

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 563 OF 2015

BETWEEN:

CHIMWEMWE MHANGO-----PLAINTIFF

AND

ATTORNEY GENERAL

(MALAWI DEFENCE FORCE) -----DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Sikwese, for the plaintiff

Itimu, for the Defendant

Itai, Court Interpreter

JUDGMENT

The matter herein commenced through originating summons in which the plaintiff Chimwemwe Mhango claims against the defendant the Attorney-General (Malawi Defence Force) declaratory and orders from the court as follows:

- a) An order reinstating the plaintiff into the service of the Malawi Defence Force.
- b) In the alternative, an order for compensation for the said conduct on the part of the defendant.
- c) Any order that the court may deem fit under the circumstances.
- d) An order of costs against the defendant.

The originating summons was served on the defendant and there is an affidavit in response to the same. The affidavit in response was deposed by Major Hilly M.H. Magola who is Senior Legal Assistant in the defendant's Directorate of Legal Services based at Cobbe Barracks in Zomba where the discharge of the plaintiff had occurred. Basically, the plaintiff relied on their affidavit in support of the application and the skeleton arguments that had been filed. The defendant did the same.

The chronology of events in this matter as per the affidavit in support of the originating summons is as follows:

1. The plaintiff was recruited as a private soldier by the Malawi Defence Force in 2002.
2. The plaintiff rose through the ranks up to the rank of Corporal.
3. In August 2013, a civilian friend by the name Mhango was selling a motor vehicle. The plaintiff was a witness to the sale of the motor vehicle which sale was between Mr Mhango the civilian and Mr Dinala Ngulama a Zomba resident. The other witness was Singh. The plaintiff exhibited a document CM1 as evidence of this agreement.
4. The seller did not honour this agreement. News of the deal having gone sour reached the defendant and the defendant blamed the plaintiff to have been wrong yet he was just a witness to this purely civilian transaction. As a result of this the defendant demoted the plaintiff to the rank of Lance Corporal and transferred him to Kasungu at the Engineering department.
5. After a few months, the plaintiff was simply informed that he had been discharged from the service and no other explanation was given.
6. The plaintiff was discharged without any benefits.
7. The plaintiff therefore claims that he was discharged without any valid reasons, hence the claims herein as particularized in the originating summons.

The defendant's story is as follows:

1. That the plaintiff in June 2013 entered into an agreement with Mrs Faith Mwandidya Service Manageress of Standard Bank Zomba for the sale of

her motor vehicle as per exhibit HHM1. That this conduct was contrary to the Standing Orders of Cobbe Barracks.

2. That in September 2013 the plaintiff issued threats of intimidation to the said Faith Mwandidya and that such threats are exhibited in HHM2.
3. In October 2013, the Zomba Magistrates Court issued a warrant of arrest for the plaintiff on allegations of obtaining money by false pretences (see exhibits HHM3 and 4).
4. The plaintiff was again involved in another motor vehicle deal that went sour and a complaint was lodged by Mr Frackson Banda (see exhibit HHM5).
5. That following all these complaints the plaintiff was visited with disciplinary charges as per HHM 6(a) to (d).
6. That the plaintiff absconded and could not appear before a disciplinary hearing as per exhibit HHM7.
7. That after re-appearing at Kasungu Engineering department, the plaintiff was accordingly charged and afforded an opportunity to defend himself. He was accordingly found guilty on all the charges.
8. The Commanding Officer Engineering department referred the matter to Malawi Defence Force Headquarters and a decision was made to discharge the plaintiff as per exhibit HHM8.
9. That the plaintiff was paid MK192, 735.00 in lieu of notice as per HHM9.
10. That the plaintiff's action has no merit and should be dismissed with costs.

This matter having originated through originating summons, the court has to rely on affidavit evidence. My understanding of the plaintiff's case is that he was not given valid reasons for his discharge and that he was not afforded an opportunity to be heard which the plaintiff says contravened section 43 of the Republic Constitution which deals with administrative justice. The plaintiff also claims that he was not paid his long service dues.

It is clear from the evidence that I have navigated through that the plaintiff a soldier by profession was involved in several private commercial transactions with civilians. As a result of these commercial transactions, several complaints were filed against the plaintiff in the way he handled these transactions. Some of these transactions led to the initiation of criminal proceedings against the plaintiff in the civil courts whereby the plaintiff was on a wanted list by the Malawi Police hence

a warrant of arrest being issued against him. When all these issues were put together, the defendant decided to bring disciplinary charges against the plaintiff. These disciplinary charges are contained in exhibit HHM6 (a) to (d). In a nutshell, the charges were four namely:

1. Being concerned in the stealing of property contrary to section 54(a) of the Defence Force Act no 11 of 2004.
2. Using Insubordinate language to a superior officer contrary to section 42(1) (B) of the Defence Force Act no 11 of 2004.
3. Committing a Civil Offence contrary to section 80 of the Defence Force Act no 11 of 2004.
4. Disobedient to Standing Orders contrary to section 45 of the Defence Force Act no 11 of 2004.

There is evidence on affidavit that after these charges were leveled against the plaintiff, the plaintiff went missing without any authority from his superiors and there is evidence to that effect contained in exhibit HHM7. The plaintiff later on re-surfaced at the Engineers Battalion in Kasungu on 13th September 2013. The plaintiff was informed of the charges herein and afforded an opportunity to explain his side of the story. Indeed there is evidence to that effect as shown in exhibit HHM8 which discloses that the plaintiff on 30th of September 2013 appeared before the Commanding Officer of the Engineers Battalion in Kasungu Major C.W. Kachingwe , psc and was found guilty on all the four charges. After finding him guilty, the Commanding Officer reduced the rank of the plaintiff to that of Lance Corporal with regards to counts (a), (b) and (d). But with regards to count number (c) of Committing a Civil Offence, the Commanding officer referred the matter to the Head office for further action. On 25th November 2013, the plaintiff was discharged from his duties. The plaintiff was discharged pursuant to section 26(g) of the Defence Force Act number 11 of 2004 and the reasons for discharge were disclosed in paragraph 2 of this letter which is found on folio 43 of exhibit HHM8. It was further directed that the plaintiff should be paid three months in lieu of notice hence the payment of Mk192, 735.90.

The issue raised by the plaintiff was that he was not afforded an opportunity to be heard and that no reasons were given for his discharge. With due respect to the plaintiff, there is evidence that the plaintiff was charged in writing and that the

charges were given to him. It was after those charges that the plaintiff had vanished into thin air before he re-surfaced in Kasungu. I take it that the plaintiff was very much aware of the charges no wonder he felt so pressured that he had to vanish. By the time he was back in Kasungu, the plaintiff had enough time to digest the charges that were awaiting him. I also found that the plaintiff was brought for a hearing before the Commanding Officer. That is the disciplinary structure that is put in place in the Malawi Defence Force. It may not be the best arrangement but it does provide a platform for someone to be heard. I certainly see nothing wrong with that arrangement although it may be intimidating. There is certainly need to improve on it. The issue of hearing in such an administrative and employment related matter has been subject of discussion in these courts. In the case of *The Anti-Corruption Bureau and Jimmy Kaunda* MSCA Civil Appeal NO. 38 of 2011, very good guidance has been given to these courts as to what constitutes a hearing. In the present case, as I have already stated, the appellant was furnished with the charges. He was brought before the Commanding Officer. The appellant gave the side of his story and after assessing the entire matter, the Commanding Officer decided that the appellant was on the wrong. There is no evidence that the appellant had requested to have witnesses cross-examined by him and the Commanding Officer had denied him that opportunity. I am therefore satisfied that there was a hearing as envisaged by the law. There is also documentary evidence that in the discharge letter, the appellant was informed of the reasons for his discharge. With regards to the terminal dues, my understanding of a discharge under section 26(g) of the Malawi Defence Act is that it is equivalent to a dismissal. It would therefore be naïve for the plaintiff to be claiming for terminal benefits for a dismissal based on misconduct.

I therefore find that the plaintiff's appeal has got no merit and it is dismissed with costs.

DELIVERED THIS

DAY OF JULY 2016 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE