IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: YEBOAH CJ (PRESIDING)
PWAMANG JSC
AMEGACTCHER JSC
TORKORNOO (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/34/2021

8TH DECEMBER, 2021

DANIEL MCCARTHY ..... PLAINTIFF/APPELLANT/RESPONDENT

VRS

GHANA BAUXITE COMPANY LTD. ..... DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

KULENDI JSC:-

INTRODUCTION:

This is an appeal from the judgement of the Court of Appeal, dated 25th November, 2020. The Court of Appeal in the said judgment reversed the judgement of the High Court dated 28th March, 2019, and held that the termination of the Plaintiff/Appellant/Respondent's (hereinafter called "the Respondent") employment by the Defendant/Respondent/

Appellant (hereinafter called "the Appellant") was wrongful, and accordingly awarded general damages equivalent to eighteen (18) months' salary in favour of the Respondent. The Appellant, aggrieved by the judgment of the Court of Appeal, has appealed to this Court praying for a reversal of the decision of the Court of Appeal.

BACKGROUND

The antecedent contentions by the parties which have culminated into the present appeal are as follows:

The Respondent was summarily dismissed on 4th October 2017, from the employ of the Appellant as a Bulldozer Operator. The Respondent, who had been in the employment of the Appellant for 5 years, was terminated by the Appellant on his alleged involvement in a theft of diesel that occurred on 20th September 2017.

On the said day, two men were allegedly seen siphoning diesel from a Bulldozer in full view and within close proximity to the Respondent who watched on as the fuel was being siphoned. According to the Appellant, an Engineer of the Appellant passing by noticed the ongoing theft and where upon, the men took to their heels after they saw him. Given the Respondent's proximity to the location where the fuel was being siphoned and his indifference to the obviously illegal activity, the Appellant assumed the Respondent's complicity in the theft and therefore caused his arrest by the police on 21st September, 2017. However, before the police could conclude their investigations into the role and involvement or otherwise of the Respondent in the theft, the Appellant summarily dismissed the Respondent, based on an alleged hearing, findings and recommendations by a Disciplinary Committee said to be set up in accordance with Appellant's Collective Bargaining Agreement and the Labour Act, 2003, Act 651.

Subsequently, the ongoing police investigations concluded that the evidence was "too weak and porous to warrant a criminal charge" of aiding and abetting crime or conspiracy to commit the crime of stealing.

Following the conclusion reached by the police, the Respondent made unsuccessful attempts to be re-instated by the Appellant. He also procured the intervention of the Western Regional Labour Officer to mediate the dispute but to no avail. Consequently, the Respondent commenced an action in the High Court, Sekondi, contending, among others that he was neither invited or appeared before any Disciplinary Committee constituted by the Appellant or any other body to defend himself on any date and therefore that the conduct of the Appellant is not only contrary to the provisions of the Collective Bargaining Agreement but also the Labour Act. As a result, the Respondent claimed per his writ of summons as follows:

a. A declaration that the Defendant's purported summary dismissal is wrongful, null, and void.
b. An order compelling Defendant to pay adequate compensation to the Plaintiff for the financial and psychological hardship and embarrassment occasioned as a result of the Defendant's action.
c. Consequential Orders including but not limited to the payment of all salaries, entitlements and benefits due.
d. Refund of legal cost of GHS 10,000.00

At the close of the trial, the High Court, on 28th March, 2019 delivered its judgment dismissing the claims of the Respondent, holding that the Respondent was lawfully dismissed. Aggrieved by the said decision, the Respondent appealed to the Court of Appeal which by a judgment dated 25th November, 2020, overturned and set aside the decision of the High Court.

In allowing the appeal, the Court in its judgement which may be found at page 477, particularly at page 505 of the Record of Appeal reasoned in part as follows:

> "... In this instant case however, we are of the respectful view that not only did the learned trial judge make findings of fact that are not clearly supported by the evidence on record, but also that his reasons in support of the findings are unsatisfactory. For this reason and in the interest of substantial justice, we will proceed to interfere with the findings made by the learned trial judge and reverse his findings that the Plaintiff's dismissal was not wrongful..."

The Court of Appeal then awarded the Respondent general damages equivalent to eighteen (18) months' salary.

The Appellant, aggrieved by the decision of the Court of Appeal, invoked the appellate jurisdiction of this court per its Notice of Appeal filed on 13th January, 2021.

GROUNDS OF APPEAL:

The grounds of appeal as stated in paragraph 2 of the Notice of Appeal which may be found at pages 510 and 511 of the Record of Appeal are as follows:

1) The Judgement is against the weight of evidence
2) Additional grounds of Appeal will be filed upon receipt of the judgement and record of appeal.

The Appellant, subsequently sought leave and filed as an additional ground of appeal the contention that: "…the general damages of 18 months' salary awarded by the Court of Appeal against the Defendant, is excessive and unreasonable."

ANALYSIS

We shall consider the omnibus ground of appeal, a resolution of which will determine the necessity or otherwise of an evaluation of the additional ground of appeal.

GROUND 1:

Where it is alleged on appeal that a judgment of the Court below is against the weight of evidence, this Court, is mandated to review the entire record of Appeal and to ascertain whether the Court below has misapplied any piece of evidence or has failed to give due consideration to any piece of evidence on record which failure has occasioned a miscarriage of justice.

This position has been re-iterated by this Court speaking through my venerable and respected brother, His Lordship, Dotse JSC in the case of **Abbey & Others v. Antwi** [2010] SCGLR 17 at 34, as follows:

> "*It is now trite learning that where the appellant alleges that the judgment is against the weight of evidence, the appellate court is under an obligation to go through the entire record to satisfy itself that a party's case was more probable*

than not. As was held by their Lordships in Tuakwa v Bosom [2001-2002] SCGLR 61 (Per Sophia Akuffo JSC),

"an appeal is by way of re-hearing, particularly where the Appellant alleges in his notice of appeal that the decision of the trial court is against the weight of the evidence… In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire Record of Appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence".

Similarly, this Court speaking through Aryeetey JSC in the case of **Agyenim-Boateng Vrs. Ofori & Yeboah (2010) SCGLR 861 at page 867** held that :

"…The appellate Court can only interfere with the findings of the trial Court where the trial court : (a) has taken into account matters which were irrelevant in law; (b) has excluded matters which were critically necessary for consideration; (c) has come to a conclusion which no court properly instructing itself would have reached ; and (d) the court's findings were not proper inferences drawn from the facts…However, just as the trial court is competent to make inferences from its specific findings of fact and arrive at its conclusion, the appellate court is also entitled to draw inferences from findings of fact by the trial court and to come to its own conclusions".

Also see the cases of; Bonney vrs. Bonney [1992/93] GBR 779; Margaret Osei Asibbey vrs Joyce Gbomittah & 2 Others, judgment dated 25th April,212 in civil appeal J4/51/2011; Ama Serwaa vrs. Gariba Hashimu & Anor, judgment dated 21st April, 2021 in civil appeal No.: J4/30/2020.

We are of the considered opinion that the duty of the Court to review the entire record by way of a re-hearing is not an unfettered license without an accompanying responsibility to litigants and or lawyers to make fanciful recourses to this omnibus ground. This is because, the duty of an appellate court to analyze the entire record of appeal must be motivated by a demonstration by an Appellant who relies on the omnibus ground of

appeal, that on a preponderance of probabilities, there are material and or substantial lapses in the evaluation of the evidence on record by the trial court. These lapses may be, among others, findings which are inconsistent with the evidence adduced at the trial, apparent wrongful inferences drawn from the evidence on record; and erroneous application of principles of law to the facts and evidence on record. We are fortified in this view by earlier decisions of this Court including the case of **Djin v Musah Baako[2007-2008] SCGLR 686 at 687** where it was held that:

> "where an appellant complains that judgment is against the weight of evidence, then he is implying that there were certain pieces of evidence on the record which if applied in his favour could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate the lapses in the judgment appealed."

In this Appeal, the Appellant contends that the Court of Appeal erred when it held that the Respondent's termination was unlawful. The Appellant forcefully urges that the Respondent was given a fair hearing before his dismissal. In support of this contention, the Appellant alleges that there was a disciplinary hearing, and that the Respondent was given notice of the said proceedings but he opted not to attend. The Appellant alleges that the Respondent asked that the Committee relied on a written statement he had earlier submitted to the Company after the incident had occurred. It is further asserted by the Appellant that the charges levelled against the Respondent were proven. In effect, the Appellant contends that the Disciplinary Committee considered the Respondent's written statement, concluded that the statement was false, and baseless and for that reason, recommended that he be dismissed. Thus, the Respondent was subsequently dismissed in accordance with the said recommendation of the Disciplinary Committee.

Since appeal is by way of rehearing, this Court is duty bound to examine the entire record of Appeal and to ascertain whether the evaluations of the evidence on record made by the Court of Appeal which informed the conclusion that the termination of the Respondent's employment by the Appellant is unlawful, is amply supported by the evidence on record.

The Respondent's contention before the Court of Appeal essentially raises questions of a lack of a fair hearing in whatever proceedings culminated in his dismissal. We are of the view that the right to a fair hearing is a hallowed principle of law and implies the more fundamental right to be heard which is more appropriately, historically described in the common law as a rule of natural justice. It is so sacrosanct that it is an entrenched fundamental human right in Article 19 of the 1992 Constitution. Accordingly, a breach of the right to fair hearing is not only an overreaching act of bad faith, but also a breach of a fundamental constitutional right.

We are further of the considered view that a person who is subject to any trial or hearing by a Court or tribunal, disciplinary proceedings or administrative hearing which may result in some adverse impact on his rights, must be given the notice of the allegations levelled against him, and an adequate opportunity to defend same. A right to a fair hearing therefore implies, among others, a right to an impartial adjudication and aright to due process of law.

Speaking in a similar regard on the essence of fair hearing in relation to administrative bodies and article 23 of the Constitution, His Lordship **Date-Bah JSC** in the case of Mariam Awuni v. West African Examination Council [2003-4] SCGLR 471, opined thus:

> "*My interpretation of fairness within the context of article 23 would be that, in general, unless the circumstances make it inappropriate, for instance for reasons of practicality or of public interest or for any other cogently valid reason, it includes a principle that individuals affected by administrative decisions should be afforded an opportunity to "participate" in the decision in the sense of being given a chance to make representations on their own behalf of some kind, oral or written, to the decision-maker. Individuals affected or to be affected by administrative decisions obviously have an interest in influencing the outcome of the decision-making process. In general, it is fair that they should be afforded an opportunity to influence the decision. Given the variety, and the width of the continuum, of contexts in which administrative decisions are taken, however,*

there is need for flexibility in the ways that are to be worked out to enable individuals to influence decisions about themselves….Accordingly, a fair "hearing" does not necessarily connote an opportunity for the person affected to be heard orally. Written representations on his or her behalf may be sufficient, given the context. Also, the nature of the opportunity to be offered to an affected person to be heard may be influenced by public interest considerations and the requirements of efficient administration.

In a more general context, in **Paul Kofi Aboagye v. Ghana Commercial Bank**[2001-2002] SC GLR 797 at 804, Bamford Addo JSC, (as she then was) in pronouncing on fair hearing had this to say:

"Further the general notion of a fair hearing extends to the right of a person accused to have notice of the actual charge against him i.e. by serving him with charges and by giving him the opportunity to present his defence, based on evidence provided in support of the charge against him. As said by Lord Denning of administrative bodies in the case of *Abbot v. Sullivan* (1952) 1 KB 189.*"These bodies, however, which exercise a monopoly in the important sphere of human activity with the power of depriving a man of his lively hood must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence and any agreement or practices to the contrary would be invalid"".*

More recently, this Court, in a judgment dated 16th June, 2021 in Suit No.: J4/08/2021 entitled: **George Akpass Vrs Ghana Commercial Bank Ltd** at page 8 per Amegatcher JSC, restated these principles in relation to disciplinary proceedings in labour disputes as follows:

"To give effect to the aged-old principle of fair trial in labour matters, adjudication of labour disputes affecting misconduct of workplace staff before disciplinary committees should as nearly as possibly follow adjudication practices which promote procedural fairness such as natural justice. There must also be pre-hearing protocols which eliminate elements of surprises. Every effort must be

made to avoid 'ambush' or surprises likely to work against the interest of the staff under investigations..... Surprises, therefore in administrative justice should be a matter of concern to the court.

However, it must be noted that the right to fair hearing is a qualified right. Like all other fundamental human rights in the Constitution, the right to be heard is subject to the respect for the rights of others and the public interest.

Specifically, Article 12(2) of the Constitution states as follows:

> "(2) Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter ***but subject to respect for the rights and freedoms of others and for the public interest***."

The right to be heard must therefore be construed and given effect in a manner that does not undermine the public interest. It is in the public interest that in administrative or disciplinary hearings, as in this case, we do not insist, as a general rule, on strict compliance to a hearing that is akin to a formal court-room hearing in a civil or criminal trial. In administrative or disciplinary proceedings, a fair hearing does not necessarily imply an in-person or oral hearing. The nature of a hearing required to achieve procedural fairness always depends on matters of practicality, reasonableness and the public interest.

These exceptions were emphasized in the Mariam Awuni case (supra), wherein His Lordship Date-Baah JSC at page 542 reasoned that:

> "I agree with the learned trial judge that the respondent before this court breached the duty to act fairly and reasonably and that therefore its decision should be set aside. His remarks, however, suggest that he had in mind a formal hearing, with cross-examination, before the respondent could take a lawful decision on the appellants' case. I would require less, in the light of practicality and the public interest. I think that the appellants should have been given an opportunity to make

written representations in response to the allegation levelled against them, before the respondent took the decision to sanction the appellants. In view of the large number of candidates involved in schools examinations, it is probably unwise to over-judicialise (sic) the due process procedures for policing wrong-doing in relation to examinations, so long as the procedures in place lead to the respondent acting fairly and reasonably.".

Having regard to the preceding principles, we must evaluate the contentions of the Appellant in this Appeal and make a determination as to the veracity or otherwise of the Appellant's complaint about the evaluation of the evidence by the Court of Appeal.

The Appellant argues that the Respondent was given a fair hearing by the Disciplinary Committee prior to the summary dismissal and thus the termination was fair. However, the evidence on record is to the contrary. This is because, the evidence on record shows that, with the exception of a general statement made by the Respondent, in furtherance of an investigation by the Appellant, the Respondent was not given an opportunity to respond to any allegation of wrong doing attributed to him. Further, no notice of disciplinary proceedings was served on him and no invitation was extended to the Respondent to appear to be heard or respond in writing.

Moreover, the disciplinary proceedings of the Appellant are governed by the Collective Agreement (Junior Staff) which was tendered in at the trial as Exhibit 2 (see page 350 of the Record of Proceedings.).

It is instructive to note that per Article 9.01(C) of the Collective Agreement (Junior Staff), the standard of proof of an offence is proof beyond reasonable doubt. The said article 9.01(c) states as follows:

> **"***Disciplinary action shall be taken in accordance with the gravity of an offence, having been proved beyond reasonable doubt and only after according the Employee full rights of defence either orally or in writing*."

Therefore, from the evidence adduced at trial, the Court must satisfy itself of whether or not the Respondent was given a full right of defence or a fair hearing which will entail notice of the constitution of the Disciplinary Committee, notice of the allegations against the Respondent and an opportunity to be respond in writing or be heard orally in respect of the allegations levelled. The Court ought to be satisfied that the above procedural standards were met before proceeding to make a determination as to whether the nature and quality of the evidence before the Committee was one which reasonably met the contractual standard of establishing the offence or misconduct beyond reasonable doubt per the Appellant's own Collective Bargaining Agreement.

From the evidence adduced at the trial, it is an incontrovertible fact that the Respondent was suspended by the Appellant on 22nd September 2017. The suspension memo, which was tendered as Exhibit D may be found at page 258 of the Record of Appeal. Exhibit D read as follows:

> *"Following your involvement in the fuel stealing case on 20th September 2017 on the stockpile, you are by this memo informed to stay away from work until further notice from today 22nd September, 2017.*
>
> *This will enable you assist the Police in their investigations"*

It was whilst the Respondent was on suspension and by inference, away from work, that a Disciplinary Committee was alleged to have been formed to investigate the conduct of the Respondent.

There is no evidence on the record of when the Disciplinary Committee was set up by the Appellant. The Appellant claimed that on 26th September, 2017, the Respondent was verbally invited to appear before the Disciplinary Committee on 27th September, 2017 but that the Respondent failed to appear before the Committee. That the Committee therefore relied on an earlier statement given by the Respondent on 21st September, 2017 to determine the fate of the Respondent. The Appellant further contends that after the deliberation of the Committee, the Committee filed a report dated the same 27th September, 2017 in which it remarked as follows:

> *"Observation:*

The disciplinary Committee during sitting realized that Daniel McCarthy was actually involved in the theft scandal. His defense against the matter was seen to be false, baseless and misleading and he can no more be trusted in his future endeavors with the Company.

Recommendation:

It was therefore unanimously ruled by the committee that Daniel McCarthy be summarily dismissed with immediate effect subject to General Manager's approval."

It is to be emphasized that the Respondent denied being invited to a Disciplinary Committee hearing. The Appellant failed to lead evidence on when the Disciplinary Committee was constituted and whether the formation and membership of the Committee was communicated to the Respondent. Reading the Collective Bargaining Agreement as a whole, and in particular, articles 9, 10, 11 and 12 on Disciplinary Procedure, Grievance Procedure, Trade Dispute, Leaving the Service of the Company (including termination) respectively, an inference that the Appellant's Disciplinary Proceedings and Procedures are intended be formal processes, is compelling.

It is striking how the Respondent was interdicted formally through a memo, yet when it came to the hearing of the Disciplinary Committee, the Appellant decided to invite the Respondent verbally. The question is: was this verbal invitation given the Respondent in person or via phone call. Also, was the details of the offence or charges stated to the Respondent during this verbal invitation? Which officer of the Appellant or the Committee extended this verbal invitation? Who are the witnesses of the said verbal invitation? No evidence was offered at the trial by the Appellant in answer to these begging questions. Therefore, the assertion by the Appellant that the Respondent was invited on the 26th September, 2017 to appear before the Disciplinary Committee on 27th September, 2017 was not proven at trial. At best, the Appellant merely repeated the above assertion under oath. In the case of T.K. Serbeh & Co. Ltd. v. Mensah [2005-2006] SCGLR 341 at page 360, this Court speaking through His Lordship Date-Bah JSC stated that:

"For, however credible a witness may be, his bare affirmation on oath or the repetition of his averments in the witness box cannot constitute proof. This is trite

law: see Majolagbe v Lari (1959 GLR 190, especially at page 192. This proposition is applicable to even matter whose proof does not require corroboration as a matter of law."

In the circumstances we are satisfied that the Appellant failed to prove that the Respondent was invited to the hearing. We therefore conclude that the Appellant was not invited to the hearing of the Committee. Further, given our earlier conclusion that per the Collective Bargaining Agreement the disciplinary procedure must be formal, the failure of the Appellant to demonstrate from the record that the formal processes and procedures set out in its own Collective Bargaining Agreement were complied with is an indication that the Respondent was denied his right to due process including his right to be notified of the proceedings and heard in the proceedings or given an opportunity to be heard. We think that formal notices in this instance connotes written notices and more so if the notice is to satisfy the requirement of an indication of the allegations levelled against the Respondent. Having found that the Respondent was not invited to the Disciplinary Committee to be heard, we are satisfied that the Respondent was not given a fair hearing since fair hearing in the context of disciplinary hearing connotes being offered an opportunity to be heard in respect of allegations levelled against you. Notwithstanding the fact that issue was joined over whether or not there was a disciplinary hearing, properly so called, no record of the disciplinary proceedings was tendered by the Appellant.

Further, from the record, we are unable to find the evidentiary basis that may have informed the conclusion of the Disciplinary Committee in its report that the Respondent was "... *actually involved in the theft scandal.".* More still, what was the basis of the conclusion reached by the Disciplinary Committee that the "*[the Respondent's] defense against the matter was seen to be false, baseless and misleading and can no more be trusted in his future endeavors with the Company".*

To come to such character-damaging conclusions against a person, the evidence must support the conclusions reached. This is because, the termination of employment of a person based on allegations of criminal conduct has potential adverse effect on the job prospects of terminated employee. Therefore, an employer who seeks to terminate an

employee on alleged misconduct must know that the misconduct must be proven to justify the termination.

Section 15 of the Labour Act, 2003 (Act 651) on grounds for termination of employment provides thus:

> "A contract of employment may be terminated, (a) by mutual agreement between the employer and the worker; (b) by the worker on grounds of ill-treatment or sexual harassment; (c) by the employer on the death of the worker before the expiration of the period of employment; (d) by the employer if the worker is found on medical examination to be unfit for employment; (e) by the employer because of the inability of the worker to carry out his or her work due to (i) sickness or accident; or (ii) the incompetence of the worker; or (iii) **proven misconduct of the worker.**

It is to be noted that subject to specific exceptions under law, employment disputes such as this are civil causes of action and consequently, the standard of proof of any facts in issue is one of a proof on a preponderance of probabilities or balance of probabilities under the Evidence Act. This notwithstanding, the Appellant in their Collective Bargaining Agreement at Article 9.01 provided that disciplinary action shall only be taken in accordance with the gravity of the offence having been **proved beyond reasonable doubt**.

Proof beyond reasonable doubt requires a high degree of proof than the standard required by proof on a balance or preponderance of probabilities. Proof beyond a reasonable doubt is the standard of proof applicable to criminal cases and is codified in various sections of the Evidence Act including sections 11 as follows:

> 11. Burden of producing evidence defined
>
> (1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.

(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

Proof beyond a reasonable doubt, in this case, does not mean there should be no doubt whatsoever in the case presented by the Appellant against the Respondent. It simply means at the end of the disciplinary hearing; the Appellant must proof every material element of the allegation that the Respondent stole or was involved in the theft of the fuel and show that the defense or explanations of the Respondent to his innocence are unreasonable.

In Miller v Minister of Pensions [1947] 2 AllER 372 at 373, Denning J (as he then was) speaking to the standard of proof beyond reasonable doubt opined that:

> '"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted
> fanciful possibilities to deflect the course of justice."

The eminent jurist further explained the expression "proof beyond reasonable doubt" as follows:

> "If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence
> 'of course, it is possible, but not in the least probable, 'the case is proved beyond reasonable doubt."

What is to be noted is that while proof beyond reasonable doubt does not mean proof beyond every shadow of doubt, or proof beyond every possibility, `proof beyond reasonable doubt' is far above proof on the
balance of probabilities.

In **Oteng v The State [1966] GLR 352at** 354 this Court expressed the view that:

> "One significant respect in which our criminal law differs from our civil law is that while in civil law a plaintiff may win on a balance of probabilities, in a criminal case the prosecution cannot obtain a conviction upon mere probabilities."

From the foregoing, it is obvious that the Appellant, having chosen to determine what would have been civil contractual workplace disputes using a standard of proof that is ordinarily applicable to criminal cases, has imposed on itself a higher burden of proof and for that matter a higher evidentiary burden in order to justify a dismissal of the Respondent on the basis of the allegations or facts in issue.

We have therefore carefully evaluated the evidence on record and are unable to find any direct or even indirect evidence that the Respondent engaged in the alleged siphoning of the fuel beyond the mere repetition of the allegation in the witness statement of the Appellant's witness at pages 182-187 of the Record of Appeal. These allegations stood untested by an oral or written statement of the Respondent in answer, since the Respondent was not afforded an opportunity to influence the disciplinary proceedings by bringing his version on the allegations to the table.

Besides, the evidence on the record shows that the Respondent was seen about 70 meters away from the place where the fuel was been siphoned and that there was a stockpile of laterite between where the Respondent stood and the point at which the fuel was being siphoned. Indeed, the Respondent in a statement dated 21st September 2017 vehemently denies any knowledge or involvement with those who were sighted stealing the fuel and expressed surprise at an attempt to incriminate him in the incident by handing him over to the Police. He must have maintained this same denial during investigations by the police. Yet, he was never challenged on his denials of complicity. Do these facts and circumstances lead to a reasonable conclusion or an irresistible inference that the Respondent was privy to and/or an accomplice of the two men seen by the Engineer engaged in the act of siphoning the fuel. We can neither reasonably reach such a conclusion from the facts in issue nor draw such an irresistible inference from the circumstances as the same is not supported by the evidence on record. These assessments coupled with the apparent inconsistencies in the witness statements of the

Appellant, which were rightly noted by the Court of Appeal at page 496 of the Record of Appeal shows the lack of veracity and unreliability of the allegations levelled against the Respondent.

Also, one cannot lose sight of the Exhibit C, a Police report, which may be found at page 256-257 of the Record of Appeal, in which the Police concluded that the Appellant was not able to substantiate its case and there is no evidence to suggest that the Respondent was in any way connected to the crime.

The entire evidence in chief of the only eyewitness is as follows:

1. Lam Benjamin Kojo Quadzie and I work as the Electrical Engineer of C Bauxite Company Limited
2. That sometime in 2017, I was returning from Takoradi to my office and on aching near the stock pile I saw one of our dozers with some people standing behind it.
3. That I parked my vehicle and got down and went to the stock pile. I asked him to move his machine to one side so I show him some work to do.
4. That I then saw people there with gallons. I chased them and they left the and run away and I realized that the gallons had diesel in them. Attached is the picture of the gallons and marked as Exhibit
5. That I then took pictures, brought the fuel in the gallons to my office and re the matter to the company.
6. That I saw the Plaintiff at where the persons I chased and they run leaving the gallons with diesel there."

The only material testimony of the witness under cross examination is as follows:

"Q: What else do you know?

A: My lord on the day in question I had gone to buy food from Takoradi coming back to the workplace. When I got to the big traffic I saw that the plaintiff's vehicle had been parked with the frontage facing the bridge when saw that, noticed that some people were standing behind the vehicle. I parked my vehicle and came out. I saw the plaintiff. Because of what I had seen I ordered them to move the vehicle. I saw two persons carrying gallons. I chased them and when we got to the stockpile they left the gallons behind. I took pictures."

Both in his evidence in chief and under cross examination, the material evidence of the Appellant's star witness is that he saw some people with gallons who he chased and that these people were at the same place where the Respondent was. In fact, it is after these people fled leaving the gallons that the witness noticed the gallons contained diesel. The witness therefore does not even allege seeing these people siphoning the diesel. He does not even allege that the Respondent was one of the people with the gallons. On the other hand, the Respondent maintained throughout that even though he was in the proximity of the event he was about 70 meters away from the place where the men who fled and left the gallons were and in any event that there was a stockpile of laterite between where he stood and the direction of these culprits. Significantly, the Respondent's testimony was not contradicted even under cross examination. On the totality of the evidence led by the Appellant, it failed to meet the threshold that will enable a reasonable tribunal conclude that the allegation of theft against the Respondent is more probable and let alone that it was proven beyond a reasonable doubt in conformity with the Appellant's own Collective Bargaining Agreement.

In the premises, we affirm the finding and conclusion of the Court of Appeal that the Appellant failed to prove that its termination of the Respondent's employment was lawful. We therefore find no reason to interfere with the judgement of the Court of Appeal. Accordingly, ground one (1) of the appeal is dismissed and the conclusions of the Court of Appeal are hereby affirmed.

We shall now consider the additional ground of Appeal, where the Appellant contends that the amount of damages awarded by the Court of Appeal was unreasonable.
The principle governing the award of damages in cases where an employee was wrongly dismissed was succinctly underscored by this Court in the case of **Klah v. Phoenix Insurance Ltd [2012] 2 SCGLR 1139, where Akoto-Bamfo JSC opined thus:**

> "*Where an employer wrongfully dismisses an employee as in the instant case, which was the finding made by the trial Judge and rightly affirmed by the Court of*

Appeal; the measure of damages is calculated largely on the basis of the principles applicable to actions of breach of contract as enunciated in Hadley v Baxendale 1854 9 Ex .341 and 354-355. "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such of breach of contract should be such as may fairly and reasonably be considered as either arising naturally i.e., in the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it."

Thus, the principle of law governing the award of damages in case of breach of contract is to place the innocent party not in default, as far as money can do in the position, he would have been but for the breach of the contract. This position was reiterated by this Court in a judgment dated 14th November, 2012 in the case of **Muller v. Home Finance Company Ltd**.**Civil Appeal No. J4/1/ 2012.**

Accordingly, where an employee is wrongfully terminated, or he is otherwise dismissed, the law is that such an employee is entitled to be awarded damages to place him in the position he would have been but for the wrongful dismissal. This therefore implies that a contract of employment is not for life. It is terminable at any point by the employer. However, where such a termination is unlawful, the employee is entitled to damages that are reasonably sufficient to place him in the position he would have been if the contract had not been breached.

In the Klah Case supra, this Court observed as follows:

"*This development does not detract from the essential nature of a contract of employment which is clearly determinable and does not therefore give the wronged party the right to be paid salary until his retirement, the exception being contracts affected by Public Law Provisions as demonstrated by the Ghana Cocoa Marketing Board V. Agbettor line of cases. ([1984-86] 1GLR 122.)"*

It is also noteworthy that when an employee is wrongfully terminated, the employee has a duty to mitigate his loss by looking for alternative employment. Thus, the law requires that the employee is to take reasonable steps if possible, to reduce the loss incurred by him as a result of the wrongful dismissal. In effect, where the employee could find alternative employment by the exercise of reasonable diligence, the amount of damages to be awarded to him would take into account such a duty of the employee to have mitigated his losses. The duty to mitigate is to prevent an employee from recovering all losses incurred by him as a result of the breach, but only those which could have reasonably been anticipated or foreseen by the Defendant as likely to result from the breach of the contract. In reiterating the duty to mitigate, the venerable Date-Bah JSC in Ashun v. Accra Brewery Ltd [2009] SCGLR 81 noted thus:

> *"Nevertheless, the duty of mitigation of damages devolves on an employee. Accordingly, he or she has the duty to take steps to find alternative employment. In principle then, in the absence of any contrary statutory or contractual provision, the measure of damages in general damages for wrongful termination of employment in the common law of Ghana is compensation, based on the employee's 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, determined by the court, after which he or she should have found alternative employment. This quantum is, of course, subject to the duty of mitigation of damages. These principles outlined above, however, hold true in relation to only contracts not affected by public law provisions. Ghana Cocoa Marketing Board v Agbettor & Ors [1984-86] 1 GLR 122 illustrates the impact of public law provisions on contracts of employment."*

In **Kobi v. Ghana Manganese Co. Ltd[2007-2008] SCGLR771 at 772,**this Court speaking through Atuguba JSC held that in assessing the amount of damages to be awarded for wrongful dismissal, all the circumstance of the case must be taken into account.

The contention of the Appellant in this Appeal is that the Court of Appeal's award of damages of 18 months' Salary against it was unreasonable and excessive, and they therefore pray this Honourable Court for same to be set aside. The Appellant contends that the Respondent had a duty to mitigate his losses by finding alternative employment to that effect. They also contend that judicial notice should be taken of the fact that Takoradi is a mining town and accordingly, finding alternative employment should not be difficult.

We are unable to accede to this argument by Counsel for the Appellant. Indeed, even though it may be a fact that Takoradi is a mining town, there is no fact so notorious to ground our finding that there is plenteous of employment in the said region. It is a notorious fact in this country that the issue of unemployment is so rampant that no region is left out. Accordingly, we are unable to take judicial notice of this invitation by Appellant. That being the case, it was incumbent of the Appellant to lead evidence to first prove that there is abundance of employment in the region, and second that the Respondent has failed to takes steps to secure such alternative employment. In the absence of such evidence, we are satisfied that the Appellant failed to demonstrate how the Respondent failed to mitigate his damages and how the award of the damage is unreasonable. Accordingly, the proposition by Ollenu J that where a party makes an averment, capable of proof in some positive way, he must lead cogent evidence to substantiate same, is relevant here. (See the case of Majolagbe v. Larbi [1959] GLR 190.

In the circumstance, we find no unreasonableness with the findings and judgment of the Court of Appeal. The judgment of the Court of Appeal is affirmed in its entirety and the appeal is therefore dismissed as without merits. We award nominal cost of GH¢ 5,000.00 to the Respondents.

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

DANIEL ARTHUR ESQ. FOR THE PLAINTIFF/APPELLANT/RESPONDENT.

WEIQIANG YANG ESQ. FOR THE DEFENDANT/RESPONDENT/APPELLANT.