

**A CRITICAL REVIEW OF THE JUDGEMENT IN KUMAR V MUTALE (Appeal No
35 2011) [2013] ZMSC 8 (25 July 2013)**

BY

MUSENGE L. NKONDE

(11045850)

**A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA FOR PARTIAL
FULFILMENT OF THE REQUIREMENTS OF BACHELOR OF LAWS.**

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By

MUSENGE L. NKONDE

(11045850)

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DEDICATION

To my family, without whom I would not stand but indeed fall.

ACKNOWLEDGEMENT

I would firstly like to acknowledge the Almighty God for His continued providence and faithfulness. Secondly, I acknowledge my Supervisor, Mrs Nkhata for her guidance and continued encouragement and without whom, this dissertation would not have been possible. Thirdly, I acknowledge my Father Mr Fred Nkonde and Mother Ms Prisca Sundano for believing in me and always providing, they are simply the best parents one could ever have. I also acknowledge my siblings from whom I derive encouragement and love. Lastly but definitely not the least, I acknowledge all my friends especially the ones I hold closest to my heart and whose names I will withhold. To you all I wish Gods peace, love and grace.

ABSTRACT

This dissertation is aimed at critically reviewing the judgement rendered in the case of *Kumar V Mutale (Appeal no 35 2011) [2013] ZMSC 8 (25 July 2013)*. This research is relevant in that it will demonstrate the purpose of statutes of limitations and the history of their enactment. Different material such as books, Journals, articles, reported cases and statutes will be consulted as this is a qualitative research. The internet will also be consulted. The objectives of this research are to review the Law Reform (Limitation of Actions etc) Act, Chapter 72 of the Laws of Zambia, which is the main statute that gives general provisions on limitation of time. A review of this Statute will lead to a comprehensive and objective conclusion on the best recommendations to implement. This research is significant in that it gives an insight on the Zambian Law with regards statutes of limitation, the possible injustices arising from the same and the best ways of curbing these. For instance, the United States has taken a novel route in dealing with suits arising from sexual offences in that the Law provides for a 'delayed discovery' where a victim of sexual abuse only has a recollection of the incident years after it happened due to repression of the memory. The law allows for such cases to be commenced in Court despite the lapse of the three -year limitation.

It has also been demonstrated in this research that statutes of limitations such as the Law Reform (Limitation of Actions etc) Act, Chapter 72 of the Laws of Zambia are important and cannot be done away with. These statutes are enacted for the purpose of specifying the period within which one can commence an action in court. These are also referred to as non-claim statutes which are intended to promote diligent prosecution of known claims, thereby providing finality and predictability in legal affairs. Statutes of limitations serve several purposes. Firstly, they protect Defendants from being vexed by stale claims whose evidence may no longer be in existence. They also protect both the Plaintiff and the Defendant where the witnesses of such claimants may not have accurate recollection of the incidents leading to these claims or may be deceased. Secondly, these help in the finalisation of claims as one can confidently rely on them to treat a matter as being finally closed. Thirdly, statutes of limitations encourage a Plaintiff not to sleep on their rights but to commence proceedings as soon as possible.

However, it is recommended that the Statute be considered for amendment so as to provide for civil suits that arise from sexual abuse cases. Also, it is recommended that there be a serious sensitisation movement for the public to be informed of these statutes and hence allow everyone not to sleep on their rights when they have a cause of action.

TABLE OF STATUTES

British Limitations Act of 1939 (Repealed)

British Acts Extensions Act, Chapter 10 of the Laws of Zambia

British Law Reform (Limitations of Actions) Act of 1956 (Repealed)

Constitution of the Zambia, Chapter 1 of the Laws of Zambia

English Law (Extent of Application) Act, Chapter 11 of the laws of Zambia

Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia

Limitations Act of 1960 (Repealed)

Limitation Act of 1980 Chapter 58 of the Laws of Britain

Limitation of Actions (Persons under Disabilities) Act of 1962

Prescription Act of 1969 of South Africa

Protection from Harassment Act 1997

Southern Australian Limitations of Actions Act of 1972

Victorian Limitations of Actions Act of 1958 (Repealed)

TABLE OF CASES

Cartledge v Jopling & Sons Ltd [1963] AC 758

Cooper v Chapell [1980] 2 ALL ER 463 CA

Kumar V Mutale[(Appeal No 35 2011] [2013] ZMSC 8[25 July 2013].

Mutale v Agro Fuel Investment and Others [2011/ HB/49][201] ZMHC 42

Orders of Railroads Telegraphers v Railway Express Agency 321 U.S. 342 [64 S. Ct. 582, 88 L. ED 788] 1944

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

This research critically reviews the judgment rendered in the case of *Kumar V Mutale*¹, this is so as to establish whether or not this judgement was sound in law and whether statutes of limitations advance access to justice. In doing this, an establishment of the history and purpose for which statutes of limitations are enacted will be outlined. It will also briefly review statutes of limitations in various selected countries in order to give further insight to the reader of the legitimacy of these statutes. Finally, the judgement in the aforementioned case will be analysed and recommendations and conclusions will be stipulated.

1.2 BACKGROUND

Statutes of limitations establish the deadline or maximum period of time within which a lawsuit or claim may be commenced in court. Limitation period for commencing an action varies depending on the circumstances of the case and the type of claim.² Statutes of limitations have been put in place in order to prevent the commencing of old actions. These statutes, which usually apply to civil actions, are designed to prevent fraudulent and stale claims from arising after all evidence has been lost. They also prevent claims arising after the facts have become obscure through the passage of time or the defective memory, death, or disappearance of witnesses.³

¹ (Appeal No 35 2011) [2013] ZMSC 8 (25 July 2013)

² Hamilton, Marcie. (2003). "The Case for Abolishing Child-Abuse Statutes of Limitations." CNN.com: Law Center. Available online at www.cnn.com/2003/LAW/07/17/findlaw.analysis.hamilton.settlement (accessed September 30, 2003).

³ Hamilton, Marcie. (2003). "The Case for Abolishing Child-Abuse Statutes of Limitations." CNN.com: Law Center. Available online at www.cnn.com/2003/LAW/07/17/findlaw.analysis.hamilton.settlement (accessed November 06, 2014).

In Zambia, the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia (hereinafter called the Law Reform Act) provides for the limitation of time in commencing a civil action in court. The preamble states the purpose of this Act which is to limit the time for bringing legal proceedings. It also limits the survival of causes of action against the estates of deceased persons and provides for purposes connected with the above mentioned matters. This, in essence means that one cannot bring an action in court after the lapse of the stipulated time. For instance, the maximum time for bringing of actions pertaining to damages arising from negligence, nuisance or breach of duty and personal injuries is three years.⁴ Suffice it to state that this Act is an amendment of the Limitation Act,⁵ which came into effect by virtue of The British Acts Extension Act,⁶ Chapter 10 of the Laws of Zambia.

The case of *Kumar v Mutale* discussed a few topics of which the most cardinal was the aspect of commencing an action out of time. The brief facts of this case are that the Respondent, Joseph Brown Mutale, had commenced an action in the Subordinate court for liquidated damages against Sachar Nerendrar Kumar. The claim was for loss of earnings and costs incurred as a direct consequence of the road accident involving Toyota Corolla ACE9639 belonging to the Respondent. The Respondent sought to joinder a third party to the proceedings, AT Computers. The High Court ruled in favour of the Respondent and allowed for the joinder of the third party, this contention was then brought before the Supreme Court. The Appellant contended that the joinder was illegal as this application was statute barred by the

⁴ Section 3 (2a) of the Law Reform (Limitation of Actions etc) Act, Chapter 72 of the Laws of Zambia.

⁵ Limitation Act, 1939 of the United Kingdom

⁶ The Limitation Act, 1939 of the United Kingdom is listed in the Schedule (section 2)

Law Reform Act. The court however finally held that joinder could be allowed as the limitation period had not yet elapsed.

1.2 STATEMENT OF PROBLEM

The Law is meant to be used as a shield for the purposes of one's defence and also as a sword for the purposes of enforcing one's right. It is also assumed that one's enforceable right must not fail only for the failure to adhere to procedure. For this reason, statutes of limitations have been viewed as inhibiting certain individuals that is, those who fail to commence an action in time. The Law Reform Act places a limitation on the commencement of civil actions in the Zambian Courts. Therefore, the problem is that the law has been viewed as inhibiting certain individuals from accessing justice. Therefore it is important to establish if this estoppel to commence action in court is an injustice to the person stopped by the statute. It is in view of this that propositions have been made for there to be exceptions rendered especially in certain special cases where it is reasonably impossible for the victim to bring a claim due their age, mental condition or economic status.

1.3 RESEARCH QUESTIONS

1. What is the history and purpose behind the enactment of the Law Reform (Limitations of Actions) Act, Chapter 72 of the Laws of Zambia?
2. How have other countries drafted their statutes of limitations and how has this enhanced access to justice for all?
3. What cases can exemplify the possible injustices that persons are faced with in light of the Statute of Limitations?
4. Should the current statutes of limitations i.e. Law Reform (Limitations of Actions) Act be reformed?

1.4 OBJECTIVES OF STUDY

1. To explain the history and purpose behind the enactment of the Law Reform (Limitations of Actions) Act, Chapter 72 of the Laws of Zambia.
2. To examine how other countries drafted their statutes of limitations and how this has enhanced access to justice by the citizens.
3. To examine the cases that exemplify the injustices that persons are faced with in light of the statute of limitations.
4. To weigh the pros and the cons of the statutes of limitations (especially the Law Reform (Limitations of Actions) Act) in concluding on whether or not they need reformation.

1.5 SIGNIFICANCE OF STUDY

It is indisputable that statutes of limitations are imperative to any society. Therefore this research will outline the importance of these statutes. The essence of an outline of the importance of the statutes of limitations will also encompass the history of these statutes so as to help reach an unbiased conclusion. However, it is important to take a critical view of the statutes of limitations; hence this research will also examine the cases which have been argued to qualify as exception in the existence of such statutes as the Law Reform Act. Also, a final analysis of the case of *Kumar v Mutale*⁷ will be the final example of how these statutes are used. Therefore, this study is significant in investigating the impact of the statutes of limitations and reaching an objective conclusion of whether or not they advance access to justice.

⁷ (Appeal No 35 2011) [2013] ZMSC 8 (25 July 2013)

1.6 LITERATURE REVIEW

The literature used in this research will comprise mainly of cases, journals, books and reports. It is imperative to use literature both in support of and against the statutes of limitations if an objective conclusion is to be reached. It will be noted from the literature presented that different authors have different opinions with regards statutes of limitations.

To begin with Swanson argues that statutes of limitations promote certainty and stability by preventing stale claims. Also, limitations serve as “practical and pragmatic devices to spare the court” from caseloads bogged down by tenuous and unimportant claims.⁸In view of this, Swanson strongly advocates for the maintenance of statutes of limitations and possibly the introduction of them where they are non-existent. Similarly to Swanson’s work, this research does not advocate for an eradication of statutes of limitation but that their enactment should foster justice by awarding enough time for one to seek justice from the court.

Secondly, Corman⁹ in his book states that old actions pose a number of problems both to the person bringing the claim and also the person defending the suit. He asserts that for the claimant, it will be difficult to gather evidence that can help in proving their case because of loss of material evidence or even the passing away of possible witnesses to testify to a set of facts. The same goes also for the Defendants in that it would equally be difficult to recollect the happenings during the incidents such that forming a proper defence would be difficult. In this particular research, it will be demonstrated by the use of case law that the defence of expiration of time or

⁸Swanson D. Paul, *Limitless Limitations*, Cornell Law Review Journal, Vol 97, (2006) P 1561

⁹ Calvin W. Corman, *Limitation of Actions*. (Boston: Little Brown, 1991) p 241

commencement of suit out of time has been used successfully. In light of these facts, Hamilton therefor explains that the statute of limitations is a defence that is ordinarily used by the Defendant to defeat an action brought against him or her after the appropriate time has elapsed. Therefore, the Defendant must plead the defence before the court upon answering the Plaintiffs complaint. If the Defendant does not do so, he is regarded as having waived the defence and will not be permitted to use it in any subsequent proceedings.¹⁰

In addition, Corman contends that Statutes of limitations are intended to encourage the resolution of legal claims within a reasonable amount of time. The Courts and Legislatures in the United States of America have been led to reconsider the purpose of time limits in dealing with certain issues. For instance, in the controversial issue of recovery memory by child sexual abuse victims, the clock has been stopped until a victim remembers the abuse.¹¹This goes to show that in the United States of America, certain circumstances have been given special treatment due to their special nature. Bharam (though speaking in terms of sexual offenses) asserts that statutes of limitations should only begin to run after every fact required to commence an action is present. This means that it is not essential that an offense has occurred; time must only run when all the facts are in existence.¹²The findings of this research will be in agreement with this assertion because certain cases demand that they be treated as exceptions to the general rule and lawsuits arising out of sexual offences are examples of such cases.

¹⁰ Marci Hamilton, "The Case for Abolishing Child-abuse Statute of Limitations."CNN.com:Law Center (2003) Avilabe online at www.cnn.com/2003/LAW/07/17/findlaw.analysis.hamilton.settlement (accessed November 06, 2014)

¹¹ Calvin W. Corman, Limitation of Actions. (Boston: Little Brown, 1991) p 241

¹² Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule ,"Journal of Criminal Law and Criminology, Volume 80 issue 3. 1989. <http://scholarlycommons.law.northwestern.edu/jclc>

Statutes of limitations have been used as a defence in many cases where an action is commenced after the stipulated time of limitation has elapsed. In the case of *Mutale v Agro Fuel Investment and Others*,¹³ the Plaintiff had issued a Writ of Summons claiming for K100 million as damages for a fatal accident and other damages for loss of life, loss of expectation of life, negligence, exemplary and aggravated damages, funeral expenses, interest and costs. This arose from the fatal accident which occurred on 21st September 2004 involving the 3rd Defendant as the employee of the 1st Defendant and the Deceased Micheal Mutale. This claim failed on the basis that it had been brought after the expiration of the limitation period. The Judge in that case stated the following obiter, “This is an unfortunate case for the Plaintiff but the law is clear that where one neglects to serve a properly issued writ within the prescribed period and outside the limitation period of 3 years from the cause of action, then his matter cannot be entertained by the courts.” Also, in an English case of *Cooper v Chapell*,¹⁴ the plaintiff had sustained injuries after he had been knocked down by the defendant. However, he was statute barred from bringing an action due to the lapse of time as stipulated by the British Limitations Act of 1939.

However, arguments against statutes of limitations have been presented. Mambo, in his dissertation asserts that the law is meant for the society, it should then not be so complicated as to keep out the very people it is proposed to serve in spite of the numerous professions it sustains. He further says that the essence of the legal

¹³ (2011/HB/49)(2011) ZMHC 42 (18th August)

¹⁴ (1980) 2 ALL ER 463 CA

process is the promise of justice and if people cannot approach the courts, they will have no choice but to resort to justice of the streets or mob justice.¹⁵

Also, Kasonde argues that the Law Reform (Limitations of Actions) Act, Chapter 72 of the laws of Zambia cannot be compared to an equivalent South African statute called the Prescription Act of 1969. The Prescription Act seeks to enable one to acquire or lose rights or to free oneself from obligations by the passage of time under conditions prescribed by law.¹⁶ He further observes that the Prescription Act has developed and evolved over the years with the repealing and replacement of several Acts on numerous occasions. All this, he believes is due to the South African Parliament consideration of the need to have the Law meet the various changes and needs of the people that have different cultures and novel needs.¹⁷

Hart, takes a neutral stage¹⁸ and asserts that all Law must be drafted in such a way that the Judges are given some discretionary power to enable them manoeuvre and make decisions as they may discern fit. He however is alive to the fact that there should still be a check placed upon this power which is the Law itself. The Law will both give the Judges wide power to hear matters as they may view just and the Law will also limit their power to that which will be stipulated therein. To him, therefore, statutes of limitations are very imperative but they must not tie down the judge such

¹⁵ Mutale, Mambo, "Procedural Adherence in the Legal System: Effects and Limitations" (Degree Dissertation, University of Zambia, Lusaka, 2012) P 37

¹⁶ Chisanga Lenka Kasonde, "A Comparative of the Application of Limitation Period in the Zambian Courts and South Africa" (Degree Dissertation, University of Zambia, Lusaka, 2012) p 23

¹⁷ Chisanga Lenka Kasonde, "A Comparative of the Application of Limitation Period in the Zambian Courts and South Africa" (Degree Dissertation, University of Zambia, Lusaka, 2012) p 24

¹⁸ Herbert L. Hart, Comment on Court and Law Making in legal Institutions Today and Tomorrow (Oxford, Clarendon Press, 1959) p 43

that just claims are not given the audience of the Court. However, this audience is to only be allowed to a certain extent.

Therefore, it has been shown that while Swanson and Corman are in entire support of statutes of limitations, other authors such as Chisenga and Mutale still see the need to make amendments to the law such that it does not lead to any injustices. It can also be noted that not much literature has been published in Zambia on the need to critically review the law on limitation of time. It is therefore imperative to consider the directions that other countries are taking and also what a society that is constantly changing might need. Indeed not much might need to change, but the very slightest ambiguity in the law may be breeding ground of injustice.

1.7 METHODOLOGY

This is a qualitative research and hence will consist mostly of desk research. Primary and relevant materials such as books, Acts, cases, journals and articles will be consulted. The internet will also be used in accessing current works done in relation to the topic. Finally, the data collected from all the above sources will then be reviewed and used to formulate a concrete conclusion.

1.8 CHAPTER OUTLINE

This research paper will have six chapter; these will be laid out as follows:

Chapter one will give a general introduction of the research topic and state the aim of the same. It will also contain a statement of problem, objectives of study and significance of the research. Also, this chapter will include a literature review of the topic, proposed methodology of study and the chapter outline. Chapter 2 will then outline the history and purpose behind the enactment of the Law Reform Act. This

chapter will endeavour to indicate to the reader Parliament's reasoning in enactment of this piece of legislation. This will help the reader understand the general purpose of the statutes of limitations.

Chapter three will then discuss best practices adopted by other countries in limiting court actions. These examples will be in the hope to clearly show to the reader that other countries have developed their law on limitations in order to suit the modernized society. This chapter is also intended to point out the lacunae contained in the Law Reform Act. Thereafter, Chapter four will critically analyse the Zambian Law to determine the extent to which it meets the desired purpose whilst advancing access to justice. It will do this by analysing various cases of when this law has been used as a defence. Finally, Chapter six will be the final chapter and it will provide suggestion and recommendations following from the above critical review. This chapter will document practices for fair limits that can best be adopted so as to allow for special cases to be commenced in court even after expiry of the limitation period. Herein also shall lay the conclusion of the whole research paper.

1.8 CONCLUSION

This chapter is a general introduction to the critical analysis of the judgment in the cases of *Kumar v Mutale*. As highlighted above, the aim of the research is to critically analyse the Law Reform Act. The problem is that the Law Reform Act does not contemplate novel situations that would require different treatment from the general treatment rendered to all other situations. This chapter has also indicated the significance of this critical analysis which is to forestall unanticipated situations resulting from this piece of legislation. This chapter has also indicated the need to

compare the wording in statutes of limitations of other countries to that of Zambia.
Also indicated in this chapter are the different views held by various authors.

CHAPTER TWO

THE HISTORY AND PURPOSE OF THE STATUTES OF LIMITATIONS

2.1 INTRODUCTION

This chapter aims at outlining the purpose for the enactment of Statutes of Limitations. The chapter will also outline the purpose and history behind the enactment of the Law Reform Act. This discussion will enable the reader to have a full understanding of the relevance of the statutes of limitations. The outline and history of statutes of limitations are necessary in that it is impossible to have an objective and meaningful critical review of these statutes without understanding their origin. Further, a study of the purpose of the statute will also help in the formulation of a solid conclusion. That is, it will help to assess whether our current statute of limitations serves the original purposes and the extent to which it hinders access to justice, if at all. The first part of this chapter outlines the general history and purpose for the enactment of the statutes of limitations. The second part will then outline the purpose and history of the Law Reform Act. The third part will be the conclusion of the whole chapter.

2.2 HISTORY OF STATUTES OF LIMITATIONS

Statutes of Limitation are enactments that are intended to bar a person seeking to commence legal proceedings against another.¹ These are also referred to as nonclaim statutes which are intended to promote diligent prosecution of known claims, thereby providing finality and predictability in legal affairs.² Statutes of limitations date back to early Roman law and have been a fundamental part of European and American law. In the case of *Order of Railroad Telegraphers v*

¹ Paul D. Swanson, "Limitless Limitations." *Cornell Law Review Journal*, Vol 97, (2006): P 1561

² Bryan Garner, ed. *Black's Law Dictionary* (St. Paul: Thomson West publishing company, 2004) P 1451

Railway Express Agency,³ it was stated by the Supreme Court that statutes of limitations are built on the equitable doctrine of laches which is unreasonable delay in asserting a claim. The statutes conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost or memories have disappeared. The Supreme Court further stated that the theory is that even if one has a just claim, it is just to put a period of limitation. Also, that the right of a person to be free of stale and late claims prevails over the right of another to prosecute them.⁴

Similarly, the intention of the British parliament in enacting the Limitation Act of 1939 was threefold. Firstly, the Limitation Act was enacted in order to prevent individuals from commencing old actions. This statute, which applied to civil actions, was designed to prevent fraudulent and stale claims from arising after all evidence had been lost. It also sought to prevent claims from arising after the facts of the case had become obscure through the passage of time or the defective memory, death, or disappearance of witnesses.⁵In essence, statutes of limitations have been structured so as to be used as a defence by the Defendant in a lawsuit. These also serve as a “practical and pragmatic device to spare the court” from caseloads bogged down by tenuous and unimportant claims.⁶

Secondly, statutes of limitation are essentially laws of procedure in that they do not necessarily add or subtract from the substantive law.⁷ Rules of procedure are just as

³ 321 U.S. 342 (64 S. Ct. 582, 88 L. ED 788) 1944

⁴ 321 U.S. 342 (64 S. Ct. 582, 88 L. ED 788) 1944

⁵ Marcie Hamilton. "The Case for Abolishing Child-Abuse Statutes of Limitations." *CNN.com: Law Centre*, (2003): Accessed November 06, 2014. Available online at <www.cnn.com/2003/LAW/07/17/findlaw.analysis.hamilton.settlement>

⁶ Paul D. Swanson, "Limitless Limitations." *Cornell Law Review Journal*, Vol 97, (2006): P 1561

⁷Liucius Polk Mc Gehee, *Due Process of Law in the Federal Constitution*(New York: Edward Thompson Company, 1906) p P171

important as the substantive law as they stipulate how, where and when the substantive law may be applied. However, these laws only affect the remedy and not the right.⁸ Therefore, where the effect of legislation is to take away the party's right to enforce his or her contract, or materially to lessen the effectiveness of his available remedies. Or where the statute interferes with his or her vested right, then the effect of such a statute shall be void.⁹

Thirdly, the British Limitations Act of 1939 was enacted with the intention of accelerating the justice process. Under Roman law, justice was known to be the steadfast and continued disposition to render to every man his right.¹⁰ Therefore, what the Romans aimed at achieving was not good law but successful justice. Successful justice includes both rendering every man his due as well as rendering it to someone advantageously and profitably.¹¹ Good law on the other just entails a strict adherence to the law such that the moral aspect of the law is irrelevant.¹² Hence, statutes of limitations would help achieve this goal as they would allow for speedy court processes and ultimately the attainment of successful justice.

2.3 HISTORY OF THE LAW REFORM (LIMITATIONS OF ACTIONS) ACT, CHAPTER 72 OF THE LAWS OF ZAMBIA

The Law Reform Act, as was stated in the previous chapter, was one of the pieces of legislation adopted by the Zambian parliament from the British Law, it is a product of the British Limitations Act of 1939. It came into force by the British Acts Extensions Act, Chapter 10 of the Laws of Zambia. Both the British Acts Extension Act and the

⁸ Liucius Polk Mc Gehee, *Due Process of Law in the Federal Constitution* (New York: Edward Thompson Company, 1906) p 171

⁹ Liucius Polk Mc Gehee, *Due Process of Law in the Federal Constitution* (New York: Edward Thompson Company, 1906) p 171

¹⁰ Ewing Cockrell, *Successful Justice* (Charlesville: The Michie Company, Law Publishers, 1939) p 7

¹¹ Ewing Cockrell, *Successful Justice* (Charlesville: The Michie Company, Law Publishers, 1939) p16

¹² Carlson Anyangwe, *An Outline of the Study of Jurisprudence* (Lusaka: UNZA Press, 2005) P 158

English Law (Extent of Application) Act served (and still do) the purpose of filling the lacuna that existed in the laws of Northern Rhodesia (now Zambia). While the later was a list of specific statutes, one of which was the Limitations Act, the former was an inclusion of all Statutes applicable in Britain before 1911.¹³

During the First Reading of the English Law (Extent of Application) Bill of 1962, the Minister of Legal Affairs, stated that the Act was going to extend the much needed Laws so as to fill the existing lacuna. He further stated that,

The British were not always here (Northern Rhodesia) and when that effect came to be felt constitutionally, our predecessors saw to it that this territory had the enormous advantage of inheriting a very large body of English statutory law and virtually the whole of its Common Law. Such remains the state of affairs today and I do not think that anybody in this house would lightly abandon the smallest bit of that common law or that statutory law which enshrines so many of the great principles of justice.¹⁴

It can therefore be seen from the quote above that the Law Reform Act was enacted for the purposes of filling the gap existing in the Zambian law. It was enacted because it was seen as necessary in upholding the principles of justice. This statute has been extremely useful as the courts have continually been faced with cases commenced out of time. For instance, the *Kumar v Mutale*¹⁵ case is distinguishable from the case of *Mutale v Agro Fuel Investment and Others*,¹⁶ as the claim was allowed in the former because time had not elapsed. In the latter, however, the claim was rejected as it was brought after the lapse of the stipulated time for personal injuries cases.

¹³ Margaret M. Munalula, *Legal process: Zambian cases, legislation and commentaries* (Lusaka: UNZA Press, 2004)P 86

¹⁴ Northern Rhodesia Hansard, Official verbatim Report of the Debates of the first session of the twelfth Legislative Council, No. 106, 15 Jan- 14 Feb 1963 (Lusaka, Government Printers, 1963) p 66

¹⁵ (Appeal No 35 2011) [2013] ZMSC 8 (25 July 2013)

¹⁶ (2011/HB/49)(2011) ZMHC 42 (18th August)

In *Vance v Vance*,¹⁷ the Constitution of Louisiana had been amended such that property would be mortgaged in favour of a minor from the day of the appointment of his or her tutor as security for his or her administration. This provision was then amended to read that the rights and privileges in property would only vest in third parties where it had been recorded in the parish hence all mortgages and privileges had to first be recorded. On making its declaration, the Supreme Court stated that the amended provision of the constitution had the nature of statute of limitation. Therefore, the legislature had the competence to give a plaintiff special rights if they were a minor and treat them as an exception. In essence, the principle in this case is that where there is a specified time period, the legislature may establish, lengthen or shorten the period of limitation for existing causes of action.

The presiding Chief Justice Waite actually stated obiter that, "It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established." In other words, the Chief Justice was alluding to the Legislature's power to not only Legislate but also to repeal the Law where it is not serving its purpose. The legislature's power does not end with him making Law; he also has power to amend the Law where it is apparent that it infringes on human rights or not serving its purpose. Hence, where the law seems to be infringing on one or more human rights, such law must be repealed as was done in *Christine Mulundika and 7 others v The People*¹⁸ where section 5(4) of the Public Order Act Chapter 104 of the Laws of Zambia was held as being null as it was unconstitutional. This led to the repeal of the section by Parliament.

¹⁷ 108 U.S 514 (1883)

¹⁸ SCZ Judgement no. 25 of 1996

2.4 CONCLUSION

In conclusion, this chapter has outlined the history of statutes of limitations and has endeavoured to discuss the purpose for which they were enacted. It can be seen from the aforementioned that statutes of limitations were enacted for the furtherance of justice. The aim of enacting these statutes was so as to avoid stale claims commenced after the lapse of time. These were to contribute to the certainty of the law as well as stability in the justice system. This chapter further outlined the history of the Law Reform Act which is a product of the British Limitations Act of 1939.

CHAPTER THREE

STATUTES OF LIMITATIONS IN AUSTRALIA, BRITAIN, AMERICA AND BOTSWANA.

3.1 INTRODUCTION

This chapter discusses practices adopted by other countries in limiting court action. This discussion will assist in realizing the ultimate aim of this research which is to critically review the judgement rendered in the case of *Kumar v Mutale*.¹ This is in relation to the statute of limitations and access to justice in Zambia. Also, this discussion is imperative to demonstrate the ways in which other countries are dealing with injustices or lacunas in their laws of limitations. This chapter will be divided into four parts. The first part will deal with the law on limitations in Australia, the second part will deal with the law in the United Kingdom, the third and final part will deal with the law in the United States of America and the fourth part will focus on Botswana. From this, it is hoped that a valid conclusion will be drawn as to which direction Zambia should take in regard to her statutes of limitations.

3.2 STATUTES OF LIMITATIONS IN AUSTRALIA

The general law on limitations in Queensland-Australia is contained three Statutes; the Limitations Act of 1960, the Law Reform (Limitations of Actions) Act of 1956 and the Limitation of Actions (Persons under Disabilities) Act of 1962.² These, however are not the only statutes of limitations as other statutes also contain limitation periods regarding certain other topics like criminal actions. It is imperative to be mindful that just like Zambia, Australia was once colonised by Britain and only got independent in 1931. Thus, the Law Reform (Limitations of Actions) Act of 1956 was a product of the British Limitations Act of 1939 and the Victorian Limitations of Actions Act of

¹ (appeal No. 35 2011) [2013] ZMSC 8 (25 July 2013)

² A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission, 1972) p2

1958.³ Precedent to the passing of the Bill in 1972, the Law Reform Commission of Queensland compiled a report on recommendations on the law in existence then.⁴ The arguments raised in the report were actually used in the amendment of the law and have particular significance because the provisions of this Statute were similar to that of the Zambian Statute. A few of these recommendations will be pointed out.

The Commission begins by pointing out the threefold purpose of the statutes of limitations. Firstly, statutes of limitation protect defendants from being vexed by stale claims relating to incidents concerning which records may no longer be in existence. The witnesses of such claims usually do not have accurate recollection of the incidents leading to these claims or may be deceased. Secondly, statutes of limitations help encourage the plaintiff not to sleep on their rights but commence proceedings as soon as possible. Finally they help ensure that a person feels confident that after a given time, the matter may be treated as being finally closed and concluded.⁵

Secondly, the Commission asserted that although the law of limitations is designed to principally protect the defendant, the interests of persons who have sustained injury must be considered as well.⁶ A plaintiff who has lost the right to claim damages even before he can know of the existence of that right must inevitably feel that he has suffered a great injustice.⁷ Even though personal injury cases are the

³ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission, 1972) p 2

⁴ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission, 1972) p 1

⁵ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission, 1972) p 7

⁶ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission, 1972) p 8

⁷ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission, 1972) P 7

ones that are likely to arise most frequently and also trigger the feeling of injustice, the problem is not confined to such cases only. The Commission stated verbatim that,

It is our opinion, however, that ignorance of the occurrence of damage which gives rise to a cause of action should not, in general, postpone the running of the limitation period and the statutory provision should be lifted only in a case where the damages claimed by the plaintiff consist of or include damages in respect of personal injury.⁸

In light of the aforementioned, the Commission made a recommendation that would allow for the extension of the limitation period in commencing action for damages for personal injury. In doing this, the person seeking damages would be allowed an extension of the limitation period if they did not know the material facts leading to their cause of action until the limitation period had almost expired. Also, the limitation period would be extended if the plaintiff could not reasonably be expected to know the material facts relating to their cause of action until after the expiry of the limitation period.⁹

The Commission further suggested that it is unjust to give less weight to the function of protecting defendants from being vexed by stale claims and greater weight to the injustice which otherwise an injured person would suffer. This therefore justifies the need for special treatment of cases of personal injury but does not justify a general relaxation of the law of limitation of actions in all cases of claims for damages. This is because in personal injury claims, an injured person not only did not know but also could not reasonably be expected to know the material facts until after the expiration of the limitation period. To exemplify such a situation is *Cartledge v Jopling & Sons*

⁸ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission,1972) P 7

⁹ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission, 1972) P 5

Ltd;¹⁰ the Plaintiff (a factory worker) contracted a disease due to the negligence and breach of statutory duty of his employer from inhaling noxious dust in 1950. The pneumoconiosis did not manifest itself until 1955 when he discovered that his lungs had been damaged.¹¹ The courts were forced by the operation of the limitation rules to reject the accident claim because it was not brought within three years of the date the damage was caused, even though there was no way of the Plaintiff knowing at that time that any damage had occurred.¹²

The *Cartledge* case was one of the cases that led to the amendment of the law. Hence, Section 12 of the Australian Limitations of Actions Act of 1972 in effect provides that in actions for damages arising from for negligence, trespass, nuisance or breach of duty, or personal injury shall be commenced within three years after the cause of such action arose. It therefore states the following,

Notwithstanding anything contained in any other Act or law or rule of law to the contrary, actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contracts or a provision made by or under a statute or independently of any contract or any such provision) where damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person shall be commenced within three years after the cause of such action arose, but not after.

Another section worth noting is section 33 which alludes to the extension of the limitation period in cases of ordinary action. In effect, it states that where an action for damages is commenced as arising from negligence, trespass, nuisance or breach of duty, or personal injury, the party may apply to court.

¹⁰ [1963] AC 758

¹¹ A Report of the Law Reform Commission on a Bill to Amend and consolidate the Law Relating to Limitations of Actions (Queensland Law Reform Commission,1972) P 8

Upon application, the court can make a determination if it appears that any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until a date after the commencement of the year following the preceding year during which the period for the cause of action was meant to expire. The court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after that date and hence the limitation period would have been extended accordingly. The same manner of extension will occur where there is evidence establishing the cause of action apart from any defence founded on the cause of a limitation period.¹³

3.3 STATUTES OF LIMITATIONS IN BRITAIN

Britain has also had difficulties in ensuring that the law on limitations does not pose any injustice. Following a number of amendments, Britain enacted the Limitation Act of 1980.¹⁴ Suffice it to state though, that an abundance of case law has also led to the allowance of certain exceptions.

Actions of wrongs causing personal injuries or death and in particular concerning special time limit for actions in respect of personal injuries and arising from negligence, nuisance or breach of duty

Section 11 of the Limitation Act of 1980 pertains to actions in respect of wrongs causing personal injuries or death and in particular concerning special time limit for actions in respect of personal injuries to the plaintiff or any other person. It states that an action shall not be commenced after the expiration of three years from the

¹³ Limitation of Actions Act of 1972 of Australia, ss 33(2a and b)

¹⁴ Schedule four of the British Limitations Act of 1980 contains the table listing the repealed from the Limitation Act of 1939 to the 1980 Act

date on which the cause of action accrued or the date of knowledge (if later) of the person injured.¹⁵

In Britain therefore, a limitation period will commence at the time that the cause of action becomes active for the claimant. The time starts to run from the earliest time that the legal proceedings first could have been brought. This means that every fact which is required to commence an action must be in existence before the limitation period will start to run.¹⁶

It also means that the last fact which gives rise to the claim must fall within the limitation period. If we take the example of a breach of contract the limitation period will start to run from the date that the breach alleged by the claimant occurred. This would apply regardless of how long ago the contract was entered into. For example the contract may have been entered into 10 years ago but the breach occurred two years into the existence of the contract the claim for breach of contract must then be brought within 6 years of the date the breach occurred.¹⁷ The limitation period for a claim brought under the law of tort would begin at the date on which the damage was suffered by the claimant, rather than the date the claimant became aware of the damage.¹⁸

However, case law has been used to identify deserving exceptions to the general rule that Statute law provides for. In the case of *Picket v British Rail Engineering*

¹⁵ British Limitations Act of 1980 , ss 11(1,2 and 3a and b)

¹⁶Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule ,"Journal of Criminal Law and Criminology, Volume 80 issue 3. (1989). <http://scholarlycommons.law.northwestern.edu/jclc>

¹⁷ Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule ,"Journal of Criminal Law and Criminology, Volume 80 issue 3. (1989). <http://scholarlycommons.law.northwestern.edu/jclc>

¹⁸ Paul D. Swanson, "Limitless Limitations." *Cornell Law Review Journal*, Vol 97, (2006): P 1561

Ltd,¹⁹ The Plaintiff, Mr Picket, worked as a miner from 1947 to 1960 before leaving the industry. In 1966 he became ill with silicosis for his work underground. Because of some procedural delays, the relevant application to the court under the 1963 Act for leave to bring court proceedings was not made until more than 12 months after diagnosis. The Court of Appeal found in the Plaintiffs favour. The finding was that the Plaintiff had taken all action as was reasonable for him to take and the application to the court was made within 12 months of the date he was advised that he would have a legal claim against the Board. It is interesting that the bench even made a comment that this case was, "One more case on this very complicated and obscure Act." The principle in this case is to the effect that the discovery rule can be used whenever it is reasonably impossible for the Plaintiff to have known of the injury and hence impossible for them to have commenced legal proceedings before the expiration of time.²⁰

Also, in certain cases, facts in relation to the claim will have been concealed from the claimant by the defendant. In such a scenario the limitation period will only commence when the claimant becomes aware of these relevant facts or the date that he should have become aware of these relevant facts. In the case of *Norwood v John Crane Inc.*,²¹ (also known as the Dodd case) Mr. Norwood was exposed to asbestos from 1952 to 1965 in circumstances where the company was clearly at fault. He was diagnosed with Asbestosis and awarded under disablement benefit without knowing that he could bring a claim following advice by his manager that he could not sue his employers. He sued in 1967 and the company contested the claim

¹⁹ [1980] AC 136

²⁰ Calvin W. Corman, *Limitation of Actions*. (Boston: Little Brown, 1991) p 241

²¹ [1973] HL

on the basis that it was out of time. The court found in favour of Mr. Dodd by 3 to 2 as the plaintiff did not have knowledge of the material fact.

3.4 STATUTES OF LIMITATIONS IN THE UNITED STATES OF AMERICA

Many states in America have adopted additional extensions specifically for cases involving sexual abuse of children. Extensions for filing civil actions for child sexual abuse are most often based upon the discovery rule since by the time the victim discovers the sexual abuse or the relationship of the conduct to the injuries, the ordinary time limitation may have expired.²² This "delayed discovery" may be due to emotional and psychological trauma and is often accompanied by repression of the memory of abuse. Child victims frequently do not discover the relationship of their psychological injuries to the abuse until well into adulthood. This is usually during the course of psychological counselling or therapy. They may not even discover the fact of such abuse until they undergo such therapy.²³

In some States in America, certain special circumstances have been given exception to the general rule of the limitation period. America, also was once a colony of Britain has a lot in common with Zambia. Firstly, both countries legal systems are built on the Common Law, these also are both democratic government where there is a separation of powers between the Legislature, Judiciary and the Executive. However, certain differences must also be pointed out such as the fact that America is a Federal state while Zambia is not. This is a significant difference because this means that each State will have its own Municipal Laws. Hence, it is not uncommon

²² Marci Hamilton, "The Case for Abolishing Child-abuse Statute of Limitations."CNN.com:Law Center (2003) 201-203 Available online at www.cnn/2003/LAW/07/17/findlaw.analysis.hamilton.settlement (accessed November 06, 2014)

²³ Marci Hamilton, "The Case for Abolishing Child-abuse Statute of Limitations."CNN.com:Law Center (2003) 201-203 Available online at www.cnn/2003/LAW/07/17/findlaw.analysis.hamilton.settlement (accessed November 06, 2014)

to find a variation with the Laws such that these can even be contradictory.²⁴ Therefore, some courts in certain States apply the statute of limitations strictly in all cases. Many courts have rejected to apply exceptions to the statute of limitations as that task is left to the legislature.²⁵ However, a few state legislatures, recognizing that many child sexual abuse acts are in fact concealed by the abuser, have enacted legislation to counter this result. Nonetheless, some states have gone ahead to recognise the exceptions.

²⁶ For example, in the State of Illinois the Legislature has specifically applied the discovery exception to sexual offences. The discovery rule provides that the statute of limitations does not start to run until the plaintiff, using reasonable diligence would have discovered the cause of action.²⁷ Another example is in the State of Louisiana which recognises the concealment exception to the four year statutory limitation period for child sexual abuse offenses. Their Law reads as follows,

The time limitations established in 572 shall not commence to run as to the following offenses until the relationship or status involved has ceased to exist where the offenses charged is one of the following.... Indecent behaviour with juveniles... and the victim is under the domination or control of the offender while under seventeen years of age.

The courts application of the concealment exception is justified under the doctrine of continuing offences. The Supreme Court has held that the Statute of Limitations normally begins to run when the crime is complete. A crime is said to be complete

²⁴Paul D. Swanson, "Limitless Limitations." *Cornell Law Review Journal*, Vol 97, (2006): P 1561

²⁵ Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule," *Journal of Criminal Law and Criminology*, Volume 80 issue 3. (1989). <http://scholarlycommons.law.northwestern.edu/jclc>

²⁶ Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule," *Journal of Criminal Law and Criminology*, Volume 80 issue 3. (1989). <http://scholarlycommons.law.northwestern.edu/jclc>

²⁷ Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule," *Journal of Criminal Law and Criminology*, Volume 80 issue 3. (1989) <http://scholarlycommons.law.northwestern.edu/jclc>

upon the satisfaction of all of the elements of the offence. However, under the doctrine of continuing offenses, even though all the elements of the crime have occurred, if one of the elements persists, the crime is not complete but is a continuing offense.²⁸ In child sexual abuse cases, although each act of penetration may constitute a separate offense, as long as the same authority that is used to accomplish criminal sexual acts against a child is used to prevent the reporting of the act. The offense is continuous and the statute of limitations does not begin to run until the child is no longer subjected to that authority.²⁹

However, the courts in Kansas have consistently held that their statutory concealment exception does not apply to child sexual offenses. In *State v Bently*,³⁰ the Kansas Supreme Court held that, "Crimes against persons, by their very nature, cannot be concealed." The court concluded that threats by an uncle to repeat the offensive acts if the nine year old victim revealed the incidents to anyone did not amount to concealment of a crime. However, the court noted that the uncle's ability to control the child victim in this case was too remote.

Factors which support a long period of limitation are concealment, investigation and the seriousness of the offense. The very nature of certain crimes, particularly child sexual abuse, makes detection of the offense especially difficult. A long period of limitation insures that a perpetrator does not escape punishment simply by successfully concealing his act. Besides, concealed crimes generally require a

²⁸ Marci Hamilton, "The Case for Abolishing Child-abuse Statute of Limitations." CNN.com:Law Center (2003) 201-203 Available online at www.cnn/2003/LAW/07/17/findlaw.analysis.hamilton.settlement (accessed November 06, 2014)

²⁹ Marci Hamilton, "The Case for Abolishing Child-abuse Statute of Limitations." CNN.com:Law Center (2003) 201-203 Available online at www.cnn/2003/LAW/07/17/findlaw.analysis.hamilton.settlement (accessed November 06, 2014)

³⁰ [1986] 239 Kan. 334

longer period of investigation and thus justify a longer limitation period. Generally, the most serious of the offenses correlates with the duration of a limitation period regardless of whether the purpose of criminal law is deterrence, incapacitation, or rehabilitation.³¹

However, it has been argued that States adopting the above approach have failed to consider the special circumstances that arise in child sexual abuse cases. In many instances, for example, report of the abuse is delayed because of coercion employed by the accused. This coercion generally results in the child becoming confused and guilt-ridden.³² Furthermore, the theory surrounding sex often causes the child to fear that he or she will not be believed or is somehow personally responsible for the sexual incident.³³ Finally, because of his or her youth and ignorance, a child may not fully comprehend the criminal nature of the defendant's behaviour.

3.5 STATUTES OF LIMITATIONS IN BOTSWANA

Botswana has a lot in common with Zambia, it is not only a former colony of Zambia's colonial master- Britain, but is also a democracy. It attained independence in September of 1966. In Botswana, the Prescription Act is the law that mainly regulates the limitation of time for commencing actions. In the case of *Modise and Others v Southern District Council*³⁴, the applicants sought an order directing the respondent, a local authority, to pay them various sums of money as overtime and

³¹ Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule," *Journal of Criminal Law and Criminology*, Volume 80 issue 3. (1980) <http://scholarlycommons.law.northwestern.edu/jclc>

³² Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule," *Journal of Criminal Law and Criminology*, Volume 80 issue 3. (1989). <http://scholarlycommons.law.northwestern.edu/jclc>

³³ Durga M. Bharam, "Statutes of Limitations for child Sexual Abuse Offences: a Time for Reform Utility of the Discovery Rule," *Journal of Criminal Law and Criminology*, Volume 80 issue 3. (1989). <http://scholarlycommons.law.northwestern.edu/jclc>

³⁴ 2005 (2) BLR 489 (HC)

subsistence allowances as well as leave pay. The respondent raised a preliminary issue that the causes of action, if any, were unenforceable as action had been brought after the expiration of two years from the date on which the cause of action accrued, as stipulated by s 4 of the Local Authority (Proceedings) Act (Cap 10:04). The applicants relied on the Prescriptions Act to argue that extinctive prescription had been interrupted by the admission of liability, causing the limitation period to run de novo from the time of the admission. It was held by the High Court that the language used in the Local Authority (Proceedings) Act was clear that after the lapse of the time period, actions were barred. Section 4 was accordingly a limitation of claims clause as opposed to a prescriptive clause. It was couched in peremptory terms and the provisions of the Prescriptions Act relating to the interruption of prescription had no application to it. The application was therefore dismissed. The term Law was said to render unenforceable a cause of action after the lapse of time.³⁵ The effect of the law was therefore to afford a statutory protection of a special kind on the debtor, the exact extent of which is dependently purely on the wording of the statute.

Also, in another case of *Mpelega v Botswana Motor Vehicle Insurance Fund*³⁶ arose from a motor vehicle accident on 4 July 1992 between a vehicle in which the plaintiff was a passenger, and a vehicle insured by the defendant. The plaintiff alleged compliance with section 16 of the Motor Vehicle Insurance Fund Act No. 30 of 1986 (Cap. 69:02), but the defendant filed a special plea of prescription. In terms of the Act the prescription period was two years from the date upon which the claim arose. Prescription was however suspended during the three month period referred to in

³⁵ This is actually the definition of prescription provided in s 4(1) of the Prescription Act.

³⁶ 1996 BLR 919 (HC)

section 15(3) and section 16(2)(a) of the Act. Section 15(3) provided that if an appointed agent did not within two months after receipt of a claim, object to its validity, prescription was further suspended until after expiration of a further period of three months from the date which the appointed agent repudiated liability in writing. Section 16(2) provided that no claim would be enforceable by legal proceedings commenced by summons served on the appointed agent before expiration of three months as from the date on which the claim was sent or delivered by hand to the agent, provided that if the agent repudiated liability for the claim in writing before the expiration of the said period, the claimant could at any time after repudiation serve summons on the appointed agent. The plaintiff's attorneys submitted a claim to the defendant on 16 June 1994. On 8 July 1994 the defendant wrote to the plaintiff's attorneys, although to the wrong address, which delayed receipt thereof, in which they acknowledged receipt of the claim, but stated that there was non-compliance with the provisions of the Act in that the plaintiff did not furnish the fund with documentary proof as regards past medical expenses incurred, etc., and asking that this be attended to. The letter did eventually reach the attorneys.

The first question before the court was whether this constituted an objection to the validity of the claim in terms of section 15(3). Summons was issued on 9 August 1994 in violation of section 16(2)(a) of the Act, the proviso not applying for there was no repudiation. The second question was whether this constituted a suspension of the period of prescription or an irregular step that invalidated the claim. The defendant's attorneys then advised the plaintiff's attorneys that the summons was invalid. Plaintiff's attorneys re-issued the summons on 3 November 1994. It was submitted on behalf of the defendant that the claim as well as the summons had to be effected within the prescription period of two years, and that as the two year

period expired after midnight on 3 July 1994, both services were out of time. The third question was whether this interpretation was sound.

It was held that the third question was answered in favour of the defendant, as the action prescribed on 4 July 1994 and it therefore mattered not whether service of the summons took place on 12 August 1994 or 3 November 1994, for both services were out of time. The claim should have been delivered by the plaintiff or sent by registered post on 3 April 1994 at the very latest to ensure its compliance with ss. 15(3) and 16(2)(a) of the Act. The first question was answered in the affirmative: the letter of 8 July 1994 was an objection by the defendant to the validity of the papers submitted and did not suspend prescription. As to the second question posed, the claim was not enforceable before the expiration of three months from the date the claim was sent or delivered by hand. This was on 16 June 1994, and the defendant had three months grace to take stock of the situation which would not have expired until 16 September 1994, unless the defendant repudiated liability, which it did not, from which it followed that there had been no compliance with the provisions of the Act, because service was premature.

Thus, it can be said that Botswana strictly follows the statutes of limitations strictly. The cases show that no exceptions were considered by the court in passing the judgment.

3.6 CONCLUSION

Finally, this chapter has been a discussion of the statutes of limitations in several countries. Firstly it was shown that Australia has reformed its law in such a way that exceptions are put with regard to damages for personal injuries. Before the amendment of the law, one who suffered a personal injury could not commence an action three years after the occurrence of the act. After the passing of the Limitations

Act of 1972 however, a personal injuries victim could now institute proceedings as long as it was proved that they did not know or could not be reasonably expected to have known the material facts of the incidents before the expiry of the limitation period.

It has also been shown that in Britain, the law on limitations is applied strictly such that actions arising in tort or contract must be commenced within three years of the occurrence of the incident. However, exception is given where the Plaintiff could not reasonably have been expected to know of the arising action before the lapse of the limitation period. The Pickett case has been used to demonstrate an instance where the court was so lenient as to reject the defendant from using lapse of time as a defence. Hence, the discovery rule is used to counter the defence of limitation of time where the Plaintiff only discovered the material facts after the expiry or toward the expiry of the limitation period. Botswana is also strict in its application and interpretation of statutes of limitations as has been demonstrated above.

In the United States of America, the courts have especially given exception to sexual abuse cases. Where it is proved that the victim of a sexual offence had repressed their memory of the incident such that it only manifested later after the expiration of the limitation period, they would be allowed to commence an action. This is because of the special nature of sexual offences which lead to the victim feeling guilty and usually afraid of the offender because of the relationship status in existence. Therefore, this discussion will be continually referred to in the subsequent chapters in indicating how best to improve the law of limitations in Zambia.

CHAPTER FOUR

LAW REFORM (LIMITATION OF ACTIONS) ACT, CHAPTER 72 OF THE LAWS OF ZAMBIA AND ACCESS TO JUSTICE

4.1 INTRODUCTION

This chapter will critically analyse the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia to determine the extent to which the Act meets the desired purpose whilst advancing access to justice in Zambia. It will do this by analysing various cases of when this law has been used as a defence. This discussion is twofold; firstly it is imperative to the reader in that it will highlight what the Statute provides with regard to limitation of time in various cases. Secondly, this discussion will also criticise the *Kumar v Mutale*¹ in depth. In achieving the twofold aim of this chapter, the limitation period for commencing personal injury claims will be discussed and also the jurisprudential opinion on the statutes of limitations.

4.2 LIMITATION PERIOD FOR PERSONAL INJURY MATTERS

It has been repeatedly demonstrated in the preceding chapters that the very purpose of statutes of limitations is the avoidance of stale claims due to the passage of time. It is however possible for one to wonder whether this does not cause a possible injustice to access of justice. The Statute regulating limitation of time is the Law Reform (Limitation of Actions) Act. It provides that the limitation period for commencing proceedings for personal injury matters arising from nuisance, negligence or breach of duty must be brought within three years.²

¹ This is the case that inspired this research and hence an in-depth discussion will be included.

² Section 2 of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia

In the case of *Kumar v Mutale*,³ (the very inspiration of this paper) the Respondent, Joseph Brown Mutale had commenced an action in the Subordinate Court for liquidated damages against Sachar Nerendrar Kumar. The claim was for loss of earnings and costs incurred as a direct consequence of the road accident involving Toyota Corolla ACE9639 belonging to the Respondent. The Respondent sought to joinder a third party to the proceedings, AT Computers. The High Court ruled in favour of the Respondent and allowed for the joinder of the third party, this contention was then brought before the Supreme Court. The Appellant contended that the joinder was illegal as this application was statute barred by the Law Reform (Limitations of Actions) Act, Chapter 72 of the Laws of Zambia. The Court however finally held that joinder could be allowed as 3 years which is the limitation period had not yet elapsed. In this case, it is clear that the appellant had sought to use the statute of limitation as a defence in contending that the time for joinder another party to a case had elapsed.

However, the Court was quick to point out that the application had been made within time. Nevertheless, this has not always been the case, in certain other cases the person seeking to use the statute of limitations has been successful and the other had been barred from continuing with the lawsuit. This is an example of when a section of the Law Reform (Limitations of Actions) Act has been used as a defence.

In the case of *Mutale V Agro Fuel Investments and Others*,⁴ the first defendant was vicariously liable for the actions of the second and third defendants who were their employees. The facts of this case are that the Plaintiff had issued a Writ of

³ (Appeal No 35 2011) [2013] ZMSC 8 (25 July 2013)

⁴ (2011/HB/49)(2011) ZMHC 42 (18th August)

Summons claiming K100 million as damages for a fatal accident and other damages for loss of life, loss of expectation of life, negligence, exemplary damages, funeral expenses, interest and costs. This arose from the fatal accident which occurred on 21st September 2004 involving the 3rd Defendant and the deceased, Micheal Mutale. This claim failed on the basis that it had been brought after the expiration of the limitation period. The judge in that case stated that, “This is an unfortunate case for the Plaintiff but the law and principles are clear that where one neglects to serve a properly issued writ within the prescribed period and outside the limitation period of three years from the cause of action, then his matter cannot be entertained by the courts.”

The contentious sections in the Law Reform (Limitation of Actions) Act is section 2 which provides for personal injuries cases which arise from the breach of duty, nuisance or negligence. These actions are to be commenced within three years of the occurrence of the act.⁵In the two distinctive cases, the same piece of legislation and the same section was used to. As can be seen, in the former case, the Statute is used as a shield and in the other as a sword.

4.3 JURISPRUDENTIAL POINT OF VIEW

Statutes of limitation are advantageous in that they put a check on the cases brought in Court. They help prevent the commencement of stale claims and encourage the efficient and quick commencement of lawsuits. This, in turn mitigates against having cases in Court which have no proper basis for the fact that all the necessary evidence is damaged, absent or that witnesses have died.

⁵ Section 2 of Law Reform (Limitation of Actions) Act, Chapter 72 of The Laws of Zambia

However, statutes of limitation have been viewed as being oppressive in that the very fabric of justice is unstitched. In the long run, more and more people lose faith in the very courts that were established for them and to protect the oppressed and voiceless.

In the Tennessee Court is an engraving that states *Fiat justitia ruat caelum*. This Latin maxim is translated as “Let justice be done though the heavens fall,”⁶ it is the belief that one is supposed to be so conscious to do justice regardless of the cost. The reason for this is that the oppressed needed someone to stand and speak for them. It signifies the belief that justice must be realised regardless of the consequences.⁷ Do statutes of limitations make it possible for justice to be done though the heavens fall- at all cost? Surely having someone fail to sue another who is clearly in the wrong must amount to an injustice especially in a society like Zambia where the knowledge of human rights is not so commonplace. Moreover the Zambian judicial system will not permit one without locus standi to commence a suit. Hence, the bureaucracy and protracted procedure of commencing court action stifles the motivation of people to go to court. However, arguing from the Human Rights perspective, this statute has been criticized as derogating from the right to commence civil proceedings as provided for by both the Constitution of Zambia and the Universal Declaration of Human Rights. Suffice it to state that this criticism will be further discussed in chapter 4 of this paper.

Regarding the judicial processes and its impact on the individuals, Nwabueze states the following,

⁶ <http://dictionary.reference.com/browse/fiat+justitia,+ruat+caelum> Accessed on 20th March, 2015

⁷ <http://definitions.uslegal.com/f/fiat-justitia-ruat-caelum/> Accessed on 20th March, 2015

Courts do not have the judicial power to intervene into disputes on their own initiative; they would rather wait until a complaint is brought before it. To this extent, a Judge may insist that the Court may only hear the issues in disputes before it and do no more than that...Because of this, individuals are not able to come to Court, not because they are not interested in challenging the issue but because they have no resources to enable them to meet the rigorous standards dictated by the judicial process.⁸

Nwabueze is contending that people do not fail to come to court because they do not want their matters to be heard but because the system is slow and very expensive. Therefore, much as statutes of limitations have been shown to be important to the justice system, the fact the people fail to access justice due to the bureaucracy and stiff procedure poses a problem of not having peoples access the courts.

Further, there needs to be effective collaboration between legislatures and courts requires on the one hand that legislatures leave room in their enactments for the exercise by the courts of their distinctive function of reasoned elaboration of the law.⁹ It also requires, on the other hand, courts to have a conception of their function which is adequate to enable them to make good use of the room which the legislature leaves them.¹⁰

4.5 CONCLUSION

In conclusion, this chapter has analysed the statute of limitations in Zambia, particularly the Law Reform (Limitations of Actions) Act, Chapter 72 of the Law of Zambia. It began by giving a brief recap of the statute by stating its purpose, it the

⁸ Nwabweze, B.O, *Judicialism in Commonwealth Africa*.(London; C. Hurst & Co., 1977) p 229

⁹ Hart, *Comment on Court and Law Making in legal Institutions Today and Tomorrow*(Oxford, Clarendon Press, 1959)p 43

¹⁰ Hart, *Comment on Court and Law Making in legal Institutions Today and Tomorrow*(Oxford, Clarendon Press, 1959)p 43

outlined the two most cardinal cases referred to in this research. The *Kumar v Mutale* case and the *Mutale v Agro Fuel Investments* cases are similar in that they Law Reform (Limitations of Actions) Act was referred to. These cases are also distinguishable as they were decided differently with one indicating that the statute can be used as a defence and the other one indicating that the statute will bar anyone from commencing an action out of time regardless of the circumstances of the case. Therefore, it can be concluded, in response to the earlier asked questions that the statute of limitation in Zambia does not distinguish between cases. The time period allocated to the commencement of cases is three years for personal injury cases caused by nuisance, negligence and breach of duty. Also, the two cases that have been cited exemplify the circumstances that in which the statute has been used.

Nevertheless, much as statutes of limitations have been viewed as being necessary, criticism has been presented against the same. Article 8 of the Universal Declaration of Human Rights provides that, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Hence, it can be argued that statutes of limitations violate the fundamental right protected in Article 18(9) of the Constitution of the Zambia, Chapter 1 of the Laws of Zambia. This Article states that an adjudicating authority prescribed by law to determine the existence of any civil right or obligation shall be independent and impartial. It further states that where proceedings for such a determination are instituted by any person before such a court, the case shall be given a fair hearing within a reasonable time (of course this is subject to certain exceptions none of which are relevant to this discussion). Hence it can be safely argued that that the statutes derogate from the provisions of the Constitution. Also, it

can be contended that certain cases must be given exception especially where it is proved that the delay in the commencement of action was not due to ones recklessness.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter will give the final conclusions and recommendations of the paper. In doing so, the conclusion of each chapter will be given and this will be followed by the final conclusion. Thereafter, recommendations will be given, these will be meant to give a guide on what should be done.

5.2 CONCLUSIONS

Chapter one was a general introduction to the critical analysis of the adverse effects of the statutes of limitations on access to justice in Zambia. It highlighted the aim of the research which was to critically analyse the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia as espoused in the case of *Kumar v Mutale*. This chapter also contained the problem statement which is that the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia does not contemplate novel situations that would require different treatment from the general treatment rendered to all other situations. It went further to indicate the significance of this critical analysis which is to forestall unanticipated situations resulting from this piece of legislation. This chapter also contained a literature review which indicated the need to compare the wording in statutes of limitations of other countries to that of Zambia. Also contained were various views by different authors on statutes of limitations.

Chapter two outlined the history of statutes of limitations in general; it also discussed the purpose for which they were enacted. In this chapter, it was shown that statutes of limitations were enacted for the furtherance of justice. The aim of enacting these statutes was so as to avoid stale claims commenced after the lapse of time. These were to contribute to the certainty of the law as well as stability in the justice system.

The second part of this chapter outlined the history of the Law Reform (Limitations of Actions) Act, Chapter 72 of the Laws of Zambia. The Act is a product of the British Limitations Act of 1939. However, arguing from the Human Rights perspective, this statute has been criticized as it derogating from the right to commence civil proceedings as provided for by both the Constitution of Zambia and the Universal Declaration of Human Rights.

Chapter three was a discussion of the statutes of limitations in several countries. This discussion has been important in pointing out the developments that the law in certain countries has undergone in an endeavour to overcome the injustices that the statutes of limitations is capable of posing. Firstly it was shown that Australia has reformed its law in such a way that exceptions are put with regard to damages for personal injuries. Before the amendment of the law, one who suffered a personal injury could not commence an action three years after the occurrence of the act. After the passing of the Limitations Act of 1972 however, a personal injuries victim could now institute proceedings as long as it was proved that they did not know or could not be reasonably expected to have known the material facts of the incidents before the expiry of the limitation period.

It was also shown that in Britain, the law on limitations is applied strictly such that actions arising in tort or contract must be commenced within three years of the occurrence of the incident. However, exception is given where the Plaintiff could not reasonably have been expected to know of the arising action before the lapse of the limitation period. The Pickett case has been used to demonstrate an instance where the court was so lenient as to reject the defendant from using lapse of time as a defence. Hence, the discovery rule is used to counter the defence of limitation of time

where the Plaintiff only discovered the material facts after the expiry or toward the expiry of the limitation period.

In the United States of America, the courts have especially given exception to sexual abuse cases. Where it is proved that the victim of a sexual offence had repressed their memory of the incident such that it only manifested later after the expiration of the limitation period, they would be allowed to commence an action. This is because of the special nature of sexual offences which lead to the victim feeling guilty and usually afraid of the offender because of the relationship status in existence. Therefore, this discussion will be continually referred to in the subsequent chapters in indicating how best to improve the law of limitations in Zambia.

Chapter four analysed the statute of limitations in Zambia, particularly the Law Reform (Limitations of Actions) Act, Chapter 72 of the Law of Zambia. It began by giving a brief recap of the statute by stating its purpose, it then outlined the two most cardinal cases referred to in this research. The *Kumar v Mutale* case and the *Mutale v Agro Fuel Investments* cases are similar in that they Law Reform (Limitations of Actions) Act was referred to. These cases are also distinguishable as they were decided differently with one indicating that the statute can be used as a defence and the other one indicating that the statute will bar anyone from commencing an action out of time regardless of the circumstances of the case. Therefore, it was concluded here that the statute of limitation in Zambia does not distinguish between cases. The time period allocated to the commencement of cases is three years for personal injury cases caused by nuisance, negligence and breach of duty. Also, the two cases that have been cited exemplify the circumstances that in which the statute has been used.

5.3 RECOMMEDATIONS

It is recommended that;

- a) The law Association of Zambia, one of whose objectives is to further the development of the law as an instrument of social justice and social order and as an essential element in the growth of society.¹
- b) Parliament must amend the Law so as to accommodate novel situation such as those arising from sexual abuse cases.
- c) A serious sensitization should be launched to educate people about statutes of limitations so as for them to be aware of the limited time for commencing court action and thereby avoid cases where an injustice is done due to the expiration of time.
- d) To include in the law discretionary powers for judges to be able to hear certain cases regardless of the fact that they have been commenced out of time.

¹ As per section 4(a) of the Law Association Act, Chapter 31 of the Laws of Zambia

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