**IN THE SUPREME COURT OF ZAMBIA Appeal No. 73/2008**

**HOLDEN AT LUSAKA/NDOLA**

**(Civil Jurisdiction)**

**B E T W E E N:**

**CHIEF CHANJE APPELLANT**

**AND**

**PAUL ZULU RESPONDENT**

***Coram: Mambilima, DCJ, Chirwa and Chibomba JJS.***

***On 9th February, 2010 and on 28th March, 2012.***

*For the Appellant: F. Jere of Ferd Jere & Company of Chipata.*

*For the Respondent: Mr. Mulenga of Legal Resources Foundation.*

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

**Chibomba, JS, delivered the Judgment of the Court**.

**Cases and other materials referred to:-**

1. Phippson, Manual of the Law of Evidence, 10th Edition at page 21

2. Black’s Law Dictionary, 6th Edition at page 366

3. Swarbrick E.J, Magistrate’s Hand Book, 6th Edition,(1991), pages 517 and 650

4. GDC Hauliers (Z) Limited vs Trans Carriers Limited (2001) Z.R. 47-49 at 48

5. Nkhata and Four Others vs. The Attorney General (1966) Z. R. 124 (CA)

6.Attorney General vs. Achiume (1983) Z. R. 1

7. Commonwealth Shipping Representatives vs. P & O Branch Services (1923) A. C. 212

8. Stephen vs. Myers (1830) 2 ALL ER 850

**Legislation referred to:-**

1. Sale of Goods Act, 1893

This is an appeal against the Judgment of the High Court, at Chipata, in which the learned Judge held that the case rested on the credibility of the witnesses and that the respondent’s witnesses were credible and that their evidence showed that the respondent was assaulted by the appellant and that his shirt was torn and that his mobile phone and car keys also went missing during the assault.

On the basis of this finding, the learned Judge proceeded to award damages amounting to K3,580,000 constituted as follows:- K3,000,000 for assault, K30,000 for the shirt, K250,000 for the Nokia phone and K300,000 for the loss of the car keys.

The learned Judge also awarded interest at Bank of Zambia determined long term deposit rate from the date of Writ to Judgment date and thereafter, at short term deposit rate from the date of Judgment until payment. He also awarded costs to the respondent.

Dissatisfied with this Judgment, the appellant appealed to this Court advancing seven grounds of appeal as follows:-

“**1**. **The learned trial Judge erred by resting his findings on the credibility of the Plaintiff’s witness when their evidence was full of contradictions.**

**2. The learned trial Judge made his findings upon assumptions that the fuel was selling at K5,000.00 a litre when as at 1st May in Chipata the fuel was selling above that price i.e. more than K6,000.00 as there was no such evidence during trial.**

**3. The learned trial Judge made wrong conclusions when he stated that the offer of fuel at K5,000.00 below the retail price meant that this was illegally sourced and was being sold at black market rare and that the only reasonable inference to be drawn is that DW2 was selling fuel on behalf of DW1.**

**4. The learned trial Judge erred in law when he took judicial notice that even in compounds in Chipata cheaper fuel smuggled from Malawi is sold, what more for the village that is closer to Malawi border.**

**5. The learned trial Judge erred in law and fact when he observed at page 8 of the Judgment that the findings on the medical report were consistent with the Plaintiff’s allegations and that, contrary, to the Judge’s findings there was no logical explanation for the Plaintiff’s failure to settle the fuel bill when he was confronted by the Chief at the roadside.**

**6. The fact that the Chief did not siphon his fuel from the Plaintiff’s vehicle did not prove that the ten litres of fuel was being sold at the black market.**

**7. The Plaintiff’s actions of grabbing fuel from DW2 amounted to a criminal offence of theft from a person and that under the law the Defendant and other private persons were empowered to use some reasonable force to apprehend or arrest the Plaintiff in order to compel him to pay for the fuel.”**

When we heard this appeal, the learned Counsel for the appellant, Mr. Jere, relied on the Heads of Argument filed. He submitted that the appeal raises two grounds as follows:

“**1. Whether there was the sell of fuel to the respondent by DW2**

**2. Whether there was in fact an assault.”**

In support of the first ground of appeal which attacks the learned trial Judge’s finding that the respondent’s witnesses were credible, it was contended in the appellant’s Heads of Argument that the learned Judge’s finding on credibility of the respondent’s witnesses was wrong as the evidence by these witnesses had various contradictions. That at page 13 line 10 of the record of appeal the learned Judge stated that:-

“**The whole case rests on the credibility of the witnesses while the Plaintiff’s witnesses have supported this case that he was assaulted and his shirt torn, phone missing so were the car keys. The defence witnesses do not allude to the tearing of the Plaintiff’s shirt and the physical assault. Therefore, the findings of fact have to be based on the assessment of the witnesses.”**

It was contended that the learned Judge, however, failed to pin-point the contradictions in the respondent’s evidence. That in paragraph 2of the Statement of Claim, the respondent stated that:-

“**On the 1st day of May 2006, the Plaintiff was off duty when he drove out of Chipata Boma to a place known as Village to visit Mrs. Zulu, the Plaintiff’s wife, who was buying farm produce in the area.”**

It was pointed out that however, in his oral testimony, the respondent stated that:-

“**My Lord, I do recall it was 1st May 2006, I took my wife where she was buying tobacco at Chief Chanje’s area. When I took my wife I dropped her where she was supposed to** **be…”**

And that he also stated that:-

“**The wife produced K50,000 which she gave directly to the Chief**…”

However, that on the other hand, PW2 stated that:-

“**Mr. Zulu asked the wife for some money and she gave him. Then Mr. Zulu gave the money to the Chief...”**

It was contended that the learned trial Judge did not bring out these contradictions as he merely stated that:-

“**When they went to where the wife of the Plaintiff was she asked what was happening as he was half naked and the Defendant threatened violence to her. The Plaintiff then told the Defendant not to involve his wife in the quarrel…”**

It was contended further that when PW3 (the respondent’s wife) testified, she told the Court below that:-

“**She went into the house got K50,000.00 and gave the Defendant.”**

It was pointed out that these contradictions affected the credibility of the respondent’s witnesses and that if the whole case rested on the credibility of these witnesses as was held by the learned Judge, then these contradictions show that the respondent and his witnesses were not credible.

In his oral submissions, in support of ground one, Mr. Jere submitted that the question whether the appellant had physical contact with DW2 can only be seen from the evidence of the witnesses for the respondent as this evidence shows that there was no sale of fuel as the evidence shows that his first contact was with DW2. Further that the evidence of PW2 who was sent to look for fuel by the respondent was that someone came who said he had 10 litres of fuel. And that he went to get the fuel which was then put in the respondent’s motor vehicle. It was argued that DW2 did not say that he was sold the fuel or the price.

It was submitted that on the other hand, the respondent’s evidence was that the 10 litres of fuel was put in his motor vehicle. That however, the respondent did not talk about the price of the fuel. When the Court pointed out to him that the respondent’s evidence was that he was to use the money meant for the fuel for transport as his motor vehicle could not start, Mr. Jere submitted that the respondent had no money on him and that if he had the money, he could have produced it to the appellant. That he had to go and look for the money from his wife and that this showed that there was no sale at all. Therefore, that, the learned trial Judge should have properly evaluated the evidence.

In support of the second ground of appeal which attacks the learned trial Judge’s findings that the fuel was selling at K5,000 per litre as at 1st May, 2006 in Chipata, it was contended that fuel was selling at more than K6,000 per litre. That therefore, this was an assumption which was not supported by any evidence on record. Further that PW2 did not testify that as at 1st May, 2006 in Chipata, fuel was selling above that price i.e K6,000.

It was pointed out that the learned trial Judge went on to state that:-

**“Throughout the questioning of the Plaintiff by the Defendant, the Plaintiff had insisted that, that was the buyer and seller transaction. The offer of fuel at K5,000.00 below the retail price meant that this was illegally sourced and was being sold at black market rate.”**

It was contended that the record, however, shows that from the encounter between the Plaintiff and Malon Mwale (DW3), it was apparent that the two did not enter into any sale agreement as the respondent’s evidence was that:-

“**Yes I told him to look for fuel, a ten litre container, if they can sell us those people who were having vehicles there. When they brought the fuel to where I was, they put the fuel in the vehicle and that man identified himself to me as Malon Mbewe. After putting the fuel in the vehicle, I tried to start the vehicle but it could not start, I tried to push it still it could not start. So I thought of may be parking the vehicle at a near by house there at Mgubudu Shopping Centre so that he can bring a mechanic the following morning. I discussed with Malon Mbewe that the money I was supposed to use for his fuel I may use it for transport and give him the following day.”**

It was submitted that the contract of sale is defined under **Section 1(1) of the Sale of Goods Act, 18931** as:-

“**A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”**

That however, in the current case, the respondent did not have money on him and hence when pressed to pay he had to ask for transport to go to the place where his wife was selling tobacco so as to pay K50,000 to the Chief. It was submitted that the respondent used his powers as a Police Officer to grab fuel which belonged to the appellant from DW2 without his consent.

In augmenting the written submissions on ground two, Mr. Jere submitted that page 13 line 12, shows that the evidence on the price of fuel did not come from any witness and that the learned Judge just assumed that the price was K5,000,000 per litre. That however, in Chipata, fuel was selling at K6,000,000 per litre. And that since this is a finding of fact, it should have come from the witnesses.

In support of ground three which was that the learned trial Judge made unwarranted or wrong conclusions when he stated that the offer of fuel at K5,000,000 which was below the retail price meant that the fuel was illegally sourced and that it was being sold at a black market rate. It was argued that there was, however, overwhelming evidence from the appellant which showed that he had sent someone in the morning to buy fuel for him. That DW1’s evidence in this respect was fully corroborated by the evidence of PW4 who testified that:-

**“…he wanted to go and catch a lift to go to town, he was then told that Chief Chanje was there and when he approached the chief he was told that he was waiting for a young man. Later the young man came and told him that the person whom he had sent to buy fuel had bought the fuel but that the policeman grabbed it…The Defendant approached this person and asked him why he grabbed the fuel, but the Plaintiff said he had gotten the fuel on credit**.”

It was contended that fuel could not have been gotten on credit as the fuel was instantly put in the respondent’s motor vehicle. And that when the motor vehicle could not start despite pushing it, he parked it at a nearby house with the intention of taking a mechanic there the following day. It was argued that it was after this process that the respondent, allegedly, discussed with DW2 that he was going to use the money that he was supposed to pay him for the fuel as transport to Chipata and that he would pay him the following day. It was argued that this evidence, infact, strengthens DW2’s story that the respondent merely grabbed fuel from him after accusing him of conducting an illegal business.

In augmenting the written submissions on ground three, Mr. Jere submitted that the learned trial Judge erred when he concluded that the fuel was being sold at black market rate of K5,000 per litre as this is contrary to the appellant’s evidence.

In support of ground four, it was contended that the learned Judge erred in law when he took judicial notice that even in compounds in Chipata, cheaper fuel smuggled from Malawi is sold and what more, for a village that is close to the Malawi border. It was contended that under the law, the Court can only take Judicial Notice of matters of common knowledge which are so notorious that to lead evidence in order to establish their existence may be unnecessary and could, as **Phippson**1 put it, “**would be an insult to the intelligence to require evidence**.” Therefore, that the learned Judge should not have taken Judicial Notice of this as it is a fact that the respondent used his power as a police officer to grab and steal the appellant’s fuel and hence his refusal to go to the nearby police station so that he could explain there.

In support of ground 5 which attacks the learned trial Judge’s observation that there was also a medical report which was consistent with the respondent’s assault allegation, it was contended that although the medical report was produced, the doctor who signed the medical report did not state that his findings were consistent with the alleged circumstances. Therefore, that, contrary to the learned Judge’s findings, there was no logic explanation for the respondent’s failure to settle the appellant’s bill when he was asked by the Chief on the road side. Further, that, it was unlikely that injuries inflicted on a person on 1st May, 2006 would completely heal by 2nd or 3rd May, 2006. In support of this argument, Mr. Jere referred to the medical report at page 40 of the Record on which the Doctor stated his observation of the alleged assault as:-

**“…Multiple bruises… 3rd May, 2006 and general body tenderness which may be suggestive of the alleged circumstances…”**

In support of ground 6, it was argued that the fact that the Chief did not siphon his fuel from the respondent’s motor vehicle did not prove that the 10 litres of fuel was being sold at the black market. Further that it was not necessary for the Chief to Siphon the fuel from the respondent’s motor vehicle as the Chief could not go to such an extent as to siphon fuel from a motor vehicle.

In support of ground 7, which was that the respondent’s action of grabbing fuel from DW2 amounted to theft from person under the law, it was contended and that the appellant and other private individuals were empowered and mandated to use reasonable force to apprehend or arrest the respondent or to compel him to pay for the fuel. It was contended that since the fuel was not sold to the respondent, he stole it and as such, the Chief had authority to use reasonable force to apprehend him. That therefore, this appeal should be allowed.

On the other hand, in opposing this appeal, the learned Counsel for the respondent, Mr. Mulenga, relied on the respondent’s Heads of Argument which he augmented with oral submissions.

In response to ground one, it was submitted that the learned trial Judge was on firm ground when he rested his findings on the credibility of the respondent’s witnesses. It was argued that the learned Judge’s assessment of the witnesses was proper and that his findings of fact which were based on his assessment of the credibility of the witnesses was sound at law. That **Black’s Law Dictionary2**, defines “**credibility**” as:-

“**Worthiness of belief; that quality in a witness which renders his evidence worthy of belief. After the competence of a witness is allowed, the consideration of his credibility arises, and not before**.”

It was contended that this means that the credibility of a witness means the extent to which he is to be believed by the Court. That in deciding this, the Court will be guided by various considerations including the demeanour of the witness.

Further, that the **Magistrates’ Hand Book3**, states that:-

“**The rules relating to what facts are subject of Judicial Notice have their basis in either statute or in case law and generally matters directed by statute to be judicially noticed by well established practice or precedents of the Courts must be recognized.”**

It was argued that the learned Judge was therefore within his province and properly directed himself when upon evaluation of the evidence before him and the demeanour of each witness, he came to the conclusion that the respondent’s witnesses were more credible than the appellant and his witnesses. It was submitted that this Court has consistently held that findings of the trial Court on credibility or fact are not to be lightly interfered with by the appellate Court as was held in **GDC Hauliers (Z) Limited vs Trans Carriers Limited4**, where this Court stated that:-

“**Findings of credibility are not to be interfered with lightly by an Appellate Court which did not see and hear the witnesses at first hand.”**

That in **Nkhata and Four Others vs. The Attorney General5** , this Court held that:-

“**A trial Judge sitting alone without a Jury can only be reversed on question of fact if (1) the Judge erred in accepting evidence, or (2) the Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the Judge did not take proper advantage of having seen and heard the witness (4) external evidence demonstrates that the Judge erred in assessing the manner and demeanour of the witness**.”

Further that in **Attorney General vs. Achiume6**, this Court held that:-

“**The appellate Court will not reverse findings of fact made by a trial Judge unless it is satisfied that he findings in question were either perverse or made in the absence of any evidence or upon a misapprehension of facts or that they were findings which on a proper view of the evidence, no trial Court acting correctly can reasonably make.”**

It was contended that there is nothing on record to show that the trial Judge:-

**“- Erred in accepting and believing the testimony of the respondent and his witness.**

* **Erred in assessing and evaluating the evidence before him by taking into account some matter which he should have ignored or failing to take into account something which he should have considered.**
* **Did not take proper advantage of having seen and heard the witnesses.**
* **Erred in assessing the manner and demeanour of witnesses.**
* **Made his findings in the absence of any relevant evidence or that his findings were perverse or made upon a misapprehension of facts.**
* **Made findings in which on a proper view of the evidence, no trial Court acting correctly can reasonably make.”**

That, therefore, there is no basis for this Court to interfere with the learned trial Judge’s findings of fact and credibility.

In response to the argument that there were contradictions in the evidence of the respondent’s witnesses and that the learned trial Judge’s findings of credibility and fact were not properly evaluated, it was contended that the alleged contradictions do not warrant interference by this Court because the examples cited as contradictions are not worthy of examination and/or considerations as they are immaterial and do not go or touch the core of the case. It was argued that the material fact remained credible and did not have any bearing on the main issue as to whether or not the respondent was assaulted and battered by the appellant. It was contended that the approach adopted by the appellant of comparing the pleadings and the evidence does not at all help the appellant’s case because the two are different and serve a different purpose. Further that the learned Judge at page 15 of the Record of Appeal stated the basis for his findings when he stated that:-

**“I observed the demeanor of PW2 who appeared to be unsophisticated, that he cannot fabricate a story which can withstand skillful cross examination**.”

And that:-

“**I observed PW3, who testified that the husband was half naked, surely could a decent wife tell a lie that the husband was naked if it were not so?”**

It was submitted that the learned trial Judge therefore properly directed himself in his assessment of the respondent’s witnesses and that he was perfectly entitled to accept the version that he found to be more credible and logical than that of the appellant.

In response to grounds 2, 3 and 4, it was contended that the learned Judge in the Court below was on firm ground when he drew inferences and made conclusions on the price of fuel in Chipata and on the finding that the fuel in question was illegally obtained as it was smuggled from Malawi and was being sold at black market rate. It was contended that there was sufficient evidence on record from which the Court drew these conclusions and inferences and this was based on the general knowledge resulting from wide human experience and a comparative assessment of the available material evidence. That at page 52 of the record, the respondent’s evidence was that:-

“**After putting the fuel in the vehicle I tried to start the vehicle but it could not start, I tried to push it still it could not start. So I thought of may be parking the vehicle at a nearby house there at Shopping Centre so that I can bring a mechanic the following morning. I discussed with Malon Mbewe that the money I was supposed to use for his fuel I may use it for transport and give him the following day**.”

It was submitted that this evidence confirms that there was a sale of fuel on credit with DW2 and that page 57 points to the price of fuel. This reads:-

“**Q. Did he not tell you the price of the fuel?**

1. **He said that it was K50,000. (This is evidence that the fuel put in the respondent’s motor vehicle had a cost attached to it). It was not for free, otherwise how did DW2 put its value at K50,000 for the 10 litre container?**

**At page 59, the evidence of PW2, Dennis Miti clearly puts the quantity of the fuel bought at 10 litres. At lines 5-7 he says:-**

**“As I was talking to the same person there came another boy who said he had fuel then we crossed the road then we went to his house. He got a 10 litre container and he carried it.”**

Further that at page 59 of the Record of Appeal, PW2, clearly put the quantity of the fuel bought as 10 litres when he stated as follows:-

“**Court: How much was the fuel?**

**A: It was 10 litres my lord.**

**Court: How much (sic) does fuel cost in Chipata per litre in 2006.**

**A: At that time it is the driver who can know but I was told that 10 litres is K50,000.**

**Court: That is where he got the fuel.**

**A: Yes he wanted to send it to me.”**

It was submitted that this evidence confirms that the price of the 10 litres container of fuel was sold to the respondent at K50,000 and translates into K5,000 per litre and also confirms the source of the fuel that it was questionable as it was kept at the road side as the person who brought it handed it over to DW2 but that this person was not called to explain where he bought the fuel from. Further that DW2’s evidence was that the source of fuel was not known except that it was brought in from town as there was no filing station in Mgubudu where someone could have bought it from. And that the evidence is that fuel was brought from town which is not the same as buying the fuel from the filling station. Therefore, that the learned Judge properly reviewed the evidence before drawing upon the general information or knowledge of the affairs which men of ordinary intelligence possess.

It was argued that the learned trial Judge reasonably deduced that the official fuel price was above K5,000. And that the fuel was illegally sourced i.e. smuggled from Malawi and was being sold at black market rate by DW2 on behalf of DW1. Further that the trial Court’s findings and conclusions are based on matters of common knowledge which are so notorious that to lead evidence in order to establish their existence may be unnecessary and could be an insult to the intelligence to require evidence. The case of **Commonwealth Shipping Representatives vs. P & O Branch Services7**, was cited in which Lord Summer held that:-

**“Judicial Notice refers to facts which a Judge can be called upon to receive and to act upon either from general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.”**

Further that the **Magistrate’s Hand Book** cited above at page 517 states that:-

“**The rules relating to what facts are subject of Judicial Notice have their basis in either statute or in case law and generally matters directed by statute to be judicially noticed by well established practice or precedents of the Courts must be recognized.”**

And that “**the Courts have a wide discretion and may notice much which they can not be required to notice**.”

It was further contended that from the evidence, it is clear that the appellant was more interested in the money than in the fuel. And that, therefore, the learned trial Judge properly directed himself and was on firm ground when he made inferences and drew conclusions with regard to the price of fuel, its source and the fact that it was being sold at the black market by DW2.

Further that grounds 2, 3 and 4 are peripheral issues which are far removed from the main issue at trial, namely, the assault by the appellant on the respondent.

In response to ground five, it was contended that the contents of the Medical Report are self explanatory and that this report indicated the findings and conclusions of the Medical Officer who examined the respondent and states that:-

**“I have examined the above named and find “multiple bruises.”**

And that:-

**“”Healed Bruises and general body tenderness which may be suggestive of the alleged circumstances.”**

It was submitted that whether the bruises healed after a day or two or a week is immaterial as these findings and conclusions are clearly indicative and confirm that the respondent was assaulted. The case of **Stephen vs. Myers8**, was cited in which the Court in England defined an assault as:-

**“An overt act indicating an immediate intention to commit a battery, coupled with the capacity of carrying that intention into effect. And a battery has been defined as the direct application of physical force on the person or the other.”**

It was argued that in the current case, the evidence on record has shown that the appellant did not only have the intention and the capacity to commit a battery, he actually committed it by applying physical force on the person of the respondent.

In response to ground six, it was submitted that the learned trial Judge correctly observed that:-

“**In any event, if the fuel was not being sold and the Chief desperately needed the fuel (sic) the fuel would have siphoned from the vehicle belonging to the Plaintiff.”**

It was contended that the appellant was clearly interested in the K50,000 instead of the fuel. And that it was therefore, proper and correct for the learned trial Judge to reasonably infer that the fuel was being sold at the black market by DW2 on behalf of the appellant.

In response to ground seven, it was contended that there was no evidence to show that the respondent grabbed the fuel from DW2 as the evidence shows that it was sold after negotiations and that DW2 was willing to put 10 litres of fuel in the respondent’s motor vehicle. And that therefore, the issue of theft does not arise and the issue of reasonable force does not arise as there was no theft and that this is merely an admission on the part of the appellant that he had applied physical force on the respondent thereby committing the said assault and battery.

In his oral submissions, in response to ground one, Mr. Mulenga submitted that the learned trial Judge properly evaluated the evidence and was therefore on firm ground as the learned Judge is the one who heard the evidence and had the opportunity to decide on the credibility of the witnesses and that page 15 of the record shows the steps that he took in assessing the evidence before writing his Judgment. Further that at page 13, the learned Judge observed that he had observed the demeanour of the witnesses. Therefore, that the learned trial Judge was entitled to arrive at the decision that he did and when he said the respondent’s witnesses were more credible than the appellant and his witnesses. It was contended that this Court has consistently held that an appellate Court will not upset findings of credibility or findings of fact. Therefore, that there is no basis for offsetting the evidence by the learned trial Judge.

In response to grounds 2, 3 and 4, Mr. Mulenga submitted that the learned trial Judge was on firm ground when he drew the conclusion that he did as there was evidence on record upon which he based his findings. And that he was entitled to take Judicial Notice on the issues that did not require evidence. Further that to suggest that the High Court Judge can fail to tell the retail price of fuel is an insult to the Court. And that at page 63, the learned Judge went out of his way to inquire and ask the source of the fuel, the price and the quantity. And that what came out is that the fuel came from a questionable source. Further, the person sent by the Chief to get the fuel was not called to testify. Therefore, that the Court was entitled to deduce that fuel came from an illegal source. And that this is a notorious fact and that they sell fuel at a lower price than the retailers. Therefore, that, the trial Judge was entitled to take Judicial Notice of this fact. Further that issues of fuel were far removed from the issue at hand which was the assault.

In response to ground five, Mr. Mulenga submitted that the respondent failed to appreciate this ground suffice to say that at page 40, it is shown that the Medical Report states that:

“…**Multiple bruises…Healed bruises and General body tenderness which may be suggestive of the alleged circumstances…”**

It was contended that if the bruises healed after a day or a week is besides the point as the issue is that he was assaulted.

In response to ground six, Mr. Mulenga contended that it is very wrong to suggest that there was no sale. That one can deduce that the appellant was more interested in the K50,000 than in the fuel as he could have gotten the fuel had he wanted to.

In response to ground seven, Mr. Mulenga submitted that the issues alluded to by the appellant do not arise as the issue was assault and that the respondent reported the matter to the police and brought this action whereas the appellant has not reported that his 10 litres of fuel was stolen by the respondent. Therefore, that this appeal has no merit and the same should be dismissed with costs to the respondent.

In reply, Mr. Jere submitted that with due respect to Counsel’s submission the main issue is that the respondent’s witnesses had contradicted each other and that their evidence does not suggest that the issue of sale and the prices of fuel was discussed as no evidence to this effect was led.

We have seriously considered this appeal together with the arguments advanced in the respective Heads of Argument, the authorities cited therein and the oral submissions by the learned Counsel for the parties. We have also considered the Judgment by the learned Judge in the Court below. It is our considered view that this appeal raises one major question and this is whether there was evidence to support the learned trial Judge’s finding that the respondent was assaulted by the appellant on the date in question.

In coming to the finding that the respondent was assaulted by the appellant, the learned trial Judge pointed out that the case rested on the credibility of the witnesses because on one hand, the respondent and his witnesses testified that indeed, the respondent was assaulted by the appellant while on the other hand, the appellant and his witnesses testified that the appellant did not assault the respondent. The learned Judge also relied on the medical report produced as supporting the finding that the respondent was indeed assaulted by the appellant. For convenience, we shall deal with grounds one, two, three, four and five together.

It has been argued on the appellant’s behalf that the learned trial Judge’s finding that the respondent and his witnesses were more credible than the appellant and his witnesses is not supported by any evidence as the respondent’s case was full of contradictions. The areas of disparity were highlighted and we have considered them. It was also pointed out that the medical report relied upon does not confirm the alleged assault in that although it states that the respondent had multiple healed bruises, it was unlikely that injuries inflicted on the respondent on 1st May, 2006 could be fully healed by 2nd or 3rd May, 2006. Therefore, that the medical report did not support the respondent’s claim that he was assaulted by the appellant on that day.

We have considered these arguments. We have come to the conclusion that the learned Judge in the Court below was on firm ground when he found that indeed, the respondent was assaulted by the appellant. The appellant challenges findings of fact by the learned trial Judge and also findings on credibility of the witnesses. However, in this case, the learned trial Judge believed the evidence of the respondent and his witnesses whom he found to be more credible than the appellant and his witnesses. We cannot fault the learned Judge for so finding as he was perfectly entitled to decide whom to believe as he had the opportunity to observe the witnesses and to form the impression that he did. We repeat here what we have stated time and again and this is that the appellate Court will not reverse findings of fact made by the trial Court unless the appellate Court is satisfied that **the findings in question were either perverse or made in the absence of any evidence or upon a misapprehension of facts or that they were findings which on a proper view of the evidence, no trial Court acting correctly can reasonably make**. The case in point is **Attorney General vs. Marcus Achiume6**.

In **GDC Hauliers (Z) Limited vs Trans Carriers Limited4**, we made it clear that **findings of credibility are not to be interfered with lightly by an Appellate Court which did not see and hear the witnesses at first hand**. We repeat this here.

Further, perusal of the Judgment has shown that the learned Judge did analyse the evidence that was before him before he came to the conclusion that the respondent and his witnesses were more credible than the appellant and gave reasons for finding thus.

Although it has been argued at length that the respondent’s case was full of contradictions, perusal of the alleged contradictions has shown that these do not at all go to the root of the case nor do they actually deal with the main issue that was before the learned Judge for determination. This issue is whether on the evidence before him, the respondent had proved on the balance of probabilities that he was assaulted by the appellant as alleged. We cannot help but agree with the submissions by the learned Counsel for the respondent that the arguments in grounds 2, 3 and 4 are peripheral issues which do not at all deal with the main issue as to whether the appellant did assault the respondent. Therefore, the question whether or not the learned Judge ought not to have taken Judicial Notice of the price of fuel in Chipata as well as his comments that the fuel was being sold at the black market rate, and that it was smuggled from Malawi do not at all go to the root of this matter and do not help the appellant’s case. This is so because it is a matter of common sense and simple arithmetics to say that if the price of 10 litres of fuel is K50,000, then, the price is K5,000 per litre. We do not also see how the appellant could have accepted the K50,000 from the respondent’s wife if the price of fuel in Chipata was more than K5,000 per litre. Further, if at all it was correct that the respondent grabbed the fuel from DW2 and that he had to be physically forced to get the money from his wife to pay for the fuel, and if the fuel was not for sell as was canvassed, then we do not see how DW2 could have gone with PW2 to where the respondent was and then allowed the fuel to be put in the respondent’s vehicle without raising alarm. We therefore, find no merit in grounds 1, 2, 3 and 4.

Coming to ground 5 which attacks the learned trial Judge’s finding that the medical report confirms the respondent’s claim that he was assaulted, our understanding of this medical report is that upon examining the respondent, the medical officer observed “**multiple bruises**”, which he put as “**healed bruises and general body tenderness which may be suggestive of the alleged circumstances**.”

In our view, this means that the medical officer was confirming the respondent’s claim that he was assaulted. We, therefore, agree with the submissions by the learned Counsel for the respondent that whether the bruises healed a day after or two weeks after is immaterial as the medial officer’s report confirms the assault allegation. The evidence of PW2 and that of the respondent’s wife, PW3, who was at a separate place from where the assault took place, confirms the respondent’s assault claim. Therefore, the learned Judge was on firm ground when he believed the testimonies of PW2 and PW3. We therefore, find no merit in the fifth ground of appeal.

With respect to ground 6 which attacks the learned trial Judge’s observation that if the fuel was not being sold and the Chief desperately needed it, the fuel would have been siphoned from the respondent’s vehicle,it is our considered view that this comment by the trial Judge must be understood in its own right. This was a mere remark which does not at all go to the root of this case. The question for determination that was before the learned trial Judge was not whether or not the fuel was being sold at the black market rate but whether or not the respondent was assaulted by the appellant as alleged, albeit, the assault having emanated from the circumstances surrounding the fuel issue. We therefore find no merit in the sixth ground of appeal.

As for ground 7 which raises the question whether the appellant was entitled to use force to compel the respondent to pay for the fuel as the respondent was alleged to have grabbed the appellant’s fuel from DW2 without paying for it, it is our firm view that this issue does not at all negate the assault claim. Whether the respondent bought the fuel from DW2, or grabbed it from him was not the main issue for determination in the Court below. The main issue was the alleged assault. In fact, this contention in this ground seem to confirm the respondent’s assault claim.

We also note from the evidence that at the time of the alleged transaction between the respondent and DW2, the appellant was nowhere near that place until much later. Therefore, the claim that the appellant was entitled to use force to restrain the respondent does not arise. We can only agree with the submissions by Mr. Mulenga that the issues argued in this ground of appeal do not at all arise as the issue was the alleged assault. We therefore, find that this appeal has no merit in ground 7.

All the seven grounds of appeal having failed, the sum total is that the entire appeal has failed on ground of want of merit. We confirm the Judgment by the learned trial Judge. The appeal is dismissed with costs to the respondent to be agreed and in default thereof, to be taxed.

……………………………………….

I. C. MAMBILIMA

**DEPUTY CHIEF JUSTICE**

…….………………………………….

D. K. CHIRWA

**AG. DEPUTY CHIEF JUSTICE**

..…………………………………….

H. CHIBOMBA

**SUPREME COURT JUDGE**