

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 736 OF 2005

BETWEEN:

DALITSO LENGTON MPOOLA.....1ST PLAINTIFF

- AND -

ALICK KHARODIA.....1ST DEFENDANT

PRIME INSURANCE COMPANY.....2ND DEFENDANT

GIDEON JACKSON MKAKA.....3RD DEFENDANT

CORAM: HON. JUSTICE MRS I. KAMANGA

Mwale for Plaintiff

Masiku for 1st and 2nd Defendants

Nankhuni for 3rd Defendant

Ms Jalasi, Court Reporter

Kafotokoza, Court Interpreter

JUDGMENT

This judgment originates from a road accident in which the plaintiff and the first defendant clashed in motor vehicles in Area 49 in Lilongwe. The second defendants were sued in their capacity as insurers of the motor vehicle that the first

defendant was driving. The third defendant was sued as owner of the motor vehicle that the first defendant was driving. This is a very interesting case. It is interesting because the first defendant Alick Kharodia never appeared in court. The second defendant dispute insuring the motor vehicle in issue and the third defendant denies owning the motor vehicle in issue nor knowing the first defendant and registering nor having possession of the motor vehicle that was involved in the accident.

On 5th July 2005 the plaintiff Dalitso Lengton Mpoola filed a writ of summons claiming the sum of K540,000.00 being replacement value of his registration number MGH 1620 which was damaged beyond economic repair as a result of the first defendant's negligence who was insured by the second defendant. The third defendant was the owner of the motor vehicle that the first defendant was driving. The plaintiff was also claiming the sum of K2,000.00 being the cost of police report; K54,200.00 being indemnity for collection costs and costs of the action.

In his statement of claim, the plaintiff stated that on or about the 27th of August 2004, he was lawfully driving his motor vehicle towards Lilongwe Old Town on Kaunda Road from Area 49 Sector 4. When he was at the lower dusty Gulliver road junction, the 1st defendant coming from the opposite direction,

negligently turned to the right hand side and collided with the plaintiff's motor vehicle, causing extensive damage to the plaintiff's motor vehicle.

The plaintiff claimed that the 1st defendant was negligent as:-

- (a) he was driving at an excessive speed in the circumstances.
- (b) the 1st defendant recklessly turned into the plaintiff's lane thereby colliding with the plaintiff's motor vehicle.
- (c) the 1st defendant failed to keep any proper look-out or to have any sufficient regard to the plaintiff's motor vehicle and other road traffic that were reasonable expected to be using the said road.
- (d) the 1st defendant failed to stop, slow down, swerve or in any other way manage or control his motor vehicle so as to avoid the collision.

During the hearing three witnesses testified for the plaintiff and two witnesses testified for the defence.

The first prosecution witness was the plaintiff himself. This was his testimony:

On 27th August, 2004 he was driving from Area 49 to Lilongwe Old Town. He was with his wife. As he was approaching Lower Gulliver where there is a junction between Area 18 Road and

the Area 49 (Kaunda) Road there was another motor vehicle Registration Number RU 2111 coming from the opposite direction. Unfortunately as he was at the junction, this other motor vehicle suddenly turned to the right without paying regard to other motor vehicles. The plaintiff had the right of way. When the first defendant turned into the plaintiff's lane the two motor vehicles collided. The plaintiff fainted on the spot. He sustained a cut and bruises on the forehead. His wife also sustained some cuts on the chin and bruises on the forehead. They were taken to Kamuzu Central Hospital where they were admitted for a day. It was his testimony that he was driving at a speed of 60-65 kilometers per hour.

The plaintiff produced a police report concerning the accident which he obtained from the Lilongwe Police Road Traffic Department. The plaintiff noted that the 1st defendant's address that appeared on the police report was not correct. He noted it was a minor mistake. The police report was marked as exhibit P2. The plaintiff also produced a letter from Prime Insurance to Royal Insurance. He told the court that Royal Insurance were his insurers. And Royal Insurance had written to Prime Insurance with regard to the accident and Prime Insurance was not responding positively. Prime Insurance was indicating that they would not accept liability as the certificate number that had been given to the police was not in their books. Royal Insurance was hoping for more information. It

was the plaintiff's testimony that no other information vis-à-vis the Insurance Certificate Number could be obtained and in the end Prime Insurance disowned the motor vehicle.

In cross-examination the plaintiff stated that despite losing consciousness after the accident, he could still remember the basic facts. He recalled that he was driving towards the Old Town and that at the point of impact, he had the right of way. He further recalled that the 1st defendant turned to the plaintiff's side within a distance of 4-5 metres. He could not recall if the 1st defendant had indicated that he was turning to the right. He also admitted that basically what happened was that it was the plaintiff who hit the 1st defendant.

Upon being referred to the pictures of his motor vehicle the plaintiff agreed that it would be correct to conclude that the damage was to that extent because of high impact. He also agreed that if he had been driving at a very slow speed the impact would have been lower.

Counsel for defence wanted to know if the plaintiff talked to the first defendant at the scene of the accident or thereafter. The plaintiff stated that he never talked to the driver of the other motor vehicle at the scene of the accident. He however stated that he saw the driver of the other motor vehicle at the hospital as he too had sustained some injuries. He never saw

the driver of the other motor vehicle after the hospital discharge.

Counsel for defence wanted to know whether the driver of the motor vehicle visited the police station to give his statement. The plaintiff responded by stating that he did not know if the driver of the other motor vehicle visited the police station.

Counsel for second defendant referred the plaintiff to the letter from the second defendants and the contents thereof. The letter was exhibited P2 and reads as follows:

Dear Sirs,

OUR CLAIM NO: GC/38/04
MOTOR ACCIDENT INVOLVING A KHALODIA'S RU 2111
AND YOUR CLIENT D.C. MPOOLA'S MHG 1620 ON 27/08/04

We acknowledge receipt of your letter dated 4th October 2004, together with the attached claim documents.

We neither have certificate of insurance number 2T 41326 in our records nor did we issue the same to cover the vehicle in question.

We are willing to have a copy of the said certificate for scrutiny before expressing our views on liability. We hope that you will obtain the same from the owner of the vehicle that hit your insurer's and forward it to us.

Signed

PRIME INSURANCE COMPANY LTD.

Counsel for second defendant wanted to know whether the plaintiff believed its contents and whether he made any sense out of the same. The plaintiff stated that as the letter was part of correspondence between the two insurance companies he knew that discussion would go on until the truth came out.

Counsel for the second defendant further wanted to know if the plaintiff had any other evidence other than the police report that the 2nd defendant had insured the motor vehicle in issue. The plaintiff responded by saying that other than the police report he did not have any other information.

Counsel for the 2nd defendant wanted to know if the plaintiff knew that the 1st defendant was a fictitious name or person. To wit the plaintiff responded that he did not know that the 1st defendant was fictitious. He stated that he was however sure that the motor vehicle that hit him was RU 2111 as its registration number. He told the court that he conducted some investigations on the motor vehicle RU 2111 and Alick Kharodia the first defendant. In his investigations he got some information that the motor vehicle was in Area 2. He did visit Area 2 where he found the motor vehicle hidden in the premises of a Mr Kharodia. The plaintiff was in the company of the police at this time. When they inquired about the 1st defendant, they were told that the 1st defendant was not living

at the Kharodia premises at the time of the visit. The 1st defendant had moved to Area 23. The people at the Kharodia premises could not, however take the plaintiff and the policemen to Area 23.

It was the plaintiff's testimony that he saw RU 2111 at the Kharodia premises. At that time it was not in a good state and it was being repaired but the repairs had not been completed. Thereafter, he never saw the motor vehicle again.

The second prosecution witness was Mrs Ellen Lizzie Mtalimanja. She told the court that she works at the Regional Roads Traffic Office as a Senior Clerical Officer for Human Resource but assigned in the Motor Vehicle Registry as an Application Clerk.

In her testimony she stated that she was required to conduct a search on motor vehicle registration number RU 2111. After her search, the computer information showed that the motor vehicle belonged to G.J. Mkaka as per the motor vehicle registration certificate. She told the court that a motor vehicle registration certificate is given to the client [who is the owner of the motor vehicle] after the processing of the motor vehicle certificate is done. She however had a reprint. She stated that much as the original is given to the owner of the motor vehicle when the motor vehicle is registered and a registration book is

produced and given to owner of motor vehicle, the information is still stored in the computer and when need arises they access the information and can produce another certificate that is called a voucher reprint.

She told the court that according to the records in their computer, motor vehicle RU 211 belongs to a first owner. As to the title holder, she stated that the number is a Malawi Registration Number with information as follows as per Exhibit Ex P6.

TITLE HOLDER

195701211080000
G.J. MKAKA
P.O. BOX 887
LILONGWE.

OWNER

195701211080000
G.J. MKAKA
P.O. BOX 887
LILONGWE.

She advised that the registration Number starts with the date of birth of the owner, and the continuation of the number is the file number. The number is created from the date of birth that the owner gives the office and as per Exhibit P6 the owner's date of birth is 21st January 2007.

Upon being cross-examined by Counsel for the 3rd defendant the second prosecution witness stated that Exhibit P6 was not

prepared by her. That Exhibit P6 was prepared by one S. Nyasulu. S. Nyasulu also works for the same Road Traffic Department in Lilongwe and he is alive and well and still working at the Road Traffic Department.

She also agreed with Counsel for the 3rd defendant that when a person seeks registration of the motor vehicle the department requires the Malawi Revenue Authority and Malawi Police clearance documents and that the Road Traffic Department keeps these documents. She said that the officer responsible for that is a Henry Mlozi.

Counsel for the 3rd defendant wanted to know whether his law firm had sought any information from her office vis-à-vis the matter at hand. She told the court that the 3rd defendant's law firm had indeed requested her office to provide the firm with documents pertaining to the registration of the motor vehicle in issue. She stated that she made some inquiries and had asked Mr Mlozi about the same. Mlozi had informed her that he had been looking for the file since 2004 in futility. Another person had also come seeking the file after the accident to no avail.

Counsel for the 3rd defendant wanted to know if the particulars in the Police clearance documents and Malawi Revenue Authority clearance documents tally with the particulars in

the Road Traffic documents to which she responded positively. She also agreed that apart from the MRA and Police documents the person registering is also supposed to file some other documents called MVRI forms. All these documents were missing as the file was missing.

Second Prosecution witness stated that she joined the Road Traffic Department in 2002 and that Computer registration was introduced prior to 2002. She agreed that misinformation on registration of motor vehicles as motor cycles have been found. She could however not commit herself to admit that there have been problems before with regard to particulars of different persons having been mismatched on the registration certificates as she was not a data clerk. It was her further statement that she has never come across fraud instances where motor vehicles have been registered without going to the Malawi Revenue Authority or Police for clearance.

It was her evidence that as far as Exhibit P6 was concerned, her evidence was based on her computer search and the information she gained there from and that she did not know what actually happened when the motor vehicle RU 2111 was being registered.

The third prosecution witness was Ashraf Sidik Elias, an insurance loss assessor and lost adjuster. His testimony was

that he had inspected the plaintiff's motor vehicle following a motor vehicle accident sometime back in March 2005 where upon he prepared a report. At the time of the report the value of the loss was K400,000.00 (Four Hundred Thousand Kwacha). The motor vehicle was a reconditioned motor vehicle from the Middle East. It was his testimony that since then the cost of such motor vehicles has appreciated and the value of the kwacha has depreciated. Upon his inspection, he found that the plaintiff's motor vehicle was severely damaged in the front. The damage was extensive to the extent that in insurance language it was a write-off as it could not be viable to repair in economic terms and cost.

The defence produced two witnesses. DW1 was Gabriel Medson Kamanga an insurer and assistant claims manager from Prime Insurance. He told the court that in the course of his duties he had transacted in the plaintiff's claim. The plaintiff's insurers had demanded compensation for their client, the plaintiff. Thereafter the plaintiff's lawyers sought the compensation. Upon checking in their records, he found that the certificate of insurance as appearing in the Police Report was issued to a Mr Kuthiwi with a motor vehicle that was different from the one indicated in the Police Report.

It was his testimony that when the police report was presented to him, it indicated a number of certificate purported to belong

to his company (the 2nd defendants). It also purported to be covering the motor vehicle that hit the plaintiff's motor vehicle. As per procedure they checked their records which contain all the serial numbers that belong to the 2nd defendants. The Police report indicated 2T then some other numbers. It was DW1's evidence that by that time serial number 2T 41326 was not in their records.

Noting the discrepancy, they thought that perhaps the police had made a mistake and had meant 3A 41326. That was when DW1 discovered that as per their files that number was issued to a Mr C. Kuthiwi.

In cross-examination DW1 stated that the insurance certificate to C. Kuthiwi was issued on 12th December 2005 to expire on 11th March 2006. Upon being referred to the Police report he agreed that the accident happened on 27/08/04 long before the Kuthiwi certificate was issued. Upon being referred to the letter of demand, DW1 noted that the letter of demand was written on 4/10/2004 long before the Kuthiwi certificate was issued.

DW1 admitted producing a certificate to Kuthiwi as the proper certificate when the same was issued in 2005 long after the incident.

DW1 stated that as at the time of the testimony the 2nd defendants had issued Insurance certificates with serial numbers starting with 2T. Then counsel for plaintiff wanted to know when the second defendants started issuing the Insurance Certificates starting with 2Ts. DW1's response was that 2nd defendants started issuing 2Ts in 1998 up to the time that they started issuing the digital ones in 2005. He agreed that the purported Insurance Certificate for RU 2111 was issued within the period that 2nd defendants were issuing 2Ts.

Then DW2 said that at the time of the accident 2nd defendants had not started using a 41 serial as the book for 41328 had not yet been printed. It was DW1's testimony that at the time that this matter arose, 2nd defendants had not told Government Printers to print numbers up to 41326.

Counsel for the plaintiff wanted to know if it was possible for the 2T numbered insurance certificate to originate from any other Insurance Company other than the 2nd defendants. It was DW1's testimony that 2T numbered insurance certificates could not be gotten from any other insurance company other than the 2nd defendants.

Since DW1 had stated that as at the time of hearing the 2nd defendants had started issuing insurance certificates with 2T, counsel for the plaintiff wanted to know whether the 2nd

defendants had found a copy of the unissued insurance certificate no 2T 41326. DW1 stated that they did not have such copy as it had not yet been printed.

Counsel for the plaintiff wanted to know if the 2nd defendants had other branches other than the Lilongwe branch. DW1 stated that the 2nd defendants had four main branches and about 7 sub-branches. DW2 admitted to having agents working for them. He however stated that the number 2T 41326 could not have been issued by any of their agents. He admitted to having had a Mr Chawinga working in the claims department in the year 2004 when the purported insurance certificate was issued.

DW1 was also cross-examined by Counsel for the 3rd defendant. In responding to queries from 3rd defendant's counsel, DW1 stated that when the 2nd defendants received correspondence from plaintiff's counsel, they drew interest to find out the identity of the alleged Kharodia who is the 1st defendant. DW1 took the initiative to find out more from the Road Traffic Office at Lilongwe Police with the help of the plaintiff. They all went to Area 2 at the premises of a Mr Sydney Kharodia where he was shown where the policemen and the plaintiff found the motor vehicle RU 2111 previously parked. They also found the owner of the premises one Sydney Kharodia. They asked Sydney Kharodia about the 1st

defendant whereupon Sydney Kharodia advised them that the 1st defendant was his brother but that he went to South Africa.

Upon asking Sydney Kharodia about the whereabouts of the motor vehicle, he told them that a certain gentleman who worked for the Capital Hotel came and collected the motor vehicle because his brother, the 1st defendant, had not finished paying for the purchase price of the motor vehicle. It was DW1's evidence that Sydney Kharodia had told them that the motor vehicle belonged to his brother.

DW2 was Gideon Justin Mkaka. He told the court that in the course of his day to day life he received a letter of demand from the plaintiff's lawyer. They were claiming that he was the owner of a motor vehicle registration no RU 2111 which was involved in an accident with the plaintiff's motor vehicle. DW2 stated that he was surprised with the contents of the letter because he has never owned a motor vehicle with a motor vehicle registration certificate as shown - RU 2111. Consequently, he went to the plaintiff's lawyers where he met a Ms Nkhoma who told him that she got the information from the Road Traffic Office in Lilongwe. He went to the Road Traffic Department to find out and indeed from their computers it showed that he was the owner of the motor vehicle RU 2111. He further went on to ask for registration information or change of ownership document which could have revealed

better information as someone could have signed somewhere but the information could not be availed to him. DW2 proceeded to the Malawi Revenue Authority to get information on motor vehicle clearing certificate which could also indicate information on the owner. The Malawi Revenue Authority had no information on the said vehicle. He also visited the Malawi Police seeking the same details of the motor vehicle. The Police had no such information. Finally he surrendered all this information to his lawyers who also sought the information on the motor vehicle. Neither the MRA, Road Traffic Department nor the Malawi Police could produce information on the motor vehicle. His evidence was that he did not know anybody by the 1st defendant's name and neither had he ever authorized any person by that name to drive any motor vehicle let alone the alleged RU 2111. He produced his driving licence whose identification number is 195701011026665.

In cross examination DW2 admitted owning a motor vehicle. He however qualified his statement by stating that he had only bought such vehicle as either second or third owner and the only documents that he had transacted in vis-à-vis motor vehicles were those concerning change of ownership. Upon being referred to Exhibit P6, DW2 stated that the number under title holder reflects his year of birth. He also admitted being the addressee. The name and initials also belonged to him. It was his evidence that other than the digits dealing with

his birth year and date, the other digits on the title holder did not belong to him. Hence the information vis-à-vis the title holder was partly false. The information vis-à-vis the motor vehicle information also did not originate from him.

From the evidence that was in court, issues for consideration include whether the first defendant does exist; whether the motor vehicle RU 2111 belonged to the 3rd defendant and whether the 2nd defendant insured the motor vehicle in issue.

Analysis of Evidence

What is not in dispute is that the plaintiff's motor vehicle was involved in a collision with a motor vehicle registration number RU 2111.

From the evidence in court, I come to the conclusion that much as the first defendant never appeared in court, the first defendant is a natural physical being. This is what leads me to this conclusion: In the plaintiff's testimony he stated that after the accident, he sustained some injuries which resulted in his being admitted at the Kamuzu Central Hospital. Whilst in hospital he saw the driver of RU 2111. The driver of RU 2111 had also sustained some injuries and equally spent the night in the same hospital. The plaintiff's testimony was supported by the evidence of DW1, who, during cross

examination stated that as they were investigating the plaintiff's claim he took the initiative to visit the place where the plaintiff had alleged was the place where RU 2111 had been parked after the accident. And when they reached the place in Area 2, the owner of the place a Sydney Kharodia introduced himself as the 1st defendant's brother, but indicated that motor vehicle RU 2111 had been collected by a third party who had allegedly sold his brother the motor vehicle for his brother's non-payment of the purchase price. This Sydney Kharodia had also told DW1 that 1st defendant was at that time in South Africa.

Was the motor vehicle RU 2111 involved in a collision with the plaintiff's motor vehicle? The answer is in the affirmative. The basis is as follows: The evidence of the plaintiff is to the effect that as he was driving his motor vehicle from Area 49 towards Old Town, the motor vehicle RU 2111 coming towards the opposite direction made a turn to the plaintiff's side of the road where the plaintiff had the right of way and a collision ensued. The police report exhibited as Exhibit P1 indicates that 1st defendant was at fault. This was not contested. Infact when the plaintiff went to the 1st defendant's brother's house he found a motor vehicle RU 2111 being repaired. It had been involved in a collision. According to DW1, the plaintiff's brother confirmed that RU 2111 had been involved in an accident much as DW1 did not personally see the said vehicle.

Who is to blame for the collision? From the evidence on record, it is not in dispute that the plaintiff had the right of way. It is not in dispute that the driver of RU 2111 turned onto the plaintiff's lane when he was not supposed to make a turn. In so doing, the driver of RU 2111 was reckless and drove without due regard to other road users. *Res ipsa loquitur*.

Is the third defendant in anyway involved or responsible for the accident either directly or vicariously? From the evidence on record, there is no evidence that associates the third defendant to the accident. This is the basis for my conclusion: The plaintiff in his testimony had indicated that after the accident and upon lodging a claim for compensation, his insurance company was advised that they did not provide insurance service with regard to the motor vehicle RU 2111. As a result, he visited the Road Traffic Department where he made a search vis-à-vis the registration of the motor vehicle. The search resulted in getting the information that the 3rd defendant was the owner of the motor vehicle RU 2111. A look at the registration certificate as exhibited in court indeed shows that the 3rd defendant was registered as the owner of the vehicle. The registration certificate has an address which infact is the 3rd defendant's address. According to PW2 the registration certificate, under title holder bears the personal information of the person who is registering his motor vehicle.

This personal information is in the form of the applicant's birth year and date. According to the information on the registration certificate reprint, the owner of RU 2111 was born on 21st January 1957. When the 3rd defendant was called to the stand as DW2, he confirmed that the address that appears on the motor vehicle registration reprint belongs to him. He also confirmed that the information with regard to the year of birth is as per his birth information. When one looks at the motor vehicle registration certificate information in that regard one can conclude that indeed the 3rd defendant is the registered owner of the motor vehicle registration number RU 2111. However, exhibit P6 which is the motor vehicle registration certificate under title holder has the number 19570121108000. Yet the 3rd defendant's driving licence number is 195701011026665. In his testimony, 3rd defendant stated that when he received a letter of demand from the plaintiff's lawyers claiming that he was the owner of RU 2111, he visited the Road Traffic Department where, upon seeing that the computer information indicated that he was the owner of the motor vehicle in issue, the 3rd defendant sought back-up information which could support the information that was in the computer. He asked for PW2's office to produce the physical file and documentation pertaining to the motor vehicle. PW2's office failed to do the same. He went to the Malawi Police to seek information vis-à-vis clearance of RU 2111. The information was not forthcoming. Equally, his

attempts to get information on RU 2111 from the Malawi Revenue Authority were futile. The 3rd defendant's testimony is supported by PW2's testimony who stated that there were a number of people who had been inquiring from her office on information vis-à-vis RU 2111 but the only information that could be produced was the computer retrieved information. Her office could not produce the physical documentation that was a mandatory requirement when it comes to motor vehicle registration in form of Malawi Revenue Authority clearance documents and Malawi Police clearance documents. DW1's testimony was to the same effect. That a search was conducted at the Road Traffic Department on information that could support the computer generated information vis-à-vis RU 2111 but the same was in vain. What I find very disturbingly interesting is the fact that on the computer generated motor vehicle registration reprint, there is information with regard to the person that had received payment for the registration of the motor vehicle in issue. His name is S. Nyasulu. During cross-examination, PW2 stated that S. Nyasulu is alive and well and is still working at the Road Traffic Department. Yet the Road Traffic Department sent PW2 whose testimony was very useless- she only came to state that she had printed out this reprint whose information is contentious. And the Road Traffic Department knew, by history of the matter that the information retrieved was contentious. The Road Traffic Department could not send a

better placed person to provide the court with better information. This gives me reason to pause and ask * why? Still in as far as the matter before this court is concerned, the 3rd defendant sufficiently rebutted the presumption of ownership of the information that appeared in the motor vehicle registration certificate as the Road Traffic Department failed to provide a reasonable explanation on the differences in information between the 3rd defendant's driving licence and the information on the motor vehicle registration certificate. Let me also mention that the information on Exhibit P6 is pathetically fictitious if one puts it in context. The accident in issue happened on 27th August 2004. The date of registration is 5th January, 2005. At the time of the accident, the motor vehicle had already acquired a Malawian registration number as well as other details that in essence are provided at the time of registration. The discrepancy in information invites me to ask – what happened at the Road Traffic Department? Fortunately for the Road Traffic Department, they were not joined as parties to the proceedings.

Then there is the 2nd defendant. The plaintiff submitted that the 2nd defendant did insure the motor vehicle RU 2111 as per the information that was obtained on the insurance certificate. The 2nd defendants deny issuing the insurance certificate in issue and hold that consequently they can not be held liable

for the 1st defendant's actions as the motor vehicle in issue was not insured by the 2nd defendants.

Now when it comes to the burden of proof in civil matters, the legal burden lies upon the party who affirmatively asserts the fact in issue and to whose claim or defence proof of facts in issue is essential. The proof is on a balance of probabilities. If the plaintiff fails to prove an essential element of his claim, the defendant is entitled to judgment. Since the plaintiff affirmatively asserts his claim, the plaintiff bears the burden of proving, his claim and the defendant assumes no legal burden by merely denying the claim. However, if the defendant asserts a defence which goes beyond denial (an affirmative defence) then the defendant must assume the legal burden of proof of his defence.

In the matter at hand the plaintiff testified that after the discharge from hospital he visited the Lilongwe Police Station where his statement vis-à-vis the accident was recorded. He learnt that the 1st defendant had also issued his statement. Later on he got a police report on the accident. The police report indicated that motor vehicle registration number RU 2111 had a certificate of insurance no. 2T 41326 issued on 04/05/04 to 03/05/05 by the 2nd defendants. Normally this would have been conclusive evidence of insurance. However in DW1's evidence in chief he stated that when the 2nd

defendants received a claim from the plaintiff's insurance on the matter, they searched their records to verify the policy but found that they do not have such a policy holder in their company. They also found out that the insurance number being mentioned in the claim was held by a C. Kuthiwi of Post Office Box 223, Salima and covered a Toyota Hilux Pick Up Registration Number SA 1174 starting from 12th December 2005 to 11th November 2006. In clarifying himself on how the 2nd defendants never had a policy holder with the insurance certificate as exhibited, DW1 stated that when he checked the police report, it indicated 2T then the numbers. Yet at the time of the claim no 2T 41326 was in their records. Hence they thought that the police had made a mistake in referring to 2T instead of 3A 41326. 3A 41326 is the insurance certificate that was issued to Mr C. Kuthiwi of Salima.

DW1 was thoroughly cross-examined. Counsel for plaintiff wanted to know why the 2nd defendants were referring to a certificate of insurance to C. Kuthiwi which was issued after the incident herein and whether DW1 knew that much as they had indicated in responding to the plaintiff's letter that they had not started issuing certificates beginning with 2T, there were some certificates with such numbers in circulation. DW1 stated that at the time that plaintiff's lawyer had sought compensation, the 2nd defendant did not have insurance certificates with serial numbers starting with 2T. He also

stated that however, at the time of the hearing they were issuing insurance certificates that started with the 2T. Counsel for the plaintiff wanted to know the exact time that the 2nd defendants started issuing insurance certificates that started with the 2T. DW1's response was that the 2nd defendant's started issuing 2T's in 1998 up to the time that they started issuing digital ones. Counsel for the plaintiff wanted to know when the 2nd defendants started issuing the digital insurance certificates. DW1 stated that the insurance industry converted to the digital system in 2005. Counsel for the plaintiff wanted to know if the insurance certificate for motor vehicle RU 2111 was issued in the period that 2Ts were being issued to wit DW1 agreed that the alleged insurance certificate was indeed issued in the period that the 2nd defendants were issuing insurance certificates that bore 2T. He however qualified his statement by stating that at the time motor vehicle RU 2111 was involved in the accident the 2nd defendants had not started using the 41 serial and the book with 41328 had not yet been printed because they had not yet started using these serial numbers. Counsel for the plaintiff wanted to know if it was possible that insurance certificates with numbers starting with 2T would have been gotten from any other insurance company. DW1's response was that these 2T numbers could not be gotten from any other insurance company. He stated that if it was an insurance certificate with 2T then it could only come from the 2nd defendants and that

you could not have a 2T insurance certificate from a company like Royal Insurance because each insurance company had its own serial numbering. As DW1 had stated that at the time of the accident and at the time the claim for compensation was being made the book bearing 2T 41326 had not been printed, counsel for the plaintiff wanted to know if the 2nd defendants had a copy of the unissued 2T 41326. To wit DW1 stated that the 2nd defendants did not have a copy since at the time that this matter came up they had not issued instructions to Government Print to print numbers up to 41326.

Counsel for the plaintiff wanted to know whether, other than the 2nd defendant's office where DW1 is the Assistant Claims Manager the 2nd defendants have other branches. DW1 stated that the 2nd defendants have four main branches and about seven sub branches; the 2nd defendants also have agents working for them. It was DW1's statement that none of the branches or agents could have issued the certificate in issue.

I will comment on the demeanour of the witness DW1. As DW1 testified, I found that he usually answered questions that he found unfavourable to his employer in an evasive way. My observation of his response to questions posed in cross-examination was that he had come with a position and he wanted to answer questions to support that position. As that position was not the correct position, he ended up contradicting himself during cross-examination. Hence his

evidence contradicts itself. In examination in chief he stated that the 2nd defendants have never issued insurance certificates with the numbering as it appeared on the insurance certificate. In cross-examination he states that at the time that the plaintiff's lawyer sought compensation, they had not started issuing such insurance certificates but that at the time of hearing they had since issued. He however qualifies that much as they had issued some insurance certificates with such numbers they had not hit the number in issue. When DW1 is asked on the period within which such 2T insurance certificates have been he states that they started issuing insurance certificates with 2T bearing since 1998. He admits that at the time of the accident the 2nd defendants had been issuing such certificates bearing 2Ts. Then to avoid self-incrimination he states that much as 2Ts are in existence the Government Print has not yet printed insurance certificates with the serial number in issue. My finding from DW1's testimony is that the testimony lacks consistency. It invites one to conclude that prior to the time of the accident the 2nd defendants did issue the certificate in issue. The certificate covered motor vehicle RU 2111. Perhaps the circumstances in which this insurance certificate was issued may raise some eyebrows within the 2nd defendant company. That, however is an inhouse issue. As far as the matter at hand is concerned the insurance in issue originated from the 2nd defendants. Hence I find that the 2nd defendants are liable as the insurers

of the motor vehicle that was involved in a collision that happened during a period that the said motor vehicle was insured by the defendants. Consequently, the plaintiff succeeds in his claim against the 1st and 2nd defendants for damages and this cost of his action.

Assessment shall be done by the Registrar.

MADE in Open Court this 11th day of June, 2008.

I.C. Kamanga (Mrs)
JUDGE