

**IN THE HIGH COURT OF ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**AT LUSAKA**

**2011/HP/1076**

(Civil Jurisdiction)

**BETWEEN:**

**LILLIAN KAYANI MTONGA**

**PLAINTIFF**

**AND**

**STEPHEN ROBERTS (Being sued as the  
Proprietor of Chilenje Filling Station Fish  
Shop)**

**DEFENDANT**

**Before the Hon. Mrs. Justice A. M. Sitali on the 14<sup>th</sup> day of February,  
2014**

***For the Plaintiff* : *Mrs C.K. Kabende*  
*Senior Legal Aid Counsel***

***For the Defendant* : *Miss C. Zamaere of*  
*Messrs Wilson and Cornhill***

---

**J U D G M E N T**

---

**Cases referred to:**

- 1. R. B. Policies At Lloyd's v. Butler [1949] 2 All ER 226 at 229,  
230.**
- 2. Board of Trade v Cayzer, Irvine and Co. Limited [1927] AC 610  
at 628**
- 3. Katongo v. Attorney General (1975) ZR 148**
- 4. Communications Authority v. Vodacom Zambia Limited SCZ  
Judgment No. 21 of 2009**
- 5. Chola Chama v. Zambia Electricity Supply Corporation Limited  
(2008) ZR 222**
- 6. Goodwell Malawo Siamutwa v. Southern Province Cooperative  
Marketing Union and Finance Bank (Z) Limited Appeal No. 114  
of 2000 (Unreported)**

7. **Zambia Railways Corporation Limited v. Mubanga (1990-1992) ZR 149**
8. **Francis v. Municipal Council of Kuala Lumpur (1962) 3 ALL E.R. 633**
9. **Contract Haulage Limited v. Mumbuwa Kamayoyo (1982) ZR 13**
10. **Zambia National Broadcasting Corporation Limited v. Penias Tembo, Edward Chileshe Mulenga And Moses Phiri (1995/97) ZR 68**

**Legislation referred to:**

1. **The British Acts Extension Act, Chapter 10 of the Laws of Zambia, section 2**
2. **The Employment Act, Chapter 268 of the Laws of Zambia, section 2**
3. **The Limitation Act, 1939 section 2 (1) (a).**

**Other works referred to:**

**Halsbury's Laws of England, 4<sup>th</sup> ed, Vol 28, paras 605 and 662 at pages 266 and 298**

The plaintiff commenced this action against the defendant by writ of summons issued out of the principal registry on 28<sup>th</sup> October, 2011 and claims for a declaration that the forced leave was illegal, null and void; payment of K226,200,000.00 with interest the same being salary arrears and leave days; an order compelling the defendant to reinstate her in her position as Manager forthwith; any other relief the court may deem fit and costs.

At the trial of the action, the plaintiff Lillian Kayani Mtonga testified that she was employed by the defendant, Stephen Roberts, who is the proprietor of the Chilenje Filling Station Fish Shop as Assistant Shop Manager in the year 2000. She was promoted to the position of Manager for the said shop with effect from 1<sup>st</sup> April, 2004 by letter dated 8<sup>th</sup> April, 2004 and her salary was

increased to K24,000,000 per year payable in monthly sums of K2,000,000.00. The plaintiff identified the letter on page 1 of the plaintiff's bundle of documents to that effect. The defendant increased her salary to K3,000,000.00 per month effective from 1<sup>st</sup> April, 2005 and a letter to that effect dated 29<sup>th</sup> April 2005 is on page 2 of the plaintiff's bundle of documents. The plaintiff further testified that she last received her salary in 5<sup>th</sup> October, 2005 as evidenced by the payslip on page 3 of the plaintiff's bundle of documents.

The plaintiff explained that in September 2005 the defendant took leave and travelled to Malawi leaving her in charge of the shop. When he returned from Malawi he gave no indication to the plaintiff that there was any problem with the shop. She conducted the fortnightly stock taking in October, 2005 and according to her all the pending payments were made. Later the defendant called her to his office and informed her that he was failing to make payments and ordered her to go on leave. She took leave for two weeks and reported for work but the defendant told her to return at the end of the month. When she returned at the end of the month the defendant sent her to see the Accountant whom he said would investigate the matter. Over the next three years the defendant kept on telling her that investigations were being conducted and has not informed her of the outcome of the alleged investigations. The plaintiff said that she is still employed by the defendant as he did not give her any letter to terminate her employment.

Under cross examination the plaintiff stated that she was placed on forced leave in November 2005 and has not worked for the defendant since that date. She said no reason was given for her being placed on forced leave. She further stated that the defendant informed her that investigations were being conducted but did not explain which payment he failed to make. The plaintiff insisted that she must be paid salary arrears because the defendant did not terminate her employment.

In re-examination, the plaintiff denied that she delayed in commencing this action.

That was the plaintiff's evidence.

The defendant gave evidence in his defence and called one witness. He testified that the plaintiff was the manager of the Chilenje Filling Station Fish and Vegetable Shop and that sometime in September 2005, he took leave from running the business for ten days and asked the plaintiff to run the fish shop in his absence. He stated that the shop had stock worth K120,000,000.00 before he left for Malawi but when he returned he found stock worth only K40,000,000.00. He called the plaintiff and asked her to explain what had happened to the stock as he expected to find assets worth more than K120,000,000.00 upon his return. The defendant further testified that the plaintiff failed to explain the short fall in the capital and so he dismissed her for theft in September 2005.

In cross examination, the defendant said that he employed the plaintiff as shop manager verbally and did not write any letter to appoint her to that position. He denied that he wrote the letters dated 8<sup>th</sup> April, 2004 and 29<sup>th</sup> April, 2005, respectively which are on pages 1 and 2 of the plaintiff's bundle of documents and claimed that the letters were fabricated by the plaintiff. The defendant further denied any knowledge of the payslip on page 3 of the plaintiff's bundle of documents and said he does not issue payslips to his employees. The defendant insisted that when he took leave he left assets worth K120,000,000.00 in the Fish shop but admitted that he did not have any document to support his assertion. He insisted that he dismissed the plaintiff verbally in September 2005 and did not place her on forced leave as she claims.

DW2 was Misheck Mwami, the shop manager of Roberts Fish and Veg. He testified that his duties include taking care of stock in the shop, accounting for sales handed to him by the cashiers and reporting on daily transactions to the Director of the business who is the defendant. DW2 said the salaries are compiled by the accountants Thewo and Company and are handed over to the shop manager who pays out the salaries and draws the cheques for the National Pension Scheme Authority (NAPSA). The NAPSA cheques are signed by the Director, DW1. DW2 confirmed that the plaintiff once worked for the defendant as shop manager of the Chilenje Filling Station Fish Shop. He identified the NAPSA contribution receipts and payment schedules for employees of Chilenje Filling Station and Fish shop on pages 1 to 12 of the defendant's bundle of documents and said that the plaintiff's name did not appear on any of those schedules because she is no longer an employee of the defendant. It was his testimony that the plaintiff last worked for the defendant in September, 2005 according to the NAPSA member statement on pages 13 to 15 of the defendant's bundle of documents.

In cross examination, DW2 said that he found a letter written by the Accountant on a company file stating that the plaintiff left employment on her own accord. DW2 further said there are no letters written to employees of the Chilenje Filling Station Fish Shop when there is a salary increment but confirmed that employees of the said shop have been receiving payslips since the year 2005.

In re-examination DW2 said that according to the NAPSA member statement on page 14 of the defendant's bundle of documents, the last payment to NAPSA on behalf of the plaintiff was made in September 2005. He said he was a general worker when the plaintiff was the Manager of the Fish shop.

That was the defendant's evidence.

The parties filed written submissions in support of their respective cases. Mrs Kabende counsel for the plaintiff filed written submissions on 25<sup>th</sup> September, 2013. The gist of her submissions is that the defendant did not comply with section 24 of the Employment Act Chapter 268 of the Laws of Zambia which requires that oral contracts of employment should be evidenced in writing. She further submitted that section 24 (5) of the said Act provides that in the absence of such records and in the event of a dispute concerning the terms and conditions of employment, the court should rely on the employee's version of events unless the employer proves to the contrary. Counsel contended that the Plaintiff produced evidence to prove her elevation in rank and salary and was not cross examined on the documents she produced in support of her claim. Counsel further submitted that the defendant's testimony that the documents produced by the plaintiff were fabricated is not true.

In addition Counsel submitted that the statements from the National Pension Scheme Authority (NAPSA) show that contributions were made on behalf of the plaintiff based on her increased salary and that the contributions only stopped in December, 2005. It was contended that the statements produced by the plaintiff show that the defendant is liable to the plaintiff with regard to benefits accrued during her employment by the defendant. It was further submitted that the defendant did not adduce any evidence to prove that the plaintiff was dismissed and that even if the employment of the plaintiff was terminated as alleged by the defendant, section 26A of the Employment Act Cap 268 requires that whenever the termination of employment is based on misconduct or performance of the employee, the employee must be given an opportunity to be heard on the charges against him which the defendant did not comply with in this case.

It was further submitted that the defendant's contention that the action is statute barred in terms of section 2(1)(a) of the Limitation Act of 1939 is an

attempt to mislead this court as the action was brought within the six years stipulated by the law as the defendant continued to pay monthly contributions to the National Pension Scheme Authority on behalf of the plaintiff up to December, 2005 as evidenced by the pay slip of October 2005. It was contended that the plaintiff's action was commenced in October, 2011 and is, therefore, not statute barred in terms of the Limitation Act of 1939. It is Counsel's submission that the plaintiff is entitled to her claims as she was not dismissed but was placed on forced leave as the purported investigation into the missing money in the sum of K80,000,000.00 was carried out whose outcome was not communicated to the plaintiff.

Miss Zamaere counsel for the defendant filed written submissions on 10<sup>th</sup> October, 2013 in which it was submitted that the first question to be determined by the court is whether or not the plaintiff's claim is statute barred because if the court finds that the plaintiff's claim is statute barred, then the plaintiff's claim will fall away. Counsel argued that the events which led to the commencement of this action occurred in September, 2005 when the plaintiff alleges she was put on illegal forced leave and that since the cause of action accrued in September, 2005, the plaintiff had six years from that date within which to commence proceedings so that the claim stood statute barred as at September, 2011, by virtue of section 2(1)(a) of the Limitation Act of 1939.

Counsel argued that the plaintiff did not amend her statement of claim which states that she was placed on forced leave in September, 2005 and that according to the case of *Raine Engineering Co. Ltd v Baker* (1972 ) ZR 156 in the absence of amendment of pleadings she is estopped from putting forward a different date of termination when she had pleaded a specific date in the statement of claim. It was submitted that in this case the relevant date is September, 2005 on which the plaintiff says she was 'placed on forced leave' and according to the defendant she was 'summarily dismissed'.

Counsel for the defendant submitted that this is the date which the court should accept as the date when the cause of action accrued.

Counsel for the defendant went on to submit that if the court finds that the plaintiff's claim was brought within the limitation period, the court nevertheless has a residual equitable jurisdiction to refuse relief on the ground of acquiescence. It was contended that the plaintiff's failure to bring this action within a reasonable period amounts to acquiescence on her part and that her claim should be dismissed for that reason even if the court finds that her action is not statute barred. Halsbury's Laws of England, 4<sup>th</sup> Edition Reissue, Vol. 28 paragraph 607 was cited in support of this submission.

With regard to the plaintiff's claim for the sum of K226,200.00 salary arrears Counsel submitted that the plaintiff has not done any work for the defendant from the time she alleges she was placed on forced leave and that for the plaintiff to be paid the money would amount to unjust enrichment for the plaintiff. The case of Kitwe City Council v. William Ng'uni (2005) ZR 57 (SC) was cited in support of this submission where it was 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."*

Further the case of Goodwell Malawo Siamutwa v. Southern Province Cooperative Marketing Union and Finance Bank (Z) Limited Appeal No. 114 of 2000 was cited in support in which the Supreme Court stated:

*"The appellant never rendered any services to the 1<sup>st</sup> Respondent from the time that his services were terminated on 20<sup>th</sup> May, 1999, up to the date of Judgment in May, 2002. There would therefore be no consideration for the money which could be paid to the Appellant were*



*such an order to be made. In our view, this would amount to unjust enrichment.”*

The case of *Chola Chama v ZESCO Limited SCZ Judgment No. 20 of 2008* was also cited in support of this submission.

It was submitted that in view of the authorities cited above, the plaintiff's claim for K226,000 in salary arrears and leave days must fail.

Counsel for the defendant went on to submit that the law places a duty on an employee to prove he suffered damage to the extent of his former salary and to mitigate his loss. The case of *Zambia Airways Corporation Limited v. Gershom B. B. Mubanga (1990/92) Z.R. 149 (S.C)* was cited in support where Gardner A.D.C. J. as he was then stated as follows:

*“As to the order that the respondent should be paid his full salary and arrears from the date of the purported dismissal, we note that no evidence was called to the effect that the respondent has actually suffered damages to the extent of his former salary. It is the duty of the respondent to mitigate his loss... it would be unrealistic to award full salary for the time that has elapsed since the wrongful dismissal. The respondent should have mitigated his loss by obtaining alternative employment within a reasonable period.”*

It was contended that the plaintiff has not adduced any evidence that she suffered damages to the extent of her former salary; that it would be unrealistic for the plaintiff to be awarded a salary which she has not worked for and that she should have taken steps to mitigate her loss and should not have waited for six years to make a claim. It was submitted that the plaintiff is not absolved of her duty to mitigate her loss merely by claiming she is still employed by the defendant.

With regard to whether or not the plaintiff's employment was terminated by the defendant, it was submitted that according to the plaintiff's claim the defendant continued to investigate her over the years and yet she did not bring any action for six years when she was not being paid. This according to Counsel for the defendant suggests that the plaintiff accepted the status quo which was akin to someone whose employment had been terminated and further that she accepted that she was no longer employed by the defendant.

Regarding the plaintiff's claims for a declaration that the forced leave was illegal and null and void, it was submitted that a declaration is a discretionary remedy and that even if the court deems it fit to make a declaration of nullity, there is a discretion to award damages. It was submitted that in the case of *Francis v. The Principal Commissioners of Kuala Lumpur* [1962] 3 ALL E. R. 633 the court stated that:

*"When there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsisted would rarely be made in the absence of special circumstances, because of the principle that the courts would not grant specific performance of contracts of service; in the present case there were no special circumstances, the appellant's remedy lay in damages for wrongful dismissal."*

It was contended that if damages are to be awarded they should not be based on salary arrears but should consist of payment in lieu of notice as it was held in *Contract Haulage Limited v Mumbuna Kamayoyo* (1982) ZR 13.

As to whether or not the defendant complied with the law in dismissing the plaintiff, it was conceded that the defendant did not follow the procedure outlined in section 25 of the Employment Act, Cap. 268 of the Laws of Zambia which requires an employer who dismisses an employee summarily

without notice or payment of wages in lieu of notice to furnish a written report of the circumstances leading to, and the reasons for, the dismissal to the labour officer in the district in which the employee was working within four days of such dismissal. It was however submitted that although the defendant did not comply with the law in dismissing the plaintiff this did not render the dismissal null and void but only gave rise to a penalty against the defendant as employer. The case of Zambia Airways v. John Musengule (2008) ZR 154 Vol. 1 was cited in support of this submission. In that case the Supreme Court held that:

*“Failure to notify a proper office after dismissing an employee as is required by the Employment Act did not render the dismissal null and void, but only gave rise to the penalty against the employer.”*

Counsel further submitted that under section 20 (2) (c) of the Employment Act, Cap. 268, the period of notice for an oral contract where none is agreed between the parties is thirty days where the contract is for a period of one week or more. She submitted that section 18 of the said Act also provides that in the absence of any agreement to the contrary, an oral contract shall be deemed to be a contract for the period by reference to which wages are calculated and that the plaintiff was thus under a monthly contract. It was submitted that as the plaintiff was employed under an oral contract which was monthly as determined by the frequency of her pay, in the absence of agreement, the correct notice period should have been one month.

Regarding the plaintiff's claim for reinstatement it was submitted that reinstatement is a rare remedy and is not an appropriate remedy in the circumstances of this case as no special circumstances have been shown to warrant an order of reinstatement. It was submitted that the rationale for the court's reluctance to order reinstatement is explained in the Contract Haulage Limited v. Mumbuwa Kamayoyo case where it was held that:

*“In a pure master and servant relationship there cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none; if he does so in a manner not warranted by the contract he must pay damages for breach of contract.”*

Counsel further cited the case of Zambia National Broadcasting Corporation Limited v. Penias Tembo, Edward Chileshe Mulenga and Moses Phiri (1995/97) ZR 68 in which it was held, inter alia, *“that the power to order reinstatement is discretionary, and, apart from the gravity of the circumstances, the effect of making such an order should be taken into account.”*

I am grateful to learned counsel for the respective parties for their submissions. I have carefully considered the evidence adduced by the parties as well as their submissions and the authorities cited by both learned counsel. It is common cause that the plaintiff was appointed by the defendant to the position of Manager of the Chilenje Filling Station Fish Shop by letter dated 8<sup>th</sup> April 2004 at the initial salary of K24,000,000.00 per annum payable in monthly sums of K2,000,000.00. By letter dated 29<sup>th</sup> April 2005, the plaintiff's salary was increased to K36,000,000.00 per annum payable in monthly sums of K3,000,000.00 effective from 1<sup>st</sup> April, 2005. The plaintiff and defendant did not sign a formal contract of employment.

The plaintiff worked for the defendant in that capacity until September 2005, when according to the plaintiff she was placed on forced leave by the defendant allegedly to pave way for investigations into the alleged loss of stock worth K80,000,000.00 at the fish shop. On the other hand the defendant contends that he summarily dismissed the plaintiff from employment in September, 2005, for failure to account for stock worth K80,000,000.00 which was left in the shop during the period it was under her sole management in the defendant's absence. The plaintiff contends that

the defendant has never informed her of the outcome of the alleged investigations and has not allowed her to return to work. She alleges that the defendant has refused to pay her any salary after October 2005, and has also not paid her for leave days she accumulated during the period of service. Hence this action.

In defending this action, the defendant pleaded in his defence that the plaintiff's action is statute barred. I will deal with this issue before I proceed to consider the plaintiff's claims against the defendant because as counsel for the defendant submitted if I find that the action herein was commenced after the statutory limitation period of six years then the plaintiff's claims against the defendant will fall away. In deciding this issue it is necessary for me to determine when the cause of action accrued. If I find that it accrued to the plaintiff as soon as she was placed on forced leave in September, 2005 so that she then had a cause of action against the defendant then as contended by the defendant the action having been commenced on 28<sup>th</sup> October, 2011 is statute barred under section 2(1)(a) of the Limitation Act, 1939, and no action can lie against him after six years from that date.

The Limitation Act of 1939 applies in Zambia by virtue of the provisions of section 2 of the British Acts Extension Act Chapter 10 of the Laws of Zambia which states that the Acts of the Parliament of the United Kingdom (which include the Limitation Act of 1939) set forth in the Schedule to the Act shall be deemed to be of full force and effect within Zambia. Section 2 (1) (a) of the Limitation Act, 1939 provides as follows:

*"2. (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-*

*(a) actions founded on simple contract or on tort;."*

It is clear from the foregoing provision of the Act that any action that is based on simple contract or on tort must be commenced within a period of six years from the date the cause of action accrues. Any action which is commenced after the expiration of the specified limitation period cannot be sustained. The purpose and effect of statutes of limitation is to protect defendants. Three different reasons have been advanced by the courts to explain the purpose of limitation statutes. The first reason is that a plaintiff with a good cause of action should pursue it with reasonable diligence. The second one is that a defendant might have lost evidence to disprove a stale claim. The third reason is that long dormant claims have more cruelty than justice in them (See *Halsbury's Laws of England*, 4th edition, para 605 at page 266).

In *R. B. Policies At Lloyd's v. Butler* (1) Streatfeild J. stated that *"one of the principles of the Limitation Act 1939 is that those who go to sleep on their claims should not be assisted by the courts in recovering their property. But another equally important principle is that there shall be an end to these matters and that there shall be protection against stale demands."*

Further in *Board of Trade v Cayzer, Irvine and Co. Limited* (2) Lord Atkinson made the following observation.

*"The whole purpose of this Limitation Act is to apply to persons who have good causes of action which they could if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use."*

The learned authors of *Halsbury's Laws of England*, 4<sup>th</sup> ed, Vol 28, in paragraph 662 at page 298 state that:

*“In an action for a breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach as after the expiration of that period the action will be barred although damage may have accrued to the plaintiff within six years of action brought.”*

The general rule is that the limitation period begins to run when the plaintiff's cause of action accrues.

In the present case the plaintiff's action arises out of a contract of employment between the plaintiff and the defendant. Although the parties never signed a formal contract of employment, the two letters written by the defendant to the plaintiff dated 8<sup>th</sup> April, 2004 and 29<sup>th</sup> April, 2005, respectively prove that there was a master and servant relationship between the parties. The plaintiff's testimony is that she was appointed as manager of the Fish Shop by the defendant in April 2004 and that she served in that position until September, 2005, when the defendant verbally placed her on forced leave without pay. She said the defendant told her this was to facilitate investigations into missing stock in the fish shop. According to the plaintiff the defendant has not reverted to her on the outcome of the investigations and has refused to pay her salary since October 2005. He has also refused to pay for the leave days which she accumulated. The defendant confirmed that he employed the plaintiff but insisted that he did so verbally and did not write any letters to that effect. The plaintiff commenced this action against the defendant on 28<sup>th</sup> October, 2011.

The defendant contends that the action is statute barred as it was commenced after six years from the time the cause of action arose which according to the defendant is September, 2005. The plaintiff on the other hand denies that the action was statute barred at the time of commencing the proceedings. Although it is the plaintiff's contention that the defendant

placed her on forced leave in September, 2005, the defendant claims that he summarily dismissed the plaintiff from employment in September 2005, because she misappropriated or failed to account for K80,000,000.00 in old currency. To support her assertion that she was not dismissed from employment in September 2005, but was merely sent on forced leave, the plaintiff produced the pay slip on page 3 of the plaintiff's bundle of documents which shows that she was paid her salary in October 2005. The defendant has not rebutted this evidence save to state that the plaintiff fabricated the payslip as he does not issue payslips to his employees.

However, the defendant's claim that he does not issue payslips to his employees is not substantiated. In fact it was contradicted by his own witness, DW2, who is currently the defendant's shop manager at the Fish shop who categorically testified under cross examination that employees of the defendant in the shop have been receiving payslips since the year 2005. Further DW2 testified that he came across a letter written by the defendant's accountant at the material time in the course of his employment at the fish shop which letter stated that the plaintiff left employment at the defendant's fish shop of her own accord. A copy of the letter is on page 6 of the plaintiff's bundle of documents. Given the conflicting evidence adduced by the defendant and his witness, DW2, I accept the plaintiff's testimony that she was placed on forced leave in September 2005 and that she was not dismissed from employment in September, 2005, as alleged by the defendant. I do not accept that the defendant could dismiss the plaintiff from employment in September, 2005 and still pay her a salary in October 2005.

From the evidence on record I find that the cause of action did not accrue in September 2005, when the defendant directed the plaintiff to go on leave because the action of placing the plaintiff on leave did not breach the contract of employment. The plaintiff was paid her salary for September, 2005, when the defendant alleges he dismissed her from employment. The



plaintiff was also paid her salary in October 2005, as evidenced by the payslip in her name on page 3 of the plaintiff's bundle of documents. Up until that point the defendant had not breached the contract of employment. As such as I have already observed no cause of action under the contract of employment accrued to the plaintiff in September 2005, for which she could have commenced an action against the defendant. That being the case it is my considered view that the cause of action accrued and time began to run only from the date when the defendant breached the contract of employment which is the date in November 2005 on which he should have paid the plaintiff her salary for that month but refused to do so. As the plaintiff commenced this action on 28<sup>th</sup> October, 2011 which was a date within the statutory limitation period of six years which is allowed for commencement of actions based on simple contract, I hold that the action is not statute barred.

Counsel for the defendant submitted that even if I find that the plaintiff's action was brought within the limitation period and is not statute barred, I should dismiss the action on the basis that she acquiesced to the defendant's action by failing to commence the action within a reasonable period. I find no merit in that submission.

Having settled that issue, I now turn to consider the plaintiff's claims against the defendant. In the first place the plaintiff seeks a declaration that the forced leave was illegal and therefore null and void. To support this claim the plaintiff testified that the defendant asked her to proceed on leave in September 2005 in order to pave way for investigations into alleged missing stock and that she proceeded on leave initially for two weeks before she returned to work. When she reported for work the defendant asked her to continue her leave until the end of the month. When she returned to the office at the end of the month the defendant referred her to the accountant whom he said was investigating the matter. The plaintiff contends that the

defendant has never informed her about the outcome of the investigations over the years and any inquiries she made were met with hostility. The defendant on the other hand denies that he placed the plaintiff on forced leave and insists that he dismissed her from employment for theft.

It is settled law that the High Court has power to grant declaratory judgments. However, the power is discretionary and must be exercised judicially. Declaratory relief cannot be demanded by a party as of right. In the case of Katongo v. Attorney General (3) and in the case of Communications Authority v. Vodacom Zambia Limited (4) the Supreme Court guided that declaratory judgments should be discouraged where a court is of the opinion that another remedy affords a claimant sufficient redress or that granting declaratory relief will not save any useful purpose particularly in a case where the claimant has an adequate alternative remedy.

In the present case the plaintiff seeks a declaration that the forced leave was illegal and therefore null and void. I do not consider that such a declaration is an appropriate remedy to award in this action because in the first place the defendant as employer was within his rights to require the plaintiff who was his employee to take leave to facilitate investigations into the alleged missing stock from the fish shop and taking such a decision was not illegal as it did not contravene any provision of the Employment Act, Cap. 268 which governed the plaintiff's contract of employment. Further, the plaintiff has not adduced any evidence to show that by asking her to take leave the defendant breached the contract of employment. Secondly, there is an adequate alternative remedy available to the plaintiff in the form of damages if she can show that she did suffer damage as a result of the defendant's action. For these reasons, I decline to make the declaration that placing the plaintiff on forced leave was illegal and therefore null and void.

The plaintiff also claims for payment of K226,200,000.00 old currency or K226, 200.00 rebased with interest in salary arrears and payment for leave days for a period of six years.

Before dealing with the plaintiff's claim for the sum of K226,200.000 in salary arrears and leave days, I will consider the implication or effect of the defendant's refusal to allow the plaintiff to return to work after he placed her on leave in September, 2005. According to the plaintiff's evidence, the defendant told her to go on leave to pave way for investigations into the loss of stock from the shop. However, since that time the defendant has not informed her of the outcome of the investigations, if any, were conducted and he has refused to allow her to return to work.

The defendant's evidence is that he did not send the plaintiff on leave but that he dismissed her summarily for theft. It is a common law position that an employer may terminate an employee's contract of employment for any reason or for no reason even without applying the rules of natural justice. In this case since the contract of employment was an oral contract, it was governed by the provisions of the Employment Act, Cap 268 of the Laws of Zambia. Section 20 of the Act reads as follows:

*20. (1) Either party to an oral contract may terminate the employment on the expiration of notice given to the other party of his intention to do so, and where the notice expires during the currency of a contract period, the contract shall be thereupon terminated.*

*(2) In the absence of any agreement providing for a period of notice of longer duration, the length of such notice shall be -*

*(a) subject to the provisions of paragraph (b), twenty-four hours where the contract is for a period of less than a week.*

*(b) fourteen days where the contract is a daily contract under which, by agreement or custom, wages are payable not at*

*the end of the day, but at intervals not exceeding one month;*

*(c) thirty days where the contract is for a period of one week or more.*

*(3) Notice to terminate employment may be either verbal or written and may be given at any time, and the day on which the notice is given shall be included in the period of notice.*

*(4) Where notice is given, there shall be paid to the employee, on the expiration of the notice, all wages and benefits due to him.*

Although the common law position is that an employer has the right to terminate a contract of service for any reason or for none and need not observe the rules of natural justice, the Employment Act Cap 268 provides that if the termination of employment is due to an employee's misconduct or performance the employer must give such employee an opportunity to be heard on the charges against him. To that effect section 26A of the Act provides that:

*"26A. An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."*

Section 26A is therefore a departure from the common law. The defendant's assertion that he dismissed the plaintiff for theft is not supported by any evidence and as I pointed out earlier in this judgment the fact that the defendant paid the plaintiff her salary in October, 2005 has not been rebutted. Further, it was the plaintiff's evidence that she conducted a stock take in the month of October 2005 and that the defendant did not complain

about any shortfall in stock. This evidence was not challenged by the defendant and it was not rebutted.

On the totality of the evidence I find that the defendant did not dismiss the plaintiff as he claims and that by his conduct of refusing to accept the plaintiff back for work after placing her on leave he terminated the contract of employment. Further, I find that he did not comply with the provisions of section 20 of the Employment Act Cap. 268 which required him to give the plaintiff notice to terminate her employment. In the absence of any agreement for a notice period of longer duration, according to section 20 (2) (c) of the Act the defendant should have given the plaintiff notice of thirty days since her contract was for a period of more than one week. From the evidence adduced by the parties it is clear that no notice was given to the plaintiff before she ceased to work for the defendant. The defendant, therefore, breached the oral contract of employment and is therefore liable to pay the plaintiff damages for such breach. I will return to this issue later in my judgment.

Getting back to the plaintiff's claim for the sum of K226,200,000.00 as salary arrears and payment for leave days, her evidence in support of this claim is that she was placed on forced leave by the defendant in September 2005 and was paid her last salary in October 2005. The plaintiff's own testimony is that from October 2005 to the time she commenced this action she has not rendered any service to the defendant.

In the case of *Chola Chama v. Zambia Electricity Supply Corporation Limited* (5) which was cited by counsel for the defendant the Supreme Court reiterated their holding in the case of *Siamutwa v. Southern Province Co-operative Marketing Union* (6) to the effect that for an employee to be paid for any period for which he has not worked when there is no consideration to justify paying the employee would amount to unjust enrichment for the employee.

In the present case the evidence is that there has been no consideration to justify paying the plaintiff the salary arrears that she claims. To order that she should be paid salary arrears for a period of 73 months calculated up to the time she commenced this action would amount to unjust enrichment for the plaintiff according to the Chola Chama and Siamutwa cases. I decline to make the order to pay the plaintiff salary arrears and leave pay for the six years leading up to the time she commenced this action. I agree with Counsel for the defendant that the plaintiff did not adduce any evidence to show that she suffered damages to the extent of her former salary and further that she had a duty to mitigate her loss as held in the case of Zambia Airways Corporation Limited v. Gershom B. B. Mubanga (7).

The plaintiff further seeks an order compelling the defendant to reinstate her in her position as Manager of the Chilenje Filling Station Fish Shop. It is trite that a court will not usually order reinstatement of an employee in a pure master and servant relationship unless there are special circumstances because to do so would be tantamount to ordering specific performance of contract of service. In the case of Francis v. Municipal Council of Kuala Lumpa (8) the House of Lords held that:

*“When there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court.”*

In Contract Haulage Limited v. Mumbuwa Kamayoyo (8) which was cited by counsel for the defendant the Supreme Court held that:

*“In a pure master and servant relationship there cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none; if he does so in a manner not warranted by the contract he must pay damages for breach of contract.”*

Further in the case of Zambia National Broadcasting Corporation Limited v. Penias Tembo, Edward Chileshe Mulenga And Moses Phiri (10) the Supreme Court guided that:

*“The power to order reinstatement is discretionary, and, apart from the gravity of the circumstances, the effect of making such an order should be taken into account. For instance, in a small organisation it would be undesirable to order reinstatement where there was personal antagonism. We do not think that consideration has been shown to apply in this case but other circumstances should be taken into account. We do not consider that this is a case where temporary appointments should have been made to replace the respondents pending this litigation. We are bound to take a realistic view that to dismiss the present employees to make way for the reinstatement of the respondents would be unfair.”*

In the present case the plaintiff has not worked for the defendant for well over eight years to date and it would be totally inappropriate to order that she be reinstated considering that the defendant’s business is a small organisation with a handful of employees and there is clearly personal antagonism between the plaintiff and the defendant. The defendant continues to be Director of the said business and the plaintiff would still be required to report to him as was the case previously if she were reinstated. Further, the position which she held has since been filled by DW2 and to order that she be reinstated in the position of manager of the fish shop would entail removing DW2 from his job which situation would be unfair and

should be avoided. In view of these facts I decline to order that the plaintiff should be reinstated in her previous job. This is because I am of the considered view that damages will suffice to compensate the plaintiff for the defendant's termination of her employment without due notice.

As I stated earlier in this judgment the defendant breached the contract of employment when he terminated the plaintiff's employment without notice.

According to section 20 (2) (c) of the Employment Act Cap 268, the plaintiff's employment could be terminated by either party giving to the other party verbal or written notice of termination. The notice period was one month. Thus for the contract to have been properly terminated a notice of one month should have been given to the plaintiff. As this was not done, the termination of the Plaintiff's employment in breach of the statutory provision amounts to wrongful dismissal. The Plaintiff is, therefore, entitled to damages for wrongful dismissal.

It is settled law that a person who is wrongfully dismissed has a duty to mitigate his loss by finding alternative employment within a reasonable period. In awarding damages for wrongful dismissal, the Supreme Court has approved payment of compensatory damages beyond the notice period and has approved of damages over a period within which comparable work can be found by a diligent plaintiff. Thus in the case of Zambia Railways Corporation Limited v. Mubanga (7), the Supreme Court held that:

“We regard a reasonable period for a person in the management position of the respondent as 12 months.”

On the facts of this case and given the scarcity of jobs at middle management level which is equivalent to the level at which the plaintiff was serving in the defendant's small organisation, and on the basis of various supreme court authorities including the case of Zambia Railways Corporation



*Limited v. Mubanga (7)*, I consider that this is an appropriate case to award compensatory damages beyond the notice period of one month. I, therefore, award damages of six months' salary at K3,000.00 rebased per month which was the plaintiff's last salary less tax applicable at the material time. I further order that the defendant pay for any outstanding leave days that accrued in accordance with the letter dated 8<sup>th</sup> April 2004, between April 2004 and October 2005 when the plaintiff worked as manager of the fish shop.

I also award interest thereon at 10% from the date of the issue of the writ of summons to the date of this judgment; thereafter to the date of payment, interest at the current lending rate as determined by the Bank of Zambia.

I also award costs to the plaintiff to be taxed in default of agreement. Leave to appeal is granted.

Dated this 14<sup>th</sup> day of February, 2014.

.....  
**A. M. SITALI**  
**JUDGE**