

SUPREME COURT OF NIGERIA
FRIDAY 16TH MAY, 1995. SC. 31/1989
CORAM:- M. L. UWAI, A. B. WALI, I. L. KUTIGI, M. E.
OGUNDARE, U. MOHAMMED, JJSC

NIGERIAN TOBACCO CO. LTD. APPELLANT

AND

ALLOYSIUS OLUMBA AGUNANNE RESPONDENT

EVIDENCE - *Burden of proof - Defence of common employment - Raised by appellant - Onus of proof is on the defence.*

LEGISLATION - *Torts - Abolition of common law doctrine of common employment - In England since 1948 - Whether that doctrine is still applicable in Northern Nigeria - In view of the relevant law.*

TORTS - *Common employment doctrine - Party injured and party causing the injury are to be in a common employment - Two conditions that will exempt the employer from liability.*

TORTS - *Negligence - Of appellant's driver - Leading to co-employee sustaining serious injuries - Whether the doctrine of common employment will apply - To exempt appellant from liability.*

FACTS

The plaintiff/respondent was a management trainee in the defendant/appellant's employment. On the 5th day of April, 1976, plaintiff was on duty on his way to Jos from Enugu his station. He travelled in the defendant's company vehicle driven by defendant's driver and servant, one Danjuma Magaji. An accident occurred on the way and the plaintiff sustained some permanent injuries. Plaintiff remained in the defendant's employment until January 1978 when he was retired on health grounds as a result of the accident. Plaintiff filed an action against the defendant claiming the sum of N500,000 damages for breach of duty and alternatively for the negligence of the defendant's servant.

Though the defendant did not dispute the facts of the case, it denied the plaintiff's claim, contending that the driver of the vehicle did

998 NTC LTD V. AGUNANNE (1995) 5 KLR 997; (1995) 5 NWLR not drive negligently. The defendant claimed that it cannot be held responsible and relied on the defence of common employment doctrine which it contended was applicable in Plateau State where the accident happened. The trial court found for the plaintiff and awarded N22,000.00 to him as general damages for the injuries and losses sustained by him. The defendant's appeal to the Court of Appeal was dismissed. Being dissatisfied, the defendant has further appealed to the Supreme Court to determine a single issue. The apex court however raised and decided a suo motu issue without hearing the parties.

ISSUE FOR DETERMINATION

Whether on the pleadings and the evidence led, the Court of Appeal was right in holding that the defence of common employment did not succeed.

SUPREME COURT'S SUO MOTU ISSUE

Whether it is correct to say that the common law doctrine of common employment is yet to be abolished in the Northern States of Nigeria as stated by the learned trial judge.

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**, Ogundare JSC dissenting only on the suo motu issue)

Torts - Common employment doctrine

1. Now, the doctrine of common employment as the authorities show would apply where the party injured is not a stranger but a fellow-servant of the party causing the injury and engaged in a common employment with him. In such a case the master is at common law not liable for injuries caused by the negligence of his servant in the course of his employment. But to exempt the master from liability two conditions as rightly submitted by Mr. Njemanze for the plaintiff must be satisfied. First, the servants must be fellow-servants, in other words they must be in the service of a common employer. It is not enough that the work should be common, but both parties must be servants of the same master. Also workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. Secondly, they must be engaged in a common employment, that is to say, the work must be common, but it need not be identical. The employment must be in common, in the sense that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. Whether the work is common is in each case a question of degree. There is however no common employment where the employees are engaged in different departments of duty.

Negligence - Whether common employment applies

2. Applying the above principles to the case in hand I have no doubt that

the pleadings and evidence referred to by Chief Williams clearly go to establish the first condition set out above only. That is that the servant injured (the plaintiff), and the servant causing the injury, the driver, Danjuma Mogaji, were fellow servants employed in the services of their common employer, the defendant. In my view there was no evidence before the court that the two servants herein were engaged on a common employment. The lower courts so found and I agree with them. The negligent driver in this case cannot in any way be said to be engaged in a common employment with the injured respondent herein. And in addition, the accident cannot be said to be any particular or natural risk of respondent's employment.

Burden of proof - Defence of common employment

3. Since the defence of common employment was only raised by appellant, it was for it to lead evidence to establish it. It was certainly not the duty of the plaintiff/respondent to adduce evidence thereof for the use of the appellant. Be that as it may, the learned trial judge considered the available evidence and as I said, rightly came to the conclusion that the defence was not established by the appellant.

Torts - Abolition of doctrine of common employment

4. So clearly in whichever way one looks at it the common law of England adopted under section 28(a) of the High Court Law above did not and could not have included the doctrine of common employment which had been abolished in England in 1948. Consequently therefore when the cause of action, the accident herein, occurred on 5th April 1976, the defence of common employment was no longer available because it has been abolished in England as long ago as 1948 even before the High Court Law of Northern Nigeria was enacted in 1955. The learned trial judge was manifestly in error when he held as he did above that the doctrine was yet to be abolished in Northern States and therefore applicable by virtue of section 28 of the High Court Law of Northern Nigeria, 1955 above.

NOTABLE POINTS OF INTEREST

KUTIGI JSC

1. Doctrine of common employment in the North - Orojo's view not correct

With greatest respect to the learned author, I think it is not correct to say that the doctrine of common employment is still part of the law of the Northern States as I have endeavoured to show above. The doctrine was infact never part of the common law of Northern Nigeria, certainly not after 1948, and it is consequently not necessary or even relevant for a law to be passed in any Northern State abolishing the doctrine. The position therefore is that the doctrine of common employment did not exist as a defence

UWAIS JSC

2. Applicability of common employment doctrine - Whether in issue

With respect, this is not the situation in the present case. The point in question was raised before us by the appellant; the respondent had had the opportunity to reply. And as it transpired the latter agreed with the former. Is this Court to shy away from this important point of law which concerns the law to be applied in the High Courts in the Northern States even if, as I will show in due course, jurisdiction is by misdirection bestowed on the High Courts, by the decisions of the lower courts and the view of the learned author of the Nigerian Commercial Law and Practice, to apply the doctrine of common employment? There is nothing in the Supreme Court Rules, 1985 or any of our previous decisions which stand in the way of this Court to consider the question, which is fundamental: whether or not the doctrine of common employment is applicable in the Northern States and in particular the Plateau State where the cause of action in this case arose. As the point was raised by counsel to the parties and we were duly addressed, we have the obligation and indeed the duty to pronounce on the point. The fact that our view on the point may differ from the submissions made by counsel to the parties is not, with respect, a ground for us to hear further address by counsel on the point.

3. Applicable English common law in the Northern States

In view of the aforesaid, it is clear from the marginal note to Section 28 a Chapter 49 that the common law which applies to the present case, is the common law of England as at the 1st day of May, 1965 when the Laws of Northern Nigeria, 1963, including Chapter 49 thereof, came into force. Since the doctrine of common employment ceased to be part of that common law as from the 30th day of June, 1948 when the Law Reform (Personal Injuries Act 1948 was enacted in England, the doctrine did not, therefore, form part of the common law adopted or to be applied by the High Courts of the Northern States as at the 1st day of May, 1965 and as at the date when the cause of action in this case arose; that is the 5th day of April, 1976.

OGUNDARE JSC

4. How Supreme Court should handle its suo motu issue

Although the view expressed by the learned trial Judge was not made an issue before this Court, that does not prevent this Court, on its own motion, from raising it, but as shown earlier in this judgment, the parties must be

heat before this Court can decide on the point raised suo motu by it. It is because this has not been done that I, with utmost respect, am of the view that tie point should not be made a basis of our decision. In my respectful view, to do so would amount to this Court going “on a frolic of its own” more so that it has not had the benefit of arguments by counsel for or against the point raised,

B

5. Applicability of common employment doctrine in the North

The common law of England in 1900 remains applicable in Northern Nigeria until such time when local legislation is enacted to abolish it as was the case in England in 1948 with the promulgation of the Law Reform Personal Injuries Act of that year. As this doctrine of common law, is part of the common law received in Northern Nigeria before the enactment in England of the 1948 Act it remains in force in that part of the country. The 1948 Act though of general application but not being in force in England on 1st January 1900 could not, and did not, affect the continued operation in Northern Nigeria of the doctrine of common employment. The suggestion that the Law Reform Personal Injuries Act 1948 which abolished the common law doctrine of common employment in England was already in force before the High Court Law of Northern Nigeria was enacted in 1955 overlooks the provision of Section 28(c) that it is only statutes of general application which were in force in England on the 1st day of January 1900 that are applicable in Northern Nigeria. Thus the 1948 Act which abolished in England that doctrine of the Common-law was not applicable to Northern Nigeria having not been in force E on 1st January, 1900.

6. Views that common employment applies - Whether correct

In my respectful opinion, therefore, the learned trial High Court Judge, Iguh J., (as he then was) and Dr. J. Olakunle Orojo whose comment in his book entitled. The Nigeria Commercial Law and Practice Vol. 1 1983 edition page 477 para. 8.66 was quoted in the lead judgment, are both correct in their view that the common law doctrine of common employment G which has not yet been abolished by legislation in the Northern States still forms part of the law of those States. If this question had been available and necessary for our decision in this appeal, that would have been my decision.

H

REPRESENTATION

Chief F.R. A. Williams SAN with T.E. Williams and G.M. Oguntade for the defendant/appellant

Chief D.C.O. Njemanze for Plaintiff/respondent.

CASES REFERRED TO

- Pollock v. Charles Burt Ltd (1940) 4 All E.R. 266
Metcalfe v. London Passenger Transport Board (1939) 2 All E.R 542
McGovern v. London Midland & Scottish Rly (1994) 1 ALL E.R. 730
B Morgan v. Vale of Neath Rly (1864) 5B & S. 570
Ajao v. Ashiru (1973) 11 S.C. 23
Atanda v. Lakanmi (1974) 3 S.C. 109
Ugo v. Obiekwe (1989) 1 NWLR (PT. 99) 566
Olusanya v. Olusanya (1983) 1 SCNLR 134 at page 139
C Ebba v. Ogodo & Anor. (1984) 4 S.C. 84
Cooke v. New River Company (1888) L.R. 38 Ch. D. 70 at page 71
Chandler v. D.PP (1964) A.C. 763 at page 789
Beswick v. Beswick (1966) CH 538
Adeosun v. Babalola & Anor. (1972) 5SC.292 at page 302
D Ehimare v. Enhonyon (1985) 1 NWLR 177
Priestly v. Fowler (1935-42) All E.R. Rep. 449 at 450

STATUTES & RULES REFERRED TO

- High Court Law Cap. 49 Laws of Northern Nigeria 1963 SS. 28, 30
E Torts Law Cap. 125 Laws of Eastern Nigeria, 1963 S. 4
Supreme Court Rules 1985 0.8 r. 2(6)
Revised Edition of the Laws of Northern Nigeria 1963 (N.N. No. 4 of 1963)
SS. 6, 10
Interpretation Ordinance Cap. 89 L.F.N. & Lagos 1958 S. 14 (b)
F Supreme Court of Judicature (Consolidation) Act 1925 S. 18(1) & (2)

BOOKS REFERRED TO

Nigerian Commercial Law and Practice vol. 1 1983 Ed. p. 477 - Orojo
Halsbury's Laws of England 4th Ed. Vol. 10 para 843 et seq

G **LEAD JUDGMENT BY KUTIGI JSC**

The plaintiff's claim against the defendant as stated in para. 8 of his Amended Statement of Claim was for the sum of N500,000 damages for:

"breach of duty and alternatively for the negligence of the defendant's servant."

- H The defendant denied the plaintiff's claim whereupon pleadings were ordered, filed and exchanged. At the trial the plaintiff testified for himself and called three other witnesses while two witnesses testified on behalf of the defendant.

The facts of the case were simple. The plaintiff was at all material

times a management trainee in the employment of the defendant. He was employed as a salesman in 1964 and rose to the rank of management trainee in 1975. He moved about in one of the defendant's vehicles while performing and discharging his official duties. On the 5th day of April 1976 he was on duty and on his way to Jos from Enugu his station. He travelled in the defendant's company vehicle registration No. LAD 7423 which at all material time was driven by defendant's driver and servant, one Danjuma Magaji. On this day and along Jos - Pankshin Road he was involved in an accident when the vehicle in which he was traveling left the tarred road and hit a concrete culvert on the right hand side of the road. He sustained many injuries, some of them permanent. He was rushed semi-conscious to Jos General Hospital from where he was later transferred to a mission hospital, also in Jos. He also received specialist treatments at the Guinness Eye Clinic Kaduna and the Orthopaedic Hospital Enugu. The plaintiff maintained that the accident was caused by the negligence of defendant's driver Danjuma Magaji and nothing else. He has remained in the employment of the defendant until January 1978 when he was retired on health grounds as a result of the accident.

The defendant did not seriously dispute the facts as narrated above. It agreed, that both the plaintiff and the driver, Danjuma Magaji, were its servants and employees at all material times; It also agreed that the plaintiff was one of its senior staff whose post was pensionable. The retirement age was 55 unless he resigned or his appointment terminated. The defendant however averred that it -

"strenuously denied that the driver of the said vehicle drove or in any way managed the same negligently or that the accident was in any way caused by the negligence of the said driver who was under the control and supervision of the plaintiff."

The defendant also contended that it cannot at any rate be held responsible for the tort of one servant against another committed in the course of their employment under the doctrine of common employment which it claimed was applicable in Plateau State where the accident herein happened.

In a reserved judgment the learned trial Judge Iguh J. (as he then was) considered the evidence from both sides and held on page 69 of the record thus

"I am satisfied that the plaintiff has proved a case of negligence against the driver Danjuma for which the defendants are vicariously liable."

He concluded on page 73 that -

In the result the plaintiff's action succeeds and there will be judgment for the plaintiff against the defendant in the sum of N22,000.00 being general damages for the "injuries and losses sustained by" the said

plaintiff on the 5th day of April 1976 as a result of the negligence of the defendant's servant."

Dissatisfied with the judgment of the High Court, the defendant appealed to the Court of Appeal, Enugu Division. The following questions were submitted for determination -

B *"1. Whether upon the pleadings and evidence led the learned trial Judge was right in making a finding of negligence against the appellant's driver.*

2. Whether upon the pleadings and evidence led the learned trial Judge was right in holding that the doctrine of common employment did not apply.

C *3. Whether in the circumstances of this case Exhibit was not a material document which ought to or could have affected the weight to be placed on the evidence of the respondent as regards how the accident happened*

D *4. Whether the learned trial Judge was right in making an award of N7,000 under the head "future loss of earnings" in view of the findings he had made thereon."*

The Court of appeal dispassionately considered all the above issues in its judgment delivered on the 16th day of February 1987 and came to the conclusion that the appeal failed and dismissed it with costs.

E Still not satisfied with the judgment of the Court of Appeal, the defendant has now appealed to this Court. Only one ground of appeal was filed and the single issue identified for determination on page 3 of the brief runs thus -

"Whether on the pleadings and the evidence led the Court of Appeal was right in holding that the defence of common employment did not succeed."

F Both sides filed and exchanged briefs of argument and made additional oral submissions at the hearing.

G Chief Williams S.A.N. for the appellant said he did not quarrel with the statements of the lower courts as to what the defence of common employment amounted to. He however submitted that apart from the cases which establish the principle, the other cases where it was applied to the facts of those cases and, which the lower courts relied upon were irrelevant. He said the facts of the case in hand must be applied independently to the principle and that the pleadings and evidence in this case established common employment. He said paras 3 & 4 of the Amended Statement of Claim which were admitted by paras 5, 6, 7 & 7A of the Amended Statement of Defence, in so far as the duties of both respondent and the appellant's driver were concerned, established that the respondent and appellant's driver were in common employment having regard to what amounts to common employment. He referred to the evidence of the respondent on page 14, lines 14 - 27 which he said was not controverted. He said the gist of the

defence of common employment was that where the work of one person was so related to the work of another person that the risk of injury to one person due to the negligence of another was not merely fortuitous, but was a special risk involved in the relationship so that such risk must be deemed to have been in the contemplation of the servant when he entered into his contract of service, such servant was said to be in common employment with the other person. He said the test was one of relationship i.e. whether their employment brought them together at the time and place of the accident in carrying out some activity in common. The following cases were cited in support -

1. Radcliffe v. Ribble Motor Service Ltd
(1939) A.C. 215
2. Miller v. Glasgow Corporation
(1947) A.C. 368
3. Glasgow Corporation v. Bruce or Neilson
(1948) A.C. 79
4. Lancaster v. London Passenger Transport Board
(1948) 2 All E.R. 796
5. Coldrick v. Partridge Jones & Co. Ltd.
(1910) A.C. 77

It was also submitted that to infer common employment it was not necessary as wrongly stated by the trial court to produce a contract of employment in evidence. He referred to Radcliffe v. Ribble Motor Services Ltd (supra). He said the lower courts were wrong to have held that on the facts the defence of common employment was not established by the appellant. The court was urged to allow the appeal and dismiss respondent's claim.

Mr. Njemanze learned counsel for the respondent in reply submitted that for the doctrine of common employment which is a common law principle to apply, two conditions must be fulfilled thus -

1. The servant injured and the servant causing the injury must have been fellow servants i.e. they must be servants of the same master;
2. They must at the time of the accident have been engaged in a common work. The case of Lancaster v. London Passenger Transport Board (supra) was cited in support. He also referred to Salmond on the Law of Tort 17th Edition.

Counsel said the learned trial Judge correctly stated the doctrine and properly applied same to the facts of the case and rightly came to the conclusion that the defence failed. It was stressed that while the respondent was a management staff, Danjuma Magaji who caused the accident was a driver showing that they performed different works in the appellant's company. That the doctrine does not apply as in this case.

"Where the injured man and the negligent co-employee are not

engaged in the same common work or are not fellow labourers in the same work or are engaged in different departments of duty.”

He referred to Pollock v. Charles Burt Ltd. (1940) 4 All E.R. 264 and Radcliffe v. Ribble Motor Services Ltd. (supra). He said the application of the doctrine was not automatic and referred us to Nigerian Commercial Law and Practice by J. Olakunle Orojo Vol. 1 1983 Edition, page 477, para. 8.66.

It was further submitted that the appellant did not give any evidence relating to the fact of common employment and that the lower courts were right on the authorities to have dismissed the defence after due consideration. We were urged to dismiss the appeal.

As shown above the only issue for determination in this appeal is whether on the facts of the case defence of common employment applied. The same issue was argued before the trial High Court and the Court of Appeal. They both respectively came to the same conclusion that the defence failed.

The learned trial Judge considering the defence said on page 57 of the record that-

*“The evidence of the plaintiff in this case which I accept as substantially true is that on the material date, a defendant’s employed driver, Danjuma Magaji was assigned to convey the plaintiff in the defendant’s vehicle number LAD 7423 to Jos on the official tour of the Jos Division. The plaintiff stated that as they took off from Jos, the driver Danjuma was speeding excessively
..... I am however satisfied that the driver Danjuma was driving at such a speed in such circumstances which made it possible for his car to career off the tarred road and to collide with a concrete culvert on the right hand side of the said road. It was the impact resulting from this collision that inflicted diverse very serious injuries on the plaintiff, injuries which he gave in evidence and which I unhesitatingly accept as proved.”*

He continued on page 62 thus -

“I will now consider whether the defendants who are the employers of both the plaintiff and the said driver Danjuma, can be vicariously liable for this negligence of their servant. In this regard the defendants have relied on the common law doctrine of common employment and have submitted that they cannot be liable on negligence of their servant under the above doctrine.

At common law a master was not responsible for negligent harm done by one of his servants to a fellow servant engaged in a common employment with him. For this to apply the servants had to be employees

of the same master and must be engaged in common employment at the time of the accident in the sense that the skill and care of one were of such special importance to the other by reason of the relationship between their services that the risk of injury to one was the natural and necessary consequence of the other's misconduct in failing to show such skill and care."

Applying the above principles and relying on various authorities B including Radcliff v. Ribble Motor Servants Ltd (supra); Miller v. Glasgow (supra); Pollock v. Charles Burt Ltd (supra); Metcalfe v. London Passenger Transport Board (1939) 2 All E.R. 542 and McGovern v. London Midland & Scottish Ry Co. & Ors (1944) 1 All E.R. 730 amongst others, the learned trial Judge came to the conclusion on page 69 of the record thus - C

"It appears to me that the risk to which the plaintiff was exposed while he was being driven by the defendant's driver Danjuma on the material date has not been proved to be the particular or natural risk of his employment and I am for all the reasons I have given above unable to hold that the doctrine of common employment has been proved to be applicable to this case. I am satisfied D that the plaintiff has proved a case of negligence against the driver Danjuma for which the defendants are vicariously liable."

The Court of Appeal also dealing with the same doctrine of common employment concluded in the lead judgment of Maidama J.C.A. (of E blessed memory) on page 138 of the record thus -

"On the authorities which I have referred to above and which I hereby adopt, I am in full agreement with the learned trial Judge's finding that the doctrine does not avail the present appellant. The appeal on this ground therefore fails."

I am also clearly of the view that the doctrine or principle of common employment did not avail the defendant on the facts of the case and that the lower courts were right in rejecting it. F

Chief Williams' submission that the doctrine applied, revolved around para. 3 & 4 of the Amended Statement of Claim only which he said were admitted by paras. 5, 6, 7 & 7A of the Amended Statement of Defence. G

Paras. 3 & 4 of the Amended Statement of Claim read -

"3. It was the duty of the plaintiff to go on sales promotion drive in vehicle provided by the defendant and driven by a servant of defendant. It was equally the duty of the defendant to employ a competent and experienced driver to ensure the safety of the plaintiff in course of his employment. H

4. On the 5th day of April 1976 the plaintiff was in the course of

his employment and was travelling along Jos to Pankshin Road in the defendant's vehicle registration No. LAD 7423 driven by the defendant's servant one Danjuma Magaji, whoso negligently managed and drove the said vehicle on the said road that it left the road and hit a concrete culvert, in consequence whereof the plaintiff sustained severe injuries and has suffered loss and damage.

Particulars of Breach of Duty

(i) Failing to take any or any adequate precautions for the safety of the plaintiff while in the course of his employment.

(ii) Failing to employ a competent and experienced driver to drive the plaintiff while on duty.

(iii) Exposing the plaintiff to the risk of accident by engaging to drive him a driver whom the defendant knows or ought to have known is incompetent and inexperienced.

And paras. 5, 6, 7 & 7A of the Amended Statement of Defence also read -

"5. The defendant admits paragraph 3 of the statement of claim to the effect that the duties of the plaintiff included going on sales promotion drives whenever its expected to provide qualified such sales promotion drivers.

6. In further answer to the said paragraph 3, the defendant aver that at all material times and on the day of the accident, the defendant provided a qualified and competent driver to drive the plaintiff on his sales promotion drive and that the said driver was under the control and supervision of the plaintiff.

7. The defendant admits paragraph 4 of the statement of claim only to the extent that on the date stated, the plaintiff was as averred, travelling in vehicle Registration No. LAD 7423, driven by one Danjuma Magaji; but strenuously and unreservedly deny that the said driver of the said vehicle drove or in any way managed the same negligently or that the accident was in any way caused by the negligence of the said driver, who was under the control and supervision of the plaintiff.

7A. By reason of the facts pleaded and/or admitted by paragraphs 3, 5, 6 and 7 of the Statement of Defence to wit -

(i) that the plaintiff was employed by the defendant;

(ii) That the duties of the plaintiff included going on sales promotion drives in the defendant company vehicle driven by a qualified and competent driver provided by the defendant;

(iii) and that Danjuma Magaji a driver employed by the defendant pursuant to (ii) above drove the plaintiff on the day in question on his sales

promotion drive; the plaintiff is not entitled to succeed against the defendant having regard to the fact that the plaintiff Danjuma Magaji were in common employment at the time of the accident.

Now, the doctrine of common employment as the authorities show would apply where the party injured is not a stranger but a fellow-servant of the party causing the injury and engaged in a common employment with him. In such a case the master is at common law not liable for injuries caused by the negligence of his servant in the course of his employment. B

But to exempt the master from liability two conditions as rightly submitted by Mr. Njamanze for the plaintiff must be satisfied.

First, the servants must be fellow-servants, in other words they must be in the service of a common employer. It is not enough that the work should be common, but both parties must be servants of the same master (See Swanson v. North Eastern Rly (1878) 3 Ex. D341. Also workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority (See Wilson v. Merry (1868) LRI SC. & Div. 326. C

Secondly, they must be engaged on a common employment, that is to say, the work must be common, but it need not be identical. The employment must be in common, in the sense that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others (See Morgan v. Vale of Neath Rly (1864) 5B &S 570). Whether the work is common is in each case a question of degree. There is however no common employment where the employees are engaged in different departments of duty (Pollock v. Charles Burt Ltd. (1941) IK. B. 121. (See generally Clerk & Lindsell-on The Law of Torts, 10th Edition page 124 etc. D

Applying the above principles to the case in hand I have no doubt that the pleadings and evidence referred to by Chief Williams clearly go to establish the first condition set out above only. That is that the servant injured (the plaintiffs), and the servant causing the injury, the driver, Danjuma Mogaji, were fellow servants employed in the services of their common employer, the defendant. In my view there was no evidence before the court that the two servants herein were engaged on a common employment. The lower courts so found and I agree with them. F

In the case of Radcliffe v. Ribble Motor Services Ltd. (supra), Lord Macmillian delivering judgment in the House of Lords had this to say on page 648 of the report G

"It is, therefore, essential in a case such as the present, where the doctrine is invoked in circumstances of a quite exceptional character, to examine carefully whether the case falls within the principle upon which the doctrine is professedly based. One thing is clear. It is not enough, for the H

doctrine to apply, that the negligent employee and the injured employee should be in the service of a common master. They must be serving him in a common employment, or as it was put by Lord Cranworth, L.C., "engaged in a common work." The chauffeur who drives his master to the works is not in a common employment with his master's employees in the works, though they have a common employer. In the ordinary case of common employment, the nature of the employment is such as to bring the employees into association with each other in carrying on some activity in common, and it is from this association that there arises the risk that one of those engaged may be injured by the negligence of another also so engaged."

So it is in this case. The negligent driver in this case cannot in any way be said to be engaged in a common employment with the injured respondent herein. And in addition, the accident cannot be said to be any particular or natural risk of respondent's employment. (See also Glasgow Corporation v. Bruce or Neilson (supra).

It is not correct as argued by Chief Williams that the learned trial Judge said

"Since the full conditions of service of the respondent were not before the court, the court was handicapped in determining whether the defence of common employment avails."

what the trial Judge said on page 67 of the record reads -

"The full conditions of service of the plaintiff, if they are in writing, were not tendered in evidence to assist the court to determine the actual and real duties of the said plaintiff by virtue of his said employment." This is clear enough.

Since the defence of common employment was only raised by appellant, it was for it to lead evidence to establish it. It was certainly not the duty of the plaintiff/respondent to adduce evidence thereof for the use of the appellant. Be that as it may, the learned trial Judge considered the available evidence and as I said, rightly came to the conclusion that the defence was not established by the appellant.

Before I close there is one point which worries my mind and which I would irresistibly like to comment briefly upon. The point is whether it is correct to say that the common law doctrine of common employment is yet to be abolished in the Northern States of Nigeria as stated by the learned trial Judge on page 63 of the record where he said -

"The doctrine is yet to be abolished in the Northern states of Nigeria and is by virtue of Section 28 of the High Court Law of Northern Nigeria 1955 applicable till this date in the said Northern States."

The learned trial Judge had held on page 62 of the record thus -

“The doctrine of common employment was applicable in England in the year 1900 and up to 1948 when it was abolished by the Law Reform (Personal injuries) Act, 1948.”

Now Section 28 of the High Court Law Cap. 49 Laws of Northern Nigeria 1963 volume II reads:-

“28. Subject to the provisions of any written law and in particular B of this section and of sections 26, 33 and 35 of this Law -

(a) the common law;

(b) the doctrines of equity; and

(c) the statutes of general application which were in force in En- C gland on the 1st day of January, 1900

Shall, in so far as they relate to any matter with respect to which the Legislature of Northern Nigeria is for the time being competent to make laws, be in force within the jurisdiction of the court.”

First, it is doubtless that the year 1900 in section 28(c) above is only applicable to statutes of general application. The common law and D doctrines of equity in section 28(a) & (b) could only respectively mean the current common law and current doctrines of equity.

Secondly, section 28 of the High Court Law (cap. 49) above came into force in 1955 while the Law Reform (Personal Injuries) Act, 1948 which abol- E ished the doctrine of common employment in England was passed in 1948.

So clearly in whichever way one looks at it the common law of England adopted under section 28(a) of the High Court Law above did not and could not have included the doctrine of common employment which had been abolished in England in 1948. Consequently therefore when the cause of action, the accident herein, occurred on 5th April 1976, the de- F fence of common employment was no longer available because it had been abolished in England as long ago as 1948 even before the High Court Law of Northern Nigeria was enacted in 1955. The learned trial Judge was manifestly in error when he held as he did above that the doctrine was yet to be abolished in Northern States and therefore applicable by virtue of G section 28 of the High Court Law of Northern Nigeria, 1955 above.

The following passage to which we were referred by Chief Njemanze in the Nigerian Commercial Law & Practice by J. Olakunle Orojo. Vol. 1983 Edition. Page 477 para. 8.66 is also relevant. It reads -

“Although the doctrine of common employment was abolished in H England in 1948 by the Law Reform (Personal Injuries) Act 1948, in Nigeria, the doctrine was only abolished in Bendel, Ogun, Ondo and Oyo (formerly Western State) in 1958, in the Federal Territory of Lagos, now in Lagos State, in 1961 and in Anambra, Imo, Rivers and Cross River States (formerly Eastern Nigeria) in 1962. With the abolition of the doctrine, any

term in a contract of employment purporting to exclude the liability of the employer with regard to his liability for injuries sustained by his worker through the default of a fellow-worker is void as being against public policy. It should be noted that in the Northern States, the doctrine has not yet been abolished and is therefore part of the law of these States;”

B With greatest respect to the learned author, I think it is not correct to say that the doctrine of common employment is still part of the law of the Northern States as I have endeavoured to show above. The doctrine was in fact never part of the common law of Northern Nigeria, certainly not after 1948, and it is consequently not necessary or even relevant for a law C to be passed in any Northern State abolishing the doctrine. The position therefore is that the doctrine of common employment did not exist as a defence in the instant case. The appeal again fails.

I must confess that this point never seriously occurred to any of us or any of the counsel at the hearing. He glossed over it as was the case in D the Court of Appeal, and it was when I was preparing the draft judgment that I observed its significance and then decided to address the point. Counsel probably ought to have addressed us fully on the point. Nevertheless no harm or damage is done to the appellant herein which has before now already lost its appeal under the single issue submitted for determination E (see for example *Ajao v. Ashiru* (1973) 11 Sc. 23, *Atanda v. Lakanmi* (1974) 3 sc. 109; *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566).

In the circumstances, this appeal fails and it is hereby dismissed with one Thousand Naira (N1,000.00) costs to the plaintiff/respondent.

F _____

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Kutigi, J.S.C. I entirely agree that the appeal has no merit and that it should be dismissed. However, I wish to add the following G by way of emphasis.

The only issue raised in the appellant’s brief of argument for the determination of this Court is -

“Whether on the pleadings and the evidence led, the Court of Appeal was right in holding that the defence of common employment did not succeed.”

H The Court of Appeal confirmed the decision of the High Court (Iguh, J. as he then was). In arriving at the conclusion that the common law doctrine of common employment did not apply in this case, the learned trial Judge based his decision on the premise that the doctrine had not been abolished in Northern States as had been the case in the Eastern States, as

per section 4 of the Torts Law, Chapter 125 of the Laws of Eastern Nigeria, 1963 and the Western States (see section 13 of the Torts Law, Chapter 122 of the Laws of Western Nigeria, 1959). I find it necessary to quote the exact statement made by the learned trial Judge in this regard, to wit:-

“The doctrine of common law employment was applicable in England in the year 1900 and up to 1948 when it was abolished by the Law Reform (Personal Injuries) Act, 1948. This doctrine has also been abolished in the four Eastern States of Nigeria by virtue of Section 4 of the Torts Law, Chapter 125 Laws of Eastern Nigeria, 1963 and the Western States of the country. The Doctrine is yet to be abolished in the Northern States of Nigeria and is by virtue of section 28 of the High Court Law of Northern Nigeria, 1955 applicable till the date in the said Northern States and consequently in the Benue State (sic Plateau State) of Nigeria.”

(Italics and parenthesis mine),

It was on this premise that the learned trial Judge gave his judgment. For he remarked as follows:

“The doctrine of common employment was not specifically pleaded by the defendants (now appellants) in their statement of defence, but I consider that this Court is entitled by virtue of section 73 (1) (a) of the Evidence Law of this State (former Anambra State) to apply the Law of Benue State (Plateau State) which includes common law doctrine of common employment. (Parenthesis and underlining mine).

In affirming the decision of the High Court, the Court of Appeal (Maidama, of blessed memory, Kolawole and Musdapher, JJ.C.A.) held as follows, as per Maidama, J.C.A.

“On the authorities which I have referred to above and which I hereby adopt, I am in full agreement with learned trial Judge’s finding that the doctrine (of common employment) does not avail the appellant.”

(italics and parenthesis mine)

Now in the course of his oral address, Chief Williams, learned Senior Advocate, for the appellant, submitted that the doctrine of common employment applied in the Northern States since the doctrine had not been abolished. Mr. Njemanze, learned counsel for the respondent, made the same submission in his oral reply to the address by Chief Williams and went further to support his submission by relying on the passage on page 477, in paragraph 8.66 of Nigerian Commercial Law and Practice Volume 1, by J.O. Orojo, which states:-

“8.66 : Although the doctrine of common employment was abolished in England in 1948 by the Law Reform (Personal Injuries) Act, 1948,

in Nigeria, the doctrine was only abolished in Bendel, Ogun Ondo and Oyo States (formerly Western State) in 1958, in the Federal Capital Territory of Lagos, now in Lagos State, in 1961 and in Anambra, Imo, Rivers and Cross River States (formerly Eastern Nigeria) in 1962. With the abolishment of the doctrine, any term in it contract of employment purporting to exclude the liability of the employer with regard to his liability for injuries sustained by his worker through the fault of a fellow worker is void as being against public policy. It should be noted that in the Northern States, the doctrine has not been abolished and is, therefore, part of the law of these States” (Italics mine)

As can be seen from the foregoing, it is significant that the point whether the doctrine of common employment was applicable in the Northern States was raised by the parties themselves to this appeal and was not raised suo motu by this Court.

Now, Order 8 rule 2(6) of the Supreme Court Rules, 1985 provides as follows at page 139F:-

“(6) Notwithstanding the foregoing provisions, the Court in deciding the appeal, shall not be confined to the grounds set forth by the appellant. Provided that the Court shall not, if it allows the appeal, rest its decision on any ground not set forth by the appellant unless, the respondent has had sufficient opportunity of contesting the case on that ground.”

The rule is a carry-over from Order 7 rule 2 (6) of the Supreme Court Rules, 1961 and Order 7 rule 2 (6) of the Supreme Court Rules, 1977 which have been interpreted by this Court in the following cases -

Odiase & Anor v. Agho & Ors (1971) 1 All NLR (Pt. 1) 170; Kuti & Anor v. Jibowu & Anor (1972) 1 All NLR (Pt. II) 180 at page 192; Ajao v. Ashiru & Ors. (1973) 1 All NLR (Pt. 11) 51 at p. 63; Atanda & Anor. v. Lakanmi (1974) All NLR (Pt. 1) 168 at page 178; Kuti v. Balogun (1978) 1 LRN 353 at page 357; Olusanya v. Olusanya (1983) 1 SCNLR 134 at page 139; Ebba v. Ogodo & Anor (1984) 1 SCNLR 372; (1984) 4 SC. 84.

The ratio decidendi which is common to all these cases is that an appellate court shall not raise any point suo motu and base its decision on the point without giving the party prejudiced by the point, the opportunity to address it on the point.

In Olusanya v. Olusanya, (supra) I made the following observation at page 139F:-

“This court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu, if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only. Where the points are so taken the parties must be given the opportunity to address the appeal court before decision on the

points is made by the appeal court”

I am also mindful of the remark made by Bowel L.J: in *Cooke v. New River Company* (1888) L.R. 38 Ch. D. 70 at page 71 -

“I believe by long experience that judgments come with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.”

With respect, this is not the situation in the present case. The point in question was raised before us by the appellant; the respondent had had the opportunity to reply. And as it transpired the later agreed with the former. Is this Court to shy away from this important point of law which concerns the law to be applied in the High Courts in the Northern States even if, as I will show in due course, jurisdiction is by misdirection bestowed on the High Courts, by the decision of the lower courts and the view of the learned author of the Nigerian Commercial Law and Practice, to apply the doctrine of common employment? There is nothing in the Supreme Court Rules, 1985 or any of our previous decisions which stand in the way of this Court to consider the question, which is fundamental; whether or not the doctrine of common employment is applicable in the Northern States and in particular the Plateau State where the cause of action in this case arose. As the point was raised by counsel to the parties and we were duly addressed, we have the obligation and indeed the duty to pronounce on the point. The fact that our view on the point may differ from the submissions made by counsel to the parties is not, with respect, a ground for us to hear further address by counsel on the point. If this were the case, then each time a submission is made by parties, in the case and the Court, when it comes to consider its decision, disagree with or does not accept the submission, for either being wrong, inapplicable or untenable, there will be no end to the Court hearing further addresses, unless of course the Court comes to agree with the submission made by the parties. I am afraid this cannot be right and is not in accord with the practice and Rules of this Court.

I will now proceed to consider whether the submission made by both counsel that the doctrine of common employment is applicable in Plateau State and indeed all the Northern States by virtue of the provisions of section 28 of the High Court Law chapter 49 of the Laws of Northern Nigeria, 1963. The law was first enacted by the Legislature of Northern Region of Nigeria in 1955 as the Northern Region High Court Law, 1955, N.R. No.8 of 1955 and it came into force (vis-a-vis section 28) on the 1st day of December, 1955, as per Northern Region Legal Notice No. 164 of 1955 (NRLN 164 of 1955). Section 28 thereof reads -

"28. Subject to the provisions of any written law and in particular of this section and of section 26, 32 and 35 of this Law -

(a) the common law;

(b) the doctrines of equity, and

(c) the statutes of general application which were in force in England on the 1st day of January, 1900 shall, in so far as they relate to any matter with respect to which the Legislature of the Region is for the time being competent to make laws, be in force within the jurisdiction of the court."

The marginal note to the section reads; "Extent of application of Law of England." If the section of the 1955 Law were to be the Law to be interpreted in this case, the question to be asked is: to which "common law" does the section apply? Is it the common law as observed in England or, on the other hand, observed in any of the common law jurisdictions? It would have been difficult to answer this question simply in the context of the section. The marginal note to the section of the law, which seeks to give indication of the common law applicable, could not by the rules of interpretation, be employed as aid to the construction of the section. The general rule of construction is stated in Maxwell on Interpretation of Statutes, 12th Edition, on pages 9-10, as follows-

"The notes often found printed at the side of sections in an Act, which purport to summarise the effect of the sections, have sometimes been used as an aid to construction. But the weight of the authorities is to the effect that they are not parts of the statute and so should not be considered, for they are "inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons."

The rationale for the general rule was stated by the House of Lords in *Chandler v. DPP* (1964) A.C. 763 at page 789, per Lord Reid, to be thus-

"In my view side notes cannot be used as an aid to construction. They are mere catchwords and I have never heard of it being supposed in recent times that an amendment to alter a side note could be proposed in either House of Parliament. Side notes in the original Bill are inserted by the draftsman. During the passage of the Bill through its various stages amendments to it or the reasons may make it desirable to alter a side note. In that event I have reason to believe that alteration is made by the appropriate officer of the House - no doubt in consultation with the draftsman. So side notes cannot be said to be enacted in the same sense as the long title or any part of the body of the Act."

I accept this as the true position with regard to a Bill that passes

through a Legislature. I venture, however, to say that this general rule does not, as an exception to it, apply to the text of any law contained in the volumes of the Revised Laws of Northern Nigeria, 1963. My reasons for so holding are as follows.

By the Revised Edition of the Laws of Northern Nigeria, 1963 (N.N. No.4 of 1963) the Legislature of Northern Nigeria appointed a Commissioner for Law Revision, *“for the purpose of preparing a Revision Edition of the Laws of Northern.”* (See Section 3 subsection (3) thereof). One of the powers of the Commissioner as provided under section 6 and paragraph 5 in Pt. 1 of the schedule to the Law (N.N. No.4 of 1963) was *“To supply or alter marginal notes.”* The manner in which the Revised Edition of the Laws is to be brought into force is provided under section 10 of the Revised Edition of the Laws of Northern Nigeria, Laws, 1963 which reads -

“10.(1) The Commissioner for Law Revision shall as soon as the Revised Edition is completed transmit a copy thereof to the Attorney General who shall lay the same before the Legislative Houses of Northern Nigeria ..

(2) Upon the passing of a resolution of each of the Legislative Houses of Northern Nigeria authorising him so to do, the Governor may by proclamation order that the Revised Edition shall come into force on such a date as may be thereon specified.

(3) Notwithstanding the foregoing provisions of this section, the Governor may, upon the passing of a resolution of each of the Legislative Houses of Northern Nigeria authorising him so to do, by proclamation bring into force any part of the Revised Edition which has been completed and published, whereupon from the date named in such proclamation and to the extent specified therein, the enactments included in that part of the Revised Edition shall be substituted for such enactment as are specified in the proclamation and shall, to such extent, be of full force and effect for all purposes and so recognised in all courts of justice.”

The procedure in subsection (3) was followed and the Governor issued 2 proclamations (N.N.L.N. No. 58 of 1965 and N.N.L.N. No. 60 of 1965) which brought all the 5 volumes of the Laws of Northern Nigeria, 1963 into *“full force and effect”* from the 1st day of May, 1965 and the 1st day of December, 1965 respectively. As the High Court Law, Chapter 49 is contained in volume II of the Laws of Northern Nigeria, 1963. I propose to quote in part the proclamation, N.N.L.N. 58 of 1965. It reads -

*“.....
..And whereas volumes I to III inclusive of the said Revised Edition have been completed and published:*

And whereas a resolution has been passed by the House of Chiefs

on the 22nd day of March, 1965 and a resolution has been passed by the House of Assembly on the 3rd day of March, 1965 authorising the Governor by proclamation to bring that part of the said Revised Edition as is contained in volumes I to III inclusive into force from such date as he shall think fit to name therein: Now therefore, I, Kashim Ibrahim, Governor of Northern Nigeria, in exercise of the powers conferred upon me by subsection (3) of section 10 of the Revised Law as is comprised in volumes I to III inclusive shall come into force from the 1st day of May, 1965, in substitution for the enactments which are replaced by the enactments included in such volumes."

C Now it is clear from the foregoing that the procedure followed in enacting the High Court Law, Chapter 49 is not the same as the procedure usually followed by the Legislature in passing bills like the Northern Region High Court Law, 1955 (N.R. No.8 of 1955). Chapter 49 is a substitution to the 1955 Law N.R. No.8 of 1955). While the marginal note to section 28 of the 1955 Law was provided by the draftsman, the marginal note to section D 28 of Chapter 49 was provided by the Commissioner for Law Revision on the authority of the Legislature of Northern Nigeria as per section 6 of N.N. No.4 of 1963 read together with paragraph 5 to Pt.1 of the Schedule to the Law. In my opinion, therefore, the rationale for the general rule of interpretation applicable to the marginal notes of Bills in general cannot be valid in E respect of or be applicable to the enactments contained in the Revised Edition of the Laws of Northern Nigeria, 1963; since the marginal notes in the Revised Edition form part of the Laws therein. As such the marginal notes can be used as aid to the construction of the section against which F they appear. See *Milverton (Inhabitants) (1836) 5 A & E 841* at page 854 and *Venour v. Sellon (1876)2 Ch.D 522* at page 525.

In view of the aforesaid, it is dear from the marginal note to Section 28 of Chapter 49 that the common law which applies to the present case, is the common law of England as at the 1st day of May, 1965 when the Laws of Northern Nigeria, 1963, including Chapter 49 thereof, came G into force. Since the doctrine of common employment ceased to be part of that common law as from the 30th day of June, 1948 when the Law Reform (Personal Injuries) Act 1948 was enacted in England, the doctrine did not, therefore, form part of the common law adopted or to be applied H by the High Courts of the Northern States as at the 1st day of May, 1965 and as at the date when the cause of action in this case arose; that is the 5th day of April, 1976.

Although the High Court and the Court of Appeal were right in holding that the doctrine of common employment did not apply in this

case, they arrived at that conclusion by erroneously following the wrong premise, to wit, that the doctrine formed part of the common law applicable in Northern States and in particular the Plateau State. It is for these reasons that I find it necessary to correct the error made by the lower courts which, with utmost respect, found favour with learned counsel to the parties to this appeal and the learned author of the Nigerian Commercial Law and Practice.

As already stated, I too find no merit in this appeal and I hereby dismiss it with N1,000.00 costs to the respondent.

WALI JSC

I have had a preview of the lead judgment of my learned brother Kutigi, J.S.C. and I entirely agree with his reasoning and conclusions; I only wish to contribute on the issue of the position of the doctrine of common employment and its applicability in the Northern States of Nigeria.

The doctrine had its origin in the common law of England that had been made applicable to Nigeria from its colonization by the British. The learned trial Judge (Iguh, J. as he then was) opined as follows:-

“The doctrine of common employment was applicable in England in the year 1900 and up to 1948 when it was abolished by the Law Reform Personal Injuries Act, 1948. This doctrine has also been abolished in the four Eastern States of Nigeria by virtue of Section 4 of the Torts Law, Cap. 125 Laws of the Eastern Nigeria 1963 and in the Western States of the country. The doctrine is yet to be abolished in the Northern States and is by virtue of S.28 of the High Court Law of Northern Nigeria 1955 applicable till this date in the said Northern, States and consequently in the Benue State of Nigeria.”

The gist of arguments proffered by Chief Williams, SAN in his brief is that the case was caught up by the doctrine of common employment still applicable in the Northern States and therefore the Court of Appeal was wrong in its decision wherein it confirmed the finding of the learned trial Judge that it did not apply to the case in hand on the facts and the evidence adduced.

In the lead judgment of Kutigi, J.S.C., on the interpretation of section 28 of the High Court of Northern Nigeria (Cap. 49), applicable to Northern States visa- vis the application of the doctrine of common law employment in the Northern States, he opined thus:-

“With greatest respect of the learned author, I think it is not correct to say that the doctrine of common employment is still part of the law of the Northern States as I have endeavoured to show above. The doctrine was in fact never part of the common law of Northern Nigeria, certainly not

after 1948, and it is consequently not necessary or even relevant for a law to be passed in any Northern State abolishing the doctrine. The position therefore is that the doctrine of common employment did not exist as a defence in the instant case. The appeal again fails.

I must confess that this point never seriously occurred to any of us or any of the counsel at the hearing. We glossed over it as was the case in the Court of Appeal, and it was when I was preparing the draft judgment that I observed its significance and then decided to address the point. Nevertheless no harm or damage is done to the appellant herein which has before now already lost its appeal under the single issue submitted for determination (see for example Ajao v. Ashiru (1973) 11 Sc. 23; Atanda v. Lakanmi (1974) 3 sc. 109; Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566."

I share the same view and endorse the opinion expressed therein. The Common Law of England referred to in S.28 of the High Court Law, is the current and applicable Common Law in England at the time the law was enacted by the Legislature of Northern Nigeria. Section 28 of the High Court Law (Cap. 49) Laws of Northern Nigeria, 1963 provides as follows:-

"Law to be applied

28. Subject to the provisions of any written law and in particular of this section and of sections 26, 33 and 35 of this Law -

(a) the common law;

(b) the doctrines of equity; and

(c) the statutes of general application which were in force in England on the 1st day of January, 1900 shall, in so far as they relate to any matter with respect to which the Legislature of Northern Nigeria is for the time being competent to make laws, be in force within the jurisdiction of the court"

When this section is read along with section 30 of the same laws, the intention of the legislature becomes clearer. Section 30 states thus -

"30. Subject to the express provisions of any written law in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court concurrently and in the same manner as they are administered by Her Majesty's High Court of Justice in England."

Section 30 (supra) speaks of the administration by the High Court of the law and equity currently administered by Her Majesty's High Court of Justice in England.

Sections 24 and 25 referred to in section 26 deal with prerogative writs and certain other state proceedings while sections 33 and 35 referred

to in section 28 deal with probate matters and native law and custom respectively.

The provisions of section 30 in my view is to qualify the applicable common law mentioned in section 28. It will therefore be a mere academic exercise to invite learned counsel to address us on the application of a common law doctrine that was abolished by the High Court Law (Cap. 49) B Laws of Northern Nigeria 1963. It will also be a mere surplusage to enact a law to repeal what has already been abolished.

In *Beswick v. Beswick* (1966) Ch. 538 It was the majority view of the Court of Appeal in England while interpreting Section 56 of the Law of property Act, 1925 that the wording of that section was sufficiently clear to C abolish the rule as to the privity of contract in many cases. Danckwerts L.J. said thus at p. 563:-

“The effect of S.56 of the Law of property Act 1925 was not discussed by the House of Lords in that case and I respectfully suggest that by section 56 Parliament has carried out what Lord Simonds said was its D function. It may be that the change in the law was not done with a fanfare of trumpets, but the words of the section, in my opinion are clear and cannot be ignored.”

And so it is in this case.

The appeal fails and it is dismissed with the same order of costs E made in the lead judgment.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Kutigi, J.S.C. just read. I agree entirely with him that on the F facts of the case on hand, the Common Law doctrine of common employment would not avail the defendant/appellant and that the two courts below were right on this issue. On this ground alone, therefore, I would dismiss this appeal with N1,000.00 costs to the respondent. .

My learned brother has, however, also considered this appeal on G another point. The point is stated by him in the lead judgment as follows:

“The point is whether it is correct to say that ‘the common law doctrine of common employment is yet to be abolished in the Northern States of Nigeria as stated by the learned trial Judge on page 63 of the record where he said -

“The doctrine is yet to be abolished in the Northern States of H Nigeria and is by virtue of section 28 of the High Court Law of Northern Nigeria 1955 applicable till this date in the said Northern State”

The learned trial Judge had held on page 62 of the record thus - *The doctrine of common employment was applicable in England in the*

year 1900 and up to 1948 when it was abolished by the Law Reform Personal Injuries Act, 1948.”

He then proceeded to discuss the point and came to the following conclusion:

“..... I think it is not correct to say that the doctrine of common employment is still part of the law of the Northern States as I have endeavoured to show above. The doctrine was in fact never part of the common law of Northern Nigeria and it is consequently not necessary or even relevant for a law to be passed in any Northern State abolishing the doctrine. The position therefore is that the doctrine of common employment did not exist as a defence in the instant case. The appeal again fails.”

The lead judgment, particularly the second ground for dismissing the appeal, is concurred in by my learned brothers Uwais, Wali and Mohammed JJ.S.C. With, profound respect and with great reluctance I find myself unable to concur both in the course taken in the lead judgment of considering the point at all and In the conclusion reached.

As regards my dissent to the course taken, I need to state that this Court has on numberless occasions frowned at and deprecated the practice of a court giving a decision on a point not argued before it. In Adeosun v. Babalola and Anor (1972) 5 Sc. 292 at page 302, Sir Udo Udoma delivering the judgment of this Court observed as follows:

“As a general rule this Court has always regarded with disfavour the practice of a court giving a decision on a point not argued before it. In Obazke Ogiamien & Anor. v. Obahon Ogiamien (1967) NMLR 245, this Court said at pages 248 and 249:-

“This court has pointed out on several occasions that it is wrong for a judge to give a decision on a point which opportunity was not afforded counsel to argue at the hearing and particularly at a point which throughout the hearing was not raised.” (See also The ‘Registered Trustees of Apostolic Church, Lagos Area v. Rahman Akindele (1967) NMLR 263).”

As recently as 1992, this court again in Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129 reiterated the stand that an appellate court should confine itself to the question or question raised by the parties but where however, the court decides or feels inclined to raise an issue for any reason, he should give the parties an opportunity of making their comment on it before taking a decision on the issues. Ogwuegbu J.S.C. delivering the lead judgment of the court in that case - and the other Justices that sat with him on the case agreed - observed at page 139 thus:

“This was the only ground of appeal argued both in the plaintiff/appellants brief and oral argument in the Court of Appeal. The Court of Appeal dismissed this ground of appeal. It should have proceeded to dismiss the appeal in its entirety. Instead, the learned Justices of that Court

went on a frolic of their own to pronounce upon the identity of the land in dispute which was not an issue before them.

Whether the land in dispute in the present case on appeal is the same or different from the subject matter of Onitsha District Court Suit No. 568/58 was not raised either in the plaintiff/appellants brief or oral submissions before the Court of Appeal. The Court of Appeal failed to confine B itself to questions raised by the parties. The appellants in the Court of Appeal did not advance any argument on the identity of the land or on the various survey plans used in Suit No. 568/58.

By raising the issue suo motu and basing its decision on it without hearing arguments from the parties, the appellant was denied the opportunity of being heard. It was not open to the Court of Appeal to raise an issue which the parties did not raise themselves during the hearing of the appeal. When the Court of Appeal felt inclined to raise such a point for any reason, it should have given the parties an opportunity of making their comments upon it before it took a decision on the issue. See *Aermacchi S.P.A. & Ors. D v A.I.C. Ltd. (1986) 2 NWLR (Pt. 23) 443 at 449*, *Kuti v Balogun (1978) 1 SC 53 at 60* and *Iriru v. Erhurhobara (1991) 2 NWLR (Pt. 173) 252 at 265.*"

Again in *Usman v. Umaru (1992) 7 NWLR (Pt. 377) 398*, this court sitting as a Full Court deprecated once again the practice of a court E deciding a case on an issue raised suo motu by it without hearing the parties.

What has happened in this case? In the judgment of the learned trial High Court Judge, he opined:

"The doctrine of common employment was applicable in England F in the year 1900 and up to 1948 when it was abolished by the Law Reform Personal Injuries Act 1948. This doctrine has also been abolished in the four Eastern States of Nigeria by virtue of Section 4 of the Torts Law, Cap. 125, Laws of eastern Nigeria 1963 and in the Western States of the country. The doctrine is yet to be abolished in the Northern States of Nigeria and is by virtue of Section 28 of the High Court Law of Northern Nigeria 1955 G applicable till this date in the said Northern States and consequently in the Benue State of Nigeria."

This statement of law was not questioned in the Court of Appeal nor in this Court. Indeed both Chief F.R.A. Williams, S.A.N. learned leading counsel for- the appellant and Chief D.C.O. Njemanze learned counsel H for the respondent agreed with the above view of the learned trial Judge and argued this appeal on that basis. The only difference in their submissions is as to whether on the facts the doctrine of common employment applied. Thus, the correctness or otherwise of that statement made by the

learned trial Judge was not an issue in the appeal before us. What is an “issue” is explained in the judgment of this Court in *Ehimare & Anor. v. Emhonyon* (1985) 1 NWLR (Pt. 2) 177. The point under consideration does not fall within the definition given in that case. The only issue put before us by the parties and on which arguments were proffered both in the

B Briefs and in oral arguments reads thus: -

“Whether on the pleadings and the evidence led the Court of appeal was right in holding that the defence of common employment did not succeed”

Although the view expressed by the learned trial Judge was not made an issue before this court, that does not prevent this Court, on-its
C own motion from raising it, but as shown earlier in this judgment, the parties must be heard before this court can decide on the point raised suo motu by it. It is because this has not been done that I, with utmost respect, am of the view that the point should not be made a basis of our decision. In my respectful view, to do so would amount to this Court going “*on a frolic of its own*” more so that it has not had the benefit of arguments by
D counsel for or against the point raised.

The second comment I wish to make on this point in the lead judgment of my learned brother Kutigi J.S.C. is the conclusion reached by him which I stated earlier in this judgment. Section 28 of the High Court
E Law Cap. 49 Laws of Northern Nigeria 1963 which is still applicable in Plateau State, is of importance. It reads;

“28. Subject to the provisions of any written law and in particular of this section and of sections 26, 33 and 35 of this Law - (a) the common law;

F *(b) the doctrines of equity; and*

(c) the statutes of general application which were in force in England on the 1st day of January, 1900 shall, in so far as they relate to any matter with respect to which the Legislature of Northern Nigeria is for the time being competent to make laws, be in force within the jurisdiction of the court.”

G This section is a re-enactment of Section 14 of the Supreme Court Ordinance Cap. 211 Laws of Nigeria (1948 edition) which came into force on 1st June 1945 and had application throughout Nigeria, Section 14 of the Ordinance provided:

H *“14 Subject to the terms of this or any other Ordinance, or any law the common law, the doctrines of equity, and the Statutes of general application which were in force in England on the 1st January 1900, shall be in force within the jurisdiction of the court.”*

Similar provisions are to be found in earlier legislations on the subject. .

The question then arises: when was the Law of England received

into the Law of Northern Nigeria? I may here mention that I am limiting the consideration of this issue to Northern Nigeria even though what applies to that part of Nigeria applies equally to the Eastern and Western parts of the country. The answer to the question posed is to be found in the Protectorate Courts Proclamation No.4 of 1900 which created for Northern Nigeria a Supreme Court of Northern Nigeria. The Supreme Court was it Court of record having both appellate and supervisory jurisdiction over lower courts, that is, the Provisional Courts. The Proclamation further provided for the application in the Northern Nigeria of the English common-law, the doctrines of equity and the Statutes of general application which were in force in England on 1st January 1900. By this Proclamation, the common law of England, the doctrines of equity applicable in that country and the Statutes of general application in force in that country on 1st January 1900 became part of the laws of Northern Nigeria. The Southern parts of the country began its own history of received law of England in 1876 when the Supreme Court Ordinance No. 4 of 1876 was enacted for the colony of Lagos and by various extensions to other parts of Southern Nigeria. A common legislation was enacted for both parts of the country with the enactment of the Supreme Court Ordinance No.6 of 1914. This Ordinance established the Supreme Court of Nigeria with jurisdiction over the colony and Protectorate of Nigeria as the country was then known. Section 14 of this Ordinance spelt out the laws of England applicable to the country. The section provided:

“14. Subject to the terms of this or any other Ordinance the common law, the doctrines of equity, and the statutes of general application which were in force in England on the 1st January, 1900 shall be in force within the jurisdiction of the court.

Subsequent Supreme Court Ordinances re-enacted Section 14 of the 1914 Ordinance which itself was also a re-enactment of similar provisions in the Northern Nigeria Proclamations No.4 1900 and, No 6 of 1902. The latest provision was Section 14 of the Supreme Court Ordinance Cap. 211 Laws of Nigeria (1948 edition). It was this provision that section 28 of the High Court Law of Northern Nigeria 1955, now Cap. 49 Laws of Northern Nigeria 1963, re-enacted. From the above historical analysis the conclusion is that the received law of England in Northern Nigeria since 1900 is the common law, the doctrines of equity and the Statutes of general application that were in force in England in 1900. By virtue of section 14(b) Interpretation Ordinance Cap. 89 Laws of the Federation of Nigeria and Lagos 1958 and Interpretation Law of Northern Nigeria (Cap. 52 Laws of Northern Nigeria 1963) the repeal of the various Supreme Court Ordinance would not affect the application in Northern Nigeria of the common law of En-

gland as at 1900 when the first proclamation was made unless by local legislation, changes had been made thereto. 'The common law of England in 1900 remains applicable in Northern Nigeria until such time when local legislation is enacted to abolish it as was the case in England in 1948 with the promulgation of the Law Reform Personal Injuries Act of that year. As
 B this doctrine of common law, is part of the common law received in Northern Nigeria before he enactment in England of the 1948 Act it remains in force in that part of the country. The 1948 Act though of general application but not being in force in England on 1st January 1900 could not, and did not, affect the continued operation in Northern Nigeria of the doctrine
 C of common employment.

The suggestion that the Law Reform Personal Injuries Act 1948 which abolished the common law doctrine of common employment in England was already in force before the High Court Law of Northern Nigeria was enacted in 1955 overlooks the provision of Section 28(c) that it is
 D only statutes of general application which were in force in England on the 1st day of January 1900 that are applicable in Northern Nigeria. Thus the 1948 Act which abolished in England that doctrine of the Common-law was not applicable to Northern Nigeria having not been in force on 1st January, 1900. Sections 26 and 35 of the Law referred to in Section 28
 E only deal with procedural law. The sections read:

"26. The jurisdiction conferred upon the' court by section 24 and 25 shall, subject to the provisions of this Law 'and to rules of court, be exercised by the court in conformity with the Law and practice for the time being in force in England.

35. Subject to the other provisions of this Law the jurisdiction vested in the High Court shall be exercised so far as regards practice and procedure, in the manner provided' by this law, by the Criminal Procedure Code or by any other written law including such rules and orders of court as may be made pursuant to this Law or any other written law, and, in civil causes and matters, in so far as any such provisions shall not extend, in conformity mutatis mutandis with the practice and procedure for the time being of the High Court of Justice in England.
 (Italics mine)

They only make applicable in Northern Nigeria the practice and procedure of the High Court of Justice in England in so far as such practice and procedure are not inconsistent with any written law or rules of Court made here. They do not, with respect, make applicable in Northern Nigeria the law for the time being in force in England. The only other section mentioned in section 28, that is, section 33 relates only to practice in probate matters which in any event is no longer within the jurisdiction of the
 H

State High Court in this country.

Mention may now be made of section 30 of the Law which reads:

“Subject to the express provisions of any written law, in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court concurrently and in the same manner as they are administered by her Majesty’s High Court of Justice in England.” B

This section does no more than empower the High Court in Northern Nigeria to administer law and equity concurrently as is being done by the High Court of Justice in England. Of course, there is a historical background to this practice in England. Before the Supreme Court of Judicature Acts of the 19th and 20th centuries these different forms of law were being C administered by different courts. For instance, equity matters went to the Lord Chancellor’s Court (later, the High Court of Equity) While Common-law matters went to the King’s Bench. For more study on those courts see Jacob Law Dictionary. The reforms of the last century abolished these various courts and established the Supreme Court of Justice and vested the D new court with the jurisdiction of the old courts, thus enabling them to administer concurrently the various forms of law, (law and equity) being administered by those old courts. With the establishment of the Court of Appeal and the Crown Courts, the Supreme Court of Judicature now consists of the Court of Appeal, the High Court of Justice and Crown Courts. E See Halsbury’s Laws of England, 4th Edition Vol. 10 paragraph 843 et seq. See also section 18(1) & (2) of the Supreme Court of Judicature (Consolidation Act 1925.)

Section 30 does not say that any law for the time being in force in England is equally in force in Northern Nigeria. The set of English laws that F are in force in Northern Nigeria has been spelt out in section 28 of the Law and that is, the common law, doctrines of equity and statutes of general application which were in force in England on the 1st day of January, 1900. Any statute made after Proclamation No.4 of 1900 abolishing any doctrine of the common law or equity will not apply in the Northern States G to change the existing law except a similar legislation is enacted here by a competent legislative authority. It is interesting to note that section 5 of the 1948 Act did not apply the Act to Northern Ireland even though that entity is a component territory of the United Kingdom. Section 5 which states:

(1) If the parliament of Northern Ireland passes legislation for purposes similar to the purposes of this Act, then in connection with that H legislation any limitation on the powers of that parliament imposed by the Government of Ireland Act, 1920, shall not apply in so far as it would preclude that parliament from enacting a provision corresponding to some provision of this Act.

(2) This Act, except in so far as it enlarges the powers of the parliament of Northern Ireland, shall not extend to Northern Ireland.”

extended the power of the parliament of Northern Ireland to enact a legislation similar to sections 1 - 4 of the Act if and when it desired to do so. Thus, until the parliament of Northern Ireland enacted a law similar to the
 B 1948 Act, the common law doctrine of common employment would continue to apply in that territory. This is a stronger reason for holding that until a similar legislation is passed in the Northern States of Nigeria, component units of a sovereign nation, that doctrine still exists in those states.

The common-law is distinguishable from any law enacted by the
 C legislature. It is a body of principles and rules of action relating to the government and security of persons and property which derive their authority solely from usages and customs of immemorial antiquity and from the judgments and decrees of the courts recognising, affirming and enforcing such usages and customs. As defined by an American court, “it consists of
 D those principles, usages and rules of action applicable to Government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature” - see Bishop v. U.S.D.C. Tex; 334 F Supp 415,418.

Often times, with the requirements of modern society, there have
 E been legislative interventions to ameliorate the rig ours of a particular doctrine of the common law or even to abolish it completely. This is exactly what the English parliament did in 1948 when it enacted the Law Reform Personal Injuries Act 1948 abolishing the common-law doctrine of common employment. That Act only made that common law doctrine no longer
 F applicable in England but as the Act by virtue of our local Legislations (see the various High Court Laws) had no force of law here being not in force on 1st January 1900, the old Eastern and Western Legislatures found it necessary to enact similar legislations in respect of their territories. Unless and until the same is done by the legislative authorities in the present Northern
 G States or any of them the doctrine would continue to apply in those States except where such legislation has been passed.

In my respectful opinion, therefore, the learned trial High Court Judge, Iguh J., (as he then was) and Dr. J. Olakunle Orojo whose comment in his book entitled *The Nigerian Commercial Law and Practice* Vol. 1 1983 edition page 477 para. 8.66 was quoted in the lead judgment, are
 H both correct in their view that the common law doctrine of common employment which has not yet been abolished by legislation in the Northern States still forms part of the law of those States. If this question had been available and necessary for our decision in this appeal, that would have been my decision.

In the final conclusion, for the reason stated by my learned brother Kutigi, J.S.C. in his judgment that on the facts of the case before us the common law doctrine of common employment would not avail the defendant as rightly held by the courts below, I dismiss this appeal with costs as earlier assessed by me.

B

MOHAMMED JSC

I have had the privilege of reading in draft, the lead judgment of my learned brother, Kutigi, J.S.C. in this appeal. I agree with him that this appeal has failed.

C

I only wish to contribute on the issue of the doctrine of common employment which has been discussed in the lead judgment and the judgment of my learned brothers who sat for this appeal. The doctrine of common employment which was applicable in England a century ago was abolished by the Law Reform (Personal Injuries) Act, 1948. The doctrine was also abolished through legislations in both former Western and Eastern Nigeria. Only the North has not enacted any law abolishing it. The learned trial Judge, in this case, stated in his judgment that the doctrine of common employment is yet to be abolished in the Northern States of Nigeria. My learned brother, Kutigi, J.S.C drew our attention to the fact that there was no need to abolish the doctrine in the North because when the High Court Law of Northern Nigeria was promulgated, the doctrine had already been abolished in England. I agree with this opinion

D

E

Under S. 28 of the High Court Law of Northern Nigeria, it has been provided that the common law of England, the doctrines of equity and the statutes of general application which were in force in England on the 1st day of January, 1990 shall be in force within the jurisdiction of the high Court of Northern Nigeria.

F

It is relevant to ask whether the doctrine of common employment is a principle of common law of England or a doctrine of equity or part of the statutes of general application. The first judicial indication of the defence of "common employment" is to be found in the judgment of Abinger, C.B. in 1837 in the case of Priestly v. Fowler (1935-42) All E.R. Rep. 449 at 450. The defence of common employment depends on the theory that the contract of employment between workmen and employer contains an implied term that the workman will not hold his employer liable for an injury due to negligence of a fellow servant engaged in common employment with him. Viscount Simon described the application of the doctrine in a House of Lords judgment in the case of Graham (or Miller) v. Glasgow Corporation (1947) 1 All E.R. 1 at page 3 in the following words:

G

H

“At one time it might almost have seemed that the defence of common employment could be compendiously expressed by saying that at common law a servant cannot claim damages from his master for the negligence of a fellow-servant. In view, however, of the increasing ramifications of business and of the many cases in which one servant could not be supposed to have had in contemplation the negligence of another servant engaged on quite a different piece of work and acting in quite a different sphere, later judicial pronouncements have made it clear that the defence provided by the doctrine is not available without regard to the circumstances and have made room for the conception that two servants are not necessarily in “common employment” because they have a common employer.”

The doctrine has been considered as a common law principle in Halsburys Laws of England, Third Edition at page 505 under the heading, “Liabilities between Master and Servant”. The doctrine is therefore a common law rule and not part of the statutes of General application. When it was abolished by the Law Reform (Personal Injuries) Act 1948 it ceased to be part of the common law of England. Thus at the time section 28 of the High Court Law of Northern Nigeria was enacted in 1955 and later revised in 1963, the provisions of the common law of England did not include the doctrine of common employment. A further provision under section 30 of the High Court Law of Northern Nigeria, applicable to all Northern States, makes it quite clear that the common law of England and equity shall be administered by the High Court concurrently and in the same manner as they are administered by Her Majesty’s High Court of Justice in England. It goes without saying that the current common law being administered in Her Majesty’s High Court does not include the doctrine of common employment.

A rider to the above is a question whether there was need to legislate in the former Western and Eastern Nigeria abolishing the doctrine of common employment since when those region’s respective High Court laws were enacted in 1955, the doctrine had ceased to exist as a principle of the common law of England. The answer, in my respectful view, is that the legislation abolishing the doctrine was unnecessary. See Section 13 of High Court Law of Western Region of Nigeria, 1955 and section 19 of the High Court Law of Eastern Region of Nigeria 1955.

For the above reasons and the fuller reasons in the lead judgment, I agree that the doctrine of common employment does not form part of the common law of England now being administered in the High Court of Northern States of Nigeria.