**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA- A.D. 2021**

**CORAM: BAFFOE-BONNIE, JSC (PRESIDING)**
**APPAU, JSC**
**DORDZIE (MRS.), JSC**
**HONYENUGA, JSC**
**AMADU, JSC**

**CIVIL APPEAL**
**NO. J4/67/2019**

**10TH MARCH, 2021**

1. ALEX ONUMAH COLEMAN
2. DAVID KOOMSON - PLAINTIFFS/RESPONDENTS/APPELLANTS

**VRS**

NEWMONT GHANA GOLD - DEFENDANT/APPELLANT/RESPONDENT

1. EMMANUEL ATSIAFU
2. ERNEST KORANG YEBOAH
3. FRED SARBAH
4. EBENEZER MILLS
5. ANDREW HAYFORD

PLAINTIFFS/RESPONDENTS/APPELLANTS

**VRS**

NEWMONT GHANA GOLD - DEFENDANT/APPELLANT/RESPONDENT

1. ISAAC KONGETEY
2. ISAAC BOADU - PLAINTIFFS/RESPONDENTS/APPELLANTS

**VRS**

NEWMONT GHANA GOLD - DEFENDANT/APPELLANT/RESPONDENT

**JUDGMENT**

**HONYENUGA, JSC:-**

**INTRODUCTION**

This is an appeal from the unanimous judgment of the Court of Appeal, Kumasi dated the 24th day of October, 2017 reversing the decision of the High Court, Sunyani, dated 18th December, 2015. By their amended Writs and Statement of claim filed in the High Court, on the 21st January and 18th February 2011 respectively, the Plaintiffs/Respondents/Appellants who were nine former employees of the Defendants/Appellant/Respondent's mining company instituted three suits against the Defendant/Appellant/Respondent claiming a declaration that their interdiction and subsequent dismissals was wrong in law, an order for their reinstating and all monies due to them from the period of interdiction and summary dismissal paid to them with interest or in the alternative general damages for wrongful dismissal. The three suits were consolidated and tied together by the High Court which gave judgment in favour of the Plaintiffs/Respondents/Appellants. In this appeal, the Plaintiffs/Respondents/Appellants would simply be referred to as the Appellants and the Defendant/Appellant/Respondent referred to as the Respondent.

## BACKGROUND

The brief facts of this appeal are that the appellants were employed by the respondent in various capacities as technician, welder, grinding operator, control room operator among others. Their employment was governed by a Collective Bargaining Agreement (CBA) dated the 1st day of August. 2007 between the respondent and the Ghana Mineworkers Union of TUC tendered as Exhibit D. Sometime in 2009, the respondent terminated the appointments of the appellants based on adverse findings of a disciplinary committee constituted by the respondent which found the appellants liable for the theft of some gold bearing materials and or conspiring with others in that regard. Their interdiction letters also contained references to other kinds of misconduct including unauthorized removal of gold bearing material. Prior to the termination of their employment, the appellants were given a hearing before the disciplinary committee to which written statements were presented, some of which contained denials and admissions which implicated others. While the appellants contended that the admissions were obtained under duress, the respondent maintained that they were voluntarily obtained. The appellants then instituted their various suits claiming the reliefs (supra).

## THE APPELLANTS' CASE

The appellants in their statement of claim pleaded that they were employees of the respondent and sometime in September 2009, they were interrogated by officers of the respondent and later interdicted for fraud, deliberate falsification of records, theft of gold bearing material and/or unauthorized removal of gold-bearing material; behaving

negligently resulting in significant loss or damage to company equipment or property, lying to a supervisor and misuse of level of authority. They further pleaded that they were served with invitation to appear before a disciplinary committee hearing on the said offences which are contained in their collective agreement. They averred that each of them denied the charges laid against them at the disciplinary committee hearing. Prior to their appearance before the disciplinary committee, the Investigator in the case caused each appellant to write a statement and some of the appellants admitted their offences under duress. According to the appellants, after the disciplinary hearing, each of them was served with a letter of termination and summary dismissal. They contend that their dismissal was wrong in law and that they are entitled to substantial damages.

**THE RESPONDENT'S CASE**

On the other hand, the respondent stated in her statement of defence that the appellants were dismissed after they were charged with the offence of stealing gold bearing materials from her process plant and after investigations and hearings, the veracity of the charge was established. The respondent contended that the appellants participated in the hearing at the disciplinary committee and were given all opportunities to defend themselves against the charges preferred. The charges were established against them and as a result they were dismissed. The respondent denied the appellants averments and pleaded that they are baseless. The respondent stated that prior to their interdiction, statements were taken from the appellants in which

some of them admitted the charges levelled against them and that their dismissal was justified

After the trial, the High Court on the 18th December, 2015 gave judgment in favour of the appellants and ordered full payment of their salaries at *"the present level"* from the date of their interdiction to the date of final payment. The trial court also ordered one year full salary at current levels as damages for defamation and loss of the right to earn a living and also payment of all allowances and other payments and bills that they would have earned were they in employment. The trial court also awarded Fifteen Thousand Ghana Cedis (GH¢15,000.00) as costs against the respondent.

In an appeal launched by the respondent to the Court of Appeal, Kumasi, the High Court judgment was on the 24th October, 2017 reversed and the various awards of damages by the trial High Court were set aside in favour of the respondent.

Aggrieved by the judgment of the Court of Appeal, the appellants have filed the instant appeal before this Court seeking a reversal of that judgment. The appellants originally filed a sole ground of appeal but upon leave of the Court of Appeal, they filed additional grounds of appeal based on the following:-

*(i) That the judgment is against the weight of evidence.*

*(ii) The learned Judges of the Court of Appeal erred in the evaluation of the evidence on record in respect of the wrongful termination of Appellants'*

*appointment and thereby occasioned grave miscarriage of justice to the appellants.*

(iii) *The Court of Appeal erred when in its evaluation of the evidence on record it failed to interrogate the basis of the Appellants' dismissal by the respondents whether the same was reasonably supported by the evidence presented to the committee that investigated the alleged misconduct of the appellants.*

(iv) *The Court of Appeal gravely erred when it held that the findings of the Committee that investigated the Appellants was not perverse and that there had been no miscarriage of justice against Appellants.*

(v) *The finding of the Court of Appeal that the preponderance of probabilities indicates that Appellant had removed gold-bearing materials is not supported by the evidence on record.*

(vi) *The Court of Appeal erred in the face of the ample evidence on record when it held that the trial judge had no mandate to attempt to impeach the dismissal of Appellants based on video evidence which did not form part of the evidence on record.*

(vii) *The Court of Appeal erred when it set aside the finding of the trial High Court that the dismissal of the Appellants' was unfair and contrary to the Labour Act, 2003 (Act 651).*

(viii) *The learned Judges of the Court of Appeal erred in law and in fact when they held that the trial judge erred when he awarded the Appellants*

*damages for defamation when the same was not pleaded and evidence led in proof of same.*

*(ix) The Court of Appeal erred when it set aside the awards made in Appellants favour by the trial court and upheld grounds B, C, D and E of the respondents appeal contrary to the evidence on record.*

**DETERMINATION OF THE GROUNDS OF APPEAL**

Rule 6(2) of the Supreme Court Rules, 1996 (C.I. 16) as amended provides:-

*"(2) A notice of civil appeal shall set the grounds of appeal and shall sate*

*(f) the particulars of a misdirection or an error in law, if so alleged".*

Before we consider the grounds of appeal, we would deal with a preliminary matter concerning the grounds of appeal. Rule 6(5) provides that vague or general grounds of appeal which do not disclose any reasonable ground of appeal except the general ground that the judgment is against the weight of evidence shall not be permitted. In the instant appeal we have observed that Counsel for the appellants failed to comply with the stated requirements in Rule 6(f) in the formulation of grounds (ii), (iii), (iv), (vi), (vii), (viii) and (ix) of the notice of appeal. The rule required Counsel for the appellants to have clearly stated the particulars of the errors of law he alleged in said grounds of appeal to avoid breach of the said Rule. **Dahabieh v S. A. Turqui & Bros. [2001-2002] SCGLR 498 Holding (1)**, held that grounds of appeal alleging

that the judgment is wrong in law is in effect saying that there is an error of law in the judgment.

Further, rule 6(2) requires the appellant to specify in the ground of appeal that particular complaint amounting to an error of law. Consequently, the grounds of appeal are inadmissible. In the circumstances, grounds (ii), (iii), (iv), (vi), (vii), (viii) and (ix) are hereby struck out as inadmissible.

Having struck out the offending grounds, grounds (i) and (v) would be subsumed and considered under the omnibus ground of appeal which is the judgment is against the weight of evidence. It is trite learning that an appeal to this Court is by way of rehearing and the appellate Court has the duty to analyze the entire record of appeal to find out whether or not the judgment under appeal was justified as supported by the evidence on record and that an appellate Court is entitled to make up its mind on the facts and draw inferences as the trial Court. In **Osei (Substituted by) Gillard v Korang [2013-2014] 1 SCGLR 221 at 226 to 227,** the Supreme Court per Ansah JSC stated the law thus:-

> *"It is trite learning that an appeal to this Court is by way of rehearing and the appellate Court has the duty to study the entire record to find whether or not the judgment under appeal was justified as supported by the evidence on record. An appellate Court is entitled to make its mind on the facts and draw inferences to the same extent as the Trial Court could do".*

Further in **Sarpong v Google Ghana & Another [2017-2018] 2 SCGLR 839; at page 843,** Adinyira JSC citing with approval **Tuakwa v Bosom [2001-2002] SCGLR 61** stated the principle as follows:-

> *"Once the whole judgment is called into issue, then we must analyze the entire record and take into account all the pleadings, affidavits, documents and submissions by both Counsel in the record of proceedings before this Court to find out whether the conclusion by the Court of Appeal can be supported".*

A further elaboration on the principle is that the onus is on such appellant to clearly and properly demonstrate to the appellate Court, the lapses in the judgment appealed against. See **Djin v Musah Baako [2007-2008] 1 SCGLR 686, Holding (1); Akufo-Addo v Catheline [1992] 1 GLR 377** and other authorities.

On this ground, learned Counsel for the appellants in his original ground of appeal submitted that the Appellants satisfied the burden of proof required by law and succeeded in establishing that their dismissal was unfair and or wrongful as the Respondent could not with any positive evidence establish their guilt. Learned Counsel also contended that no gold bearing material was ever found on any of the appellants nor was the quantum of gold stolen established. Learned Counsel further submitted that the purported investigation into the alleged misconduct were on mere suspicion or conjecture and therefore the conclusions drawn by the disciplinary committee as well as the dismissal of the appellants were perverse and wrongful.

Learned Counsel for the respondent submitted that to enable the appellants succeed, each appellant was required to prove that they had been wrongfully dismissed by the Respondent but on the evidence on record, they failed.

Indeed, the issue in this case is whether or not the termination of the appellants' appointment was wrongful and illegal and whether or not the appellants were entitled to their claims. The law is that this action being an action for damages for wrongful dismissal, each appellant assumed the burden of proving the terms of his employment that the determination was in breach of the terms of the agreement, or in contravention of statutory provisions for the time being regulating the employment. In **Kobi v Manganese Co. Ltd. [2007-2008] SCGLR 771 at 786,** this court after citing with approval **Morgan v Parknson Howard Ltd. [1961] GLR 68 at 70,** held that the action being an action for damages for wrongful dismissal, each plaintiff assumed the burden of proving the terms of his employment; that the determination was in breach of the terms of agreement and in contravention of statutory provisions for the time being regulating to employment. See also **Oduro v Graphic Communications Group Ltd. [2017-2018] 2 SCGLR 112 Holding (2).** This Court further held that if a plaintiff failed to satisfy the Court on these points, his or her claim cannot succeed. The learned Justices of the Court of Appeal in their judgment at page 1020 of the record of appeal, reviewed the judgment of the trial Court and the record of appeal and came to the conclusion that the decision of the respondent herein to dismiss the appellants from their employment must not be disturbed. Their Lordships and Ladyships stated at the said page (supra) thus:-

*"We have also reviewed the full record of exhibits and testimonies before the disciplinary committee and the Courts, and do not find any reason to disturb the decision of the Appellant to dismiss the respondents".*

A perusal of the record of appeal indicate that the Court of Appeal reviewed the evidence and the statement of each appellant before the disciplinary committee from pages 1020 to 1024 of the record of appeal and made findings that considering the contradictions and discrepancies in the testimony of each appellant, the respondent's witnesses were cogent regarding the exercises they undertook and their testimonies coherently in line with the findings of the committee and the decision of the respondent Company. The learned Justices further made findings at page 1024 of the record of appeal thus:-

*"It is for the above reason that I find that it is the judgment, which is not supported by the record, and not the decision of the Appellant Company".*

The learned Justices of the Court of Appeal also agreed that the statements and conclusions of the trial judge were without legal basis and unsupported by the evidence presented by the Court.

In this appeal, the High Court Judge upon hearing the evidence before him, gave judgment to the appellants but on appeal to the Court of Appeal, the learned Justices upon a revaluation of the entire record of appeal before them, made their own findings

and came to the conclusion that the appellants failed to discharge the burden of proof cast upon them.

It is trite that an appellate Court would disturb the findings and conclusions by a lower Court if the evidence did not amply support the evidence on record or were perverse.

After a thorough perusal of the record of appeal, we have no reason to doubt the findings and conclusions of the Court of Appeal and we therefore adopt their findings since these findings and conclusions are wholly supported by the evidence on record.

This Court in **Unilever Ghana Ltd. v Kama Health Services Ltd. [2013-2014] 2 SCGLR 861,** speaking through Benin JSC at page 885 of the Report said as follows:-

> *"Much as an appellate court should refrain from disturbing findings of fact made by a trial court, it will not shirk its responsibility of setting aside these findings of fact which are not borne out of the evidence on record".*

See also **Fosua & Adu-Poku v Dufie (Decd) & Adu Poku Mensah [2009] SCGLR 310 at 313** and other respectable decisions.

From the evaluation of the evidence on record, the appellants failed to prove that the respondent breached the agreement, the CBA or contravened any statutory provisions regulating the employment. It is not in doubt that the appellants contract of employment in the collective agreement Exhibit D on page 550 of Volume two of the

record of appeal contains the grounds for summary dismissal. These includes theft, behaving negligently resulting in significant loss or damage to Company equipment or property, and other grounds recommended by the Disciplinary Committee. (See Exhibit B). The grounds for termination for misconduct are set out in Appendix C of Exhibit D and includes lying to a Supervisor, Misuse of level of authority, Negligence resulting in Potential damage or loss to Company equipment or property and others. A perusal and evaluation of the evidence in the record of appeal reveals that the disciplinary committee was constituted in terms of Exhibit D, the CBA and the rules of natural justice was observed and opportunity was provided to the appellants to be heard. Learned Counsel for the appellants submitted that no positive evidence established the guilt of the appellants and that no gold bearing material was found on them. Counsel also submitted that no quantum of any gold-bearing material was stolen and that the respondent could not prove same. Learned Counsel for the appellants also contend that the respondent could not prove the guilt of the appellant beyond reasonable doubt pursuant to section 13 of NRCD 323. Learned Counsel also submitted that on the preponderance of the probabilities, the respondent did not prove that the appellants removed gold-bearing materials or put same into their interdiction letters, Exhibits A, G, L, Q, W, EE, KK, TT and WW. A perusal of the record of appeal indicate that the submissions of Counsel for the appellants is not supported by the evidence on record. There is abundant evidence on record which established both civil and criminal wrongdoing on the part of the appellants and that it is our candid opinion that the respondent proved the requisite standard of proof on which basis the appellants were entitled to be dismissed as in the case of **Alex Onumah Coleman** to terminate his

employment. We have found cogent and compelling evidence on the record of the stealing and unauthorized removal of gold by four appellants namely Ernest Korang Yeboah, Isaac Kongetey, Isaac Boadu and Ebenezer Mills who admitted stealing and indicated whom they did it with. In his further statement on pages 649 to 672 of the record of appeal, Volume 2, dated 21st September, 2009, Ernest Yeboah admitted the stealing and mentioned others he did it with.

> *"On the night of 1st September 2009, myself, Ebenezer Mills, and Alex Coleman did collect gold bearing materials from under the acacia basement and tried to see if we could get gold nugget from the tail. I state that it was Alex Coleman who said others have been getting gold nuggets from the tails. I plead for leniency".*

A perusal of the record of appeal reveals that apart from those appellants stated supra, other appellants on the totality of the evidence specifically including Exhibits 10 and 8, David Awelgiyah statement on page 661 of Volume 2 of the record of appeal implicates David Koomson. Exhibit 1 the report of the disciplinary committee established on the preponderance of the probabilities that they were involved in the removal of gold bearing material. It is trite that where the trust worthiness of the employee is in doubt as a result of suspicion, the employer will find it unsafe to keep the employee in his establishment. In **Kofi Sekyire v Abosso Goldfields Ltd. (Unreported), Civil Appeal No. J4/20/2015, also in [2008] 15 MLR 207**, the Supreme Court at page 6 of the judgment said:

*"In the gold mining industry, it is common knowledge that the raw materials are gold bearing rocks from which the gold is extracted. It stands to reason, therefore, to conclude that bearing rocks on the premises of the Defendant/Company must be valuable and precious commodities which the company would do its utter most to protect. My handling of the gold bearing rocks or concentrate sample in any unusual manner … is bound to create suspicion. And where the trustworthiness of the employee is in doubt as a result of this suspicion the employer would find it unsafe to keep the employer (sic) in his establishment. The employer would be justified to dispense with the services of the employee".*

Further in **Kobea and Others v Tema Oil Refinery & Ors. [2003-2004] 2 SCGLR 1033,** this Court further acknowledge the employee/employer relationship as being contractual in nature that:

*"… at common law, an employer may dismiss an employee for many reasons such as misconduct, substantial negligence, dishonesty, etc. these acts may be said to constitute such a breach of duty by the employee as to preclude satisfactory continuance of the contract of employment as repudiated by the employee"*

See also **Awuku-Sao v Ghana Supply Co. Ltd. [2009] SCGLR 710 Holding (3).**
The conduct of the appellants created a doubt in their trustworthiness and the respondent, their employer found it unsafe to keep them in his employment. See also

**Arkhurst v Ghana Museum and Monuments Board [1971] 2 GLR 7.** Learned Counsel for the appellants also complained that the Court of Appeal erred in the face of the ample evidence on record when it held that the trial Judge had no mandate to attempt to impeach the dismissal of Appellants based on video evidence which did not form part of the evidence on record. We think that this is misplaced or that the criticism of the judgment of the Court of Appeal is unfair. It is crystal clear that at page 1019 of the record of appeal, the Court of Appeal after citing **Asante v Scanship Ghana Ltd. [2013-2014] 2 SCGLR 1296** which gave power to an appellate Court not to disturb the findings made by the trial High Court unless those findings were not supported by the evidence on record, the lower appellate Court went on to hold on the video evidence as follows:-

> *"And we must hold that the trial court in this case had no mandate to attempt to impeach the dismissals based on alleged video evidence when this video evidence did not form part of the evidence on record.*
>
> *Since the videos did not form part of the record of the proceedings, we have to say that the judgment that the evidence from the videos did not prove the charges as against the weight of the record.*
>
> *In addition to the above position, we have also reviewed the full record of exhibits and testimonies before the disciplinary committee and the courts, and do not find any reason to disturb the decision of the Appellant to dismiss the Respondents".*

Indeed, it is on record that the trial judge had the benefit of watching the video evidence but same was not tendered into evidence to form part of the record of proceedings. We would rely on a decision of this Court in **Iddrisu v Amartey [2009] SCGLR 670, Holding 4,** which stated the law clearly thus:

> *"The High Court, just like all other superior courts, was a court of record. Consequently, there must be a record of everything that was done and directed by the Court, encompassing not only all processes filed before the court, but also a record of all arguments, submissions, evidence led by the parties and witnesses and the decisions or orders and judgments of the court. Whenever the record of any such process or event that was deemed to have taken place in the court was not available to be referred to, then the record of such an event could not be accepted as having taken place".*

It is thus obvious that since the video evidence was not tendered into evidence, it could never form part of the record of proceedings to enable it be considered as part of the evidence on record. We therefore agree with the finding of the Court of Appeal that the videos did not form part of the record. The submission of Counsel for the appellants is not supported by the evidence on record as same is found untenable.

As rightly stated by the Court of Appeal, even without the video evidence, the respondent was justified in dismissing the appellants since there is sufficient evidence on record. Moreover, it is trite that once an employer followed the procedures as enshrined in the contract of employment such as the CBA and followed the mandatory

requirements as the hearing under the CBA it gives a summary dismissal a validity. In **Opare Yeboah v Barclays Bank Ltd. [2011] 1 SCGLR 330 at 332**, this Court stated as follows:-

> *"That the Supreme Court would affirm the time honoured proposition that the procedures outlined in contracts of employment such as the CBA in the instant case must be followed to give a summary dismissal validity".*

See also **Lever Brothers Ltd. v Annan; Lever Brothers Ghana Ltd. v Dankwa (Consolidated) [1989-99] 2 GLR 385.**

In the instant appeal, the respondent duly interdicted the appellants gave them a hearing at the disciplinary committee level and which also made their recommendations as their contract of employment, the CBA required. A dismissal of the appellants was done in accordance with the CBA and therefore we hold that the dismissal of the appellants is not perverse but valid.

We would now consider whether the trial judge was right in awarding damages for defamation and whether the Court of Appeal was also right in dismissing the said damages. In his judgment at page 507 of the record of appeal (volume 1), the learned trial judge made a finding of fact and held as follows:-

> *"The Defendant thereby humiliated the plaintiffs and the Court takes the view that same is defamatory act against the plaintiffs for such the Plaintiffs must be entitled to damages as compensation".*

The learned trial judge then at page 508 of the record of appeal awarded damages for defamation as follows:-

> *"3. I award one year full salary at current levels as damages for Defamation and for losing the right to earn a living".*

The Court of Appeal dismissed the findings and conclusions of the trial judge thus:-

> *"…. Statements and conclusions of the trial judge were without legal basis and unsupported by the evidence presented to the court or legal authority".*

We agree with the conclusions reached by the Court of Appeal since they are supported by the evidence on record. Order 57 rules 2 and 3(1) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) provides:-

> *"2. Before a writ is issued in an action for libel it shall be indorsed with a statement giving sufficient particulars of the publication in respect of which the action is brought to enable them to be identified.*
>
> *3(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of have been used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of the sense alleged".*

It is trite learning that a writ in a libel claim must contain indorsements giving sufficient particulars of the publication in respect of which the action is brought to enable them to be identified – see Order 57 rule 2 of C.I. 47. Further, where words or matters

complained of have been used in a defamatory sense other than their ordinary meaning, particulars of the facts and matters on which a plaintiff relies in support of the case must be pleaded. See Order 57 rule 3(1) of C.I. 47.

In the case of Slander, the exact words allegedly used must be set out verbatim in the statement of claim and in direct speech. See **Bullen & Leake & Jacobs, Precedents and Pleading (13th Ed.)** page 623 and Gatley on Libel and Slander (5th Edition) paragraph 809, at p. 446) rightly cited by learned counsel for the respondent. The case law, in support is clearly stated in **Owusu-Domena v Amoah [2015-2016] 1 SCGLR 790 Holding (3)** thus:-

> *"(3) In establishing that a publication was defamatory, the Plaintiff must plead and lead evidence on the following matters in order to succeed:*
>
> *(i) There was publication by the defendant;*
>
> *(ii) The publication concerned him, the plaintiff;*
>
> *(iii) The publication was capable of a defamatory meaning in its nature and ordinary sense;*
>
> *(iv) Alternatively or in addition to (iii) above, that from the facts and/or circumstances surrounding the publication, it was defamatory of him, the plaintiff …"*

See also, **Ackah v ADB [2016-2017] 1 GLR 552**.

Defamation by the relevant rules in C.I. 47 is a distinct head under the law of tort. In the instant appeal, the appellants failed to indorse their writs with a claim for damages

for defamation, did not plead facts relevant to a defamation action nor did they provide any particulars of any defamatory matter in their pleadings during the trial. It is therefore ridiculous that the trial High Court awarded the appellant damages for defamation and "for losing the right to earn a living". Indeed, the Court of Appeal speaking through Torkornoo JA (as she then was) rightly at pages 1013 to 1014 of the record of appeal (volume 2) succinctly stated as follows:-

> *"It is difficult to appreciate how the trial judge arrived at his finding on defamation and orders for damages for defamation. First, as is well recognized as the rule in* ***Dam v Addo [1962] 2 GLR 200****, and cited by Appellant Counsel, it is a fundamental principle of substantial justice that a court cannot arrive at a decision on a case that has not been presented to it for trial. She (sic) also cited* ***Esso Petroleum Co. Ltd. v Southport Corporation [1956] AC 218*** *quoted with approval by the Supreme Court in* ***Dam v Addo*** *at pages 238 – 239 with these words 'To condemn a party on a ground of which no fair notice has been given may be as a great denial of justice as to condemn him on a ground on which his evidence has been improperly excluded ….*
>
> *Procedurally and substantially, the claims brought to court, centered on 'wrongful dismissal'. The Respondents did not confront the Appellant with any case on defamation. The Appellant did not have an opportunity to defend itself against any claims of defamation. Thus the court did not have the mandate to arrive at a decision on whether the Appellants were liable for defamation or not".*

A perusal of the writ, the pleadings and the evidence on record did not disclose that the appellants endorsed their writs, with any damages for defamation, nor pleaded same in their pleadings and provided any particulars. The appellants only led evidence to indicate that because of the publication by the respondent to other mining companies not to employ them and because they were found culpable of theft, they should not be employed. The respondent denied this in its evidence but the appellants on whom the onus shifted could not provide any corroborative evidence in support of their statements. The appellants therefore failed to prove their claim.

We therefore adopt the findings and conclusion of the Court of Appeal as stated supra. The trial Judge's findings and conclusions are outrageous and unknown to law.

In any case, the law is patently clear that in an employer and employee relationship where the employment of the employee is proved to be wrongfully terminated, the employee is entitled to restitution in integrum on account of the fact that the employee has a duty to mitigate his/her losses or damages. In **Ashun v Accra Brewery Ltd. [2009] SCGLR 81,** the Supreme Court per Dr. Date-Bah, JSC stated the law as follows:-

> *"…. The duty to mitigation of damages for wrongful dismissal devolves on an employee. Accordingly, he or she has a duty to take steps to find alternative employment. In principle then, in the absence of any statutory or contractual provision, the measure of damages for wrongful termination of employment under the common law of Ghana is compensation based on the employee*

*current salary and other conditions of service, for a reasonable period within which the aggrieved party is expected to find alternative employment. Put in other words the measure of damages is the quantum of what the aggrieved party would have earned from his employment during such reasonable period determinable by the court after which he or she should have find alternative employment. This quantum is, of course, subject to the duty of mitigation of damages".*

In the instant appeal, the trial judge was wrong in awarding damages for defamation. It is our respectful view that the learned judge failed in his judgment by awarding damages for defamation. It was the duty of the appellants to mitigate their damages instead of relying on unpleaded and unproven matters.

Furthermore, another issue which arose from the record of appeal is the gravamen of their complaint that the findings of the Disciplinary committee did not reasonably establish misconduct against the appellants. The appellants' dismissal hinged on the theft of gold bearing materials and conspiracy to steal. Indeed, the appellants' dismissal was based on a report of the findings of a Disciplinary Committee constituted by the respondent to investigate the alleged offences for which the appellants were dismissed.

A perusal of Exhibit D, the Collective Bargaining Agreement (CBA) between the Respondent and the Ghana Mine Workers' Union of TUC at its page 61 listed the grounds for summary dismissal to include:

> *"(1) Theft, fraud and deliberate falsification of records …."*

Further at page 62 of the Collective Bargaining Agreement (CBA) stated the grounds for termination to include:-

> *"(5) Lying to a Supervisor*
>
> *(6) Misuse of level of authority*
>
> *(7) Negligence resulting in potential damage or loss to Company equipment or property".*

It is thus clear that the appellants' charges before the disciplinary committee were based on the CBA under which they were employed. These provision cover both termination of employment as well as summary dismissal. It is trite law that when the disciplinary procedure is resorted to like the instant case, the employer must, when challenged, establish that good grounds existed for his action. What were the findings of the Disciplinary Committee for which the appellants were dismissed? We must state that the appellants were summoned to the Disciplinary Committee where they were given a fair hearing. At the end of its deliberation the disciplinary committee made findings at pages 643 to 644 of the Record of Appeal. While the Disciplinary Committee recommended that the appellants be summarily dismissed, the committee on a split decision recommended that Mr. Onumah Coleman be referred to the

functional Manager for review, it is noted that the functional Manager later dismissed Mr. Onumah one of the appellants in this consolidated appeal. Was the disciplinary committee required to prove the Appellants' misconduct beyond reasonable doubt? Learned counsel for the appellants argued that the disciplinary proceedings was an internal matter but the Respondent was enjoined to prove the Appellant's guilt beyond reasonable doubt with regard to sections 13, 14 and 15(1) of the Evidence Act, 1975 (Act 323) which provides:-

*Section 13 – Proof of Crime*

*(1) In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt.*

*(2) Except as provided in section 15(3), in a criminal action the burden of persuasion, when it is on the accused as to any fact the converse of which is essential to guilt, requires only that the accused raise a reasonable doubt as to guilt.*

*14. Allocation of Burden of Persuasion Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.*

*Section 15 – Burden of Persuasion in Particular cases*

*(1) Unless and until it is shifted, the party claiming that a person is guilty of crime or wrongdoing has the burden of persuasion on that issue.*

It is to be noted that under section 15 of Act 323, the burden on the prosecution never shifts to the accused. The accused has a different burden of persuasion which requires him to establish his defence by reasonable doubt. Learned Counsel has contended that the stealing and conspiracy to steal being criminal offences, the Respondent was required to prove beyond reasonable doubt or that guilt must be the irresistible conclusion from its proceedings. The question of the burden of proof applicable to an employer's internal disciplinary committee conducts hearing into allegations of misconduct against an employee was determined by this Court as rightly cited by learned Counsel for the Respondent in **Kofi Senkyire v Abosso Goldfields Ltd., Civil Appeal No. J4/20/2005 delivered on 26th June 2006.** The facts of this case are similar to the instant case. It held that the committee of inquiry set up by the defendant/appellant mining company to inquire into the plaintiff/respondent's conduct of being found with gold bearing rocks at a place at which he should not have been cannot be proved beyond reasonable doubt. At page 4 of the judgment, Ahinakwa JSC succinctly stated the law as follows:-

> *"The three man committee set to go into the matter and to give the plaintiff a fair chance to explain himself. They did not sit in panel as a criminal court whose decision was to be beyond reasonable doubt, or to get a conviction".*

We therefore adopt the submission of learned Counsel for the respondent that the provisions of the Evidence Act, 1975 (NRCD 323) namely sections 13, 14 and 15 of NRCD 323 cited by the Counsel for the appellants are inapplicable to the hearings before the Respondent's internal disciplinary committee.

It is our candid opinion that the Court of Appeal was right when it held that the disciplinary committee was not required to prove the charges against the appellants beyond reasonable doubt and that the High Court was totally wrong. Indeed, the proceedings before the disciplinary committee is not tantamount to a court of competent jurisdiction.

Learned Counsel for the appellants has submitted that from the evidence, the conduct of the disciplinary committee was not only in breach of the terms of the agreement but that it also fell short of Article 23 of the Constitution, 1992 provides:-

> *"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal".*

Indeed, the disciplinary committee of a private limited liability company such as the respondent is neither an administrative body, nor its members, administrative officials within the context of Article 23 of the Constitution, 1992. We agree with learned Counsel for the respondent that the relationship between the appellants and the respondent was purely a contractual one governed by their employment contracts. This Court has held in numerous cases that private enterprise units are not subject to public law remedies to which administrative bodies and officials are subject. In **Bani v**

**Mearsk Ghana Ltd. [2011] 2 SCGLR 796,** Date-Bah JSC in his lead opinion at page 814 of the report stated per curiam as follows:-

> *"It is a paramount principle of public law that public or administrative bodies are supervised by way of judicial review to ensure that they keep within the bounds of their jurisdiction or area of allocated authority. This is an important incident of constitutionalism. A similar policy rational does not exist for the courts supervising delegated decision-making in the private sector. Indeed, it would be against public policy to subject private sector business units to the same judicial control over the administrative decisions as public bodies. The public sector needs more flexibility and is not expected to operate under the same rules of the game, so to speak, as government and public bodies"*

In **Lagudah v Ghana Commercial Bank [2005-2006] SCGLR 388 at 401-402**, this Court emphasized the principle of public law doctrine of *audi alteram partem* as follows:-

> *"I am not persuaded that, in a commercial setting, in the absence of a contractual provision to the contrary, an employer is bound to comply with the rules of natural justice before dismissing an employee for misconduct. At common law, it is enough if the facts objectively establish cause for dismissal".*

See also **Aboagye v Ghana Commercial Bank [2001-2002] SCGLR 797 at 828-831.**

We would therefore dismiss the submission of Counsel for the appellants that the learned justices of the Court of Appeal failed to comply with Article 23 of the Constitution, 1992 as same is untenable. We must also state that a disciplinary committee is not an Adjudicatory body or Tribunal. It is only a disciplinary committee set up to investigate the charges levelled against the appellants, arrive at a conclusion and make recommendations to the appropriate authority for sanctions to be imposed. As stated supra, Article 8.2 of the CBA (Exhibit I) supports this position. It is therefore untenable for the learned trial judge and Counsel for the appellants to state that the charges against the appellants ought to be proved beyond reasonable doubts as required in criminal trials.

We agree with the finding of the learned Justices of the Court of Appeal and adopt same at page 1013 of the record of appeal that:-

> *"The only question for consideration where the decision in issue is concerned is whether the evidence presented to the committee that conducted the investigation of the company, are reasonably capable of supporting the decision of the company to dismiss the Respondents (appellants herein), and not whether two of the charges against the Respondents were proved to the standard required in Criminal law".*

The ground of appeal fails and it is hereby dismissed as the Court of Appeal ably reevaluated the evidence on record.

**CONCLUSION**

On the whole, the Appeal is dismissed as without merit and the judgment of the Court of Appeal is hereby affirmed.

**C. J HONYENUGA**
**(JUSTICE OF THE SUPREME COURT)**

**P. BAFFOE-BONNIE**
**(JUSTICE OF THE SUPREME COURT)**

**Y. APPAU**
**(JUSTICE OF THE SUPREME COURT)**

**A. M. A. DORDZIE (MRS.)**
**(JUSTICE OF THE SUPREME COURT)**

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