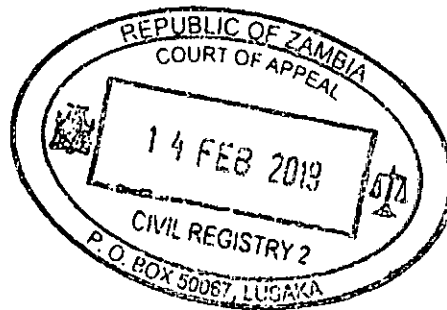


**IN THE COURT OF APPEAL OF ZAMBIA      APPEAL NO. 0061/2018**  
**HOLDEN AT NDOLA**  
**(Civil Jurisdiction)**

**BETWEEN:**

**MANYANDO MUTUKWA**



**APPELLANT**

**AND**

**THE UNIVERSITY TEACHING HOSPITAL      1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF HEALTH      2<sup>ND</sup> RESPONDENT**  
**HEADQUARTERS**

**THE ATTORNEY GENERAL      3<sup>RD</sup> RESPONDENT**

**CORAM:      Mchenga DJP, Chashi and Mulongoti, JJA**

**On 21<sup>st</sup> November, 2018 and 14<sup>th</sup> February, 2019**

*For the Appellant:      In person*

*For the Respondents:      Mr. F.K. Mwale Principal State Advocate-  
Attorney General's Chambers*

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

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**MULONGOTI, JA, delivered the Judgment of the Court**

Cases referred to:

1. **Examination Council of Zambia v Reliance Technology Limited**  
**(2014) 3 ZR 171 (SC)**

2. **Kitwe City Council v William Nguni (2005) ZR 57 (SC)**

Legislation referred to:

1. **The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia**

This is an appeal against the decision of the High Court, Industrial Relations Division, which dismissed the appellant's case for lack of merit.

The appellant sued the respondents alleging that she was not paid her salaries and leave days from November, 2009 to January, 2013 totaling 37 months. And, that she was never put on the payroll during that period. She averred that she started getting her salary in February 2013.

In cross examination during trial, she admitted that she was earlier employed by UTH (1<sup>st</sup> respondent) from 1998 to July 2009 but was disciplined over some shortages and later dismissed. She was re-employed in November, 2009 as Revenue Collector at UTH.

She also agreed that she never signed the Arrival Advice Form. In February, 2013 she was transferred to the Provincial Medical

Office at Lusaka Province and that's when she was put on the payroll.

The respondents' case was anchored on the evidence of RW1 Dr. Robert Zulu, the Vice Deputy Managing Director at UTH. His testimony was that the appellant was not paid for the period in question, because she had not reported to the station she was posted to. The procedure is that, when one is appointed and posted to UTH, they should present themselves to the Senior Medical Superintendent who would endorse on the letter of appointment. Then it would go to the Head of Human Resources and thereafter, to the Chief Accountant. He further testified that, after that, the Arrival Advice Form should have been filled in but the appellant did not do so. She could therefore, not be put on the payroll. RW1 also testified that he noticed the Arrival Advice Form exhibit 'MM3' later in 2015 at the Lusaka District Provincial office and not at UTH.

The record shows that, the appellant wrote several letters to the Vice President, the Minister of Health, the Permanent Secretary Public Service Management Division, the Senior Medical

Superintendent UTH, over the issue of not being put on the payroll and payment of salaries for the 37 months.

After analyzing the evidence, the trial Judge found that the appellant had not worked during that period and was not entitled to payment.

Dissatisfied she launched an appeal on the following grounds:

1. *The learned trial Judge erred in law and fact (at page J8, paragraph 5.9) when he found that the appellant's claim for salary arrears and leave days payment for 37 months could not be awarded even after acknowledging the fact that, it was not the appellant's fault that she was not given duties to perform at the University Teaching Hospital but this was as a result of lack of coordination between the University Teaching Hospital and the Permanent Secretary at the Public Service Management Division.*
2. *The learned trial Judge erred in law and fact (at page J7, paragraph 5:4) when in his own opinion he found that the appellant did not fill in the Arrival Advice and payment of Salary Form when evidence was on record which showed that it was the responsibility of the Senior Medical Superintendent to facilitate all recruitment procedures.*
3. *The learned trial Judge erred in law and fact (at page J7, paragraph 5:3) when in his own opinion found that, the appellant never worked as Revenue Collector at the University Teaching Hospital when it is clear that, it was the responsibility of the employer to allocate work to employee.*
4. *The learned trial Judge erred in law and fact (at page J8, paragraph 5:10 and 5:11) when in his own opinion found it was a fact that, the appellant never worked as Revenue Collector at the University Teaching Hospital when evidence was on record that, the appellant continuously made follow-ups on the appointment with management*

*at both the University Teaching Hospital as well as Public Service Management Division.*

- 5. The trial Judge erred in law and fact (at page J8, paragraph 5:8, page J9 paragraph 5.13 and 5.14) when he failed to recognize the fact that, the appellant's current employment status was still based on the appointment letter of 18<sup>th</sup> November, 2009.*
- 6. The trial Judge erred in law and fact (at page J8, paragraph 5.5) to state that, the appellant did not fill in the Arrival Advice and Payment of Salary Form when the appellant testified that the same was filled in but that, she was told that The Arrival Advice and Payment of Salary Form was misplaced by the Employer.*
- 7. The trial Judge erred in law and fact (at page J8, paragraph 5:7) when it is clear also from evidence on record that the appellant was redirected from the University Teaching Hospital. Henceforth, the replacement of the Arrival Advice and Payment of Salary Form was filled in at the Lusaka District Medical Office and deposited at the same place.*
- 8. The trial Judge erred in law and fact (at page J10, paragraph 5:15, 5:16, 6:1 and 6.2) to state that awarding the appellant salary arrears and leave days payment for the period November, 2009 to February, 2013 would amount to unjust enrichment. Borrowing from the proverbial story of the Talents in the Bible at Matthews 25v 24, 25,26,27,28 and 29 the worker was given work to do and money as an investment by the master. However, in my case nothing was given to me the appellant was not given work to do and no salary despite being a worker. The respondent acted unfair to the appellant for that period November, 2009 to February 2013, as per section 15 of the Employment Act, therefore the Judge did not do substantial justice as required under section 85(4) of the Industrial and Labour Relations Act.*

The appellant in addition filed heads of argument, wherein she argued that the court below failed to address its mind to the fact that she was legally appointed into the civil service on 18<sup>th</sup>

November, 2009. Her current appointment has nothing to do with the old appointment. This is why the Permanent Secretary requested the respondents to facilitate all recruitment processes, including the Arrival Advice and Payment of Salary Form. Thus, the trial court erred when it failed to find that the respondents, without proper reason, neglected to pay the appellant's salaries for 37 months. The respondents even agreed that there was a lapse of communication in its management, but did nothing to resolve the problem. This was contrary to the **Public Service Values and Principles Act; Part XIII clauses 1, 2 and 3:**

- "1. (a) *The Public Service must maintain and promote the highest standards of professional ethics and integrity.*
- (b) *Be effective and impartial.*
- (c) *Fair and equitable provisions.*
- (d) *Prompt, efficient and timely response to people's need.*
- (e) *Commitment to implementation of Public Policy and Programmes.*
- (f) *Accountability for administrative acts.*
- (g) *Merit as the basis of appointment and promotion.*
- (h) *Adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups.*

*Further clause 2 No. 3 (a) A Public Officer shall not be*

*(a) Victimized or discriminated in accordance with this Constitution or law, ethnic, or economical status or otherwise punished without just cause and due process.*

Regarding ground two, it is argued that the trial court should have found that the action of victimization or unilateral varying the rights of employees at the work place was a violation of the conditions of service. The evidence on record is clear that she was not paid for 37 months. The decision not to pay her was therefore, irrational and traumatized her.

The appellant argues in grounds three and four that the court's evaluation of the evidence adduced was imbalanced. The trial Judge concentrated on destroying her evidence, thereby leaning more in favour of the respondent's case. The case of **Examination Council of Zambia v Reliance Technology Limited**<sup>1</sup> was cited as authority for that position of the law.

It is further submitted that even the proverbial story of talents in the Bible, was misapprehended by the trial Judge. In the Bible, the worker was given work to do merely as an investment unlike the appellant who was not given work to do and no salary despite reporting for work every day.

In ground five it is argued that the respondents treated the appellant unfairly and that the trial Judge did not give her

substantial justice as required in **section 85(4) of the Industrial and Labour Relations Act.**

Grounds six to eight were not argued and thus abandoned.

The respondents' filed their arguments in response. It is argued in relation to ground one, that the trial Judge was on firm ground when he refused to award the appellant's claim for salary arrears and leave pay for 37 months. The appellant admitted that she never worked for UTH during that period. She was therefore, not entitled to claim for salaries and leave pay as she never worked. The case of **Kitwe City Council v William Nguni<sup>2</sup>** was referred to, in support of this proposition.

It is further argued that the court below noted the appellant's testimony that she kept going to UTH to inquire about her posting. The court did not find that the appellant was reporting for work every day but was never given work as erroneously argued by the appellant. The court also addressed its mind to the issue of the Arrival Advice Form and appointment of the appellant and found that there was lack of co-ordination between UTH and the

Permanent Secretary after the appellant's first employment was terminated for fraud.

As to ground two, it is argued that the appellant did not fill in the Arrival Advice Form in 2009 but did so on 8<sup>th</sup> October, 2015. The trial Judge found as a fact that this date was later backdated to 17<sup>th</sup> December, 2009. The Judge noted at page J8 lines 23-24 that:

***"Indeed this was an uncomfortable situation for the complainant as well as she could have debated how she would face the supervisors who had fired her on a serious charge of fraud. This would explain why the evidence of the respondent is overwhelming that the complainant did not report for work and never filled in the Arrival Advice and Payment of Salary Form."***

Furthermore, that she submitted the form in 2015 at Lusaka Medical Office and not at UTH. As testified by the respondents' witness, she should have filled in the form and returned it to the Senior Medical Superintendent at UTH for endorsement. After that it would have gone to the Head of Human Resource and lastly the Chief Accountant. The appellant would have been put on the payroll. However, because of her earlier dismissal for fraud, the appellant did not present herself to the Senior Medical

Superintendent or the Head of Human Resource as she did not fill in the Arrival Advice Form. It was her responsibility and not of UTH to follow procedure on the Arrival Advice Form. The trial Judge was thus on firm ground when he held that the appellant did not fill in the Arrival Advice Form.

In ground three, it is argued that the Judge did not err when he held that the appellant was never appointed as a Revenue Collector at UTH. This finding was in line with the appellant's own evidence. As noted at J7 lines 11-17 that:

***"The complainant has claimed that when she was appointed as Revenue Collector in November, 2009 she was posted to the University Teaching Hospital. In her own evidence, she told the court that she was not given any post at the University Teaching Hospital and kept going there to inquire about her posting from December 2009 to February, 2013."***

Thus, the respondents could not be blamed for not assigning the appellant any work as Revenue Collector after her dismissal for fraudulently under-receipting UTH money.

Additionally, it is argued that the trial Judge considered the evidence by both sides.

In ground four, it is argued that the appellant never worked as Revenue Collector at UTH. Making follow ups is not the same as working.

As to ground five, it is argued that the appellant misapprehended that portion of the Judgment as the Judge clearly noted that:

***"I agree with the respondents' evidence that the complainant was dismissed for fraud in July 2009, during which period there was a recommendation for her to be appointed as Revenue Collector."***

The Judge found that she did not work from November 2009 to February 2013 and thus her current employment status was based on the appointment letter of 2009.

At the hearing of the appeal the appellant relied on her heads of argument. She submitted in response to the respondents' heads of argument that the issue of fraud does not arise and no document was served on her regarding fraud.

We have considered the arguments by the parties. We shall address all the eight grounds of appeal together as they are interlinked. The issue that falls for determination, flowing from the grounds is whether the appellant did provide any service or

worked for the 1<sup>st</sup> respondent during the period November, 2009 to February, 2013, for which she is entitled to salaries and leave pay.

We note the various letters on record. The letter at page 26 of the Record of Appeal from the Permanent Secretary Ministry of Health to Senior Medical Superintendent UTH advised that the appellant had been appointed Revenue Collector and all necessary formalities be done by UTH. Further, that UTH (Senior Medical Superintendent) should ensure that she completed the appointment documents. The letter is dated 17<sup>th</sup> December, 2009.

At page 28 is a letter dated 3<sup>rd</sup> October, 2012 from the Permanent Secretary, Ministry of Information Broadcasting and Labour acknowledging the appellant's letter over complaint for not being on the payroll.

At page 30 is a letter of 1<sup>st</sup> November 2012 from Permanent Secretary Public Service Management Division (PSMD) to Permanent Secretary Ministry of Health stating that the appellant was appointed as Revenue Collector on 18<sup>th</sup> November, 2009.

The Permanent Secretary (PSMD) further stated that the appellant had written to PSMD stating that she had never worked at UTH because there was no vacancy. He advised UTH to identify a vacancy to which the appellant could be posted to. If this was not possible, she be surrendered to PSMD.


In February, 2013 the appellant was redirected to Lusaka District Medical Office in Kaunda Square. It was then that she subsequently, was put on the payroll. The evidence on record is clear to us, that the appellant did not work during the period November, 2009 to February, 2013. The trial Judge cannot be faulted for so finding. This finding is supported by the evidence on record. The documentary evidence (letters) show that she never worked during the period. Her own evidence was that she was going to UTH, following up on her posting. The letters she exhibited, including the one from PSMD, stated that she never worked at UTH because there was no vacancy. The Permanent Secretary (PSMD) even advised UTH to find a vacancy, if they failed to do so, she be surrendered to PSMD.

This letter is dated 1<sup>st</sup> November, 2012. Clearly, therefore she never worked until 2013 when she was posted to Lusaka District Medical Office and the respondent started paying her. It was encumbered upon the appellant to adduce evidence that she reported for work but was not assigned duties. The finding by the trial Judge that she was not given any post at UTH and kept going there to inquire about her posting, was based on her oral testimony and letters produced.

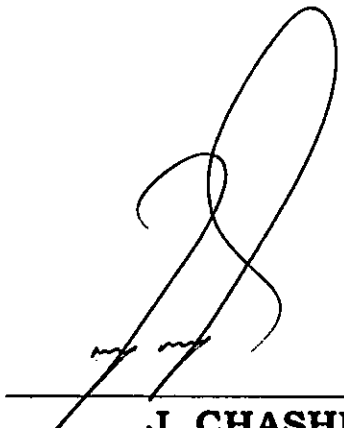
The trial Judge cannot be faulted as he considered the evidence adduced by both parties including the documentary evidence, which as shown, proved that the appellant did not work during that period. She began working in February, 2013 and was immediately put on the payroll. We therefore find no merit in her arguments. We cannot say much on the trial Judge's use of the Bible suffice to state that his finding that the appellant did not work during the period in question was supported by the evidence. RW1 stated the procedure as aforestated that, when one is appointed and posted to UTH, they should present themselves to the Senior Medical Superintendent who would endorse on the letter of appointment. Then it would go to the Head of Human Resources and thereafter, to the Chief Accountant. He further testified that,

after that, the Arrival Advice Form should have been filled in but the appellant did not do so. It was therefore, not for the respondents to fill in the Arrival Advice Form but the appellant. The trial court accorded substantial justice to both parties.


For the foregoing, we find no merit in the grounds of appeal. The appeal is dismissed. Each party to bear own costs.



**C.F.R. MCHENGA**  
**DEPUTY JUDGE PRESIDENT**



**J. CHASHI**  
**COURT OF APPEAL JUDGE**



**J.Z. MULONGOTI**  
**COURT OF APPEAL JUDGE**