IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 13 OF 2009

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

**MOBILE MOTORS (ZAMBIA) LIMITED** APPELLANT

AND

**JOHN MUBANGA MULWILA** 1ST RESPONDENT

**THE ATTORNEY GENERAL** 2ND RESPONDENT

CORAM: **MWANAMWAMBWA, CHIBOMBA AND WANKI, JJS**

On 16th February, 2012 and 17th July, 2012

For the Appellant: N/A

For the 1st Respondent: Mr. L. Linyama of Messrs. Eric Silwamba and Company

For the 2nd Respondent: Mr. M. Mukwasa, Senior State Advocate

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

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFERRED TO:-

1. **Birmingham and District Land Company -Vs- L and N.W. Ry (1886) 34 Ch. D. 261.**
2. **Bromely -Vs- Coxwell (1801), 2 Bos and P.438, 46 Digest 459.**
3. **Jarvis -Vs- Williams (1955) 1 ALL ER 108.**
4. **Kaunda -Vs- The People (1999) SCZ Judgment No. 12.**
5. **Madhupaper Investments and Another -Vs- Kenyan Commercial Bank and Two Others (1992) Kenyan LR.**
6. **International Investments Corporation and Laxman Keshra (1978) Kenyan LR 143.**
7. **Pilot -Vs- Wilkinson (1863) 2 H. and C 72; 46 Digest 460.**
8. **Zambia National Commercial Bank Limited -Vs- Kapeka Button Mhone (2000) ZR 138.**
9. **Caxton Publishing Company Limited -Vs- Sutherland Publishing Company Limited.**
10. **Arthur Lubinda Wina, F.T.J. Chiluba, Vernon J. Mwaanga,**

**Akashambatwa M. Lewanika, Levy P. Mwanawasa, Ephraim**

**Chibwe and Andrew Kashita -Vs- The Attorney General**

**(1990 - 1992) ZR 95.**

1. **Lancashire -Vs- L and N. W Rly (1892) 3CH. 274 ALL ER 108.**
2. **Johnson -Vs- Diprose (1893) 1 QB 545.**
3. **Nkhata and Four Others -Vs- The Attorney General of**

**Zambia, (1966) ZR 124.**

1. **Wilson Masautso Zulu -Vs- Avondale Housing Project**

**Limited, (1982) ZR 172.**

1. **Attorney General -Vs- Marcus Kampumba Achuime (1983)**

**ZR 1.**

1. **Attorney General -Vs- Thixton (1966) ZR 10.**
2. **Nelson -Vs- Laholt (1948) 1 KB 339, 343.**
3. **Baxter -Vs- France (1895) 1 QB 455.**
4. **Pontifex -Vs- Foord (1884) 12 QBD 152.**
5. **Furness -Vs- Pickering (1908) 2 CH. 224, 227.**
6. **Tritton -Vs- Bankart (1887) 56 L.J.Ch. 629.**
7. **Wilheim Roman Buchman -Vs- Attorney General, SCZ**

**Judgment No. 14 of 1994.**

1. **Mazoka and Others -Vs- Mwanawasa and Others, (2005) ZR**

**138.**

1. **Christopher Lubasi Mundia -Vs- Sentor Motors Limited,**

**(1982) ZR 66.**

OTHER WORKS REFERRED TO:-

1. **Halsburys Laws of England, Volume 45 paras 1422, 1433.**
2. **Chitty on the Law of Contracts, 27th Edition, Volume 1**

**(1994) page 911.**

1. **Clerk and Lindsell on Torts 12th Edition, (1961), pages 945,**

**969.**

1. **Odgers on Pleading and Practice 12th Edition, (1971) 210.**
2. **Salmond on the Law of Torts 8th Edition, (1934), 396.**
3. **Paget’s Law of Banking, 10th Edition, 271, 272.**
4. **Mcgregor on Damages, 16th Edition, 1418.**

The appellant has appealed against the Judgment and the Ruling delivered by the High Court at Lusaka, on the 24th July, 2008, that the respondent is entitled to recovery of the subject vehicle or if it is not possible restitution and awarding of the claim as prayed; and the ruling of 22nd September, 2008 that, the appellant’s application for review was misconceived and its dismissal.

When we heard this appeal, there was no appearance for the appellant. Mr. LINYAMA, however, informed the Court that Mr. PATEL had a mix up as he thought the appeal was coming for Judgment. The Court, being satisfied that the appellant’s Counsel was aware of the date the appeal was coming up and considering that the appellant had filed heads of argument and list of authorities, directed that the appeal proceeds.

The facts leading to the appeal are that the 1st respondent instituted an action against the appellant and another, by way of a Writ of Summons, claiming for: replacement or restitution of the 1st respondent’s land cruiser station wagon 10 seater GX; in the alternative payment of the replacement value plus interest at the current commercial bank rate, from March, 1993 up to date of Judgment; general damages for breach of warrant and inconvenience arising out of loss of use of the said motor vehicle from 27th March, 1993 to the date of Judgment; special damages of K250,000.00, being motor vehicle’s expenses incurred by the 1st respondent plus interest at current commercial rate; any other relief that the Court may deem fit and just; and costs.

The case for the 1st respondent was that following his election as Member of Parliament for Lukanshya Constituency on the MMD ticket in 1991, he was entitled to a motor vehicle loan from the National Assembly. He accordingly applied for and was granted a motor vehicle loan in the sum of K8,448,187.97 which money he used to buy the motor vehicle in dispute which was subsequently registered in his name in February, 1993. In March, 1993, he travelled to his Constituency in Northern Province using the subject vehicle. On his way back, the motor vehicle, broke down at Serenje. It was then towed to the appellant’s garage in Lusaka. He thereafter asked the appellant to check it and advise him what the fault was. He denied asking the appellant to repair it as he wanted it replaced. The vehicle was ordered through the appellant by the National Assembly. Instead, the appellant proceeded to repair it and then handed it to National Assembly without his knowledge.

The 1st respondent ceased to be a Member of Parliament in 1994 following his resignation from MMD on 13th August, 1994. He conceded that the balance of the motor vehicle loan was payable at once when he ceased to be a Member of Parliament. That when he ceased to be a Member of Parliament, the balance of the loan was less than K6,000,000.00. He also conceded that the motor vehicle belonged to the National Assembly, until the loan was fully repaid; and that as at the date of trial, his loan was still unpaid.

He adduced expert opinion evidence from two witnesses PW1 and PW2. PW1 an Auto Mechanic serviced the motor vehicle in question at his garage before it made the trip to Kasama. It had then done 5,000 kilometres. PW1 was of the opinion that the subject vehicle had a factory problem, namely that the oil pump was defective. That could have been the reason why the oil was not reaching the conrod bearing. That it was this factory problem which caused the knock of the engine. That at Serenje before towing it to Lusaka he checked the vehicle and discovered that all the bearings were worn out. Both PW1 and PW2 said that the oil filter used at the previous service was genuine. It was supplied by Nippon Motors, the suppliers of genuine Toyota parts.

The case for the appellant was that in April, 1993, the 1st respondent took the motor vehicle in question to its garage for repair. It had done 10,543 kilometres. It was discovered that it had a loud knocking sound. The engine was opened and repaired. The repairs involved replacing conrod bearings, main bearings, pistons and rings. It was also given a complete overhaul of the gasket kit. That the cause of the engine knock was lack of engine oil. That the problem was due to negligence by the user and not defective material or poor workmanship. That the repairs were not on warranty because damage was caused by lack of lubrication. Hence the warranty did not apply. That on 7th March, 1994, the vehicle was released to the National Assembly, on the instructions of the Clerk. The vehicle was released to the National Assembly because it was ordered by the Ministry of Works and Supply, through the appellant.

The case for the 2nd respondent was that, the 1st respondent signed a loan Agreement with National Assembly when he bought the subject Motor vehicle. Under Clause 1 to 6 of that Agreement, the motor vehicle remained the property of the National Assembly, until the loan of K8,448,187.97 was fully paid. That if the 1st respondent ceased to be a Member of the National Assembly, he was required to pay the amount owing under the loan, in one lump sum. In default, Clause 6 of the Loan Agreement empowered the National Assembly to repossess the vehicle. That the 1st respondent ceased to be a Member of the National Assembly and failed to pay about K8 million owing to the National Assembly.

The balance was therefore due and to be paid at once. However, the plaintiff failed to pay the balance. Following the plaintiff’s failure to pay the amount due, the National Assembly repossessed the vehicle. They instructed the appellant to release the vehicle to the National Assembly.

The Court below after analyzing the evidence that was adduced before it, found that the recovery of the vehicle by the National Assembly was not properly effected as it was not privy to the contract with the appellant and held that the 1st respondent was entitled to recovery of the said motor vehicle and accordingly, awarded the claim as prayed.

The appellant’s application for review of the Judgment on the ground that the Court should have made an Order calling upon the 2nd respondent to indemnify the appellant against any liability to the 1st respondent was refused as being misconceived as it was not pleaded in its defence.

The appellant advanced four grounds of appeal as follows:-

1. **The learned Judge in the Court below erred in law and in fact when he failed to properly take into account the law relating to locus standi. The learned Court failed to consider prior to delivering judgment that the 1st respondent has no locus standi to sue the appellant because he was not the absolute owner of the vehicle as at all material times the absolute owner of the vehicle was the National Assembly pursuant to the Loan Agreement between the** **1st respondent and the 2nd respondent dated 21st January, 1995.**
2. **The learned Judge in the Court below erred in law when he failed to take into account that under the terms of the said Loan Agreement the Motor Vehicle belonged to the Government as such the appellant could not stop the 2nd respondent from removing the vehicle.**
3. **The learned Judge erred in his application of the equitable doctrine of restitution and the right to an action in conversion.**
4. **The learned Judge below erred in law when he failed to take into consideration prior to making the Judgment and Ruling that the third party proceedings issued by the appellant against the 2nd respondent had not been disposed off.**

The appellant filed heads of argument and list of authorities. In support of ground one of appeal, it was contended that, the 1st respondent had no locus standi to commence an action against the appellant for either tort or in contract; that such an action can only be commenced if he had possession or the immediate possession of the vehicle in issue; but that the evidence showed that the 1st respondent was neither in possession nor possessed an immediate right to possession of the vehicle.

The appellant relied on ***CLERK AND LINDSELL ON TORTS*** (27) where the learned authors state that:-

**“The general rule is that the right to bring an action for conversion or wrongful detention of goods belong to the person who can prove that he had at the time of the conversion or detention, either actual possession or immediate right to possess.”**

Reliance was also placed on the case of ***JARVIS -VS- WILLIAMS*** (3) where it was held that:-

**“In order to maintain an action of trover or detinue, a person must have the right of possession and a right of property in the goods at the time of the conversion or detention; and he cannot sue if he has parted with the property in the goods at the time of the alleged conversion, or at the time of the alleged conversion his title to the goods has been divested by disposition, which is valid under the factors Act.”**

In relation to ground two of appeal, it was pointed out that, the ownership of the vehicle in issue under the terms of the loan agreement remained under the National Assembly. It had not reverted to the 1st respondent as the loan had not been fully paid. It was argued that, the appellant was therefore duty bound to return the vehicle in issue to the National Assembly who was the absolute owner failure to which the appellant would have subjected themselves to an action for conversion. The case of ***PILOT -VS- WILKINSON*** (7) was relied upon where ***POLLOCK***, ***CB*** stated that:-

**“When a man perfectly well knows that the goods belong to another, and will not let him have them, he is liable in an action of trover, and the law calls his refusal to let him have them “a conversion.”**

In support of ground three of appeal, it was contended that, the 1st respondent failed to prove the existence of the ingredients required for the tort of conversion on the part of the appellant. It was pointed out that, the ingredients required are a willful and wrongful act on the part of the appellant when the tort was committed.

Reliance was placed on ***HALSBURY’S LAWS OF ENGLAND*** (25) where it is stated that:-

**“There must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner’s rights and an intention; in so doing to deny the owner’s rights or to assert a right inconsistent with them.”**

Further, reliance was placed on the case of ***BROMLEY -VS- COXWELL***, (2) where it was held that:-

**“To support an action of trover there must be a positive tortuous act.”**

In relation to ground four of appeal, it was submitted in the alternative that, if the Court deems that the Court below rightly found the appellant liable to the 1st respondent, the Court should find that the Judge in the Court below erred on a point of law because it should have found that the 2nd respondent was liable to indemnify the appellant against any award of damages made by the Court to the 1st respondent on the basis that the act of which the appellant was held liable for was done at the request of the 2nd respondent.

The case of ***BIRMINGHAM AND DISTRICT LAND COMPANY -VS- L* *AND N.W. RY*** (1) was cited where it was held that:-

**“The right of indemnity arises where an act was done by one person at the request of another; and in consequence of such act the person doing it suffered loss.”**

Reference was also made to ***ODGERS ON PLEADING AND PRACTICE*** (28) where the learned authors state that:-

**“There may be someone by whom the defendant, if found liable, will be entitled to be wholly reimbursed - that is, he is entitled to an indemnity… In such cases, it is obviously desirable to bring in the third person against whom the defendant claims to have a remedy; so that the decision as to liability of the third person shall be finally settled in one and the same action.”**

In light of the foregoing, the Court was urged to allow the appeal in totality and order that the Judgment in favour of the appellant be set aside.

The 1st and 2nd respondents filed respective heads of argument and relied on them at the hearing of the appeal.

In response to ground one of appeal, the 1st respondent pointed out that, the Court will note that the issue of locus standi was raised in the Court below in the appellant’s application to strike out Statement of Claim. The 1st respondent demonstrated his ownership of the vehicle in issue and that the contract with the appellant to have the vehicle checked was between the appellant and himself. It was contended that, the trial Judge correctly addressed his mind to the evidence on record to sustain the 1st respondent’s claims and it cannot be argued that he had no locus standi.

On the question of possession of the vehicle, it was pointed out that, the record clearly shows that it was the 1st respondent who had actual possession of the vehicle and it is him who took the vehicle to the appellant’s premises for repair.

It was submitted that, a litigant can sustain a claim for the tort of conversion notwithstanding the fact that goods have been released by a defendant to a third party under an honest mistake or by mere inaction, in this case by releasing the vehicle to the 2nd respondent by the appellant, the 1st respondent was occasioned with resultant loss.

In support, the 1st respondent relied on the case of ***ZAMBIA NATIONAL COMMERCIAL BANK LIMITED -VS- KAPEKA BUTTON*** ***MHONE***, (8) where it was stated that:-

**“We have considered all that has been urged before us. The action was found on conversion which is a wrongful interference, in this case, a dealing with title deeds in a manner which was inconsistent with the right of the plaintiff as the true owner. As LORD PORTER observed in *CAXTON PUBLISHING COMPANY LIMITED -VS- SUTHERLAND PUBLISHING COMPANY LIMITED*** (9)

**“Where the act done is necessarily a denial of the owner’s right or assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner’s right though the doer may not know of or intend to challenge the property or possession of the true owner.”**

It was contended that, this is the position that comes out in the reasoned judgment of the trial Court at page **J7** line 19 when it was held that:

**“The plaintiff had possession and right of property in the goods at the time of conversion.”**

The case of ***LANCASHIRE -VS- L AND N.W. RLY*** (11) was cited as authority for the proposition.

It was contended that, the law relating to locus standi as propounded by ***LORD ATKIN*** is that, the plaintiff can maintain an action if at the time of the defendant’s acts he had:-

1. **Ownership and possession of the goods, or;**
2. **Possession of them or;**
3. **An immediate right of possession of them but without ownership;**
4. **Actual possession;**

It was further pointed out that, they were fortified in their submission by the case of ***NKHATA AND FOUR OTHERS -VS- THE ATTORNEY GENERAL*** (13) where it was held that:-

**“A trial Judge Sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:-**

1. **By reason of some non-direction or mix-direction or otherwise the Judge erred in accepting the evidence which he did accept; or**
2. **In assessing and evaluating the evidence the Judge has taken into account some matter which he ought not to have taken into account, or failed to take account some matter which he ought to have taken into account; or**
3. **If unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or**
4. **In so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.”**

It was finally submitted that, there is no merit in this ground of appeal.

In relation to ground two of appeal, it was submitted that, the contention by the appellant that the motor vehicle belonged to the Government and as such the appellant could not stop the 2nd respondent from removing the vehicle from the appellant’s premises or control is flawed. In the first place, it was not ethical for the appellant to have surrendered to the 2nd respondent, without the consent of the 1st respondent, the motor vehicle which was already a subject matter of litigation a fact that was raised timeously by the 1st respondent in a letter exhibited at page 41 of the Record of Appeal.

It was pointed out that, there was already a dispute between the appellant and the 1st respondent over the same motor vehicle and amongst the claims contained in the Statement of Claim filed by the 1st respondent on 19th January, 1994 was the remedy of restitution. The purported surrender of the vehicle to the 2nd respondent only took place after March, 1994.

It was contended that, clearly, this shows that the matter was subjudice and therefore, could have put the appellant on alert before yielding to unlawful demands by the 2nd respondent.

It was further contended that, in the second place, the loan agreement signed between the 1st respondent and the 2nd respondent did not allow the 2nd respondent to act arbitrary as they did. To wit paragraph (vi) of the 1st respondent’s undertaking states that:-

**“In the event of my dying, or leaving the service of my own accord or on retirement or of the National Assembly terminating my appointment without my having repaid the whole of the loan, any balance of the loan owing to the National Assembly shall be deducted from any monies which may be payable to me or my estate, failure of which the motor vehicle shall be surrendered to the National Assembly.”**

It was finally contended that, the argument by the appellant that, under the Loan Agreement the Government owned the motor vehicle and could not be stopped from removing it from the appellant’s premises is unsound and legally unsupported.

In response to ground three of appeal, it was contended that, the 1st respondent was entitled to restitution since he was clearly entitled to the motor vehicle which was unjustly deprived of. It was pointed out that, the trial Judge found on the balance of probabilities that the 1st respondent was entitled to recovery of the motor vehicle or, if that was not possible to restitution.

It was submitted that, in applying the doctrine of restitution, the trial Judge cited with approval ***LORD DENNING*** in the case of ***NELSON -VS- LAHOLT*** (17) where the latter said that:-

**“It is no longer appropriate to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires.”**

It was contended that, the remedy of reinstitution was appropriately granted to the 1st respondent in order to undo the injustice which he had been subjected to.

As to the contention by the appellant that the trial Judge erred in law in his application or understanding of the right to an action in conversion; the absolute owner of the motor vehicle was the National Assembly.

It was argued that, the appellant did not show that a third party, in this case the National Assembly had a better right than the 1st respondent apart from stating that they were the absolute owners - ***CLERK AND LINDSELL ON TORT*** (27) was cited where the learned authors have said under the tort of conversion that:-

**“If the plaintiff makes out a good prima facie title possession or otherwise, the defendant must in the first place impeach that title by showing that there is a better right in someone else.”**

Further, the learned authors of ***HALSBURY’s LAWS OF*** ***ENGLAND*** (25) opine that:-

**“In order to maintain an action for conversion, a person must have the right possession and the right of property in the goods at the time of the conversion or detention.”**

It was contended that, the trial Judge found as a fact that the 1st respondent had the possession and the right of property in the goods at the time of the conversion. He accordingly found that the submission by the appellant’s Counsel had little or no effect on the proposition that the 1st respondent was entitled to restitution. It was submitted that these findings of fact were not perverse and the Court must not reverse them.

The 1st respondent relied on the cases of ***NKHATA AND*** ***OTHERS -VS- THE ATTORNEY GENERAL OF ZAMBIA*** (13) ***WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED*** (14); ***AND ATTORNEY GENERAL -VS- MARCUS*** ***KAMPUMBA ACHUIME***. (15)

It was contended that in any event the appellant was at liberty to raise this issue in the Court below which it was at liberty to do even by way of review but elected not to pursue.

It was further contended that, it is not permissible for this Court to be called upon to adjudicate over it on appeal.

The case of ***WILHEIM ROMAN BUCHMAN -VS- ATTORNEY*** ***GENERAL*** (22) was cited, in which we held that:-

**Mr. Shamwana has raised before us some matter which was not raised before the Commissioner. Mr. Shamwana has not supported his complaint that the learned Commissioner should have recused himself. If he had done so in the Lower Court then the Commissioner would have made a ruling. This matter was not raised before the Commissioner; it cannot be raised in this Court as ground of appeal before this Court. The record, however, shows that the learned Commissioner was never biased in anyway. In the first instance, he granted an extension. Later he refused to extend the period but when the appellant appealed, he granted an indefinite stay in Zambia. The ground raised by the appellant in this Court cannot succeed.”**

In light of the foregoing, the 1st respondent prayed that the appeal be dismissed.

In response to ground four of appeal, the 2nd respondent contended that, having regard to the pleadings and the evidence that was before the Court below, there was no basis upon which the 2nd respondent can indemnify the appellant because the whole case in the Court below hinged on ‘product liability’ and the finding of the Court with regards this issue would be the same whether the owner of the vehicle is found to be the 1st respondent or the 2nd respondent.

It was submitted that, the question whether the 2nd respondent should indemnity the appellant must be resolved in the light of the whole case as informed by the pleadings that were filed in the Court below. This is because one of the functions of the pleadings is:-

**“To define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties.”**

The case of ***MAZOKA AND OTHERS -VS- MWANAWASA AND*** ***OTHERS*** (23) was cited.

It was further pointed out that, it is trite law that:-

**“Where the pleadings are at variance with the evidence adduced in Court, the case fails since the plaintiff’s case is completely re-cast without actual amendment of the Statement of Claim, and not only will the Court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice.”**

The case of ***CHRISTOPHER LUBASI MUNDIA -VS- SENTOR*** ***MOTORS LIMITED*** (24) was cited.

It was contended that, perusal of the Statement of Claim, pages 21 to 23 of the record, leaves no doubt that the gist of the 1st respondent’s case in the Court below was that the vehicle in issue, whilst under normal use, developed a problem in the engine and suddenly stopped and could not start; that the said problem could only be attributed to the manner in which the vehicle was manufactured and assembled; that the vehicle had a warranty coverage that obliged the manufacturer to repair or replace any part that is defective in material or workmanship under normal use. It was for this reason that, among the reliefs the 1st respondent sought, was the replacement of the vehicle and damages for breach of warranty. It was pointed out that, as a matter of fact even the evidence adduced by the 1st respondent in the Court below all went to show that the engine of the vehicle in issue was faulty.

It was further contended that, there is no doubt that the defence and the evidence presented by the appellant in the Court below focused on demonstrating that, the engine of the motor vehicle in issue developed a problem because the 1st respondent had failed or neglected to have the vehicle serviced by an authorized appointed Toyota distributor within the warranty period, paragraph 7 of the defence at page 51 of the record.

It was argued that, clearly, therefore, the question that presented itself for determination in the Court below, as informed by the pleadings and evidence before the Court, was whether the problem that developed in the engine of the vehicle in issue could be attributed to the manner in which the vehicle was manufactured and or assembled, or the 1st respondent’s failure or neglect to have the vehicle serviced by an authorized appointed Toyota distributor within the warranty period. It was contended that unfortunately, the judgment of the Court below does not seem to have addressed this very critical issue that formed the very basis of the matter before the Court.

It was submitted that, as a matter of fact even the 2nd respondent took cognizant of the fact that the vehicle in issue have defective engine and commenced arrangements to buy another vehicle for the 1st respondent, page 70 of the record. It was argued that, in the light of all these facts, can the problem that the vehicle developed in the engine be attributed to the 2nd respondent to justify the indemnity. It was submitted that, there is absolutely no basis upon which the 2nd respondent can be called upon to indemnify the appellant regardless of the owner of the vehicle.

It was further contended that, even if the Court finds that the 2nd respondent was the owner of the vehicle and not the 1st respondent, such finding will not absorb the appellant of liability which as already argued, is ‘product liability’ not attributable to the actions of the 2nd respondent.

Finally, the 2nd respondent urged the Court to find that the appellant is not entitled to be indemnified by the 2nd respondent.

We have considered the appeal; the heads of argument, the pleadings; and the judgment of the Court below.

We have found that the trial Judge in his judgment did not adequately determine and make findings on the issues in contention between the parties which issues were pleaded namely, the ownership of the vehicle in issue; product liability, whether there was negligence in the manufacture of the vehicle in issue. In the circumstances, we feel this is a proper case where we have to order a retrial before another High Court Judge.

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M. S. Mwanamwambwa,

**SUPREME COURT JUDGE.**

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H. Chibomba, M. E. Wanki,

**SUPREME COURT JUDGE. SUPREME COURT JUDGE.**