



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

Civil Cause Number 110 of 2016

BETWEEN:

JUSTICE JOMBO.....CLAIMANT

AND

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

CORAM: C MANDALA: ASSISTANT REGISTRAR
ED Salima: Counsel for Claimant of ED Salima and Company
Attorney General Unrepresented
C Zude: Court Clerk

ASSESSMENT OF DAMAGES

CM MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Judgment made by Justice KK Nyirenda on 16th December 2019. The Defendant was found liable for loss of employment and benefits, and costs of the action. The hearing on Assessment of Damages was conducted on 14th August 2020.

EVIDENCE

The Claimant was his own and only witness. The Claimant's evidence was unopposed. He adopted his witness statement as his evidence in chief. It states:

I, Justice Jombo of Jombo village, Traditional Authority Ngabu in Chikwawa District in the Republic of Malawi will say as follows:

- 1. I am a Malawian national and of full age.*
- 2. I do hail from the address named above and I am unemployed, but I do a small refrigeration business that earns me a net income of about K30,000.00 a month.*
- 3. I used to work for the Malawi Defence Force from 5th October 2009 to 14th August 2015 when I was finally dismissed. Copy of my letter of dismissal is now attached and marked as exhibit number "JJ 1".*
- 4. At the time of my exit, I used to receive a monthly salary of MK65,876. I have with me a copy of my payslip now attached and marked as exhibit number "JJ 2". I also used to receive a monthly rational allowance of MK10,000.*
- 5. At the time of my dismissal, I was paid a total sum of K180,000 or thereabout as my terminal benefits. Unfortunately, no payment voucher nor break down calculation was made available to be in order for me to know what was being paid for at the time.*

6. *Currently I am 38 years old, having been born on 9th February 1982. I have with me a copy of my national identity now attached and marked as exhibit number “JJ 3”.*
7. *I do hold a Malawi School Leaving Certificate obtained in the year 2005. I have a copy of the same now attached and marked as exhibit number “JJ 4”. I also do hold a certificate in combat driving obtained in South Africa whose copy is now attached and marked as exhibit number “JJ 5”, and a UN Peace Keeping Certificate obtained in the Democratic Republic of Congo whose copy is now attached and marked as exhibit number “JJ 6”.*
8. *At the time of my dismissal, I was working as a Private Soldier (PTE).*
9. *From the date of my exit from the Malawi Defence Forces, I have remained unemployed until this day because of the nature of my letter of dismissal.*
10. *At the time of my employment, I was on a pension scheme but the same was not paid out to me to this date.*
11. *I therefore ask this court to order the Defendant to pay me compensation for my wrongful dismissal as indicated in my skeleton arguments or as the court deems fit.*
12. *I believe that the facts stated in this witness statement are true.*

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.¹

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.² 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 buttresses this contention in *West v Shepherd*³ 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*⁴, 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*,⁵ 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

¹ 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).

² *British Commission v Gourley* (1956) AC 185.

³ *West v Shepherd* (1964) AC 326 at 346.

⁴ [1996] MLR 486.

⁵ Quoting from *HQ Chidule v Medi* MSCA 12 of 1993.

(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.'*

COMPENSATION

Unlawful Dismissal and Terminal Benefits

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 himself, through his evidence and Counsel's submissions has shown his preference for an award of compensation as his 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 compensation due to the Claimant based on the Conditions of Service applicable to members of the Defence Force.

Reference was made to the **Defence Force (Regular Force) (Officers) (Amendment) Regulations** of 2020 (gazetted on 15th May 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 almost six years. He is therefore entitled to one month pay for each completed year of service. The computations are as follows:

$$\begin{aligned} & \text{MK65,876 per month} \times 5 \text{ years} \\ & \quad \quad \quad = \underline{\underline{\text{MK329,380}}} \end{aligned}$$

The Claimant is hereby awarded the sum of MK329,380.00 at 5% interest from the date of dismissal – 14th August 2015 as his terminal benefits.

Further, the Claimant is entitled to a further sum of K3,000,000.00 as compensation for unfair dismissal, future loss of earnings and loss of pension benefits.

DISPOSAL

The Claimant is therefore awarded **K329,380 at 5% interest from 14th August 2015**, and **K3,500,000.00 for unfair dismissal inclusive of loss of future earnings and loss of pension benefits**.

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 8th day of April 2021 at the High Court, Civil Division, Lilongwe.



C Mandala

ASSISTANT REGISTRAR