

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 33/2003

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

ANGEL GOMANI NKANDU

Appellant

AND

MOPANI COPPER MINES

Respondent

CORAM: Sakala, CJ, Chibesakunda and Chitengi, JJS

On 3rd June, 2003 and 8th December, 2004.

For the Appellant : In Person

For the Respondent : Mr. A. Imonda of
Messrs A. Imonda & Company

JUDGMENT

Chitengi, JS, delivered the Judgment of the Court.

Authorities referred to: -

- 1. The Attorney-General Vs Marcus Kapumba Achiume (1983)
ZR1***
- 2. Industrial & Labour Relations Act Chapter 269 of the Laws of
Zambia***

We apologize for the delay in delivering this judgment. During last year and this year the court has been occupied by the Presidential Election Petition.

In this appeal, we shall refer to Appellant as the complainant and the Respondent as the Respondent, which is what they were in the court below. The facts of this case are that on the 19th of October, 2000, the complainant was employed by the Respondent as a shift boss. The complainant was working under Mr. Daniel Masongo (RW3), the Mine Captain. Working under the complainant were Mr. Ngonga Simuyemba (RW4), a section boss, and Mr. Martin Clement Kasuba (RW2), a front loader driver. When the complainant reported on duty at about 14:00 hours, he found instructions in the logbook logged in by one Martin Chileshe from the previous shift directing the complainant to lash copper ore on 1200 level from 305 stop and tip it into 18s box at 1380 level. The 18s box was used both for lashing in waste rock and copper ore but this was to be done at separate times. It is the standard mining procedure that after getting instructions from the logbook the section boss has to physically check to ensure that everything is in order before giving instructions to his subordinates to commence work. Ore should not be mixed with waste because when that happens it becomes difficult to extract the metal from the waste and the metal extracted is of poor quality and of reduced value.

According to the complainant, before he started operations he instructed Mr. Simuyemba (RW4), the section boss to check the contents of 18s box at 1380 level and Mr. Simuyemba telephoned him to say that the box contained waste rock. However, there was no information in the logbook to that effect. After speaking with Mr. Simuyemba on the telephone, he went underground through 800 level where he found one Mr. Kapikila, a checker, in a front loader. Kapikila told him that his (complainant's) front loader driver Mr. Kasuba (RW2) had gone to 1065 level. He followed Mr. Kasuba and found him working. He instructed Mr. Kasuba to go to 1100 level at 105 position after finishing lashing and at 12:30 hours to go to 1200 level to lash from 138 development end and tip the waste rock

into 18s tip. After giving instructions to Mr. Kasuba, he went to 1380 level where he confirmed that the contents in 18s box were waste rock. As he went on with his work, he later met Mr. Kasuba at 1100 level at 18:00 hours and all was going on well. He then telephoned the Mine Captain to inform him of the train which had broken down. While he was still on the phone, Mr. Francis Chilandu (RW1), the Grade Control Officer, came to ask him whether he had seen the contents of 18s box for him to allow Mr. Kasuba to tip waste rock into it. He agreed that he had been to 18s box. He then went to see Mr. Kasuba where he had left him. He found that Mr. Kasuba had parked the front end loader and was not working. Mr. Kasuba reported to him that he had only managed 5 buckets of waste rock from 138 development end and that he could not continue working because there was a bad smell of cement as a result of the grouting of the bars. He confirmed the bad smell and instructed Mr. Kasuba to go to 1100 Level at 105 stop to continue removing copper ore. After that he went to 1380 level where he found the Mine Captain and he knocked off at 23:30 hours. When he went to the surface he indicated in the logbook that 18s box at 1380 level had waste in it and that the 138 loader drive had not been completed because of the bad smell of cement.

The following day he was called to the Manager's office together with Mr. Kasuba and Mr. Simuyemba. In the Manager's office he found Mr. Chilandu, and Mr. Isaac Songa. The Manager asked him to explain the instructions he gave to Mr. Kasuba and Mr. Simuyemba. He explained and Mr. Kasuba and Mr. Simuyemba agreed with his explanation. And when Mr. Chilandu was asked to explain, he said he found Mr. Kasuba lashing copper ore and tipping it into 18s box at 1200 level. Thereupon, an argument ensued between him and Mr. Chilandu and the Manager suspended him pending investigations. Also suspended was Mr. Martin Chileshe. On 21st October 2000 all the rock was pulled from 18s box and there was no trace of copper ore. Despite this, his suspension

continued until when he was called to a case hearing. At the hearing he was surprised to hear Mr. Kasuba say he had instructed him (Mr. Kasuba) to tip copper ore into 18s box instead of waste rock. Mr. Simuyemba made an additional statement that he (complainant) had agreed with the instructions to tip copper ore into 18s box instead of waste. When he inquired why Mr. Kasuba and Mr. Simuyemba changed their statements, he was told that they were threatened with dismissal if they supported his statement. He was finally dismissed. He unsuccessfully appealed to the management against his dismissal.

But Mr. Chilandu's evidence is that he found Mr. Kasuba tipping Copper Ore into 60s (18s) which had waste in it. When he asked Mr. Kasuba why he was tipping ore into a tip which had waste, the latter said he had been instructed by the shift boss Mr. Nkandu (the complainant). When he queried the complainant about whether he had physically checked the contents of the tip, the complainant said it was empty. When he asked the complainant to go with him to check, the complainant refused to go. He went alone to check and he found 18s tip full of waste. He took samples which he took to the Mine Captain Mr. Masongo and later to the Geology Department to check for ore/waste. According to Mr. Kasuba it was the complainant who instructed to lash copper ore into 60s(18s) tip. And Mr. Simuyemba said that Mr. Masongo instructed him to check if 60s box was empty. He checked and found that there was waste and he informed Mr. Masongo accordingly. After that both of them went to the tip and Mr. Masongo verified that there was waste. At the start of the shift the complainant did not know that there was waste.

On this evidence, the court below found as a fact that the complainant instructed Mr. Kasuba to tip copper ore in 18s box (60s) when the box contained a lot of waste rock. Consequently, the court below found that

the Respondent was justified to dismiss the complainant on ground of negligence.

The complainant now appeals to this court against the judgment of the court below.

The complainant filed one ground of appeal stating that the court below in dismissing his claim disregarded the law and the available evidence. In his written submissions and oral arguments before us, the complainant made reference to mining regulations which, according to how the complainant's case is pleaded and was argued in the court below, it is not necessary for us to recite because the determination of this appeal does not hinge on the interpretation of mining regulations.

The complainant submitted that the court below should not have accepted Mr. Chilandu's evidence that he (complainant) had told Mr. Chilandu that 18s box was empty after accepting Mr. Simuyemba's evidence that he told him (complainant) that 18s box was full of waste rock and that he personally saw the complainant check the contents of 18s box before Mr. Kasuba started tipping. It was the complainant's submission that the court below ignored that 18s box is used for both tipping waste rock and copper ore as long as it is done at separate times. He said that that was the reason why Mr. Chilandu asked whether 18s box was being used for tipping waste rock or copper ore. He submitted that failure by Mr. Chilandu to accompany the verification team means that his concern was not genuine and not about what was tipped into 18s box.

Further, the complainant argued that failure by him not to charge Mr. Kasuba with a disciplinary offence does not mean he was guilty of the offence and that the court below was wrong to assume so. He said

during the course of his duty on the day in question, he visited many places; he did not stay long with Mr. Kasuba and he had no facts on which to charge Mr. Kasuba with a disciplinary offence.

It was the complainant's submission that the court below misdirected itself when it found that he had admitted in paragraph 15 of his Affidavit in Support of the Notice of complainant that he had tipped copper ore in 18s box disregarding the instructions in the log book by Mr. Chileshe which he had implemented. The instructions by Mr. Chileshe were that 18s box could be used for tipping copper ore. He said he too left instructions in the log books which were counter signed by the Mine Captain.

The complainant then attacked the judgment of the court below when it made a finding that the copper ore could not be easily seen in 18s box because the quantity was too little compared to the large quantities of waste rock. He submitted and argued that the fact that there were no traces of copper ore found in 18s box means that no copper ore was tipped in that box.

The complainant then complained about contradictions in the evidence as to who instructed Mr. Kasuba to stop tipping into 18s box. The complainant then questioned why he should deny in the manager's office that he gave instructions to Mr. Kasuba to tip copper ore in 18s box when according to the evidence of Mr. Kasuba, he (complainant) had agreed giving the instructions to Mr. Kasuba. Further, he submitted that the court below failed to consider the fact that 138 loader drive which was partially lashed was full of waste rock and the court did not make a finding as to where this waste rock was tipped. He said he had a belief that, that was the same waste rock which was in the 5 loader buckets tipped into 18s box as waste rock.

Finally, he said Statutory Instruments numbers 107 of 1971 and 95 of 1973 under which he was employed were not considered by the court below before arriving at its judgment.

Mr. Imonda, learned counsel for the Respondent was brief. He submitted that the complainant having instructed Mr. Kasuba to tip waste rock in 18s box where there was waste rock without verifying the instructions left by the previous shift in the log book, the complainant was guilty of negligence and, therefore, the court below properly directed itself when it dismissed the complainant's claim.

We have considered the evidence that was before the court below, the submission by the complainant and learned counsel for the Respondent and we have looked at the judgment of the court below. As we see it, this appeal is basically against a finding of fact by the court below that the complainant instructed Mr. Kasuba to tip copper ore into 18s box also known as 60s when there was waste rock in it.

As we have said in the ***Attorney-General Vs Marcus Kampumba Achiume⁽¹⁾*** and other cases, as an appellate court we will not reverse findings of fact made by a trial Judge who had the opportunity to see the parties and witness give evidence unless: -

- (i) We are satisfied that the findings in question were averse or
- (ii) Made in the absence of any relevant evidence or
- (iii) Upon a misapprehension of the facts or
- (iv) That they were findings which on a proper view of the evidence, no trial court acting properly can reasonably be made.

This appeal being from the decision of the **Industrial Relations Court Section 97 of the Industrial and Labour Relations Act⁽²⁾** the appeal is also statutorily limited to points of law or points of mixed law and fact.

We have therefore, considered whether any of the situations we have stated above do exist in this case. On the evidence we do not find that any of the situations we have stated above exists in this case.

On the totality of the evidence the fact that the complainant was negligence stands out clearly. Contrary to the complainant's submissions that the five buckets tipped into 18s box contained waste rock and not copper ore because the sample taken from 18s box showed no traces of copper ore, the evidence shows that copper ore was tipped into 18s box. Mr. Chilandu, the Production Control Manager testified that he saw Mr. Kasuba tip copper ore in 18s box. We find no reason why Mr. Chilandu should be either idle or malicious to fabricate such a serious allegation against the complainant. Indeed, the complainant did not suggest any reason why Mr. Chilandu would fabricate a story that Mr. Kasuba tipped copper ore in 18s box. In any case, the submission by the complainant that there were no traces of copper ore in 18s box is not supported by evidence. Mr. Ngosa whom the complainant said pulled 81 cars of waste rock from 18s(60s) box never gave evidence and in his statement never said that there was no trace of copper ore in the waste rock he pulled down. Mr. Ngosa was non committal. These were his words, *"I cannot, however, confirm anything as to whether the afternoon shift had tipped in ore during the previous day (19/10/2000)."* This statement does not mean that there was no trace of copper ore in the waste rock Mr. Ngosa pulled down as the complainant says. Mr. Chisala, another person the complainant said pulled down the waste rock from 18s box neither gave evidence nor made a statement. On the other hand there is a statement on the record by one Sisa in the Geology

Department to the effect that copper ore was tipped into 18s(60s) box where there was waste rock.

The complainant argued that the court below should not have accepted the evidence of Mr. Simuyemba and Mr. Kasuba because it contradicted what they said earlier on in their statements. It is not necessary for us to determine whether this allegation is true because the court below itself said they placed little reliance on the evidence of Mr. Simuyemba and Mr. Kasuba because they were witnesses with a motive of their own to serve. The complainant's complaint about the evidence of Mr. Simuyemba and Mr. Kasuba is, therefore, misplaced and unjustified.

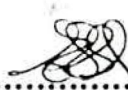
Further, the complainant in his evidence said that he was implementing the instructions left in the log book by Mr. Chileshe from the previous shift. The instructions left by Mr. Chileshe were that 18s box could be used for tipping copper. If these were the instructions, the complainant was implementing, we find it difficult to accept that the complainant did not give instructions to Mr. Kasuba to tip copper ore into 18s box. The complainant's own evidence satisfies us that the complainant gave instructions to Mr. Kasuba to tip copper ore into 18s box. We are not idle to think that Mr. Kasuba could embark on an operation of tipping copper ore without instructions as the evidence and submissions of the complainant tend to suggest..

What is clear to us, and as the court below found, is that after reading the instructions left by Mr. Chileshe in the log book, the complainant did not go to physically check 18s box before Mr. Simuyemba and Mr. Kasuba who were under his charge started operations. Indeed, the complainant does not anywhere in his evidence categorically say that he physically inspected 18s box before any operations started. The fact that it is standard procedure for the person in charge to check the places

of operation before any operations start is common cause. It follows that failure by the complainant to check 18s box before Mr. Kasuba started tipping was negligence on the part of the complainant.

The complainant pleaded and raised issues of malice and discrimination which the court below considered and rejected. We have perused all the evidence that was adduced in this case and, as the court below found, and as we have already stated above, we have no basis upon which we can find that the dismissal was actuated by malice and that the complainant was discriminated against. Apportioning blame and punishment according to ones degree of blameworthiness is not discrimination. The responsibility to check 18s box on 19th October, 2000 lay squarely on the shoulders of the complainant and not on Mr. Chileshe's shoulders. The evidence is that it is standard procedure that notwithstanding the instructions in logbooks the person in charge has to physically check the places of operation before his subordinates start work. On the day the act happened, the complainant was more to blame than Mr. Chileshe. Though for different reasons, we cannot fault the court below when it found that there was no discrimination.

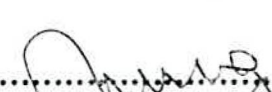
We find no merit in this appeal and we dismiss it. We make no order as to costs.



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E. L. SAKALA
CHIEF JUSTICE



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L. P. CHIBESAKUNDA
SUPREME COURT JUDGE



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PETER CHITENGI
SUPREME COURT JUDGE