IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NUMBER 6 OF 2017

(Being IRC Matter No. 19 of 2010)

BETWEEN

KAMBALE AND CHILOMO **APPELLANTS**

AND

CEAR **RESPONDENT**

CORAM: JUSTICE M.A. TEMBO

Msuku, Counsel for the Appellants
Khondiwa, Counsel for the Respondent
Mankhambera, Official Court Interpreter

JUDGMENT

This is an appeal brought by the appellants against the decision of the Industrial Relations Court made on 17th July 2017.

The appellants' claim before the lower court was that they were unfairly dismissed because they were dismissed from work for no valid reason, that the hearing as not fair and that the respondent did not act with justice and equity. The appellants claimed compensation for the unfair dismissal before the lower court.

The lower court held that there was a valid reason for dismissal, that the hearing was fair and that the respondent acted with justice and equity.

The facts of this matter arise out of an incident in which a train on which the appellants were on duty became a runaway train after it had failed 40 km from Kanengo station in Lilongwe.

The appellants were employed by the respondent as locomotive assistant and locomotive driver respectively. The train they were driving failed.

The case of the appellants is that the driver applied brakes to the wagons which only last not more than 4 hours and applied sprags to the train.

The sprag is a metal used for blocking detached wagons for purposes of removing wagons.

The appellants asserted that the sprags could not be tested as per Rule 54 of the respondent's operating procedures because the train had failed. They asserted that the sprag cannot protect a dead train. And that the procedure with sprags was that the engine must move backwards or forward to secure the said sprags. The sprags were therefore put not in line with procedure because the train had failed.

The failure of the train was reported by the appellants to the respondent and assistance from Lilongwe arrived five hours later. And this was said to be contrary to the General Appendix of the respondent. The appellants asserted that assistance should have arrived within 50 minutes of reporting. And that if a relief train had come in time that would have averted the accident herein.

In the meantime, the train started moving backwards for 4 km and then derailed.

The respondent's management came to the scene to analyse the accident.

The appellants were later called to a disciplinary hearing and were charged with failed to secure the train with sprags after it failed.

They explained what had happened and that they put sprags but not according to procedure as earlier indicated.

They were subsequently dismissed by the respondent who found that no sprags were used as there were no drag marks on the rail line in the direction the train run away. They appealed against their dismissal and the initial decision was upheld on the appeal.

The respondent's witnesses were Ms Ngámbi a human resources administrator and Mr Munde a remuneration officer.

The evidence of these two on behalf of the respondent was that after the derailment herein the appellant's officers indeed went to investigate the whole 4 km section of the rail line on which the train run away.

They accepted that a relief train was not sent within four hours of reporting of the train failure.

No evidence of sprag use was found because the rail line had no drag marks which would have been there had the sprags been applied.

The respondent concluded that the train run away because sprags were not applied.

With regard to Rule 54 of the respondent's operating procedures, they asserted that a sprag cannot be tested on a dead locomotive but is only put between the train wheel and the rail line.

They added that once the train starts rolling after the breaks are exhausted after 4 hours it engages the sprags which stops the train from rolling further thereby securing it.

The Rule 54 in issue provides in paragraph 2, as glanced from the respondent's inquiry report, that the detachment of a locomotive on a gradient should be avoided but where this is not possible the guard must in addition, to applying handbrakes, apply one or more sprags to the wheels of the standing vehicles at the lower end of the train. The number of sprags used will depend on the gradient, load of the vehicle, weather and track conditions, but the guard must satisfy himself, by test with locomotive if necessary, that the portion which is to remain is safe from runaway.

The respondent's witnesses asserted that they are not engineers but are trained for three months in trains working regulations.

They also asserted that the disciplinary hearing panel and the appeal panel were independent of each other and had no vested interest in the matters to have a conflict of interest.

During cross-examination, Mr Munde stated that Rule 101 of the respondent's operating procedures was about securing trains with sprags whether they were dead or alive. And that Rule 54 seemed not to apply to dead locomotives.

Having considered the evidence, the lower court found that there was a valid reason for dismissal on the charge that the appellants had discharged their duties negligently having failed to secure a failed train with sprags.

The lower court found that the argument of the appellants that a sprag cannot be used on a dead train was untenable because, as a matter of common sense, a sprag must engage with the train wheel once the brakes on a dead train are exhausted after four hours and the train moves along the rail line.

The lower court specifically found that there was nothing in the respondent's Rule 54 herein that said a sprag cannot be used on a dead train.

The lower court found that the respondent had a valid reason for dismissing the appellants for gross negligence since there was no evidence of sprag use in this case since no drag marks were observed on the rail line and the train had rolled after the brakes exhausted.

The lower court also found that the delay in the relief train was not consequential but that what really mattered was the failure to secure the train whilst waiting for the relief train.

With regard to the procedure on the dismissal the lower court found the same to be fair.

The lower court observed that the appellants were heard throughout the process. That they wrote reports at inquiry and investigations stage, they were called to a disciplinary hearing and were represented by a union member. Further, that they appealed and called witnesses on the appeal which failed.

The lower court found the disciplinary process to be fair.

The lower court observed that the appellants claimed that the disciplinary hearing panel was not partial because the same persons who did the investigation inquiry were present at the hearing.

The lower court observed that the disciplinary charge originated from Mr Wingolo who became de facto complainant for the respondent. The lower court observed that his presence was necessary at the disciplinary hearing. Further, that while Mr Wingolo chaired the accident inquiry he did not chair the disciplinary committee.

The lower court also noted that two members in the disciplinary hearing were members of the inquiry team as they were the best persons to give evidence on the issues as they were there at the inquiry.

The lower court then observed that in *Magalasi v National Bank of Malawi* [2008] MLLR 45 the Supreme Court of Appeal held that disciplinary panels make administrative decisions that are only made by administrative bodies. And that there may be cases where it appears that the respondent is judge in his own case. Further, that the Supreme Court of Appeal held that in such cases evidence of bias must be brought forward to prove that a claimant suffered injustice.

The lower court then held that it saw no conflict of interest, injustice or bias in the disciplinary panel. And that if there was, the appellants had not brought evidence of the same.

In the final analysis, the lower court found that the respondent had acted with justice and equity which entails fairness and reasonableness in terms of section 62 (2) of the Employment Act.

The appellants being dissatisfied with the lower court's decision, now appeal against the said decision on four grounds, namely,

1. That the lower court erred in holding that the respondent had a valid reason to dismiss the appellants.
2. That the lower court erred holding that the appellants were accorded due hearing.
3. That the lower court erred in holding that in the circumstances the respondent acted with justice and equity.
4. That the decision of the lower court is against the applicable law.

This Court observes that it hears appeals from the lower court on matters of law or jurisdiction only in terms of section 65 of Labour Relations Act which provides that

(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.

Both parties made submissions on the grounds of appeal that will be considered in turn.

On the first ground of appeal alleging that the lower court erred in holding that the respondent had a valid reason to dismiss the appellants, the appellant submitted as follows.

That in terms of section 57 (1) of the Employment Act termination of employment on the basis of allegations of misconduct can only be for a valid reason. See *Chakhaza v Portland Cement Co.* (2008) MLLR 118.

And further that the employer must show that there is a valid reason in terms of section 61 (1) of the Employment Act. See *Khoswe v National Bank of Malawi Ltd* (2008) MLLR 201.

The appellants submitted that the respondent caused the accident by failing to send a relief train on time.

The appellants contend that the lower court however narrowed the issue to sprags and reached wrong conclusions on the same. And that there was no valid reason for dismissal because essentially a sprag cannot be tested on a dead locomotive.

Further, that a sprag was found on the scene but it was dismissed by the lower court without any explanation.

The respondent contended that the first ground of appeal raises a question of fact, whether there was a valid reason for dismissal, that is not amenable to this appeal in terms of section 65 (2) of the Labour Relations Act. See *National Bank of Malawi v Zefaniya* (2008) MLLR 247 and *Magalasi v National Bank of Malawi* (2008) MLLR 45.

The appellants argued that they are challenging the basis of the findings of the fact that there was a valid reason for dismissal and that therefore the cases cited by the respondent do not apply.

The view of this Court is that the appellants do not essentially raise a question of fact on this ground of appeal. The appellants question the validity or legality of the reason for dismissal. That is a question of law. That is tenable in terms of section 65 (2) of the Labour Relations Act. Contrary to the assertions by the respondent, the first ground of appeal is competent. The cases cited by the respondent therefore do not apply here.

The first ground of appeal raises a question of law since it alleges that the finding of validity of the reason for dismissal was against the weight of the evidence or is unsupported by the evidence. See *Blantyre Newspaper Limited v Simango* IRC Appeal number 6 of 2011 (High Court) (unreported).

The respondent contended that challenging a finding of the lower court as being against the weight of the evidence cannot be allowed. This Court differs because whether a finding is against the weight of the evidence or not that is a matter of law. And the appeals against the lower court decisions are allowed on matters of law. Of course, in deciding that question this Court would have to examine the weight of the evidence before the lower court and a fine line must be drawn to guard against looking at factual grounds of appeal alone.

Section 65 (2) of the Labour Relations Act only restricts appeals to questions of law and jurisdiction. There is no restriction as to how such grounds of appeal are to be formulated. What matters is that the grounds of appeal relate to questions of law.

In that case, it is not open to the respondent to argue that the appellants cannot challenge validity of a reason for dismissal for being against the weight of the evidence. Such a challenge on appeal is on a question of law.

The view of this Court is that the weight of the evidence before the lower court in this matter supports the lower court's findings on the first ground of appeal.

The lower court analysed the evidence and made a finding of fact that there was a valid reason for dismissal on the charge, namely, that the appellants were negligent in the discharge of their duties and failed to properly secure a failed train with sprags.

The lower court analysed how sprags work and concluded that on the facts the appellants failed to show that they had applied sprags to the failed train.

The lower court found that if sprags had been used there would have been drag marks on the rail line which were absent in the present case.

The sprag found along the route in question was found to have been planted.

The lower court also considered the Rule 54 in issue herein and ruled that it does not say that sprags cannot be used on a dead train or that they must be tested on a dead train as submitted by the appellants.

In fact, indeed the Rule 54 herein says that sprags may have to be tested where necessary and that entails that testing is not mandatory as is factually being argued by the appellants.

The appellants state that the witnesses of the respondent were not engineers and not witnesses of fact. And that they did not state how they came by their information.

As contended by the respondent, the appellants must remember that the lower court is not bound by formal rules of evidence and the lower court, reasonably in this Court's view, believed the evidence of the respondent's witnesses who stated that they have three months' training on the respondent's train operating regulations. These witnesses clearly stated that they testified on the basis of official records of the respondent. Mr Munde was also present at the disciplinary hearing and was conversant with the subject matter of the disciplinary process. That was sufficient for the purposes of the lower court.

As correctly observed by both parties, section 71 (2) of the Labour Relations Act states the position that the lower court is not bound by rules of evidence in civil proceedings.

The appellant makes a distinction between challenging findings of fact and the basis of those findings in this case. The lower court made a series of findings of fact and reached a final finding of fact and law that there was a valid reason.

The legal question on validity of the reason for dismissal was therefore properly dealt with by the lower court since the lower court is not bound by rules of evidence in civil proceedings and relied on evidence of those witnesses of the respondent who were conversant with the issues at hand.

The first ground of appeal therefore fails not for want of competence but because, as a matter of law, it was supported by the weight of the evidence.

On the second ground of appeal, the appellants assert that the lower court erred holding that the appellants were accorded due hearing.

The appellants correctly observed that section 57 (2) of the Employment Act provides that where an employee is alleged to have been guilty of any misconduct, before his employment is terminated, he must be afforded an opportunity to defend himself. See *Mtingwi v Malawi Revenue Authority* civil cause number 3389 of 2004 (High Court) (unreported).

The appellants submitted that the opportunity to defend oneself is the right to be heard on the part of an employee.

Further, that one of the components of the right to be heard is that the employee must be heard by an impartial tribunal. And that the decision maker must not therefore have an interest in the matter and that justice must not only be done but must be seen to be done. See *Khoswe v National Bank of Malawi Ltd* (2008) MLLR 201.

The appellants then submitted that there is no dispute that the people who sat on the disciplinary panel are the same who sat on the inquiry herein. And that this is admitted by the respondent in a letter on the appeal outcome.

The appellants note that the respondent argues that the said people did not impose themselves but were asked to sit by the respondent's Managing Director. They observe that this is not a plausible justification.

The appellants argue that the respondent's Managing Director should have known that he cannot have the same people as investigators and also as members on the disciplinary panel in this matter.

The appellants particularly point out that the Chair of the inquiry Mr Wingolo was a member of the disciplinary panel and he is the one who was responsible for delays in sending a relief train and he could not act fairly on the hearing panel.

They contend that it matters not that Mr Wingolo was not a chair of the disciplinary panel and that what matters is that he could not act fairly having been chair of inquiry.

The appellants then contended that they did not have a due hearing in the circumstances.

On its part, the respondent contends that whether the appellant was given an opportunity to be heard is really a question of fact. See *National Bank of Malawi v Zefaniya* (2008) MLLR 247.

But that the question whether the disciplinary hearing panel was properly constituted may be a question of law or fact depending on whether the question is whether the panel was biased or whether it was constituted according to the prevailing terms of service respectively. See *Magalasi v National Bank of Malawi* (2008) MLLR 45.

The respondent argued that it will be a question of fact if the only issue is whether the appellants were heard or not. But it may be a question of law if the constitution of the disciplinary panel is questioned on the ground of bias.

This Court must quickly point out that the second ground of appeal raises a question of law that is amenable to this appeal because the appellants question the constitution of the disciplinary hearing itself for alleged bias and contending that due to bias they were not heard at law. That ground of appeal is therefore competent.

The respondent then submitted as follows on bias. That in the case of *Magalasi v National Bank of Malawi* (2008) MLLR 45 at 50 it was stated as follows

> The issue that appears to be raised by this argument is, simply put, that the respondent was a judge in its own cause. Well, that may be so, but it must be remembered that the decision by the respondent was an administrative decision, which therefore, was necessarily to be made by an administrative body. The purposes of any administrative body, in our view, may be compromised or vitiated if the law required that such decisions be made by a body of outsiders. This is for the reason that such a body of outsiders would, or may, not have knowledge of the reasons of policy which might necessitate a particular decision. There having been no evidence of bias, we are of the view that the disciplinary committee/panel was properly composed. The argument regarding the composition of the panel, therefore, also fails.

The respondent contends that there was no evidence of bias in this matter. And that the appellants were duly called to a disciplinary hearing to which they did not object and they were found guilty and they appealed.

The respondent added that on the appeal the appellants called witnesses. And that the appeal panel was different from the disciplinary panel. Further, that the appeal panel re-examined the appellant's case on merit and found them guilty as well.

The respondent therefore resisted the second ground appeal.

This Court agrees with the respondent that as held in *Magalasi v National Bank of Malawi* it is perfectly proper that insiders at a workplace may have to sit on a disciplinary panel because of the need to understand policy considerations that underlie particular decisions, even though it may appear as if the employer is sitting in its own cause.

This Court agrees further that where there is an allegation of bias against an employer's disciplinary panel, it is for the employee to show that there is evidence of that bias.

In the present case, this Court must determine whether as a matter of law there was bias established by the appellant with regard to the respondent's disciplinary panel.

It must be pointed out that the disciplinary panel is the one being attacked because two of the five members who were involved in the disciplinary panel were also involved at the investigation stage.

The respondent has observed that the appellants had appealed the verdict of the disciplinary panel to another totally independent panel. Evidence was allowed at the appeal panel. The appeal panel confirmed the initial decision.

The appellants contend that the appeal did not regularize the initial disciplinary appeal hearing. They observed that evidence was indeed brought before the appeal panel but the same was not considered and that all the appeal did was deal with the issue of the impugned members of the disciplinary panel.

The appeal hearing report shows the contrary of what is submitted by the appellants. It actually shows that, as correctly submitted by the respondent, evidence in relation to the contentious issue of sprags was considered on the appeal hearing alongside the issue of the impugned members of the disciplinary hearing.

It must be pointed out that the parties did not submit any authority at all on the legal effect of an internal appeal process on deficiencies in the earlier disciplinary process.

That question was considered in the case of *Taylor v OCS Ltd* [2006] IRLR 613. In that case Mr Taylor was dismissed from his employment with OCS Group Limited following an allegation of misconduct.

The tribunal concluded that the dismissal had been unfair because the disciplinary process leading to his dismissal was fundamentally and hopelessly flawed.

Although that process had been followed by an internal appeal, the tribunal decided that the appeal could not remedy the defects of the disciplinary process, because it had not taken the form of a review of the original decision, rather than a rehearing.

OCS appealed, unsuccessfully, to the Employment Appeal Tribunal (EAT). It subsequently lodged an appeal with the Court of Appeal.

In that case it was persuasively held by the Court of Appeal that there is no rule of law that only a rehearing by the employer on appeal is capable of rectifying earlier procedural shortcomings, and a mere review never is. And that the question is whether the procedure was fair overall, in spite of any deficiencies at the early stage.

It was further held that because the tribunal had fallen into the trap of assuming that only a rehearing could make up for earlier flaws, the appeal was allowed and the case was sent back to be reconsidered by a different tribunal.

This Court is persuaded that it is clear from the foregoing persuasive authority that it is for the court to assess whether an internal appeal has actually rectified initial disciplinary procedural flaws and whether the disciplinary process is consequently fair overall or not.

Coming to the present case, after considering all the circumstances of this case, this Court is unable to agree with the appellants that there was evidence of bias or likelihood of the same as defined at law.

The evidence against the appellants was considered by the initial impugned panel and was later confirmed by a totally different internal appeal panel. There cannot be evidence of likelihood of bias in the circumstances where the independent appeal panel had re-examined the evidence of the appellants and then confirmed the initial verdict.

In any event, the internal appeal which has not been attacked at all rectified any alleged likelihood of bias if any were to be granted.

The appellant has therefore failed to establish bias, or likelihood of bias in the circumstances of their dismissal herein.

The second ground of appeal therefore fails.

On the third ground of appeal the appellants contend that the lower court erred in holding that in the circumstances the respondent acted with justice and equity.

The main thrust of the appellants' contention is that the appellant failed to ensure that a relief train went in time to the scene of the failed train knowing full well that brakes would fail after four hours. And that as a result the respondent did not act with justice and equity in then disciplining the appellants when the brakes failed and the train run away and detailed.

On the other hand, the respondent contends that even though the matter was reported and it took time for the respondent to send a relief train and that this resulted in the train brakes failing and the train running away, the respondent expected the train to be secured by sprags. But that, as it turned out, the appellants did not secure the train with sprags which was the basis of the disciplinary charges.

The respondent contends that it acted with justice and equity.

This Court agrees with the respondent that all parties knew that when a train fails its brakes eventually fail. And that is the reason why sprags ought to be applied.

The appellants failed to apply the sprags and were therefore accordingly charged with that offence.

Consequently, this Court does not find as a matter of law that the respondent failed to act with justice and equity. The appellants failed to do what was expected of them. And they were accordingly called to account.

The third ground of appeal therefore fails.

The last ground of appeal alleges that the decision of the lower court is against the applicable law.

This ground of appeal is rather vague as it lacks specificity compared with the other preceding grounds of appeal. It was actually effectively abandoned at the hearing of the appeal as no argument was made on the same.

In so far as the issues raised on the foregoing grounds are concerned the lower court made its determination in accordance with the law. There is therefore no merit in the last ground of appeal.

The appeal herein therefore fails in its entirety.

Made in open court at Blantyre this 29th April 2019.

M.A. Tembo
JUDGE