REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO.0028 OF 2006

(From Kabale Civil Suit No.0004 of 2003

NARIS TUMWESIGYE ::APPELLANT

VERSUS

MERCY SAFARI :::RESPONDENT

BEFORE HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT

The Respondent, in the Lower Court sued the Appellant for a breach of a contract of sale of goods. She alleged she delivered to the Appellants beans on credit worth Sh. 3, 500,000/= on 10th October 2001 and that the Appellant paid her Sh. 500,000/=, after the suit was filed. The Trial Magistrate, on 6th December, 2006 ordered and decreed that the Appellant/Defendant pay Sh. 3,000,000/= being the un paid balance of the contract sum plus Sh. 3,000,000/= as nominal damages to the Plaintiff/Respondent and costs of this suit. At the trial the Appellant/Defendant had totally denied liability and on Appeal he filed the following grounds against the Judgment:-

1. That trial Magistrate erred in Law and in fact when she wrongly evaluated the evidence and came to wrong finding on the issues 1 and 2.

2. That the trial Magistrate erred in Law and in fact and wrongly admitted evidence of P.W. 4 in absence of the Defendant who was not represented by an Advocate at the time and misdirected herself on the burden of proof and the standard of proof.

3. That the learned trial Magistrate erred in Law as she wrongly upheld the Plaintiff's submission that the omission or neglect to challenge the evidence of P.W 4 on a crucial issue by cross-examination would lead to an interference that such evidence is accepted as true.

From the trial court's record there were three issues for determination, namely;

1. Whether the plaintiff supplied beans to the Defendant worth 3,500,000/=.

2. Whether there was a valid contract.

3. Remedies available to the parties.

This being the first appellate court, I am obliged to retry this case by subjecting the evidence on record to fresh evaluation and reach my own conclusion. The duty of this court is not to make a finding of whether the trial Magistrate's Judgment can be supported or not but to arrive at the appropriate Judgment based on the record.

The principles of Law on this approach were settled in the cases of **Pandya Vs R. [1957] EA 336 and SELLE & others Vs Associated Motor Boat Company Ltd and others [1968] EA 123**. It was stated in the case of SELLE (Supra), by the Court of Appeal in these words;

> *"An Appeal to this court from a trial of the High Court is by way of a re-trial and the principles upon which this court acts are well settled. This Court must consider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect."*

In a much earlier case it was decided that the appellate even where the appeal revolves on a question of fact, the court of Appeal has to bear in mind that its duty as to rehear the case. The Court must then make up its mind. See **COGHLAN VS CUMBER LAND (3) [1898] CH 704** where it was stated;

> "*The court must then make-up its mind, not disregarding the Judgment appealed, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the Judgment was wrong..... When the question arises which witness is to be believed rather than another, and that the question turns on manner and demeanour, the court of appeal always is, and must be guided by the impression made on the Judge who saw the witness. But there may obviously be circumstances, quite apart from manner and*

demeanour, which may show whether a statement is credible or not; these circumstances may warrant the court in differing from the judgment, even on question of fact turning on the credibility of the witnesses whom the court has not seen."

The above principles are applicable to the instant appeal. The Respondent had the burden of proof in this case and the standard of proof applicable is proof on the balance of probabilities. She had the duty to prove that she had dealings in trade with the Appellant, that she delivered to him goods on credit and that he has failed or refused to pay the purchase price of the goods. Considering the evidence as a whole there was no written contract or documentation of the sale, delivery or invoices between the parties in this transaction. The Respondent Safari Mercy, testified that through her daughter PW 4 Mutesi Florence she delivered beans from Kigali Rwanda to Kabale Central Market worth Sh. 3,500,000/=. When the Appellant failed to pay a meeting was convened at Kabale, attended by Father Ndyomugabe (PW 2) and Father Rwanyizire (PW 3), in which meeting the Appellant agreed he owed the Respondent Sh. 3,500,000/=. He gave her a cheque of shs. 500,000/= in part-payment leaving Sh. 3,000,000/= which he agreed to pay later. The Appellant denied ever attending this meeting, he denied the alleged transaction and told court that PW 1, PW 2 PW 3 and PW 4 told lies. He offered no explanation why all the four witnesses would tell lies against him. He agreed that he knew the Plaintiff/Respondent and that before this case they had undocumented transactions in food items, where he delivered goods to the Respondent and she paid in cash without written agreement. He further agreed that it was

possible, in trade for beans to come from Kigali to Kabale. It is appropriate at this stage to address the second issue that the trial court considered of whether there was a valid contract. From the circumstances of this case, the question of whether or not there was a valid contract turns around the fact that there was no written agreement or any other documentation. Section 5 of the Sale of Goods Act (Cap 82) takes care of this situation. It provides;

> "*5(i) A contract for the sale of any goods of the value of two hundred shillings or more shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive them, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his or her agent for that purpose."*

I have considered the fact that he has denied delivery of the goods to him and part-payment for the goods. I have also considered the evidence of PW 1, PW 2 and PW 3 that in a meeting held subsequent to his default in payment of Sh. 3,500,000/=, the total consideration of the goods, he accepted the liability and issued a cheque of Sh. 500,000/= as part payment. This cheque was later dishonoured by the Bank and he paid cash after the trial Magistrate order. I have further, considered the Defendant/Appellant's evidence that he previously had un written or undocumented sale/purchase of goods between himself and the Respondent. These facts constitute strong circumstantial evidence which establishes the sale of goods contract between the

parties. The Appellant's explanation that he issued a cheque of Shs. 500,000/= on account of motor vehicle repair and fuel is not plausible in light of the evidence of PW 2 and PW 3 who corroborate the plaintiffs evidence that it was part-payment for the beans worth 3,500,000/=. This falls within the provisions of section 5 of the Sale of Goods Act that The purchaser received the goods and gave a part-payment, however belatedly. Section 4 of Sale of Goods Act provides;

> "*4 (i) Subject to the Provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties."*

A contract of sale of goods does not have to be in writing or any particular form it can be proved by any means including oral evidence. Parties to a contract are bound by any usage to which they agreed and practice which they have established between themselves. It was no mandatory that because the seller and the buyer were from two neighbouring countries there had to be documents. By oral testimonies the Respondent discharged her burden of proof. The standard of proof is always on a balance of probabilities see **Nsubuga Vs Kavuma (1978) HCB 308**. The Defence highly criticized the trial Magistrate on the fact that she relied on evidence of P W 4 Mutesi Florence who testified in the absence of the Defendant.

The material part of her evidence is that she delivered the beans to the Defendant. It was a procedural error not to allow the

Appellant the opportunity to cross-examine PW 4. I appreciate the trial Magistrates view that the application to recall PW 4 for Cross-examination was at the time of Defence which was late but I do not agree that this would have amounted to reopening the plaintiff's case because the witness had been called by the plaintiff. The evidence she would have given in cross-examination was for the benefit of the Defence. This Omission, in my view, in the circumstances of this case, did not cause any miscarriage of Justice since PW 2 and PW 3 gave evidence that confirmed that in the meeting held at KADIO Hotel at Kabale in 2002 he had orally accepted that he got delivery of the beans which was followed by earnest part-payment of Shs. 500,000/= for the beans which further binds him. Whereas the burden of proof as a whole is upon the plaintiff/Respondent to proof the case, the Defendant had evidential burden of proof to lead evidence to prove the alleged motor repair costs and fuel costs. He should have given further particulars and show the circumstances under which it arose to rebut the plaintiff/Respondents story that it was part-payment for the beans. He who asserts apposition and risks loss of the claim if not proved has the burden of proof. What vehicle was being repaired? When was it and by who since the Respondent is not proved to have business of repairing vehicles? This clearly was an afterthought to support his denial of liability he is sued for.

In view of the above, this Appeal is dismissed with costs both on appeal and in the lower courts with further orders as follows:

(a) The Appeal is hereby dismissed.

(b) The order of payment shs. 3,000,000/= by the Appellant to the Respondent for the outstanding consideration of the sale of goods is up held.

(c) General damages of 3,000,000/= on account of damages is not interfered with.

(d) The Appellant shall pay the Respondent costs of this Appeal and in the Lower court.

(e) The Decretal sum shall attract interest at the rate of 6% per month from date of this Judgment until date of full payment.

Dated at Kabale this 7th day of August, 2012.

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J.W. KWESIGA
JUDGE
7/8/2012

<u>Judgment delivered in presence of</u>:

The Appellant.

Mr. Beitwenda for Respondent.

Respondent absent.

Mr. Joshua Musinguzi Court-Clerk.