

SUPREME COURT OF NIGERIA
24TH JUNE, 1994. SC. 110/1989
CORAM:- A. B. WALI, U. MOHAMMED,
S. U. ONU, Y. O. ADIO, A. I. IGUH, JJSC

PROFESSOR FOLARIN SHYLLON APPELLANT
AND
MRS. JUDITH ASEIN RESPONDENT

***APPEALS** - Rules guiding hearing of appeals - Is that appeal is heard on certified record of proceedings-Legal implications of a material omission from the records.*

***CONSTITUTIONAL LAW** - Failure to hear a party before delivering a ruling -Though S. 33(1) of the 1979 Constitution should not apply in all cases - Where the point is so material - Need to hear the parties.*

***PRACTICE & PROCEDURE** - Agreement between counsel on both sides - that ruling in one suit be applicable to two other sister suits - Where that agreement is not recorded by trial high court - Whether the Judge's vivid recollection -Without consent of both parties - Can cure the irregularity.*

***PRACTICE & PROCEDURE** - Practice of court taking down important submission - whether relaxed under Oyo State High Court Rules - Proper import of the relevant law.*

***STATUTES** - Oyo State High Court Law S. 61 - That provided for taking down in writing all oral evidence given before the court - Shall include relevant submissions made by counsel or parties.*

FACTS

The Respondent as Plaintiff filed three separate suits against the Defendant/Appellant before the Oyo State High Court, Ibadan. The Plaintiff claimed the sum of N1,000,000.00 in each of the suits against the Defendant for publishing an alleged libelous letter to three different officials. The Defendant raised a preliminary objection in a motion on notice urging the trial high court to dismiss the claim for disclosing no reasonable cause of action, being frivolous, vexatious and an abuse of court's process. The motion was moved

in respect of suit No. 1/155/85 which was adjourned for ruling and the other two sister cases adjourned for mention to the same date. The trial court ruled in favour of the Defendant and dismissed the Plaintiff's suit under consideration.

The Defendant's counsel submitted that there were earlier indications from leading senior counsel on both sides who were absent that the ruling delivered should decide the fate of the two other sister cases. The lawyer that held brief for Plaintiffs counsel informed the court that he was only instructed to come for the ruling and he did not have the files for the other suits. The trial Judge relied on his vivid recollections in holding that there was such agreement between counsel which was not recorded by the court. The court then struck out the statement of claims filed and dismissed the other two suits. Plaintiffs appeal to the Court of Appeal maintaining there was no such agreement between counsel was upheld mainly on the ground that what was not recorded goes to no issue. The Defendant has now appealed to the Supreme Court to determine whether it is permissible for the trial Judge to base his ruling on his vivid recollections in the absence of any evidence on record in support thereof.

HELD (Unanimously dismissing the appeal)

Taking down minutes of important submissions

1. Looking through the High Court (Civil Procedure) Rules, Oyo State there is no rule that relaxes the well known practice of taking down minutes of important and relevant submissions made by parties, either through their counsel or by themselves in the course of proceedings. The word "*shall in every cause or matter take down in writing the purport of all oral evidence given before the court*" shall be construed to include relevant oral submissions made by counsel or parties where they appear in person, in the course of proceedings. To construe it otherwise is to lay down a dangerous precedent as regards the recordings of minutes of proceedings in court. (P. 145 L.I)

Rules guiding hearing of appeals

2. The rules on hearing appeals from a trial court are clear, and that is the appeal is reheard on the certified record of proceedings forwarded to the appellate court. The learned trial Chief Judge admitted that he omitted (may be inadvertently) to record the submissions of learned Senior Counsel that they would agree to abide by the result of Ruling in 1/155/85 in the two other sister cases - 1/156/85 and 1/157/85. No such agreement can be seen in the minutes

of proceedings whether express or implied, that the decision in 1/155/85 is to bind the two other sister cases. (P. 145 L.24)

Judge's vivid recollection

3. What was not originally recorded but vividly recollected could not without the consent of both parties, form part of the record to fill in the purported gap. (P. 146 L. 18)

Failure to hear a party - S. 33(1) of the Constitution

4. Although it is not in all cases that where a party is not heard before a ruling is made against him that section 33(1) of the Constitution should apply, but in this particular case, the point in dispute is so material that the learned trial Chief Judge, rather than relying on what he did not record, should have allowed parties to move the other applications in respect of the two other sister cases, record the arguments presented and then deliver his ruling. (P.146L.30)

NOTABLE POINTS OF INTEREST

WALI JSC

1. Whether grounds of appeal are vague

"I have had a careful look and painstaking consideration of the two grounds complained about and have come to the conclusion that although they could have been formulated in a more elegant manner, none of them is vague. Each one of them is self explanatory and does not need any particulars to understand its purport." (P.143 L.5)

2. Duty of counsel in court whether holding brief or not

"I wish to draw attention of learned counsel appearing in court holding briefs for other counsel. The court takes it that once a counsel announces his appearance in court, whether he says he is holding brief for the other or not, the court takes it that he is fully authorised to conduct the case as the other would do. If for any reason he is not in a position to do so, he should state his reasons to the court and then apply for adjournment for the other counsel to appear. Without doing so, the court is not obliged to wait for them." (P.146L.39)

ONU JSC

3. Need for court to properly record all its proceedings

"In the case in hand, short of alleging that the records were forged such as

happened in this Court's decision in *EGEMASI & ANOR V. ONYEKWERE & ANOR* (1983) 14 NSCC 409 and which is clearly distinguishable, to uphold or rely on the "vivid recollection" of the learned Chief Judge, would certainly derogate from the settled principle of law that there is the need for courts to properly take down in writing all the happenings in court." (P.155 L.5)

IGUHJSC

10 **4. Decision not supported by recorded evidence is improper**

The issue under consideration is a matter of fundamental importance as all decisions or findings of trial courts of law must, to be unimpeachable, be fully supported by evidence before such courts together with all applicable laws; and decisions or findings which are not supported by such laws and evidence must be regarded as improper and erroneous on point of law. It must also be emphasized that the evidence in a case or matter referred to in the said section 61 of the Oyo State High Court Law is none other than the evidence on record and not otherwise. (P. 161 L.34)

20 **5. Whether gaps in the records should be filled from vivid recollections**

"As was pointed out, the unfortunate situation in this case is not unlikely to be a genuine mistake on the part of one or the other of all concerned, but it must not be glossed over or allowed otherwise a dangerous precedent would have been created whereby the door is left wide open for gaps in the record of proceedings to be filled at will in judgments or rulings from "vivid recollections" of the learned trial Judges without any supporting evidence". (P.162L.35)

30 **REPRESENTATION**

Chief F.R. A. Williams SAN with Ladi Williams, U.B. Anekwe for the Appellant Mrs. A.M.O. Obe for the Respondent.

35 **CASES REFERRED TO**

Ogbechie v. Onochie (1986) 3 SC. 55 at 63 - 64
Akinyede v. Opere (1967) 1 All N.L.R. 302
Bello v. N.M. Kassim (1969) NMLR 148 (1969-1970) NSCC 228

Atuyeye v. Ashamu (1987) 1 NWLR (Part 49) 267 at 268	
Egemasi v. Onyekwere (1983) 14 NSCC 409	
Otapo v. Chief Sunmonu (1987) 2 NWLR (Part 58) 587 at page 624	
Chief Nwizuk v. Chief Warribo Eneyok (1953) 14 WACA 354	5
Awoyegbe v. Ogbeide (1988) 1 NWLR 695 at 699 and 710	
McIlkenny v. Chief Constable of the West Midlands Police (1982) 1 Q.B. 283	
Henderson v. Henderson (1843) 3 Hare 100, 155; 67 E.R. 313, 319	
Kennedy v. Air Council (1927) 2 K.B. 517 at 528 - 529	
Stephenson v. Garnet (1898) 1 Q.B. 677	10
Dzungwe v. Gbishe (1985) 2 NWLR (Part 8) 528 at 537	
Alao v. Akanno (1988) 1 NWLR (Part 71) 431 at 441	
Osuminde v. Ajamogun (1992) 2 NWLR (Part 246) 156 at 180/187	
Arubo v. Aiyeleru (1993) 3 NWLR (Part 280) 126 at 145	
Igwebgo v. Ezeugo (1992) 6 NWLR (Part 249) 561 at 587	15
Adigun v. Attorney - General of Oyo State (1987) 1 NWLR (Part 66) 678	

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979 s. 33(1)	20
Supreme Court Rules 1985 O.8 rr. 2(2), (3), (2) & 4	
Evidence Act ss. 108(iii), 96(1) (c) & (2) (c), 131	
Oyo State High Court Law (Cap. 46 Vol. III Laws Oyo State) s. 61	
Oyo State High Court (Civil Procedure) Rules O.10 r. 1, O.31 r.4	25

BOOK REFERRED TO

Blacks Laws Dictionary (5th Edition) p. 900 on Minutes	30
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LEAD JUDGMENT BY WALI JSC

The facts in this case are not in dispute. The respondent as plaintiff filed three separate actions in the High Court of Justice, Ibadan Judicial Division holden at Ibadan, against the appellant/defendant, claiming in each action, the sum of N1,000,000.00 (One million Naira) for libel contained in three separate identical letters addressed to three different officials by the defendant. The three separate suits bore the following identification numbers:- 1/155/85, 1/156/85 and 1/157/85. In these cases, the plaintiff and the defendant	35
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are the same so also are the same, the contents and wordings of the libelous publications complained of.

Along with the writs were the statements of claim; and after service of the writs on the defendant and entering appearance, learned Senior Counsel appearing on his behalf filed a Motion on Notice under Order 23 rule 4 of the Oyo State High Court (Civil Procedure) Rules and Order 18 rule 19(1)(a) and (2) R.S.C. (England) praying that the Statement of Claim be struck out on the grounds that-

(a) *It discloses no reasonable cause of action and*

(b) *the action is frivolous, vexatious and an abuse of the process of the court and for a further order that the action be dismissed and judgment entered for the defendant with costs and for such further or other orders as this Honourable Court deems fit. AND FURTHER TAKE NOTICE that the grounds of the application are as follows:-*

(1) *The publication complained of is incapable of being defamatory of the plaintiff.*

(2) *Even if (which is not conceded) the publication refers to the plaintiff, it does not defame her.*

(3) *Even if all the facts alleged in the Statement of Claim are admitted or established, the plaintiff will not be entitled to the relief claimed."*

This motion was argued in respect of Suit 1/55/85 and at the conclusion of submissions by learned Senior Counsel on both sides, the learned Chief Judge reserved ruling to 28th October, 1985 while with the consent of learned Senior Counsel, the other sister cases to wit 1/156/85 and 1/157/85 were also adjourned for mention on the same 28th October, 1985 thus consequentially cancelling the earlier date of 12th September, 1985 to which they were both adjourned.

On 28th October, 1985 Mr. Ladi Williams (holding Chief F.R.A Williams brief), appeared for the defendant/applicant while Mr. Abimbola (holding Chief G.O.K. Ajayi's brief) appeared for the plaintiff/respondent. In the considered Ruling delivered by the learned Chief Judge, he held that the Statement of claim filed along with the Writ of Summons in Suit No. 1/155/85 disclosed no reasonable cause of action and was an abuse of the process of the court. He accordingly struck it out and dismissed the action.

After the court Ruling in 1/155/85 Mr. Ladi Williams made the following submissions with regard to the two other sister cases that were adjourned to the same 28th October, 1985 for mention -

"That as there were earlier indications from both leading counsel that Suit 1/155/85 should decide the fate of the other two cases (Suits 1/156/85 and 1/157/85) - the parties being the same; the cause of action being the same, the same words being complained of; the same amount of damages being claimed - the statement of claim in the two actions should be struck out and the two actions dismissed."

In reply to the submissions above Mr. Abimbola of learned counsel for the plaintiff/respondent says as follows that

"he only got a telephone call from the Chambers of G.O.K Ajayi in Lagos to come and take the Ruling in Suit 1/155/85. Says one Chief Adejumo in Ibadan has also asked him to come and hold the brief of G.O.K Ajayi in Suits 1/156/85 and 1/157/85. The files are not, he admits with him."

At the end of these submissions, the learned Chief Judge said -

"I remember quite vividly - although this was not recorded - that the two leading counsel in this case gave indications to the effect that the Ruling in Suit 1/155/85 should determine the fate of the other two sister cases - that is, Suit 1/156/85 and Suit 1/157/85. I have already decided that the statements of claim in Suit 1/155/85 disclosed no reasonable cause of action and was an abuse of the process of the court. The writs in the other two actions as well as the statements of claim are virtually the same as the writ in the action dismissed and in which the statement of claim was struck out. The only difference is the person to whom the alleged libelous words were published the alleged libellous words in Suit 1/155/85 are the same words complained of in Suits 1/156/85 and 1/157/85. I have already held that the statement of claim in Suit 1/155/85 was an abuse of the process of the court. The same would hold for that in Suit 1/156/85 and that in Suit 1/157/85. The parties in all three actions are the same. The defendant's applications for dismissals are the same."

He thereafter struck out the statements of claim filed in respect of Suit Nos 1/156/85 and 1/157/85 and dismissed the actions.

The plaintiff appealed to the Court of Appeal Ibadan Division, against the decision of the learned Chief Judge in respect of 1/156/85 and 1/157/85. After hearing the appeal, it was allowed mainly for the following reasons:

"1. There being no record of such agreement, the decision in Suit No.1/155/85 should not have determined the fate of Suits Nos. 1/156/85 and 1/157/85."

2. That since the motion to dismiss Suit No. 1/156/85 was not argued before the Statement of Claim was struck out and the entire claim dismissed, there is an infringement of section 33(1) of the Constitution. The principle of audi alteram partem was not observed."

It is against this decision that the defendant has now appealed to this court. As required by the Rules of this court, learned Senior Counsel filed and exchanged briefs of arguments. In the defendant's brief as appellant, the following three issues were formulated for determination:-

- 5 *“(i) Whether the decision of the court below to reject the evidence that the parties agreed that the decision in Suit No. 1/155/85 should determine the motions in Suit Nos. 1/156/85 and 1/157/85 is one which can reasonably be made on the evidence and material before the court by a tribunal, acting judicially, and properly instructed or directed as to the relevant law applicable to the case.*
- 10 *“(ii) In the alternative to (i) whether the trial court having given its considered judgment in Suit No. 1/155/85, it would have been an abuse of the process of the court for the plaintiff to have insisted on proceeding with the hearing of the other two motions on notice.*
- 15 *“(iii) Do the provisions of Section 33 of the 1979 Constitution and the rules of the common law doctrine of audi alteram partem operate so as to require the court to hear the other two motions on notice after the trial court had given its considered judgment in Suit No.1/155/85.”*

Learned Senior Advocate for the plaintiff did not formulate issues in his brief, but it is apparent from his brief, that he has adopted the issues
20 formulated in the defendant's brief.

In the brief filed on behalf of Chief G.O.K Ajayi, SAN, learned Senior Advocate for the respondent by Mrs. Ayo Obe, this court has been called upon to decide on the preliminary issue raised against grounds I and III of the grounds of appeal. It was submitted that ground I raises an issue of fact, not
25 headed and also no particulars provided, contrary to Order 8 rules 2(3), (2) and (4) of the Supreme Court Rules, 1985. Learned Counsel also submitted on ground (III) that it is unheaded, has no particulars and vague, contrary to Order 8 rules 2(2), (3) and (4) of the Supreme Court Rules, 1985. She urged this court to strike out both grounds 1 and 3 on ground of incompetence.

30 In reply to the preliminary objection raised on grounds I and III, learned Senior Advocate for the defendant, Chief F.R.A. Williams SAN, submitted that ground III is self explanatory and does not require any particulars. As for ground I, it was his submission that no issues of fact are involved and that it is a ground of law which is clear and not vague.

35 He contended that the objection is purely technical, raised belatedly to delay the final disposal of the appeal.

It is pertinent at this stage to reproduce hereunder the two grounds of appeal under attack. They read as follows:-

- “(i) The decision of the court below to reject the evidence that the*

parties agreed through their counsel that the decision in Suit No.1/155/85 Should determine the motions in Suit No. 1/156/85 and 1/157/85 was unreasonable and could not have become by a tribunal acting judicially and properly directed as to the relevant law applicable to the case.

(iii) The Court of Appeal erred in law in failing to uphold the submission of the defendant's counsel in this case to the effect that it would be an abuse of the process of the court to permit this case proceed to trial having regard to the decision of Suit 1/155/85."

I have had a careful look and painstaking consideration of the two grounds complained about and have come to the conclusion that although they could have been formulated in a more elegant manner, none of them is vague. Each one of them is self explanatory and does not need any particulars to understand its purport. Also from my painstaking consideration of ground 1, I am of the considered view that it is a ground of law as it questions the interference by the Court of Appeal with the decision of the trial court: on the applicability of its decision in Suit I/155/85 to the other two sister cases- I/156/85 and I/157/85 respectively. See *Ogbechie & Ors. v. Onochie & Ors.* (1986) 3 SC 55 at 63-64; (1986) 2 NWLR (Pt. 23) 484.

The preliminary objection fails and it is accordingly dismissed. For the purpose of determining this appeal, I shall refer to the parties henceforth as defendant/appellant and plaintiff/respondent respectively. Looking at the case, the main and decisive issue raised is -

Whether the learned trial Chief Judge was right in striking out the statements of claim in Suits I/156/85 and I/157/85 and subsequently dismissing them, by relying on his vivid recollection that the two leading Senior Counsel gave indications to the effect that the Ruling on Suit 1/155/85 should determine the fate of the said two sister Suits, although such was not recorded in the proceedings of that day.

Based on the issue formulated by me for the determination of this appeal, I shall only confine myself to the cardinal issue of whether there was an agreement by the parties either expressly from the record or impliedly that the decision in Suit 1/155/85 should bind the two other sister cases.

It was the submission of learned Senior Advocate for the defendant/appellant that granted that no record was made by the learned Chief Judge on the very day when the agreement was made between the two leading counsel, nevertheless a record was made on the day when the judgment was read. He contended that if learned Senior Counsel for the plaintiff/respondent was seriously contesting the correctness of the vivid recollection of this agreement on that day, the proper step for him to take was to invoke the inherent jurisdiction of the trial court to make such corrections thereby giving the trial

Chief Judge the chance to know that the correctness of his recollection of what happened was being disputed. He further contended that although he conceded that the best time to record an agreement of this nature was when it took place never-the-less the recording of it after the event could not have the effect of invalidating the agreement. Learned Senior Counsel therefore submitted that the writing made by the learned Chief Judge of the agreement between the parties to this case as recorded by him on pages 10 to 11 of the record of proceedings is admissible as evidence thereof. He referred to Sections 108(III); 96(1)(c) and 96(2)(c) of the Evidence Act in support. He said it was not permissible to contradict the evidence relating to the agreement contained in the record of proceedings in the way the plaintiff/respondent sought to do in the court below and that the affidavit evidence filed in that regard was inadmissible and should have been ignored. He cited the case of *Akinyede v. Opere* (1967) 1 All NLR 302 in support and urged the court to hold that there is no conclusive admissible evidence capable of supporting the inference that the recollection of the learned Chief Judge was faulty. He urged the court to allow the appeal on this ground alone.

In reply to the submissions above, learned counsel for the plaintiff/respondent, submitted that it was a misconception of the statements by the learned Chief Judge in his judgment about his vivid recollections for the defendant/appellant to say that there was agreement by counsel to be bound by the decision in Suit I/155/85. She said not only was there no such agreement but also the vivid recollections were not supported by the record and therefore no need for her to challenge the record. She also said the purpose of the affidavit was not to challenge the record of the learned trial Chief Judge for the 11th of September, 1985, but to ask that the record which had been omitted as a result of an administrative error of the Oyo High Court Registry be included. She therefore submitted that not only does the record of proceedings not support the defendant's/appellant's contention that there was an agreement between counsel that the result of the first action should bind the other two cases but that it would obviously have been contrary to common sense to say that there had been such an agreement.

Section 61 of the Oyo State High Court Law (Cap 46 Vol. III Laws of Oyo State) provides as follows:-

"Keeping of Minutes.

S.61. Subject to any rules of court for the taking of minutes of proceedings the presiding judge shall in every cause or matter take down in writing the purport of all oral evidence given before the court and shall sign the same at any adjournment of the case and at the conclusion thereof."

In Blacks Law Dictionary (5th Edition) the word "minutes" in relation

to the happening in court, is defined thus on page 900 -

“A memorandum of what takes place in court made by authority of the court.”

I have looked through the High Court (Civil Procedure) Rules, Oyo State but cannot lay hand on any rule that relaxes the well known practice of taking down minutes of important and relevant submissions made by parties, either through their counselor by themselves in the course of proceedings, I shall construe the word “shall in every cause or matter take down in writing the purport of all oral evidence given before the court” to include relevant oral submissions made by counsel or parties where they appear in person, in the course of proceedings. To construe it otherwise is to lay down a dangerous precedent as regards the recordings of minutes of proceedings in court. The situation in this case cannot be compared with the cases cited and relied on by learned Senior Advocate for the defendant/appellant. None of them dealt with the issue of the trial Judge recalling from memory what happened in court. The situation in this case may be compared with an inspection of a locus in quo by the Judge, where, without recording his observations, relied on those observations in his judgment. See Tawaku Bello v. N.M. Kassim (1969) 1 NMLR 148 (1969-1970) NSCC 228. Where it was held by this court:-

“an inspection of locus is much a part of the entire proceedings in any suit and the rules of evidence apply, and where findings.....have been based on the observation at the inspection and the records are conspicuously silent as to whether these resulted from visual or evidential inferences it is impossible for any court of appeal to determine the effect of the visit on the judgment of the trial court after such failure to include the appropriate notes in the record.”

The rules on hearing appeals from a trial court are clear, and that is if the appeal is reheard on the certified record of proceedings forwarded to the appellate court. The learned trial Chief Judge admitted that he omitted (maybe inadvertently) to record the submissions of learned Senior Counsel that they would agree to abide by the result of Ruling in 1/155/85 in the two other sister cases - 1/156/85 and 1/157/85. At the expense of repeating myself, what was recorded by the learned Chief Judge on 11th September, 1985 as regards 1/156/85 and 1/157/85 is:

“Court: Ruling is reserved for 28/10/85 with consent of both counsels. It is also hereby agreed that the sister cases (i.e. 1/156/85 and 1/157/85 be, and are hereby adjourned for mention to the same date. The earlier adjourned (sic) of these cases to tomorrow is consequentially cancelled.”

I am unable to see such an agreement in the minutes of proceedings

(supra) whether express or implied, that the decision in 1/155/85 is to bind the two other sister cases; neither can I see the relevance of Sections 108(a)(iii) and (6)(e) and (2)(c) of the Evidence Act to the defendant/appellant's case.

The issue here is not of an existing document that could not be produced but of something that was alleged to have been said in the course of the court's proceedings but not recorded. The provisions are not meant to cover what was "vividly recollected."

On the affidavit sworn to by Chief G.O.K. Ajayi, SAN, paragraph 3 of that affidavit seems to complain against the incompleteness of the record of proceedings of 11th September, 1985, and the admission by learned counsel for the defendant/appellant goes to confirm the averment that what the learned trial Chief Judge said he vividly recollected was not recorded. It is also clear from the record compiled in this appeal that the recorded proceeding of the court on that date was omitted from the record. In my view the Court of Appeal was quite in order to treat Exhibit GOK I as part of the record. Even Chief Williams himself did not strictly oppose the application as he said in connection with that on page 56 -

"I do not think this will affect the merit of the case. I have no quarrel with that."

The complaint is without substance that the affidavit was attacking the record. What was not originally recorded but vividly recollected could not without the consent of both parties, form part of the record to fill in the purported gap.

I do not consider it relevant at this stage to consider the issues of abuse of the court process, but only to adopt what my learned brother Ogwuegbu J.C.A. (as he then was) said in his lead judgment of that court -

"The situation in this case might be and could be a genuine mistake but should not be allowed otherwise the door will be left wide open for gaps in the records of proceedings to be filled in judgments or rulings. See also Otapo v. Chief R. O. Sunmonu & Ors. (1987) 2 NWLR (Pt.58) 587 where Belgore, J.S.C. said:

"it is in the interest of justice that all that is said or raised in court during hearing be taken in writing i.e. be properly recorded."

Although it is not in all cases that where a party is not heard before a ruling is made against him that section 33(1) of the Constitution should apply, but in this particular case, the point in dispute is so material that the learned trial Chief Judge, rather than relying on what he did not record, should have allowed parties to move the other applications in respect of the two other sister cases, record the arguments presented and then deliver his ruling. He could have even asked the parties to agree to abide by the decision in one in

respect of the other and to record the same if, they signify their consent.

I wish to draw attention of learned counsel appearing in court holding briefs for other counsel. The court takes it that once a counsel announces his appearance in court, whether he says he is holding brief for the other or not, the court takes it that he is fully authorized to conduct the case as the other would do. If for any reason he is not in a position to do so, he should state his reason to the court and then apply for adjournment for the other counsel to appear. Without doing so; the court is not obliged to wait for them. It was not enough for Mr. Abimbola appearing for the plaintiff/respondent to say that he only got a telephone call from the Chambers of Chief G.O.K Ajayi in Lagos to appear and take a Ruling in Suit 1/155/85 and also that one Chief Adejumo in Ibadan instructed him to appear and hold brief in 1/156/85 and I/157/85 without telling him what to do. At least Chief G.O.K. Ajayi, SAN, was in court when the two sister cases were adjourned to 28th October, 1985 and he ought to have given proper instruction as to what was to be done. Courts should be given the due respect they deserve and not to be treated with levity.

The appeal fails and it is dismissed with N1000.00 costs to the plaintiff/respondent. The order by the Court of Appeal that the two cases i.e. I/156/85 and I/157/85 are remitted to the High Court Ibadan, to be heard by another Judge is endorsed and affirmed by me.

MOHAMMED JSC

I had the advantage of reading before now the lead judgment of my learned brother Wali, J.S.C., which has just been delivered. I agree entirely with his reasoning and conclusions that the appeal should be dismissed. It is for the same reasons as ably stated in the lead judgment that I too will dismiss this appeal and hereby do so with N1000.00 costs to the respondent.

I also affirm the order of the Court of Appeal that the two sister cases i.e. I/156/85 and I/157/85 be remitted to the High Court, Ibadan, and to be heard by another judge.

ONU JSC

I had the advantage of reading before now in draft the judgment of my learned brother Wali, J.S.C. and I agree with his reasoning and conclusions.

I however wish to say by way of comment as follows:-

As clearly postulated in the lead judgment, the plaintiff, then full time

final year law Student of the University of Ibadan now respondent, had in the High Court of Oyo State holden in Ibadan (per Agbaje-Williams,) instituted an action claiming N1 million, that she was libeled by the defendant, a Professor and Dean of the Faculty of Law, University of Ibadan, herein appellant, in a letter written published of and concerning her by him (defendant) on or about the 10th of August, 1984 to the G.O.C. Mechanised Division, Ibadan, and also to two others in exactly identical terms, the kernel of which is as follows:-

“TREAT (SIC) TO MY LIFE IN THE PERFORMANCE OF MY DUTIES AS HEAD DEPARTMENT OF LAW UNIVERSITY OF IBADAN. NOW FACULTY OF LAW reads by way of extract, *inter alia*. thus:

On 16th January 1984, I took over the headship of the department of law University of Ibadan, I was invited by the Dean of the Faculty of the Social Sciences to take over a Department which had suffered 2 1/2 years of absentee headship. Immediately I set about reorganizing the department, and carried out many reforms. Some students affected by these reforms were not happy, particularly those who were in full-time employment and also undergoing full-time undergraduate course.

Very recently, an anonymous letter reported on cheating and other examination irregularities in the Department of Law. The Acting Vice Chancellor instructed me to investigate. In consonance with the Military Administration's policy of W.A.I., I made a careful preliminary inquiry, and reported to the Acting Vice-Chancellor. I stated that a prima facie case exists, and that further and more detailed investigation should be carried out. The Acting Vice Chancellor in his reply asked me to make further investigation.

As Acting Dean of the Faculty of Law, I recommended that the results of the affected students should be deferred. Since then I have received indirect threats to my life. As I am a family man of 4 small children and a wife, I cannot ignore these threats by those who fell (sic) threatened by my stand and investigation. I have accordingly reported the matter to the Commissioner of Police, Oyo State, and to the N.S.O. in the State, and sought protection for my family and myself. I am well aware of the present Military Administration earnest resolve to stamp out the kind of conduct I am investigating, I therefore Sir, deem (sic) it proper, with respect to bring the matter to your notice.

The defendant predictably, did not file a defence in answer to the plaintiff's statement of claim in any of the three cases but rather in identical applications (three motions as off-shoots of the three cases) moved the trial court for “an order striking out the statement of claim in this action on grounds that -

(a) it discloses no reasonable cause of action and
 (b) the action is frivolous, vexatious and an abuse of the process of the court.”

The court heard arguments on one of the three motions - that relating to the letter addressed to the Commissioner of Police. The learned Chief Judge in his judgment held that -

“(i) It is my view that the words complained of in their natural and ordinary meaning, do not refer, and are incapable of referring to the plaintiff.

(ii) As the statement of claim in my view discloses no reasonable cause of action, and as the case is “unarguable” to borrow the expression of Salmon, L.J. and “obviously ridiculous,” to employ the language of Bankes, L.J., it is frivolous, vexatious and an abuse of the process of the court. Accordingly, the statement of claim is struck out. The whole action is dismissed.”

In essence, the facts of this case are not in dispute and are straight forward enough as not to invoke any controversy in their setting. The plaintiff had filed three separate distinct and independent actions in the High Court, Ibadan as aforesaid, but as I shall seek to show later on in this judgment, they were actions that were by their very nature amenable to consolidation suo motu by the learned trial Chief Judge to be dealt with peremptorily but were not so consolidated, as required by Order 10 rule 1 Oyo State High Court (Civil Procedure) Rules. This is because in the three separate suits which bore suit numbers I/155/85, I/156/85 and I/157/85, except that they were directed at three separate individuals - the Commissioner of Police, Oyo State, the Director of the Nigerian Security Organisation and the G.O.C., Mechanised Division, Ibadan - the plaintiff and the defendant (hereinafter recharacterised as plaintiff and defendant) are the same. So also are the contents and wordings of the alleged libelous publications, and of course, the same counsel if I may add. Hence, the insistence as I shall seek to exemplify, by learned Senior Counsel for the defendant that the plaintiff is guilty of an abuse of the process of the court.

Sequel to the above phenomena, judgment was entered in favour of the defendant in respect of the two other cases, namely, a dismissal each of the plaintiff’s remaining actions, following a purported agreement said to have been made between counsel from the opposing camps to wit: that the decision in the case considered and ruled upon namely Suit No. I/155/85, should determine the remaining two motions. Plaintiff appealed to the Court of Appeal sitting in Ibadan (hereinafter referred) simply as the Court below).

In respect of those two cases, the Court below after hearing argu-

ments concluded thus:

“There was no agreement that the ruling in one should determine the fate of the two sister cases. There was nothing irregular in the learned trial Chief Judge hearing arguments on the motions in the other two suits and
 5 there was an infringement of S.33(1) of the Constitution.....The decision of the High Court dated 28/10/85 is hereby set aside. It is remitted to the High Court Ibadan to be heard de novo by another Judge.”

Aggrieved by this decision, the defendant has further appealed to this Court upon four grounds contained in his Notice of Appeal dated October 20, 1988.

10 Briefs of argument were filed and exchanged by the parties. The defendant submitted the following two questions (Issue 2 being in the alternative) for determination, to wit:

“1. Whether the decision of the Court below to reject the evidence that the parties agreed that the decision in Suit No. I/155/85 should determine the motions in Suit Nos. I/156/85 and I/157/85 is one which can reasonably be made on the evidence and material before the Court by a tribunal, acting judicially and properly instructed or directed as to the relevant law applicable to the case.

2. In the alternative to (i) whether the trial court having given its
 20 considered judgment in Suit No. I/155/85, it would have been an abuse of the process of the court for the plaintiff to have insisted on proceeding with the hearing of the other two motions on notice.

3. Do the provisions of Section 33 of the 1979 Constitution and the rules of the common law doctrine of audi alteram partem operate so as to
 25 require the court to hear the other two motions on notice after the trial court had given its considered judgment in Suit No.I/155/85.”

On behalf of the respondent, the three issues formulated are:-

1. Whether the two leading counsel in the case gave indications to the effect that the Ruling in Suit No. I/155/85 should determine the fate of the
 30 other two sister cases - that is, Suit No. I/156/85 and Suit No.I/157/85.

2. Having ruled that the Statement of Claim in Suit No.I/155/85 must be struck out because it disclosed no reasonable cause of action and was frivolous, vexatious and an abuse of the process of the Court, what should the learned Chief Judge do in respect Suit No.I/156/85 and Suit No.I/157/85?

35 3. Has there been an infringement of the Constitutional rights guaranteed to the plaintiff under S. 33 of the Constitution of the Federal Republic of Nigeria by reason of the decision of the learned Chief Judge to strike out this suit.

I deem it necessary from the onset to first consider the preliminary point raised in respect to two grounds of appeal and to which our attention was drawn by Mrs. Obe, of counsel for the plaintiff.

Be it noted that at the hearing of this appeal on 28th March, 1994, counsel on either side agreed that the decision in one should abide the decision in the other. I think commonsense dictates that this should be so. Besides, it is learned counsel for the defendant who said (though not without contest) at page 3 of his brief under the heading: Preliminary, inter alia thus: *"On the day when the judgment of the court was read in Suit No. I/155/85, counsel for the plaintiff referred to "earlier indications from both leading counsel that suit I/155/85 should decide the fate of the other cases (Suits I/156/85 and I/157/85)". He then asked that "the statements of claim in the two actions should be struck out and the two actions dismissed."* Counsel for the plaintiff said nothing of substance to oppose the application for judgment in those terms. I shall come to this point later in this judgment.

Now, it was Mrs. Obe's submission both orally and in plaintiff's brief dated 16th June, 1989, that grounds (I) and (iii) should be struck out in that:-

(i) ground 1 raises an issue of fact; is vague, not headed and is bereft of particulars contrary to Order 8 rules 2(2), (3) and (4) of the Supreme Court Rules, 1985 as amended and that

(ii) ground III is unheaded, has no particulars supplied in support thereof and is vague contrary to Order 8 rules 2(2), (3) and (4) of the Supreme Court Rules (ibid).

The short answer by Chief F.R. A Williams, S.A.N., to the preliminary objection is that while ground III is self-explanatory and does not require any particulars, in ground I, no issues of fact are involved and no particulars are necessary in that it is a ground of law giving no impression of vagueness as couched. He submitted that the objection coming now as it does, is belated, purely technical in tenor, and meant to delay the final disposal of the appeal. I see the force in this submission.

Now, grounds I and III are set out below thus:

"(i) The decision of the Court below to reject the evidence that the parties agreed through their counsel that the decision in suit No. I/155/85 should determine the motions in Suit No. I/156/85 and I/157/85 was unreasonable and could not have been made by a tribunal acting judicially and properly directed as to the relevant law applicable to the case.

(III) The Court of Appeal erred in law in failing to uphold the submission of the defendant's counsel in this case to the effect that it would be an abuse of the process of the court to permit this case proceed to trial

having regard to the decision of Suit No.I/155/85."

I have carefully scrutinized the above two grounds of appeal. I am of the opinion that ground I is none other than a ground of law and being neither vague nor amorphous is arguable.

- 5 Ground III could be more elegantly framed. However, it is, in my view, a ground of law and it not being mandatory where no need arises as in this case, that particulars of error be given (See Atuyeye v. Ashamu (1987) INWLR (Pt.49) 267 at 268), the objection herein is misconceived. See Ogbechie & Ors. v. Onochie & Ors. (1986) 2 NWLR (Pt.23) 484 at 487.

- 10 It is accordingly dismissed.

I will now commence my consideration of the issues with Issue One, which asks whether the decision of the Court below to reject the evidence that the parties agreed that the decision in Suit No. I/155/85 should determine the motions in Suit Nos. I/156/85 and I/157/85, is one which can reasonably be
15 made on the evidence and material before the court by a tribunal acting judicially, and properly instructed or directed as to the relevant law applicable. The extract from the trial court's judgment from which the purported agreement was said to emanate runs thus:

- 20 *"I remember quite vividly - although this was not recorded - that the two leading counsel in this case gave indications to the effect that the Ruling in Suit I/155/85 should determine the fate of the other two sister cases - that is, Suit I/156/85 and Suit I/157/85. I have already decided that the Statement of claim in Suit I/155/85 disclosed no reasonable cause of*
25 *action and was an abuse of the process of the Court. The Writs in the other two actions as well as the statements of claim are virtually the same as the Writ in the action dismissed and in which the statement of claim was struck out. The only difference is the person to whom the alleged libelous words were published. The alleged libelous words in Suit I/155/85 are the same*
30 *words complained of in Suits I/156/85 and I/157/85. I have already held that the statement of claim in Suit I/155/85 was an abuse of the process of the court. The same would hold me for that in Suit I/156/85 and that in Suit I/157/85. The parties in all three actions are the same. The defendant's applications for dismissal are the same. The statement of claim in Suit I/156/85 is*
35 *hereby struck out on the same reasoning as in Suit I/156/85. The action is also dismissed. The Statement of Claim in Suit I/157/85 is also hereby struck out on the same reasoning as in Suit I/155/85. The action, too, is dismissed."*

It is then the contention of learned Senior Advocate that when the learned Chief Judge stated that the agreement of the parties was not recorded,

what he obviously meant was that he did not record minutes thereof at the time when it was made. He therefore submitted that a statement made on the record of the court by a Judge of one of the highest courts of first instance in the land ought not to be so unceremoniously rejected as has been done in this case. To allow this sort of thing to happen so easily, he further contends, raises the question as to where one draws the line in the interest of the sanctity of law. Granted that no record was made by the learned Chief Judge on that very day when the agreement was made between the leading counsels, it is maintained, a record nevertheless was made on the day when judgment was read. If counsel for the plaintiff seriously maintains that the recollection of the learned Chief Judge was faulty, he contended, then his first step should have been to invoke the inherent jurisdiction of the High Court to make such correction, thereby giving the learned Chief Judge the chance to know for the first time that anyone disputed the validity of his recollection. The defendant, it is asserted, concedes that the best time to record an agreement of this nature was when it took place. However, it is learned Senior Advocate's submission, that recording it after the event cannot have the effect of invalidating it. Section 131 of the Evidence Act was cited in support.

In the light of above, it is further submitted that the writing made by the learned Chief Judge of the agreement between the parties to the case in hand as recorded by him, is admissible in evidence vide sections 108 (iii), 96(i)(e) and 96(2)(c) of the Evidence Act. Furthermore, it is argued, it was not permissible to contradict the evidence relating to the agreement as contained in the record of proceedings in the way the plaintiff sought to do in the court below. A fortiori, the affidavit evidence purporting to contradict the record was simply inadmissible and should have been ignored. Reliance is therefore placed on the case of *Akinyede v. Opere* (1967) 1 All NLR 302 for the view that a court will be reluctant in disbelieving the solemn record of the court, to wit: laying down the proposition that in the absence of agreement by both counsel (which an appellate court must indeed accept), nothing short of conclusive evidence will persuade an appellate court to disregard the solemn record of the court below. The only reasonable inference from the facts in the instance case, it is contended, is that it is inconceivable in it that the two leading counsel who appeared before the learned Chief Judge would (i) have agreed to consolidate the hearing and determination of the motion on notice to strike out the Statement of Claim or (ii) agreeing that the decision in the case argued should determine the fate of the other two suits.

On behalf of the plaintiff, it is submitted that with regard to the question as to whether there was agreement by counsel to be bound by the decision in Suit No.I/155/85, such an agreement was based on a major misconception

tion of what the learned trial Judge said in his judgment about his “vivid recollection”. While therefore it is the defendant’s further contention that plaintiff in challenging that finding is challenging the record, it is her own contention that what in effect she was doing was a challenge of the judgment
5 based on grounds of fact or law. The findings based on the “vivid recollections”, she argued, are therefore not supported by the record, adding that the plaintiff’s complaint is in effect one that there is no evidence to support the finding of fact made by the learned trial Chief Judge relating to the record of proceedings for that day 11th September, 1985. So also is the contention in
10 conclusion, that it is contrary to common sense to allege that there had been such an agreement.

I am of the view that there is considerable force in the plaintiff’s argument for the following reasons.

The High Court of Oyo State presided over by the learned Chief
15 Judge of that State being a superior court of record vide Sections 6 and 236 of the Constitution of the Federal Republic of Nigeria, 1979 as amended, is enjoined by the High Court Law., Cap.46 in Section 61 thereof and the rules made there under pursuant to Order 31 Rule 4 of the High Court (Civil Procedure) Rules to keep minutes of its record. The section and rule provide that -

20 “61. *Subject to any rules of Court for the taking of minutes of proceedings, the presiding judge shall in every cause or matter take down in writing the purport of all oral evidence given before the court and shall sign the same at any adjournment of the case and at the conclusion thereof*” and Order 31 rule 4:

25 “A minute of every judgment, whether final or interlocutory shall be made and every such minute shall be a decree of the court and shall have the full force and effect of a formal decree. The Court may of its own motion or on the application of either party order a formal decree or to be drawn up.”

The cumulative effect of the Statutory and procedural provisions
30 above wherein oral evidence which, in my respectful view, would include submissions, do not and cannot admit of the acceptance of the vivid recollection of a Judge to form part of a judgment. Moreover, learned Senior Advocate’s submission that recording the fact of the agreement after the event would not have the effect of invalidating it would, in my view, hold no water in the face of
35 his concession that the best time to record an agreement of this nature was when it took place. It is in this regard that the provisions of Section 131 of the Evidence Act (now Section 132(1) of the Evidence Act, Cap. 112. 1990 Laws of the Federation of Nigeria) come into play.

The Section reads:-

“When any judgment of any court or any other judicial or official proceedings.....has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings..... except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained; or may the contents or may such document be contradicted, altered, added to or varied by oral evidence.” 5

In the case in hand, short of alleging that the records were forged such as happened in this Court’s decision in Egemasi & Anor v. Onyekwere & Anor (1983) 14 NSCC 409 and which is clearly distinguishable, to uphold or rely on the “vivid recollection” of the learned Chief Judge, would certainly derogate from the settled principle of law that there is the need for courts to properly take down in writing all the happenings in court. For, as Belgore, J.S.C put it in Alhaji Chief Yekini Otapo v. Chief R.O.O. Sunmonu & Ors. (1987) 2 NWLR (Pt.58) 587 at page 624: 10 15

“It is in the interest of justice that all that is said or raised in Court during hearing be taken down in writing i.e. be properly recorded. When this is not done, and it is through the affidavits of parties that the true records of what transpired during hearing could be known, questions will usually be asked why the Court adopted such a procedure.” 20

To hold otherwise would, in my view, be to whittle down the edifice upon which judicial precedent is founded, and this the moreso, should the courts lower down the rung of the ladder of judicial hierarchy be bound to follow similar decisions based upon such recollections, thus jettisoning stare decisis and bringing uncertainty and confusion to the law. As the writer of the lead judgment in one of the cases herein on appeal (SC.110/1989), Ogwuegbu, J.CA. (as he then was) rightly and poignantly put it, and I quote from him in extenso)- 25

“The ruling or decision in Suit No. I/155/85 could have determined the other two sister cases one of which is the present appeal if there was consolidation of all the suits as was canvassed in ground one of the grounds of appeal or an agreement by both learned counsel that the decision in one should determine the fate of the other two. The order for consolidation of any agreement that the decision in one should determine the fate of the others must as in the settlement of issues before trial be taken down in writing by the trial Judge. It is not in the interest of justice for decisions to be based on recollections of Judges not recorded anywhere during the trial and such recollections made the subject of conflicting affidavits by counsel appearing 30 35

in the said cases who should have said with one voice that there was such an agreement or that there was no such agreement. It will be laying a dangerous precedent for this court to act on such a recollection no matter how vivid, which does not form part of the record and being the basis for the
 5 *dismissal of the sister cases*

The situation in this case might and could be a genuine mistake, but it should not be allowed otherwise the door will be left wide open for gaps in the records of proceedings to be filled in judgment or rulings.”

In contrast to the case in hand is the distinction that may be drawn
 10 from the decision in Chief Aaron Nwizuk v. Chief Warribo Eneyok (1953) 14 WACA 354, in which it was held, inter alia, that statements made in a solemn judgment in the absence of a record of the visit to a locus in quo, are not regarded as fatal and must be taken as final and a correct account of what occurred. It ought to be pointed out however that what transpires at such a
 15 locus would be regarded as a correct and final account of what happened only where there is no dispute between the parties. See the somewhat apposite case of Awoyegbe v. Ogheide (1988) 1 NWLR (Pt. 73) 695 at 699 and 710, a decision of this Court where the statement made by the trial Judge in his “solemn” judgment, not being a correct account of what occurred, as no
 20 witness gave that piece of evidence, it was held that he (the trial Judge) erred in law and that the Court of Appeal was right to have upheld the appeal before it on that ground.

It is in the light of the above that I do not consider as apposite the issue of the defence of res judicata arising in the decision in Suit No. I/155/85
 25 in so far as it relates to Suits Nos. 1/156/85 and 1/157/85. In saying this, I am not unmindful of the fact that in appropriate cases the law discourages a party from “splitting” his case or putting it forward in instalments. Such a situation may arise in my opinion, where there has been a “consolidation” prior to judgment in one case and which would necessarily involve the same judgment
 30 in the two sister cases tried or considered together, agreement notwithstanding. In the instant case, my learned brother, Ogwuegbu, J.C.A. (as he then was) put the matter more clearly when he said:

“There being no record of such agreement, the decision in Suit No. I/155/85 would not have determined the fate of Suits Nos. 1/156/85 and I/
 35 *157/85. The case of McIlkenny v. Chief Constable of the West Midlands Police & Ors. (1982) 1 Q.B. 283 referred to by the learned Senior Counsel does not apply. The facts are completely different from the facts of the present case as rightly submitted by the learned counsel for the appellant.”*

In the instant case, res judicata cannot therefore be said to apply as would give rise to delay tactics resulting in vexation or harassment of the defendant. Thus, the cases of *Henderson v. Henderson* (1843) 100, 115: 67 E.R 313, 319 (per Wigram V.C.) and *Mackenzie Kennedy v. Air Council* (1927) 2 K.B. 517 at 528-529 (per Scrutton, L.J.) cited to us by Chief Williams to buttress the applicability of that defence, is in my respectful view, of no avail. Since there was no express or implied agreement between Chief Williams and Chief Ajayi to deal with the two sister cases together with Suit No. I/155/85, and Mr. Abimbola who held Chief Ajayi's brief on 11th September, 1985 indicated that he was only holding the latter's brief, all that the learned trial Judge would have done was to have adjourned the two sister cases to another date for hearing, knowing fully well that they were meant to be mentioned merely and not be heard on that day. The above was exemplified by the Court below in another portion of its judgment thus:

"It is true that Order 10 rule 1 of the High Court (Civil Procedure) Rules of Oyo State allows a plaintiff to join the three suits in one, the rule did not stop her from instituting them separately. Where she failed in the second choice, the consequences to her by way of costs should have been obvious to her. That should be no reason for not hearing the motion on the merits. This case is also not on all fours with Stephenson v. Garnett (1998) 1 Q.B. 677 where a question was decided in a County Court upon an interlocutory application and the plaintiff brought another action in the High Court on identical question which had been decided in the County Court.

The learned trial Chief Judge might not have come to a different decision in Suit No. I/156/85 after his ruling in Suit No. I/155/85 if he had heard all the motions but he had no alternative in the absence of a consolidation of all the Suits or an agreement by parties that the decision in one should determine the fate of the other two."

Sequel to the foregoing, what one may ask, would have been the reaction of the learned Chief Judge had he been requested by Mr. Abimbola at the end of his judgment in Suit No. I/155/85 on 11th September, 1985, short of asking for adjournment, to transfer the two remaining (sister) cases to another Judge for hearing and determination, he having concluded the one (Suit. I/155/85) in hand? My answer would be that the learned Chief Judge would have been obliged to transfer Suit Nos. I/156/85 and I/157/85 for trial before another Judge. Hence, estoppel per rem judicatam could not have operated in those suits. This is moreso when it would have been incumbent on the defendant, albeit impossible for him to prove:

- (i) that the parties in all previous cases are the same as in the present suit.
- (ii) that the subject-matter is the same; and
- (iii) that the decision between the parties was conclusively determined in respect of the same cause of action or issue

5 See 1. Dzungwe v. Ghishe (1985) 2 NWLR (Pt.8) at 528.
 2. Alao v. Akano (1988) INWLR (Pt. 71) 431 at 441
 3. Osunrinde v. Ajamogun (1992) 6 NWLR (Pt.246) 156 at 180/187.
 4. Ambo v. Aiyeleru (1993) 3 NWLR (Pt. 280) 126 at 145.
 5. Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561 at 587.

10 If there was no agreement between the parties; if there was no consoli-
 dation of the Suits (Nos. I/156/85 and I/157/85) to be heard together as one
 and for the fate in I/155/85 to determine them and if finally, no res judicata
 results therefrom, my answer to issue one would be in the affirmative. Follow-
 ing that, the alternative to issue one, (Issue 2) which asks whether the trial
 15 court having given its considered judgment in Suit No. I/155/85, it would have
 been an abuse of the process of the court for the plaintiff to have insisted on
 proceeding with the hearing of the other two motions on notice, is accord-
 ingly answered in the negative.

20 The short answer to the second issue (Issue 3) is to be found in the
 concluding portion of the judgment of the court below which succinctly states
 inter alia that -

*“There was no agreement that the ruling in one should determine the fate of
 the two sister cases. There was nothing irregular in the learned trial Chief
 Judge hearing arguments on the motions in the other two Suits and there
 25 was an infringement of Section 33(1) of the Constitution.....”*

 Section 33(1) (ibid) provides:

*“33(1) In the determination of his civil rights and obligations,
 including any question or determination by or against any government or
 authority, a person shall be entitled to a fair hearing within a reasonable
 30 time by a court or other tribunal established by law and constituted in such
 manner as to secure its independence and impartiality.”*

 Of fair hearing, Obaseki, J.S.C. in Sunmonu v. Otapo (supra) at page
 605 had the following observation to make,

*“A hearing can only be fair when all parties to the dispute are
 35 given a hearing or an opportunity of a hearing. If one of the parties is refused
 a hearing or not given an opportunity to be heard, the hearing cannot
 qualify as fair hearing. When, therefore, the represented parties were not
 heard or given an opportunity of being heard in the appeal, the hearing by
 the Court of Appeal cannot come within the category of fair hearing. With-*

out fair hearing, the principles of natural justice are abandoned; and without the guiding principles of natural justice, the concept of the Rule of Law cannot be established and grow in the society.”

See also Adigun & Ors. v. Attorney-General of Oyo State (1987) INWLR (Pt. 53) 678. The provisions of Section 33 of the 1979 Constitution as well as the common law doctrine of audi alteram partem having been demonstrably shown to have been breached in the instant case, this issue is answered in the negative and so resolved against the defendant.

For the reasons proffered by me above and the fuller ones set out in the lead judgment of my learned brother Wali, J.S.C., with which I agree, I allow the appeal and affirm the decision of the court below. I make the same consequential orders as contained in the lead judgment inclusive of those as to costs.

ADIO JSC

I have read, in advance, the judgment just delivered by my learned brother, Wali, J.S.C. and I agree that the appeal does not succeed. I too dismiss the appeal and abide by the consequential orders, including the order for costs.

IGUHJSC

What calls for decision in this appeal is whether it is proper or permissible in law for a trial Judge to base his judgment, decision or ruling in a cause or matter on his “vivid recollection” of what allegedly transpired in the course of trial in the absence of any minute or evidence on record in support thereof.

The facts have been fully set out in the lead judgment of my learned brother, Wali, J.S.C. and it is unnecessary to repeat them all over again. It suffices to state that the plaintiff, who is the respondent herein, had at the Ibadan High Court instituted three separate action to wit, suits Numbers I/155/85, I/156/85 and I/157/85 against the defendant who is the appellant in this appeal. In each suit, she claimed the sum of N1,000,000.00 being damages for alleged libel. The plaintiff and the defendant are the same in all these cases. The contents of the alleged libel are also the same except that they were published to three different persons.

Upon a motion on notice by the defendant praying the trial court in suit No. I/155/85 to strike out the statement of claim on the ground inter alia that it disclosed no reasonable cause of action, the learned trial Chief Judge duly heard arguments thereon. In a considered ruling, he struck out the statement of claim in the suit and dismissed the action.

It must be pointed out that on the 28th October, 1985 immediately after the decision of court was delivered in the said suit No. I/155/85, learned counsel for the defendant, Mr. Ladi Williams referred to –

“earlier indications from both leading counsel that suit I/155/85 should decide the fate of the other two cases (Suits I/156/85 and I/157/85) the parties being the same; the cause of action being the same; the same words being complained of; the same amount of damages being claimed - the statements of claim in the two actions should be struck out and the two actions dismissed.”

Learned counsel for the plaintiff, Mr. O. Abimbola in his reply stated that he was only instructed by telephone to hold the brief of his learned friend. Chief G.O.K. Ajayi, S.A.N. in the cases. He was unable to say anything of substance in opposition to the application for judgment.

The learned trial Chief Judge in his ruling and without hearing any arguments in respect of the two similar applications for the striking out of the statement of claim and the dismissal of the remaining two sister cases proceeded to strike out the said statements of claim and dismissed suits numbers I/156/85 and I/157/85. In doing this, the learned trial Chief Judge observed -

“I remember quite vividly - although this was not recorded - that the two leading counsel in this case gave indications to the effect that the ruling in suit I/155/85 should determine the fate of the other two sister cases - that is, suit I/156/85 and suit I/157/85. I have already decided that the statement of claim in suit I/155/85 disclosed no reasonable cause of action and was an abuse of the process of the court. The writs in the other two actions as well as the statements of claim are virtually the same as the writ in the action dismissed and in which the statement of claim was struck out.....The statement of claim in suit I/156/85 is hereby struck out on the same reasoning as in suit I/155/85. The action is also dismissed. The statement of claim in suit I/157/85 is also hereby struck out on the same reasoning as in suit I/155/85. The action, too, is dismissed.”

Dissatisfied with this decision, the plaintiff appealed to the Court of Appeal which on the 22nd September, 1985 dismissed the appeal, set aside the decision of the High Court and ordered a retrial of the two suits before another Judge. This appeal is against the said decision of the Court of Appeal.

Before us, it was strenuously argued on behalf of the defendant/appellant that a statement made on the record of the court by a Judge of one of the highest courts of first instance in the land ought not to be unceremoniously rejected as was done by the court below in this case. It was conceded

that although no record was made by the trial court on the very day when the agreement was made between the two leading counsel, nevertheless a record of it was subsequently made on the day when the judgment was read. The defendant also conceded that the best time to record an agreement of this nature is when it took place. It was submitted however that recording it after the event could not have the effect of invalidating the agreement and that it was the recollection of the plaintiff's leading counsel which in all probability appeared to be faulty. 5

For the plaintiff/respondent, it was contended with considerable force that there was no agreement by counsel to be bound by the decision in suit No. I/155/85 as alleged. This is borne out from that fact that there is no minute of the alleged agreement anywhere in the court's record of proceedings, He therefore submitted that the court's finding which was based entirely on the "vivid recollections" of the learned trial Chief Judge without any supporting evidence on record is erroneous on point of law and must not be allowed to stand. The plaintiff's complaint in effect is that there is no evidence to support the finding of fact made by the learned trial Chief Judge and that the record of proceedings for the day in question supports her complaint. 10 15

On the issue of whether there was an agreement between the parties that the decision in suit No. I/155/85 should bind the other two sister cases, it is necessary to draw attention to section 61 of the Oyo State High Court Law (Cap. 45, Vol. III Laws of Oyo State) which provides as follows:- 20

"Subject to any rules of court for the taking of minutes of proceedings the presiding Judge shall in every cause or matter take down in writing the purport of all oral evidence given before the court and shall sign the same at any adjournment of the case and at the conclusion thereof." 25

It seems to me plain from the above provision of the law that subject to any rules of court with regard to the recording of minutes of proceedings, it is mandatory on the part of a Judge of the High Court of Oyo State, as indeed is the case with a Judge of the Federal or the State High Court, to record the purport of all oral evidence given before him in every cause or matter and he shall sign the same at any adjournment of the case and at the conclusion thereof. It is also my considered view that the "oral evidence" referred to in section 61 of the Oyo State High Court Law must be construed as covering not only the testimony of parties and their witnesses but includes the purport or substance of all submissions, contentions, arguments, addresses, replies, objections, applications, admissions and various other issues or matters said or raised in the course of the hearing of a cause or matter. 30 35

The issue under consideration is a matter of fundamental importance as all decisions or findings of trial courts of law must, to be unimpeachable, be

fully supported by evidence before such courts together with all applicable laws; and, decisions or findings which are not supported by such laws and evidence must be regarded as improper and erroneous on point of law. It must also be emphasized that the evidence in a case or matter referred to in the said section 61 of the Oyo State High Court Law is none other than the evidence on record and not otherwise.

This has to be so otherwise a court may find itself in the unlikely situation of where, by inadvertence, its judgment or decision is based on evidence which in point of fact might not have been before it. There is therefore a heavy duty on a trial Judge to ensure in the interest of justice that the purport or substance of everything material said or raised in the course of the hearing of a suit, cause or matter is taken down in writing and must be properly and accurately recorded. See too *Otapo v. Chief R. O. Sunmonu and others* (1987) 2 NWLR (Pt.58) 587 at 624.

Turning now to the case on hand, it is clear that the now disputed agreement by the two leading counsel to the effect that the ruling in suit No. I/155/85 should determine the fate of suits numbers I/156/85 and I/157/85 is nowhere recorded in the record of proceedings in respect of the case. I confess that I find it regrettable that this was not recorded if infact there was any such agreement. Dealing with this aspect of the appeal, the court below per the lead judgment of Ogwuegbu, JCA. as he then was, had the following to say-

"The ruling or decision in Suit No. I/155/85 could have determined the other two sister cases one of which is the present appeal if there was consolidation of all the suits as was canvassed in ground one of the grounds of appeal or an agreement by both learned counsel that the decision in one should determine the fate of the other two. The order for consolidation or any agreement that the decision in one should determine the fate of the others must as in the settlement of issues before trial be taken down in writing by the trial Judge. It is not in the interest of justice for decisions to be based on recollections of Judges not recorded anywhere during the trial and such recollections made the subject of conflicting affidavits by counsel appearing in the said cases who should have said with one voice that there was such an agreement or that there was no such agreement. It will be laying a dangerous precedent for this court to act on such a recollection no matter how vivid which does not form part of the record and being the basis for the dismissal of the sister cases."

I am in entire agreement with the above observations of the court below and fully endorse the same. As was pointed out, the unfortunate situation in this case is not unlikely to be a genuine mistake on the part of one or the

other of all concerned, but it must not be glossed over or allowed otherwise a dangerous precedent would have been created whereby the door is left wide open for gaps in the record or proceedings to be filled at will in judgments or ruling from “vivid recollections” of the learned trial Judges without any supporting evidence.

I conclude by saying that the learned trial Chief Judge, for whom I have the greatest respect, might not have come to any different decision in Suits numbers I/156/85 and I/157/85, if he had heard all the motions therein filed after his determination of Suit No. I/155/85. There was clearly no other option that was open to him than to hear all the applications in the absence of a consolidation of the suits or an agreement on record by the parties to the effect that the decision in Suit No. I/155/85 should determine the fate of the other two suits. With profound respect, it is my view that the learned trial Chief Judge was in grave error when he struck out the statements of claim in Suits Numbers I/156/85 and I/157 /85 and dismissed both actions based entirely on his “vivid recollection” as aforesaid.

It is for the foregoing and the more detailed reasons contained in the lead judgment of my learned brother, Wali, J.S.C. with which I am in full agreement that this appeal fails. Accordingly I hereby dismiss the same and abide by the consequential orders including those as to costs contained in the lead judgment.

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