



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL No. 17 OF 2012
(being IRC Matter No. 3 of 2008)

In the matter between:

ELIZABETH CHAKANZA
AND
AGRICULTURAL DEVELOPMENT AND
MARKETING CORPORATION

APPELLANT

RESPONDENT

JUDGMENT

nyaKaunda Kamanga, J.,

In January 2008 the appellant filed a dispute at the Industrial Relations Court, hereinafter the IRC, claiming unfair dismissal occasioned on her by the respondent. The appellant was employed in 1983 by the respondent as a Unit Market Officer at the respondent's Nsanje Unit Market. In 2007 she was dismissed on the grounds of negligence, dishonesty and failure to follow commodity transfer procedures which all led to the loss of 3402 kgs of maize.

The appellant attributed the loss of maize to termite attack. In December 2004, the appellant reported to the District Manager, who was her supervisor, that termites were destroying maize stacks. Her supervisor sent a pest controller to mitigate the loss but on three occasions, he did not find the appellant at her place of work and were unable to carry out the fumigation exercise. The pest controller found the appellant at her duty station on the fourth occasion. The maize stack which was attacked by the termites was dismantled and it was discovered that 22 bags were salvaged and 4 bags were lost.

During the appellant's disciplinary hearing, it transpired that apart from her negligence in stock management which led to the damage and loss of maize due the pest attack, the appellant also failed to follow commodity transfer procedures by dispatching stocks from her market to other markets without tallying the bags of maize, failed to account for 340 kg of maize and deserted her during stock taking exercise defying the Acting District Managers' instruction not to leave the station. On 11th January 2011 the Industrial Relation Court dismissed the appellant's claims and found in favour of the respondent.

On 30th April 2012, long after the period of time for filing appeals had expired the appellant filed a notice of appeal against the whole judgment. The two main grounds of appeal can be summarized as follows:

- (1) That the court erred in holding that the respondent had a valid reason to dismiss the appellant.
- (2) That the court erred in finding for the respondent when the respondent did not show that in the circumstances they acted with justice and equity.

Therefore the issues that this Court has to determine are first whether or not respondent had valid reasons for dismissing the appellant and secondly, whether or not the respondent acted with justice and equity in dismissing the appellant.

The applicable law

Sections 65(1) and (2) of the Labour Relation Act provides that the appellate court is restricted to consider the questions of law or jurisdiction which the appeal may raise as the decision of the IRC on matters of fact is final and binding. This position was affirmed by the case of *Magalasi v National Bank of Malawi*.¹ Section 57(1) of the Employment Act² provides that the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.

Section 61(1) of the Employment Act provides that apart from being given a valid reason "*an employer shall be required to show that in all the circumstances of the case he acted with justice and equity in dismissing the employee.*"

¹ [2008] MLLR 45.

² chapter 55:01 of the Laws of Malawi.

In the present matter, the respondent alleged and proved negligence on the part of the appellant as the ground for dismissing the appellant. At law negligence entails doing that which a reasonable person should not do or failing to do what a reasonable person should have in the circumstances judged objectively depending with the fore see ability of the consequences. The 'reasonable man test' is discussed in the case of *Bussily v. Car Hire Ltd and Another*.³ While the requirement for fore see ability are discussed in the cases of *Ribeiro v Martins*⁴ and *Kalolo v National Bank of Malawi Ltd*.⁵

In their argument the appellant submits that she did not see the termites nor did her supervisor. The appellant submits that she did not act unreasonably and cannot be held to have been negligent for no reasonable person, could have foreseen the damage herein which was unprecedented. Since the respondents had only assigned one labourer to the station it was not reasonably expected that such one labourer could be removing and checking the 1399 bags every day or even weekly. The appellant argues that she acted in a reasonable manner as the respondent through their withdrawing all the labourers leaving only one with the appellant. The appellant is also of the view that the fault on the part of the appellant was very minimal as damage was to the bags which were below. The appellant argues that summary dismissal was unfair the appellant having worked for 22 years and only four bags were completely damaged. The appellant refers to the case of the *Sugar Corporation of Malawi v Ron Manda*⁶ which postulates that one of the circumstances to consider whether the employer acted with justice and equity is how long the employee had faithfully worked for the employer. The appellant submits that the respondent has not shown, nor the circumstances establish that the respondent acted with justice and equity.

The respondent asserts that a reasonable man who is responsible for taking care of maize cannot argue that he was not responsible for the destruction of maize because he did not send the insects that destroyed the maize, instead, he would have been checking the condition of the maize stock despite the fact that in the past there has not been any attacks on the maize. It is the view of the respondent that a

³ [1995] MLR 521.

⁴ 5ALR [Mal] 151

⁵ [1997] 1 MLR 421.

⁶ [2008] MLR

reasonable man would have detected the destruction of maize especially in a situation where all the door frames were consumed by the termites. That a reasonable man in charge of maize stock would have taken enough care for the maize that the situation would not have been as bad as it was. It is further argued that a reasonable man would be present at her duty station during working hours and therefore would have been available when the pest controller came to arrest the attack on the maize. Under these circumstances, the respondent is of the opinion that the appellant did not act as a reasonable person. The respondent asserts that the Unit Market officer was the overseer of the maize stocks at the market and cannot argue that it was the District Managers responsibility to check the maize for possible termite attacks, as the District Manager was responsible for the whole district, he was not based at the market. The respondent submits that the lower court rightly found her liable for negligence, which was a valid reason for dismissing the appellant. Apart from the reason of negligence the respondent also dismissed the appellant for dishonesty and failure to follow (commodity transfer) procedures which led to the loss of 340 kg of maize. Only 200 kg of maize was lost due to termite attack. The respondent submits that the appellant is deliberately down playing and misrepresenting the loss to make it appear as if the respondent suffered loss of 200 kg of maize only when in fact, it suffered loss of 3402 kg of maize. It is the view of the respondent that taking into account the respondent's period of service and the gravity of the loss, it acted with justice and equity in considering the appellant's offence as a valid ground for her dismissal.

The Decision

A thorough examination of the grounds of appeal and an appreciation of the arguments that were advanced by the appellant in support of her appeal suggests that the evidence of the dismissal does not support the action that was taken by the respondent. In another way, the appellant has couched the grounds of appeal to appear as if they are questions of law when in fact this appeal court is being indirectly asked to review the evidence at trial in order to assess if it was rightly considered by the lower court. This court is persuaded by the judgment in the case of *Malawi Telecommunications Limited v Micheal Juma*⁷ where this type of approach was considered 'a question of fact and therefore, this court would have no authority to

⁷ High Court of Malawi, Principal Registry, Civil Appeal no. 23 of 2014.

deal with the matter.' This court upholds the judgment of the panel of the IRC tribunal and finds that based on the available evidence the lower court had a valid reason to dismiss the appellant and acted with justice and equity in doing so. The following findings that were made by the lower in the in dismissing the appellant's claims are pertinent:

'From the evidence before us, to begin with, there is no dispute that the respondent gave the applicant the opportunity to defend herself on the allegation against her. Apart from that, we have no issue with the respondent's reason in dismissing the applicant. In other words, the reason with which the respondent dismissed the applicant was valid. The applicant was an overseer of the maize stock. Yet she failed to take care of the maize. As a result, the respondent suffered some loss of the stock. In any event, a reasonable manager would have detected the destruction of the maize. In this event, the destruction went on and on until there was much damage. This would not have been the case had the applicant been prudent. In short, the reason of the dismissal (negligence) was valid and realistic.' at p 3.

Sections 65(1) and (2) of the Labour Relation Act and the cases of *Magalasi v National Bank of Malawi*⁸ and *Telecommunications Limited v Micheal Juma*⁹ all support the legal position that this appeal court is not competent to review the appellant's issues of evidence and proceeds dismiss all her grounds of appeal.

There is no order for costs for the reasons that this a labour matter where in general costs are not payable.

Delivered in open court this 29th day of August 2018 at Chichiri, Blantyre.

Dorothy nyaKaunda Kamanga

JUDGE

Case information:

Mr. M. Msuku

Mrs. B. Malinda Mbete

Mr. Aaron Ng'ambi/ Ms. Million

Counsel for the Appellant

Counsel for the Respondent

Court Clerks

⁸ [2008] MLLR 45.

⁹ High Court of Malawi, Principal Registry, Civil Appeal no. 23 of 2014.