



REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 220 OF 2018

**BETWEEN:**

ENOCK WHAYO.....CLAIMANT

**AND**

FOOTBALL ASSOCIATION OF MALAWI.....DEFENDANT

CORAM: **WYSON CHAMDIMBA NKHATA (AR)**

Mr. Nthewa- of Counsel for the Claimant

Mr. Mbale- of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

*INTRODUCTION*

The claimant was at all material times a General Secretary for Nchalo United Football Club. The defendant is an association involved in administration and regulation of football in Malawi. Through a writ of summons issued on 7<sup>th</sup> August, 2018, the claimant commenced these proceedings against the defendant claiming damages for defamation, loss of opportunity, career and earnings in football activities, discriminatory treatment, an unconditional apology, reversal and setting aside of the decision and the subsequent penalties and costs of this action. The Statement of Case indicates that the claimant was aggrieved by the defendant's allegations that there were attempted match fixing involving referees and officials from Nchalo United Football Club with respect to a match between Nchalo United Football Club and Chitipa United Football which led to disciplinary hearing from which he was found guilty. The defendant having failed to attend mediation before Justice Chirwa, the defence was struck out and judgment was entered for the claimant. The matter comes before this court for assessment of damages.

## *EVIDENCE*

### *The Claimant's case*

The claimant was the sole witness for his case. Through the witness statement which he adopted, he testifies that he was a General Secretary for Nchalo United Football Club prior to 2017. On 13<sup>th</sup> July, 2017 there was a Carlsberg Cup Round 32 football match between the said Nchalo Football Club and Chitipa Football Club in Mzuzu. The Defendant alleged that there was attempted match fixing involving five referees and officials from Nchalo United Football Club. Following the said allegation, the defendant called for disciplinary hearing against the officials from Nchalo United Football Club and the five referees alleged to have been involved.

He points out that the said hearing had been adjourned on several occasions to specific dates and he was availing himself to such hearings. However, the last adjournment had no specific date and the Defendant set 3<sup>rd</sup> February, 2018 as a date for Disciplinary Hearing through a letter dated 24<sup>th</sup> January, 2018. He exhibits the letter marked "EW1". He states that he was only informed of the said date on the very same day and he could not travel to Chiwembe in Blantyre at Mpira House to attend the said meeting. On the said date, the Defendant proceeded with the hearing and made a finding that he was guilty of attempted match fixing and he was banned from taking part in any stadium football related activity for 36 months with effect from 13<sup>th</sup> July, 2017 and he was further banned from entering any stadium in Malawi for 10 months with the effect from 8<sup>th</sup> February, 2018. He exhibits the letter marked "EW2". He further testifies that the decision by the Defendant is wrong against the weight of their own findings at the disciplinary hearing. Further, he is of the view that the decision was unreasonable and against the basic rules of nature justice.

The claimant further testifies that the said amounted to defamation as both the allegation and penalties are not only false but also misleading, unsubstantiated and aimed at tarnishing his image in the eyes of right thinking members of the society. As a result of the Defendant's unlawful and unreasonable decision which amounted to defamation, he suffered injury to feelings, he was grossly embarrassed, ridiculed, humiliated and suffered damage to his reputation, character and status in the society as a General Secretary. Further, the publication of the Defendant's unreasonable and unlawful decision to ban him was published in a newspaper which was widely circulated and read by many people including my relatives, friends and colleagues who inquired from him as to really what happened and he had trouble to explain his innocence from people who knew him.

Further, the defendant's decision to ban him from taking part in any football related activity for 36 months and a further ban from entering any stadium in Malawi for 10 months tarnished his image in football fraternity and that he consequently suffered loss of opportunities or privileges associated with the position

of a General Secretary for Nchalo Football Club such that he could no longer pursue any ambition to contest for the position of General Secretary for Football Association of Malawi and Super League of Malawi which could have exposed him and increased his income and enjoy attendant benefits and/or privileges.

In addition, the Defendant's unreasonable and unlawful decision led to the loss of his distinguished career as a Football Administrator which he built through hard work for a number of years. The damage which he suffered is irreparable such that it would be difficult to secure a lucrative position equivalent to his previous position in the football fraternity. He used to earn the sum of K40,000.00 monthly and travel allowances for being a General Secretary for the Nchalo United Football Club and that as a result of the Defendant's unreasonable and unlawful decision he lost such earnings since 2018 to date.

In cross-examination, he said this was his first position as secretary. He stated that he did not bring the newspaper as part of his evidence. He stated that paragraph 14 of his statement is just an ambition. He averred that when applying for a job it is not a guarantee that one will be taken but rather it is up to the employer to choose the best candidate. He stated that he did not bring evidence of payslip. He stated that he was not the only person who was suspended by the defendant.

#### *The Defendant's case*

The defendant paraded one witness, Alfred Gunda who through his witness statement averred that he is the Secretary General for Football Association of Malawi, the Defendant. He testified that following a disciplinary hearing on a match fixing case that involved Nchalo United officials and match referees, the Claimant together with other officials were found guilty of attempted match fixing. He further stated that the decision of the disciplinary committee was very fair and reasonable having followed the due process of a hearing to which all parties were invited. The penalties were very reasonable because match fixing is a very serious misconduct in football and the penalties were reasonably proportionate to the offences of every offender as stated in the Disciplinary Determination marked.

It was his testimony further that the decision and subsequent penalties were not discriminatory in any sense because the Claimant was not the only person who was found guilty and given punishment. Five other people were given suspension and some of them have now completed serving their ban. He exhibits copies of suspension letters marked "AG 1" and states that from the exhibit "AG1", even the Claimant's own club took disciplinary action against him by dismissing him from the club's committee which is cogent evidence that the Claimant was guilty and that all action of FAM was in good faith.

He further testified that the Claimant wrote a demand letter for an apology to FAM to withdraw the verdict of the Disciplinary Committee on the matter and FAM responded to the same noting the process that was followed to arrive at the verdict was thorough and the Claimant had attended been invited through the

Nchalo United Football Club just as was the case in the previous Disciplinary Hearings on the matter to which the Claimant had attended and exhibits the same marked "AG2".

The Claimant was communicated like all other members of the Nchalo United Club to attend the hearing as depicted by the invitation letter to the Disciplinary Committee Meeting that held the hearing marked "AG3" in which it was made clear that the Committee was going to proceed to hear the case in the absence of any party and consider the evidence before it to determine the case. The Claimant was duly identified by Nchalo United in their submission at the hearing to be the Secretary of the club and his identity was confirmed by the club officials in the photos which were shown during the hearing and is produced and marked "AG4". All members of Nchalo United were charged as club members against their level of involvement in the case and at no point was the Claimant excluded on the list of the accused in the case during the case by the Club to which he was a member and had been acting on behalf of in the said matter of attempted match fixing. The Lawyers for the Claimant wrote FAM a demand letter for unconditional apology, reversal and setting aside of the decision against the Claimant to which FAM responded indicating clearly that the Claimant decided not to attend a duly constituted Disciplinary Hearing that led to the findings and consequently the verdict that was given which was fair and reasonable.

Such was the evidence on assessment of damages. I would like to thank both Counsel for the guidance as evidenced by the well-researched submissions filed in support of the assessment of damages herein in which several authorities have been cited and attached to the assessment bundle. This court has given the submissions and the authorities Counsel cited the most anxious consideration.

#### *THE LAW AND LEGAL PRINCIPLES ON ASSESSMENT OF DAMAGES*

On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts use comparable cases as a guide in coming up with a reasonable quantum of damages. See the case of **Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172**. The Court will also consider factors like passage of time when the award was made, as well as the value of the kwacha at the time of making the award.

#### *Defamation*

A successful claimant in a defamation claim is entitled to recover, as general damages, a sum which will compensate them for the wrong suffered. That sum must compensate them for the damage to their reputation, vindicate their good name and take account of the distress and humiliation which the

publication has caused. In assessing damages, the most important factor is the seriousness of the defamation. The more closely it touches their personal integrity, professional reputation and the core attributes of their personality, the more serious it is likely to be. In the matter of *Mwaungulu v Malawi News and another* [1994] MLR 227 the High Court stated:

*'In assessing damages for defamation the court should take into account the following factors: the content of the article, the nature and extent of the publication including the aspect of republication of the defamatory matter, the plaintiff's standing, his reputation, character and status, the nature of the defamation, the probable consequence of the defamation, the conduct of the defendant from the time of the publication of the defamation up to the time of judgment, recklessness of the publication and comparable awards in other defamation suits and the declining value of money.'* See *Hon Justice Kapanda & Hon Justice Chikopa v Malawi Broadcasting Corporation Civil Case Number 2837 of 2007*.

The guiding considerations in determining damages was summarized in *Shepherd Mumba v Director of the Anti-Corruption Bureau* Civil Cause Number 182 of 2015 where the court states that when assessing damages under this head we consider the coverage of the publicity, the station in life of the plaintiff and the effect on his daily life.

#### *Loss of opportunity, career and earnings*

The principles concerning damages for loss of valuable opportunity are well established and are the same irrespective of whether the claim is based in tort or in contract. In *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 the High Court said:

Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point where there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities. A constant standard of proof applies to the finding that a loss has been suffered and to the finding that that loss was caused by the defendant's conduct, whether those findings depend on evidence of historical facts or on evidence giving rise to competing hypotheses. In any event, the standard is proof on the balance of probabilities.

It appears when dealing with such damages, the claimant has to quantify his losses and the duty of the court is to determine which losses are a direct result of the defendant's action and do the arithmetic-see *Diverson Saulosi v CP Beverages Limited* Civil Cause 2357 of 2010

On loss of earnings, the Court of Appeal in **Foster v Tyne & Wear CC** (1986) 1 All ER 1 stated as follows:

One must not lose sight that the court is attempting as best it can to estimate the current value of the claimant's prospective loss of income, so where one can be reasonably confident that a claimant will suffer a quantifiable loss of earnings for an appreciable time the multiplier/multiplicand approach should generally be taken.

### ***Discriminatory treatment***

Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred. In **Sakala v The Registered Trustees of The Designated School Board** Civil Cause No. 2652 of 1999 Mwaungulu J (as he was then) stated as follows:

*Where there has been a violation of them, the court is supposed to give an effective remedy (section 40(3) of the Constitution). ...The Constitution itself provides for compensation for violation of these rights. Compensation should be according to principles which apply in torts (Ministry of Defence v Cannock [1994] IRLR 509). In matters of this nature the court has to take into account injury to feelings. Injury is a necessary and foreseeable consequence of any segregation. Resignation, revulsion and rejection are the usual feelings of a man who has been discriminated. The law should therefore take injury to feelings as a component of the damages awarded.*

Essentially, the make whole provision depends on the discrimination that was suffered and the effect it had on the employee victim. In other words, what position, pay, and benefits would the employee victim have had if he or she were not subjected to discrimination.

### ***DETERMINATION***

The claimant was awarded damages for defamation, loss of opportunity, career and earnings in football activities and discriminatory treatment upon being aggrieved by the defendant's disciplinary hearing and a finding that he was guilty of attempted match fixing and the penalties imposed on him such as being banned from taking part in any stadium football related activity for 36 months and being banned from entering any stadium in Malawi for 10 months. Apparently, this follows allegations by the defendant that there was attempted match fixing involving referees and officials from Nchalo United Football Club with respect to a match between Nchalo United Football Club and Chitipa United Football Club on the 13<sup>th</sup> of July, 2017.

When the matter came for assessment of damages, the defendant made an endeavour to advance the position that the decision of the defendant was fair and reasonable the claimant having been found guilty, and the defendant having followed the due process and considering the seriousness of match fixing. Further to that, they argue that the decision was not discriminatory because the claimant was not the only one who was suspended. They point out that five others were also suspended or a given ban and that the process was done in good faith without any malicious intent as FAM was simply acting in accordance with its statutory mandate of organizing and running football by ensuring that match fixing scandals are dealt with.

In addition to the foregoing, the defendant submits that the claimant's claim is founded on an immoral and illegal act. They contend that match fixing is not only immoral but also illegal. They point out that the claimant had already been found guilty by his own club and was also found him guilty by the defendant on the defendant's own investigations. They are of the view that the claimant's action is founded on an illegal and immoral act and he is only riding on the technicality following the defendant's non-attendance at mediation to cash on the defendant. They entreat the court not to lend aid to the claimant, on the basis that his claim is founded on an immoral act.

In my considered opinion, the concerns raised on behalf of the defendant are quite germane. However, a critical analysis of the same reveals that the concerns are misplaced. They seem to challenge the whole question of liability which was already settled by an order striking out the defence by the Judge seised with mediation. I am fortified in this position considering their submission that the claimant seeks to ride on a technicality following the defendant's non-attendance to a mediation session. Out of mere curiosity, I perused the file to check if steps had been taken to restore the defence before the Judge for the matter to be decided on merits and I noticed that nothing has so far been done. Such being the case, this court remains enjoined to assess damages as awarded in the order by the Judge. I daresay that the court in so doing is not lending a hand to the claimant in benefitting from a technicality but giving effect to the order to assess damages by the Judge which stands yet to be contested.

It goes without saying that the assessment of compensation presupposes that damage has been proved and that the only matter remaining is ascertainment of the amount or value of the damages. In the case of **Michael Laudat, The Attorney General of the Commonwealth of Dominica vs Danny Ambo HCVAP 2010/016**, the Court of Appeal stated thus at p.16 of its judgment:

*“Ordinarily, at an assessment of damages hearing the court would not enquire into matters of liability because the defendant, having failed to file an acknowledgement of service and/or defence it is taken to admit liability as pleaded. At the assessment of damages*

*hearing, the court is not required to re-open the application or request for default judgment; and it would not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to the cause of action while the default judgment stands. The issue of the defendant's liability having been settled by the default judgment, the only issue for the court now is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant...*"

Likewise, in the present case, once the judgment on liability was entered against the Defendant, the High Court herein became *functus officio* in as far as the issue of liability is concerned. Thus, it cannot be called upon to determine and indeed make a finding that the claimant's claim is borne out of immorality or illegality with an implication that the Defendant is not liable to the Claimant. The issues that the Defendant raises at this point before this Court cannot be sustained. If at all they are aggrieved by the order striking out the defence which makes them liable to the Claimant, then the way to challenge it is not through assessment proceedings. This is for a simple reason that this Court is only tasked with assessing damages payable. All other issues, if any, do not concern it. Indeed, in the case of **Chrissy Chioko vs- Prime Insurance Company Limited** Personal Injury Cause Number 359 of 2016, the Court stated;

*"In the present matter, my task is to assess damages to be recovered by the claimant. Assessment of damages is basically a process of ascertaining the compensation that the claimant should receive in respect of the injuries that she sustained. It means my duty is to determine how much the claimant deserves to receive."*

With the foregoing, I shall therefore proceed mindful of the court's task at hand which is to assess damages.

First of all, the claimant is awarded damages for defamation. The claimant laments that as a result of the Defendant's unlawful and unreasonable decision which amounted to defamation, he suffered injury to feelings, he was grossly embarrassed, ridiculed, humiliated and suffered damage to his reputation, character and status in the society as a General Secretary. Further, he laments that the publication of the Defendant's unreasonable and unlawful decision to ban him was published in a newspaper which was widely circulated and read by many people including my relatives, friends and colleagues who inquired from him as to really what happened and he had trouble to explain his innocence from people who knew him.

On the other hand, it is submitted on behalf of the defendant that the Claimant in the case at hand is not entitled to any damages for defamation because there was no defamation in the first place and there is no



proof of damages. In my opinion, the disciplinary hearing and its results notwithstanding, the conduct complained of had an effect of hurting the claimant's feelings as it is repulsive in the football fraternity. Clearly, the conduct was calculated to disparage the claimant's reputation in his profession. It had an effect of portraying the claimant as a dishonest and untrustworthy person. In **Matanda v Sales Services Ltd and others** [1990] 13 MLR 219 (HC) the court stated as follows:

With regard to defamation, damages are, apart from any special damages, also at large. Put simply, these are awarded for the natural injury to the plaintiff's feelings and for the natural grief and distress he may have felt at having been defamed.

On the other hand, Counsel for the defendants contends that the claimant did not bring evidence of the newspaper to prove publication and neither did he parade witnesses of the friends, colleagues whom he alleges inquired from him. Nonetheless, in order to give effect to the decision it is obvious that it was brought to the attention of the football fraternity. Reading through the minutes of the disciplinary hearing, minute DH 12.18 alludes to the fact that the Secretary only reported after the issue came out in the press.

On comparative cases, Counsel representing the claimant cites the case of **Jeremiah Mwakayoka and Another v Blantyre Newspapers** Civil Cause Number 41 of 2012 in which the claimants were awarded K3,000,000.00 each for defamation in June 2017. He also cites the case of **Shepher Mumba v Anti-Corruption Bureau** Civil Cause no. 182 of 2015 in which the claimant was awarded the sum of K4,500,000.00 for defamation. The award was made on May 2016. In this case, Counsel is of the view that K10,000,000.00 would adequately compensate the claimant as damages for defamation taking into account the devaluation of the Kwacha. On the other hand, the defendants, presumably in their belief that damages are not awardable under this head, have not cited any cases for comparison. Thus, with thorough consideration of the law and the cases cited by Counsel for the claimant, I award him K6,000,000.00 as damages for defamation.

Apart from that, the claimant has been awarded damages for loss of opportunity, career and earnings. The claimant was banned from taking part in any football related activity for 36 months. He laments that consequently he suffered loss of opportunities or privileges associated with the position of a General Secretary. The defendant contends that the claimant is not entitled to any damages for loss of earnings because there is no proof of any loss as a direct result of the defendant's suspension. They point out that the claimant had already stopped earning; he was already dismissed by his own club before the defendant suspended him. Somehow, what the defendant has not addressed is the fact that the claimant's dismissal at his club if at all this is true was triggered by the defendant's conduct in the allegations levelled against him. All the same, an enquiry on this aspect boils down to the issue of liability which this court has undertaken to stay away from. The issue at hand is the extent of the loss suffered by the claimant under this head.

I believe this calls for the multiplier/multiplicand approach. The claimant was banned for 36 months and eventually got dismissed and has not been earning up to date. Further to that, there are future earnings to consider. The court shall add 24 months for that part thereafter the claimant must have mitigated his loss somehow. On the issue of his monthly income as multiplicand, it is stated that the Claimant earning K40,000.00 per month as travel and phone allowances. However, the Claimant, admittedly, did not adduce evidence to support this assertion. In the circumstances, according to established practice, the Court uses the minimum wage which the current applicable rate is K50,000.00. I find this rather tricky because the claimant's failure to prove his earnings seem to be working at his advantage. I would therefore adopt the K40,000.00 for the sake of fairness. Therefore, the claimant's loss of opportunity and earnings translate to  $K40,000.00 \times 60 = K2,400,000.00$ .

However, the cause of action arose in the year 2017. There is no doubt that the value of the benefits cannot be same. The payments must have been adversely affected by the ravages of inflation and devaluation. There is a need to boost the award to bring it at par with economic realities. In **Kandoje v. Malawi Housing Corporation** (2008) MLR 433, it was stated that:

"The cause of action arose in 2003 but the events cover a period from 1998. The applicant was lowly paid as noticed from the pay-slip. The local currency has since devalued and the court has discretion to award interest to cater for devaluation and inflation ... In this case the court awards 40% of the award to cater for devaluation since 1998".

In my considered opinion, the issue herein is by what percent should the court boost the award. In **Frackson Chitheka v. The Attorney General (Ministry of Finance)**, Civil Appeal No. 67 of 2008 (unreported) the appellant challenged an award of compensation which was boosted by 100%. Mzikamanda J, as he then was, confirming the boost stated that the boost by 100% pension that was entirely in the discretion of the lower court considering the devaluation and rate of living at the time. The court shall apply a 100% boosting.

Lastly, the claimant has been awarded damages for discrimination. This involves a necessary and foreseeable consequence of any segregation. The defendant, however, contends that the claimant is not entitled to damages for discrimination because he was not discriminated against. They argue that the claimant was not the only person to be suspended, five others were found guilty and suspended. I am tempted to say the treatment that the claimant was accorded is against the weight of their findings. It appears the claimant did not agree to the match fixing scheme but the punishment was more or less the same with those who actively participated in the scheme. All the same, this is issue in as far as this court is concerned is *res judicata*. Counsel for the claimant cites the case of **Sakala v The Registered Trustees of The Designated School Board (supra)**. In that case, the court in awarding the claimant K9,000.00 as damages

for discrimination took cognizance of the discrimination but found that it was not a calculated move as the Board genuinely feared for the worse should the claimant have received the payments she had been since been awarded by the court. Unfortunately, in this case, the motive may be hard to determine since the matter was not decided on merits. However, the court takes into consideration the far-reaching consequences of the discriminatory conduct to the claimant. He lamented that he has lost job and career prospects in such a hostile job market and not to mention overall trauma the whole issue caused to him. I sign off by stating that any infringement to a constitutional right must be frowned upon and must attract substantial awards. The claimant is awarded K2,000,000.00 for discrimination.

### *CONCLUSION*

Thus, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by Counsel in the light of the relevant and applicable law regarding assessment of damages, I award the claimant K6,000,000.00 as damages for defamation, K4,800,000.00 as damages for loss of opportunity, career and earnings and K2,000,000.00 for discrimination. In total, the claimant is awarded **K12,800,000.00**. The claimant is further awarded costs for the assessment of damages proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 5<sup>TH</sup> DAY OF AUGUST 2021

  
WYSON CHAMBI NKHATA

ASSISTANT REGISTRAR