



REPUBLIC OF MALAWI
IN THE INDUSTRIAL RELATIONS COURT
PRINCIPAL REGISTRY
MATTER NO. IRC PR 338 OF 2013

BETWEEN:

DAVIE MISINKHU.....APPLICANT

-and-

RAB PROCESSORS LIMITED..... RESPONDENT

CORUM: PETER M.E KANDULU, AR

Kamunga, Counsel for the Applicant

Lungu, Counsel for the Respondent

Msimuko, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

1. This matter was commenced on the 16th of July 2013 claiming damages for unlawful and unfair termination of employment, severance pay and notice pay.
2. After a full hearing of the matter, the court delivered its Judgement on the 1st day of September 2021. The court found the respondent liable for dismissing the applicant unfairly hence the court awarded compensation for unfair dismissal and severance pay both to be assessed on a date to be fixed by the court.
3. Trial proceedings on the assessment of damages were concluded on the 16th of September 2022 and both counsels for the applicant and respondent were given 14 days to file their final written submission.
4. At the expiration of 14 working days, the court had only received submission by counsel for the applicant. The respondent's counsel did not file their final written submissions as ordered by the court.
5. The court, therefore, proceeded to write its Judgement based on the evidence heard in court supported by submissions by one counsel for the applicant.

Issues for Determination

6. What is the appropriate quantum of damages of compensation to be awarded to the applicant?

Evidence in Court

7. The Applicant confirmed and adopted his written witness statement essential evidence as presented in the written witness statement is reproduced in the preceding paragraphs.
8. The applicant stated that he worked for Rab Processors Limited as a security guard. He worked from the 22nd day of October and he was dismissed on the 25th day of April. His salary of at the time of termination of employment was K15, 999.99 per month in April. The current salary at the same security guard post is K67, 000.00 following salary increments over the years.
9. Alternatively, calculations can be based on the inflation over the years on the salary K15, 999.99. He also stated that he claims 10% of the company's contribution as a benefit towards his pension which is K1, 599. 00 per month or any amount as computable based on the inflation calculations plus interest.

10. Currently, the total monthly earnings at Rab Processors Limited as of 1st October 2021 for an employee working in the same position as a security guard is K67, 000.00.
11. He stated that he now claims to be paid damages for unlawful and unfair termination of employment which must be calculated based on the current total monthly earnings in the sum of K67, 000.00;
12. He also claim to be paid severance allowance for the 5 years that he worked for the Respondent;
13. He told the court that he worked for the Respondent for 5 years and ought to be paid compensation of up to the minimum retirement age which is 60 years; currently, he is 39 years old.
14. ,He told the court that he have nor been able to secure alternative employment since the date of his dismissal even though he had been trying and continue to try to find alternative employment;
15. Considering his age and his education qualification as a Junior Certificate, it is very unlikely that he will secure employment in any immediate future unless he upgrades his qualifications.
16. Taking into account his current state of affairs as a husband, a father of 2 children and the education period of study as well as the cost of education these days, he have little or no chances to upgrade his qualifications.
17. Given the circumstances surrounding his dismissal and the security industry, he have been unable to secure alternative employment despite vigorous efforts.
18. He have since the date of his dismissal applied for several jobs such as the High Court of Malawi in 2021, the post of security guard at Goal Malawi in 2014, the post of security guard at Victoria Hotels in Blantyre in 2016. He exhibited copies of the application letters which were marked EXA 1, EXA 2 and EXA 3.
19. He stated that the chances of long service with the Respondents were eliminated due to the termination of the employment. He would have worked with the Respondent up to retirement age had this not happened. He was a very hard-working employee and chances of being promoted to high positions were very likely.
20. He, therefore, claims to be paid;
 - a) Damages for unlawful and unfair termination of employment;

- b) Damages for unfair labour practices;
 - c) Severance pay for 5 years plus interest thereon;
 - d) 10% employer pension contribution from the year 2008 to 2013
21. He stated that the calculations of his compensation should factor in inflation over the years as the Respondent has been using the funds on their business plus interest thereon.
 22. In cross Examination; he told the court that the current salary for a security guard is K67, 000.00 and that he had found out about the same from his colleagues. He also told the court that he was only partly paid his pension benefits. He also told the court that the retirement age for the Respondent is 65 years. He also told the court that the conditions of service provide that the retirement age is 50. He also told the court that he had been receiving the sum of K35, 000.00 since November 2020.
 23. In re-examination; he told the court that he had been doing piece works which do end at any time. He also told the court that he found out about the current salary of K67, 000.00 from his colleagues.
 24. The Defence paraded three witnesses to make their case;
 25. DW1 was Roy Chirwa, the Defendant's General Manager-Human Resources. He told the court that he work also as a Church Secretary for Zambezi Church as such he was privy to church information on all staff employed by the church.
 26. He told the court that the applicant was employed as a Security Guard for Zambezi Evangelical Church as a Permanent employee and is able to be given loans. He tendered a copy of a pay slip which was marked EXR 1.
 27. He told the court that the applicant is able to express himself in English and as such he can competently be able to be employed in most of the organisations in Malawi as a Security Guard. The current salary of a security guard at Rab Process is MK50, 000.00. He tendered copies of pay slips of salary of current security guards at Rab Processors.
 28. In the Cross-examination, he told the court that the total earnings at Rab currently at the level of the Applicant are K78, 000.00. He also told the court that overtime will still be on the payslip and could have still been enjoyed by the Applicant. He also told the court that the meal allowance and pension could have been enjoyed as well. He confirmed that overtime was present on all the pay slips that were tendered

- into evidence. He also told the court that overtime is an ordinary package at Rab Processors;
29. In re-examination he told the court that K2, 000.00 is deducted towards a meal.
30. DW2 was Lucius Paul; He adopted his written witness statement into evidence. He stated that he works as a security Supervisor for the respondent. He stated that he personally knows the applicant and worked as a guard at the ESCOM power plant from around 2015 to 2017. He met him several times at the ESCOM power plant and he observed that he was discharging the duties of a guard. He was doing business selling cooking oil and he continued to do the same after his dismissal.
31. In cross-examination he told the court that he works at Rab Processors Limited and has worked for the company since 2004. He also told the court that he has never worked at ESCOM before. He also told the court that he had never seen any employment agreement between ESCOM and the Applicant. He also told the court that he had not seen pay slips from ESCOM. He also told the court that no every person that is found at ESCOM premises is an employee of ESCOM.
32. He also told the court that he did not have any knowledge of any certificate of business belonging to the Applicant. He admitted before the court that he did not have anything to show the Applicant had a business. He also admitted to have not seen any business account for the business he alleges that the Applicant has. He also told the court that he had not seen any business books and further admitted that a business can make profits and losses and that he had no idea whether profits or losses were being made.
33. In re-examination; he told the court that he used to visit ESCOM at their power plant. He further told the court that he saw the Applicant at the gate.
34. DW3 was Harry Benito Makina. He told the court that he stays in Mount Pleasant and works with Pamodzi Consulting Limited. He told the court that he is a member of Ndirande Zambezi Church and that he is in the executive committee of the church's building department. He also told the court that he is a church elder and vice secretary of the committee. He tendered into evidence a letter of employment between the applicant and Zambezi Evangelical Church showing a 2-year employment contract with Zambezi Evangelical Church and the same was marked EXR3.

35. In cross-examination; he told the court that he became aware of the case through Mr. Chirwa; He told the court that the said Mr. Chirwa approached the church to get the letter. He also told the court that the Applicant was still working but his contract expires in October, 2022 (just over a month from now).

Burden of proof

36. On having so pleaded, the onus is on the applicant to prove his claims as the burden of proof rests upon the party, who substantially asserts the affirmative of the issue *Joseph Constantine Steamship Line –vs.- Imperial Smelting Corporation Ltd* (1942) AC 154.

37. The burden is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it. *B. Sacranie v. ESCOM, HC/PR* Civil Cause Number 717 of 1991.

Standard of Proof

38. The standard required in civil cases is generally expressed as proof on a balance of probabilities *Miller v. Minister of Pensions* 1947] All ER 372. It follows in this matter that the Applicant have a burden to prove on the balance of probabilities the claims against the respondent in his pleadings.

39. The court is very alive and aware that this assessment of damages was ordered by the court to assess unfair dismissal occasioned to the applicant by the respondent. It is incumbent upon the applicant to discharge the said burden of proof on the balance of probabilities to convince this court to the correct quantum to be awarded to him based on the law only.

40. Counsel for the applicant had submitted final written submission which the court shall use in order to properly determine the correct amount to award the applicant. As earlier stated, the respondent did not file their final written submission. The court has only one version of submission by the applicant. The court is aware that the issue of liability was already settled by the court of the Hon Chairperson Kamowa and her panellist. The only issue in this matter is on the head as ordered by the court on compensation for unfair dismissal and severance pay.

The Applicable Law

41. The law governing these matters can be summarized as follows: Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation.
42. In *Chilongwe v Chilembwe Lodge* [2008] MWIRC 17, the Court noted that;
“Remuneration means the wage or salary and any additional benefits, allowances or emoluments whatsoever payable directly or indirectly, whether in cash or kind, by the employer to the employee and arising out of the employee’s employment. On the other hand: Wages mean all earnings, however, designated or calculated capable of being expressed in terms of money and fixed by mutual agreement or by law, which is payable by virtue of a written or unwritten contract of employment by an employer to an employee for work done or to be done or for services rendered or to be rendered.”
43. It should be noted that the Labour Relations Act and the Employment Act, of 2000 do not define salary or pay. This notwithstanding, these words do appear now and again in the said Acts. The General Interpretation Act, does not define salary or pay. The only conclusion that one can draw from this is that salary and pay to bear the extended meaning of remuneration and wages.
44. In the case of *Tourism Development and Tourism Company and another v Mhango* [2008] MLLR 319 it was stated that unfair dismissal is a statutory wrong and in assessing compensation a court has wide discretion. That discretion must be exercised judicially and in accordance with principles.
45. Section 63(4) of the Employment Act further provides that an award of compensation shall be such amount as the court considers just and equitable in the circumstance having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.
46. All in all, the award of damages must reflect the principles of fair labour practices. Counsel for the applicant has submitted that fairness will only be achieved if the compensation will place the Applicant in a position he would have been in if there was no unfair dismissal. Counsel cited the case of *Jane Matanga vs- Old Mutual*, Appeal Case No. 4 of 2012.

47. Counsel for the applicant has further argued that in order to achieve what he submitted in paragraph 45, the Applicant must be awarded both immediate and future losses subject to the rules governing mitigation of losses.
48. According to the case of *Chiume vs- S.S Rent a Car*, IRC Matter Number 149 of 2000 (unreported), to arrive at immediate losses, the assessment is from the date of dismissal to the date of Judgment of the court. If the Applicant was re-employed soon after dismissal this factor will be taken into account by assessing when he got employed elsewhere and what his pay was. And the assessment is based on the pay per month that he would have earned during that period multiplied by the number of months in that period.
49. In this case the court awarded the Applicant the sum equivalent to the monthly salary for the entire period of his unemployment.
50. The Court must be guided by the following factors when awarding damages of unfair dismissal.
51. Whether Plaintiff to mitigate the losses. *Malawi Environmental Endowment Trust vs- Kalowekamo (2008)* MLLR 237. The manner of an employee's dismissal, his legitimate expectation and inflation since the termination of employment. See; *Kachinjika vs- Portland Cement (above)*
52. His Lordship **Justice D.F. Mwaungulu** in *Jane Matanga vs- Old Mutual*, Appeal Case No. 04 of 2012 added that the court should also calculate interest at the bank's lending rate for the unpaid wages in the following words;
- "....Section 63(4) talks about compensation and loss on principles of justice and equity'. The compensation comports putting an injured party in the same position as where there was no injury. It must follow that there will be no compensation based on justice and equity if the employee is not paid interest on unpaid wages. If a court cannot impose interest on unpaid wages under the Employment Act, it will be acting aliunde section 63(1) and 61(4) of the employment Act which requires the court to require compensation on the employee's loss on just and equitable principles..... As to the rate to apply, I think that must be the prime facie rate of Malawi, the rate at which banks lend their credit worthy customer..."*

What amount of compensation for unfair dismissal will be just and equitable in this case?

53. It is common knowledge that the purpose of awarding damages is to place the person in a position he would have been if there was no loss arising from the breach of contract or unfair dismissal in the present case, putting the Applicant herein back to the position he would have been if he was not unfairly dismissed.
54. It is also well settled that the Applicant can only be awarded the full amount of loss if he shows that he tried to mitigate the loss.

Did the Applicant mitigate the loss?

55. According to the applicant's lawyer, since his dismissal he has made several applications to secure alternative permanent employment but to no avail. The Applicant tendered into evidence 3 application letters that he wrote to the High Court of Malawi, Goal Malawi and Victoria Hotel applying for a job which was not successful.
56. The Applicant further told the court that he had on several occasions been casually engaged to do piece works, locally known as "Ganyu" but never permanent employment as he was at the Respondent company as such his status in as far as employment was greatly altered by the dismissal herein.
57. It is abundantly clear that the Applicant discharged his duty to mitigate the loss, and thus he is entitled to get the full amount of loss arising from the breach or unfair dismissal herein.

Has the Applicant been able to secure alternative employment and/or a reliable source of income as it was before he was unfairly dismissed?

58. The employment contract expires in October, 2022, just over a month from now? Further, the Respondent's witnesses attempted without being successful to downplay the struggle for permanent employment and the crippled financial status that the Applicant was going through. Mr. Lucius Paul who testified as DW2 for the Respondent alleged that he personally knew that the Applicant worked for ESCOM and that the Applicant was doing business of selling cooking oil.
59. However, in cross-examination it transpired that the witness could not sustain the allegations that he had made in his written witness statement, the witness admitted before the court that by merely seeing a person at ESCOM premises one cannot just

- assume that the person is employed by ESCOM, he admitted to have not seen any employment agreement between ESCOM and the Applicant.
60. With regards to the allegations made by DW2 that the Applicant was engaged in the business of selling cooking oil, the witness in cross-examination admitted that he had not seen any business certificate to show that the Applicant was indeed engaged in business, he admitted to have not come across any business books belonging to the alleged business operated by the Applicant and that he had no idea, of whether the business he could not prove existed, was making any profits or losses.
61. Counsel for the applicant argued that the evidence from DW3, Harry Benito, who told the court that the Applicant was running on a 2-year contract with Zambezi Evangelical Church and was being terminated in October, 2022 cemented the Applicant's testimony that he is struggling with employment since the termination herein.
62. Counsel further argued that the Applicant was dismissed in 2013, he had been applying for jobs since the said 2013 as the evidence on the record will show but to no avail, **the 2-year contract which began in 2020 and expires in one month time can surely** not be relied upon by the Respondent to lead the court to believe that the Applicant has not suffered any loss.
63. From what is gathered in court during evidence taking, the court is of the view that the applicant has managed to discharge the burden placed on him by the law on the balance of probabilities.
64. The applicant mitigated the loss of his job immediately when he got dismissed by the respondent but he had been unsuccessful. He failed to secure permanent employment similar to what he had at the respondent's company. The applicant was only able to get a renewable contract in November 2020 from Zambezi Evangelical Church. This was revealed during the trial when the respondent's representative was able to show the court proof that the applicant was on a renewable contract with the said church.
65. The applicant had remained unemployed for 7 years since he got dismissed from 2013 to 2020. The court believes this evidence that he was working with Zambezi Evangelical Church unlike the allegations levelled against the applicant that he was working with ESCOM and was selling cooking oil when evidence supporting that

accession was not tendered in court. The court shall take it that the applicant had remained unemployed for 7 years from 2013 to 2020.

What salary should be used to calculate the amount of damages?

66. Counsel for the Applicant has argued in his final submission that the applicant had told the court that the current total earnings for a person working on the grade that he was with the Respondent are K67, 000.00 as was the information that he found out when he asked around his colleagues who were still in the employ of the Respondent. This is contrary to what the respondent's representative had informed the court. The respondent representative has exhibited pay slips that the salary for the position of the applicant at the moment is MK50, 000.00.
67. Counsel for the applicant had argued that during the cross-examination of the respondent representative it transpired that the total earnings for a person working on the Applicant's grade were MK 50, 000 as a salary and 28, 000.00 as overtime allowance as testified by Roy Chirwa the Respondent's General Human Resources Manager who further during cross-examination told the court that overtime, pension and meal allowance would still be enjoyed by the Applicant. He has submitted that the same should be the basis for calculating compensation for the applicant.
68. It is my view that overtime allowances are not an entitlement or privilege accorded to employees. Employees get overtime allowance pay which they have worked for. It is not automatic that each employee would be entitled to overtime pay by the mere fact that the employee is a security guard. For the sake of fairness and equity as pleaded by the applicant, the court shall use MK50, 000 as the basis for calculating compensation. This takes into consideration that MK50, 000.00 is statutory which every employer is supposed to implement when preparing salaries for their employees.

Is the Applicant entitled to Pension?

69. The Applicant has claimed 10% employer pension contributions from 2008 to 2013 having partly been paid pension being his own contributions;
70. Counsel has argued that the said claim of pension was not disputed by the Respondent as such the court should award the applicant. Pension is a statutory obligation that each employee must be placed on a pension. Since the respondent did not dispute the claim by the applicant to be paid his pension, especially the

employer's contribution from 2008 to 2013. The court shall award 10 % employers pension contribution to the applicant.

Is the Applicant entitled to Severance Pay?

71. The Applicant had worked for the Respondent for Five (5) years before his dismissal. He is entitled to severance allowance pay. The applicant is entitled to 2 weeks' wages for each completed year he had worked for the respondent.

Is the Applicant entitled to Damages for unfair labour practices?

72. Counsel for the applicant has submitted that the applicant is entitled to damages for unfair labour practices the same being form of exemplary damages **Christopher Makileni v Attorney General (Office of the President and Cabinet) Matter Number IRC 55 of 2015.**

73. The court disagreed with the applicant's prayer that he should be paid damages for unfair labour practices. The reasons were, the same was not pleaded for in IRC Form 1. The order of the court was very clear on what the applicant was awarded. He was awarded damages for unfair dismissal and severance pay, the applicant shall not be allowed to bring in new pleadings and evidence during trial for assessment of damages. The court, therefore shall not award damages for unfair labour practices as the same was not ordered to be paid by the court.

Damages for unlawful and unfair termination of employment

74. The Applicant is entitled to the loss of earnings from the date of the dismissal to November 2020

75. Calculation based on the Current Salary of K50, 000.00 as testified by Roy Chirwa the Respondent's Human Resources Manager who further during cross-examination told the court that this is the current salary his colleagues are receiving at the moment.

76. Date of dismissal April 2013 to ate of Judgment which is November 2020

$$50, 000.00 \times 91 \text{ months} = \underline{\underline{\mathbf{K4, 550,000.00}}}$$

Severance Pay

77. FIRST SCHEDULE s. 35 (1) PART I SEVERANCE ALLOWANCE

Length of Service

Not less than one year, but not exceeding five years

Severance Allowance

Two weeks' wages for each completed year of service up to and including the f.fth year.

78. The law is clear that severance is payable at the time of termination of employment as per Section 35(1) of the Employment Act and where the same has been paid late then interest has to be faced in to make good of the deprivation from use of the month *Mathanga v Old Mutual Malawi Limited Appeal Case No. 04 cf 2012 (High Court) (unreported)*.

79. Severance will thus be calculated as follows (The Applicant worked for 5 years)

$$\begin{aligned} & \text{K } 25,000 \text{ (2 weeks wages) X 5 years} \\ & = \text{K} \underline{\underline{125,000.00}} \end{aligned}$$

10 % employer's pension contribution

80. K50, 000.00 salary X 10% Employer contribution ÷100 = K5, 000.00 (employer contribution/month) X 60 months (5 years) = K300, 000.00

81. The court awards the applicant the following;

a) Damages for unfair dismissal	K4, 500,000.00
b) Severance Pay (Plus interest)	K 300, 000.00
c) Withheld employer pension contribution	K 125, 000.00
d) TOTAL	<u>K4, 925, 000.00</u>

82. Considering the effects of devaluation and loss of Malawi kwacha over the years from 2013 to 2020. It will only be prudent that the total awards should be boosted with **50%** X 4, 925, 000.00 will give us **MK2, 462, 500.00**.

83. I now award the applicant the total sum of **MK7, 387, 500.00** as damages for unfair dismissal, pension contribution and severance pay as awarded by the court.

84. Payment awarded to the applicant is to be effected within 14 days from the date of service of this order.

85. Any party dissatisfied with this order, have the right to seek review of this order before the Hon Chairperson or Deputy Chairperson within 30 days.

86. Delivered in chambers this 10th day of October, 2022 at Blantyre.

PETER M.E KANDULU
ASSISTANT REGISTRAR

