IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 18 OF 2008

BETWEEN:

LAMECK MOYO ………….…………………………….. APPELLANT

-AND-

NATIONAL BANK OF MALAWI LTD…………………. RESPONDENT

CORAM: HON. JUSTICE M.L. KAMWAMBE
Mr Msuku Counsel for the Appellant
Mr Chisanga of Counsel for the Respondent
Mrs Gangata, Official Interpreter

Kamwambe, J

JUDGMENT

The Appellant has appealed to this court from the decision of the Industrial Relations Court delivered on 12th March, 2008.

There are four grounds of appeal as follows:-

a) The lower court erred in law in holding the Appellant responsible for the missing of fuel when there was no evidence to that effect

b) The court having held the charges were defective erred in law in holding that the same did not prejudice the Appellant.

c) The court having held that the Appellant was not given a chance to question the accuser erred in law that the same did not prejudice the Appellant.

d) The court erred in law in not considering the provisions of section 61 of the Employment Act.

The brief facts of the case are that the Appellant was employed by the Respondent and was redeployed to work as a petrol attendant or transport clerk. On 29th December 2006 he was informed not to refuel any vehicle and that the year's record will be reconciled on 2nd January 2007. This was holiday period. During this period at one time the Appellant sent away the guard to buy some food and when the guard came back, he noticed that the metre had shifted recording a difference of 44.3 litres. The Appellant was the sole custodian of fuel pump key. He was dismissed by the Respondent in May 2007 for theft of the shortage fuel. The Appellant initiated action in the Industrial Relations Court (IRC) claiming against the Respondent, compensation for unfair dismissal, severance allowance, salary for the month of may and other orders as the court may deem fit. The claim was dismissed in its entirety, hence this appeal.

The Respondent has referred the court to s65(2) of the Labour Relations Act which states that a decision of Industrial Relations Court may be appealed to the High Court on a question by law or jurisdiction within thirty days of the decision being rendered. I cannot therefore touch on matters of fact which are supposed to be final in the lower court. I cannot dispute the lower court's assessment or finding of fact.

The Industrial Relations Court found as a fact that the Appellant was in the circumstances responsible for the missing of the fuel. This fact ought to stand and I agree with it in that no other person could give an explanation about the missing fuel other then the Appellant who was the sole custodian of the key to the fuel pumps. There was enough circumstantial evidence to make the finding of fact that the Industrial Relations Court made. Nevertheless I cannot disturb the finding as it is final. Therefore the first ground of appeal is unsustainable and I dismiss it accordingly.

Coming to the second ground of appeal which purports to say that the charge being found defective should not have been held not to have prejudiced the Appellant. Let us not make a big fuss about this. The Industrial Relations Court noted that it was a typing error and the right figures came about in evidence which brought the shortage of 44.3 litres of fuel. Even before the charge was drafted, to be more specific on the 2nd January, 2007, the Appellant signed for the shortage after confirming the same. It is logical to conclude that a typing error even though repeated was made. I do not see in anyway that the Appellant was prejudiced as such, I dismiss this ground as well.

Thirdly, the Appellant contends that he was not given a chance to face and question the accuser, who happens to be the guard. The main consideration that the Court has to take into account if principles of natural justice were flouted is whether any prejudice was occasioned to the Appellant. Indeed the guard who revealed the change in the metre reading was not questioned by the Appellant in the hearing prior to dismissal. The guard anyway testified in Court. In this aspect I find the findings of the Industrial Relations Court very persuasive that it is not surprising that I agree with them. It is advisable that I quote the Industrial Relations Court verbatim.

> *"Moreover it is trite law that an employee need to be given a chance to confront whoever is accusing him of any misconduct. In the present case the applicant was not given this chance, the respondents heard the accuser*

in the absence of the applicant and he only had a chance to question the accuser in this court. It is however our considered view that this did not result in any injustice on the applicant. The evidence on which the allegation of theft was made against the applicant was not only based on the oral evidence of the guard. It was also evidenced by the metre readings which the applicant himself confirmed in D1. Thus we are of the view that even if the guard had not alerted the applicant's boss, the opening meter readings on 2nd January 07 would still have revealed the missing fuel. Accordingly the non questioning of the Guard by the applicant is of no consequence in the present case. The theft of the fuel would have been revealed anyway. Any contrary holding would be stretching the principle of procedural fairness to some ridiculous levels which would defeat the whole essence of employment law.

*Going by the reasoning in **Khoswe v National Bank** (supra) we are of the view that the applicant was given sufficient opportunity to exercise his right to be heard. "*

The above is self-telling. The Guard was not a material witness to the Applicant and any questioning would not have been expected to yield any positive results for the Applicant, as did in the Industrial Relations Court. Hence no prejudice. This ground too I dismiss it.

Lastly I have to consider if the Industrial Relations Court erred in not considering s61 of the Employment Act. In this regard the Applicant has relied on the case of **Ron Manda v The Sugar Corporation of Malawi** Civil Cause No 1761 of 2001. Of particular relevance is s61(2) which reads:-

"In addition to proving that an employee was dismissed for reasons stated in section 57(1), an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employer." (My underlining)

The Court had this to say in the **Ron Manda** case (supra)

"In my view the crucial words are those underlined. It is important to demonstrate justice and equity in dismissing

the employee by careful analysis of all the circumstances of the case. This means that the decision arrived at must bear in mind the circumstances. In other words, the circumstances must fit the decision so that one will not claim that the justice of the case was missing …. This is why each case ought to be decided on its particular facts. Generalisation is not the rule here.

What one obtains from the facts of the case is that the plaintiff had worked for 27 years before dismissal. Before this alleged misconduct the plaintiff had performed satisfactorily well. The managing director, DW1, says that he was not aware of any misconduct of the plaintiff before his dismissal for all those years. It is also in evidence that his retirement was being contemplated, or at least he had three years to go before he retired at 60. He was already due for early retirement at the age of 55. I know DW1 is saying that due to fraud it was fair to effect instant dismissal. When reaching this decision of dismissal I wonder whether they considered the duration the plaintiff had worked and that during all that time he had not committed acts of misconduct."

S61 (2) appears to me to be mandatory in nature. The Supreme Court of Appeal upheld the principle above in **The Sugar Corporation of Malawi v Ron Manda,** MSCA Civil Appeal No. 07 of 2007. It stated:-

"We agree with both counsels that the inclusion of sub – s2 introduces the application of principles of equity in the law of employment. We also agree with counsel for the respondent that the inclusion of the sub section is to avoid the mischief whereby an employee who may have been of good conduct through out his employment may be dismissed on a ground for which he could very well have been pardoned or given a lesser punishment than dismissal."

In the present case the circumstances the Appellant wants us to look at are that he had worked for the employer for 9 years without even any verbal warning before the dismissal, as he was working as a driver initially he sustained serious injuries in 2004 in a motor vehicle accident on duty and plates are now inside his legs so that he cannot drive any longer, hence he was redeployed to a clerical job, and that

it was the Respondent who footed all the Applicant's medical needs then. On this score, since the Applicant cannot work again, the Applicant is of the view that s61(2) should be invoked.

The Applicant's accident appears to have happened whilst he was on duty and it is not surprising that the Respondent treated him that favourably and they should be commended for not neglecting him. I should also think that he was accordingly compensated under the Workman's Compensation Act. It cannot be said that the accident was caused by the Respondent so that all the time the incident should be hanging on them. We cannot follow the Ron Manda case wholesale. As stated before each case must be looked into depending on its own particular facts. There were reasons for invoking section 61(2) in the Ron Manda case as shown even though the Supreme Court reversed the High Court finding. I do not think there are such reasons here even if the fuel stolen was only worth about K6100.00

In the Ron Manda case the Supreme Court of Appeal was more guided by s59(1) (a) of the Employment Act under which an employer is entitled to dismiss summarily an employee who is guilty of serious misconduct. It cited the case of **Meja v Cold Storage Company Ltd** 13 MLR 234 which was cited with approval in **Benson Kusowera v National Bank of Malawi**, MSCA Civil Appeal No 5 of 2005 (unreported) saying:-

> *"Besides the statutory provision there is an abundance of case authority stating precisely the same thing that an employer is entitled to summarily dismiss an employee where the employee is guilty of misconduct or does anything wrong incompatible or inconsistent with the fulfilment of the express or implied conditions of his duties."*

In the Ron Manda case the Supreme Court of Appeal said that the employer was found guilty of misconduct such that it would be unreasonable to require the employer to continue the employment relationship. However, in the High Court the consideration on the basis of s61(2) was a possible retirement in view of his long service, not that he should

continue in the employment relationship. The question still remains how and when s61(2) can be evoked. This did not come clearly in the Supreme Court decision, may be it was not necessary. The fear is that section 61(2) of the Employment Act may serve no useful purpose in any dismissal. It is not that the employer is coming to Court because he has clean hands after all he is guilty of misconduct, but his special circumstances nevertheless may require that he be treated with compassion, justly and equitably, otherwise the section shall never be used in favour of an employee if stringent measures are applied. It will merely be a white elephant in the Act.

All in all I find that in the present case the Appellant was guilty of misconduct, to wit, fraudulent theft, the employer was not responsible for the accident sustained and that therefore this is not a case which would require application of s61(2) of the Employment Act as would have been in the Ron Manda case (supra). I dismiss the case and uphold the lower Courts decision. No order as to costs is made.

Made in Chambers this 20th day of August, 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE