

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL APPEAL NO 8 OF 2015

BETWEEN

BIYINZIKA ENTERPRISES (FARMERS) LTD}.....APPLICANT

VS

SSEGANE MAGIDU}.....RESPONDENT

**(Appeal from the judgment/decreed/Chief Magistrate's Court of Mengo orders of
(Her worship Nambatya Irene, Magistrate Grade 1) dated 6th day of March 2015 in
Civil Suit No, 255 of 2013)**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA
JUDGMENT

The Appellant lodged this appeal against the judgment/decreed of the Chief Magistrate's Court of Mengo, Magistrate Grade 1 dated 6th of March 2015 in Civil Suit Number 255 of 2013 with five grounds of appeal namely:

1. The learned trial Magistrate Grade 1 erred when she held that the contract between the Appellant and the Respondent was oral.
2. The learned trial Magistrate erred in law in permitting the Plaintiff to present a case which was a departure from his pleadings.
3. The learned trial Magistrate erred in law and fact when she held that the Plaintiff was not accorded any opportunity to examine the chicks and that he therefore never took delivery thereof.

4. The learned trial Magistrate failed to properly evaluate and appreciate the parties' evidence on record and accordingly her decision on liability was against the weight of evidence.
5. Having wrongfully ordered for refund of Uganda shillings 5,232,000/= with interest to the Plaintiff, the learned trial Magistrate grade 1 erred when she condemned the Appellant to pay general damages of Uganda shillings 8,000,000/= with interest, which are award constituted an error in principle.

The Appellant seeks an order for the appeal to be allowed and for the judgment, decree and orders of the lower court to be set aside and substituted with an order dismissing the suit with costs. The Appellant also prays for the costs in this appeal and the court below.

The court was addressed in written submissions.

The Appellant's Counsel submitted that the case involved the Plaintiff buying the old chicks taking delivery and possession and signing a delivery note. When the chicks apparently suffocated in his hands, he returned them to the Appellant's premises and concocted a suit by which loss/liability could be assessed as falling on the seller. He sought to circumvent the law of sale of goods and principles of passing of property and risk. He contended that the decision of the lower court condemning the Appellant to liability was wrong and was wholly based on a fabricated case, a careful manoeuvre to circumvent the said principles. Secondly it was based on the failure to properly evaluate the facts of the case and was based on misapprehension of the principles of law of sale of goods and a total failure to apply to the facts.

On the other hand the facts relied on by the Respondent in opposition of the appeal are in the record of proceedings and judgment filed on court record. The Respondent's Counsel submitted that the Plaintiff and his witness told the court that he entered into an agreement with the Respondent for the purchase of chicks. The Plaintiff tendered before court the documents he got from the Appellant. The issue before the lower court and in this appeal is whether the Plaintiff now the Respondent took possession of the chicks so purchased from the Appellant. The Respondent and his witness informed the court that the chicks were never taken as argued by the Appellant.

Ground 1

The learned trial Magistrate Grade 1 erred when she held that the contract between the Appellant and the Respondent was oral.

The Appellant attacks the finding of the lower court at page 79 of the record of appeal that there was an oral contract between the parties. He contended that this was prejudicial to the Appellant because no due recognition was made for the documents on court record that were the actual basis of the contractual relationship of the parties. As a result thereof ignoring the documents led to an error in where the fault or liability lay. The failure to appreciate the documents led to the trial Magistrate leaning on the Respondent's clearly fabricated oral testimonies. He submitted that from the pleadings and evidence on record, the contract between the parties was based on documents. The documents were exhibited by the Respondent himself. Ironically it is the same documents that formed the basis of the Respondent's case and indeed the contract is disclosed in the plaint.

The Appellant's Counsel relies on exhibit P1 which is the chicks booking receipt at page 61 of the record which was the Respondents evidence of payment and the number and nature of the booking. It was presented to the Respondent before he was handed over his chicks. The Respondent signed the invoice/delivery note at page 62 of the record on receipt of his chicks. Both documents are evidently written on in the manner that tells the entire story of the party's contractual relationship. The Respondent signed the delivery note without any protests as there was indeed no basis for it. Counsel invited the court to examine the two exhibits.

He contends that the trial Magistrate ignored the documents and relied on oral testimony contrary to sections 91 and 94 of the Evidence Act. He contended that the principle of law is that the terms of a written contract cannot be varied by oral testimony. The documents speak for themselves. Counsel relies on **Uganda Revenue Authority versus Stephen Mabosi [1996] KALR 153** where the Supreme Court upheld the best evidence rule. This is that the document itself is the one to be considered by the court and the terms of agreement therein cannot be varied by oral testimony given in contradiction thereof. The Appellant's Counsel submitted among other things that section 4 of the Sale of Goods Act requires the contract of sale to be made in

writing either with or without a seal. Furthermore section 10 (3) of The Contract Act 2010 provides that the contract is in writing where it is in the form of a data message, it is accessible in a manner usable for subsequent reference or where it is in words. The Appellant's case is that there were clear words in the documents relied upon explaining the terms of the contract between the parties. Had the trial Magistrate addressed herself on the principles quoted above, she would have come to the irresistible conclusion on the evidence that the agreement of sale of chicks was in writing and was not an oral contract. In other words the chicks were paid for and delivered to the Respondent.

Ground 2

The learned trial Magistrate Grade 1 erred in law in permitting the Respondent to present a case which was a departure from his pleadings.

It was pleaded in paragraph 3 (b) of the Pleat that "on 20 December 2012 the Respondent came to collect the said chicks and when the same were loaded onto the motor vehicle the chicks got sick and the same was returned to the Appellant's stores." In the scheduling memorandum at page 20 of the record the Respondent informed the court that the Respondent came to collect the said chicks and the said chicks got sick and were returned to the Appellant's stores. However the Respondent changed his case and testified that there was no vehicle on which the chicks were loaded and that he did not take the chicks (see page 28 of the record). Counsel submitted that there could never have been any return if the chicks had not been taken in the first place. He contends that this was a clear departure from the pleadings affected by the concocted testimonies of PW2 and PW3 who falsely swore that the Respondent never took the chicks. PW2 testified that he saw the chicks between 7:30 PM and 8 PM at the Appellant's stores. He could not therefore competently testify as to whether the Respondent had or had not taken the chicks in the morning. As for PW3, he testified that he and the police officer left the Appellant's offices empty-handed. In cross examination he contradicted himself and testified that when the Plaintiff told him that he was not taking the order, he left him and did not witness anything else. He left him at the Appellant's but kept in touch. PW3's testimony was a clear falsehood because he did not interact with the police officer as alleged. He further testified that they went to the police on another day and his entire testimony is concocted.

The Appellant contends that what is manifest is that the Respondent having taken delivery of the chicks and led to their suffocation, sought to set up a case based on a total failure or refusal to take delivery so as to circumvent the law of sale of goods and have liability unjustifiably placed on the Appellant. Furthermore the Respondent had not raised any issue as to the colours of the chicks supplied and departed from his pleadings when he also raised a case of rejection of the supply chicks on the basis of their wrong colour. However in paragraph 3 (b) of the plaint, the basis of the alleged rejection of the chicks was their alleged sickness. He testified that when he started counting, he was shown the black chicks in the first box and he told the Appellants that this was not his order. The Appellant's Counsel relies on the case of **Namusisi and others versus Ntabaazi [2006] 1 EA 247** where the Supreme Court held that a party who departs from his pleadings and gives evidence contradicting his pleadings would be deemed to be lying. The principle was also applied in the case of **Doshi Hardware (U) Ltd versus Alan Construction Ltd [2009] KALR 464** where it was held that a party cannot be allowed to change his case or set up a case inconsistent with what is alleged in his/her pleadings. Counsel concluded that the Respondent set up a case inconsistent with the pleadings and ground two ought to succeed.

Ground 3

The learned trial Magistrate erred in law and fact when she held that the Respondent was not accorded any opportunity to examine the chicks and that he therefore never took delivery thereof.

On this ground Counsel for the Appellant referred to the testimony of the Respondent at page 27 of the record that he only checked after signing. When he started counting, he saw black chicks in the first box and all the rest had brown chicks. He had a helper to assist him to transport. When they checked the boxes they intimated to him that the birds had not been immunised. Furthermore the on the taking of delivery of the chicks, the Respondent testified in cross examination that he was given the chicks at 10:30 AM. He further testified that he was given a receipt which was written in red when he picked the birds. PW3 also testified that he saw the chicks because they were there but he did not load them. He had 25 boxes of chicks to be given. He saw the boxes. He saw all of them and the boxes were separated from the others. The ones of the Respondent were put aside from the rest.

The Appellant's Counsel contends that because the chicks were separated from the others, it shows that there was appropriation and the Respondent took possession of his booking. Counsel asked the court to consider whether the alleged immunisation could not be established except after close examination of the birds. Secondly the Respondent's testimony that only one box had black and the rest had brown could only be achieved through examination of all the boxes. Thirdly the various numbers of boxes mentioned by the Respondent and his witnesses all point to the fact of examination being conducted in one way or the other. The Respondent however had a premeditated plan to provide the course of justice as seen by his departure from the pleadings and falsehoods. To compound his denial of examining the chicks, he alleged that he had just signed exhibit P1 which is the delivery note/invoice because he was told to do so. When the Respondent was asked how he obtained the chicks from the Appellant on previous occasions, he testified that he always signed the delivery note only after taking possession of his chicks and supposedly after examining them. He further testified that he retained the delivery note/invoice for the first time, the Appellant having retained it on earlier purchases.

In her unchallenged testimony DW 2 the Veterinary Dr testified that she was present when the Respondent took delivery of his chicks after she had verified and confirmed that they were in good health. Secondly the Respondent called her at about 4:30 PM and reported that the chicks were dying thereby confirming that the Respondent had taken delivery of the chicks. Her assessment is that the chicks were suffocated in a bus. The doctor was at the premises of the Appellant by 11 AM when the call was made. She advised the Respondent to return to the company and have the chicks placed under a fan to save them from suffocation. Further confirmation that the Respondent took delivery of the chicks and only returned them in the evening after the call of the vet Dr include the fact of signing the delivery note/invoice exhibit P1 which speaks for itself. Secondly the testimony of PW2, the police officer that the Respondent reported to the police between 7 PM and 8 PM roughly 9 hours after he received the chicks at 10:30 AM. Finally the Appellant's Counsel submitted that had the trial Magistrate properly examined the evidence of both parties on record, she would have come to the conclusion that the Respondent did examine the chicks and took delivery thereof.

Ground 4

The learned trial Magistrate failed to properly evaluate and appreciate the parties' evidence on record and accordingly her decision on liability was against the weight of evidence.

The applicant's Counsel relies on the submissions on grounds one, two and three above. He contended that the evidence proves that the contract between the Appellant and the Respondent was based on documents and was not an oral contract as held by the learned trial Magistrate. Exhibit P1 is the chicks' booking receipt and the delivery note/invoice is the concise documentation of the entire contractual relationship between the parties. The law of sale of goods is that the property passed together with the risk. Counsel further relied on section 19 (e) Sale of Goods Act cap 82 and section 21. Property and the risk in the goods passes when the goods are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller. Counsel further submitted that the place of delivery of the goods is the seller's place of business under section 29 (2) of the Sale of Goods Act. The buyer is deemed to have accepted the goods when he or she intimates to the seller that he or she has accepted them or when the goods are delivered to him or her. The Appellant relies on the case of **Abdulla Ali Nathoo vs. Walji Hirji [1957] EA 207** for the doctrine on opportunity to inspect the goods subject to a contract and the fact that property in the goods passes to the buyer upon delivery and acceptance. Counsel further relies on the case of **Re- A Debtor (Number 38 of 1938), Debtor vs. Petitioning Creditors and Official Receiver [1938] 4 All ER page 308** on acceptance of goods thereby assuming the property the goods. The case of **Horn versus Minister of Food [1948] 2 All ER 1036** on the supply of goods falling within the agreed description and carrying of risk and responsibility for goods duly delivered and received.

He submitted that the Respondent assumed full responsibility and invariably risk for the goods when he received them freely according to exhibit P1, the delivery note as evidence of receipt and carried them away and did not return them to the Appellant's premises as alleged. It is DW2 the veterinary Dr who advised the Respondent to protect the chicks by taking them to the Appellant's stores and having them placed under a fan with a view to saving them from suffocation occasioned as a result of the Respondents own mishandling of the goods. This was after the Respondent's explanation on telephone to the doctor. According to section 34 of the Sale of Goods Act, the Respondent was accorded the opportunity to examine the chicks before

taking delivery of them which he did. PW1 testified that he looked at the different boxes and both had black and brown chicks and allegedly some of them were not immunised.

The trial Magistrate believed that the goods had not been taken. Counsel reviewed the evidence and concluded that the grounds should succeed on the basis of the evidence that the Respondent took the goods.

Ground 5

Having wrongfully ordered for a refund of Uganda shillings 5, 232,000/= with interest to the Respondent, the learned trial Magistrate grade 1 erred when she condemned the Appellant to pay general damages of Uganda shillings 8,000,000/= with interest, which award constituted an error in principle.

The Appellant's Counsel maintains that the Respondent concocted and set up a case to disclaim liability. In the premises the order for refund of Uganda shillings 5,232,000/= was erroneous. Similarly the award of general damages and costs of the suit was informed by the clearly fabricated case and should not be allowed to stand. It ought to be set aside. In the **Crown Beverages Limited vs. Central [2006] 2 EA 43** the Supreme Court of Uganda held that an appellate court will not interfere with the award of damages by the trial court unless the court acted upon wrong principles of law or the amount awarded was so large or so low as to make it an entirely erroneous estimate of the damages to which the Plaintiff was entitled

The basis for the award of general damages was that the Respondent suffered loss as a result of the Appellant's alleged breach of contract. The finding of breach is muddled with falsehoods, inconsistencies and contradictions which at the very least were fabricated. In the premises the court ought to interfere with the award by setting it wholly aside. The Appellant prays that the judgment, decree and orders of the lower court are set aside and substituted with an order dismissing the suit with costs.

The Respondent's written reply

The Respondent opposed the appeal and relies on the record of proceedings and judgment on record. The gist of the case is that the Plaintiff and his witnesses testified in court that the

Plaintiff entered into an agreement with the Respondent for the purchase of chicks. The Plaintiff tendered before court the documents he got from the Appellant. The issue before the lower court and this court is whether the Plaintiff who is now the Respondent took possession of the chicks so purchased from the Appellant. The Respondent and his witnesses testified that the chicks were never taken as argued by the Appellant.

DW1 one Harriet Ajambo Ouma testified that she was that the workplace on 20 December 2012 and she never saw the Respondent receiving the chicks. This evidence corroborates the evidence of the Respondent that the goods were never delivered to him.

Secondly in the cross examination testimony of DW 3, the Respondent left with the birds. She told court that she did not see what means the Respondent used to take the birds. This evidence corroborates the evidence of the Respondent and his witnesses that the birds were never inspected by the Respondent and the same was never taken.

With regard to this submission of the Appellant's Counsel that the contract between the parties was in writing and affected by the provisions of sections 91 and 94 of The Evidence Act, section 92 (b) provides that oral evidence can be admitted where the document is silent on any matter. Exhibit P1 relied upon by the Respondent did not cover all the matters that the parties agreed upon. The said section 10 (2) of the Contract Act 2010 provides that the contract may be oral or written or may be implied from the conduct of the parties. He submitted that the consideration of oral evidence by the learned trial Magistrate do not prejudice the Appellant. The Appellant had the opportunity and indeed cross examined the Respondent and his witnesses on the oral evidence. The Appellant and its Counsel never raised objections at the lower court which was being raised in this court so as to enable the trial Magistrate pronounce herself on that evidence.

The trial Magistrate properly addressed her mind to the law and facts before the court and rightly reached the decision in favour of the Respondent. The Appellant has not raised sufficient grounds to warrant interference with the award of the learned trial Magistrate by this court. He prayed that the court be pleased to dismiss the appeal with costs to the Respondent and that the court should uphold the judgment of the trial Magistrate.

Appellant's submissions in rejoinder

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In rejoinder the Appellant's Counsel submitted that the Respondent admits that there was an agreement and that there were documents involved. He submitted that there were matters which were not covered by the documents agreed upon but does not mention what those matters are.

DW1 testified that she was a Cashier and not involved in the actual issuance of checks. That she did not see the Respondent taking away his goods is of no consequence. She was inside the premises to receive money.

Similarly that DW3 did not see the means the Respondent used to take the checks is also of no value to the arguments in this appeal. She testified that she served twelve other customers. The Respondent was the first to be served. In the circumstances the fact that she did not see the means used to take delivery of the goods should not be surprising because she could have got busy with other customers. There is therefore no corroboration of the Respondent's evidence by the Appellant in the manner submitted on.

The Respondent Counsel submitted that the Appellant never objected to the Respondent's testimony. It is a fact at page 27 of the record of appeal that the Appellant's Counsel raised an objection in respect to the departure from pleadings. Lastly the objection against the oral testimony is not whether it did or did not prejudice the Appellant. The objection is based on clear provisions of law of evidence and it is to the effect that the Respondent cannot vary the terms of a document which he admits. In the premises Counsel prayed that the appeal is allowed and the suit dismissed with costs in the appeal and in the lower court.

Judgment

I have carefully considered the Memorandum of Appeal, the record of appeal as well as the pleadings and judgment of the trial Magistrate.

Grounds 1 and 2 of the Memorandum of Appeal deal with points of law. The first one being that there was a written contract between the parties which were at variance with the oral testimony of the Respondent and which were relied upon by the trial Magistrate erroneously. The second ground deals with upholding of the case by the trial Magistrate which departed from the Plaintiff's plaint contrary to the law on pleadings and leading of evidence to prove what is

pleaded. The other three grounds deal with evaluation of evidence as to whether as a matter of fact the Respondent took possession of the goods, the subject matter of the suit. Secondly there is a question to be considered of whether the award of the trial Magistrate should be set aside.

I will start with grounds one and two which grounds are whether the learned trial Magistrate grade 1 erred when she held that the contract between the Appellant and the Respondent was oral. The second ground is whether the learned Magistrate erred in law in permitting the Plaintiff to present a case which was in departure from the pleadings of the Respondent.

Whether or not there was a contract in writing or orally, it is an agreed fact at page 20 of the record giving the agreed facts of the parties in the joint scheduling memorandum that the Plaintiff paid Uganda shillings 5,232,000/= to the Defendant for the purchase of day old chicks. In other words there was an agreement for the supply of day-old-chicks. Secondly the Respondent paid Uganda shillings 5,232,000/=. The Appellant's Counsel submitted on the basis of the chicks booking receipt dated 20th of November 2012 exhibit P X1. At page 61 of the record of proceedings that the chicks booking receipt is dated 20th of November 2012. It shows that the Appellant received from the Respondent Uganda shillings 5,232,000/= being payment for Uganda shillings 2500 for day-old chicks at a price of Uganda shillings 2350 each. In small letters at the bottom it is written that:

"Cash is not refundable and all orders for supply at a future date are subject to the conditions that the supplier has poultry or other products for sale at such date and no claim shall lie against the supplier for failure to supply in time."

There is a handwritten note the following words on exhibit P X1: "taken 2226 LRYs +44 bonus". The second exhibit is also marked P X1 and is indicated as an invoice/delivery note. It shows the booking/order dated to be 20 November 2012 and the collection date to be 20 December 2012. The amount paid is Uganda shillings 5,231,100/=. It gives the booking details. Below it is written that the goods have been received in good order and condition.

In the plaint the Plaintiff's claim against the Defendant/Appellant is for recovery of Uganda shillings 5,232,000/= only, general damages and costs of the suit. The Plaintiff alleges that on 20 November 2012 he paid to the Defendant Uganda shillings 5,232,000/= only as the purchase

price for 2226 day-old chicks +44 chicks. The plaintiff annexed the photocopy of the receipt as annexure "A" and the delivery note as annexure "B". These are exhibits P X1 and P X2.

Whereas the contract between the parties can be discerned from the documentation issued by the Appellant, there is no specific written agreement endorsed by both parties.

As far as ground number 1 of the Memorandum of Appeal is concerned the learned trial Magistrate considered the two issues agreed upon namely whether there was breach of contract and secondly what remedies are available to the parties. I do not see the relevance of the issue of whether there was a written agreement between the parties or an oral contract because there is no dispute that there was a contract between the parties and the issue ought to have been what the terms of the contract were. That notwithstanding the finding of the learned trial Magistrate can be found at page 4 of the judgment of the court and paragraph 2 thereof where she held after considering the evidence between pages 2 and 3 of the judgment, that from the evidence adduced, it is not disputed that there was an oral contract between the parties. The terms in the exhibits are admitted because they are the Plaintiffs documents.

Section 2 of The Contract Act 2010 defines an agreement to mean a promise or a set of promises forming the consideration for each other. Secondly it defines a "contract" to mean "an agreement enforceable by law as defined in section 10. Section 10 (1) of the Contracts Act 2010 provides that a contract is an agreement made with the free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound. Secondly it provides under section 10 (2) that a contract may be oral or written or partly oral and partly written and may be implied from the conduct of the parties. Last but not least it defines when a contract is in writing. In other words the question is what is a written contract?

Section 10 (3) of The Contracts Act 2010 provides that a contract is in writing where it is in the form of a data message, when it is accessible in a manner usable for subsequent reference; and is otherwise in words. Finally it provides that the contract the subject matter of which exceeds 25 currency points shall be in writing (see subsection (5) of section 10).

Consequently a contract may be oral or in writing or partly oral and partly in writing or it may be implied from the conduct of the parties. By holding that there was an oral contract, the learned

trial Magistrate did not have a written agreement between the parties. By definition section 10 (1) of the Contracts Act, Act 7 of 2010 clearly provides that a contract is an agreement made with the free consent of the parties with capacity to contract. In other words it has to be between two or more parties and cannot be a unilateral document issued by one of the parties. In the premises P X1 the original of which has been admitted is clearly a “chicks’ bookings receipt” issued by the Appellant and signed by the Appellant. There is no provision for a signature of the Respondent. It merely provides that it is received with thanks from the Respondent the sum of money being payment for a certain number of layers. Secondly the invoice/delivery note is merely evidence that the goods had been received and endorsed by the person who received it. The two documents are evidence of a contractual relationship between the parties. The other terms of the relationship are not in evidence. One document is a receipt and the other document is a delivery note. It is clearly evidence that there is a contractual relationship between the parties but does not specify all the terms of that relationship. Going by the definition under section 10 cited above the trial Magistrate cannot be faulted for holding that there was an oral contract between the parties. In any case a contract can be implied from the two documents.

A unilaterally issued document may be evidence of the terms of a contract but it is not necessarily the agreement constituting the written or oral contract itself. I considered a similar matter in **Rapid Shipping and Freight Uganda Ltd and Rapid Freight International LLC vs. Copy Line Limited HCMA No 216 OF 2012 (arising from HCCS No. 349 of 2010)** where I quoted the law as discussed in Halsbury’s Laws of England and in PS Atiyah in **An Introduction to the Law of Contract** and I wrote:

“In **Halsbury’s laws of England volume 9** (1) 4th edition (reissue) paragraph 601 it is written that it may be impossible to give one absolute and universally correct definition of a contract though it is commonly accepted that it is a promise or a set of promises which the law will enforce. The expression "contract" may be used to describe (1) the series of promises or acts themselves constituting the contract; (2) the document or documents constituting or evidencing the series of promises or acts, or their performance; (3) the legal relations resulting from that series. To constitute a valid contract there must be two or more separate and definite parties to the contract. Those parties must be in

agreement in that they must be consensus on specific matters. They must intend to create legal relations in the sense that the promise of each side are to be enforceable simply because they are contractual promises and lastly the promises of each side must be supported by consideration by some other factor which the law considers sufficient. According to PS Atiyah in **An Introduction to the Law of Contract** fifth edition Clarendon press Oxford at page 185: "*Where a written document is relied upon by one party as representing the contract, but this document has not been signed by the Defendant, it is more difficult to determine whether its contents should be treated as embodying contractual terms. In principle it must be shown that such a document has been accepted by both parties as the basis of the contract.*" The author further notes that an illustration is a group of cases called "ticket cases..." where one party offers to contract upon certain written terms, often contained or referred to in the ticket of some kind and there is no doubt that the contract has in fact been concluded but there is doubt whether the terms have been accepted by the other party, it must be shown inter alia that sufficient notice was given of those terms.

That is the situation in this case. A receipt and delivery note were issued by the Appellant to the Respondent but the terms upon which they were issued is not in evidence and may be taken to be oral. This is usually the case for instance with bills of lading. According to Atiyah (Supra) at page 186 an agreement for the carriage of goods by sea is almost invariably recorded in the bill of lading which contains standardised, internationally agreed terms.

"But in practice an oral agreement for the carriage of particular goods on a particular ship will usually be made in advance, often by telephone; indeed the Bill of lading is not usually issued until after the goods have been loaded."

I also quoted in **Rapid Shipping and Freight Uganda Ltd and Rapid Freight International LLC vs. Copy Line Limited HCMA No 216 OF 2012 (arising from HCCS No. 349 of 2010)** the case of **S.S. Ardennes (Owner of Cargo) v. S.S. Ardennes (Owners) [1950] 2 ALL ER 517** the holding of Lord Goddard CJ held that a bill of lading is not in itself the contract between the ship owner and the shipper at page 519 when he said:

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“It is, I think, well settled that a bill of lading is not, in itself, the contract between the ship-owner and the shipper of goods, though it has been said to be excellent evidence of its terms ... The contract has come into existence before the bill of lading is signed.”

Was there a contract in this appeal before the receipt and delivery notes were issued? Considering the nature of the documents of a receipt and delivery note as issued, it can validly be concluded that a relationship subsisted between the parties before the said documents were issued. In fact the evidence shows that the Plaintiff who is the Respondent to this appeal had on previous occasions also purchased chicks from the Appellant. Furthermore from the authorities the discussion is that the document issued by one of the parties may contain contractual terms but the contract itself may be established elsewhere. In this appeal and the suit from which it arises there no evidence of a written contract between the parties and the conclusion of the trial Magistrate that there was an oral contract between the parties was reasonable and based on the evidence. Where there is no oral evidence the contract can still be implied. In either case the issue to be considered as I noted earlier is what the terms of the contract are.

In any case I do not see what prejudice the Appellant suffered as the trial Magistrate admitted the receipt and delivery note in evidence. The issue as to whether the learned trial Magistrate considered the documents as containing evidence should not in itself invalidate her finding as to whether there was an oral contract. Finally the finding that there was an oral contract is supported by the evidence of PW1 at pages 26 last paragraph at the bottom and page 27 and first paragraph at the top of the record. PW1 the Plaintiff/Respondent to the appeal testified as follows:

“I know the Defendant. I have bought poultry from them before. On 20/11/2012 I was in Kampala, Arua Park, I went to the Defendant company and I was told that each chick is 2,500/=. We negotiated and I was told that each box contained 100 chicks with an addition of 10 chicks, to make them 110 chicks. After negotiation for the chicks and I obtained a receipt dated 20/11/2012, collecting date 20/12/12, I paid the Ugx 5,232,000/=”

He further testified after the receipt and invoice were tendered in and marked as PXI as follows:

When I came to pick the chicks (2500) and I was to get 2750 since every box of 100, I would get a bonus of 10 chicks. On the date of collection, I was told to sign on the invoice which I did ...”

The parties orally negotiated for the price of each chick and the Plaintiff was issued with a receipt. The receipt itself is a unilateral document executed by the Appellant and is not an agreement though it contains some of the terms testified about by PW1 such as having day-old-chicks at 2,500 Uganda shillings each layers at Uganda shillings 2,350. It also contains the date of collection. Because PXI the receipt entitled chick booking receipt is a unilateral; document the contract of the parties preceded the making of the receipts and was only confirmed by the receipt.

In the premises ground number 1 of the appeal has no merit and is answered in the negative.

Ground Number 2 deals with departure from pleadings. The issue is whether the trial court took into account material evidence which departed from the pleadings of the Defendant and whether this affected the decision of the court.

In the written submissions learned Counsel for the Appellant dwelt on the submission that the Plaintiff changed his case when he testified that there was no vehicle on which the chicks were loaded and that he did not take the chicks. The Appellant’s case is that the Respondent took delivery of the chicks. Counsel submitted that in paragraph 3 (b) of the plaint it is averred that the chicks were loaded into a motor vehicle that is when they got sick. I have carefully reviewed the judgment of the trial Magistrate. The issue for consideration is whether she took into account evidence which contradicts the Plaintiff’s Plaint. The Blanket issue under which the evidence was discussed by the trial court is “whether there was breach of contract”. The issue presupposes that there was a contract between the parties. In considering the submissions of the parties the trial court noted that the Plaintiff’s case was that he did not take possession of the goods. Secondly some of the chicks died on the Defendant/Appellant’s premises. The Appellant/Defendants case was that the Plaintiff had opportunity to examine the chicks and ascertain whether they were fit for the purpose and he took delivery thereof. The other submissions were on matters of law.

The trial court recorded at page 3 of the judgment submissions of the Defendant's Counsel that the Plaintiff returned the chicks to the Defendant's premises hours later and on the advice of the Veterinary Doctor of the Defendant.

It is therefore the Defendant's evidence that Plaintiff took delivery of the goods and returned the goods subsequently and upon advice of the Defendant's veterinary doctor.

The learned trial Magistrate also considered submissions between pages 3 and 4 of her judgment on departure from the pleadings in terms of price of each chick. The learned trial Magistrate also referred to other departures or inconsistencies with pleadings but did not name them. She is deemed to be referring to submissions on record and was stating the gist of the Defendant's submission and these contradictions are mentioned at pages 4, 5 and 6 of the written submissions of the Defendant's Counsel and are deemed to have been referred to by the trial Court. I must repeat that the matter for consideration is whether the trial court considered the submissions of the Defendant's Counsel or whether she permitted the Plaintiff to present a different case from the pleadings.

The conclusion of the trial court on the summary of evidence is at page 7 of the judgment. It is held therein that "where goods have been delivered to a buyer who has not previously examined them; the buyer is not deemed to have accepted them until he has had reasonable opportunity of examining them to ascertain their conformity to the contract". This conclusion of the trial court did not accept per se the evidence that the Plaintiff did not take delivery but relies on the legal doctrine on the issue of whether the Plaintiff is deemed to have accepted the goods upon delivery thereof.

Secondly the learned Magistrate held that the Plaintiff did not have a reasonable opportunity to inspect the chicks and the learned trial Magistrate held as follows:

"When he realised the defect in the chicks upon inspection, he was right to reject the same."

The finding does not depend on the issue of whether the chicks had first been delivered to the Plaintiff or not. The point on departure from the pleadings pins the Plaintiff to the pleading that

he took delivery of the goods. Secondly it is partly the basis for the Defendant's conclusion that the Plaintiffs evidence was fabricated and a lie. Nonetheless the legal doctrine on rejection of goods can be considered on the merits even if the Plaintiff had taken the goods and later rejected and returned them back to the Defendant.

The duty of a first appellate court in evaluation of evidence was considered by the Supreme Court of Uganda in the case of **Ephraim versus Francis SCCA No. 10 of 1987** where Odoki J held at page 6 of his judgment that the duty of the first appellate Court which is well settled is to re consider and evaluate the evidence, and come to its own conclusions. The Supreme Court followed an earlier case of **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123** and specifically the holding of Sir Clement De Lestang Vice-President at page 126 about the duty of a first appellate court that:

" Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."
(Emphasis added)

The issue is whether the alleged error of the trial court, if corrected, is strong enough to have changed the conclusion of the trial court. Secondly in the case of re-evaluation of evidence there are some cardinal principles to be followed and the jurisdiction to overturn a trial judge's finding of fact or conclusions is to be exercised cautiously and sparingly. The principles for evaluation of evidence at the first appellate level apply to both civil and criminal proceedings. In the East African Court of Appeal case of **Peters v Sunday Post Limited [1958] 1 EA 424**, the cardinal principles for re-evaluation of evidence were quoted with approval from the decision of the House of Lords in **Watt v. Thomas [1947] A.C. 484**. The cardinal principles flow from the judgment of Viscount Simon, L.C. and other Lord Justices of the House of Lords quoted therein and I have tried to pick the gist hereunder. They are firstly that this jurisdiction should be

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exercised with caution and it is a matter of law that if there is no evidence to support a particular conclusion of the trial court, the Appellate Court should not hesitate to overturn it. Secondly if the evidence considered as a whole “can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight”. The principle is based on the advantage the judge had in hearing and observing the witnesses at first hand. An appellate court deals with printed evidence and does not have the advantages the trial judge had. Lord Thankerton added that the appellate court can take a different view on the ground that the reasons given by the trial judge are not satisfactory and that the judge did not take proper advantage of the evidence before him or her. The value of having heard and seen the witness would vary according to the circumstances of each case. Last but not least Lord Macmillan inter alia held that the judgment of the trial court can be demonstrated from the printed evidence to be affected by material inconsistencies or the trial judge can be shown to have failed to appreciate the weight of evidence or to have plainly gone wrong.

Was the conclusion of the trial Magistrate wrong in terms of whether the Plaintiff rightly rejected the goods in the facts and circumstances of the case? My conclusion is that the submission that the court allowed the Plaintiff to depart from his pleading has no bearing on the conclusion the trial court reached and the decision of the trial court can be evaluated on the basis of the evidence and according to the principles cited in **Watt v. Thomas [1947] A.C. 484**. Furthermore there is no evidence to suggest that the trial Magistrate concluded that the Plaintiff did not take delivery of the goods in contradiction to paragraph 3 (b) of the plaint. Last but not least the trial Magistrate had the advantage of considering contradictory evidence on the issue of delivery of the goods and assessing the demeanour of the witnesses. The trial judge concluded that PW1 was truthful. This was after she took note of the different witness testimonies on the question of delivery to the Plaintiff. Whether the goods were handed over to the Plaintiff and later returned does not affect her conclusion that the Plaintiff rejected the goods.

The primary contention on a matter of evidence is whether the Plaintiff loaded the chicks in his truck. He testified that he did not take the chicks away and later when they started dying he reported the matter to the police. He denied in cross examination that the chicks were loaded on a truck. He did not deny having signed the delivery note. PW2 ASP Mugabi Ronald received a complaint from the Plaintiff about his chicks. He filed a witness statement and was cross examined. He testified that he found at the Defendant's premises three boxes of chicks. Some were dying and others were dead. He took a photo thereof with his phone camera.

PW3 was supposed to pick the chicks also testified that the Plaintiff never picked the chicks.

The Defendant's witnesses on the other hand testified that the Plaintiff collected his birds after signing the delivery note thereof and later brought them back. Some of the birds were dead and others survived. There are different versions of what actually happened in terms of whether some birds survived and were taken back to Mukono.

As far as ground two of the Memorandum of Appeal is concerned, apart from arguing that the Plaintiff contradicted his averment in paragraph 3 (b) of the plaint of having loaded the birds, the learned Magistrate did not permit a departure from the pleadings. The Plaintiff clearly avers that the chicks got sick and were returned to the Defendant's stores. Secondly the trial Magistrate did not consider in detail the issue of the Plaintiff taking delivery of the goods but dwelt on the fact of rejection of the goods and legal doctrine thereon. Ground two of the Memorandum of Appeal lacks merit and is answered in the negative.

Ground 3 is that the learned trial Magistrate erred in law and fact when she held that the Plaintiff was not accorded any opportunity to examine the chicks and that he therefore never took delivery thereof.

In ground 4 it is averred that the learned trial Magistrate failed to properly evaluate and appreciate the party's evidence on record and accordingly her decision on liability was against the weight of evidence.

I have carefully considered the arguments of the Appellant's Counsel on the two grounds. On ground three his submission is that the Respondent took possession of the chicks after he had

examined them and was able to come to the conclusion that they were not immunised and also note the colours of the chicks. The gist of the Appellant's case is that the birds died because of mishandling by the Respondent according to the evidence. His submissions were that the goods were appropriated to the contract and risk passed to the buyer. Secondly the goods were delivered at the premises of the Appellant to the buyer who took delivery thereof but later returned them.

Ground four substantially relies on the arguments in grounds 1, 2 and 3 of the Memorandum of Appeal. The Respondent's submissions are that the trial Magistrate properly addressed her mind to the law and facts before the court and rightly reached the conclusion in favour of the Respondent. The obvious question is what was this conclusion? The judgment of the court commences at page 76 of the record of proceedings and specifically the ruling of the court on the matter is as follows:

"It is the law that where goods have been delivered to the buyer who had not previously examined them; the buyer is not deemed to have accepted them until he has had a reasonable opportunity of examining them to ascertain the conformity with the contract. The authority of *Gouster Enterprises Ltd versus Ouma SCCA No. 8 of 2008* is instructive.

I noted the demeanour of the Plaintiff as he testified. He impressed me as a candid, frank and a truthful witness on the one hand; although there are times he broke down and cried, he stated that it was the pain, suffering and loss he had encountered as a result inclusive of the accident he suffered. It must be noted however that the accident was not a direct result of the transaction the Plaintiff had with the Defendant and has no implication on the case now before me. That is all I will say about it.

Clearly, the above evidence shows that the Plaintiff had not accepted the chicks as he had not had a reasonable opportunity to inspect and ascertain for himself the contents of his order and when he realised the defect in the chicks upon inspection, he was right to reject the same.

Given the above chronology of events; I have seen no reason to doubt his evidence at all. It shows very clearly that the Defendant was to blame for the defects in the contract. I am of the considered opinion that the Plaintiff has made out his case in as far as there is overwhelming evidence that he did not ever take away the chicks from the Defendant's premises and he was never offered an opportunity to inspect the birds so as to ascertain whether they were in good condition at the time they were given to him. As such, issue one is answered in the affirmative."

The conclusion of the trial Magistrate is based on two findings of fact. The first finding of fact is that the Plaintiff never took the birds from the premises. Secondly the trial court held that the Plaintiff was not offered an opportunity to inspect the birds.

The conclusion that the Plaintiff never took the birds from the premises is at variance with the delivery note and the law that delivery occurs at the premises of the seller under section 29 (2) of the Sale of Goods Act. It was sufficient from the documentary evidence to reach the conclusion that the goods had been delivered to the buyer when he signed the delivery note exhibited. There is some confusion and conflict as to whether the Plaintiff actually took the goods away from the premises and only later on returned them after experiencing some problems with them. The trial Magistrate obviously believed the Plaintiff's testimony. The testimony is in conflict with the testimony of DW1, DW2 and DW3. I have considered the submission that the belief of the trial Magistrate is at variance with paragraph 3 (b) of the plaint. In this particular paragraph avers as follows:

"On 20 December 2012 the Plaintiff came to collect the said chicks and when the same was loaded onto the motor vehicle the chicks got sick and the same was returned to the Defendant stores. A photocopy of the photos is attached as annexure "C".

It is not true as submitted by the Appellant's Counsel that the averment is that the birds had left the premises. The averment is that the goods had been loaded onto the motor vehicle. Then they were returned. It is the Defendant's evidence that the Plaintiff took delivery of the goods and left with the goods. The submissions of the Appellants Counsel are really problematic in light of the written statement of defence and paragraph 4 thereof at page 14 of the record of proceedings. In

paragraph 4 and in answer to paragraph 3 (b) and (c) of the plaint the Defendant averred in the written statement of defence as follows:

“In answer to paragraph 3 (b) and (c) of the Plaint, the Defendant shall aver that the Plaintiff made a booking of day old chicks, paid for them and took delivery in strict compliance with the procedure for their sale given their fragility. The Defendant assumed full responsibility for the chicks, carried them away and did not return them to the Defendant’s premises as alleged. Copies of the Chick Booking Receipt and the invoice/Delivery Note are attached hereto and marked “B1” and “B2” respectively”.

In the defence the Plaintiff never returned the goods. Order 6 rule 6 of the Civil Procedure Rules provides that the Plaintiff or the Defendant as the case may be:

“... shall raise by his or her pleadings all matters which show the action or counterclaim not to be maintainable or that the transaction is either void or voidable in point of law and all such grounds of defence or reply as the case may be, if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Limitation Act, release, payment, performance, or facts, showing illegality either by statute or common law.”

In paragraph 6 the Defendant averred that:

“In answer to paragraph 3 as a whole, 4 and 5 of the Plaint, the Defendant avers that it carried out the transaction with the Plaintiff in accordance with the established usage and the Plaintiff clearly understood the available procedures in respect of any returned dead chicks.”

What did the Defendant mean in averring that the Plaintiff did not return the chicks to the Defendant’s premises as alleged? Paragraph 6 merely avers that the Plaintiff knew the procedure for returned dead chicks. In fact at variance with the pleading in paragraph 4 of the WSD where it is averred that the chicks were not returned, DW1 Ajambo Harriet testified in her written evidence in paragraph 9 thereof that at 4.30 pm she had been called by the veterinary doctor that the Plaintiff was in Kyengera and in paragraph 10 thereof she testified that the Plaintiff returned

and placed the chicks outside the office at around 5.30 pm. In paragraph 11 she testified that they did not allow him in on the ground that he took healthy chicks and assumed full responsibility for them. In paragraph 12 she testified that their veterinary doctor requested them to take the chicks in for purposes of saving them from suffocation. They were taken in. Some birds looked sickly and some were on the verge of dying. In cross examination testimony she did not remember how many chicks there were. She however testified that the veterinary doctor did not come. They left the live chicks at the office and they died the following day. In re-examination she testified that the dead birds were taken to the farm the following morning.

DW2 the veterinary doctor Dr. Prossy Kibirango (the gender is not specified in the witness statement or record and I assume she is a female on the basis of the name Prossy) testified that the chicks were taken when in good health. The chicks were released to the Plaintiff at around 8.30 am. Sometime later (Time not specified) she saw the Plaintiff load the chicks on a wooden cart and he went off. The Plaintiff called her at 4.30 pm when she was out of the Defendant's premises upon realising that the chicks were dying. By that time the Plaintiff was reportedly in a bus. She advised the Plaintiff to bring the live chicks back to the office to place them under favourable conditions. She thought if the Plaintiffs threw the chicks on the road as he threatened to do so on phone, it would cause embarrassment to the Defendant Company which had the boxes in which the chicks were branded with the Defendant's marks. She corroborated the testimony of DW1 that she requested DW1 to have the chicks back after calling her. She went to the Defendant's offices the next day. The Plaintiff refused to take back his chicks even the ones which had survived. 400 chicks had survived. They eventually died in the Defendant's offices. DW3 did not witness the Plaintiff taking or bringing back the goods.

In the premises the evidence is that the Plaintiff brought back the goods. Some of the day old chicks were already dead while some of them were not in a good condition health wise. In fact some of the day old chicks survived after the intervention of the Defendant's servants. On a question of fact, this evidence is at variance with the averment of the Defendant in paragraph 4 of the written statement of defence that the Plaintiff paid for day old chicks, took delivery thereof and did not bring them back to the Defendant's premises as alleged. The day old chicks were

brought back to the Defendant's premises. The Plaintiff rejected the goods as a matter of fact and this is confirmed by the testimonies of PW1 as well as PW2, DW1 and DW2.

In other words there is overwhelming evidence that some of the chicks were taken back in. Some had died. The number which died was not established. The trial court assessed the evidence and believed the Plaintiffs version of the facts. The evidence that the Plaintiff was in Kyengera can only be verified from the Plaintiff. DW2 the veterinary doctor reported that the Plaintiff called her when he was in Kyengera. What is common in all the testimony is that the goods were returned to the Defendant's place of delivery of the goods. It is further unchallenged evidence that the Plaintiff reported the matter to the police. Secondly the chicks had started dying.

Obviously this appeal and the suit in the lower court is about who should bear the loss.

It is a matter of fact that the chicks were received back and in fact some of the chicks were revived. The doctor testified that only 400 chicks survived. The Plaintiff had taken delivery of 2226+44 birds or day-old chicks. Secondly this day-old chicks had been brought to the Defendant's premises from yet another place in Mukono. The decision of the court turned on the finding that the Plaintiff had rejected the goods. Finally the issue is whether the conclusion of the trial court is supported by the evidence and the law. In other words the narrower issue should be whether the Plaintiff was entitled to reject the goods.

Last but not least the Appellant depends on the averment that risk in the goods passed over to the Respondent when he took delivery of the goods. There is however no averment in the defence as to whether the Plaintiff was negligent in handling the goods.

The decision of the trial Magistrate rested on the finding that the Plaintiff did not have an opportunity to examine and accept the goods. I am satisfied that the Plaintiff took possession of the goods and this is supported by the documentary evidence in which he signed the delivery note. However he brought back the goods and the Defendant's officials initially refused to have them back but later on the advice of the vet Dr received the goods back from the Plaintiff. Some of the goods were damaged because some day-old chicks had already died. The remainder of the chicks died in the custody of the Defendant.

The Appellant's case is premised on the passing of risk with the property upon delivery of the property to the Plaintiff. I am mindful of the fact that these were day-old chicks. The vet Dr was not around when the day-old chicks were returned. She came back the next day. The Plaintiff abandoned the day-old chicks in the care of the Defendant. I am specifically interested in the testimony of DW1 Ms Harriet Ajambo who never give a clear fact as to how many day-old chicks were received back and how many had died at the point of receiving and at the Defendants premises in her testimony in chief. In cross examination she testified that she did not remember how many chicks there were. She confirmed that the Plaintiff brought the boxes back (with the chicks inside). Some of the birds were dying and others were trying to live. She confirmed that the Plaintiff left the day-old chicks at the Defendant's premises. The dead day-old chicks were taken to the farm and thrown away. Apparently the live birds were left at the Defendant's premises overnight. They also eventually died.

I agree with the Appellant's submissions that the Respondent indeed took possession of the property. Had it been any other kind of property that would have been the end of the matter but the goods were day old chicks according to their description and fragile by the Defendant pleadings. By the time of the order they were unascertained goods except for their description in exhibit PX1 as day old chicks and layers. I note that the chicks kept on dying even after they had been brought back seemingly into more professional hands. The ones which reportedly survived the resuscitation effort of the Defendant's officials also later died. Not all survived the effort. DW2 the Vet saw them the next day. She testified in cross examination that the Respondent was a customer of the Appellant for 10 years and he never had a problem of this nature before. The chicks he took this time round were in good condition. All boxes were returned but the chicks had died. 400 birds survived but they also eventually died. The Vet was not around and her testimony is hearsay about how many were brought back. DW1 who was there and who was the one who communicated with the Vet did not know the number. Secondly in cross examination The Vet testified that the chicks died of suffocation (Including the ones which had survived).

I further find it inconceivable to infer that the Plaintiff whose chicks had already been parked in boxes by the Defendant could have examined them individually to ascertain that they were fit for the purpose. He could only examine them in their boxes. Was he even qualified to tell whether

the chicks had a problem or not? Secondly the cause of suffocation is not in evidence. How were the chicks mishandled? There is no evidence. It is only the Defendant's vet who could tell from a professional point of view. The Plaintiff had been dealing in the business of chicks for 10 years and he had no problem before. In paragraph 16 the Vet testified that on being told on phone that the Defendant's officials had rejected the chicks being brought back, she begged DW1 to have them back because she realised they were dying of suffocation. They were to be unpacked and spread out under a fan. In paragraph 18 she notes that she went to check the chicks the following day and only 400 had survived. The Plaintiff did not heed her advice to take the 400 and make a fresh booking for more. The chicks kept at the office eventually withered away and died the following day. In paragraph 22 of her written testimony she testified that the chicks died of suffocation and also heat.

It is my conclusion on matters of fact that the Plaintiff ordered for 2,500 DOC (day of chicks) but eventually took 2,226+ 44 owing to the amount of money he had. He took them but returned them the same day because he realised the chicks had a problem and were dying. The trial Magistrate believed the testimony of the Plaintiff/Respondent to this appeal and I cannot disturb her findings of fact. Was the Plaintiff justified in rejecting the goods? Most importantly the Defendant did receive back the chicks. The exact number received and which died after receipt is unknown. However all boxes were returned and some unspecified number of chicks had died. It is unknown from the record how many died after being brought back because DW1 testified that some were dying and some were struggling to survive. Secondly the Plaintiff did not accept to take the chicks back and they remained in the possession of the Defendant's officials who eventually took them to their farm after they died. Some died in possession of the Defendant's officials.

Because the Defendants official's accepted rightly or erroneously the goods back they are barred by the doctrine of estoppels from insisting that risk passed on to the Plaintiff. The circumstances are that DW2 the Vet Officer accepted the chicks back and the Plaintiff refused to take the surviving chicks which also died in the Defendant's possession.

I rely on the principles laid on in the East African Court of Appeal case of **Peters v Sunday Post Limited [1958] 1 EA 424**, that:

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“where the evidence considered as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight”.

The trial Magistrate had conflicting evidence on some issues and believed the Plaintiff.

Secondly the evidence discloses acquiescence of the Defendant’s officials in receiving the chicks back and trying to revive them. This was not a mere humanitarian act but an acceptance of responsibility for the welfare of the chicks. According to **Stroud's Judicial Dictionary of Words and Phrases, Sweet and Maxwell 2000** edition the word “acquiescence”:

“ ... does not mean simply an active intelligent consent, but will be implied if a person is content not to oppose irregular acts which he knows are being done...

If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

... the proper sense of the term 'acquiescence', and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct"

According to **Halsbury’s Laws of England, 3rd Edition, Volume 14** page 638:

“It is acquiescence in such circumstances that assent may reasonably be inferred, and it is an instance of estoppel by words or conduct. Consequently, if the whole circumstances are proper for raising this estoppel, the party acquiescing cannot afterwards complain of the violation of his rights. For this purpose the lapse of time is of no importance, he is immediately estopped by his conduct ...”

The Defendant waived its rights to insist on the passing of risk in the property to the Respondent by accepting the chicks back and even trying to revive them. In the premises though there is substance in the law submitted by the Appellant's Counsel on the passing of risk, considering that these were day old chicks and their health status was not conclusively established, the conclusion of the learned trial Magistrate that the Plaintiff rejected the goods can be supported on other grounds and will not be disturbed. In the premises grounds 3 and 4 of the Memorandum of Appeal are answered in the negative.

Ground 5

Whether the order to refund shillings 5,232,000/= was wrongfully made and general damages of 8,000,000/= Shillings wrongfully awarded.

It is true that the Respondent lost all the 2226 + 44 chicks. He ought to have mitigated his loss by taking the 400 chicks which he had been offered to take back. He could have insisted on taking different birds but decided to abandon the whole project. In the premises the award of shillings 5,232,000/= shall be reduced by the costs of 400 chicks at the agreed price of 2,350 each amounting to 940,000/=. The award of shillings 5,232,000/= is accordingly reduced to Uganda shillings 4,292,000/=.

In the submissions of the Appellant the only basis for challenging the award of general damages is the award of special damages for breach of contract.

The award of general damages will be proportionately reduced because the special damages have been reduced by about a fifth and there is no other ground for challenging the award of general damages. I will therefore reduce the award of general damages by one fifth.

In the premises the award of general damages of 8,000,000/= Uganda shillings is reduced to Uganda shillings 6,400,000/=.

In the premises the Appellants appeal only partially succeeds on the issue of quantum. Grounds 1, 2, 3, and 4 lack merit and are dismissed with costs.

Ground 5 succeeds in part and the order of the trial Magistrate is substituted with the following orders,

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1. The Respondent/Plaintiff is awarded special damages of Uganda shillings 4,292,000/= only by way of refund.
2. The Plaintiff/Respondent is awarded Uganda shillings 6,400,000/= as general damages.
3. The above sums carry interest at the rate of 24% per annum from the date of Judgment in the lower court till payment in full.
4. The Respondent is awarded 4/5^{ths} of the costs of the appeal.
5. Costs of the lower court remain costs to the Plaintiff and are only affected by the quantum substituted above.

Judgment delivered in open court on the 18th of March 2016.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Bwayo Richard Counsel for the Appellant

Appellant's official absent

Respondent in Court

Respondent's counsel is absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

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Judge

18th March 2016