IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 025/2012**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

MATILDAH MUTALE **APPELLANT**

AND

THE ATTORNEY GENERAL **RESPONDENT**

Coram: Mwanamwambwa, Chibomba and Musonda, JJS.
On 14th August, 2012 and on 1st August, 2014.

For the Appellant: Mr. C. Sianondo of Malambo and Company.
For the Respondent: Ms. C. Mulenga, Assistant Senior State Advocate.

JUDGMENT

Chibomba, JS, delivered the Judgment of the Court.

Cases Referred to:-

1. Attorney General vs Marcus Kampumba Achiume (1983) ZR 1
2. Robson Banda (Suing as Administrator of the estate of the late Rosemary Phiri) vs Varisto Mulenga (Sued as Administrator of the estate of the late Stephen Kabamba) (2003) ZR 121
3. Zambia Daily Mail Limited vs Charles Banda (1999) ZR 203
4. Herbert Ijegalu Okwo Ozokwo vs The Attorney General (No.2) (1985) ZR 218
5. Craven Ellis vs Canons Limited (1936) 2 KB.403
6. Anns vs Merton London Borough (1977) 2 All. ER 492
7. The Rating Valuation Consortium and D. W. Zyambo and Associates (suing as a firm) vs The Lusaka City Council And Zambia National Tender Board (2004) ZR 109
8. Industrial Gases Limited vs. Waraf Transport Limited and Mussah Mogeehaid (1995/1997) ZR 183
9. Kafue District Council vs. James Chipulu (1995/1997) ZR 190

Legislature and Other materials referred to:-

1. The High Court Act, Chapter 27 of the Laws of Zambia.
2. Black's Law Dictionary, 8th Edition, Thomson and West, 2004.
3. Longman Dictionary of Contemporary English, Harlow: Pearson Education Limited, 2003, pages 858 and 1368.

When we heard this appeal, Honourable Mr. Justice Dr. Musonda sat with us. He has since resigned. This is, therefore, a Judgment by the majority.

The Appellant appeals against the Judgment of the High Court, at Lusaka, in which the learned Judge awarded the sum of K32,000,000.00 and not the claimed sum of K167,367,696.50 as cost of repair of the Mitsubishi Fuso truck Registration Number GRZ 885 BG belonging to the Natural Resources Development College. (The sums in this Judgment are expressed as they were before the rebasing of the Kwacha).

The history of this matter is that the National Resources Development College (NRDC) had advertised the sale of some boarded government motor vehicles by public auction. The Appellant was interested in purchasing some of the advertised items. She attended the public auction. There was a Mitsubishi Fuso truck, Registration No. GRZ 885 BG belonging to the College which was not among the items to be auctioned as it had not been boarded. The truck was a non-runner. The Appellant was interested in the truck. In accordance with the Appellant, it was agreed with the College that she would repair the truck at her own cost, run it and after she recovers the repair costs, then she would return it to the College.

However, this arrangement went bad as the Appellant could not use a GRZ vehicle for private business. It was also discovered that since the truck had not been boarded, it could not be sold to her and that the arrangement should not have been entered into in the first place. The Appellant claimed that she spent the sum of K167,367,696.50 (before rebasing of the Kwacha), as repair costs which she claimed from the Respondent. The Respondent carried out investigations on the transaction and some of the employees of the Respondent prepared reports relating to the circumstances under which the truck was released to the Appellant and on the repair costs claimed by the Appellant. Negotiations were also held with the Solicitor General. However, the invoices that the Appellant submitted to the Solicitor General, to support her claim on the cost of repairs, were misplaced at the Solicitor General's Chambers. The parties failed to reach consensus. This prompted the Appellant to commence an action in the High Court, at Lusaka, by Writ of Summons, in which the following reliefs were sought from the Respondent: -

"(i) Refund of K167,367,696.50
(ii) Damages
(iii) Loss of use of the said amount into her business
(iv) Interest
(v) Costs."

The learned trial Judge received evidence from the parties which he analysed and found that the agreement between the Appellant and NRDC was illegal and incapable of being enforceable, on ground that the motor vehicle had not been boarded and that the transaction was not approved by the Controlling Officer, the Permanent Secretary, Ministry of Agriculture. However, on the basis of quantum meruit, the learned trial Judge awarded the sum of K32,000,000.00 and not the sum of K167,367,696.50 claimed, on ground that the claim as shown by a summary of spare parts supplied and fitted was not supported by receipts.

Dissatisfied with the award of K32,000,000.00, the Appellant has appealed to this Court, advancing two Grounds of Appeal as follows: -

> **"1. The Court erred both in law and in fact when it awarded a sum of K32,000,000.00 contrary to the evidence on record.**
>
> **2. The Court erred both in law and in fact when it did not award interest from the period when the repair costs sustained."**

The learned Counsel for the Appellant, Mr. Sianondo, relied on the Heads of Argument filed which he augmented with oral submissions.

The gist of Mr. Sianondo's submission in support of Ground one is that although the position of this Court is that it is settled law that this Court will not reverse findings of fact made by the trial Court unless it is shown that the findings in question were either perverse or made in the

absence of any relevant evidence or upon misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial Court can reasonably make, as was held in **Attorney General vs Marcus Kampumba Achiume**[1], the case before us is a proper one in which this Court can reverse the findings of fact made by the trial Court on ground that the learned trial Judge did not properly assess the evidence adduced.

Citing the last paragraph of the Judgment at pages 19-20, where the learned Judge stated, inter-alia, that he had to make an intelligent guess on what the actual value of the spare parts was as the "Summary of Spare Parts" supplied and fitted was not helpful as it was not supported by receipts, it was argued that by so holding, the Court below glossed over the evidence and cast a blind eye on the documentary evidence on record. And that the implication is that full significance was not rendered. That in view of the evidence on record which supported the Appellant's claim on the cost of repair, there was no need for the trial Court to make an "intelligent guess". Counsel pointed out that this evidence, is in form of reports at pages 58-65 and 72-78 of the Record of Appeal.

It was further submitted that the effect of the evidence of the Respondent's witness, at pages 141-144 of the Record of Appeal was that the reports ascertained the facts surrounding the release of the

motor vehicle in question and the amount spent as repair costs. The report which at pages 58-65, states in part that: -

> **"...This report concerns an investigation carried out on the irregularity of how and under whose instructions and authority GRZ 885 BGT falling under Natural Resources Development College and ended up with an employee of National Assembly, Mrs. M. M. Mutale and to confirm that she spent K150 million on repairs of the same which she requested to be boarded as per her letter addressed to Secretary to the Treasury dated 5th October, 2001, contrary to the laid down procedures of disposing Government property or asset. Mr. V. Nyirongo, the Transport Officer and the undersigned between 15th November, and 16th December, 2001 carried out the investigation..."**

Further that the report at pages 72-78 shows that repairs were done between the year 2000 and 2001 at a cost of K167,367,696.50.

Further, that the report from the Zambia Police and the Director of Public Prosecutions, shows that investigations were concluded and a decision was reached to surrender back the truck to NRDC and for the repair cost of K167,367,696.50 to be paid to the Appellant. Counsel submitted that it was also agreed that the reimbursement be effected by the Solicitor General and that the only reason the re-imbursement was not effected is the loss of relevant supportive documents (invoices) at the office of the Solicitor General. Further, that the Respondent's witness, under cross-examination, agreed to the repair cost as shown at pages 141-143 of the Record of Appeal, where he stated as follows: -

"……..

Q: Read that letter at pages 1 and 2.
A: DW1 Reads.
Q: There was an arrangement between NRDC and the Plaintiff?
A: I would agree that there was an arrangement between those mentioned officers in this document and Mrs. Mutale and not the NRDC management as a whole. That I would object to.
Q: Is the Registrar part of management?
A: Yes but he reports to the Principal.
Q: And in fact he is in charge of equipment at NRDC?
A: Yes he is in charge of plant and equipment at NRDC.
Q: Go to 4.3 at page 23.

A: Reads.
Q: According to this report, K167,367,696.50 was spent in repairing the vehicle. Do you see that?
A: Yes.
Q: Are you aware that there was a report by NRDC management that the Plaintiff had stolen the vehicle?
A: Not exactly that it was stolen by Mrs. Mutale but that it was taken from the college by Mrs. Mutale in an irregular manner or an unlawful manner.
Q: But the matter was reported to the Police by yourself?
A: Yes please.
Q: Go to page 24. Read 4.7.
A: Reads.
Q: Do you see that the Government is actually recommending the reimbursement of the said amount to the Plaintiff?
A: Yes, I see it here.
Q: Read 4.8 at page 25.
A: Reads.
Q: Do you see that the State is accepting the fact that supporting documents to effect service were submitted?
A: Yes, I see.
Q: What is the impediment to the reimbursement according to this report?
A: According to this report it is the loss of the supporting documents.
Q: Is there any objection by the State to pay this amount of K167,367,696.50?
A: No objection is stated in this document to this payment.
Q: Go to page 14 of the Plaintiff's bundle of documents. To whom is it addressed?
A: The Solicitor General, Ministry of Home Affairs, Lusaka.
Q: Upon perusal of that letter, do you see that all documents were sent to the Solicitor General?
A: Yes, according to this document but I did write on 31st October, 2001 in which I had indicated that I was objecting to the idea of selling the vehicle to Mrs. Mutale at K2million.

Q: Go to page 15. Do you see that the Solicitor General is acknowledging receipt of the letter dated 13th December, 2002 which was referred to earlier?
A: Yes.
Q: Who should have obtained the consent from the Permanent Secretary between Mrs. Mutale and NRDC?
A: It should have been the Principal if they had resolved as management..."

It was contended that the trial Court however, ignored the Appellant's evidence illustrated above. Therefore, the Appellant's contention is that this Court, disapproves such evaluation of evidence as shown by the decision in **Robson Banda (Suing as Administrator of the estate of the late Rosemary Phiri) vs Varisto Mulenga (Sued as Administrator of the estate of the late Stephen Kabamba)**[2], in which we held as follows: -

> **"On the authority of Nkhata and Others, we have no hesitation in holding that this is a proper case in which to interfere with the findings of the trial Court on the ground that in assessing and evaluating the evidence, the trial magistrate, subsequently the appellate Judge, failed to take into account the Appellant's documentary evidence."**

Mr. Sianondo submitted that had the Court below directed its mind to the documentary evidence produced by the Appellant, namely, (the reports generated by the Respondent), the Court could not have opted to guess but could have awarded the sum claimed as duly found in the Respondent's report. The case of **Zambia Daily Mail Limited vs**

Charles Banda[3] was cited which gives guidance on when an appellate court can interfere with an assessment of damages.

Counsel submitted that it was, therefore, erroneous for the Court below to award the sum of K32,000,000.00 as that award was made in misapprehension of the facts resulting from the flaws in the evaluation of the evidence. Hence, this Court should grant the sum of K167,367,696.50 as prayed.

In support of Ground two of this Appeal, it was contended that the Court below erred both in law and fact when it did not award interest from the period when the repair costs were sustained. That in awarding interest from date of Writ, the Court below relied on **Order 36/8** of **the High Court Rules** (**HCR**) which provides thus:-

> **"Where a Judgment or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as the Court or Judge may direct to the date of Judgment."**

It was argued that pursuant to **Order**, **36/8**, the Court has discretion to award interest from the date the cause of action arose or from the date of Writ. Further, that this Court has given guidance in the case of **Herbert Ijegalu Okwo Ozokwo vs The Attorney General**[4] on how the issue of interest should be approached where we stated that: -

> **"Mr. Kinariwala has argued that, if the Appellant was paid too little, that he cannot claim anything other than interest for money which he should**

have been paid and of which he has been deprived. There is an abundance of authority and especially the case of Jefford and Another v Gee (1970) (1) All E.R. 120 (1), which, although it has been qualified by later Judgments, remains in effect in this respect, that a Plaintiff who has been deprived of his money must be paid a reasonable rate of interest from the time when he was first wrongfully deprived, in order to recompense him. We agree entirely with this authority and this Court has always applied that principle."

Therefore, that on the basis of the above authority, interest should have been from the time when the Appellant was deprived of the use of the money as evidenced by the documents at pages 64-65 of the Record of Appeal, (between 5th February, 2001 and 12th October, 2001). Therefore, Ground two should also be allowed.

On the other hand, in opposing this Appeal, the learned Counsel for the Respondent, Ms. Mulenga, also relied on the Respondent's Heads of Argument which she augmented with oral submissions. In response to Ground one of this Appeal, Ms. Mulenga submitted that the learned trial Judge was on firm ground when he awarded the sum of K32,000,000.00 as value of the cost of repairs of the truck in question.

Citing the case of **Attorney General vs Marcus Kampumba Achiume**[1], it was pointed out that this case provides useful guide on reversal of findings of fact made by the trial Court. Ms. Mulenga submitted that in the current case, however, the learned trial Judge's findings were neither perverse nor were they made in the absence of any relevance evidence, nor was the decision made upon a

misapprehension of the facts as the learned trial Judge considered the evidence before him and properly analysed it before coming to the conclusion that indeed, the appellant had not proved her case on the balance of probabilities on the amount that she expended as repair costs. It was pointed out that that the Appellant's evidence in the Court below did not justify the refund of repair costs claimed as her evidence was inconsistent in that in the letter from the Appellant to the Secretary to the Treasury (at page 53 of the Record of Appeal), she claimed to have spent close to K150,000,000.00 to bring the motor vehicle to its current state. That however, the investigation report at pages 58-64, shows that when that witness interviewed the Workshop Manager of NRDC, the Workshop Manager estimated repair costs at K4,000,000.00. Further, that the report at page 61 states that verification of invoices from spare part suppliers revealed that apart from Tren Tyres, most spare part dealers were from Soweto who had no fixed place.

Further, that Appendix 1 at page 64 of the Record of Appeal refers to "invoices" and not to "receipts". And that when cross-examined whether there is difference between a "receipt" and an" invoice", PW1 responded as follows:-

> **"Yes, the difference is that an invoice is raised after goods have been delivered and a receipt is an acknowledgement by the person selling the goods that he has received payment."**

Q. Am I to understand that in the case of an invoice, goods may be supplied but payment has not been made.

Q. In your investigation, you have not mentioned verification of receipts and neither have you produced these receipts before Court.

A. But that was not part of my terms of reference.

Q. You were given the task of investigating a government asset in which the claim of K150 million was being made and you are a Senior Internal Auditor and you are aware that in all issues of money being claimed in government, receipts are to be produced and verified. How did you hope to establish this claim if you are not going to talk about receipts?

A. what I said was that the invoices and receipts were verified with items that were on the vehicle. Together they were verified."

It was submitted that there are no receipts as only invoices were produced and that invoices, as attested to by PW1, are not proof of receipt of payment.

It was further submitted that in government, conclusive verification is based on receipts and not invoices and that PW1, as a Senior Internal Auditor, ought to have known this. Further, that the report at page 61 of the Record of Appeal, talks of verification of invoices and not receipts. And that in fact, even the recommendations he put forth in the reports did not include refund and reimbursement of the sum claimed. Further, that the letter at pages 55-56 of the Record of Appeal which was written by the Acting Principal, NRDC, who was also the Respondent's witness in the Court below, states that the estimated cost of putting the truck back on the road was K8,000,000.00. And that the same witness,

testified that in one senior management meeting, the cost of repairs was estimated at K27,000,000.00. It was contended that the estimates of repairs kept changing as the figures of K8,000,000.00, K13,000,000.00 and that the latest was K27,000,000.00.

It was Ms. Mulenga's further submission that in the Court below, the Respondent's position was that there was no contract between the Appellant and NRDC as the agreement which the Appellant sought to rely upon was illegal and not enforceable because there was no authority from the Controlling Officer, the Permanent Secretary, and that as such, the contract in question was contrary to public policy.

Therefore, that the Court below correctly found that the contract was illegal and against public policy and that this fact was not challenged in this Appeal. Counsel pointed out that in the case of **Anns vs Merton London Borough**[5], the Court in England stated that:-

> **"The first stage of the inquiry is to look at the illegal conduct relied on to the claim maintained by the plaintiff and that the Court has next to consider whether there are considerations which as a matter of public policy ought to affect the plaintiff's right to recover."**

Therefore, that there were matters of public policy which affected the Appellant's right to recover. And that the Appellant cannot recover on quantum meruit basis on an illegal and unenforceable contract which is against public policy. Therefore, that the Appellant ought to have

proved that she spent the sum claimed by bringing forth reliable evidence such as receipts.

It was argued that although the Appellant has claimed that the documents were submitted to the Solicitor General and lost there, however, the letters at pages 66 and 67 of the Record of Appeal, do not indicate that there were receipts that totalled the sum of K167,367,696.50 claimed. Further, that if these receipts were submitted to the Solicitor General and were lost, it can be assumed that the Appellant, as Deputy Accountant at National Assembly, she would have exercised due diligence by keeping copies of receipts for her own records. Hence, there was no proof upon which payment could be proved.

It was further argued that even after the Appellant relied on quantum meruit to recover the amount claimed, it must be remembered that quantum meruit is an equitable remedy and that equity states that "he who comes to equity must come with clean hands". That in the current case, the Appellant has not come with clean hands as her claim on quantum meruit is exaggerated and did not reflect the correct position at the time in addition to there being no receipts to support the claim. Therefore, that if it is accepted that the Appellant is entitled to recover on quantum meruit basis, payment must be on a reasonable basis. As authority, the case of **The Rating Valuation Consortium and D. W.**

Zyambo and Associates (suing as a firm) vs The Lusaka City Council And Zambia National Tender Board[7] in which the case of **Craven Ellis vs Canons Limited**[6] was cited, was relied upon.

It was further submitted that it was not reasonable for the Appellant to claim payment of K167,367,696.50 on quantum meruit for repairs of the truck as this in itself defies logic because she could have bought a brand new truck from that amount, particularly that the Appendix shows that the majority of the spare parts were purchased within the period of two months (between 5th February, 2001 and 13th March, 2001). That however, the investigation audit shows that the suppliers were from Soweto and that they had no fixed place. It was submitted that these are unusual circumstances to justify a claim such as this one. Hence, any reimbursement that the Appellant is entitled to must be reasonable. That as such, the trial Court correctly assessed the evidence as the summary of spare parts supplied and fitted is not helpful as it was not supported by any receipts. Further, that the Court below analysed the evidence presented by the Appellant and awarded K32,000,000.00 which it was submitted, was in fact, very gracious, under the circumstances, as the agreement hatched was illegal and against public policy, taking into account the fact that it had to do with the disposal of government assets.

It was further argued that if the Appellant is allowed to recover the sum claimed, it would be inequitable and would set a very dangerous precedent in terms of safeguarding government assets and resources and may lead to mischievous consequences. Hence, the Respondent's submission that Ground one of this Appeal should be dismissed as the Appellant was not entitled to the claim should be upheld.

In response to Ground two of this Appeal which attacks the award of interest from date of writ and not from the date the cause of action arose, it was submitted that the learned Judge was on firm ground when he ordered the payment under **Order 36 Rule 8** of the **HCR.**

It was submitted that as correctly acknowledged by the Appellant, the Rule gives discretion to the Court to award interest from the date of action or the date of Writ. That however, when a Judge exercises his/her discretion, provided the discretion has been judiciously exercised, there is no reason to disturb the Judge's exercise of discretion. Hence, interest ought to be chargeable from the date of filing the Writ and not from the date when the cause of action arose. The case of **Herbert Ijegalu Okwo Ozokwo vs The Attorney General**[4] was cited in support of this contention.

It was argued that in this case, the Appellant was not wrongfully deprived of any money as her claim was only partially successful.

Hence, this Court should dismiss Ground two of Appeal as the trial Court exercised its discretionary powers judiciously.

In reply, Mr. Sianondo submitted that there is no Cross-Appeal as to damages and that the nature of the agreement does not affect the Appellant's claim. That he agrees that "he who comes to equity must come with clean hands." However, that the Court below, did not deny what was claimed because of the nature of agreement but that the Appellant's argument is that there was no basis for the learned Judge to make intelligent guess. And that the only hindrance to the Appellant getting the full claim was the loss of documents and not that the Respondent was not willing to pay. Hence, if the Respondent had these documents, Counsel did not see anything in the reports which says the Respondent could not pay the full amount.

We have seriously considered the two Grounds of Appeal together with the arguments advanced in the respective Heads of Argument, the oral submissions by the learned Counsel for the Parties and the authorities cited. We have also considered the Judgment by the learned Judge in the Court below.

Ground one of this Appeal attacks the award of K32,000,000.00 as costs of repair of the truck in question. The Appellant had claimed the sum of K167,367,696.50 as repair costs. The thrust of the Appellant's argument in support of the first ground of appeal is that the sum of

K32,000,000.00 awarded was contrary to the evidence on record which showed the expenditure and is supported by documentary evidence on record in form of reports. And that there was no need for the Court below to apply an "intelligent guess" in estimating the repair costs as the learned Judge could have been guided by the said evidence in arriving at a better estimate considering that the invoices were lost at the Solicitor General's Chambers. Therefore, that the learned trial Judge misapprehended the facts and the law and hence, on the basis of the principle in **Attorney General vs Marcus Kampumba Achiume**[1], this is a proper case in which this Court should reverse the findings of the Court below.

On the other hand, the thrust of the Respondent's argument in response is that the learned Judge was on firm ground in awarding the sum of K32,000,000.00 as repair costs on quantum meruit basis after finding that the agreement between the parties was illegal and not enforceable as it was against public policy. And that the Appellant's evidence was inconsistent on the actual repair costs and that although invoices were lost in the Solicitor General's Chambers, invoices are not proof of payment. Hence, the sum of K167,367,696.50 claimed as repair costs defy logic as the Workshop Manager at NRDC had put these at K4,000,000.00. Hence, the sum claimed is exaggerated and not the actual sum spent.

We have considered the above arguments. From the outset, we wish to state that from the thrust of the Appellant's arguments and the grounds of appeal that the Appellant is not challenging the finding by the learned Judge in the Court below that the agreement between the Appellant and NRDC was illegal and therefore, not capable of enforcement by the courts of law as it was contrary to public policy for flouting laid-down government procedures on disposal of government property or assets. So, we have no hesitation in holding that it was erroneous for the Respondent's Counsel to raise this issue in her submissions as no cross-appeal has been filed. What is being challenged is the award of the sum of K32,000,000.00 on quantum meruit basis, as repair costs which the Appellant contends, is too low.

As to what quantum meruit is, the learned authors of **Black's Law Dictionary**, defines this as:-

> **"The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship."**

It can be deduced from the above definition that damages awarded on a quantum meruit basis are meant to reasonably compensate a person for services rendered under an arrangement which is not legally enforceable but for which the Court is satisfied that a party did expend or incur costs. We upheld this position in **The Rating Valuation**

Consortium and D. W. Zyambo and Associates (suing as a firm) vs The Lusaka City Council And Zambia National Tender Board[7] in which we cited with approval, the case of **Craven Ellis vs Canons Limited**[5] where Greer, L.J., stated that: -

> **"In my Judgment, the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact from the acceptance of services or goods."**

Coming back to the issues at hand, in awarding the sum in question, the learned Judge had this to say: -

> **"From the evidence, which is not disputed, it is clear that the vehicle was released to the Plaintiff without proper authority and in an illegal manner. To start with, the vehicle was not boarded for the Plaintiff to be entitled to bid for it. Management at the Natural Resources Development College had no right or authority to lease out government property in the manner which they did as no authority was ever obtained from the Permanent Secretary who is the Controlling Officer. I therefore, agree with Counsel for the Defendant that the contract is illegal and is against public policy. I also agree with her that the contract cannot be enforced. However, I do not agree with her when she submits that because the Defendant did not request the Plaintiff to effect the repairs then she is not entitled to anything even on a quantum meruit basis....In this case, some money had been paid by the Plaintiff to repair the Fuso truck and it is not in dispute that the Fuso truck was returned as a runner to the Natural Development Resources College. The money that was paid was not paid as favour or a bribe to a government official. It was paid to buy spare parts and repair the Fuso truck. I have therefore, come to the conclusion that although the contract is indeed against public policy, the Plaintiff is entitled to recover from the Defendant.**
>
> **With regard to quantum I have considered whether or not anything would be gained by sending this matter to the learned Deputy Registrar for assessment and have come to the conclusion that it would serve no purpose as there are no documents available. The summary of spare parts supplied and fitted is not helpful as it is not supported by any receipts. In the circumstances, I will have to make an intelligent guess as to what the actual value of the spare parts is as the only guideline I have is the letter from Southern Cross Motors dated 14th May, 2009**

which quotes a figure of US$97,930.00 for a new Fuso Truck. It is not clear whether the model referred to is exactly the same as the one that was repaired by the Plaintiff. At today's exchange rate, the truck would be approximately K500,000.00. In 2001, the exchange rate was, according to the summary of spare parts supplied and fitted, K3,850.00 to 1 US$. The sum of K167,367,696.00 being claimed would therefore, have been equivalent to US$43,472.12 which would have been slightly under half the price of a new Fuso truck. I also note that the quotation was obtained on 14th May, 2009 more than seven years after the Fuso truck was repaired. The estimated cost of repairs by the Defendant's own witness is K27,000,000.00. I therefore, find that the claim of K167,367,696.00 is exaggerated and does not reflect the correct position at the time. Bearing in mind that the truck was returned as a runner, the plaintiff must have spent some money in repairing it. I am of the view that taking all the factors into consideration, a sum of K32,000,000.00 would reflect the true value of what was spent on repairing the Fuso truck. I therefore, enter Judgment in favour of the Plaintiff against the Defendant for the sum of K32,000,000.00 together with interest from 26th January, 2011 to date of Judgment pursuant to Order 36 Rule 8 of the High Court Rules, CAP 27 and thereafter in accordance with the Judgments Act, CAP 81 until full payment..." (Underlining ours for emphasis only).

From the above, it is clear that the learned Judge addressed his mind to the documentary evidence before him including the reports on record. It is also clear that the learned Judge did not find the documentary evidence helpful in assessing the repair costs. He did not also find the Summary of Spare Parts Supplied and Fitted (at pages 64 – 65 of the Record of Appeal), useful as that was not supported by receipts. The learned Judge also took into account a quotation from Southern Cross Motors and the evidence of DW1 in arriving at the sum he awarded.

The question in this Appeal is whether the evidence on record, did clearly and conclusively establish that the Appellant had spent the sum

claimed as repair costs? In his attempt to persuade us that the Appellant did, Mr. Sianondo referred us to several documents including the reports on record which we have already referred to above. Perusal of these documents has shown that different figures were given as costs of repair of the motor vehicle in question. For example, in her request to the Secretary to the Treasury to have the truck in question boarded, the Appellant claimed that she spent close to K150,000,000.00 to restore the motor vehicle to a running condition (see page 53 of the Record of Appeal). In court, she claimed the sum of K167,367,696.00 as repair costs.

Further, although Counsel for the Appellant claimed that there was no dispute in the sum claimed as repair costs, the letter at pages 72 - 78 of the Record of Appeal from the Senior Stock Verifier, Ministry of Finance and National Planning to the Permanent Secretary (FMA), clearly states under 5.2, that the amount claimed needed to be investigated by the Solicitor-General. This does not at all confirm that the sum was agreed.

Therefore, although invoices could not be produced in Court as they were lost at the Solicitor General's Chambers for which the Appellant cannot be blamed, we nevertheless, agree with the learned trial Judge that receipts are proof of payment and not invoices. As for the distinction between a "receipt" and an "invoice", Longman's

Dictionary of Contemporary English defines "receipt" and "invoice", respectively, as: -

> **"A piece of paper that you are given which shows that you have paid for something..."**
>
> **"A list of goods that have been supplied or work that has been done, showing how much you owe for them..."**

In view of this clear distinction between a "receipt" and an "invoice", we find force in the Respondent's argument that failure to produce receipts or copies thereof was fatal to the Appellant's claim as there was no evidence to confirm that the Appellant spent the sum claimed as repair costs. We also agree with Counsel for the Respondent that as a reasonable person, the Appellant was expected to have kept photocopies of the invoices that she sent to the Solicitor-General. We, further, agree with the learned trial Judge that the "Summary of Spare Parts Supplied and Fitted" (at pages 64 – 65), is not helpful as it was not supported by any receipts.

In view of the inconsistencies on the actual sum spent as repair costs and the absence of receipts, the learned trial Judge cannot be faulted for invoking an "intelligent guess" in estimating the repair costs as that was consonant with our observation in the case of **Industrial Gases Limited vs. Waraf Transport Limited and Mussah Mogeehaid**[8], where we stated that in an effort to do justice, trial Judges

have been driven into making intelligent and inspired guesses on very meagre evidence. In that case, we also upheld the principle of not interfering with awards made at assessment of damages unless the result was so high as to be utterly unreasonable. In **Kafue District Council vs. James Chipulu**[9], we observed that as a general rule, any short comings in the proof of a special loss should react against the claimant. We, however, reiterated that in order to do justice notwithstanding the indifference and laxity of most litigants, the courts have frequently been driven into making intelligent and inspired guesses as to the value of special losses on meagre evidence.

In **Zambia Daily Mail Limited vs Charles Banda**[3], we held that the appellate court will not interfere with an assessment of damages unless the lower court had misapprehended the facts or misapplied the law or where the damages are so high or so low as to be an entirely erroneous estimate of the damage to which the plaintiff is properly entitled. In the current case, we do not regard the sum of K32,000,000.00 awarded by the learned trial Judge to be too low in the circumstances of this case. We are fortified in so holding as the figures the Appellant claimed were inconsistent and were also at variance with the Respondent's evidence including that of the Workshop Manager.

For the reasons given above, we find no basis upon which we can interfere with the learned trial Judge's finding of fact nor can he be

faulted for invoking an "intelligent guess", in arriving at the sum that he awarded as repair costs. As such, we are not satisfied that the learned trial Judge misapprehended the facts and/or the law.

We are also compelled to observe that in fact, the learned trial Judge was magnanimous in awarding the sum that he did under the doctrine of ***quantum meruit*** after he correctly found that the "arrangement" the Appellant had with the NRDC was illegal and not enforceable at law as it was contrary to public policy.

For the reasons given above, we find no merit in Ground one of this Appeal. We, accordingly, dismiss it.

Ground two of this Appeal attacks the award of pre-judgment interest from the date of Writ instead of the date when the repair costs were incurred. Both parties cited the case of **Herbert Ijegalu Okwo Ozokwo vs The Attorney General**[4] in which it was held, inter alia, that:-

> **"Awards to a plaintiff who has wrongfully been deprived of something must be realistic and afford a fair recompense...."**

The thrust of the Respondent's argument is that the learned Judge was on firm ground when he awarded pre-judgment interest from the date of Writ and not from the date the repair costs were incurred. And that since the award of interest is discretional, the learned Judge

exercised his discretion judiciously as the Appellant was not wrongfully deprived of any money.

We have considered the above arguments. As a starting point, Order 36/8 of the **HCR** gives the court discretionary power to award pre-judgment interest either from the date when the cause of action arose or from date of Writ. Authorities on the exercise of discretionary power by the court are legion in this jurisdiction. We do not, therefore, intend to recite these here suffice to restate that it is settled that the exercise of discretionary power must be judiciously and properly done.

Although in **Herbert Ijegalu Okwo Ozokwo vs The Attorney General**[4], we held that a plaintiff who has been deprived of his money must be paid a reasonable rate of interest from the time when he was first "wrongfully deprived" of it (emphasis ours), in order to recompense him, the overriding question in this ground is, did the learned Judge exercise his discretionary power judiciously by awarding interest from date of Writ? The answer is that he did. We say so as the Appellant has not shown how or why she is of the view that the learned Judge did not properly exercise his discretionary power. We find no basis upon which we can interfere with the exercise of discretionary power by the learned Judge in this case. We, therefore, find no merit in Ground two of this Appeal. We dismiss it.

Both Grounds one and two of this Appeal having failed, the sum total is that this Appeal has wholly failed. Although costs normally follow the event, in the circumstances of this case, we order that each party bears its own costs in this Court and in the Court below, as the dispute arose out of some "arrangement" between the parties which went bad as shown above.

M. S. Mwanamwambwa
SUPREME COURT JUDGE

H. Chibomba
SUPREME COURT JUDGE