

**IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE**

MSCA CIVIL APPEAL NO. 28 OF 2005
(being High Court Civil Cause No. 49 of 2004)

BETWEEN

KALOWEAKAMO APPELLANT

-and-

MALAWI ENVIRONMENT ENDOWMENT
TRUST..... RESPONDENT

BEFORE : **HONOURABLE JUSTICE H.M. MTENGHA, SC, JA**
 HONOURABLE JUSTICE J.B. KALAILE, SC, JA
 HONOURABLE JUSTICE D.G. TAMBALA, SC, JA
 Kalua, of counsel for the Appellant
 Kanyuka, of counsel for the Respondent
 C. Daudi (Mrs), Official Interpreter

JUDGMENT

TAMBALA, SC, JA

The present appeal is brought by Mr Felix Kalowekamo. He brought an action in the Industrial Relations court against the Respondent his former employers. He sought damages for unlawful and wrongful termination of his employment and compensation for withheld salaries and benefits such as house allowance, use of official vehicle and mobile phone. The Industrial Relations Court found the respondent liable for unfair dismissal and awarded damages amounting to K5,280,000 being the equivalent of the appellant's salary for two years. The Respondent appealed to the High Court against the decision of the Industrial Relations Court. The latter court set aside the award of damages and substituted an award of two weeks pay in terms of section 63 –(5) (a) of the Employment Act. Mr Kalowekamo appealed to this court essentially against the order of compensation made by the High Court.

The facts are that Mr Kalowekamo was employed by the respondent as Operations Director. He was offered a two years contract. It was renewable upon the application of the employee. Mr. Kalowekamo's contract of employment commenced on 1st October, 2001 and it was to expire on 30th September, 2003. About August 2003, Mr. Kalowekamo applied for the renewal of the contract but the board of the respondent rejected the application. He was not told the reason for the rejection. He was not given an opportunity to be heard before the decision to disallow the application was taken.

There are essentially two grounds of appeal, namely-

- 3.1 The learned Judge erred in law in holding that the appellant's contract of employment with the respondent was for a special period of time.
- 3.2 Alternatively, the learned Judge having found that the respondent's refusal to renew the appellant's contract of employment contravened section 57 (1) and (2) of the Employment Act, erred in law in holding that there were no factors justifying the invocation of section 63(4) of the Employment Act.

The facts of the case show that it was very clear to both appellant and the respondent that there were entering into a fixed contract or, what is the same thing, a contract for a fixed term, at the time when the contract was made. When he was cross examined Mr. Kalowekamo said –

“The contract was for two years fixed but renewable. I do not agree that the fixed period had come to an end.....

Technically my contract had come to an end, but this was constructive dismissal”

He added-

“The fixed contract had come to an end on 30th September, 2003. This is what the contract said. When I stated and agreed that I was on contract but that contract would come to an end with reasons.....”

This document does not on its own state that reasons shall be given for not renewing contract. I was not aware of the minute till August. I was also aware that my contract would come to an end on 30th September, 2003.”

He also said-

“Fixed contract is a contract that can come to an end. My contract was fixed and the renewal was not automatic, this is why I applied.”

On the part of the respondent Mr. Tikhala Chibwana, the chief Executive Officer of the respondent said-

“Every member of staff is on a fixed contract. The first reason is that the support we are getting from USAID is for a 2 year period, so they would not allow us to employ for more than 2 years. Secondly, being new, we cannot go into things like possible terms”

To be fair to the appellant, in the Industrial Relations Court, he did not claim that he construed his contract of employment as something other than a fixed contract. There was no issue whether the contract was fixed or for unspecified period, as between the parties. It was the Chairperson who raised the issue and decided that the contract between the parties was not fixed, but was for an unspecified period, clearly contrary to the understanding and belief of the parties to the action. That in, our view has been condemned by numerous cases illustrated by the cases of **Yanu –Yanu v. Mbewe** 10 M.L.R. 417, **Nseula v. Attorney General** M.S.C.A. Civil Appeal No. 18 of 1996 (unreported) and **Chakuamba and Others v. Attorney General** (the Presidential Elections case) M.S.C.A. Civil Appeal No. 20 of 2000 (unreported).

The learned Chairperson of the Industrial Relations Court relied on section 28 (3) of the Employment Act in coming to the conclusion that the appellant’s contract of employment was, contrary to its clear terms, one for an unspecified period. The provision states-

“where the purpose or effect of a contract of employment that is purported to be a specified period of time or a specified task is the filling on a lasting basis of a post connected with the normal and permanent activity of an undertaking, it shall be deemed to be a contract of employment for an unspecified period of time..

Commenting on this section, the learned Chairperson said-

“The respondent might be wondering what the intention of the legislature was in providing for contract of employment for specified period of time if as in this case a court can reverse and find that the contract was for unspecified period of time. An answer to such question is that the legislature was trying to avoid incidents like the one in the instant case. There are genuine contracts of employment for specified period of time. However the legislature had the foresight to protect some innocent employee who might fall into the trap of entering into fixed contract that was in fact mere sham”

None of the parties to the action called upon the learned Chairperson to employ section 28 (3) in constructing the appellant’s contract of employment because no-one was in doubt about the meaning of the contract. None of the parties to the contract entertained any thought that the appellant’s contract was “mere sham” we do not think that the section gives licence to a court to reject the clear terms of a contract, rewrite it and in the process suppress the clear intentions of the parties to a contract. We take the view that the learned Chairperson’s approach to the dispute before her was wrong. We uphold the decision of the learned Judge in the High Court that the appellant’s contract of

employment was for a fixed term of two years. It was a fixed contract. Therefore, ground 1 of the appellant's appeal is unsuccessful.

In coming to the conclusion that the respondent was guilty of unfair dismissal. Notwithstanding the fact that the contract of employment was fixed, the learned Judge, in the High Court said-

“Thus by not telling the respondent the reasons for refusal to renew the contract, the appellant contravened section 57(1) and (2) of the Employment Act.”

We observe that section 57 (1) and (2) is about termination of employment **for reasons connected with the capacity or conduct** (emphasis supplied) of the employee. It is not about a fixed contract where the contract ends by the effluxion of time. It would seem to us that a fixed contract of employment is not caught by section 57 (1) and (2). Section 28 (2) of the Employment Act provides-

“A contract of employment for a specified period of time shall automatically terminate on the date specified for its termination and unless it is expressly or tacitly renewed or prolonged, no notice shall be required for its termination.”

Section 35 of the Employment Act is about termination of contract of Employment. Section 35 – (1) states

“On termination of contract, by mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the First Schedule.”

Section 35 (4) (a) states

“For the purposes of subsection (1), termination includes termination by reason of the insolvency or death of the employer, but does not include-

Termination of a contract of employment for a specified period of time where termination occurs at the expiration of the specified period.”

It can therefore be argued that fixed contracts of employment cannot be the subject of an action for unfair dismissal under the provisions of the current Employment Act, especially after the expiry of the period of the contract or after the completion of the task envisaged by the contract. We are therefore unable to agree with the learned Judge that although the appellant's contract was for a fixed period, the respondent committed the statutory tort of unfair dismissal. However, we are unable to set aside the learned Judge's

decision including the order of compensation which he made, since there was no cross appeal by the respondent.

The record shows that the appellant was finally paid salary for September 2003, an additional salary for end of contract and leave pay for 3 days, less tax. That is more than the compensation awarded by the learned Judge in the High Court. It is directed that the appellant shall retain what the respondent paid him at the end of the contract instead of the amount as ordered by the learned Judge in the Court below.

The appeal is dismissed with costs.

DELIVERED in Open Court this 12th day of December, 2006 at Blantyre.

Sgd
H.M. Mtegha, SC, JA

Sgd
J.B. Kalaile, SC. JA

Sgd
D.G. Tambala, SC. JA