

**BETWEEN**

**ALBERT MWANAUMO AND OTHERS**

**PLAINTIFFS**

**AND**

**NFC AFRICA MINING PLC**

**1<sup>ST</sup> DEFENDANT**

**QUE**

**2<sup>ND</sup> DEFENDANT**

**NELSON JILOWA**

**3<sup>RD</sup> DEFENDANT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court this 30<sup>th</sup> day of March, 2011

For the Plaintiffs: Mrs. L.K. Mbaluku – L.K. Mbaluku & Co.

For the Defendants: Mr. W.M. Forrest – Forrest Price & Co.

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

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**Cases referred to:**

1. *Mary Musambo Kunda v Attorney General (1993/94) Z.R. 1*
2. *Victor Koni v Attorney General (1990) Z.R.*
3. *Syakalonga v The People (1977) Z.R. 61*
4. *Bank of Zambia v Kasonde (1995/97) Z.R. 238*
5. *Zambia National Provident Fund v Yekweniya Mbinwa Chirwa (1986) Z.R. 70*
6. *Haulage Limited v Kamayoyo (1982) Z.R. 13*
7. *Zambia Electricity Supply Corporation Limited v Muyambango (2006) Z.R. 22.*
8. *Attorney General v Jackson Phiri (1988/89) Z.R. 121*
9. *Mulungushi Investments Limited v Cradwell Mafumba – SCZ Appeal No. 141 of 1997 (unreported)*
10. *Agholor v Cheesebrough Pond's (Zambia) Limited (1976) Z.R. 1*

By the original writ of summons issued on 20<sup>th</sup> October 2006 the six plaintiffs namely Albert Mwanaumo, Ellias Siame, Edward Katongo, Moses Makayi, John Chisenga and Sakeni Lassmith sued the defendants NFC Africa Mining Plc and someone referred to only as Que claiming for the following:

1. Unlawful and wrongful shooting of the plaintiffs by the defendants whilst at work
2. Damages for unlawful and wrongful shooting of the plaintiffs
3. An order for provision of proper medical attention for the injured plaintiffs and/or refund of all expenses incurred in this regard
4. Damages for pain and suffering caused by the unlawful and wrong shooting of the plaintiffs
5. Damages for loss of earnings
6. A declaration that the dismissal of the plaintiffs was unlawful and wrongful
7. Damages for wrongful and unlawful dismissal
8. Legal costs and incidental to this action

The details of the plaintiffs' claims were stated in paras 1 to 11 of the statement of claim at page 3 of the Bundle of Pleadings. By the amended defence, filed on 14<sup>th</sup> November 2006 at pages 6 to 8 of the same Bundle of Pleadings the defendants revealed that the 2<sup>nd</sup> defendant was an employee of the 1<sup>st</sup> defendant and denied the plaintiffs' claims and gave details of the circumstances surrounding the shooting of the plaintiffs. The first defendant also counterclaimed damages for loss and damage suffered by it as a result of the plaintiffs' riotous behavior and put its total loss at K2,128,518,059 and man hours lost at 1,670,572 (hours). In the defence to counterclaim at page 14 of the Bundle of Pleadings the plaintiffs denied having taken part in any riot or destroyed any of the items listed in para 13 and denied the defendants' counterclaim.

On 21<sup>st</sup> August 2008 the plaintiffs filed an amended writ and statement of claim joining one Jilowa as 3<sup>rd</sup> defendant. On 22<sup>nd</sup> September 2008 the plaintiffs filed another amended writ and statement of claim giving the full names of the 3<sup>rd</sup> defendant as Nelson Jilowa and amending paras 3 to 6 of the statement of claim. The same amended writ and statement of claim were filed again on 22<sup>nd</sup> April 2009 and are included at pages 56 to 60 of the Bundle of Pleadings. Prior to that the defendant had filed a further amended defence and counterclaim which appears at pages 46 to 47 of the Bundle of Pleadings.

The plaintiffs have called six witnesses. John Mubili, unemployed but a former mine police officer at the defendant company is PW1. In brief he testified that he was on duty in the afternoon on 24<sup>th</sup> July 2006 at the main gate and that around 18.00 hours miners who were reporting on duty arrived at the plant in a disorderly manner.

He said that around 19.00 hours he received a phone call from the shaft bank used by miners to go underground; to the effect that there was commotion amongst the miners and that a Chinese employee was beaten. He said that some miners went to the gate where he was with Banda, another mine police officer and started throwing stones and shattered windows in the guardroom. He said that Banda had a gun and fired a warning shot so that the miners could go outside the gate. He said that later Mr. Jilowa (3<sup>rd</sup> defendant) the head of mine police arrived and asked about the situation and that later Zambia State police arrived and threw tear gas in order to disperse the irate miners and that the commotion that night stopped.

He testified that the next morning on 25<sup>th</sup> July he was instructed not to allow any miner to enter the plant with a vehicle and that miners should be dropped outside the plant and that he followed the instructions. He said that employees were outside the plant and did not make any noise and that Zambia police officers also arrived at that time. He said that at 07.30 hours another group of miners arrived on foot with a lot of noise and stopped by the gate and started throwing stones at them inside the gate.

He said that the first group of miners was being addressed by members of the Union and was able to understand. He said that Zambia police officers started throwing tear gas and that Mr. Jilowa was present and had a pistol and fired into the crowd that was being addressed and shot one person. He said that the injured person whom he learnt was Katongo was rushed to the clinic; and that after the shooting the miners stopped throwing stones. When referred to the statement at pages 16 to 18 of the defendants' Bundle of Documents, he said that the name on the statement is his, but refused stating that police officers ran away or that there were a lot of guns or that some live bullets were fired by the police. He said that his statement was that police officers were present and were firing tear gas and that only the head of mine police fired a live bullet. He said that he did not see or know the Chinese employee who was beaten as appears at pages 46 and 47 of the defendant's Bundle of Documents and that the miners that beat up the Chinese reported on duty on 24<sup>th</sup> July 2006. He said further that later he received a letter terminating his contract without notice.

In cross-examination by Mr. Forrest counsel for the defendants, he reiterated that on 24<sup>th</sup> July 2006 the miners entered the plant quietly and went straight to the shaft; that he received a phone call around 19.00 hours that there was a commotion; and that he did not see what happened or witness the Chinese employee being beaten. He stated that he did nothing because he was at the gate and that Zambia police officers arrived around 20.00 hours and took control.

He also reiterated that on 25<sup>th</sup> July 2006 he was present when Katongo was shot and that he saw what happened, but denied knowledge of what happened at the Chinese residence. He admitted that the guardroom was damaged on 24<sup>th</sup> July by irate miners who were running inside the plant area throwing stones and insisted that only the guardroom was damaged that night. He said further that on 25<sup>th</sup> July the miners that arrived at 06.00 hours did so quietly; that the miners that arrived at 07.30 hours did so with commotion; that Zambia police officers arrived at 07.00 hours before the riotous group arrived; and that the Zambia police officers were combined with mine police to maintain order. He admitted that Zambia police officers were in charge of maintaining order and that they had tear gas guns. He said that he did not see any of the Zambia police officers carrying firearms and that he did not see anyone with a gun because there was commotion and trouble as miners were throwing stones from outside.

He also denied knowledge of how or when windows in the administration block were broken and refused that any vehicles were set on fire on 24<sup>th</sup> or 25<sup>th</sup> July 2006. He refused that the vehicles captured at page 51 of the defendants' Bundle of Documents were damaged on 25<sup>th</sup> or were at the gate or that the building captured at page 54 is part of the mine plant area or that the damage occurred on 24<sup>th</sup> and 25<sup>th</sup> July or that property worth K2.5 billion was damaged. He reiterated that Mr. Jilowa shot one of the miners. He said that he was only one metre from Mr. Jilowa and refused that he hid in the guardroom on both dates because of the commotion as he could have been injured and insisted that he saw all that happened at the gate. He denied knowledge of the riot on Chingola Road as he was at the plant area.

Albert Mwanaumo also unemployed and a former employee of the defendant is PW2. He testified that on 25<sup>th</sup> July 2006 he was on his way to work when he saw a lot of miners standing at the station and that when he drew near he heard a gunshot and saw one of the miners fall down. He said that as he tried to assist the injured person he heard another gunshot. He was also shot in the back and he fell down and woke up at Chambishi Government clinic. He said that all he remembered was the defendant company sending an ambulance and being taken to Sinozam hospital which belongs to the company. He said that he was issued with the medical report forms at pages 1 and 2 of their Bundle of Documents showing that there were bullets in his body.

He testified that he was at Sinozam hospital for one month and that Dr. Qin told him that they had failed to remove the bullet as it was near the heart and that he was given the transfer letter to Ndola Central hospital which appears at page 3 of the same Bundle. He said that he was admitted at Ndola Central hospital for four days and that after X-ray was taken, Dr. Kachenko told him that they could remove the bullet in his shoulder, but not the one near the heart which could only be removed in South Africa or Botswana. He said that from Ndola Central hospital he returned to his employer to explain what had transpired only to be told that his job was terminated from the date he was shot and that nothing was said about his treatment. He said that he was not given any charge and that it is his prayer that the court declares his shooting unlawful and wrongful and to award him damages for unlawful and wrongful shooting.

In cross-examination he denied that on 25<sup>th</sup> July 2006 around 07.00 hours he was at the plant area. He insisted that he was in the day shift and was going to the station to board a bus. He stated that it took them 5 to 8 minutes to travel from the station at China house to the plant by bus. He denied that from the mining area he went with others to the Chinese residence or housing area in Chambishi or that he entered the Chinese residence area over the wall fence with other rioters or that he was present when the windows in the Chinese residence area were damaged or that he was present when Mr. Jilowa's house was set on fire as he was already in hospital.

He admitted that the shot that was fired at him came from the Chinese residence area and not from the mining area. He insisted that he was on duty at the time he was shot by the Chinese and that the medical report form issued by the police says that he has bullets in his body. He admitted that from the document at page 3 of their Bundle of Documents he was shot by pellets and not bullets. In re-examination he said that the station is by the Chinese residence and that there is a wall fence in-between. He reiterated that he was on his way to the station to board a mine bus when he was shot.

Moses Makayi also unemployed and a former employee of the defendant is PW3. He too testified that on 25<sup>th</sup> July 2006 he was on his way to work when he found a commotion at the station and that he heard a gunshot as he approached the crowd and saw one miner fall down. He said that he got scared and was running away when he too was shot and later found himself at the Government Clinic with others who had been shot. He confirmed that an ambulance took them to Sinozam hospital where he was for about one week and he recognised his medical report at page 11 of their Bundle of Documents. He said that after he was discharged he went back to work only to be told that his job was terminated on the day he was shot and that there was no hearing of any kind. It is also his prayer that the court declares his shooting unlawful and wrongful.

In cross examination he reiterated that he was at the station at the Chinese residence area on his way to work. When referred to his statement at page 39 of the defendants' Bundle of Documents, in particular question 4 and the answer thereto, he said that he did not see what happened at the mine plant area and insisted that he was shot outside the Chinese residence. He refused that he entered the Chinese residence area for him to be shot as he tried to run away and denied knowledge of who was shot first. He said that he just saw one miner fall and that he found himself at the clinic with other miners. He denied that anyone was shot inside the Chinese residence or that he was involved in criminal activities at the Chinese residence area. He said that he learnt of the burning of one house inside the Chinese residence area when he was at the hospital and that he only heard that Katongo was shot at the plant, but he did not go to the plant area.

Kennedy Mumba Besa also a former employee of the defendant and Union member is PW4. His evidence is that on 25<sup>th</sup> July 2006 he too was going for work in the morning when he found a crowd of people waiting for buses at the station. He said when he arrived some employees asked him why there were no buses and that as they were discussing he saw Mr. Que a Chinese national, come from China house and start shooting. He said that he dropped to the ground and saw Mwanaumo and Siame drop as they were shot and that they were bleeding. He said that they took the injured people to Chambishi clinic where they were treated; that whilst at the clinic a crowd of residents of Chambishi went to ask what had happened; and that after he told them about the shooting the crowd became angry and started running towards China house. He said that he reported for work the next day and that they had a meeting with the Union and management over the shooting. He said that he told the meeting that he was present when the shooting occurred and saw what happened. He said that management responded that Mr. Que had been sent to China and that nothing would happen no matter what they did and that later he was given a notice of termination of his employment. In cross-examination he said that there was no problem when he was at China house and that they were outside China house at the bus station.

Edward Katongo also a former employee of the company is PW5. He testified that on 25<sup>th</sup> July 2006 he went for work in the day shift by the first bus; that when he reached the plant he saw Zambia police and mine police at the gate; and that mine police refused them entry to the plant and told them to remain outside the gate. He said that they stood outside and asked each other why they had been denied entry when a big crowd of miners arrived on foot. He said that some Zambia police officers had tear gas canisters and started to prepare but before the crowd reached the gate Mr. Jilowa produced a pistol and fired as the crowd approached. He said that he felt something in his legs; he fell down bleeding and fainted and woke up in hospital where he was admitted. He identified the medical report form at page 16 of their Bundle of Documents and too confirmed that when he felt better and reported for work, he was told that his job ended at the time he was shot and that he was not charged or given any letter or a hearing. He said that his prayer is in accordance with their statement of claim.

In cross-examination he said that at the time he boarded the first bus there was no problem at China house and that he arrived at the gate at the plant area around 05.50 hours. He said that a large crowd of workers arrived between 06.15 hours and 06.20 hours whilst he was standing at the gate. He emphasised that he was shot at during that period of time; that the gun was shot twice; and that he was shot at when the gun was fired the second time. When the medical report at page 16 of their Bundle of Documents was read to him, he said that he was shot in both legs with one bullet. He denied that he saw the crowd throw stones inside the plant area or reach the gate or remove the gate. He said that he did not see what followed because he collapsed after he was shot and may have been at the hospital. He said that Zambia police officers were present at the gate and that they only had tear gas canisters and not shot guns.

Lassmith Sakeni who worked for the defendant company as a welder is PW6. He testified that in July 2006 he left home for work by bicycle and entered inside the plant area. He said that he was told that all employees were not going to work and should wait for instructions outside the gate and that he went to the gate so that he could join other employees outside, but the gate was closed and no one was allowed to enter and that Zambia police and Mine police officers were at the gate. He said that some people were standing by the gate while a big crowd was approaching the gate with a lot of noise. He said that Mr. Jilowa, head of mine police produced a pistol and shot one person and called a Chinese by the name of Mr. Que and told him to shoot the people at China House.

He said that when the crowd saw that Mr. Jilowa had shot a person they started throwing stones where he was and that he was hit and injured on the mouth and was taken to hospital. He said that he was issued with the medical report at page 23 of their Bundle of Documents and that subsequently he went back for work and was informed that his employment had been terminated. He too said that he was not charged, that there was no hearing and that he worked for the company for six months before he was dismissed. He said that the court should declare his dismissal unlawful and that he be given damages for unlawful dismissal and costs.



In cross-examination he agreed with the medical report at page 22 of their Bundle of Documents that he was hit with a stone on the mouth during rioting; that the stone came from the rioters outside the gate; and that he was standing inside the plant area. He denied knowledge of the gate being uprooted or seeing the windows, doors or buildings at the gate being damaged. He said that he fell down when he was injured by the rioting workers and found himself in hospital; that only Katongo was shot within the crowd outside the gate; and that Mr. Jilowa carried a pistol. He said that he stood about two metres away from Mr. Jilowa while Katongo was about five metres away. He admitted that the people at the gate were quite many and that they were waiting for instructions and insisted that he heard Mr. Jilowa tell Mr. Que on phone to shoot the people at China House. In re-examination he said that there were two groups at the gate; that he was injured on the mouth after Katongo had been shot; and that before Katongo was shot there were no stones being thrown.

John Chisenga also a former employee of the defendant company is PW7. He testified that on 25<sup>th</sup> June 2006 he was in the day shift and went to China House to board a bus when he was shot with a gun. He said that he was taken to the Government Clinic and later to Sinozam hospital in Kitwe; that after he was treated he went back for work, but was told that he was dismissed and that he should not enter the plant. He too said that he was not given any charge and that there was no hearing.

In cross-examination he said that he arrived at China House around 06.00 hours and found other people there; that the only shot fired was inside China House; and that he found himself on the ground. He admitted that the Chinese residence area is surrounded by a wall fence; that he found himself on the ground wounded without knowing where the shot came from; and that at the time he left China House he did not leave any commotion or rioting. He said that his friends told him later that he was shot by a Chinese. In re-examination, he too said that he did not see anyone enter the Chinese residence area and that the incidence happened in July 2006.

Elias Siame a former blaster man at the defendant company is PW8 and the last witness for the plaintiffs. He testified that in July 2006 he was on his way to work when he saw a lot of people standing at the station at China House. He said that he tried to inquire why there was no bus when he heard a gunshot and he fell down and later found himself at Government Clinic. He confirmed that they were taken to Sinozam hospital by a company ambulance and that he was in hospital for seven days and was given the medical report at page 14 of their Bundle of Documents. He said that after his discharge he went for work, but was told that his employment was terminated on the day he was shot and that he was given the summary dismissal letter at page 20 of the same Bundle. He too said that there was no disciplinary hearing or sitting.

In cross-examination he said that the incident of 25<sup>th</sup> July happened in the morning between 06.35 hours and 06.50 hours; that he would not be surprised that there was a riot going on at China house; and that there were a lot of people outside China house though nothing was happening when he arrived. He insisted that he was shot on the right eye as shown in the medical report at page 15 of their Bundle of Documents; that there was no riot when he was shot; that four of them were shot at the station; and that he would not know what happened after he was taken to the clinic. He said that he did not see any gunman outside China house; that he only heard the gunshot and agreed with Moses Makayi that the gunshot came from inside the Chinese residence. He stated that he saw Mwanauimo that morning at the Government Clinic.

He also denied knowledge of the breaking of doors and windows at China house. He said that they had no access to China house as there were guards at the gate and that no one entered the Chinese residence. He denied that he appeared for a hearing after he received the dismissal letter. In re-examination he said that the letter was written on 6<sup>th</sup> September 2006, but insisted that there was no hearing as indicated in the letter and that there was no commotion when he arrived at China house or while he was there. This in brief is the plaintiffs' evidence.

The defendant company called three witnesses. Eric Chomba a mine police officer is DW1. He testified that he reported for work on 24<sup>th</sup> July 2006 around 17.00 hours and was detailed to man the main gate with Constable John Mubili (PW1). He said that around 18.30 hours miners in the night shift arrived at the gate in a bus and he went to check their identity cards before he could allow them in, but he failed to do so as they were violent and threatened to beat him. He said that he did not enter the bus, but went back and advised John Mubili not to allow the miners inside the plant because they were very violent and had refused to produce their identity cards. He said that Constable Mubili opened for them and they entered the plant in the bus.

He said that around 19.00 hours he received a telephone call from Elijah Mwelwa another mine police officer that miners were going towards the gate armed with iron bars and that they should hide themselves. He said that he was still at the gate when the miners arrived armed with steel bars and stones; and that they left the gate to go and hide in the drainage. He said that the miners entered the guardroom at the gate and started breaking windows; that they cut the telephone and threw it outside and took out documents from drawers and threw them outside. He said that he could not see inside the guardroom because they broke the light with stones; that the miners collected the papers they had thrown outside and lit a fire inside the guardroom; that at that time only Zambia police officers were present; and that the miners were very violent.

He said that after the miners finished what they were doing they gathered outside and threw stones at the Zambia police officers in the plant and wanted to force themselves back in the plant; and that the Zambia police officers were armed with guns and tear gas. He said that the police officers started throwing tear gas, but when the miners became too violent the Zambia police started shooting guns at the gate. He said that the tear gas was used to make the miners to leave the plant and that when the miners saw that the police were shooting at the gate they ran away uttering that they were going to China House.

In cross-examination by Mrs. Mbaluku, counsel for the plaintiffs he said that he reported on duty on 24<sup>th</sup> July 2004 in the night shift which ended at 06.00 hours the following day; that he did not leave around midnight; that what he saw happened at the gate around 19.00 hours; and that he did not see what happened in the plant where the miners came from. He admitted that he gave the statement at pages 11-13 of the defendants' Bundle of Documents; that the said statement at pages 12 and 13 does not mention the shooting of guns, but tear gas; and that what he observed happened around 19.00 hours when he went into hiding.

John Minyoyi also a mine police officer with the defendant company is DW2. He testified that he reported on duty on 25<sup>th</sup> July 2006 at 06.30 hours and found Constables Erick Chomba and John Mubili and a lot of Zambia police officers. He said that there was a riot as John Mubili had allowed unruly miners inside the plant area; that when he arrived the situation was worse; and that when he was identifying mining employees they were gathered outside the East gate. He said that a violent mob arrived from Chambishi Township and started throwing stones at Zambia police officers; that the guardroom at East gate where he was in charge was damaged; and that when the situation worsened he informed his boss Mr. Nelson Jilowa who was standing at a distance, who in turn informed management that he wanted to address the miners who were outside the gate.

He said that Mr. Jilowa and the Chinese officials went away and the situation became worse than before and that Constable Aaron Mulambe from Mindolo police got injured. He said that he saw the miners damage the guardroom, break the windows and pull down the gate; and that the state police were throwing tear gas, but in vain. He said that one miner was shot and wounded; that he did not know who fired the shot; and that the situation became a bit calm because Zambia police officers were taking control and that there was re-enforcement. He said that the miners were still outside the gate and moved away and went to the township after which Zambia police put everything in control. He said that he remained in the plant area until 19.30 hours.

In cross-examination he admitted that he was in charge in the morning and very important with regard to the incident and that he gave a statement on 29<sup>th</sup> July 2006. He said that he was able to check the first group of miners as it was calm; that the problem started with the mob from the township; and that he did not know whether the person shot was in the first or second group. He said that Mr. Jilowa was at a distance from the East gate; that on that occasion all the miners were outside the gate; that he could not give the exact time of the shooting; that when the second group arrived the police fired tear gas; and that all mine police were disarmed on 25<sup>th</sup> July as Zambia police were in control. He said that the statement at page 28 of the defendants' Bundle of Documents was given by Nelson Jilowa; that he did not see any firearm; that when the miner was shot everything became calm and no miners entered the gate; and that before the person was shot they were inside the gate. In re-examination he said that on 25<sup>th</sup> July no mine police officer carried a gun and that they had guns on 24<sup>th</sup> July.

Nelson Jilowa the 3<sup>rd</sup> defendant, now manager corporate affairs with the defendant company is DW3. He confirmed that in July 2006 he was head of mine police and that on 24<sup>th</sup> July about 19.00 hours miners ran amok. He said that he advised shift inspector Phillip Chanda who had informed him of the riot to contact Zambia police at Chambishi and that he drove to the plant and found about ten Chinese officials who had run for refuge from their offices. He said that there was noise coming from the offices about 200 metres away and that he was told that one Chinese was being killed.

He said that he instructed Constable Fundanga Banda and Inspector Chanda to get shot guns; that he had a 9mm pistol loaded with three 9mm ammunition; and that they advanced to the offices to rescue the Chinese who was being battered. He said that about 100 metres from the riotous miners they started firing in the air; he fired all his three bullets and ordered his colleagues to spend their ammunition; and they managed to rescue the Chinese who was beaten almost to death and to divide the group into two. He said that one group went towards East gate while the other group advanced towards them, but they ran to their offices. He said that he phoned the East gate and alerted Constables John Mubili, Eric Chomba and Banda to run away for their safety.

He said that fortunately the officer-in-charge and his armed officers from Chambishi police arrived and managed to drive the miners out of the plant. He said that on the same night the guardroom was broken into and documents burnt and that miners were throwing stones while police were firing in the air. When referred to his statement at pages 24 to 30 of the defendant's Bundle of Documents, he said that motor vehicles were driven to Mine police Enquiries and he discovered that windows were shattered and there were visible marks of stoning on the vehicles; that he saw the Chinese and Zambian employees who had run for refuge and were hiding in their offices; and that state police officers started firing between 07.00 hours and 08.00 hours.

He testified further that when he got to his house he found that it had been set ablaze, that windows were broken and that by then the rioters had dispersed. He said that he compiled the report to management at page 40 of the same Bundle of Documents; that the photographs at pages 46 to 53 of the same Bundle depict vehicles that were blocked on Chingola Road, the Chinese national they rescued, the company clinic with shattered windows, houses and offices that were broken into and China house which is about 500 metres from the plant. He said that according to their investigations some of the rioters were shot at and were taken to Sinozam hospital; that he did not shoot any of the miners; and that those that were found wanting were terminated from employment.

In cross-examination he admitted that the Chinese national was injured in the night on 24<sup>th</sup> July and that he was not aware that any of the plaintiffs were on duty at that time. When shown page 24 of his statement, he disagreed that the people he distributed firearms to only had knowledge from the document he got that had the 10 basic rules. He said that the document was obtained in 2005 and that there was time for them to train their officers in-house. With regard to the last eight lines at page 28 of his statement he admitted that what he alluded to happened in the morning on 25<sup>th</sup> July; that the first mob purely went for work because they did day work on the 24<sup>th</sup> and did not know what happened in the night; and that there was a group from Chambishi Township that refused to board buses and were on foot armed with stones and machetes and other instruments, which mob did not want to listen and was riotous.

He said that the firing command was given when the riotous group uprooted the gate and started throwing stones; and that the calm group also joined and became riotous and started throwing stones. He said that the Chinese employees did not have radios; that he was communicating on radio with his subordinates; and that he used a phone to call Mr. Que. He said that on 24<sup>th</sup> July no one was injured when mine police fired and that on 25<sup>th</sup> July, Zambia police had taken control and that mine police did not shoot anyone. He admitted that in his statement he stated that he heard a word of command from one of the bosses to "fire" and that police officers started firing tear gas and ammunition, otherwise no one would have been shot.

He reiterated that he prepared the report on behalf of management and put what he believed was important; that there were attachments to the report which contained the information he would have left out; and that the report contains information on who was shot and what happened at Chine House, but he did not know who started the tension on 24<sup>th</sup> July. In relation to page 42 para 2 of his report he said that whenever officers are dispersing rioters they start by using tear gas before using live ammunition and that he has legal training. He insisted that he prepared the report which was signed by his immediate boss. He admitted that the letter at page 1 of the defendants' Bundle of Documents indicates that the large group arrived around 09.00 hours. He said that his house is about 500 metres from China House. This in summary is the evidence adduced by the defendants.

I have received written submissions from counsel on both sides. In brief Mrs. Mbaluku has submitted that Edward Katongo was one of the plaintiffs in the calm group that was stopped from entering the plant due to the confusion which was there at night; that the group had gone to the plant for work and was by the gate and was shot at injuring Katongo; and that John Mubili who was on duty testified that Nelson Jilowa (DW3) shot at the calm group as another group which was noisy was approaching the gate. She says that John Manyoyi (DW2) confirmed that the first group was calm and he was able to check them and that DW3 confirmed that the first group was calm and merely went for work and that this is highlighted in his statement.

She has questioned the firing at workers who were calm of a gunshot which is fatal. She says that Sakeni was inside the gate and saw DW3 shoot and injure Katongo; that the same witness was near DW3 and heard him call Que who was at China house and advised him to shoot; that DW3 was the man in command and admitted that he communicated with Que using the cell phone; and that DW3 confirmed as appears at page 29 lines 12 to 16 of his statement that people were saying that he had killed one and that after the shooting people in anger went to his house and caused damage. She says that it was because DW3 shot at Edward Katongo, who was in a calm defenceless group injuring him, that people targeted DW3's house after the shooting and that the medical report form shows the injury and Katongo's hospitalisation. Mrs. Mbaluku submits further that Katongo was dismissed without any charge or hearing and that this was unlawful and wrongful and therefore should be declared null and void as it contravenes the rules of natural justice.

In relation to the events at China house Mrs. Mbaluku contends that on the evidence several workers including the other plaintiffs were heading to the bus stop where they used to board buses for work when Que a Chinese working for the first defendant shot at the group fatally injuring them. She insists that DW3 phoned Que to open fire as testified by Sakeni who was at the plant with him; that DW3 admitted phoning Que; and that that is why Que who was unprovoked opened fire on workers who were trying to gather at the station injuring them.

She says that the plaintiffs' evidence was consistent that they were all going to the station with the intention of boarding the buses when they saw Que open fire injuring them; that the medical reports especially that of Mwanaumo show that injuries were from the back meaning that they were not advancing but running away; and that Mwanaumo still has pellets in the body. It is also Mrs. Mbaluku's submission that the plaintiffs' witness who was also a union official saw Que suddenly open fire at the workers who were waiting for the bus; that the workers were not armed; and that as a reaction to the shooting after the injured were taken to the hospital an angry mob headed to China house.



She says that the order by DW3 to Que to shoot was unjustified and an abuse of power which caused injury to the plaintiffs; that the mine police were ill equipped to handle guns; and that the first defendant took the second defendant to China after the shooting in order to circumvent justice. She submits that the damage to the plant and Chinese residence as appear in the photographs exhibited by the defendants occurred in the night of 24<sup>th</sup> July and that none of the plaintiffs were present; and that the damage at China house was caused by an angry mob after the shooting as DW3 has admitted that his house was attacked after the shooting when the plaintiffs were in hospital. Counsel contends that the plaintiffs were dismissed upon discharge from hospital without any charge or hearing which was not only wrongful but also unlawful.

On the law she says that in the use of firearms due care must be exercised to avoid injuring the innocent and has referred me to *Mary Musambo Kunda v Attorney General* (1), *Victor Koni v Attorney General* (2) and *Syakalonga v The People* (3) and has urged that opening fire on unarmed workers was uncalled for and amounted to use of unjustifiable and excessive force. She has urged me to take judicial notice of Government's condemnation of the shooting of employees in Sinazeze by Chinese employers over riots associated with demand for improved conditions of service. On dismissal of the plaintiffs without being formally charged or heard, she has referred to *Bank of Zambia v Kasonde* (4) and urged that there was no fair play in the dismissals.

On the other hand Mr. Forrest has submitted based on the plaintiffs' evidence first that evidence by all six of the plaintiff witnesses confirmed that at the material times the plaintiffs were not in the course of employment; that the Zambia police service were called and arrived at the scene on 24<sup>th</sup> July around 20.00 hours; that PW1 did nothing about the disturbances and said that later stones were thrown inside the plant area resulting in windows being shattered and one Chinese being badly injured. He says that contrary to PW1's evidence that one person was shot by Nelson Jilowa on 24<sup>th</sup> July, no one was shot on that date; that Jilowa was armed with a 9mm pistol while injuries on Katongo's legs were caused by gun shots from a shot gun as confirmed by Katongo's report form; and that therefore Katongo was not shot by Jilowa.

Mr. Forrest further submits that Albert Mwanaumo confirmed that he and the other plaintiffs who were shot, were inside the yard around China house; that at the time he was shot he was not in the course of employment; and that from his evidence it is clear that only those rioters who went inside the Chinese residence were shot on 25<sup>th</sup> July. He says that the medical reports for all the plaintiffs show that only pellets were found and not bullets and that it follows logically and in fact that apart from Katongo the other plaintiffs took part in a riot on the 25<sup>th</sup> July; that evidence is available from the defence that substantial damage was caused at the plant on 24<sup>th</sup> and 25<sup>th</sup> July; and that the plaintiffs when shot were on the way to work, but not in the course of their employment.

Counsel says that PW3 further stated that he was shot outside China house and that PW2 was not telling the truth and that according to PW4 Mr. Que shot them at China house inside the yard and that at that time they were not in the course of their employment and were in the process of destroying the defendant's property.

With regard to the defence evidence Mr. Forrest submits that both DWs 1 and 2 gave evidence of the violent and riotous conduct of the mine employees on both days and of the damage caused and resulting injuries to the plant area and employees of the defendant; and that apart from a short time on 24<sup>th</sup> July between 18.30 hours and 20.00 hours when the plant gates were manned by mine police, the control of the situation was in the hands of Zambia police officers. He says that the action taken by both management and Zambia police was not excessive and was taken after substantial damage had been done to protect the defendant's property and that the employees had no right to cause such criminal damage.

Counsel contends that DW3 who at the time was head of mine police confirmed DWs 1 and 2's evidence and also gave evidence of the riot and damage caused by the plaintiffs and others at China house; that windows were shattered, that stones were thrown terrorising the occupiers; and that the house occupied by DW3 and his family was set on fire. He says that the plaintiffs were shot inside the yard at China house as they were in the course of the riot and then escaped by way of jumping over the wall.

He contends that the plaintiffs having been shot with a shot gun during the riot at China house include some of the total number who caused the damage to the defendant's property at that place and that if they had not participated in the riot and consequential damage they would not have been shot and that the second defendant was not on duty at the time, but was protecting his family and company property.

In conclusion counsel has submitted that there is more than sufficient evidence to show that the plaintiffs were shot to restrain them from a criminal act as set out in the report at page 46 of the defendants' Bundle of Documents; that the defendant drew the reasonable conclusion that as an employer it made a proper investigation to establish the facts of the conduct of the plaintiffs and other employees; that the dismissal of the plaintiffs was therefore reasonable and justified; and that by their said conduct the plaintiffs were properly terminated and dismissed and are not entitled to damages at all. Counsel has also referred me to a schedule of authorities.

I have considered the evidence and the submissions by counsel on both sides. On the evidence it is common cause that the six plaintiffs namely Albert Mwanaumo (PW2), Elias Siame (PW8), Edward Katongo (PW5), Moses Makayi (PW3), John Chisenga (PW7) and Sakeni Lassmith (PW6) were all employed by the defendant company in various positions. It is common ground that on 24<sup>th</sup> and 25<sup>th</sup> July 2006, miners at the defendant company rioted for reasons that from the report at page 41 of the defendants' Bundle of Documents related to some misunderstanding between management and NUMAW on interpretation of some items in the Collective Agreement. It is a fact that the riot was started by miners that reported on duty in the night shift on 24<sup>th</sup> July 2006, after they were allowed into the plant by PW1. It is a fact that during the riot in the night the guardroom at the main gate also known as the East gate was damaged, that windows were shattered and documents destroyed and set on fire inside the guardroom. It is also a fact that one Chinese national and member of staff whose photograph appears at pages 46 and 47 of the defendant's Bundle of Documents was seriously beaten by the rioting miners and that he had to be rescued by Mr. Nelson Jilowa (DW3) who was the Head of Mine police.

I accept that during the riot in the night of 24<sup>th</sup> July 2006, DW3 and his officers fired gun shots in order to rescue the Chinese employee. It is a fact that none of the rioting miners were injured in the night and that some other Chinese employees and mine police officers including DWs 1 and 3 had to run for their lives and to hide from the rioters. It is quite clear that the situation was volatile and that Zambia police officers were called to help contain the situation. I accept that after the arrival of the Zambia police, the rioters threw stones and other missiles at the officers, but the police managed to drive the rioters out of the plant area using tear gas and to contain the situation and stopped the commotion.

It is also common ground that the next morning on 25<sup>th</sup> July 2006, the first group of miners reported on duty at 06.00 hours in the morning and did so quietly. I accept that PW5 was in that first group and that the group was refused entry to the plant area and told to remain outside the gate. It is quite clear that both Zambia police and mine police officers were present at the gate and that PW1 who had been on duty in the night shift was still present at the gate that morning and was the one given specific instructions not to allow any miners to enter the plant and that he followed the instructions.

It is also common ground that around 07.30 hours a second group of miners arrived from Chambishi Township on foot, with a lot of noise and stopped by the gate where the first group of miners was and started throwing stones at Zambia police and mine police officers who were inside the gate, and were combined to maintain order. The fact that the rioting miners reached the gate and threw stones at the officers inside the gate is confirmed by PW1, the plaintiffs' own witness. Therefore, I do not accept PW5's evidence that he did not see the crowd reach the gate or throw stones inside the plant area or PW6's evidence that before Katongo was shot there were no stones being thrown. I accept that PW6 was injured or stoned in the plant area and not at China house as pleaded in para 8 of the amended defence and counterclaim. Further, it is common ground that PW5 was shot in both legs and injured during the riot at the plant in the morning of 25<sup>th</sup> July 2006. As I have already stated he arrived with the first bus around 06.00 hours and was in the calm group.

In my view, the first question to determine is who shot Katongo, was it DW3 or it were Zambia police officers; and the second question is whether the shooting was justified. On the first question of who shot PW5, it is the defence position that DW3 was armed with a 9mm pistol while the injuries to PW5's legs were caused by a shot gun and that therefore PW5 was not shot by DW3. On the other hand it is DW3's evidence that none of the mine police officers were armed on the 25<sup>th</sup> as the Zambia police officers had taken control and that the Zambia police officers were firing tear gas and ammunition as appears in his statement at page 28 of the defendant's Bundle of Documents.

I have before me clear evidence from three witnesses, PWs 1, 5 and 6 to the effect that they saw DW3 produce a pistol and fire into the crowd. PW1 was a mine police officer at the material time. As I have already said he was the one with specific instructions to ensure that the miners remained at the gate. He also saw both groups of miners arrive at the gate. According to him at the time the second group arrived the first group of miners was being addressed by members of the Union and DW3 fired the pistol into the crowd that was being addressed and shot one person. The evidence that the first group of miners was being addressed by Union officials at the time the second and riotous group arrived has not been challenged. Further still, PW1 stated that he was only one metre from DW3. At such short distance I am convinced that he was reliable in his observation of the events that morning.

PW1's evidence is fortified by that of PW5 himself. He said that after a big crowd of miners arrived on foot and drew near the gate, Zambia police officers who had tear gas canisters started to prepare and that before the crowd reached the gate he saw DW3 produce a pistol and fired the gun when the crowd approached. The evidence of PWs 1 and 5 is further supported by that of PW6 who had arrived at work on a bicycle and entered the plant area. On the evidence PW6 remained in the plant area because when he was told to go outside, he found the gate closed. He saw the people standing by the gate; the big crowd approaching with a lot of noise and DW3 produce a pistol and shoot one person. He saw that DW3 carried the pistol because he stood only about two metres away while PW5 was about five metres away.

In my view the defence submission that DW3 arrived with a 9mm pistol further corroborates the evidence of the three witnesses that DW3 had a pistol on the morning of 25<sup>th</sup> July and that he fired the shot that caught PW5 in both legs. PWs 1, 5 and 6 may all have been dismissed by the defendant following the riot, but I am not persuaded that they have concocted the story that DW3, the head of mine police produced a pistol and fired into the crowd.

I do not agree with the submission by Mr. Forrest that the injuries to PW5's legs were caused by gunshots from a shot gun. There is no evidence before me that any of the Zambia police and mine police officers were armed with a shot gun on 25<sup>th</sup> July 2006 or that pellets were found in PW5's legs. The medical report form at page 16 of the plaintiffs' Bundle of Documents in the name of Edward Katongo gives details of injury as gun wounds on both legs and the circumstances that he was shot at during the disturbances (rioting) at NFC Africa Mining Plc. The medical officer who examined PW5 confirmed the wounds to both legs and the X-rays revealed no foreign body or bone fracture. I believe that depending on how PW5 was standing the same bullet from the pistol that was fired by DW3 caught PW5 in both legs and I find this as a fact. Therefore, I am satisfied that DW3 and not the Zambia police officers shot PW5 when he fired into the crowd. This explains why people believed that DW3 had shot one person as he stated in his own statement.

I now turn to the second question of whether the shooting was justified. As submitted by Mrs. Mbaluku it is quite clear on the evidence that the first group in which PW5 was was calm and that their intention was merely to go for work. In DW3's words, the first mob went purely for work because they did day work on 24<sup>th</sup> July and did not know what transpired in the night and that the second group was the one armed with stones and machetes and other instruments and did not want to listen and was riotous. On the evidence I entirely agree with Mrs. Mbaluku that due care and severe restraint should have been exercised in the use of firearms to avoid injuring the innocent.

I am quite convinced that the rioters at the plant area were involved in a criminal act and that when they got to the gate they started stoning the Zambia police and mine police officers who were inside the gate. I am also convinced that the rioters mixed with the calm group that was being addressed by Union officials, and that the rioters were the same people that had started the riot in the night of 24<sup>th</sup> July 2006. However, I am not persuaded by DW3's testimony that the calm group also became riotous and started throwing stones. It is clear to me that the second group arrived well armed with stones, machetes and other instruments. But there is no evidence of where the first, calm and understanding group picked such offensive weapons from for them to join the second group in riotous behaviour and there is no evidence that the Riot Act was read out to the rioting employees as pleaded in para. 6 of the amended defence and counterclaim.

Suffice to add that under section 77 of the Penal Code Cap. 87, any magistrate, or any police officer of or above the rank of inspector, or any commissioned officer in the Defence Force, in whose view twelve or more persons are riotously assembled, or who apprehends that a riot is about to be committed by twelve or more persons assembled within his view, may make or cause to be made a proclamation in the President's name, in such form as he thinks fit, commanding the rioters or persons so assembled to disperse peaceably.

Further by section 78 of the Penal Code, if upon the expiration of a reasonable time after such proclamation is made, or after the making of such proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make proclamation, or any police officer, or any other person acting in aid of such person or police officer, may do all things necessary for dispersing the persons so continuing assembled, or for apprehending them or any of them, and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person. That does not seem to have been the case here.

Furthermore, there is very clear evidence that the gate remained locked and that none of the workers outside entered the plant area. It is a fact on the evidence that the damage to the guardroom, offices and to the vehicles that are captured on the defendant's Bundle of Documents was done in the night of 24<sup>th</sup> December 2006. On 25<sup>th</sup> July police officers started firing tear gas as the riotous group started throwing stones, making it difficult for me to appreciate at what point the gate was uprooted and thrown down. If it were true that the gate was uprooted, the rioters would have entered the plant area. They remained outside the gate because the gate remained intact.

At pages 46, 47 and 50 of the defendant's Bundle of Documents, the defendant has shown the injured Chinese national and the damage to the guardroom at East gate, but there is no photograph anywhere of the uprooted gate. On the evidence the rest of the damage by the rioters captured at pages 46 to 50 of the same Bundle of Documents occurred on 25<sup>th</sup> July 2006, after the shootings. In addition Annex 1 to the report compiled by DW3 at page 45 of the same Bundle of Documents does not include the gate as one of the items damaged by riotous behavior.

In conclusion on this aspect of the matter, I find and hold that not all miners were rioting on 25<sup>th</sup> July 2006 and that the shooting by DW3 into the crowd without bearing in mind the safety of the other group that was being addressed by Union officials was unjustified and therefore wrongful. As the irate miners did not enter the plant area, the Zambia police and mine police officers who were inside the plant area should have withdrawn to a safe distance when the riotous group started throwing stones or the police officers should have followed the provisions of sections 77 and 78 of the Penal Code.

I find and hold that firing into the crowd amounted to use of excessive force and that the shooting of Edward Katongo was wrongful. Accordingly I enter judgment in favour of PW5. In addition since DW3 was on duty when he shot PW5, the 1<sup>st</sup> defendant is vicariously liable.



I turn next to the events that occurred at China house, about one and half kilometers from the plant area. On the evidence it is a fact that PWs 2, 3, 7 and 8 were all injured on 25<sup>th</sup> July 2006 when Mr. Que, the 2<sup>nd</sup> defendant fired from a shot gun at China house. It is in evidence and not disputed that Kennedy Mumba Besa (PW4) saw Mr. Que come out of China House and start shooting. It is also plain that none of the defence witnesses saw what happened at China house on the material date as they were all at the plant area. I am told that Mr. Que who fired the shot gun is no longer in the country and was taken back to China by the 1<sup>st</sup> defendant soon after the events in question. He has not adduced any evidence to highlight the circumstances under which he fired the shot or shots that injured the said plaintiffs. In the result only the plaintiffs' version of the events and what transpired that fateful morning is before me. Accordingly I shall accept the facts as narrated by the plaintiffs.

In his submissions Mr. Forrest has urged that if the plaintiffs had not participated in the riot and consequential damage to the defendant's property they would not have been shot and that the 2<sup>nd</sup> defendant was not on duty at the time, but was protecting his family and company property. He has urged that the other plaintiffs were also not on duty. On the plaintiffs' evidence, it is quite clear that the four plaintiffs started off from their respective houses on 25<sup>th</sup> July 2006 and that they went to the station outside China house between 06.00 hours and 07.00 hours in order to board mine bus(es). They were all on their way to work in the day shift. There is no dispute that they used to board mine buses from that station or that China house was surrounded by a wall fence.

From the plaintiffs' evidence it is also clear that when PW2 got to the station he saw a lot of miners standing around and when he drew near he heard a gunshot and saw one of the miners fall down. As he tried to assist the injured person he heard another gunshot and he was shot in the back. When PW3 reached the station he found miners standing and there was some commotion. As he approached the crowd he heard a gunshot and saw a miner fall down. He got scared and started running away when he was also shot.

According to PW4, a Union member, when he reached the station some of the employees inquired from him why there were no buses. He then saw Mr. Que come out of China house and start to shoot. He saw PWs 2 and 8 fall down as they were shot. For PW7 when he got to the station there were many other people. He stood for a short while and then he was shot. According to PW7 the only shot fired was inside China house, but he did not see the person who shot him. And lastly for PW8 when he reached at the station he saw a lot of people. He too tried to inquire why there was no bus when he heard a gunshot and he fell down.

In my judgment the defendants have not called any eye witnesses to contradict the plaintiffs' evidence. Quite clearly, there were many people at the station waiting for buses and there was some commotion. Some of the employees were trying to establish why there were no buses when the shooting started. All the four plaintiffs that were shot have denied that they entered the Chinese residence area or that they were involved in a riot at China house or that they were shot as they were running away trying to climb the wall fence. PW2 appeared somehow confused under cross-examination, but he still insisted that he was shot outside China house, and I believe him. The plaintiffs were in the day shift. As DW3 stated they too could not have known what had happened in the night and were merely going for work. The commotion in the crowd could be attributed to lack of transport that morning and not to rioting.

On the totality of the evidence and in the absence of an eye witness account on the part of the defendants, I am inclined to believe the plaintiffs that they were all shot outside the Chinese residence at the station as they waited to board buses to go to the plant area. I am not persuaded that the plaintiffs participated in the riot at China house or that they were shot to restrain them from a criminal act as they climbed over the wall. I have already made the point that PW4 who is not even one of the plaintiffs saw Mr. Que who came out of China house and started shooting. Further in my judgment there is no evidence of the actual time when the damage was caused at China house. It may be true as submitted by Mrs. Mbaluku that the damage was caused by an angry mob after the shooting, as DW3's house was damaged after the shooting at the plant area.

My finding on this point is fortified by the defendants' own plea in para. 7 of the amended defence and counterclaim that the rioters ran from the mine plant area to China house in Chambishi Township where they continued to riot and that damage was caused to houses and entrance gate and that one house was set on fire. But I am not satisfied on the evidence that the rioters from the plant area included the plaintiffs as four of the plaintiffs were at the station outside China house waiting to go to the plant area. The 2<sup>nd</sup> defendant should have adduced evidence to show why he fired at the workers and from where he fired.

The third question in my view is whether the plaintiffs and the 2<sup>nd</sup> defendant were on duty. It is a fact on the evidence that all the plaintiffs including PW4 were at the station waiting for buses to go for work. It is a fact that they were not required to walk to the plant area and that they always boarded buses from the station outside China house. Had it not been a practice that they board mine buses they would not have been at the station. I have not been referred to any authority on this aspect of the matter to persuade me that the plaintiffs were not on duty. However, on the facts of this case I am convinced that the plaintiffs were in the course of employment when they were shot and injured. I believe that it was for that very reason that the 1<sup>st</sup> defendant took the plaintiffs to Government clinic and later to Sinozam hospital for treatment.

In relation to the 2<sup>nd</sup> defendant and the defence submission that he was not on duty at the time, but was protecting his family and company property, there is no evidence by any of the three defendants to that effect. The only evidence before me is by the plaintiffs that PW6 heard DW3 call a Chinese by the name of Mr. Que and tell him to shoot the people at China house. On the evidence PW6 stood alongside DW3 about two metres away when he heard the instruction. As submitted by Mrs. Mbaluku, DW3 conceded that he used a phone to call Mr. Que, but he did not elaborate what the call was about. The other evidence which I have already alluded to is that of PW4 to the effect that as they were discussing why there were no buses at the station he saw Mr. Que who came out of China house and started shooting.

Upon the evidence I am inclined to believe and accept that PW6 indeed heard DW3 instruct Mr. Que to shoot the people at China house and that Mr. Que obliged and went outside and shot at the miners at the station. There is further evidence by PW4 which has not been challenged and which I accept that they had a meeting with management the following day over the shooting in which he raised a motion and informed the meeting that he was present at the shooting and that management responded that Mr. Que had been sent to China and that nothing was going to happen no matter what they did. On the evidence this caused PW4 his job.

On the facts I agree entirely with the submission by Mrs. Mbaluku that opening fire on unarmed workers was uncalled for and amounted to use of unjustifiable and excessive force and that the order or instruction by DW3 to Mr. Que to shoot was unjustified and an abuse of power. I also find and hold that the injuries sustained by the four plaintiffs were a direct consequence of the order given by DW3 to Mr. Que and that the 1<sup>st</sup> defendant is vicariously liable for the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In conclusion on this aspect of the matter, I find and hold that the shooting of the plaintiffs was unlawful and wrongful and that they are entitled to damages for unlawful and wrongful shooting, including damages for pain and suffering to be assessed by the learned Deputy Registrar upon application. Accordingly I enter judgment for all the plaintiffs excluding Lassmith Sakeni who was not shot, but was stoned at the plant area.

The defendants have pleaded further or in the alternative in para 11. of the amended defence and counterclaim that the plaintiffs and each of them with full knowledge of the risk of injury or damage to himself by their acts or conduct voluntarily consented to accept the risk of injury and to waive any claim in respect of any injury or damage that may have been occasioned to them by reason of the action taken by the Zambia police and Mine police to stop the plaintiffs and other rioters from pursuing the said riotous conduct and malicious damage resulting there from and that in the premises the plaintiffs are not entitled to maintain their claims against the defendants. I find this defence by the defendants to be very attractive, but I am not persuaded.

In my judgment the plaintiffs could not have consented to the risk of injury or waived any claim in respect of injury as there is no conclusive evidence before me that they actually took part in the riot. I have already made the point that as the riotous group merged with the calm group, the Zambia police and Mine police should have exercised caution and that the firing by DW3 into the crowd instead of withdrawing amounted to use of excessive force. I have also made the point that the plaintiffs who were at China house were at the station waiting for buses and that they did not take part in the riot there which in fact occurred after the shooting. Accordingly this line of defence fails.

I turn next to the claim for an order for provision of proper medical attention for the injured plaintiffs and/or refund of all expenses incurred in this regard. It is common ground that all the plaintiffs were taken to the clinic and later to Sinozam hospital after they were shot. The medical report forms at pages 1 to 22 of the plaintiffs' Bundle of Documents show the nature of injuries sustained. Lassmith Sakeni who was also injured in the mouth and had two upper teeth knocked out was also taken to the clinic for treatment. On the evidence the plaintiffs were treated at the 1<sup>st</sup> defendant's expense and it seems to me that apart from Albert Mwanaumo (PW2) all the other plaintiffs were successfully treated at Sinozam Friendship hospital as pleaded in para 8 of the amended defence and counterclaim and I find that as a fact. Further there is no evidence before me that they have expended money on treatment following the shooting. Therefore they cannot be entitled to a refund of all or any expenses incurred in this regard.

In relation to PW2, it is a fact that he still has two pellets embedded in his chest which cannot be removed locally. The letter at page 3 of the plaintiffs' Bundle of Documents written by Dr. Qin Xi Sheng, Chief Medical Officer at Sinozam Friendship Hospital to the surgeon, Ndola Central hospital dated 17<sup>th</sup> August 2006 shows that PW2 was taken to Sinozam hospital on 25<sup>th</sup> July 2006 with gunshot wounds to his right upper arm and posterior chest wall; that X-rays revealed pellets imbedded on his right shoulder area and left upper chest; and that he recovered well with conservative treatment, but would like to have the pellets removed at Ndola Central hospital.

The fact that the two pellets were embedded in PW2's right shoulder and left chest was confirmed by Ndola Central hospital as appears at pages 4 and 5 of the same Bundle of Documents. It seems to me that Ndola Central hospital also failed to remove the pellets because they are in dangerous positions and that PW2 needs expert treatment to remove the pellets. It is also in evidence and not disputed that PW2 was entitled to medical treatment at his employer's expense as a condition of his employment. In view of my finding that the 1<sup>st</sup> defendant is vicariously liable for the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants resulting in the shooting of the plaintiffs, I am satisfied that PW2 is entitled to expert treatment at the expense of the employer be it within or outside the country. Accordingly I enter judgment in favour of PW2 and order that the 1<sup>st</sup> defendant provides proper medical attention for the removal of the pellet (s) that are still embedded in his chest and that this be done immediately as PW2 has already lived with the foreign bodies in his chest for over three years.

I turn next to the claim for a declaration that the dismissal of the plaintiffs was unlawful and wrongful and for damages for wrongful and unlawful dismissal. On the totality of the evidence it is common ground that all the six plaintiffs were dismissed from employment after they were discharged from the hospital. It seems to me that they were not charged with any offence and that there was no disciplinary hearing for any of them. Further apart from Elias Siame (PW8) who was given the summary dismissal letter at page 20 of the plaintiffs' Bundle of Documents, none of the other plaintiffs were written to. Their dismissal was by word of mouth.

As rightly submitted by Mr. Forrest it seems to be clear to me from *Agholor v Cheesebrough Pond's (Zambia) Limited* (10), that a master can terminate a contract of employment at any time, even with immediate effect and for any reason and that if he terminates outside the provisions of the contract then he is in breach thereof and is liable in damages for breach of contract; and further that where a master "dismisses" a servant he terminates the contract summarily without any notice, on the grounds of misconduct, negligence or incompetence and that if such grounds are justified the servant forfeits the right to any notice whatsoever and a number of other benefits.

Further it is evident from *Zambia National Provident Fund v Yekweniya Mbinwa Chirwa* (5) that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and that the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity. In that particular case the deceased employee by his own admission was guilty of the offence of theft for which the punishment of dismissal was a proper one.

In distinguishing the case of *Contract Haulage Limited v Kamayoyo* (6) the Supreme Court stated that in that case they did not take into consideration the situation which would arise where, despite a failure to comply with a certain procedure before taking disciplinary action, no injustice resulted, and confirmed that that judgment states the law as it relates to a dismissal being *ultra vires* and in consequence null and void. The Supreme Court further stated that where the procedural requirements before disciplinary action are not statutory but merely form part of the conditions of service in the contract between the parties, a failure to follow such procedure would be a breach of contract and could possibly give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void. Further, I agree entirely with Mr. Forrest that the principle in *Zambia National Provident Fund v Chirwa* (5) was upheld in *Zambia Electricity Supply Corporation Limited v Muyambango* (7).

Furthermore, the Supreme Court restated its decision in the case of *Attorney General v Richard Jackson Phiri* (8) that it is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done; and that the duty of the court is to examine if there was the necessary disciplinary power and if it was exercised in due form. In the later case the Supreme Court was satisfied from the evidence on record that the necessary disciplinary power existed and that it was exercised in due form as all the procedures were followed. This was also the decision in *Mulungushi Investments Limited v Cradwell Mafumba* (9) also referred to by Mr. Forrest.

Turning back to this particular case, it is very clear to me that the only ground of dismissal of the plaintiffs is that they took part in the riot on 25<sup>th</sup> July 2006. In my judgment the only document before me is the summary dismissal letter addressed to Siame Elias (PW8) dated 6<sup>th</sup> September 2006 indicating that following the disciplinary hearing held on 6<sup>th</sup> September 2006 for inciting a strike and riotous behavior, he had been summarily dismissed from the service of the company with effect from that date and that if he wished he could appeal within two working days by notifying the Human Resource Officer. No other plaintiffs were written to and all the plaintiffs have categorically stated that there was no hearing and that they were dismissed without being heard. I see nothing on the Bundles of Documents before me to show that disciplinary hearings were conducted or that the plaintiffs were charged. There are no complaint or charge forms or minutes of disciplinary hearings.

In the circumstances I am inclined to believe the plaintiffs that there were no disciplinary hearings conducted and that that was contrary to the company's disciplinary procedures. Therefore, it cannot be true as pleaded in para 9 of the amended defence and counterclaim that the plaintiffs and each of them failed to return to work after recovery or that though given an opportunity to appeal against the dismissals they did not do so.

In relation to the allegation by the defence that the dismissal of the plaintiffs was reasonable and justified as they were involved in a criminal act, in my judgment the evidence before me does not establish that the plaintiffs were involved in the riot either on 24<sup>th</sup> July 2006 at the plant area or on 25<sup>th</sup> July 2006 at the plant area or at China house. I think that this ground for dismissal of the plaintiffs cannot be sustained.

Further still, there is no evidence before me to support the defendants' plea in para. 10 of the amended defence and counterclaim that on 25<sup>th</sup> July 2006 the plaintiffs with others of the 1<sup>st</sup> defendant's employees in furtherance of the riots hijacked a staff bus belonging to the company on the Chambishi/Kitwe Road and set it on fire thereby causing further damage to the 1<sup>st</sup> defendant.



From the letters at pages 18 and 19 of the plaintiffs' Bundle of Documents, it seems to me that Lassmith Sakeni was dismissed because he was sick and was still waiting for a recommendation from a doctor. However, it seems that he was paid certain moneys although he was still claiming underpayment of wages, leave dues for four months and repatriation. On the evidence he had worked for the defendant company for only 6 months before he was dismissed and he was the only plaintiff who was not shot.

On the facts before me and on the totality of the evidence I am satisfied that the plaintiffs have established on the balance of probabilities that their dismissal from employment was wrongful and that they are all entitled to damages for wrongful dismissal. There can be no separate award for loss of earnings for a period not worked for by the plaintiffs. Accordingly I enter judgment in favour of the plaintiffs for damages to be assessed by the learned Deputy Registrar upon application less income tax. For PW6 any amounts found due to him should be less by any payments that he received.

In addition I award interest at 10% per annum both on damages for unlawful and wrongful shooting and pain and suffering, and damages for wrongful dismissal from the date of writ to the date of judgment and thereafter at the current Bank of Zambia lending rate until full payment.

I turn lastly to the 1<sup>st</sup> defendant's counterclaim for damages for loss and damage suffered as outlined in para 13 of the amended defence and counterclaim. Upon the evidence it is common ground that the 1<sup>st</sup> defendant suffered loss and damage and there is no serious dispute that damage was caused to the property listed in para. 13 or that man hours or production was lost due to the riot and work stoppage.

However, the loss and damage cannot be attributed to the plaintiffs especially in view of my finding that the plaintiffs did not personally participate in the riots either on 24<sup>th</sup> July or 25<sup>th</sup> July 2006. In para 2 of the defence to counterclaim the plaintiffs have in fact denied destroying any of the items listed in para. 13.

On the facts of this case I can only sympathise with the 1<sup>st</sup> defendant, but I am not satisfied on the balance of probabilities that the case has been made out against the six plaintiffs. In the circumstances the counterclaim fails and is dismissed. The costs of the proceedings are for the plaintiffs to be taxed if not agreed.

Delivered in Open court at Kitwe this 30<sup>th</sup> day of March 2011

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**R.M.C. Kaoma**  
**JUDGE**