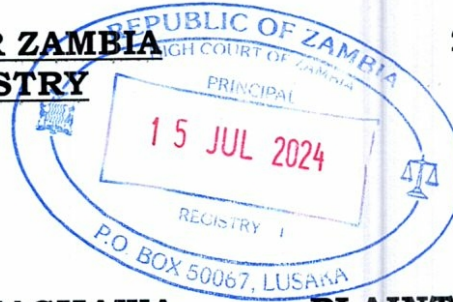


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



2015/HP/1931

BETWEEN:

TRYWELL KATUKULA KASHAWA PLAINTIFF

AND

ATTORNEY GENERAL DEFENDAT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 15TH JULY, 2024 - IN CHAMBERS**

For the Petitioner : *In Person*
For the Respondent : *Lt Lieutenant Kangwa, Captain Chansa & Mr. M.
Mwangala – State Advocates – Attorney General
Chambers*

JUDGMENT

CASES REFERRED TO:

1. *Masautso Zulu V Avondale Housing Project Limited (1982) ZR 172*
2. *Khalid Mohammed V The Attorney General (1982) ZR 49*
3. *Charles Mwila V Shif Contractors and General Dealers (COMP/IRD/ND 107 of 20170 [2018] zmhc 534 (19th December, 2018)*
4. *Bank of Zambia V Kasonde 1995, 1997 ZR*
5. *First Quantum Mining and Operations Limited V Obby Yendamoh SCZ APP No. 206/2015 SCZ*
6. *Katongo and Others V The Attorney General (Appeal 129 of 2013) [2015] ZMSC 177*
7. *Eston Banda, Dalitso Zulu and the Attorney General Appeal Number 42 of 2016*
8. *Care International Zambia Ltd V Misheck Tembo Appeal number 57/2016*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *The Defence Act Chapter 106 of the Laws of Zambia.*
2. *The Defence Force (Procedure) Rules*
3. *the Regulation & Defence Force (Procedure) Rules*
4. *Wauds Employment Law (14th Edition)*
5. *The Public Service Pensions Act*
6. *Phipson on Evidence, (7th Edition) (Thomson Reuters Legal Limited, 2010)*
7. *Principles of Employment Law (2000) 4th Edition, Cavendish Publishing Ltd, Sydney Australia*
8. *Halsbury's Laws of England Volume 41 5th Edition at Paragraph 722*

The delay in the hearing and determination of this matter is regrettable. The record shows that this matter was before my late brother The Honourable Mr. Justice Mwila Chitabo. The matter reached a very advanced stage in fact trial was concluded and was awaiting judgment before the passing on of His Lordship Judge Chitabo. The matter was re-allocated to Judge Mwikisa who referred the matter back to the Judge-In-Charge for the re-allocation stating her reasons for doing so. The matter was then re-allocated to Judge Mikalile who was transferred to the Industrial and Labour Court. I then decided to take up the matter on the 28th July, 2022.

The plaintiff commenced this action by way of writ of summons (Amended on the 17th January, 2017) and statement of claim originally filed on the 16th October, 2015. The endorsement in the Amended writ is as follows:

1. *A declaration that the dismissal was wrongful and or unlawful.*
2. *Terminal benefits for the 55 years he would have worked for Zambia Army at the rank of Warrant Officer Class two.*
3. *Damages for wrongful and or unlawful demotion.*
4. *Damages for wrongful or unlawful three years of imprisonment.*
5. *Monthly leave days at the current rate*
6. *Damages for wrongful/or unlawful dismissal*

7. *Any other relief the court may deem fit*

8. *Interest*

9. *Costs.*

In the statement of claim the plaintiff contended that he was allegedly charged for various counts of misconduct. That the said allegations were not proved or established. That he attended interviews where he was not asked with regards to the alleged charges. That the plaintiff was discharged from the **Zambia Army pursuant to Regulation 9(3) paragraph (XVII) of the third schedule read together with Section 21 of the Defence Act Chapter 106 of the Laws of Zambia.** That the allegations for the discharge from duty against the plaintiff were not true and baseless as a result he has suffered loss and anguish.

The defendant's response was by way of memorandum of appearance and defence filed on the 2nd December, 2015.

The defendant denied stating that the plaintiff's appearance for disciplinary interviews was for behaviour and conduct that was prejudicial to good order and military discipline. That the plaintiff was given an opportunity to read through the abstract of Evidence in accordance with Rule 9 of the Defence Force (Procedures) Rules Chapter 106 of the Laws of Zambia. That the plaintiff was charged and was found guilty as charged. That the plaintiff is not entitled to any of the reliefs sought as his discharge from the Zambia Army was fair and lawful and that the plaintiff is not entitled to payment of terminal benefits but is instead entitled to refund of pension

contributions which refund is to be made by the relevant Pension Board.

As stated earlier this matter was before my late brother The Honourable Mr. Justice Mwila Chitabo. On the record is a ruling dated the 19th April, 2018. Before the late Judge was an application to strike out certain portions in the amended statement of claim which were made by the plaintiff without leave of court. There was a supporting affidavit which was not opposed. The late Judge upheld the defendant's application and struck out and expunged the following from the amended statement of claim;

1. *Paragraph 1 as states "by now I should be holding a rank of Warrant Officer II (WOII).*
2. *Paragraph 6 "that is why the Army Commander's testimony is very important"*
3. *Paragraph 10 "this clearly indicates I was not heard."*
4. *Paragraph 15 (b) terminal benefits for the 55 years he would have worked in the Zambia Army and the rank of Warrant Officer Class two (WOII).*
5. *Paragraph 15 (c) damages for wrongful/ or unlawful demotion.*
6. *Paragraph 15 (d) damages for wrongful/ unlawful three years of imprisonment.*

What this meant was that the claims that I will consider are as follows:

1. *A declaration that the dismissal was wrongful and/or unlawful;*
2. *Terminal benefits for the eighteen (18) years he worked for Zambia Army;*
3. *Damages for wrongful and/or unlawful dismissal;*
4. *Any other relief the court may deem fit;*
5. *Interest and*
6. *Costs.*

Trial began on the 7th February, 2023.

It was the evidence of the plaintiff that he was employed as a soldier and was unfairly discharged from the Army in 2012 and that the proper procedure was not followed that in short, he was not heard. It was his testimony that he joined the Army in 1994 where he served for nineteen (19) years. That there came a time when he noticed that an irregularity had taken place. That two soldiers namely Staff Sergeant Likando and Staff Sergeant Mutale were promoted and he was not. That the two were moved from B3 to B1 leaving him who had a senior trade B2. That this upset him and prompted him to write a complaint to the Commanding Officer. That the issue was not resolved instead he was transferred from Chinduin Barracks in Kabwe to Mansa Region Headquarters.

Whilst in Mansa he requested for a fridge for the camp clinic where he worked as a medical assistant. He wrote a complaint to Colonel Kalangu the Commandant over not having a fridge. That the fridge was meant to be used for storing drugs. He was then transferred to

Kasama where he was accommodated at the Sergeant's mess. That on a certain day he was watching a game between Manchester City and Manchester United, the Regional Commander Colonel Nkhuwa came to the mess and took the DSTV Decoder. This upset the plaintiff, he engaged the mess member Warrant Officer B. Matukuta over the issue of the decoder. Who did nothing. The plaintiff decided to escalate the complaint until his complaint reached the Army Commander by then Lieutenant General Paul Miyova whose intervention yielded fruit and the decoder was returned to the mess.

Another incident that upset him was when he lost out on a house he felt he had a right to occupy. That a lease agreement was prepared and he moved into the house in 2012. That a decision was made to deprive him of the house. That when he told his superiors that what they were doing was bullshit, this attracted charges. He appeared before the Commanding Officer for orders. That he was of the view he would not get justice so he requested for a court martial however, the same was denied him.

It was his testimony that he requested for the summary of evidence to be taken which was not given to him. That he tried to get the summary of evidence from the legal department in the Army so that he could go through it but was not successful. That what followed was his demotion from the rank of a Staff Sergeant to that of Corporal. That after the demotion there was commotion. That he tried to bring to the attention of the powers that be **sections 70(a), 70(b) and 72 of the Defence Act Chapter 106 of the Laws of Zambia**. After two

months the Army Commander Lieutenant Colonel Paul Miyova visited their region. That during his visit the plaintiff lodged a complaint. This was done in full view of everybody at Kasama region. That following the complaint he was promoted to the rank of Sergeant. This did not please him as he wanted to be restored to his former rank of Staff Sergeant. Frantic attempts were made to obtain the summary of evidence but to no avail. That the working atmosphere became sour. The plaintiff informed the court that he escalated the complaint of his failure to get the summary of evidence to Permanent Secretary Mr. Emmanuel Mwamba of the Northern Region. According to the witness things at work became worse. That he felt that he was hated he informed his Superior Colonel Nkhuwa at Northern Region who informed him that he was wrong to complain to the Permanent Secretary.

It was his testimony that he was told by Colonel Nkhuwa that before he lost his job that the plaintiff would lose his. On the 12th July, 2012 he was called for an interview. That to his surprise there was no recorder. That he was asked what he termed as funny questions such as the team he supported as well as when he intended to shift his family from Chinduin Barracks in Kabwe to Kasama. That that was the end of the interview. According to **PW1** he was given a pass which he did not request for.

It was his testimony that the pass was given to him as a ploy meant to harm him by removing him away from his rented house so that they could access his house in his absence. That he travelled to

Chinduin Barracks. That he later learnt that indeed his house was accessed. It was his testimony that because of what he was experiencing he began to record conversations. Upon his return to Kasama he found that a soldier from pay office an accountant was occupying his house. He later learnt that the Commanding Officer Lieutenant Colonel Sikuta had re-allocated his house to another soldier.

That the Commanding Officer wanted him to surrender his military uniforms which he refused. It was then that he was given the discharge letter. That it was only when he received the discharge letter that he noticed that his pension had been forfeited to the State. He travelled to Lusaka to meet the Air Commander then Lieutenant Paul Miyova. He acknowledged that his name was appearing under interviews as well as that 91766 was his number. **PW1** referred the court to **Article 79 of the Defence Act Chapter 106 of the Laws of Zambia** on how one is discharged from the Army. **PW1** denied being tried nor heard and that there were no charges levelled against him. That as far as he was concerned, he merely attended interviews on the 12th July, 2012. That he did not see where he pleaded guilty or not guilty nor his mitigation.

On the charge sheet at page 7 and 8 of his bundles the plaintiff stated that the charge sheet had to do with the time he was demoted from the rank of Staff Sergeant to the rank of Corporal. That the procedure followed where one is heard is provided for in Regulations 19 of the Defence Act. That he did not accept the verdict neither

was he court marshalled. That when the Sergeant Major (using a razor) attempted to remove his rank he refused. He stated that **section 72 and 70(a) of the Defence Act** was not followed. That as far as he was concerned, he appeared before a kangaroo court. That this meant that his demotion was wrong. That the document states that the punishment awarded recommended for appropriate superior authority

When cross examined **PW1** informed the court that the reduction of his rank was not one of the punishments in the military. The witness stated that he was not aware that section 73 of the summary Act Regulation 14 allowed for the reduction of his rank after being tried by an appropriate superior authority. **PW1** was asked and he read out the charges in the plaintiff's bundle of documents at page 5. He was also asked to read out the punishment awarded by the Commanding Officer. He read out the charges up to page 8. It was the plaintiff's testimony that he was discharged unfairly and the proper procedure was not followed. He denied being charged that pages 5-8 of his bundle of documents were not a charge sheets. That despite it being a charge sheet he was not charged. He denied being present even after he was summoned.

When referred to page 9 of his bundle filed on 20th September, 2017 the plaintiff confirmed that it contained questions where he cross examined a witness.

When referred to page 28 of his bundles the plaintiff denied that he was heard and reserved his defence. It was his testimony that after he was heard he was found guilty and his rank was reduced. He however stated that he was not aware that there is a procedure for his rank to be reduced. The plaintiff testified that he was aware that in the army there was a procedure to follow the chain of command when airing a grievance. That he was not aware that the procedure does not involve civilians. The plaintiff denied that on the 28th May, 2012 and 30th May, 2012 he aired grievances to civilians without following laid down procedures as far as the plaintiff was concerned, he followed procedures. He further stated that he had evidence to show that he followed the proper procedure but was unable to show this to the court. He then conceded that on the 25th, 28th and 30th May he aired grievances to civilians without following procedure. He further confirmed that he was charged as a result of airing grievances to civilians.

The plaintiff denied that he was given another chance to be heard in the abstract of evidence taken when referred to the defendant's bundles filed on the 25th August, 2015 at page 14 which he read out. The plaintiff confirmed that what he read was an abstract of his case. For avoidance of doubt the plaintiff was referred to the defendant's further bundle filed on the 17th September, 2017 at page 10. The same was read out in open court. He denied that he was charged with any offences, he did not confirm the abstract of evidence which was taken for the offence of airing grievances to a civilian without following laid down chain of command. When

referred to page 14 of the same bundle two headings were read out however, the plaintiff denied that abstract of evidence was in fact taken. When referred to page 19 of the same bundle the plaintiff read out the document in open court however, he denied that he was heard. He admitted that what was written was what he said.

When referred to pages 8-11 of the defendant's further bundle of documents the plaintiff informed the court that the punishment recommended was that he be discharged. That this recommendation was made on the 12th July, 2012. When the plaintiff read the document at page 8-11 of the defendant further bundle the punishment awarded was recommendation for discharge. The plaintiff was referred to a letter at page 2 of the same bundle which the plaintiff acknowledged was addressed to him.

When referred to paragraph 3 he denied that he was charged with airing grievances, nor being heard nor was he recommended for discharge. When the plaintiff was referred to page 3 paragraph 3, he denied that it was after his misconduct and indiscipline that he was discharged. The plaintiff denied that he was aware that he was no longer required in the Army as his services were no longer required because of indiscipline and misconduct.

The plaintiff informed the court that he was not aware that when one is discharged one is entitled to pension refund (in accordance with **section 38 of the Public Service Pensions Act No. 35**)

When re-examined the plaintiff informed the court that when asked on the summary of evidence that is if he was heard that his response was that he was not heard because the summary evidence taken was for a different matter. That this was over a house and not his discharge from the Army. That the summary evidence where he was discharged was not the one where he was demoted it was the one where he was discharged, the one that was hidden. This was the same document he said was supposed to be with the Director Legal in the Legal Department. That the fact that he was not given the summary evidence meant the demotion was unlawful. That according to the document at page 1 of the defendant's bundle what was conducted was merely interviews. That, he went for interviews not orders. He referred to page 16 of the same bundle to prove that what he attended was interviews. The plaintiff wrote off the document at page 19 as misleading the court. On the question pertaining to charges of his transfer that he saw the document in court for the first time.

He insisted that he was not heard but that he was merely interviewed. It was his evidence that he did not deserve to be paid his pension refund because this can only be done after one has been discharged. The court was referred to a recording which recording the court would listen to and decide what weight if any the court would place on what was said.

DW1 was **Canisius Gubula Chisangano** a Lieutenant Colonel. He was a Staff Officer grade one manpower personnel administration.

It was his testimony that he has served in the Army for eighteen (18) years. That his duties included general documentation which is assertion, discharge, discipline, promotion and any other matters related to personal administration.

It was his testimony that a serving soldier can be discharged from the Zambian Army in accordance with the law that is what is provided for in Chapter 106 of the Defence Act. The witness went on to testify what steps an aggrieved soldier ought to take. That if a soldier is aggrieved with his Commanding Officer, he can present himself to the higher authority being the Brigadier General. If one feels that the two have not heard him the law provides that he addresses his complaint to the Army Commander. That what he has stated is the established hierarchy. That the procedure is that once charges are raised against a soldier, he will appear before the Commanding Officer. Depending on the evidence, the Commanding Officer will record if he finds him guilty or not. This will be recorded on a regimental conduct sheet and the next step will be to refer such a soldier to high authorities for punishment. It was his testimony that the Commanding Officer can award punishment being the one in charge to investigate. Punishment including forfeiture, reduction in rank and other punishment provided for in section 81 of the Defence Act.

When shown page 8 of the defendant's bundle dated the 13th September, 2017 **DW1** identified a copy of the charge sheet. It was his testimony that the charge sheet contained the accused's number

91766 and his name Sergeant Katukula TK. The same was from Headquarters Northern region the date of the offence was 28th May, 2012. **DW1** informed the court that the regimental charge sheet contains details of the accused person, particulars of the charge, the punishment awarded as well as who awarded it. For this the court was referred to page 7 of the defendant's bundle filed on the 25th August, 2016.

DW1 informed the court that the regimental conduct sheet he was shown belongs to the plaintiff Trywell Katukula. That the plaintiff appeared before the Commanding Officer on the 12th July, 2012. Further that it was on this date that the recommendation for discharge was made. **DW1** informed the court that the recommendation for discharge was addressed to administration branch where he worked. That the recommendation for discharge usually comes as a result of serious misconduct which may include interviews, a number of charges and any other reason the Commanding Officer deems fit.

The witness referred the court to pages 4-13 of the defendant's bundle. It was his testimony that when they received recommendations the same is processed. That the recommendations were studied with legal guidance from the legal branch. If the recommendation is right the soldier is discharged from the Army. That the discharge is by serving a discharged soldier with a discharge letter through the unit where he served. **DW1** identified the letter at page 1 of the defendant's further documents

as the letter of discharge addressed to the plaintiff. That the plaintiff was discharged with effect from the 31st August, 2012. That the procedure followed is that the discharge letter would be dispatched to the soldier's unit. Upon receipt the soldier will be called and served with the letter. Once the unit delivers the discharge letter the discharged soldier will be given access to their personal file to ensure that all that is due to them in order to get benefits is put on their file. If there is confirmation that the documents on the file are correct, his department writes to public pensions fund for one to get their benefits. The Army will settle any money owed that is general claims and one is given the last pay certificate, repatriation and any other money that is due to the discharged soldier. That the pensions fund informs them once a soldier has been cleared.

If a soldier is in an Institutional house once he is paid what is owed to him by the Army (repatriation and any other claims) he is expected to vacate the Institutional house.

In his cross examination **DW1** informed the court that the plaintiff was dealt with in accordance with section 70(a)(b) and 72. That the Commanding Officer can recommend for discharge where there exists documented misconduct. That the Commanding Officer is not part of the court martial. That though what is stated in the document is that upon conviction of court Martial the Commanding Officer is not part of the court Martial. That the documents that are prepared before a soldier is discharged depended on the grounds for

discharge. That the documents included a charge sheet, a regimental conduct sheet, a summary of evidence or abstract of evidence and the recommendation. When asked the importance of a loose minute **DW1** informed the court that it was an internal communication. That if the Commanding Officer wants to disseminate information internally, he will release a loose minute. That it is copied to all departments and the regimental Commanders diary. It was his testimony that the difference between orders and interviews is that orders are for those charged whilst interviews are for a formal talk or reprimand which is recorded. That the plaintiff's name fell under interviews. That though this was the case the plaintiff appeared both under interviews and as an accused. That in order to discharge a soldier who attends interviews they should be charges brought before the accused in order for one to be discharged. When a recording was played the witness informed the court that he was unable to recognize the voice of Sikuka however, he would be able to recognize the plaintiff's voice. That he was not aware that the Commanding Officer had recommended for the plaintiff to be discharged. However, having listened to the recording the witness informed the court that based on the audio he was not sure if the Commanding Officer is the one talking. That there was mention in the audio that he prepared a report, a charge sheet and any other documents.

The witness went through the process of reading out charges to the delivery of a verdict. When referred to page 7 of the defendant's bundle it was his testimony that this was a regimental conduct

sheet. That it contains a summary of the charge sheet meaning certain details are not captured. That what is on this sheet is the punishment derived from the charge sheet. When referred to the plaintiff's bundle at page 9 **DW1** informed the court in this particular case there were no witnesses that apart from that document there could be another document a loose minute in which the plaintiff appears as an accused.

DW1 informed the court that he was not aware that charges were not given to the plaintiff. That on the 12th July, 2012 the regimental conduct sheet was filled in, the offence was recorded and the evidence to this charge was the letter and the punishment which was awarded. According to the witness the mere fact that there was a charge sheet meant that the accused was charged. This witness was not aware that there was a time when the plaintiff was reinstated. The witness informed the court that summons were not given to an accused. That documents given to the accused includes a summary of evidence. The witness informed the court that he was aware of regulation 19 of the third schedule of the Defence Force Procedure Rules however, he was not aware that the plaintiff was not given the summary of evidence. **DW1** agreed that the summary evidence has to be given an accused in accordance with the law.

It was his testimony that it is the duty of the Commanding Officer to ensure that all documents are given to the accused through his Subordinates. The witness further stated that summary evidence could be served on an accused when appearing before an

appropriate superior officer. That thereafter summons are sent to the administration branch to be studied by the legal branch. If any review is done advise is given to the administration branch and the officer who tried the accused. As far as this witness was concerned the procedure followed is standard and is established in the Act.

The witness was referred to the defendant's bundle at page 16 to 18. The witness confirmed that what he was looking at was a record of the interview. He went further to state that the documents at page 19 was not part of the interview which ended at page 18. That from his assessment what is at page 19 should be part of the summary of evidence. It was his testimony that the court will gather from the charge sheet and the regimental conduct sheet dated the 12th July, 2012 that the plaintiff was heard. That what took place on the 12th July, 2012 was the appearance of the plaintiff for orders as an accused in accordance with the regimental conduct sheet. That the fact that he appeared for orders meant he was served with documents. As far as this witness was concerned the plaintiff's discharge letter was dispatched to his unit. **DW1** informed the court that he was not aware that the plaintiff was given a pass around about the time the discharge letter was sent. What he was aware of was that the discharge letter was dated the 3rd August, 2012. The witness was unable to give an explanation on how the plaintiff who was discharged was granted a pass that was possible.

It was his evidence that a letter of discharge is addressed to the unit Commanding Officer who hands it to the affected person. **DW1** informed the court that the part 2 to an order was given to the court to assist the court in arriving at a just decision.

DEFENDANT'S SUBMISSIONS

The defendant filed their written submissions on the 23rd February, 2024. The court was referred to **section 70 of the Defence Act Chapter 106 of the Laws of Zambia** which provides as follows:

“Any person subject to military law under this Act who-

- a) Makes an accusation against any officer or should a service law, which he knows to be false or does not believe to be false or does not believe to be true; or*
- b) In making a complaint he thinks himself wronged, makes a statement affecting the character of an officer or soldier subject to service law, which he knows to be false or does not believe to be true, or willfully suppresses any material facts;*

Shall, on conviction by court martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.”

The court was further referred to **section 72** which provides as follows:

“Any person subject to military law under this Act who is guilty of any Act, conduct or neglect to the prejudice of good order and military discipline shall, on

conviction by court-Martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.”

That these were the provisions used to charge the plaintiff for committing military offences. That the plaintiff was subjected to summary trial wherein he was found culpable and recommended for discharge by his Commanding Officer. It was submitted that the Adjutant General Instruction Number 20 of 1st June, 1966 guides on what amounts to conduct to the prejudice of good order and military discipline as follows:

CONDUCT TO THE PREJUDICE OF GOOD ORDER.

“As used in this section includes the sense in which the words would be understood in civil life s applicable to civilians and the sense in which they would be understood in military life as applicable to members of a military force. Conduct which is to the prejudice of good order is not necessarily to the prejudice of military discipline on the other hand conduct which is prejudice to good order in the military sense is applicable to members of a military force.”

CONDUCT TO THE PREJUDICE OF MILITARY DISCIPLINE

“It is the duty of all ranks to uphold the good reputation of the service. An act, conduct or neglect therefore which amounts to a failure in that duty by an individual may well prejudice a military discipline although it has no direct bearing on the

discipline of the unit to which the offender belongs. Before an accused can be convicted of an offence against this section it is not necessary to be satisfied that the accused was guilty of the Act, conduct or neglect alleged in the particulars but that the Act, conduct or neglect of which the accused is guilty, was to the prejudice of both good order and military discipline...”

That the plaintiff's conduct on numerous occasions was to the prejudice of good order and military discipline thereby warranting his charges and subsequent culpability. That the court will note that pages 16-18 of the defendant's bundle of document's proof that even after being charged the plaintiff did not desist from this conduct. On the principle that a plaintiff who alleges wrongful dismissal must prove it. The court's attention was drawn to the case of *Masautso Zulu V Avondale Housing Project Limited (1982) ZR 172*¹ held that:

“...Where a plaintiff alleges that he has been wrongfully or unfairly dismissed or as indeed in any other case where he makes any allegation, it is generally for him to prove those allegations.”

I was further referred to the case of *Khalid Mohammed V The Attorney General*² where it was held that:

“A plaintiff cannot automatically succeed when a defence has failed, he must prove his case.”

Further that the learned author of **Employment Law in Zambia** reiterated that:

“..., Wrongful dismissal is one at the instance of the employer that is contrary to the terms of the Employment and when considering whether the dismissal is wrongful or not, the form rather than the means of the dismissal must be examined the question is not the why but how the dismissal was effected.”

Another case I was referred to is **Charles Mwila V Shif Contractors and General Dealers**³ where the court held that:

“A dismissal is wrongful if the Employer has breached a term of the contract when dismissing the Employee including the disciplinary code.”

That the court went further to state that employment is wrongful dismissal *“if the allegations upon which the employee is dismissed are not proved against the employee.”* The court was referred to the case of **Bank of Zambia V Kasonde**⁴ wherein the Supreme Court of Zambia held that:

“If dismissal is not on proved grounds, then it amounts to wrongful dismissal...A dismissal is unlawful if the employer has breached a statutory provision such as a provision in the Employment Act when dismissing the employee.”

It was submitted that in the military an allegation against a person subject to military law is investigated through a charge, that this is provided for in **section 79 of the Defence Act** which states that:

“Before an allegation against a person subject to military law under this Act (hereinafter referred to as “the accused”) that he has committed an offence

against any provision of this part is further proceeded with, the allegation shall be reported, in the form of a charge, the accused's Commanding Officer and the Commanding Officer shall investigate the charge in the prescribed manner."

That the plaintiff was charged and appeared before his Commanding Officer. That during investigations the Commanding Officer is mandated by the Defence Act to hear the evidence to be reduced in writing. The procedure followed is found in **Rule 6 (1) of the Defence Force (Procedure Rules)** and provides:

"Subject to sub-rules (3) and (4), when a Commanding Officer investigates a charge he shall first read and, if necessary, explain the charge to the accused and shall then-

- a) Hear the evidence himself in accordance with rule 7; or*
- b) Cause the evidence to be reduced to writing."*

It was submitted that the document at page 10 of the defendant's bundle is proof that the plaintiff was charged for conduct to the prejudicial of good order and military discipline contrary to Section 72 of the Defence Act wherein he was found culpable reduced to the rank of Corporal. I was referred to the case of **First Quantum Mining and Operations Limited V Obby Yendamoh where at page 31^s** the Supreme Court of Zambia stated that:

"..., the findings by the court below were that the evidence on record reviewed that the letter of dismissal blocked the adherence by the appellant to the rule of natural justice. We agree with the finding because the evidence reviews that the respondent was not charged prior to his dismissal and neither was he invited to exculpate himself to appear before the disciplinary committee. These are the basic tenets of

natural justice which the appellant failed to comply with an employee is entitled to be heard prior to his dismissal..."

That despite being punished by his Commanding Officer, the plaintiff did not desist from exhibiting conduct contrary to the good order and discipline of the military. That the plaintiff continued airing his grievances outside the military chain of command which resulted in further charges and subsequent taking of the abstract of evidence. I was referred to the defendant's bundle of documents on page 14-15. It was submitted that even then procedure was followed in that the abstract of evidence in the defendant's bundle of documents will show. I was referred to page 14 and 15 of the bundles. It was further submitted that a copy of the abstract of evidence was handed to the plaintiff in accordance with **Regulation 9(2) of the Defence Force (Procedure) Rules** which provides that:

"When an abstract of evidence has been made in accordance with sub-rule (1), a copy of it shall be handed to the accused and he shall then be cautioned in the following terms:

This is a copy of the abstract of evidence in your case; you are not obliged to say anything with regard to it unless you wish to do so, but you should read it, and, when you have read it, if you wish to say anything, what you say will be taken down in writing and may be given in evidence.

Any statement made by the accused after he has read the abstract of evidence shall be taken down in writing and he shall be asked to sign it. This statement and a certificate signed by the person who recorded the statement stating that the accused was duly cautioned in accordance with this rule, shall be attached to the abstract of evidence and shall be in the form set out in the first schedule."

It was submitted that the plaintiff was handed the Abstract of Evidence and declined to either prove or disapprove any of the contents when he appeared for disciplinary interviews. That this is evidenced in the plaintiff's statement taken on 12th July and appears in the defendant's bundle of documents on page 19. I was referred to the learned author of **Wauds Employment Law (14th Edition)** **observed at page 38.**

"An employee guilty of conduct which is tantamount to a repudiation of a contract of employment, thereby forfeits his or her right to a notice maybe dismissed summarily (that is to say on the spot). In practice, an employer should not dismiss summarily without first investigating the circumstances and giving an employee an opportunity of present his side of the story."

It is submitted that since the plaintiff was discharged **section 21 as read together with the Third Schedule, Regulation 9(3) (xviii) of the Defence Force (Regulation Force) (enlistment and service) Regulations of the Defence Act** applies which provides that:

Section 21 – *"A soldier of the Regular Force may be discharged by the competent military authority at any time during the currency of any term of engagement upon grounds and subject to such special instructions as may be prescribed."*

I was referred to the case of **Katongo and Others V The Attorney General**⁶ wherein the Supreme Court upheld inter alia:

"...Section 21 of the DEFENCE ACT empowers a competent military authority to discharge a soldier during the currency of any term of engagement. The respondent through the Air Force Commander, is empowered by law to discharge an officer if his/her services are no longer required. The learned trial Judge, was

on firm ground when she found that the respondent had exercised its statutory power to discharge the appellants.”

I was further referred to **section 38 of the Public Service Pensions Act, No. 25 of 1996** which provides as follows:

“Any officer or practitioner who is dismissed shall be refunded the sum of the contributions the officer made plus interest at the ruling central Bank deposit rate.”

On damages for wrongful and for unlawful dismissal I was referred to the general rule relating to the burden of proof in civil cases. That ***Phipson on Evidence, (7th Edition) (Thomson Reuters Legal Limited, 2010) paragraph 6-06 at page 151*** provides as follows:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

That the learned authors continue in ***paragraph 6.06 at page 151*** as follows:

“This rule is adopted principally because it is just that he who invokes the aid of the law should be first to prove his case and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleading place it and never shifting in deciding which party asserts

the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will."

I am indebted to Counsel for the defendant for their submissions in this action. The questions that need to be resolved in this matter is whether or not the plaintiff's dismissal was wrongful and/or unlawful. Further if he is entitled to the reliefs that he is seeking.

Dismissal is unlawful if the employer has breached the statutory provisions such as a provision in the Employment Act or in this case the Defense Act Chapter 106 of the Laws of Zambia. The plaintiff informed the court that his dismissal was unlawful as the proper procedure for dismissing him was not followed. That he appeared before the Commanding Officers for orders, where his request for a Court Marshall was denied him. That he was not given the summary of evidence as required this he reported to the Permanent Secretary Northern Region. That what he attended was an interview and not a hearing, according to him he was not tried nor heard. He denied that there were charges leveled against him on 12th July, 2012. However, in the bundles that the plaintiff filed into court on 2nd March, 2016 at pages 5 to 8 and page 12 were charge sheets. The charges were against number 91766 Staff Sergeant Katukula TK unit HQNR Cops. The charge sheet at page 5 was dated the 31st of March, 2012. The plaintiff (herein after referred to as the accused) was charged with disobeying a lawful command with willful defiance of authority contrary to **section 39(1) of the Defence Act**. **Section 39 (1)** provides as follows:

“Any person subject to military law under this act who in such manner as to show willful defiance of authority disobeys any law for command given or sent to him personally shall on conviction by court Marshall be liable to imprisonment or any less punishment provided by this act.”

The particulars were that the accused at house number 2316 Mukolwe a road in new town Kasama at approximately 09:30 hours. On 31st March, 2012, when ordered by 88337 WO11 Nyasulu J. to surrender keys for the said house willfully refused to obey the order by not handing over the keys to the Warrant Officer an act he should have reasonably known to be an offence. The witnesses called were 88337 WO11 Nyasulu and 92881 Sergeant Kapungwe. The charge sheet bears the officer Commander’s signature, the date of the award and the person who awarded the punishment. The recommendation orders are also reflected so was the name of Major S. Sikuka the person who awarded the punishment. The same charge was leveled against the accused at page 6 of the bundles. The particulars of the charge at page 6 were that the accused at house number 2316 Mukolwe road Newtown Kasama at approximately 13:00 hours on 31st March, 2012 was ordered by Captain J.M. Simwanza 3859SO11 to surrender the keys to the house which order he willfully refused to obey despite being told that the house was already allocated to Sergeant Kapungwe. He refused thereby compelling the officer to forcibly open the said house and buy a new mortice lock for the house to accommodate Sergeant Kapungwe an act he should have reasonably known to be an offence. Three witnesses were listed as well as documentary evidence, namely an eviction letter dated 14th December, 2011 and

a cash sale receipts number 0861 dated 31st March, 2021. The charge was signed. The date of the award was the 12th April, 2012. The person who granted the award was the Commanding Officer by signing the charge sheet indicating the date when the punishment was awarded. The charge sheet at page 7 touched on the same property this time the charge was for **False Accusation Contrary to section 70 of the Defence Act.** The provision provides as follows:

“Any persons subject to military law under this Act who (a) makes an accusation against any officer or soldier subject to service law which he knows to be false or does not believe to be true.”

The particulars were that the accused at house number 2316 Mukolwe road Newtown Kasama at approximately 9:30 hours on 31st March 2012, falsely accused WO 1 M Monde and Staff Sergeant Makayi that the two had authorized him to occupy the said house. Two witnesses were called. The charge sheet was signed by the Commanding Officer dated and signed by the person who awarded the punishment. The Commanding Officer also signed indicating the date of the award as the 4th April, 2012. The punishment awarded was also reflected and recommended to the Appropriate Superior Authority for (ASA) orders Major Sikuka made the award. At page 8 the accused was charged with the offence of **Conduct to The Prejudice of Good Order and Military Discipline Contrary to Section 72 of the Defence Act.** The provision provides as follows:

“Any person subject to military law under this Act who is guilty of an act; conduct; neglect to the prejudice of good order and military discipline shall on conviction

by court martial be liable to imprisonment for a term not exceeding two years or any less punishment by this act.”

At page 12 it is evident that the plaintiff was charged with ***Conduct to The Prejudice of Good Order and Military Discipline Contrary to section 72 of the Defence Act.***

The particulars were that on 28th May, 2012 the plaintiff wrote a letter to the District Commissioner of Northern Province Mr. Kalanga Bwalya whose reference was resuscitation of morale. In it the accused aired his grievances without following the laid down chain of command or utilizing his redress of complaints; conducting himself in a manner not befitting a Senior Non-Commissioned Officer an act he should have reasonably known to be an offence. Punishment was awarded on 7th June, 2012 by Major Mudungu the recommendation made was for discharge on 12th July, 2017 by Lieutenant Colonel Sikuka. The court had an opportunity to have sight of the loose minute whose subject matter was CEOs orders\interviews. That the same would take place on Thursday, 12th July, 2012 at 09 hours. Sergeant Katukula TK 91766 was listed for interviews. I also had sight of the charge sheet in which the plaintiff was charged under ***section 72 of the Defence Act*** already referred to.

In arriving at my decision, the other documents I considered was a letter dated the 25th May, 2012 to the District Commissioner from the plaintiff. In it the plaintiff reports that 10 microscopes and 10 fridges did not reach designated army units in 2004. In the same

letter he named three officers. He also stated that there was a theft of food stuff and mattresses in 2008. He further stated that the Regional Commander of Northern Province obtained six million and five hundred Kwacha, that the same officer who stole the money was also flirting with the wife of a named Sergeant Mulenga. He wrote a letter to the Minister of Northern Province raising concerns on his demotion from the rank of Staff Sergeant to Corporal for fighting corruption. In the same letter he reported a misappropriation of ten thousand kwacha a malpractices which according to the plaintiff took place in 2004. All the letters that he wrote were written in 2012 the year he was charged and not when the incidents he referred to occurred. There was one letter which led to the plaintiff being charged dated 30th May, 2012 to the District Commissioner already referred to whose subject matter was resuscitation of morale. The court had an opportunity to see the regimental conduct sheets in which the plaintiff's offences already referred to were reflected. I note that the recommendation for discharge is also reflected in the regimental contact sheet at pages 7 and 8 of the defendant's bundle of documents. Further that punishment awarded was for the reduction of rank in the regimental conduct sheet at page 10. That in the exhibits at pages 11 to 13 recommendations made were for the discharge of the plaintiff.

In arriving at their decision Command relied and exhibited the letter from the Provincial Minister to whom the plaintiff wrote a letter of complaint. Before me is a record of the interview conducted in

respect of the plaintiff by Lieutenant Colonel S. Sikuka held in his office on 11th June, 2012 which statement was signed by the plaintiff where he stated that he did not read the abstract evidence from the Provincial Minister because it contained trash. In the plaintiff's bundle of document is a loose minute titled the Regional Commanders diary summary of evidence in respect of Staff Sergeant TK Katukula number 91766 which served to inform five witnesses to attend on Monday 16th April, 2012 in respect of the plaintiff which would be a hearing to be undertaken by the officer Commander signed by Major Sikuka. Also filed is a certificate of compliance which certified that rule of procedure eight had been complied with. That this summary evidence was taken by Major S.N. Mudungu in the presence and hearing of the accused on the 16th and 18th day of April, 2012, Mondongo appended his signature. Attached were the charge sheets already referred to as well as the summary evidence which was signed by Major S.N. Mudungu on the direction of the Commanding Officer of the accused. This is proof that the plaintiff who throughout the hearing disputed receiving the summary of evidence that he actually did so. This document is contained in the plaintiff's bundle of documents at page 8 filed on 20th September, 2017. The procedure followed was that a statement was given by each witness followed by cross examination by the accused. All the witnesses testified in respect of the charges of the incident surrounding the house.

At page 28 of the plaintiff's bundle was a certificate of caution to the accused. In it the plaintiff was questioned in accordance with the

rule of procedure 8 and reserved his defense. The plaintiff's signature was appended to this document, further the plaintiff also had in his possession and placed in his bundle his service document. This record was prepared in accordance with the provisions of the Defence Force Procedure 7 rules the third schedule and rule 19. This was a record of proceedings before an appropriate superior authority and contains question which were posed to the plaintiff and reproduced-

(1) Question - have you received a copy of the charge and summary abstract of evidence not less than 24 hours ago?

-Answer - yes

(2) Question - have you had sufficient time to prepare your defense?

-Answer - yes.

The document goes on to state that charges were read to the accused and he was asked the following questions:

(3) Question - have you agreed in writing that the witnesses against you need not give the evidence in person?

-Answer - all the witnesses come in person.

(4) Question - do you wish to give evidence on oath or to make a hand written statement without being sworn-your evidence or statement may deal with the facts of the case,

with your character and with the matters in mitigation of punishment?

-Answer - without being sworn

(5) Question - do you wish to adduce other evidence in your defense

-Answer - no

(6) Question - will you accept my award or do you elect to be tried by court Martial?

-Answer - by ASA. THE findings of the ASA were that of guilty and the award was reduction to rank of Corporal and this is dated 2nd May, 2012.

Above is part of the evidence of what transpired and what led the plaintiff to sue seeking a declaration that the dismissal was wrongful or unlawful.

The Supreme Court in the case of ***Eston Banda, Dalitso Zulu and the Attorney General Appeal Number 42 of 2016***⁷ stated as follows:

“We note that the terms wrongful, unlawful and unfair termination of employment have, persistently been used interchangeably in the arguments and submissions. Needless to reiterate that these terms do not refer to one and the same thing.”

Further in para 47 that according to **Micheal Jefferson** Author of ***Principles of Employment Law (2000) 4th Edition, Cavendish Publishing Ltd, Sydney Australia*** says that:

“Wrongful dismissal looks at the form of the dismissal. It refers to a situation where an employer dismisses an employee without notice or with insufficient notice. This is contrasted with unfair dismissal which is said to concentrate both on procedure and substance.”

In para 48 the court referred to ***Halsbury’s Laws of England Volume 41 5th Edition at Paragraph 722*** which also provides that:

“...dismissal may at common law either be lawful or wrongful; and a dismissal whether lawful or wrongful, may be challenged as being unfair by statute.”

In paragraph 46 the Supreme Court went on to state that the above excels only go to underscore the fact that there are only two broad categories for dismissal by an employer of an employee; it is either wrongful or unfair.

Wrongful refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of the term which the employee is engaged; whilst unfair as stated in ***paragraph 757 of Halsbury’s Law of England*** refers to a dismissal in breach of a statutory right not to be dismissed. That Michael Jefferson, further observes a loose reference to the term ‘unlawful’ to mean unfair is strictly speaking in employment parlance, incorrect and is bound to cause confusion. The Learned author Judge W.S. Mwenda clarifies on the two broad categories in

her book *Employment Law in Zambia: Case and Materials (2011) Revised Edition UNZA Press, Zambia at Page 136*. She opines that:

“In our jurisdiction a dismissal is either wrongful or unfair and that wrongful looks at the form of dismissal, whilst unfair is a creation of statute.”

The Court of Appeal guided in their decision in the case of *Care International Zambia Ltd V Misheck Tembo Appeal number 57/2016^s* as follows:

“We did reiterate the legal position that, the mode of an employee’s dismissal or exit from employment will determine what relief, if at all they would be entitled to and the need for trial courts to avoid careless and cavalier use of legal terms or expressions without regard to their proper meaning.”

Based the evidence before me I am satisfied that the plaintiff was charged with various offenses under the Defence Act.

On the claim that his dismissal was wrongful and/or unlawful the plaintiff would like the court to find that there were no charges leveled against him. That he appeared before the Commanding Officer for orders and that his request for a Court Marshall was denied him. Further that what he attended was an interview and not a hearing. Lastly that he was not given the summary of evidence a fact that led him to report to the Permanent Secretary Northern Region.

From the evidence before me it was not in dispute that the plaintiff was a person subject to military law under the Defense Act Chapter 106 all the Laws of Zambia. The plaintiff informed the court that he was employed as a soldier and served for 19 years. This clearly establishes the status of the plaintiff at the time of his dismissal.

In both the plaintiff's bundles and those of the defendant are documents proving that the plaintiff was charged. In the plaintiff's documents at page 5-8 are charge sheets proof that the plaintiff was charged in accordance with section 70 (for false accusation) and section 72 (for conduct to prejudice of military discipline) of the Defence Act Chapter 106 of the Laws of Zambia. Thus, the plaintiff was wrong to claim that there were no charges leveled against him.

I now turn to the plaintiff's appearance before the Commanding Officer, whether what he attended were interviews in the strictest sense and whether or not the plaintiff was given the summary of evidence.

From the evidence before me the appearance before the Commanding Officer was as provided for in section 79 of the Defence Act. Once an allegation was reported in the form of a charge, the accused's Commanding Officer investigated the charge in the prescribed manner. I am satisfied that after investigations the Commanding Officer dealt with the charges against the plaintiff summarily (section 80(2)). I am further satisfied that in accordance with section 80 (5) the plaintiff's Commanding Officer made a

determination after which he proceeded to the awarding of the appropriate punishment. The steps outlined above are steps taken and were taken where an accused is attending a hearing. Proof of what transpired when the plaintiff appeared before his Commanding Officer is contained in the documents already referred to. The process began with a loose minute dated 12th April, 2012 to all departments and copied to the Regional Commander diary. The reference was summary evidence of 91766 Staff Sergeant Katukula TK. The subject matter was in respect of the above named Senior Non-Commissioned Officer which would be undertaken by the Officer Commanding ZCCF on Monday, 16th April, 2012. The following witnesses were told to attend Captain J.M. Simwanza, Warrant Officer I.M. Monde, Warrant Officer II Nyasulu J, Staff Sergeant Makayi and Sergeant Kapungwe N. The same was signed by S. Sikuka Major the plaintiff's Commanding Officer. Attached to it was a certificate of compliance. In it Major S.N. Mandungu certified that rule of procedure 8 has been complied with. That this summary of evidence was taken by him at Headquarters Northern Region in the presence and hearing of the accused on the 16th and April, 2012.

As stated, earlier charge sheets were exhibited showing that the plaintiff was charged with two counts of disobeying a lawful command with willful defiance of authority contrary to section 39 (1) of the Defence Act. The particulars appear on the charge sheet as well as the witnesses who testified. The signatures of Major Mundungu as well as the Commanding Officer Sikuka the dates and

in case of the Commanding Officer the punishment awarded and who awarded.

The second charge sheet contained the charge of False Accusation contrary to section 70(2) of the Defence Act as well as the particulars. The names of the witnesses appear as well as the signature of Major Mundungu and the Commanding Officer, plus the date and in case of Major Sikuka the punishment awarded by him.

The third charge sheet was for the offense of ***Conduct to the Prejudice of Good Order and Military Discipline contrary to section 72 of the Defence Act.*** The charge sheet contained the particulars of the offence as well as the witnesses. Major Mundungu signed the charge sheet as well as indicating the date. The Commanding Officer Major Sikuka signed as well as indicated the date, punishment awarded and the fact that he awarded the punishment.

I am satisfied that not only was the plaintiff charged he was given an opportunity to exculpate himself. Not only did he appear to hear the charges against him, I am satisfied that the procedure in Rule 6(1) of the Defence Force Procedure Rules was followed. The Commanding Officer not only read the charges to the plaintiff the evidence was heard in accordance with Rule 7 and was reduced in writing.

The Regimental Conduct sheets were proof that the plaintiff was heard on numerous occasions after he was charged. That he was

found culpable and was punished accordingly. The plaintiff was charged and it was proven that he was guilty of the offences for which he was charged. The recommendation by his Commanding Officer was that he be discharged from the Army. The plaintiff on his own admission aired grievances outside the chain of command. Apart from his own admission there were letters that he himself had written in 2012 over incidents that occurred in 2004 and 2008 to the District Commissioner and the Minister of Northern Province. I am satisfied that the abstract of evidence at pages 14 and 15 of the defendant's bundle were handed to the plaintiff in accordance with Regulation 9 (2) of the Defence Force (Procedure) Rules. Proof of this is contained in the plaintiff's statement taken on 12th July and appears in the defendant's bundle of documents at page 19.


I am satisfied that the plaintiff was discharged in a fair and lawful manner. That the laws and procedures applicable were strictly followed. The claims for damages for unlawful and/or wrongful dismissal and for terminal benefits for the eighteen (18) years he worked for the Zambian Army thus fall by the wayside as there was neither resignation nor retirement.

Having been discharged in accordance with **section 21** as read together with the **Third Schedule Regulation 9(3) of the Defence Force (Regulation Force) Enlistment and Service Regulations**. I am satisfied that the plaintiff of the regular force has been discharged by competent military authority at the time during the currency of his term of engagement upon the grounds and subject to the special

instructions prescribed in *section 21 of the Defence Act*. Further that his services are no longer being required as provided for in *Regulation (9)3* the plaintiff is entitled to a refund of pension contributions which refund is made and has been made to the relevant pensions board. The court therefore Orders that the plaintiff be paid his contributions plus interest at the ruling Central Bank deposit rates.

Leave to appeal to the Court of Appeal is here by granted.

DELIVERED AT LUSAKA THIS 15TH DAY OF JULY, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE


REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
15 JUL 2024
G.C.M CHAWATAMA - JUDGE
P. O. BOX 50067, LUSAKA