

**IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT NDOLA DISTRICT REGISTRY  
INDUSTRIAL/LABOUR DIVISION**

**IRD/ND/22/2016**

BETWEEN:

**BENSON MWEWA KABALE**

**AND**

**HIGHWAY TRANSPORT**



**COMPLAINANTS**

**RESPONDENT**

**Before: Hon. Mr. Justice Judge Derrick Mulenga**

For the Complainant : In Person

For the Respondent : In person

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**JUDGMENT**

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**Cases referred to:**

- 1. Zesco v David Lubasi Muyambango (2006) ZR 22 (SC)**
- 2. Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172.**
- 3. Foster v Customs and Exercise Comrs. (1930) 2KB 226**

The Complainant herein one Benson Mwewa Kabale filed a notice of complaint and an affidavit in support of the same on 1<sup>st</sup> March, 2016, seeking the following relief:-

- (a) Payment of Terminal Benefits.
- (b) Damages for defamation of character.
- (c) Payment for accrued leave days; and

(d) Any relief the Court may deem fit.

The Complainant deposed through his affidavit in support of the Notice of Complaint aforesaid that he was employed by the Respondent, as a General Worker from March, 2011 to 25<sup>th</sup> February, 2016 when he was unlawfully dismissed from employment. The Complainant contends that his dismissal from employment was unlawful because he was not formally charged for the alleged offence of stealing a flush from a motor vehicle.

Further, that prior to his dismissal from employment the Complainant was elevated by the Respondent to the position of supervisor.

The Complainant further deposed that whereas he was accused of having stolen a flush from the motor vehicle the Respondent did not report the matter to the police.

By an Answer filed on 21<sup>st</sup> March, 2016, the Respondent contends that, the Complainant was employed as a part-time employee at different intervals from March, 2011 at Mbizi House at the instance of Mr. and Mrs. Mulenga who are the directors of Highway Transport, therefore the Complainant was a casual employee who received payments whenever he performed his duties.

The Respondent also argues that the Complainant was never promoted to the position of supervisor. It also denies that the Complainant was accused of stealing a flush from a motor vehicle, except that the Complainant and other employees who had access to the vehicle in which a flush went missing were sent home for a day pending investigations.

According to the Respondent, the Complainant never returned for work for more than 11 consecutive days without any form of communication to the Company, therefore he was dismissed from employment on account of desertion from work.

It is contended also that the Complainant never appealed against the Company's decision of dismissing him from employment.

The Respondent also says that it does not owe the Complainant any money except for the days worked in February, 2016 and for accrued leave days.

The affidavit in support of the Respondent's Answer is a repetition of the Answer to the notice of Complaint, there is no need to recite the same.

The Complainant in his viva voce testimony told the Court that he was employed by the Respondent as a cash collector from March, 2011, his job involved collecting cash from Taxi Drivers.

On 9<sup>th</sup> March, 2012, according to the Complainant he was promoted to the position of Fleet Manager via a letter signed by Mrs. Mulenga a Director of the Respondent Company. The said letter was produced and admitted in evidence marked as exhibit "C1".

The Complainant told the Court that on 14<sup>th</sup> February, 2016 he was on duty when he was accused of having stolen a flush from a motor by the Director Mrs. Mulenga therefore on Monday the 15<sup>th</sup> February, 2016 Mr. and Mrs. Mulenga both Directors of the Respondent ordered him to go back home and only return upon finding and returning a flush.



On the 16<sup>th</sup> February, 2016, the Complainant wrote an SMS to the Director Mrs. Mulenga (hereinafter referred to as (RW1) asking of the way forward considering that he knew nothing about the flush, RW1 replied also by SMS that enough was enough the Complainant needed only to return her flush.

The Complainant reported the matter to the Labour office, on 24<sup>th</sup> February, 2016 and when RW1 was summoned by the Labour Officer, she did not go there, except her husband, who went and informed the Court that the Complainant had not been dismissed. However, when the Complainant reported for work he was advised by Mr. Mulenga to go back home. On 26<sup>th</sup> February, 2016, the Complainant received a dismissal letter.

The Complainant told the Court that he worked for five (5) years for the Respondent, therefore he prayed for his terminal benefits. He also claimed payment for the 14 days worked in the month of February, 2016.

The Complainant denied having absented himself from work but that the Director had ordered him to stay away from work.

Under cross-examination by one Charity Mulenga a Director of the Respondent Company, Complainant told the Court that he used to attend prayer at Mbizi House when he was asked to work for the Respondent. The Complainant agreed that it was explained to him that Mbizi was not part of the Highway which was just a station. However, he insisted that there was a written document which referred to him as Fleet Manager, which document was for the purposes of introducing him as an employee of Highway Transport in order for him to stand as surety for one Moffat who was charged with defilement.

That the Complainant was responsible for parking and offloading of buses.

In respect of the missing flush, the Complainant told the Court that he got access to Mrs. Mulenga's car (RW1), one Vincent Mulopwe had already had access as the person who had cleaned the same car.

The Complainant also admitted in cross examination that he was employed by Mbizi and from time to time meetings were held to discuss issues of money.

The Complainant denied that he absented himself from work otherwise his staying away was on the instructions or order of RW1 and her husband who is also a Director of the Company.

The Respondent called three witnesses. The First Respondent Witness was Charity Mulenga (RW1) a director of both the Respondent herein and a Company known as Mbizi.

RW1 told the Court that the Complainant was never employed by Highway Transport but Mbizi Station which is the property of Highway Transport.

According to RW1, the Director of Highway Transport one Chigudu allowed her and her husband to operate a church Ministry at the Highway Transport Station and to run a fee paying toilet also to offload and park buses.

RW1 explained that she and her husband therefore, employed people to assist them run the fee paying toilet and offload and parking of buses business. RW1 referred the Court to a document marked "**HT 17**" in the Respondent's Notice to produce documents. Documents marked "**HT 17**" is a letter dated 1<sup>st</sup> April, 2008, of one Mr. S. M. Chigubu, a Director and Chairman of Highway Transport Limited.



Document "**HT 17**" reads in part:

*The Board of directors had a meeting and it was agreed that you be granted permission to operate your Ministry at Mbizi Station.*

*As you requested it was agreed that you be allowed to operate a fee paying toilet and offload and parking of buses at the station in order to serve community through your Ministry.*

*However, please take note that Highway Transport has nothing to do with these operations and the hiring and contracting of the staff payments of wages of the staff you employ are to be done by your Ministry.*

In the nut shell, RW1 referred to other documents in the Respondent's Notice to produce documents to show that the Complainant herein was not employed by Highway Transport Limited the cited Respondent herein, otherwise he was employed by her and husband under Mbizi Bus Station. Further, that the Complainant was merely employed on part-time basis and was introduced to RW1 by one Vincent Mulopwe.

As regards the issue of the flush, RW1 told the Court that on the material date, she had just parked her car when the Complainant went to her and asked for the car keys which she released to him. The Complainant had access to RW1's car and returned the keys. However, in what appears to be the day after RW1 found the flush missing from the car. A number of workers were asked about the flush, but the Complainant was not around and when an attempt was made to call him, his phone was off as it was believed he may have been in church.

RW1 told the Court that, she called the Complainant to the office on a Sunday and asked him about the flush and the Complaint's response was that RW1 should go ahead to deduct money from his salary.

RW1 believed that this was not a matter worthy reporting to the police. However, since there were a number of complaints before, from drivers, of losing flushes and modulators, she insisted that Complainant goes back home and return with her flush which had a lot of information.

RW1 contended that the Complainant did not want to settle the matter with her, instead he went and reported the matter to the Labour office. Further, that because the Complainant like before as can be seen from "**HT 7**" had the tendency of absenting himself from work, he absented himself from work for eleven (11) days, the Respondent then decided to terminate his services.

In respect of the claim by the Complainant that he was employed by the Respondent and was elevated to the position of Fleet Manager RW1 told the Court that the letter marked "C1" on which the Complainant relied was issued to him, merely to assist secure a bail in favour of her maid's son. Complainant, was to stand as a surety for accused.

RW1 in her examination in chief concluded by saying that the Complainant had been paid for all his accrued leave days except for the year 2016; otherwise he is owed nothing as he was employed only on part-time.

RW1 insisted in cross-examination that the Complainant was employed from 2011 to the date of termination by Mbizi. She admitted having written the letter marked "**C1**" which describes the Complainant as Fleet Manager.

RW1 admitted having sent the Complainant home as she wanted him to return a flush.



The evidence of RW2 one Steven Chigubu, Managing Director of Highway Transport Limited is that Highway Transport Limited has a building in Kitwe. He told the Court that RW1 is his daughter and she uses the premises belonging to Highway Transport as a Parking Area for Buses and Taxis.

RW2 said that the business being run by RW1 is completely independent of Highway Transport Limited, therefore, employees of RW1 have no relationship with Highway Transport Limited.

RW2 was not cross-examined by the Complainant.

RW3 was one Loveness Mutwale a Secretary with Mbizi. She told the Court that, as a Company which was dealing in fee paying toilet, parking of buses/taxis and loading and offloading, they used to encounter difficulties with Taxi Drivers, therefore, the Complainant who was one of the members who used to congregate with them pledged to assist. The Complainant was retained to collect parking, loading, and offloading fees and toilet fees.

RW3 told the Court that the Complainant at times worked in the night and there were problems of people losing items and fuels.

In respect of the flush in issue, RW3 told the Court that, on the material date, RW1 parked her car when Complainant went and asked for the keys in order to stick properly the sticker of Road Licence. However, later on, RW1 discovered that a flush from which she played music had gone missing. She therefore asked the Complainant to return the flush.



RW3 told the Court that as a keeper of the Company records at Mbizi, there was no record to show that the Complainant was a supervisor neither was he, a Fleet Manager. The letter marked "C1" was merely issued to the Complainant in order to escort the accused to Court.

RW3 further told the Court that, she was the person responsible to keep the attendance register and marked it.

In cross-examination, RW3 told the Court that she was phoned by RW1 about the missing flush and that RW1 did not discover the missing of the flush immediately.

RW3 denied any knowledge of Complainant being appointed as Fleet Manager.

After a careful scrutiny of the evidence before me, I have found the following facts:

- (a) That there is a dispute as to which entity between the cited Respondent (Highway Transport) and Mbizi, employed the Complainant.
- (b) The Complainant was retained to collect parking fees, load and of loading fees and private toilet fees from 2011 to 24<sup>th</sup> February, 2016 when he was dismissed from employment.
- (c) The Complainant was sent home from work when the flush went missing from RW1's car.

This Court is called upon to make a determination arising from the evidence on the following issues;

- (i) Whether or not the Complainant is entitled to payment of Terminal benefits and if so, who is liable to pay between Highway Transport and Mbizi.
- (ii) Whether or not the Complainant is entitled to Damages for defamation of character.

- (iii) Whether or not the Complainant is entitled to any other relief which this court may deem fit.

I shall address the issue of Liability first. It is clear from the arguments of the Respondent's witness one (RW1) that it is being disputed that the cited Respondent is a proper party to this proceedings.

RW1 argues that the Complainant was not employed by an entity called Highway Transport Limited but by Mbizi House.

An argument of this nature ordinarily need be raised at the earliest opportunity in the proceedings before commencement of hearing of the main cause.

The above position notwithstanding, it is evident from the document before this Court that the Respondent communicated to the Complainant in writing made on the headed paper of the cited Respondent.

The Complainant has exhibited pay slips through his affidavit in support of complaint which payslips are headed "Highway Transport Limited". The letter of dismissal dated 24<sup>th</sup> February, 2016 is on the headed paper of Highway Transport and the same is under the hand of Director of the said Company. The Respondent's documents are equally on the headed paper of Highway Transport, more so in her own affidavit, RW1 states that she is one of the Directors of Highway Transport, managing the premises at Mbizi House. I am inclined to come to the conclusion that RW1 being a director of the cited Respondent Company, used its name, thereby the same was viewed throughout as the employer of the Complainant.



The letter dated 1<sup>st</sup> April, 2008, under the hand of one S.M. Chigubu (RW2) addressed to a Mr. Mulenga, otherwise "HT 17", alluded to herein above, tends to dissociate the Respondent from any business of the Ministry at Mbizi Station. There is no evidence before this Court that the Complainant was privy to the said communication as the same was made way back before he even joined the organisation.

It is therefore, the conclusion of this Court that if there was any wrong doing in the use of the letter head of the Respondent Company, the same is at the instance of RW1 the Director. Under the doctrine of estoppel the Respondent is precluded by its own conduct from denying that it employed the Complainant herein.

In determining whether or not the Complainant is entitled to any terminal benefits, I have found from the evidence before me that there is no dispute that the Complainant was accused of stealing a flush from the car belonging to the Respondent's Director (RW1).

Arising from the allegations of theft, the Complainant was sent home by RW1 with instructions or an order that he returns to work upon finding the flush.

There is no evidence to show that the Complainant was recalled or charged with any offence. However, it would not be wrong to consider the order of RW1 to the Complainant as some form of indefinite suspension from work. This Court does not believe the Respondent that the Complainant with others were only sent home for a day pending investigation and Complainant failed to return for work for more than eleven (11) days. In cross examination, RW1 admitted that when Complainant returned to work, she sent him back again insisting that he finds the flush.

There is also evidence on record that Complainant reported the matter to Labour office and by letter dated 19<sup>th</sup> February, 2016, the Labour Officer invited the Managing Director of the Respondent Company for a meeting on the 24<sup>th</sup> February, 2016 at 14.30 hours. RW1's husband who is also a Director of the Respondent Company attended the said meeting and according to Complainant, Mr. Mulenga (RW1's husband) told the Labour Officer that the Complainant had not been dismissed and could report for work the following day, however, when the Complaint reported for work as indicated he was advised to go back home by the same Mr. Mulenga and was going to communicate by letter.

On 26<sup>th</sup> February, 2016, Complainant received a letter of summary dismissal dated 24<sup>th</sup> February, 2016. The said letter reads in part:-

*RE: Summary Dismissal*

*It has been observed and confirmed that you have not been reporting for work for now over a week. Efforts to contact you proved futile as your whereabouts were not known. Management has therefore regarded your absence as desertion hence the decision to summarily dismiss you from employment with immediate effect.*

The contents of the Dismissal Letter addressed to the Complainant quoted in part herein above flies in the teeth of the Respondent and a futile attempt to run away from the truth. There is no way a person who was sent home on two occasions could be said to be his whereabouts as unknown. The Complainant was at Labour office with a Director of the Respondent Company on the very day the dismissal letter was authored.

The Court is mindful of the caution given by the Supreme Court of Zambia in the case of **Zesco v David Lubasi Muyambango(1)**, that:

*As we have said in the case of Attorney-General v Phiri, it is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary*



*procedures 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.*

However in this case, it is necessary to closely look at the events that led to the summary dismissal of the Complainant from employment by the Respondent. Having critically looked at the evidence adduced by the parties herein, it has become very clear that the Respondent wrongfully dismissed the Complainant from employment. The Court has come to the said conclusion after making a finding that the averments of the Respondent that the Complainant absented himself from work for more than a week are erroneous.

Further, it should be noted that whereas the Complainant did not specifically plead damages for wrong dismissal from employment, the same has been arrived at by this Court under "any relief the Court may deem fit" as pleaded by the Complainant.

I award the Complainant six months salary as damages for wrongful dismissal, payment for days worked in the month when he was forcibly sent home and for accrued leave days. The amount that shall be found due to the Complainant shall attract interest at ruling Bank of Zambia rate from the date of the Notice of Complaint until date of payment.

The Complainant sought damages for defamation. There was little said of this claim in the testimony of both the Complainant and the Respondent. However, the said claim appear to have arisen from the allegation of theft of the flush at the instance of the Director of the Respondent Company (RW1) against Complainant.

The burden of proof is on the Complainant to prove on the balance of probabilities that he was defamed by the Respondent. In the case of **Masauso Zulu v Avondale Housing Project Limited (2)**, the Supreme Court held:

*Where a complainant alleges that he has been wrongfully or unlawfully dismissed as in any other cases where he makes any allegation, it is generally for him to prove those allegations, a Complainant who has failed to prove his case cannot be entitled to judgment, whatsoever may be said of the opponent's case.*

With the above decision in mind, the Complainant herein need to prove that he was defamed by the Respondent within the meaning of the Law of Defamation.

In this case the Complainant appear to be complaining about the allegation made against him by the Director of the Respondent Company (RW1) that he was responsible for the missing flush, therefore, the Complainant alleges that he was defamed by slander which is a publication of defamatory matter by word of mouth.

In order to prove the complaint of defamation the Complainant herein must establish and prove each and every ingredient of the action in defamation by slander. The following are the ingredients which are required to be proved on the balance of probabilities:-

- (a) That the statement complained of referred to the Complainant.
- (b) That the statement is defamatory of the Complainant.
- (c) That the statement was published by the Respondent or in circumstances in which the Respondent is responsible for publication.



In the case in casu, the Complainant asked RW1 for the car keys so that he could have access to the same for the purposes of fixing the Road Licence sticker which appeared to be loose. The Complainant was availed the car keys and he had access to RW1's car. Later on RW1 found the flush which was in the car missing and she asked Complainant and others who had access to the car to return the flush, she further ordered the Complainant and others to go back home.

The facts of this case do not reveal any kind of publication or circulation to other persons other than the Complainant himself that the flush in issue went missing at the instance of the Complainant. The facts of the case in issue are distinguishable of the case of **Foster v Customs and Exercise Comrs. (3)**.

In that case, Lady Foster sued for slander by conduct (and false imprisonment) after she was stopped at Heathrow Airport, her bags were searched and she was then marched publicly through the airport's concourses in a manner which would have meant to everybody that she was being arrested for serious offence.

I have not found anything defamatory in the manner RW1 complained of the missing flush against the Complainant. It should not be expected that when a person loses an item should keep quiet for fear of being sued in defamation. There was no publication or circulation of any defamatory statement against the Complainant to other people. The Complainant has failed to prove the Complaint of defamation, it is accordingly dismissed for lack of merit.

The summary of the decision herein is that the Complainant has only succeeded and awarded damages of six months salary for wrongful dismissal from employment, payment for days worked in the month when he was forcibly sent home and for accrued leave days. The amount that shall be found due to Complainant shall attract interest at the ruling Bank of Zambia rate from the date of Notice of Complaint until the date of payment. Costs to the Complainant.

Informed of Right of Appeal thirty (30) days from the date hereof.

Delivered at Ndola this **18<sup>th</sup>** day of **July, 2016**.

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Hon. D. Mulenga  
**JUDGE**

