

**SUPREME COURT OF NIGERIA**  
29TH JANUARY, 1993. SC. 269/1990

**CORAM:- A. G. KARIBI-WHYTE, P. NNAEMEKA-AGU,  
A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE, JJSC**

CHIEF EMMANUEL OGUNBADEJO ..... APPELLANT

AND

OTUNBA A.L.A OWOYEMI ..... RESPONDENT

*APPEALS - respondent's notice - whether appropriate where the respondent seeks to challenge the trial judge's reasoning in deciding in his favour - whether new argument amounts to raising a new issue without leave of court.*

*EVIDENCE - admissible evidence taken at a tribunal of inquiry - whether admissible under the relevant law - proof of libel - what plaintiff must tender.*

*TORTS - action for libel - whether plaintiff is entitled to succeed or not.*

**FACTS**

The Plaintiff/Respondent brought an action against the Defendant claiming N500,000.000 as damages for libel. The defamatory matter was a letter written to the plaintiff and copied to the Defendant. During proceedings of a Tribunal of Inquiry the letter was tendered in evidence by the Defendant. At the hearing of the action for libel, the Plaintiff tendered, in proof of the libel a certified true copy of the report of the Tribunal of inquiry. The report contained at page 119 a reproduction of the letter containing the alleged defamatory words. Counsel for the Defendant objected to the admissibility of the report but was overruled. He also objected to the admissibility of page 119 of the report but was again overruled. The trial judge subsequently found for the plaintiff and awarded him N5,000.00 as damages for libel. The Defendant appealed against the decision of the trial court to the Court of Appeal.

The Plaintiff filed a respondent's notice to vary the award of damages by increasing same being aggrieved with the quantum of damages. The Court of Appeal dismissed the Defendant's appeal and struck out the Respondent's notice filed by the plaintiff, holding that the plaintiff cannot come by way of Respondent's notice but cross-appeal. Both parties appealed to the Supreme Court. Appellant's Counsel cited provisions of a statute that barred admission of the Report of the tribunal of inquiry, which respondent's Counsel submitted was tantamount to raising a new issue.

**HELD** (Allowing the Defendant's appeal and dismissing the cross-appeal, NNAEMEKA-AGU JSC dissenting on the issue of cross-appeal)

1. To succeed in a claim for libel, the actual defamatory words complained of must be proved, to do this the plaintiff must tender in evidence the document containing the alleged libel. Where the plaintiff is unable to produce the original libel, however, he can give secondary evidence of it. (p. 175 L. 19)

2. Where the issue under contention is admissibility (Report of the panel of inquiry) appellant's citing of provision to support his submission that the document inadmissible is tantamount to raising a new argument and not a new issue. (p. 175 L.33)

3. To the extent that the report tendered in evidence during trial contains the evidence led at the inquiry, it is clearly inadmissible under the statute. (p. 176 L. 3)

4. Plaintiff/Respondent has failed to prove the alleged libel by not tendering in evidence the letter containing the libel. (p. 176 L. 20)

5. The Respondent in challenging the reasoning of the learned trial judge in arriving at the quantum of damages awarded to him could only do so by appealing and not by way of Respondent's notice. (p. 182 L. 12)

**PER NNAEMEKA-AGU JSC** *"Now the first duty of a plaintiff who comes to court in a case of libel contained in a document is, subject to recognized exceptions, to produce and tender the whole of the*

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*mplained of as well as any connected documents which are capable*  
*of throwing any light on the meaning of the words complained of to*  
*be read and construed by the Court. This is a duty which the plaintiff*  
*owes to the defendant and the court.*  
(p. 182 L. 31)

**PER NNAEMEKA-AGU JSC** *“Whereas a party to a suit cannot in*  
*the Supreme Court raise without leave of court an issue which was*  
*not canvassed in the court below, such a party can rely on any new*  
*line of argument or new authorities; judicial or statutory to support*  
*his argument in an issue which is properly before the court”*  
(P. 184 L. 10)

### **REPRESENTATION**

O. Ayanlaja Esq., for the Appellants  
Ayo Obe (Mrs.), for the Respondents

### **CASES REFERRED TO**

1. Lagos City Council v. Ajayi (1970) 1 All NLR 291
2. Roe v. Mutual loan Fund Ltd (1887) 19 QBD. 342
3. Elochin Nig. Ltd v. Mbadiwe (1986) 1 NWLR 47
4. Adekeye & Ors v. Akin Olugbade (1987) 3 NWLR 291
5. Ogunlade v. Adeleye (1992) 8 NWLR (Pt. 260) 409
6. Plato Films v. Speidel (1961) A.C. 1126
7. R. v. Lambert (1810) 2 Camp 398
8. Johnson v. Hudson (1836) 7 A & E 233
9. Rainy v. Bravo (1872) LR 4 PC 287
10. Doe & Philps v. Morris (1835) 3 A & E 46

11. Owner v. Beehive (1914) 1 KB I Ob
12. Sayer v. Glossop (1848) 2 Exch. 411
13. National Society for Distribution of Electricity v. Gibbs (1881) 2ch 280
14. Re cavenders Trust (1880) 16th D 270
15. Re Wilson (1916) 1 KB 382 CA
16. African Continental Seaways Ltd v. Nigerian Dredging Roads and General Works Ltd (1977) 5 SC 235
17. Sunmonu & Ors v. Ashorota (1975) NMLR 16
18. Oloyede v. Oloyede (1974) 3 WACA 152

### **STATUTES & RULES**

1. Commission of inquiry Law cap 24 Laws of Ogun State s. 10
2. Tribunal if Inquiry Act Cap 442 Laws of Federation of Nigeria s. 8
3. Constitution of the Federal Republic of Nigeria 1979 s. 277 (1)
4. Evidence Act s. 97 (1)
5. Supreme Court Rules 1977 order 7 rule 13 (1)
6. Supreme Court Rules 1985 order 8 3(1) & (2)
7. Court of Appeal Rules order 3 rule 8 & 14(1) order 8 rule 5

### **BOOKS REFERRED TO**

Gately on Libel and Slander 7th ed. para. 1209 -1213  
Supreme Court Practice, 1982 para. 59/6/1

### **LEAD JUDGMENT BY OGUNDARE JSC**

The defendant (who is now the appellant before us), is the head of the Kingmakers to the Dagburewe of Idowa Chieftaincy. At all times relevant to this action, that is, 1982, there was a vacancy in the chieftaincy. The plaintiff (who is now the respondent before us) and one Alhaji Yinusa Adekoya were nominated by the Agbonmagbe

Ruling House to fill the vacancy. The kingmakers met and made a recommendation to the Governor of Ogun State. Protests followed and the State Government set up an administrative panel to look into the dispute. Meanwhile, one B.O. Akala of the Arijeloye Royal family of Idowa had on 6th September, 1982, written a letter to the plaintiff, a copy of which was sent to the defendant. During the proceedings of the fact finding administrative panel set up by the Ogun State Government. The defendant produced his own copy of the said letter and handed it over to the chairman of the panel. The chairman read out the letter at the Inquiry and admitted it in evidence. It is the contents of this letter that the plaintiff complained of in the subsequent action instituted by him against the defendant as constituting libel of him. He claimed N5,000.00 damages in the said action. At the hearing of the action, the plaintiff, in proof of the alleged libel, tendered in evidence a certified true copy of the report of the fact finding administrative panel. The report at page 119 of it contains a reproduction of the letter containing the alleged defamatory words. Defendant's counsel objected to the admissibility of this report but was over-ruled. He also objected to the admissibility of page 119 of the report containing the reproduction of the said letter. He was also overruled. The report was admitted in evidence as Exhibit A-A 139 and page 119 of it as Exhibit A 119. The defendant led no evidence at the trial at the conclusion of which. After addresses by learned counsel for the parties, the learned trial Judge found for the plaintiff and awarded him N5,000.00 damages.

The defendant was displeased with this judgment and appealed to the Court of Appeal. The plaintiff who was aggrieved as to the quantum of damages filed a respondent's Notice to vary the award of damages by increasing same. The Court of Appeal dismissed the defendant's appeal and after holding that the plaintiff could not come by way of a Respondent's Notice to vary an award of damages, struck out the notice filed by the plaintiff. Both parties are aggrieved by the decision of the Court of Appeal and have appealed to this court.

The main issue that calls for determination in the defendant's appeal is as to whether or not the report of the administrative panel was admissible in evidence and whether Ex. A119 could be held to constitute proof of the alleged libel. In respect of tile cross-appeal, the main question for determination is as to whether the Court of Appeal

was right in holding that the plaintiff could not complain against award of damages by way of a Respondent's Notice. Both parties filed and exchanged their respective briefs of arguments on the two appeals and learned counsel addressed us in oral argument.

I shall deal first with the main appeal, that is, the defendant's appeal. Mr. Ayanlaja learned counsel for the defendant in submitting that Exhibit A, A 139, that is, the report of the fact finding administrative Panel of Inquiry set up by the Ogun State government was inadmissible in the present proceedings relied on section 10 of the Commission of Inquiry Law Cap.24 Laws of Ogun State, Mrs. Obe learned counsel for the plaintiff/respondent submitted that reliance on section 10 of the Commission of Inquiry Law by learned counsel for the appellant was a new issue as the point was never raised in the courts below. She also submitted that the Law being a state legislation could not override the provisions of the Evidence Act. She finally submitted that the report being a public document was admissible in evidence under the Evidence Act.

To succeed in a claim for libel, it is settled law that the actual defamatory words complained of must be proved. To do this the plaintiff must tender in evidence the document containing the alleged libel. Where a plaintiff is unable to produce the original libel, however, he can give secondary evidence of it. In order to discharge this burden, the plaintiff in the case on hand tendered in evidence a certified true copy of the report of the administrative panel set up by the Ogun State Government. This report contains a page wherein the letter allegedly containing the defamatory words was reproduced. It is the contention of learned counsel for the defendant that the report is inadmissible in law. He relies on section 10 of Cap.24 Laws of Ogun State in support. Mrs. Obe of counsel for the plaintiff submits that learned counsel for the defendant/appellant has raised a new issue. I do not agree with this. The issue in contention is the admissibility or otherwise of the report of the panel. By citing before us section 10 not cited in the courts below, learned counsel for the appellant is only raising a new argument to support his submission that the report is inadmissible.

Now section 10 reads:

*"No evidence taken under this law shall be admissible against any person in any civil or criminal proceedings whatever; except in*

*the case of a person charged under section 12 of this Law with giving false evidence before the Commissioners."*

To the extent that the report tendered in evidence at the trial of the action leading to this appeal contains the evidence led at the inquiry it is clearly inadmissible under the above provision. Further-  
5 more, that part of the report which contains the facts as found by the administrative panel cannot be said to be relevant to the issue of libel, the subject matter of the plaintiff's action and that part will equally be inadmissible. Having regard to section 10 and the rule of evi-  
10 dence as to relevancy, therefore, Exhibit A to A139 was wrongly admitted in evidence and should be expunged from the record.

Mrs. Obe submits that section 10 being a State legislation cannot override the provisions of the Evidence Act. She has not directed our attention to any section of the Evidence Act which makes  
15 the report of a Tribunal or Commission of Inquiry admissible in evidence. On the contrary, section 8 of the Tribunals of Inquiry Act Cap. 447 of the Laws of the Federation of Nigeria 1990 prohibit, like section 10 of Cap.224 of Ogun State, the admissibility of evidence taken at an Inquiry under the Act. It is my conclusion that section 10 is not  
20 in conflict with the Evidence Act. The report, Exhibit A/97A 139 being inadmissible and the letter containing the libel not having been tendered in evidence, it follows that the alleged libel was not proved by plaintiff and on that ground alone his action ought to have been  
25 dismissed.

Assuming, but without deciding, that the report is admissible in evidence, Exhibit A/19 is at best only secondary evidence of a letter said to have been produced at the Inquiry by the defendant. Section 97(1) of the Evidence Act lays down the conditions under  
30 which secondary evidence would be admissible. I can see no evidence on record to support in this case the admissibility of secondary evidence in place of primary evidence of the contents of the letter containing the alleged defamatory words. There is no evidence as to why the original of that letter was never produced, moreso when it  
35 was written to the plaintiff himself. Nor is there any evidence as to why the copy sent to the defendant and said to have been tendered by him during the proceedings of the panel (and presumably still in the possession of the Panel's Secretary) was not tendered in evidence at the trial of the action.

The learned trial Judge was clearly wrong in admitting page 119 of the report in evidence and the Court of Appeal was equally wrong in affirming that decision. Thus both under section 10 of the Commission of Inquiry Law of Ogun State and section 97(1) of the Evidence Act the report and, in particular, page 119 thereof were wrongly admitted in evidence. Having come to this conclusion it follows that the appeal must succeed and it is hereby allowed. The plaintiff having failed to prove the defamatory words complained of by him, his action fails and it is hereby dismissed by me.

The learned trial Judge found in favour of the plaintiff and awarded him N5,000.00 damages. The plaintiff considered this amount too low but rather than appeal against it, his learned counsel at the Court of Appeal filed a respondent's Notice under Order 3 Rule 14(1) of the Court of Appeal Rules. The Court of Appeal in its judgment, per Omololu Thomas, J.C.A., held the view that the Notice to vary the award of damages by increasing same was incompetent. I entirely agree with the Court of Appeal.

Order 3 Rule 14(1) of the Court of Appeal Rules states:

*"A respondent who, not having appealed from the decision of the court below, desires to contend on the appeal that the decision of that court should be varied, either in any event or in the event of the appeal being allowed in whole or in part, must give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the court to make, or to make in that event, as the case may be."*

Pursuant to this rule the respondent in the Court of Appeal who is now the cross appellant before us filed a respondent's Notice praying the court below to substantially increase the award of damages made by the trial Judge upon the grounds that:

*"1. The learned trial Judge erred in law in holding that the damages caused by the publication of the words complained of was limited in scope, when:*

*(i) There was uncontradicted and uncontroverted evidence before the learned trial Judge that the name of Senyoruwa was notorious in Idowa history as a person who had attempted to dethrone a reigning Oba, and who had never himself become an Oba;*



(ii) *The plaintiff was one of two contestants for the vacant Obaship of Idowa at the time of the publication of the words complained of;*

(iii) *There was uncontradicted and uncontroverted evidence that as a result of the publication of the words complained of, the plaintiff lost a lot of support in his candidacy for the vacant Obaship of Idowa, and was shunned by the citizens of Idowa over whom he aspired to rule:*

(iv) *In this circumstance, the sum of N5,000.00 damages awarded in favour of the plaintiff was most inadequate to compensate for the harm done to him by the malicious publication of the words complained of:*

*2. The learned trial Judge misdirected herself in law and on the facts when she said as follows:*

*There must have been some exchanges of uncharitable words in the course of enquiry.'*

*When:*

(i) *there was no evidence before the learned trial Judge to support this conclusion;*

(ii) *it was never suggested either during the course of evidence or during address by counsel that uncharitable words had been exchanged;*

(iii) *the learned trial Judge was thereby making out a case to excuse the defendant's actions which the defendant had not made out for himself."*

In effect the defendant contends that the reasoning of the learned trial Judge leading to her award of damages is erroneous and ought to be set aside. Can he maintain this contention on Respondent's Notice? Or must he file an appeal challenging the correctness of the learned trial Judge's reasoning? If one goes by the argument in the respondent's brief in the court below, one would see that the defendant's contention was to the effect that the learned trial Judge's award of damages was affected by wrong principles of law.

This court dwelt fully on the characteristics of a Respondent's Notice when considering Order 7 Rule 13(1) of the former Rules of this Court. Order 3 Rule 14(1) of the Court of Appeal Rules under consideration is in pari materia with Order 7 Rule 13(1) of the former Rules of the Supreme Court. Delivering the judgment of this court in Lagos City Council v. Ajayi (1970) 1 All NLR 291, G.B.A. Coker. 5 J.S.C. observed at page 296 of the report:-

*"Another characteristic of Order 7, rule 13(1) is that it is applicable only where the respondent intends to retain the judgment but at the same time wants it varied; so where a respondent intends for instance to dispute the jurisdiction of the court of trial or to contest competency of the entire proceedings or to maintain the absence of a fundamental prerequisite, it seems he cannot come under this rule."* 10  
In that case he has to file a substantive cross appeal. The basis for this is clear for a man cannot at the same time obtain an advantage by 15 maintaining a particular standpoint and then seek to discard that same standpoint whilst keeping the advantage. As Lord Esher, M.R. observed in Roe v. Mutual Loan Fund Ltd. (1887) 19 Q.B.D. 347 at p. 350:-

*'I base my judgment on this, that the bankruptcy proceeded on the basis that the bill of sale was valid, and that this was with the knowledge and acquiescence and for the benefit of the plaintiff, who thereby affirmed that the bill of sale was valid, and cannot now be heard to say that it was invalid in order to obtain a further advantage. I cannot therefore agree with the judgment appealed from, and the 20 appeal must be allowed.'* 25

Continuing, the learned Justice of the Supreme Court at pages 296 to 297 concluded:-

*"The result of the enquiry therefore is that the notice under Order 7, rule 13(1) applies where a particular point in the appeal of the appellant is being stretched by the respondent who contends for its maintenance but proposes a variation of it if that be the only way by which he could be enabled to retain the judgment. It would seem 30 however that once a respondent's notice has been given, the appellant cannot prevent the respondent having the point raised in his notice argued by withdrawing his (appellant's) notice of appeal. 35 See in Re Cavander's Trusts, supra.*

*The notice filed by the respondent in his case clearly seeks to retain the judgment but requests a variation of the amount awarded by that judgment. The notice postulates that the approach of the learned trial Judge to the case was correct, but that his conclusions had adversely affected the respondent who thereby contends that by the*  
 5 *same reasoning of the learned trial Judge he should have received a greater award.*" (Italics is mine for emphasis).

Again in *Eliochin (Nig) Ltd. V. Mbadiwe (1986) 1 NWLR (Pt.4) 47*, this court had another opportunity of examining the scope  
 10 of a Respondent's Notice and it held that the respondent seeking to set aside a finding which is crucial and fundamental to a case can only do so through a substantive cross appeal and not by way of a Respondent's Notice, *Oputa. J.S.C.* in his judgment in the case observed at pages 72-73:

15 *"I will now consider the provisions of Order 7 rule 13(1) of the Supreme Court Rules 1977 (now Order 8 Rule 3) of the Supreme Court Rules 1985 dealing with affirming the judgment appealed against on other grounds. That Order stipulates:*

Order 7 Rule 13 (1)

20 *"It shall not be necessary for the respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of the appeal to contend that the decision of the court below should be varied, or that it should be affirmed on grounds other than*  
 25 *those relied on by that court he shall within one month after service on him of the notice of appeal cause written notice of such intention to be given to every party who may be affected by such contention... In such notice the respondent shall clearly state the grounds on which he intends to rely...*

30 The most important word in the rule reproduced above is "decision". By section 277(1) of our 1979 Constitution:

35 *"S.277(1) "decision" means, in relation to a court, any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.*

*Decision as defined above does not mean judgment although it includes a judgment. In the case on appeal, the fulcrum around*

*which everything else revolves is the issue whether or not the plaintiffs were in lawful possession or in unlawful possession and therefore trespassers. The determination of the Court of Appeal was that the plaintiffs were all in lawful possession. They were not trespassers. It was also a determination of the Court of Appeal that the defendant's action amounted to trespass. If these two determinations or decisions are affirmed as requested by the defendant/respondent in his notice, then the logical and in fact the only result will be not a dismissal of the appeal, definitely not, but the allowing of the appeal. Chief Onyiuke, SAN, gallantly conceded that if trespass is proved against the defendant, the plaintiffs' claim for exemplary damages will be no reason or excuse for denying the successful plaintiffs some damages, be that general or even nominal. Both parties - plaintiffs/appellants and defendant/respondent - therefore agreed that the Court of Appeal was wrong in not awarding damages of any kind simply because exemplary damages were claimed. What decision of the Court of Appeal now remains to be affirmed on grounds other than those relied upon by the court below? I do not see any. The ground relied upon by the Court of Appeal in dismissing the plaintiffs' appeal was unfortunately Erroneous and cannot be affirmed in any event and on any ground. The present appeal does not therefore lend itself to the invocation of the procedure under the then Order 7 Rule 13(1) now Order 8 Rule 3, Rules of the Supreme Court 1985. It lends itself only to a cross-appeal to reverse the pernicious and devastating findings of the court below without which this court cannot but allow the appeal. A respondent can only come under Order 8 Rule 3 of the Supreme Court Rules (or the old Order 7 Rule 13) if On the fact and on the law the decision of the court below will in any event be affirmed."* (Italicising mine).

In Adekeye & Ors v. Akin Olugbade (1987) 3 NWLR (Pt.60) 214 this court affirmed its earlier decisions in Lagos City Council v. Ajayi (supra) and Elochin (Nig) Ltd. v. Mbadiwe (supra). See also Ogunlade v. Adeleye (1992) 8 NWLR (Pt.260) 409, 424. 425.

It is clear from the grounds of appeal and the arguments in the respondent's brief in the court below that the defendant was challenging the reasoning of the learned trial Judge in arriving at the award of N5,000.00 damages. In my view he could only do so successfully by appealing and not by way of respondent's Notice.

In Lagos City Council v. Ajayi (supra), the appellant appealed against the award of damages made by the trial Judge complaining of misdirection by the learned trial Judge in arriving at the conclusion on which he had based his decision. Thus the setting aside of the decision of the trial Judge in that case on the quantum of compensation was challenged by the appeal. The respondent however, sought to retain that decision but contended that the award made be increased on the ground that if the learned trial Judge had not erred in law, he would have assessed the monetary compensation at a much higher figure. This court held in that case that a respondent could come by way of a respondent's Notice. In the present case, the appeal to the Court of Appeal was not on the issue of quantum of damages but rather on liability. The defendant, who, as respondent in the court below, sought to challenge the reasoning of the trial Judge in arriving at the quantum of the award made could, in my view, only do so by way of an appeal and not by way of a respondent's Notice.

In conclusion therefore, I am of the view that the court below was right in striking out the respondent's Notice and consequently the cross-appeal fails and it is dismissed by me.

The defendant having succeeded in the main appeal and the cross-appeal is entitled to his costs both in this court and in the courts below. I award to him N 1,000.00 costs of this appeal, N500.00 costs of the appeal in the Court of Appeal and N300.00 costs of the trial making a total of N1,800.00 costs to be paid by the plaintiff/respondent.

### **NNAEMEKA-AGU JSC**

I have had a preview of the judgment just delivered by my learned brother, Ogundare, J.S.C., in this appeal. As far as the main appeal goes. I entirely agree with him. He has fully set out the facts: I do not intend to repeat them.

Now, the first duty of a plaintiff who comes to court in a case of libel contained in a document is, subject to recognized exceptions, to produce and tender the whole of the original document complained of as well as any connected documents which are capable of throwing any light on the meaning of the words complained of, to be read and construed by the court. This is a duty which the plaintiff owes to

the defendant and the court. See *Plato Films v. Speidel* (1961) A.C. 1126, at pp.1143-1144; also, *R. v. Lambert* (1810) 2 Camp. 398, at pp. 400-401, per Lord Ellenborough. This important rule obliging the plaintiff to produce and tender the whole of the original document complained of can only be relaxed in three situations. The first is where secondary evidence is admissible and the plaintiff has laid the proper foundations and taken the necessary steps for admission of such secondary evidence (see *Johnson v. Hudson* (1836) 7 A. and E. 233n, 234n; also. *Rainy v. Bravo* (1872) L.R. 4 P.C. 287. The second is where the document in question is shown to be in the possession of the defendant or his solicitor and the plaintiff has served upon them a proper notice or subpoena duces tecum but they have failed to produce it: see *Doe & Phillips v. Morris* (1835) 3A and E.4). The last is where it has been shown that the libel is contained in a document or in such a form which it is physically impossible or highly inconvenient to produce same in court see *Owner v. Beehive* (1914) 1 K.B.105.at p.108: also *Sayer v Glossop* (1848) 2 Exch. at p.411. A good example of the last exception is where the alleged libel is written in an immovable structure the production of which in court would be impossible or highly inconvenient. Unless a plaintiff who comes to court in a case of libel based on a document or other publication in a permanent form can bring his case within one of the above three exceptions, the rule that he must produce and tender not only the whole of the original document said to contain the libel but also other connected documents has full force and effect. If the document is in the possession of a person who is not a party to the proceedings but is within jurisdiction, the plaintiff must serve him with the appropriate subpoena to come and produce the document. See on these: *Gately: On Libel & Slander* (7th Edn.) paragraph 1209 to 1213.

In the instant case, none of the above exceptions has been shown to be available to the plaintiff. Rather his case is that he tendered the letter as part of the evidence in a Panel of Inquiry, a copy of which was tendered as Exhibits A-A 139. Clearly this is at best a secondary evidence of the letter in question. But the requirements of the law for tendering and administering secondary evidence were not complied with. So on this ground alone, it ought not to have been admitted. But more fundamental is the fact that such evidence

has been declared inadmissible in any subsequent criminal or civil proceedings by the Commission of Inquiry Law of Ogun State, section 10, I do not accept the argument of Mrs. Obe that because that law was not cited or relied upon in the court below to support the view of that court on this issue and no leave has been given here, it cannot be relied upon in this court. I believe that such a line of argument is the product of confusion between an issue and an argument or an authority in support thereof. I believe that the true position of the law is that whereas a party to a suit cannot in this court, without leave, raise an issue which was not canvassed in the court below, such a party can rely upon any new line of argument or new authorities, judicial or statutory, to support his argument in an issue which is properly before this court. Also, the argument that the provisions of section 10 of the Commission of Inquiry Law of Ogun State which declares any evidence taken in such an inquiry inadmissible in any civil or criminal proceedings is contrary to some unspecified provisions of the Evidence Act and is therefore of no effect falls to the ground when it is noted that section 10 of the Commission of Inquiry Law of Ogun State is in pari materia with section 8 of the Tribunals of Inquiry Act. Cap. 447 of 1990. I therefore agree that on either or both grounds, Exhibit A 119 which was admitted as part of Exhibits A-A 139 was inadmissible. It follows therefore that the alleged libelous document was not proved as required by law.

It is with respect to my learned brother conclusions on the counter-claim that, with greatest respects, I find it difficult to agree. My difficulty stems from the nature of the difference or relationship between a cross-appeal and a respondent's notice and in what circumstances either should be resorted to. No doubt, the proper basis for all appeals, whether an appeal properly so-called because it involves the transfer of a case from an inferior to a higher tribunal in the hope of reversing or modifying the decision of the former or by means of judicial review by which the higher court supervises and controls inferior bodies, courts, and tribunals, is the existence of a fault or error committed by the lower. In order to properly invoke the powers of the higher court or tribunal the aggrieved party files a notice of appeal or, where permitted by the rules in appropriate cases, applies for a review. Where the aggrieved party is a respondent after the other party has appealed, then he may file a notice of a cross-

appeal which to all intents and purposes is like an appeal. Or he may file a respondents notice, if he desires to retain the judgment appealed against but desires that it should be varied or be affirmed on grounds other than those relied upon by the lower court. The problem raised by this appeal is what are the proper determinants as to when to file a cross-appeal and when to file a respondent's notice. 5

Let me consider first when a respondent needs to file across-appeal. Dealing with this problem, the learned authors of Supreme Court Practice 1982, in paragraph 59/6/1 identified the following situations as those requiring the filing of a cross-appeal, namely: 10

(i) Where there are separate and distinct causes of action and one party seeks to contest the decision upon one cause of action and another party upon another cause of action: *National Society for Distribution of Electricity v. Gibbs* (1900) 2 Ch. 280: 15

(ii) Also, where there are several parties and the respondent seeks to vary the decision or order of the court on a point in which the appellant has no interest: *Re Cavenders Trusts* (1881) 16Ch D.270: 20

(iii) Again where the respondent wishes to contest the jurisdiction or vires of the court, he should file a cross-appeal: *Re Wilson* (1916) 1 K.B. 382. C.A. Our own courts have added to these categories of cases a fourth and a fifth, namely: 25

(iv) Where the respondent seeks to reverse any findings made by the court or courts below: see *African Continental Seaways Ltd. v. Nigerian Dredging Roads & General Works Ltd.* (1977) 5 S.C. 235. at p.247; also *Eliochin (Nig) Ltd. v. Mbadiwe* (1986) 1 NWLR (Pt.14)47. 30

(v) Where a respondent wants a complete reversal of the decision of the lower court, he should file a cross-appeal. See *Alhaji Sunmonu & Ors v. Gbadamosi Ashorota* (1975) 1 NMLR 16. p.23: also *Baibre Oloyede v. Hector O.O. Oloyede* (1974) 3 W.S.C.A. 152. 35



In all other cases, the respondent may file a respondent's notice.

Now Order 8 rule 3(1) and (2) of the Supreme Court Rules, 1985, made provisions for respondent's notice. They provide as follows:-

3.(1) A respondent who not having appealed from the decision of the court below, desires to contend on the appeal that the decision of that court should be varied, either in any event or in the event of the appeal being allowed in whole or in part, must give notice to that effect specifying the grounds of that contention and the precise form of the order which he proposes to ask the court to make, or to make in that event, as the case may be.

(2) A respondent who desires to contend on the appeal that the decision of the court below should be affirmed on grounds other than those relied upon by that court must give notice to that effect specifying the grounds of that contention.

As I have stated, the simple issue that arises for decision with respect to the cross-appeal in this case is whether the respondent was right to have filed in court below a respondent's notice rather than a cross-appeal. The factual basis of it is that the learned trial Judge gave judgment for the plaintiff and awarded damages of N5,000.00 to him for the libel. While not disputing that he was entitled to a judgment for damages, the plaintiff seeks to have the quantum of damages increased. In his respondent's notice, he has specified the reasons for which he contends that the damages be increased. In the notice he attacked as an error in law the learned Judge's holding that the damages caused by the defendant's alleged libellous publication was limited in scope, He also contended that the conclusion of the learned trial Judge that there must have been some exchanges of uncharitable words was one which had no evidence to support it; hence a misdirection.

It is my view that the point at issue in the cross-appeal is on all fours with the decision of this court, in the case of Lagos City Council v. Emmanuel Ayodeji Ajayi (1970) 1 All NLR 291. In that case plaintiff claimed compensation against the Council for a house with landed property acquired by it. The learned trial Judge awarded to the plaintiff a compensation of 13,640.00 plus 3,950.00 per annum as rental profits from 17th June, 1964, until the date of judgment.

ment. The Council appealed and on receipt of the notice of appeal, the plaintiff/respondent filed a respondent's notice under Order 7 rule 13(I) of the 1961 Rules which is in pari mareria with Order 8 rule 3(1) of the 1985 Rules. It is of material significance that in the said notice the respondent, as in, this case, complained of misdirection by the learned trial Judge and contended that but for the misdirection the learned Judge would have assessed the compensation as 31,415.00. Again, as in this case, the appellant argued that he should have come by way of a cross-appeal and not a respondent's notice because he complained of a misdirection.

This court per Coker, J.S.C. rejected the contention. 10

He held:-

*"The result of the inquiry therefore is that the notice under Order 7 rule 13(1) applies where a particular point in the appeal of the appellant is being stretched by the respondent who contends for its maintenance but proposes a variation of it if that be the only way by which he could be enabled to retain the judgment.* 15

*The notice filed by the respondent in this case clearly seeks to retain the judgment but requests variation of the amount awarded by that judgment. The notice postulates that the approach of the learned trial Judge to the case was correct, but that his conclusions had adversely affected the respondent who thereby contends that by the same reasoning of the learned trial judge he should receive a greater award."* 20

These words are clearly applicable in this case. I do not think it matters that the respondent, in the particulars of his grounds in the notice called the fault of the learned trial Judge which led to the wrong award errors in law and misdirection. These are only the reasons with which he intends to persuade the court to increase the award. They do not alter the fact that the aim is to retain the judgment for a monetary award but vary the quantum of it. This is the intendment of Order 8 rule 3(1) of the Supreme Court Rules, 1985. So, a respondent's notice is appropriate. A different situation would have arisen if he had sought to change the judgment as was the case in Sunmonu & Ors. v. Ashorota (supra) in which the respondent sought to change the judgment from that of a non-suit to one for the plaintiff for a monetary award. I would, therefore, resolve this issue in favour of the respondent. 25 30 35

But, as I have held that the plaintiff's claim was not proved, no question of enhancing the award can arise. I would, therefore, simply allow the main appeal and dismiss the plaintiff's case. As the plaintiff has succeeded in part in this court I assess costs against the plaintiff at N500.00 only in this court, N500.00 in the Court of Appeal and N300.00 in the High Court.

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**WALI JSC**

10 I have read in advance a copy of the lead judgment of my learned brother, Ogundare, J.S.C. I agree with his reasoning and conclusions.

For those same reasons contained in the lead judgment, I  
15 shall also allow the defendant/appellant's appeal both in the main appeal and the cross-appeal. The order by the Court of Appeal striking out the Notice by the respondent to contend that the decision of the court below be varied on other grounds is also affirmed.

I subscribe to the consequential orders made in the lead judgment including that of costs.

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**KUTIGI JSC**

25 I read in advance the lead judgment of my brother, Ogundare, J.S.C. just delivered. For the reasons stated therein, I also allow the appeal and dismiss the cross-appeal. I endorse the order for costs as made by him.

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