

IN THE SUPREME COURT OF ZAMBIA

SCZ Appeal No. 36 of 1993

HOLDEN AT KABWE

(Civil Jurisdiction)

B E T W E E N :

ELIAS NISELO

Appellant

and

NATIONAL DRUG COMPANY LIMITED

Respondent

CORAM: Sakala, Challa and Muzyamba JJJ.S.

10/2/94 and 19th April 1994

For the Appellant : In person

For the Respondent : Mr. R.N. Mandona of Permanent Chambers

J U D G M E N T

Challa, J.S. delivered the judgment of the court.

Cases referred to:

1. Contract Haulage Limited v. Kamayoyo (1982) ZR 13
2. Raine Engineering Co. Ltd v. Baker ZR 1972 p.156

This is an appeal by the appellant against the High Court decision to dismiss his case for wrongful dismissal by the defendant company.

The brief facts of the case were that the appellant was employed by the defendant. On 29th April, 1991 the management of the defendant company transferred the appellant from Kabwe to Mongu. The appellant being dissatisfied with the transfer, rejected the transfer and wrote two very long letters in which he gave his reasons. The management, however, did not reverse the decision and insisted that he should go to Mongu on transfer. The appellant then sought an audience with the headquarters in Lusaka, and the meeting was arranged and he was given

/2....an audience

an audience with the headquarters in Lusaka, and the meeting was arranged and he was given an audience in the office of the General Manager. The meeting according to the evidence adduced in the lower court was very acrimonious. The appellant behaved very badly and was taken away and the meeting never saved any useful purpose. The appellant was later charged with various offences including refusal to accept the transfer and to obey lawful instructions. The appellant replied to the charges. The reply was received and considered by the management on 30th May, 1991. The company terminated the appellant's services and gave reasons why the employment was terminated. The reasons included:- (1) Malicious damage to company property. He was accused of having damaged the door lock in the General Manager's office. He also knocked down the telephone in the General Manager's Secretary's office causing it to be out of order since that day. (2) Riotous behaviour. (3) Refused to obey lawful instruction in that he refused to be transferred to another station in the interest of the company.

The appellant gave evidence on his own behalf, and he produced documents as well. The respondent called witnesses in support of their case. The learned trial judge considered the evidence placed before him and made the following conclusions:- (1) that the relationship between the defendant company and the appellant was that of the master and servant. (2) The learned trial judge was satisfied that the appellant refused his appointment and transfer to Mongu. (3) The appellant behaved rudely and riotous on 21st May 1991. (4) It was also established that in some branches of the defendant company the operations were to a large extent illegal, firstly the personnel manning such branches were not qualified as pharmacists, secondly the labelling of such drug stores as Chemists was illegal as it led the people to believe that they were being manned by qualified pharmacists or doctors. The learned trial judge found that the appellant did not manhandle any member of staff to the contrary it was the security guard who manhandled the appellant.

The learned trial judge considered the relationship between master and servant and took into account the case of Contract Haulage Limited v. Kamayoyo (1). As regards the damage to company property, the judge held that although there was no eye witness who saw the appellant damage the lock of the door and telephone receiver there was very strong inference that the appellant broke the door lock when the appellant felt deceived when it was suggested that the meeting should be transferred to the Boardroom only to find that the General Manager closed and locked the door. The learned trial judge further considered the question of illegality. He looked at the correspondence which went between the appellant and management. From the correspondence the learned trial judge concluded that the appellant was of violent character and ill natured. The judge further held that proper procedure in terminating employment was followed and that rules and principles of natural justice were adhered to and that he was given adequate and fair hearing.

The appellant filed various grounds of appeal and detailed heads of argument. The grounds of appeal can be summarised as follows:- (1) The learned trial judge erred in law when he failed to produce a balanced summary of the whole case to produce a balanced judgment. (2) The learned trial judge erred when he failed to evaluate evidence favourable to the appellant's case. (3) The learned trial judge erred in arriving at the verdict which showed prejudice and bias against the appellant. (4) The learned trial judge erred in considering the case before him brought in new issues which were not raised by the respondent or his Advocates. In his support of the grounds, the appellant in his heads of argument, argued that the learned trial judge decided in favour of the appellant when he concluded that the appellant had not manhandled the General Manager. He argued that the learned trial judge further found in his favour that there was some illegality in the running of the defendant company. The learned trial judge found that the appellant had been frustrated because the management had refused to send him for further education or training. The appellant argued that having found in the

appellant's favour that the company had engaged in some illegality, the judge should have concluded that the appellant was not to blame in refusing to obey the so called lawful instructions to be transferred to Mongu for him to run a Chemist contrary to the provisions of the Pharmacy and Poisons Act. The learned trial judge should have not found the refusal to go on transfer as the basis of dismissal from the employment. The appellant further argued that the appellant should not be dismissed on the charge of damage of the company's property. He has argued that if anything the damage was due to the conduct of the General Manager who should have been charged for the offence. The appellant has further maintained that the learned trial judge should have not talked about the character of the appellant and should have not drawn a conclusion based on the evidence adduced by the respondent. The appellant during the hearing of the appeal rested on his written heads of argument and requested the court to consider both the grounds as well as the heads of argument in support of the grounds of appeal.

For the Respondent Mr. Mandona filed heads of argument. Mr. Mandona has argued among other things that the learned trial judge in assessing the evidence and coming to the conclusions which he made properly directed himself having regard to the evidence before him. Mandona has argued that the learned trial judge was correct in rejecting the appellant's reason for refusing the transfer as that of no illegal practice in respondent's company. He has further argued that the learned trial judge was right in making the finding that the appellant was rude and the appellant had written abusive letters to the management and that the learned trial judge evaluated the evidence properly and made right conclusions. Mr. Mandona referred the court to various authorities including the case of Raine Engineering Co. Ltd v. Baker (2). He further referred us to the following authorities:- 1. Contract Haulage Limited and W. Kamayoyo - 1982 ZLR p.13. 2. Y.M. Chirwa and Zambia National Provident Fund - selected Judgment 3. Wilson Masautso Phiri and Avondale Housing Project Limited SCZ No. 31 of 1982.

Mr. Mandona further submitted that in this case the appellant's employment was terminated correctly and that even if such termination were wrongful the right of claim sought by the appellant would be limited. But he argued that in this particular case the appellant's employment was properly terminated and that the appellant has no right of claiming re-instatement and any damage. In his reply the appellant argued that the grounds upon which termination was based were not true. He was just victimised.

The authorities relied upon by the parties all dealt with the question of master and servant. In the Raine case and Kamayoyo case principles governing the law of master and servant were discussed. It is trite law that in cases of wrongful dismissal the usual remedy is in damages. That follows from the fact that specific performance of contract of service will not normally be enforced. In the two cases referred to above the law has been expressed in the following terms:-

"The law is well settled that if where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari. If the master rightfully ends the contract there can be no complaint: if the master wrongfully ends the contract then the servant can pursue a claim for damages."

The recent statement of principles is to be found in the Kamayoyo's case already referred to where it was held:

- i In a pure master and servant relationship there cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none; if he does so in a manner not warranted by the contract he must pay damages for breach of contract.
- ii Where there is a statute which specifically provides that an employee may only be dismissed if certain proceedings are carried out, then an improper dismissal is ultra vires: and where there is some statutory authority for a certain procedure relating to dismissal a failure to give an employee an opportunity to answer charges against him or any other unfairness is contrary to natural justice and a dismissal in those circumstances is null and void."

It was further said in that case at page 19:-

"Throughout the relevant cases there is reference to breach of natural justice, usually referring to circumstances where an employee has been dismissed for disciplinary reasons without being given a reasonable opportunity to be heard in his defence. And, in the resent case, this was the argument put forward on behalf of the respondent. The learned trial judge found that, in view of the fact that the respondent was not given an opportunity to explain the circumstances that led to his arrest, this was a denial of natural justice and the dismissal was unlawful."

In the present case the learned trial judge rightly concluded that on the facts as presented to him the appellant was merely asking for damages should the court find his dismissal was wrongful. The appellant's case and arguments are that the dismissal was wrongful since the grounds upon which the termination was based were not true. In this case it is a fact that the appellant was served with the charges in writing and he was asked to exculpate himself. He did so. The respondent company considered his exculpation and there after terminated the employment. In accordance with the principles laid down in the cases referred to particularly the Kamayoyo case, the appellant was heard and the rules of natural justice were followed. The learned trial judge concluded in his judgment that proper procedure was followed and that according to the principles of natural justice he was given adequate and fair hearing. In coming to his conclusion the learned trial judge was guided by the principles laid down in the Kamayoyo case which he considered in his judgment. In our view the learned trial judge took into account all the principles laid down in the decided cases and law relating to the master and servant situation. He applied the law correctly to the facts proved in the present case and he concluded that the rules of natural justice were followed. We cannot find anything to show that the judge fell into error in making such conclusions. The appeal is therefore dismissed. There will be no costs.

- J7 -

.....
E.L. Sakala
SUPREME COURT JUDGE

.....
M.S. Challa
SUPREME COURT JUDGE

.....
W.M. Muzyamba
SUPREME COURT JUDGE