



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 506 OF 2014

BETWEEN

ANDEX CHIBWANA.....1<sup>ST</sup> CLAIMANT

BRAZIO MKWICHI.....2<sup>ND</sup> CLAIMANT

AND

ATTORNEY GENERAL (MINISTRY OF DEFENCE).....DEFENDANT

**Coram:**

**Brian Sambo, Assistant Registrar**

Mr. K. Kamwendo, of counsel for the Claimant

Mr. Bonomali, of counsel for the Defendant

Mr. Kumwenda, Official Interpreter/ Law Clerk

**ORDER ON ASSESSMENT OF DAMAGES**

A default judgment, on application by the Claimants, was entered by the judge on the 13<sup>th</sup> of November, 2019 for the following;

- i. That the decision of the Defendant refusing to release record of proceedings in the court of the court martial for the Claimants' appeal was unconstitutional, and
- ii. That the Claimants should recover damages from the Defendant

- iii. That costs of action should be for the Claimants, and should be assessed if not agreed upon by the parties.

On 28<sup>th</sup> of September, 2021 I made an inquiry with regard to damages that were awarded by the honourable judge on the 13<sup>th</sup> of November, 2019.

The facts of this case are simple enough. The two Claimants are ex-Malawi Army soldiers. They were, along with three other soldiers tried and found guilty in the court of the Court Marshal; a court which was convened by the Army Commander in June, 1996 (Ref. No. 169/Y/27). They were all charged under, (I) Section 68 of the Defence Force Act and (II) Section 37 of the same Act.

Brazio Mkwichi was found guilty and convicted on both counts, and was eventually sentenced to a term of 5 years imprisonment with hard labour. Andex Chibwana was found guilty and convicted on count 1, and was dismissed from the Army.

The Claimants were against the convictions and sentences meted by the Court Marshal, and were aware that the law allowed them to appeal against the Decision of the said court in the High Court within 40 days. They immediately started asking for the court record in order for them to lodge an appeal in the High Court but they were expressly denied it. They kept on pressing for the same but to no avail until the legally allowed time during which they could appeal in the High Court got expired.

They later engaged the Legal Aid Bureau to help them with the appeal process. The Bureau, on its part, also tried to obtain the court record from the Defendant but their request was also resisted by the Defendant.

Both parties brought witnesses during the assessment hearing. On the part of the Claimant, both Claimants testified.

The 1<sup>st</sup> witness to testify on the part of the Claimants was Andex Chibwana. He testified that he joined the Malawi Army in 1980 and was in the rank of Lance Corporal – EX-CO 6459 but was assigned duties of a typist, at Kamuzu Barracks.

He went on to testify to the effect that, on 20<sup>th</sup> of April, 1995 he was arrested together with the 2<sup>nd</sup> Claimant on allegations that he had connived with Mr. Njoloma to assassinate the then Army Commander, General Chigawa, a matter he had no knowledge of. He remained in detention until the matter was finalized on 11 June, 1996. He said the Court Marshal found him guilty, and as part of his punishment, he was dishonourably discharged from the service of the Malawi Defence Forces.

Being dissatisfied with the decision of the Court Marshal, he immediately requested for the court record but he was refused. Instead, the record was only given to Mr. Njoloma, who upon appealing in the High Court, the conviction was quashed and sentences entered by the Court Marshal against him were set aside; he was cleared of the charges. He said, the Defendant kept on refusing to give him the court record despite his tireless effort to get it. He said, later he and his friend sought legal representation by the Legal Aid Bureau. He went on to tell the court that, even the Bureau's attempt to obtain the record also proved abortive, and the matter was eventually referred to the ombudsman. He tendered a letter written by his lawyer to the ombudsman marked AC1. He said, when his lawyer realised there would be no clear answer by the office of the ombudsman, the matter was then commenced in the High Court. He finally, told the court that, the conduct by the Defendant had made him and his friend to lose their respective terminal benefits. He asked the court to order the Defendant to pay him his pension and other terminal benefits. He said, before the conviction, he was living in an institutional house but he was evicted after the conviction. He had a shop at Kawale Market from which he was generating money in the range of MK200, 000 and MK400, 000.00 in a month, but it was bolted due to lack finance. His children who were, at that time schooling at Kamuzu Barracks stopped, and this incapacitated them from attaining university studies, as his income was greatly affected.

During cross examination he told the court that he was convicted on an allegation that he had taken part in assassinating General Chigawa. He said he

knew that the moment the Court Marshal had convicted him, his right to receive terminal benefits was forfeited. He said he did not bring evidence showing how much money he was making in a month because the matter took place many years ago. He said after conviction he relocated to Zomba where his children began attending open government schools which made his children to get poor results in their Malawi School Certificate of Education (MSCE). He said he did not bring evidence to show that he became sick after the dismissal.

In re-examination, he told the court that he had not brought much evidence because this was an old matter, and the delay was caused by the Defendant by refusing to give him and his friend the court proceedings. He said he was treated at Salima Military Hospital but he did not have a Medical Report to show for it. He added that he had a tailoring shop at Kawale Market, and another tailoring shop was inside Kamuzu Barracks but both of them got closed because he had no money to sustain them.

The evidence by the 2<sup>nd</sup> Claimant, Mr. Brazio Mkwichi was, basically in the same terms suffice to say that the Court Marshal convicted and sentenced him on his plea of not guilty. He was sentenced to a term of 5 years imprisonment with hard labour, and also dishonourably discharged from the service of the Malawi Armed Forces. He was dissatisfied with the judgment of the Court Marshal, and immediately sought to obtain the court record from the Defendant in order to lodge an appeal in the High Court but his request was dismissed. He served the jail term despite the fact that he knew that he was not guilty of the offences he was convicted of. He said, at the time of his conviction, he had already served in the Malawi Armed Forces for 14 years.

He said, after his conviction, his family was, immediately evicted from the institutional house, and his wife was, at that time expectant. His son who was in standard 8 dropped from school. Some of his colleagues and neighbours humiliated his wife to the extent that she was being pestered for marriage because they knew he would take time to return home from prison. He said he

suffered great trauma especially at the fact that his family was in trouble, and he was being punished for an offence he did not commit. He said he was released from prison in 1998, and only managed to secure a job in 2002 at Air Malawi.

During cross examination he said he was convicted for the offence of taking part in killing General Chigawa, an offence he did not know. He said he was aware that once one was convicted by the Court Marshal he was disentitled of his terminal benefits. He said the conviction caused inexplicable hardship to him and his family members as there was no one to provide them with necessities of life.

The Defendant had Mr. Herbert Lemani as its witness. He was a Major at the Malawi Defence Force. He told the court that he had worked with the Defendant since 2004 and his Employment Number was 01007. He said he worked as a Human Resource Officer stationed at Kamuzu Barracks.

He testified that on 11<sup>th</sup> June, 1996, Brazio Mkwichi and Andex Chibwana along with other officers were arrested and charged under sections 68 and 37 of the Defence Force Act. He said, the former was convicted and sentenced to 5 years imprisonment while the latter was also convicted and dishonourably discharged from the Malawi Defence Force. He said, 18 years later, the two commenced proceedings in the High Court claiming hardships and terminal benefits due to the loss of employment and inability to release the Court Marshal's record which eventually affected their appeal process. The witness said, it was true that the Defence Force Act provided for the right to appeal against the decision of the Court Marshal but that section 142 of the same only allowed 40 days being the limitation period during which to exercise the right. The witness said since the Claimants had delayed to commence their appeal process, they were not entitled to the remedies that they were seeking. The witness further cited section 71(b) of the Defence Force Act which provided that once the Court Marshal had convicted a member of the Malawi Defence Force, all his benefits stood, automatically, forfeited.

During cross examination by counsel for the Claimants, he said he joined the Malawi Defence Force on 25<sup>th</sup> January, 2004. He said the Defendant had already disposed the court record of this matter by the time he was joining the Malawi Defence Force. He said, if the matter took place in 1996, its record was definitely disposed of in 2002. He said he learned about their charges from the remaining piece of record he had discovered in his office. He said the law provided for 40 days being the time limit during which one who is not satisfied with the judgment by the Court Marshal could appeal in the High Court. He said there was indeed possibility that the High Court, given a chance to hear the appeal, could decide otherwise. He said the court record was indeed not given to the Claimants.

In re-examination, he told the court that he joined the Malawi Defence Force in 2004. He said he got the record from the summons that were served on the Defendant. He added that the Defendant did not receive any record of appeal.

The only issue in this matter is the quantum of damages payable to the Claimant in these circumstances. I noticed witnesses touched the issue of pension and other terminal benefits, but all what was allowed by the judge are damages. I am not permitted to assess that which has not been allowed by the judge. See Order 25 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 – which provides that the jurisdiction of the registrar is subject to the judge.

A person who has suffered damage due to the negligence of another is entitled to recover damages. The aim of awarding damages is to compensate the injured party as nearly as possible as money can do: See **Livingstone vs. Rawyards Coal Company** (1880) 5 A.C. 25.

In the above case the court said at p49:

*“Where any injury is to be compensated by damages, in setting a sum of money to be given for damages, you should as nearly as possible get at that sum of money which will put the party who has been injured in the same*

*position he would have been in if he had not sustained the injury for which he is now claiming compensation."*

In the present matter, the conduct by the Defendant in denying the Claimant their right to appeal constituted a serious violation of their fundamental right. Section 42(2) (f) (viii) of the Malawi Constitution provides for the right to appeal. It reads as follows;

*2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—viii) to have recourse by way of appeal or review to a higher court than the court of first instance. (the underlined is emphasized)*

My view is that, by refusing to provide the Claimants with the court record, the Defendant had, in essence denied the Claimants the right to appeal in the High Court. If they had appealed, there was possibility for them to be cleared of the charges as they boss, Mr. Njoloma was cleared. If the High Court had upheld the conviction and the sentences by the Court Marshal, justice would have still been served.

Section 41 of the Malawi Constitution also provides the right to access justice. In my view, this provision should be read together with section 42(2) (f) (iii) above. Section 41 reads as follows;

*41. Access to justice and legal remedies*

*(1) Every person shall have a right to recognition as a person before the law.*

*(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.*

*(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law. (The underlined is emphasized).*

Obviously, by denying the Claimant to appeal to the High Court, their right to access a court of law with jurisdiction was violated, and the violator has to be punished in payment of damages.

The defence witness talked about delay; saying the delay by the two Claimants was quite inordinate in that they commenced the matter in the High Court 18 years later. With due respect, I do not agree with this position. The Defendant was the sole architect of the inordinate delay, and therefore cannot be allowed to benefit from its own wrong. If the Defendant had provided the Claimants with the court record, immediately, the delay would have been avoided. To that end, the issue of automatic forfeiture of terminal benefits as provided for under section 71(b) of the Defence Force Act cannot arise. They were denied of their right to appeal. The Claimants strongly believe that had it been that they were allowed to appeal by being given the court record in good time, the High Court of Malawi might have cleared them of the convictions, and they would, eventually be entitled to their employment as well as to their respective benefits.

The two Claimants were soldiers and were on monthly salaries. It is without doubt that they were also qualified for other benefits. The evidence is on record that, before being convicted, they were both living in institutional houses inside Kamuzu Barracks. The Defendant did not dispute this fact. After conviction, both of them were evicted from the institutional houses, and they went away. The consequence of the eviction was that their respective family lived in great want of financial support. Their chance to receive terminal benefits was distorted. The pleasure associated with employment in the Malawi Armed Forces was also disturbed. Their school-going children were also disturbed because of the relocations and financial hardship. Admittedly, they both deserve adequate compensation.

I will not consider their evidence to the effect that they were conducting business before being convicted for lack of proof. I know the matter took place long time



ago, and it may be true that they lost most of the evidence. However, these being a special damages, they have to be specifically proven.

I have also considered the issue of mitigation of damages. There is evidence that the 2<sup>nd</sup> Defendant secured a job with Air Malawi. In his evidence, he did not expound as to how much he was receiving in salaries and other benefits. In the same vein, it is not known whether the 1<sup>st</sup> Defendant got re-employed or not. I wish I had received enough evidence from him on this point as he was not incarcerated; he remained outside throughout this period. It was the 1<sup>st</sup> Defendant who, after being released from prison in 1998 secured a job with Air Malawi. This could be a reason for a deeper thought regarding the 1<sup>st</sup> Defendant. I still believe that the 1<sup>st</sup> Claimant had something to do in mitigation of damages.

Considering all the above, I award **MK10, 000,000.00** to each of the two Claimants. This whole amount (**MK20, 000,000.00**) is payable within 30 days from today.

Costs are for the Claimant and shall be assessed separately if not agreed upon by the parties.

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Made in chambers today Thursday the 18<sup>th</sup> day of October, 2021.



Brian Sambo  
Assistant Registrar