

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 154/2015

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BAIDALA LEVI MWANZA (MALE)

APPELLANT

AND

HARRINGTON AKOMBWA

1<sup>ST</sup> RESPONDENT

DAVID KASAJI

2<sup>ND</sup> RESPONDENT

HAPSON HAMUKALI

3<sup>RD</sup> RESPONDENT

JAMES SIPUNGWE

4<sup>TH</sup> RESPONDENT

PASSMORE HACHLINGA

5<sup>TH</sup> RESPONDENT

BOATENG WIAFE

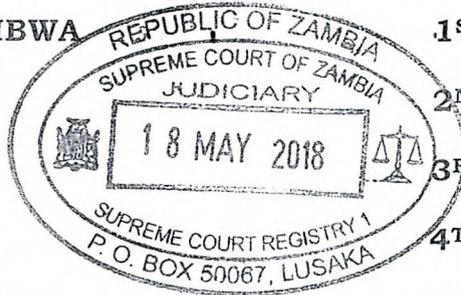
6<sup>TH</sup> RESPONDENT

RASFORD MUSONDA

7<sup>TH</sup> RESPONDENT

LUSAKA EYE HOSPITAL (Sued as firm)

8<sup>TH</sup> RESPONDENT



Coram : Hamaundu, Kabuka and Mutuna, JJS

On 8<sup>th</sup> May 2018 and 18<sup>th</sup> May 2018

For the Appellant : Mr. C. Chuula of Messrs Chibesakunda and Company

For the Respondent : N/A.

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

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Mutuna, JS. delivered the judgment of the court.

Cases referred to:

- 1) **Sacher Nasendra Kumar v Joseph Brown Mutale, SCZ judgment No. 8 of 2013**
- 2) **William David Carlise Wise v E.F. Harvey Limited (1985) ZR 179**
- 3) **Sata v Zambia Bottlers Limited SCZ judgment No. 1 of 2003**
- 4) **Attorney General v Marcus Achiume (1983) ZR 1**
- 5) **Bolitho v Hackney Health Authority (1998) A.C. 232**

Legislation referred to:

- 1) **The Limitation Act 1939 (of England)**
- 2) **The Law Reform (Limitation) of Actions) Act, Cap 72**
- 3) **The Supreme Court Practice, 1999**
- 4) **The Health Professions Act, 2009**

Works referred to:

- 1) **Halsbury's Laws of England, by Lord Hailsham of St. Marylebone, 4<sup>th</sup> edition, reissue, Butterworths, London**
- 2) **Winfield and Jolowicz on Tort, by W. H. Rogers, sixteenth edition, Sweet and Maxwell, London.**
- 3) **Charlesworth and Percy on Negligence, tenth edition, by R. Cooper, S. E. Wood and J. Walton, Sweet and Maxwell, London.**
- 4) **Ethical Judgments-Re-Writing Medical Law by Stephen W. Smith, John Coggon, Clark Hobson, Richard Huxtable, Sheelagh McGuinness, Jose' Miola and Mary Neal, Bloombury, Oxford and Portland, Oregon 2017.**

## **Introduction**

- 1) The facts of this appeal make very sad reading. They emanate from an action commenced by the Appellant in the High Court against the Respondents, following an operation to his eye by the Respondents. The action is for breach of

contract, duty of care and compensation for injury suffered whilst he was under their care.

- 2) During the course of the action, as will be demonstrated by the background to the appeal, a determination had to be made as to whether the Appellant's action was one for personal injuries. The reason for this was that it had an effect on whether or not the action was statute barred.
- 3) Arising from the determination made by the Learned High Court Judge, the appeal addresses: when the period for limitation of the action started running; whether or not there were subsequent causes of action; whether or not there was concealment; and, whether or not there was a break in the limitation period.
- 4) Last of all, the appeal discusses the ethical and moral obligations placed upon medical

practitioners to provide care for their patients. In doing so, it looks at the effect of an action being statute barred.

### **Background**

- 5) Sometime in April 2010, the Appellant noticed that he had difficulty driving in the night which prompted him to attend the Eighth Respondent eye hospital. Upon being examined he was informed that he had a cataract in his left eye.
- 6) The Eighth Respondent recommended that the Appellant undergo an operation in the left eye which he was advised was safe. He, therefore, paid the prescribed fees, after which the operation was conducted on 5<sup>th</sup> May 2010.
- 7) The operation went horribly wrong resulting in pain, discomfort and loss of sight in the left eye. This appears to have been caused by the negligent

manner in which the operation was conducted by the Respondents and was revealed to the Appellant a week after the operation was conducted.

- 8) The Respondents continued to attend to the Appellant by placing him on medication and reviewing his condition from time to time. After some time, they took the Appellant by ambulance to another eye hospital known as Vision Care Appasary (VCA) for further treatment.
- 9) Upon examining the Appellant, the doctors at VCA agreed with the diagnosis given to the Appellant by the Respondents but indicated that they lacked capacity to remedy the condition he was in and recommended that he travel to India for remedial action. He was given a medical report by VCA which appraised him of the extent of his injuries.

- 10) On 4<sup>th</sup> August 2010, the Appellant wrote to the Eighth Respondent informing it of the diagnosis by VCA hospital and the recommendation. He also requested the Eighth Respondent to meet part of the costs of treatment and travel to India. The Eighth Respondent ignored his letter.
- 11) The Appellant travelled to India at his own expense where a cornea transplant was carried out and partial visibility was restored to his left eye. He continued to attend the hospital in India and required another operation and further reviews.
- 12) As a consequence of the matters referred to in the preceding paragraphs, the Appellant took out an action against the Respondents in the High Court on 16<sup>th</sup> September 2014.

### **The Appellant's claim in the High Court**

13) The Appellant's suit in the High Court was by way of a writ of summons and statement of claim.

14) The endorsement on the writ of summons was for the following:

- 14.1 damages for breach of contract;
- 14.2 damages for breach of duty of care;
- 14.3 damages for pain and suffering;
- 14.4 damages for loss of expectation of life;
- 14.5 damages for loss of amenities;
- 14.6 nominal, general and exemplary damages;
- 14.7 Interest;
- 14.8 any other order the court may deem fit; and,
- 14.9 costs of and incidental to the action.

### **The proceedings in the High Court**

15) After the Appellant filed the writ of summons and statement of claim, the Respondents applied to dismiss the action for being statute barred before the Learned Deputy Registrar. The application

was by way of an interlocutory summons in support whereof were affidavits. In response, the Appellant filed an affidavit in opposition. The parties also filed skeleton arguments

- 16) The contention by the Respondents as contained in the affidavit evidence and arguments presented to the Learned Deputy Registrar was that since the Appellant's claim was one for personal injuries it should have been commenced within three years of the operation having been conducted on the Appellant.
- 17) The Respondents also contended that the Appellant was aware of his cause of action by 4<sup>th</sup> August 2010 as evidenced by his letter of even date to the Respondents. That there was, therefore, no concealment of the cause of action by the Respondents. Consequently, since the

Appellant did not commence the action within three years of the event, it was statute barred.

18) The contentions by the Appellant were as follows:

18.1 the claim he made was not one for nor did it include a claim for damages for personal injury. As such the limitation period was six years not three years;

18.2 for purposes of computing the limitation period, time did not start running from the date of the operation but rather the date of accrual of the cause of action;

Alternatively,

18.3 the continuous reviews after the operation gave rise to distinct causes of action from the one which ensued after the operation which were not time barred;

18.4 the matter fell within the ambit of section 26(b) of the Limitation Act which provides for suspension of time on account of concealment of a fact relevant to the action by the Eighth Respondent.

19) Consequently, the action was not time barred.

20) The Learned Deputy Registrar considered the evidence and arguments presented before her and held as follows:

20.1 the Appellant's claim does not include a claim for damages for personal injuries, as such the applicable limitation period was six years and not three years;

**20.2 that time in respect of the limitation period did not start running from the date of the operation but rather when the cause of action arose; and,**

**20.3 the Appellant continued to attend the Eighth Respondent up to 2012, as such, commencement of the action was within the period of limitation**

21) As a result of the foregoing, the Learned Deputy Registrar held that the application lacked merit and dismissed it with costs.

22) The Respondents appealed against the decision of the Learned Deputy Registrar to the Learned High Court Judge by way of a notice of appeal raising three grounds of appeal as follows:

**22.1 The Honourable Deputy Registrar erred in law and fact when she refused to dismiss the action after the expiry of the limitation period,**

**22.2 The Honourable Deputy Registrar erred in law and fact when she held that the (Appellant's) claim did not include a claim for personal injuries; and,**

**22.3 The Honourable Deputy Registrar misdirected herself when she held that time did not start running on account of alleged reviews and check-ups done on the (Appellant) by the Eighth Respondent**

- 23) At the hearing of the appeal the parties relied entirely on the evidence and arguments advanced before the Learned Deputy Registrar.
- 24) The Learned High Court Judge considered the arguments and identified the issues in contention as being: when the Appellant's cause of action against the Respondents arose; and, whether or not the Appellant was within the limitation period when he took out the court processes.
- 25) The Judge then quoted from the learned authors of *Halsbury's Laws of England*, 4<sup>th</sup> edition, vol. 28 at paragraph 822 as to when a cause of action is deemed to have accrued. She also referred to section 2 of the *Limitation Act* 1939 and section

3 of the *Law Reform (Limitation of Actions) Act* (the Act).

26) In addition, the Learned High Court Judge analyzed the claim and relief sought by the Appellant and the evidence before her. She concluded that a claim for damages for negligence which consists of, or includes damages for personal injury, is subject to the limitation period of three years. She relied on the proviso to section 3 of the Act.

27) According to the Learned High Court Judge, her analysis of the claims and remedy sought by the Appellant led her to conclude that they relate to, or are hinged on the personal injuries he suffered. This, she stated further, applied to the claim for breach of duty of care or negligence because they were all related to the history of the incident of the

eye operation from which the Appellant contended that the Respondents did not use reasonable skill in the operation.

- 28) As a consequence of the foregoing, the Learned High Court Judge took the view that the limitation period applicable to the Appellant's action is three years and not six years.
- 29) In arriving at this decision the Learned High Court Judge distinguished the facts of this case from those in the case of *Sacher Nasendra Kumar v Joseph Brown Mutale*<sup>1</sup>. According to her, the claim in the *Sacher* case arose from damage to a vehicle and consequent loss of business. The case did not, therefore, assist the Appellant's case.
- 30) Turning to the second issue of when the limitation period started running in respect of the

Appellant's claim, the Learned High Court Judge referred to our decision in the case of *William David Carlise Wise v E. F. Harvey Limited*<sup>2</sup> in which we held as follows at page 179:

**"A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."**

- 31) The Learned High Court Judge concluded that in cases of personal injuries the cause of action accrues on the date of the accident or incident which gives rise to the injuries. She, however, found in relation to the Appellant's claim, that since an operation is a specialized procedure a lay person cannot be expected to know immediately after the operation that damage has occurred. As such, the cause of action accrues only after the

victim becomes aware of the injury caused to his person.

- 32) After arriving at the conclusion in the preceding paragraph, the Learned High Court Judge analyzed the evidence and pleadings which revealed that the Appellant was prompted to return to the Eighth Respondent about two weeks after the pain in his eye got worse and was informed of the cause of his current condition. Further, this notwithstanding, the doctor who attended to him insisted that the Appellant continue on medication.
- 33) The Learned High Court Judge advanced her analysis by referring to the Appellant's letter to the Eighth Respondent's Administrator of 4<sup>th</sup> August 2010 in which he reveals his knowledge of the damage done to his eye and the remedial

steps recommended to him. As a consequence of these facts, she found that the limitation period started running on 4<sup>th</sup> August 2010 and not the day of the operation of 5<sup>th</sup> May 2010.

34). In regard to the contention that the limitation period was suspended in line with section 26(b) of the **Limitation Act, 1939** by virtue of concealment of facts, the Learned High Court Judge declined to accept the argument on the ground that the Appellant did not reveal the facts which were allegedly concealed. She found that Part 2 of the **Limitation Act, 1939** under sections 22 to 26 provides for extension of the Limitation period in cases of disability, acknowledgement of the wrong done and part payment, fraud and mistake.

35) In the case of the Appellant, the allegation was fraud, based on the contention that the damage done to his eye was concealed from him and he only learned of it through the medical report he obtained from University Teaching Hospital (UTH) in 2013, thus, time started running then. In dismissing the contention, the Learned High Court Judge looked at the content of the medical report from UTH and concluded that it merely gave the history of the Appellant's injury, its extent at the material time and recommended remedial action. Further, it set out the treatment which the Appellant underwent on 17<sup>th</sup> May, 2010 in Zambia and subsequently in August, 2010 in India. It also revealed that the Appellant knew the nature of the injury he suffered by those dates and the state the injury

progressed to by February, 2011. The view taken by the Learned High Court Judge was that, in any event, by the date of the medical report the limitation period had already expired.

- 36) The Learned High Court Judge also declined to accept the Appellant's contention that his subsequent visits to the Eighth Respondent in 2011 and 2012 for check-ups and reviews gave rise to a continuous duty of care and therefore, constituted separate causes of action. According to the Judge, the Appellant had failed to prove this contention because he did not specifically outline the distinct causes of action nor did he demonstrate when and how the Respondents' subsequent breach of duty either aggravated the earlier injuries suffered in 2010 or materially

contributed to the condition which existed after the operation in 2010.

37) Following from the foregoing findings, the Learned High Court Judge held that the preliminary motion raised by the Respondents had merit and upheld it. In doing so, she dismissed the Appellant's claim as being statute barred and ordered each party to bear their respective costs.

38) This decision has riled the Appellant, prompting this appeal which is brought on five grounds.

**The grounds of appeal and arguments presented to this Court by the parties.**

39) The five grounds of appeal presented before us are as follows:

**39.1 The Learned High Court Judge erred in law and fact when she held that the Appellant's claim consisted of or includes damages for personal injury;**

**39.2 The Learned High Court Judge erred in law and fact when she held that for purposes of the limitation period, time started running a day from 4<sup>th</sup> August 2010;**

**39.3 The Learned High Court Judge erred in law and fact when she held that the continuous reviews and checkups on the [Appellant] by the Eighth [Respondent] did not give rise to a continuous duty of care and subsequent cause of action;**

**39.4 The Learned High Court Judge erred in law and fact when she held that there was no concealment of relevant facts by the Eighth [Respondent], as such, time was not suspended; and alternatively;**

**39.5 The Learned High Court Judge erred in law and fact when she dismissed the whole action and not just the claims she found to consist of or include claims for personal injury.**

40) At the hearing of the appeal, counsel for the Respondents were not in attendance having filed a notice of non-appearance pursuant to Rule 69(1) of our Rules. Further, counsel for the Appellant informed us that the Appellant had abandoned

grounds 1 and 5 of the appeal and only argued grounds 2 to 4 of the appeal.

- 41) The Appellant filed his heads of argument on 5<sup>th</sup> October 2015 while the First, Second and Eighth Respondents filed theirs on 15<sup>th</sup> December 2015. There were no heads of argument filed on behalf of the other Respondents.
- 42) In arguing the appeal the parties relied upon the heads of argument. The Appellant augmented the heads of argument with *viva voce* arguments.
- 43) In regard to ground 2 of the appeal, the Appellant's argument was simply this, that a cause of action accrues when there is in existence a person with a right to sue and one who can be sued and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed. Reference in this regard was

made to *Halsbury's Laws of England* 4<sup>th</sup> edition vol. 28:

- 44) The Appellant advanced his argument by contending that the elements required to be present for a cause of action to accrue are: duty of care; the breach of such duty; and damages arising from the breach. Further, and quoting from the Learned authors of *Charlesworth on Negligence*, sixth edition and the case of *Sata v Zambia Bottlers*<sup>5</sup>, negligence is only actionable if actual damage is proved and conversely, negligence alone does not give rise to a cause of action. He thus, concluded that there was no evidence to support the finding by the Learned High Court Judge that damages arose on 4<sup>th</sup> August, 2010 or indeed that the Appellant's letter to the Eighth Respondent sufficiently proves

he was aware of the extent of the damage to his eye by that date:

45) In advancing the arguments in the preceding paragraph further, the Appellant acknowledged that this Court can only reverse findings of fact by a trial court where they are perverse or made in the absence of any relevant evidence or upon a misapprehension of facts, in accordance with our holding in the case of *Attorney General v Marcus Achiume*<sup>4</sup>. He contended that the finding by the Learned High Court Judge that the cause of action accrued on 4<sup>th</sup> August 2010 met the criteria we set in the *Achiume*<sup>4</sup> case and should, therefore, be set aside.

46) The arguments under ground 3 of the appeal can hardly be termed as such because there are merely a restatement of the ground of appeal as

crafted in the memorandum of appeal.

Consequently, we have not reproduced them.

- 47) In the *viva voce* arguments counsel for the Appellant Mr. C. Chuula contended that the Appellant's subsequent causes of action arose from the fact that he continued attending the Eighth Respondent for reviews in 2011 and 2012. He however, did not specify the nature of these causes of action save to state that the limitation period started to run in 2012 and not 4<sup>th</sup> August 2010.
- 48) In respect to ground 4 of the appeal, the Appellant contended that the Learned High Court Judge dismissed his contention that there was concealment of damages based on the contents of his letter to the Eighth Respondent of 4<sup>th</sup> August 2010. He argued that the Learned High Court

Judge failed to recognize the fact that he is a lay person and authored the letter with no medical professional opinion which informed him of the extent of his injury. That the injury he suffered was one which could only be appreciated upon receipt of professional advice which only came in February, 2013 in the form of a medical report from UTH.

- 49) Concluding arguments on this ground of appeal, the Appellant contended that the Eighth Respondent owed him a duty of information of full disclosure of the extent of his injury. That the Eighth Respondent failed to discharge the said duty.
- 50) In the *viva voce* arguments counsel for the Appellant, Mr. C. Chuula, clarified that the concealment of facts by the Respondents lay in

the fact that they did not respond to the Appellant's letter of 4<sup>th</sup> August 2010. He however conceded that the contents of the letter of 4<sup>th</sup> August 2010 suggest that the Appellant knew the extent of the injury to his eye and that the damage could only be corrected outside the country.

- 51) In response to ground 2 of the appeal the Respondents argued that according to the Learned authors of *Halsbury's Laws of England*, the limitation period in cases for personal injury begins to run either on the date the cause of action accrues or on the date which the Plaintiff becomes aware of the injury, whichever is the later. The Respondents explained the rationale for this as being that negligence alone cannot give rise to a cause of action in line with our decision in the case of *Sata v Zambia Bottlers*<sup>3</sup> case. The

court must, therefore, examine the facts surrounding a claim and determine when both negligence and damage are present.

52) Applying the reasoning advanced in the preceding paragraph to this case, the Respondents contended that the claim by the Appellant is that the Eighth Respondent negligently operated on his left eye on 10<sup>th</sup> May 2010, causing damage to it. Therefore, on that date both the negligence and damage were present and thus, the cause of action accrued.

53) The Respondent advanced the argument by contending that due to the special nature of medical cases, *Halsbury's* takes the view that where there is both negligence and damage but the Plaintiff is unaware of the damage done to him, the cause of action arises when he becomes

aware. They set out the test in *Halsbury's* in relation to when a person is presumed to be aware of the damage.

54) In conclusion, it was submitted that the Appellant was aware of the damage on 4<sup>th</sup> August 2010 when he sent the letter to the Eighth Respondent setting out the nature of his injuries.

55) As regards ground 3 of the appeal, the Respondents argued that the Appellant has not revealed the subsequent causes of action which arose and when they arose as a consequence of the reviews. In addition, he has not given particulars of the alleged continuous duty of care and whether it was breached. According to the Respondents, the Court cannot speculate on these issues because it is the duty of the Appellant to prove them.

56) In relation to ground 4 of the appeal the argument by the Respondents was merely this that, it is evident from the contents of the Appellant's letter to the Eighth Respondent dated 4<sup>th</sup> August 2010, that he had knowledge of the extent of the damage to his eye. Consequently, the contention that there was concealment is untenable.

### **The decision of this Court**

57) We have carefully considered the arguments raised by the parties, the record of appeal and the ruling which is the subject of this appeal. The grounds of appeal advanced by the Appellant raise three issues for determination as follows:

**57.1** when did the limitation period start running;

**57.2** was there a continuous duty of care on the part of the Eighth Respondent which gave rise to subsequent causes of action; and,

**57.3 was there concealment of facts by the Eighth Respondent in relation to the Appellant's injury which resulted in the suspension of the limitation period.**

58) In regard to the first issue on when the limitation period began to run the parties are in agreement that in terms of the proviso to section 3 of the Act, the limitation period in respect of the Appellant's claim is three years and not six years. It is important to state this agreed position because the background to this appeal reveals that this issue was in dispute in the Court below.

59) *Halsbury's Laws of England* has the following to say at page 420 in terms of when the limitation period begins to run:

**"Where damage is the cause of action or part of the cause of action, as for example with negligence, the period of limitation runs from the date of the damage and not of the act which caused the damage."**

As a consequence of the foregoing and in relation to the Appellant's claim, the limitation period did not start running on the date of the operation but rather the date of the damage.

60) This must be considered in the light of our decision in the case of *William David Carlisle Wise v E.F. Hervey Limited*<sup>2</sup>, which the Learned High Court Judge referred to, and which we have quoted in the earlier part of this judgment.

61) The interpretation we have given to the passages from *Halsbury's* and the *Wise* case in relation to the Appellant's claim is that the limitation period did not begin to run after the operation but rather after he discovered the extent of the damage. The reason for this is that it is clear from the facts of this case that on the day of the operation the Appellant did not know that damage

had been done to him. He, however, discovered the full extent of the damage subsequently and confirmed it by letter dated 4<sup>th</sup> August 2010. Our decision has the support of *Halsbury's* paragraph 905, referred to us by the Respondents which states in part as follows:

**"For purposes of the application of the limitation period for actions involving personal injury, the date of a person's knowledge is the date on which he first had knowledge of the following facts:**

- 1) That injury in question was significant;**
- 2) That that injury was attributed in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;**
- 3) The identity of the defendant; and,**
- 4) ...**

- 62) The Appellant's letter of 4<sup>th</sup> August 2010 reveals that he had been examined at VCA and was given a medical report explaining the extent of the injury to his eye. Thus, at this point the Appellant became aware of the damage. The letter also

reveals that he was aware that the damage was attributable in whole to the omission or breach of duty of care. That is, the damage was attributable to the operation gone wrong, and that the Respondents were responsible, hence his writing to the Eighth Respondent. We cannot, therefore, fault the finding by the Learned High Court Judge.

63) We now come to the second issue which relates to the contention that there was a continuous duty of care on the part of the Respondents which gave rise to subsequent causes of action. The Respondents have argued that the Appellant has not explained what these subsequent causes of action are. We agree with the argument advanced by the Respondents especially that such subsequent causes of action are not even revealed in the pleadings. The fact, in and of itself, that the

Appellant went for review at the Eighth Respondent in 2011 and 2012, does not entitle the Appellant, to a fresh cause of action.

64) Further the Appellant has not specifically stated what the continuous duty of care was on the part of the Appellant which was allegedly breached.

65) In addition, the Appellant has not claimed that he suffered further injury as a consequence of the operation or reviews or that subsequent actions of the Respondents led to further injuries.

*Halsbury's Laws of England* puts the position advanced by the Appellant under this issue as follows at paragraph 821:

**"Where there has been a continuance of damage, a fresh cause of action arises from the time to time, , as often as damage is caused. For example, if the owner of mines works them and causes damage to the surface more than six years before action, and within six years of action a fresh subsidence causing damage occurs without any fresh working by the owner, an action in respect of the**

**fresh damage is not barred, as the fresh subsidence resulting in the injury gives a fresh cause of action."**

The Appellant's circumstances as revealed by the undisputed facts of this case reveal that they by no means fall in the ambit of the example given by *Halsbury's* because it has not been claimed or indeed proved that the initial damage to the Appellant's eye had a ripple effect which resulted in further damage.

- 66) The third issue contends that there was concealment of facts by the Eighth Respondent in relation to the Appellant's injuries. We must state from the outset that we find no merit whatsoever in the contention by the Appellant in view of the contents of his letter to the Eighth Respondent dated 4<sup>th</sup> August 2010. The letter, as we have said, reveals that he was referred to VCA where the full extent of the injury was explained to him and

remedial action suggested. We, therefore, see no basis upon which to uphold the contention or the arguments to that effect by Mr. C. Chuula.

### **Moral and Ethical Considerations**

67) We prefaced the determination of this appeal by stating that the facts of this case make very sad reading. The reason for this is that the Eighth Respondent and indeed the other Respondents have the primary objective of care giving in line with *The Health Professions Act*, 2009 which provides for the promulgation of a code of ethics for medical practitioners. The position at Common Law is not different, as was explained in the text *Ethical Judgments-Re-Writing Medical Law* and quoting Lord Montgomery in the case of *Bolitho v Hackney Health Authority*<sup>5</sup> as follows:

"This case raises issues of clinical judgment and moral integrity that lie at the very foundation of medical

**malpractice law. Medicine is a calling that requires knowledge, skill and judgment. Doctors must be scientists applying their expertise in the interests of their patients within a centuries -old ethical tradition and thus must possess moral integrity. On this combination of scientific expertise and ethical orientation, a social contract is built that offers the medical profession a privileged position in our society in return for the care that it provides."**

68) In this case the Respondents reneged on their duty and do not dispute that their actions resulted in the injuries complained of by the Appellant. The non contest can be seen from the arguments advanced in relation to when the limitation period began to run. They have argued that it began to run when the Appellant knew the full extent of his injuries as reflected by the letter of 4<sup>th</sup> August 2010. By implication this is an acceptance of the contents of the letter.

69) The question is, should the Respondents on ethical and moral grounds hide behind the

principle of statute bar leaving the Appellant to suffer physically, mentally and financially? We are by no means suggesting that the Respondents are not entitled to have recourse to the *Limitation Act, 1939* or the Act nor are we suggesting that the Respondent is not entitled to set up the defence of statute bar, but should they not consider their ethical and moral duty to the Appellant and what impact their actions have on their reputation as medical care givers, especially that this action is in the glare of the public? Statute bar is a complete procedural defence to a claim on grounds that the time within which to seek redress through the courts of law has lapsed. It is not a defence on the merits to the claim. There is, therefore, need for introspection on the part of the Respondents.

**Conclusion**

70) The determination we have made of the three issues leads us to the conclusion that the appeal must sadly fail. All three grounds of appeal fail and we dismiss them accordingly.

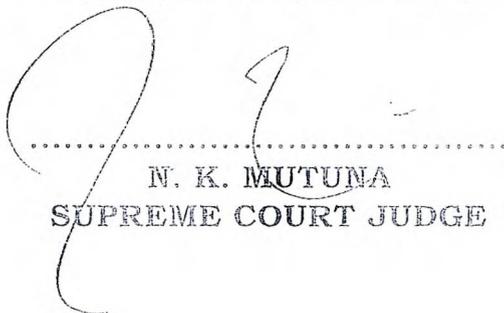
71) As to the issue of costs, the principle is that they follow the event unless where the Court decides to exercise its discretion otherwise. The nature of this case is such that we have felt compelled to order that the parties bear their respective costs.



.....  
E. M. HAMAUNDU  
SUPREME COURT JUDGE



.....  
J. K. KABUKA  
SUPREME COURT JUDGE



.....  
N. K. MUTUNA  
SUPREME COURT JUDGE