

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1635 OF 1997

BETWEEN:

MAGGIE CHIMBAYO.....PLAINTIFF

and

IMPORT AND EXPORT MALAWI LTD.....DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr Mpando, of Counsel for the Plaintiff

Mr Nyasulu, of Counsel for the Defendant

Balakasi J.H.G., Official Interpreter

Kapanda, J.

JUDGMENT

Introduction

By a writ of summons fully endorsed, with a statement of claim the Plaintiff, Maggie Chimbayo, commenced an action against the Defendant. In the action instituted, the Plaintiff's claims against the Defendant are as follows:-

- (a) a declaration that her dismissal was wrongful and consequently ineffectual.
- (b) salary from December to date of judgment.
- (c) in the alternative, damages for wrongful dismissal.

The Plaintiff also claims money in respect of overtime hours, for ours worked during public holidays and weekends.

On 5th August 1997 the Defendant indicated its intention to defend the action but failed to serve its defence on the Plaintiff. As a result of its failure to serve the said defence a default judgment was entered against it on 29 September 1997. The defendant had the default judgment set aside. It was then allowed to serve its defence on the Plaintiff. Thus there was an exchange of pleadings between the parties herein.

Pleadings

The Plaintiff's pertinent allegations of fact as revealed by the amended statement of claim are as follows:-

“

PART 1

2. By a written contract dated 13th September 1995 and signed by the Plaintiff on 18th September 1995 the Defendants employed the Plaintiff as a sales lady in their Kandodo stores with effect from 19th September 1995.

3. The said contract provided *inter alia* that:-
 - (a) An employee would be liable to termination only after one verbal warning and two written warnings in connection with *inter alia* the employees' failure to carry out instructions.
4. By letter dated 6th December 1996, in breach of the term referred to in paragraph 3 and the whole contract of employment, the defendant summarily dismissed the Plaintiff from employment.
5. As a result of the acts complained of, the Plaintiff has suffered loss and damage---”

Pausing here I wish to observe that the Plaintiff did not give the particulars of loss and damage. Now turning again to the Plaintiff's pleadings. It was further averred in the Plaintiff's amended statement of claim as follows:-

“

PART 11

6. The Plaintiff repeats paragraph 2 and 3 and states that it was a further term of the said contract of employment that she would work a maximum of 42 hours per week from Sunday to Friday and that she would be entitled to overtime payment for all excess hours and for all hours worked during week ends and public holidays.
7. By the time she got a dismissal letter referred to in paragraph 4 the Plaintiff had accumulated, for which she was not paid.
 - (a) 67 overtime hours

- (b) 34 days for public holidays and week ends.”

The Defendant, in its amended statement of defence, admitted that it is a Malawian registered company and that among other things it runs self-service shops under the style Kandodo stores. It was further admitted by the Defendant that it employed the Plaintiff as a sales lady in its Kandodo stores with effect from 19th September 1995.

But the Defendant denied the other allegations of fact made by the Plaintiff in her amended statement of claim and prays that the Plaintiff's action be dismissed with costs. The relevant parts of the Defendants' amended statement of defence are as follows:-

- “2. The Defendant denies paragraph 3 of the Plaintiff's statement of claim in that according to its service contract an employee may be summarily dismissed without notice being given and without salary for wilful disobedience to lawful orders.
3. The Defendant refers to paragraph 4 of the Plaintiff's statement of claim and denies it in its entirety and contends that it summarily dismissed the Plaintiff according to its service contract.
4. The Defendant refers to paragraph 5 of the Plaintiff's statement of claim and denies it in its entirety and contends that:-
 - (a) there was no termination of service.
 - (b) she was not owed any salary as she had been paid her dues.

(c)

(d) she was not wrongfully dismissed.

5. The Defendant refers to paragraph 7 of the Plaintiff's statement of claim and denies that the Plaintiff had any overtime pay outstanding as all moneys owing have been paid in their entirety.
6. the Defendant refers to paragraph 7 of the Plaintiff's statement of claim and denies that the Plaintiff had any overtime hours for which she had not been paid as all moneys owing had been paid in their entirety---

By reason of the Defendant's denial the parties joined issues on the legal suit commenced by the Plaintiff. To this end the Plaintiff was obliged to call evidence to prove all the allegations of fact made by her in the amended statement of claim. The Defendant, though not obliged to call evidence, testified in its defence.

It must be noted that the Plaintiff, at the hearing of this case, withdrew her two claims against the Defendant. These claims were in respect of a bonus which she alleged she was entitled every December. The other claim was in connection with her alleged entitlement to a pension. In point of fact the Plaintiff did not offer any evidence with regard to the claims she withdrew. I now propose to deal with the evidence in this action. I intend to review, in a narrative form the evidence of both the Plaintiff and the Defendant.

Evidence

Both the Plaintiff and the Defendant called evidence in this matter. It was the testimony of the Plaintiff, hereinafter referred to as PW1, that she was at all material times a sales lady at one of the Defendant's self

service shop in the City of Blantyre, of the Republic of Malawi, until she was dismissed from the service of the Defendant on 6th December 1996.

PW1 tendered in evidence a letter, dated 6th December 1996, which conveyed the message that she had been summarily dismissed from her employment with the defendant. The pertinent parts of the letter of dismissal are as follows:-

“Dear Madam

SUMMARY DISMISSAL

We refer to the disciplinary form dated 6th November 1996 charging you with an offence under Code S.22 - Failure to carry out standing instructions.

It is reported that you failed to register a sale in your till on two packets of vim worth K5.85 each. You made this omission because you deliberately ignored work instructions despite repeated advice by your superiors.

Management has found your attitude most unacceptable and find you guilty of the offence as charged. You are therefore dismissed from company employment with effect from 11th December 1996. You will be paid salary up to and including 11th December 1996 plus 5 accrued leave days less any indebtedness with the company. Meanwhile we have advised our insurers to delete your name from pension scheme and forward a refund cheque to as which will be sent to you in due course---

Yours faithfully
(Signed)

V F Sinjani

GROUP HUMAN RESOURCES EXECUTIVE---”

It was the testimony of PW1 that her dismissal was wrongful in that she was not, at any point in time, warned either verbally or in writing before the dismissal. In point of fact it was further given in her evidence that the dismissal was not in accordance with the conditions of service. She further testified that at the time of her dismissal she had worked 34 days on public holidays and weekends and 67 overtime hours for which she was not paid as per the terms of her employment with the defendant.

PW1 was cross examined at length. She appeared to me to be a truthful witness. This is more especially with regard to what transpired on the day she is alleged to have deliberately ignored work instructions. I found her evidence generally convincing. I prefer her evidence where it is in conflict with the testimony of DW1.

The Defendant called Mr Kalebe Lazalo Zikabuma, hereinafter referred to as DW1, to testify on its behalf. It was the testimony of DW1 that, at the time the Plaintiff was dismissed from employment, he was the Shop Manager for Kandodo Limbe Superette and that the Plaintiff was working under him. He further told this court that on two previous occasions he had verbally warned the Plaintiff for failing to punch in items into a till as a result of not removing items from a shopping basket.

It was further given in evidence by DW1 that when the matter concerning the said two packets of vim was reported to him he convened a meeting to hear the Plaintiff's side of the story. At the said meeting, DW1 testified, there was also present the Security Supervisor and the Shop Supervisor. DW1 further testified that he believed the story of the two Supervisors and concluded that the Plaintiff was not telling the truth. It was the further sworn statement of DW1 that the Plaintiff stormed out of the meeting whereupon he contacted his bosses at Head office who instructed him to ask the Plaintiff to sign a disciplinary form. DW1 further told this court that the Plaintiff refused to sign the disciplinary

form. In cross examination DW1, upon being shown Ext. P2, conceded that he never gave the Plaintiff a written warning nor a letter of advice, as was required of him pursuant to the code of conduct and procedure, in respect of the wrongs allegedly committed by the Plaintiff. He further admitted that the Plaintiff was not suspended prior to her being dismissed from employment.

DW1 purported to testify on what transpired on the day the Plaintiff is alleged to have failed to register two packets of vim. His testimony in this regard can be best described as hearsay and I will completely disregard it. This is so because he admitted in cross examination that he was not there in the shop at the time. In my considered opinion the Security Supervisor and the Shop Supervisor would have been better placed to testify on what happened on the day the Plaintiff allegedly failed to register the said two packet of vim.

Issues For Determination

The principal issue for determination in this matter is whether or not the dismissal of the Plaintiff was wrongful and consequently ineffectual. There are also auxiliary issues for determination if the main issue herein is decided in the affirmative. These ancillary issues may be identified as follows:-

- (a) whether or not, if the Plaintiff was wrongly dismissed, she is entitled to her salary from December 1996 to date of judgment.
- (b) whether or not the Plaintiff is entitled to be paid for the alleged overtime hours, and hours worked during public holidays and weekends.

Before proceeding to decide on the issues enumerated above it is necessary that the Plaintiff's and Defendant's arguments be stated in this

judgment. It has also to be noted that I have to decide these issues on the basis not of sympathy, but whether on the evidence on record the Plaintiff has satisfied the necessary legal requirements for an award in her favour.

Contentions

Plaintiff's Arguments

It is argued on behalf of the Plaintiff that the dismissal of the Plaintiff was wrongful in that the terms of the contract of employment between the Plaintiff and the Defendant were not complied with. In particular, it is contended by the Plaintiff that in terms of the provisions of Ext. P2 if the Plaintiff committed a summary offence, which is denied by her, then she ought to have been suspended first pending a decision to dismiss her. It is the Plaintiff's contention that she was not suspended pending her dismissal.

The Plaintiff further contends that if any offence was committed by her such offence was a cautionary one under the item entitled Code of Conduct and Discipline in Ext. P2 and that the said offence was punishable by either a letter of advice or a letter of warning. It is submitted by the Plaintiff that her dismissal was wrongful because, as conceded by DW1 in cross examination, no letter of warning or advice was ever written to her.

Defendant's Arguments

It is the contention of the Defendant that the Plaintiff was not wrongfully dismissed as there was a valid reason warranting the summarily dismissal of the Plaintiff. The Defendant has argued that the Plaintiff disobeyed lawful orders of the employer thus it was justified in

summarily dismissing her. It is the further submission of Counsel for the Defendant that the defendant led evidence, through DW1, to demonstrate that the Plaintiff had conducted herself in a way which showed disobedience at two levels *viz* refusing to adhere to standard practice of removing items from a shopping basket before registering same in a till; and storming out of a meeting coupled with her refusal in signing a Disciplinary Form.

Law and Findings

Statutory Position

The matters complained of, as shown by the evidence on record, occurred in December 1996. Thus the statutory law applicable is the **Employment Act Cap. 55:02** and not the **Employment Act No. 6 of 1999** which is a recent Act of Parliament. As regards summary dismissal, which is what happened in the instant case, the pertinent provision of the said **Employment Act (Cap. 55:02)** is **Section 11** which provides as follows:-

- “(1) An employer shall not dismiss an employee summarily except -
- (a) where an employee is guilty of misconduct, whether in the course of his duties or not, inconsistent with the fulfilment of the express or implied conditions of his contract;
 - (b) for wilful disobedience to lawful orders given by the employer;
 - (c) for lack of skill which the employer expressly or by implication holds himself out to possess;
 - (d) for habitual or substantial neglect of his duties; or

- (e) for absence from work without the permission of the employer or without other reasonable excuse.
- (2) where an employee is summarily dismissed for lawful cause, he shall be entitled on dismissal to wages due to him up to the time of his dismissal.”

In my considered judgment a summary dismissal, of an employee contracted prior to the enactment of the Act No. 6 of 1999, will be lawful only if it is seen to be in compliance with any of the provisions of **Section 11 of the Employment Act (Cap. 55:02) of the Laws of Malawi**. As stated earlier in this judgment the main issue for determination by this court is whether or not the Plaintiff was wrongfully dismissed. Further, I must decide on the auxiliary issues enumerated above.

But before proceeding to decide on the said issues I have reminded myself that it is a settled principle of law, and I need not cite an authority for it, that in proving the allegations of fact pleaded in the statement of claim, the standard of proof required of the Plaintiff is on a balance of probabilities. Further, I am mindful of the well known principle of law that he/she who alleges must prove what he/she is alleging. I will apply these principles on determining the issues set out above.

Regarding the issue of whether or not the dismissal of the Plaintiff was wrongful it is contended on behalf of the Plaintiff that the dismissal was wrongful because there was no suspension of the Plaintiff from duty pending a decision to dismiss her for having committed a summary offence. It is submitted by the Plaintiff that in terms of the contract of employment this act of/or omission by the Defendant rendered the dismissal wrongful. The Plaintiff's further argument is that if any offence was committed by the Plaintiff such an offence was only a cautionary one punishable by a letter of warning or advice. To this end

it was the Plaintiff's contention that since there is no evidence that there was such a letter of warning or letter of advice the dismissal of the Plaintiff was wrongful.

The Defendant, as earlier noted, is contending that the dismissal of the Plaintiff was lawful in that it was justified in doing so because of the misconduct on the part of the Plaintiff. It is urged on the part of the Defendant that the Plaintiff disobeyed lawful orders by failing to carry out standing instructions. Further, it is contended by the Defendant that the Plaintiff's storming out of a meeting allegedly called by DW1 was an act of misconduct that warranted summary dismissal. Pausing here I wish to observe that this latter contention can not stand in view of the fact that it was not pleaded in the Defendant's statement of defence. I will therefore ignore the evidence adduced in support of this contention as well as the allegation of misconduct that was alluded to by the Defendant's witness.

As regards the contention by the Defendant that the Plaintiff failed to carry out standing instructions my finding is that there is no evidence to support that argument. As rightly observed by Counsel for the Plaintiff the evidence of DW1 is pure hearsay for he was not there when the Plaintiff allegedly failed to register two packets of vim in a till as a result of not removing items from a shopping basket. In my considered view the security officer, who is still alive, could have come to give sworn testimony in support of the allegation that the Plaintiff failed to register the said two packets of vim because of her disregard of standing instructions regarding the removal of items from a shopping basket. The failure by the Defendant to call this witness (the security officer) whose evidence would have been very relevant has weakened the Defendant's contention that the Plaintiff failed to register the said two packets of vim because she did not remove same from a shopping basket. If there was this evidence from the security officer then surely that would have gone

a long way to prove that the Plaintiff failed to carry out standing instructions thereby committing a summarily offence warranting a summarily dismissal in terms of **Section 11 of the Employment Act(Cap 55: 02 of the Laws of Malawi.**

In the absence of admissible sworn evidence to prove the fact that the Plaintiff failed to register the said two packets of vim because she disregarded standing instructions then it follows that her dismissal was wrongful. I therefore find that she was unlawfully dismissed.

Now having found that the Plaintiff was unlawfully dismissed I must proceed to make a finding on the ancillary issue of whether or not she is entitled to her salary from December 1996 to date of Judgment. This question involves the measure of damages in situations where a person is unlawfully dismissed from employment.

It is the Plaintiff's submission that she is entitled to damages calculated in terms of her monthly salary from December 1996 to date of judgment. The Defendant on the other hand has argued that damages should not exceed notice pay. In point of fact learned Counsel cited the case of **New Honda Centre-vs- Sagawa 11MLR 212** in support of this argument. This case authority is for the proposition of law that an individual's damages from wrongful dismissal are equal to the amount the employee would have earned under the contract period if the employee could have lawfully been dismissed. The following words of Unyolo, J. as he then was, are very instructive:-

“---I think I can safely conclude that damages for wrongful dismissal must be assessed at salary and benefits which would have accrued up to the earliest time at which the employer could, under the contract have terminated the employment. I think that **Harley-vs- Harman 113E.R.617** sets out the correct position in cases such as the instant one, namely, that **where the contract is terminable by a months**

notice, damages will ordinarily be a month's wages plus, of course, other benefits which have accrued such as leave pay and bonuses if such things were payable as of right under the terms of the particular contract.”

In the instant case the contract of employment was terminable by a months notice. Thus on the principle enunciated in **Sagawa's case**, cited above, the damages to be awarded to the plaintiff can not be from December 1996 to date of Judgment. I therefore award to the Plaintiff, as damages for wrongful dismissal, a sum equal to one month salary. The amount should be assessed by the Registrar if not agreed upon by the parties.

Finally, I must dispose of the issue of whether or not the Plaintiff is entitled to be paid for the overtime hours and for the hours worked during public holidays and weekends. There is ample evidence that the Plaintiff worked overtime and that she worked during weekends and public holidays but the Defendant neither paid her for such overtime and for working during weekends and public holidays nor did the plaintiff go off duty for the equivalent hours or days worked. This is even acknowledged by DW1 in his testimony and it is clearly noted on exhibit P4. In my Judgment, at the time of her dismissal the Plaintiff was supposed to be paid for the overtime hours and for the time she worked during public holidays and weekends. I therefore find that the Plaintiff is entitled to be paid in respect of the overtime and all the hours worked during public holidays and weekends. The amount payable should be assessed by the Registrar on a date to be fixed by him, if not agreed upon between the parties herein.

Costs

The question of costs has exercised my mind very much. Even though the Plaintiff has substantially been successful on her claim

against the Defendant it is my view that she should be awarded costs on the subordinate court scale.

I am of this view because the Plaintiff's action ought, at law, to have been commenced in the subordinate court considering the damages that were awardable.

Pronounced in open court this 16th day of January 2001.


F.E.Kapanda
JUDGE