THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE CJ; ARACH- AMOKO; NSHIMYE, MWANGUSYA; MWONDHA; JJSC]

CIVIL APPEAL NO.1 OF 2015

BETWEEN

UGANDA TELECOM LIMITED.....APPELLANT

AND

MTN UGANDA LIMITED.....RESPONDENT

(*Appeal from the judgment of the Court of Appeal at Kampala before the Honourable Justices Kasule, Opio Aweri and Buteera, JJA, dated 28th October, 2014 in Civil Appeal No. 58 of 2011)*

JUDGMENT OF M.S.ARACH- AMOKO, JSC

This is a second appeal. It was brought against the judgment of the Court of Appeal which upheld the judgment of the High Court in a suit instituted by the Respondent against the Appellant for breach of contract arising from an Interconnection Agreement between them.

Background

The background to the appeal was well set out in the judgment of the Court of Appeal and the High Court. Briefly, the undisputed facts are that the Appellant and the Respondent are limited liability companies that are licensed to carry out telecommunications business in Uganda. By an Interconnection Agreement effective from 1st February, 2001 "hereinafter referred to as the

Interconnection Agreement", the two companies agreed to interconnect their respective systems to allow for termination of traffic in each other's networks. Pursuant to the said agreement, the parties were obliged to pay to each other interconnection fees for traffic terminating in the other party's network.

In 2006, the Government of South Sudan requested the Government of Uganda to permit the use of the Uganda country code **+256** by a company called GEMTEL LIMITED, a telecommunications operator in Sudan (hereinafter referred to as GEMTEL), until the Government of South Sudan obtained its own country code. The Government of Uganda gave permission for GEMTEL to use Uganda's country code **+256** and the Appellant entered into an Interconnection Agreement with GEMTEL, allowing GEMTEL to use the prefix **477** which was originally reserved for Northern Uganda**.**

Pursuant to the interconnection agreement, in February 2008, the Respondent invoiced the Appellant UGX 6,568,872,676 as interconnection fee for the period of March to December 2007. However, the Appellant only paid UGX 3,475,689,812 and rejected the balance of UGX 3,482,303,277 on the ground that it had arisen because the Respondent had wrongly applied the rate of UG SHS. 100 which was the charge for local traffic instead of USD 0.50 which was chargeable for international traffic in computing the amount due to the Respondent for the use of the code **+256 447** by GEMTEL.

In a bid to recover that balance, the Respondent instituted **High Court Civil Suit No. 297 of 2009** in the Commercial Court against the Appellant for breach of the Interconnection Agreement by refusing to pay the said amount. The Respondent prayed for the amount in question together with interest and costs of the suit.

The Appellant denied liability contending that such traffic was international traffic chargeable at a rate of USD $0.50 per call and

if international traffic rates were applied to the traffic in issue instead of local traffic rates , there would be no amount due from it at all to the Respondent under the interconnection agreement. It prayed for dismissal of the suit with costs.

According to the learned trial judge, the core issue was whether traffic originating from the Respondent's network destined for code **+256 447 xxx** that had been lent to GEMTEL in Southern Sudan was international or local traffic, and the rate that was applicable to the said traffic. This remained the bone of contention in the appeal before the Court of Appeal as well as this appeal.

After thoroughly evaluating the evidence before him, the learned trial judge found that the tariff rate of US $ 0.50 which the Appellant was insisting on for traffic destined for **+256 477xxx** did not exist in the Interconnection Agreement. Most importantly, the Learned trial judge found that in reality, the Appellant's network and that of GEMTEL were one and the same, that GEMTEL had no network outside that of the Appellant and that without code **+256 477 xxx**, which was a local code for Ugandan purposes, GEMTEL could not operate.

The trial judge held that the traffic to GEMTEL from the Respondent via code **+256 477 xxx** was not international, but locally terminated within the meaning of **Section A1** of the Interconnection Agreement. Therefore, the applicable rate was the rate for local traffic which was UGX 100. In the result, he entered judgment in favour of the Respondent for the balance of UGX 3,482,303,277, together with interest of 1,494,506,359 at a rate of 19% p.a; interest on delayed payment at 19% p.a from date of judgment till payment in full; general damages of 100,000,000 with interest at 8% p.a from date of judgment till payment in full plus the costs of the suit.

The Appellant was dissatisfied with the judgment and appealed to the Court of Appeal. The Court of Appeal dismissed the appeal for

lack of merit with costs to the Respondent, hence this appeal. The Memorandum of Appeal contained two grounds framed as follows:

1. *The learned Justices of Appeal erred in law and in fact by misconstruing and failing to subject the evidence on record to adequate inquiry and re-appraisal when they held that the applicable rate for traffic from the Respondent to GEMTEL in Southern Sudan was Ug Shs. 100 under section A1 of the tariff table of the Interconnection Agreement.*

2. *The learned Justices of Appeal erred in fact when they held that code* ***+256 477 xxx*** *was for Northern Towns of Arua, Lira and Gulu.*

The Appellant prayed that:

a. *The appeal be allowed;*
b. *The judgment of the Court of Appeal be set aside;*
c. *The judgment of the High court be set aside and substituted with an order dismissing the suit;*
d. *The rate of USD .90 cents stipulated in the agreement applies to the suit traffic;*
e. *The Appellant be awarded the costs of this appeal and in both courts below.*

Representation

Mr. Didas Nkurunziza represented the Appellant and Mr. Joseph Matsiko and Mr. Augustine Idoot appeared for the Respondent. Both Counsel filed written submissions and authorities which this court considered in determining this appeal.

Mr. Nkurunziza argued the grounds in the order in which they were framed. Mr. Matsiko adopted the same order.

Submissions by Counsel on ground 1

Regarding ground 1, Mr. Nkurunziza began his submission by stating the now settled law that where it is apparent that the evidence or record of proceedings had not been subjected to adequate scrutiny by the trial judge or first appellate court, the 2nd appellate court has an obligation to do so. In support of his submissions Counsel relied on the case of **Muluta vs. Katama [1999] 2 EA 216.**

Mr. Nkurunziza submitted that the learned Justices of the Court of Appeal, while considering Ground 2 of the Memorandum of Appeal by which the Appellant maintained that the rationale for establishing the rates for telecommunications traffic is cost based on the infrastructure used to relay traffic and not code based, made the correct finding in their judgment that parties are bound by their agreement once it is concluded and signed as the correct position and was in line with the legal position that courts of law must construe a contract as it is written and must give effect to the intention of the parties as was held by this Court in **MTN Uganda Limited vs. Uganda Telecom Limited [2005] and Osman Mulangwa [1995-98]2 E.A.**

However, his main criticism is that the learned Justices of the Court of Appeal, without considering and appraising the rest of the evidence before them that was relevant to the issue, went on to erroneously hold that the applicable rate was Ug Shs. 100 under section A1 of the Tariff Table of the Interconnection Agreement. In particular, the learned Justices failed to appraise and construe **Article 6.4** of the Interconnection Agreement, which article is at the heart of the case. **Article 6.4** of the interconnection agreement provides that:

"*For transit traffic from either party's network via the other parties network to* ***a third party operator*** *the price shall be the transit traffic rate as agreed between the parties and recorded in the Rates/Appendix Tariff Table appended to this agreement."*

The Rates Appendix/Tariff Table provides that:

"*Section **A4: International Transit** traffic to: International Band 6(Africa ecl. SA… USD 0.90."*

Counsel submitted that it is important to note that the article, as agreed in writing by the parties, refers to "a third party operator" not a "third party network". That this was confirmed by DW1 Mr. Don Nyakairu when he testified that in relation to this article, "…*it is going to a third party operator."*

Counsel submitted that this fact was brought to the attention of the learned Justices of the Court of Appeal in the submissions in rejoinder, but they ignored it.

He submitted that it was not in contention that the third party operator in this matter was called GEMTEL LIMITED and that it was licensed to operate and give telecommunications services in Southern Sudan by the Government of South Sudan. It did not operate in Uganda. Exh.D16 and D17 showed that both parties had agreed that traffic went to GEMTEL in Southern Sudan. The testimony of PW1 Katamba confirmed this. What was in dispute was the rate to be applied to it. That by Article **6.4,** the applicable tariff in the Interconnection Agreement between the Respondent and the Appellant for traffic to GEMTEL LIMITED the ***third party operator***, was **Section A4: International Transit traffic to: International Band 6** { **Africa exl.SA**}**...$0.90.** It was therefore international traffic and not local traffic. He submitted that this position is supported by the following evidence on record which the learned Justices did not appraise or consider:

(a)Exhibits D27 and D29 respectively, which demonstrated how international traffic is routed and the structure it travels on;

(b) Exhibit D29 adduced by Mr. Nyakairu, which showed how traffic from the Appellant in Uganda travelled to GEMTEL in Southern Sudan and vice versa;

(c) The fact that the rates for telecommunications traffic is cost-based on the infrastructure used to relay traffic and not code based was confirmed by PW2 Martha Kanene;

(d) The fact that PW1 Katamba had also conceded to the fact that Canada, Trinidad & Tobago, USA and many other countries share the country **code 1** did not mean that calls between them were local calls. That PW1 had called them regional calls; that PW1 further conceded, upon a question from the trial judge that "international telephone codes" and "international telecommunications services" are two different things. That PW1 also confirmed that GEMTEL had its own switching unit at Yei, Southern Sudan. That the Interconnection Agreement between the parties defined "switch" as meaning "*an element of a Telecommunications System associated with a set of circuits intended to interconnect temporarily on request such circuits to constitute connections"***.**

(e) A fundamental piece of evidence by the Respondent's witness PW2 Martha Kanene during examination in chief who stated that what makes traffic local or international is:

"*When you call from one country to another that is called international traffic."*

Counsel submitted that this evidence was corroborated by the evidence of DW1 Donald Nyakairu who demonstrated how, through Exhibit D29, traffic flowed from the network of the Appellant in Uganda (one country) to that of GEMTEL in Southern Sudan (another country).

He submitted that it was not disputed that GEMTEL operated and was licensed in Southern Sudan. The above concession alone would have resolved this issue and proved that the traffic from the Respondent, transiting the network of the Appellant and terminating on the network of GEMTEL LIMITED, the third party operator, in Southern Sudan was international traffic and therefore

chargeable under **Article 6.4 of the Interconnection Agreement** and **Section A4-International Band 6 (Africa excl. SA) for US$ 0.90.**

He submitted that whilst the learned Justices correctly held that parties were bound by their agreements and since there was no variation thereof, the discounted rate of US $ 0.50 the Appellant had sought to apply, could not consequently be applied, however, the learned Justices erred in holding that the applicable tariff was A1, yet that section clearly stated that it was for "locally terminated traffic" only.

He contended that the finding by the learned Justices of the Court of Appeal that the interconnection Agreement did not define "international traffic" was also erroneous. This is because according to **Black's Law Dictionary 7th Edition by Bryan Garner,** a definition is one "*that, for purposes of the document in which it appears, arbitrarily clarifies a term with uncertain boundaries or that includes or excludes specified items from the ambit of the term.*"

He argued that the Rates Appendix Tariff Table clearly showed, by exclusion, the seven Bands, plus Inmarsat, which comprised International Transit traffic (Section A4). These were, Europe & SA; N. America & Australia; Middle East, Asia, Africa excl. SA and East Africa. That by exclusion, locally terminated traffic (Section A1), regional terminated traffic (section A2) and regional transit traffic (section A3) were left out of what comprised international transit traffic. Included **in Section A4 International Band 6 (Africa excl. SA) … $ 0.90,** which, without doubt covered Southern Sudan.

He contended that had the learned Justices of the Court of Appeal properly appraised and considered the above evidence, they would have come to the conclusion that the terms of the Interconnection Agreement, being binding on the parties, were that the traffic from the Respondent transiting the network of the Appellant and

terminating on the network of the said GEMTEL in Southern Sudan, was international traffic and therefore chargeable under **Article 6.4 of the Interconnection Agreement and Section A4 International Band 6 (Africa excl. SA) ... $ 0.90.**

In conclusion, Counsel urged this Court to subject the evidence to fresh scrutiny and appraisal and uphold this ground of appeal.

In opposition to the above submissions, Counsel for the Respondent submitted that the Appellant's Counsel was trying to get this Court to re-appraise the evidence on a second appeal to disagree with the High Court and the Court of Appeal so as to come to the wrong conclusion that telephone traffic that terminated on the Appellant's local Uganda code **+256 477 xxx** which had been lent to GEMTEL in Southern Sudan was international telephone traffic, attracting the international rate of US $ 0.90, and not local traffic which attracted Ug Shs. 100.

However, according to the case of **Muluta vs. Katama** (supra), it was held that this Court can re-appraise evidence, only when it is apparent that the evidence or record of proceedings had not been subjected to adequate scrutiny by the trial judge or first appellate court, which was not the case in the appeal before the Court.

Counsel submitted that contrary to the Appellant's submissions, the learned Justices of Appeal were fully aware of their duty as a first appellate court and did effectively and correctly re-appraise all the necessary evidence before them that was relevant to the issues, before making their judgment.

Regarding the argument by the Appellant's Counsel that the learned Justices of Appeal did not re-appraise and misconstrued Article 6.4 of the Interconnection Agreement, Counsel described it as a misrepresentation of the position reflected in the Court of Appeal judgment and he quoted a passage from that judgment which shows that the learned Justices clearly addressed their minds to

the Interconnection Agreement. I intend to reproduce this passage later in this judgment to avoid repetition.

As for the rest of examples given by the Appellant's Counsel above, Counsel for the Respondent submitted that they were merely attempts by the Appellant's Counsel to demonstrate one issue, that the learned Justices did not evaluate the evidence which was relevant to the issues before court, which is not only misleading, but is also false. To elucidate his contention, Counsel reproduced the part of the record of appeal specifically page 670 to 671 where, in his view, the learned Justices had effectively carried out the appraisal exercise.

On the format for re-evaluation of evidence, Counsel submitted that there is no particular format for re-evaluation. All that is necessary is for the record to show that the Justices of Appeal and the trial court had addressed their minds to the Interconnection Agreement. That there is thus no basis to interfere with their judgment. He relied on the judgment of this Court in the case of **Margaret Kato & Anor vs Nuulu Nalwoga , SCCA NO.3 OF 2013** (Okello JSC) and **Uganda Breweries Limited v Uganda Railways Corporation, SCCA NO.06 OF 2001** in support of his submission on this point.

Counsel then prayed that this Court should disallow this ground of appeal.

CONSIDERATION OF GROUND 1 BY COURT:

Ground 1:

The learned Justices of Appeal erred in law and in fact by misconstruing and failing to subject the evidence on record to adequate inquiry and re-appraisal when they held that the applicable rate for traffic from the Respondent to GEMTEL in Southern Sudan was Uganda Shs. 100 under section A1 of the tariff table of the Interconnection Agreement.

The duty of the Court of Appeal to re-appraise evidence on an appeal from the High Court in its original jurisdiction and draw inference of fact is set out in Rule 30 of the Court of Appeal Rules. This Court has restated the application of this Rule in the case of **Kifamunte Henry vs. Uganda Criminal Appeal No. 10 of 1997 (SC).** The Court said:

"We agree that on a first appeal… the appellant is entitled to have the appellant's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to rehear the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge who saw the witness but there may be other circumstances quite apart from manner and demeanor, which may show whether the statement is credible or not which may warrant a court in differing from a judge even on a question of fact turning on the credibility of a witness which the appellate court has not seen. See Pandya v R (1957) E.A 336; Okeno v Republic (1972) E.A 32; and Charles Bwire v Uganda Criminal Appeal No. 23 of 1985 (SC) unreported."

In the same case, the Court also said:

"It does not seem to us that except in the clearest of cases, we are required to re- evaluate the evidence like a first appellate court. On the second appeal it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principles. See: Pandya v R (supra) and Kairu v Uganda (1978) HCB 123."

After referring to the provisions of the Judicature Act and the Trial On Indictments Decree, which are not relevant to the instant case, the Court then continued:

This court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale, we shall assume the duty of the first appellate court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal as the first appellate court, the court of Appeal mis-applied or failed to apply the principles set out in the decisions such as Pandya (supra) Ruwola (supra) and Kairu (supra).”

The same principles were reechoed by the Court in subsequent cases including **Bogere Moses vs. Uganda, Criminal Appeal No. 1 of 1997 (SC)** unreported. Although the principles were in respect of a criminal appeal, there can be no doubt that they equally apply to civil appeals.

In the case of **Muluta vs. Katama** (supra) that was relied on by both Counsel, this Court stated that:

“…*appellate courts have firmly held that where it is apparent that the evidence or record of proceedings has not been subjected to adequate scrutiny by the trial court or first appellate court, as the case may be, the appellate court has an obligation to do so.”*

Under ground 1 of appeal, this court is being invited to re-appraise the evidence, on a second appeal, in respect of the issue whether the telephone traffic from the Respondent that terminated on the Appellant’s local code **+256 447 xxx** which had been lent to GEMTEL in South Sudan was a local or international code and the applicable rate.

While the Appellant contends that it was international traffic attracting the rate of US $ 0.50, the Respondent insists that it was

local traffic which attracted the rate of UG SHS. 100. The two courts below found in favour of the Respondent and held that it was local traffic and attracted the rate of UG SHS. 100. Counsel for the Appellant argued that this was an error that was a result of the Court of Appeal misconstruing and failing to subject the evidence to fresh scrutiny as the Court of Appeal was bound to do.

Learned Counsel for the Respondent disagreed with the Appellant's Counsel and contended that the learned Justices of Appeal had, contrary to the Appellant's contention, properly evaluated the evidence and had come to the correct conclusion that the network used by GEMTEL in Southern Sudan was the Appellant's network using the Ugandan code since it was impossible to separate GEMTEL traffic from that of the Appellant.

In order to determine this point, therefore, this court must peruse the entire record of proceedings and the evidence on record that is relevant to the issue. According to the record of appeal, this issue was raised by the Appellant before the Court of Appeal in ground 2 which was framed as follows:

"The *trial judge failed to construe and apply the Telecommunications (interconnections) Regulation S.I. No. 25 of 2005 and erred in law when he failed to find that the rationale for establishing the rates for telecommunications traffic is cost-based on the infrastructure used to relay traffic and not code based."*

This is how the learned Justices of the Court of Appeal dealt with that ground of appeal, and I quote extensively in order to bring out clearly the issue of evaluation of evidence:

" It is not contested by either party that Regulation 17(13) of the Telecommunications Regulations S.I. No. 25 of 2005 requires that the "telecommunications operators rates for transport and termination of the telecommunications traffic shall be established on the basis of cost oriented pricing."

It is also an agreed fact that in the instant case the parties, UTL and MTN, entered into an interconnection agreement for reciprocal compensation effective 1st February 2001. This was in fulfillment of the Telecommunications (interconnections) Regulations (supra) for the different service providers to enter into such reciprocal arrangement.

The trial judge made a finding that the agreement between the parties did not define what an international or local call was. We agree with that finding.

The rates applicable to MTN and UTL international or local, however, were negotiated by the two parties and they reached what they called "interconnection agreement between Uganda Telecom Limited and MTN Uganda Limited" It was exhibited as P1 on page 263 of the record of appeal. That was the agreement between the parties on the rates they were to use.

Where parties have negotiated an agreement and have reduced it into writing, then they are bound by that agreement in their dealings in the matter.

Counsel for the parties in their submissions do agree that under Regulation 17(13) of the Telecommunications Regulations S.I. No. 25 of 2005 there is a requirement that "telecommunications operators shall be established on the basis of cost oriented pricing." Counsel for the Respondent argued that the rates in the agreement between MTN and UTL was cost based.

We add that whatever factors the parties considered in reaching their agreement, it binds them once they concluded and signed the agreement." (underlining was added for emphasis).

The learned Justices of the Court of Appeal went on to state as follows:

"We have also considered the provisions of the Regulations 17(12)(4) of the same Regulations, which states that the rates chargeable for

interconnection have to be based on the principle of reciprocal compensation. This too was considered by the Learned trial judge.''

The learned Justices of the Court of Appeal concluded as follows:

"We agree with the reasons and his findings when he held:

"A perusal of the interconnection agreement and especially the tariff table Section A4 on interconnection agreement... makes it impossible to apply the rate of USD $ 0.50 without a variation of the agreement as envisaged under Article 21. No evidence of a variation was presented to Court."

The applicable rate was Ug shs.100 under Section A1 of the tariff table of the interconnection agreement.

We conclude therefore that ground two of the appeal fails."

It is evident from the relevant part of the judgment of the Court of Appeal that I have reproduced above that, with the greatest respect, the learned Justices failed in their duty when they did not subject all the relevant evidence to fresh scrutiny which the appellant had expected it to do.

The learned Justices of the Court of Appeal were dealing with the ground relating to the main complaint in this case, that is the question whether the telephone traffic originating from the Respondent's network destined for code **+256 447 xxx** that had been lent to GEMTEL in Southern Sudan was international or local traffic, and the rate that was applicable to the said traffic.

The Learned judge, after failing to find the definition of the words "local rate" and "international rate" in the Interconnection Agreement, determined the matter purely on the evidence on record, particularly the, expert evidence of the witnesses.

In my opinion, the Court of Appeal was therefore duty bound under Rule 30 of the Court of Appeal Rules and the authorities above, to

subject all the evidence that was relevant to this issue to fresh scrutiny and arrive at their own conclusion. This included the Interconnection Agreement which formed the basis of the relationship between the two parties, in particular **Articles 6.1** and **Article 6.4** and the Tariff Table, the oral testimony of the four witnesses, namely, Mr. Katamba PW1, Mrs. Martha Kanene Onyeajuwa PW2, Mr. Chijioke PW3 and Mr. Donald Nyakairu DWI. They had to consider the various correspondences as well. They also had to consider the laws that governed the transaction which included the Uganda Communications Act as well as the Telecommunications (interconnections) Regulations S.I. No. 25 of 2005, the ITU Convention, among others which were referred to by the parties and the trial judge.

In the circumstances, I am of the view that this is one of the clear cases in which it is incumbent upon this Court to re-evaluate the evidence. I have accordingly proceeded to re-evaluate the relevant evidence on this issue.

On perusal of the entire record of proceedings, I find that the Learned trial judge, throughout his judgment, did address his mind to the pleadings, the evidence before the court and the submissions of Counsel in support of their respective positions, which I have found to have been consistent throughout the course of resolving this dispute right from the High Court, the Court of Appeal up to this Court.

It is noteworthy that the parties never agreed on the wording of the issue relating to the rates applicable right from the outset. The Respondent framed the issue as "*whether the telephone traffic originating or terminating on code + 256 477 xxx is local traffic?*"

While the Appellant on the other hand, framed the issue as "*whether traffic originating from the Plaintiff's (MTN's) network and terminating on code +256 477 xxx terminated on the defendant's*

(UTL's) network or terminated on the network of Gemtel in Southern Sudan."

The record shows that the learned trial judge had to actually invoke his powers under 0rder 15 rules 5 of the Civil Procedure Rules to frame an appropriate issue that could determine the real issues in controversy in the suit.

After careful consideration, he decided, rightly in my view, that the real issue for determination by the court was "*which rate should be applied to MTN calls made to subscribers of Gemtel i.e. local or International rates."* This is the issue he determined, taking into account the issues the parties had framed.

The record shows that the Respondent called three witnesses namely, Mr. Katamba PW1, Mrs. Martha Kanene Onyeajuwa PW2, and Mr. Chijioke PW3 and the Appellant called one witness, Mr. Donald Nyakairu DWI.

PW1 testified that he holds an honors LLB degree from Makerere University and a Post Graduate Diploma in Legal Practice from the Law Development Centre. He also holds a Masters Degree in Information Telecommunications (IT). He was the Manager Legal and Corporate Affairs of the respondent at the material time. His duties included managing all the regulatory affairs of the respondent including licensing. He was also the chief legal advisor to the management and the Board of Directors and was responsible for drafting all contracts and managing relationships with other telecom operators as well as the Government and other key stakeholders. He testified that Telephone traffic destination Code **+256 47 xxx** is a local code that belongs to UTL and is consistent with the telephone numbering assigned to UTL by the Regulator, Uganda Communications Commission. He further testified that the said code is indeed one of those assigned by the Uganda Communications Commission for use in the Northern Districts for use in the Northern Uganda towns of Arua which uses **+256 476**

xxx , Lira which uses **+256 473 xxx** and Gulu which uses **+256 471 xxx**, as proved by Exhibit P1.

PW2 told court that she holds an electrical engineering degree plus a Master of Science degree in electrical engineering and electronics from the University of Lagos, Nigeria. That she also had a certificate in telegraphic engineering from the University of Stritelight, in Scotland. She informed court that she was, from her qualifications and experience, an expert in International Telecommunications, Tele-traffic, Numbering Plan and Administration and Management of Country Codes. That she is also a Senior Consultant of the ITU Study Group 2, which is charged with allocation of country codes, their administration and management.

The summary of the evidence of PW1 and PW2 was that telephone traffic originating or terminating on **+256 477 xxx** is local telephone traffic and would attract interconnection rates applicable to locally terminated traffic in accordance with the interconnection Agreement. That telephone traffic destination Code **+256 ***** is the Country Code for Uganda and that all other countries have specific codes assigned to them by the ITU. Further, Sudan as a country has its own Country Code assigned to it by the ITU which is Code **+249*****.** This is also clear from Exhibit P17.

PW2 testified that it was not possible for a country such as Sudan or any part of it to legally use the country Code for Uganda without prior authorization from the ITU and that it is actually illegal for a country to assign or share its code without prior authorization of the ITU.

PW2 further testified that what determines whether a call is local or international is the destination of the Code and if anybody sees a call with the Code **+256******,** they would be entitled to assume that it is a call originating within Uganda. And if they are in Uganda, they would be entitled to assume that they would be charged Ugandan, not international tariffs.

It was also her testimony that if a call is made to MTN (**+256 77xxx)** from a telephone number **+256 477 xxx,** that would be treated as local call. Likewise, if a call is being made from MTN to **+ 256 477 xxx**, it would still be a local call. She went on to say that although UTL can take its code to Gemtel, Gemtel is actually part of the UTL network. The witness stated that this is called "homing" in telephone terminology. When she was asked whether Gemtel and UTL were operating in the same network, she answered that, because of the same code they were using, it was the same network. That if you dial **4** after **+256**, it automatically goes to UTL network.

The summary of the evidence adduced by PW1 and PW2 is that all telephone traffic originating or terminating on code **+256 477 xxx** was lent to Gemtel by UTL, is local telephone traffic, notwithstanding the geographical location of its termination or origin, and notwithstanding any arrangement that UTL had entered with third parties in relation to the use of its numbering asset assigned to it by the Regulator.

The Appellant's only witness Mr. Nyakairu DW1, testified at great length how calls from MTN to Gemtel through code +256 477 xxx had to be routed through UTL's International infrastructure at Mpoma via Satellite to Gemtel's network; therefore, the call was international.

The record shows that the learned trial judge, in his judgment, began by determining the relationship between the Appellant and the Respondent. He established that the relationship was governed by the Interconnection Agreement entered into pursuant to the Telecommunications (Interconnection) Regulations (supra), which provided for reciprocal compensation.

The learned trial judge found that the rates are contained in the Rates Appendix/Tariff Table appended to the said Agreement. However, the learned judge found, after examining the entire agreement and the annexture thereto, that the Interconnection

Agreement does not define what an International or local call is. He also found that **Article 28** of the Agreement provided that:

"This *Agreement represents the entire understanding between the parties in relation to the Interconnection and supersedes all previous understandings, agreement or commitments whatsoever, whether oral or written. All references to… annexes shall be deemed references to such part of this Agreement, unless the context shall otherwise require…"*

I have perused the relevant provisions of the Agreement, namely, The definition in **Article 2,** Article **6** entitled "*Charges For Interconnection"* as well as the Rates Appendix Tariff Table and none of them defines the terms local or international rates, and this fact is not in dispute. The learned trial judge was therefore right in his finding

According to the learned trial judge, both sides had raised compelling argument and the issue was a technical one. He relied on section 34 of the Evidence Act which says:

"…*when a court has to form an opinion upon a point… of science… the opinions upon that point of persons especially skilled in that science… are relevant facts. Such persons are called experts."*

He then proceeded to evaluate the evidence of the expert witnesses on record. He was persuaded by the evidence of PW2 on the matter because:

"She had the best qualifications and experience to handle technical issues. Her testimony was clear and consistent. She also had the added advantage of having worked as a telecom regulator in Nigeria."

The learned judge compared this to the testimony of DW1 and found that:

" The compelling testimony of DW1 notwithstanding of how MTN traffic to +256 477 xxx would have to be routed through their Mpoma Satellite station as would other International calls, the evidence shows that in reality, the UTL and Gemtel network were one and the same. This conclusion is akin to the company law of "lifting the veil" to ascertain the reality of the transactions. Gemtel had no network outside that of UTL and without the code +256 477 xxx which was a local code for Ugandan purposes, Gemtel could not operate. As found earlier, this was an ad hoc arrangement of a temporary nature and had been sanctioned by the Minister in Uganda. Everything technical about the said arrangement was Ugandan and I accordingly find." (The underlining is added for emphasis.)

With respect to the rate, this is what the learned trial judge held:

"As to the rate, UTL had notified MTN that a rate of USD 0.50 would be applicable to them as of 1st June, 2006. A perusal of the Interconnection Agreement and especially the tariff table section A4 on International Transit traffic shows that no such tariff existed. Article 28 of the Interconnection Agreement makes it impossible to apply the rate of USD 0.50 without a variation of the agreement as envisaged under Article 21. No evidence of variation was presented to court. In any event, my aforementioned findings leave only one logical conclusion that the said traffic to Gemtel from MTN was locally terminated within the meaning of section A1(i.e at shs 100) of the tariff table of the Interconnection Agreement and so I find accordingly." (I have again added the underlining for emphasis.)

It is on record that learned Counsel for the Appellant actually conceded that the rate of US $ 0.50 claimed by the Appellant was not in the interconnection agreement. The rate agreed upon in the interconnection agreement was US $ 0.90. In the absence of any variation to the agreement, that rate remained.

This finding is supported by the rest of the evidence on record particularly the various correspondences between the Government

of South Sudan and Uganda as well as those between the two parties on the subject. I cannot fault the learned Justices of Appeal for upholding the same.

Further, regarding the issue of costing, the learned Justices of the Court of Appeal never held anywhere in their judgment that the rates were to be established on the basis of a code based pricing at all. The Court of Appeal reproduced verbatim the provisions of Regulation 17(3) which states that *"traffic shall be established on the basis of cost oriented pricing."* This was the contention of the Respondent too, according to the record of proceedings. They cannot be faulted unfairly.

Furthermore, it is evident from their judgment that the learned Justices of the Court of Appeal were alive to the fact that the parties must have taken into consideration all the factors that must have been considered by the parties before arriving at this "cost oriented pricing" which in my view must have included factors such as the cost of infrastructure alluded to by witnesses from both sides especially Mr. Don Nyakairu (PW1) and Martha Kanene (PW2). That is why the learned Justices of the Court of Appeal stated that:

"We add that whatever factors the parties considered in reaching their agreement, it binds them once they concluded and signed the agreement."

Regarding the status of GEMTEL, I have not found anywhere in their judgment where the learned Justices of the Court of Appeal held that GEMTEL was *"a third party network"* as alleged by the Appellant's Counsel. Regulation 17 (3) which they quoted in their judgment talks of *"telecommunication operators rates"* and **Article 6.4** also clearly described GEMETEL as a *"third party operator."* The evidence on record clearly shows that GEMETEL was a third party operator based in Southern Sudan but was allowed to temporarily use the UTL code **+256 477 xxx** that was meant for Northern Uganda. The calls were locally terminated because they terminated

on the same local Ugandan code. The international transit rates under Section A4 could not apply since Article 6 .4 provided for "*transit traffic from either party's network via the other part's network to a third party operator…"*

It would be unfair, in the premises to criticize the learned Justices for a decision that they never made.

In the premises, although I find merit in the Appellant's criticism that the learned Justices of the Court of Appeal failed to subject the evidence on record to adequate inquiry and re-appraisal, I disagree with the criticism that the learned Justices misconstrued the evidence and thereby reached the wrong decision. This is because I find that their decision is supported by the evidence on record, although they used a short cut to arrive at the same without subjecting all the material evidence that was adduced before the learned trial judge to fresh scrutiny and evaluation as required by Rule 30 of the Court of Appeal Rules before agreeing with the trial judge.

Ground 1 of appeal accordingly fails.

Submissions of Counsel on ground 2

Ground 2 of the appeal is that the learned Justices of Appeal erred in fact when they held that code +256477 was for the Northern Uganda towns of Arua, Lira and Gulu.

Learned Counsel for the Appellant submitted that there was no evidence on record to back this finding by the learned Justices of Appeal. That there was therefore no justification for making that finding. He prayed that this ground be upheld.

Counsel for the Respondent on the other hand, supported the finding of the Court of Appeal. He relied on **Kifamunte Henry v Uganda (supra)** and contended that the learned Justices of the Court of Appeal had properly re-appraised the evidence on this

point as well and had come to the right conclusions. That PW1 and PW2 had talked about code **+256 477** in their testimony. Their evidence that the said code was a code for Northern Uganda was not in dispute. That DW1 had actually admitted in his evidence which is on record that 4 sets of the codes for the Appellant for the towns of Arua, Lira and Gulu were similar and that they were similar to the GEMETEL code in Southern Sudan.

That the substance of the finding by the learned Justices of Appeal were that the **+256 477 xxx** was a code for Northern Uganda, which was extended to Southern Sudan, in that, they all had the prefix number **+256** and they all started with the number **47** after the **+256**. The Justices were right since the essence of their finding was that code **+256 477** was for Northern Uganda, which includes the towns of Lira, Gulu and Arua. In substance, the holding is that it was a local Uganda code used in Southern Sudan, which is correct. It is not therefore open to this Court as a second appellate court to re-appraise this concurrent finding of facts by the two lower courts.

Counsel invited the Court to find that this ground fails as well and prayed that the appeal be dismissed with costs here and in the courts below.

CONSIDERATION OF GROUND 2 BY COURT

The learned Justices of the Court of Appeal stated in their judgment in the paragraph complained of that:

"Gemtel did not have a country Code for its operations in South Sudan. UTL allowed Gemtel to use its Code ***+256 447*** *which was for the Northern towns of* ***Arua, Lira*** *and* ***Gulu****."*

This is a question of fact. According to the evidence on record and the finding of both courts, it is not in dispute that GEMTEL was a licensed telecommunications operator in Southern Sudan. South Sudan as a country was in the process of procuring a

telecommunications Country Code from the International Telecommunications Union (ITU). The Government of South Sudan initiated negotiations in April 2006 with the Uganda Government through their respective Ministers responsible for telecommunications, requesting the Uganda Government to allow the use of the Uganda **Code +256** by GEMTEL, until South Sudan had obtained its country code from the International Telecommunications Union. The negotiations resulted into permission by UTL to allow GEMTEL to utilize the Code **+256 447** as a temporary measure until South Sudan acquired its own code. It is not in dispute that this Code was reserved for Northern Uganda. It is further agreed that the Code is still the numbering asset of UTL allocated to it by the Uganda Communications Commission (UCC). The Code was a local code for Uganda.

The statement by the learned Justices of the Court of Appeal has therefore to be taken in that context. A careful perusal of the record of proceedings indicates that the learned Justices carefully perused and properly re-evaluated the evidence before them, before coming to their decision on this ground of appeal. This Court as a second appellate court cannot interfere with the concurrent findings of fact by the High Court and the Court of Appeal unless the findings are not backed by evidence. The evidence of PW1, PW2 and DW1 all support this finding of fact. The evidence is to the effect that the Code for **Arua is +256 467**, **Gulu is +256 473** and **Lira is +256 471**. All the three towns are in northern Uganda. The Code which UTL allowed GEMTEL to use is **+256 477**. GEMTEL was based in Yei, which is in Southern Sudan. It was intended to be a temporary arrangement awaiting the acquisition by South Sudan of its own telecommunications Country Code from the International Telecommunications Union.

In the premises, I accordingly decline the invitation to overturn the finding fact by the two courts.

In the result and for the reasons I have given in this judgment, I find no merit in the appeal and accordingly dismiss it with costs to the Respondent.

Dated in Kampala this .....day of.....2017

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ARACH AMOKO MARY STELLA

JUSTICE OF THE SUPREME COURT.

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