

KENYA / JUDGMENT

Brollo Kenya Ltd v Ali [1987] KECA 91 (KLR)

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COURT

Court of Appeal

BEFORE

JO Nyarangi, HG Platt, JM Gachuhi

CASE / FILE NUMBER

Civil Appeal 161 of 1986

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Brollo Kenya Ltd v Ali (Civil Appeal 161 of 1986) [1987] KECA 91 (KLR) (13 August 1987)

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[1987] KECA 91 (KLR)

Republic of Kenya

In the Court of Appeal at Mombasa

Civil Appeal 161 of 1986

JO Nyarangi, HG Platt & JM Gachuhi, JJA

August 13, 1987

Between

Brollo Kenya Ltd

Appellant

and

Saleh Hassan Ali

Respondent

(Appeal from the High Court at Mombasa, Bhandari J)

Judgement of Nyarangi

1.The material history of this case can be concisely stated.

2. On July 15, 1981 the defendant agreed to sell and deliver to the plaintiff 200 tons of various sizes of galvanized pipes and black pipes at an agreed price of Kshs 2.80 per kilo. The total cost of the consignment was Kshs 560,000 and the goods were to be delivered within 30 days from the date of contract. The defendant claimed that it was understood that the plaintiff would pay sales tax in addition to the contract price as, he, the defendant was under a statutory and legal obligation to collect sales tax on behalf of the commissioner of sales tax. On or about August 13, 1981 the plaintiff went to take delivery of the pipes and tendered a sum of Kshs 510,000 which was the balance of the total purchase price, a deposit of Kshs 50,000 having been paid earlier. However, the defendant did not deliver the goods because the plaintiff, having refused or neglected to pay sales tax of Kshs 84,000 payable by him, was in breach of the agreement and therefore no delivery could be effected until the sales tax was paid. The plaintiff failed to pay the sales tax and as a result the defendant sold the pipes to someone else.

3. The questions for consideration by the judge were: 1) whether the price of Kshs 2.80 per kilo were inclusive or not of the sales tax. 2) if it was inclusive was the defendant entitled to refuse delivery and sell off the goods. 3) if not, what are the damages, if any.

4. The plaintiff's case on the first issue was that a cheque for Kshs 510,000 was handed to Bonomi who refused to accept the cheque and said that the price of the goods had in the meantime gone up to Kshs 6.50 per kilo. It was not until the plaintiff went to his advocates for the second time that he learnt that the defendant had demanded from the plaintiff the payment of tax and that the plaintiff had refused. The plaintiff stated that sales tax had not been mentioned during the negotiation and that he had not asked the defendant to waive the sales tax.

5. By way of riposte to the plaintiff's version, there was evidence on behalf of the defendant which can be summarized briefly. According to Ombuora, the General Manager of the defendant company since March 1, 1980, the plaintiff, Erman and Bonomi, the defendant company's commercial manager came to the office to see the General Manager about sales tax for the materials they were buying from the defendant company. At first the plaintiff argued that he would not pay tax. When Ombuora refused, the plaintiff changed his position and requested that the sales tax be waived but it was explained that sales tax was a government requirement and there was no way of helping him by waiving it. Ombuora told the judge that all prices quoted by the defendant are always exclusive of sales tax, that sales tax is never stated on any stores requisition voucher and that it is the duty of the accounts staff to add sales tax when they issue invoices. The judge considered the evidence and concluded that: "when the price was fixed there was no mention of sales tax and the plaintiff was not required to pay any sales tax in addition to that price because either the price was inclusive of sales tax or no sales tax was payable."

6. Grounds 4, 5 and 8 of the memorandum of appeal attack this particular finding of the judge. As the dispute on sales tax is central to this appeal, I prefer to tackle it right away.

7. Sub-section 1 of section 10 of the Sales Tax, cap 476 (the Act) provides as follows; (1) Every registered manufacturer who sells any taxable goods shall furnish the purchaser with an invoice in respect of the transaction at the time of sale of those goods and shall state thereon the amount of tax payable, if any, separately from the prices for which the goods are sold. Sub-section 2 states: “(2) The amount of the tax payable, if any, shall be recoverable by the registered manufacturer from the purchaser in addition to the sale price.”

8. It is clear on the pleadings and on the evidence that it was not in dispute that the defendant was a registered manufacturer. In paragraph two of the amended defence, the defendant's averment is that the defendant company was under a statutory and legal obligation to collect sales tax on behalf of the Commissioner of Sales Tax in addition to the contract price. That was a reference to the obligation placed on a registered manufacturer under section 10(1) of the Act. The General Manager of the defendant company told the plaintiff that the issue of sales tax could not be discussed as it was a requirement of the Act. The plaintiff did not challenge the defendant's assertion that it was a registered manufacturer so much so that in July 1981 the plaintiff went to the offices of the defendant company's chief accountant, to find out whether the defendant company should charge sales tax but not to tell the chief accountant that the defendant was not a registered manufacturer. So one must start with section 4 of the Act to decide if the pipes were taxable goods in respect of which sales tax could be collected and one looks at section 10(1) to see by whom sales tax is payable. There was evidence that the defendant company manufactured the material pipes. The defendant company furnished the plaintiff with an invoice in respect of the transaction and informed the plaintiff that the sales tax imposed separately was Kshs 84,000. That amount was the tax payable and had to be recovered by the defendant company from the plaintiff as purchaser in addition to the sale price. To my mind, it is obvious that the amount of sales tax payable on taxable goods as defined in section 2 (d) of the Act is not a matter for negotiation between parties. The payment of the tax by the purchaser to the registered manufacturer follows upon sale of taxable goods. In the present case, for example, it matters not whether sales tax was mentioned or not and nothing, therefore, in my judgment, is to be made of the body of evidence which centered on whether or not reference was made to sales tax. In the light of the view that I take Mr Khanna is right in what I regard as the principal argument.

9. In my judgment the judge erred in his finding that the plaintiff was not required to pay any sales tax in addition to the purchase price. It follows that the price of Kshs 2.80 per kilo was not and could not be inclusive of the sales tax.

10. I now turn to grounds 2, 3 and 7 of this appeal which cover the second of the agreed issues. My finding that the plaintiff was required under the Act to pay sales tax in addition to the sale price does not, in my opinion, render academic the second issue. Much argument was directed to this issue and I think it right to state the view that I have formed in the circumstances of this case. The mandatory nature of sub-section 1 of section 10 of the Act means that the registered manufacturer who sells taxable goods must state on the invoice in respect of the transaction at the time of the sale the amount of sales tax payable. My understanding of sub-section 2 of section 10 is that the sales tax is recovered from the purchaser at the time of payment of the sale price. In

other words, the plaintiff was required under the Act to pay the sales tax of Kshs 84,000 on or about August 13, on which day the plaintiff tendered the balance of the purchase price, before the agreement could become a valid transaction under the Act. The defendant, having agreed to sell goods, was an unpaid seller by virtue of section 39(1)(a) of the Sales of Goods Act (SGA). The defendant had a right to retain the pipes for the price while he was in possession of the pipes, and also a right of resale as limited by the SGA.

11. The plaintiff's contention is that the defendant resold without giving notice to the plaintiff and therefore contrary to section 48(3) of the SGA.

12. It is plain that the plaintiff unlawfully persisted in non-compliance with sub-section 10(1) and (2) of the Sales Act notwithstanding the amended defence. The plaintiff had no valid reason for not paying the sales tax in addition to the balance of the sale price on or about April 12, 1983 when the amended defence was filed. On July 5, 1981, three months before the plaint was filed, the General Manager of the defendant company clearly informed the plaintiff that the payment of sales tax was a statutory requirement which had to be complied with. Despite all that the plaintiff did not see the light of day. On August 24, 1981, the plaintiff's advocates tendered the balance of the sale price but not the sale tax amount and threatened to institute legal proceedings unless the defendant delivered the pipes. On August 31, 1981, the defendant's advocates reminded the plaintiff's advocates that the defendant was required to pay Kshs 84,000 for the account of the Commissioner of Sales Tax. The defendant waited until September 11, 1981 when he proposed the payment of Kshs 84,000 without prejudice to the plaintiff's right to recover the same from the defendant. The defendant's advocates replied on the same day and said they were taking further instructions. And on September 28, the defendant told the plaintiff that he had sold the goods to a third party as the plaintiff was not prepared to pay the additional sum of the sales tax although the defendant was allowed sufficient time.

13. In my opinion, the plaintiff was allowed more than sufficient time to pay the balance of the sale price and additionally the sales tax amount. The defendant waited for the plaintiff to comply with the Act from July 15, 1981 to October 1981. The plaintiff sought to mitigate his loss on September 11, 1981 but then he did not tender a cheque for the two outstanding amounts. His was still a proposal based on misapprehension of a statutory provision. The plaintiff cannot in my opinion be heard to claim that he has suffered loss. The defendant attempted for a period of three months to overlook the Sales Tax Act.

14. The defendant ought to have served notice on the plaintiff of his intention to resell. The resale contravened section 48(3) of the SGA.

15. The plaintiff has not shown the fact of loss. Nominal damages, which I would assess at Kshs 100, would suffice: *Fidahusseini & Co v Mohamed Ally & Co*, [1973] EA 1.

16. I would allow the appeal but I would award damages in the nominal sum of Kshs 100 in place of the Kshs 280,000 awarded by the trial learned judge.

17.I would set aside the order for costs made by the High Court and substitute it with an order that the appellant company be paid its costs of the High Court and the respondent be paid three quarters of his costs in this court.

18.As Platt and Gachuhi JJA have reached the same conclusions, it is so ordered.

Judgement of Platt

1.This appeal arises out of the alleged non-delivery of pipes bought by the plaintiff Saleh Hassan Ali from the defendant Brollo Kenya Limited.

2.The High Court at Mombasa found that the defendant was at fault, and awarded the plaintiff shs 280,000 damages on 10th January, 1986, with "costs and interest as claimed." By a later order dated, 1986, the Court found that such interest should run from the date of filing the suit. The defendant has now appealed on three main issues; Liability, the quantum of damages, and the date from which interest should run if more than nominal damages are awarded. But I shall refer to the parties as they were at the trial.

3.On the first of these issues, it is my opinion that however one looks at the case the defendant acted wrongly.

4.The basic facts as found by the High Court were that the plaintiff, his friend Erman Faxie and Georgio Moretto, a Director and technical Adviser of the defendant company, met at the company's premises on 14th July, 1981. During a conversation in Italian, it was agreed that the plaintiff would buy four lots of second quality water pipes, 200 tons in all, as follows: 3/4" white pipes 75 tons; 1" white pipes 75 tons; 3/4" black pipes 25 tons; 1" black pipes 25 tons. There was evidence that the defendant's price of these second quality pipes was Kshs 4/20 per kilo, but that the deal was made at the price of shs 2/80 per kilo, and a cheque of shs 50,000 was deposited. The white pipes required to be cleaned, threaded, socketed and polished and for this to be done a period of 30 days was to be allowed, so that delivery would be given on 13th August, 1981. The issue was to arise whether the price of shs 2/80 per kilo was to be inclusive or exclusive of sales tax. But according to the plaintiff, that issue did not arise on 14th July, 1981. At this time it was understood that the pipes had been lying there since 1974 without demand for them and because of this, the white pipes required to be put in a deliverable state.

5.Nor was the issue of sales tax raised on 13th August 1981, when the plaintiff and Mr Faxie met Mr Bonomi. Mr Moretto was still away on leave. In his place, Mr Bonomi, the Commercial Manager, gave the plaintiff and Mr Faxie to understand that his pipes were ready, whereupon the plaintiff produced a cheque for the balance of the price, as he alleged shs 510,000.

6.But Mr Bonomi refused to accept the cheque or to deliver the goods, saying that the price had in the meantime risen and he demanded Kshs 6/ 50 per kilo. That the plaintiff refused. He decided to wait for Moretto; but nothing came of that, according to the plaintiff as Moretto refused to see the plaintiff. Moretto however alleged that there had been several meetings.

7.The witnesses for the defendant company claim that sales tax was always an element to be paid by the plaintiff in addition to the price. This tax had been insisted upon by the defendant company from the very beginning. The plaintiff had refused to pay the tax, and that was the cause of the non-delivery.

8.Correspondence between the advocates of these parties ensued. On 24th August,1981, Mr Magan for the plaintiff, wrote to the defendant company setting out the terms of the contract and what occurred on 13th August, 1981. He said:“You refused to deliver the consignment to our client against the said payment (the cheque for shs 510,000) on the grounds that the price of the commodity was not acceptable to you. You cannot either in fact or in law refuse to honour your obligations under the said contract”.

9.The cheque for shs 510,000 was sent back with the request that delivery would be confirmed. But legal proceedings were also threatened.

10.The defendant answered on 31st August 1981 through Mr Khanna’s letter. The deposit of shs 50,000 was repaid, the cheque for shs 510,000 was returned. The sale had been subject to 15% sales tax amounting to shs 84,000, which ought to have been paid. Accordingly the plaintiff was in breach of the agreement and not the defendant, the latter being unwilling to effect delivery to the goods as the plaintiff had failed; to pay the amount in respect of sales tax.

11.The plaintiff tried again. On 11th September 1981 his advocate wrote denying that sales tax had been an element of the price. What had happened was that the defendant had been offered a higher price. The damages might be considerable because the plaintiff had buyers for shs 9 per kilo. Therefore the plaintiff returned the two cheques for the price of shs 500,000 and a further cheque for shs 84,000 to cover tax under protest. Having taken delivery of the goods, the plaintiff would sue to recover the shs 84,000, he pointed out.

12.On 28th September, 1981, the defendant’s advocate returned or repaid all the cheque from the plaintiff. The steps to inform the plaintiff that he had to pay the sales tax were set out. Several of the defendant’s officers had told him so. Then came the crucial part:“Since your client was not prepared to pay the additional sum in respect of the sales tax, our clients sold the said goods to a third party despite our clients allowing your client sufficient time within which to purchase the said goods by preparing the sales tax. Had your client been prepared to pay the sales tax at that time, the goods would have been supplied to him. It is now too late for your client to request our clients to deliver the said goods to him.”On 7th October 1981 the plaint was brought.

13.After reviewing the evidence on both sides, the learned judge concluded that there was no mention of the sales tax when the price of shs 2/80 was agreed, and that the plaintiff did not have to pay shs 84,000 in addition to the price. There was a memorandum of the sale drawn up and signed by Moretto in Exhibit 3, the stores requisition order.

14.Secondly the learned judge thought that the defendant had not proved that the defendant company was a registered manufacturer; one on the sale of whose goods the sales tax must be paid.

15.Thirdly the learned judge found that on 13th August 1981, the seller had admitted that the goods had been put into a deliverable state; they had become ascertained goods, and the property in them had passed to the buyer. Consequently, the seller had wrongly refused to deliver the goods to the buyer.

16.Alternatively the court made the important finding that even if the plaintiff had wrongly refused to pay the sales tax the seller was not entitled to dispose of those pipes by sale to a third party. No doubt, as an unpaid seller, the defendant company could exercise its lien over the goods under section 40 of the Sale of Goods Act (cap 31).

17.The defendant could then exercise his right of resale as limited by the Act (section 40(1)(c) of the Act). The limitation is found in section 48(3) of the Act the relevant words of which are:“or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.”

18.In this case, the judge held that no notice having been given, the re-sale was improper and a breach of the contract. Indeed, the defendant had resold the pipes by the time the price was tendered.

19.The evidence of the re-sale then becomes of vital importance. Let it be assumed that in conformity with the legislation imposing sales tax, namely the Sales Tax Act (cap 476), the defendant was a registered manufacturer, and required to levy sales tax from the plaintiff on these second quality goods, exclusive of the agreed price of shs 2/80. It would then be clear that on 13th August 1981 the plaintiff had to pay shs 510,000 together with shs 84,000. The contract itself was sound, as in Exhibit 3 there was a sufficient memorandum to comply with section 6 of the Sale of Goods Act (cap 31). It was written by Moretto, it was to notify his company of the sale agreed, after which tax would be calculated, a copy of it was given to the plaintiff to witness the sale. Moreover a deposit of shs 50,000 was paid. It was merely a question of who was to pay the tax. On 13th August, 1981 Bonomi refused to make delivery claiming a price for shs 6/20. Moretto refused to see the plaintiff, on 15th August and 18th August. This is as the plaintiff and Erman Faxie explained the situation.

20.On the defendant’s side, Bonomi was not called. Moretto, described the situation as the plaintiff coming to see him three or four times, every time wanting to exclude his liability to pay tax. These meetings lasted two months or so. Moretto was asked when the defendant had started reselling the contract pipes. He did not remember exactly.“A part of those pipes were sold to another customer during those two months that he was coming to see me.”

21.He was asked how many were left by 30th September, 1981. He answered:“About half - by the time I came back from leave. That would be within one month of the sale. None of these pipes were sold after I came back and by the end of September very little of them were left. When the plaintiff first came to see me after my return from leave I did not know that about half the pipes had been sold.I found it out the same day after I had talked to Commercial Manager.”“When I said yesterday that when I returned from leave half of the plaintiff’s pipes had been sold, that

was wrong. I was confused. I have now thought about it. I want to say that the pipes had been prepared for sale, that is they have been threaded for the plaintiff. Those pipes were sold in October 1981 to somebody else.”

22. Not surprisingly this evidence did not attract the approbation of the learned judge. But either way it matters not. If the pipes were sold before the 13th August, 1981 that was a clear breach of contract unknown to the plaintiff and would illustrate why Mr Bonomi was reluctant to complete the sale.

23. The payment of sales tax had not arisen as a dispute before that date. Payment was due on 13th August, 1981 (see section 28 of the Act).

24. If the pipes were sold in October, as the learned judge observed, the defendant could consider that it was an unpaid seller, after 13th August, 1981, when the plaintiff first refused to pay sales tax. It could either exercise its lien or retain the pipes under section 40 of the Sale of Goods Act, and give notice of intention to resell. A reasonable time must be allowed for the buyer to bring in the price and the tax element. This, the buyer never got, but he acted without notice and brought in the price and tax element. This was by the 11th September, 1981, just less than a month after the dispute arose, and well before the alleged resale, (see section 48 of the Sale of Goods Act). The seller was obviously at fault. In my opinion there was evidence from which the learned judge could draw the inference that the seller had got a better bargain elsewhere and was not interested in the contract with the plaintiff. The learned judge was quite right to hold the seller liable, at least on this alternative ground.

25. But the more difficult questions lie ahead. The measure of damages is set out in section 51 of the Act. Sub-section 3 provides: “(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

26. These are not easy terms to apply to the facts of this case. First and foremost the rules only hold good as a prima facie measure. That means that there may be circumstances in which it would be right to employ other tests. Secondly they pertain to a situation where there is an available market for the goods in question. It is difficult to find evidence that there was an available market. There seems to have been no market for the sale of these pipes between 1974 and 1981. Then the plaintiff and some other purchasers became interested. There was thus a growing demand. But even then were other similar second quality pipes available; or to put the test more specifically, could the plaintiff have gone into Mombasa and bought similar pipes? Apparently not. Apparently he would have to buy new pipes from Mabati, (a company mentioned), or the defendant company. Doshi and Co., whose Director gave evidence, does not stock black pipes at all and does not manufacture pipes of these sizes. We know nothing of Mabati's work. A pipe manufacturer was to be called but he did not materialize. As far as I can see, nobody pointed out to the plaintiff that there were pipes he could have bought. He merely said that he did not try to buy similar pipes elsewhere, no doubt because as he said, he had no

ready customer. There are various judicial descriptions of an available market in England, but the essence of such a market must surely be that the buyer should be able to go out and buy equivalent goods, so that a differential between the market price and the contract price may be established.

27. But if there is no available market in this sense, and that seems to have been the position in this case, then a similar result is achieved in any event. This position is described in McGregor on Damages, 13th Ed at p 399. "The essential requirement is that the buyer should be able to go out and buy equivalent goods. If he can do this, then the court awards damages on the basis of the price which he can buy, either by way of "available market" and an application of section 51 (3) or, despite a holding of no "available market" within the meaning of the subsection, by still regarding the price at which the buyer can buy as the market price."

28. Hence although there would not seem to be any "available market" nevertheless the inquiry goes on as to price at which the buyer can buy. That would follow under section 51 (2) of the Act as Law JA pointed out in *Fidahussein v Mohamedally* [1973] EA 1 at page 4.

29. In this case the buyer did not buy anymore pipes; the seller resold them. It is not in evidence what the price was; except that Bonomi said the price had risen to shs 6/50. The price at which a third party has agreed to buy goods from either the seller or the buyer, may be treated as evidence of the market price where it is difficult to assess, but generally it is irrelevant and should not be taken in lieu of the market price. (see McGregor paragraph 552; Chalmers on Sale of Goods, 15th Ed pp 162, 163 and *Williams v Agius* [1914] AC 510, 523). As the resale price is not known and as Bonomi's reported statement is not a great deal to go by, the learned judge chose the price quoted by the defendant company as the usual price second quality goods were sold, namely shs 4/20. That was not an entirely unreasonable point of view, but it does not happen to have been more than a catalogue price. No witness thought it applied at the time of sale or dates of delivery. It is thus very difficult to assess what the market price was, and whether it was true that the price remained the same from July to October, 1981.

30. There are cases where consequential loss can be claimed but they do not help the plaintiff in the case.

31. On what ground then can the damages awarded by the learned judge be claimed? Mr Khaminwa says that there are no such grounds. He says that the plaintiff failed to prove any market price and therefore failed to show any quantum of damages. Mr Magan counters that by saying that he can rely upon the total evidence in the case including the evidence of the defence. In general I would agree that if the defence has filled a gap left by the plaintiff's case, particularly if such evidence is especially within the defendant's knowledge, it is as much evidence as if it were put before the court by the plaintiff or one of his witnesses. The difficulty in taking that course is well illustrated by the three partly opposing judgments in *Fidahussein v Mohamedally*, [1973] E.A. 1, where there was no evidence by the plaintiff of the price of cloves. Law, JA looked at all the evidence (see page 4) given by both sides and found a basic market price of £961- 19-3 per ton. Sir William Duffus, P and Mustafa, JA found that evidence to be unsatisfactory, although the

latter observed at page 7: "...I have considerable sympathy with the point of view that a court should, from whatever evidence there may be in a case, seek to assess the damages suffered."

32. But on the evidence the majority held that the court was not justified in inferring of its own motion what the minimum price of cloves would be on the date of breach (per Mustafa, JA - page 8). Consequently only nominal damages of shs 100 were awarded. A passage from Mayne and McGregor on Damages, 12th Ed p 202 para 203 was approved by Law JA (at page 3,) - "Nominal damages may also be awarded where the fact of a loss is shown, but the necessary evidence as to its amount is not given."

33. Mr Magan contended that the market price was well illustrated by the price of shs 4/20. But it was not a matter of practical knowledge. It was what I have called a catalogue or proposed price, which the defendant company did not feel bound by. Moretto agreed to sell at shs 2/80, and Bonomi wanted shs 6/50. One can hardly call shs 4/20 a market price.

34. The learned judge did not give these aspects of the question concerning damages, quite the full consideration he had given to other issues in this conflicting and contradictory contest. It may be that he did not have the benefit of the very full argument which the parties have placed before us, including the decision of this court in Fidahussein's case. But it appears to me that this case must have a similar result to that in Fidahussein's case. No market price was proved; there was no projected further sale by the plaintiff, despite his letter of the 11th September 1981; and consequently he did not prove any loss, not even on the basis of the resale by the defendant. Nominal damages only can be awarded.

35. I would allow the appeal to the extent that I would substitute nominal damages of shs 100 for the sum of shs 280,000 awarded by the learned judge. I would make the same award for costs as that made in Fidahussein's case, namely that the respondent should have the costs in the High Court and the appellant company three-quarters of the costs in this appeal. The High Court's order for costs and interest should therefore stand.

Judgement of Gachuhi

1. I have read the draft judgment of Nyarangi JA which I agree with. However, I wish to add that the defendant is guilty of selling the goods which had already been sold to the plaintiff. The agreement of sale was completed before the defendant started putting them in shape ready for delivery. Before he could sell them, he was bound to give notice of the repudiation of the agreement.

2. The plaintiff was partly to blame because as a businessman, he ought to have known that sales tax is a statutory tax payable by the purchaser which is not part of the selling price. Sales tax is not negotiable. It is a fixed percentage of the total net value of the goods. It is worked out when goods are invoiced or when cash sale receipt is issued. There is no way the plaintiff could have escaped sales tax. At any rate, he did not show how he could have avoided that payment.

3.The moment the defendant refused to deliver goods, it was in breach of the contract. The remedy available to the plaintiff was compensation by the award of damages. The High Court awarded him Shs 280,000.

4.But the plaintiff did not show that he had a ready purchaser of the price at which he was expecting to sell. There was no market for it. In my view, he never proved the loss he incurred. Without the proof of such loss he was entitled to nominal damages and not the sum of Shs 280,000.

6.I too would allow this appeal to the extent of the damages awarded. I would set aside the judgment for Shs 280,000 and substitute thereof the sum of Shs 100/- nominal damages. The respondent should have the cost of this suit in the High Court and the appellant will have three quarters of its costs in the appeal.

DATE AND DELIVERED AT MOMBASA THIS 13TH DAY OF AUGUST 1987J.O.

NYARANGI.....JUDGE OF APPEALH.G. PLATT.....JUDGE OF

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