

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.3136 OF 2000

BETWEEN:

MRS E KOMBE PLAINTIFF

AND

THE ATTORNEY GENERALDEFENDANT

CORAM : POTANI, REGISTRAR
Mbendera, Counsel for the Plaintiff
Manyungwa, Counsel for the Defendant

RULING

This is an action by Mrs E Kombe on behalf of the estate of her late husband, A D C Kombe. The plaintiff's claim is for lost salaries and other benefits. A judgement in default of service of defence was entered on November 15, 2000. It was adjudged in that judgement that the defendant do pay the plaintiff:

1. All emoluments and benefits from 1st August 1985 to 15th June 1990 taking into account all changes in salaries and other benefits.
2. Terminal benefits and/or death benefits payable to the estate following the death of late Kombe on 15th June 1990;
3. Interest on the amounts payable under (1) and (2) from 1995 to the date of payment;
4. The exact sums in points 1, 2 and 3 to be assessed by the court;

5. Costs of this action;

Subsequent to the default judgement, the plaintiff took out a notice of assessment of the sums due on the judgement. In the light of the evidence that came up during the assessment, counsel for the plaintiff sought the leave of the court to amend the statement of claim and judgment. The defendants raised no objection to the proposed amendments as such, the court, exercising its powers under order 20 of the Rules of the Supreme Court, allowed the proposed amendments. As a result of the amendments, the year of 1985 alluded to in paragraphs 5 and 8 of the statement of claim and paragraph 1 of the judgment would read as 1983.

The plaintiff and one Felix Hamilton Mwenefumbo, an official from the Ministry of Tourism, Parks and Wildlife, testified for the plaintiff's case. Both these witness were not at all cross-examined by the defence. The defence also elected not call any witnesses and therefore the plaintiff's case is uncontroverted.

The plaintiff's late husband was employed by the defendant in the Department of Parks and Wildlife. In June 1983, the plaintiff's late husband fell victim of the draconian Banda/Malawi Congress Party (MCP) regime as he was dismissed from the Civil Service without lawful cause. He was subsequently detained in 1985 and released in 1986. Then in 1990, on June 15, he died. The plaintiff or any of the deceased's dependants never got any death or terminal benefits from the Government, hence the present action.

As regards the claim for emoluments and benefits from the time of the unlawful dismissal of the plaintiff's late husband in 1983 to the time of his demise in 1990, it was the undisputed evidence of Felix Hamilton Mwenefumbo (PW2) that with regard to salary, the deceased should have earned a total of K72,468.79. Further, PW2 testified that during the same period, the deceased was entitled a total of 210 days of annual leave which if commuted into cash using the formula applicable in government service would translate into K7,691.18.

It was also the evidence of PW2 that during his employment, the plaintiff's deceased husband was entitled to housing at 10 percent of his basic salary, in case of unfurnished house and 12 percent, in the case of a furnished house. It is, however, not clear from the evidence as to which of the two types of houses the deceased was residing during his employment. Be that as it may, in considering as to whether or not the plaintiff should be awarded lost housing allowance, guidance has been sought from the recent decision of the Malawi Supreme Court of Appeal in the case of Chawani v. The Attorney General MSCA Civil Appeal Number 18 of 2000

(unreported). In that case, the plaintiff was wrongfully and prematurely retired by the respondent. He, among others, claimed the following:

- i) Annual salary increments from the date of his premature retirement to the time he could have been properly been retired.
- ii) Annual leave grants covering the same period as (i) above
- iii) Responsibility allowance, entertainment allowance, maintenance allowance, housing allowance, telephone allowance, transport allowance and security guard allowance also for the same period as (i) and (ii) above.

In its judgement, after a detailed exposition of the relevant law, the court held that the appellant was entitled to lost salary with increments and leave grants for the period he was unlawfully put out of employment. The court, however, refused to award the plaintiff the claims relating to housing, telephone, transport entertainment, maintenance and security allowance. It was the courts reasoning that an employee who is wrongfully dismissed cannot be granted damages for loss of expected benefits to which he had not contractual right and reference was made to Hill v CA. Parsons and Company Limited (1972) ch 304. I therefore make no award relating to housing allowance/benefit.

Then there is the claim for terminal or death benefits. The Supreme Court of Appeal in the Chawani case awarded the plaintiff lost gratuity. That being the case, the plaintiff's claim for death benefits/gratuity has to be entertained. According to PW2, the normal calculation of death gratuity in the Civil Service is 3 years salary where the deceased's period of service is less than 20 years. Where the deceased's service is 20 or more years, then over and above the 3 years salary, an additional sum known as transferred pension is paid. The deceased, according to PW2, joined the Civil Service in 1962 and therefore served for more than 20 years. PW2 gave the figure of K29,503.59 as the deceased's transferred pension. He went on to testify that in 1990, the deceased would have been earning an annual salary of K13,368.00 hence his salary for 3 years for purposes of calculating death gratuity would be K40,104.00. This means that the death gratuity the plaintiff is entitled to would be K29,503.59 plus K40,104.00 which comes to K69,607.59. The total award for lost salary, benefits and death gratuity therefore comes to K150,767.56.

I now move on to consider the claim for interest on the sum awarded Section 11(v) of the Courts Act empowers the court award interest on debts, including judgement debts. It was held in Gwembere v. Malawi Railways Limited A MLR 369 that the power bestowed by Section 11(V) is a discretionary one. It therefore has to be exercised judiciously. Courts have readily awarded interest to a party that has been

forced into litigation in order to recover money due. In the instant case, the sums awarded to the plaintiff because due upon the issuance of a Government Circular on Civil Servants unlawfully dismissed during the one party era. That circular was issued on July 28, 1995 but taking effect from May 21, 1994. The defendants never bothered to pay the sums due. Efforts by the plaintiff to get redress through the National Compensation Tribunal proved futile. The plaintiff had no choice but to take recourse to these proceedings which were commenced on October 3, 2000. I therefore direct that interest be paid on the awarded sum of K150,767.50 with effect May 21, 1994, to the date of full payment. The rate of interest to be applied has given me anxious moments. As the case does not arise from a commercial transaction, it will be oppressive to award interest on bank lending rate. At the same time, I am mindful of the rise in inflation that has taken place since 1994. I consider an interest rate of 25 percent per annum calculated on simple interest basis to be fair in the circumstances of this case.

The plaintiff is also awarded costs.

Made in Chambers this day of November 23, 2001, at **BLANTYRE**.


H S B Potani
REGISTRAR