JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NO. 15 OF 2020
(Being IRC Matter No. LL 230 of 2010)

BETWEEN

FRANCIS KAYAMBA PHIRI ……..…..…… APPELLANT

AND

AGRICULTURAL DEVELOPMENT AND MARKETING CORPORATION LIMITED ……...… RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Chibwana, Counsel for the Appellant
Mrs. Mbeta, Counsel for the Respondent
Mrs. Alinafe Mtenje, Court Clerk

JUDGMENT

Kenyatta Nyirenda, J.

1. This is my judgment on an appeal by Mr. Francis Kayamba Phiri (Appellant) against a judgment that was made by the Industrial Relations Court (lower court). The Appellant seeks three orders, namely, an order setting aside the judgment by the lower court, an order of reinstatement or retirement with full benefits and an order awarding him costs of the action.

2. The appeal is strongly opposed by Messrs. Gostings Mitumbira, Lefati Sade and Often Kampaliro (Respondents).

3. The judgment of the lower court is relatively brief. It reads as follows:

> *"The applicant's claim is for unfair dismissal. He was employed by the respondent on 4 July 1976 as an Accounts Clerk at the respondent's Head Office in Limbe. In the year 1982, he was made Senior Marketing Supervisor at Lumbadzi ADMARC market. From*

September 2006. The depot started receiving fertilizer in readiness for the growing season. In January 2006, there came auditors led by Mr. Chikalipo. They discovered a loss of about 300 bags of D Compound fertilizer to the value of around K1,800,000.00.

PW 2 was Mrs Paulina Jere who in 2006 was working as Registration/General Duties Clerk at the Lumbadzi market. Mrs Jere was working as the Head Clerk and the applicant was their supervisor.

Her duties were to receive goods, counting the goods, and any other duties that were assigned to her by the applicant or the Head Clerk. During the growing season, the market was receiving fertilizers like 23:21:0, CAN, UREA and D Compound. They were able to sell all the other fertilizers easily but not the D Compound. The applicant called her and Mrs Munthali and informed them that he had got a phone call from the Regional Office. The applicant told them that the caller had stated that the Regional Office had sent a vehicle with 300 bags of D Compound fertilizer. The applicant expressed surprise to his two colleagues concerning when this vehicle had come to their station and asked them if they had knowledge of the issue. The two clerks searched the files and found a form showing that indeed the fertilizer had been received at the Lumbadzi market. The three officers agreed that the applicant was to go to the Regional Office to inquire into the matter. At the Regional Office, the applicant discovered that the files showed that the fertilizer had indeed been sent the Lumbadzi market. PW 2 stated that she wondered why more of this fertilizer would have been sent to them considering that there was already plenty of this type of fertilizer at their station. However, Mrs. Munthali now affirmed that the fertilizer had indeed been received at the station.

The auditors came to the Lumbadzi market. At the time, Mrs. Munthali was ill and was admitted at Mtengo wa nthenga hospital. Her husband came to the station to inform the office of his wife's illness. Mr. Chikalipo informed Mr. Munthali about his audit findings. At this, Mr. Munthali told Mr. Chikalipo that he would refund the shortage and that he needed a month to do this. Mr. Chikalipo went out and called the Regional Manager to inform him about what Mr. Munthali had said. He came back in and reported that the Regional Manager had said that the money had to be repaid within seven days. Mr. Munthali said that seven days was two short a time for him to do the refund. Later, the three officers at the station were suspended and then they severally attended disciplinary hearings. The applicant and Mrs Munthali were dismissed while PW 2 was reinstated.

DW 1 was Joseph Chikalipo. He is now the respondent's Unit Market Officer at Ukwe in Lilongwe West. In the years between 2004 and 2007, he was the respondent's Regional Internal Auditor for Central Region. He and his fellow auditors had been assigned to conduct district hand overs for Dowa between two officers, Mr. E.S. Chikuse and Mr. Singo. In pursuit of that assignment, on 28 February 2006, he visited the respondent's Lumbadzi market. There they reconciled both cash and stock. There was, however, a certain quantity of stock missing: 42,500 Kg of D Compound Fertilizer, 8000 kgs of CAN fertilis of CAN fertilizer, 9,299 Kg of OPV maize seed and 82 Kgs of long grain rice. The value of the shortage was K1,886,740.

The fertilizer stacks looked intact from the outside but when they were dismantled, it was discovered that the bags inside the stack had not been arranged in order such that they

gave a false picture on the outside. The applicant was shown this and his response was that he knew nothing about this.

The auditors also discovered that when the market was conducting sales, there was no use of the internal document for cash transfer known as C2. The cash sales were being done by two clerks, Mrs Jere and Mrs. Munthali. These then had to transfer the cash to the applicant. In the respondent organization, this C2 document is raised whenever one person has to transfer cash to another within the organization.

The auditors also compared the Security Guard Gatebook for the period with the Weekly Inspections Stocksheet known as M2 and discovered that there were more fertilizer sales endorsed in the Security Guard Gatebook than in the latter. DW 1 took a statement from the applicant. The applicant conceded to the fact that there was the stated shortage. He attributed the shortage to among other things theft by people during sales since the place where the fertilizer was kept did not have enough security and people were flooding the place. The second, the applicant gave was that the fertilizers that had shortages (D Compound and CAN) had been stacked outside the main shed due to the fact that the main shed had been rented out by the respondent to Rab Processors Co. since the year 2005. Concerning the bogus stacks, the applicant stated that these were constructed by ill-minded people. As to the shortage sum, the applicant stated that the three members of staff at the Lumbadzi market (the applicant, Mrs Jere and Mrs Munthali) would discuss on how to pay this off.

In cross-examination, DW 1 denied having seen the applicant build the bogus stacks. He stated that he had indeed interacted with Mr. Munthali during the audit process at the Lumbadzi market and that Mr. Munthali had told him that his wife, Mrs. Munthali (the Clerk) was admitted at Mtengo wa nthenga Hospital. He also said that Mr. Munthali also indicated to him that he would pay back the full amount of the shortage within a month.

DW 2, Kentrion Wilson Suza, the Human Resource Officer for the respondent, stated that after the applicant was employed by the respondent on 4 May 1976, his services were terminated on 11 January 1995. He was pad severance pay and pension. The respondent re-employed and applicant on 9 September 1000 as Assistant Tobacco In-Charge. His position was tenable at Lusangazi Grading Centre in Mzuzu. The letter of re-employment stated that this was a new appointment and that it would not be related to his previous service. After working for six years, he was suspended on 7 March 2006 following an audit report that stated that he had failed to account for fertilizer and other stocks. He was on 21 June 2006 invited to a disciplinary hearing. Following the disciplinary hearing, he was dismissed on 17 April 2007.

DW 2 stated that since the applicant was not entitled to pension under his conditions of service, he was paid severance allowance.

The applicant's dismissal letter in part reads:

It was established at the hearing that:

(i) You failed to account for fertilizers, maize seed and long grain rice all valued at K1,886,740.00
(ii) Fertilizer stacks at the market were bogusly constructed to conceal the shortages.
(iii) Despite your receiving and signing for commodity transfer voucher No. 2005/9746 of 24th November 2005, you did not raise a Goods Received Note as the procedure demanded.
(iv) After selling 42200 Kilograms of D Compound fertilizer, you understated the sales figures on the market accounting books by declaring only 11150 kilograms.
(v) You withheld cash sale receipts and failed to show them in your cash book.
(vi) You disregarded laid down accounting procedures by not documenting sales cash transfers between yourself and the clerks at the market.

In failing to account for stocks in your custody and flouting accounting procedures, you transgressed the Conditions of Service relevant to your appointment. Therefore you are being dismissed with immediate effect.

Upon your dismissal you will be:

(i) Paid withheld salary for the period of your suspension.
(ii) Paid 28 days accrued leave for 2005/2006 and 23 days for 2006/2007.
(iii) Paid refund of your pension benefits as soon as the same is processed from out assurers, Old Mutual.

These benefits will go towards part recovery of the loss suffered by the Corporation and any other debts you may owe the Corporation…'

In cross-examination, PW 2 had stated that after selling commodities in the Lumbadzi market she was just handing over the cash to the applicant without documentation. This confirmed DW 1's findings that the station was not implementing the use of the document for internal cash transfers. The applicant does not dispute the fact that he did not follow the accounting procedures that were outlined in his dismissal letter. All he claims is that the shortage must have been caused by the fraudulent activities of Mrs. Munthali for she took responsibility to pay back the money. We do not know what transpired at Mrs. Munthali's hearing. , but the result of it was that she was dismissed.. The respondent found the applicant guilty too of the offences in the dismissal letter. It must be that regardless of the fact that Mrs. Munthali claimed responsibility for the loss, the respondent still felt that it was the applicant's neglect of following the accounting procedures that led to this loss. The respondent decided to dismiss the applicant too. The applicant may not himself have constructed the bogus stacks or may not even have had knowledge of the same but he was however responsible for not following the accounting procedures. He was guilty of a substantial neglect of his duties.

Section 58 states that:

(1) An employer is entltled to dismiss summarily an employee on the following grounds—

(b) habitual or substantial neglect of his duties:

(2) In subsection (1), "summary dismissal" means termination of the contract of employment by the employer without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

As regards the issue of disciplinary hearing minutes, Muhome writes:

There is no legal requirement for disciplinary proceedings to be recorded or for minutes to be kept. However, it is advisable that the employer keeps a coherent record, not least to avoid disputes as to what transpired. If the proceedings were recorded, it is a moot point whether the employer is obliged to make a copy of the record available to the employee. Our view is that, if the employer allows an internal appeal amounting to a review of an earlier recorded inquiry, the record should be available to the employee.

While there were disciplinary hearing minutes captured, the same were not tendered in court. The applicant is mainly aggrieved because even though Mrs. Munthali asked to refund the money, the was nonetheless dismissed. He does not deny omitting to do the stated accounting procedures. He does not allege that there was anything amiss with how the disciplinary hearing was conducted. Thus we find no real reason why the disciplinary hearing minutes would be of paramount importance in the matter. As the infractions stand, they were emough to warrant a dismissal."

4. Upon being dissatisfied with the judgment of the lower court, the Appellant lodged an appeal with this Court. The Appellant cited the following five grounds of appeal:

"1. The Court erred in law in holding that the minutes of disciplinary proceedings were of no substance to the decision the Respondent made to dismiss the Appellant.

2. The Court erred in law in their omission to address fully the provisions of Section 31 of the Republic of Malawi.

3. The Court erred in law in holding that the Appellant was guilty of substantial neglect of his duties when the evidence before the Court pointed to some employee who accepted liability.

4. The Court erred in law and fact in holding that the Appellant was liable for the loss when the Respondent refused Mr. Munthali's offer to repay the amount in full on behalf of his wife.

5. The Court erred in law and fact in omitting to determine how much were the Appellant's dues in relation to the loss caused to the Respondent."

5. The five grounds of appeal were argued before this Court and each ground of appeal will now be considered in turn.

Whether or not the lower Court erred in law in holding that the minutes of disciplinary proceedings were of no substance to the decision the Respondent made to dismiss the Appellant?

6. The submissions by the Appellant on this ground of appeal were couched in the following terms:

> *"A.* ***IMPORTANCE OF MINUTES OF THE DISCIPLINARY PROCEEDINGS***
>
> *Rules of natural justice demand that a person should not be condemned unheard. In other words before a person or Company takes a decision that affects the legitimate of an employee, the person or Company must give the employee an opportunity to be heard. That is to say the employee must be given the right to explain his side of the story. Section 43 of the Malawi Constitution restates the principles of natural justice. The Section provides as follows:*
>
> *"Every person shall have the right to*
>
> *a) Lawful and procedurally fair administrative action which is justifiable in relation to reasons given where his or her rights, freedom, legitimate expectations or interests are affected or threatened and*
>
> *b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, expectations or interests are known".*
>
> *It is the appellant's right according to Section 43 to be furnished with reasons in writing to explain the administrative action to terminate his employment contract. This requires that the minutes of the Disciplinary proceedings be made available to the employee i.e the Appellant.*
>
> *Minutes of the disciplinary proceedings are relevant to the employee because they will show who were present on the disciplinary panel to dispel the fear that among them was someone who should not have been a member of the panel. One other rule of natural justice demands that no person should act as a judge in his own cause. In* ***Jawadu vs Malawi Revenue Authority MLLR 397****, the Court opined that the Commissioner General Mr Phiri was acting as both accuser and complainant.*
>
> *In the present case in the absence of the minutes the Court was not able to determine as it should have done who were on the disciplinary panel. In other words whether the auditor was among them in which case the proceedings would be flawed.*
>
> *Therefore, the rules of natural justice as restated in Section 43 of the Constitution were breached and consequently the dismissal of the Appellant was on this ground alone unfair."*

7. The position of the Respondent is that this ground of appeal is misconceived in that it does not raise an issue of law. The relevant paragraph of the Respondent's Skeleton Argument reads as follows:

> *"3.2.5 …The lower court found that since the Appellant did not allege that there was anything amiss with the how the disciplinary hearing was conducted, there was no reason for attaching paramount importance to the Disciplinary Minutes. There is no legal requirement that for disciplinary proceedings to be recorded or for the minutes to be kept. Therefore, we argue that there is no issue of law for this court to look at on this point…."*

8. In the alternative, it is submitted that the Respondent satisfied the requirements of section 43 of the Constitution by according the Appellant the right to be heard through a disciplinary hearing and furnishing him with a letter of dismissal which stated all the reasons for the decision.

9. I have considered the respective submissions on this ground of appeal and I cannot agree more with the submissions by the Respondent. With due respect to the Appellant, the relevant part of section 43 of the Constitution gives every person the right to "be furnished with reasons in writing for administrative action". It is not in dispute that the Appellant was written a letter which contained reasons for his dismissal. I am not persuaded that section 43 of the Constitution requires that that given reason must be accompanied by supporting documents.

10. In any case, it seems to me that the Appellant is simply on a fishing expedition for grounds of appeal. It is the argument of the Appellant that the minutes should have been tendered before the lower court to "determine as it should have done who were on the disciplinary panel": see paragraph 6 above. I have read and re-read the court record of the lower court in search of questions or issues raised regarding composition of the disciplinary panel but my search has been in vain. The issue pertaining to composition of the disciplinary panel is just an afterthought that has no substance to it.

11. For the foregoing reasons, this ground of appeal has to be dismissed and it is so dismissed.

<u>Whether or not the lower Court erred in law in their omission to address fully the provisions of section 31 of the Republic of Malawi?</u>

12. It is the case of the Appellant that lower Court erred in law in their omission to address fully the provisions of section 31 of the Constitution. This ground was argued in the Appellant's Skeleton Arguments thus:

"Section 31 of the Constitution is in the following words:

> *"Every person shall have the right to fair and safe labour practice and to fair remuneration".*

The right to fair labour practice is a rule of natural justice and should be read in conjunction with Section 43 of the Constitution which provides:

> *"Every person shall have the right to:*
>
> *a) Lawful and procedurally fair administrative action which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened.*
>
> *b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known".*

The Employment Act 2000 reenacted the natural justice rules when it provided in Section 57 that the employment of an employee shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking and further that before terminating the employee's employment contract the employee should be provided an opportunity to be heard.

*In **Kamkosi vs Office of the Ombudsman** **2008 MLLR 418**, the Court held that fair labour practice requires that before an employer takes any disciplinary action other than dismissal the employer should act reasonably. The applicant was not afforded an opportunity to explain her side of the story and to bring any mitigating circumstances which was a violation of the rules of natural justice which require that a person should not be condemned unheard.*

Disciplinary hearing minutes are therefore important to the appellant because that is the only means for determining whether rules of natural justice as enshrined in the Constitution and International Labour Organization Convention No 158 which Malawi ratified."

13. I am baffled by this ground of appeal. How does section 31 of the Constitution come into play in the circumstances of this case? Firstly, it is not in dispute that the Respondent accorded the Appellant an opportunity to be heard. This is ably evidenced by the fact that the Appellant admits that he attended a disciplinary hearing and the disciplinary hearing process was not challenged in the lower court either by way of pleadings or evidence. Secondly, the lower court made a finding of fact that the Appellant did not challenge the disciplinary hearing procedure that was followed. That finding of fact was well grounded. Accordingly, it my holding that the finding by the lower court cannot be the subject of an appeal: see section 65(1) of the Labour Relations Act.

14. Thirdly, the sincerity of the Appellant in pursuing this ground of appeal has to be questioned. It is the argument of the Appellant that minutes of the disciplinary hearing are "important to the appellant because that is the only means for determining whether rules of natural …" were followed: see paragraph 12 above. I have read and re-read the court record of the lower court in search of questions or issues raised regarding rules of natural justice not being followed during the disciplinary hearing but my search has been in vain. This issue is also an afterthought and it has no substance to it.

15. In view of the foregoing and by reason thereof, the second ground of appeal has to be dismissed and it is so dismissed.

Whether or not the lower Court erred in law in holding that the Appellant was guilty of substantial neglect of his duties when the evidence before the Court pointed to some employee who accepted liability?

16. The arguments by the Appellant in support of this ground can be better understood by quoting in full the skeleton arguments thereon:

> *"The object of pleadings is to bring the parties to an issue and in the case of* ***Yanu Yanu Company Limited vs Mbewe(PB) and Mbewe(MM)*** ***Vol 10 MLR 417*** *Jere J(now late) said quoting Jessel MR in* ***Thorpe Vs Holdsworth(1876) 3 ChD 637 at 639****.*
>
> > *"The whole object of proceedings is to bring the parties to an issue and the meaning of the rules of Order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact the whole meaning of the system is to narrow the parties to definite issues and thereby to diminish expense and delay especially as regards the amount of testimony required on either side at the hearing".*
>
> *In essence the Court was saying that it could only decide on what was pleaded by the parties.*
>
> *In* ***Super Trade House vs Mazombwe*** ***Vol 10 MLR 89*** *the Supreme Court of appeal refused to make any finding as to the nature of the relationship between the parties and whether an alternative claim to that of sale might have been fruitful for the appellant on the grounds that the material facts had not been pleaded by the appellant.*
>
> *In the present case the appellant in the lower Court was claiming to have been dismissed unlawfully and for withheld benefits. The Respondent in paragraph v of their defence allege that the plaintiff's services were terminated due to his failure to account for fertilizers, maize seed, and long grain rice stocks valued at K1,886,740.00.*

> *The dismissal followed the acquittal of the appellant by a competent Court after the state offered no evidence against the Appellant. The Court below did not have to base its judgment on "substantial neglect of duties" because such was not proved by the Respondent.*
>
> *There is no jurisdiction for a Court to determine a case on a point not at issue between the parties* ***Likaku vs Mponda Vol 11 MLR 411****."*

17. The position of the Respondent is that this ground goes against the requirements of section 65(2) of the Labour Relations Act in that the Appellant seeks to attack a finding of fact. The submissions on this point have been put thus by the Respondent:

> *"The third ground of appeal alleges that the lower Court erred in law in holding that the Appellant was guilty of substantial neglect of his duties when the evidence before the Court pointed to some employee who accepted liability. On page 4 of 5 of the lower court's judgement the lower court stated that "it must be that regardless of the fact that Mrs Munthali claimed responsibility for the loss, the respondent still felt that it was the Applicant's neglect of following the accounting procedures that led to this loss. The Respondent decided to dismiss the Applicant too. The Applicant may not himself have constructed the bogus stacks or may not even have had knowledge of the same but he was however responsible for not following accounting procedures. He was guilty of a substantial neglect of duties." We argue that this was a finding of fact based on the evidence that was adduced before the lower court. This being the case, no right of appeal can be made against this finding of the court."*

18. In the alternative, it is submitted by the Defendant that the decision of the lower court cannot be faulted as it was properly grounded in terms of both the applicable law and material facts. Paragraph 3.2.7 of the Respondent's Skeleton Arguments is relevant and it reads, in part, as follows:

> *"… it has been held that although a person in a supervisory role is not personally guilty of misappropriation of funds or fraud, the failure of the person to detect fraud or malpractices, or to explain the anomalies or shortages may justify the employer's action against them. See* ***Hauya v Cold Storage Co. Ltd*** *Civil Cause No. 274 of 1984. The Appellant was the custodian of the fertilizer, maize seed and rice stock. It is noted that the Appellant did not offer any explanation on how the maize seed and rice went missing. Supposing that the late Mrs Munthali was solely responsible for the theft of the fertilisers, the Appellant failed in his supervisory role over her by failing to detect the theft, the bogus fertiliser stacks which were constructed and reporting the malpractices to the Respondent's Management or even the Police. Therefore, we argue that the lower court was justified to hold that the Appellant was guilty of substantial neglect of his duties."*

19. I have carefully considered the respective submissions by both Counsel and I fully agree with Counsel Mbeta that this ground of appeal is simply questioning a finding of fact.

20. Section 65 of the Labour Relations Act is couched in the following terms:

> *"(1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.*
>
> *(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered."* – Emphasis by underlining supplied

21. It is clear from the wording of section 65(2) of the Labour Relations Act that an appeal against a decision of the lower court can only be on a question of law or jurisdiction. A most helpful definition of a point of law is to be found in the case of **Robert John Sheridan v. British Telecommunications PLC** (1998) EWCA Civ. 3538, in which Lord Justice Mc-Cowan quoted the law from **Watling v. William Bird & Son Contractors Limited** (1976) 1l. T.R. 70 as follows:

> "*The authorities on what is a point of law are endless, and they express the matter in all sorts of different ways, but it all in the end comes down to the same thing. An appellant who claims that there is an error of law must establish one of three things: he must establish either that the Tribunal misdirected itself in law or misunderstood the law, or misapplied the law; or, secondly, that the Tribunal misunderstood the facts, or misapplied the facts; or, thirdly – and this again was put in all sorts of different ways – that although they apparently directed themselves properly in law, and did not mis-state, or misunderstand, or misapply the facts, the decision was "perverse", to use a word which to modern ears sounds harsh, or (which is another way of saying the same thing) that there was no evidence to justify the conclusion which they reached".*

22. The following passage in the same case from the judgment of Lord Justice Ralph Gibson is also illuminating:

> *"For my part I agree that the concept of misunderstanding or misapplying facts may amount to an error of law, although when it does it may be, as my Lord has suggested, that such a case is capable of being assigned to the third category of case where there is no evidence to support the conclusion….*
>
> *Misunderstanding or misapplying the facts may, in my view, amount to an error of law where the Tribunal has got a relevant undisputed or indisputable fact wrong and has then proceeded to consider the evidence and reach further conclusions of fact based upon that demonstrable initial error. Such may be an error of law because the Tribunal is required by law to consider the case in accordance with agreed or undisputed facts"*

23. The Court notes that, although this ground of appeal is framed in such a way as making reference to the lower court "erring in law", what the Appellant is in fact

contending against are findings of fact that the lower court made. It is not competent for the Appellant to ask the Court to relook at the findings of fact of the lower court unless he can show that the same amounts to a point of law as understood within the context of section 65(2) of the Labour Relations Act. Unfortunately, at no point in time did the Appellant seek to establish that the appeal raises points of law as explained in the cases of **Robert John Sheridan v. British Telecommunications PLC,** supra, and **Watling v. William Bird & Son Contractors Limited,** supra. In short, the Appellant has failed to discharge the burden of proving that:

(a) the lower court misdirected itself in law or misunderstood the law, or misapplied the law;

(b) the lower court misunderstood the facts, or misapplied the facts; or

(c) the decision of the lower court was "perverse",

24. All in all, this ground of appeal lacks merit and it is dismissed.

Whether or not the lower Court erred in law and fact in holding that the Appellant was liable for the loss when the Respondent refused Mr Munthali's offer to repay the amount in full on behalf of his wife?

25. The submissions by the Appellant on this ground of appeal were couched in the following terms:

> *"In the Court's Judgment at page 2 when going through the evidence the Court said:*
>
> > *"Then Auditors came to the Lumbadzi market. At the time Mrs Munthali was ill and was admitted at Mtengowanthenga Hospital. Her husband came to the station to inform the office of his wife's illness. Mr Chikalipo(Internal Auditor)informed Mr Munthali about his audit findings.*
>
> *At this, Mr Munthali told Mr Chikalipo that he would refund the shortage and that he needed a month to do this. Mr Chikalipo went out and called the Regional Manager to inform him about what Mr Munthali had said. He came back in and reported that the Regional Manager had said that the money had to be repaid within seven days, Mr Munthali said that seven days was too short a time for him to do the refund. Later three officers at the station were suspended and then they severally attended disciplinary hearings. The applicant and Mrs Munthali were dismissed while PW2 was reinstated".*
>
> *What the Court did not capture was that the Appellant was reported to Police and was arrested, brought before Court and acquitted.*

The Court did not consider the totality of the evidence. If Mrs Munthali was dismissed was it not logical for her to set off her terminal benefits when the Court had evidence of her husband wishing to refund the full amount. Why dump the loss on the Appellant?

At page 3 of the Judgment the Court said:

> *"In cross-examination DW1 (i.e Chikalipo) denied having seen the Applicant build the bogus stacks. He stated that he had indeed interacted with Mr Munthali during the audit process at Lumbadzi Market and that Mr Munthali had told him that his wife, Mrs Munthali(the clerk) was admitted at Mtengowanthenga Hospital.*

He also said that Mr Munthali also indicated to him that he would pay back the full amount of the shortage within a month".

This is an equivocal admission of responsibility by Mr Munthali of his wife's guilt. If it is not then what amounts to admission of liability?

The deduction from the terminal dues of the Appellant therefore, smacks of injustice."

26. The position of the Respondent is that the holding by the lower court that the Appellant was liable for the loss was based on findings of fact which were reached by the lower court after it considered the evidence that had been adduced before it. This being the case, the Respondent submits that no right of appeal can be made against this finding of the lower court.

27. The Respondent has also advanced an alternative argument. It is argued that, going on the basis of its submissions in paragraph 3.2.7 of the Respondent's Skeleton Arguments (see paragraph 18 above), the Appellant failed in his supervisory role over Mrs. Munthali hence the Respondent was justified to hold her guilty of substantial neglect of duty.

28. I have considered the respective submissions on this ground of appeal and I cannot agree more with the submissions by Counsel Mbeta that this ground of appeal is caught by section 65(2) of the Labour Relations Act. The Court's reasoning in paragraphs 21, 22 and 23 above apply to this ground with equal force and the said reasoning is adopted accordingly.

29. For the foregoing reasons, this ground of appeal has to be dismissed and it is so dismissed.

Whether or not the lower Court erred in law and fact in omitting to determine how much were the Appellant's dues in relation to the loss caused?

30. It is the case of the Appellant that the lower court omitted to determine the amount of money that was due to the Appellant in relation to the loss caused to the Respondent and that the omission constituted an error of law and fact. This ground was argued in the Appellant's Skeleton Arguments thus:

> *"Mrs Munthali, who was responsible for the loss was never invited to the Disciplinary hearing to confront the Appellant but the Respondent deducted all the terminal benefits which had accrued to the Appellant for 33 years of service.*
>
> *The terminal benefits were not disclosed to the Appellant. To this day the Appellant does not know how much he was entitled to.*
>
> *What was the essence of calling Mrs Munthali to the Disciplinary hearing? The Disciplinary hearing was about the shortage that had been revealed by the audit. The Respondent was anxious to have the money refunded. The only person who owned the shortage was Mrs Munthali. This was supported by her husband's offer to refund the amount in full.*
>
> *The Defendant in paragraph IV pleads that the Appellant's would be terminal benefits were used to offset part of his shortage of K1,886,740.00. This is a vague assertion and such action was illegal.*
>
> *Section 52(1)(b) of the Employment Act 2000 provides as follows:*
>
> > *"No employer shall require or permit an employee to pay or repay to him any remuneration payable or paid to the employee in accordance with this Act".*
>
> *The Appellant's terminal benefits are the Appellant's remuneration which was payable to him in accordance with this Act. They represented what was due to the Appellant on termination of the employment contract after many years of service.*
>
> *Further by Section 52(1)(d) the Act provides:*
>
> > *"No employee shall do any act or permit any act to be done as a direct or indirect result of which an employee is deprived of the benefit or of any portion of the benefit of any remuneration so payable or paid".*
>
> *Therefore on the basis of the foregoing provisions the purported deduction by the Respondent of the Claimant's terminal benefits to set off against the loss caused by Mrs Munthali is illegal. Besides, the Claimant was never informed how much he was supposed to have accumulated over the period of his employment."*

31. The position of the Respondent is that the question of how much were the Appellant's dues is a question of fact requiring a special hearing as they would involve this Court enquiring from the Respondent the amount of the Appellant's dues in order to determine how much the Appellant was entitled to. Therefore, the Respondent asserts that this Court cannot consider this ground of appeal.

32. In the alternative, the Respondent contends that the material period of service by the Appellant for purposes of this appeal is not 33 years but 9 years:

> *"the Appellant's period of service was 9 years and not 33 years as he is alleging. Section 41 (1) of the Employment Act provides that continuous employment shall begin from and include the first day on which an employee begins to work for an employer and shall continue up to and including the date of termination of employment. Sub section 3 (c) goes on to provide that an employee's continuous employment shall not be treated as interrupted if the employee is absent from work for less than six months due to termination of his employment prior to being re-instated or re-engaged. The Appellant worked for the Respondent from 1976 to 1995 when his services were terminated and he was duly paid his terminal benefits. He was re-employed 4 years later in 1999 and dismissed on 17 April 2007. The Respondent submitted the evidence of all this in the lower court. Therefore the Respondent's dues which were used to offset against the loss were for 9 years and not 33 years."*

33. I have considered the respective submissions by both parties on this ground of appeal. To my mind, this ground of appeal raises a question of law in that the issue is not so much about whether or not the Appellant was responsible for the loss (a question of fact) but whether or not the deduction by the Respondent of the sum of K1,886,740.00 (being the value of fertilizers, maize seed and long grain rice that the Appellant whose loss the Appellant was held responsible for), or part thereof, from the Appellant's terminal benefits was lawful?

34. The Respondent admits that the Appellant's dues were used to offset against the loss suffered by the Respondent. Under what authority was the offsetting done?

35. Sections 52 and 56 of the Employment Act are relevant. Section 52 of the Employment Act sets out prohibitions relating to payment of remuneration. It is expedient that the provision be quoted in full:

> *"(1) No employer shall--*
>
> *(a) pay wages in the form of promissory notes, vouchers or coupons;*
>
> *(b) require or permit an employee to pay or repay to him any remuneration payable or paid to the employee in accordance with this Act;*

(c) require or permit a direct or indirect payment from the employee or deduction from the employee's wages for the purpose of obtaining or retaining employment;

(d) do any act or permit any act to be done as a direct or indirect result of which an employee is deprived of the benefit or of any portion of the benefit of any remuneration so payable or paid;

(e) require or permit an employee to give a receipt for or otherwise to represent that he received more than he actually received by way of remuneration;

(f) pay an employee by requiring the employee to make use of any store which is established--

(i) in connexion with the undertaking of the employer; or

(ii) for the sale of commodities to his employees;

(g) require or permit wages to be paid in any place of amusement or where alcoholic liquor or noxious drugs are sold, shop or store for the retail sale of merchandize, except in the case of persons employed therein;

(h) limit in any manner the freedom of the employee to dispose of his wages.

(2) No employer shall deduct from an employee's wages any amount, except--

(a) the employee's contribution to a compulsory social security scheme;

(b) an amount to be deducted in accordance with law or a court order:

Provided that such deduction shall not be more than one-half of the employee's wages for the period in respect of which the wages are being paid;

(c) an amount authorized by the employee in writing which is not greater in aggregate to an amount equal to one-half of the wages of the employee and which--

(i) is due to the employee in respect of housing furnished by the employer to the employee, goods sold by the employer to the employee or any loan or advance on his wages granted by the employer to the employee;

(ii) the employer has paid or has undertaken to pay in connection with any loan granted to such employee in order to acquire a dwelling

or in connection with the hiring of a dwelling or other accommodation; or

(iii) the employee owes to a vacation, sick, medical, insurance, savings, provident or pension fund;

(iv) is deducted in accordance with section 36 of the Labour Relations Act."

36. Section 56 of the Employment Act deals with disciplinary action and subsections (3) and (4) thereof relate to imposition of monetary penalties:

> *"(3) Subject to subsection (4), no employer shall impose a fine or other monetary penalty on an employee:*
>
> *Provided that the employer may not pay wages to the employee for the period he has been absent from work without permission of the employer and without reasonable excuse.*
>
> *(4) An employer may deduct an amount of money from an employee's wages as restitution for property damaged by the employee."*

37. I have carefully read sections 52 and 54 of the Employment Act and I have found nothing therein which would support the deduction by the Respondent of the sum of K1,886,740.00 or part thereof from the remuneration of the Appellant.

38. It is clear from a reading of section 56(3) and (4) that imposition of fines or other monetary penalties on employees is strictly prohibited subject to one exception only, namely, deduction of an amount of money from an employee's wages as restitution for "property damaged by the employee". Examples that readily come to mind are damage caused by an employee to tools, equipment, assets of the employer.

39. It is commonplace that the disciplinary case against the Appellant was about a shortage and not about the Appellant causing damage to the Respondent's property. To my mind, it would be a violation of the English language to argue that a shortage falls within the phrase "property damaged by the employee".

40. In any case, the onus was on the Respondent to prove that the deduction was lawfully done. The Respondent has not put forward any legal argument to support the deduction that was made. It is, accordingly, my finding and my holding that the lower court erred in allowing the Respondent to deduct the sum of K1,886,740.00, or part thereof, from the remuneration of the Appellant.

41. The phrase "the sum of K1,886,740.00 or part thereof" is advisedly used by the Court. Neither the record of the proceedings in the lower court nor the judgment

of the lower court states (a) the sum of money that was due to the Appellant as terminal benefits and (b) the sum of money that was deducted from the Appellant's terminal benefit to "go towards part recovery of the loss suffered by the Corporation" (see the last paragraph of the dismissal letter quoted above. In this regard, I direct the parties to agree on the amount that is due to the Appellant as his terminal benefits within 14 days of the date hereof. If the parties fail to agree within the stated period, the matter has to go before the Assistant Registrar for his determination of the sum of money payable to the Appellant as his terminal benefits. It is so ordered.

42. In view of the foregoing and by reason thereof, the fifth ground of appeal is allowed.

43. All in all, the Appellant has failed on four grounds of appeal and succeeded on one ground of appeal. Each party has to bear his or its costs. It is so ordered.

Pronounced in Court this 14th day of November 2023 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE