

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO.69/2014

HOLDEN AT LUSAKA

SCZ/8/200/213

(Civil Jurisdiction)

BETWEEN:

JESSIE MTONGA MULENGA

APPELLANT

AND

LUSAKA CITY COUNCIL

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

CORAM : MWANAMWAMBWA DCJ, MUTUNA AND CHINYAMA JJS

On 5th October 2016 and 28th October 2016

FOR THE APPELLANT : Mr. G. Lungu of Messrs Muleza
Mwiimbu and Company

FOR THE FIRST RESPONDENT : N/A

FOR THE SECOND RESPONDENT : Mrs. S. Chanda, State Advocate
of Attorney General Chambers

J U D G M E N T

Mutuna JS, delivered the judgment of the court.

Cases referred to:

- 1) *Zambia Airways Corporation Ltd vs. Gershom Mubanga (1990 - 1992) ZR*
149 (SC)

2) *Zambia Revenue Authority vs. Hitech Trading Company Limited* SCZ No. 40 of 2000

3) *Victor Namakando Zaza -vs- Zambia Electricity Supply Corporation Limited* SCZ No. 18 f 2001

4) *National Breweries Limited -vs- Phillip Mwenya* SCZ No. 28 of 2002

5) *Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa* SCZ NO. 18 OF 1986

Legislation referred to:

1) *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*

Works referred to:

1) *Black's Law Dictionary, 5th edition by Bryan A. Garner (1979) West Publishing Co., London*

This is an appeal against the judgment of the Industrial Relations Court, sitting at Lusaka, dismissing the Appellant's claim for a declaration that her discharge from the First Respondent's employment was null and void. The judgment also dismissed the Appellant's claim for re-instatement, compensation, damages and costs.

The undisputed facts leading up to this appeal are that the Appellant was employed by Kalulushi Municipal Council as a clerical officer, on 1st June 1998. Later she was transferred to Kafue District Council and eventually to First Respondent Council when she was promoted to the position of Assistant Director, Finance in 1996. Later on 9th June 2005, the Appellant was appointed to act as Director of Finance, for administrative convenience.

Sometime in 2009, the First Respondent ordered a gear box for one of its fire tenders from a supplier known as Tijen Enterprises Limited. The initial deposit of fifty percent of the purchase price totaling K52,200.00 was paid. Subsequently, the Appellant instructed the group accountant - payments office, to raise a payment voucher for the balance in the sum of K52,200.00. The payment voucher was raised but it was not accompanied by documents supporting the purchase, such as the goods received note and engineers report. Notwithstanding this, the payment voucher went through the process of approval leading to the preparation of the cheque. After the cheque was prepared it was

sent to the audit department for verification and pre-audit and it was approved despite there being no supporting documents. The cheque was then signed by two signatories before it was presented to the Appellant, who also signed it despite the fact that it did not have supporting documents.

Arising from the facts in the preceding paragraph, on 23rd April 2009 the Appellant was charged with the offence of gross negligence and failure to comply with established procedures in the procurement of the gear box, pursuant to Regulation 62(b). She was accordingly requested to show cause why disciplinary action should not be taken against her by way of an exculpatory letter, addressed to the Acting Town Clerk, within seven days of the date of the charge letter.

The Appellant wrote an exculpatory letter to the Acting Town Clerk on 30th April 2009, in which she, among other things, explained the circumstances that led to the payment for the gear box. In doing so, she confirmed that the payment voucher and cheque were not accompanied by supporting documents. She also

conceded that she and other officers had been careless in handling the transaction which she attributed to pressure of work.

On 23rd March 2010, after considering the exculpatory letter and report of the *ad-hoc* audit committee, the Acting Town Clerk suspended the Appellant from employment and requested her to hand-over the responsibilities of her office to the Acting Deputy Director of Finance. The suspension was made pursuant to Regulation 89 of the Local Government Conditions of Service 1996, for non unionized officers as read with Regulation 33 of Statutory Instrument number 115. The suspension was also for an indefinite period during which the Appellant was to receive half pay. Subsequently, on 6th April 2010, the Acting Town Clerk informed the Appellant that the First Respondent had resolved, at a meeting held on 26th March 2010, that she reverts back to her substantive position of Assistant Director of Finance.

By letter dated 24th June, 2010, the Acting Town Clerk invited the Appellant to a Special Establishment Committee meeting scheduled to take place on 28th June 2010 at 14:30 hours. The meeting was convened for purposes of hearing the case against her

for abuse of office and it was duly held on the scheduled date and time. After the hearing, a report was prepared which revealed the findings of the committee as follows: the Appellant issued instructions for the preparation of the final payment for the gear box without supporting documents such as the goods received note and engineers report; this act led to the loss by the First Respondent of the sum of K52,200.00 from a government grant meant for service delivery; and the Appellant admitted having been careless in handling the transaction and attributed the carelessness to pressure of work.

From the foregoing findings, the committee resolved as follows: that the Appellant be dismissed from service in the First Respondent for flouting Regulation 62(b) of the Local Government Conditions of Service, 1996, for non unionized officers; that she forfeits the half salaries withheld during the period of suspension; and that a *lien* be placed on her terminal benefits to recover the monies involved.

Following from the facts in the preceding paragraph and on 2nd December, 2011, the Acting Commission Secretary, for the

Local Government Service Commission, wrote to the Appellant, informing her that she had been discharged from the First Respondent's services for gross negligence. This prompted the Appellant to take out an action in the court below on 28th February 2012, by way of a notice of complaint pursuant to section 85(4) of the **Industrial and Labour Relations Act**. The ground upon which the complaint was presented was that:

"By letter of discharge dated 2nd December 2011 issued by the 2nd Respondent discharging the Complainant from the 1st Respondent's employment was unfair, unlawful and wrong as the said case was considered concluded by the 1st Respondent when it terminated the Acting Appointment of the Complainant. The Complainant further feels that she was used as a "sacrificial lamb" in a matter that involved other officers including the Town Clerk by then Mr. Timothy Hakuyu who was not even charged of any offence despite him having amended the procurement order without the procurement committees' authority".

As a consequence of this, the Appellant sought the following relief:

- "1) a declaration that the purported discharge of the Complainant's employment of service from the 1st Respondent by the 2nd Respondent was null and void as the said case was fully concluded by the 1st Respondent;*
- 2) reinstatement of the Complainant as Acting Director of Finance confirmed and retired just like other Directors who were in the Acting positions and were confirmed and retired accordingly*
- 3) compensation for long suspension of about two (2) years without justifiable cause together with the anticipated initial contract of three (3) years which is granted automatically once the officer retires*
- 4) damages for anguish embarrassment and anxiety for unfair, wrongful and unlawful discharge of the Complainant from the 1st Respondent's employment of service*
- 5) any other relief the court may deem fit*

6) interest on all the sums found due to the Complainant from the date of this complaint until payment in full at the current commercial bank lending rate".

The notice of complaint was supported by an affidavit sworn by the Appellant which revealed her employment background and the events leading up to the raising of the payment voucher and cheque in respect of the purchase of the gear box and approval of the two documents. This latter evidence revealed that there were no supporting documents that accompanied both the payment voucher and the cheque. It also revealed that it was the Appellant who initiated the raising of the payment voucher and that she signed the cheque, notwithstanding that it was not accompanied by supporting documents.

The evidence also revealed the disciplinary process the Appellant went through which eventually led to her discharge from employment with the First Respondent.

In response to the Appellant's complaint, the Respondents filed an Answer on 29th March 2012 in which they stated that the Appellant's services were discharged because, whilst executing her

duties as Acting Director of Finance, she violated regulation 62(b) of the Local Government Conditions of Service (1996) for non-unionized officers. They contended that this resulted in loss of colossal sums of money by the First Respondent. The Respondents, therefore, denied that Appellant's claim.

In support of the answer, the Respondents filed an affidavit sworn by one Rabecca C. Banda. Her evidence revealed that the Appellant was employed by the First Respondent as Assistant Director of Finance. Later she was appointed to act as Director of Finance for administrative convenience and while acting in such capacity, and on an unknown date, she authorized a final payment for the procurement of a complete gear box for a fire tender. This she did prior to the delivery of the said gear box and in contravention of the provisions of the contract entered into by the First Respondent and Tijen Enterprises. As a consequence of this, the First Respondent lost a colossal sum of money to the tune of K52,200,000.00 (un-rebased).

Following from the facts in the preceding paragraph, the First Respondent formed the opinion that the Appellant grossly failed or

neglected to exercise due care and regard in discharging her duties. It, therefore, instituted disciplinary action against the Appellant which resulted in the matter being referred to the Special Establishment Committee for a hearing of the Appellant's disciplinary case on 28th June 2010. During the hearing, and in mitigation, the Appellant admitted to having been careless in handling the transaction on account of pressure of work. Therefore, the First Respondent had no option but to dismiss the Appellant for gross negligence in accordance with her conditions of service.

The evidence revealed further that at the time of the Appellant's dismissal, her case had not been concluded by way of her demotion. Further that, she was not demoted but was reverted back to her substantive position of Assistant Director of Finance.

At the trial in the court below the Appellant testified on her own behalf while the Respondents did not call any witnesses.

The evidence of the Appellant in the court below revealed her working career with the First Respondent. She, in this regard, explained how she rose through the ranks to the level of Director Finance.

As regards the background to her dismissal, the Appellant's evidence revealed that on 21st December 2007 a tender committee sat to consider a number of resolutions including the purchase of a gear box for a fire tender. The resolution was passed and the supplier, Tijen Enterprises, was awarded the tender to supply the gear box at the price of K70,000,000.00(un-rebased). At the time the resolution was being passed the Appellant aired her objection at the choice of the supplier but her objections were not minuted.

Later, the Appellant received documentation relating to the gear box with instructions from one Patrick Mayanala of procurement section, to pay 50% of the purchase price. When the Appellant examined the documentation she noticed some irregularities which included: the amendment of the tender amount of K70,000,000.00 (un-rebased) to K104,000,000.00 (un-rebased); the said amendment was initiated on 27th August 2008; and the amendment was approved by the then Acting Town Clerk one T. Hakuyu on 5th September 2008. She explained that since the amended amount exceeded 25% of the original order, the correct course of action was to refer the matter back to the tender

committee because none of the management staff had authority to amend a tender beyond 25% of the value. Further that, the amendment was done out of time because a time limit of six months had been set for the implementation of all tenders. These irregularities prompted the Appellant to see the Acting Town Clerk with whom she shared her concerns regarding the irregularities in the documents. The Acting Town Clerk still insisted that the procurement should go ahead because the First Respondent only had one fire tender and there was an increase in the prevalence of fires in the city. As a consequence of this, the Appellant went ahead and paid half the purchase price of the gear box on the amended tender, in the sum of K52,000,000.00 (un-rebased).

The evidence revealed further that after the Appellant made the payment, the supplier delivered the gear box to the mechanical workshop of the First Respondent in November 2008. The delivery was witnessed by staff from the procurement section, internal audit and mechanical workshop and they noticed that the gear box had some parts missing. Having noticed this anomaly, the staff were supposed to report to the Director of Engineering but they instead

sent the gear box back to the supplier. In doing so, they also provided the supplier sample parts for the gear box to enable it supply the correct gear box thereby committing the First Respondent to the contract.

In February 2009, the supplier re-supplied the gear box to the First Respondent. Subsequently, in March 2009, external auditors went to the First Respondent to audit its expenditure in respect of funds received through grants. In preparation for this audit, the Appellant gathered all returns, payment vouchers and supporting documents to show how the grant funds were spent by the First Respondent. At this point the Appellant noticed that one of the items of the grant funds had a shortfall of K52,000,000.00 (un-rebased), which was in respect of the extra payments due to the purchase of the gear box. The Appellant, therefore, authorized the payment which was made at the point where the gear box was in the custody of the First Respondent. The gear box was later rejected and returned to the supplier.

The evidence went on to reveal that after the final payment was made the Appellant was charged with gross negligence along

with three other officers, namely, Bornwel Lwanga, Director Engineering, Patrick Munyawala, Head Procurement and Fred Musukuma, Manager Internal Audit. Upon receipt of the charge letter, the Appellant responded to it by way of an exculpatory letter. There was no further communication between Appellant and the First Respondent.

Later the Appellant was prompted to approach the Acting Town Clerk to ascertain why he had not been charged in view of the fact that it was he who irregularly amended the tender, thereby allowing an unscrupulous supplier into the First Respondent. This caused a lot of tension between her and the Acting Town Clerk. Subsequently in November 2009, the Acting Town Clerk was appointed Permanent Secretary Ministry of Local Government and Housing. In his place, Bornwel Lwanga was appointed Acting Town Clerk.

The evidence further revealed that after Bornwel Lwanga was appointed Acting Town Clerk, he revived and pursued the case against the Appellant in respect of the gear box. During this same period there was a recommendation that the Appellant should be

confirmed as Director of Finance. The confirmation was to be considered at a full council meeting scheduled for 26th March 2010. However, to the Appellant's shock and surprise, on 23rd March 2010, she was suspended for the offence allegedly committed in 2009. After receiving the suspension letter, the Appellant confronted the Acting Town Clerk and complained about the timing of the suspension letter in view of the fact that her confirmation was due in a few days and the external auditor had just been appointed to audit the books of the First Respondent. The Acting Town Clerk's response was that her suspension was influenced by the Minister of Local Government. The Appellant then proceeded to remove her personal effects from her office and left the First Respondent's premises.

While the Appellant was on suspension and the audit of the First Respondent was going on, she continued to receive persistent requests to report back to work and clarify audit queries which the Acting Director Finance was unable to respond to. These included allegations that the Appellant had misappropriated a sum of money in excess of K7,000,000,000.00 (un-rebased). Initially, she declined

to report for work to clarify the queries but did so after she was threatened that it would be assumed that the allegations against her were proven if she did not address the queries. This prompted the Appellant to report for work and address the queries following which there was no further communication on the issue from the First Respondent.

The evidence went on to reveal that on 26th March 2010, when the full council of the First Respondent met, they were not aware of the Appellant's suspension. The Appellant was also of the view that her case was concluded by way of being demoted to her original position of Assistant Director Finance. This followed the report of the audit committee which is not mandated to deal with staff matters. Later, the Appellant was summoned to appear before the establishment committee to answer charges of abuse of office. This charge was different from the earlier charge leveled against her of gross negligence.

At the hearing of the Appellant's case, the committee focused on the allegations of abuse of office and the Appellant was given an opportunity to present her case. In doing so, and by way of

mitigation, she admitted being careless in the procurement of the gear box. Later on she received a letter from the Local Government Service Commission discharging her from duty.

The evidence concluded by revealing that whilst the Local Government Service Commission had power to dismiss the Appellant because gross negligence was a dismissible offence, her discharge was unlawful because she had already suffered the punishment of demotion.

This was the evidence presented before the court below. After the trial court considered the evidence, it found the following facts as proven: that the Appellant admitted originating instructions to one Fatima Mwape to effect payment for the gear box; she admitted being careless in handling the transaction concerning the purchase of the gear box; that there was no evidence to show that by the time the Appellant was being discharged, the case against her had already been concluded; and that the Second Respondent had a supervisory role over the First Respondent and as such there was nothing wrong with the Second Respondent taking up the matter and dismissing the Appellant. Having made the foregoing findings,

the trial court dismissed the Appellant's claim for a declaration that her purported discharge from employment by the Second Respondent was null and void because by the time she was discharged, the case against her had been concluded by the First Respondent.

The trial court further found that the Appellant had been working in an acting capacity and whilst still in such acting capacity, she was accused of an offence. Following from this, she was reverted back to her substantive position and later discharged. As a consequence of the said findings, the trial court dismissed the Appellant's claim for reinstatement as Acting Director of Finance, confirmation to the position of Director Finance and retirement in line with what happened to the other directors in the First Respondent who were allegedly similarly circumstanced.

The trial court also dismissed the Appellant's claim for compensation for the long suspension and anticipated contract of three years. Her claims for anguish, embarrassment and anxiety for wrongful discharge were also dismissed.

The trial court, however, ordered that if the Appellant was on half pay during the suspension, the portion of the salary withheld should be paid to her with interest. It was ordered further that such salary should be paid in respect of the Appellant's substantive position and not the acting position.

The Appellant is dissatisfied with the foregoing judgment and has launched this appeal on four grounds as follows:

- 1) That the Judge below erred in law and fact when he did not take into account that final payment of the gear box was made on an illegally amended purchase order by the Town Clerk without authority from the internal tender committee;*
- 2) That His Lordship erred in law and fact by finding that the appellant was heard by the Disciplinary Committee and the Local Government Services Commission on the charge of gross negligence when not;*
- 3) That the Learned Judge below erred both in law and fact by finding that the Appellant was not wrongfully discharged when the procurement Manager and the Director Engineering Services*

of the First Respondent should have been the ones to be dismissed or discharged and not the Appellant;

4) That the court below misdirected itself in finding that being careless amounts to gross negligence.

Prior to the hearing the Appellant and Second Respondents filed heads of argument in support and opposing the appeal, respectively. The First Respondent did not file heads of argument and was not represented at the hearing of the appeal despite having been notified of the hearing date.

In the Appellant's heads of argument under ground 1 it was argued that since the purchase order was amended out of time and without authority of the tender committee, it was void *ab initio*. As such, the purchase order had no force of law and the Appellant could therefore not be made liable on it because it would mean that it is clothed with legitimacy.

The gist of the arguments under ground 2 were that although the Appellant was charged with gross negligence she was never heard on that charge. At the disciplinary hearing, the committee proceeded as if she was charged with abuse of office. It was argued

that the investigative report also reflected the offence of abuse of office which was endorsed by the committee. Further that the Appellant was therefore not heard on the charge of gross negligence and there was a failure to comply with established procedures by the First Respondent. This, it was argued, is evident from the letter summoning her to the disciplinary hearing and the minutes of the disciplinary hearing. As a consequence of this, it was argued, the Respondents breached the rules of natural justice. Reliance was made on the case of ***Zambia Airways Corporation Limited vs Gershom Mubanga***¹ where we ordered reinstatement of the Respondent on account of wrongful dismissal.

Under ground 3 it was the Appellant's contention that she should not have been charged and dismissed because it was other persons who orchestrated the offence. She laid the blame at the doors of the then Director of Engineering Services, Procurement Manager and head Audit Section. That the guilt of the aforementioned officers is evident from the fact that they were also initially charged.

It was argued that the Appellant was merely a victim of circumstances, especially that it was not her that authorized the final payment for the gear box but rather, one Regina Mwango.

Under ground 4, it was the Appellant's argument that the fact that she may have been careless does not mean that she was entitled to be charged and punished for gross negligence. The Appellant defined the word careless with reference to ***Black's Law Dictionary***, 5th edition, by Bryan A. Garner to mean absence of care, negligent, reckless. It was argued that in terms of the conditions of service under which the Appellant served, the offence of negligence for a first offender attracts a written severe reprimand whilst the second offender suffers demotion. On the other hand, gross negligence attracts summary dismissal.

The Appellant also attacked the trial court's findings of fact. It was argued, in this regard, that it was a misdirection on the part of the trial court to hold that the charge of gross negligence had been proved merely because it found that the Appellant was negligent in the handling of the transaction for the gear box. Further that the trial court misdirected itself when it found as a fact that the

Appellant was invited to the committee to answer charges of abuse of authority of office and gross negligence, when the record clearly shows that what she was asked to answer to was abuse of authority.

It was also argued that the gear box was delivered and as such the Appellant was on firm ground when she initiated the payment. That the Gear Box was later rejected without the knowledge of the Appellant because there was no communication to her to that effect.

In the *viva voce* argument and in response to a query by the court, counsel for the Appellant, Mr. G. Lungu conceded that the Appellant was appointed by the First Respondent to act as Director Finance for administrative purpose. As such the First Respondent was entitled to revert her to her substantive position. He also conceded that the evidence shows that the payment voucher and cheque did not have accompanying documents when the Appellant processed them.

In the Second Respondents heads of argument, it was argued under ground one that the evidence advanced in relation to the

alteration of the tender document was not presented before the trial court and as such it could not be advanced on appeal. Reliance was made on our decision in the case of ***Zambia Revenue Authority vs Hitech Trading Company Limited***², where we provided guidance on how fresh evidence can be adduced on appeal.

The gist of the arguments under ground 2 were that the ground seeks to challenge a finding of fact by the trial court. It was argued that there was nothing wrong in the findings made by the trial court on the issue of whether the Appellant was heard on the offence for which she was charged and as such the same could not be disturbed by this court. In advancing the said argument reliance was made on our decision in the case of ***Victor Namakando Zaza - vs- Zambia Electricity Supply Corporation Limited***³ where we held that findings of fact by a trial court should not lightly be interfered with.

The arguments under ground 3 were that the trial court properly applied the principle in the case of ***National Breweries Limited -vs- Philip Mwenya***⁴. The case sets out the principle that where an employee has committed a dismissible offence, his

dismissal will not be nullified by the failure of the employer to follow laid down disciplinary procedure. It was argued that the facts of the case show that the Appellant failed to show that her dismissal was for anything other than gross negligence and failed to prove her claim against the Respondents.

The arguments under ground 4 mirrored the ones under ground 3.

We have considered the record of appeal, the judgment appealed against and the arguments advanced. The grounds of appeal and arguments advanced by the Appellant raise two contentions. These are firstly, that by the time the committee met to hear the Appellant's case she had already been punished by way of the directive demoting her back to her substantive position of Assistant Director Finance. Therefore, there was no need for the committee to hear and determine her case and discharge her because it amounted to punishing her twice. Secondly, that her discharge from employment was procedurally wrong because, she was charged with the offence of gross negligence and failure to comply with established procedure and yet at the hearing, the

committee determined her case on the offence of abuse of office and discharged her for the offence of gross negligence.

As a consequence of the said contentions, the four grounds of appeal raise two issues for consideration as follows: whether the hearing by the committee and subsequent discharge amounted to punishing the Appellant twice? and whether the Appellant's discharge was irregular in view of the discrepancy in the charge leveled against her and the charge tabled for consideration at the hearing of the committee?

As regards the first issue and by way of recapping, the evidence by the Appellant is that prior to her suspension she had been appointed to the position of Acting Director Finance awaiting confirmation. During her suspension, however, on 6th April 2010 her acting appointment as Director Finance was terminated reverting her to Assistant Director Finance, thereby marking the end of her case because she was demoted.

The determination of this issue lies in the interpretation to be given to the Appellant's letter of appointment to act as Director of Finance and her evidence under cross examination. For this

purpose we have reproduced the letter in full which reads as follows:

June 9, 2005

Mrs Jessie M Mulenga
Assistant Director
Department of Finance
LUSAKA

APPOINTMENT TO ACT AS DIRECTOR OF FINANCE

Reference is made to the above subject matter.

This serves to inform you that Council at its meeting held on 8th and 9th June, 2005 resolved that you be appointed to act as Director of Finance for administrative convenience with immediate effect until further notice.

You shall be paid an acting allowance and by copy of this letter, the Director of Finance is informed accordingly.

Yours faithfully

Timothy Hakuyu
ACTING TOWN CLERK

Cc His Worship the Mayor
Cc The Permanent Secretary, Ministry of Local Government and Housing
Cc The Director of Finance

We are of the considered view that the effect of this letter is that the Appellant was appointed to act as Director of Finance only

for administrative convenience. The acting appointment was not, in our considered view, in anticipation of confirmation to the position of Director of Finance.

The Appellant did infact concede in cross examination that her acting appointment was as such, for administrative convenience only.

For this reason, the First Respondent was entitled to terminate the acting appointment as and when it deemed fit. This can be discerned from the wording in the letter at the end of paragraph 2 which stipulates that the appointment is "... *until further notice*". These words, in our considered view, grant discretion to the First Respondent, upon notice to the Applicant, to terminate the acting appointment. We therefore do not accept the argument that the termination of her acting status amounted to a demotion. We are fortified in our finding by the fact that the said letter of termination is not even worded as a demotion nor does it state that the decision is as a consequence of the charge the Appellant was facing.

In answer, therefore, to the first issue, the Appellant was not punished twice.

We now turn to consider the second issue. It has been argued by the Appellant in respect of this issue: under ground 1, that since the purchase order was amended without the authority of the Tender Committee and out of time, the payment was illegal and null and void *ab initio*; under ground 2 that the Appellant was never heard on the offence she was charged with of gross negligence and failure to comply with established procedure; under ground 3 that the other players in the procurement of the gear box should have been charged and not her; and under ground 4 that careless does not amount to gross negligence.

The facts of this case as have been revealed by the record of appeal show that by a letter dated 23rd April 2009, the Appellant was charged with the offence of gross negligence and failure to comply with established procedure. Subsequently, and by letter dated 30th April 2009, she exculpated herself in respect of the said charge. Later, on 24th June 2010, the Appellant was invited to the committee meeting to hear her case on the offence of abuse of office. The report of the committee dated 28th June 2010 also revealed that, it considered the charge of abuse of office. Finally the letter of

discharge dated 2nd December 2011 refers to the charge of gross negligence. These facts reveal a discrepancy in the charge as laid before the Appellant and in the discharge letter, on the one hand, and as considered by the committee on the other. However, although these discrepancies exist, we are of the considered view, that the finding by the trial court that the Appellant's discharge was not irregular is not a misdirection because there were sufficient facts to support the disciplinary measure and sufficient evidence to sustain the charge of gross negligence and failure to follow laid down procedure. This can be discerned from the fact that the Appellant conceded that she noticed that the payment documents were not accompanied by a goods received note or engineers report. The goods received note was, in our view, the document which could have confirmed receipt of the gear box thereby justifying the payment. It is, therefore, not enough for the Appellant to say that she did not know that the gear box had been returned. Further, she did also concede that she was careless in the manner in which she handled the gear box issue. This, in and of itself, is an admission of failing on her part which failing though careless, can rightly be termed gross negligence because of the definition ascribed to the

term in the conditions of service for non unionized employees 1996 pursuant to which the Appellant was charged. It is defined as:

"Failure to execute proper care and regard to the manner of discharging duty resulting into financial or pecuniary loss, loss of council property, injury or loss of life".

The view we take is that the admission of having been careless proves the first aspect of the definition which is that of want of *"proper care and regard"* in the manner of discharging duties. This is confirmed by the appellant's evidence which proves such lack of proper care and regard. Further, the facts also show that the careless acts of the Appellant resulted in pecuniary loss by the First Respondent which prove the second aspect of the definition. We, therefore, dismiss the arguments by the Appellant that the admission of carelessness did not prove gross negligence on the part of the Appellant. We are also of the view that her arguments that the purchase order was a nullity re inforce her carelessness rather than redeem her situation. This is the position we take because, the Appellant having noted that the purchase order was wrongly amended should, therefore, have not actioned it and

subsequently signed the cheque issued in pursuance thereof. These acts on the part of the Appellant demonstrate sufficient transgression on her part to justify her discharge notwithstanding the discrepancies in the disciplinary procedure. We stated in the case of ***Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa***⁵ that where it is not disputed that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity. This is the same principle we followed in the case of ***National Breweries Limited -vs- Philip Mwenya***⁴ which the trial court relied upon in dismissing the Appellant's claim.

The facts of this case clearly demonstrate that the Appellant was guilty of the offence charged of gross negligence and failure to follow laid down procedure. She herself concedes that she had erred in the processing of the payment. Further the offence is a dismissible offence. The fact, therefore, that there were

discrepancies in the charge and offence she faced at the hearing cannot entitle her to the relief claimed.

In view of the foregoing we find no merit in all four grounds of appeal. The appeal, therefore, fails and we dismiss it with costs, both in this court and the court below. The costs are to be agreed, in default taxed.



M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



N.K. MUTUNA
SUPREME COURT JUDGE



J. CHINYAMA
SUPREME COURT JUDGE