



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL DIVISION**

Civil Cause Number 128 of 2020

**BETWEEN:**

**MAYESO BONFACE MALILI.....CLAIMANT  
AND**

**THE ATTORNEY GENERAL (MALAWI DEFENCE FORCE).....DEFENDANT**

|               |                    |  |
|---------------|--------------------|--|
| <b>CORAM:</b> | <b>CM MANDALA:</b> | <b>ASSISTANT REGISTRAR</b>                                 |
|               | Mbwana:            | Counsel for Claimant of Roberts & Franklin Law Consultants |
|               | Kaliza             | Counsel for the Attorney General                           |
|               | Kumwenda:          | Court Clerk  |

**ASSESSMENT OF DAMAGES**

**CM MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a Default Judgment entered on 5<sup>th</sup> June 2020. The Defendant was found liable for unfair dismissal and unfair labour practice, pension and gratuity benefits, and costs of the action.

The Claimant was dismissed from the Malawi Defence Force on 8<sup>th</sup> October 2018 having worked there since 18<sup>th</sup> December 2007, (almost 11 years). The Claimant was taken before a disciplinary committee where he was not given a chance to be heard, and was only given the sum of K1,767,336.64 as pension/gratuity. The Claimant did not receive terminal benefits.

**EVIDENCE**

In viva voce, the Claimant told the Court that they are seeking compensation for being dismissed unfairly, they are claiming their gratuity, and claiming their pension contributions since they were supposed to retire aged 65 years. The Claimant adopted their witness statement as their evidence in chief. It states (in part):

6. *I am Boniface Mayeso Malili of C/O Roberts & Franklin Law Consultants of P.O. Box 30195, Lilongwe in the Republic of Malawi.*
7. *I am the claimant in this action.*
8. *I was employed by the defendant in December 2007 as a military soldier in the Malawi Defence Force.*
9. *My gross salary was MK190,800.00 per month. I now produce a copy of my final pay slip and mark it "MBM1".*
10. *On 8<sup>th</sup> October 2018, I was dismissed by the defendant on grounds that my services with the defendant were no longer required. I now produce a copy of my dismissal and mark it "MBM2".*

11. *I contend that there were no valid and sufficient grounds to dismiss me as I was not even accorded any opportunity to explain my side of the story on the allegations levelled against me and my witnesses were not even allowed to testify in the circumstances.*
12. *Upon my dismissal, I was only paid the sum of MK1,767,336.64 being my pension and gratuity instead of MK24,613,200.00 for the 11 years that I had worked with the defendant. I now produce the cheque and mark it “MBM3”.*
13. *Since my dismissal, I have not been able to find formal employment.*
14. *I am 32 years old.*
15. ***I declare that this statement is true to the best of my knowledge and belief.***

In cross examination, the Claimant confirmed that they signed the witness statement with an understanding of the phrase ‘*I understand that this sworn statement shall be used in these proceedings.*’ The Claimant confirmed that a pension is received after attaining the age of 65 years. During the Claimant’s employment they were informed that the retirement age had been raised from 60-65 years by their bosses. The Claimant confirmed that paragraph 10 of the witness statement contained the amounts withheld. The Claimant was not involved during the preparation process. The Claimant did not agree that the money that was stated was the only sum due to him. According to the Claimant’s last payslip there were deductions and expenses charged that were outside the salary. The Claimant didn’t claim the deductions because the matter was already before the court. Some of the sums were added after the Claimant petitioned the Court and the computations were only given to the Claimant after the matter had commenced before Court. The Claimant sued for unfair dismissal and once the cheque was released, the Claimant added claims for inadequate terminal benefits. The Claimant was given the documents and the cheque, but no explanations were offered on the deductions. The Claimant’s employer, the Malawi Defence Force (MDF), has the last payslip containing the deductions. The Claimant confirmed their attempts at seeking employment but could not provide evidence of the same. Although the Claimant confirmed that they had applied for jobs at NBS Bank, National Bank of Malawi, Standard Bank, and the Malawi Electoral Commission. The Claimant confirmed that they were not sure of the number of years that one must work before they are entitled to a pension. The Claimant was supposed to receive over K24 million but only received K1 million instead of 1 year’s gratuity for each of the eleven (11) years.

In re-examination, the Claimant confirmed that they were seeking assistance from the Court since their former employer illegally dismissed them. The Claimant was not asked about the unlawful dismissal by Counsel. The K1 million plus that was received was based on calculations that considered eleven (11) years of service but was not calculated correctly. The Claimant does not know how the figure was calculated.

### ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant’s pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.<sup>1</sup>

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.<sup>2</sup> Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and considering the money value. Lord Morris

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<sup>1</sup> See *Cassel and Co v Broom* [1972] AC 1027. See also *Tembo v City of Blantyre and The National Insurance Co Ltd* – Civil Cause No. 1355 of 1994 (unreported).

<sup>2</sup> *British Commission v Gourley* (1956) AC 185.

buttresses this contention in **West v Shepherd**<sup>3</sup> by stating: ‘money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.’

The mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is equal with the value of the currency at the time the award is made. In **Malamulo Hospital (The Registered Trustees) v Mangani**<sup>4</sup>, the Supreme Court states: “It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money.” In **Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu**,<sup>5</sup> the Court states: “Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award.” In **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: ‘In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.’

#### SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

Counsel for the Claimant filed written submissions in support of the application. The pertinent parts of the arguments will be set out herein:

##### **3.1 Damages for Unfair Dismissal.**

3.1.1 Section 63 (4) and (5) of the Employment Act provides 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.**

**(5) The amount to be awarded under subsection (4) shall not be less, than—**

**(a) one week’s pay for each year of service for an employee who has served for not more than five years;**

**(b) two week’s pay for each year of service for an employee who has served for more than five years but not more than ten years;**

**(c) three week’s pay for each year of service for an employee who has served for more than ten years but not more than fifteen years; and**

**(d) one month’s pay for each year of service for an employee who has served for more than fifteen years,**

3.1.2 Thus the measure of damages or compensation for unfair dismissal is what the court thinks just and equitable – see section 63(4) of the Employment Act and **Kachingwe vs. Group Commodity Brokers Ltd IRC Matter No. 117 of 2000 (unrep)**.

3.1.3 What is just and equitable is left to the discretion of the court. See **Wawaya vs. Malawi Housing Corporation, MSCA Civil Appeal No. 40 of 2007 (unrep)**.

3.1.4 In **Chitheka v Attorney General, Civil Cause No. 67 of 2008 (unrep)**, Mzikamanda J had this to say:

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<sup>3</sup> West v Shepherd (1964) AC 326 at 346.

<sup>4</sup> [1996] MLR 486.

<sup>5</sup> Quoting from **HQ Chidule v Medi MSCA 12 of 1993**.

*Now compensation as a remedy for unfair dismissal is provided for in Section 63 (1) (c) of the Employment Act. Such compensation must be that which the court considers just and equitable considering all the circumstances of the case. As has been stated on a number of occasions compensation is at the discretion of the court to make good the loss suffered as a result of defendant's breach of contract of employment. It is intended to ensure that as far as money can do, the Plaintiff should be placed in the same position as if the contract had been duly performed. It is made in reference to the employee's net monthly pay and loss of fringe benefits. As was stated by Twea, J. in DHL International Ltd v Nkhata Civil Appeal No. 50 of 2004 in exercising its discretion in assessing compensation the court must give reasons. The award must be such as by law would be allowed.*

- 3.1.5 *In assessing compensation for unfair dismissal, the court takes into account a number of factors. These include the applicant's effort to mitigate his loss, employee's age, physical fitness, qualification, and the prevailing labour market. See **Chitheka v Attorney General, Civil Cause No. 67 of 2008** (unrep), per Mzikamanda J.*
- 3.1.6 *In the recent case of **Blantyre Newspaper Ltd vs. Charles Simango Civil Appeal No. 6 of 2011** Justice Mwaungulu has held that compensation for unfair dismissal is at two levels: immediate loss, viz, loss up to the date of assessment, and future loss, viz, loss from the date of assessment.*  
claimant's immediate loss herein
- 3.1.7 *In this case the Claimant's salary was MK190, 400.00 per month. He was dismissed on 8<sup>th</sup> October, 2018. To date, the claimant has lost salary for 26 months.*
- 3.1.8 *Therefore, compensation for immediate loss will be as follows:*  

$$\text{MK190, 400.00} \times 26 \text{ months} = \text{MK4,950,000.00}$$

Claimant's Future Loss

- 3.1.9 *In the case of **Blantyre Newspaper Ltd vs. Charles Simango Civil Appeal No. 6 of 2011** Justice Mwaungulu states that 'the correct measure of the loss is the time when the employment was to determine and the loss flowing from the termination of the contract.' He goes on to state as follows:*  
*"A person, retiring at 60 years unfairly dismissed at 45, loses fifteen years of employment and the earnings the years covered, all considered. Equally, a person on a five-year contract unfairly dismissed at one year loses employment for four years and earnings in those years. this is the loss envisioned in sections 63 (1) (c) and 63 (4) of the Employment Act. Remuneration and wages may not be the only financial loss emanating from unfair dismissal. Generally, remunerations are used to determine the actual loss in monetary terms."*
- 3.1.10 *In determining future loss, the court will assess the probability of the employee finding another job. If the probability is zero, full compensation must be awarded. See **Blantyre Newspaper Ltd vs. Charles Simango Civil Appeal No. 6 of 2011**, per Justice Mwaungulu.*
- 3.1.11 *In the present case, the claimant has not managed to find employment since he was dismissed. This has been largely because of the manner in which he was dismissed.*
- 3.1.12 *The plaintiff's prospects of finding another employment are, therefore, very slim.*
- 3.1.13 *Section 2 of the Pensions Act provides that retirement age shall be stipulated in the rules of the Pension Fund, which shall be between 50 and 70 years, or as the Minister may prescribe for purposes of the Act.*
- 3.1.14 *Munkman J., **Damages for Personal Injury and Death, 10<sup>th</sup> Ed.**, states as follows at page 148:*  
*"In determining the number of years' purchase, the most important question is, how long would the deceased have continued to live if he had not met with*

*a particular accident? If the deceased was wholly dependent upon his personal earnings, what matters is not so much his full expectation of life as his expectation of working life. Thus, when the deceased was elderly and his working life was nearing its end, the damages must be smaller. But it has been said that many men continue to work until 70, or even, if they keep their health, considerably longer: per Lord Goddard CJ, in *Zinovieff v British Transport Commission* (1954) *Times*, 1 April; and a skilled tradesman, for at 70, whose trade was in demand, could be expected to work until 75: *Gilbertson v Harland & Wolf Ltd* [1966] 2 Lloyd's Rep 190."*

3.1.15 In the present case, the claimant is aged 32. He could have worked up to 60 years. The probability of finding another employment are slim, almost zero. We, therefore propose that he should be awarded a salary for 20 years. Thus,  
 $MK190,400.00 \times 12 \times 20 = \text{MK}45,696,000.00$

3.1.16 Therefore, the plaintiff should be awarded a total sum of **MK50,646,000.00** for unfair dismissal.

### 3.2 Pension and gratuity benefits.

3.2.1 In this case the Claimant's has been in the employment with the defendant for 10 years and 9 months.

3.2.2 Therefore, his pension and gratuity will be as follows:

$MK190,400.00 \times 129 \text{ months} = \text{MK}24,561,600.00$

3.2.3 This figure must be taken into account of the fact that the claimant was already paid the sum of **MK1,767,336.64**.

3.2.4 Therefore, the claimant is entitled to **MK22,794,263.36** being pension and gratuity benefits.

## COMPENSATION

Counsel for the Claimant submitted computations of the compensation due to the Claimant. Counsel for the Claimant submits as follows: Section 63 of the **Employment Act** provides remedies for unfair dismissal. The guiding principle for the Court is to 'consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal'- Section 63 (2) of the **Employment Act**. In this instance, the Claimant has been awarded compensation for unfair dismissal. The deciding court did not make an order for reinstatement or re-engagement. Further, the Claimant, through evidence and Counsel's submissions has shown preference for an award of compensation as the remedy of choice. This Court proceeds on that basis.

Section 63 of the **Employment Act** further guides 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.

(5) The amount to be awarded under subsection (4) shall not be less, than—

(a) one week's pay for each year of service for an employee who has served for not more than five years;

(b) two week's pay for each year of service for an employee who has served for more than five years but not more than ten years;

(c) three week's pay for each year of service for an employee who has served for more than ten years but not more than fifteen years; and

(d) one month's pay for each year of service for an employee who has served for more than fifteen years,

*and an additional amount may be awarded where dismissal was based on any of the reasons set out in section 57 (3).*

While this may be true, it is also known that the Employment Act does not apply to members of the Defence Force. Section 2 of the **Employment Act** states:

*(1) Subject to subsection (2), this Act applies to the private sector and the Government, including any public authority or enterprise.*

*(2) This Act does not apply to members of the armed forces, the prisons service, or the police, except those employed in a civilian capacity.*

This Court therefore consulted the **Defence Force Act** and subsidiary legislation therefrom to determine the amount of gratuity due to the Claimant based on the Conditions of Service applicable to members of the Defence Force.

#### *Unlawful/Unfair Dismissal*

In the matter of **Justice Jombo v the Attorney General (Malawi Defence Force)** Civil Cause Number 110 of 2016, this Court, on 8<sup>th</sup> April 2021, awarded the Claimant K3,500,000.00 as compensation for unfair dismissal, future loss of earnings and loss of pension benefits. In that case, the Claimant had worked with the MDF for five years and was not pensionable. This was a nominal award of general damages made by the Court as compensation.

Following from this award, this court distinguishes the **Justice Jombo Case** with the present one in considering the Claimant's length of service. The Claimant herein dedicated almost 12 years of service to the Malawi Defence Force which is over twice the length of service in the **Justice Jombo Case**.

This Court therefore awards the sum of K7,000,000.00 as compensation the Claimant herein for unlawful/unfair dismissal.

#### *Gratuity Benefits*

Reference was made to the **Defence Force (Regular Force) (Other Ranks) Regulations** of 2020 that provides for 'Benefits on discharge or dismissal on prescribed grounds.' The pertinent section states as follows:

*83. A member who under section 26 of the Act (other than on the grounds of medical or physical fitness occasioned without any misconduct or serious negligence on his part) or under section 82 of the Act, is discharged or dismissed from the Regular Force may be entitled –*

...

*(g) where he is discharged under section 26(g), one month pay for each completed year of service.*

The Claimant herein was discharged pursuant to section 26(g) of the **Defence Force Act**. It provides:

*An officer or a soldier of the Regular Force may be discharged by the appropriate superior authority, at any time during the currency of any term of engagement—*

...

*(g) if for any reason given to him in writing his services are no longer required;*

The Claimant worked for the Malawi Defence Force for over eleven (11) years and is therefore entitled to one month pay for each completed year of service. The computations are as follows:

$$\begin{aligned} &\text{MK190,800.00 per month} \times 11 \text{ years} \\ &= \text{MK2,098,800} \end{aligned}$$

The Claimant is hereby awarded the sum of MK2,094,400.00 at 5% interest from the date of dismissal – 8<sup>th</sup> October 2018 as his gratuity benefits. The Claimant already received K1,767,336.64 from the Malawi Defence

Force which will be subtracted. **The Claimant is therefore awarded the balance of K327,063.36 at 5% interest from 8<sup>th</sup> October 2018 – the date of dismissal as gratuity benefits.**

#### *Pension*

Regulation 61 of the **Defence Force (Regular Force) (Other Ranks) Regulations** provides as follows:

- (1) Subject to these Regulations, the pensionable service with reference to which any pension, gratuity or other benefit is to be calculated shall be continuous from the date of enlistment.*
- (2) Pensionable service shall include—*
  - (a) time spent on duty;*
  - (b) time spent on leave;*
  - (c) time spent on attachment or secondment to any other force or organization in accordance with the Act; and*
  - (d) in the case of a person who, immediately before the date of commencement of these Regulations, was a member, the period of employment which, immediately before that date, could, in terms of the law then applicable to him, have been taken into account in computing his pension.*
- (3) Where any person who has had previous service in the Regular Force is later engaged for service in the Regular Force under section 5 of the Act, then, if—*
  - (a) such person is not a disabled member who is required to resume duty in the Regular Force under regulation 54 (1);*
  - (b) the previous service terminated not more than two years prior to the date of such later engagement for service in the Regular Force; and*
  - (c) no gratuity or pension or any terminal benefits were paid to such person in respect of the previous service, the period of the previous service shall be reckoned as pensionable service.*
- (4) Pensionable service shall not include any period of service by a member in respect of which, by virtue of regulation 26, no pay was paid to him:*  
*Provided that the pensionable service of a member shall not be deemed to have been interrupted by the exclusion therefrom of any period of service referred to in this paragraph.*
- (5) The period of pensionable service shall be calculated by the month, but fractions of a month shall be taken to the nearest whole month.*

In this case, the Claimant had been in the employ of the Malawi Defence Force for over 11 years, two (2) months shy of 12 years. Pensionable length of service in the Malawi Defence Force is 15 years. The Claimant is therefore not entitled to an award for pension benefits; however, the Court awarded these benefits in the judgment so this Court cannot exclude him from an award of pension. This Court will therefore award the Claimant nominal damages of K1,000,000.00 as their pension entitlement.

#### DISPOSAL

The Claimant is therefore awarded K327,063.36 at 5% interest from 8<sup>th</sup> October 2018 until the date of full payment, as gratuity benefits, K7,000,000.00 for unfair dismissal and K1,000,000.00 for loss of pension benefits. Interest of 5% ought to only be calculated in respect of the gratuity benefits amounting to K327,063.36.

Costs of the action will be assessed by the Registrar if not agreed upon by the parties. Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames. Leave to appeal is hereby granted.

Ordered in Chambers on the 5<sup>th</sup> day of August 2021 at the High Court, Civil Division, Lilongwe.

C Mandala

**ASSISTANT REGISTRAR**