

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2046 OF 1995**

BETWEEN:

K.CHABWERA.....PLAINTIFF

and

TUWICHE BUS SERVICE LIMITED.....DEFENDANT

CORAM: TEMBO, J

Maulidi, of Counsel for the Plaintiff

Jumbe (Mrs), of Counsel for the Defendant

Katunga (Mrs), Official Interpreter

JUDGMENT

Tembo, J. The plaintiff's claim is for damages for wrongful and unlawful dismissal from employment. The defendant denies any liability therefor. It has been pleaded, in its defence, that there were express terms of the contract of employment in respect of which the plaintiff was in breach and for which he has been dismissed summarily by the defendant.

During trial, the court only received the evidence of the plaintiff. The defendant did not attend trial, even after the court had adjourned the hearing twice, in order, to allow counsel for the defendant to organize her witnesses therefor.

In the circumstances, the facts of the case are as follows: The plaintiff was initially

employed in the capacity of Bus Inspector on 19th July, 1988. He remained in employment for approximately eight years, thus until 19th September, 1995, when the defendant decided to terminate his contract of employment. During his employment, the plaintiff had a successful career. By the date when his contract of employment was terminated, the plaintiff had risen to the rank of Assistant Chief Inspector, at which he received a monthly salary of K763.40, which was threefold the monthly salary for his first appointment in July, 1988.

The letter of termination did not disclose any reasons therefor. Clause Number 5 of the defendant's Staff Conditions of Service makes provision for termination of appointment as follows:

Employment of confirmed employees may be terminated by either party by giving one month notice in writing or payment of one month salary in lieu of notice.

The letter of termination dated 19th September, 1995 was as follows:

Dear Mr. Chabwera

Re: Termination of Service

I regret to inform you that management has decided to terminate your service as a Traffic Inspector with effect from 11th September, 1995.

Please arrange to collect your salary for 1 - 11 September, 1995, on 30th September, 1995 in the Accounts Office.

Yours faithfully,
for Tuwiche Bus Service Limited

H.J. Malenga
EXECUTIVE CHAIRMAN

In the light of these facts, the plaintiff in his statement of claim and indeed by what he said during trial is claiming the following reliefs from the defendant: salary and notice

pay; pension scheme contribution; overtime payment; annual leave entitlement.

This case raises issues of law applicable upon the termination of a private contract of employment. In the case of **Dr. B.S. Chawani -v- The Attorney General** MSCA Civil Appeal Cause No. 620 of 1997 (Unreported), after reviewing case authorities respecting the applicable common law to private contracts, Honourable Mr. Justice Tambala J.A. in delivering the judgment of the Supreme Court of Appeal said this -

To sum up, the following principles emerge from the case authorities which have been examined: (1) where an employee has wrongly, but clearly, terminated a contract of employment, the termination is effective, although it is in breach of contract; (2) the relationship of employer and employee is brought to an end, following a clear termination of contract of employment; (3) where there is a wrongful, but clear termination of a contract of employment, the dismissed employee cannot insist that the contract of employment still subsists and cannot sue for specific performance of the contract; (4) the dismissed employee cannot sue for the salary or wages which he could have earned if the employer had not wrongfully terminated the contract because a salary or wages must be earned; (5) as the relationship of employer and employee is brought to an end the dismissed employee cannot claim the reward for services which are no longer rendered; (6) when there is a breach of contract, the innocent party is entitled to be compensated only for the defendant's failure to perform his legal obligations. The law of contract is concerned only with legal obligations, created by mutual agreement, and not with expectations, however reasonable those expectations might be; (7) an employee cannot be granted damages for loss of expected benefits to which he had no contractual right; and (8) as regards the measure of damages, an employee who is wrongfully dismissed gets damages which cover the period which he would have served, if he had been given proper notice.

Reverting to the instant case, it is quite clear that clause 5, on termination of appointment, allows either party to terminate the contract upon giving a month notice in writing therefor or upon payment of a month salary in lieu of notice. The evidence in the case does not indicate that the defendant had done or fulfilled either of the conditions precedent to the termination of the contract. In the circumstances the plaintiff's claim for payment of notice pay succeeds.

However, the plaintiff's claim for salary other than that for notice pay should fail. In view of the law, it does not matter that the defendant did not effect the termination in the prescribed manner, thus by giving a month notice therefor or by making payment to the plaintiff of a month salary in lieu of notice. What is essential is that the defendant clearly terminated the contract, though in breach of the contract in that it did not give notice or make payment in lieu of notice. The termination is effective. In that regard a letter of termination set out herein above is the evidence in point. Besides, following the termination, the plaintiff in fact henceforth stopped offering his services as Assistant Chief Inspector or in any other capacity whatsoever. He cannot, therefore, claim to be

paid salary for a period during which no services were rendered to the defendant by him. In the circumstances, the plaintiff did not earn the salary which he now claims to be paid. Consequently, in that regard, his claim must fail and is dismissed accordingly.

The plaintiff's claim for overtime payment is for the amount of K3,195.12 as shown in Exh.P13. It is the testimony, and thus the evidence of the plaintiff, that he used to work during public holidays throughout the period of his employment with the defendant. The work was then undertaken at the instructions of the Executive Chairman. However no overtime payment had been effected by the date of termination of the contract. No evidence in rebuttal has been adduced on the part of the defendant. To the extent that the court has in fact afforded more than adequate opportunity to the defendant for it to present its own version of the story on this point, which the defendant has declined to avail itself, the court accepts the plaintiff's claim for overtime payment. It is so ordered.

Besides the foregoing, the court allows the plaintiff's claim for payment in lieu of leave days which the plaintiff would have taken out during the entire period of his employment, as shown in Exh.P14. Clause 10 of the defendant's Staff Conditions of Service prescribes annual leave entitlements for the servants of the defendants. The plaintiff was entitled to 14 days annual leave. For the entire period of his employment, until the date of termination, the plaintiff was not given authority to proceed on leave. Yes, this clause also prescribes that leave may not be accumulated except as and when management may specify. Further, that pay in lieu of leave will not be granted except where management think fit. In the case of the plaintiff, the defendant did not authorize him to proceed on leave, but instead he was by the defendant expressly instructed to report for duties each time the plaintiff sought defendant's authorization for him to proceed on leave. In so far as the defendant expressly required the plaintiff to report on duty when in fact the plaintiff ought then to have been allowed to proceed on leave, the defendant must be deemed to have allowed the accumulation of plaintiff's leave days over the years and also to have sanctioned the payment of cash therefor in lieu of leave. No evidence to the contrary was given by the defendant so as to persuade the court to hold otherwise on this point. In the premises, the court allows the plaintiff's claim for an amount of K1,303.07 in lieu of leave, as shown in Exh.P14.

Concerning refund of pension scheme contribution, the court's view is that this claim must fail. The plaintiff has not proved to the satisfaction of the court that he is entitled to a refund in an amount exceeding K323.19, as shown in Exh. P15. This was an amount which the defendant paid to the plaintiff respecting an amount due for a refund of pension scheme contribution. The plaintiff merely told the court that he remembered that he was deducted K37.00 monthly for pension scheme contribution. No evidence by way of pay slips or payment vouchers had been adduced to establish that fact or the extent of the amount then due for refund. It would seem that the plaintiff has not been able to prove on a balance of probabilities that he is entitled to a refund in the amount in excess of that which he already was paid, as evidenced by Exh.P.15. In the circumstances, that claim must be dismissed and it is so ordered.

Costs are for the Plaintiff.

PRONOUNCED in open court this Wednesday, 4th day of July, 2001 at Blantyre.

A. K. Tembo
JUDGE