



**IN THE MALAWI SUPREME COURT OF APPEAL**

**AT BLANTYRE**

**MSCA CIVIL APPEAL CAUSE NO. 24 OF 2010**

(Being High Court, Lilongwe Registry, Civil Appeal No. 4 of 2009)

**BETWEEN:**

WILLY KAMOTO.....APPELLANT

- AND -

LIMBE LEAF TOBACCO COMPANY LIMITED.....RESPONDENT

BEFORE: **HON. JUSTICE D.G. TAMBALA, SC, JA**  
**HON. JUSTICE I.J. MTAMBO, SC, JA**  
**HON. JUSTICE A.K.C. NYIRENDA, SC, JA**

Chagwamnjira & Misanjo, Counsel for the Appellant  
M. Nkhono, Counsel for the Respondent  
E.W.S Mwale, Recording Officer  
Ethel Matunga Chisale (Ndunya), Senior Personal Secretary

**JUDGMENT**

## **NYIRENDA, SC, JA**

This appeal is against the award of compensation made by Honourable Justice Mzikamanda by his judgment of the 9<sup>th</sup> July, 2009. The judgment was on appeal from the decision of the Industrial Relations Court. The matter is very brief on the facts and the issues for consideration.

The appellant had been in the respondent's employment since 1983. He started working as a general worker, working on shifts during day and night. In the course of time he was upgraded and became a tractor driver. He still continued to work both at night and during day time. In June, 2003 the appellant was dismissed from his employment. The reasons for the dismissal were that the appellant had refused to work during daytime and instead came to work at night. Both the Industrial Relations Court and the High Court found that the appellant had in fact been allowed to come to work at night by his immediate superior on account that at the material time during the day time he used to take his children to hospital. Both courts found, consequently, that the appellant's dismissal was unlawful.

The appeal to this Court does not seek to question that finding. The appeal is only against the amount of compensation that the appellant was awarded. The Industrial Relations Court awarded the appellant 12 months salary as compensation pursuant to section 63(4) of the Employment Act. The High Court raised the award to 15 month's salary. The appellant is still dissatisfied and seeks that the multiplier be raised. He does not however suggest what level would be considered sufficient.

Section 63 of the Employment Act provides:

*"63 (1) 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 –  
(c) an award of compensation as specified in subsection 63(4).*

*63(4) 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.*

Both the Industrial Relations Court and the High Court observed, and rightly so, that compensation under these provisions is discretionary. Both Courts went on to observe that the circumstances of the case will guide the court's discretion.

During the hearing of the appeal what took the centre stage was what would be considered appropriate as a multiplier for compensation other than what the lower Courts determined in the circumstances of the appellant's dismissal.

A couple of considerations exercised our minds in determining the issue here. The first consideration is that the appellant's employment could not have been for life. Unfortunately the record does not include the appellant's contract of employment. It occurs to us therefore that this was ordinary employment which could ordinarily be lawfully terminated by the respondent and from which the appellant himself could have lawfully opted out. We acknowledge that the appellant had served the respondent for 17 years. This was a clear sign of commitment to duty and permanence. That nonetheless could not be equal to a commitment for life. It is equally unsafe to assume that the appellant would have been available for the respondent until the age of his retirement as suggested by the appellant.

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Fortunately for the appellant the Employment Act 2000 settles a couple of key remedies in cases of wrongful dismissal. These remedies include severance pay which the appellant was paid. The award of compensation is over and above these other remedies and we believe that is exactly the reason why it was made discretionary. Commenting on compensation under section 63 of the Employment Act 2000, Dr. Cassim Chilumpha, SC, in his book "Labour Law" says:

*"The Act requires that the amount to be awarded should be what the Court considers just and equitable in the circumstances having*

*regard to the loss sustained by the employee in consequence of the dismissal and the extent, if any, to which he may have caused or contributed to the dismissal. Clearly that provision gives the Court a lot of discretion in deciding not only the amount to be awarded but also the composition of the award itself. However the discretion needs to be exercised in a structured and justifiable manner. In other words although the court has apparent flexibility in determining the compensation to be awarded, it has to be exercised judicially and in accordance with clear rules. As Sir John Donaldson observed in **Norton Tools Co. Ltd Tewson [1972] 1 CR 501** [the] court is enjoined to assess compensation in an amount which is just and equitable in all circumstances [but] there is neither justice nor equity in a failure to act in accordance with principle”*

In **Clarkson International tools Limited v Short [1973] 1CR 191** the approach is that compensation is not to express disapproval of industry policy but to compensate the plaintiff employee for loss occasioned by the unfair dismissal. All in all compensation must take into account such matters as immediate loss of wages, to some degree future loss of wages and the manner of the dismissal. Compensation could never be aimed at completely protecting the employee into the future.

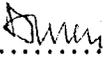
It is here that the court’s discretion becomes critical; but that could not mean a court must be pin point accurate in measuring the amount of compensation. Just as the factors for consideration could never be absolute, there could never be a gauge to measure the accuracy of compensation. Unless the exercise of discretion is obviously perverse, an appellate court should be slow to set aside discretionary orders of courts below, **Witkamp v Sitting**, [1971-72] ALR Mal 246, **Kamwamba v J.M. Njala and Sons** [1971-72] ALR Mal. 75.

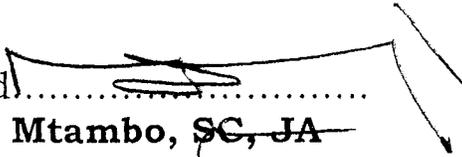
In arriving at 15 month’s salary as compensation the learned Judge below took a number of factors into consideration including the circumstances of the appellant’s dismissal, the effort made by the appellant to mitigate loss, the possibility of the appellant finding comparable employment on the market, the appellant’s age, fitness and qualifications. As it were, the Judge below took into consideration what we ourselves would have taken into consideration. We find nothing else in what has been presented

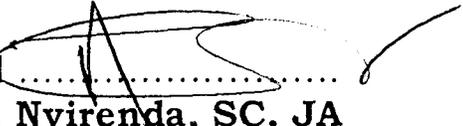
before us by the appellant to compel us to depart from what the learned Judge determined. In the result we find this appeal without merit and we dismiss it.

Considering the position of the parties and also that this was a labour related litigation we would order that each party bears own costs.

**PRONOUNCED** in Open Court at Blantyre this 13<sup>th</sup> day of October, 2010.

Signed.....  
**D.G. Tambala, SC, JA**

Signed.....  
**I.J. Mtambo, SC, JA**

Signed.....  
**A.K.C. Nyirenda, SC, JA**