

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 2/2017

B E T W E E N :

ZAMBIA TELECOMMUNICATIONS⁴
COMPANY LIMITED

APPELLANT

AND

EVA BANDA

RESPONDENT

CORAM : Mchenga DJP, Chashi and Chishimba, JJA
4th April, 2017 and 28th July, 2017

For the Appellant : Mr. M. Chiteba of Messrs Mulenga Mundashi
Legal Practitioners.

For the Respondent: Mrs. I. M. Kunda of Messrs George Kunda & Company

J U D G M E N T

CHISHIMBA JA, delivered the judgment of the Court

CASES REFERRED TO:

1. National Airports Corporation Limited Vs. Reggie Zimba and Savior Konie (SCZ Judgment No. 34 of 2000)
2. Union Bank Vs. Southern Province Cooperative Union (1997) S.J. 30 (SC)
3. Kitwe City Council Vs. William Ng'uni (2005) ZR 57 (SC)
4. Dunlop Pneumatic Tyre Company Limited Vs. New Garage Motor Company Limited (1915) AC 79
5. Raine Engineering Company Limited Vs. Baker (1972) ZR 156 (CA)
6. Vidyodayo University of Ceylon Vs. Silva (1954) 3All ER
7. Tijem Enterprises Limited Vs. Children International Zambia Limited (2011) ZR
8. Palmolive (Z) Incorporation Vs Able Shemu Chuuka and Others Appeal No. 181 of 2005 (unreported).
9. Redrilza Limited Vs Abhid Nkazi and Others SCZ No. 7 of 2011.
10. Nsansa School Education Trust V Musamba (2010) ZR Volume 1.
11. Chilanga Cement Vs Kasote Singogo (2009) ZR 122.
12. Printing and Numerical Registering Company V Simpson (1875) LR 1

13. **Giraud UK Limited Vs Smith UKEAT/1105/99**
14. **Cleene Link Limited Vs Brylan UK EAT/0440/12**
15. **Zesco Limited Vs Alexis Mabuku Matale SCZ Appeal No. 227/2013**
16. **Callister Kasongo and Mansa Milling Limited(now APG Milling Limited) Naomi Tetamashimba, Racheal Tetamashimba, Christopher Mulusa and Nathan Kabamba Mulonga SCZ Appeal No.184/2014**
17. **Zambia Privatisation Agency Vs James Matale (1996) ZR 157**

OTHER WORKS REFERRED TO:

1. **W. S. Mwenda, Employment Law in Zambia: Cases and materials. Revised Edition (Unza Press) Lusaka.**
2. **Halsbury's Laws of England 4th Edition.**
3. **Chitty on Contracts Volume 1 General Principles 30th Edition (H.G Beale)**
4. **Contracts of Employment (Employment Law IDS Handbook) -2014, Thomson Reuters.**

This is an appeal against the Judgment of the High Court's Industrial Relations Division dated 27th October, 2016 awarding the Respondent a sum equivalent of her gross salary for the remainder of the contract of employment period of five months based on the last salary received, with interest at the current lending rate as determined by the Bank of Zambia.

The Respondent in the Court below had claimed for damages or compensation including damages for loss or expenses, entitlements and benefits under and related to the Contract for constructive or unfair dismissal. In the alternative, the Respondent sought an order for payment of damages or compensation as prescribed in Clause 9.1(b) of the contract of employment.

The undisputed facts in the Court below are as follows; the Respondent was employed by the Appellant, on 1st April, 2011 as Chief Human Resources and Administration Officer in grade ZT2 of the conditions of service. The duration of the contract was for a fixed period of 16 months. By a letter dated 24th February, 2012, the contract of employment was terminated five months before expiry pursuant to Clause 9.1. The Respondent averred that no reasons were advanced by the Appellant for the termination. The Respondent surmised that her contract was terminated owing to the fact that she was on a Lap Green contract in ZT2 band, a grade which, according to the Respondent, was allegedly unsustainable. It was further averred that after the Government acquired 75% Shareholding in the Company, the Appellant engaged Hay Group to carry out a Market Survey for ZT1 and ZT2 positions. A report was produced recommending that employees in ZT1 and ZT2 positions should be either retained until end of contract or that their contracts be terminated; and further that new offers be made on new salary levels which were to be less favourable than those pertaining to the Respondent's contract of 1st April, 2011. Hence the Respondent's contract being accordingly terminated.

The Appellant, in its answer to the Respondent's case averred that in a pure master servant relationship, the master is at liberty to terminate a contract of employment at anytime and for any reason or for none at all. Further, that in any event the Appellant had merely exercised its contractual rights by invoking the termination clause under clause 9.1 of the contract in issue. The Appellant further averred that the proviso to Clause 9.1 (b) of the contract in issue is unconscionable and therefore of no effect. Clause 9.1 of the agreement in issue provided as follows;

"Both parties may terminate this agreement by giving three months' written notice thereof or payment in lieu of notice.

Notwithstanding the above:

(a)Where an employee terminates the contract before the expiration of the contract period, the employees shall pay to the employer a sum equal to the employee's total gross salary for the remainder of the contract period.

(b)Where the employer terminates the contract for reasons other than misconduct or performance, the employer shall pay the employee a sum equivalent to the employee's total gross salary for the remainder of the contract period."

The trial Court held that the circumstances leading to the Respondent's dismissal did not amount to constructive or unfair dismissal. The Court went on to hold that the termination was wrongful as the Appellant did not fully comply with the provisions

of Clause 9.1(b) of the contract of employment in not paying the sum equivalent to her gross salary for the remainder of the Contract period. Having found that the termination of the Respondent's employment was wrongful, the trial Court awarded the Respondent 5 months' gross salary being the remainder of the contract period based on the last salary received.

The Appellant being dissatisfied with the Judgment of the Court, advanced three grounds of appeal namely that;

1. **The Court below erred in law and in fact when it held that the Appellant's termination of the Respondent's contract of employment amounted to wrongful dismissal.**
2. **The Court below erred in law when it invoked clause 9.1(b) of the contract of employment, which said clause was penal in nature and therefore unenforceable.**
3. **The Court below erred in law and in fact when it ordered that the Respondent should be paid for the remainder of her contract of employment notwithstanding the fact that she did not serve the full term of the said contract.**

The Appellant relied upon the heads of Argument dated 6th January, 2014. Grounds 1 and 2 were argued together. It was submitted that wrongful dismissal is the ending of a contract of employment and is concerned with whether dismissal was in conformity with the contractual terms of employment and not the merits behind it.

It was argued that, clause 9.1 of the contract of employment provided for termination of contract by giving 3 months' written notice or payment in lieu of notice. Further, that though Clause 9.1(b) provided for the payment of a sum equivalent to the employee's total gross salary for the remainder of the contract in the event of termination by the employer for reasons other than misconduct, this provision is unenforceable. As authority, we were referred to the case of **National Airports Corporation Limited Vs. Reggie Zimba and Savior Konie** ⁽¹⁾ where the Supreme Court refused to uphold terms of an employment contract similar to the provisions of Clause 9.1 and held that;

"We find and hold the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositions by Lord Dunedin in Dunlop Pneumatic Tyre Company Limited v New Garage And Motor Company Limited (8), especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."

The Appellant's contention is that the payment of the three months' salary in lieu of notice amounted to an agreed genuine pre estimate of damages that would arise from any breach of the contract. Further, that the provision of payment in excess of the said three

months' notice amounts to a penalty which is unenforceable. The Appellant referred us to the case of **Union Bank Vs. Southern Province Cooperative Union** ⁽²⁾ where the Court held that an agreement to charge penal interest is unenforceable.

The Appellant argued that the Respondent having already been paid the equivalent of 3 months' pay in lieu of notice even before the action in the lower Court was commenced, the issue of wrongful termination could not arise after the payment to the Respondent. The Appellant further argued that Clause 9.1 (b) of the contract of employment was a term in *terrorem* meant to act as a fetter on the right to terminate rather than a genuine pre-estimate of loss.

Under ground 3 the Appellant contended that the Respondent's employment was properly terminated. No further payment was due to the Respondent as she had ceased being in the employment of the Appellant. Therefore, the Court erred when it ordered the Appellant to pay a sum equivalent of the Respondent's gross salary for the remainder of the contract period when the Respondent had not served in employment for the period in issue. Our attention was drawn to the case of **Kitwe City Council Vs. William Ng'uni**⁽³⁾ where the Supreme Court held that it is unlawful to award a salary or pension

benefits, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment. We were urged to uphold the appeal.

The Respondent in the heads of argument in response, submits that wrongful dismissal arises when an employer terminates an employee's contract of employment contrary to the terms of the employment. We were referred to a passage from the book entitled **"Employment Law in Zambia: Cases and Materials"** by W. S. Mwenda where the Learned author discussed the concept of wrongful dismissal. In addition, the Respondent referred the Court to the case of *Dunlop Pneumatic Tyre Company Limited Vs. New Garage Motor Company Limited* ⁽⁴⁾ where Lord Dunedin gave guidelines on the grant of liquidated damages as a genuine covenanted pre-estimate of damages to be construed upon the terms and interest of each particular contract at the time of execution.

It was the Respondent's contention that though the authorities cited by the Appellant provide good guidance, the facts of this case are distinguishable. In respect of the cited case of *National Airports Corporation Limited Vs. Reggie Zimba and Savior Konie* ⁽¹⁾ it was submitted that the clause before the Court was held to be penal in

nature as it favoured only one party whereas the clause in question favoured and applied to both parties. It was argued that Clause 9.1 provided for termination and payment by either party. Notwithstanding the wording of Clause 9.1, the contract breaker was still under an obligation to compensate the innocent party in accordance with either clause 9(1)(a) and (b). The definition of the word "notwithstanding" by A.S. Hornby in the New Oxford Learners dictionary was referred to as well as Clause 12 of the Contract of employment. The Respondent referred the Court to the case of **Raine Engineering Company Limited Vs. Baker** ⁽⁵⁾ in which Justice Doyle made reference to the case of **Vidyodayo University of Ceylon Vs. Silva** ⁽⁶⁾ where the Court in a nutshell stated that where an employment contract is terminated wrongfully, the employee is at liberty to pursue a claim for damages. The Respondent contended that the parties had freely and voluntarily entered into the contract of employment whose terms are enforceable. As authority, we were referred to the High Court case of **Tijem Enterprises Limited Vs. Children International Zambia Limited** ⁽⁷⁾ in which reference to the case of **Palmolive (Z) Incorporation Vs Able Shemu Chuuka and Others** ⁽⁸⁾ was made, where the Court held that contracts, when entered into freely and voluntarily by men of full age and competent

understanding, they shall be enforced by the Courts. The Respondent argued that Clause 9.1(b) is enforceable. Further the said clause is equitable because equity looks to the intent rather than form and imputes intent to fulfil an obligation. In addition, that he who comes to equity must come with clean hands and must do equity.

It was the Respondent's argument that the contract in issue was drawn by the Appellant and that by virtue of clause 12, the parties were entitled to rely on the express provisions contained therein. Clause 9.1(b) was not penal in nature and falls within the guidelines enunciated in *Dunlop Pneumatic Tyre Company Limited Vs. New Garage Motor Company Limited (supra)*

The Respondent urged the Court to uphold the findings of the trial Court to the extent that the termination of the Respondent's contract was wrongful and that Clause 9.1(b) is not penal in nature but is a pre-estimate of damages as agreed by the parties and therefore enforceable.

In response to ground 3 the gist of the argument by the Respondent is that Clause 9.1(b) of the Contract is a genuine pre-estimate of damages agreed upon by the parties and not a salary per se.

Therefore the cited case of *Kitwe City Council Vs. William Ng'uni* ⁽³⁾by the Appellant is distinguishable as in the said case the issue was payment of a salary whereas, Clause 9.1(b) 'used' the salary as a basis upon which liquidated damages would be computed in relation to the remainder of the period of the contract. This would not be unjust enrichment as the formula was applicable to both the employer and employee as the case may be.

In respect of the argument that Clause 9(1)(b) is unconscionable, the Respondent contends that the issue was not pleaded and was only raised in the submissions by the Appellant. In any event no proof was shown to the Court below that the Clause was unconscionable. In response, the Appellant contends that the issue is a matter of law which does not require evidence to be led. The Appellant did plead unenforceability of the contract which issue was not addressed by the Learned Trial Judge.

We have considered the appeal, the Judgment of the lower Court, the authorities cited and the submissions by the Learned Counsel on behalf of the Parties.

In ground one, the Appellant assails the Learned Trial Judge's holding that the termination of the Respondent's contract of employment amounted to wrongful dismissal.

It is settled law that there is a distinction between dismissal and termination. In the case of *Redriza Limited Vs. Abhid Nkazi and Others* ⁽⁹⁾, the Supreme Court held that

"there is a distinction between dismissal and termination. Dismissal involves loss of employment arising from disciplinary action. While termination allows the employer to terminate the contract of employment without invoking disciplinary action."

The terms dismissal and termination should not be used interchangeably.

It is trite that wrongful dismissal is dismissal by the employer in breach of contract and gives rise to an action for wrongful dismissal at Common Law. *Halsbury's Laws of England 4th Edition* defines wrongful dismissal as

"a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged...."

There are a number of ways in which wrongful termination may occur such as where a fixed term of contract is terminated before the date of expiry is due. Where a contract of employment permits

the employer to terminate employment with notice or upon payment of a sum of money in lieu of notice, the employer is merely acting within the strict terms of the contract.

In the *case in casu*, the Respondent's contract was terminated pursuant to clause 9.1 of the contract which stipulated that either party may terminate the agreement by giving three months written notice or payment in lieu thereof. The Respondent was paid the three months notice. We are of the view that this was termination contractually provided for in accordance with the terms of the contract. The Learned Trial Judge at page 18 of the record of appeal in fact held that

"the employment relationship between CW1 and the Respondent ended by termination...."

She even went further at page 19 of the record to define the terms termination and dismissal. Despite the Learned Trial Judge having correctly defined the terms termination and dismissal, she went on to find that the manner the dismissal was effected was wrongful for failure to comply with the provisions of clause 9.1(b) of the contract. In essence, there was no such wrongful termination of contract as it was properly terminated by **NOTICE**.

The issue is in respect of 9.1(b), the effect of the clause over and above the termination Notice clause. Whether it is a contractual term to be enforced as agreed between the parties upon the occurrence of the specified event as a genuine pre-estimate of damages.

In respect of grounds two and three which are interrelated, the issues for consideration are as follows;

(i) Whether clause 9.1(b) is or was a fair pre estimate of the damages the Respondent ought to be paid for the termination of the contract of employment despite the employee not having served the full term of contract.

(ii) Whether clause 9.1(b) of the contract is penal in nature and unenforceable.

The general principle of damages in breach of contract of employment is to put the innocent party in the monetary position in which he or she would have been had the contractual obligations been performed. Damages for breach of contract are compensation for the loss or injury suffered occasioned by the breach. We refer to the case of ***Nsansa School Education Trust Vs Musamba***⁽¹⁰⁾.

Normally damages for wrongful termination where a contract for a fixed term is terminated prematurely, will be the loss suffered as a result of the employer's action and are limited to the Notice period. We refer to the case of **Chilanga Cement Vs Kasote Singogo⁽¹¹⁾** where the Supreme Court stated that;

"when awarding damages for loss of employment, the common law remedy for wrongful termination of a contract of employment is the notice period. In deserving cases, the courts have awarded more than the common law damages as compensation for loss of employment".

The Appellant in this matter argues that the three months payment in lieu of notice paid to the Respondent was adequate and no other damages agreed upon in Clause 9.1(b) are enforceable. The Appellant contends that clause 9.1(b) is penal, unenforceable and is contrary to the Law. Whilst on the other hand, the Respondent contends that the parties having agreed on a fair pre estimate of damages, the clause is enforceable and is not extravagant. Heavy reliance was placed on the case of **National Airports Corporation (supra)**.

We have perused the cited Supreme Court decisions particularly the cases of **National Airports Corporation Limited Vs Reggie Zimba⁽¹⁾**, and **Kitwe City Council Vs William Ng'uni⁽³⁾** where the Supreme Court held

that paying damages as if the contract had run its full course offends the rules or principles laid out in the *Dunlop Pneumatic Tyre Company Limited (supra)* case and is unconscionable, and may be termed as unjust enrichment.

In the *case in casu*, the Respondent's Contract was terminated five months prematurely before its expiry date.

It is not in dispute that clause 9.1(b) provided that **"notwithstanding"** the written Notice period or payment in lieu of notice, where the employer terminates the contract for reasons other than misconduct or performance, the employer shall pay the employee a sum equivalent of the employee's total gross salary for the remainder of the contract period. The provision was equally applicable to the employee in the event that she terminates the contract before the expiration of the contract period.

The issue is whether the clause is a liquidated damages clause or whether it is penal, unconscionable and unenforceable.

It is trite that a contract being a set of promises which the Law will enforce, gives rise to obligations which are enforceable or recognised by the law. We refer to *Chitty on Contracts Volume 1. General Principles 30th Edition (H.G. Beale)*

Further contracts freely and voluntarily entered into by men or women of full age and competent understanding must be enforced by courts of law. We refer to the case of ***Printing and Numerical Registering Company Vs Simpson*** ⁽¹²⁾ where the above principle of law was stated.

It is therefore trite that employers and employees may agree and provide in the contract that in the event of premature termination, one party will pay to the other a specified sum. This is what is commonly referred to as liquidated damages clause. A liquidated damages clause specifies a fixed or determined sum to be payable on a breach by one party to the innocent party. Where it constitutes a penalty it will be unenforceable against the party in breach.

In the English case of ***Giraud UK Limited Vs Smith***⁽¹³⁾ the Employment Appeals Tribunal(EAT) held that there is no objection in principle to liquidated damages clauses in employment contracts of particularly senior executives in an attempt to avoid costly legal proceedings in events of termination before expiry. According to the Learned Authors of ***Contracts of Employment(Employment Law Handbook) 2014*** determination of the issue of whether the clause is enforceable is

whether it is regarded as a liquidated damages clause or a penalty clause. To qualify as a liquidated damages clause, the payment envisioned must be a genuine pre-estimate of the loss likely to flow from the breach.

A Penalty clause on the other hand is a provision designed to secure performance of the contract so as to deter breach of the contract and is unenforceable. The key consideration is that the sum specified must be compensatory and not in terrorem. We refer to the *Dunlop Pneumatic Tyre Company Limited* case. In the case of *Cleene Link Limited Vs Bryla* ⁽¹⁴⁾, it was stated that in determining whether a repayment sum is deterrent rather than compensatory, it is necessary to compare the amount that would be payable on a breach under the contract with the actual loss that might be sustained if the breach occurred. If there is a significant difference between the two sums, then it is likely that the provision clause is a deterrent and is therefore a penalty which would be unenforceable.

We have considered whether clause 9(1)(b) in issue i.e the payment of the gross salary for the remainder of the period was a reasonable estimate of the likely recoverable loss of the innocent party and

whether the sum exceeded the amount that was likely to have been recovered in normal damages claim.

We are of the view that the impugned Clause 9.1(b) is penal in nature and the amount payable under the clause was imposed in terrorem. In addition, it does not constitute a genuine pre-estimate of the loss. The Clause is a deterrent to breaching the contract and is in our view unenforceable. The Appellant's argument that because the clause was applicable to both parties, it is not unjust enrichment is untenable. It is immaterial that the clause was applicable to both parties as it was deterrent on both the employer and employee.

We have perused a number of Supreme Court decisions which has settled the position of the law where an employee seeks payment of salaries or benefits for the remainder of the period not worked. In the cited case of ***National Airports Corporation Limited and Reggie Ephraim Zimba and Another⁽¹⁾*** the contract of employment provided for three months notice and further had a clause that stipulated that;

"If the employer terminated the contract prematurely for reasons other than incompetence or unlawful neglect of duty, all the

benefits under the contract shall be paid as if the contract had run the full term."

The Supreme Court held that damages;

"should relate to the period of three months of salary and perquisites and any other benefits such as gratuity over that period."

As the notice clause in the above case was not invoked, the Supreme Court went on to state as follows;

"We find and hold that the phrase invoked so as to damages as if the contract had run its full course offends the rules which were first propounded as proposition by Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited Vs New Garage and Motor Company Limited* (8), especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. This part of the appeal has to succeed and the damages directed to be assessed as we have indicated and not as ordered below."

In the case of *Kitwe City Council Vs Williams Ng'uni*⁽⁹⁾ the Supreme Court held that

"We are, therefore, dismayed by the order to award terminal benefits equivalent to retirement benefits the Plaintiff would have earned if he had reached retirement age had he not been constructively dismissed. Apart from the issue of constructive dismissal, which we have already dealt with, we have said in several of our decisions that period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."

Further in the case of *Zesco Limited Vs Alexis Mabuku Matale*⁽¹⁵⁾, the Supreme Court reiterated by stating the following that;

"We have held, in a number of cases that an employee cannot be paid salaries or allowances for a period he or she has not worked".

The cases in point that the Supreme Court referred to were namely the *Kitwe City Council Vs William Ng'uni*⁽³⁾ and *National Airports Corporation Limited Vs Reggie Ephraim Zimba and Savior Konie*⁽¹⁾.

The Supreme Court stated further that;

"the principles emanating from these authorities are still good law and we agree with them entirely."

As an Appellate Court we are bound by the decisions of the Supreme Court on the issue of payment of salaries/benefits for a period not worked for.

We are further fortified by the recent Supreme Court case of *Callister Kasongo and Mansa Milling Limited (now APG Milling Limited) Naomi Tetamashimba, Racheal Tetamashimba, Christopher Mulusa and Nathan Kabamba Mulonga*⁽¹⁶⁾ where it was held in reference to dismissal of the claim for salaries and allowances for the period during which the Appellant's benefits remained unpaid, that;

"However, this claim was doomed to fail on the basis of our decision in the case of *Kitwe City Council Vs Nguni*⁽³⁾ that it is unlawful to award

a salary for a period not worked for because such an award has not been earned and might properly be termed unjust enrichment."

We are of the view that the Learned Trial Judge misdirected herself when she awarded five months Salary for the remainder of the contract period which the Respondent had not served or worked.

The Respondent in this matter was paid three months salary in lieu of Notice as provided in the contract.

In the case of *Zambia Privatisation Agency Vs James Matala*⁽¹¹⁷⁾ the Supreme Court held that;

"payment in lieu of notice was a proper and lawful way of terminating the Respondent."

It was further stated that

"damages measured by loss of the salary for the remainder of a fixed term employment are only payable where the employer wrongfully repudiates the contract and not where termination is lawful as in the present case."(Our Emphasis)

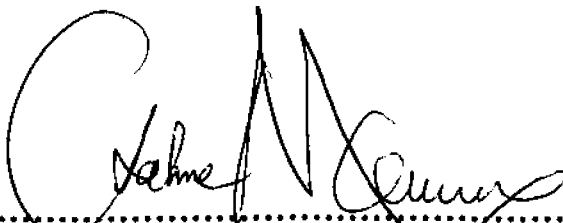
The normal measure of damages in this matter was three months notice period which the Appellant complied with by paying the Respondent. There was therefore no wrongful termination and the Learned Trial Judge misdirected herself by holding that there was wrongful termination and invoking clause 9(1)(b) of the contract of


employment. The period of notice having been paid upon termination of contract, there was no wrongful termination.

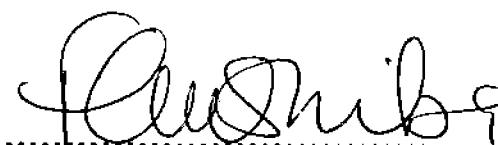
We accordingly, on the totality of the issues raised, find merit in the appeal and allow it.

We hereby set aside the Judgment of the lower court awarding the Respondent the sum equivalent to the complainant's gross salary for the remainder of the contract period.

Costs to the Appellant to be taxed in default of agreement.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL


.....
J. Chashi
COURT OF APPEAL JUDGE


.....
F. M. Chishimba
COURT OF APPEAL JUDGE