



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL CAUSE NO. 253 OF 2011

BETWEEN

SAMSON CHIWANDA

.....CLAIMANT

AND

THE ATTORNEY GENERAL (MALAWI POLICE SERVICE).....DEFENDANT

CORAM: THE HONOURABLE JUSTICE TS MASOAMPHAMBE

Mdazizira, of Counsel for the Claimant
Zikagwa, State Advocate, of Counsel for the Defendant
Tepeka, Official Court Interpreter
Mrs. Mboga, Court Reporter

JUDGMENT

1. INTRODUCTION

The Claimant commenced this action against the Defendant claiming compensation for alleged unlawful termination of contract. The Claimant hereinafter, Samson Chiwanda, who was at the material time a Recruit Police Constable undergoing training at Mtakataka Police Training

School, brought an action against the Defendant, hereinafter, Inspector General of Malawi Police, who at all material times had recruited the Claimant. The Claimant is claiming that the Defendant verbally terminated the Claimant contract of employment, contrary to rules of administrative justice, natural justice and Police Services Regulations.

The Claimant wants this Court to declare:

- (i) Loss of salary for January 2011 to July 2011 amounting to K94, 185.00
- (ii) Damages suffered as a result of failure to graduate as a Police Constable on 11th March 2011
- (iii) Re-instatement as a Recruit Police Constable
- (iv) To be allowed to graduate at the next available graduation ceremony.
- (v) Payment of Claimant salaries from the month of August 2011 until such a date when the Claimant shall be reinstated.
- (vi) Costs of these actions.

It is the story of the Claimant that, on 10th April 2010, he was recruited for Police Training and was sent to Mtakataka Police Training School. On 30th April 2010, the Claimant was sworn as a Recruit Police Constable and continued the police training at Mtakataka Police Training School.

It was the Claimant's story that he was offered employment and every month he was receiving a salary and his last salary to receive was in December 2010. The Claimant was getting MK13,455.00 per month. He tendered in evidence a pay slip and it was marked exhibit "SC1".

The Claimant went on to state that on 2nd August 2010, he was sent for practicals at Mzuzu Police Station and he successfully completed the same. On 7th December 2010 the Claimant returned to Mtakataka Police Training School. On 15th January 2011, the Claimant completed his Police Training School after writing the final examinations. The last paper to write was that of Public Order. After completing final examinations, the Claimant remained at Mtakataka Police Training and participated in the passing out parade on daily basis as he was waiting for the graduation ceremony which was scheduled to take place on 11th March 2011.

It was his testimony that one day he was approached by one Chipiliro Kachigamba, a fellow recruit who was selling his phone memory card. In order to check if it was genuine memory card, the

Claimant tried it by slotting in the phone of another fellow recruit, Constable Chifuniro Kanthiti. Surprisingly, the memory card contained photographs of another fellow recruit, one Mphatso Guzani, the girlfriend of Constable Aubrey Msusa who had earlier on announced that he had lost his phone. The Claimant averred that he was accused of stealing the said cellphone because he was found with memory card that contained photographs of Aubrey Msusa's girlfriend, one Mphatso Guzani. It was the Claimant's story that upon a thorough search on each of the recruit's bags, Aubrey Msusa's cellphone was found in the bag of a fellow recruit, Constable Precious Gondwe. The matter was reported to the authorities at Mtakataka Police Training School and the reporter distorted the story that the authorities accused the Claimant of stealing Aubrey Msusa's cellphone and that the Claimant put the said cellphone into the bag belonging to Precious Gondwe. The Claimant's claim is that he was beaten and locked up and thereafter verbally told by Commander G.T. Mpumulo of Mtakataka Police Training School that Claimant's contract of employment had been terminated. The Claimant was forced to pack up and go home. The Claimant told the court that he was not charged with any offence or procedurally taken through disciplinary hearing. Further, he never received any letter terminating his contract of employment and he never got his salary for month of January 2011 up to date. The last time he got salary was in December 2010. The Claimant told the court that he was supposed to graduate with his colleagues on 11th March 2011 but he was not included on the list of graduates. Neither was he awarded the Police Training Certificate despite that he had complied with all the requirements.

The Defendant, on his part, admitted that Samson Chiwanda was a Recruit Police Constable at Mtakataka Police Training School. It was the story of the Defendant that on 7th of January 2011, a Recruit Constable Msusa reported to the authorities at the Training School that his phone with a memory card was missing. On the 20th day of January 2011, the Claimant approached Recruit Constable Kanthiti asking him if he could use his memory card in the said Kanthiti's phone. The Defendant further avers that the said Kanthiti helped the Claimant insert the memory card. Kanthiti saw photos of a Recruit Constable Mphatso Guzani, a girlfriend to Aubrey Msusa, from the memory card. The said Chifuniro Kanthiti consulted friends on the issue and they decided to confront the Claimant who admitted to have stolen the said phone. This was after one Chipiliro Kachigamba said he never gave the Claimant the memory card. The Defendant claimed that the claimant was given opportunity to defend himself before a disciplinary committee and he was found guilty of the offence of conduct to prejudice good order and discipline. The Claimant was

dismissed on 28th day of January 2011 and a dismissal letter followed on 19th day of March 2011. The Defendant claimed that the Claimant was properly dismissed and that the Defendant denies liability for damages for pain and suffering, loss of amenities of life, disfigurement, loss of future earnings, loss of earning capacity, any special damages pleaded and costs of action.

Claimant Argument

The Claimant argument is based upon section 29, 31, and 43 of the Republican Constitution of Malawi that the Defendant violated these sections when terminating his contract of employment. The Claimant also based his claim under Employment Act section 28, 29, 57, 58 59, 61 and 63 that the Defendant was in violations of the above sections. The Claimant also added the following cases to support his arguments before this Court: **Lameck Moyo v National Bank of Malawi**, matter No. 182 of 2004, **Khoswe v National Bank of Malawi Ltd** [2008] 201, **Kalinda v Limbe Leaf Tobacco Ltd**, Civil Cause No 542 of 1995, In the matter of the removal of **Mac William lunguzi as the Inspector General of Police** Miscellaneous No 55 of 1994 (unreported) and **Sucoma v Ron Manda** (Supra).

2. ISSUES TO BE DETERMINED

- i. Whether the Claimant was given a right to be heard and defend himself against the allegation of theft.
- ii. Whether the Claimant was unlawfully dismissed or not.
- iii. Whether the Claimant must be re-instated or not.
- iv. Whether Claimant salary must be paid from the date of dismissal to date.
- v. Whether interest can be awarded or not.

3. THE APPLICABLE LAW

On burden and standard of proof

Ordinarily, the burden of proof lies on a party who substantially asserts the affirmative issue. Or put in other words, on a party who assert the truth of the issue in dispute. And the party has to adduce sufficient evidence to raise a presumption that what is claimed is true. See **Commercial Bank of Malawi v Mhango**, Civil Appeal No.8 of 2001. The legal burden of proof for civil case is that facts must carry a reasonable degree of probability, but not so high as required in criminal

case. If the evidence is such that the tribunal can say: “we think it is more probable than not” the burden is discharged; but if the probabilities are equal, it is not. A well settled principle of ancient application is i.e. **incumbit probatio guid cot not qui negat**. This essentially means that the burden of proof lies on the party alleging a fact of which correlative rules is that he who assert a matter of fact must prove but he who denies it need not prove it. In contested actions, a party succeeds whose evidence establishes a preponderance of probability or a balance of probability in his favour. See **Kumalakwaathu t/a Accurate Tiles and Building Centre v Manica (Malawi) Limited**, Civil Appeal NO. 57 of 2014, the Supreme Court.

The Constitution of the Republic of Malawi

Section 29 reads: every person shall have the right freely to engage in economic activity, work and to pursue a livelihood anywhere in Malawi.

Section 31 reads: (1) every person shall have the right to fair and safe labour practices and to fair remuneration.

Section 43 reads: every person shall have the right to –

- (a) Lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are known.
- (b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known.

4. ANALYSIS OF THE LAW AND THE EVIDENCE

From the constitutional provisions cited above and from case law as will be seen below, it is the opinion of this Court that the Constitution is considered the supreme source of law here, and it is to the Constitution that this Court must turn to find guidance. **Section 5** of the Constitution provides for the supremacy of the Constitution; the said section is in the following terms:-

“any act of the Government or any law that is inconsistent with the provisions of this constitution shall to the extent of such inconsistency be invalid.”

The Constitution is the supreme law and it is to the Constitution itself that the Court must look up to resolve the legal issues that is before this Court. As the Court has stated elsewhere in its ruling, there is only one question to be answered, whether or not under Republican Constitution, an employee can be terminated without giving him right to be heard.

Section **43** of the Constitution was also intended to enable persons affected by administrative actions to have adequate opportunity to defend themselves effectively. A person would be able to present a good and effective defence to an administrative action when he knows the reasons supporting the action against him. The **section** is simply an entrenchment of the principles of natural justice which require that no person shall be condemned without being heard.

It is against this background that the conduct of the Defendant in this case resulted in improper or unlawful termination of a contract of employment between the Claimant and the Defendant. There was a breach of contract of employment which followed from the Defendant's failure to comply with **section 43** of the Constitution.

In **Mc William Lunguzi and Another v Attorney General** MSCA Civil Application No 23 of 1994 (unreported) it was stated that **section 43** of the Constitution restates principles of natural justice that a man shall not be condemned unheard and that these principles of natural justice ensure that the decision making process is fair.

As for the issue of **legitimate expectation** submitted by the Claimant, the doctrine comes from the English law, where it was first pronounced by Lord Denning in Obiter in the case of **Schmidt v Secretary of state for Home Affairs** [1969] 2 CH 149 (CA). In that case, Lord Denning observed that a legitimate expectation existed which entitled the complainants to be heard before an adverse decision was made against them.

The Defendant in this matter, failed to accord the Claimant the opportunity to confront the witnesses. The Claimant was expecting the Defendant to call all the parties concerned. Constable Phatso Guzani, Constable Chifuniro Kanthiti, Constable Aubrey Msusa, Constable Chipiliro Kachigamba and Constable Precious Gongwe to the said hearing but there is no evidence that these people attended the hearing, there is no evidence to support that Sub Inspector Kasawala was part of the disciplinary hearing. If indeed, there were disciplinary hearing, it might be between Assistant

Superintendent Likimbirani Mkandawire, who was Deputy Commandant, Central Region Centre and the Claimant.

In Ghanaian case of **Serbeh- Yiadom v Stanbic bank (gh) Ltd** [2003- 2005]1 GLR 86 the Supreme Court stated that:

“ it is a salutary and well-known principle of law that a person should be given the opportunity of being heard when he is accused of any wrongdoing before any action is taken against him.”

The effect of the failure to hear a person was stated in another Ghanaian case, the **Republic v High Court, Accra Ex- parte Salloum (Senyo Coker (interested Party)** [2011] 1 Scalr 574 where the Supreme Court stated that: -

“Equally so, if a party is denied the right to be heard as in his case, it should constitute a fundamental error for the proceedings to be declared a nullity.

*The Courts in Ghana and elsewhere seriously frown upon breaches of the **audi alteram partem** rule to the extent that no matter the merits of the case, its denial is seen as a basic fundamental error which should nullify proceedings made pursuant to the denial.”*

In **Kanda v Government Malaya** [1962]AC 322, the Court held that the accused person ought to know the case made against him and the evidence supporting the same and be given fair opportunity to correct or contradict them.

In the instant case, the Defendant heard the accuser in the absence of the Claimant and the Claimant did not have the right to cross-examine the Defendant’s witnesses.

What constitutes an opportunity to be heard was well explained in **Kanda v Government of Malaysia (supra)** as follows:-

“if the right to be heard is to be a real thing which is worth anything, it must carry with it a right in the accused man to know what evidence has been given and what statement have been made affecting him, and then he must be given an opportunity to correct or contradict them.

Apart from the reason for the dismissal, unlawful dismissal is based on the manner in which the dismissal was handled. In **Fairmount Investments Limited v Secretary of State** [1976] 2 A ER 865, it was said that if a party is adversely affected by any evidence and is given the right to comment on that evidence, the principle of right to be heard is complied with.

When evidence is given as to why dismissal occurred it is clearly better if everyone is in general agreement, and this is better sorted out before dismissal. The employer before dismissal is supposed to make sure that all the evidence is available and clear. **See Employment Law, James Holland and Stuart Burnett, Blackstone Press 2000.**

In this matter, the Claimant was never invited to any full hearing nor was he given an opportunity to cross-examine those who gave conflicting report. The Claimant's evidence on the absence of hearing was not in any way contradicted by the Defence.

In the present case, the Defendant dismissed the Claimant's assertion that the phone was found in Constables Precious Gondwe's bag and also the Commandant denies that the phone was found in the Constable Precious Gondwe's rather the phone was put in the bag by the Claimant.

5. DETERMINATION

5.1. On Pain and suffering, loss of amenities of life and disfigurement.

The Claimant has not brought any evidence to support his claim for damages for pain and suffering, loss of amenities of life and disfigurement. Therefore, this claim fails.

5.2. On whether the Claimant was fairly dismissed or not.

It is the finding of this court that the termination of the contract of employment was in violation of fair labour practices granted by the Constitution. In so far as, therefore, the termination herein was in violation of fair labour practices, it was also a violation of the Constitution of Malawi. **This Court is the view that the Claimant was unfairly dismissed** with regard to all the circumstances of the case, the sham disciplinary hearing organized by the Commandant was not in accordance with Police Services Regulations. The Commandant did not grant the Claimant the right to be

heard. In general, the hearing was not in conformity with rights enshrined in the Constitution and principles of natural justice. Apart from that, the Court finds the decision of the Defendant Management to dismiss the Claimant to be disproportionate and heavy-handed in all the circumstances of the case. The Claimant was not given the opportunity to cross-examine or discredit evidence brought against him by the following Constables; Precious Gondwe, Chipiliro Kachigamba, Aubrey Msusa and Constable Kanthiti .

5.3. On whether the Claimant should be re-instated or not

It is trite law that each and every dismissed occasioned by an employer must always be fair, or else the Court shall make an order compelling the employer to either reinstate the aggrieved employee or compensate him. In the present matter the Defendant dismissed the Claimant without giving him the right to be heard and without opportunity to cross examine witnesses. See. The cases of **Jawadu v Malawi Revenue Authority** (2008) MLR 397 at 409 and the case of **Chakhaza v Portland Cement Ltd** (2008) MLR 118.

In the present case, the Court is of the opinion that compensation is an appropriate remedy in the circumstances because it is impracticable to re-instate the Claimant taking into account the period of time that had elapsed between 2011 and 2022.

5.4. On loss of salary

As for loss of salary, the Court thinks it is not appropriate to award damages for unlawful dismissal while separately making another award in respect of salaries for the period in between the termination and this judgment. That would most likely not only needlessly complicate the compensation process.

5.5. On damages

In considering damages for unlawful dismissal, the circumstances must fit the decision so that one will not claim that there was miscarriage of justice. This is why each case ought to be decided on its peculiar facts. See **Mwangulu J, in Magola v Press Corporation** (civil Cause 3719 of

1998(2003) and **Norton Tool Co Ltd v Tewson** (1773) 1 ALL ER 183 by Lord Donaldson the President of National Industrial Relations Court.

It is, therefore, the conclusion of the court that on the balance of probabilities, the Claimant has proved that he was unfairly dismissed from his employment. I, therefore, order that the Defendant is liable to pay general damages for the dismissal. The Registrar should assess damages.

5.6.On costs

Section 30 of the Courts Act requires costs to follow the event, except when it appears to the Court that some other order should be made as to the whole or any part of the costs. In the present case, the Claimant has wholly succeeded in the matter. I, therefore, consider it just and equitable that the Claimant be awarded costs.

Made in open court this Tuesday, the 24th of January, 2023 at Zomba.



Texious Masoamphambe

JUDGE