

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 3626 OF 2001**

**BETWEEN:**

DAVIE THOMU  
MUHONDO.....PLAINTIFF

and

POLYPLAST  
LIMITED.....  
DEFENDANT

**CORAM: THE HON. MR JUSTICE F.E. KAPANDA**  
J. Gulumba, of Counsel for the Plaintiff  
C. Tukula, of Counsel for the Defendant  
M.H. Fatch, Official Interpreter/Recording Officer

Place and Dates of hearing: Blantyre 22<sup>nd</sup> December 2003 & 19<sup>th</sup>  
January 2004  
3<sup>rd</sup> May 2004 & 5<sup>th</sup> May 2004  
Date of judgment: .....May 2005

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## **JUDGMENT**

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### **INTRODUCTION**

As will be observed this judgment has taken long to be handed down. The reasons for this delay are two fold viz firstly, Counsel for the Defendant has not, despite so many reminders, given the Court the Defendant's closing submissions in this matter. Even at the time of writing this judgment the Defendant has not submitted its closing written submissions. Secondly, due to circumstances that I found myself last year I was not able to attend to this matter. The delay is very much regretted. I have decided to proceed to hand down the judgment even though the Defendant has not yet submitted its written closing submissions.

The Plaintiff is a former employee of the Defendant Company. He has taken out this action to seek compensation from this Court. The basis of his claim is centred on an alleged discrimination that he suffered when he was in the employ of the Defendant Company. Further, the Plaintiff is claiming damages for loss of earnings which he alleges were suffered as result of his certificate being withheld from him. The Plaintiff also seeks an order requiring that the Defendant Company should return his certificate. Moreover, the Plaintiff is claiming costs of, and arising out of, this action. Additionally, the Plaintiff is demanding that the Defendant pays him Legal Practitioner's collection charges.

The Defendant Company is challenging all the claims made by the Plaintiff. Indeed, the Defendant denies each and every allegation of fact made by the Plaintiff except the one to do with the fact that the Plaintiff was at one point in line its employer. Naturally, the Defendant wants the Plaintiff's action dismissed.

## **Pleadings**

I would like now to set out the five points of the Plaintiff's contention and the Defendant's reply to the allegations of fact made by the former. The said allegations by the Plaintiff and the response thereto are in the pleadings that were exchanged between the parties herein. The said pleadings are the Plaintiff's statement of claim and reply to defence<sup>1</sup> on the one hand. On the other there is the

<sup>1</sup> **“STATEMENT OF CLAIM**

1. The Plaintiff was at all material times an employee of the Defendant until 27<sup>th</sup> September, 2001 when his employment was verbally terminated by the Defendant.
2. The Defendant was at all material times a well-known manufacturing company and the employer of the Plaintiff.
3. The Plaintiff commenced employment with the Defendant on or about 22<sup>nd</sup> March 1999 as a Casual Labourer at a salary of K1,300.00 per month.
4. The Plaintiff was neither given a formal letter of appointment nor was he made to sign any letter of offer of employment to signify his acceptance of the employment offered to him.
5. Having worked with the Defendant for several months, the Defendant's Personnel Manager, one Ted Kumwenda, found out that the Plaintiff was in fact a holder of the Malawi School Certificate of Education.
6. On the basis of his new qualification the Plaintiff was offered some training for three months under the supervision of Mr Nyasulu after which he was promoted to the post of mixer.
7. Upon undergoing the training aforesaid, and as proof of his qualification for the new post, the Plaintiff was advised to produce the original of his said certificate which he left in the custody of the Defendant.
8. The monthly salary for a mixer in the employ of the Defendant at the material time was K4,000.00 but the Defendant continued to pay the Plaintiff the salary of K1,300.00 per month for his new-elevated position in which he worked for 6 months.
9. Following a dispute concerning over-time pay, the Plaintiff was suspended from his work but was subsequently recalled.
10. Upon his recall, the Plaintiff was placed on some training for 3 months under the supervision of Mr Chibisa, before he was subsequently assigned the post of quality inspector.
11. The Plaintiff worked on the post of quality inspector between February 2000 and

Defendant's Defence.<sup>2</sup>

## **The Complaint by the Plaintiff**

The Plaintiff's allegations are in a statement of claim and reply to a Defence which are unusually long. The following are, in a sketch, the material allegations of fact that have been made by the Plaintiff in his statement of Claim and Reply to Defence:

- September 2001 being a period of about 1 year and 6 months.
12. The established salary for the post of quality inspector is K3,500.00 per month, but the Plaintiff was still being paid the monthly salary of K1,300.00 as if he was still a casual labourer.
  13. The Plaintiff's employment with the Defendant was eventually terminated in September, 2001 upon which he requested for the return of his Certificate which was still in custody of the Defendant.
  14. Despite the Plaintiff's repeated requests for the return of his certificate, the Defendant has hitherto failed and/or neglected to return the said certificate.
  15. The Defendant's failure to return the Plaintiff's certificate has caused the Plaintiff great embarrassment and inconvenience as he has been unable to get new employment and has been prevented from pursuing a Computer Course that was on offer.
  16. Based on the established salaries payable to holders of the posts of mixer and quality inspector, the Plaintiff would have to be reimbursed the sums of K16,200.00 and K39,600.00 respectively for having worked on the posts of mixer for 6 months and the post of quality inspector for 18 months at a lower salary than the normal.
  17. By reason of the foregoing, the Plaintiff has suffered loss and damage.

And the Plaintiff therefore claims:

- (1) The sum of K55,800.00 being money wrongly withheld from him by the Defendant.
- (2) The sum of K8,370.00 being Legal Practitioners collection charges on the liquidated claim.
- (3) Damages for loss of earnings to be determined by the Court by reason of his certificate being withheld from him.
- (4) The immediate return of his certificate by the Defendant.
- (5) Costs of this cation.

### **REPLY TO DEFENCE**

1. The Plaintiff repeats paragraphs 3,4,5,6,7,8,9,10,11 and 12 of his Statement of Claim.
2. The Plaintiff refers to paragraph 4 of the Defence and avers that the Defendant still has custody of his certificate despite numerous requests for its return even before his employment with the Defendant was terminated.
3. The Plaintiff refers to paragraph 6 of the Defence and maintains that he is legally entitled to equal pay for equal work.
4. The Plaintiff refers to paragraph 8 of the Defence and maintains that the only job that he was offered was that of a Casual Labourer which he took up on 29<sup>th</sup> March 1999 and not 15<sup>th</sup> July 1999 as alleged by the Defendant.
5. The Plaintiff refers to paragraph 9 of the Defence and denies that he ever got a letter of confirmation of employment as alleged by the Defendant as the Defendant is never in the

The Plaintiff was employed by the Defendant as a casual labourer on or about the 22<sup>nd</sup> day of March 1999 at a salary of K1,300.00 per month. [The said employment was allegedly verbally terminated on 27<sup>th</sup> September 2001] Should come at end of complaint].

- habit of making any written communications no matter how official.
6. The Plaintiff refers to paragraph 10 of the Defence and denies that he was unable to understand the mixing procedure as it was actually his supervisor, Mr A. Nyasulu who certified to the Defendant that the Plaintiff was capable of assuming the post of Mixer.
  7. The Plaintiff further avers that he was transferred to the Quality Inspection Department to replace Mr Kangoti who had been dismissed because of a dispute concerning over-time payments with the Defendant.
  8. The Plaintiff refers to paragraph 11 of the Defence and denies that the Defendant ever gave him money to go to MANEB to ask for the replacement of his certificate as the Defendant kept making promises that the certificate would be given back to the Plaintiff.
  9. The Plaintiff denies that the Defendant ever made any arrangement to have prospective employers referred to the Defendant and puts the Defendant to strict proof thereof.
  10. The Plaintiff further avers that the Defendant has never taken any tangible initiative to replace the Plaintiff's certificate and has always acted in a high handed and contemptuous manner towards the Plaintiff."

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#### **DEFENCE**

1. Save the fact that the Plaintiff was at one point an employee of the Defendant, the Defendant denies the contents of paragraph 1 of the Plaintiff's statement of claim.
2. Paragraph 2 of the Plaintiff's statement of claim is admitted.
3. The Defendant strongly denies the contents of paragraphs 3,4,5,6,7,8,9,10,11 and 12 of the Plaintiff's statement of claim and the Plaintiff is put to strict proof thereof.
4. The Defendant admits that it had at one time custody of the Plaintiff's certificate but denies that the Defendant requested for its return when his services were terminated.
5. Contents of paragraphs 14 and 15 of the Plaintiff's statement of claim are denied and the Plaintiff is put to strict proof thereof.
6. The Defendant denies that the Plaintiff is and/or was entitled to the alleged sums of K16,200.00 and K39,600.00 and is put to strict proof thereof.
7. The alleged loss and damage is denied.
8. The Defendant avers and will at the trial contend that the Plaintiff was offered a job as a mixing assistant which he accepted by signing the offer letter dated 15<sup>th</sup> July 1999. The wage, as stipulated on the offer letter, was K22.00 per day.
9. The Defendant will further contend that the Plaintiff's appointment was confirmed by a memo from the Defendant to the Plaintiff. The confirmation was with effect from 1<sup>st</sup> day of February 2000.
10. The Defendant will furthermore contend that due to the Plaintiff's failure in understanding the mixing procedure, he was transferred to the quality inspection department as a trainee. The same was not and was never understood as a promotion.
11. The Defendant avers and will at the trial contend that in all respect it took all the necessary measures to avoid the alleged damage due to the loss of the Plaintiff's certificate.

It is the further alleged by the Plaintiff that he was neither given a formal letter of employment nor made to sign any letter of offer of employment confirming acceptance of the employment offered to him. The Plaintiff further alleges that the Defendant, having realized that he has a Malawian School Certificate of Education, promoted him to the post of a Mixer. Additionally, it is his allegation that he was asked to produce and surrender the original of his certificate to the Defendant as proof of his qualification for the said new post of Mixer.

The Plaintiff moreover alleges that the monthly salary for a person employed as a Mixer was K4,000.00 but for 6 months the Defendant continued to pay him a salary of K1,300.00. It is further claimed by the Plaintiff that he was later assigned the post of Quality Inspector which he held from February 2000 to September 2001. Again, the Plaintiff asserts that the salary for the post of Quality Inspector was K3,500.00 yet he was being paid a monthly salary of K1,300.00 being a salary for a casual labourer. Accordingly, the Plaintiff contends that he is entitled to be reimbursed the difference in the salaries between that of a Mixer and a Quality Inspector and that of a Casual Labourer. He further charges that he worked as a Mixer for six months and for that he is entitled to be reimbursed the sum of MK16,200.00. As regards the post of Quality Inspector he alleges that the reimbursement would be in the sum of MK39,600.00 being the difference he ought to have been given as a salary for the period of 18 months which he allegedly worked as a Quality Inspector.

Moreover, the Plaintiff charges that his services with the Defendant were verbally terminated on 27<sup>th</sup> September 2001 whereupon he requested for the return of his Malawi School Certificate

#### **PARTICULARS**

- (a) Once it was discovered that the Plaintiff's certificate was missing, the Defendant gave money to the Plaintiff to go to Maneb and facilitate its replacement.
- (b) The Defendant informed the Plaintiff to refer all the prospective employers to the Defendant for confirmation of his qualification.
- (c) The Defendant took its own initiative to facilitate the replacement of the certificate.

12. SAVE as hereinafter specifically admitted the Defendant denies each and every allegation of fact contained in the Statement of Claim as if each was set out and traversed seriatim."

of Education which was in the custody of the Defendant. He continues to allege that despite this request the Defendant has failed and/or neglected to return the said certificate to him. It is further intended by the Plaintiff that the non-return of his certificate has caused him embarrassment and inconvenience for he is unable to get new employment and pursue a course in computing.

The Plaintiff, therefore, claims the following from the Defendant:

- (a) The sum of K55,800.00 being money he says was wrongly withheld from him by the Defendant in respect of his so called salaries as a Mixer and Quality Inspector.
- (b) The sum of K8,700.00 being Legal Practitioners collection charges.
- (c) Damages for loss of earnings by reason of the Plaintiff's certificate being allegedly withheld by the Defendant.
- (d) A return of the certificate.

The Plaintiff is also claiming the costs of, and occasioned by, the action he commenced against the Defendant.

## **The Reply by the Defendant**

The Defendant has joined issues with the Plaintiff on the claim as set out in the Plaintiff's statement of claim. For purposes of clarity, the Court has already set out the Defendant's statement of defence which contains the latter's reply to the statement of the claim. It is, therefore, not necessary to repeat the contents of the Defendant's response. However, it will suffice to give the essential elements of the Defence by the Defendant which I do hereunder as follows"

The Defendant, whilst admitting that at one time it had custody of the Plaintiff's certificate, denies that the Defendant requested for its return at the time the Plaintiff's services were terminated. It is further asserted by the Defendant that it took all necessary measures to avoid the alleged damage due to the loss of the Plaintiff's certificate by doing the following:

- (a) Giving money to the Plaintiff to go to Maneb so as for him to obtain a replacement of the certificate.
- (b) Advising the Plaintiff to refer all prospective employers to it for confirmation of his qualification.
- (c) Taking an initiative to facilitate the replacement of the certificate.

The Defendant further contends that the Plaintiff was offered a job as a Mixing Assistant which the latter accepted on 15<sup>th</sup> July 1999 and the salary for such job was K22.00 per day. It is further contention of the Defendant that the Plaintiff's appointment as a Mixing Assistant was confirmed with effect from 1<sup>st</sup> February 2000.

Finally, the Defendant charges that the Plaintiff failed to



understand mixing procedure and was therefore transferred to its Inspection Department as a trance but such transfer was not a promotion.

## **Reply to Defence**

As stated earlier, the Plaintiff has given a reply to the Defendant's Defence. The particulars of the reply have already been given as footnote. The essence of the reply is that the Plaintiff is maintaining his allegation of fact and denying the contentions of the Defendant. As I understand the position at law, this reply was unnecessary for the Plaintiff has only denied the allegations of fact the Defence put up by the Defendant<sup>3</sup>. Further, the Plaintiff avers that he is legally entitled to equal pay for equal work for the said alleged posts of Mixer and Quality Inspector.

The above is an outline of what the pleadings are in this matter. It is now necessary that the issues that a rise from the and require to be determined, be set out in this judgment.

## **Issues for Determination**

The Court has pointed out that there has been a joinder of issues between the parties. This has, as a matter of law, arisen from the pleadings that were exchanged herein. as I understand it, the following are the main questions that arise from the pleadings:

- (a) what posts did the Plaintiff hold in the Defendant Company.
- (b) Whether or not the Plaintiff was discriminated against as

<sup>3</sup> Order 18/3/2 of the Rules of the Supreme Court.

against other in so far as the pay for the posts he allegedly held at the Defendant Company.

- (c) Whether or not the Defendant has wrongly withheld the Plaintiff's certificate.
- (d) Whether or not the Plaintiff suffered any loss or damage as regards his certificate.

Finally, and depending on whether the above issues are answered in the affirmative, the Court will have to determine whether the Plaintiff's points of claim should be awarded to him. Accordingly, if the determination by this Court will be against the Defendant it will not become necessary to air its views on the reliefs claimed by the Plaintiff.

It is now important, before the Court makes any findings of fact on the issues stated above, that I say something about the evidence that was offered by the parties herein and the facts arising from the said evidence.

### **The testimony and facts**

Both the Plaintiff and the Defendant offered earlier evidence in this matter. Their testimonies-in-Chief was mostly in a form of written witness statements. The Plaintiff put in one witness statement while the Defendant had two witness statements. Further, the authors of these statements availed themselves at trial to adopt their statements and also to give viva voce evidence. It is from these written witness

statements, and the viva voce evidence, that the facts of this case which this Court will shortly set out below:

## **Facts**

The following are what the Court has found to be the facts disclosed by the evidence on record:

### **Engagement of the Plaintiff**

The parties are in agreement that the Plaintiff was engaged by the Defendant Company sometime in the month of March 1999. Further, it is common fact that the Plaintiff was employed as a casual labourer at a salary of K1,300.00 per month. Moreover, there is no dispute as regards the fact that the Plaintiff worked in this capacity as a casual labourer for four(4) months i.e. March 1999 - 15<sup>th</sup> July 1999. Indeed, the parties agree that the Plaintiff's changed from being casual labourer but are at cross purposes as regards what posts he eventually held when he stopped being designated as a casual labourer.

### **Post held by the Plaintiff in the Defendant Company**

The Plaintiff has told this Court that the Defendant eventually employed him as a Mixer. Further, the Plaintiff says that as such Mixer he was supposed to get a salary of K4,000.00 per month like other Mixers working in the Defendant Company.

As will be seen from the Defendant's evidence their story is

different. The Defendant avers that the Plaintiff was later engaged as a Mixing Assistant on a probationary terms confirmation as an Assistant Mixer. Further, the Defendant states that for this job the Plaintiff was getting a wage of K22.00 per day of Eight(8) hour work. Actually, the Defendant Company tendered in evidence two letters to substantiate its contention on the question of offer of employment to the Plaintiff and the latter's confirmation of employment as such Mixing Assistant (Assistant). The letter of offer of employment is dated 15<sup>th</sup> July 1999 and shows that the Plaintiff accepted the offer of employment. The said letter was in the following terms:

"NAME D. MUHONDO

DATE 15/7/1999

POLYPLAST

RE; OFFER OF EMPLOYMENT

We are pleased to offer you employment as A MIXING ASSISTANT on the following Terms and Conditions:

(a) Starting date 26/7/94

(b) Hours of work

Day Shift 11 HRS

Night Shift 13 HRS

General Shift .....

Note, Hours worked in excess of the statutory 8 Hours normally worked in a day will be considered as overtime.

(a) Wage based on normal 8 hors working day K22.00

(b) You will serve a three month probationary period which will be calculated from the date of you employment.

- (e) You will eligible to a Housing Allowance of 25% of your monthly basic wage on successfully competing your probationary period.
- (f) In the event of either sides requiring to terminate his or hers employment with the company, a two weeks notice during the probationary period will be required. A full calendar months notice will be required in writing to terminate the employment after the probationary period of three months is completed.

Note: The Company reserves the right to change the above terms and conditions as it may see fit, however before any changes are made, the employee shall be duly informed.

If you agree with the above stated terms and conditions, kindly sign below indicating your acceptance.

Your faithfully,  
For Polyplast

(Signed)

T.E. Kumwenda  
Assistant Personnel Manager  
Manager

I. SACRANIE  
General

AGREEMENT

I DAVIE MUHONDO HEREBY ACCEPT THE APPOINTMENT OFFERED TO ME ON THE ABOVE MENTIONED TERMS AND CONDITIONS.

SIGNED.....

WITNESS.....”

And the letter of confirmation of appointment was couched in the following words:

“Mr D. Muhondo Thom  
C/o Box 80048  
Blantyre 8  
Dear Sir,

Re: CONFIRMATION OF APPOINTMENT

The management has decided to confirm you on your post as an ASS. MIXER with effect from 1/2/2000.

In respect of this, 25% of your monthly basic salary will be paid to you as Housing Allowance.

It is our hope that you will work extra hard.

FOR POLYPLAST

(Signed)

T.E. KUMWENDA  
ASS. PERSONNEL OFFICER

I. SACRANIE  
GENERAL MANAGER

CC: Accounts Dept.

Personal File.”

This Court finds and concludes that the Plaintiff was not a Mixer but was engaged as Mixer but was Mixing Assistant (Assistant Mixer). Further, there is uncontroverted evidence a fact admitted by the Plaintiff that the Plaintiff was being taught the job of a Mixer by a Mr Arthur Nyasulu who was the Defendant’s Mixer. In point of fact, the Plaintiff admitted that the said Mr Nyasulu was more experienced and knowledgeable.

Moreover, it is found as a fact that the Plaintiff did not finish his training as a Mixing Assistant (Assistant Mixer). This is borne out by the evidence on record and more especially the letter of 7<sup>th</sup> February 2001 from the Defendant to the Plaintiff. The said letter of 7<sup>th</sup> February 2001 was in the following terms:

"DAVE MUHONDO

07/02/2001

RE: DEPARTMENTAL TRANSFER

Due to your failure in understanding the mixing procedure, we have decided to transfer you to the quality inspection department as a trainee, and we hop that you will be able to learn and grasp the quality inspection procedures.

Kindly note that you be warned several times in regards to suspicion that you are conspiring to steal from the company. This transfer should be noted as a final chance and both matters will considered. i.e.

- (a) Able to learn and understand the job.
- (b) Proof of being reliable and honest worker.

FOR POLYPLAST

(Signed)

T. KUMMWENDA

PERSONNEL OFFICER

I. SACRANIE

GENERAL MANAGER

Indeed, it is an undeniable fact that the Plaintiff was moved to the Quality Inspection Section of the Defendant Company where he started all over again to be trained in Quality Control by a certain Mr Chibisa. Further, there is no evidence to show that his remuneration package changed. As a matter of fact, the Plaintiff failed to produce cogent evidence that his salary was to change when he moved to Quality Inspection Section. In point of fact he purported to introduce evidence on the salary of a Quality Inspector. I am afraid to say that the piece of evidence the Plaintiff wanted to put in is hearsay. This Court finds it as a fact that there is no evidence that the Plaintiff's salary changed when he was redeployed to Quality Inspection Section.

## **Termination of Employment and Request for Certificate**

The Plaintiff's employment with the Defendant was terminated on 12<sup>th</sup> August 2001. In point of fact, the Defendant dismissed the Plaintiff from employment on grounds of theft. Further, it is a fact that at one point in time the Defendant had kept the Plaintiff's MSCE certificate and misplaced it. On termination of his services the Plaintiff requested a return of his certificate but the Defendant could not produce it since it had been lost. However, the Defendant did try to assist the Plaintiff to obtain a replacement copy of the said certificate. Actually, the Defendant informs this Court that it did provide transport to the Plaintiff to go to Zomba to obtain the replacement copy of the certificate. Further, the Defendant says that it did advise the Plaintiff that it was prepared to furnish a reference to prospective employers regarding the Plaintiff's qualification. Thus, Court has found that the Defendant's story adds up when considered in the light of the letter from Malawi National Examinations Board dated 12<sup>th</sup> December 2001 which was addressed to it thus:

**" CONFIDENTIAL**

12 December 2001



The Manager  
Polyplast  
P O Box 5048  
BLANTYRE  
Dear Sir,

**RE: TRANSCRIPT: DAVIE C T MUHONDO**

**Davie Muhondo** has requested The Malawi National Examinations Board to certify to you the subjects he passed and the grades he obtained in the Malawi School Certificate of Education Examinations.

We would therefore confirm that **Davie Muhondo** wrote the Malawi School Certificate of Education Examinations in the year 1996 at Gowa MCDE as candidate No. 145/087. The following are the results he obtained.

	<b>Subject</b>	<b>Grade</b>	<b>Year</b>
	Agriculture	8	1996
Biology		7	1996
Chichewa	7		1996
Commercial Studies	7		1996
English		8	1996
Geography	5		1996
Mathematics	4		1996
History	6		1996

Davie Muhondo qualifies for the award of the Malawi School Certificate of Education. The grades are equivalent to those for General Certificate of Education (Ordinary Level) in the United Kingdom. They have the following significance:

1-2 denote a pass with distinction

3-6 denote a pass with credit

7-8 denote a pass

(Singed)

S J O Nselema

**For: EXECUTIVE DIRECTOR"**

### **Failure to secure alternative employment and training opportunity**

The Plaintiff purported to show that as a result of the Defendant's failure to return his certificate he failed to secured a job with prospective employers. To this end he produced a letter showing that he had been involved to attend an interview at Indebank where he was requested to bring to them, inter alia, his certificates. However, there is no evidence that he Plaintiff attended the interview and/or he failed to secure employment because of the non-availability of the certificate. As regards the allegation that he could not pursue a computer course the Plaintiff offered no cogent evidence to support the allegation. The long and short of it is that the Court does not believe the Plaintiff's story that he failed to secure a job or pursue training because of the Plaintiff's failure to return the certificate. More on this will be discussed later in this judgment.

The above are the salient facts that this Court found from the evidence on record.

As mentioned earlier, the Plaintiff's allegations of fact have been put in issue. Accordingly, the Court must proceed decide on the facts in issue in this action. It must be pointed out that, although on reading there appear to be so many issues, in my mind there are principally two issues that ought to be determined by this Court. These are: (a) whether the Plaintiff was discriminated against as regards the salary that was paid to him, compared to other employees

of the Defendant Company, at the time he either worked as Assistant Mixer or in the Quality Inspection Section of the Defendant Company; and (b) whether the Defendant has suffered any loss or damage as a result of the alleged failure by the Defendant to return his Malawi School Certificate of Education Certificate.

## **Law and Consideration of the Issues**

### **Constitutional and Statutory framework**

#### **Non-discrimination : equal remuneration**

In Malawi, the law on non-discrimination in respect of remuneration is governed by both statute (Employment Act, 2000) and the Constitution<sup>4</sup>. Basically, these two provisions call upon employers to pay employees equally for work of equal value without distinction or discrimination of any kind. There is no explanatory note as regards what these stipulations mean in actual practice. Further, as far as I am aware there is no local case authority that has interpreted what the words “equal remuneration for work of equal value.” Thus, this Court must give an interpretation of these words.

<sup>4</sup> Section 31(3) of the Republic of Malawi Constitution states that:

“Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on basis of gender, disability or race” and section 6(1) of the Employment Act, 2000 (Act No. 6 of 2000) provides that:

“Every employer shall pay employees equal remuneration for work of equal value without distinction or discrimination of any kind, in particular, on basis of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities.”

As I understand it, these provisions are meant to ensure that employers pay their workers equally for equal work. Thus, any interpretation of the term equal remuneration for work of equal value must bear this in mind. However, it foolhard on the part of the Court to expect that all workers in an organization would be paid equally. In saying this I am alive to the fact that the calculation of what one gets in an organization is a component of so many things. Indeed, it is this Court's understanding that these words should be understood as connoting that equal pay is accorded to work of equal or comparable value evaluated in terms of skill, effort, responsibility and working conditions.

### **Was the Plaintiff give equal pay for work of equal value?**

As stated earlier, Section 6(1) obliges employers to pay employees equal remuneration for work of equal value without distinction or discrimination of any kind. As discussed above, equality in pay being referred to in this subsection should be understood as meaning that equal pay is offered to work of equal or comparable value evaluated in terms of skill, effort, responsibility and working conditions. Further, the Court is aware that in terms of Section 6(2) of the Employment Act, 2000 the burden of proving that there is no violation of this fundamental principle rests on the employer.

The Plaintiff made an allegation that the Defendant paid him less than what other employees were getting as Mixers or others in the Quality Inspection Section. This Court has found that the Defendant established that it is not trite that the Plaintiff had worked as a Mixer. Indeed, the Defendant proved it before this Court that the Plaintiff was actually redeployed to work as an Assistant Mixer and was being trained as such Assistant Mixer but never finished his training. The same is true when he was eventually posted to work in the Quality Inspection Section of the Defendant Company. Moreover, the Plaintiff admitted that these other employees that he was comparing himself with had more experience and more skillful than him. Furthermore, the Plaintiff conceded that the other employees he was comparing himself with had joined the Defendant Company earlier than him.

In view of the above, this Court finds that there was no proof of discrimination made against the Defendant Company. As I understand it, and indeed the law does not suggest so, that there should be equal pay just because one is in same or similar position with or working in

the same section with another employee. It must be observed that inequality in pay might and do arise due skill, experience, training, increment in salaries as a result of long service. There is evidence on record to show that the Plaintiff did not have the same qualities in terms of skills experience as those he was comparing himself with. It is so found that there was not violation of the Constitution or the statute providing for equal pay for equal value of work. Accordingly, the Plaintiff's liquidated claim in respect of what he alleged as money wrongly withheld must fail. It follows, therefore, that the Plaintiff's claim for the sum of MK8,370.00 being Legal Practitioner's collection charges on the said liquidated sum also fails.

### **The issue of Certificate**

It is not in dispute that the plaintiff's certificate was lost whilst in the custody of the Defendant Company. The Court has already found as a fact that the Plaintiff did provide transport to secure a replacement of his certificate. However, the Plaintiff did not mitigate the loss of the certificate. Notwithstanding the fact that he was provided with the means to obtain a replacement certificate the Plaintiff did not want to avail himself of that opportunity. It cannot, therefore, lie with him to complain to this Court that he awarded damages for loss of earnings by reason of the loss of the certificate. Indeed, the Plaintiff has failed to show that prospective employers refused to employ him because of the loss of the certificate. Additionally, the Defendant has shown in this Court that it did advise the Plaintiff that it would assist him with a reference regarding his qualifications if he needed it for purposes of securing a job with any prospective employer.

The Court has observed that one of the Plaintiff's claim is that he wants this Court to order an immediate return of his certificate. The demand by the Plaintiff is an impossibility considering that the certificate was lost. Indeed, there are all indications that the certificate cannot be traced. In the circumstances, the claim for immediate return of the certificate fails. The question of damages does not even arise since there is no evidence of the value of the certificate. Consequently, the only option that is left with the Court is to make a declaratory order directing the Defendant to continue to assist the Plaintiff to obtain a replacement of his certificate. It is so directed.

### **Conclusion**

The Plaintiff has failed in all the claims that he made against the Defendant. As a matter of fact, the Plaintiff's action is dismissed.

This Court has dismissed the Plaintiff's action. Ordinarily the dismissal should have been with costs but I will not order that such costs be paid. The refusal to order payment of costs is premised on the fact that this Court believes this matter, being an employment matter, should have been prosecuted in the Industrial Relations Court where costs would generally not have been made<sup>5</sup>.

**Pronounced** in open Court this ..... day of May 2005 at the Principal Registry, Blantyre.

<sup>5</sup> Section 72 of the Labour Relations Act; see also the cases of *Kamphoni -vs- Malawi Telecommunication Ltd* of 25<sup>th</sup> April 2005 Civil Cause No. 684 of 2001 [unreported] High Court decision of 18<sup>th</sup> May 2001, *E.K. Thomson -vs- Lyland Daf (Mw) Ltd* Civil Cause No. 919 of 2003 [unreported] H.C. decision.

A handwritten signature in blue ink, consisting of several vertical and curved strokes, positioned above the name and title.

F.E. Kapanda

**JUDGE**