IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 203/2016**
HOLDEN AT NDOLA **SCZ/8/167/2016**

(CIVIL JURISDICTION)

BETWEEN:

CHANSA NG'ONGA **APPELLANT**

AND

ALFRED H. KNIGHT (Z) LTD. **RESPONDENT**

Coram: **Malila, Kabuka and Mutuna, JJS,**
On 3rd September, 2019 and 26th September, 2019

For the Appellant: Mr. M. T. Chabu, Messrs Terence Chabu & Co.

For the Respondent: Mr. K. Bota, Messrs William Nyirenda & Co.

JUDGMENT

Malila, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Priscilla Ngenda Simvula Kalisilira v. Zambia National Commercial Bank Plc., SCZ Judgment No. 8/2015.*
2. *Konkola Copper Mines Plc. v. Greenwell Mulambia, SCZ Appeal No. 053/2013.*
3. *Kawimbe v. Attorney General (1974) ZR 44.*
4. *Orman Corrigan v. Tiger Ltd. and Abdi Jumale (1981) ZR 60.*
5. *Zambia Airways Corporation v. Gershom B. B. Mubanga (1990-1992) ZR 149.*

6. *Barclays Bank Zambia Limited v. Mando Chola and Another SCZ Judgment No. 8 of 1997.*
7. *Daniel Chintomfwa v. Ndola Lime (1999) ZR 172.*
8. *Chilanga Cement Plc. v. Kasote Singogo (2009) ZR 122.*
9. *Attorney-General v. John Tembo (2012) 1 ZR1.*
10. *Philip Mhango v. Dorothy Ngulube & Others (1983) ZR 61.*
11. *Wilson Masauso Zulu v. Avondale Housing Project Ltd. (1982) ZR 172.*
12. *Robson Banda v. Varisto Mulenga (2003) ZR 121.*
13. *Caroline Tomaidah Daka v. Zambia National Commercial Bank Plc. (2012) 3 ZR 8.*
14. *Lyons Brooke Bond (Z) Ltd. v. Tanzania Zambia Road Services Ltd. (1972) ZR 317.*
15. *Dennis Chansa v. Barclays Bank Plc. (Appeal No. 111/2011).*
16. *First Quantum Mining & Operations Ltd. v. OB Yendamoh (Appeal No. 206 of 2015).*
17. *Swarp Spinning Mills Plc. v. Chileshe & Others (2002) ZR 23.*
18. *Denmark Production Ltd. v. Boscobel Productions Ltd. (1968) I ALL ER 513 at 524.*
19. *Mobil Oil Zambia Limited v. Ramesh M. Patel (1988-1989) ZR 12.*
20. *National Airports Corporation Ltd. v. Reggie Ephraim Zimba (SCZ Judgment No. 34 of 2002).*
21. *Dunlop Pneumatic Tyre Co. v. New Garage and Motors Co. (1915) AC 79.*
22. *Tom Chilambuka v. Mercy Touch Mission International (SCZ appeal No. 171 of 2012).*
23. *Kitwe City Council v. William Ng'uni (2005) ZR 75.*
24. *Jacob Nyoni v. Attorney-General (2001) ZR 65.*
25. *Konkola Copper Mines Plc. v. Aaron Chimfwembe and Kingstone Simbayi (Selected Judgment No. 33 of 2016).*
26. *Fyfe v. Scientific Furnishing Ltd (1989) IRLR 331.*
27. *Eastern Cooperative Union Ltd. v. Yamene Transport Ltd. (1988–1989) ZR 126.*
28. *Wilding v. British Telecommunications Plc. (2002) ICR 1079.*

Legislation referred to:

1. *Article 118 (2) (c) of the Constitution of Zambia Amendment Act No. 2 of 2016.*
2. *English Court of Appeal at para. 37.*

P.821

At the heart of this appeal is the question of how the determination is to be done of the quantum of damages due to an employee whose dismissal from employment is found by a court of law to be legally wanting in one form or another.

The appellant was employed as the Sectional Leader in the Lubricants Testing Department of the respondent company in April, 2009. Sometime in October 2012, he earned a promotion to the rank of Lubricant Testing Manager. He was suspended from employment in May 2015 and dismissed some three weeks later, following his appearance before a disciplinary hearing on a charge of absenteeism.

The circumstances of his dismissal were not ordinary in any way. He was suspended on account of being absent from work for five days without his manager's authorization. The ultimate punishment for a first offender of that transgression under the respondent's Disciplinary Rules and Procedures, was a written warning. What that dismissal translated to was that the erring employee was given much more than was warranted under the

P.822

Disciplinary Rules and Procedures. Furthermore, no formal charges in writing as required by those Rules and Procedures were raised for him to answer at the disciplinary hearing. To compound the appellant's predicament, his dismissal letter listed reasons for dismissal over which he was not afforded any hearing. To be precise, he was dismissed for perpetual absenteeism leading to, what the respondent called, poor management of the lab; for failure to assist, as expected, resulting in poor performance of the lab and business stagnation; for failure to follow management instructions leading to poor communication and for overall, poor performance against company expectations.

Following his dismissal the appellant approached the Industrial Relations Court (IRC) seeking relief which he structured in his notice of complaint as follows:

(i) An order and declaration that the respondent's decision to dismiss the complainant from employment was wrongful, unfair and unlawful;

(ii) An order and declaration that the complainant be paid damages for wrongful termination of employment;

(iii) Interest on (ii) above from the date of dismissal to date of full payments;

(iv) Costs of an incidental to the proceedings; and

(v) Any other relief the court may deem fit.

Upon considering the evidence laid before it, the IRC in a judgment delivered on its behalf by Mwenda J, Deputy Chairperson, crystalised the issues for determination as being; first, whether or not the appellant's employment was terminated in accordance with the respondent's disciplinary rules and procedures, and second, whether or not the appellant had been given an opportunity to defend himself on the charges contained in the dismissal letter other than absenteeism for which he had earlier been suspended.

Guided by our decision in the case of **Priscilla Ngenda Simvula Kalisilira v. Zambia National Commercial Bank Plc[1],** the court held that the penalty for any work related offences should be as provided for in the disciplinary code of conduct for employees. In this particular case, the Disciplinary Rules and Procedures of the respondent did not provide for dismissal on first breach for the

offence of absenteeism. The appropriate sanction, according to the court, should have been a written warning with five days suspension with no pay. The court, accordingly, substituted the penalty of dismissal with that of a written warning with five days suspension with no pay.

The court next dealt with the other offences outlined in the appellant's letter of dismissal and came to the conclusion that the respondent had not availed the court of any proof that the appellant was charged with those offences, which he claims were first brought to his attention in the letter of dismissal; in other words, the respondent had not shown that the appellant was not given an opportunity to be heard. The court, accordingly, held that the dismissal based on all such grounds was done in violation of the rules of natural justice. In the ultimate, the court held that the dismissal of the appellant was wrongful. It, however, did not make an order of reinstatement, preferring instead to award the appellant only damages.

In determining the quantum of damages, the court, in obedience to our decision in the case of **Konkola Copper Mines Plc**

v. Greenwell Mulambia[2], awarded the appellant a sum equivalent to three months' salary and perquisites. The reason the court gave for that award was that the appellant had not adduced any evidence to show that he had suffered damage to the extent of his former full salary, nor had he adduced any evidence to show that he had mitigated his loss by looking for alternative employment.

The appellant, aggrieved by that decision, has now appealed to us on three grounds formulated as follows:

1. **The learned Deputy Chairperson erred in law and fact when she held that fair compensation for the appellant would be damages equivalent to three months' salary and perquisites;**

2. **The learned Deputy Chairperson erred in law and fact when she held that no evidence was adduced by the appellant to show that he suffered damages to the full extent of his former salary; and**

3. **The learned Deputy Chairperson erred in law and fact when she held that the appellant had not adduced any evidence to show that he had mitigated his loss by looking for alternative employment.**

P.826

It is clear from these grounds that the appeal before us chiefly turns on the narrow point regarding the appropriate level of compensation that the appellant ought to have been awarded. The appellant maintains that he was entitled to much more than three months emoluments, if precedents set by this court are anything to go by. The respondent, for its part, argues that the precedents of this court, in fact, support the award given by the lower court.

At the hearing of the appeal, Mr. Chabu, learned counsel for the appellant, relied on the heads of argument which he supplemented orally. In respect of ground one, the learned counsel assailed the lower court's award of three months' pay as being inordinately low and that the court below had applied a wrong principle of law in making the said award. We were referred to the case of **Kawimbe v. Attorney General**[3] where we held, *inter alia*, that an appellate court should not interfere with the findings of a trial court as to the amount of damages merely because the appellate court is of the view that, if it had tried the case in the first instance, it would have given a lesser sum.

Counsel also referred to the case of **Orman Corrigan v. Tiger Ltd. and Abdi Jumale**[4] where, again, it was emphasized that before an appellate court can interfere with the quantum of damages, it must satisfy itself that the damages-assessing court applied a wrong principle of law, or the amount awarded was either so inordinately low or so inordinately high that it was a wholly erroneous estimate of the damages properly due.

Counsel cited the case of **Zambia Airways Corporation v. Gershom B. B. Mubanga**[5] where we awarded the respondent full salary and other entitlements from the date of suspension to the date of dismissal, together with damages of twelve months' salary and other entitlements, as a more considerate award of damages for wrongful dismissal.

Mr. Chabu also cited the case of **Barclays Bank Zambia Limited v. Mando Chola and Another**[6], where an award equivalent to twelve months salary and other benefits was made to each of the respondents as compensation for unfair dismissal, as being another fitting award of damages for its time. More purposely

perhaps, counsel additionally referred us to our decision in **Daniel Chintomfwa v. Ndola Lime**[7] which we cited with approval in the subsequent case of **Chilanga Cement Plc. v. Kasote Singogo**[8] in a passage counsel quoted reading as follows:

> **.... in *Chintomfwa v. Ndola Lime Limited*[7], the rational for awarding two years as damages was due to the appellant's grim future job prospects. However, when each case is considered on its own merit, future job prospects may not be the only consideration for enhancing damages in wrongful or unlawful dismissal.**
>
> **In the instant case, the respondent was compensated for 'abrupt loss of a job.**

We there declined to interfere with the award because we shared the indignation with the lower court in the harsh and inhuman manner in which the respondent was treated.

Mr. Chabu also referred to the case of **Attorney-General v. John Tembo**[9] where twenty-four month salary was awarded as damages for wrongful dismissal. The learned counsel submitted, with indomitable faith, that in the present case, the basis upon which the lower court should have awarded the appellant twenty-four months salary or even more along with perquisites, should

have been the court's own findings of fact which was that the appellant was dismissed partly on the basis of offences for which he was not charged and called upon to exonerate himself at the hearing, and partly for an offence which, at most, only attracted a written warning under the respondent's own Disciplinary Rules and Procedures.

Counsel implored us to uphold ground one of the appeal

Turning to ground two of the appeal, the learned counsel attacked the lower court's finding of fact that the appellant had adduced no evidence to show that he had suffered loss to the extent of his former full salary. That finding, according to the learned counsel, was perverse in law as the court had already found that the dismissal was wrongful and as a result, the appellant had lost earnings which he would otherwise have received.

To support the submission that a perverse finding of fact of a lower court, or one made in the absence of any relevant evidence, or upon a misapprehension of facts, is liable to be

interfered with by an appellate court, Mr. Chabu cited the cases of **Philip Mhango v. Dorothy Ngulube & Others[10], Wilson Masauso Zulu v. Avondale Housing Project Ltd.[11]** and **Robson Banda v. Varisto Mulenga[12]**.

Counsel stressed the point that it was perverse for the court to have made a finding of fact that the appellant had not suffered loss to the extent of his salary after it had found that the appellant was no longer in employment by reason of his wrongful dismissal by the respondent. He urged us to uphold ground two of the appeal.

In regard to ground three, the learned counsel assailed the holding by the lower court that the appellant had not shown any evidence of mitigation of loss by looking for alternative employment. He submitted that the onus of showing that mitigation of damages was not done lies with the respondent employer and not with the appellant employee. For this submission, the learned counsel relied on a High Court judgment in the case of **Caroline Tomaidah Daka v. Zambia National Commercial Bank Plc.[13]** where the judge stated, *inter alia*, as follows:

P.831

> **The burden is on the employer to show that the employee has failed to take reasonable steps to mitigate his loss. Thus he may be able to do either by reference to a matter known to him, or by obtaining some form of discovery from the employee concerning attempts to seek alternative employment. Whether an employee has taken reasonable steps to mitigate against his loss is a question of fact to be determined by the court, bearing in mind all the circumstances, including the employee's age, mobility, personal commitments, qualifications, experience and so on.**

Counsel finally cited the case of **Lyons Brooke Bond (Z) Ltd. v. Tanzania Zambia Road Services Ltd.**[14] on the need for parties to plead specially and distinctly any matter raising issues of fact and to bring forth evidence to prove the facts. He submitted that no evidence was led by the respondent regarding the appellant looking for alternative employment to enable the court to arrive at the finding of fact being assailed under this ground.

At the hearing of the appeal, Mr. Chabu supplemented the heads of argument orally. In respect of ground one, he spiritedly submitted that the award of three months' salary as compensation to the appellant was not fair and adequate. He referred us to Article 118 (2) (c) of the **Constitution of Zambia Amendment Act No. 2 of 2016** which provides as follows:

P.832

In exercising judicial authority, the courts shall be guided by the following principles ....

(c) adequate compensation shall be awarded where payable.

Counsel submitted that the use of the term 'shall' in Article 118(2)(c) implies that it is mandatory that the courts should compensate successful litigants adequately. In the present case the compensation given to the appellant was hardly adequate within the intendment of the Constitution.

We asked Mr. Chabu whether what he was raising was not, in fact, a constitutional issue fit for reference to the Constitutional Court in terms of Article 128 (2) of the Constitution. The learned counsel promptly answered in the negative and proceeded to withdraw the submission premised on Article of the Constitution.

Mr. Chabu posed for himself the question whether the circumstances under which the lower court made the award to the appellant warranted the setting aside of the award. He answered the question in the affirmative. He thereafter referred

us to the case of **Dennis Chansa v. Barclays Bank Plc**[15] where this court enhanced the awards in unlawful/unfair/wrongful dismissal/termination cases from the high of twenty-four months' emoluments set in **Daniel Chitomfwa v. Ndola Lime**[7] case, to thirty-six months. A similar award was made in **First Quantum Mining & Operations Ltd. v. OB Yendamoh**[16] where we, again, awarded thirty-six months emoluments as compensation to wrongfully dismissed employees.

Mr. Chabu, reiterated that granted the appellant's position in the respondent company and the circumstances underwhich he was dismissed, the appellant deserved an award comparable in quantum to that awarded in the **Dennis Chansa v. Barclays**[15] and the **First Quantum Mining and Operations**[16] cases.

The learned counsel distinguished the case of **Swarp Spinning Mills Plc. v. Chileshe & Others**[17] which was heavily relied upon by the respondent, in that, the present case, dealt with wrongful dismissal which is in the category where the courts have offered the highest awards. The **Swarp Spinning Mills**[17] case, according to counsel, dealt with mere wrongful termination of

security guards. Counsel ended by fervidly praying that we uphold the appeal.

The learned counsel for the respondent applied for, and was granted leave to file the respondent's heads of argument at the hearing of the appeal. He, in turn, relied on those heads of argument, which he orally augmented briefly.

In supporting the holding of the lower court under ground one, the learned counsel for the respondent quite briefly submitted that the court below was properly guided by authorities of this court when it made the award of damages. The guiding case authorities, according to counsel, are **Konkola Copper Mines Plc. v. Greenwell Mulambia**[2] and **Swarp Spinning Mills Plc. v. Chileshe & Others**[17]. In the latter case, the court reiterated that:

> **The normal measure of damages applies and will normally relate to the applicant contractual length of notice or the notional reasonable notice where the contract is silent.**

In **Konkola Copper Mines Plc. v. Greenwell Mulambia**[2] the court – as did the lower court in this case - awarded three months' pay.

P.835

Mr. Bota ended his submission on this ground by stating that the present case was on all fours with that of **Konkola Copper Mines Plc. v. Greenwell Mulambia**[2] and there has been no reason shown for this court to depart from that decision.

Counsel for the respondent argued grounds 2 and 3 together. He maintained that the lower court made the correct findings of fact when it held that the appellant did not adduce any evidence to show that he had suffered damages to the extent of his full salary, nor did he adduce any evidence to demonstrate that he had mitigated his loss by looking for alternative employment. He again relied on our judgment in the case of **Konkola Copper Mines Plc. v. Greenwell Mulambia**[2] from which he freely reproduced the following passage:

> **Further in the case of *Zambia Airways Corporation Ltd. v. Gershom BB Mubanga*[5], we held that for the court to order that a complainant be paid full salary and arrears from the date of the purported dismissal, there must be evidence called to show that the respondent had actually suffered damages to the extent of his former full salary. We also held that it was the duty of the respondent to mitigate his loss following the dismissal. In the absence of evidence to justify the payment of a full salary and arrears, it was held that the court must do its best to award the respondent fair recompense. In the appeal before us, the**

> **respondent did not adduce any evidence to justify an award equivalent to the full extent of his salary. The record is also silent on whether or not he found alternative employment after termination. We accordingly substitute the order of retirement with full benefits with an order for damages equivalent to three months' salary and perquisites.**

The learned counsel ended his submission on a rather diffident note. He observed that the case cited by the learned counsel for the appellant, namely **Caroline Tomaidah Daka v. Zambia National Commercial Bank Plc**[13] to support the position that the burden to show that the employee had failed to take steps to mitigate his loss lay on the employer, was in fact a High Court judgment purporting to contradict a principle settled by this court in such cases as **Zambia Airways Corporation v. Gershom BB Mubanga**[5]**.** Counsel was shy of submitting outrightly that the **Caroline Tomaidah Daka**[13] case was wrongly decided and should be overruled. It was Mr. Bota's impassioned prayer that we dismiss the appeal with costs.

P.837

In reply, Mr. Chabu merely rehashed the argument that, unlike in the **Konkola Copper Mines[2]** case, this case was about wrongful dismissal and the award of damages should closely follow awards made in cognate cases.

We are grateful to counsel for both parties for their exertions. As we noted at the outset of this judgment, the point in contention is narrowly focused on the quantum of damages to be awarded as compensation where a dismissal is adjudged wrongful. This is a recurring question for this court whenever a finding is made that a dismissal of an employee or a termination of a contract of employment is unlawful or wrongful. We cannot but admit straight away that at face value, our jurisprudence around the award of damages to employees in these circumstances, appears rather inconsistent. Awards have ranged from amounts equivalent to payment in lieu of notice – determinable with reference to the notice period – up to thirty-six months emoluments. We have, however, throughout maintained the position that the starting point is that the normal measure of damages in wrongful/unlawful

dismissal/termination cases should be payment of money equivalent to, or in lieu of the notice, that would otherwise lawfully terminate the employment contract. In other words, the quantum of compensation payable at common law is determinable with reference to the period necessary to terminate a contract by notice, or where no notice period for termination is stipulated in the contact, a payment equivalent to what would be payable in lieu of the notional reasonable period. This should be the case unless there are other compelling circumstances to warrant an award in excess of that determinable with reference to the notice period.

In the English case of **Denmark Production Ltd. v. Boscobel Productions Ltd.**[18] it was held that:

> **As an employee dismissed in breach of his contract of employment cannot choose to treat the contract as subsisting and sue for an account of profits which he should have earned to the end of the contract period; he must sue for damages for wrongful dismissal and must of course mitigate those damages as far as he reasonably can.**

P.839

We have consistently employed similar reasoning in this court, subject always to varying individual circumstances. In **Mobil Oil Zambia Limited v. Ramesh M. Patel**[19] we stated that where a contract breaker had a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option. We carried the same sentiments in **National Airports Corporation Ltd. v. Reggie Ephraim Zimba**[20]**.** There we stated among other things that:

> **We find and hold the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as prepositions by Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. New Garage and Motors Co.*[21], especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be roved to have followed the breach.**

We qualified that position in **Tom Chilambuka v. Mercy Touch Mission International**[22] when we held that, unless the dismissal happens in traumatic circumstances, the normal measure of

damages is the salary payable for the period for which notice to terminate could have been given. This decision follows a host of other decisions such as **Swarp Spinning Mills Plc. v. Sebastian Chileshe & Others**[17], referred to by the learned counsel for the parties.

In the present case the appellant seeks to be paid compensation for twenty-four or thirty six-months which he has not worked for. It is of course fair for him to entertain such hope as long as he can show, as did claimants in cases where such awards were made, that the peculiarity of the circumstance and the loss he suffered merited such an award.

In **Kitwe City Council v. William Ng'uni**[23] we held that paying an employee for a period not actually worked for would amount to unjust enrichment. As counsel for the appellant correctly observed in his submissions, we held in **Chilanga Cement v. Kasote Singogo**[8] that in deserving cases, courts could award more than the common law damages as compensation for loss of employment.

P.841

In **Jacob Nyoni v. Attorney-General**[24] we explained that in awarding damages in wrongful dismissal cases, each case should be considered on its own merits. In **Daniel Chitomfwa v. Ndola Lime Limited**[7] and in **Dennis Chansa v. Barclays Bank Plc**[15], the high awards that were made were dictated by the considerations peculiar to those cases that the court took into account.

In **Konkola Copper Mines Plc. v. Aaron Chimfwembe and Kingstone Simbayi**[25] the two wrongfully dismissed employees were awarded eighteen months' and twenty-four months' salary respectively, as compensation. In declining to interfere with those awards we pertinently observed that:

> **The award of damages in wrongful termination of employment cases is subject at all times to a rather amorphous combination of facts peculiar to each case and perpetually different in every case. As no facts of any two cases can be entirely identical, it should not be expected that in applying the general principle for award of damages in these cases. The courts will think in a regimented way. In the present case, the trial court took into consideration the ages of the respondents and the number of years they had served the appellant company before determining the awards. We have no basis to fault the court in this regard.**

P.842

Relating our explanation of the law as we have given it above, to ground one of the appeal we must say by way of emphasis, that the award of general damages for wrongful dismissal for the successful employee cannot be general damages but proven special damages, which actually is the salaries and other entitlements of the employee during the period of the purported termination or dismissal. It comprises what would have accrued to such employee had the dismissal or termination complied with the due process envisaged in the conditions of service or the law. It is the entitlement payable to the employee in lieu of notice (where reinstatement cannot be done).

The appellant did not explain any special or peculiar circumstances to take his case out of the realm of the ordinary award of compensation.

He did not produce any evidence before the lower court to show the extent of his loss and indeed, this the appellant does not appear to dispute. The learned counsel for the appellant contends that the mere fact that the court found that the

appellant had been dismissed unlawfully was sufficient evidence that he had suffered loss. Our view is that it was not.

There is no doubt whatsoever that the mere fact of being dismissed is damage or loss in itself. However, to compensate that loss beyond the normal common law compensation determinable by reference to the termination notice provision, required the appellant to do more by way of proving further loss.

In holding as it did that the lower court could only award damages with reference to the notice period for termination, the court was, in our considered view, properly guided by the authorities on the point.

Our view, therefore, is that the court was on firm ground to hold that fair compensation for the appellant was damages equivalent to three months' salary and perquisites.

Ground one is bound to fail and we dismiss it.

Turning to ground two, we apprehend the appellant's challenge as being essentially one against a finding of fact,

namely the finding that the appellant did not suffer any demonstrable loss to the extent of his former salary.

We have adequately spoken to this ground as we addressed ground one. The upshot is that ground two is equally without merit and it is hereby dismissed.

The third ground of appeal raises the all important common law doctrine of mitigation, based on fairness, common sense, and more importantly, who bears the burden.

A person who alleges that he has suffered loss will not be able to recover for such losses as he could have reasonably avoided. Thus, a person claiming loss bears the burden of proving the fact that he has suffered a loss and the quantum of damages commensurate with or arising from the loss.

It is a fundamental principle that any claimant will be expected to mitigate the losses they suffer as a result of an unlawful or wrongful act. A court will not make an award to cover losses that could reasonably have been avoided. Likewise, an employee is expected to search for other work, and will not

P.845

recover losses beyond a date by which the court concludes the employee ought reasonably to have been able to find new comparable employment at a similar rate of pay. [The burden of proving a failure to mitigate is on the respondent **(Fyfe v. Scientific Furnishing Ltd.[26])**].

In **Eastern Cooperative Union Ltd. v. Yamene Transport Ltd.[27]**, we pointed out that it is always the duty of the plaintiff to minimise his loss and where the plaintiff fails to do so he cannot expect the court to award damages which will be limitless both as to time and extent.

In **Wilding v. British Telecommunications Plc.[28]** the English Court of Appeal in the judgment of Potter LJ held that:

> **.... (i) It was the duty of [the claimant] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from .... his former employer; (ii) the onus was on [his former employer] as the wrongdoer to show that [the claimant] had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv)**

Where the employer alleges that the employee could but did not mitigate his loss, the burden of proof to show failure to mitigate lies with the employer. The employer thus bears the burden of establishing that the employee made no effort towards re-employment and that had he made such efforts he would have had a reasonable chance of success.

In the present case it is the appellant who was claiming to have suffered loss or damage to a given extent. It was incumbent upon him to prove that loss and also that he took steps to mitigate the loss. The respondent, however, bears the onus of proving, on a balance of probabilities, that the appellant failed to make reasonable efforts to mitigate even if mitigation was possible.

In agreeing with counsel for the appellant on the burden of proof with regard to failure to mitigate, our view is that in the case of **Caroline Tomaidah Daka v. Zambia National Commercial Bank Plc.**[13] the High Court was correct to hold as it did, that the burden is on the employer when he alleges absence of mitigation on the part of the employee to show that the employee has failed to take

P.847

reasonable steps to mitigate his loss. This, however, does not change the position that the duty in this case, lay on the appellant to show that he had taken steps to mitigate his loss. We say this because the employee was seeking damages beyond the normal or ordinary measure. If the respondent had claimed that the appellant had not made any effort to mitigate, it would have been for the respondent to plead and show that the appellant had failed in his duty to mitigate.

As matters stand, we are satisfied that the appellant, as the party upon whom the duty to mitigate rested, did not demonstrate in his evidence before the lower court that he had discharged that duty. The upshot is that ground three has no merit and is bound to fail. It is dismissed accordingly.

In sum, we find no merit in the whole appeal and hereby dismiss it in its entirety. We make no order as to costs.

.....
M. MALILA
SUPREME COURT JUDGE

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

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