IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL Nº 141 OF 2018

BETWEEN:

MODEST KALUNGA APPELLANT

AND

ZESCO LIMITED RESPONDENT

CORAM: **Chashi, Lengalenga** and **Siavwapa, JJA**
On 27th March, 2019 and 24th January, 2020.

For the Appellant: Mr. B. Mosha – Messrs Mosha & Co

For the Respondent: Mr. G. Mileji – Principal Legal Officer & Mrs. J. Kunda – Legal Officer (ZESCO)

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **ZAMBIA CONSOLIDATED COPPER MINES v MATALE (1995 – 97) ZR 144**
2. **CHARLES NYAMBE & 182 ORS v BUKS HAULAGE LTD (unreported) (App. No. 202/2014)**

3. **NDONGO v MULYANGO & ANOR (2011) 1 ZR 187**
4. **MOBIL OIL ZAMBIA LTD v RAMESH M. PATEL (1988 – 89) ZR 12**
5. **NKHATA & ORS v THE PEOPLE (1966) ZR 124 (CA)**
6. **ATTORNEY GENERAL v MARCUS K. ACHIUME (1983) ZR 1 (SC)**
7. **ZULU v AVONDALE HOUSING PROJECT LTD (1982) ZR 172**
8. **KITWE CITY COUNCIL v WILLIAM NGUNI (2005) ZR 57**
9. **SITHOLE v THE STATE LOTTERIES BOARD (1975) ZR 106 (SC)**
10. **CHUBA v THE PEOPLE (1995 – 97) ZR 3**
11. **FAWAZ SHAWAZA & ANOR v THE PEOPLE (1995 – 97) ZR 3**

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of the Industrial Relations Division of the High Court delivered by Hon Mr. Justice E. L. Musona on 11th July, 2018.

2.0 BACKGROUND

2.1 The background to this appeal is that the Appellant was employed as an electrician by the Respondent on 25th October, 1996. Later in August, 2000 he was dismissed from employment for causing damage to company property arising from failure to obey lawful instructions in accordance with the conditions of service under which he served.

2.2 After the Appellant unsuccessfully appealed the dismissal to the Respondent's Managing Director, he filed an action by way of Complaint against the Respondent in the Industrial Relations Division of the High Court claiming the following reliefs:

(a) A declaration that the dismissal was wrongful and unfair;

(b) Damages for wrongful and unfair dismissal;

(c) Payment of terminal benefits;

(d) Payment of accrued salaries from August, 2000 to-date;

(e) Any other relief as the Court may deem just and equitable.

2.3 According to the Appellant's testimony in the Court below, on 25th August, 2000 he was driving the Respondent's motor vehicle, Toyota Hilux, registration number AAT 9486 which he was about to park and handover to the duty manager at Malambo Road, ZESCO office when he was sent to attend to a fault in Matero Compound. He was accompanied by a Mr. Nyirenda, who was the Respondent's employee. Upon the Appellant's return to the Respondent's Malambo office at 22:00 hours after rectifying the fault, he found

that the duty manager had knocked off and he decided to park the vehicle at the Respondent's head office and he left driving his personal motor vehicle.

2.4 The following morning when the Appellant reported for work at 06:45 hours at the Respondent's head office, he picked up the motor vehicle as he had an assignment to pick up personnel on standby, including one Mr. Kalaso who was an engineer on induction to go to Mandevu Compound to mount a transformer.

2.5 However, upon the Appellant's realisation that he had forgotten an AVO metre at his house in Shorthorn on Mumbwa Road he decided to drive there. After driving for a distance of about 12 kilometres at the Kalundu area, the Appellant's vehicle had a tyre burst and he lost control of the vehicle and it overturned.

2.6 When the Appellant reported for work the following Monday on 28th August, 2000 he was directed to obtain a police report of the accident. On 30th August, 2000 he was charged with causing damage to the Respondent's property and subsequently dismissed from the Respondent's employ.

2.7 In its Answer, the Respondent contended that the Appellant's dismissal was neither wrongful nor unfair and that he was dismissed pursuant to clause 6.2.6 (vi) of the Respondent's disciplinary code applicable to him for causing damage to corporation vehicle and failing to obey lawful instructions. According to the Respondent, the Appellant was given an opportunity to exculpate himself before a disciplinary committee and he was found wanting. It was thus contended that the Respondent followed the right procedure and acted fairly and was justified in dismissing the Appellant.

2.8 At the hearing of the Appellant's Complaint, the Respondent called three witnesses.

2.9 RW1, Nicholas Chipulu, a Chief Cable Jointer for the Respondent, testified that on 25th August, 2000 he was on standby and he and others gathered at the Respondent's Malambo Road office at 20:00 hours for work. He was assigned to deliver people to Kabanana and upon his return to the office, to pick up the Appellant to take him to his home in Shorthorn in Lusaka West.

2.10 However, upon his return from Kabanana he found a client from Matero East who reported a fault and he and the Appellant

proceeded to Matero East to sort out the fault. According to RW1 after the fault was sorted out, the Appellant objected to be driven to his home and opted to go to Emmasdale as he told him that he had some business to do with Edward Mukuka, CW2 and that is how the Appellant remained with the Respondent's vehicle.

2.11 RW2, Weston Chola, a Principal Engineer in the Respondent's employ testified that on 25th August, 2000 he was then an Assistant Engineer who was reporting to the Regional Engineer. According to RW2's testimony, he instructed the Appellant who was driving the Respondent's vehicle, registration AAT 9486 to drop him at his home and that thereafter, hand over the vehicle to RW1, Nicholas Chipulu who would drive him to his home in Shorthorn in Lusaka West. Thereafter, the said vehicle was to be parked at the Respondent's Malambo Road office by Nicholas Chipulu.

2.12 RW3, Bernard Simwanza, a former Mechanical Workshop Manager for the Respondent testified that he was called to the Appellant's disciplinary proceedings because he was in charge of workshop and was knowledgeable about motor vehicles. RW3's role was in relation to the alleged tyre burst which he claimed was non-existant as the

tyre seemed to have been slashed. He advised the disciplinary hearing committee to take the motor vehicle to Toyota Zambia or Dunlop for expert opinion but according to his evidence, his proposal was met with objection by the union representative.

3.0 CONSIDERATION OF THE EVIDENCE AND DECISION BY THE COURT BELOW

3.1 At the conclusion of the trial of the matter, the learned trial judge considered the evidence adduced before him. He opined that in order to prove a claim for wrongful dismissal (i) an employer must have violated a contractual provision and/or (ii) the employee must have been dismissed on allegations which were not proved against him.

3.2 In this case, he noted that the Appellant was charged with the offence of causing damage to corporation property contrary to clause 6.2.6 (vi) and specifically states:

> **"Causing damage to corporation property or injury to personnel where such damage or injury arises from negligence or failure to obey regulations or lawful instructions."**

3.3 The learned trial judge further noted that there was no dispute that the corporation property namely a Toyota Hilux motor vehicle, registration number AAT 9486 was damaged in an accident whilst being driven by the Appellant. He found that the Appellant drove the said vehicle in the direction of his home without permission as he did not adduce that he had permission. He subsequently found that there was no wrongful dismissal as the Appellant refused to obey instructions from one Weston Chola Kalasa because he claimed that he was on induction and, therefore, not superior to him.

3.4 With regard to unfair dismissal, the learned trial judge noted that the Appellant was given a disciplinary hearing and he found no irregularity in the manner it was conducted. He further found that the Appellant did not show any breach of any disciplinary procedure. He, accordingly, found that the claim for unfair dismissal had equally not been proved.

3.5 Consequently, he found that the claim for damages for wrongful and unfair dismissal could not succeed and he dismissed it.

3.6 On the issue of payment of terminal benefits, the trial judge noted that in the letter of dismissal dated 30th October, 2000 exhibited as **"MK8,"** the Respondent informed the Appellant that he would be paid his terminal benefits less what may be owed to the Respondent.

3.7 To that effect, the learned trial judge directed that the Appellant be paid his terminal benefits if the Respondent had not paid him. He further directed that the said benefits be paid with interest from date of filing the Complaint at the short term deposit rate up to date of judgment and thereafter at the current Bank of Zambia lending rate until full payment.

4.0 GROUNDS OF APPEAL

4.1 The Appellant being dissatisfied with the judgment of Hon Mr. Justice E. L. Musona, now appeals to this Court and has advanced the following grounds of appeal:

1. **The Court below misdirected itself in law and fact when it held that the claim for wrongful dismissal was dismissed for being destitute of merit on account of the fact that the Appellant disobeyed lawful instructions from RW2, Weston Chola Kalasa when the Appellant clearly demonstrated that the latter had no authorisation at the time from the Corporation to issue instructions. In any case, if assuming this Court is of**

the view that RW2 was authorised to issue instructions the same were issued on 25th August, 2000 and yet the accident occurred on 26th August, 2000.

2. **The Court below misdirected itself in law and fact when it held that the Appellant disobeyed lawful orders when he drove in a different direction when the records show that the Appellant drove to pick tools and personnel for the purpose of accomplishing the assignment within the area of operation at Shorthorn where Respondent accommodated the Appellant.**

3. **The Court below misdirected itself in law and fact when it held that the accident was caused due to negligence on the part of the Appellant because he covered a distance of 17.5 km in 20 minutes, which according to the learned judge was over speeding.**

4. **The Court below misdirected itself in law and fact when it held that the cause of the accident was due to negligence when expert evidence from the State police report shows that the accident occurred due to tyre burst mechanical fault.**

5. **The Court below misdirected itself in law and fact when it did not consider the Appellant's submission.**

5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF GROUNDS OF APPEAL

5.1 The Appellant's heads of argument in support of the appeal were filed into court and Counsel for the Appellant relied on them.

5.2 In support of ground one, it was argued that the holding by the Court below that the Appellant disobeyed lawful instruction from RW2, Weston Chola Kalasa was erroneous. To fortify this argument, reliance was placed on CW2, Edward Mukuka's testimony on record in which he stated that at the material time he worked with the Appellant, their supervisor was a Mr. Solanki who on 25th August, 2000 instructed him to hand over the vehicle to the Appellant and he did so at 16:45 hours. CW2 further stated that, that is how the Appellant came into possession of the said vehicle.

5.3 It is the Appellant's contention that the evidence on record shows that Mr. Solanki was senior to both the Appellant and RW2. It was submitted that, therefore, RW2 being an inductee at that time and junior to Mr. Solanki could not give contrary instructions to those given by his supervisor.

5.4 It was further submitted that it was on that basis that the Appellant faulted the learned trial judge's finding that his conduct was wrongful because he allegedly disobeyed lawful instructions. It was thus contended that the learned trial judge did not do much to investigate the matter in order to arrive at a fair finding of fact as

was guided by the Supreme Court in the case of **ZAMBIA CONSOLIDATED COPPER MINES v MATALE**[1] in which it stated that the Court has power to delve behind the real reason for the dismissal in order to reduce any injustices discovered. It was argued that had the learned trial judge made further inquiries he would have known that the accident occurred within the perimeters of the Appellant's operational zone on a tour of duty as the evidence on record shows that at the time of the accident, the Appellant was on his way to pick tools and staff for the operational assignment.

5.5 This Court was urged to set aside the finding by the Court below and to uphold ground one.

5.6 Grounds two, three and four were argued together.

5.7 It was argued that the finding by the learned trial judge that the Appellant disobeyed lawful orders when he drove in a different direction is erroneous and not supported by evidence on record. Reliance was placed on the Appellant's testimony that on 26th August, 2000, the day of the accident, he picked up the vehicle from the Respondent's headquarters where he parked it the previous night and that on the material day he had work that included

mounting a transformer and he decided to go home and pick up an AVO meter which he needed for work. It was contended that his testimony was not challenged.

5.8 The Appellant also relied on his witness CW2's evidence that he communicated with Mr. Solanki that he met with the Appellant in the morning of 26th August, 2000 and he informed him that he was going to pick up an AVO meter in Shorthorn. It was submitted that CW2's evidence was not rebutted during the trial.

5.9 It was further submitted that the Appellant testified that whilst he was driving along Mumbwa Road going to his home which was within his area of operation, he heard a tyre burst and he tried to apply emergency brakes but in the process the vehicle overturned. The Court was referred to the police report on the cause of the accident which was indicated as a tyre burst that caused the driver to lose control of the vehicle which overturned.

5.10 It was argued that, therefore, the learned trial judge's finding that the accident happened due to negligence is presumptuous as it is not supported by evidence on record as no witness was called to testify on the aspect of negligence.

5.11 The Appellant attacked the learned trial judge's statement that led to his conclusion that the Appellant covered a distance of 17.5 kilometres in 20 minutes which pointed to negligence on his part. The said observation and finding is found at page 22, lines 8 to 15 of the record of appeal where he stated that:

> **"By simple calculation, I have found that the Complainant covered a distance of 17.7 km in 20 minutes. This further translates to a speed of almost one (1) minute for every kilometre. I find that this points to negligence on the part of the Complainant, particularly, taking judicial notice that, that was rush hour when other people are also moving on the same road going to work and other morning ventures."**

5.12 It was contended that the said finding is erroneous and not supported by evidence on record as driving at the rate of one minute per kilometer which is 60 km per hour on a highway cannot be said overspeeding by any standard, especially as no evidence was adduced to ascertain the speed limit on that particular road.

5.13 Consequently, in urging this Court to reverse the said findings by the learned trial judge, Counsel for the Appellant relied on the cases of **CHARLES NYAMBE & 182 ORS v BUKS HAULAGE LTD[2]**

(unreported) and **NDONGO v MULYANGO & ANOR[3]** where the Supreme Court held that:

> **"An Appellate Court will not reverse findings of fact made by a trial judge unless it is testified that findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of facts, or that they were findings which on a proper view of the evidence, no trial court acting correctly can make."**

5.14 It was finally submitted in support of grounds two, three and four that based on the authorities cited in the absence of any relevant or supporting evidence of the findings made by the learned trial judge, the said findings should be set aside and grounds two, three and four upheld.

5.15 In ground five the learned trial judge is faulted for not considering the Appellant's written submissions filed on 5th June, 2018. It is contended by the Appellant that the judgment by the learned trial judge conspicuously ignored his submissions which are part of the record and that the omission had a negative effect on his case. He asked this Court to take judicial notice that the court record had gone missing after the matter had been concluded before another judge in 2007.

5.16 It was submitted that the purported court record was later found intact with all its documents and proceedings and is part of this Court record but the learned trial judge in his wisdom opted to re-hear the whole case at a very rapid speed. It was further submitted that the omission to consider the Appellant's written submission was an error and that this Court should uphold ground five.

5.17 In conclusion, the Appellant prayed that this Court should allow the appeal and set aside the judgment of the Court below.

6.0 RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE APPEAL

6.1 Respondent's heads of argument in opposition to the appeal were filed into Court on behalf of the Respondent. Reliance was placed on the said arguments.

6.2 The Respondent's In-house Counsel, Mr. G. Mileji by way of introduction, before responding to the grounds of appeal, drew this Court's attention to the fact that the Appellant's Amended Complaint contained at pages 65 to 68 of the record of appeal was expunged from the record during trial on application by the Respondent's

Counsel as it was filed after the Appellant had given evidence and subjected to cross-examination.

6.3 He further referred this Court to pages 168 to 224 of the record of appeal and submitted that the said court proceedings were not proceedings before the Court that passed the judgment that was being appealed against. He accordingly urged this Court to expunge the said proceedings from the record.

6.4 Respondent's Counsel, thereafter, proceeded to respond to the Appellant's grounds of appeal.

6.5 In responding to ground one, it was noted that the said ground has two limbs, that is, on one limb it suggests that RW2, Weston Chola Kalasa did not have authority from the Respondent to issue instructions while on the other, it states that if RW2 was authorised then the instructions were issued on 25th August, 2000 whilst the accident occurred on 26th August, 2000.

6.6 It is contended that there is evidence on record to show that RW2 had authority to issue instructions to the Appellant and this could be deduced from RW2's testimony at page 237 of the record of appeal in lines 5 to 10 where he stated that:

> **"I was able to give instructions. I was Assistant Engineer. I was under the Regional Manager. I was not on induction at the material time. I had completed my induction. I had joined Respondent on 25th January, 2000 and confirmed in June, 2000, so I was not on induction. I did not work under the instructions of Complainant (Appellant)."**

6.7 It was further submitted that RW2's evidence is supported by RW1, Nicholas Chipulu's evidence at page 234, lines 10 to 14 where he stated that:

> **"When we gathered at Malambo all the people I have mentioned earlier were present when instructions were given. Complainant was also present. Mr. Kalasa was the leader in that team. There was no other senior person present."**

6.8 The Respondent's Counsel, therefore, submitted that the Court below rightly found that the Appellant had disobeyed lawful instructions from RW2. It was further submitted that the trial court's inference is a finding of fact that cannot be attacked by an appellate court. Reliance was placed on the case of **MOBIL OIL ZAMBIA LTD v RAMESH M. PATEL**[4] in which the Supreme Court followed with approval, the decision of the Court of Appeal in the case of **NKHATA & ORS v THE PEOPLE**[5].

6.9 This Court was also referred to the earlier case of **ATTORNEY GENERAL v MARCUS K. ACHIUME**[6] in which the Supreme Court followed the **NKHATA** decision when it held that:

> **"an appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."**

6.10 In view of the cited authorities, Respondent's Counsel submitted that this Court cannot reverse the findings of fact by the trial court as the said findings were arrived at after a proper evaluation of the evidence before the court. He further submitted that the Appellant had not shown this Court that the said findings are either perverse or were made in the absence of relevant evidence or upon a misapprehension of the facts.

6.11 Respondent's Counsel thereafter responded to the second limb of ground one where the Appellant states that **"the instructions were issued on 25th August, 2000 and yet the accident occurred on 26th August, 2000."**

6.12 It was contended that the Appellant's disobedience of the lawful instructions from RW2 was not an isolated incident but a continuing act. It was submitted that this was a transaction that started from 25th August, 2000 when the Appellant refused to hand over the vehicle to RW1 until 26th August, 2000 when he had the accident. It was further submitted that the Appellant's disobedience was confirmed by RW1's evidence on record that the Appellant refused to be dropped in Shorthorn because he said that he had some business to do with his colleague, Edward Mukuka (CW2) in Emmasdale.

6.13 It was argued that had the Appellant handed over the vehicle to RW1 as directed by RW2, the events of 26th August, 2000 could have been avoided, as the Appellant would not have had access to the vehicle.

6.14 It was submitted that the Appellant has, therefore, failed to prove that he was wrongfully and unfairly dismissed as his dismissal was based on his wrongful conduct and whose penalty of dismissal was correctly applied by the Respondent. To support this argument, reliance was placed on the case of **ZULU v AVONDALE HOUSING PROJECT LTD**[7] where the Supreme Court stated that:

> **"I think that it is acceptable 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."**

6.15 It was finally submitted on ground one that based on the foregoing arguments and authorities cited, the Court below was on firm ground in finding that the Appellant's claim was destitute of merit. Respondent's Counsel prayed that ground one fails on that account.

6.16 In response to ground two, Respondent's Counsel submitted that the trial court rightly found that the Appellant disobeyed lawful orders when he drove in a different direction because the evidence on record indicates that the Appellant's journey to Shorthorn was not authorised by anyone. It was submitted that according to RW2's evidence at page 236, line 24 of the record of appeal, he instructed the Appellant to pick the motor vehicle on 26th August, 2000 and to pick him and at page 237, lines 2 to 4 of the said record, RW2 stated that:

> **"I got a report on 26th August, 2000 that there was an accident. On 26th August, 2000 Complainant did not**

pick me up. I never instructed Complainant to pick up an AVO meter."

6.17 In view of the evidence on record, it was submitted that the Appellant may have been based under Lusaka West region but there was no evidence that Shorthorn in particular was his area of operation. It was further submitted that as can clearly be seen from the evidence on record, the Appellant did not seek permission to drive the corporation vehicle to Shorthorn on the material date and time.

6.18 It was submitted that in fact he Appellant conceded that he did not seek permission at page 229, lines 21 and 24 of the record of appeal when he stated that:

"When going off range I was supposed to report to RCC (Regional Central Centre) ..... I was supposed to pick Mr. Kalasa from his home in the morning but I did not."

6.19 Respondent's Counsel, therefore, submitted that collecting an AVO meter that was not even required did not justify the Appellant driving a corporation vehicle to an unauthorised direction even though Shorthorn was where he was accommodated.

6.20 He further submitted that the trial court's findings on this issue raised in ground two is also a finding of fact by the trial court and he reiterated his arguments in ground one. On that premise, it was submitted that ground two should equally fail.

6.21 In response to ground three, Respondent's Counsel submitted that the Court below was on firm ground when it held that the accident was caused due to the Appellant's negligence. He referred to the Appellant's evidence where he stated that he reported for work at the Respondent's head office at 06:45 hours and that the accident occurred at 07:05 hours and that the Disciplinary Committee at page 74, lines 16 to 18 of the record of appeal observed that:

> **"Going to get an AVO meter from Shorthorn couldn't have urged him to rush at 100 km/h especially that the same AVO meter was not a unique one in that other regions have them and that for that particular day, it was not even required."**

6.22 Respondent's Counsel submitted that from the evidence of the distance that was covered by the Appellant in that short space of time, indicated that he was over speeding. It was further submitted that the trial court in arriving at its decision, took judicial notice of the activities on the particular road at that time of the day.

6.23 It was further contended that the trial judge rightly found that the Appellant was negligent in the manner in which he drove considering the activities on the said road. Respondent's Counsel submitted that, therefore, ground three must fail and should be dismissed.

6.24 The Respondent in response to ground four where the Court below is faulted for holding that the accident was caused as result of the Appellant's negligence, submitted that the Court below considered the evidence before it. It was further submitted that if there was anything credible in the police report, the Court below would have stated so but it found no probative value in the opinion evidence. It was contended that the police report's authenticity was challenged at trial but it was not tested under cross-examination.

6.25 Respondent's Counsel referred this Court to RW3's evidence at both the disciplinary committee hearing and trial that the alleged tyre burst did not appear original but appeared like a slash. It was the Respondent's contention through Counsel, that the said evidence was not rebutted and that the disciplinary committee observed that the Appellant was rushing by driving at 100 km/hour. It was further submitted that the Appellant conceded that he covered a distance of

17.5 kilometres in twenty minutes from the Respondent's head office to the area where the accident occurred which was about 500 metres from the Appellant's house.

6.26 It was, therefore, submitted that the Court below rightly established negligence on the Appellant's part after considering all the evidence before it. It was further submitted that ground four must accordingly fail in view of the foregoing submissions.

6.27 With regard to ground five that the Court below misdirected itself in law and fact when it did not consider the Appellant's submission, Respondent's Counsel responded that the Court below competently considered the evidence before it in adjudicating on the matter. He argued that the Court below diligently discharged its duties in guiding the Appellant during the proceedings so as to enable him prosecute his case in a manner that would assist it in arriving at a just decision.

6.28 It was further submitted that it is trite law that the Court is not bound by submissions in arriving at a decision as was elucidated by the Supreme Court in the case of **KITWE CITY COUNCIL v WILLIAM NGUNI**[8] when it stated that:

> **"The Court is not bound to consider Counsel's submissions because submissions are only meant to assist the Court in arriving at a judgment."**

6.29 It was, therefore, submitted that based on the cited case, the trial court properly directed itself to the evidence before it and found that the Appellant was rightly dismissed.

6.30 In conclusion, Respondent's Counsel urged this Court to dismiss all the grounds of appeal based on the submissions and cited authorities, and consequently dismiss the appeal in its entirety with costs for lacking merit.

7.0 THIS COURT'S CONSIDERATION OF THE GROUNDS OF APPEAL, ARGUMENTS AND AUTHORITIES AND DECISION

7.1 We have considered the grounds of appeal, respective arguments, authorities cited, evidence on record and judgment appealed against.

7.2 With regard to ground one, the Appellant attacks the judgment of the Court below, firstly on the basis that RW2, Weston Chola Kalasa lacked the requisite authority to order the Appellant to surrender the vehicle to RW1, Nicholas Chipulu. On the second limb of this ground the Appellant questions whether the instruction issued on 25th

August, 2000 by RW2 applied to 26th August, 2000 for him to be found to having disobeyed lawful instructions.

7.3 With regard to the first limb of ground one we noted from RW2's testimony that in 2000 he was the Assistant Engineer in charge of maintenance and operations and he was reporting to the Regional Manager. He testified that he was supervising the team which included the Appellant, CW2, Edward Mukuka, and RW1, Nicholas Chipulu. According to his evidence on 25th August, 2000 he gave instructions to the Appellant to surrender the vehicle to RW1 and for him to collect it on 26th August, 2000.

7.4 We further noted from RW2's evidence that he joined the Respondent on 25th January, 2000 and that he was confirmed in June, 2000. Therefore, according to that evidence as at 25th August, 2000 RW2 was not on induction.

7.5 Based on the evidence on record we opine that RW2 had the requisite authority to give the Appellant instructions. We also observed that RW2 stated in cross-examination that he and Mr. Solanki were both supervising the team.

7.6 With respect to the second limb of ground one, we noted from the evidence on record that on 25th August, 2000 he had instructed the Appellant to pick up the vehicle on 26th August, 2000 and to pick him up and he denied instructing the Appellant to pick up the AVO meter in Shorthorn. We are of the view that the fact that the Appellant went to pick up the AVO meter before picking up RW2 clearly indicates that he failed to obey instructions even on 26th August, 2000.

7.7 Therefore, we find that the Court was on firm ground in holding as it did. We find ground one to be devoid of merit.

7.8 We noted that grounds two, three and four were argued together but we decided to consider ground two separately as it is not relevant to grounds three and four.

7.9 Ground two attacks the finding of the learned trial judge that the Appellant disobeyed lawful orders when he drove in a different direction to Shorthorn to pick up an AVO meter from his house. We noted that this ground further states that the Appellant also drove there to pick up personnel for the purpose of accomplishing the assignment within the area of operation at Shorthorn.

7.10 Upon perusal of the evidence on record, we noted that it is not disputed that the Appellant picked up the vehicle from the Respondent's Malambo head office and drove to Shorthorn instead of going to pick up RW2 as he had been directed the previous day. Then evidence on record clearly indicates that the Appellant's journey to Shorthorn was not authorised by anyone as the Appellant conceded in cross-examination that when going off range he was supposed to report to Regional Central Centre which he did not do. It is evident, therefore, that the Appellant went off range without permission.

7.11 We further observed from his evidence that contrary to the contents of ground two that he drove to pick up tools and personnel for the purpose of accomplishing the assignment within the area of operation at Shorthorn, he conceded in cross-examination that he was supposed to pick up RW2 from his home in the morning.

7.12 In addition to that, nowhere in the record did we find evidence by the Appellant to the effect that Shorthorn was his area of operation.

7.13 In the circumstances, we find that the learned trial judge cannot be faulted for finding as he did. Ground two is, therefore, bereft of merit.

7.14 We turn to grounds three and four which attack the finding by the Court below that the accident was caused by negligence due to over speeding contrary to the finding in the police report that the cause was a tyre burst as a result of mechanical fault.

7.15 With regard to issue of over-speeding alluded to by the Court below, upon perusal of the record at page 229 we noted that the Appellant admitted that at the time of the accident, he was driving at 100 Km/h and that he covered a distance of 17.5 kilometres in twenty minutes from Malambo Road head office.

7.16 We observed that the police report of the accident indicated the cause of the accident as being mechanical fault due to tyre burst. We noted that apart from that, the police did not indicate anything else such as the speed that the Appellant could have been travelling at to result in a tyre burst and overturning of the vehicle.

7.18 Based on the attack on the Court's finding, it is evident that the Court below did not find the police report to be convincing. We

further noted that the police report did not indicate how the conclusion of a mechanical failure was arrived at. We opine that the Court below was not bound to accept the police report or opinion of RW3 that the tyre appeared to have been slashed. Authorities on this position abound but just to mention a few like the cases of **SITHOLE v THE STATE LOTTERIES BOARD[9], CHUBA v THE PEOPLE[10]** where the Supreme court gave guidance that the opinion of a handwriting expert can only be a guide, albeit a very strong guide to the court in arriving at its own conclusion on the evidence before it.

7.19 This guidance was reiterated in the case of **FAWAZ SHAWAZA & ANOR v THE PEOPLE[11].**

7.20 Based on the cited authorities, we find that the Court below properly directed itself when it disregarded the police report and held that the accident occurred as a result of the Appellant's negligence.

7.21 We find that grounds three and four are also devoid of merit.

7.22 In ground five the judgment of the Court below is attacked for disregarding the Appellant's written submissions. We are of the considered view that whilst it would have been desirable for the

Court below to demonstrate its consideration of the Appellant's submissions, the Court is not bound by submissions in arriving at a decision as was held by the Supreme Court in the case of **KITWE CITY COUNCIL v WILLIAM NGUNI** that was relied on by the Respondent. The role of submissions is to assist the Court in arriving at a decision, therefore, the lack of their consideration is not fatal.

7.23 Consequently, we find ground five to be bereft of merit.

8.0 CONCLUSION

8.1 In conclusion, all five grounds of appeal being unsuccessful, the appeal fails and is accordingly dismissed. Each party to bear own costs.

.....

J. Chashi

COURT OF APPEAL JUDGE

.....

F. M. Lengalenga

COURT OF APPEAL JUDGE

.....

M. J. Siavwapa

COURT OF APPEAL JUDGE