Arnold Malinda & 55 Others v Carlsberg Malawi Limited

Judgment

Court:	Supreme Court Of Appeal
Bench:	The Honourable Justice L.P Chikopa SC JA, Hon. Justice H.S.B. Potani, JA, Hon. Justice J. Katsala, JA, Hon. Lady Justice I. Kamanga, JA, Hon. Justice M.C.C. Mkandawire, JA, Hon. Justice S.L. Kalembera, JA, Hon. Justice R. Mbvundula, JA
Cause Number:	MSCA Civil Appeal No. 4 of 2023
Date of Judgment:	May 13, 2025
Bar:	appellant unrepresented respondent unrepresented

Hon. Chikopa SC, Deputy Chief Justice

Background

1. There are 56 appellants in this matter. They claim that they were at all material times employees of the respondent. They worked in the respondent's

Sales Department having been employed on different dates. Their 'employment' was terminated on December 31, 2015 due to the respondent's operational requirements. They were then paid their dues via a standard letter addressed to all claimants dated February 25, 2016.

2. The appellants claim that they were, during the subsistence of their employment with the respondent, unfairly and unlawfully treated. They therefore brought an action in the Industrial Relations Court (IRC) where they particularised the unfair and unlawful treatment as follows:

i. That they received a monthly salary of K18,200.00 while others on the same grade doing the same work were on K83,000.00 per month;

ii. That they were not given the two bottles of mineral drinks a day given to other employees on the same grade doing the
same work;

iii. That they were denied the daily free meals given to other employees on the same grade doing the same work;

iv. That they were not on any medical scheme like other employees doing the same work on the same grade;

v. That they were not put on any pension scheme like the other employees doing the same work on the same grade;

vi. That during the subsistence of their contract of employment with the Respondent they worked through public holidays and never had day offs as

provided for under the Employment Act;

vii. That at the termination of their respective contracts of employment they were paid a severance allowance which was not calculated in line with the provisions of the Employment Act and that accordingly there was a shortfall which must be paid to them; and

viii. That they were not paid any gratuity on the termination of their contracts of employment contrary to the provisions of the Employment Act.

3. Claiming that they thereby suffered loss and damage, the appellants sought the following reliefs in the IRC:

i. An order that each appellant should be paid the shortfall on their remuneration for all the years worked;

ii. An order that each appellant should be paid the value of bottles of minerals for all the years worked;

iii. An order that each appellant should be paid the value of the meals for all the years worked;

iv. An order that each appellant should be paid the equivalent of the respondent's contribution towards the medical scheme for all the years worked;

v. An order that each Appellant should be paid the equivalent of the appellant's contribution towards the pension scheme for all the years worked;

vi. An order that the Respondent should pay the Appellants the statutory gratuity the same to be calculated on wages after

taking into account the shortfall on the salary, the meal allowance, drinks allowance, and the Respondent's contributions towards the medical and pension schemes;

vii. An order that the Respondent should recalculate the severance pay based on wages after taking into account the shortfall on the salary, the meal allowance, drinks allowance, and the Respondent's contributions towards the medical and pension schemes and should pay the shortfall to the Appellants; and

viii. Any other relief the court deems fit.

4. The IRC found for the appellants and ordered that they be compensated as above.

5. The respondent was not satisfied with the judgment. It appealed to the High Court which allowed the appeal by its judgment of 18th November 2022. The High Court specifically reversed the IRC's conclusion that the appellants were employees of the Respondent and thus made the issue of terminal benefits totally redundant.

6. The Appellants were not satisfied with the High Court's decision. They appealed to this Court filing in relation thereto the following grounds of appeal.

i. That the High Court erred in law in holding that the appellants were not employees of the respondent within the definition of
employee provided for in sections 3(b) of the Employment Act and 2(1) of the

Labour Relations Act;

ii. That the High Court erred in law by holding that the appellants were independent contractors;

iii. That the High Court erred in law in failing to determine whether the issues raised by the respondent in respect of the release
and discharge agreements were properly before the Court for adjudication and further in determining the said issues;

iv. That the High Court erred in law by holding that the release and discharge agreements that were signed by the appellants were not signed under duress; and

v. That the High Court erred in law by failing to hold that the release and discharge agreements amounted to an illegality in that they offended the fundamental principles provided for in sections 5 and 6 of the Employment Act and sections 20 and 31 of the Constitution of the Republic of Malawi.

7. The record shows that the notice of hearing herein was issued and served on the parties on January 10, 2024 for a hearing set for February 8, 2024 at 09 :00 hours. The record also shows that the appellant had by this date complied with the procedural protocols relating to appeals in this Court. They had filed their arguments complete with a list of underlined authorities and a chronology of events.

8. The respondents had on the other hand filed nothing with this Court. They instead on 2 February 2024, filed a Notice of Intention to rely on a preliminary

objection, an affidavit in support of the preliminary objection, skeleton arguments in support of the preliminary objection, a list of authorities relating to the preliminary objection and a Notice of Intention to rely upon skeleton arguments on record. In other words, and in relation to the skeleton arguments, that it be allowed, during the hearing of this appeal, to rely on the skeleton arguments filed in the High Court.

The Issues

9. There are at most three broad issues in this appeal. First, concerning the respondent's intention to rely on a preliminary objection. Secondly, whether the respondent should be allowed to use skeleton arguments filed in the court below and lastly, the appeal itself.

Preliminary Issues/ Objection

10. Two of the three issues, namely the intentions to rely on a preliminary objection and to use skeleton arguments filed in the court below, immediately come up for determination.

11. Before delving into the issues' merits, let us first reiterate the fact that the law and practice applicable in this Court is not in any doubt. We are guided by statutes, case law and Practice Directions issued from the Office of the

Honourable the Chief Justice over time.

12. Thus, for instance, Practice Direction No. 1 of 2010 provides:

"1. Filing of skeleton arguments

When presenting skeleton arguments in the Malawi Supreme Court of Appeal-

(a) in all substantive appeals-

(i) the appellant shall file with the Court skeleton arguments within fourteen (14) days after filing the appeal in this Court and shall during the same period serve a copy of the skeleton arguments on the respondent;

(ii) the respondent shall file his skeleton arguments with the Court within fourteen (14) days after the date the appellant's skeleton arguments were served on him and shall at the same time serve a copy of the skeleton arguments on the appellant;

....

3. Failure by the respondent to comply If the respondent fails to comply with this Practice Direction the Court shall proceed to hear and determine the appeal or the application, as the case may be, without hearing the respondent."

13. Meanwhile, Order III, rule 14 of the Supreme Court of Appeal Rule provides:

"Notice of preliminary objection to be filed

(1) A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with four copies thereof with the Registrar within the same time.

(2) If the respondent fails to comply with this rule the Court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit." (Emphasis supplied)

14. Secondly, we must emphasise the fact that this Court has always insisted and will continue to insist that parties seeking an audience before us must strictly and fully comply with the applicable laws, rules and protocols. Accordingly, appropriate sanctions will always be imposed whenever there is a failure to do so. A party, in our most considered view, seeking audience in this Court must first comply with all applicable laws, rules and protocols before they can be accorded such audience. An example is the recent case of Britam Insurance Company Limited v Jack Jimu, MSCA Civil Appeal No. 21 of 2019 (unreported) where this Court refused to entertain a preliminary objection due to a party's noncompliance with the above cited Practice Direction.

15. Coming back to this case and the respondent's intention to raise a preliminary objection and use arguments filed in the court below, we feel obliged to point out that as of the date of hearing the respondent was in blatant breach of the procedural rules and protocols. We cannot and should not in our opinion,

treat the respondent any differently from the offending party in Britam Insurance Company Ltd v Jack Jimu (supra). The respondent's applications to raise a preliminary objection and to use the arguments from the court below are hereby summarily dismissed.

16. But even only as obiter and without in any way detracting from the immediately above conclusion, we wish to put it on record that the applications are clearly without merit. Take the request to use the skeleton arguments from the court below for instance, it is obvious that the procedural protocols in this Court envisage a fresh filing of skeleton arguments. Even if a party is going to use the very same arguments used in the court below, they cannot tell this Court to go dust up the skeleton arguments from the court below and proceed to use them in this Court. That would be an affront to the rules of procedure and equal to a filing of the respondent's arguments via the backdoor. It also smacks of a want of respect. If the application were properly before us, we would still have dismissed it for want of merit.

17. The same goes for the preliminary objection. In Petros Jonga v National Bank of Malawi, Civil Appeal No. 03 of 2019 (unreported) and *JTI Leaf Malawi Limited v Angle Dimension*, Civil Appeal No. 11 of 2019 (u nreported) this very Court observed that a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings which if argued as a preliminary objection may dispose of the suit. See also *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where Sir Charles Newbold P. at page 701 said:

" ... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of iudicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop." (Emphasis supplied)

18. The above cannot be said about the preliminary objection in this matter. It would not, if it were successful, wholly dispose of the appeal. If truth be said, it would, at the very most, only lead to an adjournment and further delay. The preliminary objection is clearly without merit. It would thus have been dismissed even if it were properly before us.

The Substantive Appeal

19. There are six grounds of appeal. An analysis of the grounds however clearly shows that this appeal turns on whether the appellants were employees of the respondents. The lower court found that they were. It consequently ordered that they be compensated in a manner that would put them in the same position as the rest of the 'more favoured' employees of the respondent with whom they were on the same grade and did the same work.

20. The court below disagreed with the lower court. It found that the appellants were not employees of the respondent. They were casual labourers, alternatively, independent contractors. The question of compensation for discrimination, terminal benefits etc. did not therefore even arise.

21. In this Court, we are being asked to reinstate the lower court's conclusion that the appellants were at all material times the respondent's employees, that they were discriminated against to the extent alleged and that they should therefore be compensated therefor in the manner determined by the lower court. The question we should therefore ask and answer is whether the appellants were at all material times the respondent's employees. If the answer is in the negative, it will be the end of the appeal. If it is in the positive, we will proceed to debate, and if need be, award the reliefs awarded to the appellants by the IRC.

22. But before we delve into the appeal itself, two things must be emphasized in our view. First is that appeals in this Court proceed by way rehearing. See Order III, rule 2(1) of the Supreme Court of Appeal Rules and Professor Arthur Peter Mutharika and Electoral Commission v Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera, MSCA Constitutional Appeal No. 1 of 2020 (unreported).

23. Second is the fact that the respondent was not heard in this appeal. It lost its right to be heard courtesy of their failure to fully comply with Practice Direction Number 1 of 2010.

24. So, were the appellants at all material times the respondent's employees?

The Appellants' Arguments

25. The sum total of the appellants' arguments is that they were indeed the respondent's employees. Their argument kicks off with Section 3 of the Employment Act and section 2 of the Labour Relations Act which define an employee as:

"a person who offers his services under an oral or written contract of employment, whether express or implied; (b) any person, including a tenant, share cropper who performs work or services for another person for remuneration or reward on such terms and conditions that he is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of employee than that of an independent contractor."

26. The appellant also referred us to case law in support of their contention. The first is *Carlsberg Malawi Ltd v Hastings Lameck & 107 Others* Civil Appeal No. 12 of 2017 (unreported) where the High Court of Malawi said the following about section 3 abovementioned:

"to begin with an employee is one who performs work for another for remuneration. This part simply says one provides his service or labour for another and is paid for the same ....

On the second part an employee is one who is in a position of economic dependence. The word dependence simply means placing reliance or need on someone or something. One becomes dependent where an expectation is created and met ....
On the third part an employee is one who is under an obligation to perform duties. Being under an obligation to perform duties means in other words, that one is under a duty to perform work .... "

27. The second case is that of *Simango v Blantyre Newspapers Ltd* [2008] MLLR 488. A decision of the IRC itself. As to who is an employee or an independent contractor the court said:

"An employee contract is established if the following elements are proved. [a] that the person is under a legal obligation to perform work; [b] that the person receiving the services is under obligation to remunerate the person rendering the services; and [c] that the person who offers his work depends on the person remunerate providing the work economically. These Factors constitute what are termed under common law as [a] the control test i.e. whether the putative employer had control over the selection of his servants. The right to control the method of doing the work and the right to suspend and dismiss; [b] the integration test i.e. whether the worker was considered part and parcel of the employer's organisation; [c] the economic reality test which is composite of the above elements. A contract of employment is constituted if these three tests are answered in the positive."

28. The third case is *Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi* [1990] 13 MLR 303 where
at pages 307-308 the court said:

"One of the supreme facts which I must decide, in this case is whether the plaintiff was a servant of the defendants or whether he was an independent contractor. In earlier cases the issue of whether a contract of employment was a contract for services was determined primarily on the true interpretation of the contract and it very much depended on whether there was or was not a right of the master to superintend or control the manner in which the work was done. The test was whether a master could order or require not only what is to be done but also how it shall be done, in which case the contract was of employment. The courts in the earlier cases stressed the matter or factor of superintendence and control. The current law however is that it is important to look at all the primary facts which have been proved and to see what legal inference can be drawn from those facts. It is now accepted that although the extent of control which the alleged employer is entitled to exercise over the work is by no means a decisive criterion of universal application, it is likely, in many cases, to be a factor to be considered."

29. In the *Nchizi* case the plaintiff was, *inter alia*, receiving his pay at the end of the month. He was entitled to sick and notice pay. The court concluded that he was an employee.

30. We were also referred to foreign case law. The first is a decision of the Australian High Court in *Hollis v Vabu Pty Ltd* [2000] HCA 44. The court thought a holistic approach should be adopted in deciding whether or not the facts disclosed an employee/employer relationship.

31. The said court pronounced itself similarly in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty* Ltd [2022] HCA 1. There was, in this instant, a written contract that actually referred to a 'worker' as a self- mployed contractor. The court still found the 'worker' an employee. The court thought the word 'worker' is not of itself necessarily definitive. One still has to look at the totality of the facts and determine what the worker is, an employee or an independent contractor. The definitive factor in this case was control. The employer had control over wages, the worker and the work itself. It concluded that the 'worker' was an employee as opposed to an independent contractor.

32. From the Supreme Court of the United Kingdom there is the case of *Autoclenz Ltd v Belcher& Others* [2011] UKSC 41. Again, the contract referred to the workers as independent contractors and the employers as clients. The Supreme Court held firstly that a court could disregard the terms of a written contract in so far as they were inconsistent with what was actually agreed between the parties and secondly that whether or not a worker was an employee was a fact to be concluded from a consideration of all the available facts.

33. There is also the case of *Uber BV & Others v Aslam & Others* [2021] UKSC 5. According to the appellant, it not only agreed with the *Autoclenz* case but also

further posited that employment legislation is intended to protect workers from exploitation. It must as much as possible therefore be interpreted to achieve that objective. In other words, and as we understood them, workers should always be given the benefit of the doubt. Where therefore a worker seems more of an employee than an independent contractor they should be concluded as such lest they be denied the benefits that comes with being an employee.

34. Applying all of the above to the instant case the appellants are convinced that they were at all material times employees of the respondent. They were engaged at the instance of the respondent. True, the contracts were oral and devoid of any documentation but that, as the cases above have shown, is inconsequential. They worked at the direction of the respondent and were economically dependent on the respondent. Looking at the totality of the above facts, the documentation on the basis of which the appellants were discharged, and the urge in the *Uber BV* case to protect the weaker in labour relations, it is the appellants' argument that the conclusion in the instance case must be that the appellants were the respondent's employees and not independent contractors.

The High Court's Decision

35. The court below's views on whether the appellants were employees or not were brief and to the point. It opined that section 3 of the Employment Act offers very little in deciding whether a worker is an employee or an independent contractor. In its view, a court must, in determining whether a worker was an

independent contractor or an employee, search for the total relationship of the parties.

36. At page 299 of the record of appeal the court below summarized the facts, *inter alia*, as follows:

(i) That there is no single document recording any employment contract between the respondent and any one of the claimants. It quoted para. 6 at p. 4 where Mr. Chibaya (one of the appellants said): "*I know that we were not given any letter of appointment. We were told what to do after we were hired. The job description was verbal. There was nothing that was written* ... ". In contrast under the appellant's (the respondent now) conditions of service, all the employees were issued with and signed an employment agreement relevant to their band.

(ii) That there was no document evidencing or suggesting that in the course of their dealings the appellant and any of the respondents regarded their relationship as that of employer and employee. There was an absence of documents such as leave forms, salary advance applications, bereavement support papers, sick leave reports, disciplinary reports etc. Considering that the respondent's and the appellants' relationship ranged from 6-14 years, the absence of these documents suggested that the parties herein did not regard themselves as being in an employee and employer relationship.

(iii) That the respondents (now appellants) were not, as a matter of fact, subjected to employment entry procedures applicable to the respondent's other employees such as medical examinations, probations, confirmations and relevant trainings.

(iv) The respondents were not under control of the appellant in the performance of their roles. The respondents were not at all integrated into the appellant's operational set up.

(v) Economic dependence on its own is not enough to create an employer and employee relationship between parties. Even independent' contractors depend on those giving them work for livelihood. It does not make the service provider an employee.

(vi) That the appellants always knew that other people allegedly in the same category with the respondents had drinkage, pension, medical scheme, written letters of employment and conditions of service. None of the 56 respondents complained about this in 6-14 years. The conclusion can only be that both parties knew that there was no employee and employer relationship between them.

37. On the basis of the above, the High Court concluded that the appellants (then respondents) were not employees but independent contractors. They hang around the respondent's premises in the hope of getting this or that piece of work. They were free not to report for work. Not to work at all. They did not have

to ask for permission from the respondent or any of its staff to stay away from work. When they did not, another of the hangers on would be engaged. The foregoing explains why there were no letters of engagement, no letter of confirmation, and no letter about terms and conditions of service. It was by sheer coincidence, in the view of the High Court, that these casual labourers/independent contractors were able to work for the respondent for as long as they did.

38. And because they were not employees, the question of underpaid or unpaid gratuities did not arise. Neither did claims for discrimination and compensation in respect thereof.

This Court's Consideration of the Law and Facts

39. There are six grounds of appeal herein. But as we have said above, this appeal turns on the whether or not the appellants were at all material times employees of the respondent.

40. We have looked at section 3 of the Employment Act and section 2 of the Industrial Relations Act. We agree with the court below that the two pieces of legislation do not by themselves provide a lot of assistance to a tribunal in deciding whether, on the facts of a particular case, a worker is an employee or not. We have also looked at the cases cited by the appellants and the principles enunciated therein. We have also looked at cases other than those cited by the appellants.

41. In *Christine Adot Lopeyio v Wycliffee Mwathi Pere* [2013] eKLR. The court said:

"The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also by noting that most contracts for service are not written, the facts of each case are paramount and worth consideration as to the intentions of the parties to such a contract... This differentiation relates to very fundamental issues noting that under a contract of service it customarily relates to an employee who is subordinate or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner ... "

42. In *Ontario v Sagaz Industries Canada Inc*. [2001] 2 SCR 983; 2001 sec 59 The Supreme Court of Canada said:

"It is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves useful purpose ... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all the factors will be relevant in all cases or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining one."

43. In *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 the court set out the factors that categorize a worker as an employee and therefore under a contract of service as where:

(i) The servant agrees to provide his own work and skill by providing services in consideration of wages or other remuneration.
(ii) The servant agrees that in the performance of that service they will be subject to the master's control. Control includes the power of deciding the things to be done, the way in which it shall be done, the means to be employed in doing it, the time and place where it shall be done.
(iii) The contract of service complies with the terms of an employment agreement. This entails complying with the statutory requirements in the Employment Act including minimum wage, provision for leave and payment of income tax.

44. We also had occasion to peruse *Clerk & Lindsell on Torts*, 13th Edition, 1969 at page 123 where the learned authors said on the subject at hand:

" *... ultimately the decision in each individual case will turn upon the view taken by the Court of the relationship between the parties considered as a whole*."

45. Looking at the facts and the law as set out above we agree that there is no single test for determining whether or not a worker is an employee or not. The Employment Act and the Industrial Relations Act do not, as we have said above, offer much help. The absence or presence of a written contract/document cannot not of itself answer the question whether a worker was an employee or not. Neither do the facts that the workers were, for instance, given uniforms or were economically dependent on the employer. Indeed, went by this or that title. Instead, we wholly endorse the view that the surest way to answer the question whether a worker is an employee or not is to look at the totality of the worker's and employer's relationship. Look at how they regard each other. Do they actually regard their relationship as that of an employer and employee? Or as 'employer' and casual labourer/independent contractor? If the answer be that they are in an employee and employer relationship, so, will it be the fact that they might not be titled employee notwithstanding. Similarly, if it is that they are not so also will it be. The presence or absence of a written contract, the facts that the workers wore uniforms, were economically dependent on the employer or worked regular hours will only be some of the facts that a tribunal will take into consideration in deciding that a worker was an employee or not.

46. Taking the above approach, we have looked at the facts before us afresh. We cannot fail to notice that the appellants provided a service to the respondent for a lengthy period of time. Nine years in some instances. Fourteen in others. And yet others in between. It can be said, and properly so in our judgment, that that is symptomatic of an employer and employee relationship. The same can, in our further judgment, be properly said in relation to the fact that the appellants wore the respondent's uniforms during work, (paid tax on their earnings), worked under the control and supervision of the respondent and were economically

dependent on the respondent.

47. It can also be said however that the absence of any documentation about the appellants' hiring, about their terms and conditions of service, the absence of any documentation about sick leave, bereavements, the absence of pension and medical scheme, the denial of drinkage and meals were all indicative of a causal relationship between the parties. One where the appellants would work as and when work was available. As independent contractors as opposed to being employees. And that it is because both parties regarded the relationship as such that the appellants raised no query in all the years they worked for the respondent about either their status or their terms and conditions of service. And, if truth be told, we were on the way to agreeing with the court below on this point until we reconsidered the purport and effect of the letter that brought the curtain down on the relationship between the appellants and respondents. It is dated February 25, 2016 which was exhibited by the appellants. The words used show, on a balance of probabilities, that the letter was addressed not to the respondent's casual workers but to their employees. The respondent, going by that letter, clearly regarded the appellants as employees. That letter considered in the light of, *inter alia*, the length of time worked, the manner in which the salaries were paid, the control, the supervision, the uniforms, leave us in no doubt that the balance of probabilities weighs more in favour of the finding/conclusion that the appellants were at all material times employees of the respondent. Meaning, if we go back to the grounds of appeal, that the court below erred in holding that the appellants were independent contractors and not employees of the respondent.

48. We now come to the allegations of discrimination.

49. It is crucial, in our view, that we properly understand the appellants' claims. They are not, as we understand them, claiming that they were in receipt of illegal wages i.e. wages below the statutory minimum. The claim is that they were in receipt of wages and benefits different from others of the respondent's workers that were on the same grade and doing the same job as them. Examples were given. The others were in receipt of a higher salary, were on pension scheme, were on medical scheme, got drinkage and were entitled to lunch. There were also separate claims for gratuity in *lieu* of pension and an under calculation of their severance pay. And it is in relation to those differences that the claims about discrimination and unfairness arise.

50. As has been said many times over, it is for those that allege to prove their allegations on a balance of probabilities. In the instant case, it was for the appellants not just to allege discrimination or unfairness but to also prove it on a balance of probabilities.

51. So, in the context of this case, what exactly is discrimination? Were the appellants discriminated against? What were they supposed to allege and prove in this case?

52. At its simplest, discrimination is treating similarly positioned people differently on the basis of a legally untenable basis. Section 20 of the

Constitution talks about discrimination. It makes references to the basis of differentiation in the treatment of equally positioned persons. It prohibits differentiation on the basis of "*race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition*". Meaning, in our view, that an allegation of discrimination should not stop at contending that one was treated differently. It should go on to allege and prove, on a balance of probabilities, that the different treatment was on the back of any of the bases proscribed in section 20 above-mentioned or some such "other status or condition".

53. The thinking is simple enough. There has arisen in the recent past an acceptance of the fact that not all discrimination is proscribed. There is the concept known as positive discrimination where treating similarly positioned persons differently is allowed in order to, for instance, correct historical wrongs e.g. racial or sexual discrimination. Hence, the requirement that an allegation of discrimination must allege and prove not just the complained of but also that it was in terms of section 20 above- entioned improperly grounded or founded.

54. In the instant case the appellants contend that they were discriminated against. They were treated differently from others similarly positioned. They eloquently testified about how they were treated by the respondent. They also spoke about how the respondent treated others similarly positioned. They even tendered as evidence an uncertified copy of a payslip purporting to show what the favoured employees were getting in relation to them.

55. At least four points come up for consideration.

56. First is about what the appellants alleged regarding the favoured employees' terms and conditions of service. They told the court below what they could only have heard. They should, in our view, have asked any number of the favoured employees to testify about their terms and conditions of service as compared to those of the appellants. Second is around the payslip. It was not about any of the appellants or any one of their witnesses in this case. Whatever the appellants told these courts about it and the alleged discriminatory terms and conditions of service can only amount to a story regarding some other employee's salary and benefits.

57. We are aware of section 71(2) and (3) of the Labour Relations Act which provides that the IRC is not bound by the rules of evidence in civil proceedings and that it may order the giving or production of and receive evidence which would otherwise be inadmissible in a court of law provided the court thinks that such evidence may assist to deal with a matter. Our understanding of the provision is that the production and/or receipt of evidence which ordinarily is not admissible in a court of law is permissible only where the IRC is of the opinion that such evidence will assist in the just determination of the matter before it. This means that the production or admission of such evidence is not automatic or open ended. It must happen with the sanction of the IRC. And it is a matter that is in the discretion of the IRC. For that reason, there must be good grounds explaining why a party cannot produce or give the evidence that is admissible in a court of law.

58. We do not think that by putting section 71 as it is, it was the intention of the Legislature to promote evidential laziness in the conduct of matters in the IRC. We believe the provision was intended to cater for situations where a party, despite making reasonable efforts, has failed or cannot be expected to bring the evidence that would be admissible in a court of law. For instance, where a party cannot access the emails he exchanged with his/her employer on the employer's email network now that he/she is out of employment and/or he/she is blocked from accessing the emails, or where the evidence is lost or destroyed, just to mention a few. We do not think this provision was intended to benefit a party who has not made any effort to bring primary evidence.

59. In the present appeal, we do not think that the appellants could benefit from this provision because they could have easily called any number of the alleged favoured employees to testify about their terms and conditions of service and to produce documents such as their payslips in order to substantiate the contention being made by the appellants. It is our considered view that, to the extent that the appellants failed to call these 'favoured' employees to testify on their terms and conditions of service, the cogency of the appellants' testimony on the same was grossly compromised.

60. Thirdly, and even assuming that the appellants were indeed remunerated differently from others of their grade, have the appellants alleged and proved to the requisite standard that they were thereby discriminated against? As we have indicated above, the scheme under section 20 of the Constitution envisaged not

just proof of the conduct complained about but also of such conduct being predicated on the grounds listed in it (section 20). In the instant case, the appellants have only alleged discriminatory treatment. They have said nothing about its basis. Whether it was on sex, language, ethnic, social origin or other status/condition. Their failure to do so leaves us incapable of concluding that the appellants were in breach of section 20 of the Constitution or indeed discriminated against.

61. The fourth issue concerns employment contracts as generally understood. They are private and personal. Their terms and conditions are the subject of agreement between parties thereto. Being on the same grade and doing the same job does not automatically entitle employees to receipt of the same wages and benefits. Other considerations like academic exposure, experience, length and quality of service and good negotiating skills come into play. They can and do properly result in similarly positioned persons being treated differently and/or being entitled to different benefits. Such differentiation does not of itself equal to discrimination as envisaged in section 20 of the Constitution. It must, like we have said above, be shown that the differentiation is based on considerations proscribed in section 20 of the Constitution.

Conclusion and Determination

62. We have found that the appellants were employees of the appellants. In relation to the grounds of appeal we must agree with the appellants that the court below erred when it held that the appellants were not employees of the respondent but independent contractors. Grounds of appeal one and two are therefore successful.

63. Grounds three to five must fail. They are based on the contention that the appellants were discriminated against and thereby suffered loss. We have found no evidence of discrimination. The appellants could not therefore have suffered any loss. The release and discharge agreements are therefore a nonissue - a practical irrelevance. It matters not, in this case, how they were dealt with. Grounds three to five are therefore dismissed for want of merit.

64. In summary, grounds one and two of appeal are successful. To that extent only the appeal is successful. Grounds three to five are dismissed. To that extent as well the appeal is a failure.

65. The above success does not however entitle the appellants to anything more than what they have already received. They received all that was due to them.

66. Not in passing we notice that the appellants received, courtesy of the judgment in the lower court and through their legal representatives, sums of money beyond that which they were given under the release and discharge agreements. They are clearly not entitled to that money. Accordingly, it is hereby ordered that the appellants' counsel should within 30 days of this date give an account of all money had and received in this matter from the respondent. Any money other than that which the appellants are entitled to in relation to this case should be refunded to the respondent within 30 days from the date of such account. Any sums outstanding beyond the 30 days within which it should have

been refunded will begin to attract interest at the ruling commercial bank lending rate from the date following the 30 days within which it should have been refunded.

Costs

67. There is a debate going on about costs in labour matters. On the one hand, there is the view that because the Labour Relations Act says no costs should be awarded in the IRC, the same principle should prevail wherever the matter goes. Meaning that no party in a matter originating from the IRC should be awarded costs on appeal be it in the High Court or in this Court. See First Merchant Bank v Mkaka [2014] MLR 105.

68. The other view is that, in accordance with the statute, costs should not be payable only in the IRC. And that because the statute is silent about what should happen in the High Court or Supreme Court of Appeal, the matter of whether or not to award costs in these courts should be in the discretion of a presiding court. See *Chithila and others v Central East African Railways Ltd* Miscellaneous Civil Application No. 53 Of 2023 (unreported) for a detailed discussion of the issue.

69. Having thoroughly considered the issue and the law as it stands now, we are of the latter view. If the Legislature decided not to include the other courts in the Labour Relations Act's proscription in the matter of costs in labour matters, it should not be up to these courts to legislate on their behalf. They should only apply the law as it was passed. Therefore, appellate courts, in our view, have the power to award costs in labour matters. It lies in their discretion whether or not

to award costs. And, as always, they must exercise the discretion judiciously.

70. Proceeding as above, it is a fact that the appellants are largely unsuccessful in this appeal. We would have been willing to consider an award of the costs herein to the respondent. But the respondent did not appear in this Court since they did not comply with the procedural prescriptions and could not be heard, as earlier indicated in this judgment. Strictly speaking, they are not, the successful party. The appellants are just not successful. Each side will therefore pay its own costs. We so order.

Pronounced at Blantyre this 13th day of May 2025.