IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 174/2002**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

WINSTON CHUNDA	**1st Appellant**
EMMANUEL MWAPE	**2nd Appellant**

And

MOPANI COPPER MINES PLC	**Respondent**

Coram: Lewanika, DCJ, Mambilima and Chitengi, JJS

On 4th March, 2003 and 1st June, 2004

For the Appellants: Mr. D.E. Ndhlovu of Messrs Luso Chambers

For the Respondent: Mr. Imonda - Legal Counsel

JUDGMENT

Chitengi, JS, delivered the Judgment of the court.

Authorities referred to: -

1. ***Augustine Kapembwa Vs Danny Maimbolwa and Attorney-General 1981 ZR 127.***

2. ***Attorney-General Vs Achiume 1983 ZR 1.***

3. ***Simon Mukanzo Vs ZCCM Limited SCZ Appeal No. 133 of 1999 (Unreported).***

4. ***Joseph Daniel Chitomfwa Vs Ndola Lime Company Limited SCZ Judgment No.28 of 1999 (Unreported).***

5. ***The Attorney-General Vs Kamoyo Mwale Appeal No. 79 of 1996 (Unreported).***

In this appeal we shall refer to the first Appellant as the first Plaintiff, the second Appellant as the second Plaintiff and the Respondent as the Defendant which were their designations in the court below.

This was an action for unlawful dismissal. Reduced to a narrow compass, for the purpose of this appeal, the facts of this case are briefly that the first and second Plaintiffs were employed by the Defendant as Mine Policemen with responsibility of guarding and protecting the Defendant's Mine. On the 28th June, 2000 the first and second Plaintiffs were detailed to work at the concentrator cable link some 500 or so metres from the Central Shaft where the alleged disciplinary offence took place. The Appellants were in a shift from 14:00 hours to 22:00 hours and were supervised by Chief Inspector Ng'ombe and Sergeant Chavula who gave them patrol sheets to sign to prove that they were on duty. During the shift the first Plaintiff was wearing a green dustcoat and a head cap lamp while the second Appellant was wearing a blue jersey, which was part of Mine Police uniform. However, the first Plaintiff was not the only one wearing a green dust coat. Most of the Mine Policemen were wearing green dust coats given to them by the Shift Boss, a Mr. Mukuka.

During the Plaintiff's shift at the concentrator cable line some thirteen thieves, who we may describe as adventurous, went down the shaft, some going down the mine as far as 600 metres level to cut cables. Investigations revealed that the thieves entered the mine through an

unguarded emergency ladder some 500 or so metres from where the Appellants were guarding. When these thieves were detected, caught and brought to the surface, they pointed at the second Plaintiff as the one who had assisted them to gain entry to the mine and said that they had given money to the second Plaintiff. After interrogation the thieves changed their story and said they had given the money to a Mine Policeman wearing a green dustcoat and a head cap lamp. When the Police picked the second Plaintiff he denied being dressed in the manner described by the thieves and said it was the first Plaintiff who was dressed like that.

It appears after the apprehension of the thieves statements were taken from them and some other witnesses. A disciplinary hearing was conducted and the Plaintiffs were found guilty of assisting the thieves to enter the Mine and were dismissed. It appears the decision of the disciplinary committed was based on the Plaintiffs' exculpatory statements and statements of witnesses and on what the Defendant's first witness, Jonathan Mwanza, who joined the investigations on 29th June, 2001 long after the thieves had been apprehended, said.

On these facts the learned trial Judge found that although the two suspects who were apprehended underground were not called to testify, it was not fatal to the Defence case because the second Plaintiff conceded that the two suspects pointed at him. The learned trial Judge also found that although there was unclear evidence as to who was exactly wearing the green dustcoat the first Plaintiff conceded that he was wearing such an outfit. Further, the learned trial Judge found that because the suspects said they dealt with a Mine Policeman wearing a green dustcoat and head cap lamp the conclusion should be that the Mine Policeman could only be the first Plaintiff. Further more, the learned trial Judge found that because the Plaintiffs conceded that they were in the same

shift, the Plaintiffs must have connived and worked together in all the illegal arrangement.

The learned trial Judge ended by saying that he upheld the decision of the defendant to dismiss the Plaintiffs.

The Plaintiffs now appeal to this court against the judgment of the court below.

Mr. Ndhlovu , learned counsel for the Appellants, filed a Memorandum of Appeal with four grounds of appeal and written heads of argument which he augmented with oral submissions.

Though couched differently, the first and second grounds of appeal are actually one and can be dealt with together. The import of these grounds of appeal is that the learned trial Judge misdirect himself in law and fact when he found that the Plaintiffs were properly identified as the persons who assisted the intruders to enter the Defendant's Mine.

The third ground of appeal is that the learned trial Judge misdirected himself in law when he said the Defendant was justified in dismissing the Plaintiffs but only suspend and warn their superiors. The fourth ground of appeal is that the learned trial Judge misdirected himself in law when he treated as evidence against the Plaintiffs extra judicial statements of people who were not called as witnesses.

In the heads of argument and oral submissions Mr. Ndhlovu took the rather unorthodox way of not arguing the grounds of appeal seriatim. He made a general argument to cover all the grounds of appeal. In order for the court to properly follow the arguments and submissions of counsel, it is always better that each ground of appeal be argued separately. When

counsel wishes to argue some grounds of appeal together counsel must so inform the court.

In his written heads of argument Mr. Ndhlovu submitted that the learned trial Judge misdirected himself when he said the first Plaintiff assisted the criminals to enter the Mine because he ignored the Plaintiff's evidence that the first Plaintiff was not the only person supplied with green dustcoat at the material time. Further, Mr. Ndhlovu submitted that when the first Plaintiff was presented to the two suspects the first Plaintiff was still wearing the green dust coat but the two suspects pointed at the second Plaintiff as being the one who assisted them to enter the mine and not the first Plaintiff. It was Mr. Ndhlovu's submission that the findings of fact by the learned trial Judge should be reversed as they were not supported by evidence. As authority for reversing findings of fact by a trial Judge Mr. Ndhlovu cited the case of ***Augustine Kapembwa Vs Danny Maimbolwa and Attorney-General***[1].

Mr. Ndhlovu then attacked the learned trial Judge's evaluation of the evidence charging that the learned trial Judge was more concerned with the Defence case than that of the Plaintiffs' case. He gave, as an example, the learned trial Judge's unusual approach of starting with the summary of the Defence case when usually judgments start with the Plaintiff's case. Mr. Ndhlovu then referred to the failure by the learned trial Judge to consider evidence favourable to the Plaintiffs which was given by the Defendant's second witness to the effect that the tunnel through which the intruders entered was not guarded and that the Plaintiffs were some 400 metres away from the place where the intruders entered the Mine. It was Mr. Ndhlovu's submission that after the combined team of Zambia Police and Mine Police had cleared the first Plaintiff, the Defendant had no fresh evidence upon which it would dismiss the first Plaintiff. Further, Mr. Ndhlovu submitted that because

of the unbalanced evaluation of the evidence by the learned trial Judge the court should reverse the learned trial Judge's findings. As authority for this proposition Mr. Ndhlovu cited the case of **Attorney-General Vs Achiume**[2].

Finally, Mr. Ndhlovu attacked the learned trial Judge's finding that the Plaintiffs connived and worked together in this illegal arrangement. In attacking this finding, Mr. Ndhlovu recited the evidence which shows, inter alia, that the Plaintiffs have never worked underground and submitted that those who assisted the intruders must have been people who knew the geography of the underground. It was Mr. Ndhlovu's submission that because of this the inference drawn by the learned trial Judge that the Plaintiffs connived was wrong.

Mr. Ndhlovu's oral arguments and submissions are a summary of what is contained in the written heads of argument. We do not, therefore, see any useful purpose to repeat them.

Mr. Imonda, learned counsel for the Defendant, filed heads of argument in which he argued grounds of appeal numbers one and two together. He submitted that the learned trial Judge was right to uphold the Defendant's decision to dismiss the Plaintiffs. It was Mr. Imonda's submission that the intruders entered the Mine during the time the Plaintiffs were on duty and using an emergency tunnel within the area patrolled by the Plaintiffs and the unauthorized persons identified the second Plaintiff as the Mine Policeman who assisted them to gain entry. Further, Mr. Imonda submitted that the intruders said they were assisted by a Mine Policeman who was wearing a green dustcoat and a head cap lamp and the first Plaintiff wore a green dustcoat and a head cap lamp at the material time. Furthermore, Mr. Imonda pointed out that the two Plaintiffs worked closely on the material date. Mr. Imonda

concluded his submissions on grounds one and two by saying that there was sufficient evidence to connect the Plaintiffs to the offence for which they were dismissed and the learned trial Judge cannot be faulted in concluding that the Plaintiffs connived and worked together.

In arguing the third ground of appeal Mr. Imonda's reply was simply that, the seriousness of the offence influences the punishment.

In ground four Mr. Imonda submitted that the learned trial Judge properly directed himself when he admitted and relied on the statements of the suspects which formed part of the evidence upon which the administrative disciplinary committee relied in finding the Plaintiffs guilty. Citing the case of ***Simon Mukanzo Vs ZCCM Limited SCZ Appeal No. 133 of 1999***[3] as authority, Mr. Imonda submitted that it not the duty of the trial court or even the Supreme Court to rehear the proceedings of a disciplinary body set up in a code. In this case, the learned trial Judge was not rehearing the disciplinary case and so it was unnecessary for him to recall all the persons who made statements.

Mr. Imonda's oral submissions, like those of Mr. Ndhlovu were a summary of what is in the written heads of argument and so we see no reason for reproducing them.

We have considered the evidence, submissions of counsel and we have looked at the judgment of the court below.

This appeal is basically an appeal against findings of fact by the learned trial Judge. As we said in **Kapembwa case**[1] **and Achiume Case**[2] this court is always slow to interfere with a finding of fact made by a trial court, which had the opportunity and advantage of seeing and hearing the witnesses, except where it is positively demonstrated to us that: -

(i) the findings in question were perverse or;

(ii) made in the absence of any relevant evidence or;

(iii) made upon a misapprehension of the facts or;

(iv) they were findings which on, a proper view of the evidence, no trial court acting correctly could reasonably make.

There are two Plaintiffs in this appeal. The learned trial Judge found as fact that the Plaintiffs connived and worked together in what he termed "all this illegal arrangement". The learned trial Judge came to this finding on the basis that the Plaintiffs worked together that day. We have searched the record, in vain, to find evidence which shows or suggests that the Plaintiffs connived. Indeed none of the intruders who were interrogated said that he dealt with two persons at the material time. The learned trial Judge, therefore, misdirected himself when he found that the Plaintiffs connived. In the same vein Mr. Imonda's submissions that the Plaintiffs connived are not tenable. We accept Mr. Ndhlovu's submissions that there was no evidence to support a finding that the Plaintiffs connived. The fact that the Plaintiffs were in the same shift does not necessary mean that the Plaintiffs connived. The Plaintiffs must, therefore, be dealt with separately.

We now deal with the first Plaintiff. As Mr. Ndhlovu submitted, none of the intruders pointed at the first Plaintiff as the person who assisted them to enter the Defendant's Mine. The learned trial Judge found against the first Plaintiff solely on the ground that the intruders dealt with a person wearing a green dustcoat. The learned trial judge made this finding even after observing that the evidence as to who was wearing a green dust coat was unclear. What weighed with the learned trial Judge was the fact that the first Plaintiff agreed that he was wearing a green dustcoat on that day. What the learned trial Judge did not consider was the fact that the first Plaintiff did not say that he was the

only one wearing a green dustcoat. According to the first Plaintiff's evidence, there were many others wearing green dustcoats and that evidence was not challenged. As Mr. Ndhlovu submitted, the first Plaintiff was presented to the intruders in a green dustcoat but he was not identified by them as one of the persons they dealt with. The finding by the learned trial Judge that the first Plaintiff was one of the persons who assisted the intruders to enter the Defendant's Mine was, therefore, not supported by evidence. In the same vein we do not accept the submissions by Mr. Imonda on this issue because they are not supported by evidence. In terms of the cases of **Kapembwa**[1] and **Achiume**[2] we must reverse the learned trial Judge's finding of fact that the first Plaintiff assisted the intruders to enter the Defendant's mine. In the event we find that the Defendant had no grounds for dismissing the first Plaintiff and we find that the first Plaintiff's dismissal was wrongful.

We now deal with the second Plaintiff.

The learned trial Judge agreed with Mr. Ndhlovu's submissions that the two intruders who gave statements during investigations should have been called to testify but held that the failure to call these two intruders was not fatal because the second Plaintiff himself conceded that the two intruders pointed at him. Because of the second Plaintiff's admission that the intruders pointed at him, the learned trial Judge found that the second Plaintiff assisted the intruders to go down the Defendant's Mine. We find this a misdirection. The learned trial Judge's task was to find whether there was evidence to support the charge for which the Plaintiffs were dismissed. The Plaintiffs denied the charge. So the fact that the second Plaintiff said the two intruders pointed at him does not mean that he was saying he assisted the two intruders to get down the Defendant's Mine. What the second Plaintiff was actually saying was that he was

falsely accused. It was the learned trial Judge's duty to find whether, on the evidence, the accusation by the two intruders was false or true. Therefore, it was misdirection on the part of the learned trial Judge to find that simply because the second Plaintiffs said the intruders came to point at him, the second Plaintiff must have assisted the intruders to go down the Defendant's mine.

That is not the end of the matter. As we see it, we are now at large to find whether there was other evidence supporting the charge against the second Plaintiff. We find no other evidence to support the charge against the second Plaintiff. The evidence upon which the second Plaintiff was dismissed was contradictory and nebulous. According to the Defendant's second witness, Mr. Jonathan Mwanza, the two intruders said the second Plaintiff assisted them to go down the Defendant's Mine and that they had given the second Plaintiff money. But when interrogated they said they gave the money to Mine Police Officer who was wearing a green dust coat and a cap lamp. The second Plaintiff was not dressed in that fashion that day. It was the first Plaintiff, who they failed to identify, who was dressed in a green dustcoat and a cap lamp.

Clearly, the evidence by the intruders was not credible evidence which could support the learned trial Judge's finding that the second Plaintiffs assisted the intruders to enter the Defendant's Mine. We do not, therefore, agree with Mr. Imonda's submissions that there was sufficient evidence to support the charge. As, Mr. Ndhlovu submitted, we are of the view that the learned trial Judge did not properly evaluate the evidence that was before him. In his judgment, the learned trial Judge appears to have leaned heavily on the side of the Defendant. As Mr. Ndhlovu submitted, the learned trial Judge highlighted the Defendant's

case right from the beginning of his judgment and saw the Plaintiffs' case in dim light.

On the authority of the ***Achiume Case*** and the other cases we have decided on this subject, we are bound to reverse the learned trial Judge's findings of fact. We find that the learned trial Judge's finding that the second Plaintiff assisted the thieves to go down the Defendant's Mine was not supported by credible evidence. The charge against the second Plaintiff was not established. Accordingly, we find that the second Plaintiff was wrongfully dismissed.

We now deal with the reliefs that the Plaintiffs sought.

The Plaintiffs claimed the following reliefs: -

(a) A declaration that their dismissals were unlawful in that the reasons for their dismissals were not true.

(b) Compensation for loss of employment.

(c) Special damages in the form of salaries from the date of dismissal up to normal retirement.

Our finding that the Plaintiffs were wrongfully dismissed disposes of relief (a).

We now deal with relief (b) which is compensation for loss of employment. Counsel in their arguments and submissions did not address us on this issue. We, therefore, decide this issue without assistance of arguments from counsel.

In the case of **Chitomfwa**[4] we laid down the principle that in assessing damages for loss of employment the possibility of the Plaintiff easily

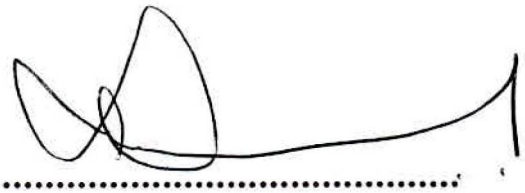
getting a similar job should be taken into account. In the ***Chitomfwa case***[4] the Plaintiff was an Engineering Clerk. The trial court awarded the Plaintiff damages equivalent to one(1) year's salary plus perks. To reflect the scarcity of jobs we interfered with the award by the trial court and awarded the Plaintiff damages equivalent to two (2) years salary with perks.

In this case the Plaintiffs were employed as Mine Policemen who, for all intents and purposes, were security guards. We take judicial notice of the fact that this kind of job does not require the high level of training and skill necessary for the jobs which are scarce. Indeed, the first Plaintiff is already in employment as a Guard with Securicor. In the circumstances of this case, we are of the view that six (6) months salary plus allowances (if any) will be adequate compensation to each Plaintiff for loss of employment. The award shall attract interest at the short term deposit rate from date of the Writ to the date of this judgment and thereafter at 10% until final payment. This award is in addition to any other benefits the Plaintiffs may have got upon their dismissal.

Under (c) the Plaintiffs have claimed special damages in the form of salary from the date of dismissal up to the normal retirement.

This claim is not tenable in law. As we said in the case of ***The Attorney General Vs Kamoyo Mwale***[4] an employee who has been wrongly fully dismissed cannot receive as damages his lost salary up to the age he was supposed to retire. The employee is only entitled to the monies, which he has already earned. The claim by the Plaintiffs for salary up to the time they would have retired is wrong in principle. We accordingly dismiss it.

The result of our judgment is that the appeal has succeeded. The Plaintiffs will have their costs in this court and in the court below.



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D. M. LEWANIKA
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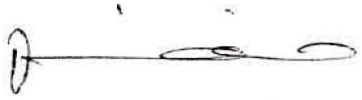

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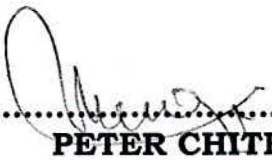
I. C. MAMBILIMA
SUPREME COURT JUDGE



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PETER CHITENGI
SUPREME COURT JUDGE