



THE JUDICIARY  
IN THE HIGH COURT OF MALAWI  
ZOMBA REGISTRY  
CIVIL CAUSE NO. 27 OF 2021  
(BEFORE JUSTICE MASOAMPHAMBE)

BETWEEN:-

YAMIKANI CHATCHUKA.....PLAINTIFF

AND

ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT

MALAWI DEFENCE FORCE.....2<sup>ND</sup> DEFENDANT

**CORAM:** **Hellen Chitsanzo Kachala, Assistant Registrar**

Mr Chirwa, counsel for the Applicant

Mr Maulidi, of counsel for the Respondent

Mr. C. Twea, Official Interpreter/Court Clerk

**ORDER ON ASSESSMENT OF DAMAGES**

**INTRODUCTION**

1. This order on assessment of damages follows the judgment of Honourable Justice Masoamphambe made on 22<sup>nd</sup> September, 2023. The Respondent was ordered to pay the claimant compensation, gratuity, pension and notice pay.

2. The matter came for assessment of damages hearing on 13<sup>th</sup> February, 2023.

### **EVIDENCE**

3. The plaintiff, Yamikani Chatchuka, testified in his case as the only witness. He come from Chalundu Village, Traditional Authority Chilowoko, Ntchisi District.
4. He adopted and tendered his witness statement which was marked as EXP 1 by the court. He testified that he was recruited and employed by the Malawi Defence Forces (MDF) on 11th December 2007. This took place at the District Commissioner's office, Ntchisi District.
5. He stated that his gross monthly salary, as of January 2014, was K49, 565. 00. He tendered his pay slip which the court marked as EXP 2.
6. He explained that on completion of training, he was stationed at Changalume Barracks, within Zomba. He stated that that was his duty station at the time of his dismissal from MDF. He told the court that he was holding the rank of a Private Soldier (General Duties) and his service number was 15758.
7. He went on to explain that during the night of 25th to 26th December 2013, he was posted on duty of a guard at the Corporal's Mess at the said Changalume Barracks. He was armed with an FN Herstal (Fabrique Nationale Herstal) rifle with a magazine having 20 rounds.
8. He explained that at about 9:40 pm that day, he saw an unidentified person snooping at a window of the Mess. There was a blackout. He was supposed to be with another soldier on duty but he was alone.
9. He stated that he asked that person to identify himself and to state the reason for his presence at the Mess and why he was snooping at that place at that point in time. He did all this in accordance with the standard operating procedures of his duties. However, that person did not respond to his questions. Instead, he started walking away into the dark.
10. He explained that he cocked his gun, in accordance with the applicable standard operating procedures. This was to make the person stop and reveal himself and the reasons for his presence at that place.

11. It was his evidence that the person duly stopped and identified himself as Private Bauti. He stated that he, at that time, wanted to watch a football match on TV in the Mess yet the TV was off in view of that blackout.
12. He told the court that he then left him alone and parted ways.
13. He explained that the following day, he returned the gun, with a full magazine of 20 rounds, to the Arms Store. The Store man was Sergeant Njilima and he signed for it.
14. He went on to explain that after that, he went on his annual leave of 14 days. On 9th January 2014, he was summoned from the leave and told to appear before the Commanding Officer (CO) at Changalume Barracks.
15. He told the court that on 11th January 2014, he appeared before the CO, Lieutenant Colonel Gunda Phiri, in his office. He accused him of threatening to shoot, for no reason, Private Bauti on the night of 25th to 26th December 2013.
16. He also stated that without giving him an opportunity to defend himself to the accusation, he was informed that he had dismissed from my employment with the MDF with immediate effect. He dismissed him verbally.
17. He went on to explain that on 12th January 2014, he requested the CO to give him a letter of his dismissal in accordance with the standard practice in the MDF on matters of dismissals from employment. He refused and omitted to do so.
18. He explained that on 27th February 2014, the Chief Clerk at the Changalume Barracks told him to go to the MDF Headquarters in Lilongwe for any queries on his dismissal. He went there as advised and met responsible senior Administrative Officers. He stated that he went there on multiple occasions to no avail.
19. It was his evidence that at some point, the Chief Clerk at the MDF's Headquarters informed him that there was no letter of his dismissal from Changalume Barracks on his file. As such, there was nothing he could do to help him access his terminal benefits.
20. He further told the MDF, through the CO, dismissed him from his employment without a proper hearing. He was not informed, in advance, of the charges against him. He was not given an opportunity to confront any adverse witness in his case. He explained that he was not given reasons, in writing, for his dismissal.
21. He went on to testify that during the mediation session in this matter, he was made to understand that, based on MDF's Charge Report Form as disclosed in this case, he was

dismissed by the CO because he had found him guilty of having committed four offences, namely: (i) disgraceful conduct, contrary to section 74 of the Defence Force Act (cap 12:01 of the Laws of Malawi); (ii) conduct to the prejudice of good order and military discipline, contrary to section 77 of the Defence Force Act; (iii) escape from lawful confinement, contrary to section 66 of the Defence Force Act; and (iv) malingering, contrary to section 51(1)(a) of the Defence Force Act.

22. He stated that all of these charges were said to have arisen from the same set of facts surrounding his encounter with Private Bauti as stated in the preceding paragraphs herein.
23. He explained that he was also made to understand that he was dismissed from the MDF under section 26(g) of the Defense Force Act.
24. He explained that he was advised by his lawyer that, by law under this provision, a soldier of the Regular Force may be dismissed at any time by an appropriate authority if, for any reason given to him in writing, his services are no longer required.
25. He stated that the CO did not indicate to him, in writing, that his services were no longer required by MDF. He told the court that on his dismissal and discharge, he was also not given a certificate of discharge containing such particulars as may be prescribed.
26. He stated that from the date of his dismissal, he has not been paid anything connected to his dismissal. He tendered a copy of a 'Notification of Impending Discharge of an Other Rank from Military Service' formally disclosing his discharge from the MDF and further disclosing that he was not paid anything.
27. He explained that from the date of his dismissal, he had not been able to secure any other gainful employment. This is because of his limited education qualifications and skills. He stated that he simply was a holder of a Malawi School Certificate of Examinations.
28. On cross examination he confirmed that he was unfairly dismissed. He stated that he was dismissed without any document. He explained that he was not given any money by MDF.
29. He denied the fact that he was summoned at Bakili Muluzi MDF.
30. When re-examined he told the court that the defendant did not follow the procedure on dismissing a person. He explained that one is supposed to be called and asked to explain in writing the event.
31. He explained that dismissing someone verbally was very unusual.

32. He denied having received any money from MDF arguing that if they did there should have been some documentation.
33. The claimant closed his case.
34. The defendant had indicated that they would parade a witness, however, they did not. They also indicated that they would file final written submissions with the court but they did not.

#### **ISSUE FOR DETERMINATION**

35. At this stage, there is a presumption that damages have already been proved. The only issue for the court to determine is the correct quantum of benefits payable to the claimant. This is in line with the case of **Ngosi t/a Mzumbazumba Enterprises vs. H. Amosi Transport Co. Ltd** (1992) 15 MLR which held that:

*“Assessment of damages... presupposes that damages have been proved. The only matter that remains is the amount or value of the damages(compensation) ”.*

36. As it should be, I should not deal with issues that were not permitted by the judge. I am very much aware that the jurisdiction of the Registrar is subject to the judge; see Order 25 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017(CPR).
37. During the hearing of assessment of damages, Counsel for the defence observed that there was no sworn statement verifying the witness statement. Counsel for the defendant admitted the irregularity. He made a without application for an order to be permitted to verify the witness statement. I granted the same on the understanding that the irregularity was curable under Order 18 rule 5 as read with Order 2 (3)(f) of the CPR.

#### **SUBMISSIONS**

38. On damages for unfair dismissal, Counsel for the Claimant has referred the court to section 63 (4) and (5) of the Employment Act which provides as follows:

*(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.*

*(5) The amount to be awarded under subsection (4) shall not be less, than—*

- (a) one week's pay for each year of service for an employee who has served for not more than five years;
- (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;
- (c) three weeks' 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.

39. Counsel also submits that it is also known that the Employment Act does not apply to members of the Defence Force as per Section 2. He submits that in any event, the measure of damages or compensation for unfair dismissal is what the court thinks just and equitable –see section 63(4) of the Employment Act and **Kachingwe vs. Group Commodity Brokers Ltd** IRC Matter No. 117 of 2000 (unrep).
40. He argues that what is just and equitable is left to the discretion of the court. See **Wawaya vs. Malawi Housing Corporation** MSCA Civil Appeal No. 40 of 2007 (unrep).
41. In assessing compensation for unfair dismissal, the court takes into account a number of factors. These include the applicant's effort to mitigate his loss, employee's age, physical fitness, qualification, and the prevailing labour market. See **Chitheka v Attorney General**, Civil Cause No. 67 of 2008 (unrep), per Mzikamanda J.
42. He has cited that case of **Justice Jombo v the Attorney General (Malawi Defence Force)** Civil Cause Number 110 of 2016, the High Court, on 8th April 2021, awarded the Claimant K3,500,000.00 as compensation for unfair dismissal, future loss of earnings and loss of pension benefits. In that case, the Claimant had worked with the MDF for five years and was not pensionable. This was a nominal award of general damages made by the Court as compensation.
43. He has also referred the court to the case of **Malili v the Attorney General (Malawi Defense Force) (Assessment of Damages)** (Civil Cause 128 of 2020) [2021] MWHC 52 (05 August 2021), where the Court awarded the Claimant compensation amounting to K7, 000, 000. The Court took into account the fact that he had worked for the Malawi Defence Forces (MDF) for a period of about 11 years.

44. On gratuity counsel for the claimant counsel has referred the court to the Defence Force (Regular Force) (Other Ranks) Regulations of 2020 which provide for 'Benefits on discharge or dismissal on prescribed grounds.' Regulation 83 provides that :

"A member who under section 26 of the Act (other than on the grounds of medical or physical fitness occasioned without any misconduct or serious negligence on his part) or under section 82 of the Act, is discharged or dismissed from the Regular Force may be entitled –

.....  
(g) where he is discharged under section 26(g), one month pay for each completed year of service.

45. Counsel for the claimamt also cited Regulation 10 of the Defence Force (Regular Force) (Other Ranks) Regulations, it is provided as follows:

(1) A member whose pensionable service amounts to fifteen years may retire; from his employment in the Force on giving three months' notice in writing to the Commander of his intention to do so and on paying to the Government any amount which he is liable to pay to the Government in terms of these Regulation....

He also submitted that Regulation 61 of the Defence Force (Regular Force) (Other Ranks) Regulations provides as follows:

(1) Subject to these Regulations, the pensionable service with reference to which any pension, gratuity or other benefit is to be calculated shall be continuous from the date of enlistment.

(2) Pensionable service shall include—

(a) time spent on duty;

(b) time spent on leave;

(c) time spent on attachment or secondment to any other force or organization in accordance with the Act; and

(d) in the case of a person who, immediately before the date of commencement of these Regulations, was a member, the period of employment which, immediately before that date, could, in terms of the law then applicable to him, have been taken into account in computing his pension.

- (3) Where any person who has had previous service in the Regular Force is later engaged for service in the Regular Force under section 5 of the Act, then, if—
- such person is not a disabled member who is required to resume duty in the Regular Force under regulation 54 (1);
  - the previous service terminated not more than two years prior to the date of such later engagement for service in the Regular Force; and
  - no gratuity or pension or any terminal benefits were paid to such person in respect of the previous service, the period of the previous service shall be reckoned as pensionable service.
- (4) Pensionable service shall not include any period of service by a member in respect of which, by virtue of regulation 26, no pay was paid to him:
- Provided that the pensionable service of a member shall not be deemed to have been interrupted by the exclusion therefrom of any period of service referred to in this paragraph.
- (5) The period of pensionable service shall be calculated by the month, but fractions of a month shall be taken to the nearest whole month.

46. Counsel has submitted that the pensionable length of service in the Malawi Defence Force is 15years (see **Malili v Attorney General**, supra,) He argues that is apparent that, in making this finding on the pensionable length of service, the Court had considered the provisions of Regulation 10 (on retirement) as read with Regulation 61 of the Defence Force (Regular Force) (Other Ranks) Regulations.

#### LAW AND ANALYSIS

47. The cardinal principle in awarding damages is '*restitutio in integrum*' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – Halsbury's Laws of England 3rd Ed. Vol. II p.233 para 400. This principle was further enunciated in **Livingstone v Raywards Coal Co (1880)** 5 App Cas 25 at 39, where Lord Blackburn said:

*'...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have*

*been in had he not sustained the wrong for which he is now getting his compensation or reparation.*

#### **DETERMINATION**

48. I have followed the submissions by Counsel. The court takes judicial notice that the Malawi Kwacha has for a number of times gone down, therefore issues of inflation cannot be entirely overruled. See **Sakonda v S.R. Nicholas Ltd** (67 of 2013) [2014] MWHC 452 (26 September 2014).

#### **UNLAWFUL DISMISSAL**

49. Under this head general principles on assessment of damages will apply. The evidence before this court is that the Claimant worked for the MDF for a period of 5 years, 11 months and 13 days. He was employed on, and the date is his attestation was, 11th December 2007. He was discharged on 16th January 2014. A period of more than 7 years has passed from the date of his dismissal to the present day. He also told the court that he has had no gainful employment.

50. Taking into account the fact that he had worked for Malawi Defence Forces for a period of 5 years the court will award him **K7, 000, 000. 00**. This court distinguishes the *Malili case* with the present one in considering the Claimant's length of service. The Claimant herein dedicated 5 years, 11 months of service to the Malawi Defence Force which is less than the length of service in the *Malili Case*.

#### **GRATUITY**

51. According to the evidence herein, the Claimant was discharged pursuant to section 26(g) of the Defence Force Act. In view of Regulation 83 of the Defence Force (Regular Force) (Other Ranks) Regulations of 2020, he is entitled to one month's salary for each completed year of service. He was employed on, and the date is his attestation was, 11th December 2007. He was discharged on 16th January 2014. As such, he worked for 5 years, 11 months and 13 days.
52. In the premises, he is entitled to  $K49, 565 \times 5 = K247, 825$ ; Plus,  $K59, 000 \times 1 \times 11/12 = K45,434$ . Total amount being **K293, 260**.

#### **PENSION**

53. Under Regulation 10 of the Defence Force (Regular Force) (Other Ranks) Regulations, it is provided as follows:

54. In the case of *Malili v Attorney General, supra*, the Court noted that pensionable length of service in the Malawi Defence Force is 15 years. It is apparent that, in making this finding on the pensionable length of service, the Court had considered the provisions of Regulation 10 (on retirement) as read with Regulation 61 of the Defence Force (Regular Force) (Other Ranks) Regulations.

55. It is clear that the claimant herein is not entitled to an award for pension benefits, having been dismissed before the prescribed retirement age of 15 years.

56. The Claimant worked for the MDF for a period of 5 years, 11 months and 13 days. As such, his length of service is less than 15 years, the prescribed period for retirement and pension in the MDF. I am aware that, he, in his Statement of Case, claimed for an award of all of his terminal benefits. They include pension benefits. I will award him K1, 000, 000. 00 as his terminal benefits.

#### **NOTICE PAY**

57. The claimant made a claim for payment in lieu of notice is contained in the Claimant's Statement of Case in this matter. I will award him K148, 695. 00 as his pay in lieu of 3 months' notice (thus of K49, 565 x 3).

#### **DISPOSAL**

58. The Claimant is therefore awarded **K7, 000, 000. 00** for unfair dismissal/unfair; **K1, 293, 260. 00** for gratuity and pension, and **K148, 695. 00** as pay in lie notice.

59. Costs of the action will be assessed by the Registrar if not agreed upon by the parties.

60. Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

PRONOUNCED IN CHAMBERS ON 29<sup>TH</sup> JANUARY, 2024

  
**HELLEN CHITSANZO KACHALA**  
**ASSISTANT REGISTRAR**