



REPUBLIC OF MALAWI
IN THE INDUSTRIAL RELATIONS COURT OF MALAWI
SITTING AT BLANTYRE
IRC MATTER NO. 67 OF 2022

BETWEEN:

EDWARD PASELI.....APPLICANT

-and-

ENCOR PRODUCTS LIMITEDRESPONDENT

CORAM: H/H PETER M.E KANDULU, AR
Henry Chizimba, Counsel for the Applicant.
The Respondent, Absent and Unrepresented
Ms. Rose Msimuko, Court Clerk.

ORDER ON ASSESSMENT OF COMPENSATION

Background

1. This is an assessment of compensation that is payable to the applicant pursuant to a default Judgement of this court dated 6th day of May 2022.
2. The said Judgment makes the following awards to the applicants:
 - Damages for unfair dismissal
 - Damages for unlawful labour practices
 - Severance pay
 - Gratuity pay overtime pay
 - Notice Pay
 - Leave Pay
3. The default Judgement further directed the assessment to be assessed by the Registrar if parties fail to agree.
4. Service for the assessment was duly served to the respondent and return service duly served to the court.
5. However, during assessment trial the respondent did not avail themselves in court and the court ordered the matter to proceed to trial since there was proof of return of service.
6. The applicant adopted and tendered his witness statement which is on court record. He was not even cross examined since the respondent was not in court. The said witness statement stated as follows:
7. The Respondent employed him on 5th April, 2018 as a Security Guard. He has been a loyal employee of the Respondent from the date of commencement of employment until in November, 2021 when the Respondent unfairly dismissed him from employment.
8. At the material time of his dismissal he was being paid MK58, 774.00 per month. A copy of pay slip was exhibited and marked.
9. Throughout his employment, he was a diligent and hardworking employee for the Respondent. The Respondent never found him in the wrong at all.

10. Since his dismissal, he has not secured an alternative job even though he has tried all he could to secure one. He has tried looking for a job at Agora, Speedys, and Zaggaf but he has failed to secure one. It is hard these days to find a job.
11. He is currently struggling financially as he is jobless. He is finding it extremely hard to make ends meet.
12. He is doomed to suffer the effects of his joblessness for many years to come as he do not expect to find a job any time soon or at all because the current job market is extremely tight and tough. It is even worse with the Covid pandemic.
13. He has been in the employment with the Respondent for 3 years 7 months which is 43 months. Having worked for the Respondent for 3 full years he is entitled to be paid severance allowance by the Respondent. However, the Respondent never paid him severance allowance at the time he got dismissed.
14. He was never put on pension during the entire period he worked for the Respondent. As such, he is entitled to be paid gratuity for the 43 months that he actually worked for the Respondent herein. Nonetheless, the Respondent never paid him gratuity at the time of his dismissal herein.
15. Throughout the period he has been in employment with the Respondent, he has been working 6 days in a week from 4pm to 5am from Monday to Sunday except Tuesdays.
16. He also worked on public holidays, however, he was never paid for overtime at the time of his dismissal for the entire period he has worked overtime for the Respondent.
17. He worked 45 days of public holidays (being 13 national annual holidays multiplied by 3 years plus 6 national holidays in 7 months).
18. He therefore claims overtime pay for 45 days which the Respondent never paid at the time of his dismissal.
19. As an employee, he was entitled to annual leave yet he was never allowed to go for annual leave throughout the entire period he has worked for the Respondent.
20. At the time of his dismissal he had accumulated 63 days (being 18 annual leave days multiplied by 3 years plus 9 days of the 7 months).
21. However, the Respondent never paid him in lieu of the 63 annual leave days at the time of my dismissal.

22. He was being paid his salaries per month. He is entitled to one month's notice or one month's payment in lieu of notice. However, he was never paid the same on his dismissal. He therefore claims MK58, 774.04 as notice pay.
23. The above is the evidence of the applicant and the same is uncontroverted I therefore regard it as the true version of what had happened.

Issues

24. What is the applicable quantum of compensation for Damages for unfair dismissal, Damages for unlawful labour practices, Severance pay, Gratuity pay overtime pay, Notice pay and Leave Pay that applicant is entitled?

Burden of proof

25. On having so pleaded, the onus is on the applicants to prove their claims as the burden of proof rests upon the party, who substantially asserts the affirmative of the issue *Joseph Constantine Steamship Line –vs.- Imperial Smelting Corporation Ltd* (1942) AC 154.
26. The burden is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it. *B. Sacranie v. ESCOM*, HC/PR Civil Cause Number 717 of 1991.

Standard of Proof

27. The standard required in civil cases is generally expressed as proof on a balance of probabilities *Miller v. Minister of Pensions* 1947] All ER 372. It follows in this matter that the Applicants have a burden to prove on the balance of probabilities the claims against the respondent in their pleadings.

28. The applicable law

29. The law governing these matters can be summarized as follows:

30. Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation.

31. In the case of *Tourism Development and Tourism Company and another v Mhango* [2008] MLLR 319 it was stated that unfair dismissal is a statutory wrong and in assessing compensation a court has a wide discretion. That discretion must be exercised judicially and in accordance to principles.

32. In as far as employment is concerned, the word ‘damage’ is replaced by compensation. Section 63 (1) of the Employment Act provides that if, the Court finds that an employee’s complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies—
- a. reinstatement
 - b. re-engagement
 - c. an award of compensation as specified in subsection (4).
33. As outlined by Section 63 (1) (c), in awards for compensation for unfair dismissal, the guiding principles are as specified in Section 63 (4) read together with subsection (5) of Employment Act. Section 63 (4) provides as follows:
- “An award of compensation shall be such an 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”*
34. Section 63 (5) then provides some guidance as to the amount of compensation the court may award. It provides that ‘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 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.’
35. Further to these, the court is given wide latitude to the extent that entrenched common law principles are applicable in assessing compensation provided the same revolves

around the principle enacted in Section 63 (4). This was reflected in the Supreme Court decision in *Wawanya vs Malawi Housing Corporation*, Civil Appeal No.40 of 2007.

36. In that case, the question whether the compensation could be said to be compensation under common law or under Employment Act was answered by the Supreme Court at page 8 of the transcript in this way:

“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.”

37. As promulgated by the provision of Section 63 (4) of the Employment Act, the fundamental principle in making the award of compensation for unfair dismissal is that it should be just and equitable in the circumstances.

38. Now, to ensure that the compensation is fair, just and equitable to both parties, Section 63 (5) then provides for the starting point. Thus, the discretion of how much maximum compensation to award to an employee who has been unfairly dismissed is given to the court. In exercising this discretionary powers, however, what essentially Section 63(4) states is that the court must consider a proven loss sustained by the Applicant due to the dismissal in the first place and that the dismissal must be attributable to the actions of the employer. And finally that the loss suffered must be examined in light of the actions of the employee himself/herself, as to whether he or she has contributed in one way or the other.

39. Another important factor, of course, in determining how much to award as compensation, and it is now trite in all employment cases dealing with issues of compensation for unfair dismissal, is that of mitigation of loss. Under this requirement, the dismissed employee must take initiative to mitigate the loss. He is not supposed to sit idle on the pretext that the court will make good no matter what the time. He must move on and try to fetch for himself another job (See *Archibald Freighting Ltd vs Wilson* [1974] IRLR 10). The reason being that it is not “just and equitable” for the Court to assist litigants who sit idle and fail to make effort to alleviate their loss (See

- also *Msiska vs Dairiboard Malawi*, IRC, Matter No. 6 of 1999). This takes different forms but the obvious ones include trying to look for alternative employment. If this is not shown at trial, it is a ground on which discretion could be exercised by the court in an unfavorable way to the Applicant.
40. In addition, the employee's age, physical fitness or health, type of contract and skill or qualifications in relation to one's chances of getting another employment at the prevailing labour market in his/her field at that particular time are also factors to be considered in deciding the amount to award to the dismissed employee (See *Kachinjika vs Portland Cement Company* [2008] MLLR 161 and *Davie Daudi and 7 others vs Glory Investment*, Matter No. IRC 769 of 2019).
 41. In the case of *Norton Tool Company vs Tewson* 1973]1 ALL ER183, Sir John Donaldson, President of the National Industrial Relations Court said: -
"The amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle. First the object is to compensate, and to compensate fully, but not to award a bonus...second, the amount to be awarded is that which is just and equitable in all circumstances having regard to the loss sustained by the complainant. Loss does not include injury to pride or feelings"
 42. The above quote clearly indicates that the court has to show satisfactory on how it arrived at figures for compensation. See the case of *Kachingwe vs Group Commodity Brokers Limited*, IRC Matter No.117 of 2000.
 43. Furthermore, in the case of *Terrastone Construction Ltd vs Solomon Chathuntha*, MSCA Civil Appeal No 60 of 2011, the Supreme Court of Appeal determined the question of what amounts to a just and equitable compensation and how the Court would apply its discretion in order to arrive at a just and equitable compensation with reference to Section 63(4) of the Employment Act.
 44. The Court held that 'a court has to take into account the loss sustained by an employee as a result of the unfair dismissal but that the assessment does not have to end on the enquiry of loss. The court has to determine the matter on terms which are reasonable and that reasonableness will be achieved, if the interests of both the employee and the

employer are taken into account'. The court then guided and advised that Section 63(4) of the Employment Act should be read together with Section 63(5) of the same Act and added that 'it is important that reasons should always be given for coming up with the assessment of damages which are in excess of what is set down in the law.

45. In the case of *Sothorn Bottlers (SOBO) vs Graciam Kalengo*, [2013] MLR 345 the Supreme Court of Appeal also stated the following at Page 348:
46. *"Let us reiterate what was said in Standard Bank vs R. B Mtukula, Misc Appeal No. 24/2007 (High Court) that where the court wishes to exceed the minimum compensation in Section 63(5) of the Employment Act, it must give clear reasons so that the employer, employee and also the appeal or review court are able to appreciate why the award was enhanced."*
47. The court, in Terrastone case (supra) actually warned against awarding damages with elements of punishment to the employer and set aside an award of damages that was equivalent to the salary the Respondent earned the whole period he had worked for the Appellant. Instead, the Court awarded him the minimum statutory compensation in Section 63 (5) of the Employment Act of two weeks' pay for each year of service. Taking into account of Section 63 (4), the Court did not increase the award because the Respondent was found to have contributed to his own dismissal.
48. On page 6 of the judgment, the Court held which I find to be illustrative:
"Section 63(4) is not a blank cheque for the court to decide any amount to be payable. It needs to be read into Section 63(5) whenever compensation is awarded. In our view, it is a guideline on how a court may give an award under subsection 5, and should not be read in isolation. This section provides for a minimum award, but the court can award more than this minimum depending on the circumstances of the case as provided in Section 63(4) of the Act.
49. As we have seen in *Graciam Kalengo* case (supra), these guiding principles on assessment of compensation were earlier applied in the case of *Standard Bank vs Mtukula* (supra).
50. In that case, *Mtukula*, who had worked for the bank for 19 complete years and therefore entitled to the statutory minimum award of one month's salary for each year of

- complete service, was awarded compensation at the rate of three months' pay for each year of completed service upon the court taking into account the peculiar facts of the matter. This award was upheld by the Supreme Court of appeal.
51. These principles as outlined in *Mtukula* case were similarly applied in *National Bank of Malawi vs Benjamin Khoswe and First Merchant Bank Ltd vs Eisenhower Mkaka and Others*, Civil Appeal No1 of 2016, being IRC matter number 137 of 2012.
 52. In fact, in the case of *First Merchant Bank Ltd vs Eisenhower Mkaka and Others* (supra), which is relatively the recent Supreme Court of Appeal decision, it was well articulated that employment is not a lifetime commitment and that it would not be in the spirit of Section 63(4) and (5) of the Employment Act to award the Applicant up to retirement age. The Court actually stated as follows which we also find quite illuminating, instructive and illustrative:
 53. *“In assessing compensation, the IRC had to stick to the spirit of Section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of the compensation that must fall due, not the loss of salary, increments and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages/compensation. In the same manner, future losses do not matter at all. Therefore, one cannot talk of loss of earnings up to the time the former employee should have retired. Certainly, that is not the spirit of the Employment Act. As already observed, Section 63(5) sets down the minimum compensation. The court may go up depending on its evaluation of the matter. The court enjoys the wide discretion to settle for either the minimum prescribed or for any higher amounts of compensation as would fit the description of “just and equitable” after weighing the considerations in Section 63(4) of the Act”.*
 54. In the *National Bank of Malawi vs Benjamin Khoswe* (supra), Chipeta J, as he then was stated the following on award of compensation for unfair dismissal and salary increments on page 25 and 26 of the judgment:
 55. *“In this case, however, instead of the Respondent seeking just and equitable compensation that is in accordance with Section 63(5) as might or might not be increased in the court's discretion, he wants full salary and increments for each day he*

*was out of employment to date of assessment of damages. Subject to discretion the law gives me about whether to stick with the minimum or to increase it, my opinion is to follow the guidance offered by Section 63(5) of the Employment Act. At the minimum, therefore, regardless of whether it will come to more than or less than what the Deputy Registrar had awarded him, I hold the view that the Respondent would be entitled to a just and equitable award of a month's pay for each of the 21 years he had served the Bank. Considering, however, that this case is virtually at all fours with the **Stanbic Bank vs Mtukula** case, where the Supreme Court of Appeal upheld an award at the rate of three months' pay for each of the completed years of service, I see no reason why the Respondent should be treated differently in this case. I accordingly set aside the award he got of full salary for the whole period between dismissal and assessment of damages. Instead, I award him three months' salary per year for each of the 21 years he served the Appellant ...which is what I would consider granting him as his due compensation under the current legal formula as legislated by the Employment Act."*

56. In the case of **Kachinjika vs Potland Cement Company** [2008] MLLR 161, the court refused to award loss of salary from the date of termination to the date of judgment on the ground that 'such an award would be flawed as it would proceed on the assumption that the plaintiff was never terminated which was not true; that he continued being an employee of the defendant company which was not true; and that the plaintiff in his pleadings prayed a declaration that he should be regarded as having continued in his position from the date of termination until that of judgment which was also not the case'.
57. The above cited and discussed cases were considered and applied in the cases of **Douglas Mbilima vs Macsteel Malawi Limited**, Matter No IRC. LL 645 of 2011, **Vision Zikhole vs Blantyre Water Board**, MZ IRC 319 of 2011 **and Loveness Chalera and Davie Maseko vs Reserve Bank of Malawi**, Matter No IRC 32 of 2015; and almost in all of these cases, the contracts of employment were for unspecified period of time. Guided by the above outlined principles on assessment of compensation for unfair dismissal, my court will now proceed to analyze the facts in light of these applicable principles.

58. Section 39 of the Employment Act provides the law of overtime pay and the provision states:

1. Overtime shall be subject to the limitations set out in sections 36 (4) and 37.
2. There shall be three classes of overtime known respectively as
 - a). ordinary overtime, which shall be time worked on a working day in excess of the hours normally worked by the employee in the undertaking concerned;
 - b). day of overtime, which shall be time worked by the employee on a day on which he would otherwise be off duty; and
 - c). holiday overtime, which shall be time worked on a public holiday.
3. An employee shall for each hour of ordinary overtime be paid at the hourly rate of not less than one and one-half his wage for one hour.
4. An employee shall for each hour of duty-off overtime be paid at the hourly rate of not less than twice his wage for one hour
5. An employee shall for each hour of holiday overtime be paid at a rate of not less than twice the normal hourly rate.

59. An assessment is a trial. Accordingly, during the assessment in this case, the Court will have to bear the foregoing principle in mind. The Court will have to analyze the evidence and see whether the applicants have discharged the burden placed on them by law. The duty on the applicants is to prove their compensation on a balance of probabilities and nothing more.

COMPENSATION FOR UNFAIR DISMISSAL

40. The Applicant was unfairly dismissed on 5th April, 2018 after working for the Respondent without any problems for 3 years 7 months. The Applicant has stated that he has tried to secure a job at Agora, Speedys, and Zaggaf but he has failed to secure one and that he does not see himself succeeding in the future given the volatile economic environment.

41. It is the Applicant's testimony that he is currently jobless and is currently struggling. The Applicant has stated that he prays that he be awarded compensation up to retirement as he stated that he does not see himself finding employment.

42. Considering the facts of this case, the court will not consider to award the applicant up to his retirement age since employment is not life time engagement.
43. It is my considered view that 60 months' salary will be just and equitable compensation in the circumstances. Monthly salary of K58, 774.04 multiplied by 60 months gives us MK3 526, 442.40.
44. I therefore award the applicant the sum of **MK3 526, 442.40** being damages for unfair dismissal.

SEVERANCE PAY

45. It is trite law that an employee who has worked for more than one year is entitled to be paid severance allowance for the full years actually worked. The Applicant in his witness statement testified that he actually worked for the Respondent for 3 years 7 months.
46. He further stated in his testimony that he was dismissed without being given severance pay. The Applicant therefore is entitled to 2 weeks' wages for the 3 complete years he actually worked for the Respondent.
47. The Applicant is therefore entitled to the sum of MK88, 161.02 as severance pay (being 2 weeks' wages of the monthly salary thus $MK58, 774.04 / 2 \times 3$ years).
48. I therefore award the applicant the sum of **MK88, 774.04** being severance pay due to him.

GRATUITY

49. The Applicant has stated in his testimony that the Respondent never put him on pension. It is trite that an employee who was not on pension is entitled to be paid gratuity for the months actually worked at 5% of the monthly salary.
50. He further testified that he actually worked for the Respondent for 3 years 7 months which translates to 43 months. It is his further testimony that he was dismissed without being given gratuity.
51. The Applicant therefore is entitled to 5% of his monthly salary for all the 43 months that he actually worked.

52. The Applicant is therefore awarded the sum of **MK126, 364.19** as gratuity (being 5% of the monthly salary of MK58, 774.04 x 43 months).

OVERTIME PAY

53. The Applicant has stated in his testimony that he was working every day of the week from Monday to Sunday except Tuesdays and was working from 4pm to 5am throughout the entire period he has worked for the Respondent.

54. It is trite law that every employee has 8 working hours a day, any employee who works for more than the normal working hours is entitled to receive an overtime pay equivalent to the total hours worked beyond the regular working hours.

55. The Applicant testified that he was working from 4pm to 5am thus 12 hours a day also worked during public holidays which he said the days worked on public holidays are 45 in total.

56. As such, the Applicant is entitled to twice the hourly rate. Therefore, the Applicant is entitled to MK220, 402.65 as overtime pay for the 45 days he worked during public holidays (being MK306.11 hourly rate x 2 x 8 hours in a day x 45 days)

57. I therefore award the applicant the sum of **MK220, 402.65** being overtime pay

PAYMENT IN LIEU OF LEAVE DAYS

58. It is trite law that after 12 months of employment, every employee is entitled to 18 days paid annual leave.

59. The Applicant has testified in his testimony that throughout his 3 years and 7 months he has worked for the Respondent, he was never allowed to go for annual leave.

60. The Applicant further testified that at the time of his dismissal he had accumulated 63 annual leave days but was never paid in lieu of the same.

61. As such, the Applicant is entitled to the sum of MK154, 281.86 (being daily rate of MK2, 448. 92 x 63 days).

62. I therefore award the applicant the sum of **MK154, 281.86** on this head.

NOTICE PAY

63. The Applicant has stated in his testimony that he was being paid his salaries per month. Section 29 (1)(a) of the Employment Act is very clear that where salaries are paid at a monthly rate then the notice period shall be one month's salaries.
64. The Applicant testified that he was dismissed without being given notice pay. As such, the Applicant is entitled to one month' notice or pay in lieu thereof of MK58, 774.04.
65. I therefore award the applicant **MK58, 774.04** being one-month notice pay.
66. The Malawi Kwacha has lost value due to inflation since September, 2020 when the Applicant was unfairly dismissed.
67. The Malawi Kwacha was recently devalued with 25% to USD as such the compensation should be boosted by 25% to cater for inflation.
68. In the case of *Musuma and Chilinda -vs- Reserve Bank of Malawi* Matter No. 30 of 2014, the court awarded 54 months' salary and benefits as compensation to Musuma who had 17 years to retirement and 80 months' salary as compensation to Chilinda who had 22 years to retirement. The court boosted the awards herein by 50% owing to inflation.
69. The case of *Musuma and Chilinda* (supra) is distinguished from this case as the applicant herein has just worked for 3 years and 7 months unlike the applicants in the cited case who had worked 17 years for the respondent.
70. My court is of the view that boosting the compensation with 50% will not be fair and equitable in the circumstances.
71. I therefore boost the total sum **MK4, 174, 426.16** awarded with 25% considering the devaluation of the Malawi Kwacha.
72. $MK4, 174, 426.16 \times 25\% = \mathbf{MK5, 218,032.70}$

73. I therefore award the applicant the total sum of **MK5, 218, 032.70**
74. Payment to be effected within 14 days from the date of service of this order.
75. Delivered in chambers this 25th day of July, 2022 at Blantyre.



**PETER M.E KANDULU
ASSISTANT REGISTRAR**

