

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
*(CORAM: ODOKI, CJ, KATUREEBE, KITUMBA, TUMWESIGYE,
KISAAKYE JJ.S.C.)*

CIVIL APPEAL NO.02 OF 2012 BETWEEN

GODFREY OPUS:.....APPELLANT

AND

HARVEST FARM SEEDS LTD:.....RESPONDENT

*[Appeal from the decision of the Court of Appeal at Kampala (Byamugisha, Kavuma
and Nshimye JJA) dated 7th April, 2009, in Civil Appeal No. 66 of
2005]*

JUDGMENT OF KITUMBA JSC

This is a second appeal to this Court from the judgment of the Court of Appeal whereby the appeal by the respondent, Harvest Farm Seeds Ltd, against the judgment of the High Court was partially allowed. The cross-appeal by the appellant, Godfrey Opus, was dismissed.

By the judgment of the High Court, the respondent was to pay to the appellant, a sum of Ug.Shs One million five hundred thousand (1,500,000/=) as general damages and a commission amounting to Ug. Shs Two million four hundred seventy eight thousand two hundred fifty nine (2,478,259/=) with interest at 24% p.a from 14/06/2001 and costs of the suit. The judgment was set aside and instead the appellant was ordered by the Court of Appeal to pay to Godfrey Opus a commission amounting to Ug.Shs Two million four hundred seventy eight thousand two hundred fifty nine (2,478,259/=) with interest of 24% p.a. from 14/06/2001.

The cross -appeal by the appellant was dismissed. The appellant was ordered to pay the costs of the cross-appeal to the respondent.

The following is the background to this appeal:

In 2000 Harvest Farm Seeds Ltd, the respondent in the instant appeal, was in business of processing and packaging Agricultural Farm Seeds, in the industrial area Kampala with branches throughout the country.

On 12th June 2000, it employed the appellant as an area sales representative (Eastern Region)

In addition to his gross monthly pay of 263,000/=, he would earn a monthly commission of 1% of the gross sales he would make between 15-100mts. He would earn 1.5% commission if his sales of seeds exceeded 100mts a month.

Outside the terms of the appointment letter, the General Manager of the respondent, Mrs. Okot (PW1), requested the appellant to share the commission with others he would be working with in order to motivate them. It is not in dispute that during the sales session in question, 1% of the sales the appellant was entitled to as commission was shs, 2,478,259/=. If he had been paid then, by the above gentleman's agreement, he would have earned shs.433, 695, 35/=. It was the appellant's case that neither himself nor those he worked with were paid the said commission.

The appellant was dismissed from employment by the respondent on 10th March 2004 but was not paid any commission.

The appellant filed Civil Suit No. 447 of 2004 in the High Court against the respondent. The cause of action was breach of contract. The appellant claimed that as a sales representative of the respondent he was entitled to a commission as remuneration for work done on the basis of his appointment letter and contract of employment.

In its defence the respondent contended that a commission was payable only on sales which were completed. The appellant had been paid all that was due to him and there was no breach of contract. During the trial in the High Court only two issues were framed for determination namely:-

1. *How much commission was due and payable to the plaintiff?*

2. *What remedies were available to the plaintiff?*

Kiryabwire J held that the plaintiff/appellant had proved that he was entitled to a commission of Ug. Shs. 2,478,256/= which the respondent had not paid to him.

He entered judgment in his favour and ordered the respondent to ²⁰ pay to the appellant a commission amounting to Ug. Shs. 2,478,259/= and interest on the same at the rate of 24% p.a from 2001 until payment in full. The learned trial judge held that the respondent had breached the contract and awarded him general damages amounting to Ug. Shs 1,500,000/= and the costs of the ²⁵ suit.

The respondent was dissatisfied with the judgment of the learned trial judge and appealed to the Court of Appeal. The appellant also cross-appealed.

The respondent appealed to the Court of Appeal on the following four grounds

- 1. The learned judge erred in law when he failed to evaluate the evidence and as such came to wrong decisions.**
- 2. The learned judge erred in law and in fact when he awarded the Respondent /Plaintiffs the commission in excess of Ug. Shs. 433,695/=.**
- 3. The learned judge erred in law and in fact when he awarded the Plaintiff general damages of Ug. Shs. 1,500,000/= with interest.**
- 4. The learned judge erred in law and fact when he awarded the Respondent costs.**

The cross-appeal was on four grounds which were framed into two issues for determination by court.

- 1. Whether or not the cross appellant's/respondent was ²⁵ entitled to commission of 6 seasons and not only one.**
- 2. Whether or not the appellant had a duty to produce sales records in his custody.**

The learned Justices of Appeal found for the appellant on grounds 1 and 2 of the appeal. Regarding ground 3 the learned Justices of Appeal faulted the learned judge for awarding general damages on the ground that having awarded interest on the commission he went beyond putting the appellant in the position he would have been if there was no breach of contract. On ground 4 the Court of Appeal held that the appellant was not entitled to all the costs.

Regarding the cross - appeal the Court of Appeal held that the appellant had not produced evidence before court to prove his sales so as to get the commission claimed. The court further held that Rule 30 of the Court of Appeal Rules could not be used to allow the appellant to call additional evidence as his counsel had requested to do. In their view that was an afterthought.

The Court of Appeal made the following orders-

(a) That the judgment of the High Court is set aside and substituted in its place with judgment for the respondent (appellant) for Shs 2,478,259/= with interest at 24% p.a from the 14th June 2001.

(b) The respondent (who is the current appellant) was to have two thirds of the costs of appeal and in the court below.

(c) The appellant (who is current respondent) was to have costs of the cross- appeal.

Dissatisfied with the judgment of the Court of Appeal the appellant has filed his appeal to this court on three grounds which I will later reproduce in the judgment-

During the pre-hearing in this court, counsel for both parties opted for written submissions and filed them in court. The appellant was represented by Omongole & Co. Advocates and the respondent was represented by M/s Sekabanja & Co. Advocates.

In their written submissions counsel for both parties first argued grounds 2 and 3 jointly followed by ground 1.

In this judgment I will deal with ground 1 first and then handle grounds 2 and 3 jointly.

Ground 1:

The Honourable learned Justices of the Court of Appeal erred in law and fact when they arrived at a wrong conclusion to

reverse the award of general damages of Ug. Shs. 1,500,000/= and interest awarded to the appellant by the High Court.

The complaint by counsel for the appellant on this ground is that the learned Justices of Court of Appeal erred in interfering with the trial judge's award of general damages. Counsel contended that it is now a settled principle of law that the appellate court may only interfere with the award of general damages by the trial court when such damages are inordinately high or low so as to represent an erroneous estimate or where it is shown that the judge acted on a wrong principle. Counsel further submitted that the trial judge acted on the correct principle in awarding general damages. In support of his submission counsel relied on **Henry H. Ilang vs. Manyoka [1961] EA 705.**

Counsel argued that the object of damages is to compensate the plaintiff for the loss or injury so as to put him/her in the position he/she would have been if he/she had not sustained the loss or injury.

He submitted further that in the instant case, the trial judge correctly noted that the respondent was in breach of its obligation to pay the commission and no reason was given for the nonpayment. According to counsel, this was a blatant deliberate breach of the contract on the part of the respondent. Thus

damages would naturally follow from such circumstances. The non-payment caused loss and damage and even injury to the appellant who ought to be compensated. He relied on the decision of this court **Cuossens Vs Attorney General [1999] IE A 40.**

Counsel contended that the trial court used its discretion in determining the amount of general damages to be awarded and that he exercised his discretionary powers judiciously. He argued that, however, his decision was set aside by the Court of Appeal without proper justification or showing how the discretion had been abused or over exercised to warrant the reversal.

In support of that submission counsel quoted from **Crown Beverages Limited vs. Sendu [2006] 2 EA 43 (SCU)**, where it is stated as follows:

“It was trite law that the amount of general damages which a plaintiff would be awarded was a matter of discretion for the court.”

In reply, counsel for the respondent opposed the appeal and supported the Justices of Appeal in reversing the award of Ugx. 1,500,000/= as general damages with interest.

He submitted that general damages are compensatory and not punitive. Additionally the defendant is not liable for damages which are too remote.

Counsel submitted that this test was applied in the case of **Hadley vs. Baxendale (1854) 9 Exch. 341**, where it was held that;

“damages...should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such ¹⁵ breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach. ”

On the principles governing award of damages counsel referred this court to **Treital, the Law of Contract 8th Ed p 825**.

He concluded his submissions by stating that the learned Justices of Appeal correctly held that the learned trial Judge did not follow proper principles of the law in arriving at the award of Ugx. 1,500,000/= as general damages in addition to the commission of sum of Ugx. 2,478,256/= with interest and thereby came to a wrong conclusion. He prayed that the appeal be dismissed with costs.

I have perused the record, the submissions of both counsel and the authorities referred to. I am of the considered view that the Justices of the Court of Appeal were alive to the law and the principles governing the award of general damages. General damages are compensatory in nature and are not meant to enrich the plaintiff. They must be in the reasonable contemplation of parties to arise from the breach. I therefore, do agree with the Court of Appeal's finding that the appellant was sufficiently compensated by the award of the sum of Ugs. 2,478,256/= plus interest. I find no merit in this ground and it must fail.

I now turn to grounds 2 and 3.

Ground 2.

The Honourable learned Justices of the Court of Appeal erred in law and fact when they failed to re-evaluate evidence and rejected the cross-appeal.

Ground 3

The Honourable learned Justices of the Court of Appeal erred in law and fact when they failed to properly re-evaluate the evidence on record thus arriving at the wrong conclusion.

The complaint by counsel for the appellant, in both grounds is that the learned Justices of Appeal did not properly re-evaluate the evidence.

He submitted that the Justices of Appeal did not re-evaluate and subject the evidence on record to a fresh scrutiny as a first appellate court ought to have done. Consequently, they came to a wrong decision and rejected the cross-appeal.

In their written submissions appellants' counsel contended that the appellant testified that between 2001 and 2004 he made sales which he believed entitled him to a commission. The appellant made weekly and monthly reports of sales which he sent to the head office in Kampala and did not keep copies. According to the evidence of Tom Opio Oming DW1 it was the duty of Mrs. Okot, (PW1) the general manager of the respondent to work out the commission. In counsel's view, the Justices of the Court of Appeal did not properly scrutinize the evidence otherwise they would have come to the conclusion that it was not the duty of the appellant to work out the commission. Appellant's counsel submitted that according to prayer (a) of the plaint the appellant had prayed for an account of the sales over the period worked that entitled him to a commission and the amount of commission due. The trial judge did not however, make a finding on that which was the basis of the cross- appeal.

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The fact that records of sales were all kept at the head office was unchallenged. Counsel contended that the Justices of the Court of Appeal ought to have properly re-evaluated the evidence of PW1, PW2 and DW1, wherein it was admitted that all the records of sales were kept at the head office and it was the duty of the respondent's general manager to work out the commission, the appellant was entitled to.

Counsel criticized the Court of Appeal for holding that the appellant should have kept photocopies of the sales because that would be contrary to the appellant's letter of appointment, Exhibit 1, which stated that company documents were strictly confidential and any breach would have resulted into termination of employment.

Counsel referred to **Rule 30(1) of the Court of Appeal Rules** that enjoins the Court of Appeal to re-evaluate the evidence. He also cited the following authorities **Luwero Green Acres Ltd vs. Marubeni Corporation f1995 - 1998] 2 EA 168 (SCU)**, where this court held that;

"It is well settled that the duty of the first appellate court is to reconsider and evaluate the evidence and come to its own conclusion bearing in mind however

the fact that it never saw the witnesses as they testified. ”

Counsel also cited **Tumushabe and Another vs. Anglo-African Ltd and another f1999] 2 EA 219 (SCU)**, where Kanyeihamba J.S.C (as he then was) stated that the effect of failure by the first appellate court to re-evaluate the evidence is an error of law.

Counsel submitted that if the Justices of the Court of Appeal had properly re-evaluated the evidence on record they would have found that the onus was on the Respondent which was in possession of records of sales made by the Appellant, to prove that he was entitled to the commission for six seasons as he claimed.

In reply, counsel for the respondent referred to the arguments of counsel for the appellant in respect of the cross- appeal in the Court of Appeal. Counsel stated that the appellant’s counsel argued that the duty was on the respondent to prove that he was not entitled to further commission since the learned judge had found that the appellant had made sales from 2001 up to 2004. The duty was upon the respondent to disprove the sales since the records were kept at the head office.

The appellant’s counsel had argued in the alternative that he had all the intention to conduct a discovery. However, due to the error

on part of counsel it was not applied for. Then counsel applied under Rule 30 of the Court of Appeal Rules to receive or direct the discovery to be conducted to enable the appellant's commission to be properly established. The respondent's counsel submitted that the Court of Appeal did not allow the application. He further submitted that in this appeal the appellant's counsel has shifted his argument and concentrated on only one issue that the Court of Appeal did not re-evaluate the evidence. Counsel contended that there were no exceptional circumstances for this court to reevaluate the evidence. In conclusion the respondent's counsel submitted that since the Court of Appeal had properly re-evaluated the evidence this court was not required to repeat the process of re-evaluation.

It is noted that during the trial of the cross-appeal the Court of Appeal did not allow counsel's application to call for additional evidence to enable the appellant prove his claim to the commission for six seasons. Nshimye JA in his lead judgment considered the legal provisions on additional evidence and stated:

"Counsel for the cross appellant moved us under rule 30 to allow calling additional evidence to enable his client prove his claim".

The rule states:

“(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may:-

(a) reappraise the evidence and draw inferences of fact;

and

(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner (emphasis added)”.

“The rule is not meant to cater for “after thought” but for serious litigants who are able to show sufficient reason. Counsel did not even attempt to add some flesh to a bear and blunt application. No sufficient reason therefore, has been shown to justify granting the application. The application is therefore rejected

-1 entirely agree with decision of the Justices of Appeal on that point.

I now consider the issue of re-evaluation of evidence. This Court has on several occasions’ highlighted circumstances which would warrant the Supreme Court as a second appellate court to reevaluate the evidence. This is when the Court of Appeal has failed in its duty to re-evaluate the evidence and come to its own conclusion on the facts.

In his lead judgment Nshimye JA quoted the following legal authorities where the duty of the first appellate court to re-evaluate evidence was stated. **Pandya VS R [1957] EA, 336, Bogere Moses Vs Uganda SC CR Appl No. 1997.**

Then he took into account how the learned trial judge had considered the evidence relevant to the cross-appeal and stated thus-

“The trial judge considered the evidence pertaining to this cross- 15 appeal and had this to say (page 20 of the record).

“There are only 2 other sales that I am able to ascertain. The first in exhibit receipts from the defendants dated 1st April 2004 when the plaintiff passed over to the defendants shs 28,880,000/= being sales for 1400 kgs of beans and Kgs 1850 of maize. Thesecond is in exhibit P. 10 which is a cash deposit slip [dated 21st May 2004 for shs, 3,415,500/= but the amounts of seed sold are not disclosed. These 2 exhibits were not challenged either. Since commission is based on quantity sold under the contract one can only refer to exhibit P9 for 1400 kgs of beans (i.e. 1.4mts) and 1850 kgs of maize (i.e 1,85mts) totaling to 3250 kgs (i.e 3.25mts) which is below the 15mts minimum to earn a commission. There can be no doubt that the plaintiff was making sales as late as 2004, but

unfortunately, the onus is on him to prove the amounts and his as counsel for the defendant say he has not done” (Sic).

I find no reason to fault the trial judge on the above finding. Apart from the 1st season, there is no evidence on record that the cross appellant made sales above 15mts to entitle him to further commission. The cross appellant had a personal duty to make recordings and where possible make photocopies of all sales he made to justify claims for commission he would make. If he did not know what he was claiming, how could the court know? He had a duty to prove his claim which duty as the trial judge held, he failed to discharge. The result is that there is no merit in the cross appeal.”

The above passage from the lead judgment of Nshimye JA clearly indicates that the Justices of Appeal were alive to the duty as a first appellate court to re-evaluate the evidence on record.

It appears to me that the Justices of the Court of Appeal properly re-evaluated and re-appraised the evidence adduced at trial and correctly concluded that the appellant had a duty to prove his claim at trial, which duty he failed to discharge. The appellant who was the author of the reports would not have, in my view, breached the confidentiality clause in his contract if he had kept photocopies of

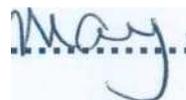
the reports to enable him to claim his commission. The Court of Appeal correctly held that there was no merit in the cross -appeal. I agree.

Grounds 2 and 3 lack merit and therefore should fail.

Before I take leave of this appeal, I would like to state that this appeal should not have come all the way to this court. Counsel for both parties as officers of court and bearing in mind the interests of their clients, should have amicably settled the matter and saved this court's time and costs to their clients.

In the result, I would dismiss this appeal. Taking into account all the circumstances of this appeal I would order that each party bears its own costs of the appeal in this court. The order of costs granted by the Court of Appeal would be upheld.

Dated at Kampala this..30th...day of



2013

**C.N.B. KITUMBA JUSTICE OF THE
SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA, AT KAMPALA

(CORAM: ODOKI, CJ., KATUREEBE, KITUMBA, TUMWESIGYE AND KISAAKYE,
JJ.SC).

CIVIL APPEAL NO. 02 OF 2012

B E T W E E N

GODFREY OPUS. APPELLANT

AND

HARVEST FARM SEEDS LTD. RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala: (Byamugisha, Kavuma, and Nshimye, JJA) dated the 7th April, 2009, in Civil Appeal No. 66 of 2005].

JUDGMENT OF KATUREEBE, JSC.

I agree with the Judgment of my learned sister, Kitumba, JSC, that this appeal should fail. I also concur in the orders she has proposed.

Dated at Kampala this.....30th.....day ofMay 2013.

Bart M. Katureebe
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, C.J.; KATUREEBE; KITUMBA; TUMWESIGYE AND
KISAAKYE; JJSC.)

CIVIL APPEAL NO. 02 OF 2012 BETWEEN

GODFREY OPUS ::::::::::::::::::::APPELLANT

AND

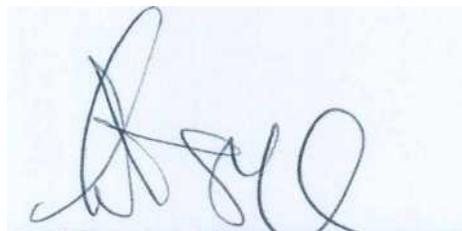
HARVEST FARM SEEDS LTD ::::::::::::::::::::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Byamugisha, Kavuma and Nshimye
JJ.A) dated 7th April 2009 in Civil Appeal No. 66 of 2005]

JUDGMENT OF TUMWESIGYE, JSC

I have had the benefit of reading in draft the judgment of my learned
sister, Kitumba, JSC, and I agree with it and the orders she has
proposed.

Dated at Kampala this.....30th day of May.....2013


JOTHAM TUMWESIGYE

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

*(CORAM: ODOKI, CJ., KATUREEBE, KITUMBA, TUMWESIGYE &
KISAAKYE, JJ.S.C.)*

CIVIL APPEAL NO. 02 OF 2012

BETWEEN

GODFREY OPUS

APPELLANT

AND

HARVEST FARM SEEDS LTD

RESPONDENT

*{Appeal from the Decision of the Court of Appeal at Kampala
(Byamugisha, Kavuma and Nshimye, JJ.A.) dated 7th April, 2
Civil Appeal No. 66 of 2005}*

JUDGMENT OF DR. KISAAKYE, JSC.

I have had the benefit of reading in draft the judgment of my learned sister,
Justice Kitumba, JSC.

I concur with her that this appeal has no merit and that it should be dismissed.

I also agree with her proposed orders with regard to costs in this court and in
the two courts below.

Dated at Kampala this 30th day of

May

2013.

**DR. ESTHER KISAAKYE JUSTICE OF
THE SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, C.J, KATUREEBE, KITUMBA, TUMWESIGYE AND
KISAAKYE, JJ. S.C)

CIVIL APPEAL NO 02 OF 2012

BETWEEN

GODFREY OPUS

APPELLANT

AND

HARVEST FARM SEEDS LTD

RESPONDENT

*[Appeal from the decision of the Court of Appeal at Kampala (Byamugisha Kavuma and
Nshimye, JJA) dated 7th April 2005 in Civil Appeal No 66 of 2009]*

JUDGMENT OF ODOKI, CJ

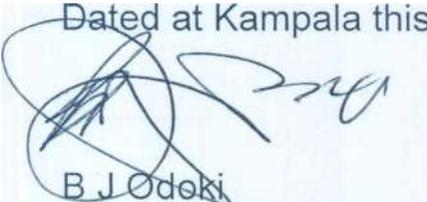
I have had the advantage of reading in draft the judgment prepared by my learned sister, Kitumba JSC, and I agree with it and the orders she has proposed.

As the other members of the Court also agree, this appeal is dismissed with orders proposed by the learned Justice of the Supreme Court.

Dated at Kampala this

30th

day of ... May ... 2013.



B. J. Odoki

CHIEF JUSTICE