JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

MSCA CIVIL APPEAL CASE NO. 50 OF 2009

(Being High Court Civil Appeal No. 59 of 2008)

BETWEEN:

FRANCIS KOMWA.....APPELLANT

-AND-

CHLORIDE BATTERIES.....RESPONDENT

CORAM: **HON. JUSTICE TAMBALA, SC., JA**
HON. JUSTICE TEMBO, SC., JA
HON. JUSTICE SINGINI, SC., JA
Mr. Chayekha, Counsel for the Appellant
Mr. Lameck, Counsel for the Respondent
Mr. Mwale, Official Interpreter

JUDGMENT

Tambala, J.A.

The appellant who was not represented by counsel in both the Industrial Relations Court and in the High Court in Mzuzu, brought an action against the respondent seeking compensation for unfair dismissal. He was successful in the Industrial Relations Court. But the respondent was dissatisfied with the decision and lodged an appeal with the High Court in the Mzuzu District Registry. The appeal was successful, the Court below having been satisfied that the appellant's dismissal was not unfair. The appellant takes the

view that the judgment of the Court below is wrong and brought the present appeal to this Court.

The facts relating to this appeal are simple and straightforward. The respondent employed the appellant as a data clerk in 1989. He rose to the position of Senior Sales Supervisor and was heading the respondent's Mzuzu Branch when his services were terminated on 30th March, 2007. There was a cashier Mr Spy Msiska who worked immediately under the appellant. It was the duty of Mr Msiska to conduct sales at the counter and receive cash or cheques from customers. He would eventually hand the cash and cheques to the appellant who did the banking. The money would have supporting documents such as receipts, invoices and a sales summary. It was the duty of the appellant to ensure that the money was supported by the relevant documents which he received from Mr. Msiska before he banked the money.

The dispute between the appellant and the respondent arose when a customer reported to the respondent that he had bought a battery at the Mzuzu Branch and paid a post dated cheque, but the appellant who conducted the sale failed to issue an invoice to the customer. An investigation conducted by the respondent disclosed anomalies connected with the banking of money in 2006 and, since the appellant was responsible for banking, suspicion was focused on him. On 19th January, 2007, the appellant was suspended from employment. The General Manager of the respondent travelled to Mzuzu where he conducted inquiries from various customers who dealt with the Mzuzu Branch of the respondent. The General Manager also invited the appellant to a meeting where they discussed the relevant banking anomalies. At the end of the discussion the General Manager asked the appellant to make a written report. The appellant obliged and on 21st February, 2007 he sent his written report to the General Manager of the respondent. It would appear that Spy Msiska was also required, by the respondent, to submit a written report on the matter and he also obliged.

The respondent's investigations revealed fraud which resulted in a financial loss of K85, 960.00. Both the fraud and the amount of loss were readily admitted by both Msiska and the appellant in their reports to the respondent and in Court when they testified before the Industrial Relations Court; but they each blamed the other for the fraud and loss.

There are three grounds supporting the appeal. The first ground argues that the learned Judge in the lower Court erred in law in holding that the written reports and the meeting between the appellant and the General Manager of the respondent amounted to a fair hearing regard being had to the fact that there were contradicting reports necessitating an oral hearing. Section 57-(2) of the Employment Act requires the employer to give an employee an opportunity to defend himself against allegations made against him before termination of employment. Ground one of the appeal clearly addresses that right possessed by every employee. The learned Judge in the Court below dealt with the issue raised by ground one as follows:-

> *"The respondent wrote a report about such allegations. He even met the appellant's General Manager. The respondent says he was not given a hearing as such. The truth remains however that he met him in respect of this matter. Can it be said that the respondent was not heard? The answer is that he was heard. The IRC also agreed that he was heard. The point of departure is that the IRC thinks the respondent should have been given an oral hearing and not by way of reports as was done.*
> *Is an oral hearing a legal necessity? In the alternative was it a necessity in this case? We discussed the matter of hearings in* ***Mwandenga V Secretary for Health and Population Miscellaneous Civil Cause No. 9 of 2003 (unreported)****. We reiterated that there is no uniform fashion of hearing an employee. Provided an employee has been given ample notice of the charges*

against him and a chance to defend himself it matters not what kind of hearing an employee is afforded. It might be an oral one. It might be by way of reports. It is not true therefore, as the IRC suggests herein, that a hearing equals only an oral hearing. The procedure employed by the appellant cannot therefore be faulted merely because the respondent was not orally heard."

That is how the learned Judge in the Court below dealt with the issue relating to the employee's right to be heard on allegations made against him before his employment is terminated. There are certain things this Court would agree with the learned Judge. We agree that there is no legal necessity for an oral hearing. We also agree that there is no uniform fashion of hearing an employee in the context of section 57 (2) of the Employment Act. But, is there no standard, no matter how flexible it might turn out to be, which employers would be called upon to follow, if the employee's right to be heard in the circumstances would be meaningful? Is an employer at liberty to choose whether it suits him to give the employee an oral hearing without more or to give him an opportunity to confront his principal accusers including informers, or an opportunity to contradict and cross-examine essential witnesses or simply demand written representations from the employee? We are concerned that the learned Judge in the Court below took a simplistic and casual approach in dealing with the issue of an employee's right to be heard at the work place. How did the Industrial Relations Court deal with the matter? This is what the learned Deputy Chairperson of the Industrial Relations Court, in her lucid and elaborate judgment, said:-

"It would seem from the evidence that after the anomalies in the cheques and invoices were revealed, the respondent simply asked the appellant and cashier to write reports. The allegation made being that of fraud. The respondent ought to have done much better than this. They ought to have

conducted an oral hearing. This they did not do. Moreover the written reports by the two were contradictory which would have given the respondent a further ground to conduct an oral hearing. This notwithstanding they proceeded to summarily dismiss appellant without such oral hearing and confrontation with the cashier. This was procedurally unfair in terms of Section 57 – (2) of the Employment Act.

We agree with the view expressed by the learned Deputy Chairperson that when the evidence between the principal accuser and the employee against whom an accusation is made, is contradictory the correct approach is to require an oral hearing where the employee can contradict accusations made against him and, where necessary, be able to cross examine principal witnesses who give adverse evidence against him. We also agree that where the allegation made against the employee is of a serious nature, as was the case in the present appeal and that the employee's story strongly contradicts that of the principal witness or witnesses for the employer, an oral hearing with an opportunity to cross-examine those persons making adverse statements would be advisable. This view is supported by the statement made by Lord Denning in the case of **Kanda v. Government of Malaya [1962] AC 322 at 337** Lord Denning said;-

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

In the present case the respondent's General Manager visited customers who dealt with the respondent's branch in Mzuzu. He made inquiries with those witnesses. Obviously those customers made statements affecting the appellant, but

it would appear that the appellant was not told about what the General Manager gathered from those persons. That was unfair. The respondent deliberately chose to act without transparency. The appellant was being ambushed. Clearly the conduct of the respondent in the manner in which it collected evidence, concealed it from the appellant and denied him the opportunity to orally contradict allegations made against him, was inconsistent with the statement made by Lord Denning in the **Kanda's** case. The case of **Zodetsa and Others v. Council for the University of Malawi [1994] M.L.R 412** approved and adopted Lord Denning's dictum in the Kanda's case.

It is important, however to state that while it is important to safeguard the employee's right to be heard before his employment is terminate, care must be taken by the Court to ensure that onerous standards are not imposed on employers necessitating turning the workplace into some kind of an employment tribunal, as that would make doing business in Malawi a very difficult and frustrating exercise. That is why it would be useful to heed what **Kamwambe, J.**, said in **Jamu v. Nurses and Midwives Council of Malawi Civil Cause No. 51 of 2009**(Principal Registry unreported.) The learned Judge said:-

> *"I should state further that the right to be heard must be considered in the context of each particular case by looking at and analyzing all the circumstances that prevailed. Circumstances may differ from one case to another as the principles of natural justice as important guidelines may be applied differently depending on the peculiarities of each case."*

However, in the present case we would agree with the learned Deputy Chairperson that circumstances existed which should have compelled the respondent to conduct an oral hearing where the appellant would have ample opportunity to address and contradict allegations made against him and a further opportunity to cross-examine Mr. Spy Msiska or any

other witness who gave damaging evidence. We clearly disagree with the view taken by the learned Judge in the Court below on the issue whether the respondent properly complied with its duty to hear the appellant before terminating his employment. Ground two of the appeal addressed the same issue revolving around the employee's right to be heard before his employment is terminated. It would, therefore, not be necessary to give it a separate treatment.

Ground three of the appeal lacks clarity. But it probably is to the effect that the lower Court should have decided that the respondent could not be held to have fairly dismissed the appellant if it failed to prove, in the Industrial Relations Court, the exact misconduct the appellant was accused to have committed. What happened was that the appellant was accused of having committed fraud and dishonesty and was dismissed by the respondent for that reason. The Industrial Relations Court, after hearing evidence, came to the conclusion that the respondent failed to prove that the appellant committed fraud and dishonesty, but that it proved that the appellant was guilty of gross negligence. That Court took the view that the offence proved was a valid ground for dismissing an employee and that it was immaterial that the reason proved in court is different from the reason which the respondent gave the appellant for terminating his employment.

This is the way in which the Industrial Relations Court dealt with the issue raised in ground 3 of the appeal. The learned Deputy Chairperson of the Industrial Relations Court quoted a statement of Lord Denning MR in the case of **Abernethy v. Mott Hay and Anderson [1974] IRLR 213**, as follows:-

> *"I do not think that the reason has got to be correctly labelled at the time of dismissal. It may be that the employer is wrong in law as labelling it as a dismissal for redundancy. In that case the wrong label can be set aside.*

The Deputy Chairperson continued:-

> *In the above case an employer honestly believed that the case constituted redundancy. The tribunal concluded however after looking at the facts to the capabilities of the employee to the work he was employed to do. (Sic) Borrowing from the English Jurisprudence then and in accordance with section 61 of the Employment Act, it would seem in Malawi where an employer fails to provide the reason for a dismissal or where having provided the reason the Court finds that the facts do not constitute the stated reason nor any reason at all to dismiss then the court will have to find that the dismissal was unfair. Where however as it happened in the above case, the court finds that the employer simply wrongfully labelled the reason for dismissal and the court on assessing the facts finds that actually the reason is another one then the court would set aside the stated reason and make a determination on the fairness or unfairness of the dismissal based on the new reason."*

What the learned Deputy Chairperson was saying was that the dismissal of an employee will not be regarded by the Court as unfair merely because the employer, at the time of dismissal, incorrectly stated the reason for dismissal with the result that when the matter is tried in court, a new reason equally capable of constituting a valid reason for dismissal, is established. The Court is not so much concerned with the labelling or packaging of the reason for dismissal as with the substance and true nature of the reason for the termination of employment.

We considered the approach taken by the Industrial Relations Court and the conclusion which it finally reached on the matter and we find no fault with both. We entirely agree with the decision which the Industrial Relations Court made on this matter.

The approach taken by the learned Judge in the Court below was that the Industrial Relations Court found that the appellant was dismissed for a valid reason, but he did not cross-appeal against the decision of the Industrial Relations Court on that issue. The lower Court therefore took the view that the issue of the validity of the reason for dismissal was therefore not open for discussion in the Court below. The learned Judge was entirely correct. The appellant did not cross-appeal on the issue of the validity of the reason for dismissal. We also take the view that since the issue was not argued in the Court below, it would be wrong for the matter to be raised and argued in this Court. We find ground three of the appeal to be idle and incompetent. It is unsuccessful.

We have agreed with the Industrial Relations Court that in terminating the appellant's employment, the respondent violated the appellant's right to be heard as provided for in Section 57-(2) of the Employment Act. Therefore, this Court, as did the Industrial Relations Court, takes the view that the appellant's dismissal was unfair. The appeal is allowed. No order as to costs is made. The matter is remitted to the Industrial Relations Court to consider the relief, if any, awardable to the appellant.

Delivered in Open Court on this 25th day of November, 2010 at Blantyre.

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

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

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