IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 163 OF 1998

BETWEEN

VINCENT J. MBENJERE …… APPELLANT

AND

MALAWIAN ENTERPRENEOURS DEVELOPMENT INSTITUTE ……. DEFENDANT

CORAM	**:**	**HON. JUSTICE MZIKAMANDA**
	:	Mr. Kadzakumanja, Counsel for the Applicant
	:	Mvalo, Counsel for the Respondent
	:	Mr. S. Baziliyo – Court Interpreter

JUDGMENT

This matter has been outstanding for the past eleven years. By a specially endorsed writ the plaintiff commenced this action on 26th March, 1998 claiming damages for unlawful dismissal, withdrawal of benefits for 7 years and costs of the action.

The Plaintiff was at all material times an employee of the defendant. He was also the Chairman of the MEDI Social Welfare Committee, and in that capacity he

escorted a funeral procession to Mwanza District using MEDI's vehicle Registration Number 45 SC 12 having been authorized by the transport officer in the absence of the Administrative Manager. On 29th December, 1996 as the vehicle was returning from the funeral in Mwanza it was involved in a road accident and eight people died on the spot. Six people including the Plaintiff survived the accident although he was seriously injured. On 3rd November, 1997 the defendant unlawfully dismissed the Plaintiff for allegedly breaching Section 10.01 (f) of MEDI Terms and Conditions of Service. The Plaintiff denied to have authorized the use of the vehicle. The defendant prior to the dismissal failed or omitted to give the Plaintiff the right to be heard and acted contrary to Section 43 of the Constitution thereby.

The Plaintiff ought to have retired at 55 years and he still had 7 years to reach the said age of 55 years. By reason of the said dismissal the Plaintiff suffered loss and damage. He claims damages for wrongful termination, remuneration and benefit for 7 years and further and other reliefs as well as costs of the action.

The statement of defence avers that in accordance with the Terms and Conditions of Service which govern all contracts of employment between the defendants and its employees a contract of employment is terminable, inter alia:

(a) On an employee committing a serious act of misconduct.
(b) Where either party gives three months' notice or three months' pay in lieu of notice in case of employees from grade MC to MA 1.

The defendant averred that they lawfully terminated by Plaintiff's contract of employment by paying him three months' salary in lieu of notice plus terminal benefits under the defendant's pension scheme. The Plaintiff had committed an act or acts of misconduct falling within the express terms of the Terms of Conditions of his employment of:

(a) Misuse or use without permission of the Trust Property and
(b) Any other act which may be deemed by management to be an act of misconduct.

The defendants averred that the Plaintiff's action was frivolous and vexatious and totally lacks merit. It should be dismissed in its entirety.

Trial did not commence until 11th July, 2001 when Hon. Justice Chinangwa heard the Plaintiff as PW 1.

According to the Plaintiff he was employed by MEDI on 1st July 1982 as Technical Officer (TO). When MEDI became A Parastatal in 1990 he became MEDI Marketing Centre Supervisor, responsible for production and marketing and technical skills training. This was a position next to a manager. He performed well and continued to receive promotions on merit. He was dismissed on 3rd November, 1997.

He narrated events that led to his dismissal. He stated that on 28th December, 1996 an employee of MEDI, Mr. Chilingo lost a child in Mwanza. He telephone his

immediate boss about it, Mr. D.L. Mpingasa, and requested financial help of K1,000.00 for funeral expenses. At the time the Principal, Deputy Principal and Administration Manager were out of Station. Mr. Mpingasa met the Plaintiff as Chairman of Welfare Committee for assistance. Although he responded by saying that it was difficult to request for transport to Mwanza in the absence of the bosses, he suggested that they approach the transport officer, Mr. Kazembe. The transport officer approved and arranged for a lorry to start off at 4.30 am. All arrangements were done between the Transport Officer, Mr. Mpingasa and the driver. The Plaintiff joined the people who travelled to Mwanza. On their return, about 10 Km from Mwanza Boma, the vehicle skidded on the wet tarmac as there were heavy rains. Eight people died on the spot and seven others including him were seriously injured. The Plaintiff was in hospital for four months as he was discharged on 6th May, 1997. He walked on Clutches. He was told to write a report of the accident. He submitted it to the Administration Manager. He started working in July or August. Then he went on leave. When he resumed work and on 3rd November, 1997 he received a letter terminating his services for using the motor vehicle which was involved in the accident without authority. He was compensated K100,000.00 for the injury. He denied authorizing the use of the lorry. He was not given an opportunity to be heard. He tried to complain to the Board but he was told the decision was final. He was paid salary in lieu of notice. He had 7 more years of service to retirement at 55 years when his services were terminated.

During cross-examination it transpired that he had found a job with NICE until 2002. Although he was the most Senior member of staff on the lorry he did not

go there as such, but as Chairperson of the Social Welfare Committee. At the time he wrote the report there was no allegation against him.

The Plaintiff was his only witness. The case was adjourned for defence on 13th July, 2001. Thereafter numerous adjournments followed until 12th September, 2006 when Honourable Justice Chinangwa recused himself. The case was next called before Honourable Justice Singini Sc., as he then was, on 8th January, 2007 when the defence applied for an adjournment to file witness statements for the defence. An adjournment was granted to March, 2007 for the defence. What followed were further adjournments to 24th April, 2008 and 14th July, 2008. On 14th July, 2008 the matter was brought before Honourable Justice Kamanga. Only counsel for the Plaintiff was present. Counsel for the defendant was absent. The Judge observed that the matter was overdue and needed to be resolved as soon as possible. She also noted that the witness statements directed by Honourable Justice Singini to be on record were not on record. She then directed that the matter proceeds to judgment and directed that submissions be provided within 14 days. Submissions were provided but the Judge had to leave for further studies in the United Kingdom. I therefore proceed to prepare the judgment on the material before me.

I must state here that the only evidence available to this court is that of the Plaintiff. The defendants chose not to give any evidence despite the numerous adjournments granted to allow them to enter their defence. Further the court gave the defence an opportunity to file witness statements. The defence failed to file such statements despite being granted adjournments for that purpose. What I have therefore is the unchallenged evidence of the Plaintiff. Submissions by

counsel do not amount to evidence. The duty that this court has is to test the evidence of the Plaintiff against the law and make findings on it.

It is trite that the Plaintiff has the duty to prove his case on a balance of probabilities. There is no dispute that at all material times the Plaintiff was in the employ of the defendant. He had been promoted through the ranks and attained a Senior position. It is also not in dispute that at the time that has come into question the Plaintiff was Chairman of a Social Welfare Committee for MEDI and among his roles included assisting at funerals of members of staff and their spouses and defendants. Also not in dispute is the fact that on 3rd November, 1997 the Defendant terminated the Plaintiff's employment. The letter of termination is in the following terms:

"PRIVATE AND CONFIDENTIAL

Mr. V.J. Mbenjere
MEDI
Private Bag 2
MPONELA.

Dear Sir,

TERMINATION OF SERVICES

On the direction of the Board, I advise, with regret that your services are hereby terminated forthwith for breach, on your part, of Section 10.01 (f) of MEDI Terms of Conditions of Service. This arises from your use of Trust Lorry No. 45 SC 12 which ended up in a fatal road accident in Mwanza on 29th December, 1996.

Further, management in exercise of its discretion, has deemed the act of using the Lorry in question without the permission of competent authority as misconduct falling within the realms of Section 10.01 (m).

You will be paid three months salary in lieu of notice. Management will also arrange your withdrawal from the Group Pension and Life Assurance Scheme, and once the benefits from the Scheme are received they will be paid to you.

Upon your departure you will hand over to the Administration and Personnel Assistant the keys to your house, and any other Trust property that may be in your possession. I note from your record of service that you owe the Trust the sum of K200.00 in respect of salary advance availed to you. This will be recovered from your salary before departure, unless you advise otherwise.

Yours faithfully

Sosten M.C. Nyoni
PRINCIPAL"

Clause 10.01 (f) of MEDI Terms and Conditions of Service provides as an act of misconduct:

> *"Misuse or use without permission of Trust Property."*

Clause 10.01 (m) provides as misconduct:

> *"Any other act which may be deemed by management to be an act of misconduct."*

The Plaintiff has given evidence to show that use of Trust property like a lorry for a funeral of a member of staff or his or her dependant is not misuse. He referred

the court to Clause 30.02 of the MEDI Terms and Conditions of Service on Death of member of staff and Dependants which provide that:

> *"Funeral expenses including the cost of Coffin shall be met by the Trust."*

He also gave evidence that it is a practice at MEDI to provide transport to take members of staff to a funeral of a member of staff or a direct dependant. That evidence has not been controverted. I find that the use of the lorry to take members of staff to Mwanza for the funeral of a son of another member of staff did not amount to misuse of the lorry as it was consistent with the practice at the Defendant's place of work and did not depart from Clause 30.02 of MEDI's Terms and Conditions of Service. Certainly the use of the lorry for the funeral was not for private purposes for the Plaintiff but in advancement of Welfare of members of staff of the Defendant.

As to whether the Plaintiff used the lorry without competent authority the Plaintiff has given evidence that in fact the use of the vehicle was authorized by the Transport Officer, who is also Administrative Assistant. According to the Plaintiff it was within the powers of the Transport Officer in the absence of the Principal, the Deputy Principal and the Administration Manager to authorize the use of the lorry in question in view of the fact that this was an emergency. That evidence has not been challenged at all. The Defence submission seems to want to make capital out of the fact that the Plaintiff was the most Senior Officer on the lorry. The Plaintiff however has been emphatic that the only reason he found

himself on the lorry was because he was Chairman of Social Welfare Committee for MEDI and not on account of his seniority at MEDI. That point was firmly established by the Plaintiff. Again Ex P 10 the letter of termination of service does not define what *"competent authority"* means. Indeed Clause 10.01 (f) of MEDI's Terms and Conditions of Service only makes reference to *"authority"* and not *"competent authority."* The Defendants might have introduced the word *"competent"* to qualify authority having realized that after all there was authority, and wanting to still find fault with the Plaintiff despite.

Again the Defence submissions suggest that the Plaintiff failed to care for the Defendant's property by not stopping the driver from proceeding in hostile weather as there was heavy rain. The case of *Halm v Spearhead Holdings Ltd and Others [1990] 13 MLR 143* was cited for the proposition that an employee has a duty to care for the employer's property and held that the Plaintiff breached that duty. Here again the Plaintiff was firm that his only role on the trip was that of Chairman of the Welfare Committee and he was never in charge of the vehicle. He never gave any instructions or direction to the management of the vehicle. The gate pass was signed, not by him but by the Administration Assistant who was the Transport Officer. All fueling of the vehicle was done under the supervision of someone else not being the Plaintiff. In those circumstances it is hard to see how a duty of care on the part of the Plaintiff would arise. Moreover the Police accident report states in its concluding paragraph that:

> *"In view of the circumstances of the accident and observation of the scene it has been found that the accident happened due to heavy*

rains which forced the tarmac to become slippery, so the driver is not to blame for this accident."

One would wonder then why the Plaintiff should be to blame for the accident.

The short of it is that the Defendants have failed to establish a breach of Clauses 10.01 (f) and 10.01 (m) of the MEDI Terms and Conditions of Service.

Now Termination of Service is governed by Clause 9.00 of MEDI's Terms and Conditions of Service while Dismissal is governed by Clause 11.03 of the same Terms and Conditions of Service. According to Clause 9.01 (d) Services of members of staff may be terminated on committing serious act of misconduct. Yet the Terms and Conditions do not define what amounts to serious acts of misconduct. Under Clause 11.03.02 (i) it is required that when it is proved beyond reasonable doubt by management that a member of staff is guilty of any misconduct the gravity of which warrants dismissal then the Principal shall suspend the member of staff of the grade from MC to MA 3 and report the matter to the Chairman of the Board of Trustees. What is notable here is that it is grave misconduct which can warrant dismissal just as it is serious misconduct that can warrant termination of services. Yet the Terms and Conditions do not define what is grave misconduct. It cannot be left to management to determine this for the obvious danger of selective application. Further proof of such misconduct is beyond reasonable doubt, a very high standard of proof. That has not been achieved herein.

The Defendant's submission indicate that the Plaintiff was not dismissed. Rather his services were terminated. The immediate question is whether such termination was fairly or properly done. I have already observed that the Termination herein is based on misconduct under Clause 9.01 (d) of MEDI's Terms and Conditions of Service. That provision applies only when the member of staff commits a serious act of misconduct. The Plaintiff was never told that he had committed an act of misconduct, let alone a serious act of misconduct. No charge was laid before him to answer to before he was dismissed. Under Section 43 of the Constitution of the Republic of Malawi the Plaintiff was entitled to be heard before the decision affecting him was made. The Plaintiff was never given an opportunity to make representations before the administrative decision was made. I am mindful of what Chipeta, J. said in *Guwende v OAN Malawi Ltd Misc. Civil Cause No. 25 of 2000 (Unreported)* that:

> *"Where there is an ordinary contractual relationship of master and servant, in the ordinary sense that we know it, the master can terminate the contract with his servant at any time and for any reason, he is not even obliged to give reasons for doing so."*

Chipeta, J., was quoting Mtegha, J. as he then was in *Chihana (Mrs.) v Council of the University of Malawi Misc Civil Cause No. 20 of 1992*. However, that view must be tempered by the fact that each contract of employment is subject to construction depending on the terms that govern it. It is to be noted that Clause 9:01 of the Terms and Conditions allows termination for reason. And where there is termination for reason it is inherent that the other party should have an

opportunity to challenge that reason. This was not done in the present case. There was no fairness in the procedure followed. I come to the conclusion that the termination was unfair. The Plaintiff suffered damage as a result and is entitled to claim damages.

The Plaintiff claims damages for unfair termination of employment. It is clear that he got three months pay in lieu of notice as provided for under Clause 9:03 of MEDI Terms and Conditions of Service. That is a figure payable where the termination is normal. Here the termination was unfair. He is entitled to damages over and above the three months pay in lieu of notice. I am mindful of the case of *Dudha v North End Motors 11 MLR 425* where Unyolo, J. as he then was held that where a contract of employment stipulates that it could be determined by a period of notice by either party or pay in lieu of period of notice an employee is only entitled to payment of salary for the period of notice as special damages. His Lordship went further to state that no general damages would be awarded unless exceptional circumstances are shown to exist in the case. I am also mindful that the cause of action herein arose before the Employment Act 2000 was enacted. The formula for calculating damages as in the Employment Act and severance pay would not apply to the present case. In the present case I find that there are exceptional circumstances warranting the award of general damages. The termination of employment was totally unfair and unjustified in this case. The Plaintiff in *William E.S. Mvalo v The Council of the University of Malawi*, *Civil Cause No. 197 of 1993* was awarded general damages for wrongful discharge in employment. The Plaintiff was awarded K300,000.00 as general damages. In *J.F. Chanza v Southern Bottlers Ltd*, *Civil Cause No. 4 of 2000 (Unreported)* the Plaintiff

was awarded K526,358.19 as general damages for unlawful discharge from employment. In the present case the Plaintiff was able to mitigate his loss by getting a job within a year or so with NICE at a salary higher than he used to get from the Defendants. That was a contract for two years subject to renewal. I think that considering the fall in value of the Kwacha since 1998 when the Plaintiff's employment was unfairly terminated an award of K200,000.00 by way of general damages would adequately compensate the Plaintiff. I award that amount.

The Plaintiff's employment was unfairly terminated 7 years before his retirement age. The Plaintiff has sought to rely on the case of *Dr. B.S. Chawani v The Attorney General MSCA Civil Appeal No. 18 of 2000 (Unreported)* to claim remuneration and other benefits until the age of retirement. First of all it is important to note that the settled principle of law is that a pensionable employment does not oblige the employer to retain the employees services until the age of retirement is reached. Further permanent employment is not employment for life as it may be termination at any time under proper circumstances. The case of *Thorncroft v Nchima Tea and Tung Estate Ltd [1991] 14 MLR 486* held that pensionable employment does not oblige employer to retain employee's services until retirement is reached. The situation in the case of *Dr. Chawani v The Attorney General (Supra)* was a special one and peculiar to its own facts. The court observed that under the Public Service Act which applied in respect of Dr. Chawani, Government could not properly terminate the Appellant's contract of employment earlier than the time when he would attain mandatory retirement. At page 12 of its Judgment the Malawi Supreme Court of Appeal said:

"However, considering the remarkable success which the appellant achieved during his career in the Civil Service and considering the period of time which remained before he could attain the age of the mandatory retirement, we take the view that the Government could not properly terminate the appellant's contract of employment earlier than the time when he would attain the mandatory retirement. He is, therefore, entitled to damages covering the period between the date of wrongful termination to the date of the appellant's mandatory retirement."

The same cannot be said of the Plaintiff herein. The Public Service Act did not apply with respect to the Plaintiff as he was not in the Civil Service. Moreover there is a growing trend that the decision in *Dr. Chawani v The Attorney General (Supra)* should be confined to its own facts. At page 14 of the judgment the court was able to say:

"There is also clear legal authority to the effect that an employee who is wrongfully dismissed cannot be granted damages for the loss of expected benefits to which he has no contractual right: Hill v CA Parsons and Co. Ltd. The appellant, in the Court below, relied on High Court cases of Brigadier Kalumo v The Attorney General, Misc Civil Cause No. 22 of 1995; Phiri and 14 Others v Minister of State in the President's Office and Attorney General, Civil Cause No. 60 of 1997 and Mvalo v The Council of the University of Malawi, Civil Cause No.

197 of 1993 (Unreported). He argued that these cases support the view that an employee who is wrongfully dismissed is entitled to damages for benefits which he legitimately expected to receive if there was no breach of the contract of employment. We are unable to accept the decisions in those cases as they do not appear to be based on sound legal principle, on the contrary, they contravene clear legal authority."

In the light of all the above this court is unable to grant remuneration and benefits to the Plaintiff for the 7 years between the termination of employment and the mandatory retirement age.

I therefore enter judgment for the Plaintiff in the sum of K200,000.00 plus costs of this action

PRONOUNCED in Open Court this 16th day of July, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E