

Kayaka GBT

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

COMP/302014

BETWEEN:

AUGUSTINE KATONGO

COMPLAINANT

AND

**CLUB SECRETARY
NDOLA SENIOR POLICE CLUB**



RESPONDENT

BEFORE:

Hon. E.L. Musona - JUDGE

MEMBERS:

1. Hon. W.M. Siame
2. Hon. J. Hasson

For the Complainant : Mr. D.B. Mupeta of Messrs Mupeta & Co.

For the Respondent : Mr. N.M. Sianyang (In Person)

JUDGMENT

Date: 27th July, 2016

Cases referred to:

1. Bank of Zambia v Kasonde, 1995 - 1997 ZR

This Complaint was filed by M/Augustine Katongo against Ndola Senior Police Club. We shall, therefore, refer to M/Augustine Katongo as the Complainant and to Ndola Senior Police Club as the Respondent which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

- (a) an order and declaration that the Complainant's dismissal was unfair, unlawful, wrongful and illegal;
- (b) damages;
- (c) interest on the amount due;
- (d) costs.

The duty for this court is to ascertain whether or not the Complainant has proved his claim.

Three (3) witnesses testified in favour of the Complainant's case, the first of whom was the Complainant. We shall refer to these witnesses as CW1, CW2 and CW3 respectively.

CW1 was M/Augustine Katongo, the Complainant.

The evidence for CW1 was that he was employed by the Respondent on 2nd February, 1990 as a Barman. The following were his duties:

- (i) selling beer;
- (ii) managing the gate to ensure that no bottles were smuggled out.

CW1 did this job with M/Champo who was also a Barman. These (2) Barmen executed their duties alternating on weekly basis.

On Sunday, 26th August, 2013 CW1 was manning the gate at 16.00 hrs. Four people came out of the club with twelve bottles. Those people told CW1 that the Club Chairman had allowed them to go away with the bottles. When CW1 refused them to go away with the bottles they went back into the club but shortly emerged with Mr. Musunga who was the Club Chairman. Mr. Musunga then told CW1 that he as Chairman had allowed those people to go away with those bottles. CW1 still refused to allow those people to go away with bottles because he did not want to suffer deductions from his salary for loss of bottles. Mr. Musunga then shouted at CW1 in the presence of those people and threatened to dismiss him and called him unwise and those people left with the bottles. That was on 26th August, 2013. On 28th August, 2013 CW1 was charged with three (3) counts. Those were:

1. Insubordination and use of abusive language.
2. Being drunk on duty.

3. Reporting late for work.

CW1 was put on suspension on 28th August, 2013 and removed from the payroll. On 28th December, 2013 CW1 was given a letter of termination of contract.

CW2 was M/Elias Mulenga. The evidence for CW2 was that he started going to Ndola Senior Police Club in 2006 to drink beer although he was not a member. He used to see CW1 sell beer, some days CW1 would be picking bottles. CW2 did not know if CW1 was a permanent worker. CW2 heard of the dismissal of CW1 in 2013.

CW3 was M/Fautino Kateule. The evidence for CW3 was that he used to be hired to do some plumbing works at the Ndola Senior Police Club in 2004. It was during those works that CW3 met CW1 who then was a Barman at Ndola Senior Police Club.

The Respondents called three (3) witnesses. We shall refer to them as RW1, RW2 and RW3 respectively.

RW1 was M/Chibesa Kunda a Police Officer based in Mufulira.

The evidence for RW1 was that he was based in Ndola in 2013 and was Secretary at the Ndola Senior Police Club the Respondent herein.

RW1 told this court that the Complainant was a Casual Worker at the club working in the bar as a Barman. RW1 stated that there were no records for workers and no conditions of employment. He further stated that there were allegations that the Complainant had opened his own bar near the Senior Police Club and became a competitor to the club for which the Complainant worked. Most of the time the Complainant was found at his bar. There were also allegations of disrespect to patrons at the Senior Police Club by the Complainant. In a meeting which was held by the Respondent, the Respondent decided to terminate the employment of the Complainant and they did. RW1 also stated that employees of the Respondent were not contributing to National Pension Scheme authority (NAPSA) but during cross examination RW1 admitted that the Complainant was contributing to NAPSA.

RW2 was M/Emmanuel Kawangu a Police Officer. The evidence for RW2 was that in 2013 he was Vice Secretary for the Respondent Club. RW2 told this court that the Complainant was suspended on the following allegations:

1. Insubordination.

2. Reporting for work late.
3. Being drunk of duty.

RW3 was M/Adlay Delma Somanje a businessman. The evidence for RW3 was that in 2013 he was a Committee Member for the Respondent Club. He told this court that on either 23rd or 24th August, 2013 he was at the club, and that while at the club he saw the Complainant quarrel with the Club Chairman who then was M/Musunga about bottles. He said it was a heated quarrel until he intervened. He said that he never saw the Complainant drink beer but that the Complainant sometimes looked drunk and was cautioned.

There was a dispute as to whether the Complainant was a full time employee or not. The Complainant's evidence was that he was a full time employee. He testified that he worked for the Respondent from 2nd February, 1990 up to his dismissal on 28th December, 2013. The Complainant also exhibited some statements from National Pensions Scheme Authority (NAPSA) which showed that the Respondent was remitting contributions to NAPSA in favour of the Complainant.

There is also evidence from the Respondent that the Respondent had even provided accommodation to the Complainant. The Respondent admitted that they were paying

the Complainant a salary from the sales of the Respondent Club.

On the basis of the available evidence, we are satisfied that, indeed, the Complainant was a full time employee of the Respondent.

We have also looked at the submissions which were filed in this case. We must state that the Respondent filed submissions which were signed by M/Nebert Miyanda Sianyanga. Nebert Miyanda Sianyanga is the Club Secretary for the Respondent and appeared in court during court proceedings on behalf of the Respondents.

What is sinister is that somebody who was not a party to this case also filed and signed submissions purported to come from the Respondent on 21st June, 2016. That was Mr. C. Musunga. Mr. C. Musunga signed his purported Respondent's submissions purporting to be the Chairman of the Respondent Club, but there is evidence that he is no longer the Chairman, he is a former Chairman. The Respondent to this complaint is the current executive not the former executive for which Mr. C. Musunga was Chairman. The submissions filed by Mr. C. Musunga are at variance with the submissions which were filed by Mr. Nebert Miyanda Siayanga who is currently Secretary of

the Respondent Club. The Respondent disputed the Complainant's claim but Mr. C. Musunga admitted the Complainant's claim. The submissions by Mr. C. Musunga were clearly capable of misleading the court. We have wondered where Mr. C. Musunga found the audacity to file such submissions when he was not a party to proceedings. We must warn Mr. C. Musunga against such mischief which border on crime, and we shall not consider his purported submissions.

Having considered all the evidence in this case, we shall now consider the relief sought.

- (a) An order and declaration that the Complainant's dismissal was unfair, unlawful, wrongful and illegal

We shall discuss this claim under separate heads as shown in the claim itself.

These are:

- (i) unfair;
- (ii) unlawful;
- (iii) wrongful;
- (iv) illegal.

i. Unfair

A dismissal is unfair if the disciplinary procedure leading to dismissal was not followed. The procedure is that the accused employee must be charged. After the employee has been charged the employee must be caused to appear before a tribunal or Disciplinary Committee for hearing.

The evidence in this case is that the Complainant was charged with three offences. These were:

1. Insubordination and use of abusive language.
2. Being drunk on duty.
3. Reporting late for work.

As can be seen, these charges are very serious in employment by any standard. There is a dispute as to whether the Complainant exculpated himself or not. The Complainant alleged that he exculpated himself but produced no proof. Conversely, the Respondent alleged that the Complainant did not exculpate himself of these charges. It was right to charge the Complainant as the Respondent did. However, we note from the evidence of both the Complainant and the Respondent that there was no formal hearing. This was wrong. It was wrong because

the Respondent proceeded to terminate the Complainant's employment without a hearing, thereby denying the Complainant a hearing. When there are allegations against an employee it is not proper to terminate the services of the employee unless the employee is given a hearing on those allegations and the allegations must be proved. Failure, neglect or refusal by the employee to exculpate oneself on the charges should not be the basis for dismissing an employee without a hearing. An employer can only proceed to dismiss an employee if the employee neglects or refuses to attend a disciplinary hearing after due notice. To the extent that the Complainant was dismissed without a hearing we find that the procedure for dismissing an employee was not followed. On those basis, therefore, we find that the Complainant's dismissal was unfair.

ii. Unlawful

A dismissal is unlawful if the employer has breached a Statutory Provision when dismissing the employee. We have seen no Statutory Provision which was breached in this case. This ground, therefore, fails.

iii. Wrongful dismissal

A dismissal is wrongful if the employer has breached a term of the contract when dismissing the employee. It is also wrongful dismissal if the allegations upon which the employee is dismissed are not proved against the employee.

The Supreme Court in the case of **Bank of Zambia v Kasonde (1)** held that if the dismissal is not on proved grounds then it amounts to wrongful dismissal.

To the extent that there was no hearing to prove the allegations against the Complainant, the dismissal was wrongful.

iv. Illegal dismissal

Illegal dismissal is synonymous with unlawful dismissal. What is unlawful is illegal. To mount a claim for wrongful dismissal and again to claim for illegal dismissal on the basis of same facts is tautology. We have already discussed the aspect of unlawful dismissal in (ii) above. What we held when we discussed the aspect of unlawful dismissal equally applies here.

b. Damages

The facts of this case show that the Complainant is claiming damages in relation to his dismissal. We have already ruled that the Complainant's dismissal was unfair. We have also agreed that it was wrongful. We, therefore, order that the Complainant be paid two (2) months salaries as damages for wrongful and unfair dismissal.

c. Interest on the amount due

We order that the Complainant shall be paid interest on the damages awarded at the current Bank of Zambia rate from 14th March, 2014 when this complaint was filed until full payment.

d. Any other relief the court may deem fit

We have seen no other relief to deem fit.

e. Costs

We order costs in favour of the Complainant. There shall be no interest on costs.

In default of agreement on the computations of the monies herein, same shall be referred to the Deputy Registrar of this court for assessment or taxation as the case may be.

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

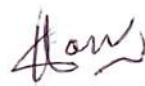
Delivered and signed at Ndola this the 27th day of July, 2016.



Hon. E.L. Musona
JUDGE



Hon. W.M. Siame
MEMBER



Hon. J. Hasson
MEMBER