IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 206 of 2018

BETWEEN

PRADIP ENTERPRISES (E.A) LIMITED.....APPELLANT

AND

MAGIC CHEMICALS INC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi Commercial & Tax Division, (Olga Sewe, J.) dated 12th June 2018

in

Milimani HCCC No. 565 of 2013)

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JUDGMENT OF THE COURT

1. The dispute in this appeal relates to sale of goods by sample and description.

By a plaint dated 20th December 2013, and amended on 3rd February 2017, the appellant filed suit against the respondent seeking rescission of contract and refund of the sum of US$ 59,130 together with interest thereon at court rates from 19th April 2013 until payment in full and which sum be set off together with interest from the sum of US$ 70,350 owed to the respondent. The appellant *inter alia* prayed for the sum of Ksh. 126,182/= being the balance after set-off together with interest from the date of filing suit until payment in full. In addition, the appellant prayed for special damages for loss of profit in the sum of Ksh. 1,990,881.60; punitive and exemplary damages was also sought.

2. The undisputed facts giving rise to the claim against the respondent are that:

(i) The appellant entered into an agreement with the respondent for the supply of Eucalyptus Oil 80%.

(ii) The respondent submitted samples of Eucalyptus Oil to the appellant on or about October 2012 which the appellant approved on 11th October 2012.

(iii) It was a condition in the sale agreement that the bulk of the Eucalyptus Oil to be supplied would correspond with the sample in quality and would be merchantable.

(iv) On or about 19th April 2013, the appellant duly paid the respondent the sum of US$ 59,130 as per proforma invoice dated 17th December 2012.

3. The averment giving rise to the cause of action is that contrary to specification, the respondent supplied Eucalyptus Oil that was not as per sample and description; that the Eucalyptus Oil supplied by the respondent had a strong dettol disinfectant odour that raised complaints from the appellant's customers; the complaints were made known to the respondent by e-mail; the respondent by e-mail dated 3rd July 2013 acknowledged and regretted having bought the product from a different source as a cost cutting measure and agreed to compensate the appellant and provide a solution by mixing the product with another to uplift its quality.

4. The appellant avers it incurred costs for experts for analysis to determine the quality of the Eucalyptus Oil supplied by the respondent. For

this reason, the appellant claimed special damages for expert costs and cumulative costs for insurance and shipment; three expert analysis were done as follows:

(a) Test by University of Stellenbosch in South Africa which found the Cineol content in the supplied Eucalyptus Oil was 5.678% as opposed to the standard of not less than 80%.

(b) Test by Mr. Livingstone Anyanzwa which revealed the supplied product had a weak Eucalyptus scent that smelt like dettol disinfectant and was not fit for production and its relative density was below specification.

c) Test by the Chemical & Industrial Consultancy Unit of the University of Nairobi.

5. The appellant further averred the respondent was in breach of ***Section 15*** of the **Sale of Goods Act** which required that in sale of goods, the goods supplied shall correspond to description.

6. The respondent in its amended defence denied liability and damages to the appellant. More specifically, the respondent denied it submitted a sample of Eucalyptus Oil 85% that was approved by the appellant; it denied the Eucalyptus Oil supplied was not as per the express specification and or the approved samples.

7. The respondent averred the appellant's Managing Director, Mr. Manoj Shah, requested for a cheaper product than what the respondent had been supplying to the appellant; upon the request, the respondent agreed to source for Eucalyptus Oil within the appellant's price expectation; it was agreed the respondent will make a shipment of the cheaper product without a sample; the respondent then submitted a sample of Eucalyptus Oil 80% which was approved by the appellant; the respondent thereafter supplied the product as per the appellant's approval and purchase order. It is contended the appellant got quality product as per its approval. The respondent denied ever supplying the appellant with a wrong or sub-standard product.

8. On special damages, it is contended that the appellant unilaterally procured services of experts to test the goods in question without notice to the respondent; the unilateral testing is deliberate contravention of trade customs and practices under the **International Commercial Terms** INCOTERMS.

9. With regard to the applicable law, the respondent denied breach of ***Article 46*** of the Constitution or any provision **Sale of Goods Act** or the **Consumer Protection Act**. The respondent contends the appellant is not entitled to any of the relief claimed in the amended plaint.

10. Upon hearing the parties, the learned judge dismissed the appellant's claim.

In dismissing the claim, the judge expressed herself as follows:

"[35] As to whether the defendant did in fact supply the plaintiff with sub -standard goods, evidence was adduced herein by the plaintiff that, following several complaints by its customers, it caused samples of the product to be submitted to Stellenbosch University of South Africa…. The plaintiff also called as its witness Simon Siele (PW2) of Kenafric Industries Limited, and his evidence was that the results of the analysis he carried out revealed that the product supplied by the defendant had a weak eucalyptus scent that smelt like Dettol disinfectant…Finally the plaintiff relied on the evidence of Prof. Amir Okeyo Yusuf of Chemical & Industrial Consultancy of the University of Nairobi. His testimony was that the percentage of eucalyptol in the sample he tested was found to be between39.2% and therefore below 80% specification provided by the plaintiff….

[36] It is significant that the tests aforementioned were conducted after the delivery of the goods and without any reference to or participation of the defendant. It is therefore not clear how the sampling was done.

[40] It is therefore manifest from the foregoing that the tests in question were unilaterally conducted at the instance of the plaintiff long after the goods had been delivered and of samples whose origin was not properly tracked or linked to the defendant. In any event those tests were not conducted by internationally accredited institutions or professionals for purposes of INCOTERMS…...

[41] In the premises, the court is far from satisfied that the plaintiff has discharged the burden of proving that the defendant supplied it with sub-standard Eucalyptus Oil. Accordingly, any offer on the part of the DW1 to assist the plaintiff in ameliorating the quality of its products after closure of the transaction would be of no consequence in terms of liability, granted that the risk in the goods had already passed upon delivery and subsequent payment.

[44] …. It is plain therefore that where a contract has been fully performed and the property in the goods passed to the buyer, the remedy of rescission is not available.

[45] Having found the plaintiff has not proved, on a balance of probabilities, that the defendant acted in breach of their supply contract…or the Sale of Goods Act or the Consumer Protection Act, it would follow that the plaintiff is not entitled to any damages of any kind. It is noteworthy that even the allegations of loss of profit were not specifically proved herein as by law required. Accordingly, the question of interest does not arise.

[46] In the result, the plaintiff's claim fails and is hereby dismissed with costs."

11. Aggrieved by the dismissal of its claim, the appellant lodged the instant appeal citing the following condensed grounds:

(i) The judge erred in failing to find the respondent supplied goods that were not as per express specifications and sample that had been approved.

(ii) The judge erred in failing to find the respondent had admitted in writing by e-mail on 3rd July 2013 having bought the product from a different source as a cost cutting measure and agreed to compensate the appellant.

(iii) The judge erred in failing to find the three appellant's expert evidence was not rebutted and the expert's opinion corroborate the respondent had supplied a sub-standard product.

(iv) The judge erred in failing to consider the Constitution in Article 46 thereof make it mandatory that consumers have a right to goods and services of reasonable quality and are entitled to compensation for defects in goods.

(v) The judge erred and failed to find that INCOTERMS cannot override Article 46 of the Constitution.

(vi) The judge erred by failing to award damages for loss of profit and special damages that had been pleaded and proved.

12. In its memorandum of appeal, the appellant prays *inter alia* for judgment of the High Court dated 14th May 2015 be set aside and judgment be entered in favour of the appellant as prayed for in the amended plaint dated 3rd February 2017.

13. At the hearing of the instant appeal, learned counsel ***Mr. Allen Gichuhi*** appeared for the appellant while learned counsel ***Mr. J. K. Muthui*** appeared for the respondent. Both parties filed written submissions and list of authorities.

APPELLANT'S SUBMISSIONS

14. Counsel for the appellant rehashed background facts leading to the dispute between the parties. It was submitted that the respondent submitted samples of Eucalyptus Oil 80% on or about 2012 which the appellant approved on 11th October 2012. Subsequent to the approval, the respondent supplied the appellant with 30 barrels of Eucalyptus Oil at a cost of US$ 59,130 which the appellant paid for.

15. The appellant's case is that contrary to the "Eucalyptus Oil 80%" specification agreed between the parties, the respondent supplied Eucalyptus Oil that was not 80% specification; the Oil supplied by the respondent had a strong odour smell like dettol disinfectant; the dettol smell arises when the eucalyptol and cineol content is below the specification.

16. The appellant contends the learned judge erred in failing to find the product supplied by the respondent did not correspond to the agreed sample and description; that it is not in dispute the agreement between the parties was for supply of Eucalyptus Oil 80%. The appellant submitted the respondent by e- mail dated 3rd July 2013 expressed regret for having bought the product from a new source; by another letter dated 2nd August 2013, the respondent forwarded to the appellant a sample of Eucalyptus Oil 55-50% shipped from China to be mixed with the earlier product to uplift its quality. It is the appellant's case the judge erred in failing to find the communication from the respondent vide email dated 3rd July 2013 was an admission that the product supplied was of poor quality and hence the suggestion to mix the product with what the respondent termed as a good product to uplift its quality.

17. The appellant submitted that by e-mail dated 4th July 2013, the respondent admitted the shipment was to be as per specifications and the sample approved; it was admitted the composition and percentage of cineole was a critical component.

18. The appellant stated upon delivery of the product and attempted sale thereof, customers began complaining the product had a strong dettol scent. The customers' complaint was brought to the attention of the respondent and at no time did the respondent dispute the product did not comply with the requirements as per contract.

19. On damage suffered, the appellant submitted as a result of breach of agreed specifications, it has been unable to dispose of the product as delivered; its business reputation is tarnished and customers have lost faith and trust in its ability to supply quality products. On liability, counsel submitted the respondent did not rebut the expert evidence tendered by the appellant and the judge erred in failing to rely on the appellant's uncontroverted expert testimonies. Counsel cited the case of **Dick Omondi Ndiewo t/a Ditech Engineering Service -v- Cell Care Electronics [2015] eKLR** where it was held expert evidence can only be challenged by the evidence of another expert.

20. The appellant further submitted that the respondent was in breach of *inter alia* ***Sections 15*** and ***17*** of the **Sale of Goods Act;** ***Sections 5, 12*** and ***13*** of the **Consumer Protection Act** and ***Article 46*** of the Constitution. It was urged ***Section 5*** of the **Consumer Protection Act** provides that any agreement that purports to negate or vary any implied condition or warranty under the **Sale of Goods Act** or under the **Consumer Protection Act** is void.

21. Counsel cited dicta from the Uganda Supreme Court in **Eladam Enterprises Limited -v- Society General De Surveillance SA & Others CIVIL APPEAL NO. 20 OF 2002 (2004) UGCA1** where it was stated the performance or non-performance of obligations relating to pre-shipment inspection does not take away or in any way interfere with the parties' obligations under the Sale of Goods Act if the claim is brought against the supplier or seller of sub-standard goods. Counsel further cited dicta in **George Mitchell (Chestehall) Limited -v- Finney Lock Seeds Limited 9 19830 2 All ER 737** where it was held a seller who had supplied goods that were not of merchantable quality cannot rely on an exclusion clause.

22. The appellant finally submitted that the learned judge erred in failing to award any damages. Counsel cited the case of **Ken Aluminum Products Limited - v- High Tech Air Conditioning & Refrigeration Limited (2018) eKLR** where it was held a supplier who was in breach by supplying a product of unmerchantable quality and unfit for purpose was liable in special damages incurred as a result of the

breach. It was also urged the judge erred in failing to award exemplary and punitive damages; that ***Section 16 (9)*** of the **Consumer Protection Act** permits the court to award exemplary damages. In concluding its submissions, the appellant urged that ***Section 16 (1)*** of the **Consumer Protection Act** and ***Section 13 (2)*** of the Sale of Goods Act allow a buyer to repudiate a contract for breach by the seller.

RESPONDENT'S SUBMISISONS

23. It was submitted that in July 2013, six months after conclusion of the contract, the appellant approached the respondent with complaints regarding difficulties in selling the product to its customers; that out of a long standing cordial commercial relationship between the parties, and in utmost good faith, the respondent offered to assist the appellant in procuring a new product which would be mixed with the initial product in an effort to improve its quality; the respondent's attempt to procure a new product was independent and distinct from the contract the subject of dispute between the parties; that the initial contract had been performed and concluded in strict conformity with the stipulated terms; that no new agreement was reached to upgrade the product.

24. Counsel submitted that the trial judge did not err in finding the appellant had not discharged its burden of proof to demonstrate the respondent had supplied a sub-standard product. On merits of the case, it was submitted the appellant's order did not contain any description and or product specification as to quality, cineole content, scent, taste or otherwise; the appellant ordered the product as per the terms of the Proforma Invoice and the said invoice did not contain any description of the goods or express specifications thereof; that the contract between the parties was squarely within the definition of a contract under ***Section 17*** of the **Sale of Goods Act** and the appellant was accorded every opportunity to evaluate the sample.

25. It is not in dispute the respondent insisted on sending the appellant a sample of the product for its evaluation; the reason the sample was sent was because the product was being sourced from a new source at the appellant's request. Counsel submitted the appellant did not conduct any evaluation on the sample but proceeded to order the same; having failed to evaluate the sample, the appellant cannot be heard to allege that the cineole content was not according to the specification as to quality; the appellant had opportunity to inspect the goods before delivery; the appellant was specifically requested to confirm whether pre-shipment verification on quality was required; the appellant opted against such verification due to cost implication; by failing to have a pre- shipment verification, the appellant took a risk and cannot blame the respondent for any subsequent prejudice suffered.

26. On expert analysis and reports, it was submitted that the persons who conducted test and analysis for the appellant were not experts; that ***Dr. Amir O. Yusuf*** (PW1) and ***Mr. Simon Siele*** (PW2) were not experts; none of them is accredited to an international inspection agency with capacity to carry out the relevant inspections on international trade matters; none of them is skilled, knowledgeable or experienced in international trade matters; the appellant failed to prove samples that were subjected to tests were from the product supplied by the respondent; the samples were submitted from ***Osho Chemicals*** and not the respondent; and there is high probability of confusion regarding the source of sample submitted for test and analysis. The respondent emphasized that the product returned by ***R.H. Devani*** on 3rd April 2013 was not and could not have been the product supplied by the respondent; this is confirmed by the evidence on PW4 that the appellant only started selling the respondent's products in June or July 2013.

27. It is contended the appellant's action of submitting unverified samples to unqualified persons was a deliberate contravention of trade customs and practices under INCOTERMS which require that such analyses be conducted by an Accredited International Inspection Agency with offices worldwide appointed by the parties. The respondent submitted the learned Judge correctly held the expert opinion tendered by the appellant was unilateral and had no weight.

28. On the alleged breach of the **Sale of Goods Act**, the respondent contends the agreement for sale between the parties was not sale by description but sale by sample. As such***, Sections 13, 15*** and ***16*** of the **Sale of Goods Act** are inapplicable.

29. In concluding its submission, the respondent urged that because the sale was by sample, the issue of whether or not the respondent supplied goods of reasonable quality as contemplated under ***Article 46 (1)*** of the Constitution does not arise. As to the application of the **Consumer Protection Act** to the dispute between the parties, it was urged the Act came into force on 14th March 2013 way after the contract of sale had been entered into by the parties; by the time of commencement of the **Consumer Protection Act**, the contract between the parties had been concluded and the product delivered and accepted by the appellant.

ANALYSIS and DETERMINATION

30. We have considered both the oral and written submissions by the parties as well as authorities cited. The suit before the trial court was determined by *viva voce* evidence and written submissions. As the first appellate Court, it is our duty to reconsider the evidence, evaluate it and draw our own conclusions guided by the applicable law. As was stated by Sir Kenneth O'Connor JA in **Peters -vs- Sunday Post Limited [1958] EA 42,** our duty also entails bearing in mind that:

> ***"…. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."***

31. At the outset, the record shows the appellant to be ***Pradip Enterprises Limited***. The sale agreement, Proforma invoice and documentation in this appeal is between ***Osho Chemicals Limited*** and ***Magic Chemicals Inc***. The appellant stated ***Pradip Enterprises Limited*** purchased ***Osho Chemicals Limited***. For this reason, we construe reference to ***Osho Chemicals Limited*** as *ipso facto* referring to ***Pradip Enterprises Limited***.

32. The principal applicable law to the dispute between the parties is the **Sale of Goods Act, Cap 31 of the Laws of Kenya**. A critical issue is whether the Eucalyptus Oil 80% ordered by the appellant from the respondent was a sale by sample or description or both. Another issue is when property to the Eucalyptus oil passed from the respondent to the appellant; and finally and pivotal, whether the respondent supplied

Eucalyptus Oil as per description or sample or both. All other issues urged in the appeal depend on determination of the foregoing issues.

33. Of relevance to this appeal are the provisions of ***Sections 15, 16, 17, 35*** and ***36*** of the **Sale of Goods Act**. For ease of reference, the Sections provide as follows:

> **"Section 15:**
>
> **"Where there is a contract for the sale of goods by description – there is an implied condition that the goods shall correspond with description; and if the sale is by sample as well as description; it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description."**
>
> **Section 16:**
>
> **Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: -**
>
> > **a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose: provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;**
> >
> > **b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacture or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regard defects which that examination ought to have revealed;**
> >
> > **c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;**
> >
> > **d) An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith."**
>
> **Section 17:**
>
> **"In the case of a contract for sale by sample there is: -**
>
> > **(a) an implied condition that the bulk shall correspond with the sample in quality;**
> >
> > **(b) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;**
> >
> > **(c) an implied condition that the goods shall be free from any defect rendering them un-merchantable which would not be apparent on reasonable examination of sample.**
>
> **Section 35:**
>
> **"Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."**
>
> **Section 36:**
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> **The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."**

34. In a persuasive authority, the High Court in **Prudential Printers Limited -v-Carton Manufacturers Limited [2012] eKLR** held that a reading of ***Section 16*** of the **Sale of Goods Act** shows there is no warranty or condition as to the merchantability of goods; the only time such a warranty will be implied is when the buyer relies on the skill and judgment of the seller or where the goods are bought by description from a seller dealing with such goods.

35. On the facts of this case, it is not in dispute the appellant ordered for Eucalyptus Oil 80% from the respondent. It is not contested the respondent submitted a sample of Eucalyptus Oil to the appellant for purposes of evaluation; it is common ground the appellant did not evaluate the sample submitted to it; it is not controverted the respondent has all along been supplying the appellant with Eucalyptus Oil and the appellant had requested for a cheaper product and the respondent undertook to source for a cheaper product.

36. The first issue for our consideration and determination is what product was actually ordered by the appellant from the respondent? Both parties agree the product that was ordered is Eucalyptus Oil 80%. By letter dated 9th October 2012, the respondent sent to the appellant a sample of Eucalyptus Oil 80% for evaluation. The forwarding letter is addressed to ***Osho Chemical Industries Limited***. As earlier stated, it is not in dispute the appellant did not evaluate the sample sent to it. Failure of the appellant to evaluate the sample brings into play the provisions of ***Section 35*** of the **Sale of Goods Act** which states:

> **"where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."**

37. Guided by the provisions of ***Section 35*** of the **Sale of Goods Act,** it is our finding the appellant cannot be deemed to have accepted the Eucalyptus Oil that was delivered until it had a reasonable opportunity of examining them. It is a question of fact whether the appellant had a reasonable opportunity to examine the goods.

38. The central issue for our determination is whether the contract for sale of Eucalyptus Oil 80% was a sale by sample or sale by description. The appellant contends the sale was both by sample and description. In support of this contention, the appellant avers the description of the product to be supplied is Eucalyptus Oil 80%, the sample to be supplied was described as Eucalyptus Oil 80% as per the respondent's letter dated 9th October 2012.

39. Conversely, the respondent states that sale was not by description but by sample. To the respondent, the sample is the product that was sent to the appellant to evaluate as per its forwarding letter dated 9th October 2012. It is the respondent's case that whatever was sent to the appellant is the product that was delivered; that it was incumbent upon the appellant to evaluate the Eucalyptus Oil that was sent to determine if was fit for its purposes; the respondent submitted the appellant approved and ordered the exact product that was delivered. Consequently, the respondent contends the sale was by sample and not description.

40. We have considered the rival submissions as to whether the sale of the Eucalyptus Oil 80% was by sample or description. From the record, it is not in dispute the product to be supplied was Eucalyptus Oil 80%. In our understanding, this is the description of the product. On sale by sample, we have examined the letter dated 9th October 2012 from the respondent to the appellant. The letter describes the sample being forwarded as Eucalyptus Oil 80%; the same was being sent to the appellant for evaluation. Having examined the forwarding letter, we are satisfied the respondent clearly understood the product to be delivered was Eucalyptus Oil 80%. The respondent cannot be heard to say the sample that was forwarded is the one that was to be delivered. If this is so, and it turns out that the sample was not Eucalyptus Oil 80%, then the forwarding letter dated 9th October 2012 is a misrepresentation as to the nature of the product that was sent as a sample. We are satisfied that the contract of sale between the parties was principally a sale by description. If at all it was a sale by sample, the sample had to correspond with the description.

41. Having found that the sale agreement between the parties was sale by description, the provisions of **Section 15** of the **Sale of Goods Act** come into play. The Section provides:

> **"Where there is a contract for the sale of goods by description – there is an implied condition that the goods shall correspond with description; and if the sale is by sample as well as description; it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description."**

42. The next issue for our consideration is whether the respondent supplied Eucalyptus Oil 80% as per description in the contract. The appellant contends the product supplied was not Eucalyptus Oil 80% as per description. The evidence tendered by the appellant to support its contestation are three expert analysis reports as follows:

> (i) Test by University of Stellenbosch in South Africa which found the Cineol content in the supplied Eucalyptus Oil was 5.678% as opposed to the standard of not less than 80%.
>
> (ii) Test by Mr. Livingstone Anyanzwa which revealed the supplied product had a weak Eucalyptus scent that smelt like dettol disinfectant and was not fit for production and its relative density was below specification.
>
> (iii) Test by the Chemical & Industrial Consultancy Unit of the University of Nairobi where the findings were that the percentage of eucalyptol in the formulation was within the range of 36.73 - 41.79%; that a percentage of eucalyptol that is below 60% contains isovaleralhehyde which impart an unpleasant odor.

43. In challenging the three expert reports by the appellant, the respondent contend the persons who prepared the reports are not experts under INCOTERMS; that ***Dr. Amir O. Yusuf*** (PW1) and ***Mr. Simon Siele*** (PW2) were not experts; none of them is an accredited international inspection agency with capacity to carry out inspections in international trade matters; none of them is skilled, knowledgeable or experienced in international trade matters; the appellant failed to prove the samples that were subjected to tests were the product supplied by the respondent; the samples were submitted from ***Osho Chemicals*** and not the appellant; there is a high probability of confusion regarding the source of the sample submitted by the appellant for test and analysis; and no evidence was submitted to demonstrate the source of the sample that was submitted for chemical analysis.

44. The learned judge in rejecting the three expert reports expressed:

> ***"[36] It is significant that the tests aforementioned were conducted after the delivery of the goods and without any reference to or participation of the defendant. It is therefore not clear how the sampling was done.***

[40] It is therefore manifest from the foregoing that the tests in question were unilaterally conducted at the instance of the plaintiff long after the goods had been delivered and of samples whose origin was not properly tracked or linked to the defendant. In any event those tests were not conducted by internationally accredited institutions or professionals for purposes of INCOTERMS…..."

45. From the foregoing paragraphs, it is manifest the learned judge gave several reasons for rejecting the three expert reports namely: (i) tests were conducted unilaterally without reference to the respondent; (ii) it is not clear how sampling was done; (iii) tests were conducted long after the goods had been delivered; (iv) the origin and tracking of the samples not proper; (v) tests were not conducted by internationally accredited institutions or professionals for purposes of INCOTERMS.

46. In this appeal, it is our duty to consider if the reasons given by the learned Judge in rejecting the expert reports are sound in law. In **Dick Omondi Ndiewo T/A Ditech Engineering Service -v- Cell Care Electronics [2015] eKLR**, it was correctly stated that the evidence of an expert can only be challenged by evidence of another expert. In **Stephen Kinini Wang'ondu -v- The Ark Limited [2016] eKLR** it was expressed:

"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess…."

47. In the instant appeal, the learned judge accepted the respondent's submission that the three expert reports were not availed by internationally accredited institutions or professionals. In so holding, the judge concluded the persons who conducted the tests and analysis were not experts. In **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988**, it was stated expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it, it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.

48. When considering expert evidence, a court must take into account the entire evidence on record. In our view, expert evidence is not the only method of proving existence or non-existence of a fact in issue. In the instant matter, there is other evidence on record to establish if the goods supplied correspond to the description. First, the respondent knew the product to be supplied was Eucalyptus Oil 80%. Second, it was brought to the attention of the respondent that appellant's customers had complained the Eucalyptus Oil supplied and delivered had dettol scent and odor. Third, upon the complaint being brought to the attention of the respondent, it did not dispute or deny the product did not comply with the requirements. Fourth, there is admission by the respondent vide e-mail dated 2nd August 2013 that the quality of the product could be uplifted by mixing it with another product.

49. The trial court did not address its mind to the implication of above enumerated evidence on record. The evidence reveal persistent complaint by customers and the appellant that the product supplied was not Eucalyptus Oil 80%. A consumer's experience with a product cannot be trashed and wished away without consideration. Consumers of a product are the best experts on quality control. When a product has a side effect, it is the consumer who is best placed to know, appreciate and feel the same.

50. One of the reasons given by the trial court in rejecting the three expert reports is that the tests were done unilaterally and long after the goods had been supplied. Analysis of the trial court judgment shows the judge did not address her mind to the provisions of **Section 35 of the Sale of Goods Act** which provides that:

"where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

51. In this appeal, it is not in dispute the appellant did not evaluate the sample sent to it vide the letter dated 9th October 2012; it is also not controverted there was no pre-shipment inspection of the product before it was shipped to Kenya and delivered to the appellant. In light of these facts, ***Section 16 (b)*** of the **Sale of Goods Act** comes into play. The proviso in the sub-section is inapplicable. The sub-section stipulates where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacture or not), there is an implied condition that the goods shall be of merchantable quality.

52. The respondent submitted that unilateral test and analysis conducted by the appellant was contrary to trade usage and custom. In **Harilal & Co. and another -v- The Standard Bank Limited, [1967]EA 512** it was held trade usage must be specifically pleaded and proved and a usage is not proved merely by the evidence of persons who would benefit from it unsupported by other evidence. In this appeal, the respondent did not lead evidence to prove existence of trade usage; further, no evidence was led to prove the usage was so well known to the appellant as a person who would be affected by it when entering into the contract for sale of Eucalyptus Oil 80%.

53. In **Varley - v- Whipp [1900] 1 QB 513** the defendant agreed to buy from the plaintiff a second-hand reaping machine which was stated to have been new the previous year and hardly used at all. The defendant had not seen the machine at the time of the sale. He later refused to accept it on the ground that it did not correspond with the description. The court agreed that the machine did not correspond with its description and held that the defendant was not liable for the price. The judge stated, *inter alia*, that the phrase "sale by description" must apply to "all cases where the purchaser has not seen the goods but is relying on the description alone". It applies where the buyer has never seen the article sold, but has bought by the description.

54. In the instant appeal, the appellant's customers evaluated the product supplied by the respondent; the customers determined the product was not of merchantable quality. In **Nichol -v - Godts (1854) 10 Ex. 191,** Nichol agreed to sell to Godts some oil described as "foreign refined rape oil, warranted only equal to sample." Nichol delivered oil equal to the quality of the samples, but which was not "foreign refined rape oil." Two issues arose for determination whether there was a breach of condition and whether the buyer was entitled to refuse the goods.

It was held that breach of condition occurred and Godts could refuse to accept the goods. It was further expressed that where there is a sale of goods by sample as well as by description, the goods must correspond with the description as well as sample.

55. In this appeal, persuaded by the merits of the decisions in **Varley -v- Whipp, [1900] 1 QB 513** and **Nichol v Godts (1854) 10 Ex. 191,** we are of the considered view that the judge erred in failing to find the respondent had supplied to the appellant's goods that did not meet the description as per the agreement for sale. The product supplied was not Eucalyptus Oil 80%. We further find the appellant had discharged the burden of proof and established the product supplied was not Eucalyptus Oil 80%. Accordingly, we find the respondent was in breach of ***Sections 15*** and ***16*** of the **Sale of Goods Act** and in breach of the agreement to supply Eucalyptus Oil 80%.

56. An issue urged in contestation is the sample sent by the appellant to the three experts for analysis and testing may not be the product supplied by the respondent; that it is also doubtful whether the goods returned by the appellant's customers were sourced from the respondent. The respondent submitted the evidence of ***Paul Omondi*** (PW2) as to the return of good by **R. H. Devani Limited** on 3rd April 2013 and cast doubt as to whether thegoods returned by the appellant's customers were sourced from the respondent. In response, the appellant submitted the products supplied by the respondent has a distinct batch number and the sample sent for testing was supplied by the respondent.

57. We have considered the submission on this issue and are satisfied the respondent's submission carries little weight taking into account that all along, the parties engaged in discussion that the product as supplied did not correspond to description. The critical factor is whether the respondent supplied a product that corresponds to the description and not who returned what and when it was returned.

58. We have held the respondent is liable to the appellant for breach of contract in failure to supply Eucalyptus Oil 80%. The next issue is what relief the appellant is entitled to for the breach of contract.

59. In its amended plaint, the appellant prays for the following relief and orders:

> ***"(a) Rescission of the contract and refund of US$ 59,130/= together with interest at court rates from 19th April 2013 till payment in full.***
>
> ***(b) Set off from the sum of US$ 70,350/= owed to the respondent.***
>
> ***(d) Ksh. 1,990,881.60 being loss in profit together with interest at court rates from the date of filing suit until payment in full.***
>
> ***(e) Ksh. 26,645/= with interest at court rates from 20th May 2014 till payment in full being the cost of carrying out chemical analysis in South Africa.***
>
> ***(f) Ksh. 44,300/= with interest at court rates from 15th April until payment in full being the cost paid to the nominee of Chemical & Industrial Consultancy Unit.***
>
> ***(g) Ksh.1,105,740/= with interest at court rates from 14th May 2013 till payment in full being cumulative total in respect of Insurance, IDF application fees, VAT, IDF entry, Merchant Ship Levy, MCT Charges Agility invoice and transport charges by Agility paid on diverse dated between 25th October 2012 and 14th May 2013.***
>
> ***(h) Punitive and exemplary damages.***
>
> ***(i) An order that the respondent do forthwith collect the drums of the Eucalyptus Oil supplied.***
>
> ***(j) Costs of the suit with interest at court rates until payment in full."***

60. We have made a finding that the respondent is liable to the appellant for breach of contract. It follows the respondent is liable in damages for the breach. The issue is the quantum of general or special damages that is due. In **Francis Namatoi Obongita - v- Cocker Printers and Designers Ltd [1984] eKLR,** the principles for award of general damages for breach of contract were considered. In approving dicta in **V.R. Chande and Others -v- E.A. Airway Corporation [1964] E.A. 78,** it was held:

> **"The general rule as to the quantum of damages to be awarded for breach of contract was stated by ALDERSON, B in Hadley Baxendale (18854) 9 Ex 341 (156 E R 145 at P. 151) in the following terms: -**
>
> > **Now we think a proper rule in such a case as the present is this; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as my fairly and reasonably be considered either arising naturally i.e. according to the usual course or things from such a 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 contracts the probable result of the breach of contract.**

61. In the instant matter, the natural and probable consequence of failure by the respondent to supply Eucalyptus Oil 80% is the loss of purchase price by the appellant. Accordingly, we find the measure of damages due and owing to the appellant is the purchase price of US$ 59,130/=. We enter judgment in favour of the appellant against the respondent in the said sum of US$ 59,130/=.

62. The next issue is whether the appellant is entitled to interest on the sum of US$ 59,130/= and if so, at what rate and with effect from

which date. In its amended plaint, the appellant claims interest from 19th April 2013. The original plant in this matter was filed on 20th December 2013. The appellant is thus claiming interest from a date that precedes filing of the suit.

63. In **Highway Furniture Mart Limited -v- Permanent Secretary and Another [2006] 2 EA 94,** the Court of Appeal held, *inter alia*, that interest antecedent to the suit is only claimable where, under an agreement, there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. In **Omega Enterprises (Kenya) Limited -v- Eldoret Sirikwa Hotel Limited & 2 others [2001] eKLR** this Court at page 7 said as follows:

> **"There is no doubt that if a party is deprived of the use of his money he must be compensated therefore by an award of interest thereon from the date he (was) (sic) so deprived."**

64. In this matter, the appellant has claimed interest from 19th April 2013 which is the date on when it paid the invoice of US$ 59,130/= for supply of Eucalyptus Oil 80%. Guided by the decision in **Omega Enterprises Kenya Limited -v- Eldoret Sirikwa Hotel Limited & Others** (supra), we find and hold the appellant is entitled to interest on US$ 59,130/= from 19th April 2013 when it paid the invoice. The interest is payable at court rates from 19th April 2013.

65. The appellant has made a prayer for set off of US$ 59,130/= and interest thereon from the sum of US$ 70,350/= owed to the respondent. Whereas the appellant admits owing the respondent the sum of US$70,350/=, the right of set-off is a right that can only be exercised if there is a counterclaim and set off in the present suit filed by the respondent. Any monies owed by the appellant to the respondent is an independent cause of action not related to the breach of contract for supply of Eucalyptus Oil 80%. Being an independent cause of action, the sum of US$ 70,350/= owed by the appellant to the respondent is enforceable outside the ambits of the present suit. In the absence of a counterclaim and set off in this suit, we decline to grant the order of set off as prayed.

66. A further prayer in the amended plaint is for the sum of Ksh. 1,990,881.60 being loss in profit together with interest at court rates from the date of filing suit until payment in full. We have examined the record of appeal. The appellant did not lead evidence to prove its claim for loss of profit. Accordingly, we decline to enter judgment for loss of profit in the sum of Ksh. 1,990,881.60.

67. Other monies claimed by the appellant against the respondent are Ksh. 26,645/=; Ksh. 44,300/= and Ksh. 1,105,740/= being respectively the costs incurred for expert analysis of the Eucalyptus Oil supplied by the respondent and the cost of shipment of the product to Kenya. We have considered the claim for these monies. We have taken into account that the long standing cordial business relationship between the parties. In particular, we have considered the tests and expert reports were prepared unilaterally without involving the respondent. Due to the unilateral action on the part of the appellant we decline to enter judgment in favour of the appellant in relation to the expert costs. For avoidance of doubt, we decline to enter judgment in the sum of Ksh. 26,645/= and Ksh. 44,300/= as prayed in the amended plaint.

68. As regards the sum of Ksh. 1,105,740/= being cumulative costs in respect of shipment, IDF etc.; we find this to be a direct consequence of breach of contract. The appellant did not evidently establish when the monies were paid but simply averred payment was made on diverse dates between 25th October 2012 and 14th May 2013. Due to ambivalence on date of payment, we enter judgment for the appellant in the sum of Ksh. Ksh. 1,105,740/= with interest thereon from the date of filing suit namely 20th December 2013.

69. We decline to award punitive and exemplary damages as there is no evidence to prove there was capricious or wanton arbitrariness on the part of the respondent.

70. Finally, to restore economic parity balance between the parties, we order the respondent to collect the drums of Eucalyptus Oil supplied to the appellant within 90 days of this judgment. No storage or demurrage charges is to be levied. If the respondent fails to collect the product within 90 days, the appellant be at liberty to forthwith destroy the product and bill the respondent for the cost of destruction.

71. Considering the parties entered into the contract for sale in good faith, we hereby order each party to bear its own costs in this appeal and before the High Court.

72. The upshot is we find this appeal has partial merit. The judgment of the High Court dated 12th June 208 be and is hereby set aside in entirety and varied. We substitute in its place the following final orders:

> ***(i) Judgment be and is hereby entered in favour of the appellant in the sum of US$ 59,130/= with interest thereon at court rates with effect from 19th April 2013.***
>
> ***(ii) Judgment be and is hereby entered for the appellant in the sum of Ksh. 1,105,740/= being the cumulative total in respect of Insurance, IDF application fees, VAT, IDF entry, Merchant Ship Levy, MCT Charges Agility invoice and transport charges. Interest on this sum is with effect from the date of filing suit namely 20th December 2013.***
>
> ***(iii) The prayer for set off in the sum of US$ 70,350/= owed by the appellant to the respondent be and is hereby dismissed.***
>
> ***(iv) The prayer for judgment in the sum of Ksh. 26,645/= and Ksh. 44,300/= as prayed in the amended plaint be and is hereby dismissed.***
>
> ***(v) The prayer for judgment for loss of profit in the sum of Ksh. 1,990,881.60 is hereby dismissed.***

(vi) The prayer for exemplary and punitive damages be and is hereby dismissed.

(viii) We order the respondent to collect the drums of Eucalyptus Oil supplied to the appellant within 90 days of this judgment. No storage or demurrage charges is to be levied. If the respondent fails to collect the product within the stipulated time line, the appellant be at liberty upon 14 days notification to the respondent to forthwith destroy the product and bill the respondent the cost of destruction.

(viii) Each party to bear its own costs in this appeal and before the High Court.

Dated and delivered at Nairobi this 21st day of June, 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

…….....…….

JUDGE OF APPEAL

J.OTIENO-ODEK

……...……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR