



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL DIVISION  
IRC CIVIL APPEAL NUMBER 2 OF 2023  
(Being IRC Matter No. PR 11 of 2014)  
(Before Honourable Justice Muhome)**

**BETWEEN:**

**THE REGISTERED TRUSTEES OF NYUNGWE GIRLS  
CATHOLIC SECONDARY SCHOOL .....APPELLANT**

**- AND -**

**FRAZER TAULO MOMBE.....1<sup>ST</sup> RESPONDENT**

**ISAAC NALUSO ..... 2<sup>ND</sup> RESPONDENT**

**CORAM: HON. JUSTICE ALLAN HANS MUHOME**

Mr Yasin Domasi, of Counsel for the Appellant  
Mr Ishmael Wesley, of Counsel for the Respondents  
Mrs Jessie Chilimampunga, Official Interpreter

## **JUDGMENT**

### ***Background***

1. The Appellant operates a secondary school where the Respondents were employed as teachers between 2007 and 2013. The Industrial Relations Court (IRC), by a Judgment dated 12<sup>th</sup> August 2020, found that the Respondents were dismissed from employment without valid reasons and they were not accorded a right to be heard in keeping with the requirements of section 57 of the Employment Act.<sup>1</sup> They were awarded severance allowance, various payments in arrears and compensation for unfair dismissal, subject to assessment.
2. By an Order of Assessment dated 29<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent was awarded a total sum of K3,820,658.80 and the 2<sup>nd</sup> Respondent was awarded a total sum of K2,425,574.81. The Appellant was absent during the assessment despite due service of the notice.
3. The Appellant is dissatisfied with both the Judgment and the Order of Assessment and has filed five grounds of appeal as follows:
  - 3.1 Ground One: The lower court erred in law in awarding severance allowance on a fixed term contract.
  - 3.2 Ground Two: The lower court erred in law and fact in calculating severance allowance inclusive of expired terms of contract to which the Respondents were duly paid their dues.
  - 3.3 Ground Three: The lower court erred in law and fact in calculating gratuity inclusive of expired terms of contract to which the Respondents were already duly paid.
  - 3.4 Ground Four: The lower court did not consider the fact that the Respondents had a duty to mitigate damages and in fact mitigated damages by seeking employment.

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<sup>1</sup> Cap 55:02 of the Laws of Malawi.

3.5 Ground Five: The assessed award was not supported by evidence.

***Arguments from the Appellant and the Respondents***

4. Through their respective Counsel, the Court received both written and oral arguments from both parties. The Court shall avoid a repeat of the arguments and only refer to them under relevant parts of this Judgment.

***Discussion***

***Powers of the High Court on Appeal***

5. Under section 65 of the Labour Relations Act,<sup>1</sup> decisions of the IRC are final and binding. However, a decision of the IRC may be appealed to the High Court on a question of law or jurisdiction. This Court is aware that an appeal is by way of a re-hearing. This entails reviewing the evidence and the court's decision with the aim of determining whether the lower court arrived at a correct decision. An appeal is not a second attempt at one's luck in a claim. See *Manera Luciano v Wilson Tasera*<sup>2</sup> and *Press Corporation Limited and Presscane Limited v Rolf Patel and Others*.<sup>3</sup>

***Ground One: The lower court erred in law in awarding severance allowance on a fixed term contract***

6. Counsel for the Appellant has argued that severance allowance is not payable to employees who are engaged on a fixed term contract. This argument is not supported by any law. Section 35(1) of the Employment Act provides for severance allowance where an employee has been unfairly dismissed. There is no connection whatsoever to the question whether the employee was on a fixed term contract or not. Counsel for the Appellant referred the Court to section 35(4) of the Employment Act. However, that section has no relevance on the facts of this case as it applies to a situation where

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<sup>1</sup> Cap 55:01 of the Laws of Malawi.

<sup>2</sup> Civil Appeal Number 110 of 2018.

<sup>3</sup> MSCA Civil Appeal Number 26 of 2014.

termination of a fixed term contract occurs at the expiration of the specified period, and indeed in that scenario, severance allowance is not payable. The Respondents' last fixed term contract did not expire but was rather cut short by the Appellant's breach of section 57 of the Employment Act. The only requirement under Schedule I to the Employment Act, on the calculation of severance allowance, is that an employee who is unfairly dismissed shall be entitled to severance allowance upon completion of a period of at least 12 months of continuous employment. In addition, the Courts have always and correctly so been awarding severance allowance to contracted employees. See *Nsaliwa v Malawi Communications Regulatory Authority*<sup>1</sup> and *Konyani v Malawi Revenue Authority*.<sup>2</sup>

7. This ground of appeal is therefore dismissed.

***Ground Two: The lower court erred in law and fact in calculating severance allowance inclusive of expired terms of contract to which the Respondents were duly paid their dues***

8. This ground of appeal is summarily dismissed for similar reasons under which ground number one is dismissed. Furthermore, by section 41 of the Employment Act, the Respondents were deemed to be in 'continuous employment' from and including the first day on which they began to work for the Appellant up to and including the date of termination of their employment.
9. Under this ground of appeal, Counsel for the Appellant argued, at length, about the distinction between wrongful dismissal and unfair dismissal and submitted that the Respondents' case herein was about wrongful dismissal and hence notice pay should not have been paid. We fail to appreciate this argument. The distinction between unfair dismissal remedies, under section 63 of the Employment Act, and common law remedies is superfluous. This position is well settled through the Supreme Court of Appeal Judgment in *Wawanya v Malawi Housing Corporation*,<sup>3</sup> where the Court plainly stated that '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 common

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<sup>1</sup> Matter Number IRC PR 24 of 2015.

<sup>2</sup> Matter Number IRC PR 582 of 2016.

<sup>3</sup> MSCA Civil Appeal No. 40 of 2007 at page 8 of the transcript.

law award or any other description as one may please.’ The apex Court went further to mention clearly that ‘Where the contract of employment provides for a period of notice for termination and also payment *in lieu* of such notice, the compensation under section 63(4) may be in addition to the payment *in lieu* of notice.’

***Ground Three: The lower court erred in law and fact in calculating gratuity inclusive of expired terms of contract to which the Respondents were already duly paid***

10. Counsel for the Appellant has argued that gratuity ought to have been assessed for the last contract only, as the Respondents’ claims (per IRC Form I) were in relation to the last contract. This may be true but it is not supported by any proof of payment of gratuity in relation to the previous fixed term contracts. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this case the Appellant: See *Nkuluzado v Malawi Housing Corporation*<sup>1</sup> and *Miller v Minister of Pensions*.<sup>2</sup>
11. In the absence of such proof, this Court is of the view that the assessor was within the law to award the Respondents gratuity from the first fixed term contract to the end of the last contract. We take notice of the fact that the Appellant did not attend the assessment session despite due notice of the same. As aptly stated by N’riva J. in *Manera Luciano v Wilson Tasera*,<sup>3</sup> ‘an appeal is not a second attempt at one’s luck in a claim’ but rather a review of the relevant facts and evidence that was already before the lower court.
12. This Court therefore affirms the gratuity as assessed by the Assistant Registrar and dismisses the appeal in that regard.

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<sup>1</sup> [1999] MLR 302.

<sup>2</sup> [1947] All ER 372.

<sup>3</sup> Civil Appeal Number 110 of 2018 at page 1.

***Ground Four: The lower court did not consider the fact that the Respondents had a duty to mitigate damages and in fact mitigated damages by seeking employment***

13. Both Counsel submitted that it is a general principle of law that an employee who is dismissed from employment has a duty to mitigate the loss. Section 63(4) of the Employment Act provides that ‘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.’ This Court observes that whereas section 123(4) of the English Employment Rights Act, 1996 specifically incorporates the duty of an employee to mitigate his loss, there is no similar provision in our law.
14. Despite the lack of a clear provision on mitigation of loss, this Court agrees with both Counsel that for the compensation to be *just and equitable*, the Court is granted wide discretion in arriving at the same, including determining whether the employee mitigated his or her loss. This has indeed been the approach of the Courts. See *Kachinjika v Portland Cement Company*,<sup>1</sup> *Mwafulirwa v Manica Malawi Ltd*<sup>2</sup> and *Nsaliwa v Malawi Revenue Authority*.<sup>3</sup>
15. Considering the evidence on record, including the fact that both of the Respondents sought alternative employment and were indeed employed after some months, this Court has no reason to believe that the lower court did not address its mind to such matters and we cannot fault the Assistant Registrar in that regard. This ground of appeal is dismissed.

***Ground Five: The assessed award was not supported by evidence***

16. This ground of appeal does not elaborate the extent to which the assessed award is not supported by the evidence on record. It is duly dismissed considering that the lower court supported its assessment with relevant evidence. This is manifest from the Ruling of the Assistant Registrar on the Assessment of Compensation.

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<sup>1</sup> 2008 [MLLR] 161.

<sup>2</sup> Matter No. IRC 34 of 2004.

<sup>3</sup> Matter No. IRC PR 24 of 2015.

***Disposal***

17. This Court concludes that this appeal must fail. It is unmerited and consequently dismissed with costs.

Made in Open Court this 22<sup>nd</sup> day of June, 2023.



Allan Hans Muhome  
**JUDGE**