THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[Coram: Tumwesigye, Arach-Amoko JJ.S.C; Odoki, Tsekooko, Okello, AG. JJ.S.C]

CIVIL APPEAL NO 20 OF 2010

BETWEEN

MOHAMMED BAHATI :::APPELLANT

AND

JAMES GARUGA MUSINGUZI :::::::::::::::::::::::: RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Twinomujuni, Kitumba, and Byamugisha, JJ.A) dated 15th February 2010, in Civil Appeal No. 48 of 2008.]

JUDGMENT OF TUMWESIGYE, JSC

This is an appeal by the appellant Mohamed Bahati who was a defendant in a High Court suit that was filed against him by the respondent James Garuga Musinguzi. In that suit the respondent had alleged that the appellant breached a contract for sale of radio transmission equipment. The High Court decided the suit in favour of the respondent. The appellant then appealed against the High Court decision to the Court of Appeal which also decided against him. Dissatisfied, the appellant lodged this appeal.

Background

In March 2005 the respondent entered into an oral contract with the appellant for the sale of second hand radio transmission equipment described by the seller as a 2 Kilo Watt (K.W) F.M. radio transmission system. The agreed sale price was shs. 50,000,000/=. In the same transaction, the respondent also agreed to buy the appellant's studio equipment for shs. 20,000,000/=.

It was agreed that before delivery the radio transmission equipment would first be examined by a radio engineer, one Lubega, to certify that the equipment corresponded with specifications. The respondent made a partial payment largely by cheque of shs. 60,000,000/= before the equipment was examined by the engineer. He had accepted the appellant's request to be paid in advance as he (the appellant) pleaded he was facing severe financial pressure from a creditor.

When the engineer later examined the radio equipment, he found that it was a IK.W. and not a 2K.W. system as the parties had agreed. He issued a report to the parties to that effect. The respondent reacted to the engineer's report by refusing to take delivery of the radio equipment. He demanded from the appellant a refund of his money.

When the appellant refused to pay, the respondent instituted a suit in the High Court claiming shs. 83,200,000/= consisting of shs. 60,000,000/= he paid for the equipment, shs. 20,000,000/= being the cost he incurred for installing of the radio mast in anticipation of the delivery of the equipment and shs

3,200,000/= being money paid for the cement used. He also claimed general damages, interest and costs. The defendant made a general denial to the plaint and a counter claim. At the scheduling conference the parties agreed to settle their dispute through a third party.

The parties filed a consent judgment under which the appellant paid to the respondent shs. 30,000,000/= as part of the refund on the purchase price. However, the appellant later disowned the consent judgment and applied to the court to set it aside on the ground that he had not authorised his lawyers to file it. As a result, the consent judgment was set aside and the case proceeded to formal trial.

The trial judge entered judgment for the respondent, awarded him shs 60,000,000/= as special damages, shs. 3,000,000/= as general damages and interest on the general and special damages at a rate of 25% p.a. from the date of judgment till payment in full. Dissatisfied, the appellant appealed to the Court of Appeal. At the joint scheduling conference three issues were framed by the parties for the Court of Appeal's determination.

(a) Whether the respondent was entitled to repudiate the contract.

(b) Whether the doctrine of caveat emptor applied to the contract; and

(c) Whether the trial judge erred to award the respondent general damages and interest at the same time.

The Court of Appeal resolved all the three issues in favour of the respondent but varied the amount awarded as special damages by the trial judge from shs. 60,000,000/= to shs 30,000,000/= taking into account the money the appellant paid to the respondent under the consent judgment before it was set aside. Dissatisfied by the decision of the Court of Appeal, the appellant filed this appeal.

Grounds of Appeal

The memorandum of appeal contains the following grounds framed as follows: -

"1. The learned Justices of the Court of Appeal erred in law to order the refund of the purchase price of UGX 60,000,000/= to the respondent: -

(a)When there was no total failure of consideration.

(b)When the special damages were not specifically proved.

(c)After finding no evidence that the goods were not fit for the purpose.

2. The learned Justices of the Court of Appeal erred in law to hold that the respondent was entitled to reject the radio equipment: -

(a) In spite of the Court's finding that the respondent did not test the said equipment.

(b) When there was no evidence of a breach of a condition by the appellant.

The appellant prayed that the appeal be allowed, the orders of the trial court and the Court of Appeal be set aside, and the respondent pays costs of the appeal here and in the courts below.

Counsel's submissions

The appellant was represented by Richard Okalany while the respondent was represented by Kasiisa Ronald Willis. Both counsel filed written submissions.

Ground 1

On ground one, learned counsel for the appellant argued that the Court of Appeal erred in law to order the refund of the purchase price of shs. 60,000,000/= when there was no total failure of consideration; that the Court of Appeal did not make a finding that there was total failure of consideration while the trial judge found that there was substantial performance of the contract by the appellant; that the appellant supplied radio equipment, only that it was 1K.W. instead of 2K.W., and that, therefore, there was partial failure of consideration but not a total failure of consideration.

Counsel argued that where there is no total failure of consideration the right to recover under S. 53 of the Sale of Goods Act does not apply. He cited the cases of **Anwar v. Kenya Bearing Co**. [1973] E.A. 353 and **Fibrosa Spolka Akeyjua vs. Fairbairn Lawson Combe Harbour Ltd** [1936] All ER to support his contention.

His second argument on this ground was that there was no evidence that the goods were not fit for the purpose and, therefore, the Justices of Appeal erred in ordering a refund of the money paid; that there was no breach of the implied condition as to fitness for the purpose to warrant rejection of the goods and a claim for refund, and that even the learned Justice of Appeal who wrote the lead judgment had concluded that S. 15 of the Sale of Goods Act did not apply having found that there was no proof that the equipment had failed to broadcast any of the respondent's programmes.

Learned counsel for the respondent, on his part, supported the decision of the Court of Appeal in ordering the appellant to refund shs 30,000,000/= to the respondent. He argued that it was agreed between the parties that radio Engineer Lubega would examine the system and upon examining it, the engineer established that the system was 1K.W. system instead of the agreed 2K.W. system. That since the respondent had contracted for a 2K.W. and not a 1K.W. system, he was entitled to reject the goods.

Counsel cited the case of **Livio Carli & Others v. Salem & Mohamed Bashanfer & Others** [1959] E.A. 701 where court observed that buyers were entitled to refuse to accept delivery of goods not meeting the description. He argued that the description of the Kilowatt system being 2K.W. was central to the contract and that anything less would be a breach of a condition under S. 12(1) and (2) of the Sale of Goods Act which would entitle the respondent to exercise the option to reject the goods.

Counsel further argued that there was total failure of consideration when the system turned out to be a 1 K.W. instead of a 2 K.W. system; that S.53 of the Sale of Goods Act gives a buyer the right to recover money paid where consideration for the payment has failed, and that in this case since the contract was not based on fitness for purpose but rather on a watts system, there was a total failure of consideration which entitled the respondent to recover the money paid.

Ground 2

Learned counsel for the appellant submitted that there was substantial performance of the contract by the appellant and, therefore, the respondent did not have the right to repudiate the contract or to reject the goods which, in his view, amounted to the same thing. He argued that the court did not find that the equipment was not fit for the purpose and could not broadcast as a radio station and that, therefore, S.12(2) of the Sale of Goods Act did not apply.

Counsel argued further that it was wrong for the Court of Appeal to draw a distinction between repudiation and rejection in order to hold that the decision in **Anwar v. Kenya Bearing Co** (supra) did not apply as the trial judge did not deal with the issue of repudiation. Since, in his view, there was substantial performance of the contract, the decision in **Anwar v. Kenya Bearing Co**. (supra) should have been followed.

Learned counsel for the respondent, on the other hand, supported the finding of the Court of Appeal that the respondent was entitled to reject the radio equipment. He argued that this

was a contract of sale of goods by description and that according to S.14 of the Sale of Goods Act where there is a sale of goods by description there is an implied condition that the goods shall correspond with description. It was a condition that the system the subject of the contract was a 2 K.W. system and this condition was not met, he argued.

Counsel argued further that there was a difference between repudiation and rejection; that repudiation has the effect of bringing the contract to an end whereas in cases of rejection the seller can still deliver the correct goods before the expiry of the time of performance of the contract.

Consideration of the grounds

In dealing with the issues raised in this appeal, I will consider the appellant's ground one and ground two together since they are closely related.

The uncontested evidence in this case is that the appellant entered into an agreement with the respondent to sell to the respondent a second hand 2 K.W. radio transmission system. It was agreed by the two parties that before delivery of the radio system to the respondent Engineer Lubega would first test it and issue a report to the parties as to whether the goods were in conformity with the contract. However, when Engineer Lubega tested the radio system he found that it was a 1 K.W. system and not a 2 K.W. system. The respondent refused to take delivery of the radio equipment and asked the appellant to refund the shs. 60,000,000/= he had paid in advance for the radio equipment.

The Court of Appeal agreed with the High Court and ordered a refund of the money because, in its view, the respondent was entitled to reject the goods since they did not conform to the specifications. The contention of the appellant is that the Court of Appeal was wrong to order the refund of the purchase price because (1) there was no total failure of consideration, (2) there was no finding that the goods were not fit for the purpose as the equipment was found not to be unfit to broadcast and (3) that this being a partial and not a total failure of consideration section 53 of the Sale of Goods Act about refund of money did not apply.

The question in this case is whether the sale of the radio system by the appellant to the respondent was a sale by description or whether it was based on fitness for the purpose as the appellant contends. The evidence is obvious that what the appellant agreed to sell to the respondent was a 2 K.W radio system. The appellant himself does not deny it. In his evidence the respondent stated that what he agreed to buy was a 2 K.W. radio system. Engineer Lubega (PW2) stated in his evidence to court:

> **"My view is that under the current technical conditions, the system is 1000 watts and can only operate so, not as a 2000 watts system".**

This is the evidence on which the trial court and the Court of Appeal based their decisions. There is no evidence that the respondent agreed to take anything less so long as it was in a working condition and answered a requirement of fitness for the purpose. Being a second hand radio system, the respondent was no doubt anxious that the 2 K.W. system he had agreed to buy

would itself be in a sound working condition. So fitness for the purpose was not an irrelevant factor in this sale. But it was not the main factor. Engineer Lubega in fact found the equipment could operate as a 1 K.W. radio system. However, because a 1 K.W system was not what the respondent had agreed to buy, he rejected it. He was no doubt entitled to do so.

Section 12(1) of the Sale of Goods Act provides:

> **"Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated."**

The Sale of Goods Act implies conditions in contracts of sale, and one of the conditions which is implied is an implied condition of sale by description. Section 14 of the Act provides: -

> **"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description..."**

By the two parties specifying in their agreement that the radio system would be a 2 K.W. system, the sale had become a sale by description. And when the appellant tendered a 1 K.W. system instead of the agreed 2 K.W. system, he breached the implied condition of sale by description. Section 12(1) of the Act gives the buyer a number of options. The respondent as buyer could have opted to treat the breach of the condition as a breach of warranty and sue for damages, or to waive the breach and proceed with

the contract, or to reject the goods and treat the contract as repudiated. He chose the last option and asked the appellant to refund the purchase money.

Though this point was not highlighted in the judgments of the High Court and the Court of Appeal as two courts seemed, I think, to have taken it as obvious, there is a marked difference between a 2 K.W. radio transmission system and 1 K.W. one. The appellant himself admits that the two systems are different, and that is why counsel for the appellant in his submissions stated that there was partial failure of consideration in tendering 1K.W. instead of 2 K.W.

Courts have interpreted failure of goods to correspond to description rather strictly. For example in **Livio Carli and Others v. Salem and Mohammed Bashanfer and Others** [1959] E.A 701 a change of name in the cement brand delivered by the seller resulted in the rejection of the delivery by the purchaser, and the court held that the purchaser was entitled to reject the goods. In Arbitration between **Moore and Company Ltd and Landauer and Company** [1921] C.A 519 the court held that by supplying a consignment of fruits in cases containing 24 tins instead of 30 tins per case as had been agreed, even if the total number of tins remained the same, the sellers had breached a condition of sale by description and the buyer was entitled to reject the goods.

When the respondent signalled to the appellant his rejection of the goods because they did not correspond with the description, the question of whether or not the goods were fit for the purpose ceased to be of relevance. A lot of time and space was taken up

by the appellant's argument that there was substantial performance and that there was no total failure of consideration because there was no proof that the radio system was not capable of operating. This argument has no validity.

He argued that this court should follow the decision in **Anwar v. Kenya Bearing Co.**(supra). This case, however, is distinguishable from the instant case. In the **Anwar** case the sale of the tractors was unconditional whereas in this case it was based on an implied condition of sale by description. The property in the goods in the **Anwar** case had passed to the buyer and part of the property had already been delivered to the buyer, whereas in the instant case property in the goods had not passed and the goods had not been delivered. Therefore, the decision in **Anwar** cannot be followed in this case.

When a buyer rejects the goods and repudiates the contract as he respondent did in this case, he is entitled to be discharged from the performance of his obligations under the contract. And if the price (or part of it) has already been paid in advance, he is entitled to recover it back as money paid for a consideration which has wholly failed. See **Kwei Tek Chao v. British Traders and Shippers Ltd** [1954] 2 Q.B. 459. Section 53 of the Sale of Goods Act which allows recovery of money where consideration has wholly failed, therefore, applies. The law entitles the respondent to reject the goods under S. 12 of the Sale of Goods Act. By not receiving the goods owing to the fault of the appellant to tender what was agreed, the respondent received nothing and so there was total failure of consideration.

The Court of Appeal's order for the refund of the purchase price was, therefore, correct and I would not interfere with it.

On the issue of special damages not having been specifically proved which was raised by the appellant in his memorandum of appeal, I would say that this is a question of fact which was decided by the trial court and upheld by the Court of Appeal. The appellant should not have raised it in this court as it is not a question of law or mixed law and fact. This probably explains why counsel for the appellant rightly abandoned it in his submissions.

The decision and orders of the Court of Appeal are, therefore, upheld. Accordingly, I would order that this appeal be dismissed with costs to the respondent here and in the two courts below. As the other members of the court agree, it is ordered accordingly.

Delivered at Kampala this 12th day of June 2014

Jotham Tumwesigye

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(Coram: Tumwesigye, Arach-Amoko JJ.S.C; Odoki, Tsekooko, Okello, Ag. JJ.S.C)

CIVIL APPEAL NO. 20 OF 2010

BETWEEN

MOHAMMED BAHATI.....APPELLANT

AND

JAMES GARUGA MUSINGUZI.....RESPONDENT

[Appeal from the decision of the Court of Appeal (Twinomujuni, Kitumba, Byamugisha, JJA; dated 15th February, 2010, in Civil Appeal No. 48 of 2008]

JUDGMENT OF ARACH-AMOKO, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Justice Tumwesigye, JSC and I concur with him that this appeal must fail. I also agree with the orders he has proposed.

Dated at Kampala this 12th day of June 2014.

M.S ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

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

{Coram: Tumwesigye & Arach-Amoko, JJSC.; Dr. Odoki, Tsekooko & Okello, Ag. JJSC.}

Civil Appeal No. 20 of 2010.

Between

MOHAMMED BAHATI ═══════ APPLICANT.

And

JAMES GARUGA MUSINGUZI ═══════ RESPONDENT

{Appeal from the judgment of the Court of Appeal at Kampala [Twinomujuni, Kitumba & Byamugisha, JJA] dated 15th February, 2010 in Civil Appeal No. 48 of 2008}

Judgment of Tsekooko, Ag. JSC:

I have had the benefit of reading in draft the judgment prepared by my learned brother, his Lordship Tumwesigye, JSC., and I agree with him that this appeal should fail and that the respondent should get the costs of this appeal and those in the two Courts below.

Delivered at Kampala this 12th day of June, 2014

J.W.N. Tsekooko
Ag. Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: TUMWESIGYE, ARACH-AMOKO, JJSC,

DR ODOKI, TSEKOOKO AND OKELLO, AG. JJSC)

CIVIL APPEAL NO. 20 OF 2010

BETWEEN

MOHAMMED BAHATI :: APPELLANT

AND

JAMES GARUGA MUSINGUZI :::::::::::::::::::::::::::::: RESPONDENT

[*Appeal from the judgment of the Court of Appeal at Kampala (Twinomujuni, Kitumba and Byamugisha JJA) dated 15th February 2010 in Civil Appeal No. 48 of 2008*]

JUDGMENT OF DR ODOKI, AG JSC

I have had the advantage of reading in draft the judgment prepared by my learned brother, Tumwesigye, JSC, and I agree with him that this appeal should be dismissed with costs to the respondent in this court and the courts below.

Dated at Kampala this 12th day of June 2014

DR. B.J. Odoki

AG. JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: Tumwesigye, Arach-Amoko, JSC; Odoki, Tsekooko, Okello, Ag.JSC

CIVIL APPEAL NO. 20 OF 2008

BETWEEN

MOHAMMED BAHATI.....APPELLANT

AND

JAMES GARUGA MUSINGUZI.....RESPONDENT

Appeal from the judgment of the Court of Appeal at Kampala (Twinomujuni, Kitumba, Byamugisha , JJA; dated 15th February, 2010 in Civil Appeal No. 48 of 2008

JUDGMENT OF G.M. OKELLO, AG. JSC

I have had the benefit to read in draft the judgment of my learned brother, Justice Tumwesigye, JSC. I agree with his conclusion that this appeal must fail and also with the orders he proposed.

Dated at Kampala this 12th day of June .....2014.

G.M. OKELLO

AG. JUSTICE OF THE SUPREME COURT