

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

**APPEAL NO. 132/2022**

BETWEEN:

**EMMANUEL ZGAMBO**



**APPELLANT**

**AND**

**THE UNIVERSITY OF ZAMBIA**

**RESPONDENT**

**CORAM: SIAVWAPA, JP, MAKUNGU AND CHISHIMBA, JJA**

On 23<sup>rd</sup> March and 25<sup>th</sup> April, 2023

FOR THE APPELLANT: MR. B. ZULU OF MESSRS G.M. LEGAL PRACTITIONERS

FOR THE RESPONDENT: MRS. TOWELA NKHOMA, IN-HOUSE COUNSEL

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

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**SIAVWAPA, JP**, delivered the Judgment of the Court.

**Cases referred to:**

1. *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa* (1986) ZR 70
2. *ZESCO Limited v Muyambango* (2006) ZR 22
3. *Kafula Joseph Mulenga v ZESCO Limited - SCZ Judgment No 8285/2007*
4. *Bank of Zambia v Kasonde* (1995-1997) ZR 28

**Legislation referred to:**

1. *The University Act, Cap. 136 of the Laws of Zambia*

2. *The Court of Appeal Rules No. 7 of 2016*
3. *The Employment Code, Act No. 3 of 2019*

## **1.0 INTRODUCTION**

- 1.1 An appeal against the Judgment delivered in the High Court by the Hon. Mrs. Justice M. Makubalo dated 25<sup>th</sup> March 2022.
- 1.2 The learned Judge dismissed the Appellants claims for wrongful and unfair/unlawful dismissal and for refund of half salaries withheld during his suspension. The learned Judge however, allowed the claims for gratuity on the 1<sup>st</sup> and 2<sup>nd</sup> Contracts of employment.

## **2.0 BACKGROUND**

- 2.1 The Appellant was employed as a Hall attendant initially on fixed term Contracts until he was placed on permanent and pensionable conditions of service.
- 2.2. While serving on permanent and pensionable conditions, he was charged with the offence of Bribery/Corruption contrary to Clause 7.4 category 4 (c) of the University of Zambia Staff Disciplinary and Grievance Procedure Code.
- 2.3 He was taken through the various levels of disciplinary process until his summary dismissal which he appealed at two levels namely; the Vice Chancellor and the Council without success.

### **3.0 THE COMPLAINT**

3.1 He filed a Notice of Complaint and an affidavit in support in the Industrial Relations Division on 27<sup>th</sup> March, 2020.

3.2 The Complaint contained the following reliefs;

- (a) Gratuity for the 1<sup>st</sup> Contract
- (b) Gratuity for the 2<sup>nd</sup> Contract equivalent to K95, 765.04
- (c) Damages for wrongful dismissal
- (e) Refund of difference in salaries from the time the complainant was put on half salary to the time of his dismissal.
- (f) Interest on the amounts due
- (g) Costs
- (h) Any other relief the Court deems fit

### **4.0 DECISION OF THE HIGH COURT**

4.1 The learned Judge had no difficulty in finding that the Appellant was owed gratuity on the two Contracts as the Respondent admitted the debt save for the excuse of the list of eligible employees which was long.

4.2 With regard to the claim for wrongful dismissal, the learned Judge agreed with the Appellant that the procedure was not strictly adhered to as the charging officer was not the one prescribed by the Disciplinary and Grievance Procedure Code.

- 4.3 The learned Judge, after citing the cases of Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa<sup>1</sup>, ZESCO Limited v Muyambango<sup>2</sup> and Kafula Joseph Mulenga v ZESCO Limited<sup>3</sup> held that the Appellant was not wrongfully dismissed.
- 4.4 The learned Judge based the application of the above cited cases on the plea for leniency made by the Appellant at the conclusion of disciplinary proceedings before the Standing Disciplinary Committee, which the learned Judge held to be an admission of offence.
- 4.5 With regard to the claim for unfair dismissal, the learned Judge relied on section 50 of the Employment Code Act which provides for summary dismissal of an employee for Gross Misconduct inconsistent with the express or implied conditions of the contract of employment; among others.
- 4.6 In this regard, the learned Judge found that the Respondent was entitled to summarily dismiss the Appellant in view of his having committed a dismissible offence.
- 4.7 As regards the claim for the refund of withheld salaries between his suspension and dismissal, the learned Judge referred to Clause 92 of the Code which provides for half salary for an employee during suspension.

4.8 She accordingly held that since the Court had not found that the Appellant was wrongfully dismissed the claim could not hold.

## **5.0 THE APPEAL**

5.1 The Memorandum of Appeal filed into Court on 22<sup>nd</sup> April, 2022 contains the following grounds of appeal;

1. The Honourable trial Court misdirected itself in both law and fact by failing to adjudicate upon each and every issue raised by the Appellant especially relating to the reason for his dismissal.
2. The Honourable trial Court erred in law by holding that the Respondent did not unfairly dismiss the Appellant when it was clear that the Standing Committee had no evidence to show any nexus between the charges levelled against the Appellant and the evidence presented at the said hearing.
3. The Honourable trial Court erred in law and in fact when they refused to award the Respondent the difference in the salary he was receiving during the period when he was undergoing disciplinary action. Quite clearly, it is incontrovertible that he was on half pay and it was a total misdirection for the Honourable trial Court to allege that he was not entitled to the difference on the basis of the

reading of Clause 9.2 of the Staff Disciplinary and Grievance Procedure Code.

4. The Honourable trial Court misdirected itself in law by evaluating evidence on record in an unbalanced way thus engendering a miscarriage of justice herein.
5. The Honourable trial Court erred in law by failing to comply with the current tenets on Judgment writing resulting in a complete grinding of the wheels of justice in this matter.

## **6.0 ARGUMENTS IN SUPPORT**

- 6.1 In the heads of argument filed into Court on 24<sup>th</sup> June, 2022, the Appellant set out three grounds of appeal.
- 6.2 However, of the three grounds, only grounds two and three were transposed from the Memorandum of Appeal while ground one is totally new. Therefore, the first ground in the heads of argument is disallowed pursuant to Order X rule 9 (3) (4) of the Court of Appeal Rules for want of leave of Court.
- 6.3 Further, grounds one, four and five which are not in the heads of argument are deemed to have been abandoned.
- 6.4 In this regard, only grounds two and three in the Memorandum of Appeal will be considered.

- 6.5 In arguing ground two, the Appellant asserts that there was no evidence adduced before the Disciplinary Committee to prove that he was guilty of Bribery/Corruption.
- 6.6 He supported his assertion by referring to the learned Judge's reliance on section 50(1) of the Employment Code Act which allows summary dismissal for Gross Misconduct or disobedience of lawful instructions.
- 6.7 He argues that since he was not dismissed for Gross Misconduct, the section does not apply.
- 6.8 He further argues that by relying on his plea for lenience in mitigation to impute admission, the learned Judge misdirected herself but further that it went to show that there was no evidence that he was guilty of Bribery/Corruption.
- 6.9 In ground three the argument is mainly anchored on the Appellant's belief that the dismissal was wrongful and unfair for breach of procedure and lack of evidence that he committed the offence for which he was dismissed.

## **7.0 ARGUMENTS IN OPPOSITION**

- 7.1 The Respondent filed heads of argument on 27<sup>th</sup> September 2022 in which it argued each ground separately and in sequence.

- 7.2 Although the Respondent has Responded to the arguments in ground one, we will not consider them in view of what we have stated in paragraph 6.2 above. We will accordingly proceed to consider ground two.
- 7.3 In ground two, the respondent argues that contrary to the appellant's assertion that there was no evidence linking him to the offence of Bribery/Corruption, there was evidence from two witnesses before the tribunal to the effect that the Appellant received K6, 000.00 to secure University accommodation for the two witnesses.
- 7.4 As regards the Appellant's foul cry over the learned Judge's holding that the Appellant's plea for leniency during mitigation amounted to an admission of the offence, the Respondent opined that since the mitigation was made before the Appellant was found guilty; the same amounted to an admission.
- 7.5 As to whether or not the offence did not fall within the purview of the Disciplinary Code because it was not the Appellant's responsibility to allocate rooms, the Respondent has argued that as custodian of the keys to the halls of residence, and responsible for issuing keys to the successful applicants, the respondent was acting within the scope of his work.
- 7.6 In ground three, the Respondent simply agreed with the position of the Court below based on the interpretation of

Clause 9.2 of the Disciplinary and Grievance Procedure Code which provides for payment of half salary to an employee on suspension.

## **8.0 OUR ANALYSIS AND DECISION**

- 8.1 The Appellant seeks to assail the Judgment of the Court below because he believes that he was wrongfully and unfairly dismissed and therefore, he should be refunded the salaries that were withheld during his suspension.
- 8.2 He has criticized the learned Judge for holding otherwise on the basis that section 50(1) of the Employment Code Act applies when in fact not and for relying on a plea for lenience during mitigation as an admission.
- 8.3 The first question then is; was it competent for the learned Judge to dismiss the claim for wrongful dismissal after finding that the Respondent did not follow the laid down procedure in handling the Appellant's case?
- 8.4 The Appellant raised two main breaches in the disciplinary process namely; that he was charged by an officer, who is not his immediate supervisor contrary to Clause 9.2 of the Disciplinary Code. The second breach is that the issue should have been first dealt with within the department before escalating it to the Standing Disciplinary Committee.

- 8.5 The contention by the Appellant is that failure to follow a Disciplinary Code amounts to wrongful dismissal. The case of Bank of Zambia v Kasonde<sup>4</sup> emboldened the Appellant in pursuit of his argument.
- 8.6 In arriving at her decision, the learned Judge relied on the cases of Zambia National Provident Fund v Chirwa (Supra), ZESCO Limited v Muyambango (Supra) and Kafula Jospeh Mulenga v ZESCO (Supra), all of which hold the principle that an undisputed commission of a dismissible offence by an employee is not defeated by non-adherence to the Disciplinary Procedure Code.
- 8.7 In this case, there is evidence that the Appellant admitted receiving some money from a student with a promise to secure accommodation for that student. The money was refunded upon failure to secure accommodation.
- 8.8 That is sufficient evidence and indirect admission of a Bribery scheme that went wrong.
- 8.9 The Appellant has argued that for the offence of Bribery/Corruption to stand, it must be proved that the employee received an inducement to do something which was in line of his duty.

8.10 He argues that as a Hall attendant, it was not part of his duties to allocate rooms and therefore, he was not caught up by Clause 7.7 category 4(c) of the Standing Disciplinary Committee and Grievance Procedure Code.

8.11 The said Clause provides as follows;

*“Bribery / Corruption giving or receiving or attempting to give and receive anything or inducing or tempting any person to perform any act in return for a favourable act which is ordinarily the employee’s responsibility.”*

8.12 At page 462 of the Record of Appeal is a document marked “EZ11” titled;

The University of Zambia;  
Job Description

This is in respect of the position of Hall Attendant, which was the Appellant’s position.

8.13 Under 2.2, Student Affairs and Accommodation, the holder of the position is intimately connected to the accommodation situation in the various Halls of Residence for the students.

8.14 Even though there is no role assigned to allocate bed spaces, it is the duty of the holder of the position to stake an inventory of the occupancy rate and available bed spaces.

8.15 Armed with that information, the holder of that office can easily promise a desperate student accommodation at a fee and that is what the Appellant did in this case.

8.16 The other point to make is that when determining a complaint from a properly constituted disciplinary body, it is trite that the Court does not sit in appeal to interrogate each and every factor on how the tribunal arrived at its decision.

8.17 It is sufficient that a substratum of facts was available to the tribunal upon which it arrived at its decision on a preponderance of probabilities.

8.18 Our view is that the tribunal acted within its powers and the Court below was therefore, on firm ground to uphold the decision by the disciplinary tribunal.

8.19 In turn, we cannot fault the learned Judge for dismissing the claims though not because of the provisions of section 50(1) of the Employment Code Act and the plea for leniency in mitigation, but because there was evidence of the Appellant receiving money from students with a promise to in turn, secure accommodation for the students.

8.20 It is for the above stated reasons that the cases relied upon by the learned Judge below find applicability to this case.

8.21 The second question is whether the Appellant can legitimately claim the salaries that were withheld during his period of suspension.

8.22 As earlier indicated, and this point was made by the trial Judge, the only reason the Appellant feels entitled to the said portions of his salary is his view that his dismissal was wrongful and unfair.

8.23 What that means is that for the Appellant to be entitled to that portion of his salary, he should convince the Court that his dismissal was indeed wrongful and unfair and therefore, he should not have been suspended in the first place.

8.24 However, as earlier stated, it is imbedded within the suspension clause that an employee on suspension will receive half of his salary. So the half salary has nothing to do with the outcome of a challenge on an employee's dismissal. It is a condition attached to the suspension only.

8.25 Where one is not found liable by the Disciplinary process, the suspension is lifted and the withheld portions of the salary are paid back.

8.26 However, where one is found wanting and dismissed, a successful challenge of the dismissal in the Courts of law only

entitles the employee to damages and, if, in those rare circumstances re-instatement is ordered, the employee is entitled to recover the monies withheld during the suspension period.

8.27 In the case of a failed challenge of the dismissal in a Court of law, as is the case with the Appellant, the withheld portions of the salary are not refundable.

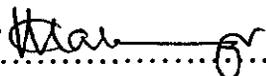
## **9.0 CONCLUSION**

9.1 The end result of this Judgment is that the appeal is unsuccessful on both grounds and we dismiss it accordingly.

9.2 This being a labour matter, parties shall bear their own costs.



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**M.J SIAVWAPA**  
**JUDGE PRESIDENT**



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



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**F.M. CHISHIMBA**  
**COURT OF APPEAL JUDGE**