

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL NO. 210/2023**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**B E T W E E N:**

**CLIFFORD SIMFUKWE**

**AND**

**ZESCO LIMITED**



**APPELLANT**

**RESPONDENT**

**CORAM: KONDOLO SC, MAKUNGU, CHEMBE, JJA**

**On: 14<sup>th</sup> January, 2026 and 29<sup>th</sup> January, 2026**

*For the Appellant: In Person*

*For the Respondent: Mrs. M.A. Kambole and Ms. V. Kalaba – In-House Counsel*

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## **J U D G M E N T**

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**KONDOLO SC JA**, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Ridge v Baldwin [1964] AC 40**
2. **Kambatika v ZESCO Limited (Appeal No. 186/2000)**

3. **Sobek Lodges Limited v Zambia Wildlife Authority  
2008/HP/668**
4. **Wilson Masautso Zulu v Avondale Housing Project  
Limited(1982) ZR 175**
5. **Albert Mwanauo v NFC Africa Mining Plc (2011) 1ZR 30**
6. **Chimanga Changa Limited v Stephen Ngombe CAZ Appeal  
No. 053/2021**
7. **Mumba v Telecel Zambia Limited.Appeal No. 156 of 2005**
8. **Emporium Fresh Foods Ltd v Kapya Chisanga (Food Lovers  
Market) CAZ Appeal No. 44/2021**
9. **Enock Kavindele & Another v Bologna Properties CAZ  
Appeal No. 136/2020**

#### PUBLICATIONS

1. **Winnie Mwenda Sitole, in Employment Law in Zambia:  
Cases and Material,**

#### **1.0 INTRODUCTION**

- 1.1 This is an appeal against the Judgment of Hon. T.I. Katenekwa delivered on 31<sup>st</sup> January 2023 in which he dismissed the Appellant's claim for wrongful dismissal, in favor of the Respondent.

1.2 In the High Court, the Appellant was the Plaintiff and the Respondent was the Defendant, we shall refer to them as Appellant and Respondent throughout this Judgment.

## **2.0 BACKGROUND**

2.1 The Appellant was employed by the Respondent as an Electrical Technician but was later dismissed from employment after being accused of illegally connecting a private residence to the Respondent's electricity supply.

2.2 The Appellant commenced proceedings in the High Court on 12<sup>th</sup> July, 2017 claiming, among other reliefs, damages for malicious prosecution, declarations that the charge was duplicitous, and wrongful/unlawful dismissal.

### **2.3 Appellant's Case in the High Court**

2.4 The Appellant averred in his statement of claim that while on duty a customer came in and complained that he had paid for electricity to be connected at his house but ZESCO had delayed to do so. That after seeing the customer's receipts, he showed them to his supervisor who authorized him to proceed and

connect power to the customer's residence in Mindolo North M1164.

- 2.5 The Appellant's action was investigated and reported to the police as an illegal connection. He stated that he was prosecuted for the offence of illegal connection of power but was acquitted for lack of evidence.
- 2.6 He further averred that whilst being prosecuted, the Respondent charged him with dishonest conduct connected to the same act, and eventually summarily dismissed him from employment on 30<sup>th</sup> October, 2014.
- 2.7 During his Court testimony in cross examination, the Appellant admitted that he was found guilty of fraudulent appropriation of power and fined the sum of K2,500.
- 2.8 In further cross examination the Appellant admitted that he was not employed under the department responsible for new installations and that he had no proof that his supervisor Mr. Ndambo, had authorized him to connect the customer's residence.

3.0 When pressed further, the Appellant agreed that he was represented by his Union during the disciplinary proceedings. He also admitted that at the disciplinary hearing Mr. Ndambo denied authorizing him to connect the customer's residence.

**3.1 Respondent's Case in the High Court**

The record of appeal (ROA) filed by the Appellant does not contain the Defence filed by the Respondent in the High Court. The record however shows that the Respondent denied all the Appellant's claims and at trial called its main witness Mr. Alex Mbumba, who chaired the disciplinary committee. He testified in detail on the composition of the committee, the conduct of the hearing, and the evidence considered. He testified that the committee heard from supervisors, security personnel, and the alleged authorizing officer, who denied ever instructing the Appellant to connect the power or carry out installation duties.

3.2 It was concluded that the evidence before the disciplinary committee showed that the connection made by the Appellant was illegal, installed without a meter and was contrary to

company practice. After the hearing, the committee recommended that the Appellant's employment be terminated.

#### **4.0 HIGH COURT DECISION**

4.1 Upon considering the evidence before it, the trial Court considered that the two central issues for determination were:

**I. Whether the Appellant was authorized to connect electricity to the customer's house.**

**II. Whether the Respondent was justified in terminating the Appellants employment.**

4.2 On the question of authorization, the Judge found that the Appellant gave inconsistent explanations as to how he came to connect the electricity and that during the hearing, the alleged authorizing officer expressly denied giving such instructions. The Court held that the connection was made without authorization.

4.3 On the Appellant's alleged wrongful dismissal, the Court found that the Appellant acted outside his designated duties and department by unlawfully connecting power to a house. That the Appellant was afforded a fair disciplinary hearing with union representation. The

Court took the view that the Respondent followed due process, and the Appellant's termination of employment was justified.

4.4 The Court rejected the claim of malicious prosecution and all the other claims made by the Appellant and held that he had failed to prove his claims on a balance of probabilities and dismissed his case.

## **5.0 APPEAL**

5.1 Dissatisfied with the Judgment of the High Court, the Appellant now appeals to this Court advancing four grounds of appeal as follows:

### **Ground One**

- 1. The lower Court erred in law and fact when in its Judgment it failed to take judicial notice that the Appellant being fined in the Subordinate Court was not to be subjected to further administrative action but to be reinstated.**
- 2. The lower Court erred in law and fact by not considering that the Respondent set a precedent where an employee who is fined is reinstated, and therefore the Appellant's dismissal was a selective application of the rules.**
- 3. The lower Court erred in law and fact by concluding that the Appellant's supervisor did not authorize the connection when instead it was**

evident that the said Mr Ndambo was simply protecting his job and made the Appellant a “sacrificial lamb.”

4. The lower Court erred in law and fact when it accepted the Respondent’s disciplinary committee as being legal when the said committee was constituted in breach of its own rules.

## 5.2 Appellant’s Arguments

### 5.3 Grounds 1 and 2

5.4 The Appellant argued grounds 1 and 2 together, as they both relate to the legal consequences of the criminal proceedings and the Respondent’s disciplinary process. He submitted that the trial Judge misdirected himself by not acknowledging that the Respondent in the internal rules, failed to comply with the 14-day threshold to hear disciplinary matters as per internal rules as the Appellant was charged with dishonest conduct on 9<sup>th</sup> September, 2014 and only heard on the 9<sup>th</sup> of October, 2014, and was not informed of the reasons for the delay.

5.5 It was submitted that the sentence imposed by the Kitwe Subordinate Court did not meet the threshold for enabling the

Respondent to summarily dismiss him from employment. That clause 14 of the conditions of service expressly contemplates dismissal only where an employee is imprisoned without the option of a fine or convicted of offences involving fraud or dishonesty leading to imprisonment.

5.6 That the Respondent had, by its own past conduct, established a precedent whereby employees who were fined by criminal Courts were reinstated, and that the Appellant's dismissal therefore amounted to a selective and discriminatory application of the rules.

5.7 That his dismissal was contrary to both the Collective Agreement and his contract of employment and that if the learned trial Judge properly applied the Collective Agreement, he would have found that the dismissal was procedurally unlawful, regardless of the alleged misconduct.

**5.8 Grounds 3 and 4**

5.9 Grounds 3 and 4 were further anchored on the argument that the disciplinary process violated the rules of natural justice and amounted to a wrongful dismissal in law. The Appellant

contended that the disciplinary hearing of 9<sup>th</sup> October, 2014 lacked legal foundation, as it was conducted in breach of Clause 14 of the collective agreement and while the same matter was still pending before the criminal Court.

5.10 The Appellant submitted that he was effectively punished administratively before the criminal process had been fully and conclusively resolved. He cited the case of **Ridge v Baldwin** <sup>(1)</sup> on breach of contract by an employer and also relied on the learned author **Winnie Mwenda Sitole, in Employment Law in Zambia: Cases and Material**, which explains that wrongful dismissal is concerned primarily with form and procedure rather than the merits of the dismissal.

5.11 The Appellant submitted that the learned trial Judge failed to apply these principles and instead focused narrowly on the alleged misconduct, while disregarding the procedural breaches that went to the root of the employment relationship.

## 6.0 RESPONDENT'S ARGUMENTS

### 6.1 Ground 1

6.2 In response to the appeal, the Respondent argued that criminal proceedings do not prevent internal disciplinary proceedings. That under Clauses 14.1.1 and 14.1.6 of the Collective Agreement the penalty for dishonest conduct is summary dismissal.

6.3 The Respondent submitted that the lower Court correctly found that the disciplinary process was properly invoked and fairly conducted in due form, in line with the guidance given in the case of **Kambatika v ZESCO Limited** <sup>(2)</sup>.

6.4 That the Appellant failed to identify any provision within the Collective Agreement that mandated reinstatement following a fine imposed by a criminal Court.

6.5 That ground 1 was defective and effectively abandoned, as it did not challenge any specific finding of fact or law made by the lower Court. The Respondent therefore urged the Court to dismiss ground 1 as lacking merit.

6.6 **Ground 2**

6.7 On Ground 2, the Respondent argued that the lower Court properly distinguished between the sentence imposed by the Subordinate Court and the administrative disciplinary sanction imposed by the employer. The Respondent maintained that disciplinary sanctions are governed exclusively by the Collective Agreement, which *in casu*, prescribes summary dismissal as the penalty for dishonest conduct under Clause 14.1.6. and that Clause 14.1.8 empowers management to take administrative action notwithstanding on-going police investigations or Court proceedings.

6.8 **Ground 3**

6.9 In ground 3, the Respondent submitted that the Appellant failed to discharge the burden of proof that his supervisor had authorized him to proceed with the connection as he failed to produce evidence of authorization. Reliance was placed on the case of **Sobek Lodges Limited v Zambia Wildlife Authority** <sup>(3)</sup>, where it cites Phipson on Evidence to the effect that the party asserting a fact bears the burden of proving that fact. Also cited

was the case of Wilson **Masauso Zulu v Avondale Housing Project Limited** <sup>(4)</sup> which affirms that a Plaintiff alleging wrongful dismissal must prove the allegation on a balance of probabilities.

6.10 The Respondent reiterated that the law on summary dismissal is clear, citing **Albert Mwanaumo v NFC Africa Mining Plc** <sup>(5)</sup>, **and Chimanga Changa Limited v Stephen Ngombe** <sup>(6)</sup> both of which affirm that an employer may summarily dismiss an employee for serious misconduct, provided the employee is given an opportunity to be heard.

6.11 The Respondent submitted that the Appellant was afforded multiple opportunities to exculpate himself, including written responses and a disciplinary hearing, thereby satisfying the requirements of natural justice as reinforced in **Mumba v Telecel Zambia Limited** <sup>(7)</sup>.

#### 6.12 **Ground 4**

6.13 Lastly, on ground 4, the Respondent submitted that the Appellant failed to demonstrate how the disciplinary committee was improperly constituted or which specific rules were

breached. The Respondent argued that the Appellant neither challenged the composition of the committee during proceedings nor led evidence to establish illegality. The lower Court was therefore correct in accepting the committee as properly constituted. Accordingly, ground 4 was described as speculative and unmeritorious.

## **7.0 APPELLANT'S ARGUMENTS IN REPLY**

7.1 In reply, the Appellant more or less repeated his arguments and maintained that his dismissal was wrongful and unlawful because firstly, summary dismissal is only contemplated where an employee is imprisoned without the option of paying a fine and remains absent from work for more than ten consecutive working days; and secondly, because the Respondent's disciplinary committee lacked lawful authority to dismiss him as it convened and conducted proceedings outside the stipulated time limits prescribed under the Disciplinary Code.

7.2 The Appellant insisted that the Respondent's decision to terminate his employment while the matter was still active in

Court, and without reference to clause 14 amounted to a misapplication of the Collective Agreement.

## **8.0 THE HEARING**

8.1 At the hearing, both parties relied on the record of appeal and the filed arguments which were basically regurgitated *viva voce*.

## **9.0 ANALYSIS AND DECISION**

9.1 We have considered the record of appeal and the arguments advanced by both parties and find the questions for determination are as follows:

- 1. Whether the disciplinary process leading to the Appellant's dismissal was conducted in accordance with the Respondent's conditions of service;**
- 2. Whether the lower Court erred in law or fact in holding that the Appellant was not wrongfully dismissed;**
- 3. Whether any procedural breach amounts to wrongful dismissal under Zambian Employment law;**

9.2 The Appellant's central submission was that having been fined in a criminal Court, he should not have been subjected to further

disciplinary action leading to dismissal in relation to the same facts.

9.3 In the case of **Emporium Fresh Foods Ltd v Kapya Chisanga (Food Lovers Market)** <sup>(8)</sup>, this Court held that summary dismissal is permissible where the employee has committed a dismissible offence and has been accorded due process in disciplinary proceedings.

9.4 The record shows that the Appellant was given the opportunity to exculpate himself through two written statements (see p.47 and 53 of the record of appeal) in which he stated that he understood the charge laid against him and admitted to making the connection on his own volition.

9.5 A hearing was later held and a report of the committee produced at page 55 of the record which concluded that the Appellant ought to be dismissed for his conduct. Nothing in the report showed that the Appellant challenged the constitution of the committee or any procedural irregularity. In that respect, even if the Respondent failed to convene within the prescribed 14-day period, that had no impact on the proceedings .

9.6 Further the Appellants supposed “precedent” that employees who are only fined after criminal proceedings are reinstated was unsupported by evidence or specific contractual provisions of the collective agreement.

9.7 Clause 14 and 14.1.6 at pages 88 and 89 ROA sets out the offences that lead to summary dismissal as follows;

*14.1.6 (vii) Being convicted of any offence involving fraud, dishonest **or to be sentenced to imprisonment without any option of paying a fine for any offence whatsoever.** (emphasis ours)*

9.8 The Appellant appears to have misunderstood the emphasized part of the clause as meaning that only a conviction without the option of paying a fine could result in summary dismissal. In our view, the said part of the provision is simply one of the instances in which an employee can suffer summary dismissal. In this case Appellant was subsequently convicted of an offence involving dishonesty.

9.9 At the hearing, we were referred to section 2 of the appendix of the disciplinary code which reads as follows;

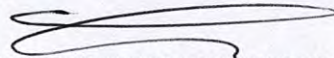
2. "Court Cases

*Where the employee is imprisoned without the option of paying a fine he/she may be summarily dismissed as a deserter after the expiry of more than ten consecutive working days without reporting for work."*

- 9.10 In our view, this provision relates to the highlighted part of clause 14.1.6 (vii) as reproduced in paragraph 9.7 above.
- 9.11 In the premises, we see no perverse findings of fact or misapprehension of the law by the learned trial Judge. Grounds 1 and 2 are therefore dismissed.
- 9.12 On ground 3, the evidence shows that the Appellant failed to prove that his supervisor authorized him to connect the customer's premises to the Respondent's supply of electricity. We agree with the lower Court's finding and the Respondent's argument that the Appellant failed to discharge his burden of proof. Ground 3 consequently fails.
- 9.13 In ground 4, the Appellant alleged an improper constitution of the disciplinary committee which he had not pleaded, contrary to the law that issues not raised at trial cannot be raised for the first time on appeal. See **Enock Kavindele & Another v**

**Bologna Properties** <sup>9</sup>. In any event, the Appellant provided no proof to support this assertion. Ground 4 equally fails.

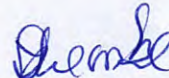
9.14 The entire appeal is dismissed for lack of merit with costs to the Respondent, to be taxed in default of agreement.



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**M.M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**



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**C. K. MAKUNGU**  
**COURT OF APPEAL JUDGE**



.....  
**Y. CHEMBE**  
**COURT OF APPEAL JUDGE**