

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 1998. SC. 18/1991
CORAM:- S. M. A. BELGORE, A. B. WALI, M. E.
OGUNDARE, E. O. OGWUEGBU, U. MOHAMMED, JJSC

AYAMI EBAK IROM APPELLANT
AND
IREK OKIMBA RESPONDENT

APPEALS - Issue - Raising a fresh issue for the parties - Is to be avoided as much as possible - Except where serious issues of law or the Constitution is involved.

APPEALS - Issue - Raising a fresh issue suo motu - Without hearing the parties on the issue - And abandoning the issues raised by the parties - Amounts to denial of justice.

APPEALS - Hearing - Fresh issue surfacing at the close of hearing - And which was the kernel of the appeal - Where court did not recall parties to address it on the point - Pronouncement made thereon is totally incompetent

FACTS

The plaintiff/appellant sued the defendant/respondent for defamation at the High Court of Cross River State sitting at Obubra judicial division claiming N50,000.00 as damages. The parties hail from Apiapum. According to the statement of claim and evidence adduced in support, the plaintiff/appellant sent his caretaker and sister to go and harvest his cassava on his farm so as to make garri out of it. They complied and deposited the cassava tubers at his house. Latter the chief of their village sent for the appellant. On getting to the chief's house, where a crowd had gathered including the defendant/respondent and to the hearing of all, the chief informed the appellant that the respondent had lodged a complaint against him that he (appellant) had stolen the cassava belonging to the wife of the

respondent. The appellant there and then denied the allegation. The respondent in the presence of the same crowd repeated the allegation. From there the respondent went to report the matter to the police leading to the appellant's prosecution in the magistrate's court Obubra. He and his caretaker who was tried along with him were discharged and acquitted. As a result of the allegation, the appellant who was in the run for the headship of a ruling house of Obamkpe in Okum was bypassed. The respondent in his defence admitted making the allegation. He denied that the chief's house was full of people when he repeated the allegation but never mentioned how many people were there. The trial judge found for the appellant and awarded him damages.

The respondent lodged an appeal to the Court of Appeal. He formulated two issues for determination. The appeal was fought on these issues. However in the course of judgment the Court of Appeal abandoned these issues and raised a new issue suo motu to the effect that the very words purported to be defamatory were not set out. Without recalling the parties to address it on the new issue, the court based its judgment thereon. The appellant being dissatisfied, has now appealed to the Supreme Court.

HELD (Unanimously allowing the appeal per lead judgment of BELGORE JSC)

Raising a fresh issue for the parties

1. The Court of Appeal, to my mind raised an entirely new issue for the parties. The primary duty of the Court is to hear parties on their complaints and confine them to the battle ground they have chosen. The Court must as much as possible avoid a situation whereby new battle grounds would be opened to the parties. The exception to this cardinal rule are serious issues of law or the Constitution which could be raised at any time either by any or both the parties or by the Court. (p. 306 H)

Raising a fresh issue suo motu

2. This appeal is however in a worse state in that the parties were not heard on the issue raised suo motu by the Court of Appeal. On discover-

ing the issue as important as the matter of law and practice raised, the Court of Appeal ought to have deferred judgment and invited parties to address it on the issue. This is not a question of lack of fair-hearing, it is that of not being heard. Unfortunately, the Court of Appeal never addressed the issues raised by the parties on the ground that the very words purported to be defamatory were not set out, a point raised suo motu in the judgment of that Court, this amounts to denial of justice. (p. 307 E)

Fresh issue surfacing at the close of hearing

3. In the present case, the parties had long left the face of the Court when the Court discovered a point, so important that it could be the kernel of the whole appeal, and it was. The parties never adverted to it before the Court or in their briefs of argument. They ought to have been recalled to address on the new point with the Court formulating the issues on the new point. The Court never did this. Parties were not heard and the pronouncement of the Court of Appeal on this point is totally incompetent. (p. 307 H)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Questions pertaining to law or the Constitution

Questions pertaining to law or the Constitution are always very important and must be addressed promptly once they surface in any proceedings. They can touch on the very foundation of jurisdiction or illegality and that is the reason why they must be addressed at any time before judgment. Thus where parties in the grounds of appeal and briefs of argument never adverted to a point of law of great importance to the decision or a Constitutional issue and it surfaces during or after the appeal has been heard the Court has a duty not to ignore that point. Then what are the duties of the Court in such a circumstance? The Court is to invoke the time honoured principle of hearing the parties on the issue. (p. 307 B)

2. Hearing - What it entails

Hearing, I must emphasis, involves in the trial Court, the tendering of evidence, testing that evidence by cross-examination and re-examination

so that all facts and all laws are clearly before the tribunal. In the appellate Court where witnesses are no longer necessary, hearing entails calling parties to explain the points in issue; that is to say, affording the parties the chance to address on all points. (p. 307 G)

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REPRESENTATION

Richard O. Ebri Esq. with Saka Azimazi Esq for the Appellant
M.A.O. Okulaja Esq. for the Respondent

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CASES REFERRED TO

N.I.P.O.L. Ltd. v. Bioku Investment & Properties Co. Ltd. (1992) 3 NWLR (Pt. 232) 727

Ebba v. Ogodo (1984) N.S.C.C. 255 at 265

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Umar v. Bayero University, Kano (1988) ALL N.L.R. 361 at 368

T. O. Kuti (Trading as Abusi Odu Transport) v. Jibowu (1972) 6 S.C. 147

LEAD JUDGMENT BY BELGORE JSC

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This is a matter of defamation heard by the High Court of Cross River State sitting at Obubra Judicial Division. The appellant now before us was the plaintiff at the trial Court. The appellant and the defendant are natives of Apiapum. According to his statement of claim and his evidence

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in support, the plaintiff (hereinafter referred to as the "appellant"), sent his caretaker and sisters to go and harvest his cassava on his farm so as to make garri out of it. They complied and deposited the cassava tubers at his house. Latter the Chief of their village, Chief Awassam sent for the appellant. On getting to the Chief's house, where a crowd had gathered

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including the defendant/respondent, and to the hearing of all there, Chief Awassam informed the appellant that the respondent had lodged a complaint against him that he (appellant) had stolen the cassava belonging to the wife of the respondent. The appellant there and then denied the allegation

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maintaining that he harvested his own cassava on his farm and that he never stole anybody's cassava. The respondent in the presence of the same crowd repeated the allegation. From the Chief's house aforesaid the respondent went to report to the police that the appellant stole his wife's

cassava; leading to his prosecution in the magistrate's court, Obubra. He was discharged and acquitted after the trial; his farm caretaker who was tried along with him was also discharged and acquitted. As a result of the allegation, the appellant who was in the run for headship of a ruling house of Obamkpe in Okum was bypassed. He therefore sued for this defamation and claimed N50,000.00 as damages. B

In his statement of defence the respondent admitted making the allegation that the appellant stole his wife's cassava by sending his caretaker and sisters to harvest the same because "he had no right to harvest the cassava as he did;" While admitting that he repeated the allegation of the appellant's stealing in the chief's house, he denied that the house was full of people but never mentioned how many people were there. Certainly the respondent never denied making the allegation, rather he repeated it in his statement of defence and his evidence in court. The trial judge found for the appellant and awarded him damages. D

The respondent lodged an appeal to the Court of Appeal. Based on his grounds of appeal he formulated the following issues for determination: E

"(i) Whether the communication to the Clan Head and the police was privileged and if so whether that plea was not fully and sufficiently raised in the pleadings by the Defendant's assertion in paragraph 15 (e) that his wife and himself were by law entitled to report the matter to the chief and the police for investigation. F

(ii) Whether the Defendant's conduct in the circumstances was reasonable and bona-fide or whether he behaved unreasonably and was actuated by malice."

The parties fought the appeal on these issues. However, in course of the judgment the Court of Appeal abandoned all these issues and suo motu raised a new issue which for clarity I set out from the judgment of that Court as follows: G

"I think this appeal turns on whether on the facts of the case the defendant uttered words capable of being defamatory of the plaintiff. If he did not, or if no such words are shown, then the consideration of the other matters is irrelevant for the determination of this appeal. H

It is settled law that in libel and slander it is essential to know the very words or as nearly as possible on which a plaintiff founds his claim. He must in his pleading set out the words with reasonable certainty: see Collins v Jones (1955) 1 QB 564. At page 571 Lord Denning

LJ said:

"In a libel action it is essential to know the very words on which the plaintiff found his claim. As Lord Coleridge CJ said in Harris v. Warre: 'In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions alleged, which is the fact on which the case depends' ".

I have carefully perused the plaintiff's statement of claim and in none of the paragraphs did he set out the very words complained of on which he grounded his action. The closest he came to doing so was paragraph 7 which states:

"7. As soon as the plaintiff arrived at the Ohorodo's Palace the said Chief Awassam informed him that the Defendant and his wife complained that he (the plaintiff) stole the defendant's wife cassava."

It is absolutely vital that the plaintiff should have set out with a degree of certainty the very words the defendant used. He cannot do this by substituting them with his own interpretation of what was said. It is the function of the Judge, upon the words used, to rule whether they are capable of being defamatory as a matter of law. Thereafter, on the evidence, he construes the words and circumstances as a whole whether they are defamatory of the plaintiff; see J. I. Okolo v Mid-West Newspapers Corporation & Ors. (1977) 1 SC. 33. By stating that the defendant said he stole without setting out the very words complained of, the plaintiff was in effect drawing a conclusion which the court ought to draw after hearing all the evidence."

The Court of Appeal, to my mind raised an entirely new issue for the parties. The primary duty of the Court is to hear parties on their

complaints and confine them to the battle ground they have chosen. The Court must as much as possible avoid a situation whereby new battle grounds would be opened to the parties. The exception to this cardinal rule are serious issues of law or the Constitution which could be raised at any time either by any or both the parties or by the Court. Questions pertaining to law or the Constitution are always very important and must be addressed promptly once they surface in any proceedings. They can touch on the very foundation of jurisdiction or illegality and that is the reason why they must be addressed at any time before judgment. Thus where parties in the grounds of appeal and briefs of argument never adverted to a point of law of great importance to the decision or a Constitutional issue and it surfaces during or after the appeal has been heard the Court has a duty not to ignore that point. Then what are the duties of the Court in such a circumstance? The Court is to invoke the time honoured principle of hearing the parties on the issue. In the cases where the Court of Appeal decides one issue out of many and leaves the other issues unpronounced upon, this Court frowns N.I.P.O.L. Ltd. vs Bioku Investment & Properties Co. Ltd. (1992) 3 NWLR (Pt. 232) 727. This appeal is however in a worse state in that the parties were not heard on the issue raised suo motu by the Court of Appeal. On discovering the issue as important as the matter of law and practice raised, the Court of Appeal ought to have deferred judgment and invited parties to address it on the issue. This is not a question of lack of fair-hearing, it is that of not being heard. Unfortunately, the Court of Appeal never addressed the issues raised by the parties on the ground that the very words purported to be defamatory were not set out, a point raised suo motu in the judgment of that Court, this amounts to denial of justice. Hearing, I must emphasis, involves in the trial Court, the tendering of evidence, testing that evidence by cross-examination and re-examination so that all facts and all laws are clearly before the tribunal. In the appellate Court where witnesses are no longer necessary, hearing entails calling parties to explain the points in issue; that is to say, affording the parties the chance to address on all points. In the present case, the parties had long left the face of the Court when the Court discovered

a point, so important that it could be the kernel of the whole appeal, and it was. The parties never adverted to it before the Court or in their briefs of argument. They ought to have been recalled to address on the new point with the Court formulating the issues on the new point. The Court never did this. Parties were not heard and the pronouncement of the Court of Appeal on this point is totally incompetent. It is more than a case of not being given fair-hearing; it is that of not hearing the parties, a situation aggravated by the point being the sole one for the final decision with abandonment of the issues the parties fought. This appeal on this sole reason succeeds and the matter is sent back to the Court of Appeal a different panel to decide the issues between the parties and any other issues they may decide to raise in the appeal. I award N10,000.00 as costs in this appeal to the appellant against the defendant.

WALI JSC

I have the privilege of reading in advance the lead judgment of my learned brother Belgore JSC and I entirely agree with the reasons given therein for allowing the appeal. I adopt the reasons as mine.

Where an Appeal Court wishes to raise a point Suo motu, it is incumbent on the appellate court to invite the parties to address it on the issue before making a pronouncement on the same. In the present appeal the Court of Appeal failed to adhere to this cardinal rule of practice, thus seriously breaching the rule of fair hearing.

I also allow this appeal, set aside the decision of the Court of Appeal and adopt the order of sending the case back to the same court for hearing before a panel differently constituted.

I adopt the order of costs in the lead judgment.

OGUNDARE

I agree entirely with the judgment of my learned brother, Belgore JSC just delivered. And for the reasons given by him in the said judgment I too allow this appeal and abide by the consequential order(s)

made therein.

OGWUEGBU JSC

The Court of Appeal abandoned the issues identified by the parties as arising for determination in the appeal before them and formulated its own issue. It based its decision on the issue so framed without hearing the parties on it. B

The courts have been reminded in many decisions of this court of the dangers inherent in the practice. It is not open to the Court of Appeal to raise issues which the parties did not raise for themselves either at the trial or during the hearing of the appeal. The parties should have been heard on the issue before judgment is pronounced on it. See Ebba v. Ogodo & Ors. (1984) N.S.C.C. 255 at 265, Umar v. Bayero University, Kano (1988) ALL N.L.R. 361 at 368 and T. O. Kuti (Trading as Abusi Odu Transport) v. Jibowu & Ors. (1972) 6 S.C. 147. C D

I agree therefore that the appeal be allowed. I also abide by all the consequential orders made by my learned brother Belgore, J.S.C. including the order for a re-trial by a different panel of the Justices of the Court of Appeal, Enugu Division. E

MOHAMMED JSC

I have had the privilege of reading, in draft, the opinion of my learned brother, Belgore, J.S.C., in the judgment just read and I agree with him that the Court of Appeal abandoned the issues formulated by the appellant for the prosecution of this appeal and raised a new issues which was not based on any of the grounds of appeal. The Court of Appeal is wrong to determine the appeal without inviting the parties to address it on the new issue. F G

This appeal is allowed. I agree that the proper order to make is to send the case back to the Court of Appeal for rehearing of the appeal before a differently constituted panel of that court. I hereby order accordingly. I abide by all the consequential orders made by my learned brother including the assessment on costs. H

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