new and not fully involved. DW1's evidence that he was not dismissed because he was new and not fully involved shows that there were serious flaws in the Defendant's system as his role as authorizer was essential as it gave effect to the transactions. The flaws could have been on account of the system itself or inadequate understanding by the members of staff involved in the process. Regardless of which of the above two (2) possibilities could've caused the flaws, what is clear is that all the safeguard measures at the different stages of the process failed to detect the fraudulent activities. This led to K5,176,110,00 being diverted from the ATM Acquired GL through fictitious transactions from December 2014 to September 2017. Further, the fact that their supervisor could not pick up on these fictitious transactions lends credence to the Plaintiff's case. Her role was not to supervise Edwin Musonda but to ensure that what was inputted on the Bank's system balanced.

7.28 DW1 testified that the transactions were not encrypted. However, this Court cannot ignore the evidence that these transactions were not originated by the Plaintiff. Consequently, what she was expected to detect, by extension, should have been detected by the supervisor. In fact, it was the role of the supervisor to detect the fictitious transactions as it is his action in the system that gave the transactions effect. Hence, a more than mechanical approach in effecting approval would be

expected from him in comparison to the Plaintiff whom by his own admission in cross examination was an initiator.

7.29 I find that the processes of the Defendant Bank were inadequate, and hence employees were unable to detect irregular postings done by Edwin Musonda. The Plaintiff cannot be faulted for this.

7.30 I have noted the Disciplinary Committee's finding that it was confirmed that upload files could not be uploaded in the system and made to stay for a long period of time without authorization. Hence, that it was not possible for Edwin to have made an upload in advance. As stated above, there has been no evidence adduced to negate the Plaintiff's evidence that Edwin would initiate the process on Employee Central and she would come in at the second stage which was to pick it up from Flexcube after the file had been uploaded. Equally, her evidence that Edwin's user ID in Flexcube would be enabled when she would proceed on leave enabling him to carry out the entire process on both Employee Central and Flexcube was not negated.

7.31 The Minutes also state that the Plaintiff was the Defendant's first line of defence had she reviewed her work. I am of the considered view that all the Defendant's lines of defence failed in this process because even the final authoriser did not detect the fictitious transactions. Further, the Compliance and Audit Units equally did not detect the fraudulent activities for the years it went on. This is revealing of a bigger problem.

7.32 I find that the Defendant did not act reasonably in arriving at its decision to summarily dismiss the Plaintiff. I am fortified by the decision of the Supreme Court in the case **Konkola Copper Mines Plc v Hendrix Mulenga Chileshe Appeal No. 94/2015** wherein it held:

The main grievance which the Appellant had with the Respondent was his alleged failure to supervise and inspect the works of the contractor.

The court below found, and evidence abounds, that this was not a deliberate action on the part of the Respondent but rather that of his superior. We are in agreement with this finding because the evidence of the Appellant's witness in the court below and indeed the audit report, confirm this fact. It follows that the consequences of the lack of such supervision and inspection like the building not conforming to the BOQ cannot be placed at the door of the Respondent... These observations we have made demonstrate that there was no substratum of facts to support the decision made by the Appellant to dismiss the Respondent. The court below made these observations which we do not consider as a review of the decision of the disciplinary and appeals committees but rather, an examination of the evidence presented to see if the exercise of the power by the committees was valid in view of the surrounding facts.

7.33 Based on the foregoing analysis of all the facts before me, it is my considered view that there was no substratum of facts to justify the Plaintiff's dismissal. **Consequently, I find that the Plaintiff was unfairly dismissed by the Defendant.**

7.34 In arriving at my decision, I did take into consideration the Defendant's Internal Audit Unit's *Report on the Fraudulent Postings of Fictitious off-us ATM Transactions* that led to the Plaintiff being charged. The said report is dated 3rd October 2017 and appears on page 13 of the Defendant's Bundle of Documents. DW2 testified that the Defendant's decision to charge the Plaintiff was a result of the findings of the said report. The Internal Audit Unit carried out investigations that culminated into the said report following Edwin Musonda's confession to his supervisor (Alfred Ackon) on the fraudulent transfers from the Defendant's ATM Acquired General Ledger to the two customer accounts. The objectives of the investigations were as follows:

2.0 Objectives

2.1 To determine the extent of fictitious entries in ATM Acquired GL and the parties involved.

- 2.2 To establish total financial loss to the Bank.
- 2.3 To identify control lapses that were exploited by Edwin and any other E-business staff to post fictitious entries.
- 2.4 Make appropriate recommendations based on our findings.

7.35 Clause 3 which outlines the work done by the Internal Audit Unit states that it among others obtained and reviewed the leave application forms for Edwin Musonda and the Plaintiff and that audit log of accounts were obtained and reviewed. The *Findings* of the Report show that the fictitious transactions inputted by Edwin Musonda and the Plaintiff were approved by the following authorisers:

Staff Name	Amount Posted (K)	Amount Authorised (K)
Edwin Musonda	3,163,410.00	
Natasha Bwalya Chunga	2,012,700.00	
Tembo Sakulani		3,542,580.00
Bwalya Bwalya		390,170.00
Chibale Chipulu		166,790.00
Michael Mulenga		493,110.00
Paul Bale		221,000.00
Chewe Nkole		150,110.00
Chitimbe Zimba		204,350.00
Mwansa Sichela		8,000.00
Total	5,176,110.00	5,176,110.00

7.36 The evidence on the record shows that none of the authorisers listed above detected the fictitious transactions. The Internal Audit Unit actually recommended that Sakulani Tembo, Bwalya Bwalya and Chipalu Chipulu face disciplinary action for authorizing the fictitious transactions and for overriding the Flexcube system pop up to view the content of the batch uploads while authorizing the entries. The Report also recommended that disciplinary action be taken against the following officers as follows:

	Reason
Alfred Ackon (Head of E-Business Unit)	The channels' activities such as Credit card settlements, ATM dispense error reimbursements, priming of ATM cards and settlement of off-us ATM transactions to the

	branches were not championed and reviewed by him. This is supervisory negligence.
Yemi Oyewole (Former Head of Conduct & Compliance Unit)	Failed to carry out adequate review of the E-Business unit in Access Bank Zambia for over two years that this fraudulent act had occurred. This included no call over reviews and failure to notice unretired cash advances.

7.37 I also find it necessary to recast the following portions of the report which demonstrate the systemic failures and lapses in the Defendant bank: *Findings*, *Control Lapses* identified, *Conclusions* drawn and *Recommendations* of the report. This is because they demonstrate the gravity of the failures of key personnel on account of policy inadequacies and lack of proper training as well as the system deficiencies. These are couched as follows:

4.0 Findings

...

- 4.15 When Sakulani Tembo- ABO (Head – Domestic Operations & Central Clearing) was queried on the due diligence he observed while authorising the off-us uploads on the central upload portal, he explained that raw data on ATM transactions were obtained from E-business settlement at Group Office to prepare the batch upload and whenever these transactions were processed, he ensured that the inputters (Edwin Musonda and Natasha Chungu) collected the source documents to be used for the call over process of the transaction the next day and that he felt that had the process been done and done correctly, it would have highlighted all the fictitious entries.
- 4.16 In her response to our query on the due diligence she observed while authorising the batch uploads, Bwalya Bwalya-ABO (Head of Makeni Branch) stated that she had raised her concerns to her then supervisor Sylvester Okworu (former Country Operations Officer) stating that she was not familiar with E-Business transactions which does not require an approval neither was the process flow made available. She further explained that after several meetings with her former Country Operations Officer, they were mandated to authorise for E-Business unit

and the aforementioned transactions were authorised based on his instructions.

- 4.17 Chibale Chipulu – ET (Head of Treasury Operations) also explained that the fictitious transactions were prepared and uploaded from E-business and because there was no authoriser in the unit, the entries were brought to domestic operations for authorization. She further explained that she could not view the content or details of the batch-upload when it was uploaded on flexcube for authorization. We observed from our reviews that contrary to her claims that she could not view the content of transactions uploaded for authorizations, authorisers actually have the option to either view transaction details or override the option. Our findings revealed that the authorisers always opted out for the override option.
- 4.18 Alfred Ackon (Head, E-Business Unit) in his response to our query explained that the process was basically between the settlement team and the authorisers in Domestic Operations Unit and as such he had little or no input in the process flow.
- 4.19 Alfred claimed further that it was difficult for him to detect fictitious transactions since he didn't partake in the inputting/authorizing process and also stated that the control was placed in the hands of the authorisers to ensure that entries were being processed correctly. We found Alfred's unsatisfactory as being the Head of E-Business Settlement Unit, he ought to have ensured that no single staff in the Unit handled the transaction for such a long period of time.
- ...
- 4.30 E-Business Unit's transaction batches for the period between January 1, 2014 and September 13, 2017 were not submitted to Conduct and Compliance Unit for further call over as required by the Bank's policy.
- 4.31 Policy gaps in respect of documentations and approvals required for batch upload of transactions were also established to be largely responsible for the fraudulent diversion of funds. The hard copy of ATM transactions (off-us) schedules were not summed up to indicate the total value and signed off by the imputer, authoriser and Head of E-business Unit.

- 4.32 The Unit has not adopted Group E-Business unit's SOP as mandated to guide its processes.**
- 4.46 Staff were rotated in the Bank without issuing a letter of transfer and new job function.**
- 5.0 Control Lapses**
- 5.1 Key control reviews surrounding the ATM transactions (off-us) upload and settlements posting were weak as the diversion of the funds were not detected as a result of failure to carry out routine call of the transactions by Conduct and Compliance Unit.**
- 5.2 Non submission and lack of call over of transactions tickets created an avenue for Edwin Musonda and Natasha Bwalya Chunga to perpetrate the fraudulent act by diverting funds totalling ZMW5,176,110.00.**
- 5.3 KYC documentation for the three accounts opened could not be found and could have been deliberately taken away from the bank by Edwin at the time he had opened the accounts because at that time he was in Branch Operations.**
- 6.0 Conclusions**
- ...
- 6.3 Non submission of transaction tickets for call over created an avenue for Edwin Musonda and Natasha Bwalya Chunga to perpetrate the fraudulent act.**
- 6.4 ATM transactions were authorised without reviewing the upload entries by the supervisors and authorisers. This also created a serious gap and was exploited by Edwin.**
- 6.5 Routine review of E-Business Unit was not carried out by Conduct and Compliance Unit.**
- 6.6 Transactions of other Banks' customers on our ATM machines were being posted manually into the respective GLs. This weakness was exploited by Edwin and Natasha to perpetrate this fraud.**
- ...
- 8.0 Recommendations**
- ...

- 8.3 Transactions of other Bank's customers on Access Bank's ATM machines should be automated before the end of the year to forestall future occurrence.
- 8.4 The management should ensure that all standard operating procedures and policies of the Bank are documented and circulated appropriately to all the relevant users.
- 8.5 Flexcube users' training should be conducted for all operations staff and other users in the Bank.
- 8.6 All transaction batches should be called over by imputers and authorisers and ensure submission to Conduct and Compliance before 12noon the next day.
- 8.7 Contract and Job functions of Head, E-Business Unit should be reviewed and a reshuffling of the unit should be carried out if possible to help unearth other possible fraudulent activities in the Unit.

7.37 This report reveals several policy inadequacies and lack of proper training of key bank staff as well as the system deficiencies as earlier stated. It would, therefore, be unfair to attribute the loss incurred by the bank on the Plaintiff in light of all these glaring lapses by the bank.

7.38 I now turn to the question whether the Plaintiff was wrongfully dismissed. In the case **First Quantum Mining and Operations Limited v Obby Yendamoh Appeal No. 206/2015 (SCZ/8/3-7/2015)** the Supreme Court guided as follows:

We must state from the outset that we agree with the findings by the Court below that wrongful dismissal addresses the procedure adopted in effecting the dismissal whilst unfair dismissal addresses the genuineness or otherwise for the dismissal. We also agree that in dealing with wrongful dismissal a Court should not act as an appellate tribunal, but rather examine if the procedure prior to dismissal was correct and if the constitution of the disciplinary committee was in accordance with the disciplinary code.

- 7.39 The Plaintiff was charged and found liable of committing an act and/or omission that results in loss, damage and/or injury under Section 6.18 of the Defendant's Disciplinary Code of Conduct. A review of the Disciplinary Code of Conduct reveals that it prescribes a first and final recorded warning for a first breach and summary dismissal for a second breach. The Plaintiff was summarily dismissed contrary to the provisions of the document. DW2 testified that this is because the Disciplinary Committee members felt that the Plaintiff did not deserve or warrant to be given a 1st and final warning because of the huge amounts and clients that the Defendant had lost due to the incident.
- 7.40 This was a clear departure from the Disciplinary Code of Conduct. The Defendant flouted its provisions. This shows that although the Defendant had disciplinary power over the Plaintiff, which it exercised through the Disciplinary and Appellate Committees, the said power was not validly exercised in breach of the Disciplinary Code of Conduct. The Defendant acted contrary to the Disciplinary Code of Conduct thereby breaching the contract of employment between the parties. **Consequently, I further find that the Plaintiff was wrongfully dismissed.**
- 7.41 I am fortified by the case **Konkola Copper Mines Plc v Hendrix Mulenga Chileshe Appeal No. 94/2015** wherein it was held:

The Appellant's predicament is compounded by the fact that the instances warranting dismissal reflected in the disciplinary code do not include negligence. This was confirmed by the Appellant witness in the court below. Clause 2.1.10 of the Appellant's disciplinary code sets out the offences which are dismissible as a first offence and they include offences relating to absenteeism from work, reporting for work under the influence of alcohol or drugs and unprofessional conduct likely to tarnish the image of the Appellant. The fact that the sanction imposed on the

Respondent offended the disciplinary code is another demonstration of improper exercise of disciplinary powers by the Appellant.

7.42 As regards the Plaintiff's claim for damages for unlawful, wrongful and unfair dismissal, my response is as follows. In the case **Care International Zambia Limited v Misheck Tembo Selected Judgment No. 56 of 2018** the Supreme Court guided that the mode of an employee's exit from employment will invariably determine what, if at all, relief they would be entitled to.

7.43 In addition, the following Supreme Court decisions are instructive on assessment of damages and compensation. In the case **First Quantum Mining and Operations Limited v Obby Yendamoh Appeal No. 206/2015 (SCZ/8/3-7/2015)** the Supreme Court guided that:

...The matters however, do not end there because, the Court below went on to award two remedies, that is twenty four months' damages for wrongful dismissal and twelve months' salary as compensation for the unfair dismissal.

The position we have taken is that the two awards were wrong in principle because they arise out of one compensatory event, which is the loss of employment. In granting the two awards the Court below justified them with the fact that re-instatement was inappropriate and that there is scarcity of jobs on the labour market. The Court relied on a number of our decisions to justify the awards.

The first of such decision was *Dennis Chansa v Barclays Bank of Zambia Plc* in which we upheld an award of thirty six months salary as damages on the ground that with passage of time our awards must increase because the global economies deteriorate the chances of finding employment.

There is a clear distinction between the principle applied in the award by the Court below, which we upheld, in the *Dennis Chansa* case and the one in this case by the Court below in that in the former, the thirty six month salary award was a single award for a single or one compensatory event. In essence, the fact that a single compensatory event had been proved by

two facts i.e. wrongful dismissal and unfair dismissal does not mean two remedies should be awarded. What we have said in the preceding paragraph must be distinguished from what we said in the *Kafue District Council v Chipulu* case which is the second decision the Court below relied upon. In that case we upheld the decision of the lower Court awarding various monetary amounts as damages. These were, inter alia, for inconvenience and mental torture arising out of the appellant's failure to recruit the Respondent. These were proper awards because they were given in respect of the various damages proved to have been suffered by the Respondent. To this extent, the case is distinguishable from this appeal. Likewise, the decision in the *Singogo* case is also distinguishable because we only upheld one award of twenty four month salary as damages and struck down the award of six months pay for mental torture. In the ordinary course of things we would have been compelled to strike down the two awards by the Court below. We have not done so because, the quantum of damages i.e. thirty six months is in conformity with our decision in the case of *Dennis Chansa v Barclays Bank of Zambia Plc* where we expressed the need for awards to increase because the scarcity of employment is higher by the day on account of deterioration of the global economy.

- 7.44 In the case *Mukansemu Shambweka Nyirenda (Mrs) (Suing as the Administratrix of the estate of the late Elijah Nyirenda) v Zambia Forestry and Forest Industries Corporation Limited* the Supreme Court guided as follows:

Coming to the claim for damages, we have looked at a number of decided cases on principles for assessment of damages for wrongful dismissal. In particular, we have taken into account our decision in the case of *SWARP SPINING MILLS V. SEBASTIAN CHILESHE AND 30 OTHERS*¹¹³¹, where we said that-

"In assessing the damages to be paid and which are appropriate in each case, the court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed

from where the circumstances and the justice of the case so demand. For instance, the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering...."

7.45 I have taken into consideration that the Plaintiff's contract of employment contains a termination of employment clause which reads:

Following confirmation of appointment, either party may give one-month's notice to terminate services or one month pay in lieu of notice and any outstanding financial obligations to Access Bank (Zambia) Limited shall become immediately due.

7.46 I have also taken into consideration the fact that the letter of dismissal dated 2nd November 2017 indicates that the Plaintiff was paid her terminal benefits upon completing the Defendant's clearance processes and deduction of sums owed to the Bank. However, given that the Plaintiff was both unfairly and wrongfully dismissed from employment, on the strength of the above Supreme Court decisions I **award the Plaintiff damages equivalent to twenty-four month's salary including all allowances and perquisites to be assessed by the Registrar in default of agreement.**

7.46 Shall now consider the Plaintiff's claim for damages for inconvenience, undue distress, suffering, embarrassment, and loss of employment opportunities. On this claim, I am guided by the Supreme Court's decision in the case **Standard Chartered Bank Zambia Plc v Kasote Singogo** wherein it held:

Although damages for mental anguish, distress and inconvenience may be awarded in appropriate cases, as was the case in Attorney General v Mpundu an award of such damages should only be considered where they are pleaded and proved. Nowhere in the writ of summons, statement of claim or evidence has mental anguish, distress or inconvenience been claimed. No evidence was led to prove mental anguish, distress or inconvenience. This claim should not have been awarded by the court on its own motion even under the omnibus head of "any order that the court may deem fit" in the statement of claim.

7.50 The Supreme Court further guided in the case **Aaron Mwiya and 6 Others v Trade Kings (Z) Limited** that:

We begin our determination of this issue with a consideration of whether he is entitled to damages for anguish, mental stress and torture. The relief was claimed in the writ of summons and statement of claim but it was not specifically pleaded in either documents by way of setting out the contentions in relation to the claim. Further, and as Mr. G. Mulele has argued, no evidence was led by the Fourth Appellant in his testimony in the Court below in support of the claim. There is no reason for us to award these damages as claimed.

7.51 It is clear from the foregoing authorities that the Plaintiff should have pleaded her claim for damages for inconvenience, undue distress, suffering, embarrassment, and loss of employment opportunities by setting out contentions and proven the same at trial. She should have provided the facts that led to the claim. The evidence on record does not show how the Plaintiff suffered the pain and anguish nor was any documentary evidence produced in the form of medical reports to corroborate this claim.

7.52 Whilst the Plaintiff may have endured suffering and anguish, there was no evidence led before this Court to substantiate the claim to justify such an award. **Therefore, I decline to award any damages for the claim.**

7.53 As regards the Plaintiff's claim for payment of terminal benefits in full as if she had completed her full service and retired at the age of fifty-five, sixty or sixty-five years as the case may be. The Supreme Court has guided in the case **Kitwe City Council v William Ng'uni SCZ Judgment No. 12 of 2005** that a salary or pension benefits cannot be awarded for a period not worked for because such an award would not have been earned and may be properly termed as unjust enrichment. **This claim fails especially in light of the fact that there is no dispute**

that the Plaintiff was paid her terminal benefits at the time of dismissal.

7.54 The Plaintiff further claimed for interest on the amount found due. Since the Defendant has kept the Plaintiff out of her money, the Defendant ought to compensate her for it, in line with the Supreme Court case of **Indeni Petroleum Refinery Company Limited v V.G Limited.**

7.55 Regarding the Plaintiff's claim for costs, it is trite law that costs are at the discretion of the Court and generally follow the event. **Having considered the circumstances of the case, I award costs to the Plaintiff to be taxed in default of agreement.**

8.0 DEFENDANT'S COUNTER CLAIM

8.1 I now turn to the Defendant's Counter Claim. The Defendant has counter claimed the sum of K2,012,700.00 for the loss occasioned to the Defendant on account of the alleged Plaintiff's fraudulent and negligent discharge of her duties as an inputter in the Defendant's Core Banking System. This Court having found that there was no basis upon which the Defendant could've found the Plaintiff to have been at fault for the loss incurred as a result of Edwin Musonda's fraudulent transactions, it is my considered view that she cannot be held responsible for the Defendant's loss being claimed in its counterclaim.

8.2 As earlier stated, it is not in dispute and was confirmed by PW1 and DW1 that transactions were first uploaded on the Employee Central banking system and then they would be uploaded to the Flexcube banking system. Ideally, the 2 functions were performed by different individuals with the exception of when one went on leave, in which case the evidence shows that Edwin was able to act as inputter on both the Employee Central system and the Flexcube system.

- 8.3 The Defendant advanced evidence that the fictitious accounts were different from the account numbers of genuine transactions. Further, that the interface used to upload the transactions (a screenshot was provided on page 1 of the Defendant's Supplementary Bundle of Documents) has a provision which when opened would allow the Plaintiff to see the contents of the excel document uploaded. DW1's evidence that anyone who wanted to conduct due diligence on the contents of the files initiated by Edwin Musonda had the ability to do so and that the said transactions were in fact not encrypted. These were among other factors the Defendant contends the Plaintiff ought to have utilized to detect the fictitious transactions.
- 8.4 However, in her evidence, the Plaintiff has insisted that the transactions posted by Edwin Musonda were encrypted. In her evidence in court, it was her evidence that an encrypted upload was only known by the creator, in this case Edwin Musonda. That from her end on Flexcube she could only identify the batch number of the general ledger, account name and the total credits and debits. That her role was to merely ensure that the debits and the credits balanced. In her letter of appeal against the dismissal, the Plaintiff stated that she had no way of seeing any irregularities on the part of Mr. Musonda. She stated that this position could actually be confirmed by her supervisor that the uploads were encrypted. That the supervisor was the one that reviewed the uploads and ensured that reconciliations were done and were in order, a system that she said, she believed was a security feature put in place by the bank.
- 8.5 What I get from the Plaintiff's explanation of her role as an inputter is that she may not have fully understood and appreciated the importance of her role in the bank. She insisted that her role was simply to ensure that the debits and the credits balanced, which the Defendant doesn't

seem to agree with. This again seems to point to the earlier stated deficiency in staff training and failure by the bank to fully explain the new job function to the employees upon being assigned new roles as indicated in the Internal Audit Unit report.

8.6 Furthermore, as earlier stated, the fact that these fictitious transactions could not be picked by not only the Plaintiff but even their supervisor lends credence to the Plaintiff's case. Besides, the Plaintiff's role was not to supervise Edwin Musonda but to ensure that what was inputted on the Bank's system balanced.

8.7 It can hence be said that was more of the supervisor's responsibility to detect the fictitious transactions as it was his action in the system that gave the transactions effect. Therefore, the omission to act diligently to avert the losses incurred by the bank that the Defendant ascribed to the Plaintiff to dismiss her and which it seeks this Court to find in the Counter Claim is one that all the major stakeholders in the process failed to execute. In fact, the failure to detect the fictitious transactions was not only at the Flexcube stage, it was also at the Authorization stage, and for all the years this went on, both the Audit and Compliance Departments, failed to detect them.

8.8 This shows that the Defendant's entire system was not effective because all the safeguard stages and measures failed. Therefore, I find credence in the Plaintiff's submission that the Defendant dismissed her as a way to send a message to the rest of its employees and not on account of a substratum of facts to warrant such an action. **The Defendant's Counter Claim fails.**

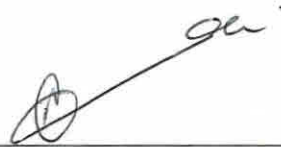
9.0 FINAL ORDERS

The following are, therefore, the final Orders of this Court:-

- i. **The Plaintiff's claim for Payment of terminal benefits in full as if she had completed her full service and retired at the age of either fifty-five, sixty or sixty-five years as the case may be is unsuccessful and dismissed.**
- ii. **The Defendant must pay the Plaintiff damages equivalent to twenty-four month's salary including all allowances and perquisites to be assessed by the Registrar in default of agreement for having unfairly and wrongfully dismissed the Plaintiff from employment.**
- iii. **The claim for damages for inconveniences, undue distress, suffering, embarrassment and loss of employment opportunities is dismissed for lack of merit;**
- iv. **The sum awarded in (ii) shall attract interest at short-term bank deposit rate from the date of the Writ to the date of Judgment. Interest thereafter until full payment shall be at the current lending rate as determined by the Bank of Zambia.**
- v. **The Defendant's Counter Claim fails and is dismissed.**
- vi. **Costs for this action to be paid to the Plaintiff by the Defendant which costs are to be taxed in default of agreement.**

Leave to appeal is granted.

Dated at Lusaka this 31st day of December 2024



**C. Chinyanwa Zulu
JUDGE**