

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Industrial Relations Division)

IRC/ND/36/2021

BETWEEN:

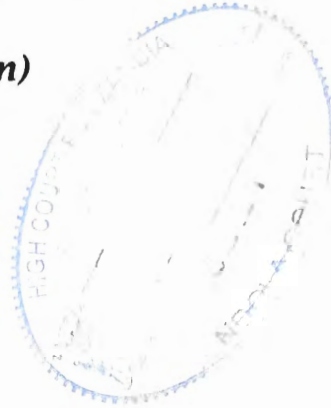
KENNEDY HERBERT LUNGU

COMPLAINANT

AND

COOL BANANAS LIMITED

RESPONDENT



Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 30th day of June, 2022.

For the Complainant: In Person.

For the Respondent: Mr. D. S. Libati, Messrs D.S. Libati Legal Practitioners.

JUDGMENT

Cases referred to:

1. Eston Banda v The Attorney General, Appeal No. 42 of 2016.
2. Kitwe City Council v William Ng'uni (2005) Z.R. 57 (SC).

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. 2021.

By notice of complaint supported by an affidavit filed into Court on 8th July, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

1. An order for compensation for loss of employment due to unlawful, unfair and wrongful dismissal.
2. Payment for accrued leave days.
3. Payment of terminal benefits.
4. Any other dues the Court may deem fit.
5. Costs and Interest.

In opposing the complaint, the respondent filed into Court its answer and an affidavit in opposition to the notice of complaint on 29th July, 2021 and denied all the complainant's claims.

On 14th December, 2021, the complainant filed into Court an affidavit in reply to the respondent's affidavit in opposition.

The complainant, through his affidavits and at the trial, testified that he was employed by the respondent on 4th April, 2017 as Chief Security Officer after the respondent's Director looked at his military background from Special Forces. That he worked for a period of five years from 4th April, 2017 to 26th April, 2021. That his basic salary was K7,659.00. That his duties included planning, coordinating and enforcing company security policies. He was also the in-charge of the security department, responsible for the protection of company property, employees and company information. That during his five years of service, he worked so

hard such that in 2018, he had his salary increased twice. That, however, he also accumulated enemies amongst his fellow workers such that one day he was almost hacked with a machete by one of the workers. That the same worker also went to his house and planted a plastic containing dagga. That upon discovering that, he reported to the respondent's Director but the Director did not do anything about it.

The complainant testified that during the five years of his service, he never went on annual leave.

The complainant stated that it all started when he was serving on probation for three months from April, 2017 to June, 2017. That when the probation expired, he was informed by the Director that his probation period was going to be extended for another three months from July to September, 2017. That he was told that the reason for the extension of the probationary period was that his colleague, Chrispin Nkwanisha was not doing his work according to his job description so the Director had to extend their probation for him to assess them properly. That in 2018, he was confirmed and he continued working so hard. In the month of September, 2018, he requested to go on annual leave because he had accrued 24 leave days. That the request was made through Mr. Juji Shanti who was in charge of Human Resource and Administration. That after Mr. Juji presented the complainant's request to the Director, Mr. Juji informed the complainant that the Director had declined his request for leave because Chrispin Nkwanisha had resigned

and there was no one to stand in for the complainant. That, therefore, the year 2018 came to an end with the respondent owing him 24 leave days which were equivalent to K6,600.44. That in 2019, he continued working hard and remained disciplined such that he never received any charge letter. That in September, 2019, he requested to go leave to go and pursue a Bachelor's degree in criminal law and procedure which required him to be in school for two weeks and later continue through distance learning. That he made the request through the farm Manager, Mr. Titus Million who went to see the Director. That when he came back to him, Titus Million told the complainant that the Director had said that the complainant should first find an Assistant who was supposed to be a former soldier and not Bemba by tribe to stand in for him. That that was a difficult task for him because most of the former soldiers he knew were Bemba by tribe. Therefore, the year 2019 ended without him going on annual leave and the respondent owed him 24 accrued leaves days which translated to K7,128.00 for the year 2019, which came to a total of K13,728.92 for both 2018 and 2019.

The complainant testified that whilst working, they had established a system of communication at the farm through the phone either by voice calls, text messages or WhatsApp messages. That through the said platforms, any company messages could be relayed and such messages were treated as official. He stated that in January, 2020, he received a call from the farm Manager, Mr. Titus Million who informed him that there was going to be a

meeting in the Director's office at 11:00. During the said meeting, the Director informed them that he had concluded discussions with a certain union based in Kabwe, that is, the National Union of Plantations, Agriculture and Allied Workers (NUPAAW) and he had allowed the union to open a branch at the respondent company. That he wanted all the workers starting from Farm Manager, other Managers, Supervisors and Casual Workers to join as members of the union. After the meeting, all the workers were given forms to fill in and sign. That in March, 2020, they had some deductions of 1% from their basic salary towards the union monthly contributions. That in April, 2020, elections to elect the union office bearers were held and he was elected as Union Vice Chairperson for the respondent's branch. In due course, the Chairperson and Secretary of the union resigned from their positions and he remained the only active Executive Member, most of the times communicating to the National Executive in Kabwe. That during that time, he started receiving a lot of complaints from workers such as non-payment of housing allowances for those who were on contract, non-payment of tools allowance as the workers were made to use their own tools to do the work at the farm and not paid allowances at the end of the month. That in December, 2020 after receiving a lot of complaints from the Labour Office, the respondent's Director started paying for accrued leave days to those workers who never took leave. That the complainant was among those that were paid for the accrued leave days for the year 2020. That he was paid by Martin who made him sign on a brown envelope which he got as proof of payment.

The complainant testified that in 2021, he continued to work hard and never attracted any charge or disciplinary hearing. That however, in the month of March, 2021, his work environment started becoming uncondusive. That the farm Manager, Mr. Titus Million brought someone by the name of Levison Kunda to be his Assistant. That the said Levison Kunda never wanted to follow the programs that the complainant was making for the department. That when he tried to sit him down, Levison Kunda told the complainant that he was following instructions from the Farm Manager, who had told him not to follow instructions from the complainant. That the situation continued and between 30th March, 2021 and 12th April, 2021, the complainant was compelled to bring it to the attention of the Acting Human Resource Manager, Mr. Saviour Manda. That he informed Mr. Manda through a phone text message. That 14th April, 2021, Mr. Manda replied to his text message telling him that the Director was informed, and he said that he should continue working hard because he was doing a good job where security of the farm was concerned. That between 20th April, 2021 and 24th April, 2021, the Farm Manager and the complainant's Assistant brought three men from the village. That his Assistant told him that the Farm Manager wanted those men to be employed as Security Guards. That one of the three men that were brought had been dismissed from work whilst on probation because of reporting for work in a drunken state. That the complainant explained this to his Assistant who went back to the Farm Manager and when he came back, the Assistant said that the

Farm Manager had insisted that all the three men should be employed and that was how they were employed. That on the same day, Saturday, 24th April, around 10.00 hours, he wrote a text message on WhatsApp to the Director, which he exhibited as 'KHL5' in his notice of intention to produce and the Director replied at 13.36 hours stating that he was suspended from work until the matter in which he had reported the Farm Manager to the Labour Office was sorted out. That around 14.00 hours, the Director went to see him in the company of the Farm Manager, the Assistant Farm Manager, Andrew and two other white boys. That he requested the Director to put it in writing that he had been suspended but the Director refused and started shouting at him saying that he was a thief, and that was why he was dismissed from the Army because he stole money from the accounts department where he was working from. That on 26th April, 2021, the Assistant Farm Manager, Andrew assigned some Guards to surround the company house he was occupying and monitor his movements. Later, the Assistant Farm Manager went to his house with the Farm Manager and told him to jump on the vehicle and took him to Twapia Police station where they reported that the complainant was extorting money from his fellow workers. That the Officer-in-Charge asked the Farm Manager whether they had instituted disciplinary proceedings before reporting the matter to Twapia police, and that was how they went back. The next day on 27th April, 2021, whilst at his house, he saw the Assistant Farm Manager organising Guards and one of the Guards, Mumba, who was near his home asked his fellow Guard when he was called to

go and give a statement to the Farm Manager, what type of statements they were supposed to give. That the Guard responded that it was over the issue of the complainant's statements. That the other Guard shouted that he did not know anything about the issue. That the complainant never said anything but he was just hearing the two Guards talk in his yard. Later that day, he received a phone call from Twapia Police and they told him to report there the same day. That when he went there, he found the Director, Simon Hayward with the Farm Manager, Titus Million, the Assistant Farm Manager, Andrew and the Human Resource Manager, Mr. Saviour Manda. Then the Officer-in-Charge invited them into his office and advised Simon Hayward to go back and follow the respondent's disciplinary procedures since it was a labour-related matter. The complainant then went to the Labour Office where he met Mr. Charles Muwowo, the Assistant Labour Commissioner for Copperbelt Province and explained everything concerning his suspension. That Mr. Muwowo then told him that in fact he had not been suspended but he had been dismissed. That the Labour Office had received the complainant's letter of dismissal dated 26th April, 2021. Mr. Muwowo, however, said that he would proceed to summon the respondent and he wrote the letter, exhibited as 'KHL8' in his notice of intention to produce, to the respondent to go to his office the next day on 28th April, 2021 over the matter of unfair, unlawful and wrongful dismissal. A meeting was held the following day and the respondent was represented by Mr. Saviour Manda and the Assistant Farm Manager, Andrew. That Mr. Muwowo asked them to explain the respondent's side of the story and

Saviour Manda said that the respondent did not dismiss the complainant but Mr. Muwowo showed him the letter stating that the complainant had been dismissed. Then Mr. Saviour Manda said he was going to get in touch with the respondent and told the complainant that he would be contacted. That the complainant then wrote a letter to the Minister of Labour and Social Security explaining what had happened and he copied the said letter to the Permanent Secretary for Copperbelt Province and the District Commissioner of Ndola. That he also involved an organisation called the Adjudicators which was headed by Mr. Cephas Daka, who engaged Mr. Muwowo through the phone and Mr. Muwowo confirmed that he knew the matter and that the complainant had since been dismissed and that he had ruled in the complainant's favour. He produced the text message between Mr. Daka and Muwowo as 'KHL6' in his notice of intention to produce. That after sometime, the complainant went to Mr. Muwowo to ask him to refer the matter to Court and he wrote the letter dated 28th April, 2021. That that was how he sued the respondent claiming that his dismissal from employment was wrongful, unlawful and unfair. That he was also claiming for payment for accrued leave days in the sum of K13,728.00 for the year 2018 and 2019 which he was never paid. That he was also claiming for payment of terminal benefits which he could have received if his employment had not been terminated unlawfully, unfairly and wrongfully.

He added that all the allegations stated in his dismissal letter, 'KHL1' namely; gross incompetence, gross dishonest, gross

insubordination and threatening behaviour by the respondent were not true because never at any time was he charged for the said offences and he was never at any time called to appear before any disciplinary hearing. That he was not informed of the dates indicated that he was called to appear before the disciplinary hearing. Further, that the workers who reported against him were also not called to prove their allegations before him. That he just saw their statements for the first time in the respondent's affidavit. That he did not also know the woman who had accused him of having solicited for sex from her and he did not know the property he was alleged to have stolen. That he wondered why he was not reported to the Police at the time he was taken there if he had stolen. He further stated that his leave days for 2018 and 2019 were never paid and he saw the document that was presented by the respondent indicating that he had signed to show that he had been paid for the first time in the respondent's affidavit when it was served on him; and that the signature on it was a copy and paste of his signature.

During cross-examination, when referred to clause 12(a) and (e) of the complainant's contract of employment at page 4 of the complainant's notice of intention to produce, the complainant stated that it was not correct that an employee was liable for summary dismissal if found guilty of gross misconduct or disobedience but admitted that what he had read was that an employee would be liable to summary dismissal if found guilty of serious misconduct. He denied that the respondent could dismiss

him if it took the position that he had either grossly misconducted himself or was disobedient. He also denied that the respondent dismissed him based on gross negligence, gross misconduct and disobedience. When referred to clause 25(e) of the collective agreement, 'KHL2', and asked whether he was paid for his accrued leave days and for the days he worked, the complainant stated that he was underpaid. When referred to the letter, 'SH4', and again clause 25(e) of the collective agreement, 'KHL2', the complainant stated that he was entitled to accrued leave days and days worked upon summary dismissal but insisted that that was not what he was only entitled to. When referred to the letter, 'SH4', the complainant confirmed that it was his last pay for April, 2021. That he was paid K7,627.47 as his income. That he was paid K586.73 for accrued leave days and K2,542.49 as gratuity. He confirmed that his final pay included gratuity and payment in lieu of notice but it was not over and above what he was not entitled to. He stated that the gratuity was not among his entitlements under clause 25(e) of the collective agreement. When referred to the letter of termination of employment, dated 26th April, 2021, the complainant still denied that he was dismissed for gross misconduct. When referred to the letters, 'HS3' and 'HS(i)', the complainant confirmed that the signatures on the documents were his. When referred to the notice, 'HS4(viii)', the complainant confirmed that he received the notice and that one of the signatures and NRC numbers on the 2nd page of his document were his. He admitted that he was put on notice of the prevalence of the practice of extortion in the workplace on 31st March, 2021. He

denied that the eight complaints attached to the notice, exhibit 'HS4(viii)' were lodged against him to the respondent. That he disputed the complaints in paragraph 10 of his affidavit in reply. He stated that it was never brought to his attention that he had breached company rules. He admitted that he had the said document with him together with all the eight complaints even before he filed his notice of complaint but he never asked for further and better particulars. He also admitted that he lodged a complaint against the respondent at the Labour Office and the letter, exhibit 'KHL8' was from the Labour Office to the respondent following his complaint. That there were numerous correspondences among the Labour Office, the respondent and himself but he did not produce them before Court. The complainant confirmed that the letter, exhibit 'HS2(ii)' dated 23rd April, 2021 was from the Labour Office and that he disputed the contents of the said letter in paragraph 9 of his affidavit in reply wherein he stated that he strongly challenged the respondent that there was no disciplinary hearing and he was not given a chance to exculpate himself. Further, that he responded to the contents of the letter in paragraphs 6 and 7 of his affidavit in reply where he stated that he was not served with a charge letter or any letter inviting him to exculpate himself or appear before a disciplinary hearing. When referred to the letter, exhibit 'SH4(v)', the complainant confirmed that he received the said letter from the Assistant Labour Commissioner, Mr. Muwowo. He admitted having written letters to both the Minister of Labour and the Labour Office. When referred to the letter, exhibit 'SH4(iv)', the

complainant confirmed that he had received the document from the respondent when it responded to his notice of complaint and that he disputed its contents in paragraph 7 of his affidavit in reply although not specifically. When referred to the letter, exhibit 'KHL1', the complainant admitted that according to the said letter, he repeatedly missed appointments with Management to discuss his conduct in the workplace and also that on 28th April, 2021, the complainant refused to receive the letter of termination of his employment in front of the Labour Officer. When referred to the WhatsApp messages 'KHL4' and 'KHL5' in the complainant's notice of intention to produce, the complainant denied that on 'KHL4', the response that he gave to Mr. Hayward was cut out. That the message was complete as the two documents contained the same message. When referred to the text messages, exhibit 'KHL6' in the complainant's notice of intention to produce, the complainant stated that there was no mobile number and date indicated on the document. When referred to the medical slip, 'KHL3' in the complainant's affidavit in reply, the complainant admitted that there was no letter supporting that the slip was from Mushili Commando Hospital but stated that there was a date stamp. When referred to the letter, exhibit 'HS1' dated 6th April, 2021 and the letter, exhibit 'HS2' dated 12th April, 2021, the complainant confirmed that the letters were addressed to him as well as the letter, exhibit 'HS2(ii)' dated 20th April, 2021.

When further cross-examined, the complainant stated that during the five years he worked for the respondent, he worked so hard

such that his salary was increased twice in 2018 but he started accumulating enemies among his fellow workers. However, he did not produce any document or call any witness to prove that he had enemies at the work place. He stated that he had no witness or documentary evidence to confirm that one day he was almost hacked with a machete by one of the workers; and also that that worker planted dagga in his yard. He stated that he had no witness or documentary evidence to prove that he was told that his probation was going to be extended from July to September, 2017 because his colleague, Chrispin Nkwanisha had not performed well. That he had no witness or documentary evidence to show that when he applied for leave, Mr. Juji, after presenting the complainant's request to the Director, was told that the complainant could not go on leave because Chripsin Nkwanisha had resigned and there was no one to stand in for him. That he did not bring any witness or documentary evidence to show that in September, 2019, he had applied for two weeks' leave to go and pursue a Bachelors' Degree in Criminal Law and Procedure. That he did not call any witness or produce any documentary evidence to show that at some point, NUPAAW started deducting 1% from his salary. That he had no witness or documentary evidence to prove that the Farm Manager, Titus Million had brought someone by the name of Levison Kunda who never wanted to follow the programmes the complainant was putting up for the department. That he had no evidence to show that the Farm Manager and the Assistant Farm Manager had taken three men from the village to work as Security Guards and it was insisted that the three should

work under him despite that one of them had been caught drunk whilst on duty. That he had no witness or documentary evidence to show that when he told the Director to put it in writing that he had been suspended, the Director refused to do so and started shouting at him, stating that he was a thief and that that was why he was dismissed from the Army because he stole from the accounts department. That he had no witness or documentary evidence to show that he had been taken to Twapia Police on two occasions by the respondent where the respondent reported him for extortion.

In re-examination, the complainant stated that the statements in the eight complaints that were lodged against him were not clear enough for him to understand what was meant by the statements. He stated that the reason he could not call witnesses was because they were still working for the respondent and so he thought they could not be credible witnesses. He also stated that the incomplete part of the text message, exhibit 'KHL5' was not submitted before Court so he felt it was not possible to bring it before Court as it was not even marked.

The evidence from the respondent came from Simon Francis Hayward (RW1), Director in the respondent company, through his affidavit in opposition to the notice of complaint and at trial. He testified that in 2017, the respondent recruited Sergeant Major Chrispin as a Guard Force Commander. That the Sergeant Major asked if he could recruit an Assistant and when allowed to do so,

he brought in the complainant as his Assistant. That after a very short period of time, the Sergeant Major resigned and the respondent offered the position of Guard Commander to the complainant.

He explained that when he first started working for the respondent, the complainant was very good but small problems started to occur which grew bigger overtime. That in early 2021, the witness started to hear stories of Supervisors extorting money from workers such as payment to get a job, payment to take a day off, payment to take leave and sometimes being forced to take out loans for a supervisor. That he gathered all the Managers and Supervisors in his office and he gave each one of them letters stating that extorting money from employees would not be tolerated. That the complainant and all other Managers and Supervisors signed to say they had received the said letter. That in the next few days, he started receiving complaints from the Guard force that the complainant had been extorting money from them and a number of witness statements were lodged in evidence to that effect. That he also received complaints from at least one of the women who worked on the farm that the complainant had been pestering them for sexual favours, thereby abusing his position of trust. That two weeks later, he summoned the complainant in writing to exculpate himself on two occasions. That before that, he had met with the complainant in his office on two occasions to attempt to get to the bottom of what was disturbing him. That the complainant refused to sign the letters

the witness gave him and also to appear for exculpation before an internal disciplinary hearing before the witness and the Farm Manager. That he, therefore, took advice from the Labour Office on how to proceed with the matter. That Labour Office then advised the witness that the respondent had acted within the law. Then on 24th April, 2021, the complainant had a blazing argument with the witness publicly where the complainant threatened the witness and made claims of victimization against the Farm Manager. That as a result, the witness suspended the complainant with full pay pending investigations. He explained that during the argument, the complainant was shouting at him saying that 'Sack me!' Sack me! Sack me!' However, the witness did not sack the complainant but instead suspended him. The witness then sought legal advice and with the blessing of the Labour Office, he was told that he could terminate the employment of the complainant. That the letter of termination of employment was delivered to the complainant by the Labour Office. That the Labour Office also told the witness the final financial settlement which had to be made to the complainant, that is, outstanding leave days for 2021, gratuity for 2021, one month's pay in lieu of notice and any outstanding pay. That the money was paid to the complainant and he accepted it.

The witness testified that the complainant was dismissed at the end of April, 2021 for extorting money from workers, threatening female employees, not carrying out his duties properly, threatening the witness, making false claims against the Farm

Manager, refusing to work with an Assistant that the respondent provided him to help him run the Guard Force and refusing to attend disciplinary hearings. That the witness was left with no choice but to dismiss the complainant. The witness referred the Court to a copy of the letter, 'HS4(viii)' dated 31st March, 2021 and stated that it was the letter that he had given to all the Managers and Supervisors advising them that extorting money from employees would not be tolerated. That the complainant had signed the said letter. The witness also referred the Court to the eight statements that were attached to the said letter, which he said were complaints from the Guard Force to the effect that the complainant had been receiving money from them. The witness reiterated that after receiving the said complaints, he summoned the complainant on two occasions via the letters, 'HS1' dated 6th April, 2021 and 'HS2' dated 12th April, 2021. That he also wrote the letter, 'HS2(i)' dated 20th April, 2021 in which he informed the complainant that he was going to seek legal advice. That in response to its letter to the Labour Office, the Labour Office wrote to the respondent the letter, 'HS2(ii)' in which the Labour Office advised that the respondent had acted within the law. The witness stated that the complainant's claims that he was unfairly, unlawfully and wrongfully dismissal were baseless. That the accusations against the complainant that he grossly misconducted himself, that he was grossly incompetent, grossly dishonest, grossly insubordinate and that he had engaged in threatening behaviour were true.

Regarding the complainant's claim that he was owed the sum of K13,728.00 for accrued leave days for the year 2018 and 2019, the witness stated that the claim was baseless because he personally paid the complainant his leave days for those years. That the complainant signed the letters, exhibits 'HS3' dated 21st December, 2019 and 'HS3(i)' dated 23rd December, 2018 to that effect. That upon his dismissal at the month end of April, the complainant was paid K6,101.98 for the days he worked in April, 2021; K2,542.49 gratuity upto April; 2021, K586.73 leave pay for 2021 and K7,627.47 as one month's pay in lieu of notice as shown by the pay statement, 'HS4'. The witness rejected all of the complainant's claims.

During cross-examination, when referred to the WhatsApp message, 'KHL5' in the complainant's notice of intention to produce, the witness stated that he could not remember his response when the complainant sent him that message but the text appearing on the message, exhibit 'KHL4' stated that *'this is a very serious charge and until it is sorted, I have no choice but to temporary suspend you on full pay'*. That after exchanging those texts messages, the only meeting he remembered having with the complainant was the one at the Labour Office when the complainant was told that he was dismissed. That he could not remember any other meeting. He denied testifying that he employed the complainant through Human Resource and stated that the complainant was taken to the farm by Sergeant Major Crispin. He admitted that they had a Human Resources Manager at

the farm but that he did not keep personal files of the employees. When referred to the letter and collective agreement, exhibit 'KHL2' in the complainant's affidavit in support of the complainant, the witness stated that he was not a signatory to the collective agreement. He admitted that the respondent was a member of the Farmer's Union of Zambia but that it was not a member of the National Union of Plantation, Agriculture and Allied Workers. That the National Union of Plantation, Agriculture and Allied Workers represented employees and not employers. That the respondent accepted the said union when it went to open a branch at the respondent company. When referred to clause 10(c) of the collective agreement, 'KHL2', the witness stated that the respondent applied the clause to the complainant at the time he was dismissed and there was proof before Court to show that the clause was followed.

When referred to the letters, exhibits 'HS3' and 'HS3(i)', RW1 stated that the two were not standard documents the respondent used when making payments such as payments for accrued leave days but he wrote the documents to the complainant. That every case was different so there was no standard document. That he gave the original document to the complainant and made copies in the presence of the complainant which he kept. That the document was signed in his office on 23rd December, 2019. That he was just with the complainant and no other person was present. He remembered paying the complainant for his accrued leave days for the year 2020. That he could not remember who was present

when he was paying the complainant. That they could have signed a similar document when making the payment but he did not have the document. When asked how the signatures on the letters, exhibits 'HS3' and 'HS3(i) which were signed one year apart had his signature block almost on the same position, the witness stated that that was how the complainant used to sign. When referred to the statements attached to the notice, exhibit 'HS4(viii)', RW1 stated that the allegations did not happen on the same day. That the said statements were not dated. He denied that they were written in January, 2021. The witness stated that the complainant's job description was in his contract. That there was no clause in the contract that specifically gave the complainant authority to deal with employees' leave but that the complainant, as the Guard Commander and just like any other Supervisor, was responsible for approving leave applications for his subordinates. He stated that the female employee who reported that the complainant had solicited for sex from her was Dorothy from the Store at the Farm. That she made the complaint after the witness had suspended the complainant and she said that it had happened on numerous dates in the Store. That there was no statement recorded from Dorothy as she made a verbal complaint. That there was no need for him to investigate that allegation because he had already suspended the complainant at the time she told him and it was not part of the charges that had been levelled against the complainant. The witness stated that the complainant was given chance to prove his innocence. That he had asked the complainant to go to his office to exculpate himself on 12th and 21st April, 2021

but the complainant refused to do so. When referred to the letter, 'KHL8' in the complainant's notice of intention to produce, the witness stated that he understood the contents of the letter. That to the best of his knowledge, all the documents that were required by the Labour Office were delivered. That if they had not been delivered, the Labour Office would not have reached to the conclusion that it reached. He denied that the Labour Office summoned him despite having advised him that the respondent had the right to dismiss the complainant. RW1 stated that he could not remember the exact date when he summoned the complainant to his office to find out what was troubling him but that it could have been in March. That no statement was recorded and there was no witness in the meeting. He stated that when the complainant accused the Farm Manager of victimisation on 24th April, 2021, he did not call the Farm Manager so that the complainant could substantiate his claims because the complainant was screaming and shouting. That the complainant was unresponsive and being unreasonable. That he got the information that the complainant was refusing to work with the Assistant from the complainant himself and Memory around 24th April, 2021. That the complainant had told the Farm Manager and that the witness took it as the truth because he believed the Farm Manager. He denied condemning the complainant before hearing him. That as shown in the message, 'KHL4', he did not dismiss the complainant but just suspended him with full pay pending inquiries. When asked whether he had given the complainant chance to answer to the allegations between Saturday, 24th April, 2021 when he suspended the complainant and

Monday, 26th April, 2021 when he dismissed the complainant, RW1 stated that he had asked the complainant on numerous occasions to explain the side of his story but he repeatedly refused. He stated that the dismissal did not emanate from the message only. He stated that he did not speak to the complainant over that weekend he suspended him. He admitted that he did not give the complainant chance to be heard before that dismissal but stated that it was because the complainant was not communicating with him. He stated that the reason the complainant was taken to Twapia Police station in April after he had already been dismissed was because the Guards had accused him of extorting money from them. That he could not answer as to whether the police charged or locked up the complainant as he only reported the matter because he thought it was not right. That the Officer in-Charge did not give any guidance to the respondent. That they went back to Twapia police because the complainant was summoned again a few days later. When referred to the letter of termination, exhibit 'KHL1', RW1 stated that there was no need to prove that the complainant had taken any documents that belonged to the respondent but he just asked the complainant to return anything that he might have taken. That the books that the complainant was alleged to have stolen on page 2 of the letter of termination, 'KHL1' were record books for logging in vehicles that were going in and out of the farm. When asked why the witness did not report the complainant to have stolen property from the farm, the witness stated that when the complainant was recalled to Twapia police for the second time, the witness went there and

the allegation that was levelled against the complainant was that of extortion. That the date when it was discovered that the books were stolen was irrelevant. When referred to section 52(3) and 36 of the Employment Code Cat No. 3 of 2019, the witness stated the respondent followed the provisions of the collective agreement when dealing with the complainant's case and that the complainant had a copy of the said collective agreement.

In re-examination, when asked whether the respondent had complied with clause 10(c) of the collective agreement, the witness stated that the process leading upto the complainant's dismissal took over a period of two to three weeks during which time he refused two requests to exculpate himself. That, therefore, the respondent did everything to the letter of the law. That he had exhibited letters in his affidavit which he had also submitted to the Labour Office and to the complainant stating that the complainant had failed to present himself for exculpation at a disciplinary hearing. He stated that the statements by the Guards were made after he had suspended the complainant. That the verbal complaint from the female employee was also made after the complainant had been suspended but that the main accusations against him were extortion. He stated that after suspending the complainant on 24th April, 2021, there was a meeting with the complainant, the Labour Officers and representatives from the respondent at the Labour Office. That the complainant was dismissed from work at the end of that meeting. That during that meeting, the complainant had the opportunity to

exculpate himself. That the question of books being removed was of less significance than the other allegations.

Both parties filed final written submissions which I have duly taken into account and I will make reference to them where relevant.

I have considered the affidavit and *viva voce* evidence from both parties.

The facts which were common cause are that the complainant was employed by the respondent on 4th April, 2017 as Chief Security Officer. He worked for a period of five years until he was dismissed from employment on 26th April, 2021 on allegations of gross misconduct, gross incompetence, gross dishonesty, gross insubordination and threatening behaviour. The complainant was not heard on the said allegations by the respondent before his dismissal. Further, during the course of his employment, the complainant had not gone on annual leave in 2018 and 2019; and had accrued a total of 24 leave days in each of those years.

From the evidence on record, the following are the issues for determination:

- i. Whether the complainant's dismissal from employment was wrongful and unfair thereby entitling him to damages.

- ii. Whether the complainant is entitled to the payment of the sum of K13,728.92 for accrued leave days for the year 2018 and 2019.
- iii. Whether the complainant is entitled to the payment of terminal benefits that would have accrued to him had he not been dismissed from employment.

I will start with the first issue.

Regarding the complainant's claim for an order that his dismissal from employment was unlawful, unfair and wrongful, the Supreme Court in the case of **Eston Banda and Another v the Attorney General**¹, has guided that:

"There are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of a term for which the employee is engaged; whilst 'unfair' refers to a dismissal in breach of a statutory provision where an employee has a statutory right not to be dismissed. A loose reference to the term 'unlawful' to mean 'unfair' is strictly speaking, in employment parlance, incorrect and is bound to cause confusion. The learned author, Judge W.S. Mwenda, clarifies on the two broad categories, in her book *Employment Law in Zambia: Cases and Materials*, (2011), revised edition UNZA Press, Zambia at page 136. She opines that, in our jurisdiction, a dismissal is either wrongful or unfair, and that wrongful dismissal looks at the form of the dismissal whilst unfair dismissal is a creature of statute."

On the above authority, I am of the view that the relief that the complainant is seeking is for an order that his dismissal be

declared to have been wrongful and unfair, hence the main question that has been set for the determination by the Court.

For the complainant to succeed in his claim that he was wrongfully dismissed from employment, he has to prove, on a balance of probabilities, that the respondent breached the disciplinary procedure and/or a term of his contract at the time he was dismissed as was held in the *Eston Banda*¹ case.

As for his claim that his dismissal from employment was unfair, the learned authors, **Judge W.S. Mwenda and Chanda Chungu**, in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, state at page 241 as follows:

“Unfair dismissal is dismissal that is contrary to the statute or based on unsubstantiated ground. For unfair dismissal, the Courts will look at the reasons for the dismissal for the purpose of determining whether the dismissal was justified or not. In reaching the conclusion that the dismissal is unfair, the Court will look at the substance or merits to determine if the dismissal was reasonable and justified.”

Therefore, to prove that his dismissal from employment was unfair, the complainant has to establish that a specific statutory provision was breached by the respondent or that the dismissal was based on unsubstantiated reasons.

In the present case, the complainant has contended that his dismissal from employment was wrongful and unfair because the respondent breached the provisions of clause 10(c) of the collective agreement, exhibit ‘KHL2’ and section 52(3) of the

Employment Code Act No. 3 of 2019, which provide that an employer shall not terminate the contract of employment of an employee on grounds related to conduct or performance without affording the employee an opportunity to be heard. The complainant argued that he was not served with any charges and he was not invited to exculpate himself or appear before a disciplinary hearing before the respondent dismissed him. He also argued that all the allegations for which he was dismissed, that is, gross incompetence, gross dishonest, gross insubordination and threatening behaviour were not substantiated as he was never at any time charged for the said offences and he was never at any time called to appear before any disciplinary hearing to exculpate himself. Further, that the workers who reported against him were also not called to prove their allegations against him. That he saw their statements for the first time in the respondent's affidavit. That he also did not know the woman who accused him of having solicited for sex from her; and he did not know the property he was alleged to have stolen.

On the other hand, the respondent has argued that the complainant was dismissed for exhorting money from workers, soliciting sex from female employees, not carrying out his duties properly, threatening behaviour, making false claims against the Farm Manager, refusing to work with an Assistant that the respondent provided him to help him run the Guard Force and refusing to attend disciplinary hearings. That RW1 had received complaints from Guards that the complainant had been extorting

money from them as shown by the witness statements attached to the letter, 'HS4(viii). That after receiving the said complaints, he summoned the complainant on two occasions via the letters, 'HS1' dated 6th April, 2021 and 'HS2' dated 12th April, 2021 to appear before Management to answer to the allegations and to also appear before an internal disciplinary board but the complainant refused to sign the said letters. That before that, RW1 had met with the complainant on two occasions in an attempt to get to the bottom of what was disturbing him but to no avail. That RW1 also received complaints from at least one of the women who worked on the farm that the complainant had been pestering them for sexual favours. That on 24th April, 2021, the complainant had an argument with RW1 publicly where the complainant threatened him and made claims of victimization against the Farm Manager. That he suspended the complainant with full pay but could not afford him an opportunity to be heard because they were not communicating. That the accusations against the complainant that he grossly misconducted himself, that he was grossly incompetent, grossly dishonest, grossly insubordinate and that he had engaged in threatening behaviour were true and the respondent was left with no choice but to dismiss the complainant.

I have considered the parties' opposing arguments.

It is not in dispute that the complainant was dismissed from work for the offences of gross misconduct, gross incompetence, gross

dishonesty, gross insubordination and threatening behaviour. It can be seen that the above offences related to the complainant's conduct and performance. Section 52(3) of the Employment Code Act No. 3 of 2019 provides that:

"An employer shall not terminate the contract of employment of an employee for reasons related to an employee's conduct or performance, before the employee is accorded an opportunity to be heard."

Further, clause 10(c) of the collective agreement, 'KHL2' which governed the complainant's conditions of service provided as follows:

"An employer shall not terminate the service of an employee on grounds related to the conduct or performance without affording the employee an opportunity to be heard on charges laid against them."

In *casu*, it is on record that the complainant did not exculpate himself on the allegations that were levelled against him and he was not heard by the respondent before he was dismissed from employment. According to the respondent, the reason the complainant was not heard was because he had, on numerous occasions, refused or neglected to exculpate himself or present himself for disciplinary hearing when summoned do so both verbally and in writing. To that effect, the respondent produced the letters, 'HS1', 'HS2' and 'HS2(i). I have read the said letters. Under 'HS1', the respondent informed the complainant of the charges that had been raised against him by fellow employees and asked him to appear before Management on 8th April, 2021 to exculpate himself. The complainant did not appear before

Management on 8th April, 2021. Under 'HS2', the respondent wrote to the complainant informing him that since he had failed to appear before Management as requested, he would have to appear before an internal disciplinary board for a hearing relating to his conduct on 16th April, 2021. The complainant still did not appear before the internal disciplinary board. The respondent then wrote the letter, 'HS2(i) to the complainant stating that since he had failed to appear before the internal disciplinary board, it was going to seek legal advice. On 22nd April, 2021, the respondent wrote the letter, 'HS2(iii) to the Labour Office seeking advice on how proceed with the matter. In response, the Labour Office wrote the letter, 'HS2(ii) to the respondent wherein it advised the respondent that it had the right to act and proceed to decide the matter in line with its disciplinary code since the complainant had decided not to appear before Management and the internal disciplinary board.

The complainant denied having been served with the letters, 'HS1', 'HS2' and 'HS2(i) and he stated that on 8th April, 2021, he had gone to the clinic with the permission of the respondent. He produced a document in his affidavit in reply, which he said was from Mushili Commando Hospital. However, the complainant did not produce any slip to show that the respondent had given him permission to go to the hospital and he did not mention the specific office or person that had given him permission to go to the hospital. Further, the document produced by the complainant in his affidavit in reply did not have any signature from any medical personnel from the hospital he attended. I believe it

cannot be a mere coincidence that the complainant decided to go to the hospital on the day that he was asked to appear before Management to exculpate himself over the complaints that had been laid against him by his fellow employees. In my view, the complainant was aware of the charges and deliberately decided to go to the hospital to avoid appearing before Management to answer to the said charges. On the whole, I find that the complainant had been served with the letters, exhibits 'HS1', 'HS2' and 'HS2(i)'; and that he deliberately chose not to seize the opportunity to be heard and to defend himself against the allegations levelled against him. For this reason, I have believed the respondent that it had on numerous occasions summoned the complainant to exculpate himself on the allegations but he wittingly refused to do so. In this regard, the complainant has himself to blame as he decided to sleep on his right to be heard. Therefore, the respondent cannot be faulted for having dismissed the complainant without hearing him out as the complainant was accorded an opportunity to be heard which he turned down. Consequently, I am satisfied that the respondent did not breach the provisions of section 52(3) of the Employment Code Act No. 3 of 2019 and clause 10(c) of the collective agreement, 'KHL2' and as such, the complainant's claim that his dismissal from employment was unfair and wrongful cannot stand and is accordingly dismissed.

I now turn to the second issue, which is, whether the complainant is entitled to the payment of the sum of K13,728.92 for accrued leave days for the year 2018 and 2019.

There is undisputed evidence that the complainant did not go on leave in 2018 and in 2019, but it was argued, on behalf of the respondent, that the complainant was paid K6,093.12 in 2018 and K6,582.00 in 2019 for the leave days he had accrued as shown by the letters, 'HS3(i) and 'HS3' which he signed. The complainant denied having been paid the money.

I have read the letters, 'HS3(i) and 'HS3'. The said letters merely indicated that the respondent acknowledged that the complainant had not taken leave in the respective years and calculated the leave pay that was due to the complainant for the days that had accrued. There is nowhere in the letters where it was indicated that the complainant had received the payment. Further, the respondent did not produce any documentary evidence such as pay statements or any documents signed by the complainant confirming that he had received the payment. For this reason, I am satisfied that the complainant was not paid for his accrued leave days in 2018 and 2019. Therefore, I enter judgment in his favour in the sum of K12,675.12 being payment for accrued leave days for the year 2018 and 2019, with interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complainant to the date of the judgment and thereafter, at 10% per annum until full settlement.

Regarding the third issue, which is whether the complainant is entitled to the payment of terminal benefits that would have accrued to him had he not been dismissed from employment, I am guided by the holding in the case of **Kitwe City Council v. William Ng'uni**,² where it was held that:

"You cannot award a salary or pension benefits, for that matter, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."

In *casu*, it is on record that the complainant did not render any services to the respondent after he was dismissed from employment and as such, awarding him terminal benefits for a period he did not work would amount to unjust enrichment. In this regard, therefore, the complainant's claim for terminal benefits that could have accrued to him had he not been dismissed from employment is devoid of merit and is accordingly dismissed.

I make no order for costs. Each party will bear own costs.

Leave to appeal is granted.

Delivered at Ndola this 30th day of June, 2022.


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Davies C. Mumba
HIGH COURT JUDGE