



JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

MSCA CIVIL APPEAL NO. 36 OF 2010

BETWEEN:

GREGORY KAMWENDOAPPLICANT

- AND -

MALAMULO PUBLISHING HOUSE.....RESPONDENT

CORAM: THE HONOURABLE JUSTICE E. B TWEA

Absent, Counsel for the Applicant

Absent, Counsel for the Respondent

Balakasi – Official Interpreter

RULING

Twea, JA

This Notice of Motion was brought by the applicant seeking leave to appeal out of time against the judgment of Potani J, delivered on 23rd November, 2009. It is supported by an affidavit to which several documents, including the judgment in issue, are exhibited. The respondent filed an affidavit in opposition. Be this as it may, the respondent did not appear.

The facts of the case, briefly, were that the parties appeared before the Industrial Relations Court, on a claim for unlawful dismissal. The court found that the dismissal of the applicant, on the ground that he had contracted a polygamous marriage, was unlawful for violating Sections 57(3)(a) and 5(1) of the Employment Act. It ordered compensation in the sum of K200, 000.00 and damages in respect of the applicant's motor vehicle.

The respondent appealed on grounds that the order of compensation was wrongly grounded on Section 5(1) of the Employment Act, and that it was excessive. Further, that there was no basis for the order of damages in respect of the applicant's motor vehicle which, in fact, was a non – runner at the time of his dismissal.

The appeal was set down for hearing on 16th November, 2009 before Potani J. The applicant lawyers did not appear on the appointed day. The matter was heard in their absence and ruling was reserved. There was confusion about the case, however, the gist of the application was that the applicant only became aware of the judgment, delivered on 23rd November, 2009, on 14th July, 2010.

I acknowledge the confusion that led to the delay in lodging an appeal. Ordinarily this would have entitled the applicant to leave to appeal out of time. Be this as it may, I am obliged to consider whether the intended appeal raises issues that are likely to succeed: see *AGA Karim and Sons Vs AMI Rennie Press (MW) Ltd and Another, MSCA Civ. Ap. 4 of 1998*, as pleaded by the respondent.

The intended appeal basically raises two issues: whether, the appeal to the court below was brought contrary to Section 65(2) of the Labour Relations Act; that is, that it was on matters of fact and not law or jurisdiction and that the court erred when it disallowed damages in respect of motor vehicle.

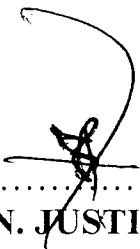
On the first issue, I think the challenge to the jurisdiction should have been argued in the court below. It was not. In my view, this ground of appeal is an afterthought on the part of the applicant. Even if I was wrong on this, I would still find that this ground cannot be sustained. It is clear from the arguments before the court below that there was a serious misunderstanding of Section 5 of the Employment Act, which is penal in

nature and Section 58 of the Employment Act. The former criminalizes discrimination of stated grounds, the latter provides that dismissal based on the same stated grounds, as provided in Section 57(3) (a) of the said Act, would amount to unfair dismissal. While the former attracts a fine of K10, 000.00 the latter attract remedies provided in Section 65 of the said Act. The Judge in the court below took time to examine this issue and he explained. Clearly, the award of compensation made by the Chairperson of the Industrial Relations Court was made under Section 63(4) and (5) of the said Act. It was not a fine, under Section 5 of the Act. These are matters of law. With this in mind the applicant cannot be heard to say that these were matters of fact.

On the second ground I agree with Potani, J that there was no proper basis for ordering damages in respect of the motor vehicle. It was on record that the vehicle was a non – runner at the time the applicant was dismissed. How the respondent could be held liable in damages was not made out. The applicant contended that the respondent failed to repatriate him to his home after termination. Repatriation of an employee depends on many factors that are subject to contract and proof. In any case there must be a nexus between repatriation of an employee and removal of his or her vehicles which are not capable of self – propulsion, which may put remoteness of damages in issue. I find therefore, that Potani J correctly found that the grounds for such damages were not made out.

I therefore find that the intended appeal does not have any prospect of succeeding. I accordingly refuse to grant leave to appeal out of time. This application is dismissed. Since the respondent did not appear, despite service, I order that each part should bear its own costs.

Pronounced in Chambers on this 14th day of October, 2010 at Blantyre.

Signed:

HON. JUSTICE TWEA, JA