

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2018/HP/0194

BETWEEN

ROBERT ZULU

AND

ATTORNEY GENERAL



PLAINTIFF

DEFENDANT

*Before the Honorable Lady Justice C. Lombe Phiri in Chambers*

*For the Plaintiff: Mr. S. L. Mbewe - Keith Mweemba Advocates*

*For the Defendant: Mr C. Mulonda - SSA, AG's Chambers*

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## JUDGMENT

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CASES REFERRED TO:

1. **Barclays Bank Zambia v Stephenson Zawinja Gondwe, Appeal No. 135 of 2016**
2. **John Nyambe Lubinda v The People (1988-89) Z.R 111, Camfed Zambia v Yvonne Matebele Sichingabula Appeal No. 111 of 2016 (SCZ/8/44/2016)**
3. **Caroline Tomaidah Daka vs Zambia National Commercial Bank Limited PLC 2008/HP/ 0846**
4. **The Attorney General vs Richard Jackson Phiri (1988-1989)**
5. **Chimanga Changa Limited v Ngombe (2010) Z.R. Vol1, p 208**
6. **Jones v Lee and Guilding (1980) ICR 310**

7. **The Attorney General v Richard Jackson Phiri (1988 - 1989) Z.R. 121 (S.C.)**

**MATERIALS REFERED TO:**

1. **Halsbury Laws of England 4<sup>th</sup> Edition 16 p 414 para 451**
2. **Cases and Material 2011 by W.S. Mwenda at page 105**

This is a matter where the Plaintiff took out a Writ of Summons and Statement of Claim wherein, he claimed for: -

- i. *A declaration that there was no substratum of facts established to support the disciplinary measures taken against the Plaintiff by the Defendant through the Drug Enforcement Commission;*
- ii. *A declaration that no allegation of receiving/accepting K200 was leveled against the Plaintiff in the charge letter to warrant disciplinary proceedings and subsequent dismissal of the Plaintiff from employment;*
- iii. *A declaration that there was no evidence to sustain the charge of receiving/accepting K200 leveled against the Plaintiff by the Defendant in the disciplinary proceedings even though the Defendant went through the proper motions and followed the correct disciplinary procedures;*
- iv. *A declaration that there was no substratum of facts established to warrant the dismissal of the Plaintiff from the employment with the Drug Enforcement Commission;*



- v. *A declaration that the Plaintiffs dismissal from employment by the Defendant is wrongful as such null and void;*
- vi. *An order that the Plaintiff be retired with full retirement benefits having served for over 27 years;*
- vii. *Interest thereon; and*
- viii. *Costs.*

In the statement of claim filed on 30<sup>th</sup> January, 2018 it was averred that in or around July, 1990 the Plaintiff joined the Government of the Republic of Zambia as an attested Police Officer under the Zambia Police Force (now “Service”) under the Paramilitary Unit working as an instructor at the Paramilitary School in Swondela. It was further averred that in April 1999, the Plaintiff was transferred from the Paramilitary Unit to the Drug Enforcement Commission as an Assistant Security Officer. Further that by 8<sup>th</sup> August, 2017 when the Plaintiff was dismissed from his employment, he was holding the position Assistant Investigations Officer under the Drug Enforcement Commission in Lusaka Province having served the Government of the Republic of Zambia for 27 years.

It was averred that on 20<sup>th</sup> February, 2017 the Plaintiff received a charge letter from the Drug Enforcement Commission authored by Joseph Sakala, a Chief Investigations Officer, captioned “*Exculpate Yourself*” outlining allegations of discreditable conduct and bribery/ corrupt practices.

It was stated that the allegations against the Plaintiff were as follows;



- (i) That he did solicit K950.00 from a Mr Kapambwe Mulenga for the release of a suspect namely Banda Sam who was apprehended on 11<sup>th</sup> February, 2017, with a smoked joint weighing 0.3 grams, which conduct tarnished the image and integrity of Commission contrary to rule 12(1) (d) part IV of the Conduct and Discipline of the Drug Enforcement Commission Staff Rules.
  
- (ii) That he did accept cash payment amounting to K950.00 from Mr. Kapambwe Mulenga and promised to assist in the release of Sam Banda from lawful custody contrary to Code 11(a) Category E of the Disciplinary Code and Procedures for handling offences in the Public Service.

The Plaintiff stated that the said letter required him to respond to the allegation the same day being 20<sup>th</sup> February, 2017 before 15:00 hours. Further, that he exculpated himself the following day wherein he denied all the alleged charges. He also stated that at the purported disciplinary hearing he asked the Panel to avail Mr. Kapambwe Mulenga and Sam Banda so that he could cross examine them. The Committee, however, refused to do so. Furthermore, that after the Plaintiff gave his explanation, the Panel changed its position and alleged that the Plaintiff had received K200.00 from Daniel Mwamba, an Assistant Investigations Officer.

He further averred that the purported K200.00 was never part of the charges in the letter dated 20<sup>th</sup> February, 2017. He also stated that on 8<sup>th</sup> August, 2017 he received a dismissal letter dismissing him from the



employment with the Drug Enforcement Commission. Further that the said dismissal letter set out as a ground for dismissal, that the Drug Enforcement Commission had information that the Plaintiff received K200 from Daniel Mwamba who received K950.00 from a relative of Sam Banda, a suspect who was arrested on 11<sup>th</sup> February, 2017. It was averred that the Plaintiff appealed to the Public Service Management Division against the decision of the Disciplinary Committee That Public Service Management Division, upheld the decision of the Drug Enforcement Commission to dismiss the Plaintiff from employment. The Plaintiff argued that the charges levelled against him by the Drug Enforcement Commission were frivolous, arbitrary and unmeritorious. Further that there was no sufficient justification to warrant his dismissal from the employment with the Drug Enforcement Commission.

In their Defence the Defendant admitted that the Plaintiff was employed in the Government of the Republic of Zambia as an attested Police Officer under the Zambia Police Force (now "Service") under the Paramilitary Unit working as an instructor at the Paramilitary School in Swondela. Further that by 8<sup>th</sup> August, 2017 when the Plaintiff was dismissed from his employment, he was holding the position of an Assistant Investigations Officer under the Drug Enforcement Commission in Lusaka Province. It was also admitted that on 21<sup>st</sup> August, 2017 the Plaintiff exculpated himself denying the purported charges. The Defendant denied the assertion by the Plaintiff that the charge of receiving K200 came as an afterthought upon the Plaintiff exonerating himself over the earlier charge of receiving K950.00. The Defendant also denied the fact that the allegation that the Plaintiff received K200 was not part of the initial charges against the Defendant. The other allegation denied by the Defendant was the assertion that the



Committee was bias. The Defendant also averred that the Drug Enforcement Commission conducted an operation in George Compound in the city of Lusaka where one male named Sam Banda was apprehended. It was further stated in Defence that the Plaintiff and another officer by the name of Mwamba received K950 from the relatives to the said suspect out of which the said Mwamba gave K200 to the Plaintiff. It was also stated in Defence that as a result of the above, the Plaintiff was charged for discreditable conduct and bribery. Further that the Plaintiff was given an opportunity to exculpate himself and admitted having received K200 from Mr. Daniel Mwamba. The Defendant denied having acted frivolously and unmeritoriously when it invoked the jurisdiction to dismiss the Plaintiff.

It is common cause that:

- (a) The Plaintiff was employed by the Defendant in July, 1990 as an attested Police Officer under the Zambia Police Force (now service) under the Paramilitary Unit working as an instructor at a Paramilitary School in Swondela.
- (b) In April 1999, the Plaintiff was transferred from the Paramilitary Unit to the Drug Enforcement Commission as an Assistant Security Officer.
- (c) Further that by 8<sup>th</sup> August, 2017 when the Plaintiff was dismissed from his employment, he was holding the position of an Assistant Investigations Officer under the Drug Enforcement Commission in Lusaka Province.
- (d) At the time of his dismissal he had served the Defendant for 27 years.

- (e) On 20<sup>th</sup> February, 2017 the Plaintiff received a charge letter from the Drug Enforcement Commission for Discreditable Conduct and Bribery/Corruption.
- (f) The charge letter required the Plaintiff to forward his response to the undersigned the same day.
- (g) A disciplinary hearing was conducted after which the Plaintiff was dismissed.
- (h) The Plaintiff appealed and the appellate tribunal upheld the decision of the Drug Enforcement Disciplinary Committee.

This Court is called upon to determine whether the dismissal was wrongful, also whether there was any substratum of facts established to support the dismissal of the Plaintiff.

The main argument in the submission by counsel for the Plaintiff was that the charges levelled against the Plaintiff were serious and the Defendant ought to have called as witnesses at the tribunal hearing, Mr Kapambwe Mulenga or Daniel Mwamba. The Plaintiff further contends that the complaint letter upon which the charges were drawn was also not produced at the Provincial Tribunal hearing. The Plaintiff relied on the case of **Barclays Bank Zambia v Stephenson Zawinja Gondwe, Appeal No. 135 of 2016<sup>(1)</sup>**. Further reference was made to the cases of **John Nyambe Lubinda v The People (1988-89) Z.R 111, Camfed Zambia v Yvonne Matebele Sichingabula Appeal No. 111 of 2016 (SCZ/8/44/2016<sup>(2)</sup>**, and



**Caroline Tomaidah Daka vs Zambia National Commercial Bank Limited**  
**PLC 2008/HP/ 0846<sup>(3)</sup>** among other authorities.

The Defendant submitted that the Plaintiff was given an opportunity to be heard and to bring witnesses at the tribunal but he did not. Also that the Plaintiff during the tribunal hearing admitted to having been given an amount of K200 by Mr. Mwamba from the money that he received through the corrupt practices. It was further contended that the Plaintiff admitted at the Provincial Tribunal hearing to meeting one of the relatives of the suspect Mr Sam Banda who was charged with the offence of trafficking. Also, that he confirmed being aware that the relatives to the suspect were looking for a way to have the suspect released from custody. Reference was made to the cases of **The Attorney General vs Richard Jackson Phiri (1988-1989)<sup>(4)</sup>** **Chimanga Changa Limited v Ngombe (2010) Z.R. Vol1, p 208<sup>(5)</sup>** among others.

According to the learned authors of **Halsbury Laws of England 4<sup>th</sup> Edition 16 p 414 para 451** Wrongful dismissal is defined as follows;

*“A wrongful dismissal is a dismissal in breach of the relevant provisions in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled” namely*

- 1) The employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case maybe; and*



2) *The dismissal must have been wrongful, that is to say without sufficient cause to permit the employer to dismiss him summarily*".

The case of **Caroline Tomaida Daka v Zambia National Commercial Bank Limited (2012)** analysed the meaning of wrongful dismissal in comparison to unfair dismissal as follows:

*"this unlike wrongful dismissal which looks at the form, unfair dismissal looks at the merits of the dismissal. And form is only supportive of the whole merits of the dismissal".*

Furthermore, in **Jones v Lee and Guilding (1980) ICR 310**<sup>(6)</sup> it was held that:

*"where the contract of employment makes a dismissal subject to a contractual condition of observing a particular procedure. on a proper construction of a contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground".*

In the case of **The Attorney-General v Richard Jackson Phiri (1988 - 1989) Z.R. 121 (S.C.)**<sup>(7)</sup> one of the cases referred to by the Defendant in the submissions, the Supreme Court held that:

- (i) *Once the correct procedures have been followed the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same.*
- (j) *The court cannot be required to sit as a court of appeal from the decision of the Public Service Commission to review its proceedings or*

*to inquire whether its decision was fair or reasonable. The court ought to have regard only to the question whether the Public Service Commission had valid disciplinary powers and, if so, whether such powers were validly exercised.*

As noted by the Court in the case of **Tomaida**, wrongful dismissal looks at the form which is basically the procedure and process surrounding the hearing of the charges. This Court also ought to make a finding on the relevant provisions in the contract of employment relating to the expiration of the term for which the employee was engaged, whether the said contract was for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case maybe, as per the Principle in Halsbury Laws of England<sup>2</sup>. In the case in casu, the Plaintiff was a civil servant employed on permanent basis. The facts will show that his employment was terminated before the expiration of his fixed period of service which is at retirement.

The question that needs to be satisfied is whether there was power to intervene, that is to say, whether the Drug Enforcement Commission and the Public Service Management Division had valid disciplinary powers to dismiss the Plaintiff. There was no dispute that the Drug Enforcement Commission and Public Service Management Division had jurisdiction and power over the disciplinary proceedings and they can impose the penalty to dismiss the Plaintiff. The only issue which remains to be considered is whether, in exercising the power which they undoubtedly have, such powers were validly exercised.



It would appear that the procedure was followed. Further that after the disciplinary hearing was conducted the Plaintiff was given an opportunity to appeal and was heard on appeal.

The question I ask myself is whether there were facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same.

The evidence on record will show that one of the reasons the Drug Enforcement Commission relied on to dismiss the Plaintiff was that he received K200 through corrupt practices. The Defendant contends that the Plaintiff admitted to having received K200 from Mr Mwamba at the Provincial Tribunal hearing. There is no evidence to substantiate the above assertion. No minutes of the said disciplinary hearing were produced before this court. While the Plaintiff admitted that he was approached by a woman who wanted to know how Sam Banda a suspect could be assisted, there is no evidence to show that there was an allegation levelled against the Plaintiff that he received K200. Furthermore, there is no evidence to show that at the disciplinary hearing, the Plaintiff admitted to have received the said K200 from Mr Mwamba as stated in the dismissal letter. I also had occasion to look at the exculpatory letter by the Plaintiff.

The Defendant also argued that the Plaintiff in his exculpatory letter stated that he met one of the relatives to the suspect who was asking for ways to release the accused, also that the Plaintiff did not report that conduct to the superiors but referred the said person to the arresting officer. For the avoidance of doubt, the relevant portion of that letter reads as follows;



*“however, I do not deny having met this woman who came to me at UTH as I was being attended to at clinic 4. I did ask Mr Mwamba as to what the woman wanted from us, Mr Mwamba said she wanted to talk to us, after meeting her I was not interested with what she was talking about, according to my understanding she wanted to know how some Banda can be assisted, it was at this point that I told her that it was better to see the dealing officer who was Mr Mbao. Few minutes later Mr Mbao called her and this is how she was told to go and see Mr Mbao.*

The exculpatory letter does not however, state that the Plaintiff said that the relatives to the suspect wanted him released but simply put assistance. The circumstances in the exculpatory letter provide for sufficient substratum of facts to require investigations of the case. Furthermore, the Defendant vehemently denied the assertion by the Plaintiff that the issue of the K200 he was dismissed for was not in the original charge and was only included after he exculpated himself on the allegation of soliciting and receiving K950. A perusal of the letter titled ‘Exculpate Yourself’ which laid down the charges for the Plaintiff reveals that the issue of the K200 was not mentioned in the charge letter. Instead it was information received from the Defendant’s witness. Even though the issue of K200 was not categorically raised in the charge letter, it is clear that the Plaintiff was given a chance to give an explanation regarding K200

In view of the foregoing it is clear that there existed a substratum of facts upon which the Plaintiff’s dismissal was premised. There is no basis for this Court to interfere with the decision of the Public Service Management Division to uphold the decision of the Drug Enforcement Commission to dismiss the Plaintiff.



To this extent the claim by the Plaintiff fails.

Costs for the Defendant to be taxed in default of agreement.

**Delivered at Lusaka this 7<sup>th</sup> day of May, 2020.**



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**C. LOMBE PHIRI**  
**JUDGE**

