

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

ZAMBIA BREWERIES LIMITED

APPELLANT

VS.

CHARLES MUSENDO

RESPONDENT

CORAM: Bweupe DCJ, Chaila and Chirwa JJS.

On 29th October, 1996 and 29th May, 1997.

For the Appellant - Mr. DZEKEDZEKE of Dzekedzeke and Company

For the Respondent - In Person.

JUDGMENT

Bweupe DCJ, delivered judgment of the court.

Cases and Legislation referred to:

1. Ngwira case Appeal NO. 15 of 1994
2. Section 108 of the Industrial and Labour Relations Act No. 27 of 1993

This is an appeal from a decision of the Industrial Relations Court ordering that the Respondent be reinstated in his former post as Senior Investigations Officer with effect from the date of the purported dismissal and further ordering that he should be paid his arrears of salary and any allowances he was entitled to with effect from the date of the purported dismissal plus interest at the current bank leading rate.

The facts of the case are that the Respondent was employed as a Senior Security Officer. On 5th June, 1992 he was Mr. MUBU were assigned to follow a truck which was suspected to have removed beer unlawfully. They went to Chaisa at Chimutengo bar using one of the Respondent's Vanettes. After finishing the assignment, they decided to return to the plant. As they were going the Respondent observed that there were two

vehicles, one following them and the other blocked their way. He, however, managed to drive and as he was driving, he crashed in a gate. At that moment he heard gun shots but he managed to reach Emmasdale police Station where he reported the matter and later reported the case to the management.

Later during the week he was served with a complaint from charging him with the abuse of official transport and suspended. He remained on suspension up to 14th August, 1992 when his case was heard by the Chief Engineer who acquitted him.

After his acquittal, Mr. PHIRI raised another complaint form relating to damage of transport that occurred when he had gone to Chaisa and suspended him until 25th November, 1993 when he was finally dismissed.

The Respondent felt he was discriminated against because he did not cause the damage deliberately as he was running away from armed robbers. He lodged his complaint under Section 108 (2) of the Industrial and Labour Relations Act No. 27 of 1993 against the Appellant which stated that the Appellant discriminated against him on social status without establishing any case against him. He prayed for reinstatement with full benefits and payment of arrears of salary.

Section 108 of the Industrial and Labour Relations Act No. 27 of 1993 reads:-

"No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or social status of the employee."

The learned advocate, Mr. DZEKEDZEKE, on behalf of the Appellant, argued that the Assistant Superintendent NANCY KAONA CHINGAIPE was a ballistic expert whose evidence must have been discredited by the evidence of another

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was not destroyed in cross examination. The court below had, therefore, no basis for stating "whether the shots were fired from outside or inside the vehicle, they could not have been fired by the complainant as there was no evidence to the effect that the complainant had any gun of the calibre from which the shots were fired." He argued that it was incumbent upon the complainant to explain how the gun shots emanated from the inside of the car and not upon the Appellant to show what the Respondent had at the time.

Mr. DZEKEDZEKE further argued that the court below erred in holding that :-

"(a) The Appellant did not produce any witness who might have witnessed the incident to rebut the Respondent's evidence to what happened."

With due respect, he argued that the Appellant's only witness was the very employee who was complaining.

"(b) If CW 1 found any spent cartridges in the vehicle, one would not doubt RW 1's evidence. We do not think that the complainant could have had time to remove the spent cartridges from the vehicle following the shooting."

He argued that this was ably answered by the expert herself when she said

"The 4 empty cartridges at the scene were found, this to me indicates that the gun was fired at a close range as it threw out the cartridges."

He further argued on this point that indeed the court itself recognised this when it observed that:-

"The finding of the 4 cartridges at the scene indicated that the gun was fired at a close range as it threw out cartridges."

And in any case, he went on, what would stop the occupants of the car throwing out the cartridges after the shooting. The ballistic expert showed that if the complainant's story was true he would be dead and never be able to tell history.

Mr. DZEKEDZEKE then argued discrimination on social status. He said the Ngwira case and the question of reinstatement were not adequately addressed by the court. He referred this court where the court below said:-

"The court comes to the conclusion that the Respondent committed no offence (We have shown that this is not very true) and argues that one can be discriminated in the employment hierarchy..... his dismissal was based on discrimination because of his social status."

He said these were not proven facts on the face of the facts before the court. Indeed, the court entangles itself when it states that there is a technicality.

He further argued that if the court found that the dismissal was dismissal was unlawful and wrongful the remedy should have been founded in damages and not re-instatement unless there was proof of aggravation.

He said the court failed to see the existence of corroborative evidence in Mr. MUBU who was alleged to have been in the motor vehicle at the time of the "accident". The complainant does not explain why this witness was not called. He does not even explain the whereabouts of this witness.

The Respondent who appeared in person argued that the learned court adequately addressed its mind to the question of ballistic expert evidence. Assistant Superintendent NANCY KAONA CHINGAIPE was a very senior Police officer who practised as a forensic ballistic expert responsible for examining and identifying various types of fire arms and in this case she was the principal witness. She did not complete her investigations professionally in that she failed to visit the scene of such important incidence to fortify her investigations thoroughly.

He said the court below had basis for stating that whether the shots were fired from inside or outside, they could not have been fired by him and indeed they were not fired by him. He said he had no gun of the calibre from which the shots were fired. He said the ballistic expert was not the best witness in that there were alot of discrepancies in her report.

He said his dismissal was based on his social status because:-

(a) Mr. B. S. PHIRI suspended him for these days without pay

and charged him with failure to obey lawful instruction for which he was acquitted;

- (b) after acquittal, Mr. PHIRI raised another charge against him for abuse of official transport relating to the incidence which occurred on 5th June, 1992 and was put on indefinite suspension without pay for 3 months and acquitted;
- (c) after the acquittal Mr. B. S. PHIRI raised another charge sheet for malicious damage to company property and was put on an indefinite suspension without pay for six months until 25th January, 1993 when he was finally dismissed without pay. He said he was charged twice on the same motor vehicle.

We have carefully considered the evidence and the judgment of the court below. We have also considered the authorities cited and the arguments presented. The Respondent's complaint was that he was discriminated against on grounds of his social status under S.108 of the Industrial and Labour Relations Act No. 27 of 1993. We have hereinbefore quoted the contents of that section.

In Ngwira case Appeal No. 15 of 1994 we said:-

"It is quite clear that the parties and the Industrial Relations Court misconceived the meaning of the expression "social status" when considering whether the Appellant had been discriminated against within the terms of the section. The word "social" relates to "society" and the expression "social status" means a person's standing in society generally and workers standing in any employers organisation. The fact therefore, that the Appellant was Chief Personnel and Administration Manager in the Respondent company had nothing to do with his social status. There is nothing improper in punishing a senior member of an organisation more severely on the grounds that he should be setting an example to others.

The intention of the legislature in this section must have been to indicate an abhorrence of a system whereby the people of a society are divided into different social classes and people of an allegedly "lower class" are discriminated against."

It is, therefore, our considered view that the finding of the Industrial Relations Court that the Respondent was discriminated against because of his social status was wrong. There is no evidence on record that the Respondent was discriminated against on ground of his social status. The court below accepted discrimination because there was no reason found for his dismissal. The expert evidence rebutted the Respondent's evidence.