

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

IRC/ND/108/2015

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BETWEEN:

SIMON KAMINDA

AND

NKANA WATER SEWERAGE COMPANY



COMPLAINANT

RESPONDENT

Before: Hon. Judge D. Mulenga this 14th day of June, 2017

For the Applicants : Mr. D. Mazumba of Messrs Douglass & Partners

For the Respondent : Mr. G. Kalandanya of Messrs G.M. Legal Practitioners.

JUDGMENT

Cases referred to:

1. **Kankombo and Others v Chilanga Cement Plc (2000) Z R 129**
2. **Zulu v Avondale Housing Project Limited (1982) Z R 172**
3. **Chimanga Changa Limited v Stephen Chipango (2010) Z R, 208**
4. **Zesco Limited v David Lubasi Muyambango (2006) Z R 22**
5. **Elias Makasa Musonda v Konkola Copper Mines Plc (2013) Z R 117, Vol. 1, page 117**
6. **Zambia Airways v Gershom Mubanga (1992) Z R 2**

Legislature referred to:

1. Section 5 (1) (g) of the Industrial and Labour Relations (Amendment Act 1997

The Complainant herein presented his Notice of Complaint with the Affidavit in Support on 2nd December, 2015, on the ground that on 2nd September, 2015 his employment was wrongfully and unfairly terminated on unjustified grounds.

The Complainant therefore seeks damages for wrongful termination of employment and that he be paid benefits for the full period of his retirement age, damages for unfair Labour Practice, damages for mental distress, interest, any other relief as the Court may deem fit and costs.

The Respondent opposes the Complaint and to that effect filed the Answer on 6th May, 2016. In its Answer to the Complaint the Respondent contends that the Complainant was alleged to have committed an offence in the course of his employment and upon conduct of disciplinary hearing the Complainant was found guilty as charged and his contract of employment was terminated.

The Respondent therefore, denies that the Complainant's employment was wrongfully terminated. Further that the Complainant's Disciplinary hearing was rightfully and lawfully conducted in accordance with the Respondent's Disciplinary Code of Conduct and Grievance Procedure.

The back ground to this case is that the Complainant who was employed by the Respondent in 2001 was also a Union Vice Chairman of the Union recognised by the Respondent Company. Though employed as Transport Officer, the Complainant on 28th February, 2015; according to him having been assigned by the Union Chairman to investigate a complaint by the members of the Union of the alleged matter of a health hazard threat, emanating from the leakage of sewage from defective pumps, approached the Contractor from Jayrex Engineering Services for Davis & Shirtliff, the same were contracted by the Respondent.

The Complainant approached the Contractor and according to him, he asked the Contractor as to why he had put defective pumps which never lasted.

According to the Complainant, it was out of the said short conversation he had with the Contractor which resulted into his being charged with intimidation and misconduct likely to bring the Company into disrepute, as per exhibit "*SKI*" in the Complainant's affidavit in support of complaint. The Complainant was charged under Clause 39 and 41 of the Disciplinary Code of Conduct.

The particulars of the charge as per charge letter (*exhibit "SKI"*) are that, the Complainant on 28th February, 2015 went to Nkana East Sewerage Treatment Plant where a contractor from Jayrex Engineering Services working for Davis & Shirtliff, sub-contractors of UNIK, under NWSSP Kitwe Sanitation Contract, was assigned to install pumps. The Complainant asked the Contractor as to what he was doing and when he was told that he was there to re-install a pump, the Complainant stopped him from

doing the job and told him that he should never do any work in the plant. The Complainant accused the contractor of supplying defective pumps.

It was further alleged that the Complainant had used abusive language, threatened to beat up and burn the motor vehicle if the Contractor went ahead to install the pump, because of the alleged conduct, the Contractor could not go ahead with the planned installation and suspended the works.

The Complainant contends that the Respondent did not adhere to its own Disciplinary Procedure Code when it failed to cause the alleged offence to be investigated and charged by the Complainant's immediate supervisor a Mr. Phiri, in accordance with Clause 3.1 (a) and (b) of the Disciplinary Procedure Code.

The Complainant's other Complaint is that the Respondent's Disciplinary Committee was not properly constituted. According to the Disciplinary Code and Grievance Procedure of the Respondent the Disciplinary Committee should comprise three Management officials at Managerial level, the Human Resources Officer and the Union official (Article 4.0) when arriving at the verdict. However, the Disciplinary Committee had asked the Union official to leave the room, according to the Complainant the said act is in violation of Article 5.0 of the Disciplinary Procedure.

On Appeal, the Disciplinary Committee's decision was upheld but the sanction was reduced from summary dismissal to Discharge.

In his viva voce testimony, Complainant testified that on 25 February, 2015 he received a report from employees of the Respondent who work at the Sewerage Treatment Plant that there was a health hazard and their lives were at risky. The said health hazard was said to have arisen from the shoddy works performed by a Contractor who was retained by the Respondent to install mono pumps at the sewerage treatment plant.

According to the Complainant, he was assigned by the Union Chairman One Brian Mwaba to go to the Plant to ascertain what was happening. It was for the said reason the Complainant, went to the Sewerage Treatment Plant and talked to the person responsible for the contractual works. The Complainant told the Court that he talked to the person who was responsible for the contractual works, by asking him how he would be of assistance in averting the hazard health risk.

Whereas, the incident took place on 28th February, 2015, the Complainant was handed a charge letter on 20th May, 2015 around 19.20 hours. The Complainant argued that the charge in issue was not raised by his immediate supervisor (Abel Phiri), he was just made to sign it, contrary to Clause 4 of the Disciplinary Code.

The Complainant also complained that the disciplinary decision is supposed to be made by the Disciplinary Committee comprising Management of one part and the Union on the other part. However, in the case in casu, after hearing of the witnesses and the Complainant, the Union Representatives were asked to leave the Room, thereby causing the decision to summarily dismiss him, made only by Management.

Further, the Complainant, also argued that many of the witnesses who were called by the Respondent exonerated him.

On appeal, the Appeals Committee reduced the sanction from summary dismissal to a discharge and the Complainant was still not satisfied with the Respondent's decision.

In cross-examination the Complainant reiterated that he was unfairly dismissed from employment because the Respondent failed to follow its own Disciplinary Procedure Code, in the manner he was charged by some other person other than his immediate supervisor.

The Complainant, told the Court that he was not an Engineer neither was he privy to the contract between the Respondent and the Contractor who was tasked to re-install the mono pumps at the Sewerage Plant. However, he was concerned with the works because there are houses of employees who are Union members including his, within the Plant.

As regards the witness at the case hearing one Samuel Munamba, (Contractor), Complainant explained that, the said witness did not attend the case hearing, but was made to testify via a telephone and the Complainant was not able to hear what he was saying clearly as the phone was faint. Further, that it was the Human Resources Manager who talked to Samuel Munamba and recorded the discussion.

The Respondent called one witness David Nkonde (RW1), the Acting Human Resources Manager of the Respondent Company.

According to him he knew the Complainant as a Transport Supervisor of the Respondent Company.

The gist of RW1's testimony is that sometime in February, 2015, as a department, they received a report to the effect that the Complainant had gone to the Sewerage Plant where he found a Contractor who he threatened to beat up, as he alleged that the said Contractor had supplied defective pumps. The Complainant, was therefore, charged and accorded an opportunity to be heard.

According, to RW1, witnesses were called and there was overwhelming evidence against the Complainant.

RW1, further told the Court that as a result of the Complainant's conduct towards the Contractor, there was stoppage of works.

According to RW1, there is no need for the Union Representative to be present when a decision of the Disciplinary case hearing committee is being made. He relied on Clauses 9.5.5. of the Disciplinary Code of Conduct and Grievance Procedure of 2014.

RW1 insisted that the Complainant committed an offence of threatening the Contractor and incited the employees of the Respondent, which is a riotous behaviour, contrary to Clause 3.8 of the Disciplinary Code.

It was in cross-examination where the issue of none existence of Clauses 39 and 41 in the Respondent's Disciplinary Code and Grievance Procedure was raised and admitted by RW1.

RW1, also admitted and failed to show the Court, the clause which provides for the offence of "intimidation", whilst admitting further that it is unfair, to subject an employee to a charge which is not provided for by the Respondent's Disciplinary Code and Grievance Procedure.

RW1 also admitted that the Complainant's immediate supervisor was the person required to initiate investigations and to charge him if at all with any disciplinary offence.

In this case the issue to determine is whether the Complainant's summary dismissal and or discharge from employment is wrongful and or unfair.

Both Advocates for the Complainant and the Respondent filed written submission and the same shall be alluded to whenever necessary.

There is no dispute as regards the burden of proof, as submitted by Learned Counsel on reliance on the decision of the Supreme Court in the case of **Kankombo and Others v Chilanga Cement Plc**¹ and earlier in the case of **Zulu v Avondale Housing Project Limited**² that it is trite law that he who asserts must prove. Therefore, the burden of proof in the case in casu lies on the Complainant to establish and prove his Complaint on the balance of probabilities.

The Complainant through his advocate has submitted that whereas the Respondent charged the Complainant with the offence of "Intimidation and misconduct likely to bring the Company into disrepute", the Respondent's witness failed to show the Court the existence of Clause 41 and 39 under the Disciplinary Code.

The Complainant argues that the offence of "Misconduct likely to bring the Company into disrepute" which falls under paragraph 9.5 of the Respondent's Schedule of offences has the first sanction of six (6) months Final Recorded Warning with seven (7) days suspension without pay.

I have perused the Respondent's Disciplinary Code of Conduct and Grievance Procedure and I have failed to find the offence of "Intimidation" or indeed Clause 45 which the Respondent cited.

As can be seen from minutes of the Disciplinary case hearing Committee (*exhibit "SK10"*) in the Complainant's affidavit in support of the Notice of Complaint, the sanction imposed against the Complainant was that:-

1. For the offence of "*misconduct likely to bring the Company into disrepute*". The Complainant was given six (6) months Recorded Warning with seven days suspension from duty.
2. For the offence of "*Intimidation*". The Complainant was given summary dismissal.

The Respondent's advocate submitted on reliance on the Supreme Court decision in **Chimanga Changa Limited v Stephen Chipango**³, that the employer does not have to prove or satisfy beyond reasonable doubt that the employee committed the act in question, its function is to act reasonably in coming to a decision and that it carried out investigations in the allegations against the Complainant.

This Court is also mindful of the guidelines given by the Supreme Court in the case of **Zesco Limited v David Lubasi Muyambango**⁴, that;

It is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary process to review what others have done. The duty of the Court is to examine if there was the necessary discipline power, and if it was exercised in due form.

The above guideline by the Supreme Court do not suggest that the Employer can charge and subsequently dismiss an employee or indeed discharge from employment on a none existent offence.

As alluded to herein above, perusal of the Respondent's Disciplinary Code of Conduct and Grievance Procedure, does not provide for an offence of "Intimidation".

Learned Counsel for the Complainant referred this Court to the decision of the High Court, in the case of **Elias Makasa Musonda v Konkola Copper Mines Plc** ⁵, where the Court held inter alia that:-

1. The defendant did not follow the normal sequence of a warning penalties provided for under the Disciplinary Code and

2. That the dismissal was wrongful because the conditions of service were breached, . . .

Mindful of the caution not to interpose as if the court's role is that of an appellate Tribunal within the domestic disciplinary process of the Respondent Company, the said notwithstanding, the Respondent is not justified to charge an employee with an offence which is none existent within its Disciplinary Code of Conduct and Grievance Procedure. In any case, the offence of "Misconduct likely to bring the Company into disrepute" appear to be a proper charge under the Disciplinary Code of the Respondent.

It is also noted from the letter of discharge (*exhibit "SK12"*) that at the appeal stage, the Respondent dealt with the offence of "Intimidation" and not the "*Misconduct likely to bring the Company into disrepute*". The only import of the failure or none attendance to the Complainant's appeal on the issue of "misconduct likely to bring the Company into disrepute is that the same was upheld by the Respondent's Appeal's Committee. As alluded to herein above the said offence ("*misconduct likely to bring the company into disrepute*") is a proper offence charged against the Complainant, the same is provided for under paragraph 9.5 of the Respondent's Disciplinary code of Conduct and Grievance Procedure.

The Court has also noted that the sanction which was meted against the Complainant that is six (6) months Final Recorded Warning with seven (7) days suspension without pay is in accordance with the Respondent's Disciplinary Procedure Code. However, this Court has found and held that the charging of the Complainant with the offence of "*Intimidation*" which

offence is none existent under the Respondent's own Disciplinary Code of Conduct and Grievance Procedure, and the subsequent summary dismissal and or Discharge from employment is wrongful and unfair.

The Court has also noted that the Complainant was employed as Head Driver or Transport Supervisor, therefore, he could not be expected to have gone to the Sewerage Plant and confront the Contractor in the said capacity but as that of a Vice Chairman of the Union, recognised by the Respondent.

It is imperative to state here that it is not the position of this Court that an official of the Union who is not engaged in full-time Union activities but also carries on daily performance of services to the employer, cannot be charged and disciplined just like any other employee. However, caution should be taken when the act or omission upon which such a Union official is to be charged, relates to Unionism or Union activity.

The Complainant, made it clear from inception that he was asked by his Union Chairman to go and investigate the Union Members' complaint about a health hazard threat resulting from some defective mono pumps being installed at the Respondent's Sewerage Plant. It is therefore, in his capacity as a Union Vice Chairman, he went to the Respondent's Sewerage Plant and had a confrontation with one of the Contractor's Personnel. This Court has already made it clear that the charge against the Complainant of "*misconduct likely to bring the company into disrepute*", is sound as the same is provided for under the Respondent's Disciplinary Code of Conduct and Grievance Procedure. Further, that the Complainant's Union was not privy to the contract between the Respondent herein and the Contractor, therefore, the Complainant had no mandate to confront the Contractor

regarding its works. The Complainant as a Union Representative, should have presented his complaint to Respondent's Management. There is no doubt that the Complainant was properly dealt with when the Respondent gave him six (6) months Final Written Warning and suspension from duty for seven days without pay.

The above notwithstanding **Section 5 (1) (g) of the Industrial and Labour Relations (Amendment Act 1997**, provides:-

(1) Notwithstanding anything to the contrary contained in any other written law and subject only to the provisions of the Constitution and this Act every employee shall have the following:

(g) the right not to be dismissed, victimised or prejudiced for exercising or for the anticipated exercise of any right recognised by this Act or any other law relating to employment, or for participating in any proceedings relating there to.

In view of the cited law herein above, it is imperative for any employer to treat an employee whose disciplinary offence arises from a Union activity, with caution, needless to emphasise that in such circumstance, it is good practice to engage the Union so that the same may discipline its own official.

Having come to the Conclusion that the Complainant's summary dismissal or Discharge from employment is Wrongful and unfair, the issue of the relief to award the Complainant should be addressed.

The Complainant sought damages for wrongful termination of employment and that he be paid benefits for the full period of his retirement age, damages for unfair Labour Practice, damages for the mental distress, interest, any other relief as the Court may deem fit and costs.

Sections (3) of the Industrial and Labour Relation (Amendment) Act 1997, provides that;

- (i) The Court shall, if it finds in favour of the Complainant
 - (a) Grant to the Complainant damages or compensation for loss of employment
 - (b) Make an order for re-employment or re-instatement, or
 - (c) Make such other order as it may consider appropriate in the circumstances.

The Complainant was employed in 2001 therefore he was in the Respondent's employment for a period of closer to fifteen (15) years. He was a Vice Chairperson of the Union recognised by the Respondent.

The Respondent Company is one in which the Government of the Republic of Zambia has interest (quasi-public corporation) which is expected to protect employee's rights.

The International Labour Organisation Committee on International Labour standards, recommended on **protection against unjustified Dismissal, Pub, 1995 paragraph 232** that, the committee considers that compensation in the case of termination of employment impairing a basic right, should be aimed at compensating fully both in financial and in

occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights.

This Court is alive to the guidelines given by the Supreme Court in the case of **Zambia Airways v Gershom Mubanga** 6 that:

It is trite law that a Court will not usually order re-instatement to an employee in a pure master and servant relationship unless there are special circumstances because to do so would be tantamount to ordering special performance of a contract of service.

Having critically looked at the circumstances of the case and the law, I have come to the conclusion that the only relief which is adequate is reinstatement of the Complainant to his erstwhile position and to be paid all salaries and allowances from the date of the expiry of the seven days suspension without pay to date of reinstatement.

Cost to the Complainant to be taxed in default of agreement.

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

Delivered at Ndola this **14th** day of **June, 2017**.

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D. Mulenga
HON. JUDGE

