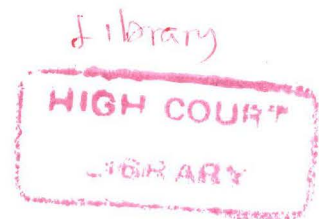




MALAWI JUDICIARY



# IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 58 OF 2013

BETWEEN.

MACLEAN TONDEZA.....PLAINTIFF

-AND-

CARLSBERG MALAWI LIMITED.....1<sup>ST</sup> DEFENDANT

THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT

CORAM.	TAMANDA C. NYIMBA	: Assistant Registrar
	Makwinja	: Counsel for the Plaintiff
	Absent	: Counsel for the 1 <sup>st</sup> Defendant
	Mr. Chitsulo	: Court Clerk

## ORDER ON ASSESSMENT OF DAMAGES

### 1 INTRODUCTION AND BACKGROUND

1.1 By way of writ of summons, the plaintiff commenced this action in January 2013. His claim was for damages for false imprisonment, malicious prosecution, defamation, unfair dismissal and costs of the action. The 1<sup>st</sup> defendant denied the claims while the 2<sup>nd</sup> defendant made no appearance nor did the 2<sup>nd</sup> defendant attend trial which was before Honourable Justice Dorothy nyaKaunda Kamanga.

1.2 In a fully reasoned judgment pronounced by the learned Judge on 21<sup>st</sup> September 2015 and perfected on 29<sup>th</sup> January 2016, the plaintiff's claims for defamation and for unfair dismissal succeeded against the 1<sup>st</sup> defendant. On the other hand, the claims for false imprisonment and malicious prosecution as well as all the claims against the 2<sup>nd</sup> defendant were dismissed. Therefore, the matter comes before me for assessment of damages respecting the successful claims for defamation and unfair dismissal as against the 1<sup>st</sup> defendant only.

### 2 THE EVIDENCE

2.1 In presenting his case for purposes of assessment of damages for unfair dismissal, the plaintiff adduced evidence. He fully adopted his Witness Statement. Therein he states

that he was employed by the 1<sup>st</sup> defendant as a painter on 21<sup>st</sup> April, 2008. He was unfairly dismissed from employment of the 1<sup>st</sup> defendant on 30<sup>th</sup> May, 2011. He went on to state that he was earning K42,656.00 per month. That at the time of the unfair dismissal, he was aged 32 years. He stated that since his unfair dismissal, getting full-time employment has been difficult except for piecemeal jobs which he secures sporadically through Blantyre Labour Office earning him an average of K40,000.00 per job. That but for the unfair dismissal, he expected and intended to work for the 1<sup>st</sup> defendant up to retirement age. Nothing of consequence arose from the cross-examination of the plaintiff by Counsel for the 1<sup>st</sup> defendant.

- 2.2 For purposes of assessment of damages for defamation, the plaintiff testified that his image has been tarnished and also paraded Paul Zuze. For a reason which shall be apparent later in this order, I find no utility in setting out Paul Zuze's testimony. The 1<sup>st</sup> defendant did not call any witness but filed final submissions in reply to the plaintiff's submissions. I shall make reference to the parties' respective submissions as I discuss the law and facts in subsequent sections of the order herein.

### 3 DAMAGES FOR UNFAIR DISMISSAL

- 3.1 Section 63 of the Employment Act 2000, hereinafter referred to as "the 2000 Act", holds the key to the resolution of the compensation under this head not least subsection (4) thereof. In *National Bank of Malawi v. Benjamin Khoswe*<sup>1</sup> the Court made eloquent remarks at page 14 regarding the operation of section 63(4) of the 2000 Act thus:

*"It is a requirement of the said subsection that the amount of compensation 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 and the extent, if any, to which the employee caused or contributed to the dismissal. It is therefore clear from this provision that the justice and equity of the compensation to be awarded is not to be measured from a vacuum. It instead ought to be measured first from a fountain of the level of blameworthiness of the employer in the occasioning of the unfair dismissal and then, if it exists, also from a fountain of blame the employee also bears for inviting the dismissal on himself".*

- 3.2 The plaintiff, through his learned Counsel, submits that the retirement age of the 1<sup>st</sup> defendant's company is 60 years and calculates that the plaintiff still had 28 years to work for the 1<sup>st</sup> defendant. While conceding that the plaintiff would not have worked for the 1<sup>st</sup> defendant up to retirement age for a variety of reasons, Counsel submits that in order to be just and equitable to both the employer and employee, the plaintiff should be awarded 18 years' salary totalling K9,212,400.00<sup>2</sup> as damages for unfair

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<sup>1</sup> Civil Cause No. 718 of 2002

<sup>2</sup> That is K42,656.00 multiplied by 12 months multiplied by 18 years

dismissal. The plaintiff is also praying for severance allowance amounting to K63,984.00<sup>3</sup>. It is the plaintiff's further submission that the figure arrived at be upped by 25 percent to cater for devaluation and inflation so that the final damages for unfair dismissal be K11,515,500.00.

3.3 In contrast the 1<sup>st</sup> defendant, through its learned Counsel, contends that the plaintiff is youthful and likely to secure a new job. That considering the plaintiff's age, qualifications as well as the fact that employment is not a life contract and also that he demonstrated that he is able to make more or equal to the money he was making from his employment prior to the dismissal, the 1<sup>st</sup> defendant is of the view that the plaintiff has not established any loss so that his claim for damages for unfair dismissal ought to be assessed at nil. The 1<sup>st</sup> defendant goes on to submit that if the Court is of a different opinion, the compensation to be awarded to the plaintiff should be no more than one year's wages, that is, K511,872.00<sup>4</sup>.

3.4 With the parties' foregoing submissions in mind, it is apposite that I reproduce more of the Court's sentiments in the *Khoswe case*<sup>5</sup>. At page 17 of the judgment the Court said:

*"...bearing in mind the minimum payable compensation as prescribed by Section 63(5) of the Employment Act 2000, the Court should feel free to settle for whatever amount it considers to be just and equitable compensation. It all depends on how the Court's assessment of Section 63(4) considerations goes in the case that happens to be before it at the time of consideration".*

3.5 Significantly, the Supreme Court of Appeal in the case of *Wawanya v. Malawi Housing Corporation*<sup>6</sup> had this to say at page 8:

*"Section 63 (5) then sets out the minimum the Court shall award. Our reading of section 63 (4) is that a court has considerable latitude in awarding compensation under the Employment Act. In the end it really should not make any difference whether one wants to call the award an award under Section 63 of the Employment Act or a common law award or any other description as one may please. The provision allows for what the Court would consider just and equitable in the circumstances of the case. If the Court was minded, and the circumstances were compelling, there is nothing to stop it from awarding compensation for the unexpired term of a fixed term contract or indeed a shorter period".*

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<sup>3</sup> The 'suspect' formula for arriving at this figure being, K42,656.00 multiplied by  $\frac{1}{2}$  multiplied by 3 years.

<sup>4</sup> K42,656.00 multiplied by 12 months.

<sup>5</sup> n.1 above

<sup>6</sup> MSCA Civil Appeal No. 40 of 2007.

- 3.6 And so, when all is said and done this court's discretion is broad and can settle for either the minimum prescribed or for any higher amount of compensation as would fit the description "just and equitable in the circumstances" after evaluating the considerations contained in Section 63(4) of the 2000 Act.
- 3.7 The considerations this court will bear in mind in arriving at what may be considered a just and equitable award in the circumstances of the case at hand are aptly captured on page 9 of Honourable Justice Dorothy nyaKaunda Kamanga's judgment on liability in this matter whereon the learned Judge resolves why the plaintiff's dismissal was unfair. This is what she said:

*"The plaintiff claims damages for unfair dismissal and this court in relation to the disciplinary hearing has to determine whether the plaintiff was accorded a fair hearing in the circumstances obtaining in the present case. One of the principles of fair labour practices is that an employer such as the [1<sup>st</sup>] defendant abide with principles of natural justice by affording an employee an opportunity to be heard and defend himself before his services are terminated. In the circumstances of this case the plaintiff was physically and mentally restricted at the disciplinary hearing and could not freely state his case and defend himself because he was brought to the hearing whilst under police custody. He was handcuffed and one of the two policemen who escorted him had a gun. In all fairness the so called disciplinary hearing was staged, there was lack of procedural fairness and the 1<sup>st</sup> defendant violated the plaintiff's right to fair labour practices. This court finds that the set-up of the disciplinary hearing was not conducive to a fair hearing. This court is inclined to believe the plaintiff's statement that he was forced to write the contents that appear in exhibit marked PC1 and accordingly dismisses the 1<sup>st</sup> defendant's assertion that this confession was voluntarily obtained. The subordinate court already made a finding in the criminal matter that the admission and confession obtained from the plaintiff was not voluntary. This court finds that the summary dismissal following a sham disciplinary hearing was unfair and cannot be valid and lawful."*

- 3.8 Reading the foregoing passage, there cannot be a shred of doubt as regards the enormous level of blameworthiness the 1<sup>st</sup> defendant, as an employer, wielded in occasioning the plaintiff's unfair dismissal. On the other hand the plaintiff, as an employee, bore not a scintilla of blame as to engender the dismissal on himself.
- 3.9 It is for all I have reasoned above that I proceed to award the plaintiff twelve (12) months salary per year for each of the three (3) years he served the 1<sup>st</sup> defendant. His salary having been at K42,656.00 per month at dismissal, his award comes to that sum times twelve months times three years, which amounts to **K1,535,616.00** which figure I hereby grant him as his due compensation under the correct legal formula as legislated by the 2000 Act. In my conscientious view, this award would fit the description just

and equitable in the circumstances of this case in keeping with the evaluation of the considerations contained in Section 63(4) of the 2000 Act.

- 3.10 I am reinforced to so conclude by quoting the statement of the Court in the *Khoswe case*<sup>7</sup> wherein the Judge stated as follows at page 29 respecting the 2000 Act:

*"The Statute, as I understand it, tells Courts what to bear in mind as they compute compensation for unfair dismissal through Section 63(4) of the Employment Act. It then, in Section 63(5) provides a method of calculating what would be the minimum just and equitable compensation, and it ties this to period of service and fractions of monthly pay for each year of service of the dismissed employee. If, therefore, this is the method set by law, we are obliged to follow it even if methods of calculating this type of compensation elsewhere look more promising of getting a hefty reward".*

- 3.11 Moving on, the plaintiff is clearly also entitled to severance allowance for three completed years in the 1<sup>st</sup> defendant's employment<sup>8</sup>. I award the plaintiff **K59,062.14**<sup>9</sup> severance allowance.

#### 4 DAMAGES FOR DEFAMATION

- 4.1 The matter under consideration is a case of slander, that is, defamation conveyed by spoken words or gestures. Slander is normally distinguished from libel, that is, defamation conveyed in a permanent form. Ordinarily special damage must be proved for slander. Nonetheless imputation of a criminal offence punishable by imprisonment is slander which is actionable per se<sup>10</sup>. This means that if the defendant imputes that the plaintiff is a thief, as in the instant case, then the plaintiff does not need to prove that his reputation suffered<sup>11</sup>. This is so because the fact of imputing a criminal offence punishable by imprisonment is in and of itself defamatory. The rationale for this is that the misconduct alleged is of a serious character that the law visits it with punishment, and is therefore so likely to cause other people to shun or avoid the person defamed or exclude him from society. It is for this reason that damage is presumed.

- 4.2 Indeed in the case of *Manda v Ethanol Company Ltd*<sup>12</sup> the Court stated thus:

*"To call a person a thief when he is not is a serious matter. Nobody wants to be associated with thieves. The plaintiff must have been ridiculed among his friends. There has been no proof of any special damage in the present case*

<sup>7</sup> n. 1 above

<sup>8</sup> Section 35(1) Employment Act 2000

<sup>9</sup> K42,656.00 x 12 months divide by 52 weeks x 2 weeks x 3 years

<sup>10</sup> *Rose Chiwanda v. Mrs Amoni & Ors*, Civil Cause No. 547 of 2006 (Unreported); *Mkulichi v Central Africa Transport Co Ltd*, Civil Cause No 599 of 1981

<sup>11</sup> It is for this reason that this court earlier in this judgment formed the view that the testimony of Paul Zuzu is inconsequential.

<sup>12</sup> [1993] 16(2) MLR 572 (HC)

and counsel for the plaintiff has argued in his skeleton arguments that the slander in this case is actionable *per se*. In the case of *Mkulichi v. Central Africa Transport Co Ltd*, Civil Cause No 599 of 1981, the plaintiff was awarded K1 000-00 for being called a thief".

- 4.3 Sir Thomas Bingham in the English case of *John v MGN Ltd*<sup>13</sup> had this to say on the governing principles when it comes to remedies in cases of defamation:

*"It is standard practice for plaintiffs in defamation actions to claim damages and also an injunction against repetition of the [defamatory words].....The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory [words] have caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the [slander]; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant....."*

Further in his judgment the esteemed Judge stated that:

*"There could never be any precise, arithmetical formula to govern the assessment of general damages in defamation....."*

- 4.4 In the instant case, I observe that the plaintiff has not pleaded for special damages and there is in fact no evidence to support the same. Consequently, this court shall confine itself to assessing general damages because they naturally flow from cases of this type. General damages are damages that the law presumes follow from the sort of wrong complained of herein<sup>14</sup>. In other words, once the threshold question of the defamation taking place has been successfully proved as in the within case, loss of reputation, as a minimum, is presumed to result from the fact of defamation.
- 4.5 As stated, there is no precise, arithmetical formula to govern the assessment of general damages in defamation. Generally, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. It is against this background that Counsel for the plaintiff and the 1<sup>st</sup> defendant have cited a number of comparable cases to guide the court in arriving at an appropriate compensation.
- 4.6 Under this head, the plaintiff's short submission went as follows. That 1<sup>st</sup> defendant has not apologised to the plaintiff for imputing that the plaintiff is a thief. That imputation

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<sup>13</sup> [1997] QB 586

<sup>14</sup> *Chinyama v Land Train Haulage* [1999] MLR 99 (HC)

of a crime is actionable per se if the words complained of impute theft<sup>15</sup>. The plaintiff has cited two cases to guide this Court in determining the quantum of damages. In *Hastings Chitsulo Gama v. Attorney General*<sup>16</sup> the Court in January 2010 made an award of K1,000,000.00 as damages for defamation. In *George Divason Kadzipatike v. Attorney General (Malawi Police)* (also cited by the 1<sup>st</sup> defendant) an award of K300,000.00 general damages for defamation was made in September 2010. Counsel for the plaintiff submits that, guided by the awards in the foregoing cases, K3,000,000.00 should be awarded to the plaintiff as damages for defamation.

- 4.7 On the 1<sup>st</sup> defendant's part, the contention is that the plaintiff has not demonstrated the extent of the damage to his reputation. That the plaintiff has failed to prove that he has suffered damage to warrant compensation so much so that he should only be awarded a nominal sum of K100,000.00 as damages for defamation. In light of my earlier exposition of the law which I need not repeat, this argument cannot hold and I decline it forthwith.
- 4.8 As a matter of fact, Honourable Justice Dorothy nyaKaunda Kamanga in her judgment on liability in this matter categorically accepted the following testimony adduced by the plaintiff which testimony formed the basis of the finding of liability for defamation against the 1<sup>st</sup> defendant. The learned Judge stated thus:

*"In the present matter the plaintiff informed the court that he was called a thief by the agents of the 1<sup>st</sup> defendant and that they handled [him] in a manner that showed that he was a criminal. The evidence was clear that Mr. Chirwa and two police officers took the plaintiff from the cell and back to the office where he was paraded as a thief in the [P]ersonnel section and the Personnel Manager rebuked him".*

- 4.9 I shall certainly bear the foregoing evidence in mind as I decide on an appropriate quantum of damages. I shall further have recourse to the following comparable cases under this head of damages. In *Alick Dumba v. The Registered Trustees of Roman Catholic Church (Zomba Diocese)*<sup>17</sup> an award of K500,000.00 was made in October 2012 as damages for defamation. In *Ephraim v. Prime Insurance Company Limited*<sup>18</sup> an award of K900,000.00 was made in July 2013 as damages for defamation. Importantly, I shall also take into consideration that since the awards in all the cases cited were made, the Kwacha has substantially plummeted in value. It was remarked by the Court in *Steve Kasambwe v SRK Consulting (BT) Limited*<sup>19</sup> that:

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<sup>15</sup> *Mkulichi v Central Africa Transport Co Ltd*, Civil Cause No 599 of 1981

<sup>16</sup> Civil Cause Number 2146 of 2009

<sup>17</sup> Civil Cause No. 49 of 2009 (Unreported, HC Zomba District Registry)

<sup>18</sup> Personal Injury Cause No. 658 of 2012 (Unreported)

<sup>19</sup> Personal Injury Cause No. 322 of 2014 (Unreported)

*"At times the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. the cost of living and the rate of inflation and the drop in the value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases."*

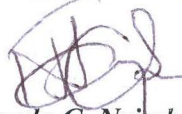
4.10 Taking into account all the considerations above, I award the plaintiff **K2,800,000.00** as damages for defamation. At the risk of overkill, I must emphasize that in awarding this figure, I have considered the legally presumed damage to the plaintiff's reputation and taken into account the distress, hurt and humiliation which the defamatory words caused the plaintiff owing to the manner the plaintiff was treated as captured by Honourable Justice Dorothy nyaKaunda Kamanga in a passage from her judgment quoted hereinabove.

5 **CONCLUSION / SUMMARY**

5.1 By way of summary and in the interest of clarity, the plaintiff is awarded a total sum of **K4,394,678.14** encompassing damages for unfair dismissal (K1,535,616.00), severance pay (K59,062.14) and damages for defamation (K2,800,000.00).

5.2 As to costs, these normally follow the event and are discretionary. In the exercise of this discretion, I award costs to the plaintiff to be assessed if not agreed. Order accordingly.

**PRONOUNCED IN CHAMBERS AT CHICHIRI, BLANTYRE THIS 10<sup>TH</sup> DAY OF APRIL, 2019**



**Tamanda C. Nyimba**  
**ASSISTANT REGISTRAR**