SELECTED JUDGMENT NO. 27/2019

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IN THE SUPREME COURT FOR ZAMBIA APPEAL No. 110/2016

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

SUPABETS SPORTS BETTING **APPELLANT**

AND

BATUKE KALIMUKWA **RESPONDENT**

CORAM: Wood, Kabuka and Mutuna, JJS.
On 2nd April, 2019 and 8th October, 2019.

FOR THE APPELLANT: Mr. E. K. Mwitwa, Mwenye and Mwitwa Advocates.

FOR THE RESPONDENT: Mr. F. Mudenda, Messrs Chonta, Musaila and Pindani Advocates.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. The Attorney-General v Richard Jackson Phiri (1988 -1989) ZR 121 (SC).
2. Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2006) 22 (SC).
3. Dennis Chansa v Barclays Bank, SCZ/8/128/2011.
4. Zambia Airways Corporation Ltd v Gershom Mubanga (1992) ZR (SC).
5. Chintomfwa v Ndola Lime Limited (1999) ZR 173 (SC).
6. Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) ZR 70 (SC).
7. Wilson Masauso Zulu v Avondale Housing Project Limited (1983) ZR 172 (SC).
10. The Attorney General v Marcus Kampumba Achiume (1983) ZR 1(SC).
11. Chilanga Cement Limited v Kasote Singogo (2009) ZR 122 (SC).
12. Zambia Consolidated Copper Mines v Ennedie Zulu (1999) ZR (SC).
13. Carnel Silomba v Mulonga Water and Sewerage Company, SCZ Appeal No. 139 of 2013.
14. Konkola Copper Mines Plc v Aaron Chimfwembe and Another Appeal No. 195 of 2013.
15. Dennis Chansa v Barclays Bank Plc SCZ /8/128/2011.
16. YB and F Transport Limited v Supersonic Motors Limited (2000) ZR 22.
17. Zambia China Mulungushi Textiles (Joint Venture) Limited vs Gabriel Mwami (2004) ZR 244.
18. Zinka (Shilling Bob) v The Attorney General (1991) ZR 73 (SC).
19. Moses Choonga v Zesco Recreation Club, Itezhi Itezhi Appeal No. 168 of 2013.
20. Care International v Misheck Tembo Appeal No. 57 of 2016.
21. Swarp Spinning Mills Plc v Sebastian Chileshe & Others (2002) ZR 23 (SC).

22. Jacob Nyoni v Attorney General SCZ Judgment No. 11 of 2001.
23. Kitwe City Council vs William Ng'uni (2005) ZR 57 (SC).

Legislation and Other Works referred to:

1. The Industrial and Labour Relations Act, Cap. 269, S.97.
2. Industrial Relations Court Rules, rule 44 (1).
3. The Employment (Amendment) Act No. 15 of 2015 s.36 (1) (c).
4. Employment Law in Zambia, Cases and Materials, 2011, W. S. Mwenda, revised edition; UNZA Press, Zambia.
5. Halsbury's Laws of England, Vol.16, 4th Ed, Re-issue, paragraphs 628 and 629.

Introduction

1. This is the appellant's appeal against a judgment of the Labour Division of the High Court dated 9th February, 2016 which found that the appellant had wrongfully and unfairly dismissed the respondent from his employment.

Background

2. The background to the appeal is that, the South African based appellant intended to expand its business presence in Zambia. In pursuit of that objective, the respondent was on 5th June, 2014 employed as manager for the Zambia office, on permanent terms and conditions of service. The respondent was sent to the appellant's headquarters in South Africa for

training and upon his return, proposed the opening of three container pro-shops in the Chawama, Mtendere and City Market areas of Lusaka. According to the respondent, the appellant accepted his proposal and undertook to pay him K2,000.00 commission for each new container pro-shop opened.

3. The three pro-shops were opened as proposed and the respondent began a recruitment exercise of interviewing persons who were computer literate to be employed as cashiers and supervisors. Five months later, in November, 2014 the appellant appointed Steve Irvin as country manager for Zambia.

4. Two months after that appointment, two concerns were received in South Africa from Zambian customers. The first concern was that the respondent was taking deposits and selling fixtures, which was contrary to the appellant's policy. The second, accused the respondent of having illicit sexual

relations with some members of staff, including prospective employees undergoing training.

5. In order to address those concerns, an impromptu visit was made to the Zambia office on 26th January, 2015 by Steve Irvin and the appellant's operations manager, one Fittinghoff. Investigations were immediately launched, in the process of which a cash reconciliation was also undertaken and revealed a shortfall of K400.00. The respondent was queried about this shortfall but he produced a document showing that the country manager had authorised two salary advances of K200.00 each, to two employees. When the investigations were concluded on 27th January, 2015 the respondent was charged with the following four disciplinary offences:

   (i) breach of good faith for selling fixtures to customers;
   (ii) gross incompetence for failing to carry out duties;
   (iii) gross insubordination (later changed to sexual harassment); and
   (iv) gross misconduct (later altered to misrepresentation of cash figures, appearing on the reconciliation report).

6. At the disciplinary hearing held the following day on 28th January, 2015 the respondent requested for and was granted

time, to engage a representative on the basis that, he did not receive notice of the hearing. While the respondent was securing attendance of his representative, one of the appellant's local cashiers phoned Mr. Fittinghoff and communicated details of two young women who claimed to have been sexually harassed by the respondent. The women were contacted and requested to avail themselves as witnesses following which the disciplinary hearing proceeded as scheduled.

7. In answer to the first charge, of selling fixtures to customers, the respondent explained that, he was away in South Africa when the incident occurred and put a stop to the practice upon his return. In denying the charge of gross incompetence by which he was accused of keeping the shop dirty and not meeting targets, the respondent's explanation was that, the shop could not be properly cleaned as there was no regular supply of water. The respondent challenged the framing of the charge of gross insubordination on the basis that, the narration appeared to relate to sexual harassment. After some

debate, the charge was altered to one of sexual harassment. On the final charge of misrepresentation of cash figures on the reconciliation statement, the respondent maintained that the two salary advance payments were authorised by the country manager.

8. Left with the sexual harassment charge only, the disciplinary panel called the two witnesses referred to in paragraph 6. The witnesses were made to write their statements during the hearing in which they alleged that the respondent had lured them to his home with a view of having sexual relations with them. That he did not employ them because they had declined his said overtures.

9. In denying that allegation the respondent explained that, the two witnesses were amongst other candidates who were being trained, but failed the interviews even after being given a second chance. Thereafter, they persistently contacted him on phone inquiring whether they had been employed. The respondent questioned these witnesses' credibility and why the alleged sexual harassment was not reported much earlier.

10. On 29th January, 2015 the respondent was handed a dismissal letter in which he was informed that the charge of sexual harassment had been established against him. When his appeal against the dismissal was unsuccessful, he decided to take the matter to the Industrial Relations Court (IRC).

Notice of Complaint, and Answer filed before the Industrial Relations Court

11. In his notice of complaint filed in that court, the respondent claimed for:

    (i) payment of his leave days;
    (ii) salary for the month of February, 2015;
    (iii) K2,000.00 commission for each new container pro- shop opened; and
    (iv) damages for wrongful and unfair dismissal.

12. The appellant filed an answer denying all those claims and averred that, all the charges proffered against the respondent were in accordance with its disciplinary code of conduct and were all brought to his attention before the hearing. The errors in the charges were however, admitted including the alteration of the 'gross insubordination' charge to one of 'sexual harassment' in the course of the disciplinary hearing. The

appellant also admitted that, the two witnesses who came to testify against the respondent on the allegation of sexual harassment were only contacted on the day of the hearing, itself.

Proceedings before the trial court, consideration of the evidence and decision

13. At the trial of the matter before the IRC, the respondent set out his grievance substantially as earlier outlined in paragraphs 2-12 of this judgment. He further challenged the presence, on the panel hearing his appeal, of the chairperson of the initial hearing Praise Mhike (RW1) and Steve Irvin (RW2).

14. In his evidence given on behalf of the appellant, RW2 admitted that he did not know about the existence of the two witnesses at the time he was framing the charge for sexual harassment. He further admitted that the witnesses wrote their statements during the hearing, but claimed the respondent was given an opportunity to question them on the contents. RW2 also confirmed that the appellant had no established disciplinary

procedure, which could have been followed but was still adamant in making the point that, dismissal was the penalty provided for the offence of sexual harassment.

15. In determining the claim for wrongful dismissal, the trial court noted that, wrongful dismissal looks at the form of dismissal and requires evidence showing a contravention of an established disciplinary procedure or some steps in it that were omitted. That the court's duty in such matters was not to interpose itself as an appellate tribunal, to inquire whether the decision was fair or reasonable; but merely to examine, if the disciplinary committee had the necessary powers and if such powers were properly exercised. The decisions of this Court in **Attorney General v Richard Jackson Phiri**[1], and **Zambia Electricity Supply Corporation Limited v Lubasi Muyambango**[2] were cited as authority.

16. In the absence of a disciplinary procedure which could be followed, the trial court further noted that, the rules of natural justice still applied and required that a person be heard before

a decision is made against him (*audi alteram partem).* On the evidence led, the trial court's finding was that, the disciplinary committee did not exercise its powers properly as the process was flawed. The flaws were identified as: (i) the manner that the respondent was charged, as evidence revealed the charging officer did not understand the offence of gross insubordination and changed it to sexual harassment, in the course of the hearing; (ii) the respondent was not given sufficient time to prepare his defence, as a result; and (iii) the appeals panel was not properly constituted, as RW1 who chaired the disciplinary hearing at the first instance also sat to hear the appeal and in the trial court's words 'thereby greatly influenced the outcome.'

17. The trial court's observation on the sexual harassment charge was that, it is generally, difficult to prove as it mostly occurs in private and involves two people who are the only witnesses. The court's finding was that, it could not be established who was telling the truth between the respondent and the two witnesses. In the circumstances, the issue of whether the

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dismissal was wrongful was resolved by considering the manner the disciplinary process was conducted, which revealed the following elements of malice:

(i) the substitution of one charge for another during the hearing;

(ii) statements of the two witnesses which were made on the day of the hearing itself;

(iii) ambushing the respondent, leaving him with no ample time to prepare his defence.

18. It is on account of the identified procedural flaws that the trial court found, the respondent's dismissal was wrongful and awarded him 2 weeks' salary in damages, being the contractual notice period required to terminate his contract of employment.

19. The court further considered that, for the dismissal to have been justified or fair, there was need for evidence showing the respondent abused his authority in the manner alleged against serving employees of the appellant who were under his charge. The dismissal was accordingly, also found to be unfair but reinstatement as a remedy, was discounted, on considerations of an acrimonious relationship existing

between the parties. The respondent was instead, awarded 24 months' salary, in damages for the unfair dismissal and the cases of **Dennis Chansa v Barclays Bank[3]; Zambia Airways Corporation Limited v Gershom B. B. Mubanga[4];** and **Chintomfwa v Ndola Lime Limited[5]** were relied upon as authority.

20. The respondent was also granted his claims for payment of his leave days and salary for the month of February, 2015. The claim for commission at the rate of K2,000.00 for each of the three new container pro-shops opened in Chawama, Mtendere and City Market was dismissed for not having been established with evidence. The respondent was however, awarded his costs of prosecuting the matter.

Grounds of appeal to this Court

22. Dissatisfied with the judgment, the appellant has come to this Court advancing seven grounds of appeal, substantially

attacking the trial court for having found:

1. **that RW1 who chaired the disciplinary panel was also on the panel of the appeal hearing and had thereby greatly influenced the verdict of the appeal;**
2. **that the disciplinary committee's powers were not exercised properly, as the process was flawed and there was an element of malice involved;**
3. **that the respondent had made a case for wrongful dismissal, when the appellant had followed a proper, reasonable and fair procedure leading to his dismissal;**
4. **that there was unfairness in the way the respondent was dismissed;**
5. **that an award of twenty-four months' salary in damages for unfair dismissal was due to the respondent, as the award was not only unlawful; but also, excessive;**
6. **that the respondent was owed his salary for February, 2015 and ordered that he be paid the salary;**
7. **that the respondent be reimbursed expenses relating to the suit when his action was unjustified.**

The appeal was supported by written heads of argument and submissions filed by the advocates for the respective parties.

21. We have looked at all the grounds of appeal and find grounds one and two attack findings of fact made by the trial court. This is contrary to **section 97 of the Industrial and Labour Relations Act, Chapter 269** which requires grounds of appeal

from that court to be based on points of law only or of mixed law and fact. We, for those reasons, will not consider grounds one and two of the appeal, for being incompetently before us. Grounds one, two and three having been argued together, our consideration of the intertwined arguments will be restricted to the extent that they are relevant to ground three.

22. In ground three of the appeal, learned counsel for the appellant submitted that, where it is established that an employee committed a dismissible offence and he is dismissed, the dismissal will not be reversed on account only of failure to comply with the procedure, when no injustice has been caused to the employee. The case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**[6] was cited as authority for the submission.

23. His further submission was that, in the absence of a procedure for handling disciplinary hearings, the respondent in this appeal was afforded a chance to be heard in a proper, fair and reasonable manner. Counsel urged us to reverse the

trial court's finding of wrongful dismissal, on the basis that, it was made in the absence of relevant evidence or was based on a misapprehension of the facts. He relied on our decisions in the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited**[7] and **The Attorney General v Marcus Kampumba Achiume**[8].

24. In grounds four and five, relating to the finding that the dismissal was unfair, the argument was that, the lower court erred in law by delving into the merits of the decision of the appellant's disciplinary committee to arrive at the finding that, the respondent was unfairly dismissed, when there were no exceptional reasons or circumstances for the said finding. Counsel re-iterated the submission that, a trial court should not interpose itself as an appellate tribunal from a decision of a disciplinary committee, to inquire whether the decision was fair or unreasonable. That failure on the part of the trial court to determine who was telling the truth between the respondent and the two witnesses, confirmed the respondent had failed to

prove his case on a balance of probabilities, that he had been wrongfully or unfairly, dismissed.

25. Counsel went on to argue that, the trial court's finding on damages for both wrongful and unfair dismissal, with an element of malice, was also flawed. His contention was that, the court had confused itself with the inquiry when determining whether the dismissal was unfair, wrongful or both, by delving into the merits of the case.

26. It was in that regard, further contended that, there appears to be no decided cases in Zambia that clearly define the concept of unfair dismissal with the danger that, an employer may be punished twice. First, under the guise of wrongful dismissal; and, for the same reasons punished a second time, for unfair dismissal, even where there has been no breach of a statutory provision. The submission was that, unlike in the case of **Chilanga Cement Limited v Kasote Singogo**[9], there was nothing in the appeal in *casu* showing that the appellant wished to get rid of the respondent at all costs.

27. On the quantum of damages, counsel cited the case of **Zambia Consolidated Copper Mines v Ennedie Zulu[10],** which decided that, damages beyond the notice period would be appropriate where reinstatement might have been ordered. Relying on that case, counsel urged us to find that, the trial court's award of 24 months' salary for unfair dismissal, was excessive and unjustified.

28. In ground six, the submission was that, the trial court's finding that the respondent was owed his salary for the month of February, 2015 is not supported by the evidence on record.

29. Finally, in ground seven, attacking the award of the litigation costs to the respondent, counsel submitted that, the order was unjustified and contrary to provisions of **rule 44 (1) of the Industrial Relation Court Rules.**

Respondent's Heads of argument

30. In their response to ground three of the appeal, learned counsel for the respondent argued that, in light of the evidence before the trial court, the disciplinary procedure undertaken

by the appellant cannot be said to be proper, reasonable and fair. The submission was that, according to **Selwyn's Law of Employment**, no disciplinary action should be taken in advance of proper investigations by an employer; and that, there must be a balance between according an employee a fair hearing and the need to protect an informant.

31. In ground four, counsel argued that, as the finding of unfair dismissal is supported by the evidence on record, there was no basis for this Court to interfere. The case of **Carnel Silomba v Mulonga Water and Sewerage Company**[11] was relied upon for the submission that, unfair dismissal is not tied to common law contract or concepts, but looks at the substance of the dismissal and the reason given for it. Reference was also made to learned authors of **Halsbury's Laws of England, Vol. 16, 4th Edition at paragraph 335** where they state that, the key consideration in cases of unfair dismissal is the reasonableness of the employer's decision to dismiss and not the injustice caused to the employee. **Employment Law in Zambia: Cases and Materials,** was further referred to for the

submission that, unlike wrongful dismissal which looks at form, unfair dismissal looks at the merits or substance of the case.

32. In ground five, relating to the award of 24 months' salary as damages for unfair dismissal, learned counsel for the respondent submitted that, the same was neither unlawful nor excessive. The cases of **Konkola Copper Mines Plc v Aaron Chimfwembe and Kingstone Simbayi**[12]**;** and **Dennis Chansa v Barclays Bank**[13]**;** were called in aid of the submission, where damages of 24 months' and 36 months' salary, respectively, were awarded. We were urged to find that, taking into account all the circumstances of this case, including job prospects and loss of earnings, the lower court cannot be faulted for awarding 24 months' salary as damages.

33. In ground six, learned counsel relied on the evidence on record for the submission that, the respondent is still owed an outstanding salary for the month of February, 2015.

34. Lastly, in ground seven of the appeal, learned counsel simply urged us to uphold the trial court when it awarded the

respondent as the successful party, his costs of prosecuting the matter. The case of **YB and F Transport Limited v Supersonic Motors Limited**[14] was cited as authority, in making the submission that, costs follow the event; and, that a successful party should not be deprived of his costs, unless their conduct or actions in the matter are found wanting.

35. When the appeal came up for hearing, learned counsel for the parties, in the main, relied on their written heads of argument as earlier referred to in paragraph 24-34 of this judgment, which they supplemented with brief, oral submissions.

Consideration of the matter by this Court and decision

36. We have considered the evidence on record, heads of argument, submissions, the host of case law and other authorities cited by counsel, for which we are indeed indebted. Having discounted grounds one and two for incompetence, we will accordingly, first consider the appeal starting with the ground three, deal with grounds four and five together, as they are interrelated, proceed to ground six and conclude with ground seven of the appeal.

37. Ground three attacks the finding of wrongful dismissal made by the trial court. The evidence on record shows that the appellant employed the respondent on 5th June, 2014. After seven months, on 27th January, 2015 the appellant proffered four charges against him, being; *(i) breach of good faith; (ii) gross incompetence; (iii) gross insubordination; and (iv) gross misconduct.* All the charges collapsed, except the charge of gross insubordination which was also changed in the course of the disciplinary hearing, to sexual harassment.

38. The evidence on record also shows, there was no dispute, that the alleged victims of sexual harassment were not employees of the appellant and no earlier report of the allegations had been made by themselves to the appellant's management. The accusation was said to have been prompted by an anonymous employee and the witnesses were contacted on the day of the hearing itself. They availed themselves and gave written statements citing the respondent as having sexually harassed them, but the respondent denied the allegation. The evidence

further shows that, the appellant did not have any disciplinary procedure.

39. From that premise, and in view of the legal position that, wrongful dismissal looks at the form of the dismissal and refers to dismissing an employee in breach of contractual terms, such as non-compliance with the disciplinary procedure. Further, that the essence of complying with a disciplinary procedure is to ensure the determination of disciplinary offences in a fair, transparent manner and to protect employees from unwarranted loss of employment. As the appellant did not have a disciplinary procedure, the trial court was guided by the *audi alteram partem* rule of natural justice, in determining whether the appellant acted properly in arriving at the decision to dismiss the respondent.

40. On the evidence before it, the court's findings were that, the charging officer did not understand the offence of gross insubordination and changed it to sexual harassment, in the course of the hearing. As a result of that sudden change, the trial court found the respondent was not given sufficient time

to defend himself. It also found, the appeals panel was not properly constituted, as RW1 who chaired the disciplinary hearing at the first instance, also sat to hear the appeal and thereby influenced the outcome.

41. The appellant has countered those findings by arguing that, no injustice was caused to the respondent, as he agreed to the alteration of the charge and the particulars remained the same. The submission on the point was that, since the respondent was given an opportunity to answer to the substituted charge, this constituted sufficient hearing. Our decision in the case of **China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami**[15] was called in aid of the submission.

42. The importance of upholding the right to a hearing envisaged in the rules of natural justice was recounted in **Zinka v The Attorney-General**[16]**,** in the following quote:

> **"the principles of natural justice are implicit in the concept of fair adjudication,** that an adjudicator shall be disinterested, and unbiased (nemo judex in causa sua); and **that, no person shall be condemned unheard. That is,**

> **parties shall be given adequate notice and opportunity to be heard** (audi alteram partem)".

43. Considered against that backdrop of the law, the record of appeal in *casu* discloses, as correctly found by the trial court, that there was nothing in the evidence led to show that the two female witnesses had previously raised any complaint of sexual harassment against the respondent. It also appears irregular to us: that without any or adequate notice to the respondent, the initiator of the disciplinary hearing was on the day of the hearing itself prompted to call the two witnesses whom he did not even know; who had never made a formal complaint to him previously; and were not in the employ of the appellant; to come and testify. This was after making them write statements which were availed to the respondent and altering the charge, whilst the hearing was on going and thereby denying him adequate opportunity to prepare his defence on the charge as altered.

44. Those are the reasons we are unable to fault the trial court when it found, that procedure, which was employed by the

appellant prior to dismissing the respondent was flawed and did not comply with the rules of natural justice. The dismissal was rendered wrongful by the said procedural flaws, as a result.

Ground three of the appeal challenging the finding of wrongful dismissal accordingly, fails.

45. In assailing the finding that the dismissal was also unfair and that the award of 24 months' salary in damages which was made to the respondent was erroneous and excessive; the appellant contends that the concept of unfair dismissal is one of statutory creature under English law; and should be looked at in the context of our statutes and precedents.

46. It is further argued that, the concept of unfair dismissal has not been properly defined by our case law. Hence, an employer risks being punished twice, under the guise of wrongful dismissal; and for the same reasons, a further punishment inflicted for unfair dismissal, when there is no breach of any statutory provision to warrant such a finding. The appellant in that regard, quotes Mwenda J, in her book,

Employment Law in Zambia: Cases and Materials where she confirms that, unfair dismissal is a creature of statute whose roots may be traced back to England. That it evolved from laws enacted in the quest to promote fair labour practices by preventing employers from terminating contracts of employment except, on specified grounds. She also writes that, whilst wrongful dismissal looks at the form or procedural errors in effecting the dismissal, unfair dismissal looks at the reasons for dismissal.

47. In a recent decision of this Court, **Moses Choonga v Zesco Recreation Club, Itezhi Itezhi**[17], our holding was that, the dismissal was unfair and unlawful as the reason given, was not related to the qualifications or capability of the appellant in the performance of his duties. We referred to **Halsbury's Laws of England, Volume 16, 4th Edition, Re-issue, at paragraphs 628 and 629** to the effect that, in order to determine whether a dismissal was fair or unfair, an employer must show the principal reason for the dismissal. That such reason must also relate to the conduct; capability or

qualifications of the employee for performing work of the kind which he was employed by the employer to do; or to operational requirements of the employer's business.

48. We do acknowledge the legal position that unfair dismissal is a creature of statute with its origins in the need to promote fair labour practices by prohibiting employers from terminating employees' contracts of employment except for valid reasons and on specified grounds. That position is substantially in line with Article 4 of the International Labour Organisation (ILO) standards, Convention 158, Termination of Employment, 1982.

49. It was following upon those standards, that **the Employment Act Cap. 268** was by **Act No. 15 of 1997** amended to introduce **section 26A**, that seeks to protect employees serving on oral contracts from termination of their employment, without a hearing, on grounds related to their conduct or performance. The section as amended reads as

follows:

> **"26A. An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."**

50. That protection was, with effect from 3rd December, 2015, also extended to employees serving on written contracts, by the **Employment (Amendment) Act No. 15 of 2015** which amended **section 36 (1) (c) of the Employment Act Cap. 268 of the Laws of Zambia** to now further provide that, termination by the employer must be for valid reasons related to conduct, performance or operational requirements of the business, in the following words:

> **36. (1) (c)** "A written contract of service shall be terminated in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise, **except that where the termination is at the initiative of the employer, the employer shall give reasons to the employee for the termination of that employee's employment; and**
>
> **(3) The contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking."** (boldfacing for emphasis only)

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51. In the case *in casu,* apart from having been wrongfully dismissed, the respondent was, as correctly found by the trial court, also unfairly dismissed for the charge of sexual harassment, which according to the evidence on record was not supported by any relevant substratum of facts. The decision appears to have been prompted by the appellant's predetermined resolve to find a ground on which to dismiss the respondent, as expressed in the following words of RW1:

> *"I arrived at the verdict and communicated with Human Resource in South Africa telephonically and that I did not find him guilty of other charges but* ***sexual harassment*** *and that it* ***'was the only charge I could use to dismiss'*** *the complainant"* (boldfacing for emphasis, ours)

Ground four of the appeal attacking the finding that the dismissal was unfair, fails for the reasons given.

52. In his submissions, learned counsel for the appellant further contended that, the trial court had confused itself with the inquiry when determining whether the dismissal was unfair, wrongful or both, by delving into the merits of the case. In addressing that contention, we re-iterate the point already alluded to in paragraph 48 of this judgment that, whereas

inquiry into whether or not a dismissal was wrongful is restricted to consideration of procedural lapses in effecting the dismissal; unfair dismissal looks at the substance or merits of the dismissal to determine whether it was reasonable or justified.

53. The court is in unfair dismissal, obliged to consider the merits or substance of the dismissal to determine, whether the reason given for the dismissal is supported by the relevant facts. Undertaking such an exercise cannot be equated to confusion on the part of the trial court, as learned counsel for the appellant sought to argue.

54. On counsel's further contention that the trial court found there was unfair dismissal of the appellant in this appeal in the absence of any statutory contravention. We can only underscore the point that, in this jurisdiction, even prior to the statutory amendments referred to in paragraphs 49-50 of this judgment, this Court did have occasion to consider the issue of unfair dismissal claims. Some of those claims were upheld on the basis that, there was improper exercise of power

by the employers, as the reasons given for the dismissals were found not to have been supported by the relevant facts. In one such latest decision, **Care International v Misheck Tembo[18],** we did affirm the position that, termination of employment may be both wrongful and unfair and further that, an employee's terminal benefits are informed by the mode of exit from such employment.

55. In considering what would constitute an adequate measure of damages in a particular case where a dismissal is found to be wrongful, we have again previously said the starting point is that, the normal measure of damages followed, is the common law notice period for termination, where such is provided for in the contract and where there is no such provision, notional reasonable notice, will apply.

56. Where elements of aggravation are found to exist, the measure of damages may exceed the notice period. In such event, the particular circumstances of the case, will inform the trial court in arriving at an appropriate award of damages for dismissal

found to be wrongful or unfair or both. Past decisions of this Court also variously guide that, such considerations may include the age of the employee, length of service, prospects of future employment and the manner in which the dismissal or unfair termination or both, have been inflicted. In the cases of **Chintomfwa v Ndola Lime Limited[5]; Swarp Spinning Mills PLC v Sebastian Chileshe & Others[19]** and **Jacob Nyoni v Attorney General[20],** we took into account evidence of the abrupt loss of employment and scarcity of finding a new job as aggravating factors justifying awards beyond the notice period.

57. In the **Choonga[17]** case, referred to in paragraph 47, we further stated that damages for both wrongful and unfair dismissal should not have been made separately as they ordinarily arise from the same set of facts. Accordingly, in the appeal in *casu*, the trial court's separate award of 2 weeks salary as damages for wrongful dismissal and twenty-four months' salary for unfair dismissal are hereby set aside.

58. On the facts of the appeal in *casu*, we take into account that the respondent was subjected to a flawed disciplinary

procedure, which rendered the dismissal wrongful. The evidence on record also shows that, the allegations of sexual harassment were unjustified for not being supported by any substratum of facts. In this jurisdiction we have held such dismissals as unfair. We take into account also, evidence that the respondent's service was for a period of about seven months. That the 'gambling' business in which the appellant was engaged is now filtering in our local market, as a viable economic activity. The respondent's prior exposure would thus, be an added advantage, for his future job prospects. And, that entrepreneurship or self-employment is not excluded, in that line of business.

59. Informed by those considerations, we find six months' pay as damages for both wrongful and unfair dismissal an appropriate award, in the circumstances of this case. To that extent, ground five of the appeal partially succeeds.

60. Coming to ground six, we agree with the appellant that evidence on record shows, the respondent was dismissed on 29th January, 2015 and did not work for the month of

February, 2015 for him to be entitled to payment of a salary for that month. As we held in the case of **Kitwe City Council v William Ng'uni**[21], it is unlawful to award an employee a salary or pension benefits, for a period not worked for, as such award amounts to unjust enrichment.

Ground six of the appeal must succeed.

61. On the claim for litigation costs, subject of ground seven of the appeal, suffice to re-iterate that, the general rule that costs follow the event cannot be applied contrary to any statutory provision providing for costs in the particular circumstances. In terms of **rule 44 (1) of the Industrial and Labour Relation Court Rules,** a losing party in what is now the Labour Division of the High Court, can only be condemned to pay costs of the successful party, if their actions or conduct in the proceedings is blameworthy. In the absence of evidence of such misconduct, on the part of the appellant as the losing party in the court below, the order of costs made by the trial court against the appellant cannot be sustained and is hereby

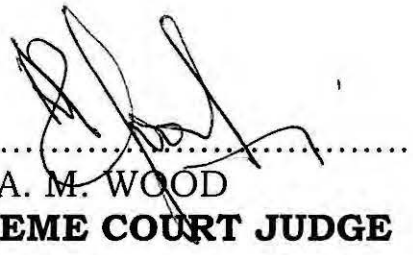
set aside.

Ground seven of the appeal also succeeds for those reasons.

62. In sum, grounds one, two, three and four of the appeal have failed, whilst grounds six and seven have succeeded. Ground five has partially succeeded to the extent that the awards of 2 weeks damages for wrongful dismissal and 24 months' salary for unfair dismissal have been set aside and substituted with six months' salary as damages for both wrongful and unfair dismissal. Such award will carry interest at the average short-term bank deposit rate from the date of filing the complaint to the date of judgment, in the court below. Thereafter, interest will accrue at average bank lending rate as determined by the Bank of Zambia, to the date of payment.

63. As there is no evidence on record to warrant an order of costs against the respondent in this appeal. In terms of **Rule 44 (1),** each party will bear its own litigation costs, both here and in the court below.

Appeal partially succeeds.



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A. M. WOOD

SUPREME COURT JUDGE

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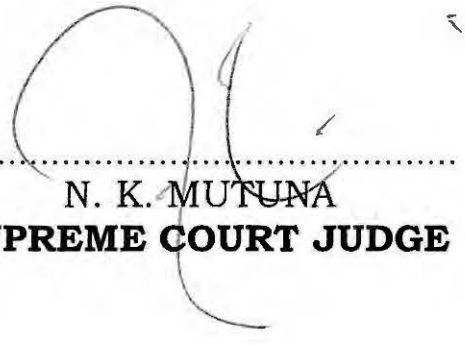
J. K. KABUKA

SUPREME COURT JUDGE



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N. K. MUTUNA

SUPREME COURT JUDGE