

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

COMP/88/2001

BETWEEN:

ELPIDIUS MWELA

COMPLAINANT

AND

NDOLA LIME COMPANY LIMITED

RESPONDENT



**CORAM: JUDGE Dr. W. S. MWENDA – HON. DEPUTY CHAIRPERSON
SITTING WITH J.M. BWALYA AND G.M. SAMUSUNGWA –
HON. MEMBERS.**

For the Complainant : Mr. K. Tembo, Legal Aid Counsel – Legal Aid Board

For the Respondent : Mrs. M.K. Mwape of Messrs. J.B. Sakala and Company

JUDGMENT

Cases referred to:

1. Chimanga Changa v Stephen Chipango Ng'ombe, SCZ Judgment No. 5 of 2010.
2. Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2006) Z.R. 22 (SC).
3. Attorney General v Richard Jackson Phiri (1988-89) ZR 121 (SC).
4. Lewis Kalamatila v Mopani Copper Mines Plc. IRC Comp/94/2014.

Publication referred to:

Astra Emir, *Selwyn's Law of Employment* - 17th Edition (Oxford University Press, 2012)

On 14th December, 2001, Elpidius Mwela (hereinafter referred to as "the Complainant") filed a Notice of Complaint against Ndola Lime Company Limited (hereinafter referred to as "the Respondent").

The grounds upon which the complaint was presented were wrongful dismissal and unfair treatment by the Respondent.

The relief sought by the Complainant was as follows:-

- (i) Reinstatement.
- (ii) Payment of full salary arrears, allowances and/or full terminal benefits.
- (iii) Compensation.
- (iv) Interest therein.
- (v) Costs; and
- (vi) Any other relief that the Court may deem fit.

The complaint was buttressed by an affidavit sworn by the Complainant wherein he stated that on 16th October 2001, he was dismissed for alleged removal of Company property but averred that he did not remove any company property as alleged.

In rebuttal, the Respondent filed an Answer on 6th February, 2002 wherein it denied that there was anything unfair and/or wrongful about the Complainant's dismissal effected on 16th November, 2001. The Respondent

deposed that the Complainant was summarily dismissed from employment for unauthorised removal of company property. Further, that the Complainant was summarily dismissed despite his plea for leniency because of his bad disciplinary record. In addition, the Respondent denied that the Complainant was entitled to any relief being sought.

This matter was characterised by a number of adjournments before being struck off the active cause list with liberty to restore. It was later restored following a successful application for restoration. This explains the delay in concluding the matter. Hearing of the matter finally took place on 2nd June, 2015. The Complainant testified on his own behalf and also called one witness by the name of Lotti Nhlane whom we shall hereinafter refer to as "CW2". We shall refer to the Complainant as "CW1".

CW1's oral testimony is a repeat of facts on record in the Complainant's Affidavit in Support of Complaint and his statement contained in exhibit "JN2" of the Respondent's Certificate of exhibits appended to the Respondent's Affidavit in Support of Respondent's Answer.

A brief summary of the facts as given by CW1 are that he was employed by the Respondent as Senior Mechanic and worked for the company for nearly 27 years. On 16th October, 2001 he was dismissed for alleged removal of Company property.

CW1 testified that on 16th October, 2001 he went to the scrap yard which he referred to as salvage yard in his statement to management. CW1 testified further that he went to the salvage yard to look for spring

washers. In the process he came across two copper coils and became interested in them.

According to CW1 he decided to take the copper coils to the mechanical workshop so that he could ask his supervisors for permission to buy them. Since the items were very heavy he requested the Loader Operator by the name of Tanasho Chilando who was working in the plant to assist him.

It was CW1's testimony that the security personnel saw the loader since it was a big machine. CW1 averred that the guard who was present on the scene told other guards that he had seen a Loader Operator removing something from the scrap yard and bringing it to the plant.

CW1 testified in addition that he was later approached by Inspector Mwiinga who asked him where the things he got from the scrap yard were. According to CW1, before he could finish explaining Inspector Mwiinga gave him a charge of giving false information. It was his testimony that the manner in which Inspector Mwiinga was asking was one of intimidation. According to CW1, the Mine Police Officer told him that he had stolen and asked why he was refusing. CW1 said Inspector Mwiinga accused him of being a thief and asked him for the things he had allegedly taken.

CW1 averred that Inspector Mwiinga took him to the gate. He said he was a bit confused because in the 27 years he had worked in the plant he had not experienced such a thing.

CW1 explained how a statement was taken from him; how he was charged and later forced out of the plant. He said after being charged there was no suspension but just a dismissal letter. It was CW1's testimony that a disciplinary procedure was followed. He said after his dismissal he appealed to the Manager. The Manager said there was nothing he could do and upheld the dismissal. According to CW1, he did not steal anything as everything he took was still at the workshop within the plant.

During cross-examination CW1 contended that his dismissal was based on the allegation that he stole and not on unlawful removal of property. He conceded that he did not know the distinction between scrap yard and salvage yard.

In further cross-examination, CW1 testified about the procedure in place at the Respondent Company for getting things from the salvage yard. He said the interested person identifies the item he likes and informs the supervisor; after permission is granted the person collects the items.

CW1 was shown exhibit "JN2" in the Respondent's Affidavit in Support of Answer, that is, CW1's statement to Mine Police and when it was put to him that he had admitted the charge, he said he was not the one who wrote the statement but was just told to sign it.

When asked why he did not wait to collect the items in the morning when his supervisor was around, CW1 said he could not do so because he was in the afternoon shift.

In further cross-examination CW1 conceded that a disciplinary hearing was conducted. He confirmed that he appealed three times but to no avail.

When it was put to him that he had appealed for leniency CW1 said he was appealing for leniency against the sentence and not with regards to the findings or procedure.

During re-examination CW1 maintained that he followed the procedure for getting things from the salvage yard although not completely. He said he intended to complete the procedure the following day.

CW1 reiterated that when Inspector Mwiinga approached him he was confused because in the 27 years he worked for the Respondent he had never been approached by the police. He averred further that he got permission from the shift supervisor to use the loader to assist him.

CW2 was Mr. Lotty Nhlane, a retired Machinist and former employee at Ndola Lime. CW2 said he worked with the Complainant in the Mechanical Department.

The witness explained mainly the procedure that was followed when one wanted to buy an item he was interested in. According to CW2, they were in the Engineering Department and could pick something they were interested in. It was CW2's testimony that the salvage yard and scrap yard were one and the same. He testified that when you got something you had to keep it near you so that you could keep an eye on it because others could be interested in it. You then approached your supervisor who would check all the items you took. It was CW2's testimony that you would inform the

supervisor verbally so that you would know which item(s) he would allow you to have.

CW2 further explained that the supervisor would inspect the items. He then gave a detailed explanation of the procedure followed up to the time the items were paid for and a receipt issued to enable the person remove the things from the company premises.

When asked what his reaction would be if he was informed that someone got an item and was intercepted by Police and charged, he said he would be disturbed because the items would still in the plant.

In cross-examination CW2 maintained that you could take whatever you wanted and seek the supervisor's approval before collecting the item and paying for it. If the supervisor did not approve, he would tell you to take the item back to the salvage yard.

In further cross-examination, CW2 repeated what he had said in his examination-in-chief, namely, that you would pick what you wanted and tell the supervisor verbally. The supervisor would then go to see the items and either give you his approval to purchase the items or tell you to return them to the salvage yard.

This marked the close of the Complainant's case.

The Respondent called three witnesses. The first one was Whitson Mwiinga, a retired Mine Police Officer, whom we shall hereinafter refer to as "RW1".

RW1 testified that on 4th October, 2001 a guard who was manning a restricted salvage yard at Ndola Lime informed him that unknown people had dismantled an electric motor. He said upon checking the motor in the salvage yard he discovered that the inside components had been removed. Two of the components were hidden underneath some scrap material just near the motor, the other two were missing.

RW1 testified further that he then detailed the guards to keep vigil over the area and report anyone who would pick up the hidden items. He averred that on 16th October, 2001 he received a report from a security guard who was manning the salvage yard to the effect that someone had collected the two items using a front-end loader and that the loader was going towards the Mechanical Workshop.

A summary of the events that followed after this are that RW1 later asked the driver of the front loader Tanasho Chilando about the matter and he agreed that he had gone to the salvage yard to pick two reddish items on behalf of CW1.

RW1 later approached CW1 and asked him about the items that he picked from the salvage yard. CW1 told him that he had gone to the salvage yard to look for bolts and in the process he picked an item which he called a mantle spanner. He showed RW1 the said item which was on the floor in the workshop. RW1 testified that Tanasho Chilando (the Front Loader driver) disputed transporting a mantle spanner and stated instead that what he transported were two items, reddish in colour. Meanwhile CW1

maintained that the part he picked from the salvage yard was a mantle spanner.

RW1 took CW1 and Tanasho Chilando to the main gate for further questioning. While at the main gate, CW1 changed his statement and agreed that what he carried from the salvage yard was not a mantle spanner but two copper coils which he wanted to use at home.

According to RW1, CW1 led him to one of the rooms at the Mechanical Workshop where he found the room full of scrap materials. RW1 noticed that two copper cables were hidden under scrap material. He recovered the two coils and later recorded statements from the two men.

RW1 explained that the salvage yard is a place where used components are kept for re-use in future in case of a breakdown in the plant. He said individuals are not allowed to get anything for personal use from the salvage yard. Further, no one is allowed to go to the yard without authority and that is why the place is guarded.

RW1 testified that every department at the Respondent Company had a scrap area where they put obsolete items which could be given or bought by the employees.

RW1 explained further that an interested employee could apply to purchase scrap. He would then identify the scrap from respective areas and the police would be called to check. Once the Police were satisfied that the items were indeed scrap, the employee would be allowed to buy it. RW1

maintained that the items CW1 got were from the salvage yard and not scrap yard.

In cross-examination RW1 made a distinction between the salvage yard and scrap yard. He indicated that they were not one and the same thing. He maintained that the salvage yard was guarded 24 hours a day and that the guard was instructed not to allow any unauthorised person to enter the premises.

RW1 averred that he did not threaten CW1 but only asked him (CW1) to accompany him. He reiterated that CW1 showed him a mantle spanner which was on the floor.

In re-examination RW1 testified that the items collected by CW1 were not considered to be scrap. He said they were items which could be reused by the company.

RW1 maintained that the materials were collected from the salvage yard and taken to the mechanical workshop without authority.

RW1 defined unauthorised removal of an item as removing an item from point A to point B without authority. He said in the instant case unauthorised removal came in when CW1 collected the items from the salvage yard and took them to the Mechanical Workshop without getting authority from his supervisor.

RW1 contended that the salvage yard was always guarded because of the items that were kept there and that it was a restricted area. He also

maintained that he did not harass CW1 either verbally or physically when he was questioning him.

The second witness for the Respondent was Japhally Amisi, the Senior Human Resources Officer - Industrial Relations (hereinafter referred to as "RW2"), who testified that he dealt with disciplinary cases raised against CW1 that led to his dismissal.

Most of the evidence given by RW2 is already on record and therefore, will not be repeated here.

RW2 testified that CW1 admitted during the case hearing that he had removed the company property. He also stated that he recorded a statement from CW1. He said he recorded CW1's side of the story and read what he had recorded to him in the language he understood, which was Bemba.

It was RW2's further testimony that had it not been for the dismissal of CW1 on a charge of unauthorised removal of company property, he would still be in employment. RW2 explained that the charge of unauthorised removal of company property came about because CW1 did not have permission to remove the items from where they were to take them elsewhere.

During cross-examination RW2 maintained that CW1 was dismissed because of unlawful removal of company property in accordance with the provisions of clause 4.5.4 of Ndola Lime Disciplinary Code.

He described the charge as moving an item from point A to point B and contended that this was provided for in 4.5.4 of the Disciplinary Code.

It was RW2's testimony that he did his own private investigation to balance up issues in case CW1 was forced to make a statement but he found that CW1 had indeed committed the offence.

RW2 testified that the salvage yard was within the premises of Ndola Lime Company. He also said that in addition to the main scrap yard, every department had a scrap yard where they kept their scrap materials.

According to RW2, at the time the case happened the scrap yard was near the salvage yard and the latter contained scrap as well as reusable materials.

In further cross-examination RW2 stated that what determines scrap is reusability, that is, scrap is something that cannot be reused or put differently, something obsolete.

In re-examination RW2 reiterated that CW1 was dismissed for unauthorised removal of company property whose penalty was mandatory summary dismissal.

RW2 averred further that CW1 appealed against the sentence but not the findings of the Disciplinary Committee that he was guilty of the offence.

The third witness for the Respondent was Maunda James Mwape, the Human Resources Manager, hereinafter referred to as "RW3", who testified

that the company was on firm ground to have dismissed CW1 as the charge against him demanded the penalty of summary dismissal in accordance with their Disciplinary Code.

According to RW3, CW1 admitted having wronged the company and was therefore found guilty on his own admission.

As was the case with the evidence of RW2, most of RW3's testimony consisted of evidence which is already on record and therefore will not be repeated. Suffice to say, it was RW3's evidence that CW1 was found with company property without authority from the company. That he removed company property namely, copper coils from the salvage yard to the Mechanical Workshop without authority.

According to RW3 the salvage yard was a restricted area within the plant. He said it was a requirement that items moved from there should be authorised and that CW1 needed to get permission from his supervisor before moving the copper coils from the yard.

During cross-examination, RW3 stated that there was only one site at the plant called salvage yard which contained scrap materials.

It was RW3's testimony that anything picked from the salvage yard needed authority. Even for scrap material authority was needed before it could be picked.

In further cross-examination, RW3 testified that Chilando was initially charged with the same offence as CW1 but CW1 exonerated him. CW1 said

he just used Chilando to transport the items. According to RW3, this was the reason why Chilando became a witness in the disciplinary proceedings against CW1.

In re-examination, RW3 stated that the procedure for someone who has retired from the company to get scrap material is the same. The retirees also need permission before taking scrap out.

This marked the close of the Respondent's case.

It is common cause that:-

- (i) The Complainant was employed by the Respondent as Senior Mechanic until 26th October, 2001 when he was summarily dismissed for the offence of unauthorised removal of company property.
- (ii) On 16th October, 2001 the Complainant instructed one Tanasho Chilando, a Front Loader driver to take two copper coils from salvage yard to the Mechanical Workshop.
- (iii) The Complainant was charged with the offences of giving false evidence and unauthorised removal of company property.
- (iv) The Complainant was given an opportunity to exculpate himself.
- (v) A case hearing was held and the Complainant was found guilty and dismissed summarily for the offence of unauthorised removal of company property.
- (vi) The Complainant was afforded the opportunity to appeal twice and the appeals were unsuccessful on both occasions.

Learned Counsel for the Respondent correctly submitted that the area of dispute revolves around the procedure involved when an employee was interested in buying an item from the salvage yard and at what stage authority was to be sought from the supervisor. The Complainant's position was that the item could be picked and permission sought later while the Respondent's position was that the salvage yard was a restricted area and permission had to be sought before an item was removed from there.

After carefully analysing the evidence on record we find that the issues to be resolved by this Court are the following:-

- (i) Whether or not the Respondent had reasonable grounds for believing that the Complainant had committed the offence levelled against him ; and
- (ii) Whether the Complainant's dismissal was wrongful and unfair.

With regard to the first issue, it is our considered view that the Respondent was on firm ground in believing that the Complainant had committed the offence of unauthorised removal of company property as the available records show that during the course of investigations the Complainant did admit the charge of unauthorised removal of company property after he had earlier on given false evidence as to the identity of the items. The Complainant in his statement to Mine Police stated and we quote:-

"I became confused and denied knowledge of the items but later told him the truth."

We concur with the submission by learned Counsel for the Respondent that it is strange that the Complainant could deny knowledge of the two copper coils which he had picked from the salvage yard using a loader due to an alleged state of confusion but remember everything else! On the issue of when authority was required to remove something an employee was interested in from the salvage yard, all the Respondent's witnesses testified that permission was required before an item could be removed from the salvage yard. Even the Complainant himself conceded and alluded to that fact in cross-examination.

We are inclined to disbelieve the Complainant's testimony to the effect that he was not the author of the statement and that he was made to sign it under duress because as learned Counsel for the Respondent rightly submitted, the Complainant did not adduce any evidence to prove that he made his statement under duress.

We therefore find and hold that the Respondent had reasonable grounds for believing that the Complainant had committed the offence levelled against him. We are fortified in our finding by the Supreme Court decision in the case of **Chimanga Changa v Stephen Chipango Ng'ombe (1)** where Supreme Court 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. An employer's function is to act reasonably in coming to a decision, what is crucial is that an employer carried out the investigations as a result of which he reasonably believed that the employee is guilty of misconduct.

There is evidence before this Court which shows that the Respondent carried out investigations relating to the charges against the Complainant as a result of which the Respondent reasonably believed that the Complainant was guilty of the offence of unauthorised removal of company property. We, therefore, have no reason to fault the Respondent in this regard.

In any case, the Supreme Court of Zambia in the case of **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2)** provided guidance as to the role of the court in such matters. The Court ruled as follows:-

As we have said in the case of Attorney General v Phiri (3), it is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary proceedings to review what others have done. The duty of the Court is to examine if there was the necessary disciplinary powers and if it was exercised in due form.

Therefore, as this Court has said before in the case of **Lewis Kalamatila v Mopani Copper Mines Plc (4)**, the duty of the Court in such instances is limited to examining if there was the necessary power and if it was exercised properly.

In the case in *casu* it is our finding that the Respondent had the necessary disciplinary power and it was exercised in due form.

Further, the Respondent followed the rules of natural justice in that the Complainant was afforded an opportunity to be heard by the appropriate

authorities in a disciplinary hearing. Before that, he was duly charged and asked to exculpate himself, which he did.

At the disciplinary hearing he was found guilty as per his own admission and summarily dismissed for the offence of unauthorised removal of company property. The Complainant was given an opportunity to appeal against the verdict. As per procedure, he appealed to his Head of Department but not against the finding of guilt but for leniency. The appeal was unsuccessful and the Complainant was given an opportunity to lodge his second and final appeal to the General Manager. Again the Complainant appealed for leniency. This appeal failed too.

From the foregoing it is evident that the Respondent had reasonable grounds for believing that the Complainant had committed the offence levelled against him. The Respondent was therefore justified in dismissing the Complainant for a dismissible offence under the Company's Disciplinary Code (see section 3.10.1 (e) and section 4.5.4 of the Extracts from the Respondent's Disciplinary Code and Grievance Procedure on pages 1 and 2 of the Respondent's Notice to Produce Documents dated 22nd November, 2013).

The learned author of **Selwyn's law of Employment (17th Edition)** succinctly put it as follows at page 429:

One way in which wrongful dismissal may occur is when the employer terminates the employment without carrying out disciplinary procedure which has been incorporated in the employee's contract.

This was not the situation in the case in *casu*. There is sufficient evidence before this Court that the Respondent did follow the disciplinary procedure laid down in its conditions of service. Indeed the Complainant did not raise any issue regarding the procedure taken by the Respondent in his case.

The evidence before this Court leaves us without any doubt in our minds that the Respondent carried out investigations relating to the charge against the Complainant. In our view the Respondent acted reasonably in coming to the decision it made. Consequently, we do not find the dismissal either wrongful or unfair.

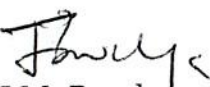
On the totality of the evidence adduced before us, we find and hold that the Complainant has lamentably failed to prove his case on a balance of probabilities. We, therefore, dismiss the complaint for lack of merit.

Each party to bear own costs.

Informed of Right of Appeal to the Supreme Court within thirty (30) days of the date hereof.

Delivered at Ndola the.....th.....day of.....*July*.....2016


Dr. W.S. Mwenda
DEPUTY CHAIRPERSON


J.M. Bwalya
MEMBER


G.M. Samusungwa
MEMBER