

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

IRC/ND/11/2022

BETWEEN:

DAVID MENDE

AND

CANCAM CARRIERS LIMITED



COMPLAINANT

RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 16th day of September, 2022.

For the Complainant: In Person
For the Respondent: No Appearance

JUDGMENT

Cases referred to:

1. *Eston Banda and Another v the Attorney General*, Appeal No. 42 of 2016.
2. *Chilanga Cement v Venus Kasito*, Appeal No. 86 of 2015.
3. *Bethel Mumba and Another v Africa Market (Trading as Shoprite Checkers)* Complaint No. IRC/ND/80/2015.
4. *Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami* (2004) Z.R. 244 (S.C.).

Other works referred to:

1. W.S. Mwenda, 'Employment Law in Zambia: Cases and Materials': UNZA Press, Lusaka, 2004.
2. W.S. Mwena and Chanda Chungu: *A Comprehensive Guide to Employment Law in Zambia*: UNZA Press. 2021

At the hearing of this matter, only the complainant was in attendance. There was no reason advanced by the respondent for its absence. Having been satisfied that the respondent was served with the notice of hearing, I proceeded with the trial.

By notice of complaint supported by an affidavit filed into Court on 3rd March, 2022, the complainant commenced this action against the respondent seeking the following reliefs:

1. An order for payment of damages for loss of employment;
2. Payment of his terminal benefits;
3. Payment for his accrued leave days;
4. Payment for interest and costs;
5. Any other dues the Court may deem fit.

In his affidavit in support of the complaint, the complainant deposed that he was employed by the respondent on 3rd June, 2019; and was unlawfully and wrongfully dismissed on 16th February, 2022 as shown by the exhibits marked "DM1" to "DM3". That he was alleged to have been absent from work for 5 days when in actual fact he was sick and did produce the sick notes, "DM4" and "DM5", to the respondent. That he became sick whilst on duty and management was aware of his sickness although it was pretending to be unaware of his absence from duty. That his dismissal was wrongful and unlawful because there was no compliance with the disciplinary code procedure as he was not charged, and he was not accorded a chance to

exculpate himself as there was no disciplinary hearing. That he was not absent as alleged since he had produced the sick notes to the respondent who refused to collect them. He urged the Court to grant him the reliefs sought.

On 21st March, 2022, the respondent filed into Court an answer and an affidavit in support thereof sworn to by Chisala Kaunda, the Human Resources Manager for the respondent company. The deponent denied that the complainant was employed by the respondent on 3rd June, 2019; and that he was unlawfully and wrongfully dismissed by the respondent. He stated that the complainant had entered into a two year contract with the respondent which started running on the 2nd day of June, 2021. That the said contract, exhibit "CK1" clearly defined the terms and conditions under clause 17.2 as read with the code of conduct, exhibit "CK2", offence 3/9 referring to offences relating to time keeping and absentees which clearly reinforced the respondent's decision. That the complainant did not produce the sicknotes to the respondent but only did so after the respondent had already served him with the dismissal letter, exhibit "CK3" on 16th February, 2022. It was stated that the respondent gave clear instructions for the complainant to communicate after being seen by a medical practitioner in line with the requirements of section 38 of the Employment Code Act, 2019 but he failed to do so. That, the respondent, through Elias Ngulube, did try to call the complainant as per exhibits marked

"CK4" and "CK5" but his phone was consistently switched off. That the respondent on 14th February, 2022, through its Workshop Supervisor, did send Kennedy Chungu to the complainant's residence after 17.00 hours, and when he arrived at the complainant's residence around 18.00 hours he found that the complainant was not available and at his home. That the complainant's wife was advised to request the complainant to report for work on 15th February, 2022. That the complainant did not make any effort to go for work on the said date nor did he make any effort to communicate his absence. That the respondent was left with no option having seen that its efforts to engage the complainant were disregarded. Therefore, it opted to exercise the rights enshrined in the Contract of Employment, code of conduct and the Employment Code Act. That it was of particular interest that the respondent had encountered a similar incident with the complainant in January, 2022 where the complainant was put to task, as shown by the exhibit "CK8". That the complainant was counseled by the respondent, and was advised of the correct procedure. That it was inconsequential that the complainant was not charged, not accorded a chance to exculpate himself, and that there was no disciplinary hearing of his case. That the respondent only saw the complainant on 7th February, 2022. That the complainant made it impossible to be engaged on any matter as he opted to switch off his phone, opted to disregard the respondent's request to meet him on 15th February, 2022 without communicating to the respondent. That

the complainant was absent from duty as he only decided to avail his sick notes after he was issued with his dismissal letter, 10 days after having been advised to do so by the respondent. That the respondent's decision to dismiss the complainant was in line with section 38 of the Employment Code; exhibit "CK9", clause 17.2 of the Contract of Employment and the Code of Conduct. That the respondent has since paid the complainant his final dues as provided by his Contract of Employment and the Employment Code Act of 2019, exhibit "CK10". That the respondent refutes that the complainant is entitled to any of the reliefs claimed for reasons set out above; and as the complainant of his own volition left the respondent thereby leaving it with no option but to exercise the rights under the Contract of Employment, the Employment Code Act of 2019 and the Code of Conduct.

At the trial, it was the complainant's *viva voce* testimony that on 6th February, 2022, he fell sick. That he left his home for his workplace in order to get permission from his supervisor. That when he asked his supervisor for permission, he declined to grant it and gave him two options; either to lose employment or continue working. The complainant testified that he chose to work and went to the workshop where there was only a horse truck on which he wheel alignment. After that, he developed a severe fever and felt very tired. He then went to sleep in the tyre store. When his condition got worse, his colleague called for the

Tyre Supervisor to go and see the state in which he was. His Supervisor responded favourably and eventually referred the complainant to the Workshop Supervisor. The Workshop Supervisor permitted him to go to the clinic around 15.00 hours and advised him to go back when he felt well with a sick note. That since it was already 18.00 hours, he went home as Kasompe clinic did not operate during night time. The next day, on 7th February, 2022 in the morning, he went to Nchanga North General Hospital where he had already submitted his sputum specimen on 4th February, 2022. That he was diagnosed with TB, put on treatment and given one week bed rest. That when he went home, he could not walk as he had developed joint pains.

On 15th February, 2022, he went for review and after being attended to, he was given another three days' bed rest and advised to go back for review on 18th February, 2022. That when he felt better on 16th February, 2022, he took the sick notes to the respondent; and when he reached the office, he found a dismissal letter already printed and put on the table for the Workshop Supervisor. That he submitted his sick notes which were rejected. He was then informed that he had already been dismissed. That he asked the supervisor why he had done that despite the complainant having the relevant documents for his absence. In response, the Supervisor told him that it was the Human Resource Officer who had done that. That he was referred to the Human Resource Officer and after looking at the sick

notes, including the one that indicated that he was supposed to go for review on 18th February, 2022. After being presented with the sick note, the Human Resource Officer wondered that he was still unfit. That the complainant explained to him that the date to return back to work was going to be determined after his medical review. The Human Resource Officer then told him that there was nothing he could do because he had already been dismissed.

It was the complainant's testimony that he was not given any charge for the offence for which he was dismissed. Further, that he was not given the right to exculpate himself and he was dismissed without being heard.

With regard to his claim for payment for accrued leave days, the complainant testified that he was employed by the respondent on 3rd June, 2019. That he was on a fixed term contract for 24 months but he only served the respondent on that contract for 9 months. That he was paid for his accrued leave days and gratuity for 9 months. That according to the respondent, that was what constituted terminal benefits.

That he was also claiming for damages for loss of employment because he lost access to medical services and he was also evicted from the house which he was renting. That he also had challenges in terms of food because he was sick and had difficulties in providing school requirements for his children.

That he could not work because he was still sick and on T.B treatment. He contended that he was claiming damages because of inhaling smoke from burning rubber as he branded tyres; and that burning rubber increased the chances of contracting T.B.

That according to his conditions of service, he was supposed to be on a full salary for three months, then half salary for another three months and he would have been medically discharged but he was dismissed. It was his evidence that he had also incurred a lot of costs as he had lost medical access to the company hospital where they used to go.

I have considered the affidavit evidence by both parties; and the *viva voce* evidence by the complainant.

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

1. Whether the complainant's dismissal was wrongful and unfair thereby entitling him to the payment of damages for the loss of his employment.
2. Whether the complainant is entitled to the payment of his terminal benefits in terms of accrued leave days and gratuity.

Regarding the complainant's claim for damages for loss of employment, I should state from the outset that the award of

damages can only be ordered as a remedy after the complainant has proved some wrong doing on the part of the respondent. The mere loss of employment cannot be the reason for the award of compensation.

In the case of **Eston Banda and Another v the Attorney General**¹, the Supreme Court 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 will, therefore, consider whether the complainant’s dismissal from employment was wrongful and/or unfair thereby entitling him to damages.

I will begin with the issue of wrongful dismissal.

It is settled that for an employee to successfully bring and maintain an action for wrongful dismissal, it must be shown that the employer breached the disciplinary procedures under the

contract of employment, the rules of natural justice and/or indeed the procedure outlined under the Employment Code Act no. 3 of 2019. Hon. Dr. Judge W.S. Mwenda, learned author of the book entitled '**Employment Law in Zambia: Cases and Materials**' states at page 18 that:

"The concept of wrongful dismissal is the product of common law. When considering whether a dismissal is wrongful or not, the form, rather than the merits of the dismissal must be examined. The question is not why, but how the dismissal was effected."

Further, in the case of **Chilanga Cement v Venus Kasito²**, the Supreme Court held that:

"The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question."

The above authorities have provided enough guidance as to what amounts to wrongful dismissal.

In *casu*, I have found no evidence on record indicating that the respondent had formally charged the complainant with the offence of absenteeism for which he was dismissed. By not charging the complainant with the offence for which he was dismissed, the respondent denied him an opportunity to defend or exculpate himself contrary the rules of natural justice and section 52(3) of the Employment Code Act No. 3 of 2019. Put simply, the complainant was not accorded his rights to a fair hearing. It should be stressed that there is always the need for an

employer to formally charge an employee prior to his/her dismissal on disciplinary grounds. In the case of **Bethel Mumba and Another v Africa Market (Trading as Shoprite Checkers)**³, it was held that:

“In industrial and labour matters, the need for an employer to charge an employee with a disciplinary offence and to give such an employee an opportunity to be heard before any sanction can be imposed cannot be over-emphasised as the same is the hallmark procedural and legal requirement in dealing with disciplinary process in employment matters.”

Further in the case of **Zambia China Mulungushi Textile (Joint Venture) Limited v Gabriel Mwami**⁴ it was held that:

“Tenets of good decision making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard.”

In the present case, it is clear that when dismissing the complainant from employment, the respondent did not comply with its own disciplinary rules, the principles of natural justice and the provisions of the Employment Code Act. In this regard, the complainant has, on a balance of probabilities, proved that his dismissal from employment was wrongful and he is entitled to damages accordingly.

I have also to determine whether the complainant's dismissal from employment was unfair. The learned authors, Judge Dr. W.S. Mwenda and Chanda Chungu in their book entitled: A

In summary, I hold that the complainant's dismissal from the respondent's employment was both wrongful and unfair; and he is accordingly entitled to the payment of compensation for his unwarranted loss of employment.

Having considered all the circumstances of this case, particularly the fact that the termination of his employment was effected abruptly, I find that this is a deserving case to award the complainant damages beyond the normal measure of damages based on the notice period. Therefore, I award the complainant damages equivalent to six months of his last basic salary plus allowances, with interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complaint to the date of the judgment and thereafter, at 10% per annum until full settlement. The amount is to be agreed by the parties or assessed by the learned Deputy Registrar in default of such agreement.

The last issue to be determined is whether the complainant is entitled to be paid terminal benefits which includes payment for accrued leave days and gratuity. The complainant's two years' fixed term contract was effective from 2nd June, 2021 as shown by exhibit 'DM1'. His contract of employment was terminated on 16th February, 2022. Essentially, the complainant had served the respondent for close to 9 months. In his evidence, the

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complainant confirmed that he was paid for accrued leave days and gratuity for the 9 months that he had served the respondent. Since he was paid for all his entitlements for the period he had served the respondent, it means that his claims against the respondent are unfounded and are accordingly dismissed. I order no costs. Each party shall bear own costs.

Leave to appeal is granted.

Delivered at Ndola this 16th day of September, 2022.


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Davies C. Mumba
HIGH COURT JUDGE