

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
CIVIL JURISDICTION**

APPEAL NO. 149A of 2000

BETWEEN:

CHRISTOPHER MOKOLA MUWANA

APPELLANT

AND

ATTORNEY-GENERAL

RESPONDENT

CORAM:

**Sakala, Chirwa and Chibesakunda, JJs on
11th October 2001 and 15th October 2002**

For the Appellant:

Mr. V. Kachaka, Law Association of Zambia

For the Respondent:

Mr. M. Haimbe, State Advocate

J U D G M E N T

Chirwa, JS, delivered judgment of the Court: -

Cases referred to:

1. CAPT. LEWIS KANYANTA MAKASA Vs ATTORNEY-GENERAL 1997/HP.202.
2. ATTORNEY-GENERAL Vs D.G. MPUNDU [1984] Z.R. 6.
3. MIYANDA Vs THE ATTORNEY-GENERAL [1985] Z.R. 185

In this appeal, although the record shows that Mr. Kachaka appeared for the appellant and although he was physically present in court, he allowed his client to proceed to argue the appeal as previously arranged between them and only assist the appellant where need be. As it transpired there was no need for Mr. Kachaka to come in and the appellant argued the appeal on his own.

This appeal is against the quantum of damages by the High Court after it found that the dismissal of the appellant from the Zambia Army was wrongful having found that the offences the appellant is alleged to have been committed by him were not punishable by dismissal. The judge also found that the military procedure in charging and prosecuting the appellant was not

followed and that in fact they were mala fide. Having thus found for the appellant the learned judge found the dismissal wrongful but declined to award the award of reinstatement which the appellant prayed for but instead he awarded him the following damages: -

(a)	Exemplary damages	=	K1,800,000-00
(b)	Loss of earnings	=	K4,000,000-00
(c)	Inconvenience and embarrassment	=	K800,000-00

Making a total of K6.6 million. The learned trial judge declined to award the appellant damages for loss of accommodation stating that that right goes with employment and once employment is terminated, the employer is not obliged to offer accommodation to the employee. The trial judge declined to reinstate the appellant's commission as a Captain in the army saying that the court had no jurisdiction to award the same once the President has exercised his discretion to withdraw the commission from anybody.

As we have said, the appellant argued the appeal himself and his memorandum of appeal is so detailed that they are in fact heads of arguments which would not ordinarily be allowed. Be that as it may, we allowed memorandum of appeal to stand and in fact the appellant relied on the arguments therein. What can be extracted from the memorandum of appeal is that the damages should have been calculated up to the retirement age, namely 50 years and this should have included allowances with all increments as the appellant would have risen to the rank of major as most of his intake-mates and some of those that followed him have attained that rank. The awards therefore should reflect the element of exemplary and punitive character and the award of K1,800,000-00 was inadequate. Further the award of K4 million for loss of employment is adequate considering that he has been wrongfully dismissed from a disciplined force, it would be difficult for him to find a job. The appellant further argued that the award of K800,000-00 for inconvenience and embarrassment is totally inadequate. Equally the interest rate of 2.5% is inadequate.

The appellant further alluded to the question of loss of accommodation that he should be given something as an officer he was entitled to free electricity, water, refuse disposal and servant quarters. He prayed that the damages on this head should be calculated at the minimum rate of K200,000-00 per month as in cases settled outside court by the respondent like in the case of CAPT. LEWIS KANYANTA MAKASA Vs ATTORNEY-GENERAL (1).

For the State, Mr. Haimbe did not put up a very spirited fight to oppose the appeal not because of anything else, but because there is merit in the appeal so far outlined and as will be shown shortly.

We agree that the facts of the case do attract exemplary damages as accepted by the trial court. Having accepted this, we feel the award of K1,800,000-00 totally inadequate. We set aside this award and in its place, we award the appellant K10 million as exemplary damages. These reflect the fact that there was no serious proven offence to warrant dismissal.

As to general damages, bearing in mind the position the appellant held in the defence force, as an officer and not an ordinary soldier who would find a job as a security guard, we set aside the loss of earning award, which we believe is for general damages, of K4,000,000-00 and in its place award K10 million.

For the inconvenience and embarrassment, we also set aside the award of K800,000. There was certainly great inconvenience and anxiety caused by the appellant's dismissal and the award is in line with our guidance in the case of ATTORNEY-GENERAL Vs D.G. MPUNDU (2). The award here should be more because the appellant suffered some mental distress and inconvenience as a result, not merely a long suspension as in MPUNDU case. We award the appellant on this head the sum of K2 million kwacha.

The total award to the appellant is therefore K22 million broken down as follows: -

(a)	Exemplary damages	=	K10 million
(b)	General Damages	=	K10 million
(c)	Mental distress and inconvenience	=	K2 million

We also set aside the nominal award of interest at 2.5% and in its place award 45% from date of issue of writ to day and thereafter 6% until payment.

There is now the question of cancellation of the commission by the President. The lower court correctly pointed out that under Article 18 (4)(5) of the Constitution, one cannot be tried and punished twice for the same offence. The court found that the appellant had been tried and found guilty by the Appropriate Superior Authority (ASA) and the matter then came to an end. The court found that even as the appellant was tried by ASA the offences did not warrant the punishment of dismissal. The court further found that as the dislike of the Commanding Officer of the appellant, the relationship was so bad that he recommended the dismissal of the appellant on false accusations. The court was not asked to question the discretion of the President to award and cancel commission but the court was asked to declare that the cancellation of the appellant's commission was wrongful as the President exercised his discretion on false reports. In this regard the case of MIYANDA Vs THE ATTORNEY-GENERAL (3) is of great guidance. In considering the point, we bear in mind the damages we have awarded. We also note that Mr. Haimbe, on the facts of this case, felt that the court below should have recommended reinstatement of the commission as the cancellation was founded on false reports. We agree that is as far as the court could go. As the court found that the dismissal was wrongful the remedy of reinstatement was available to the court but bearing in mind the institution from which the appellant was dismissed, it would have been "wholly eccentric for the court to grant a disruptive declaration when an obvious alternative and adequate remedy is available in the form of damages". While the President may be considering his discretion to reinstate the commission, not necessarily for the appellant to re-join the army, the appellant should be taken to have resigned on his own from the date of dismissal and may claim the pension if any that was due to him under the circumstances. This is so because if the President was given the correct facts he may not have exercised his discretion to cancel the appellant's commission.

: J5 :

This appeal therefore succeeds with costs. Costs to the appellant will be those reasonable and actual out-of-pocket disbursements in prosecuting his appeal in this court.

As the appellant was ordered by the High Court to pay K500,000-00 as security for costs for this appeal, the same should be refunded to him.

E.L. SAKALA
SUPREME COURT JUDGE

D.K. CHIRWA
SUPREME COURT JUDGE

L.P. CHIBESAKUNDA
SUPREME COURT JUDGE