IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

MSCA CIVIL APPEAL NO. 19 OF 2009

(Being High Court Civil Appeal No. 18 of 2008)

BETWEEN:

LAMECK MOYO.....APPELLANT

- AND-

NATIONAL BANK OF MALAWI.....RESPONDENT

CORAM: HON. JUSTICE D.G. TAMBALA, SC, JA
HON. JUSTICE A.K. TEMBO, SC, JA
HON. JUSTICE E.M. SINGINI, SC, JA
Mr. Msuku, Counsel for the Appellant
Mr. Chisanga, Counsel for the Respondent
Mr. Balakasi, Official Interpreter

J U D G M E N T

Tambala, J.A.

This is an appeal against the decision of KAMWAMBE, J, which dismissed the appellant's appeal against the decision of the Industrial Relations Court. The latter Court had held that the appellant's dismissal from employment by the respondent was not unfair.

The facts from which the present appeal arises are that the respondent employed the appellant as a driver in 1998. In

about 2004 and while performing his duties as a driver he was involved in an accident in the course of which he broke his limbs. When he recovered from his injuries he was unable to perform the duties of a driver. The respondent did not discharge him from employment. It treated him with some compassion and fairness by assigning him some work which he could perform in the condition in which he found himself. He was given the responsibility of managing the respondent's fleet of vehicles and was later put in charge of the respondent's fuel pump.

In the course of performing his duties relating to the respondent's fuel pump, the appellant was instructed by Mr Mkangala the respondent's warehouse supervisor that during the period between 29th December, 2006 and 2nd January, 2007, he should not sell fuel from the fuel pump, because of an impending stock taking exercise. The meter reading on the fuel pump gave 17286.8 liters as a closing figure. On 2nd January, 2007, Mr Mkangala noted some movement of the meter reading. The opening figure came to 17331.1 liters, representing a difference of 44.3 liters. Mr Mkangala who gave evidence in the Industrial Relations Court as DW1, asked the appellant about the meter reading movement. Eventually they both agreed that the appellant had a shortage of 44.3 liters. The appellant and the witness signed for the shortage in a register. The appellant voluntarily signed for the shortage, acknowledging responsibility for the shortage. The appellant was the sole custodian of the fuel pump key.

In the Industrial Relations Court, Mr Samson Likaomba gave evidence for the respondent as DW2. He said that he was an employee of G4 Security and that during the material time he was assigned to work at the premises of the respondent. He said that between 27th December, 2006 and 1st January, 2007, he had observed the meter reading on a pump operated by the appellant read 17286.8 liters. But on 1st January, 2007 the appellant came to work and at a certain time the appellant instructed him to go and buy some lunch. When he came back to the appellant's place of work, he noticed that

there was some movement on the meter reading and that the new meter reading was 17331.1 liters. There was a difference of 44.3 liters. The witness confronted the appellant and questioned him about the difference, but the appellant denied responsibility for the shortage. The witness decided to report the matter to a Mr Kaneka the boss of the appellant, because the appellant was the only person who came to work at the place on 1st January, 2007 and he was the sole custodian of the fuel pump key. The witness testified that when he went to buy lunch for the appellant he was away from the fuel pump for about one hour.

The appellant was later summoned before a disciplinary committee constituted by the respondent. The appellant was asked, during the disciplinary committee hearing, about the fuel shortage. He was given a chance to defend himself. Mr Likaomba DW2 who reported the matter to the appellant's supervisor was not summoned to appear to give evidence before the disciplinary committee meeting.

In ground one of the appeal it is argued that the learned judge erred in upholding the dismissal based on a charge which the court itself found to have been defective.

The law in the Employment Act is clear. For a dismissal to be fair the employer must prove a valid reason entitling it to effect the dismissal; **Section 57-(1) of the Employment Act**. The Industrial Relations Court was satisfied that on the evidence brought before it, the appellant was responsible for the loss of 44.3 liters of fuel from the fuel pump which was under his control and management. That court was satisfied that the appellant stole the fuel. In coming to that conclusion the learned Deputy Chairperson of the Industrial Relations Court stated:-

> *"It is our unanimous view that the appellant stole or is the one responsible for the missing fuel. He did not dispute that he indeed came to work on 1st January, 2007 and yet it was a public holiday and*

there was no way there would be any need to fuel any car more so considering that he had been told before this that there would be a reconciliation of fuel books the following day. The fact that there was no one who caught him red handed with the fuel does not necessarily make it a matter of suspicion as the appellant would make this Court believe. He was the only one with the key to the pump. There was no way anyone could have stolen the fuel except him. He acknowledged the missing fuel from his pump when confronted on 2nd January, 2007 and signed for it as evidenced by DW1."

This Court, as did the Court below, finds no fault with the manner in which the Industrial Relations Court dealt with the evidence relating to theft of the respondent's fuel by the appellant. We are satisfied that that court came to the correct conclusion. The respondent proved to the satisfaction of that court a valid reason entitling it to dismiss the appellant. This Court finds no merit or substance in ground one of the appeal.

Ground two of the appeal is that the learned Judge erred in upholding the dismissal which was clearly in breach of the rules of natural justice. Again, the law is clear that besides proving a valid reason justifying dismissal, the employer must establish that the employee was provided with an opportunity to defend himself against allegations made against him. The main complaint by the appellant here is that Mr Likaomba, the security guard who reported him to his supervisor, was not called before the disciplinary committee hearing and offered to the appellant for cross-examination. The Industrial Relations Court was live to this issue and dealt with it very carefully as the following passage from its judgment demonstrates:-

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

> *accuser in the absence of the appellant 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 appellant. The evidence on which the allegation of theft was made against the appellant was not only based on the oral evidence of the guard. It was also evidenced by the meter readings which the appellant himself confirmed on DW1. Thus we are of the view that even if the guard had not alerted the appellant's boss, the opening meter reading on 2nd January, 2007 would still have revealed the missing fuel. Accordingly the non-questioning of the guard by the appellant is of no consequence in the present case. The theft of the fuel would have been revealed any way.* ***Any contrary holding would be stretching the principle of procedural fairness to some ridiculous levels which would defeat the whole essence of employment law.*** *" Emphasis supplied.*

We strongly agree, as did the learned Judge in the Court below, with the powerful and elaborate treatment of the principle of procedural fairness in the context of the facts of the present appeal. Learned Counsel seems to be preoccupied with the mechanical and rigid compliance with the requirement that the right to be heard entails the right to be given a chance to question an accuser. But Counsel must realize that a rule or a principle which is inflexible and does not allow any exception in its application to particular facts would, in certain circumstances, lead to absurdity, injustice and oppression. When the evidence is very clear to the Industrial Relations Court, the Court below and this Court that the appellant stole the property of his employer, he should not be allowed to escape the consequences of such conduct just because a guard who made a report of some doubtful consequence was not summoned to attend a disciplinary committee hearing. Courts must also guard against the possibility of turning the work place into some

kind of employment tribunal. We think that ground 2 of appeal also lacks merit and substance.

Ground 3 and 4 of appeal relate to the employers duty to act with justice and equity in dismissing the employee. The relevant provision is section 61(2) of the Employment Act. In the case of the **Sugar Corporation of Malawi v. Ron Manda MSCA Civil Appeal No. 7 of 2007** this Court observed:-

> *"We agree with both counsels that the inclusion of sub- section (2) 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 throughout his employment may be dismissed on a ground which he could very well have been pardoned or given a lesser punishment than dismissal."*

This Court agrees that section 61(2) introduces principles of equity, justice and fairness at the work place. But as **Kamwambe, J,** observed in the present case **each case must be looked into depending on its own particular facts.** In the instant case the respondent treated the appellant with compassion and fairness when he was involved in a road accident. The respondent paid medical bills for the appellant while in hospital. After he was discharged from hospital and he was unable to carry out his duties as a driver, the respondent, instead of discharging him, redeployed him and assigned him work he could perform. Instead of being thankful and discharging his duties faithfully, the appellant chose to steal the very property he was required to safeguard. His conduct amounts to a serious breach of the trust which the respondent expected him to maintain. Does he deserve to be treated with leniency? The answer is certainly no. It would be unfair to expect the respondent to treat the appellant as if he has not committed a serious act of dishonesty against his employer.

Before we rest we wish to state that this Court appreciates that it has a duty to correctly interpret and apply section 61(2) of the Employment Act to ensure that the right of an employee to be treated with equity and justice, within the context of termination of employment, is safeguarded. However, there is clearly tension between section 61(2) and section 59(1)(a) of the Employment Act. Section 59-(1) provides:-

> An employer is entitled to dismiss summarily an employee on the following grounds:-
>
> a) where an employee is guilty of serious misconduct inconsistent with the fulfillment of the expressed or implied conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship.

It is the view of the Court that the conduct of the appellant in this case fell within section 59-(1)(a). The employer had a right to dismiss him summarily and in that event the questions of the appellant's right to be given an opportunity to be heard and the right to be treated with justice and equity would be irrelevant.

This Court, therefore, finds that grounds 3 and 4 are unmerited. The appeal is unsuccessful. As with the Court below, we make no order for costs.

Delivered in Open Court on this 12th day of November, 2010 at Blantyre.

Signed.....
D.G. Tambala, SC., JA

Signed.....
A.K. Tembo, SC., JA

Signed.....
E.M. Singini, SC., JA