



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL APPEAL CAUSE NO. 40 of 2010

BETWEEN

RABECCA KAYIRA

APPELLANT

-and-

MALAWI TELECOMMUNICATIONS LIMITED (MTL)

RESPONDENTS

CORAM: HON MR. JUSTICE D.T.K. MADISE

Appellant present, unrepresented.

Respondents, absent, unrepresented.

Mr. R.S.D. Kahonge/M.K. Luhanga Official Interpreter

Mrs. F. Silavwe Court Reporter

Madise, J

JUDGMENT

Introduction

The Appellant in this matter took summons in the Industrial Relations Court (hereinafter referred to as the IRC) for unfair dismissal. She claimed she was dismissed because of her HIV status and sought compensation. The Respondents denied the claim on the basis that she was retrenched as a result of market forces which resulted in the restructuring of the entity. After a full hearing the IRC found that there was no unfair dismissal based on discrimination but found unprocedural unfair dismissal. Being unsatisfied with the decision of the lower court she now appeals to this Court.

Appeals in this Court

I'm reminded that appeals in this Court are by way of rehearing. When this Court is considering an appeal from the court below, it proceeds by way of re-hearing of all the evidence that was before the court below, the findings of fact and the law applied and then consider in the light of all that took place during trial whether the court below was within jurisdiction in coming to its conclusion.

Grounds of Appeal.

The Appellant filed three grounds of appeal which we reproduce as filed.

- a) Money awarded to me was very little that it cannot assist me.
- b) The dismissal was without notice which made me to be disturbed. I was not prepared.
- c) I have a lot of responsibilities on top of this I'm taking ARVs which need food.

The Issues

There are two main issues for determination before this Court.

- A) Whether the lower within the law when it found that there was no unfair dismissal, based on discrimination.

B) Whether compensation was payable.

The Evidence

The evidence shows that the Appellant was employed by the Respondents on 29th August 2006 as a Telephonist. She was retrenched on 1st December 2008. She alleged it was because of her HIV status. It has been difficult for me to establish in clear terms the basis of the Appellant's first challenge in the IRC. It would seem however that she questioned the criteria used to choose her for retrenchment. It was her submission that she was chosen for retrenchment after she had revealed to the Respondents that she was HIV positive. It is on this basis that she claims that her retrenchment was unfair.

The first Respondent's witness Lydia was Malajila. She told the court below that at that time the company was not well financially and that it was making losses every year. Moreover at the same time most of the operations of the company were computerized which made the Appellant's position unnecessary. The second witness Mr. Nyirenda told the court that there were 3 people in the Appellant's section and 2 were retrenched. He testified that the one who was retained was a supervisor in the department and was more experienced.

The letter the Chief Executive of Malawi Telecommunications Limited wrote dated 26 November 2008 was as follows.

Ref. No. MTL/CS/012/16

29th November, 2008

*Miss. Rabecca Kaira
MTL- Mzuzu Faults
PO. Box 46
Mzuzu*

Dear Miss. Kaira

RETRENCHMENT

As a result of market forces as well as customer high expectations and demand for efficient delivery of services, the company has been undergoing restructuring process and, regrettably services of some employees are no longer required.

I wish to advise that you are one of the employees whose services are not required in the restructured company. Consequently, your employment has been terminated with effect from 1st December, 2008.

In appreciation of the services you have been rendering to the company before and after your re-engagement on 1st February, 2006, you will be eligible for the following terminal benefits:-

- (i) One month salary in lieu of notice.
- (ii) One month housing allowance.
- (iii) Severance allowance at the rate of two weeks wages for each completed year of service.
- (iv) Payment of outstanding leave days (if any at all).
- (v) Refund of contributory pension including the company's contribution from the date you joined the Scheme.
- (vi) Payment of repatriation allowance.

Please note that any outstanding debts that you may have with the company will be recovered from your dues. If you have a company guaranteed bank loan, it is your responsibility to settle it in line with the terms of the loan. Your terminal dues have been paid directly through your bank.

Please arrange to handover to your immediate supervisor any company property you might be keeping including Toolkit, MTL card and CDMA handset if it was issued to you. Furthermore, be informed that following your retrenchment you are required to keep out of the company premises. If you reside in a company house, you will be expected to vacate such house before 31st December, 2008.

May I take this opportunity to thank you for the services you have rendered to the company.

Yours sincerely

Peter Zimmer

Chief Executive Officer

*Cc: Benefits Manager
Senior Payroll Officer
Recruitment Records Officer
Personal file.*

PZ/pnk

The Law and Evidence

Section 57- (1) of the Employment Act provides for unfair dismissal.

The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirement of the undertaking.

One of the reasons under section 57 (1) Employment Act on which a dismissal can be effected is due to operational requirements of the organizations. This basically refers to retrenchment and redundancy. Retrenchment is where the employer organization is going through some financial difficulties and is unable to fully operate and in an attempt to cut down operational costs, some employees are laid off. On the other hand redundancy is where due to some technological innovations and advancement, the entity upgrades its systems and the employee's position is scrapped off and is no longer required in the company. Consequently the employee is sent packing.

The law demands that the employer must give reasons for the retrenchment. Where the employer fails to do this the dismissal becomes unfair. Additionally it is the duty of the employer to show the criteria used in choosing a particular employee over another. The criteria used should be clear, objective and also justifiable. An employee's HIV/Aids status cannot be a valid reason for making one redundant because the same would amount to discrimination under section 20 of the Constitution and also section 5 of the Employment Act and amount to unfair dismissal.

Section 20- (1) Republican Constitution:

Discrimination of persons in any form is prohibited and all persons are under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

Moreover it is not enough for the employer to show that he had a valid reason to retrench or make an employee redundant. Although not clearly provided for in section 57 of the Employment Act, the International Labour Organisation (ILO) Convention No. 158 on Termination of Employment which Malawi ratified, in Article 13, obliges the employer to fully engage the employee in consultations as regards the impending restructuring. The consultative process is designed to find ways how the adverse effects of retrenchment can be mitigated. Where such a procedure is not followed the redundancy or retrenchment may be declared unfair.

Burden and Standard of Proof

The Appellant alleged she was retrenched because of her HIV status. The law is clear he/she who alleges must prove. In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the *quantum* of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other must carry the day.

Has the Appellant led evidence to the satisfaction of the Court that indeed she was retrenched because of her condition? Have the Respondents given valid reasons for the retrenchment? Two witnesses testified that the company was undergoing financial difficulties and had to cut down on operational costs. The Respondents actually presented their financial statements to the court. Further the company had computerized some of its operations and had to do away with the old system. In the process the Appellant was found to be one of the workers to be laid off. She was not the only. How then can she substantiate her claim?

Conclusion

I have looked at the entire evidence and I fail to fault the finding of the court below. The Appellant has failed to satisfy me that there was an error of law in the manner the lower court arrived at its decision. I find her assertion that she was retrenched because of her HIV/Aids status without any basis. The Respondents had a valid reason to retrench her. This ground of appeal fails.

I further find that there were proper consultations by the Trade Unions on the retrenchment process. The Appellant herself admitted during cross examination that some union members came and informed them that some people would lose their jobs but that they were not given further and better particulars of the same as to who is likely to be affected and how the process will be effected. There were no *one on one* meetings with the persons who were going to be retrenched. This was an error on the part of the Respondents. However, it was a mere procedural irregularity which does not go to the root of the entire consultative process. I therefore find that the lower court erred when it found unfair dismissal on this basis alone.

The mere fact that only one component of the entire consultative process was not followed that in itself cannot invalidate the whole process. Here I fault the lower court. However since a procedure was not followed to the fullest, to wit, the *one on one* consultative process with the persons chosen, that was procedural unfairness but not amounting to unfair dismissal and the Appellant must be compensated accordingly.

Section 63(5) Employment Act provides for the minimum compensatory awards that could be awarded in cases of procedural unfairness amounting to unfair dismissal. In this case the Appellant was not unfairly dismissed. However we are of the view that she must be compensated for not being consulted on the retrenchment process. Since there is no any other guidance on the formula, this Court will use the formula in section 63 (5) Employment Act as a guide.

The evidence shows that the Appellant was receiving K22, 085.00 per month. She had worked for the Respondents for 2 completed years. As such in accordance with section 63(5) (a) Employment Act, her compensation could have been calculated at the rate of one week's wages for each completed year of service if she had been unfairly dismissed. Accordingly the minimum total due to the Applicant could have been K11, 042. 50.

I proceed to award the Appellant the sum of K44, 170. 00. The Respondents are hereby ordered to pay this sum within 14 days from the date of this order. The money is to be paid through this court. This ground of appeal succeeds. This appeal partly succeeds.

Costs

The Respondents should pay the costs of this appeal.

Pronounced in Open Court at Mzuzu in the Republic this 9th day of January 2012.

Hon. D.T.K. Madise
JUDGE