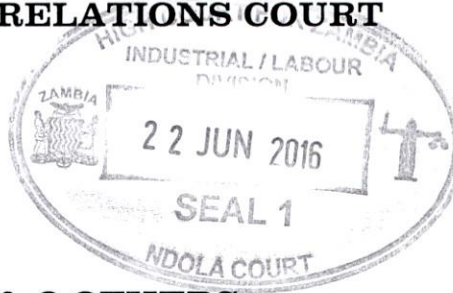


**IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA**



COMP/24/2015

BETWEEN:

MAGGIE CHISHIMBA & 3 OTHERS

COMPLAINANTS

AND

**MPULUNGU HARBOUR CORPORATION
LTD.**

RESPONDENTS

BEFORE:

Hon. Judge E.L. Musona

MEMBERS:

**Hon. W.M. Siame
Hon. J. Hasson**

For the Complainants :

- (1) Mr. J. Zulu, Senior Legal Aid Counsel of Messrs Legal Aid Board.**
- (2) Mr. K. Tembo, Legal Aid Counsel of Messrs Legal Aid Board.**

For the Respondents : Mr. Mando Mwitumwa of Messrs M.L. Mukanda and Co.

JUDGMENT

Date : 22nd June, 2016

Cases referred to:

1. **Chilanga Cement Plc v Kasote Singogo (2009) ZR (SC)**
2. **William Ng'uni v Kitwe City Council (2005) ZR.**

There are four (4) Complainants in this case and their names are, F/Maggie Chishimba, M/James Lombe, M/Joseph Simwinga and M/James Sikazwe. We shall, therefore, refer to them as CW1, CW2, CW3 and CW4 or collectively as the Complainants.

The Complaint was filed against Mpulungu Harbour Corporation Ltd. We shall accordingly refer to Mpulungu Harbour Corporation Ltd as the Respondents.

The Complainants' claim is for the following relief:

- (a) Damages for unlawful and wrongful dismissal;
- (b) Damages for loss of expectation of income and anguish;
- (c) Any other relief which the court deems fit and just under the circumstances;
- (d) Costs.

The duty for this court is to ascertain if the Complainants have proved their claims.

We shall now consider the evidence in this case. The first witness for the Complainants was F/Maggie Chishimba. She is

CW1 in this case. The evidence for CW1 was that she was employed on 16th September, 2010 as an Accounts Assistant and at the time of her dismissal from employment on 23rd February, 2015 she was a full time employee as a Documentation Supervisor. According to CW1 herself, on 22nd January, 2015, CW1 received a charge letter wherein she was charged with inciting violence and riotous behaviour. CW1 told this court that this charge came as a shock to her because during the alleged period she was not in the district having gone to Kasama for a workshop on monitoring of elections. CW1 alleged that when the disciplinary hearing was held on 26th January, 2015 the procedure was not followed because the disciplinary chairman simply read the charge and asked CW1 what CW1 wrote in her exculpatory letter without calling witness to testify against CW1. CW1 denied that charge. CW1 further alleged that her appeal to the General Manager was dismissed without hearing CW1 who was the Appellant.

CW2 was M/Joseph Simwinga. CW2 told this court that he was employed on 1st October, 2010 as a forklift Operator. CW1 worked for 4 years and 5 months. On 22nd January, 2015, CW2 received a charge letter. He was charged with inciting violence at the place of work. On 26th January, 2015, CW2 attended a disciplinary hearing. He received a dismissal letter on 22nd February, 2015.

The Respondents called six witnesses. We shall refer to them as RW1, RW2, RW3, RW4, RW5 and RW6.

The first Respondents' witness was M/Davis Mondella Kaluba the General Manager for the Respondents.

RW1 told this court that the Respondents are an Inland Port on the Southern tip of Lake Tanganyika, a Parastatal under the Ministry of Transport, and has a total establishment of one hundred and four (104) permanent employees and one hundred casual workers known as stevedores.

The evidence of RW1 was that he was a witness to the work stoppage on 12th January, 2015 by stevedores. An investigation revealed that the stevedores were incited to stop work for some reasons including insufficient pay.

Prior to this work stoppage the Board for the Respondents had met and one of the issues which management submitted for approval was wage increase for stevedores.

There had been no prior complaint to management by stevedores, the submission by management to the board for approval of wage increase was purely an operational necessity as deemed by management. That work stoppage was regrettable.

Following the dismissal of the Complainants, RW1 was involved at the appeal stage. Their appeal against dismissal was dismissed by the Appeals Committee which was chaired by RW1.

The second witness for the Respondents was M/Samuel Mwimanzi.

The evidence for RW2 was that on 7th January, 2015 he received James Lombe at his house. James Lombe is one of the Complainants in this case. James Lombe went to RW1 to lobby from RW2 for use of the house for RW2 as a venue for a meeting. James Lombe revealed to RW2 that the purpose of the meeting was to plan to stage a demonstration against the Respondents' management. When James Lombe disclosed to RW2 that he did not have a police permit for their planned demonstration, RW2 advised James Lombe to obtain a police permit otherwise James Lombe would be in trouble.

On 9th January, 2015, whilst at work, RW2 was again approached by Joseph Simwinga who too talked about the same planned demonstration. Joseph Simwinga is one of the Complainants in this case. That same day on 9th January, 2015, RW2 reported the matter to the Respondents, Human Resources Officer.

What buffled RW2 on 12th January, 2015 is that there was chaos at Respondents' port and port activities came to a stand-still due to the confusion which occurred there. Stevedores were shouting, "Aleya", "Aleya" which literally interpreted means, "let go, let go".

RW3 was Milambo David a Maintenance Foreman for the Respondents. The evidence for RW3 was that in the second week of January, 2016 he received information through the Human Resources Office that there was going to be a demonstration the following week. Upon receipt of this information, RW3 proposed to the Human Resources Office to call for a meeting on Sunday, 11th January, 2015 to be held in the office of the Human Resources Officer. The objective of that meeting was to counsel the people involved in the planned demonstration.

On 12th January, 2015 the stevedores went on work stoppage. The stevedores became violent and did not work the whole of that day.

The fourth witness for the Respondents was Friday Lupasha a Welder for the Respondents. This RW4 was later dispensed with by the Respondents.

The fifth witness for the Respondents was Wedson Chileshe. This RW5 was also dispensed with by the Respondents.

The sixth witness for the Respondents was Esnart Nyirenda a Human Resources Officer for the Respondents.

The evidence for RW6 was that she received numerous phone calls on 9th and 10th January, 2015. The phone calls were from different employees inquiring about a planned protest by other

employees. Among those phone calls, were from Samuel Mwimanzi and Friday Lupasha. She also received a phone call from the Office of the President. The information from these callers was that there were employees of the Respondents who were planning to protest against the General Manager and the entire management for the Respondents. Those planning the protest, among them were, Joseph Simwinga, James Lombe and James Sikazwe.

A meeting was called and held on 11th January, 2015 to meet the employees who were mentioned to have been planning the protest. During that meeting the employees who were mentioned as planners for the protest were cautioned by management for the Respondents.

On the morning of 12th January, 2015, stevedores staged a protest demanding to be addressed by the General Manager. After the General Manager obliged and addressed them the stevedores resumed work.

RW6 received a further phone call from the Office of the President reiterating that Joseph Simwinga, James Lombe and James Sikazwe were the people who planned and incited stevedores to stage the protest. In this second phone call Maggie Chishimba was included on the list of people who planned and incited stevedores to stage the protest.

We have considered all the evidence in this case. We must now consider the relief sought;

(a) Damages for unlawful and wrongful dismissal

Unlawful dismissal means that a statutory provision was breached in the manner the dismissal was effected. For a claim of unlawful dismissal to succeed it must, therefore, be shown that a statute was breached. The Complainants did not show which statute was breached. On those basis, therefore, the claim for unlawful dismissal fails.

Wrongful dismissal means that the disciplinary procedure leading to dismissal was not followed or the dismissal was based on allegations which were not proved against the employees. In order to dismiss an employee the allegations against the employee must be proved, if they are not proved, the dismissal becomes wrongful.

We have already stated that we have considered the whole of the evidence in this case. We have noted, and indeed, are satisfied that the allegations against all the within Complainants were not proved against each of the Complainants because of the following reasons:

1. Throughout the web of the evidence in this case, all the evidence is clear. What is clear is that the protest at the harbour was staged by casual workers known as stevedores in Marine Law. None of the Complainants was a stevedore. There is no evidence that other employees other than

- stevedores also participated in the protest. This, therefore, proves that the Complainants did not participate in the protest.
2. We are also alive to the allegation that the Complainants planned the protest and that they incited the stevedores to stage a protest. We have seen no evidence to prove that the Complainants were the planners for the protest by stevedores. RW2 was Samuel Mwimanzi. RW2 attempted to show that James Lombe and Joseph Simwinga planned the protest but during cross examination he admitted that he too was originally a suspect in this same case. This makes his evidence unreliable because he is a witness with an axe to grind. Thus, he is likely to have his own purpose to achieve. The danger with such a witness is that he might exaggerate the role of the Complainants or merely fabricate evidence in order to minimize his own role or to simply win favour from the Respondents.
 3. We have seen no evidence to show that the Complainants incited the stevedores to stage a protest. Davis Mondella Kaluba and David Milambo were RW1 and RW3 respectively. These two (2) witnesses testified that the Complainants incited stevedores to protest but fell short of proving how the Complainants incited the stevedores to stage a protest.
 4. No stevedore was called by the Respondents to testify that the stevedores were incited by the Complainants. The only stevedore who the Respondents called was Wedson Chileshe (RW5) but he was dispensed with by counsel for the Respondents themselves after it became apparent to counsel

that the evidence of RW5 was contrary to the instructions which counsel had.

On the foregoing facts, we are satisfied that the dismissal of the within Complainants was wrongful.

We have looked at the case of **Chilanga Cement Plc v Kasote Singogo (2)** and have been guided by the principle in that case for the award of damages. In that case, the Supreme Court held that:

“when awarding damages for loss of employment, the common law remedy for wrongful termination of a contract of employment is the period of notice. In deserving cases, the courts have awarded more than the common law damages as compensation for loss of employment.”

In the circumstances of this case we are satisfied that an award of three (3) months' pay to each Complainant as damages for wrongful dismissal shall suffice and, so, we do order accordingly.

We also order interest on damages due at the Bank of Zambia rate from 27th April, 2015 when this complaint was filed until full payment.

(b) Damages for loss of expectation of income and anguish

This court cannot award damages for loss of expectation of income because an employee can only be paid for what he

has earned. In the case of **William Ng'uni v Kitwe City Council (1)** the Supreme Court held that it was illegal to award a salary or pension benefit for a period not worked because such an award has not been earned and can properly be termed as unjust enrichment. We can also not award any damages for anguish because anguish was not pleaded in evidence and the Complainants never testified in support of the claim for an award of damages for anguish. It follows, therefore, that the Complainants did not prove this claim and it accordingly fails.

- (c) Any other relief which the court deems fit and just under the circumstances

We have not seen any other relief for the court to deem fit and just under the circumstances.

- (d) Costs

The Complainants have succeeded on their claim for damages for wrongful dismissal. We accordingly order costs in favour of the Complainants.

In default of agreement on any part of the within awards, same shall go to the Deputy Registrar of the Industrial Relations Court for assessment or taxation as the case may be.

J12

Leave to appeal to the Supreme Court within 30 days from today is granted.

Delivered and signed at Ndola this the 22nd day of June, 2016.



Hon. E.L. Musona
JUDGE



Hon. W.M. Siame
MEMBER



Hon. J. Hasson
MEMBER