



REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL APPEAL CAUSE NO. 90 OF 2011

(Being IRC Matter No. 43 of 2011 at Mzuzu)

BETWEEN

JEVIOUS CHIMUNGU..... APPELLANT

-and-

MZUZU UNIVERSITY..... RESPONDENT

Coram: Honorable Mr. Justice D.T.K. Madise
Mr. G. Kadzipatike Counsel for the Appellant
Mr. G. Nyirenda Counsel for the Respondent
Mr. C. Chawinga Official Interpreter

Madise, J

JUDGMENT

1.0 Introduction

1.1 The Appellant commenced an industrial action in the Industrial Relations Court on 14 June 2011 claiming damages for unfair dismissal. He further claimed pension funds, salary arrears, leave days allowance, leave grants, MASM contributions, responsibility allowance and repatriation allowance. On 4 November 2011 the court below dismissed his prayer for unfair dismissal but awarded the Appellant several prayers except salary arrears, responsibility allowance and MASM contributions. On 24 November 2011 the Appellant filed a notice of appeal with the High Court against the Order of the Deputy Chairperson as regards the dismissed claims.

2.0 Grounds of Appeal

The Appellant filed seven grounds of appeal as follows:

- 1) The lower court erred in holding that the Appellant was not entitled to 20% salary increment from October 2007 when facts were clear that 20% salary increment was effected at the said time and the Appellant was in employment up to 5 June 2008.
- 2) The learned Deputy Chairperson erred in holding that the Appellant would not get his 90 days leave days allowance when it was clear that the Appellant was in employment and entitled to all benefits up to 5 June 2008.
- 3) The learned Deputy Chairperson erred in holding that the Appellant was not entitled to responsibility allowance when performing functions of two offices at once, which holding is contrary to provisions of Mzuzu University regulations.
- 4) The holdings of the learned Deputy Chairperson in grounds 1 and 2 above were discriminatory against the Appellant as the same court awarded the same entitlements to litigant who was equally situated with the Appellant.

- 5) The holding of the learned Deputy Chairperson contained in ground 3 above was discriminatory against the Appellant as several employees of the Respondent are given responsibility allowance when they perform functions of two or more offices at once.
- 6) The learned Deputy Chairperson erred in holding that the Appellant was not entitled to a refund of his MASM contributions deducted monthly from his salaries when the Appellant was stopped from using the MASM facility.
- 7) The order on assessment was in the above and other respects against the law and the weight of evidence.

3.0 The Issues

There are three issues for determination before me.

- 1) Whether this appeal should be entertained as it is allegedly based on matters of facts.
- 2) Whether the court below was within jurisdiction when it dismissed the Appellant's prayers for want of evidence.
- 3) Whether those orders can be reversed.

4.0 The Facts

4.1 The Appellant was dismissed from the Respondent's employment as an Accountant. The dismissal was due to gross misconduct which arose from financial mismanagement and dishonesty. The Industrial Relations Court under Matter MZ 57 of 2008 upheld the misconduct and ruled in favour of the Respondent. The matter was then set down to assess what the Appellant was entitled to before he was dismissed.

4.2 The court below made several awards but refused to grant the Appellant the following: Salary arrears, responsibility allowance, Medical Aid Scheme and

Leave days. The Appellant being unsatisfied with the decision of the lower court he now appeals to this Court

5.0 The law

5.1 The Respondent has argued that the law as stipulated in section 65 Labour Relations Act clearly states that appeals to the High Court only lie on matters of law and not facts. That the IRC's decision on matters of facts are final. I disagree with the Respondent on two fronts.

5.2 Firstly matter of facts are matter of evidence and therefore matters of law. Secondly the IRC cannot and should not be the final arbiter on matters of facts. They are not a court of unlimited jurisdiction. The danger is that we would be proceeding on the wrong premises that the IRC can not make error on facts. They actually do.

5.3 The High Court has original and unlimited jurisdiction to hear any matters and disallowing the High Court to determine an appeal on matters of facts would be usurping the powers of the High Court. However the case of Magalasi vs. National Bank of Malawi Ltd MSCA Civil Appeal No. 45/2007 authoritatively ruled that section 65(1) and (2) Labour Relations Act 1996 is law in this country and I'm bound by it although I respectively opine that it is bad law.

5.4 The issue in this matter is the weight the court attached to the Appellant's evidence as the facts were not in dispute

This is not a matter of fact but rather a matter of law as it tests the standard of proof that was invoked.

6.0 The finding

6.1 Salary arrears: The court below dismissed this claim on the basis that the Appellant failed to demonstrate that he had received an increment. Surprisingly, the same court *in Reuben Mhango Vs Mzuzu University IRC Matter MZ 18 of 2010*, observed that the Respondent in that matter had not challenged the evidence of the Plaintiff and proceeded to award him arrears of salaries. The court stated as follows:

“The Appellant’s evidence is unchallenged, as we have already pointed out. It is therefore not disputed that he had a salary increment. For this reason we order that the Appellant should be paid the arrears for the salary increment.”

6.2 In this matter, I wonder what further evidence was the Appellant supposed to bring to court to demonstrate that he had a salary increment. Similarly his evidence was not challenged by the Respondent. I find that the lower court had unfairly treated the Appellant and this sort of discrimination cannot be allowed to continue. I reverse that decision and order that the Appellant be paid his salary increment.

6.3 Responsibility Allowance: The lower court dismissed this claim on the basis that although the Appellant's supervisor had recommended the payment of responsibility allowance, the authorities did not approve the same. The issue here is that the Appellant was working as an Accountant and at the same time

he was performing the duties of an Assistant Accountant. He was surely doing two jobs meant for 2 people.

6.4 The fact that the authorities did not approve the recommendation to pay the Appellant the responsibility allowance is neither here nor there. The fact is that they did not specifically say no to the request and most importantly is that the Appellant had performed these two duties. I find that the lower court erred in dismissing this claim. I order that the same is payable.

6.5 Medical Aid Scheme: The court below dismiss the Appellant's prayer for a refund of the MASM funds he paid while his scheme was suspended and he was not allowed to use it. I fail to find the basis for the lower court's decision to deny the Appellant this claim. The Appellant did inform the court that he had used his own funds to access medical services. The Respondent did not challenge the fact that the medical scheme was suspended.

6.6 It was therefore wrong for the court below to dismiss this claim on the basis that there was no evidence that he was sick. The way the court below dealt with this matter leaves more questions than answers. The court below acted as if it was representing the Respondent. I find that the lower court erred in law. He must get his refund.

6.7 Leave days: The court below amended the Appellant's prayer for leave days because he did not provide a formula according to University regulations. The Appellant was still in employment and was entitled to all the privileges his office carried. I see no reason why the court below awarded him leave days using the Employment Act when the University had its own conditions of service. I reverse that finding and order that the same be paid to him according to his terms and conditions of employment.

7.0 Conclusion

7.1 It appears the court below had used a higher standard of proof. In civil matters the standard of proof is on a balance/scale of probabilities. Whichever story is more probable than not must carry the day.

7.2 The Appellant must succeed in this appeal. The court below had no justification whatsoever to dismiss the Appellant's prayers for lack of evidence when it had granted similar prayers to Mr. Hango who was also working for the Respondent and was suspended together with the Appellant on similar facts. Mr. Hango's case went unopposed just like the Appellant's case.

7.3 The standard of proof in civil matters is on a balance/scale of probabilities. Looking at the evidence it is clear the court below invoked a higher standard of proof as if this was a case involving fraud or negligence. In my considered view the Appellant had proved his case on a balance/scale of probabilities and the court below ought to have granted the reliefs sought in summons.

This appeal must succeed with costs.

Pronounced in Open Court at Mzuzu in the Republic on 4th April, 2016.

Dingiswayo Madise
JUDGE