IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS APPLICATION NUMBER 37 OF 2015

(Being IRC Matter number 146 of 2013)

BETWEEN:

CLIMINTON GWAZENI PHIRI APPELLANT

AND

DIGNITAS INTERNATIONAL (MALAWI) CORAM: RESPONDENT

JUSTICE M.A. TEMBO,
Nyirenda, Counsel for the Appellant
Ngoma, Counsel for the Respondent
Chanonga, Official Court Interpreter

JUDGMENT

This is the decision of this Court on the appellant's appeal against the decision of the lower court awarding the appellant the minimum compensation under the Employment Act on his uncontested claim for unfair dismissal against the respondent.

The appeal is heard pursuant to section 65 (2) of the Labour Relations Act which provides that a decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction.

There was no trial on liability before the lower court because the respondent admitted liability for the unfair dismissal. Thereafter the matter was heard on assessment of compensation. The lower court then awarded the appellant the minimum compensation under section 63 (5) of the Employment Act principally on account of his contribution towards his own unfair dismissal. The lower court specifically found that after the appellant was unilaterally and verbally dismissed by the respondent's Country Director the appellant subsequently refused to accede to requests to go and meet with the respondent's officers to discuss the matter of the appellant's employment. And further that for three months as this went on the respondent kept paying the appellant his salary. The lower court also found that the appellant did not mitigate his loss after his dismissal. Hence an order of minimum compensation.

The appellant being dissatisfied with the lower court's decision filed the following grounds of appeal, namely that

(a) The Industrial Relations Court erred in law in failing to apply the facts to the law;

(b) The Industrial Relations Court erred in law in coming up with findings which were not supported by evidence;

(c) The Industrial Relations Court erred in law in putting too much weight on the invitation extended to the Applicant for discussions while such discussions were intended to rectify the Respondent's mistakes at the expense of the Applicant;

(d) The Industrial Relations Court erred in law in failing to make its determinations on some of the claims lodged by the Applicant such as the claim for notice pay, payment for untaken leave, claim for pension and terminal benefits, interest on the pension benefits and on severance allowance;

(e) The Industrial Relations Court erred in law in failing to make an award of compensation for immediate loss of earnings from the date of dismissal to the date of judgement, that is, 20 months' salary.

(f) The Industrial Relations Court erred in law in holding that the Applicant had failed to mitigate his losses;

(g) The award of compensation to the Applicant made by the Industrial Relations Court was not just and equitable and was contrary to awards made by the Industrial Relations Court and the High Court in similar cases.

The appellant seeks the following reliefs

(a) That the ruling of the lower court that the appellant should be paid minimum compensation only should set aside;

(b) That the compensation payable to the appellant should be enhanced and should include compensation for immediate loss of earnings from the date of dismissal to the date of judgment and from the date of judgment to the appellant's retirement age, payment for notice pay, payment for untaken leave, claim for pension and terminal benefits, interest on the pension benefits and on severance allowance

(c) Costs of the appeal.

Since there was no trial on liability it becomes necessary to set out the plaintiff s claim before the lower court to appreciate the factual background to this matter leading up to admission of liability by the respondent and the reasoning of the lower court on assessment of compensation.

The appellant claimed that he was employed by the respondent as a logistics officer in September 2004. He was promoted over the years and in 2010 he held the position of logistics manager.

The appellant further claimed that on or about 13th August 2012 he reported for work from his leave. He was then called into the respondent's Country Director's office. He claimed further that there he was told by the respondent's Country Director that he did not have leadership qualities and was dictated on some things that the Country Director thought the appellant was not doing properly. He claimed further that thereafter he was sent on forced leave for three days by the respondent's Country Director who escorted the appellant to a waiting car.

The appellant claimed that after three days, that is on 16th August 2012, he reported back to work where he met the respondent's Country Director, Human Resources Manager and the Data and ICT Manager. The appellant and this team had discussions on some reports from the appellant's department and overall departmental leadership.

The appellant further claimed that after the discussions and after he had given his position on how he handled the issues raised in the meeting, the respondent's

C0untry Director proceeded by giving her final position that the contract between the appellant and the respondent was terminated with immediate effect.

The appellant further claimed that on 18th August 2012, the respondent's Country Director wrote emails notifying all the respondent's staff at its headquarters in Canada and within Malawi that she had terminated the appellant's contract as Logistics Manager and that one Linda would act in that position until the position was advertised.

The appellant further claimed that on 21st August 2012 he went to collect his termination letter and notice pay but the respondent's Country Director advised him that she had sent the termination letter to the respondent's lawyers and that the letter would only be given to the appellant once the lawyer had a look at it.

He claimed further that during the evening of 2 l5t August 2012, he received a message from the respondent's Human Resources Manager that he would be called to collect his papers later.

He further claimed that on the 23rct August 2012, the respondent's Human Resources Manager advised the applicant that his issue had been reviewed at management level and that he would continue getting his normal salary.

The appellant claimed further that on 29th August 2013, the respondent's Country Director invited him to a meeting where the following issues were discussed, namely, direct management and responsibility of the logistics team, accountability or responsibility for safety and security, safe management of vehicles and properties, fleet and equipment maintenance, proper adherence to policies and procedures and other issues.

The appellant claimed further that during this meeting the respondent's Country Director stated that the applicant's termination letter was delayed because the respondent's lawyers did not approve of it and that there lacked procedures and enough reasons for the appellant's dismissal and that the aim of the meeting was that the applicant should help the respondent follow the procedure as she was not reversing the decision terminating the appellant's contract.

The appellant claimed further that the respondent's Country Director stated that after following the procedures, the appellant's contract would still be terminated and he

would get all his benefits and continue to be in a good relationship with the respondent. The appellant stated that he refused to continue with the meeting and demanded minutes of the earlier meeting which took place on 16th August 2012. He claimed that after he got the minutes he noted that new items were added and he decided not to proceed with meeting the respondent's Country Director as she had already made a decision to terminate the appellant's contract on 16th August 2012.

The appellant claimed that on 17th December 2012 his then lawyers Kandako Mhone Law Firm received a letter from the respondent calling him to go back to work. Further, that on 18th December 2012 he got a letter from the respondent's Country Director dismissing him. And that at this point the respondent stopped paying the appellant his salary.

The appellant asserted that his position was that he was dismissed on 16th August 2012 without being given valid or lawful reasons and without being heard. Further, that the said termination was baseless, unlawful, unreasonable and only out of the personal reasons and decision of the respondent's Country Director for reasons not related to the appellant's performance. He added that he was never charged with any offence or misconduct in relation to his contract of employment and duties towards the respondent nor was he accused of anything related to his performance.

The appellant asserted that all that the respondent did after 18th August 2012 was just to cover up its unlawful termination of the appellant's contract. He claimed that prior to the coming in of the respondent's Country Director his record of work was good as per the performance appraisals and absence of any warning.

The appellant claimed that after his employment was terminated the respondent paid him nothing despite many reminders. He therefore claimed the following reliefs, namely, notice pay, severance allowance, pension and terminal benefits, damages for unfair dismissal, interest on pension and severance allowance and any other reliefs the court deemed fit, just and proper. The foregoing is the appellant's statement of claim before the lower court.

In its response to the appellant's statement of claim the respondent put up a response which was as follows. That the appellant reported directly to the respondent's Country Director. That when the appellant went on leave a number of serious shortcomings in the way he run the Logistics Department came to light. And

consequently, the respondent's Country Director called the appellant to a meeting to discuss the shortfalls. That the Country Director gave the appellant three days to prepare.

The respondent's Country Director denies escorting the appellant to a waiting car after the meeting but rather that after the meeting the appellant was upset and the Country Director asked the Transport Officer to arrange a car to take the appellant home.

The respondent denied that its Country Director terminated the appellant's employment with immediate effect. And that after three days the appellant returned to work as he himself acknowledges in his statement of claim.

The respondent asserted that from 16th August 2012 until sometime in December 2012 there had been discussions between the appellant and the respondent until such time as the appellant became uncooperative. And that such discussions would not have been had if the respondent had no intention of maintaining the employment contract. Further, that the appellant's contract was terminated on 12th December 2012 as a result of the appellant's unwillingness to resolve the outstanding issues in the manner which he discharged his duties.

The respondent denied that its Country Director sent emails notifying all Dignitas staff that the appellant's employment was terminated on 16th August 2012 or at all. And on the contrary, the respondent asserted that the appellant was not reporting for duties and it became necessary that someone should take over the responsibilities.

The respondent further claimed that it never terminated the appellant's employment on 16th August 2012 as alleged because it paid the applicant his salary from August to December 2012. The respondent asserted that it could not have been paying the salary if it did not want to maintain the employment relationship with the appellant.

The respondent denied dismissing the appellant without a hearing and without legal basis. On the contrary the respondent asserted that its Country Director laid out the shortfalls for discussion with the appellant at meetings held on 16th August 2012, on 29th August 2012 and on 5th September 2012.

The respondent also denies that between 12th August and 17th December 2012 there was a draft letter of termination that was being reviewed by the respondent's

lawyers. Rather that the respondent had at all times been keen to resolve the outstanding issues with the appellant but that for three months the appellant willfully disobeyed lawful orders given to him to return to work. And that in view of the foregoing the respondent had no option but to conclude that the appellant had no intention of being bound by the employment relationship.

The respondent denied that it refused to pay the appellant's dues as the same were already calculated and the appellant was yet to collect the same upon returning the respondent's property.

The respondent asserted that the appellant's refusal to go back to work constituted insubordination that entitled the respondent to dismiss the appellant. Further, that the appellant's continued absenteeism while receiving his monthly pay entitled the respondent to dismiss him summarily. However, that the respondent in an attempt to act fairly decided to terminate the appellant's employment. Consequently, the respondent denied the appellant's claim to the reliefs he set out in his statement of claim.

When the matter came for trial the respondent admitted liability for unfair dismissal of the appellant. That entails that the respondent abandoned its response to the appellant's statement of claim. The matter then proceeded to assessment of compensation.

At the hearing of assessment of compensation both the appellant and the respondent's Human Resources Manager Mirriam Luhanga testified.

The evidence of the appellant during examination by his counsel was as follows. That he was 43 years old. That he joined the respondent on 1st September 2004 as a Logistics Driver and Mechanic. That he was dismissed on 16th August 2012. That his salary was K319, 000. That he was on permanent employment. That by the date of hearing he was not working. That he had a Diploma from the Chartered Institute of Logistics and Transport. That he had started rearing chickens but was then bankrupt and depended on his wife who is a teacher. He added that he had been making job applications.

He added that he intended to retire at the age of 60 years as compulsorily provided for. He stated further that he failed to get another job due to the manner he was

dismissed by the respondent. He stated that on any job application a reference would be required and that the respondent cannot be a good reference.

He also stated that the respondent paid him two consecutive monthly salaries because the respondent wanted the appellant to go and have discussions with the respondent. He asserted that after dismissal he was paid nothing. He added that he had 10 leave days.

During cross-examination by counsel for the respondent the appellant stated as follows. That he started working in 2004. That then he was Logistician and Driver/Mechanic. That he was employed as a Driver/Mechanic. That he was dismissed on 16th August 2012. That he was paid for three months. That he was invited to meetings with the respondent three times and he only went once.

He admitted that from August to November he was not working but was paid by the respondent for each of those months. He stated that he got the letter of dismissal on 18th December 2012 but it was dated 17th December 2012. He however stated that there was also communication of his dismissal on 16th August 2012.

He stated further that it does not make sense to be paid whilst not working. And that he was asked to go to the respondent but he did not.

He stated that he remembered the leave days he had accumulated and those he had taken. He then stated that he was claiming compensation.

During re-examination the appellant stated that he had gone to discuss the matter herein with the respondent's witness. That he was called to the respondent's office on 5th September. That in between he had received a message from the respondent's Human Resources Manager that his issue was not dealt with up to the final level.

He added that he was told that the respondent was not reversing the decision to terminate his employment and so he stopped going to meet the respondent. He added that the respondent stated that it erred and wanted to correct its error. And that is why the respondent continued to pay the appellant his salary. He reiterated that he was dismissed on 16th August and the reason was that he does not have leadership skills. He stated that his relationship with the respondent's Country Director was not good and she could not give him a good reference. Then the respondent's witness testified.

1fs Luhanga testified during examination that she works as Human Resources Manager for the respondent. That she knows the appellant.

She stated that the respondent made an offer to the appellant and that she had the offer. She added that the offer was made after the respondent had sought legal advice. Further, that the offer was made in June. She explained that the offer comprised one-month notice pay. There was also 1.67 days for annual leave. She added that the appellant already took 10 days out of 11 days leave he could have taken. She added that she did severance allowance calculation and the total came to Kl, 266, 676.70. She also calculated damages of two weeks ' wages for each completed year of service and this came to Kl, 117, 092.28. She deducted pay as you earn [PAYE] at K787, 214.60.

She also deducted the money already paid out. She stated that before the Pensions Act they were doing T.B. Scheme. And the money under that scheme was already paid out to employees including the appellant. And that otherwise that money should have gone to pensions as severance pay. She stated that she had the cheque for K773, 000.00.

During cross-examination Ms Luhanga testified that the appellant was not given a letter of dismissal. She added that they sat down with their Country Director to say that what she had done was wrong. She conceded that the Country Director made a unilateral decision in this matter and their interest was to get to the bottom of the decision. She however denied that they wanted to formalize the unilateral decision of dismissal. She further added that she expected the appellant to come to the office. She concluded by saying that the calculation on the appellant's terminal benefits was based on advice from the respondent's lawyers.

After hearing the evidence above the lower court found that there was indeed a unilateral decision dismissing the appellant from employment on 16th August 20 12. This Court notes that the respondent actually admitted unfairly dismissing the appellant by its admission on the record.

The lower court then referred to section 63 Employment Act on how compensation is to be awarded. It reasoned that compensation that is just and equitable is awarded in the court's discretion after considering all the circumstances of the case including the extent of contribution to the dismissal of actions by the employer and the

employee if any. And further, whether the employee mitigated his loss after the dismissal. The lower court correctly noted that section 63 (5) of the Employment Act provides the minimum awards of compensation below which no award can be made. Section 63 Employment Act provides that

> (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-
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> (a) an order for reinstatement whereby the employee is to be treated in all respects as if he had not been dismissed;
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> (b) an order for re-engagement whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and on such terms of employment as may be specified in the order or agreed by the parties; and
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> (c) an award of compensation as specified in subsection (4).
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> (2) The Court shall, in deciding which remedy to award, first consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.
>
> (3) Where the Court finds that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.
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> (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.
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> (5) The amount to be awarded under subsection (4) shall not be less, than-
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> (a) one week's pay for each year of service for an employee who has served for not more than five years;
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> (b) two week's pay for each year of service for an employee who has served for more than five years but not more than ten years;
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> (c) three week's pay for each year of service for an employee who has served for more than ten years but not more than fifteen years; and

(d) one month's pay for each year of service for an employee who has served for more than fifteen years,

and an additional amount may be awarded where dismissal was based on any of the reasons set out in section 57 (3).

(6) Where the Court has made an award of reinstatement or re-engagement and the award is not complied with by the employer, the employee shall be entitled to a special award of an amount equivalent to twelve weeks' wages, in addition to a compensatory award under subsections (4) and (5).

The lower court then reasoned that it was not just and equitable to award the appellant compensation until retirement age because he refused to go and meet the respondent's officers after the respondent's unilateral decision dismissing the appellant and whilst the appellant was being paid. The lower court further reasoned that the appellant did not mitigate his loss and did not substantiate his claim that the respondent would not give a good reference for him on any job application. The lower court consequently decided to award the minimum compensation as provided under section 63 (5) Employment Act.

The appellant is dissatisfied with the lower court's decision hence this appeal herein.

This Court will defer to the lower court on findings of fact but will deal on this appeal with matters of law or jurisdiction only. See Section 65 Labour Relations Act.

This Court will deal with the grounds of appeal and submissions by both parties on the same in tum.

On the first ground of appeal that the Industrial Relations Court erred in law in failing to apply the law to the facts the appellant submitted as follows.
The appellant first referred to section 65 (2) of the Labour Relations Act which provides that a decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within 30 days of the decision being rendered.

He further submitted that it is accepted that a finding of fact which cannot be supported by evidence is an error in law and will support an appeal to the Supreme Court. See *Hayles v The Republic* [2002-2003] MLR 68 (SCA).

He further alluded to the case of *Chisenga v Rep* [1993] 16(1) MLR 52 (SCA) in which the appellant was convicted on a charge of theft by a person employed in the public service contrary to section 278 as read with section 283(1) of the Penal Code when he appeared before the Resident Magistrate's Court at Ntcheu. He was sentenced to the mandatory minimum term of seven years in prison with hard labour. His appeal to the High Court against both conviction and sentence was dismissed in its entirety. He henceforth appealed to the Supreme Court of Appeal on grounds that there was no evidence at all to support the conviction. Section 11(2) of the Supreme Court of Appeal Act provided, inter alia, that a second appeal in criminal cases lies to the Supreme Court of Appeal on a matter of law only, and that the decision of the High Court is final as to matters of fact. The Court citing with approval *Scraw v Rep* MSCA Criminal Appeal No. 17 of 1979 and *Banda v Rep* MSCA Criminal Appeal No. 24 of 1988 (both cases unreported) held that the appellant's contention that there were no facts at all on which to base the conviction raised a matter of law and, therefore, appealable. The appeal was successful.

The appellant further referred to the case of *Pandirker v Rep* 7 MLR 328 in which the Malawi Supreme Court of Appeal held that the only questions of law which can arise concerning primary facts concerning an appeal pursuant to sections 11(2) and 12(1)(a) of the Supreme Court of Appeal Act are whether there was any evidence to support a finding of primary fact and whether any conclusions drawn from the primary facts were ones which could reasonably be drawn.

The appellant further referred to the case of *Bracedirde* v. *Oxley* [1947] 1 K.B. 358; [1947] 1 All E.R. 130, in which Denning, LJ stated that the court will only interfere if the conclusion cannot reasonably be drawn from the primary facts.

The appellant further referred to what Denning L.J. stated in *British Launders ' Research Assn.* v. *Hendon Borough Rating Auth* [1949] 1 K.B. 471 as follows

> Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by production of the thing itself; such as original documents. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process or reasoning from them. If, and so far as, these

> conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact: and the only question of law that can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one that could reasonably be drawn from the primary facts.

The appellant added that an appellate court will interfere with the judge's findings of fact, if it is satisfied that the verdict was obviously wrong. see *Kafwambila v Rep* (1968-1970) ALR (Mal) 321 at 322; *Munyenyembe v Rep* [1996] MLR 433 (SCA).

The appellant then referred to *Phiri v. Illovo Sugar* Civil Appeal Number 36 of 2006, (High Court) (Mzuzu District Registry) (Unreported) in which Madise, J held that the limitations imposed by section 65 of the Labour Relations are unconstitutional as it creates an unpleasant situation of having a court which is concurrent with the High Court and also that they remove the right of an aggrieved party to any legal action to appeal to a superior court on matters of law, jurisdiction or facts. He also stated that section 65(2) of the Labour Relations Act is arbitrary in law and violates section 41(2) of the constitution which provides that every person shall have the right access to any court of law or other tribunal with jurisdiction for final settlement of legal issues. The appellant further stated that Madise, J made the following remarks

> Final settlement must be understood in its natural sense. For an aggrieved party to have final settlement they must have access to all appeal courts up to the Supreme Court of Appeal. S. 65 of the Labour Relations Act purports to limit this right and cannot stand the constitutional test. The preliminary objections raised by the Respondent are hereby overruled.

This Court wishes to point out at this juncture that section 41 (2) of the Constitution provides a right to access a court of law or tribunal for final settlement of legal issues. Here, there is no constitutional right to appeal on factual issues in civil matters. This must be distinguished from the right to appeal as provided to accused persons in criminal matters under section 42 (2) (f)(viii) of the Constitution. The convention is that in most democracies around the world the appeal courts will deal with legal issues and not factual issues. That therefore means that, in the view of this Court, section 65 of the Labour Relations Act does not limit the right to appeal in an

unconstitutional manner. It is within the spirit of the Constitution. The trial court deals with factual issues since it hears the evidence and assesses the same. The appeal court will of course interfere with findings on factual matters in certain circumstances as this Court is being called upon. For example, where the evidence does not support the findings by the trial court. There is therefore nothing unconstitutional in the scheme of section 65 of the Labour Relations Act.

The appellant then submitted that the distinction between matters of fact and matters of law is not always clear - cut. For example, any argument as to the sufficiency of evidence or reasonableness of any finding thereon are undoubtedly questions of fact and no appeal is possible. However the High Court may intervene on behalf of the Director of Public Prosecutions if it considers that there was no evidence to support those findings of fact, this being a question of law . *Pandiker*
v Rep (1971-72) ALR Mal. 208.

The appellant then made the following analysis and submissions. He observed that in awarding the statutory minimum compensation, the lower court stated at page 4 of its decision that

> In this matter we do not see the reason why the applicant should receive compensation up to the time he would have retired. We find that the respondent was calling applicant for further discussions. We also note that after unilateral decision by the respondent's Country Director, the respondent kept on calling the applicant to his office. The applicant chose not to go. The respondent kept on paying the applicant. Whatever the respondent wanted to, the applicant was uncooperative. Further to that, it is quite apparent that the applicant did not mitigate his loss arising out of the dismissal. The applicant alleges that the respondent would have been putting up bad reference against him. We find that that assertion is unsupported by evidence. In the circumstances, our agreed view is that the applicant should be awarded minimum compensation.

The appellant submits that this is a misdirection in law. Further, that this was an improper application of the law to the facts. The applicant submitted that as he was already dismissed from employment, the fact that the "respondent kept on calling the applicant to the office and the fact that the respondent kept paying the applicant even after he was dismissed from employment" could not be a good reason for punishing the appellant by awarding him minimum compensation. Crucially, that the lower court should have considered that the termination of employment was procedurally and substantively unfair. Further, that the lower court should have

looked at comparable decisions of the High Court and Industrial Relations Court. The appellant then alluded to several cases in that regard.

In *Mbewe v Reserve Bank of Malawi* Matter Number IRC PR381 of 2012 (Unreported), the lower court awarded the lost salary from the date of the claimed constructive dismissal to the date of judgement which amounted to a salary of 36 months; and on the evidence that the applicant failed to secure a job, the court awarded her future loss for six months (six months' salary). In total the applicant was awarded 42 months' salary. This was despite argument that the applicant was offered another job which she declined.
In *Musuma and Chilinda v Reserve Bank of Malawi* Matter Number 30 of 2014 and Matter Number 31 of 2014, the lower court awarded 54 months' salary and benefits as compensation to Mr. Francis Musuma who had 17 years to retirement and 80 months' salary and benefit as compensation to Mrs. Lydia Chilinda who had 22 years to retirement. The amounts were boosted by 50% owing to inflation. This was in addition to compensation for immediate loss of earnings.

In *Banda v. Dimon (Malawi) Ltd* 2008 MLLR 92, the court awarded exemplary damages equivalent to three years' salary. This was in addition to the 4 months' salary representing loss of salary from the date of dismissal to the date the Plaintiff found alternative employment. In *Kachinjika v Portland Cement Company* [2008] MLLR 161 (HC), the court awarded 48 months' salary to the Plaintiff who was 50 years old and whose retirement age was 60.

The appellant further submitted that, the lower court improperly exercised its discretion by relying on the "respondent calling the applicant to its office" in terms of *Odusote v Odusote* [1971] 1 All NLR 219 which is to the effect that discretion has to be exercised judicially; *Stanbic Bank Limited v Mtukula* MSCA Civil Appeal No. 34 of 2006_which is to the effect that an appellate court will interfere in the award of compensation if there is improper exercise of discretion and *Davies and Another v Powell Duffryn Associated Collieries Limited* [1992] 1 All ER 657 at 661.

The appellant further submitted that although the court cited *Norton Tool Co. Ltd v Tewson* [1973] 1 ALL ER 183 and the case of *Kachinjika v Portland Cement Company* [2008] MLLR 161 (HC) which give guidance on making compensatory

Whether the appellant mitigated his loss [at page 3 of the order], the lower court never paid any attention to the principles it cited save for mitigation of loss. In other words, the principles cited by the lower court were not applied to the facts of the case.

The appellant also charged that the lower court also never considered the various case authorities on point cited by the Applicant's representative.

The appellant submitted that he had been hunting for jobs for two years. He had 16 years to retirement. His monthly salary was MK.319, 169.22. He was psychologically affected by the unilateral termination of employment. That this was therefore a proper case in which the appellant should have been awarded a salary beyond the statutory minimum and as was submitted in the court below, the compensation should have been MK.61,280,490.24.

On its part, the respondent first referred to Section 63 of the Employment Act which provides for remedies for unfair dismissal. Particularly, section 63 (4) of the Employment Act which states as follows

> An award for 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 has caused or contributed to the dismissal.

The respondent then stated that commenting on the above provision, the High Court in the case of *Magola v Press Corporation Limited* Civil Cause number 3719 of 1998 (High Court) (unreported) stated the law as follows

> The principle of compensation are the same under the constitution, the English Employment Act and the Malawi Employment Act. The Court or tribunal is enjoined to assess compensation in an amount, which is just and equitable in all the circumstances and there is neither justice nor equity to act in accordance with principle. The first objective is to compensate and

> compensate fully, but not to award a bonus, save possibly, in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or tribunal. The second objective is to award an amount that is just and equitable in all the circumstances having regard to the loss sustained by the complainant.

The respondent then submitted that therefore in awarding damages for wrongful termination the court has to bear in mind the hallmark and the premise of a contract of employment; that as a consideration for work done an employee earns a salary. The respondent noted that in the case of *Kazombo v Reserve Bank of Malawi* Civil Cause number 1645 of 1999 (unreported) the High Court held as follows

> Numerous case authorities have contributed to clarity on the legal position relating to damages. It is clear that a salary ought to be earned and that it does not follow that on wrongful termination, a party can remain idle and demand his salary as damages. Even a wrongful termination, it is conceded, effectively ends the employment relationship. In most cases this court and the Supreme Court have opted to be governed by the agreed notice period for termination in determining the award due. (See also the case of *Mbewe v ADMARC* 16(2) MLR 594).

The respondent then pointed out that in the present case there was no factual dispute for the court's determination the respondent herein having chosen not to contest the claim for unfair dismissal. Further, that for purposes of assessment, the court duly heard the applicant's testimony. And that from the transcript of the main hearing of the assessment as well as from the Order of the court, the following factual background was established

That the Appellant was employed by the Respondent in 2004 as a logistics driver and Mechanic at a salary of K319.000. The appellant was dismissed in 2012. That the appellant had been invited to three meetings and that he only attended one, as he refused to attend the other meetings.

That from August to November he was not working but he was paid for each and every month. The appellant conceded that it did not make sense to be paid without working.

That the appellant agreed that the employment was not for life and that he had taken his accumulated leave days.

The respondent noted that the appellant suggested that he should be paid compensation up to the end of his contract, in other words, up to the time of his retirement. And that the appellant based his argument on the decision of the lower court in the case of *Malopa v Malawi Broadcasting Corporation* matter number IRC PR 392 of 2012.

The respondent submitted that from the foregoing, it is clear that the court had a clear grasp of the facts before it. Further, that in determining the award to be made to the appellant the lower court was guided by the decision of the court in the case of *Chitheka v Attorney General (Ministry of Finance)* Civil Cause no 67 of 2008. And that the court was also guided by the provisions of section 63 of the Employment Act. Further that section 63 and the decided cases on issues of compensation require that the court should award what it considers just and equitable.

The respondent submitted that compensation must be aimed at making good the loss suffered by the employee as a result of the employer's breach of contract of employment taking into account all circumstances of the case. Consequently, the respondent respectfully submitted that the court fully appreciated the facts before it and applied the law to the facts and came up with a just and equitable award of compensation. The respondent submitted that the appellant's instant ground of appeal should be dismissed.

This Court agrees with the statement of the law by both parties that the lower court was bound to award compensation that is just and equitable in all the circumstances of the case in terms of section 63 of the Employment Act. The compensation must not only take into account the acts of the employer in causing the unfair dismissal but also the actions of the employee, if any, in contributing or causing the dismissal.

The lower court in this matter was driven in awarding the minimum compensation by the fact that after the unilateral dismissal of the appellant by the respondent's Country Director the appellant refused to subsequently meet the said Director and that the appellant failed to mitigate his loss.

The appellant contends that this was a wrong application of the law to the facts. He contends that he should have been awarded compensation above the minimum provided since otherwise it means he is being penalized even though what was important is that he was unfairly dismissed by the respondent. The respondent contends that the minimum compensation was just and equitable.

This Court agrees with the appellant that once there was evidence of unilateral termination of employment of the appellant by the respondent the lower court should have considered that the termination was unfair thereby entitling the appellant to treat the employment as being at an end. In such a case, the respondent could not unilaterally change the position again and withdraw the termination as it sought in this matter by tempting the appellant with pay in order for it to hold discussions with him. The appellant was justified in accepting the unambiguous termination and treating the employment as being at an end and the respondent could not unilaterally withdraw the termination. There is persuasive authority to that end in the case of
C.F. Capital PLC v Willoughby [2011] EWCA Civ 1115.

What should the effect of this be on compensation payable? Should the appellant's refusal to succumb to requests by the respondent to return to work to discuss the respondent's unfair unilateral position be used against the appellant on assessment of compensation? It seems unjust to this Court that an employer should unilaterally terminate employment and then call that employee back for its own reasons, such as discussions herein, and then use that as a factor to allege that the employer contributed to his own dismissal. It is therefore equally unjust for the lower court to use the appellant's refusal to go back to the appellant in the present circumstances as a reason for awarding the minimum compensation. At any rate, the lower court did not make any finding as to why the respondent was calling the appellant for discussions. The respondent's evidence on that was that the respondent did not want to formalize the unilateral decision but wanted to get to the bottom of the unilateral decision. It is not clear what that means. The appellant's evidence was that the discussions were to be had since the matter was not yet at the respondent's final level of management but the unilateral decision would not be changed. So one thing that is clear from the foregoing is that neither party envisaged re-engagement.

Whatever the case, the vital fact of the matter is that the appellant did not contribute to his own dismissal the respondent having admitted to have unilaterally and unfairly dismissed the appellant on 16th August 2016.

In the premises, the lower court misapplied the law to the facts in arriving at a decision to award minimum compensation as a result of the appellant's refusal to attend meetings with the respondent after the respondent's unilateral unfair termination of employment.

The lower court also found that the appellant did not mitigate his loss since he had not shown that he applied for work. The appellant rightly submitted that the lower court properly articulated the matters to be taken into account on assessment of compensation in relation to finding new employment to mitigate loss arising from a dismissal such as the marketability of the employee, his age and other factors. The appellant states that the lower court did not apply these principles to the facts. The respondent states the contrary.

This Court has noted that the lower court drew the correct inference of lack of mitigation of loss from the testimony of the appellant, since the appellant categorically stated that he could not get a good reference from the respondent. The correct inference was that the appellant must not have applied for any job even though he could easily do so within the transport sector. There was also no proof of any such job applications. The issue in point is however that the lower court should have applied the legal principles by determining how long the appellant was likely to take to get such employment had he applied for a job related to his qualification and skills as driver and logistician. The lower court did not do that. The lower court simply decided to award the minimum compensation. This was another misapplication of the law to the facts as alleged by the appellant.

In the foregoing circumstances, this Court finds that the lower court indeed misapplied the law to the facts in its decision arriving at the minimum award under section 63 (5) of the Employment Act. The first ground of appeal therefore succeeds

On the second ground of appeal, that the lower court erred in law in coming up with findings which were not supported by evidence the appellant started by noting that

at- page 4 of the order, the lower court concluded that 'we also note that after the unilateral decision by the respondent's country director, the respondent kept on calling the applicant to his office. The applicant chose not to go'.

The appellant then notes that however at page 2 of the order, the lower court records that He said he was called to the office for three times but he only went once.....In re examination he said he went to the respondent and had discussions. He said he was called on 5 September and that in between there were messages from the Human Resources Management. He said they told him that the issue was not up to the final level. He said they told him that they were no reversing the decision for (sic) terminate his employment.

The appellant submitted that the finding by the lower court that the appellant chose not to go to the respondent when the respondent called him was not supported by evidence. He submitted further that it is clear from what the lower court recorded that when the respondent called him he went to meet the respondent who told him that the decision to terminate his employment had been maintained.

The appellant also noted that at page 4 of the order, the lower court concludes that "the respondent kept on paying the applicant" implying that the respondent was paying the applicant for the whole of the period he was dismissed but before judgment. The appellant observed however, that the lower court at page 1 of the order records that the applicant "was being paid from August to November". And that this is contrary to what the lower court concluded at page 4 of the order.

The appellant also submitted that furthermore, the conclusion reached by the lower court was as if the respondent was offering to re-engage the appellant when the respondent's witness is quoted by the lower court as saying "they expected the applicant to come to the office for further discussion". And the appellant asked the question: Were the discussion in respect of compensation which failed even after the respondent conceded liability or that the appellant should be re-engaged?

The appellant then submitted that in terms of *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA) and *Chief Public Prosecutor v Phiri (H) J O MLR 202* the lower court erred in law in making findings not supported by the evidence. The

appellant pointed out that Msosa JA, as she then was, in *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA) held that the duty of a judge is to determine the case on the evidence before him and not to use his personal knowledge, the circumstances and the parties. At page 48 of the report Msosa JA delivering the unanimous opinion of the Supreme Court stated

> It is clear from the above comment that the Judge was using his personal knowledge to decide the credibility of Mr Chapweteka and to decide whether it was true that the respondent and Mr Chapweteka colluded in order to transfer funds from the customer's accounts to the insurance brokerage company. This was certainly wrong. The duty of a Judge in deciding a case is to evaluate the evidence before him and the relevant law in order to arrive at a correct decision. Cases must be decided on the evidence before the court and the relevant law. We would again allow this ground of appeal.

On its part the respondent started by referring to the case of *Dr. Muluzi v Director of Anti-corruption Bureau* MSCA Civil Appeal No 17 of 2005 in which the learned Chief Justice Munlo SC clearly stated that the courts have no business of granting what they believe to be effective remedy in the absence of proper pleadings which form the basis for granting such relief. The respondent stated that the learned Chief Justice stated as follows

> I agree that every person has a right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by the constitution or any other law. However, the right to an effective remedy does not exists in a vacuum. Further, the right to an effective remedy is not established by mere assertions. It behoves a litigant who claims factual and legal basis to properly plead his case and show the factual and legal basis on which he believes he is entitled to an effective remedy. The courts will only grant an effective remedy to a litigant after examining the pleadings that the litigant has brought before it and making a finding that establishes that there may be or indeed there have been acts violating the rights and freedoms granted to the litigant by the constitution.

The respondent then referred to the case of *Banja La Mtsogolo v Chiomba* 2009 MLR 18, in which the court also commented on the principle as follows

> It must be appreciated that there is usually tension between the court's zeal to give a litigant effective remedy and the Court's overarching duty to remain impartial and neutral during legal proceedings. We think that care

> must be taken that the duty to provide effective legal remedy must not dwarf and undermine the duty to remain impartial.

The respondent noted that the appellant contends that the finding of the court on page 4 of the order concludes that "the respondent kept on paying the applicant" implying that the respondent was paying the applicant for the whole period he was dismissed but before judgment. And further that the appellant further alleges that however, the lower court at page 1 of the order records that the applicant was being paid from August to November. And that the appellant further concludes from the foregoing that the lower court concluded that the respondent was offering the applicant re-engagement.

The respondent submitted that, however, it is clear from pages 1 and 2 of the order of the court (found on page 5 of the record of appeal) that the lower court found the following facts as proved. That the appellant was employed as a Logistics Driver. That the appellant was dismissed on 17th December, 2012 and that he was getting paid whilst not working. That the appellant was called to the office three times but he only went once.

The respondent submitted that the lower court decided on this factual background as follows

> In the matter we do not see the reason why the applicant should receive compensation up to the time he would have retired. We find that the respondent was calling the applicant for further discussions. We also note that after the unilateral decision by the Respondent's Country Director, the Respondent kept on calling the applicant to his office. The Applicant chose not to go. The Respondent kept on paying the applicant. Whatever the respondent wanted to do, the applicant was unco-operative . Further to that, it is quite apparent that the applicant did not mitigate his losses arising out of the dismissal. The applicant alleges that the respondent would have been putting up bad references against him. We find that that assertion is unsupported by evidence. In the circumstances, our agreed view is that the applicant should be awarded minimum compensation.

The respondent then submitted that from the foregoing, it is clear that the lower court fully appreciated the issues before it and made the determination on the same based on legal principles. That nowhere in the order of the lower court did the court suggest

that the respondent was offering the applicant re-engagement. And that this explains why the court did not order re-engagement as provided under Section 63 of the Employment Act. The respondent submits that this court should consequently dismiss the appellant's second ground of appeal.

This Court has considered the respondent's submission that it is clear from pages 1 and 2 of the order of the court (found on page 5 of the record of appeal) that the lower court found the following facts as proved. That the appellant was employed as a Logistics Driver. That the appellant was dismissed on 17th December, 2012 and that he was getting paid whilst not working. That the appellant was called to the office three times but he only went once. An examination of the order on assessment of compensation and of the record of the lower court clearly shows the contrary. At pages 1 and 2 of the lower court's Order on assessment of compensation the lower court does not make findings of fact. Rather, the lower court simply lays out the testimony of the witnesses. And therefore the respondent's submission that the lower court made the findings attributed to it at pages 1 and 2 of the Order on assessment of damages is inaccurate.

The appellant is correct in saying that the evidence was clear that the appellant was called for three times for discussions with the respondent, after the unilateral decision to dismiss him, and he only went there once. This is clear from page 2 of the Order on assessment of compensation where the lower court records that the appellant went for discussions since he was informed his issue had not yet reached the final level of the respondent. But he was later informed that the unilateral decision would not be reversed and that is why he says he stopped going to the respondent. Therefore, the lower court's finding that after the unilateral decision dismissing the appellant the respondent kept on calling the appellant to its office and the appellant chose not to go is not supported by the evidence. At least the appellant went there once. That is what the evidence shows.

The appellant also correctly noted that at page 4 of the Order on assessment of compensation, the lower court concludes that "the respondent kept on paying the applicant" implying that the respondent was paying the applicant for the whole of the period he was dismissed but before judgment. The correct position however, is that the one that the lower court recorded at page 1 of its Order on assessment of compensation that the applicant "was being paid from August to November". The

lower court's conclusion at page 4 of its Order was therefore unsupported by the evidence.

The appellant also correctly submitted that furthermore, the conclusion reached by the lower court in the circumstances to award minimum compensation was as if the respondent was offering to re-engage the appellant and the appellant was uncooperative and refused the same. When the evidence shows clearly is to the contrary since the respondent's witness is quoted by the lower court as saying "they expected the applicant to come to the office for further discussion". It is not clear what these further discussions were aimed to achieve. The lower Court itself at page 4 finds as follows with respect to the intention of the respondent in relation to the discussions 'Whatever the respondent wanted to, the applicant was uncooperative'. Even the lower court itself did not make any finding as to why the respondent called the appellant for discussions. In such circumstances it would not be right for the lower court to use the invitation to discussions as a reason for awarding the minimum compensation as if the invitation was meant by the respondent to offer the appellant re-engagement which the appellant refused unreasonably.

In the circumstances, this Court agrees with the appellant that the lower court made findings of fact that were not supported by the evidence before it. This was an error at law. The second ground of appeal also succeeds.

On the third ground of appeal that the lower court erred in law in putting too much weight on the invitation extended to the applicant for discussions while such discussions were intended to rectify the respondent's mistakes at the expense of the applicant the appellant submitted as follows.

The appellant submitted that the law requires that the compensation that the court should award must be what the court considers to be just and equitable. That the compensation must be aimed at making good the loss suffered by the employee as a result of the employer's breach of the contract of employment taking into account all the circumstances of the case. *Chitheka v Attorney General (Ministry of Finance)* Civil Cause Number 67 of 2008 (High Court) (unreported) and *Mbewe v Reserve Bank of Malawi* Matter Number IRC PR381 of 2012 (unreported).

The appellant submitted that in *Stanbic Bank Limited v Mtukula* [2006] MLR 399 the Malawi Supreme Court of Appeal held at page 404-405 that

> The compensatory award represents an amount which the court considers just and equitable, under the circumstances. It is an award made in the discretion of the court. An appellate court is ordinarily reluctant to interfere with an award of damages made by trial courts in the exercise of their discretion: see *Davies and Another v Powell Duffeyn Associated Collieries Limited* [1992] 1 All ER 657 at 661. Again this court is slow to interfere with an award of damages made by the trial Court and will only do so where it is satisfied that the award is "glaringly large or small' and that no reasonable court would make it. See *Peoples' Trading Centre v Ng'oma* MSCA Civil Appeal No. 30 of 1996 where it is stated:
>
> > 'the award of damages is a matter which falls within the discretion of the trial court and the appellate court is slow to interfere with that discretion unless the award is glaringly 'large or small' and that no reasonable court could make it. Again this court can interfere if award represents an entirely erroneous estimate or show no reasonable proportion between the amount awarded and the loss sustained: See *Dangwe v Aleke Banda* Civil Appeal No. 8 of 1993'.

The appellant then submitted that the lower court erred in putting too much weight to the invitation extended to the appellant by the respondent when such invitations were meant to correct the respondent's mistakes. Further, that invitations for discussions have never been legal reasons for awarding a small amount of compensation as the lower court did.

The appellant further submitted that there are sufficient grounds for this Court to interfere with the findings of the lower court. That the compensation awarded by the lower court was glaringly small in terms of *Stanbic Bank Limited v Mtukula.* And that the compensation was not just and equitable from the standpoint of both the employer and the employee.

On its part, the respondent submitted that Section 63 (4) of the Employment Act empowers the court to make an award of compensation 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 attributed to the dismissal. Further, that the law clearly empowers the court to look at the conduct of the employee and to take into account the extent to which the

employee contributed to the dismissal when determining the amount of compensation to be awarded.

The respondent submitted that in the present case, the lower court examined the conduct of the employer and employee. The respondent noted that at page 4 of the lower court's order on assessment of compensation the lower court stated as follows

> In this matter we do not see the reason why the applicant should receive compensation up to the time he would have retired. We find that the respondent was calling the applicant for further discussions. We also note that after the unilateral decision by the Respondent's Country Director, the respondent kept on calling the applicant to its office. The Applicant chose not to go. The respondent kept on paying the applicant. Whatever the respondent wanted to do, the applicant was uncooperative.

The respondent submitted that from the foregoing, it is clear that the lower court was mandated by Section 63(4) of the Employment Act and took into account and consideration both the conduct of the employer and the extent to which the appellant herein contributed to his dismissal in determining the compensation to be awarded to the appellant. The provision of Section 63(4) of the Employment Act is clear, the court had the right mandate to take into account the extent to which the appellant herein contributed to his dismissal. The respondent submitted that this court should also dismiss this ground of appeal.

This Court agrees with both the appellant and the respondent on the import of section 63 (4) of the Employment Act that the lower court has to take into account and consider both the conduct of the respondent and the extent to which the appellant herein contributed to his dismissal in determining the compensation to be awarded to the appellant.

This Court however does not appreciate how the appellant can be said to have contributed to his own dismissal in the circumstances of this case as submitted by the respondent. The respondent herein unilaterally dismissed the appellant. It conceded that. Thereafter, the respondent called the appellant for discussions to get to the bottom of the decision. The appellant refused to continue attending the said discussions.

There is no evidence on the record of the lower court on assessment of compensation that the discussions were aimed at re-engaging the appellant which would have been a positive development the refusal of which would have made the appellant guilty of contribution to his own loss.

In the circumstances, this Court agrees with the appellant that, in making the minimum award of compensation, the lower court erroneously placed too much weight on the invitation extended to the applicant for discussions. This is the case, particularly where the lower court did not make a finding as to the respondent's motive behind such discussions as illustrated by the lower court's statement at page 4 of its order to the effect that 'Whatever the respondent wanted to, the applicant was uncooperative'. The lower should therefore not have place too much weight and reliance on invitations to discussions herein to award the minimum compensation herein. The third ground of appeal therefore succeeds.

On the fourth ground of appeal that the lower court erred in law in failing to make its determinations on some of the claims lodged by the appellant such as the claim for notice pay, payment for untaken leave, claim for pension and terminal benefits, interest on the pension benefits and on severance allowance the appellant submitted as follows.

The appellant submitted that in addition to the payment of damages for unfair dismissal and severance pay the appellant prayed for compensation for loss of pension benefits, notice pay amounting to MK319, 169.22, untaken leave days being the sum of MK.145,076.95, interest on the money payable to the appellant. He submitted that the lower court never made any determinations on these issues.

The appellant then submitted that on 11th March, 2011 Parliament passed the Pension Act. The law was published in the Gazette on 9th April, 2011. He submitted that under section 4 (a) of the Pension Act every employer is compelled to provide pension for every person employed by that employer. That this is restated at section 6(2) of the Act where it is stated that all employees who have been employed for three months shall be entitled to pension. The appellant submitted that the principal object of the pension law has been said to be "to introduce mandatory requirement for every employer to provide pension for every person under his employment".

The appellant submitted that in terms of the case of *Nkhoma v Medicines Sans Frontiers France* Matter No. IRC PR560 of 2011, (Unreported), the Pension Act has retrospective application.

The appellant submitted that vantage the law mandates that employees with earnings above a minimum salary threshold should contribute 5% of salary to a new national pension fund. That employers should contribute 10% of salary for all employees who have worked for them for at least 12 months. That workers will be able to retire at age 50 or older with at least 20 years of service. That retirement can be deferred until age 70 ("maximum retirement age"). And that workers who are unemployed for more than 6 months will be able to withdraw a portion of their individual account balances prior to reaching the minimum retirement age.

The appellant submitted that for employers who did not operate any pension fund, severance allowance liability as at 31st May, 2011 is transformed into employer's compulsory pension contribution and has to be paid into the pension fund for the benefit of the employee.
Further that section 51(2) of the Employment Act requires an employer to keep accurate written records of their employee's wages, remunerations and any deductions from their wages and remunerations and reasons thereof.
The appellant then submitted that the respondents should have brought to the court these records of pension deductions and any pension benefits the appellant was entitled to. And that it is clear that the respondent in this matter neglected its statutory duty to pay or arrange for the payment of its pension contribution for the benefit of the appellant herein.

Further, that the respondent neglected to pay the appellant notice pay. The appellant submitted that section 30(2) of the Employment Act provides that in lieu of providing notice of termination, the employer shall pay the employee a sum equal to the remuneration that would have been received and confer on the employee all other benefits due to the employee up to the expiration of the required period of notice .

The appellant contended that although the respondent paid the appellant his salary from August to November, 2012, this payment cannot be regarded as notice pay. He submitted that it should be regarded as ex gratia payment. The appellant submitted

that in *Kachinjika v. Portland Cement Company* [2008] MLLR 161 at 182-183 Chikopa, J., as he then was, made the following observations on the purport and effect of ex gratia payment

> We would also agree with the defendant that an ex gratia payment of the kind made by the defendant herein is entirely in the discretion of the grantor whether or not to grant it. We are however unable to agree with the defendant that once granted it is also in the discretion of the grantor to take it back. As we understand ex gratia payments they are given, unconditionally, as a token of thanks to the grantee for services well rendered. It is exactly what happened herein. The payment was made because the defendant thought it befitting to reward the plaintiff for many years of good service. But having so exercised their discretion, for good reasons we are sure, in favour of the plaintiff it is not the case that they can at any time thereafter get it back. The ex gratia payment though thus styled must be taken to be a gift out and out. After all it is not as if the defendant would be in a position to "refund" to the plaintiff the good service that he put into the defendant company. The only way it can be had back is if it were premised on fraud or misrepresentation from the grantee which is not the case herein. The case of *Malawi Railways Ltd v PTK Nyasaulu* MSCA Civil Appeal No. 13 of 1992 (decided in November 1998) has a discussion on ex gratia payments that is in tandem with our opinion above.

The appellant then referred to *Blantyre Netting Company v Chidzulo and others* [[1996] MLR 1 (SCA) in which the question was whether rule 6 of the appellant's conditions of service was contrary to common law, normal practices in employment situations and defeated the very purpose of giving notice or payment of salary in lieu of notice and further whether it was contrary to section 31 of the Constitution and therefore invalid. The Supreme Court of Appeal upheld the High Court's decision which was to the effect that the said rule 6 of the Appellant's conditions of service was invalid, in that it was inconsistent with the provisions of section 31(1) of the Constitution, which provided a right to everyone to fair and safe labour practice and to fair remuneration. Unyolo J opined as follows

> Referring to the present case, we are of the firm view that the respondents could not be said to have got the full measure of protection of their fundamental right, namely, the right to fair remuneration under the said section 31(1), if they got, as they did, only one month's salary in lieu of three months' notice. In our judgment, it seems absurd to hold otherwise.

The appellant therefore submitted that the lower court ought to have awarded the appellant notice pay as pleaded and as submitted in the final submissions on assessment.

The appellant then referred to *Malamulo v Reserve Bank of Malawi* Civil Appeal Number 17 of 2012, (Lilongwe District Registry) (Unreported) in which the High Court granted an order to the appellant correcting the judgment to include the payment of interest at the prevailing bank lending rate.
He further referred to *Tak Ming-Co v Yee Sang Metal Suppliers Co* [1973] 1 WLR 300 in which it was held that even though it is desirable to ensure that litigation comes to a close the court has inherent jurisdiction to make an order which it failed to do so because of accidental omission of counsel to ask for it.
The appellant then referred to *Madinga v Nedbank_M SCA* Civil Appeal No. 15 of 2009 (High Court) (Unreported) in which an award of interest was made on the terminal benefits even though such interest had not been specifically pleaded.
The appellant then submitted that interest in labour matters was awarded in the case of *Total Malawi Limited v Namwili* Civil Appeal number 203 of 201 l , (High Court) (Unreported). Further, that in *Matanga v Old Mutual Malawi Limited* Appeal Case No. 04 of 2012 (High Court) (unreported) Mwaungulu J., as he then was, awarded interest on severance allowance which was paid late. The appellant then submitted that the lower court should have awarded the appellant interest on the sum due to him as pleaded.
The appellant then referred to section 44 (1) of the Employment Act which provides that

> Every employee, except where otherwise provided for in this Act, shall be entitled to a period of annual leave with pay of not less than--
>
> *(a)* eighteen working days if he works six days a week; and
>
> *(b)* fifteen working days if he works five days a week,
>
> and the leave shall be taken within six months of the entitlement to the leave falling due:
>
> Provided that the leave may be deferred and accumulated by mutual agreement.

The appellant indicated that he claimed the sum of MK.145,076.95 representing untaken leave. He contended that as submitted above, it is the statutory duty of the

respondent to maintain employee's records. He pointed out that the respondent never tendered any record showing that the appellant went on leave. He therefore submitted that the sum of MK145,076.95 is payable to him with interest.

On the fifth ground of appeal that the lower court erred in law in failing to make an award of compensation for immediate loss of earnings from the date of dismissal to the date of judgement, that is, 20 months' salary the appellant submitted as follows. He started by referring to *Mbewe v Reserve Bank of Malawi* Matter Number IRC PR381 of 2012 [unreported], in which the lower court made the following observations

> Suffice to say, as has been stated elsewhere, that the court has discretion to award compensation under section 63 of the Employment Act. Where compensation is awardable, the Act, in section 63(5), only provides the minimum award that a court can make. The making of the actual award is left to the discretion of the Court after having recourse to the evidence and all circumstance of the case which might include mitigation of the loss and contributory fault on the part of the dismissed employee. The guiding principle is that the compensation must be just and equitable .....
>
> In trying to award a just and equitable amount, the court will look at several factors such as the marketability of the applicant on the job market, the job market itself, the qualifications of the applicant, age of the applicant and whether the applicant has mitigated his loss. More importantly, the court looks at the loss itself and its proximity to the dismissal and the applicant's role in causing the dismissal.

The appellant submitted that in *Mbewe v Reserve Bank of Malawi* the lower court awarded the lost salary from the date of the claimed constructive dismissal to the date of judgement which amounted to a salary of 36 months; and on the evidence that the applicant failed to secure a job, the court awarded her future loss for six months. In total the applicant was awarded 42 months' salary.

The appellant then submitted that in the present case, the period from the date of dismissal to the date of judgment was 20 months and thus 20*319, 169.22=MK6, 383,384.40. And that the lower court ought to have awarded the appellant the sum of MK6, 383,384.40 representing compensation for immediate loss of earnings.

The appellant then submitted that, the fair and equitable way of compensating the appellant for loss of immediate earnings and future loss as pleaded (from the time of

the dismissal to the time of judgment) is by adopting what prevailed in *General Simwaka v The Attorney General* MSCA Civil Appeal Number 6 of 2001 (Unreported) in which the Malawi Supreme Court of Appeal awarded salary increments of 20% per annum.

On its part the respondent submitted on both grounds four and five at once and started by referring to the case of *Kachinjika v Portland Cement Company* (2008) MLLR 161, in which the court held as follows

> As a matter of principle, we think it is incorrect to award damages for wrongful termination of the contract of employment while separately making another award in respect of salaries. This would most likely not only needlessly complicate the compensation process but also result in over compensation. It would also be a technically and conceptually flawed award. It would proceed on the assumption that the plaintiff was never terminated. Which is not true. It would also assume that the plaintiff in his pleadings prayed for a declaration that he should be regarded as having continued in his position from the date of termination until judgment which is not the case. . ..compensation in cases like the one before us should be based on factual truths. These inter alia are firstly that the plaintiff was terminated ... secondly that he has since then done no work for the company for which he should be paid any salary. Instead the plaintiff should only be compensated for the wrongful termination. And the correct way about it is not to pay him salaries for which he did no work but to, as much as possible, award him damages in the "general damages" mould for wrongful termination that will take into consideration whatever was lost as a result of the wrongful termination.

As regards payment of pension benefits, the respondent submitted that the Pension Act 2010 changed the position of the law and it is instructive on claims for payment of pension benefits. It submitted that under the Act, upon termination, an employee's pension benefits ought to be transferred to a pension scheme of his choice. And that, the said pension funds can only be accessed upon retirement age. Further, that under the Act, an order withdrawing pension benefits can only be made by the Registrar of Financial Institutions upon application and satisfaction of several conditions put in place.

As regards the claim for untaken leave days, the respondent submitted that the lower court found as a matter of fact that the appellant had taken his accumulated leave

days. On page 2 of the ruling (found on page 5 of the record of appeal) of the court the court found the following facts

> He said he was dismissed on 17th December, 2012. He said it did not make sense for him to be getting paid when he was not working. He said he was called to the office three times but he only went once. He also said that he remembered that he took his accumulated leave days.

The respondent then submitted that, furthermore, the principles of compensation are the same under the Constitution, the English Employment Act and the Malawi Employment Act. That an employee can only be awarded compensation over and above the statutory minimum only in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or *tribunal. Magola v Press Corporation Limited* Civil cause number 3719 of 1998 (High Court)(unreported).

The respondent submitted that in the present case, the lower court did not make an order of reemployment which the respondent denied to entitle the appellant to compensation over and above the statutory requirement of a just and equitable compensation. And that from the legal principles above, the decision of the lower court cannot be faulted. The respondent asked this court to dismiss the appellant's fourth and fifth ground of appeal.

This Court agrees with the appellant that, in its order on assessment of compensation, the lower court did not adjudicate on appellant's claim to notice pay. There is no convincing counter-argument from the respondent on this aspect. The appellant is entitled to a month's notice pay.
With respect to notice of termination this Court notes that a contract of employment must provide for the same. In any event, section 29 of the Employment Act provides for the minimum notice for termination of employment. If no such notice is given, then payment must be made in lieu of notice equivalent to the remuneration due for the period of notice as provided in section 30 of the Employment Act. In terms of section 29 (1) (a) Employment Act a minimum of a month's notice is required to terminate a contract where an employee gets monthly pay.
The appellant was entitled to a month's notice or a month's pay in lieu of such notice. The payments between August and November 2012 by the respondent were not notice pay. Only the respondent knows what they were meant for. They were

probably ex gratia payments as contended by the appellant and described in *Kachinjika v Portland Cement Company.* But in so far as termination for employment is concerned the respondent ought to have given a month's notice or pay in lieu of such notice. This is in view of absence of any evidence of a contrary agreement for more than a month's notice. This Court therefore finds that the appellant is entitled to a month's pay in lieu of a month's notice since he was getting a monthly salary.

With respect to payment for untaken leave days this Court agrees with the appellant that the lower Court did not adjudicate on outstanding leave days. The appellant's evidence was that he had 10 leave days outstanding. The respondent's evidence was that the appellant had taken 10 out of the 11 leave days he was entitled to. The respondent did not bring any record to show the leave taken. The lower Court in its order on assessment of compensation, at page 2, indicated whilst stating the testimony of either party that the appellant stated that he remembered that he took his accumulated leave days. This was not adjudication on the appellant's claim for outstanding leave days as the respondent's wants this Court to believe. In fact, this statement of the appellant's testimony at page 2 of the lower court's was erroneous because the record shows that what the appellant had actually said was that 'I remember the leave days I had accumulated and taken'. This does not seem to convey the meaning that the appellant had taken ahis accumulated leave days.
In the circumstances, the lower court ought to have adjudicated on the appellant's claim for outstanding leave days that he had not taken by the time of his dismissal. The appellant testified that the number of untaken leave days was 10. This Court agrees with the appellant that the respondent who has leave days' records bore the onus of disproving this claim. The respondent never brought any records to disprove the claim. The appellant is therefore entitled to payment for the 10 outstanding leave days.

With regard to the appellant's claim for pension and terminal benefits this Court notes that indeed the law on pension has changed with the coming into force of the Pension Act as submitted by both the appellant and the respondent. This Court notes that the appellant at assessment of compensation sought that he be paid his contributions and those of the respondent since he is not working. The lower court erroneously did not adjudicate on that issue despite having jurisdiction to decide

labour related disputes arising under the Pension Act as provided in section 83 Pension Act.

In terms of the Pension Act the pension contributions by both the employer and employee vest for the benefit of the employee once paid into the pension fund and these are transferrable in terms of section 14 of the Pension Act. The respondent would have to provide details of all the pension contributions to the appellant at his request.

However, as rightly submitted by the respondent, the pension benefits can only be paid out in terms of section 64 of the Pension Act upon fulfillment of certain conditions such as retirement. In terms of section 65 Pension Act, the pension benefits can be paid out early as the appellant sought herein upon application to the Registrar of Financial Services and upon fulfilment of certain conditions such as that the employer has terminated employment and an employee has been unemployed for not less than six months.

There can therefore be no application for payment of benefits to the lower court. The appellant ought to apply to the Registrar of Financial Institutions in terms of section

64 Pension Act for payment of his pension benefits if he so wishes. There consequently can also not be an application for interest on pension benefits to the lower court.

With respect to the appellant's claim for interest on severance allowance the respondent did not put up any counter-argument. The lower court also erroneously did not adjudicate on that claim.

The employer is bound to pay the severance allowance at the time of termination of employment. Section 35 (1) of the Employment Act is clear to that effect as it provides that 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.

The appellant herein should have been paid his severance allowance in August 2012 when his employment was terminated. That was not done. This Court therefore awards interest on the severance allowance at the commercial lending rate on a compounding basis from August 2012 to the date of payment of the severance allowance. This is because the appellant was put out of use of his money with the potential to invest the same. The reality of today is that the loss suffered by the appellant can only be properly compensated by compound interest as recently held

by the Supreme Court of Appeal in the case of *Kamwaza and Kasote t/a Kamwaza Design and Partners v ECO Bank* MSCA Civil appeal number 45 of 2014 (decision delivered on 20th July 2016). This interest shall be at the prevailing commercial lending rate and shall be assessed by the lower court if not agreed within 14 days of this decision.

On the appellant's contention that the lower court erred in law in failing to make an award of compensation for immediate loss of earnings from the date of dismissal to the date of judgement, that is, 20 months' salary this Court agrees with the respondent that the lower court arrived at the proper decision in the circumstances.

As rightly noted by the respondent, the lower court had to arrive at a just and equitable compensation for the unfair dismissal of the appellant herein considering all the circumstances of the case. In doing so, the lower court had to consider the conduct of the appellant after dismissal in mitigation of his losses. The appellant in this matter did not look for employment. He decided to go into chicken rearing business. He did not disclose what his earnings where at all or for how long he carried on his business so that these could be off-set against his losses. There was therefore no justification for awarding immediate loss of 20 months' salary covering the period between the unfair dismissal and the order on assessment of compensation by the lower court.

Having said the foregoing, this Court does not agree that an employee can only be awarded compensation over and above the statutory minimum only in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or tribunal as decided *in Magola v Press Corporation Limited* cited by the respondent. That is not a correct statement of the law. The correct position is that courts are to award compensation that is just and equitable in the circumstances of the case except that in any case courts cannot award compensation below the minimum provided in section 63 (5) Employment Act.

On the sixth ground of appeal that the lower court erred in law in holding that the applicant had failed to mitigate his loss the appellant submitted that he tried to look for employment for two years but to no avail. He submitted that the fact that he tried to look for employment is an indication that he tried to mitigate his losses.

On its part, the respondent first referred to section 63(2) of the Employment Act which provides as follows

> The court shall in deciding which remedy to award, firstly consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any to which the employee caused or contributed to the dismissal.

The respondent then referred to the case of *Norton Tool Co Limited v Tewson* (1973) 1 ALL ER 183 the court stated the legal principle as follows

> The amount of compensation has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, the discretion has to be exercised judicially and on the basis of principle. First, the object is to compensate and compensate fully but not to award a bonus. ....second the amount to be awarded is that which is just and equitable in all circumstances having regard to the loss sustained by the complainant. The loss however does not include injury to pride and feelings.

The respondent then submitted that the lower court in determining the award of compensation to be made amongst other considerations took into account the appellant's own conduct and contribution to his dismissal. It further submitted that it was the appellant's own testimony in court that he was called 3 times by the respondent to discuss issues with him but that he only went once.

The respondent then submitted that the lower court took into consideration this factual background and the employee's conduct, and the court failed to see why the applicant should receive compensation up to the time he would have retired.

The respondent then submitted that the said considerations taken by the court and the weight attached to the applicant's failure to mitigate his losses was in line with the clear legal principles provided for in Section 63 of the Employment Act. And that it is clear from the provisions of section 63, and previous decided cases that the court acted within its legal mandate. The respondent asked this Court to dismiss this appellant's ground of appeal as it lacks merit.

This Court agrees with the respondent that the appellant's conduct is what drove the lower court to reason that the appellant did not mitigate his loss. The appellant said that he tries to look for a job for two years. Yet, he stated that he could not get a job as he did not expect to get a good reference from the respondent. The onus of proving that the appellant mitigated his losses was on the appellant as a dismissed employee. See *Mhango v Raiply Malawi Limited M SCA* Civil appeal number 60 of 2012. The appellant did not provide any proof that he applied for a job since his dismissal. He stated that he simply went into the chicken rearing business.

In such circumstances, this Court agrees with the respondent that the lower court did not err at law in finding that the appellant did not mitigate his loss and that therefore he was not entitled to loss of salary until his retirement.

On the last ground of appeal that the award of compensation to the appellant made by the lower court was not just and equitable and was contrary to awards made by the lower court and the High Court in similar cases the appellant submitted as follows.

The appellant started by referring to the case of *General Simwaka v The Attorney General* MSCA Civil Appeal Number 6 of 2001 (Unreported) in which the Malawi Supreme Court of Appeal Gudgement delivered on 24th November, 2009) awarded the following compensation

(a) an amount of salary representing salary he would have earned during the period between the date of termination of employment and the date when he would have attained mandatory retirement
(b) salary increments covering the period between the date of termination and the date of mandatory employment
(c) gratuity and pension based on salary which could be earned from the date of employment to the date of mandatory retirement together with salary increments .

The appellant then referred to the case of *Chawani v The Attorney-General* [2000- 2001] MLR 77 (SCA) in which it was held that the applicants were entitled to damages in the form of salaries up to the time they would have been lawfully retired. The appellant also referred to *Mbewe v Reserve Bank of Malawi* Matter Number IRC PR381 of 2012 (Unreported) in which the lower court awarded the lost salary from the date of the claimed constructive dismissal to the date of judgement which amounted to a salary of 36 months; and on the evidence that the applicant failed to secure a job, the court awarded her future loss for six months (six months' salary).

In total the Applicant was awarded 42 months' salary. This was despite argument that the Applicant was offered another job which she declined.

The appellant also referred to *Musuma and Chilinda v Reserve Bank of Malawi* Matter Number 30 of 2014 and Matter Number 31 of 2014, the court awarded 54 months' salary and benefits as compensation to Mr. Francis Musuma who had 17 years to retirement and 80 months' salary and benefit as compensation to Mrs. Lydia Chilinda who had 22 years to retirement. The amounts were boosted by 50% owing to inflation. This was in addition to compensation for immediate loss of earnings.

The appellant then referred to *Banda v. Dimon (Malawi) Ltd* 2008 MLLR 92 in which the court awarded exemplary damages equivalent to three years' salary. This was in addition to the four months' salary representing loss of salary from the date of dismissal to the date the plaintiff found alternative employment. The appellant lastly referred to *Kachinjika v Portland Cement Company* [2008] MLLR 161 (HC), the court awarded 48 months' salary to the Plaintiff who was 50 years old and whose retirement age was 60.

The appellant submitted that the lower court ought to have been guided by the comparable case law from both concurrent jurisdiction and appellant jurisdiction when arriving at a just and equitable award to the appellant. That the lower court failed to do so and the appellant accordingly submitted that the lower court decision should be set aside.

On its part, the respondent started by referring to section 63(4) of the Employment Act which is submitted empowers the court upon making a finding of unfair dismissal to make an award which must be 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 contributed to the dismissal.

The respondent submitted that under section 63(4) of the Employment Act, the court is given leeway to exercise its discretion to achieve justice and fairness. Further, that the Employment Act permits the court to examine the factual circumstances of each case to determine the following, namely, the loss sustained by the employee in

consequence of the dismissal, the actions taken by the employer and the extent to which the employee contributed to the dismissal.

The appellant then submitted that the lower court upon establishing the above facts will have to consider the principles governing an award of compensation from the act and decided cases as follows. That an award must be just and equitable as per section 63 of the Employment Act. That the hallmark and premise of the law of employment is that as consideration for work done an employee earns a salary. *Kazombo* v *Reserve Bank of Malawi* civil Cause no 1645 of 1999; *Mbewe* v *ADMARC* 16(2) MLR 594 and *Wawanya* v *Malawi Housing Corporation* (MSCA Civil Appeal number 40 of 2007. That an award of salary and benefits up until retirement age is reserved for special cases where the court made an order for reinstatement and the employer has refused to implement the *order. Magola* v *Press Corporation Limited.* And that the claim for loss salary and other benefits should be included in the "general damages" mould for wrongful termination that should take into consideration whatever was lost as a result of the wrongful termination. *Kachinjika* v *Portland Cement Company.*

The respondent submitted that in the present case, the court duly took note of the factual background of the case for its determination as per pages 3-4 of the ruling of the court found on page 5 of the record of appeal. In brief, that the court noted and took into consideration the conduct of the respondent's country Director, the conduct of the respondent as an organization and the conduct of the appellant. That the court also took into account and consideration several other factors such as the marketability of the appellant on the job market, the job market itself, the qualifications of the appellant, the age of the appellant and whether the appellant mitigated his losses. Most importantly the court also looked at the loss itself and its proximity to the dismissal and the appellant's role in causing the dismissal.

The respondent submitted further that, from the foregoing it is clear that the lower court in deciding the just and equitable compensation to be awarded to the appellant herein acted within the provisions of Section 63 of the Employment Act and the principles laid down in previous decisions of the Industrial Relations Court, the High Court and the Supreme Court of Appeal.

Tne respondent argued that that the common thread in all the courts' awards of compensation for unfair dismissal is that the court must make an award that is just and equitable in the circumstances of each case. That indeed courts follow the principles laid down in each case. And that it is impossible for the court to implement and effect a uniform award for all cases. And further that, it is on such a basis that the Industrial Relations Court refused to award the appellant herein the same award as the court awarded the applicant in the case of *Malopa v Malawi Broadcasting Corporation* Matter Number IRC PR 392 of 2012 as submitted by the appellant in the lower court. The respondent then submitted that the award made by the lower court is grounded in law and cannot be faulted by this appellant court.

The respondent asked this court to dismiss the appellant's ground of appeal as it lacks merit and is unsupported by law.

This Court agrees with the respondent that the lower court in making an award of compensation for unfair dismissal has to make an award that is just and equitable and must take into account the circumstances of each case. As such, it would not be that in each case the lower court has to aim to make awards that accord with its earlier awards or awards made by appellate courts. Consequently, this Court finds that the last ground of appeal lacks merit in the scheme of the other earlier findings of this Court particularly that the lower court correctly found that the appellant did not mitigate his loss hence he was not entitled to an award of compensation comprising salary until retirement age.

In the foregoing premises this Court grants the appellant the following reliefs, namely, that the order of the lower court that the appellant should be paid minimum compensation is set aside.
The compensation payable to the appellant is enhanced. The lower court instead of awarding the minimum compensation should have considered what was the likely period it would have taken the appellant with his driving skills and Diploma in logistics to get an employment. The appellant having failed to provide proof that he mitigated his loss, this Court is of the view that it was likely in the present job market for him to get an employment within one year. His compensation for unfair dismissal shall therefore be pay for one year. Consequently, the compensation for loss shall not include compensation for immediate loss of earnings from the date of dismissal

to the date of judgment and from the date of judgment to the appellant's retirement age.
The appellant is awarded one month's pay as notice pay as well as 10 days' payment for untaken leave.
The appellant's appeal on his claim for pension and terminal benefits fails as does his claim for interest on the pension benefits as these are matters that the appellant must present for the consideration of the Registrar of Financial Institutions under the Pension Act.
The appellant's claim for interest on the severance allowance that he was awarded by the lower court is allowed.

Costs of the appeal are also for the appellant.

Made in open court at Blantyre this 29th September 2016.