

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

**IRC/ND/51/2021**

**BETWEEN:**

**ALEX ZULU**

**AND**

**KONKOLA COPPER MINES**



**COMPLAINANT**

**RESPONDENT**

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 17<sup>th</sup> day of August, 2022.

For the Complainant: Ms. K. Chitupila, Senior Legal Aid Counsel, Legal Aid Board.

For the Respondent: Mr. N. Chaleka with Ms. N. Phiri, Messrs ECB Legal Practitioners; and Mr. S. Banda, In-house Counsel.

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**JUDGMENT**

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**Cases referred to:**

1. Attorney-General v Phiri (1988-1989) Z.R. 121 (S.C).
2. Annard Chibuye v Zambia Railways Corporation Limited (1985) Z.R. 4.
3. Kabwe Transport Limited v Press Transport Limited (1984) Z.R. 43.
4. Ernest Maxwell Kabeya v Neon and General Signs Limited, Appeal No 157/2008 (Unreported).
5. Chimanga Changa Limited v Stephen Chipango Ng'ombe (2010) Z.R.208.

**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 15<sup>th</sup> September, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

1. Damages for unfair dismissal.
2. Damages for mental distress caused by the actions of the respondent.
3. Interest
4. Costs.
5. Any other relief the Court may deem fit.

In his affidavit in support of the complaint, the complainant deposed that he was employed by the respondent in 2007 as a Workman and he was later elevated to the position of Electrician in 2014. He deposed that on 9<sup>th</sup> March, 2021, copper hanger bars were found in the area where he was assigned to carry out plant checks on isolations, reactivations, hot deep tanks and substations. That following the discovery of the said copper hanger bars, he was charged with the offence of theft by servant after the respondent reported the matter to the Police; and that the respondent also took an administrative measure and summoned him for a disciplinary hearing for theft by servant. That after the disciplinary hearing and his appeal, he was dismissed from work as shown by the letter of dismissal, exhibit 'AZ1'. He deposed that on 6<sup>th</sup> August, 2021, the Court acquitted him of the said charge of theft by servant as shown by the

certificate of acquittal, exhibit 'AZ2'. He also deposed that during the disciplinary hearing, there was no evidence adduced to the effect that he had stolen or had attempted to steal the copper hanger bars. That the area where he was working from was monitored by CCTV and there was no footage produced at the disciplinary hearing showing the complainant stealing the copper hanger bars. It was his evidence that no witness testified that he saw or had found him moving the copper hanger bars from where they were ordinarily kept. That the respondent's witnesses, Teddy Zyambo and Cephas Kalaba (RW2), in Court, testified that they did not recognise the person who was getting the copper hanger bars, neither did they have any proof by way of finger prints that the complainant had attempted or had stolen the copper hanger bars. That the decision to dismiss him on allegations of theft was grossly unfair, unfounded and was devoid of the rules of natural justice.

On 2<sup>nd</sup> August, 2022, the respondent filed an answer and an affidavit in support thereof sworn by Bernard Mwansa, Assistant Human Superintendent Officer in the respondent company. He deposed that the complainant was employed by the respondent as a Workman in 2007, and he was later promoted to the position of Artisan Electrician. That after a successful restructuring and re-organisation of the respondent, the complainant was, on 21<sup>st</sup> January, 2021, offered the same position of Artisan Electrician under KCM3 conditions of service, a position he held until his

dismissal. To that effect, the deponent produced copies of the complainant's 2007 contract of employment and the 2021 offer of employment, marked collectively as exhibit 'BM1'. The deponent averred that on or about 9<sup>th</sup> March, 2021, the late Constable Teddy Zyambo, who at the time was the Mine Security Officer, received a call from RW2 informing him that he had spotted an unknown person from his view at the new tank house tower carrying some hanger bars heading to the substation as shown by the statement, exhibit 'BM2' which was given by the said RW2. That after receiving the said information, Teddy Zyambo proceeded to the substation unit 3 with two other Magnum Security Officers and found the complainant unaccompanied. He was asked if he had seen any persons carrying copper hanger bars but the complainant refused. That Teddy Zyambo then entered the substation and found the copper hanger bars. That he questioned the complainant who tried to offer him a bribe and pleaded but Teddy Zyambo persuaded the complainant to move away from the dangerous area in the substation so that they could agree on the bribe for fear that if he arrested him there, he could harm himself. That the complainant was taken outside and handcuffed. The deponent produced a copy of the statement, exhibit 'BM3' which was given by the late Teddy Zyambo. He further deposed that when Chalwe Bwalya, an Electrical Foreman visited the scene a day after the incident in the presence of the Zambia Police and CID Officers, they found the cable trench open and filled with copper hanger

bars as shown by the statement, exhibit 'BM4' given by the said Chalwe Bwalya. That the complainant was then arrested and charged with a criminal offence; and he was later charged administratively for the offences of unauthorised removal of company property and non-compliance with established procedures as shown by the complaint form and disciplinary and grievance procedure code, exhibit 'BM5'. He deposed that the complainant was charged, given an opportunity to exculpate himself and the initial committee as well as the appeal committee found him guilty as shown by the minutes of the initial committee, investigations report and appeal committee, exhibit 'BM6'. That regarding the offence of non-compliance with established procedures, the complainant had been warned before on several occasions as far back as 2010, as shown by the warning letter, exhibit 'BM7' where the complainant was warned to start clocking-in in the register for logging in. That the complainant had requested for CCTV footage of the new tank house knowing very well that the camera did not cover certain areas and they had been working on covering blind spots which the thieves had been using to maneuver the cameras. That the dismissal was properly done in that the procedure was properly followed and the complainant admitted to non-compliance with established procedures after several warnings and charges which alone was enough to have him dismissed. That there was overwhelming evidence that he participated in the theft. That the respondent made the right decision. The deponent produced the

complainant's statement, exhibit 'BM8' to that effect. That the complainant was heard on 9<sup>th</sup> March, 2021 and after the hearing, he was accordingly dismissed and informed of his right to appeal which he duly exercised. That the appeal was rejected as shown by the dismissal letter and the recommendations after the hearing, exhibit 'BM9'. The deponent further averred that the criminal proceedings were immaterial and it was clear that just because the complainant was supposedly acquitted for a criminal charge he felt entitled to the present action.

At the trial, the complainant testified that he started working for the respondent on 2<sup>nd</sup> August, 2007 at Nchanga mine under KCCM as a General Worker. After working for five years, the respondent sponsored him for training at Kitwe Trades School where he was trained as an Electrician. After completing his studies, the respondent promoted him to the position of Electrician in 2014, increased his salary and gave him a substation key which he was allowed to be taking home. He was also shown where he was to be working from, that is, the TLP tank houses. He was also informed that all the workers in that section had a similar substation key.

On 5<sup>th</sup> March, 2021, he went for work in the night shift and when he reached the electrical workshop between 19.10 and 19.15; he found that his colleague, David Kalumba, whom he was working with in the night shift had already arrived and had received the

list of the duties that they were assigned. That David Kalumba gave him the said list which indicated that they were assigned to check on all the substations and all the machines known as rectifiers used for making copper cathodes. They remained in the workshop awaiting to be called for any breakdown of the machines so that they could go and work on them. The complainant explained that when David Kalumba was taking over the shift between 18.00 and 20.00 hours, he was informed that at substation unit 2, rain water had seeped into the substation in the afternoon and they had placed a pump to pump out the water so that the water could not go into the electrical panels.

The complainant testified that around 02.00 hours, Mr. Collins Chinyamba, their Section Engineer phoned and told them that he wanted a report by 06.00 hours concerning the substation which had been flooded with water because water was dangerous to electricity.

Around 05.45 hours, the complainant went to the new tank house while David Kalumba went to the old tank house. That when he reached the new tank house gate at 06.00 hours, he found a Mine Police Officer, Teddy Zyambo who opened the gate for him. That he entered and first went to the substation unit 1. He opened the substation doors and recorded the readings on the rectifier and switched off all the security lights because it was bright outside. After completing his work, he left the substation and closed the

door. He then went to substation unit 2 and opened the doors. That he did not enter the substation but just peeped because it was flooded with water and he knew that it was dangerous to go inside because of the water that had seeped through where there was electricity supply. He also noticed that there was a pump that was pumping out water. He closed the doors and went to substation unit 3. He opened the doors, entered inside and when he reached the rectifier, he saw Teddy Zyambo, a Mine Police Officer who informed him that he had received a phone call from RW2 who was operating from the Mine Police tower informing him that he had seen a person who was throwing copper outside the fence. That the person he saw was wearing yellow clothes and had run towards the same substation which the complainant had opened. Afterwards, Teddy Zyambo started searching the unit 3 substation and when he reached the cable trenches, he found that the lid was removed and the trench was left open. Teddy Zyambo lit a torch light and inspected the trench. That the Officer saw copper hanger bars and asked the complainant if that was where they were supposed to be. The complainant told him that they were not supposed to be there. The Officer then asked how the items got there and the complainant stated that he did not know. Teddy Zyambo then told the complainant that he was going to arrest him because he was the one he had found there, and that he was the one who had opened the substation. That the complainant told Zyambo that he was not the only who used to work there and that all Electricians and Engineers had the same



key to the substation but Zyambo refused to accept his explanation. That he also told Zyambo that instead of arresting him, he should view the CCTV footage since the place was under CCTV monitoring and that the area was guarded by Zambia Police Officers, Mine Police Officers and pro-shield security but Zyambo refused to take all that into consideration. That Zyambo took the complainant, placed him in hand cuffs and stated that everything at the substation should remain intact and not tampered with. Thereafter, Zyambo took him to the guardroom. He explained that at the time Zyambo found him, he was wearing a blue electrical flash suit. That RW2 also went to the guard room and Teddy Zyambo called the Mine Police CID and asked them to go with a vehicle and Security Personnel to pick him up. That when the CID Mine Police reached, they picked up the complainant and took him to the substation unit 3 together with Zyambo and RW2 to check on the copper hanger bars that were in the trench. That the CID and Zambia Police officers obtained a statement from Teddy Zyambo about everything that he was explaining to them and also took a statement from RW2. Afterwards, they took the complainant to Anti-Copper-Zambia Police offices within the plant and charged him with the offence of theft by servant. He was told to wait for the Human Resource Manager. Eventually, the Human Resource Manager went there in the company of his Manager, Sylvester Phiri. That the Human Resource Manager informed him that he was charged with the offence of unauthorised removal of company property and non-compliance

with established company procedures; and read the said charges to him. After reading the charges to him, the Human Resource Manager informed him that he was dismissed from employment and Sylvester Phiri signed the letter of dismissal, 'AZ1'. He was also informed of his right to appeal within two days.

The complainant told the Court that he was not given a chance to exculpate himself. They just read the charges and relied on the statements from Teddy Zyambo and RW2. He was then taken to Chingola Central Police station where he was detained for a night. The next day, he was released on police bond and later taken to the Magistrate's Court where he was tried for the offence of theft by servant. That Teddy Zyambo and RW2 testified on behalf of the respondent. That he was acquitted on 6<sup>th</sup> August, 2021 as shown by the certificate of acquittal, exhibit 'AZ2'. He stated that before the criminal trial in the Magistrate Court was concluded, the respondent invited him for a disciplinary hearing. That that was the second disciplinary hearing he was invited to attend. That in attendance was the Human Resource Manager, and the complainant was represented by the union. That the charge was read to him and he was informed that his appeal had been dismissed. That he appealed again and the third hearing was held before a different Manager-Business Smelter Human Resources. That the Manager upheld the dismissal and when the complainant asked the Manager to show

him the CCTV footage and call all the Security Personnel who were on duty on that day, he refused to do so.

The complainant urged the Court to award him compensation for the mental suffering he had endured and for dismissing him without a cause. That he also wanted damages for defamation. That he did not commit the offences he was charged with. That he was not the only person who had access to the substation as a lot of people had the key to the same substation. Further, that no one found him with the items he was alleged to have stolen.

During cross-examination, the complainant confirmed that he was claiming that he was unfairly dismissed and not wrongfully dismissed. He also confirmed that he was charged with two offences namely: non-compliance with established procedures; and unauthorised removal of company property.

With regard to the offence of non-compliance with established procedures, the complainant stated that whether one had to log in before accessing the substation depended on what was happening at the substation. That for instance, there was no need to log in if there was fire. He confirmed that there was no fire at unit 3 substation on 9<sup>th</sup> March, 2021. He confirmed that at the time he was taken to the guardroom, he was asked whether or not he had logged in and in response, he admitted that he had not logged in. That when asked why he had not logged in, he

stated that he knew that he was going to log in when leaving. He stated that this was the first time he was being charged for the offence of failure to log in. When referred to the letter, 'exhibit 'BM7'', the complainant confirmed that the date on the document was 25<sup>th</sup> January, 2010 but he denied having been given the said letter. He stated that he was aware of the consequences of not logging in. He admitted that he did not log in at the time he was found at unit 3 substation. He stated that the reason he was denying the offence of non-compliance with company procedures was because it was not a dismissible offence. He admitted that he was aware of the electrical procedure for entry into unit 3 substation but that he did not know that a minimum of two electricians had to enter the substation. When referred to page 6 of his statement, exhibit 'BM8', the complainant confirmed that when asked if he was allowed to enter the substation alone, he responded that the standard was 2 people but sometimes they could split due to workload, however, one could not work alone. He admitted that he entered unit 3 substation alone but he did not do any work. That he was aware that failure to follow the rules had huge implications on the mine. That the mine could be charged which could lead to huge losses. He confirmed that he was the one that opened unit 3 substation and not Teddy Zyambo. That the new tank house was fenced and the substations to which only the complainant and other electricians had keys were inside the fence. That Teddy Zyambo only opened the gate for the complainant who then

entered the premises and opened unit 3 substation. That he entered the substation around 06.15 hours and that Teddy Zyambo found him inside the substation. The complainant confirmed that he had opened the doors around the same time that RW2 had reported seeing people throwing copper hanger bars over the fence. He confirmed that Teddy Zyambo asked him if he had seen any person in the area and in response, he said he was alone. It was the complainant's argument that he felt that the suspicion that he was the person who was seen in that area was unfair despite the fact that he had deliberately left the doors open, had not logged in and he was the only one in the area. That Teddy Zyambo took him to the Mine Police head office after he handcuffed him and that he (the complainant) gave a statement of the events that had happened.

When referred to the complaint form, exhibit 'BM5', the complainant stated that the date of occurrence as shown on the document was 10<sup>th</sup> March, 2021 and the place of occurrence was the new tank house, unit 3 substation. He admitted that according to the document, after taking statements from him, he was laid off. That he was aware that there was an investigation instituted as he was arrested. When referred to pages 9 and 10 of the minutes of the complainant's first appeal hearing, exhibit 'BM6', the complainant stated that even as an Electrician, he would go with a hacksaw in unit 3 substation. When referred to page 11 of the said minutes, the complainant denied that a

minimum number of two technicians was allowed to go into the substation. He stated that he was not given the dismissal letter on the same day after the investigations were completed. When referred to the dismissal letter, exhibit 'BM9', the complainant confirmed that the date on the said letter, which was addressed to him was 9<sup>th</sup> March, 2021. He stated that he could not remember the date when he was given the dismissal letter but that it was not on the same day he was dismissed. That, however, he appealed within two days despite not having been given the letter and he was heard on appeal. When referred to the minutes of the appeal hearing, 'exhibit 'BM6', the complainant confirmed that that was his first appeal after the dismissal. That he was informed that his appeal was not successful and the dismissal was upheld. He was also informed of the right to the final appeal. That he was called for the third and final appeal and he was informed that it was unsuccessful. Finally, he admitted that he was accorded an opportunity to be heard throughout the entire disciplinary process.

In re-examination, the complainant stated that he did not log in when entering the substation because Teddy Zyambo followed him quickly after entering the substation and started interrogating him about a person who had entered in there. He explained that there were two types of logging in, the first one when entering the mine main gate and the second one when entering the substation. That that letter that was shown to him

was in relation to clocking in at the main gate when entering the mine. He stated that on 9<sup>th</sup> March, 2021, the Human Resource Manager and the Manager just read the charges to him and informed him that he was dismissed. That he was given a short hearing whilst in handcuffs.

Bernard Mwansa, Assistant Superintendent-Human Capital Management, Mining Department was RW1. The witness testified that on 9<sup>th</sup> March, 2021, his office received a report from the Mine Police department about the arrest of the complainant after he was found at the new tank station, unit 3 substation. That he instituted investigations after which it was established that the complainant committed two offences namely: non-compliance with established procedures and unauthorised removal of copper hanger bars from the substation. That the complainant was invited to exculpate himself at the Human Resources department on 10<sup>th</sup> March, 2021 and a statement was gotten from him and other witnesses after which the documents were handed over to the hearing official. That after studying the documents, the hearing official informed them that he was ready to hear the case the very day. The complainant was informed of the hearing and advised to go with a Union Representative. Later in the day, the complainant went for the disciplinary hearing with a Union representative. Present in the case hearing were the Human Resources Manager, the complainant and the Union R

representative. When the hearing started, the complainant was given a chance to narrate to the tribunal about what had happened. That after the hearing, the committee found that the complainant did not comply with the procedures relating to working in a substation. It was also found that the complainant was in possession of copper hanger bars in the substation. The witness testified that according to the report at page 9 of exhibit 'BM6', paragraph 7 and 8, footprints of the safety shoes the complainant was wearing were found on the scene together with a hacksaw he used to cut the copper hanger bars. That it was also found that the complainant was the only key holder at the material time; that he entered the substation alone; and he did not log in before entering the unit 3 substation as per the requirement. He stated that the complainant was working with David Kalumba in the same night shift.

Further, the witness testified that the complainant was dismissed based on the fact that in 2010 he had been warned for a similar offence as shown by the letter, exhibit 'BM7'. That after his dismissal, the complainant was advised of his right to appeal within two working days as shown by the letter, exhibit 'BM9' which right he exercised. The complainant was heard on appeal in the presence of a union official and the dismissal was upheld as shown by the minutes of the said appeal hearing at pages 1 and 2 of exhibit 'BM6' as the hearing official did not find any fresh evidence to enable him set aside the earlier verdict. That



the complainant was informed of his right to appeal further to the Director of the Business unit, and the nominee Director set a date for the final appeal. The complainant was heard but still there was no fresh evidence and the appeal was rejected as shown by the minutes, exhibit 'BM6' at pages 3-5. That the respondent then wrote the letter at page 6 of the minutes, exhibit 'BM6' to the complainant informing him of the results of the final appeal. After that, the complainant was referred to the department of the Human Resource Officer to undertake exit procedures which he complied with.

In cross-examination, the witness stated that the complainant was found with 500kg of copper hanger bars. He admitted that it was not possible for one person to carry the said 500kg of copper hanger bars but that they were in the complainant's office, which was the substation. He also admitted that all the Electricians and Engineers had keys to the substations that were assigned to them and that there were two shifts before the shift the complainant was working in. That according to the log sheet, there was only one Electrician in the day shift, a lady. He confirmed that there was a report of flooding in unit 2 substation from the Section Engineer. That unit 2 substation and unit 3 substation were 10 meters apart. That there were three substations in total. That the lady who had entered unit 3 substation was with the Section Engineer who was in the day shift. He stated that they did not establish whether David

Kalumba had entered the old tank house by himself because they did not go there. He stated that he was aware of Regulation 1924 which provided that Electricians could go to the substations alone in case of emergencies. He admitted that no one found the complainant throwing or removing the copper hanger bars from the substation. That according to the report, the person who was seen throwing the copper hanger bars was wearing orange clothes. That the complainant was wearing a blue work suit at the time he was found. He also admitted that the complainant needed to wear safety boots to enter the substation which the company provided to all Electricians who used to enter the substations. That the complainant was wearing the safety boots at the time he was found. He admitted that the complainant was dismissed because of the repeated prior warnings. He stated that it was illegal to enter a substation alone. That David Kalumba was not charged for entering the old tank house alone.

In re-examination, the witness stated that there were trenches in the substations for cable lines going outside the plant to various places. That the 500kg of the copper hanger bars were found in the trench where the complainant was also found. He stated that after investigations, David Kalumba was given a benefit of doubt. He also stated that there was no emergency in unit 3 substation on that day for the complainant to enter it alone. He further stated that the safety boots which the respondent provided to Electricians were the same in make but different in sizes.

RW2 was Constable Cephas Kalaba, a Mine Police Officer. He testified that on 9<sup>th</sup> March, 2021, he reported for work around 18.00 for the shift that was from 18.00 to 06.00 hours the next day on 10<sup>th</sup> March, 2021. That he was assigned to man the new tank house tower. Around 05.40, he spotted a person who was coming from the new tank house substation throwing copper hanger bars through the steel fence. That he called his colleague, Constable Teddy Zyambo who was manning the new tank house main gate and informed him that he had seen someone throwing copper hanger bars through the gaps in the steel fence. That the witness dropped from the tower and went to where the copper hanger bars were. About ten minutes later, Teddy Zyambo called him and asked him to go to the new tank house. That when he entered the new tank house through the guard room at about 06.00 hours, he saw Teddy Zyambo with the complainant going towards the guardroom and the complainant was in handcuffs. That they notified the shift-in-charge who went with Zambia Police Officers. He gave a statement after which they went to check the substation where the copper hanger bars were found together with Teddy Zyambo and the complainant. That the Officers then collected both the copper hanger bars that were thrown outside and those that were found in a trench inside the substation.

In cross-examination, the witness admitted that he was on top of the tower when he saw the intruder. That it was a distance of 10m from the new tank house. That it was a bit dark at the time. That the intruder he saw was wearing an orange work suit. That at the time he was dropping off the tower, he lost sight of the intruder as he went back to the substation. That the witness went to the substation after 10 minutes. That when he reached the substation, he found the complainant wearing a blue work suit and safety boots. He stated that he was not able to see the face of the intruder from the tower. He admitted that the copper hanger bars he found could only be carried by a number of people due to their weight. The witness admitted having given a statement, exhibit 'BM2', in which he stated that it took him 20 minutes to get to the substation from the time he called Teddy Zyambo.

In re-examination, the witness confirmed that the intruder was seen running towards the substation where the complainant was. He stated that the whole incident took about 20 minutes from the time he called Teddy Zyambo to the time he saw him at the guardroom but that it took about 10 minutes between the time he called Teddy Zyambo and the time Zyambo called him back.

I have considered the parties' affidavit and the *viva voce* evidence. I have also considered the final written submissions filed by Counsel for both parties and I will make reference to them where relevant.

As the record shows, the facts of this case were common cause. There is no need to reproduce the said facts except to state that the complainant has vehemently argued that his dismissal was unfair as he did not commit the offence for which he was dismissed. Therefore, the only issue for determination is whether the complainant's dismissal was unfair. Should the question be answered in the affirmative, then I will consider whether the complainant is entitled to damages for mental distress.

I have analysed the evidence in this case and I am quite satisfied that the respondent complied with disciplinary procedures in determining the complainant's case and his eventual dismissal. I am satisfied that he was accorded all his rights to a fair hearing. He was formally charged for the offences that were alleged against him, he was called upon to exculpate himself and given an opportunity to be heard.

In the case of **The Attorney-General v Phiri**,<sup>1</sup> it was held that:

**"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 it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same. Quite clearly, if there is no evidence to sustain charges levelled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures."**

In *casu*, the complainant was dismissed for the offences of non-compliance to established procedures; and unauthorised removal of company property. The complainant denied having committed the said offences. In essence, he has contended that there was no substratum of facts to support his dismissal from the respondent's employment.

The learned authors, Judge Dr. 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."**

On the above authority, for the complainant to succeed in his action for unfair dismissal, therefore, he must show that the dismissal was based on unsubstantiated reasons.

I have considered the events that led to the respondent taking disciplinary action against the complainant and his eventual dismissal from employment.

With regard to the offence of non-compliance with established procedures, the respondent alleged that the complainant entered

unit 3 substation alone and without logging in, contrary to the respondent's standard procedures which required a minimum of two Electricians to enter the substation at any given time; and to log in prior to entering the substation.

The complainant did not dispute having entered the substation alone and without logging in. He stated that whilst it was an established standard procedure that a minimum of two Electricians had to enter the substation together, sometimes they used to split due to workload. The complainant also stated that there was also no need to log in in case of emergencies. He stated that the reason he did not log in was because he had intended to do so when leaving the substation. Further, he stated that there was no time for him to log in because immediately he entered the substation, Teddy Zyambo followed him and started interrogating him over someone who had been seen getting copper hanger bars.

It is clear from the complainant's own evidence that he did not log in prior to entering unit 3 substation; and that he entered the substation unaccompanied by another Electrician. Regarding logging in, the complainant testified that when he reached the unit 3 substation, he opened the door, entered it and went to the rectifier. That he was found inside the substation by Teddy Zyambo. This means that at no point did Teddy Zyambo interrupt him in logging in prior to his entry into the substation.

Therefore, I reject his argument that he was interrupted by the said Teddy Zyambo as a result of being interrogated. For this reason, the respondent cannot be faulted for having found the complainant guilty of the offence of non-compliance with established procedures. However, the question that begs an answer is whether his summary dismissal from employment was the correct penalty for this offence.

I have perused the respondent's Disciplinary Code, section 4.4.1(c) which provides for the offence of non-compliance with established procedures, among others. The punishment has not been specified for committing such an offence. What appears under section 3 of the Disciplinary Code are general penalties for committing various offences. Under section 3.1.1(a), it is provided that:

**"In general, disciplinary action should in the first instance be educational and then corrective; punitive action should be taken when the earlier steps have proved ineffectual. However, each case is determined on its own merit.**

**NOTE: It must be emphasised that this schedule of penalties provides guidelines only, and depending on the circumstances of the case, an offence may warrant a more or less severe penalty than that laid down."**

Further, under section 3.3, the Disciplinary Code provides for the types of penalties to be imposed depending on the severity of an offence. From the reading of section 3.3, it would appear that the respondent has discretion to impose a punishment that it thinks befits the severity of the offence. The determination of such



severity would depend on the circumstances of each particular case. In the present case, the complainant, during cross-examination, admitted that failure to log in would expose the respondent to huge losses upon being charged. It was also the respondent's evidence that this was not the first time the complainant had neglected to log in and in support of that evidence, they produced to Court the letter dated 25<sup>th</sup> January, 2010, exhibit 'BM7' which the complainant denied having been given. I am satisfied that the complainant, by the letter, exhibit 'BM7' was warned of the need to be clocking in (logging in) and out of various locations across the respondent's mine and that he was fully aware of the consequences of not doing so, particularly in respect of unit 3 substation. Therefore, I find that the complainant had received enough education about the need to log in and that the earlier steps taken to correct him on his omissions did not yield any positive results. Having considered the fact that he had been previously warned about the need to log in and out of any location; and having also considered the severity of the breach, the respondent's decision to dismiss him for the subject offence was well founded. Consequently, the complainant has, on a balance of probabilities, failed to prove that his dismissal from employment for the offence of non-compliance with established procedures was unfair.

Regarding the offence of unauthorised removal of company property, the complainant's evidence was that following the

discovery of the said copper hanger bars at unit 3 substation where he was assigned to work, he was charged with the offence of theft by servant after the respondent reported the matter to the Police and the respondent also took an administrative measure and summoned him for a disciplinary hearing for the said offence. That on 6<sup>th</sup> August, 2021, the Court acquitted him of the said charge of theft by servant as shown by the certificate of acquittal, exhibit 'AZ2'. He contended that during the disciplinary hearing, there was no evidence adduced to the effect that he had stolen or had attempted to steal the copper hanger bars. That the area where he was working from was monitored by CCTV and there was no footage produced at the hearing showing him stealing the copper hanger bars. He also stated that no witness testified that he saw or had found him removing the copper hanger bars from where they were ordinarily kept. That the decision to dismiss him on allegations of theft was grossly unfair and unfounded.

On the other hand, the respondent alleged that after RW2 spotted a person who was coming from the new tank house unit 3 substation throwing copper hanger bars through the steel fence, he informed his workmate, Teddy Zyambo. That Teddy Zyambo went to the said substation where he found the complainant and after searching the area, he found some copper hanger bars which were not supposed to be in that place. That they also found footprints of the safety shoes the complainant was

wearing on the scene together with a hacksaw that was used to cut the copper hanger bars. Further, that investigations revealed that the complainant was the only key holder to the substation at the material time; that he entered the substation alone contrary to the regulations which provided that a minimum of two Electricians had to enter the substation at any given time; and that he did not log in before entering unit 3 substation as per the company policy. It was also argued that there was no emergency for the complainant to have entered the substation alone and without logging in.

I have considered the parties' opposing arguments.

At the outset, I should deal with the complainant's averment that after the discovery of the copper hanger bars, he was charged with the offence of theft by servant after the respondent reported the matter to Chingola Central Police station. That he was prosecuted for the said offence in the Chingola Subordinate Court and was subsequently acquitted of the charge on 6<sup>th</sup> August, 2021, as shown by the certificate of acquittal, exhibit 'AZ2'.

I must mention that it is settled that evidence in a criminal trial has no relevance in civil litigation and should not, therefore, be referred to in a civil trial. I am fortified in this position by the

decision of the Supreme Court in the case of **Annard Chibuye v Zambia Railways Corporation Limited**<sup>2</sup> where it was held that:

**“Following Kabwe Transport Limited v Press Transport<sup>3</sup>, the result of a criminal trial cannot be referred to as proof of a fact which must be established in a civil Court; and this applies whether the criminal trial resulted in a conviction or in an acquittal.”**

Further, an employer is not barred from taking administrative disciplinary measures and meting out appropriate punishment against an erring employee even if he may have been acquitted of criminal charges which arose from the same transaction. In the case of **Enerst Maxwell Kabeya v Neon and General Signs Limited**<sup>4</sup>, the Supreme Court held that:

**“The fact that an employee is acquitted of a criminal offence does not preclude the employer from taking out any disciplinary measure and meting out appropriate punishment including dismissal even where the disciplinary charge taken out arose out of the same set of facts as the criminal charge.”**

Based on the above authorities, it is clear that the complainant's acquittal has no relevance to the present case. Therefore, I am satisfied that the respondent was well founded to have taken administrative disciplinary measures against the complainant on the same facts as those on which the criminal charge was based.

Turning back to whether the offence of unauthorised removal of company property was substantiated, it is on record that the complainant had entered unit 3 substation unaccompanied and without logging in. His conduct was contrary to the respondent's

policy which provided that a minimum of two Electricians were required to enter the substation at any given time; and had to log in in the log book prior to entering the substation. It is also in evidence that RW2 saw an unknown intruder who was coming from unit 3 substation throwing copper hanger bars through the gaps in the steel fence and thereafter, alerted the late Constable Teddy Zyambo about it. According to the complainant's own evidence, Teddy Zyambo conducted a search in unit 3 substation and when he reached the cable trenches, he found that the lid was removed and the trench was left open. That it was in the trench that Teddy Zyambo saw copper hanger bars where upon he told the complainant that he was going to arrest him because he was the one who was found there. Upon being asked, the complainant admitted that the copper hanger bars were not supposed to be found at unit 3 substation. There was also evidence to the effect that the complainant was found with a hacksaw which was believed to have been used to cut the said copper hanger bars. In my considered view, it was not a mere coincidence that the complainant entered the substation unaccompanied and without logging in, and with the hacksaw; and at the same time copper hanger bars were found in a trench in unit 3 substation. I find that the deliberate neglect to invite another Electrician to accompany him and the failure to log in before entering into the substation was a calculated move to conceal the illegal acts he had embarked on. Further, what was perplexing was the fact that the unknown person who was seen

by RW2 was never seen in that area except that the complainant was the only person found and he confirmed that he was the only person in that area. I find that the complainant did not offer any reasonable explanation for being found at a point where the stolen copper hanger bars were also discovered. All the circumstances of this case point to the only irresistible inference of the complainant's guilty conduct. In this regard, therefore, the respondent could not have been required to prove beyond reasonable doubt that the complainant committed the offence in question. I am fortified by the decision of the Supreme Court in the case of **Chimanga Changa Limited v Stephen Chipango Ng'ombe**<sup>5</sup>, where it held that:

**“An employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. An employment relationship is anchored on trust. And once such trust is eroded, the very foundation of the relationship weakens.”**

Based on the evidence in this case, therefore, the respondent cannot be faulted to have found the complainant guilty of the offence of unauthorised removal of company property. According to section 3.8.1(g)(iv) as read with table 1 of the respondent's Disciplinary Code-Schedule of offences and sanctions, the said offence attracted the punishment of summary dismissal. In this regard, the respondent properly exercised its

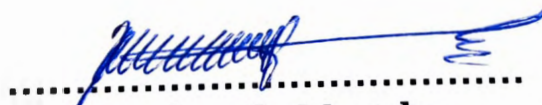
disciplinary powers to summarily dismiss the complainant from employment. In the result, the complainant has, on a balance of probabilities, failed to prove that his dismissal from employment was unfair.

Consequently, the complainant having failed to prove that he was unfairly dismissed for both offences, his claims for damages for both unfair dismissal and mental distress cannot stand and are accordingly dismissed.

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

Leave to appeal is granted.

**Delivered at Ndola this 17<sup>th</sup> day of August, 2022.**



**Davies C. Mumba  
HIGH COURT JUDGE**