



**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 48 OF 2013**

**BETWEEN:**

**SAMSON MATHIWA..... 1<sup>st</sup> PLAINTIFF**  
**PETER SILIKASI.....2<sup>nd</sup> PLAINTIFF**  
**WALES JUSTIN.....3<sup>RD</sup> PLAINTIFF**  
**AND**  
**GROUP 4 SECURICOR (MALAWI)LIMITED.....DEFENDANT**

**CORAM:**        **K. BANDA, ASSISTANT REGISTRAR**  
                      Mr. Kauka of Counsel for the plaintiffs  
                      Mr Ngwata of Counsel for the defendant  
                      Ms E. Chimang'anga -Court Clerk

---

**ORDER ON ASSESSMENT**

**INTRODUCTION**

This is an order on assessment of compensation for unfair dismissal emanating from the decision of the High Court dated 13<sup>th</sup> November, 2015 delivered by Kamwambe J in which he found that the Applicants herein were unfairly dismissed and consequently ordered for their compensation under the provisions of section 63(4) of the Employment Act. The plaintiffs also asked for inclusion of severance as the same is a matter of law where there has been a finding of unfair dismissal. The defendant did not object. Both parties gave evidence and it is on that basis that I now give out this order.

**BACKGROUND**

Briefly the three plaintiffs were in the employment of the defendant up to the 3<sup>rd</sup> of March, 2011 when they were suspended from work pending investigations over the missing items of the defendant. The first plaintiff was given the letter of suspension on the 8<sup>th</sup> of March, 2011 which letter was dated 1<sup>st</sup> March, 2011. The other two were just informed that they were suspended and that they would be summoned for a full hearing. A hearing never took place. Upon discontinuance of the criminal proceedings in the Blantyre Magistrate Court, they used to go to the defendant's premise to meet Mr Mofolo now deceased, Mr Ngwale at Ginnery Corner Office And Mr Kasambwe at Chilimba G4S Headquarters. No one of them was of any assistance. Particularly, the plaintiffs made several visits to the office so that they may resume work but they were told to wait for the investigations. The court case failed to proceed because the defendant was not ready with witnesses. No investigatory hearing took place and their wages were withheld since then. It is this situation that led to plaintiff seeking the judgment of the court hence these proceedings emanating from that as stated in the introduction.

## **EVIDENCE**

### **PLAINTIFFS EVIDENCE**

#### **PW1**

PW1 was Peter Paul Silikasi, aged 26 at the time of the hearing. It was his evidence that he was arrested on 4<sup>th</sup> March, 2011. He informed the court that he joined G4S Co. Limited on 12<sup>th</sup> July, 2008. He also told the court that he is currently not working. That since dismissal he never attempted to secure employment but decided to go back to school. That is to repeat his form 4 for purposes of his Malawi School Certificate of Education. He further stated that since 2015 up to the time of hearing, he had not secured employment.

It was his averment that his salary after tax was MK19,500.00 per month. And this was as at 4<sup>th</sup> March, 2011.

In cross examination he stated that 75 years was the official retirement age. That he had no copy of conditions of services. That he did not have any evidence of him trying to apply for other jobs. He stated that he was looking for specific job i.e. "reaction unit" just like the one he was doing at G4S Co. Limited.

#### **PW2**

PW 2 was Samson Mathiwa. He stated that he was 40 years old. That he joined G4S on 12<sup>th</sup> February, 2010. He stated that at the time of trial he was living at his home in Ntcheu and doing farming. He further told the court that he had tried to find employment but failed because he had no references. He also stated that at the time of leaving employment his salary was MK19, 500.00. That is after tax deduction.

In cross examination he conceded not having the references because he did not go to request the same from G4S (Malawi) Limited.

### **PW 3**

PW3 was Wales Justin. He told the court that he is 34 years old. That he joined G4S on 12<sup>th</sup> February, 2010. He stated that now he does farming at Balaka his home. It was his statement that he tried to look for employment but could not be considered because their matter was before the courts and ongoing. That they were regarded as being still under G4S.

As to salary he stated that it was the same MK19,500.00.

In cross examination he conceded to have no any evidence that he tried to seek alternative employment. He however stated that he did go back to check for reference letter and Mr. Ngwalero told him that he was still under G4S and as such he declined to give him the reference letter.

## **DEFENDANTS EVIDENCE**

### **DW1**

DW1 was Debora Ntaba. She informed the court that she is in the employment of the defendant as Regional Human Resources Manager for the Southern Region. That at the time of assessment, she had been in employment of the defendants for four years.

As to the identity of the plaintiffs she conceded of knowing them as former employees of G4S (Malawi) Limited in the rapid response department. That Wales Justin was a driver and Samson Mathiwa and Silikasi were crew members respectively.

She informed the court that the company's applicable mandatory retirement age was 55 years. That this was contained in the company policy on retirement. The document number 32 in the company policy document. The document was later tendered in court as exhibit "DW1".

As to the salaries of the three plaintiffs at the time of leaving employment, she was unable to inform the court on the figures with certainty and only suggested that it could have been K5000.00 per month in the year 2010. She informed the court that she had documented it somewhere but could not recall.

In cross examination she stated that she recalls that the plaintiffs last day of employment was in March, 2011. Further as to the version date of the policy, she narrated that it was 1<sup>st</sup> of July, 2014 and expiry was 31<sup>st</sup> July, 2015. She conceded that on date of hearing, which was 1<sup>st</sup> December, 2016, there was no new version of the policy but that the old policy was still applicable and in use.

## THE LAW ON COMPENSATION

The starting point is s.63(4) of the Employment Act. The same is in the following terms;

### 63. Remedies for unfair dismissal

*(1) If the Court finds that an employee's complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies—*

*(a) ...*

*(c) an award of compensation as specified in subsection (4).*

The said subsection four is stated as follows

*(4) An award of compensation shall be such amount as the Court considers just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.*

The fundamental principle in making the award is that it should be just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer.

In short, the discretion of how much to award is given to the court. Further the court is given wide latitude provided the same revolves around the principle enacted in section 63(4). What essentially this section states is that there must be a proven loss sustained by the applicant due to the dismissal in the first place. That again this must be attributable to the actions of the employer. Thirdly this loss

must be examined in light of the actions of employee, as to whether he or she has contributed in a way or the other.

So if there be loss established but not attributable to the employer, the employee will lose out. In the same vein if the circumstances are re-visited and it is clear that justice and equity requires that the applicant gets less the court will be at liberty to exercise its discretion in that way.

That said it is trite that an employee if dismissed must take initiative to mitigate the loss. See. *Archibald Freighting Ltd v Wilson* [1974] IRLR 10. The reason being that it is not “just and equitable” for the Court to assist a litigant who sit idle and fail to make effort to alleviate their loss. See. *Msiska v Dairiboard Malawi*, IRC, Matter No. 6 of 1999. This takes different forms but the obvious ones include trying to look for alternative employment or other engagements. If this is not shown at trial, it is a ground on which discretion could be exercised.

Again age is a factor and indeed consideration of the labour market for ones skills are always considered in arriving at a just and equitable compensation. See. *Kachinjika v Portland Cement Company* [2008] MLLR

Looking at the circumstances herein, PW 1 clearly suffered loss in that his sole source of income was terminated and in the process rendering him destitute. As properly found by the High court, the loss was attributable to the defendant herein. This is not in contention.

As to mitigation of loss, PW1 stated that after employment he did not labour himself with the task of hunting for an alternative employment. He states he decided to go back to school to improve on his Malawi School Certificate of Education and that it was only after finishing school that he started looking for employment but as of the date of hearing, he was yet to get one. He did not indicate as to whether he got better grades or not after repeating the Malawi School Certificate Examinations. And further I notice however that no tangible or specific evidence was adduced to support this statement. In short he did not mitigate the loss.

As to age, at the time of assessment he was only 26 years old. In my view still young and energetic with better chances of getting other employment on the labour market. I however notice that the nature of the job he was involved in and skill obtained cannot allow him more better chances than where he was. On this point, he deserves consideration.

PW2 informed the court that he had tried to look for alternative employment but could not succeed as he had no reference. However despite stating so he did not demonstrate or give evidence to that

effect. As it turned out in cross examination, it is my finding that he did not mitigate the loss. For instance in cross examination he stated that he never visited the offices of the respondents nor did he request to get his reference letter.

Unlike PW1 I notice that PW2 at the time of assessment was more advanced in age. In evidence he stated that he was 40years at the time. I take this as factor that would work negatively with him on the labour market as at forty one is not in his prime. The question of whether he suffered loss or not practically was resolved at trial by the high court. The status is as for PW1.

And for PW 3, the question of loss follows similar to PW1 and PW2. However in mitigation, PW3 indicated that he had tried to look for alternative employment but could not succeed due to the fact that he was still being in the hands of G4S. I decline to take this on board. As at the time of hearing, he had been out of employment of G4S but still did not show evidence of any effort. As to age he stated that he was 34 years. I take this in consideration as well.

Reverting to the issue of ages and exhausting it, the plaintiff told the court that the defendants mandatory retirement age is 75 years. This was however not supported by evidence and was rebutted by the defendants. The defendants did furnish the court with the company's policy on retirement. The said policy document indicated that the recommended age is fifty five. Counsel for the plaintiff however contested this and argued that the same was outdated. This counsel premised on the fact that the document indicated that it was expiring on 31<sup>st</sup> July,2016. In response the defendant stated that at the time of trial they were drafting a new policy.

That said I agree with counsel that evidence on the point indeed showed that the document was expired. I however find no justifiable basis to use the 75years old retirement basis for two reasons. Firstly one can easily notice that apart from their being no evidence by his witness, the nature of the job itself requires one to been in his prime and with much vigour. I decline to think a person at 75 can do a guarding job much more that of rapid response unit. That said, secondly this matter was heard on 1<sup>st</sup> December,2016. This is the same year the document had expired and was said to be revised. I find that it would make more sense to base whatever decision we may on this rather than on the speculative number by his clients. I therefore adopt the 55years old as the companys retirement age.

Reverting to the facts herein one notices that PW1 had close to 29 years to retire assuming all factors being constant but for sure eventualities abound. PW2 had 15 years to go. Obviously had a short period to retirement. Again we assume eventualities could as well curtail this. As for PW3 he

had 21 years to go before retirement. Note however that employment is not for life and therefore to the same I factor in eventualities of life. These could include accidents, diseases and others that ran chances of reducing the life span.

Having examined each ones circumstances I am convinced that apart from the age factor, it would seem their circumstances are similar. As stated earlier the guiding principle is mainly premised on what is just and equitable in the circumstances. As earlier stated, also the discretion of how much to award remains with the court. I am however mindful that discretion ought to be exercised judiciously and not based on my personal quims.

As to what format or formula to use, that is consideration of whether to base the award on statutory position obtaining under the employment act or common law, the Supreme Court of Appeal settled it. In **Wawanya v Malawi Housing Corporation**, Civ.Appeal No.40 of 2007 at page 8, the Supreme Court stated as follows:

*“Our reading of section 63(4) is that the court has considerable latitude in awarding compensation under the Employment Act. In the end it really should not make any difference whether one want to call the award an award under s.63 of the Employment Act or a common law award or any other description as one may please.*

This far I am mindful that the plaintiff were already paid by consent order dated 4<sup>th</sup> February, 2016, their salaries for the period they were deemed to be in employment of the defendant, that is from March, 2011 to December, 2015. I therefore take this in consideration and award each, that is PW1, PW2 and PW 3, 30 months’ salary calculated at the rate each was in receipt at the time of his termination of service. Using the MK19, 500.00 figures which was not contested, it therefore follows that each gets **MK585, 000.00**. And therefore for the avoidance of doubt total figure payable for all three is **MK1, 775,000.00** under this head. I do so order.

The plaintiff counsel also requested that I also assess severance allowance as this is a matter of law and is consequent upon an order of a finding of unfair dismissal. I agree with counsel.

## **THE LAW ON SEVERANCE**

That said, the law on severance is covered by section 35(1) of the Employment Act (herein after called EA). The said section states as follows:

### *35. Severance allowance*

*(1) On termination of contract, by mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the First Schedule.*

In line with the law, severance allowance is calculated using the first schedule to the EA. The said first schedule to the EA considers first the number of year's served and weekly wages received by an employee at the time of termination. The number of years is divided into three categories namely, one to five years, six to ten years and eleven plus years.

As such for a service extending to not less than one year, but not exceeding five years, severance allowance payable is two weeks' wages for each completed year. And for service exceeding five years, but not exceeding ten years, the sum payable is three weeks' wages for each completed year and so is the case when service exceeds ten years that four weeks' wages for each completed year would be paid.

Following on the information on the record of the court, PW1 and PW3 were both employed on 12 February, 2010 whereas PW2 was employed on 12<sup>th</sup> July, 2008. This implies that PW1 and PW3 each has exactly five years whereas PW 2 has 7 years of service.

Following Part 1 of the First Schedule to the Employment Act, as amended in 2010, the plaintiffs are each entitled to "Two weeks' wages for each completed year of service" for the first five years of service under the first category. Then only PW2 is entitled to three weeks wages for the 6<sup>th</sup> and 7<sup>th</sup> year. It follows therefore that for PW2, the total of the sum for the first and second category is what will constitute severance allowance for him.

Note that the word "wage" is defined in the Act. See section 35(2) as amended by the Employment (Amendment) Act, 2010. That section excludes pension, medical aid and leave grants for purposes of calculating the severance allowance. Accordingly, the operative salary for the appellant is the one that excludes these items.

Reverting to the matter herein, it was in evidence that the plaintiffs were at the time of termination of their employment each getting a monthly wage of MK19,500.00. It follows therefore that severance allowance as at the time of termination of employment would be:

For PW1 and PW 3, each will get:

- a. Category one- first five years

**Weekly wage for purposes of severance allowance:**



**Basic salary x 12 months/52 week**

**MK 19,500.00 x 12months / 52 weeks =MK4,500.00**

It follows that weekly wage will be MK4,500.00

**Weekly wage x 2 x Number of years**

**MK4,500.00 x 2 x 5 = MK45,000.00**

**PW1 and PW 3 will each get MK 45,000.00**

For PW 2 he will get MK45,000.00 for the first five years and then for the 6<sup>th</sup> and 7<sup>th</sup> year as calculated below.

b. Category two- (two years )sixth year to seventh year

**Weekly wage x 3 x Number of years**

**MK4,500.00 x 3 x 2= MK27,000.00**

Gross severance pay for PW 2 will therefore be:

**MK45,000.00 + MK 27,000= MK 72,000.00**

It follows that severance allowance as at time of termination will be MK 72,000.00 for PW 2 and MK45,000.00 each for PW1 and PW3.

In total therefore the first plaintiff, Mr. Samson Mathiwa and the third plaintiff, Mr. Wales Justin gets MK585,000.00 +MK 45,000.00 each .i.e **MK630,000.00**. The second plaintiff gets MK 585,000.00 + MK 72,000.00 =**MK 657,000.00**. I do so order. Note that these calculations are based on the salary after tax.

In summary the plaintiffs are awarded the total sum of **MK 1,917,000.00** plus costs of this assessment.

**Ordered in Chambers here at Blantyre, this 4<sup>th</sup> day of May, 2018 in the Republic.**

  
KONDWANI BANDA

**ASSISTANT REGISTRAR**