

**DECENT WORK AGENDA for WOMEN; RIGHT to
EQUALITY and NON DISCRIMINATION IN
EMPLOYMENT**

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ABSTRACT

This paper provides a synopsis of case studies in the Industrial Relations Court of Malawi (hereinafter referred to as IRC) involving discrimination of women in employment. The sample of cases used shows that IRC approaches women's cases from a blend of economic efficiency and human rights perspective. This approach takes into consideration the fact that we cannot be talking about globalization of the economy without an infusion of globalization of social justice. Women have been marginalized in all spheres of life including the workplace. Effects of economic globalization are passing women by because they are not fully integrated into the economic arena in terms of decision making and participation in the global economy on equal footing with men. It is clear that there is a huge income gap between women and men. As a result women continue to be inferior to men. The superiority complex that men have over women combined with cultural beliefs that women are a man's property to be dealt with as the man pleases¹ has a direct impact on how women are treated in the workplace. Cases of gender discrimination are common although it is only a few bold ones who report these cases to authorities for redress. The rest accept discrimination as part of life because discrimination of women is institutionalized and deeply entrenched perpetuated by poverty whereby women are made to feel grateful for having a job at all. It is the few cases that have been adjudicated upon that form the basis of this paper. The main objective is to show different forms of discrimination against women as a means of raising awareness with the overall objective that when faced with similar situation women will take appropriate action with knowledge that the state will protect them. This in itself is a way of empowering women because discrimination brings about feelings of disempowerment and rejection, two factors that hinder women's full participation in the global economy. The IRC as a state agent has utilized the broad and purposive interpretation of relevant laws to raise the floor for rights of women at work. It is however noted that the IRC has made these specific inroads mainly because of its relaxed procedural framework, special training on handling labour discrimination cases, conducive court practice and policies on handling discrimination cases and a generally accommodative legal framework whose intention is to foster equal access to resources including employment as a means of achieving true development. No woman should fight for her place in society and no woman should give up her dignity to access employment and its benefits. Human dignity is not for barter and should never be for barter².

¹ The Malawi culture allows men to have more than one wife and to treat women as they would treat their children because women are part of the man's property

² A contribution by one of the participants at the World Conference on Social determinants of health, Rio de Janeiro, Brazil, 19-21 October 2011.

PREAMBLE

On Being a Woman in a Man's World

My personal story gives a general picture of experience of women workers. It brings out a woman worker's experience in pursuit of academic empowerment as a means of gaining employment security and her experience in pursuit of career advancement. It is a two dimensional example that looks at bottlenecks from the family front even before she steps into the world of work where more challenges await.

After graduating from the law school in 1997 three of us from my class went straight to join the Malawi Judiciary, on the same day in January of that year. By this time I already had a baby aged six months old. In 1999 I won a scholarship from the American Association of University Women (AAUW) and I was admitted to pursue a Master of Laws degree at Indiana University, Bloomington in the United States of America (USA). I arrived in Indiana on 30 December 1999. In January 2000 I received an express mail from my husband informing me that he had moved out of the house. The marriage was over. The reason was because I cared more for my family and friends than I cared for him. He left my then two and half year old daughter in the custody of my sister. I had a return ticket to Malawi. My first reaction was to take the next flight back and either beg him to come back or at least so that I could take care of my daughter. Obviously my academic advisor Ms Lisa Farnsworth, bless her heart, advised me otherwise and encouraged me to forge ahead and get my degree. I poured out my heart to a fellow Malawian Dr Linda Semu who was studying towards her doctorate degree in sociology. She invited me to meet some ladies from across Africa who was also pursuing postgraduate studies. It transpired that their marriages had broken down, for some of them similar to my situation, i.e. expressly, for others silently, just a black-out on communication from home.

Fast forward to 2007

My two colleagues and I were eligible for promotion to the High Court as Judges. We all responded to the internal advert. By then I was the most senior in the judiciary hierarchy among my said two colleagues. To also add that I was the only one then with a post-graduate degree obtained in 2000. My seniority came about after a competitive interview back in 2004. One of my colleagues was promoted to the position of judge. Three years later, in 2010, another advert for judges was issued. I and my colleague applied for the position. He was offered the job. In both cases no interviews were held. There was no information as to why my colleagues made it and I failed to make it. In view of the fact that I was not told why I failed on two occasions to get a promotion, I assumed that I failed to make it not based on merit but based on the fact that I am a woman and my colleagues are male. However my brother, a senior citizen has a different reason for my failure to get a promotion. He says it's because, 'you have

not given it to whoever is responsible for your promotion.’³ Another advert for position of judge was released in January 2012. I have this time round not submitted an application because I don’t see what has changed in me that would influence my promotion. Further, I don’t want to subject myself to the subsequent feeling of rejection and disempowerment which can be demoralizing especially where reason is not given for the rejection.

BACKGROUND

Malawi is situated in Southern Africa. It was colonised by Britain in 1889 and was called Nyasaland and was part of the British federation with Northern and Southern Rhodesia. It is bordered by Mozambique, Zambia and Tanzania. It is a landlocked country spread over 118 500 square kilometres. Twenty percent of this land is covered by fresh waters of Lake Malawi, renowned for its sandy beaches and one of the largest variety of fish species, the most famous being the colourful cichlid. Lake Malawi is in the rift valley and is also shared by Mozambique. The lake meanders into the Shire River which drains into the Zambezi River in Mozambique. The Shire River starts from the south end of the lake and joins the Zambezi River 250 miles (400 km) farther south in Mozambique.

In attempt to open up Malawi to the seas, the government constructed a waterway along the Shire River to allow small water vessels to sail between the Indian Ocean and Malawi through the Zambezi River. This project was suspended after the Mozambican Government objected to use of its waters. The reason was that an Environmental Impact Assessment was not carried out to the satisfaction of the Mozambican Government. A trial barge which was on a mission from the ocean side to inaugurate the waterway, named the Nsanje Inland World Port was captured and detained in Mozambique by authorities of that country.

Malawi has 16 million people. Women constitute 52 percent of the population. It has a labour force of close to 6,100,000, of these only 440,000 work in the formal sector. Agriculture industry contributes 80 percent to the labour force. Over 50 percent of the population lives below the poverty line⁴. Deep and severe poverty is more pronounced in female headed households⁵. Statistics show that more working women than men are poor⁶.

³ My brother is not conversant with the promotional system in the Judiciary. He does not know who makes the decision and how. He in no way was referring to a particular individual. It was a general statement made from his personal opinion of the issue, in this case, why I was not being promoted.

⁴ National Statistical Office of Malawi. Integrated Household Survey of 2004/2005. www.nso.malawi.net

⁵ National Economic Council of Malawi, 2000, The State of Malawi’s Poor: Poverty Analysis of the Integrated Household Survey 1997-1998

⁶ GOM; 2010. Employment Diagnostic Analysis on Malawi

Prepared for the Government of Malawi by Professor Dick Durevall and

Dr. Richard Mussa, with assistance from the International Labour Organisation

June 2010 (Sources: Welfare Monitoring Survey 2008 and 2008 Population Census (NSO, 2009a, 2009b).

The employment ratios, i.e. the number of people working as a share of the population are also high, 86 percent for all, and higher for women than for men. However, the ratios are too high; values over 80 usually indicate that there are many low-quality jobs. This interpretation is supported by the large number of working poor, 2.43 million, or 40 percent of the labour force, as well as the large share with vulnerable employment, 86 percent. There is also a substantial gender bias; the share of women in wage employment is only 20 percent. When combined with the large female employment-to-population ratio, (87 percent for women and 84 percent for men) it is clear that most women work in agriculture and the informal sector⁷.

Factors contributing to working women's poverty include the fact that they are employed in low paying jobs and in the informal sector. Other factors are illiteracy, ignorance, poor self confidence, dependency, HIV/AIDS and power factors whereby women hold junior positions and hence have no influence in decision making. These factors expose women to discrimination in the workplace.

The above situation calls for the state to take deliberate measures that support human rights for all and outlaw discrimination. Malawi can effectively participate and enjoy fruits of globalization if its labour laws and policies promote equity because there is no real development without equity. Globalization of social justice should begin with women empowerment. Women have traditionally been left out in development agenda, with globalization, it is expected that the trend will begin to change and that tangible results will be noticed as proof of women's involvement in development. Girls need good education. It has a direct impact on empowerment which in turn can prevent many social injustices against women like discrimination and HIV. For working women opportunities must be made available to them to advance and where necessary affirmative action should be promoted to enhance their decision making power. Although the laws are conducive to promoting women, there is need for political will to put in place mechanisms that will effectively see the laws put into practice. Political will is crucial to bring about social justice because men dominate decision making position. It is through sheer will that they can make decisions that positively impact on women. Men control the budget, for instance, Malawi Parliament has 193 members out of which only 47 are women. To counter this under representation, Parliament can establish a special committee of parliament on women's affairs to address existing inequities and protect women against unfair discrimination.

Law and institutions of human rights alone are not good enough when what is needed is action at political level to reduce inequities in society. The State as a duty bearer must raise the floor for rights at work for women by moving from rhetoric to action. It is often said by our politicians that women are agents of change. It is time to show political commitment by investing in women and girls to bring about social, economic and political development. Women should move out of the poverty zone.

⁷ Ibid

It is the view of the International Labour Organization (ILO) that ‘the main route out of poverty is work’⁸. However it is not just work that will reduce poverty in women; it ought to be ‘decent’ work; this is work that is productive, obtained in conditions of freedom, equity, security and human dignity. In order to achieve decent work, the ILO has identified four priority areas, which Malawi has endorsed and these are; promotion of rights at work and core international labour standards, employment creation and enterprise development, social protection and social dialogue. The ILO recognizes that different countries will experience different challenges in securing decent work for its men and women. The ILO therefore offers support through integrated decent work programmes⁹ mainly “to define priorities and targets within national development frameworks and aim to tackle major decent work deficits through efficient programmes that embrace each of the strategic objectives”.¹⁰

In relation to women, the ILO vets decent work programmes to ensure that they include gender equality in their design and implementation¹¹ because gender equality is one of the main themes underpinning each of the four dimensions of decent work.¹² In line with the ILO Decent Work Agenda, Malawi has developed the Decent Work Country Programme, the goal of which is to contribute to the objectives of the national development agenda through improved gainful, secure and rights-based employment for the youth, women and men. Tripartite social partners identified three priority areas to realise this goal. These are:

- (1) Creating more and better employment and income generation opportunities, particularly for the vulnerable groups including the youth, women and people with disabilities, as well as ensuring the elimination of the worst forms of child labour;
- (2) Enhancing and extending the coverage of social protection; and
- (3) Building the capacities of the government and social partners to improve service delivery.

Priority one restates earlier observations on securing empowerment of women through gainful employment. For example, at the follow up to the 4th World Conference on Women, it was agreed that “as a matter of priority Malawian women should be empowered in the areas of agriculture production, health and fertility control, access to factors of production, economic employment, and environmental and resource management” [GoM, 1997: 7]. In this regard, the State and its agencies are obliged to create an enabling environment that will see women participating fully, effectively and on equal terms with men in economic activities.

⁸ This observation was recently confirmed by African Union (AU) Ministers of Economics at their meeting held in Lilongwe, Malawi.

⁹ See www.ilo.org.

¹⁰ See www.ilo.org.

¹¹ Second Supplementary Report: Stocktaking of implementation of the ILO Action Plan for Gender Equality, 2008-2009 [GB 304/14/2, 304th Session].

¹² See www.ilo.org.

The role of labour rights in the economic empowerment of women therefore derives from the fact that without guaranteed labour rights the economic empowerment of women is jeopardised. Women require a high status in society that will empower them and enable them to make informed choices and decisions without fear of harassment or coercion. Employment has this effect on women. Through decent employment, women have power to enjoy their human rights. These rights include health rights, education, access to essential services including legal services and productive resources, e.g. credit facilities and insurance benefits.

Legal Framework

Malawi has no special legislation that outlaws discrimination against women. However women in Malawi are guaranteed rights and freedoms in the Constitution. Issues relating to women are addressed alongside other labour issues and general non-discriminatory provisions. The constitutional provisions call for equal and fair treatment. They provide for enabling legislation that will ensure equality and non-discrimination;¹³ affirm rights in relation to employment conditions and labour relations such as fair and safe labour practices including remuneration, trade unionism and freedom to work;¹⁴ access to basic services and special consideration for potentially vulnerable groups such as women, children and the disabled.¹⁵ In addition, the Constitution stipulates that children are entitled to be protected from economic exploitation or any treatment, work or punishment that is likely to be hazardous, interfere with their education or be harmful to their health or to their physical, mental or social development.¹⁶ The Constitution also prohibits slavery or servitude, forced labour or bonded labour that amounts to servitude.¹⁷ Other relevant provisions are section 13 on principles of national policy, especially section 13(a) on gender, section 22 on family and marriage and section 46 on enforcement of rights and freedoms.

The Constitution specifically provides in section 24(2) that: “Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as discrimination in work, business and public affairs.”¹⁸

Furthermore, the Employment Act 2000 contains comprehensive legislation on employment.¹⁹ The objective of the Act is “to establish, reinforce and regulate minimum

¹³ Sections 20 and 24 of the Constitution.

¹⁴ Section 31 of the Constitution.

¹⁵ Section 30 of the Constitution.

¹⁶ Section 23 of the Constitution.

¹⁷ Section 27 of the Constitution.

¹⁸ So far no special legislation has been passed to address particular issues relating to women. The Wills and Inheritance Act is undergoing reform to specifically provide for the woman’s share of the deceased’s property. Another piece of legislation is proposed to deal with matrimonial property at dissolution of marriage.

¹⁹ The Employment Act draws from and replaces earlier legislation that regulated employment, namely, the Employment Act (Cap. 55:02), the Regulation of Minimum Wages and Conditions of Employment Act (No. 14 of 1964) and the Employment of Women, Young Persons and Children Act (No. 22 of 1939) as amended in 1963.

standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice”. Relevant provisions for purposes of this discussion include section 5(1) on anti-discrimination, section 5(2) on affirmative action/positive discrimination, section 5(3) on discrimination as a criminal offence, section 6 on equal pay, section 7 on remedies for breach of fundamental labour rights, section 47 on maternity leave, section 48 on right to return to work after maternity, section 49 on prohibition of termination of employment on grounds related to pregnancy, section 57(3)(a)(d) on discrimination in dismissal or disciplinary action and section 35(8) of the 2010 Act on deceased estate benefits.

Malawi has ratified the two core ILO conventions dealing with discrimination, namely, Convention 100 (Equal Remuneration, 1951) and Convention 111 (Discrimination – Employment and Occupation, 1958). As a result of the ILO’s participation in fulfilling the decent work agenda, women’s entrepreneurship development and gender mainstreaming are already being applied by the UN system in Malawi to enhance economic empowerment of women.²⁰ However Malawi is yet to ratify Convention 156 (Workers with Family Responsibilities) and Convention 183 on Maternity Protection.²¹

Policy Framework

The Constitution compels the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving among other goals, gender equality. It is envisaged that gender equality shall be achieved through:

- (i) Full participation of women in all spheres of Malawian society on the basis of equal opportunities with men;
- (ii) The implementation of the principles of non-discrimination and such other measures as may be required; and
- (iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

Although principles of national policy do not bind the courts in decision making, they are important because people in decision making positions including the courts can be guided by them and use them as basis for arriving at a particular decision. Further concerned groups can use policy to lobby government to address particular issues. Malawi established National Gender Policy which was launched in 2000 and National Gender Programme of 2004. It is party to the SADC Gender Protocol, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

Through policies, Malawi has set a goal of ensuring that by 2015 there shall be equal representation of women and men in all areas of decision making in the public and private sectors. Furthermore, the DWCP has activities aimed at promoting the rights and conditions of working women.

²⁰ ILO Participatory Gender Audit Tool (DWCP, 2009).

²¹ See Report VI, ILO, 2009.

Whether women need special labour laws

It is argued that too much legislation/regulation is not good for anyone. It is counter-argued that in special cases where there is a clear need to address specific issues; legislation may be the only solution. It is argued that legislation makes the law clear. It removes ambiguities; it provides certainty, predictability, consistency and uniformity. Therefore it avoids corruption and a *laissez-faire* attitude in handling issues. As a result, the law engenders confidence in members of the general public to use the courts as the outcome is often predictable.

Due to the vulnerability of women in society, there is the need for further provision of clear laws that address issues relating specifically to women as opposed to relying on laws of general application. It is shown that discrimination against women in the workplace is rampant and it takes various forms. Therefore the law on discrimination must be strengthened so as not to leave any loopholes in its interpretation and application. For instance, there is the need for clear definitions of discrimination. However, the definition should be open-ended to avoid being too restrictive. Direct discrimination is not really an issue since employers or public and private institutions are not blatant in their discriminatory tendencies against women. They rather use indirect discrimination. One such form of discrimination is associative discrimination.

The law must therefore be formulated in recognition of these particular issues concerning women. An example of legislation which has taken steps to provide specifically for women is the Employment Act 2000. It provides for special leave considerations for women on maternity leave who cannot return to work immediately due to ill-health arising from child birth or illness of the child. The EA provides for maternity leave, however, if after the maternity leave has expired and the mother or child is not well, section 47(3) of the EA states that the employer “shall grant the employee additional leave as the employer may deem fit”. This provision has several benefits for the female employee. Some of these benefits include:

- Employment security;
- Job security;
- Career progression;
- Continuity of service;
- Promotions;
- Training opportunities;
- Allowances, gratuity, redundancy benefits, pension, overtime;
- Productivity due to peace of mind arising out of the health of the mother and child; and
- Income security.

Institutional Framework

Laws and policies must be supported by an effective institutional structure. This is why the Constitution does not only guarantee labour rights but it also established the IRC to protect, promote and enforce labour rights and freedoms. The IRC is the only specialized court created in the Constitution of Malawi. It is a clear manifestation of the intention of the framers of the Constitution that they intended labour rights and freedoms to be fully and adequately enforced. This is why it is important to highlight some of the important work that the IRC has done in effecting the spirit of the Constitution especially regarding women as a vulnerable group in the workplace requiring special recognition.

The IRC is a subordinate court within the judiciary. It has a constitutional mandate to interpret the laws. Appeals from the IRC go to the High Court. An aggrieved party can only appeal on matters of law and jurisdiction. Findings on fact are final and binding. The courts have an important role to play in the promotion of decent work for women. The role of labour judges and magistrates in ensuring non-discrimination and a supportive working environment is crucial. Policies and legislation that outlaw discrimination in the workplace and provide prevention measures and social protection will have little effect unless they are strenuously enforced in labour courts that are accessible [ILO, 2005: 2]. For instance, pillar number four of the decent work agenda will not be achieved if the courts are ineffective. This pillar provides for promotion of rights at work and core international labour standards. In applying this pillar and in view of the fact that many issues are not legislated, e.g. HIV/AIDS, sexual harassment and discrimination, it may be necessary for the courts to apply the rights-based approach over and above common law principles. This is the approach adopted by the ILO which recognises that labour judges and magistrates should assess the effectiveness and relevance of current laws and add their voices to calls for law reform where necessary and possible. They are able to work with parliamentarians, government, social partners and other experts to help ensure that an effective regulatory framework is in place to eliminate workplace discrimination [ILO, 2005].

IRC as stepping stone in raising the floor for rights at work

Malawi is a common law jurisdiction. Courts not only interpret the law but they also make law. The advantage of this system is that a court may interpret any relevant legal provision broadly to incorporate needs of a particular vulnerable group of people. In some cases legislation follows case law. As a result many individuals are guaranteed some protection of human rights even where no specific legislation addresses a particular issue. In cases of HIV in the world of work for example, the IRC has found that it is a form of discrimination to dismiss an employee on the basis of her HIV status²². This is despite the fact this provision does not appear anywhere in the Malawi labour laws. The IRC has also utilized its pre-hearing procedure, which is a conciliation process intended for out of court settlement of cases especially involving discrimination. Cases are settled because an employer is advised at this process that it is a violation of human rights to discriminate an employee on any ground. The procedure provides a more informal setting that promotes dialogue; there is no expectation of fault finding, confrontation or judgment.

²² Banda v Lekha [2008] MLLR 338 (IRC)

Apart from finding that it is a violation of human rights to discriminate against a person on the basis of gender or sex, the IRC has taken deliberate steps to create a conducive environment for resolving cases alleging discrimination in particular cases where the victims are women, such as sexual harassment. These measures include expedited hearings, confidentiality policy and recommendations and referrals for state legal aid in serious violations.

Although there is no specific legislation dealing with equality or anti-discrimination the IRC has found sexual harassment as a form of discrimination²³ and has decided in favour of women where they have alleged discrimination on the basis of sex²⁴. The decisions have been based on purposeful interpretation of the Constitution and international instruments to which Malawi is a party. Other notable cases included in this study involve discrimination of women on the basis of pregnancy²⁵, gynecological complications²⁶, maternity²⁷ and marital status²⁸.

It is clear from the case studies that the IRC has utilized its procedural framework and rules of practice to raise the floor for rights at work. This has been enabled by the general Constitutional and statutory provisions. However this approach has at least two limitations. Firstly, similar procedures are not available in the judicial hierarchy where more emphasis is placed on technicality and form than substance and the primacy of fact and secondly, the approach envisages a judicial officer that appreciates the need for a rights' based approach either through experience or specialized training to focus on issues of vulnerability and marginalization.

The IRC has a distinct advantage as a specialized court whereas the rest of the judicial system is not. It follows therefore that protective legislation is required to provide standards and uniformity in judicial decisions affecting women and other vulnerable groups. Such legislation must be supported by a responsive institutional framework that promotes access to information, justice and equality. It must enhance capacity of both law enforcement officers and victims to enable them challenge discriminatory practices, seek legal redress and realize their rights. Malawi can therefore achieve global socioeconomic growth where women are active participants in economic development and enjoy the benefits of such development. As it is often said, there is no true development without equity.

The study has shown however that regardless of the conducive legal framework, fewer women than men report labour violations to the authorities. For example, it is shown that of the 3 546 labour complaints lodged with the IRC, only 350 cases (representing

²³ Kamkosi v Office of the Ombudsman [2008] MLLR 418 (IRC); Nazombe v Malawi Electoral Commission [2008] MLLR 460 (IRC) and Ntaba v Continental Discount House [2008] MLLR 472 (IRC)

²⁴ Hlongo v Pegas Panel Beaters [Matter Number IRC 563 of 2007 (unreported)] IRC

²⁵ Jumbo v Banja La Mtsogolo [2008] MLLR 409 (IRC)

²⁶ Chinkondenji v Malawi Stock Exchange [2008] MLLR 379 (IRC)

²⁷ Chisowa v Ibrahim Cash 'n Carry [2008] MLLR 386 (IRC)

²⁸ Jana v Attorney General [2008] MLLR 391 (IRC); Kaunda v Tukombo Girls Secondary School [2008] MLLR 446 (IRC) and Mwanamanga v Malamulo Mission Hospital [2008] MLLR 457 (IRC)

9.9 percent) were brought by women.²⁹ Poverty, ignorance of the law, illiteracy, low self-esteem, scepticism, fear and pressure of traditional and biological roles are some factors that prevent women from pursuing their labour rights. Furthermore, complex court processes, costs and delays hamper women's access to legal remedies. In addition, some court officials, including judges and lawyers, are not conversant with the concept of fair labour practices and therefore fail to assist women adequately. These are just some of the factors that dissuade women from accessing the courts. There are other subtle factors that prevent women from enjoying their rights at work. Most women will not take legal action because a violation does not present itself in the conventional way. For instance biological and cultural factors hinder career advancement of women in the form of unequal access to employment benefits like training, promotion and transfers. Biological factors include procreation. While women take time off to bear children and raise them, the job market does not stop to wait for them. Technology and other structural changes move on and sometimes leaving the women behind. The women are consequently prone to redundancies.

Women as custodians of culture have a responsibility to meet demands imposed on them by their culture; for instance, holding vigil at funerals and participating in cultural life at the expense of work. Women as care takers have an added responsibility of taking care of children and family members in times of illness. They take children to hospital for vaccinations and for treatment at risk of losing out at work. Sometimes women are not discriminated against because they have any problem but because they are responsible for other family members who may have problems of disability or ill-health requiring constant attention and presence of the working woman.

The above form of discrimination is referred to as associative discrimination. This is an extension of discrimination that is not regulated in Malawi. It refers to discrimination of an employee which is not based on his/her own disability but based on the disability of an individual whom the employee is associated with through family or other social or legal connection. This form of discrimination has been developed in Europe through a judgment of the European Court of Justice (ECJ) in *Coleman v Attridge*.³⁰ The ECJ held that disability discrimination included associative discrimination. In extending this principle to discrimination issues relating to women, it is argued that women in Malawi are culturally and "naturally" expected to take care of other vulnerable individuals with whom they are associated through family or marriage.

METHODOLOGY

The study took the form of both empirical and theoretical methodologies. It took into consideration available literature on discrimination of women in general and in the work place in particular. The theoretic perspective on women's discrimination was

²⁹ IRC 2010, Statistics of individuals exercising labour rights at the Principal Registry (2003 to March 2010) (IRC, Blantyre). It is acknowledged that women in the formal sector constitute approximately 7% of the entire sector and therefore comparatively more women take cases to court. However, this study was not restricted to the formal sector. It included cases brought by workers from both the formal and informal sector.

³⁰ C-303/06.

authenticated by actual cases decided in the IRC over a period of ten years. Only selected cases were used to highlight different forms of discrimination. The selection was based on the nature and gravity of the discrimination and it avoided repetitions. For instance if one form of discrimination was decided in more than one case, only, one case is highlighted. However where discrimination in a particular form was decided in more than one case but with two distinct set of material facts, then each case is highlighted based on the unique facts. The main body of the paper is based on empirical evidence because (a) actual cases have a more practical effect on the mindset than theory. The actual cases have a human face that may influence legal, policy and behavioural change, (b) most literature on the subject is authored by laypersons therefore it is lacking in legal substance and (c) local cases can be used for comparative study with other jurisdictions unlike theory which tends to focus more on universal trends which may not be accurate where two different countries with huge economic and development gap are concerned.

EMPIRICAL ANALYSIS

Below are selected case studies depicting discrimination of women in the workplace and how the IRC handled the cases. It is noted that none of the decisions in these cases was reversed on appeal.

1. HIV/AIDS discrimination

Although both women and men can suffer HIV/AIDS discrimination, this sample was selected for this study because statistics show that more women than men are infected and affected by HIV. The applicant in *Banda v Lekha*³¹ was dismissed from her employment after undergoing HIV voluntary counselling and testing. She tested positive. She was not ill and had not developed AIDS.

The court found that the employer dismissed the employee using prohibited grounds. Unfair discriminatory reasons are not valid grounds for dismissal. The respondent violated the applicant's right to equality and the right to fair labour practices under the Constitution. The dismissal was declared unfair and the employee was awarded compensation.

Justification for court's decision

Incapacity due to ill-health is a ground for dismissal only where the person is so sick that he/she cannot perform the functions for which he/she was employed.

Unfair discrimination in any form is prohibited under section 20 of the Constitution. It is unfair labour practice to dismiss an employee on grounds of HIV positive status. The reason for dismissal was discriminatory therefore unjustified.

2. Gynaecological complications

³¹ [2008] MLLR 338 (IRC).

In this case the court considered a number of issues including the need for women to be vigilant in taking action to enforce their rights. Although men can experience similar discrimination, this case is unique because it involves a peculiar ailment that only women can suffer from as it is related to a woman's biological make-up.

In *Chinkondenji v Malawi Stock Exchange Ltd*³² the applicant worked as Administrative Assistant. In the course of her employment she fell ill and had to undergo a minor gynaecological operation (D&C). Upon her return from sick leave she was advised to work in the reception area. Although her salary and benefits remained the same she felt that working at the reception was a demotion in rank. She filed an application for urgent interim relief for an order for reinstatement to her former position of Administrative Assistant. The court allowed the action and ordered reinstatement:

Justification for court's decision

It is demotion even if one receives the same salary and benefits and yet is asked to perform duties of a lower rank.

It is unfair labour practice to demote an employee on ground of incapacity without seeking professional opinion.

It is unfair labour practice to make a unilateral decision to demote an employee without giving her an opportunity to be heard.

An employee must be vigilant by immediately seeking legal redress in the form of interim urgent relief as soon as her rights are violated.

3. Pregnancy

In *Jumbo v Banja La Mtsogolo*³³ the employee was employed as a Nurse Aid in November 1999. In early 2001 her employer discovered that she was pregnant. She was admonished for falling pregnant at the 'wrong time' and advised her that she would not be granted maternity leave. In June 2001 the employee was dismissed. The employer refused to give her a reference letter arguing that she was a temporary worker therefore she was not entitled to a reference letter. The employee took out action claiming unfair dismissal and sought remedy of reinstatement. The court granted her prayer.

Justification for court's decision

Pregnancy is not valid ground for dismissal.

Dismissing an employee on ground of pregnancy is a criminal offence punishable with fine of MK400 000-00 and imprisonment for five years.

³² [2008] MLLR 379 (IRC).

³³ [2008] MLLR 409 (IRC).

On termination of a contract of employment, an employer, if so requested by the employee, shall provide the employee with a certificate of termination.

4. Maternity leave

In *Chisowa v Ibrahim Cash 'n Carry*³⁴ the employee engaged as a casual labourer. She was later promoted to a more permanent position of Sales Lady. There was no written contract. The parties orally agreed on terms and conditions of employment. The employee went on maternity leave. She was dismissed immediately upon her return. She challenged the dismissal alleging that reason for dismissal was not valid. She prayed for reinstatement. The employer opposed the claim arguing that the employee was a casual labourer therefore not entitled to any employment benefits. He argued that the reason for dismissal was theft.

The court raised a number of issues concerning employment. Many women find it difficult to secure permanent employment. Usually they are employed as casual labourers or on fixed short-term contracts. The court, considering all the facts, brought into operation various provisions of the law to protect the employee. The court considered section 3(b) of the Employment Act 2000 (hereinafter referred to as EA) which defines employee. It found that the applicant was an employee in terms of the provision. The court also considered section 27 of EA which places on the employer the duty of drawing up written particulars of employment and providing the employee with a copy of the particulars. The court found for the employee.

Justification for court's decision

A female employee shall be entitled, within every three years, to at least eight weeks maternity leave on full pay.

Upon the expiration of her maternity leave, an employee shall have the right to return to the same job with the same benefits and entitlements as immediately before her absence.

In order to buttress its decision, the court applied section 11 of the Constitution and section 2 of the Labour Relations Act 1996 which empowers it to refer to foreign case law to support its decision. The court then used *Brown v Stockton-on-Tees Borough Council*³⁵ where the House of Lords considered section 60 of the Employment Protection (Consolidation) Act of England. This provision is similar in effect to section 49 of the EA.

In determining the appropriate compensation to award the employee, the court observed that the employer had violated a fundamental right of the employee, namely, the right to fair labour practices when it dismissed the employee on account of her pregnancy. This fundamental right is protected in the Constitution. In terms of section 48(2) of the EA, the violation of this fundamental right attracts a fine and imprisonment. The court held that in

³⁴ [2008] MLLR 385 (IRC).

³⁵ [1988] IRLR 263 HL.

addition to the penalty imposed under section 48(2) it may order the employer to reinstate the employee, who shall be treated in all respects as if her employment had not been terminated, and may further order compensation as specified in section 63(1)(c) of the EA.

The law further guarantees women employment in cases where their jobs are declared redundant due to economic, technological or organisational requirements of the enterprise while they are on maternity leave. Under such circumstances, the employer is obliged to find and offer the woman alternative employment.³⁶

Section 48 (a) of the EA suggests that a woman may take time off to take care of biological requirements relating to child-bearing. This section can be used as basis for legal protection of women where demands relating to nature or culture tend to hamper their career development.

5. Sexual harassment

Sexual harassment is violence against women as recognised by CEDAW General Recommendation No. 12 of 1989. Both the ILO and CEDAW consider acts to constitute sexual harassment when the victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruitment, promotion or when it creates a hostile working environment. Sexual harassment can take any or more of the following forms: insults, remarks, jokes, insinuations and inappropriate comments on a person's dress, physique, age, family situations, and a condescending or paternalistic attitude undermining dignity, unwelcome invitations or requests that are implicit or explicit whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching, caresses, pinching or assault. It is acknowledged that men may also be subjected to sexual harassment. However, due to the vulnerable position of women and their status in society, it is more likely that women and not men will encounter sexual harassment at the workplace.

The applicant in *Kamkosi v Office of the Ombudsman*³⁷ was employed as Personal Secretary to the Ombudsman. She alleged that the Ombudsman created a hostile working environment that adversely affected her work. She stated that her relationship with her boss, the Ombudsman, became sour following a series of events that the court found to constitute acts of sexual harassment. One instance of sexual harassment related to an incident where the employee said that while attending training in 1999 in Blantyre, the Ombudsman pestered her with small notes inviting her to join him for dinner. She further alleged that on 23 January 2002 while out of town and on duty with the Ombudsman she was invited to work after hours in the evening. The employee's response was non-committal as she thought the Ombudsman was joking. This offended the Ombudsman who, upon return to the office, ordered that she be removed from his office and cease serving him as his Personal Secretary.

³⁶ Section 48(1) (a) of the Employment Act.

³⁷ [2008] MLLR 418 (IRC).

The respondent, without hearing the applicant's side of the story, proceeded to have the applicant removed from her office into a dirty, poorly ventilated office which had no furniture, no computer and no telephone. The court had to determine whether or not the respondent's conduct was fair and whether or not this conduct amounted to constructive dismissal. The court allowed the action and held that the Ombudsman had sexually harassed the applicant.

Justification for court's decision

It is unfair labour practice to subject an employee to a hostile working environment due to her strong stand not to give in to her boss's demands to have dinner with him. The invitations for dinner were unwelcome and constituted sexual harassment. It is unfair to shift an employee to a dilapidated office with no facilities as punishment for refusing to be abused by the boss.

5.1 In *Nazombe v Malawi Electoral Commission*³⁸ the employee Personal Secretary to the Chief Elections Officer (CEO). However, in the course of her employment, she was removed from the Office of the CEO and placed in a junior office to serve the Deputy Chief Elections Officer. She was further moved to yet another office to work as Copy Typist. This was after she had a misunderstanding with her boss regarding some issues while attending a workshop at a lakeshore resort. The applicant regarded this conduct as unfair because financially she was disadvantaged. She sought an order of reinstatement. She also sought an order for damages for mental torture due to the ill-treatment and an award of allowances which she was deprived of receiving because she could no longer attend workshops. The court allowed the action and ordered reinstatement.

Justification of court's decision

By virtue of occupying a lower office and being asked to perform work as a Copy Typist, the applicant was put in an office of a lower category. Although her salary remained the same, she was told to hand over her cell phone and she was deprived an entitlement to attend workshops which would earn her allowances. This was a clear indication that she was now reduced to a different category which was lower. This was constructive demotion.

5.2 In *Ntaba v Continental Discount House Ltd*³⁹ the employee was a Pool Secretary. Two weeks after she commenced employment, the Head of Operations (HO) called her to his office. He briefed her about the office procedures and how she was to conduct her work. The HO then proceeded to enquire from her on how she spent her weekends. He then requested her to consider if during one of those weekends she would accompany him to a lakeshore resort. The applicant declined the offer.

³⁸ [2008] MLLR 460 (IRC).

³⁹ [2008] MLLR 472 (IRC).

After this conversation the HO's attitude towards her changed. He ignored her and behaved as if she did not exist. An incident occurred whereby the applicant was accused of offending the HO and was asked to apologise. The applicant apologised to the HO through a memorandum. The HO eventually assumed the position of Chief Executive Officer (CEO) in the respondent organisation. The CEO continued to ignore the applicant and treated her differently from the other staff. She indicated, for example, that she applied for an educational loan which the CEO did not approve whilst another employee's loan for a much larger amount was approved. The applicant alleged that her services were terminated because she refused to go to the lake with the boss.

The court allowed the action on a technical point that she was not accorded a fair opportunity to be heard before dismissal. The court dismissed the allegation of sexual harassment.

Justification for court's decision

One incident of sexual harassment cannot constitute sexual harassment.

5.3 In *Phiri v Smallholder Coffee Farmers Trust*⁴⁰ the employee was a Security Guard on a renewable fixed-term contract. In the course of her employment she was nearly raped by a fellow male employee. Upon taking the matter up with the employer she was accused of misconduct for having gone public about the incident. Her contract was not renewed. No reason was given for failure to renew the contract. She took out an action against the employer contending that her contract was terminated without justification and that she had been a victim of sexual discrimination and sexual harassment. The court found in her favour.

Justification for court's decision

The court agreed with the employee that it was reasonable for her to think that her contract would be renewed and that the employer's failure to renew the contract was based on her reporting the attempted rape incident.

The EA, the LRA and the Constitution prohibit unfair discrimination in all its forms. Sexual harassment is a form of discrimination on the basis of gender.

The respondent breached an implied contractual term of employment relating to mutual trust and confidence. The employer had a legal obligation under the contract to protect its female employees.

The reason for dismissal was unfair and invalid. The respondent violated the applicant's right to fair labour practices, the right to work, the right to a safe working environment and personal dignity.

⁴⁰ [2008] MLLR 482 (IRC).

Dismissal on grounds of discrimination is prohibited under section 57(3) of the EA. Where a court finds that a dismissal was based on any of the prohibited ground, the court may make an additional award in terms of compensation over and above the general compensation.

In the English case of *Bracebridge Engineering Ltd v Darby*,⁴¹ the court held that failure by the employer to treat an allegation of sexual harassment seriously is a breach of the implied contractual term relating to mutual trust and confidence. The implied contractual term relating to mutual trust, confidence and support is an extremely important one for female employees.

6. Sex

*Hlongo v Pegas Panel Beaters*⁴² involved failure by the employer to provide separate changing rooms for female employees. The employee who was working in workshop was compelled to use men's changing rooms despite her protests. This protest resulted in her dismissal. She challenged the dismissal. The court found in her favour. She was awarded compensation.

Justification for court's decisions

The employer failed to contradict by way of evidence that the only reason they terminated the applicant's contract was because she was female and the employer did not want to provide her with separate changing facilities.

7. Marital status

Although both men and women may face discrimination on the basis of their marital status or the marital status of those they are associated with, it is important to highlight this case because Malawi has very few women in decision-making positions and it is against policy on women's empowerment to discriminate against a woman because of marital status.

In *Jana v Attorney-General*⁴³ the employee took out an action against the Government of Malawi claiming discrimination in the manner that her transfer from District Assembly to Ministry of Persons with Disabilities was conducted; the failure of the government to promote her to Principal Secretary and the refusal of the government to retire her on the basis of a voluntary retirement scheme. The employer denied all the allegations. Brief background to the case was that the employee was a senior officer in the public service serving as District Commissioner. She was also a sister in-law of a politician in opposition. The court found for the employee.

⁴¹ [1990] IRLR 3 EAT.

⁴² Matter Number 563/2007 (unreported) IRC.

⁴³ [2008] MLLR 391 (IRC).

Justification for court's decision

In claims for discrimination, unlike unfair dismissal under section 61(1) of the EA, the burden is on the party who alleges to show on a balance of probabilities that he/she was treated in a discriminatory manner. The burden then shifts to the respondent to show that the act or omission was not based on discriminatory considerations.

There was no valid reason for not promoting the applicant since she had the necessary qualifications, experience and was regarded by her immediate supervisor as capable and proficient. Furthermore, during this time the government of Malawi was proclaiming its commitment to the promotion of women to responsible positions in the Public Service. The fact that her sensitive background was taken into account was unconstitutional, irrelevant and illegal.

The Constitution guarantees women full and equal protection and prohibits discrimination on the basis of gender or marital status.

The government of Malawi is duty bound under the Constitution and international treaties to promote affirmative action/positive discrimination.

7.1 In *Kaunda v Tukombo Girls Secondary*⁴⁴ the employee and her husband both worked for same employer. The employee's husband resigned from his employment. The employer in turn terminated the employee's employment contract on account of her husband's resignation explaining that her contract was linked to that of her husband's. The court found for the employee and awarded her compensation.

Justification for court's decision

The respondent clearly discriminated against the applicant on account of her marital status;

The effect of the respondent's decision was to prevent married women from seeking and sustaining employment in their own right;

The dismissal was unfair because it violated the applicant's right to fair labour practices and her right to pursue a livelihood through employment. The respondent breached a fundamental human right.

7.2 In the case of *Mwanamanga v Malamulo Mission Hospital*⁴⁵ the employee was a Librarian. She was dismissed for marrying a polygamist. In its letter of termination, the respondent stated as follows: "The administration in its recent meeting of the 18th January 2000 voted to terminate your services with one month notice on the grounds of marrying a polygamist". The employee challenged the dismissal alleging

⁴⁴ [2008] MLLR 446 (IRC).

⁴⁵ [2008] MLLR 457 (IRC).

that the reason was not valid. The court ruled in favour of the employee and awarded her compensation.

Justification for court's decision

All men and women have the right to marry and found a family. The Constitution applies to all marriages at law, custom and marriages by repute or by permanent cohabitation.

It is not a defence that the employer's conditions of service prohibit polygamous marriages among its workforce. Such condition is inconsistent with the supreme law of the land, the Constitution and therefore invalid.

The reason for termination amounted to an interference with the applicant's right to marry a person of her choice: a right guaranteed by the Constitution.

The reason for dismissal amounted to denying the applicant the right to engage in economic activity through employment.

It is not a defence that the respondent's conditions of service prohibited polygamous marriages. Such conditions were inconsistent with the Constitution and therefore unconstitutional and invalid.

CONCLUSIONS AND RECOMMENDATIONS

Role of government and other state agents

The above cases are just a sample of violations of women's rights and freedoms in the workplace. Most women do not take their cases to court. As highlighted above, it is necessary to raise awareness in women of the importance of enforcing their rights while at the same time raising awareness of employers in recognising and respecting women's rights and freedoms. More women should utilise the courts to enforce their rights and freedoms.

There is need for financial and technical resources to be provided for specific gender programmes. Extensive monitoring and evaluation systems in gender programmes should be put in place. Implementation of the programmes will turn gender empowerment programmes into a reality. These can be measured by maintaining and updating a database on women empowerment. The following programmes are crucial to ensure economic empowerment of women:

1 Training

It is now widely accepted that long-term investment in human capital plays a key role in enhancing productivity and growth;⁴⁶ furthermore, that training is a crucial component of

⁴⁶ ILO, Report VI, and 98th Session, 2009: Gender equality at the heart of decent work, ILO, Geneva.

the flexicurity approach as it improves the female employee's capacity to adapt to change in the labour market. Training is an essential element for career advancement through enhanced skills and competencies. A woman with higher educational qualifications and professional skills stands a better chance of negotiating favourable terms and conditions of employment than a woman with little or no educational background or skills.

Tertiary education also plays a crucial role in skills development in women. It gives them an edge over other unskilled people. Jobs such as nursing, which are traditionally performed by women, are still lucrative as they provide security of tenure and status in society. This is apart from the other benefits derived from the knowledge of health issues which the nurse can impart to her family.

It is viewed as a State's responsibility to initiate programmes, policies and special measures for the implementation of indigenous women's economic and social conditions through support of their traditional occupations and expansion of alternative employment opportunities if they so choose.⁴⁷ For instance, nursing is a female-dominated occupation. It is estimated that women make up two-thirds or more of the workforce in the health and education services sector. On the other hand, women also dominate areas such as tourism and clerical positions which have been the most affected by the recent global economic crisis and have led to layoffs through retrenchments and redundancies.⁴⁸ It would be surprising therefore if one day the government came up with a policy to remove fees subsidies on nursing training thereby making access to nursing colleges unattainable for many women.

The ILO is concerned with government's reluctance to introduce measures to address unequal access of women to training and education at all levels and the lack of statistical information on the participation of women in training and education.⁴⁹

2 Economic policies

There is the need for deliberate policy to encourage both public and private employers to recruit women and appoint deserving women to decision-making positions. The South African government has achieved this by awarding government contracts and business to companies that can show that they have women in decision-making positions. This is a form of affirmative action which is encouraged in Malawi laws.

3 Legal awareness

Knowledge of the basic legal tenets is important for women so that they are able to assert themselves in society. Lack of basic knowledge of labour rights and human rights expose women to exploitation in the workplace. Women must therefore learn human rights as part of their preparation for adult life.

⁴⁷ ILO, Report VI, 2009, Geneva at 5.

⁴⁸ ILO, Report VI, 2009, Geneva.

⁴⁹ CEACR: Individual Observation concerning Discrimination (Employment and Occupation) Convention No. 111, 1958 (ratified by Malawi in 1965), published, 2009.

4 Provision of accessible State facilities for enforcement of human rights

Accessible State facilities include courts, legal aid offices and other offices. They should be made easily accessible geographically, technically and financially. Such State facilities should command authority, award appropriate and relevant remedies and should not be amenable to frivolous challenges.

5 Provision of legal aid

The provision of legal aid is critical if women are to access labour justice and enforce their labour rights and therefore achieve economic empowerment. Legal advice should be available at all times and should not be restricted to resolving disputes. Women should have legal advice when applying for jobs, attending interviews, signing contracts. This legal advice should also be available after the interview process and throughout the employment period.

6 Need for more research on women in employment and women in decision-making positions

Research plays a crucial role in women empowerment. Through research, specific questions and issues affecting women can be addressed. One of the challenges affecting progress in women empowerment is lack of verifiable information and data, for example, the lack of statistics on women's employment status is a major drawback in the efforts to combat poverty through decent work. It is through statistics that appropriate policy and legal reforms and interventions can be formulated. It is through employment data disaggregated by sex that development policies relating specifically to women can be implemented, monitored and valued.⁵⁰

ILO intervention

One of the issues raised by the ILO through the Committee of Experts on Application of Conventions and Recommendations (hereinafter referred to as CEACR) on Malawi's adherence to Convention 111 on Discrimination (Employment and Occupation) is the lack of updated statistical information, disaggregated by sex, showing the progress made in ensuring equal access of women to public service employment at all levels. To-date none of these concerns has been addressed.

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