REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 639 OF 2017

VIVID PRINTING EQUIPMENT SOLUTIONS LIMITED.............APPELLANT

VERSUS

MONICAH NG'ONG'OO T/A IDENTITY PARTNER....................RESPONDENT

(Being an appeal from the judgement of Hon. L. W. Kabaria (MS), Resident Magistrate delivered on the 18th April, 2017)

JUDGEMENT

1. The plaintiff/respondent filed suit against appellant claiming a sum of Kshs. 1,518,173.65 money she paid to the appellant for purchase of a commercial T-shirt printer and its consumables. She complained that it was not of merchantable quality.

2. The appellant filed defence denying the amount was due to the respondent contending that any default that may have occurred was respondent's doing.

3. The matter was thus heard and the court made a judgement in respondent favour for Kshs.1,207,444/=.

4. The above verdict triggered the filing of the instant appeal in which appellant set out 10 grounds namely:-

(1) That the learned magistrate erred in failing to determine the all-important issues of wen the goods/property passed to the respondent which issue has a direct being on:-

(i) Whether the risk in goods had passed to the buyer subject to section 19 and section 20(a) of the Sales of Goods Act.

(ii) Whether any condition breached was to be deemed as a warranty pursuant to section 13(3) of the Sales of Goods Act.

(2) That the learned magistrate erred in failing to find that pursuant to section 19 and section 20 (a) of the Sales of Goods Act and the maxim *'res perit domino'*, the property in this instance had passed to the buyer/respondent on 17th September, 2013 and as such the risk of loss had also passed to the respondent.

(3) That the learned magistrate erred in law and fact by finding that there was an implied warranty as to fitness for purpose contrary to section 16 of the Sales of Goods Act when the buyer did not rely on the seller's skill and judgment when purchasing the machine.

(4) That the learned magistrate erred in fact and in law by finding that the machine was not of merchantable quality in line with section 16(6) of the Sales of Goods Act when the machine had been examined by the buyer.

(5) That the learned magistrate erred in fact and in law by failing to take into account/ignoring the particulars the particulars of unmerchantability put forth by the respondent at paragraph 12 of the plaint, the nature of which would all have been revealed on examination of the machine.

(6) That the learned magistrate erred in fact by holding that the problems encountered by the machine were as a result of latent defects in the machine when no expert evidence was adduced to that effect by the respondent.

(7) That the learned magistrate erred in fact by misapprehending the difference between a quotation and an invoice leading to the conclusion that the machine was ordered upon issuance of the quotation and further that the buyer relied solely on the

appellant's advice before purchase of the machine.

(8) That the learned magistrate erred in disregarding the expert testimony adduced by the appellant in support of the fact that the issues raised with the machine were user/operator related and not as a result of defective machine.

(9) That the learned magistrate erred in law by finding that the alleged breach in question amounted to a condition as opposed to a warranty.

(10) That the learned magistrate erred in holding that the respondent was entitled to repudiation of the contract translating to a full refund of the machine contrary to section 13 (3) of the Sale of Goods Act.

5. The matter was directed to be heard via submissions.

APPELLANT'S SUBMISSIONS:

6. The appellant contends that the failure of the trial court in failing to determine the all-important issue of when the goods/property passed to the respondent was a stark omission that denied the court the opportunity to determine the question of risk.

7. The goods herein therefore passed when the contract was made. It is the appellant's contention that all the vital elements of a contract were satisfied on the 17th September 2013 when the respondent having observed the printer in action, made her first payment.

8. As such any risk from thereon henceforth was to be shouldered by the respondent. It relied on the case of ***Van Dorn Limited vs East African Breweries Limited [2014] eKLR*** in which the court stated with approval that:

> ***"I concur with the submissions of the appellant when it maintained that the provisions of section 20(a) of the Sale of Goods Act (Supra) applied to the contract between the parties. I find that the respondent purchased specific goods from the appellant in a deliverable state and as a result, the property passed to it when the contract was made. As is detailed in Benjamin's Sale of Goods 4th Edition paragraph 6-002: "Risk follows property. 'As a general rule,' said Blackburn J in Martineau v. Kitching, 'res perit domino', the old civil law maxim, is a maxim of our law; and when you can show that the property passed, the risk of the loss prima facie is in the person with whom the property is."***

9. Section 20 of the Sale of Goods Act is useful because in the absence of any express terms or conditions, it provides the rules for ascertaining the parties, intention as to when property passes.

> **"20. Rules for ascertaining intention as to time when property passes unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer..."**

10. The contract between the appellant and the respondent was not contingent upon anything or subject to the happening of an event; it was unconditional in the sense of section 20 (a) of the Act. It can legitimately be concluded, that under that provision the property in goods passed to the respondent the moment the contract was concluded.

11. In light of this thereof, the question that remains to be asked is whether of merchantability and fitness for purpose applies in this scenario.

12. There was no written contract between the parties in the suit but the parties had transacted before on other occasions where the respondent herein had purchased printing equipment from the appellant. In the course of the agreement between the parties herein, there had been no express warranty that was issued by the appellant in respect of the subject printer.

13. The learned magistrate erred in law and fact by finding that there was an implied warranty as to fitness for purpose contrary to section 16 of the Sales of Goods Act when the buyer did not rely on the seller's skill and judgement when purchasing the machine. The buyer, respondent herein, gave evidence that she was in the business of printing and she was acutely aware of what she wanted and the specifications thereof.

14. The learned magistrate erred in fact and in law by finding that the machine was not of merchantable quality in line with section 16(6) of the Sales of Goods Act when the machine had been examined by the buyer and she had given it a clean bill of health. The respondent/buyer was not an ignorant party in the workings and operation of printers.

15. The learned magistrate erred in fact and in law by failing to take into account/ignoring the particulars of un-merchantability put forth by the respondent at paragraph 12 of the plaint, the nature of which would all have been revealed on examination of the machine.

16. That the court took the respondent's word without the respondent adducing evidence in support of their claim, the court circumvented the rules of evidence and misdirected itself on relying on evidence that sought to weave a tale instead of basing its decision on incontrovertible evidence.

17. The learned magistrate erred in fact by holding that the problems encountered by the machine were as a result of latent defects in the machine when no expert evidence was adduced to that effect by the respondent. The court in and of itself, has no mechanical ability or is not an expert in the area of operations of printing machines.

18. As pointed out in ***Civil Appeal No. 2 of 2014 – Stephen Kinini Wang'ondu vs The Ark Limited [2016] eKLR***, expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.

19. The learned magistrate erred in disregarding the expert testimony adduced by the appellant in support of the fact that the issues raised with the machine were user/operator related and not as a result of a defective machine. The respondents herein, procured a 3rd party primer which they then used on the printer, in spite of the fact that the appellant had informed them that they could only use parts specific to the printer.

20. In addition, the learned magistrate failed to take into account the evidence of the appellant through DW2 on the fact that the respondent's operator would call him telling him that he had forgotten about the maintenance and he was asking to be taught afresh.

21. That fact is fundamental to determine this dispute but the learned magistrate did not pay attention to it and neither was it under the trial court's consideration in arriving at its decision.

22. The appellant severally referred to the respondent's bundle of documents to show that the respondent had failed to carry out its duty for the proper running of the machine by:

> **(i) The operator failing to allow time for the printer to initialize before operating hence leading to the error display;**
>
> **(ii) The respondent herein used a third party primer, against the clear instructions of the appellant restricting the use of third party material. The incompatibility of the third party primer affected the printing head as it absorbs the ink and the chemicals in the primer.**
>
> **(iii) The operator repeatedly failed to drain the waste ink bottle daily as instructed by the appellant's experts. As a result, the machine automatically showed an error message.**
>
> **(iv) The operator was not cleaning the print head nozzle properly and the result was poor print quality. However, as soon as the print head was cleaned properly, the quality was better after. That this problem was persistent is clear that inspite of the appellant fixing the problem, the operator continued to cause to exist situations and circumstances that would compromise the working of the printer.**
>
> **(v) The respondent switched off the printer, yet she had been advised not to switch it off at any point. The said switch off affected the printer's parts and led to repairs.**

23. Failure by the trial court to take these factors into consideration was highly prejudicial to the appellant's case and did not meet the ends of justice. The failure by the respondent and or her agents to exercise due care and skill in the handling of the machine means that any defects that occurred were only an expected result of that failure.

24. Had the trial court taken into account the actions of the respondent and her staff, even the question of liability could not have been established on the terms which the trial court found.

25. In ***Civil Appeal No. 74 of 2011 – Dickson Maina Kibira vs David Ngari Makunya [2015]*** where the court aptly summarized the question of condition and warranty as follows:

> **"Once the respondent had accepted the goods, a breach of any condition by the seller would, under section 13 of the Sale of Goods Act, be a breach of warranty which would not be a sufficient ground for rejecting the engine or for treating the contract as repudiated. This section states:-**
>
> **Section 13(3) where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."**

26. Indeed, the contract between the parties have been oral and from the evidence given at the trial it is not apparent that the contract was subject to any condition the breach of which would have entitled either party to treat the contract as repudiated.

27. Without such express condition, the trial court fell into error when it effectively implied a condition in the agreement between the respondent and the appellant when there is no evidence of such an intention between the parties themselves.

RESPONDENT'S SUBMISSIONS:

28. It is the respondent's submission that the transfer and/or passing of risk in the goods was not pleaded or raised at the trial court and as such, the court could not make a finding on the same. In the case of ***Galaxy Paints Company vs Falcon Guards Ltd [2000] eKLR*** the Court of Appeal held that the issues for determination in a suit generally flow from the pleadings and the court may only pronounce judgment in the issues arising from the pleadings or such issues as the parties have framed for the court's determination.

29. The law is clear that this court should not consider or deal with issues that were not canvassed, pleaded or raised at the lower court.

Furthermore, for a matter to be a ground of appeal, it has to have been sufficiently raised and succinctly made an issue at trial. This position was stated in the case of ***Stallion Insurance Company Limited vs Ignazzio Messina & C S.P.A. [2007] eKLR.***

30. Other decisions by the Court of Appeal reiterating this position include ***Erwen Electronics Limited & 3 Others vs Radio Africa Limited & Another [2018] eKLR, Global Vehicles Kenya Limited vs Lenana Road Motors [2015].***

31. The intention of the parties was that the transfer of the property in the machine and its associated risks from the appellant to the respondent would be determined by whether the goods were fit for the purpose which they were purchased.

32. In particular, the appellant was to ensure that the primer once installed, would run smoothly without any major hitches. Problems with the printer manifested themselves almost immediately after installation.

33. Having failed to deliver printer that was fit for purpose which it was intended, the respondent submits that no risk had passed to her.

34. The respondent submitted that the chronology of events would bear her witness. It was the respondent's evidence that in her line of business, she received large order from clients prompting her search for a printing machine that would meet the orders and at the same time deliver quality prints on T-shirts.

35. The appellant was well aware of the respondent's orders from its client and specifications that came with the said orders. It is out of this information that the appellant indicated would meet the needs of the respondent and her clients. Relying on this information, the respondent ordered for the print.

36. Section 16 of the Sale of Goods Act Cap 31 Laws of Kenya provides that there is an implied condition as to fitness for purpose and warranty of goods provided the buyer makes known to the seller the purpose for which the goods required. The appellant sold to the respondent a printer which was not fit for the purpose for which it was purchased. This amounted to a breach of an implied condition by the appellant.

37. There was however no tangible evidence adduced by the appellant to demonstrate that the printer was poorly handled or indeed tampered with. As experts in the subject field, it was the duty of the appellant to convince the court that the problems reported were attributed to the respondent.

38. At the trial, it was the uncontroverted evidence of the respondent that the printer exhibited problems immediately it was installed. This is why the appellant was called in on several occasions to assess the fault, a fact admitted to not only in the appellant's defence, but also in the evidence of Mr. Sarthiyaraj and Mr. Sathanaraj.

39. Both parties confirmed at the trial court that there were reports filled after each visit. In open of the field reports, the appellant's engineer admitted a persistent problem which required them to contact the manufacturer for a solution.

40. The trial court was told that the manufacturer had offered to either provide consumables free of charge to enable the appellant repair the printer or have the printer returned and the purchase price refunded. The appellant did not provide any reasons to the trial court why it ignored the manufacturer's proposal or why it did not contact the manufacturer with a view to finding a permanent solution to the constant problems.

41. The ***High Court in Ken Aluminum Products Limited vs High-Tech Air Conditioning & Refrigeration Limited [2018] eKLR*** held as follows:-

> **"Consequently, I would find and hold that the fact of the breakdown of the machine, and in particular the leakage in the copper pipes, was due, not to tampering as was alleged by the appellant, but due to the fact that the same was not of merchantable quality within the ambit of section 16 of the Sale of Goods Act; and therefore, the appellant acted in breach of contract in supplying the machine in that condition. Having known of the respondent's perennial problem with its water chilling machine, and having prescribed the solution for the perennial problem, it was by necessary implication, the obligation of the appellant to supply a machine that would provide the respondent with a lasting solution to its problem and not one that would break down in a few months."**

42. What also emerged from the evidence at the trial was that the problems with the printer did not manifest at once. Rather, problems cropped up immediately the printer was installed and intermittently thereafter, for 6 months until it finally shut down in March, 2013.

43. This was evidenced by the field reports presented at the trial court. It was evident that, the appellant's engineers could not instantaneously discover the defects and it became apparent that several attempts to repair the printer was based on trial and error.

44. While considering the un-merchantability of the printer, the trial court observed that:

> **"Regarding merchantability, indeed under section 16(b) of the Act, where the goods are bought by description from a seller dealing in goods of that description there will be an implied condition that the goods shall be of merchantable quality provided that the defects where the goods have been examined are not defects that would have been revealed in the examination."**

45. The respondent submitted that it mattered not that the printer was inspected and installed to her satisfaction. The respondent is not an

expert in that particular field and the defect was not such as would be easily detected, even upon ordinary examination.

46. The respondent submitted that the printer was ordered upon issuance of the quotation. It is therefore evident that she was persuaded to purchase the printer before it arrived and that she relied on the advice given by the appellant's general manager.

47. The appellant despite conceding that several visits were made by its engineers to the respondent's premises in connection with the printer argued that the problems encountered were operational.

48. This line of argument however proved fruitless because the trial court was presented with reports after every visit to the respondent's premises. It emerged that the problems did not emanate from the respondent's operators as claimed.

49. The reports are indicative of the fact that the appellant sold to the respondent a defective printer.

50. As a result of the recurrent problems with the printer, the respondent was unable to meet demands from its clients. She had also been rendered liable to her customers for defective deliveries of T-shirts and proved to the trial court that she had suffered great loss and damage.

51. Further, the printing machine was very slow as compared to the assertions given during the pre-purchase period where the appellant indicated it was able to print T-shirt a minute.

52. To the contrary, it was only able to do a T-shirt every 3 minutes thus greatly slowing down time within which the respondent had anticipated to meet the orders the net effect being cancelled contracts by clients.

53. Arising from these findings, the trial court correctly awarded the respondent the sum of Kshs.1,207,444/- together with interest at court rates from the date of filing suit.

EVIDENCE ADDUCED:

54. Ngongoo adopted as her evidence her filed witness statement. By its Ms. Ngongoo tells the court she is the sole proprietor of the firm, identity Partner Marketing and Advertising Media Printing. That about the month of July 2012, she began searching for a T-shirt printer.

55. That she then visited the Office Dynamics where she was taken through a printer demonstration. Ms. Ngongoo told the court that she then went to the appellant's premises where she met one Samanthan Raaja.

56. That Mr. Raaja informed her that they were expecting T-shirt printers from South Korea which he could offer to her at a good price. That she decided to purchase the printer from the appellant after listening to the descriptions given by Mr. Raaja.

57. Ms. Ngongoo told the court that she received a partial invoice from Mr. Raaja in the month of August 2012 for the cost of the printer and its consumables. The appellant, the court was told, it did not appear to know how the machine would work.

58. That Ms. Ngongoo therefore asked the appellant to forward her the product brochure; the appellant did not do so. The respondent told the court that the machine arrived in the month of September and she paid what was due to the appellant between that month of September and the month of January.

59. That the machine was delivered to their offices on the 19th September 2012 inspite of agreement between the two parties that it would be delivered upon payment of the deposit on 15th September, 2012. Ms. Ngongoo told the court that the appellant did send its engineers who began to install the machine and train them on the use of the printer.

60. That that was when they were made aware of the conditions of use the machine of that were previously undisclosed to wit; that the machine was never to be disconnected from power, secondly that the ink tubes had to be cleaned twice every day without fail.

61. That the respondent would have to incur extra costs in purchasing a new computer so that the printer would have to incur extra costs in purchasing a new computer so that the printer software could be installed.

62. This Ms. Ngongoo complains she only learnt after installation had been done, that she was also informed that the machine was not for many T-shirts and could not print on a ranger of fabrics. That there an indication initially that the machine would come with free ink, but instead the respondent was asked to pay a sum of Kshs.39,115.20 for it.

63. Ms. Ngongoo told the court the machine kept displaying an error message after it was installed. That on the 20th September the respondent had needed to print some T-shirts and was advised by the appellant's technicians who were assisting in the printing, to purchase the pre-coating solution from another supplier because the appellant's technicians on the 25th September 2012, attributed to the incompatibility of the machine with the pre-coating solution bought.

64. She told the court, the problems with the machine persisted, that the error persisted. The appellant's technician was called on the 26th September, 2012. He checked the nozzle and did an ink test assuring that all was now well. That was not to be, that on 28th October 2012 the quality problems were still subsisting, the machine was slower than indicated.

65. On the 15th October 2012 the quality of print changed, destroying T-shirts in the process of printing, that the appellant's technician again

attended their offices and checked the machine. He found there was excessive ink being discharged from the machine, that it was again tested on the 16th October 2012.

66. The bad quality persisted, that on the 17th to 21st October the machine continued to experience problems. That a technician sent by the appellant on the 22nd October 2012 indicated to them that the appellant would contact the manufacturer, the appellant did not however get in touch with them thereafter.

67. Ms. Ngongoo told the court that she did contact the appellant about the 21st December 2012 seeking their assistance in shutting the machine down for the Christmas period as had been recommended by the appellant, which was done by the appellant's technician the following day, the 22nd December 2012.

68. Ms. Ngongoo told the court she called the appellant again on the 7th January 2013 asking for assistance in switching the machine on which was done by the appellant's technician on the 8th, that the technician on that very day replaced the cleaning solutions, did head cleaning and nozzle checks, but on carrying out the print test found two nozzles were not working.

69. That he left the problem unresolved. Ms. Ngongoo complains that it was not until the 13th January 2013 that the technician returned, that he discovered that the nozzle was blocked in the period when the machine was shut down. That she was informed that the same needed replacing, that it was not covered by the guarantee and a further Kshs.85,377.15 plus VAT would be required from her for the supply of the part.

70. She told the court that the appellant's technician returned to their offices on the 6th February 2013 and drained all ink from the machine and cleaned the tubes and returned on the 11th to install a new print head. That thought the machine was then recommissioned, it still had excessive ink discharge, and for this reason the respondent kept declining orders because the quality was poor.

71. That the inks in the machine began to run out on the 23rd February 2013, there was need to buy fresh ink that the appellant however informed her that they had no stock they would have to order it from the manufacturer in South Korea.

72. Ms. Ngongoo told the court that she was thereafter forced to buy cleaning solution from a different supplier on the 28th February 2013 as they awaited the stocks from South Korea, that a week later the machine began to display the error message and on the 6th March it shut itself down. That all this while there had been no communication from the appellant.

73. Ms. Ngongoo told the court that she wrote to the appellant via email on the 15th March 2013 rescinding the contract and claiming her money back, that the machines manufacturer did in the month of August indicated that it would be willing to refund the appellant what the appellant had paid if the appellant refunded her the purchase price.

74. Ms. Ngongoo complains that the appellant misled the respondent into purchasing the machine and refused to address its unmerchantability thereby causing the respondent loss and damage. That the respondent lost business because of it and incurred higher electricity costs.

75. Mr. Pitchandi Santhanaraj, the general manager of the appellant too adopted as part of his testimony his filed witness statement. By it he told the court that the respondent expressed interest in purchasing the machine sometime in the year 2012, that a quotation was given to her with terms:

76. That the machine would be delivered on 17th September 2012, that 60% would be paid in advance while the balance would be paid before delivery, that the one year warranty against manufacturing defects was applicable for the printer but excluding any electrical, electronic items, rubber items and consumables and lastly that the customer would prepare the site as per the manufacturers standards.

77. Mr. Santhanaraj told the court that the machine was installed on the 19th September 2012 and an installation report filled and duly signed by the respondent, the latter indicating that she was satisfied with the machines performance and training, as well as the quality of the output.

78. That the respondent's representatives were on that day trained on the working of the printer, important aspects being that the same had to be connected to power throughout and secondly that consumables used had to be those of the supplier, that third party consumables would interfere with the running of the machine.

79. Mr. Santhanaraj told the court that he did sent an engineer to the respondent's premises on the 24th September 2012 when the error in display was reported, that the problem was solved, that he again sent an engineer on the 25th who determined that the print quality was not good because the respondent had used a third party primer.

80. That an engineer was sent again on several occasions; on the 27th, the problem was solved, on the 15th October when the engineer indicated a need to contact the manufacturer on the quality of images, that the problem was nonetheless fixed on that very day, that the engineer was in the respondent's premises thereafter on the 22nd November.

81. The problem was fixed to the respondent satisfaction, on 22nd December when work was one to the respondent's satisfaction, the 8th January 2013, when the machine was restarted and left functional, and on the 6th February and 11th February 2013 when the machine was left functioning.

82. Mr. Santhanaraj contends that the above does demonstrate that this machine was working every time their engineer left the premises, that it was the respondent that failed to maintain it hence the numerous visits.

83. At the hearing Mr. Santhanaraj told the court that the machine did not have factory defects. The errors were in the operation. That the machine have been in use, else it would not have needed the consumables.

84. Mr. Sathiyaraj Pandurangan an engineer working with the appellant company was DW2. He too adopted as his testimony his filed witness statement. By it he told court that he was the one who installed the machine on that 19th September 2012, that the customer was fully satisfied with its performance and the quality of the output.

85. That indeed the respondent's representatives were trained as told by Mr. Santhanaraj. Mr. Sathiyaraj told the court that he was instructed to check the error in display reported by the customer on the 24th September 2012, he did so and solved the problem, that he visited the respondent's premises on the 25th September.

86. That he indeed he found the print quality poor because the respondent had used a third parry primer, that he returned on the 22nd November, the 22nd December and the 11th February 2013 on all of these occasions leaving the machine fine and problems fixed. At the hearing Mr. Sathiyaraj told the court the respondent operator would call him telling him he had forgotten about maintenance asking to be taught afresh.

ISSUES, ANALYSIS AND DETERMINATION

87. After going through the pleadings, evidence and submissions on record, I find the issues are: ***whether the machine herein was merchantable for the purposes it was procured for? If above in the negative, what was the remedy to the respondent? What is the order as to costs?***

88. According to Ms. Ngongoo, she had purchased a printer from the appellant company before, that she visited their offices and was told by Mr. Santhanaraj of good printers they were expecting from North Korea.

89. After listening to the description and specifications she decided to purchase the machine, this was in August, 2012. The machine she told the court arrived in the month of September.

90. Mr. Santhanaraj conceded in cross examination that Ms. Ngongoo did visit their offices in search of a printer that he did brief her on the machine. He told the court however that Ms. Ngongoo was to go and see the machine at the exhibition that was to be held in early September before she ordered the machine.

91. This testimony apparently inconsistent with the evidence on record placed before the court. This is so as quotation for this very machine, was dated 28th August, 2012, and part of the terms and conditions was the date of delivery indicated was the 17th September 2012.

92. That was certainly inconsistent with Mr. Santhanaraj testimony that the machine was not ordered until after the exhibition while he told the court took place between the 10th and 12th September 2012, two weeks after the quotation was given and a delivery date set.

93. The evidence supports the respondent's claim, that she was persuaded to purchase the machine before it arrived relying on the advice of the appellant's general manager.

94. In his evidence in chief, Mr. Santhanaraj did tell the court that the appellant had a working relationship with the respondent, that the appellant had sold a couple of machines to the respondent previously, that suffices to show that the appellant knew the purpose for which the machine was intended.

95. The respondent as well told the court she did make clear what the machine was required for, the appellant concedes to this in submissions. There is lastly evidence that a sum of Kshs.1,207,444/= was paid for the printer.

96. By virtue of the provisions of section 16 of the Sale of Goods Act Cao, 31 of the Laws of Kenya, where a buyer has made known to the seller the purpose for which goods are required and the buyer relies on the seller skill, and the goods are such as are in the sellers business to supply, there will be an implied condition that the goods are reasonably fit for that purpose.

97. Regarding merchantability, indeed under section 16(b) of the Act, where the goods are bought by description from a seller dealing in goods that description there will be an implied condition that the goods shall be of a merchantable quality provided that the defects where the goods have been examined are not defect that would have been revealed in the examination.

98. The instant case fits these descriptions squarely; the question then is whether appellant breached the implied condition that the printer purchased by the respondent was reasonably fit for the purpose for which it was intended.

99. The respondent complains that it was not, she detailed in evidence the problems that plagued the machine from the day of installation. The appellant while conceding that several visits were made by its engineers to the respondent's premises in connection with this printer, however told the court the problems encountered were operational, that there was nothing wrong with the machine itself.

100. This was the testimony of both Mr. Santhanaraj, the appellant's general manager and Mr. Sathiyaraj an engineer working for the

appellant.

101. In the reports which both parties confirmed were filled after each visit the same running from page 11 – 25 of the respondent's bundle. Installation of the machine, both parties agreed was completed on the 24th September 2012, the installation report confirms it.

102. The machine the report reads was fine and was printing. Another report filled on the same day shows that there was an error in the display. The machine the report reads was restarted and the problem solved.

103. The following day the 25th September another problem was reported, this time touching on the print quality, the engineer found the problem lay in the use of a third party primer blaming the respondent for this. Two days later on the 27th September, 2012, another problem was reported, the machine was not responding.

104. The report reads, the problem was found that the inkpad counter had exceeded its limit, the counter was reset and problem solved. The next report is dated the 15th October 2012 about two weeks thereafter. The problem reported was regarding the quality of images, the inks were producing a smudge, the engineer on this day records that there was need to contact the manufacturer.

105. The following day, the 16th October, 2012 the same problem was reported, the report reads that the images tested were found to have a problem, the machine engineer/technician comments that the machine was ***ok*** but it was placed under observation for quality.

106. The next report is dated the 22nd November 2012 about five weeks after the 15th October, the problem reported was that the machine was printing numbers.

107. Mr. Sathiyaraj explained this, telling court that the respondent complained that the machine was producing numbers on the materials that it should have been producing on the machine.

108. He told the court he had asked for snapshot of these numbers. Now there is indication in the report that these snapshots would be sent to the manufacturer. This indication was thereafter cancelled.

109. The next report was dated the 22nd December, 2012, cleaning was done. The court was told that the machine was shut down on the same day for the Christmas Holidays. Mr. Sathiyaraj confirmed that he did shut the machine down telling the court that what was shut down though, was the subpower and not the main power. The latter was not to even be shut down, shutting the subpower he told the court would not affect the machines performance.

110. The next report was of the 8th January 2013 when the machine was restarted after the holiday. The report indicates that the machine was alright, a problem was however reported three days later, on the 11th January 2013, the complaint was that the white colour was not firing. The appellant's representative found that the white colour was not printing.

111. The next report is dated the 6th February 2013, inks were drained from the machine and bottles cleaned. There is indication that an invoice was to be raised for the service. The last report is dated the 11th February 2013, there was indication that the print had required replacing, this was done and the machine was working fine.

112. Ms. Ngongoo told the court the machine continued to run intermittently with bad quality and continued to discharge excessive ink. That between the 28th February and 15th March 2013 the machine was non-operational, that on the 6th March it had beeped blinked an error message and shut itself down.

113. While there were no reports between the 11th February and the month of March 2013 shown to the court, the email correspondence at pages 26 and 32 of the respondent's bundle, at page 28 was an email by one Huzefa Yamani regarding the printer in question; there was indication at paragraph 3 that the machine required replacement of the printer heard for good quality printing and at paragraph 4 an acknowledgement that there was discharged of white ink. This was in tandem with the respondent's testimony.

114. It was apparent that the machine was plagued with problems from the very day the machine was installed and intermittently thereafter for the six months following until it finally shut down in March 2013. The appellant argued that the problems were all caused by the respondent operators.

115. Mr. Sathiyaraj told the court that the problems were brought about because of the maintenance of the machine. The evidence again does not support the position, save for the 25th September when the appellant engineer blamed the respondent for using a third party primer. There was no mention in any report that the problems reported were attributable to the respondent.

116. Indeed if the problem laid with the manner in which the respondent operated the machine, why did the appellant's representative Huzefa on the 15th October 2012 upon receiving a complaint on the image quality indicate that there was need to contact the manufacturer?

117. The following day the same gentleman indicated that the machine needed to be observed for quality acknowledging then the complaint that the image quality produced was not good. Mention of the manufacturer was made again on the 22nd November 2012 barely two months after the machine was delivered when the appellant's engineer found that the machine was producing numbers on the materials.

118. If indeed the problem laid with the respondent why would the appellant feel the need to forward the problem to the manufacturer?

119. Now after the Christmas break, there was a problem found with the white colour, it was not firing. In the correspondence at page 28, Mr. Huzefa writes, *"the manufacturer themselves cannot guarantee that the head will not be blocked as this is a machine that deals with white inks.."* and at paragraph 4, *"...in regard to the white ink discharge, as you clearly know there are four bottles of white inks compared to the other colours in the printer....when the machine performs cleaning during the printing or when idle, white inks will be discharged more than the rest as the white inks can clog the tubes or head. This is why this happens and there is no way to control the discharge of inks as this part of the technology...."* Clearly this problem as well was not of the respondent's making.

120. The evidence as a whole supports the assertion by the respondent that the machine yielded poor quality images there was ink overflow, images were smudge, the conclusion one arrives at it that this printer sold to her by the appellant was not fit for the purpose for which it was intended, thus this court agrees with trial court finding in the judgement impugned.

121. The implied condition that the printer would be reasonably fit for the purpose it was intended for, the printer sold to the respondent, was indeed not of merchantable quality.

122. What then are the remedies available to the respondent? The buyers remedy would lie in damages. On a breach of a condition by the seller in contrast, the buyer can reject the transaction and return the goods to the seller.

123. The latter was applicable in this instance, the breach was that of an implied condition, the respondent was entitled to seek refund of the purchase price the sum of Kshs.1,207,444/= effectively repudiating the contract entered into.

i. ***Thus the court finds no merit in the appeal and dismisses the same with costs to the respondent.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGAE