

COURT OF APPEAL
BENIN DIVISION
14TH MARCH 1996. CA/B/233/91
CORAM:- A. AKINTAN, S. A. NSOFOR, A. O. IGE, JJCA

B. E. O. OGIALE & 3 ORS. APPELLANTS
(For themselves and on behalf of the people of
Olomoro Isoko, Bendel State of Nigeria)

AND

SHELL PETROLEUM DEVELOPMENT RESPONDENT
COMPANY OF NIGERIA LIMITED

EVIDENCE - Admissibility - Team of experts - In different but related fields of study - Joint report - Tendered by one of them - Is admissible - Exception thereto.

EVIDENCE - Burden of Proof - Averment of the appellants that was not admitted by the respondent - The burden was on the appellants to Prove their averment.

EVIDENCE - Expert witnesses - Admissibility - Opinion of experts on Scientific Matters - Is admissible.

EVIDENCE - Evaluation of evidence - Expert evidence - Where the evidence given by the expert witnesses did not pass the legal requirement - Rejection of their evidence by the trial judge was right.

EVIDENCE - Expert - Who an expert is - And the correct test of the relevance of an expert's opinion.

EVIDENCE - Expert - The duty of the expert - Is to furnish the Judge with the necessary scientific criteria for testing his conclusion - Otherwise his evidence would be value less.

EVIDENCE - Hearsay - Team of experts - Joint report produced by them - Evidence based on the report given by one of them - Is not hearsay in respect of those not called as witnesses - But admissible evidence.

EVIDENCE - Witnesses - Expert - The expert called as a witness must give his qualifications and experience - Before he begins to give his evidence.

FACTS

At the Oleh High Court, the plaintiffs/appellants instituted an action in representative capacities for themselves and on behalf of the people of Olomoro, Isoko in the then Bendel State now in Delta State. They claim against the defendant/respondent for the sum of N358,549,500.00 (three hundred and fifty-eight million, five hundred and forty nine thousand, five hundred naira) representing damages and loss suffered by them as a result of the impoverishment of their tract of land by the defendant's continuing exploitation of crude Oil and natural gas at Olomoro and the operations negligently carried on by the defendant on a continuing basis since 1962 at its Oil wells at Olomoro. Alternatively they claimed general damages. The defendant is a limited liability company incorporated in Nigeria. It is an arm of a multinational commercial giant carrying on the business of crude Oil and natural gas exploration and production with installations in many parts of Nigeria including Olomoro.

The gravamen of plaintiffs' case against the defendant was that as a result of the defendant's activities on their land, their said land had been seriously and adversely impoverished. They claimed that they were predominantly a farming community depending on outputs from the land for their living. They allege that the activities of the defendant company had greatly diminished the output they used to realise from their farming activities on the land. Hence they brought the action to Obtain a redress from the losses they had suffered. The defendant denied the plaintiffs' claim. The plaintiffs called among other witnesses 3 witnesses who were experts in their respective fields. The defence also called an expert

as a witness, who had carried out his studies with a team of experts. He rendered a report which was jointly produced by them.

The learned trial judge in a reserved judgment rejected the evidence given by the various experts. The court found as a fact that whenever there was an oil spillage, the defendant cleared up and paid compensation to the owners of the crops affected. It finally came to the conclusion that the plaintiffs failed to prove their claim. The claim was accordingly dismissed with costs in favour of the defendant. Dissatisfied, the plaintiffs have appealed to the Court of Appeal, Benin Division. The defendant also cross-appealed. The plaintiffs raised two issues while the defendant on the other hand raised three issues.

ISSUES FOR DETERMINATION

"(i) Whether there was valid ground for the court below to have rejected the testimony of P.W 4, P.W.5 and P.W.6 called as expert witnesses.

(ii) Whether the court below was right:-

(a) to have rejected the testimony of all the witnesses called by the plaintiffs; and

(b) to have dismissed plaintiffs/respondents' action.

(iii) Was the learned trial Judge right to reject the evidence of D.W.4 the expert witness called by defendant?"

HELD (Unanimously dismissing the appeal per lead judgment of **AKINTAN JCA**)

Evidence - Burden of proof

1. The averment of the appellants was that the activities of the respondent led to impoverishment of their land resulting in reduced agricultural farm yields. The burden was definitely on them under Section 135 of the Evidence Act to prove their averment since that averment was not admitted by the respondent. See Ganiyu Tewogbade & co. v. Arasi Akande & Co. (1968) N.M.L.R 404. (p. 1153 A)

Evidence - Expert witnesses - Admissibility

2. Evidence of opinion of experts on scientific matters, as in the instant

case, is admissible whenever the court has to determine issues within that field. See section 57 (1) of the Evidence Act 1990; and Seismograph Services Nigeria Limited v. Ogbeni (1976) 1 NMLR 290. (p. 1153 C)

B *Expert - Who an expert is*

3. An expert is definitely a person specially skilled in a particular field of study enumerated in section 57(1) of the Evidence Act 1990. The correct test of the relevance of the witness's opinion as that of an expert is whether he is specially skilled on the particular field in question. See Seismograph Services Limited v. Onokpasa (1972) 1 All NLR (part 1) 343. (p. 1153 D)

Expert - The duty of the expert

- D 4. The duty of the experts is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. See Phipson on Evidence, 12th Edition, paragraph 1227 on page 497; Davie v. Edinburg Magistrates (1953) SC 34 at 40 per Lord President Cooper; and Section 65 of Evidence Act 1990. It is therefore not enough for an expert to give a mere opinion and conclusion and leaving out the criteria upon which such opinion and conclusion are based. His opinion and conclusions must be supported by scientific analysis otherwise his evidence would be valueless. See U.T.B. v. Awanzigana Enterprises Limited (1994) 6 N.W.L.R (Part 348) 56, Shell Petroleum Development Co. Nigeria Limited v. Otoko (1990) 6 NWLR (Part 159) 693; (p. 1153 E)

Evidence - Witnesses

5. It is the requirement of the law that the expert must be called as a witness and he must give his qualifications and experience before he begins to give his evidence at all; See Wambai & Anor v. Kano N.A. (1965) NMLR 15; Aguda, Law & Practice Relating to Evidence in Nigeria, (1980, paragraph 904, Page 115; and Nwadialo, Modern Nigerian Law of Evidence, supra, Page 87. (p.1154 A)

Evidence - Evaluation of evidence

6. The conclusion therefore is that the evidence given by the expert witnesses did not pass the legal requirement of expert evidence. The result is that the learned trial Judge was right in rejecting their evidence. Having rejected the evidence, it means that the plaintiffs failed to prove the most important averment in their claim. The court was therefore right in dismissing their claim. (p. 1156 H)

Admissibility - Team of experts

7. There is definitely no doubt that where a team of two or more experts in different but related fields of study jointly undertook a research project and jointly produced a report, that report tendered by one of them in court proceedings is admissible: See Shell Petroleum Development Co. Nigeria Limited v. Farah & others, supra. But this general statement of the law will not be applicable where there is evidence of a clear division of labour among the team of experts particularly whereby a specified field of study was carried out by a particular expert or experts in not very related field of study. In such a situation, it may be necessary that at least an expert from each of the specialised field is called to give evidence in the related field of specialisation. (p. 1157 H)

Hearsay - Team of experts.

8. A similar point came up for determination recently before the Port-Harcourt Division of this court in Shell Development Co. Nigeria Limited v. Farah & Others, supra. Edozie, J.C.A. said thus at page 191 of the report:-

"Furthermore, I take the view that where, as in the case, a team of two or more experts in different but related fields of study jointly undertake a research project and jointly produce a report, that report tendered by one of them in court proceedings is admissible. The fact that the expert tendering the report is not as qualified as the one called as a witness in the area he is being cross-examined can at best go to the question of weight to be attached to the report and not to the admissibility of report."

I entirely agree with the above view expressed by my learned brother, Edozie, J.C.A. My conclusion therefore is that the learned trial Judge was in error when he held that the evidence of D.W.4 as far as Professor Esuruoso and Dr. Obigbesan was concerned was hearsay and that his evidence alone was not sufficient to determine the infertility of the soil at Olomoro. I hold that D.W.4's evidence was quite admissible and sufficient for the purpose for which it was tendered. The cross-appeal therefore succeeds and it is hereby upheld. (p. 1158 F)

C **NOTABLE POINTS OF INTEREST**
NSO FOR JCA

1. Forms of action.

For the purpose of elucidation, I think it ought, firstly, to be recognised that even among the academia, there is no consensus whether or not there be the law of "Tort or Torts", or the Law of "Contract" or "Contracts". And this, in my view, arises from the concept as expressed by Maitland, "the forms of action are dead and buried but they still rule us from their graves." But why this government of the living by the "dead"? However, and whichever side one takes or aligns oneself with, it is of common acceptance that the Law's primary objective (and in litigations in Courts of Law and Equity) is to punish "fault" or "Wrong". By "fault" or "Wrong", I mean "injuria", id est, legal wrong. But now section 236 of the Constitution of the Federal Republic of Nigeria 1979, has revolutionized the ancient and antiquated concept and in effect has done away with the concept of "forms of Action"; the principle predominating being, Ubi jus, ibi remedium". It is also desirable to observe that, for example, in a tort of trespass or in nuisance or under the rule of Rylands v. Fletcher there ought to be established "Damnum". Unless there be a "Damnum", there need not be, a "Remedium", id est, damages in the sense I am discussing. (p. 1160 E)

H

2. What constitutes an adequate traverse

I fail to read into paragraph 10 (supra) any "admission" or any averment

capable of being christened, as the counsel for the appellants appeared to me to do, "common ground that the complaint of the plaintiffs about low yields from their land was established." Paragraph 10 of the "Defence" (supra) was a good and an adequate traverse of the very complaint of or by the appellants qua plaintiffs at the trial. Besides, speaking B for myself, to constitute a traverse it is not even necessary that every paragraph of a statement of claim should be specifically denied. That, of course may be done. Jolly well and good: But what is essential is that the case put forward by a defendant conflicts in material particulars with C that put forward by a plaintiff and thus puts the different material averments in issue: *Ojo Ajao & Ors. v. Opoola Alao* (1986) 12 S.C. 193; (1986) 5 NWLR (Pt. 45) 802 *Howell v. Dering* (supra). (p.1175 F)

3. The role of an appellate court. D

And, again, I remind myself of the role of an appellant court, which this court is. It does not try cases. Trial courts, as the name suggests, do that. Appellate courts do not. They do not believe or disbelieve witnesses. No they do not make finding of facts. Their main duty is to E oversee the trial courts and to ensure that they have used the right procedures and applied the right or proper law to the facts, either as found by them or as admitted by the parties. With regard to the issues of F credibility and confidence to be reposed in the testimony of witnesses, an appellate court may take the view that, not having seen or heard the witness, it cannot, on printed evidence or record, usurp the essential function of the trial court. It is, however, otherwise if the sole question is the inference or the deduction to be drawn from agreed or uncontested G facts - there an appellate court is in as good, a position as, or even better than, the trial court. See *Ebba v. Chief Warri Ogodo* (1984) 1 SCNLR 372 at 379; (1984) 4 S.C. 84, per Eso, J.S.C.; at page 98 to 99. See also *Benmax v. Austin Motors* (1955) 1 All E.R. 326 at page 327. H
(p. 1177 D)

4. The opinion evidence by an expert is not conclusive.

I had, above, referred to section 57 of the Evidence Act, Cap. 112 Laws

of the Federation, 1990. It only remains for me just to say that an expert witness is no more and no less than a witness in the case he is summoned to give an opinion-evidence on a fact in issue, within the area of his expertise or speciality. The opinion-evidence by an expert is not, by any means, conclusive of the point on which he testifies because only and only because the opinion is that of an expert. No. All I am trying to say is this. A Judge, in a non-Jury trial, or the Jury, in a Jury trial, does not just, surrender his independent judgment on an issue to the expert witness because he is such an expert. If there be good causes or a good cause, the Judge or the Jury may, well, legitimately reject the opinion evidence of an expert. And I am, respectfully, in agreement with Lord Cooper's dictum in Davie v. Edinburgh Magistrates (supra) when he said talking about expert-witnesses:-

"Their duty is to furnish the Judge or jury with necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or Jury to form their independent judgment by the application of these criteria to the facts proved in evidence."

(The Italics is mine) (p. 1180 E)

REPRESENTATION

T.E. WILLIAMS For the Appellants/Cross-Respondents

T.J.O. OKPOKO, SAN with C. A. Ajuyah for the Respondent/Cross-Appellant

CASES REFERRED TO

Ganiyu Tewogbade & Co. v. Arasi Akande & Co.. (1968) N.M.L.R 404;
Abiodun & Others vs. Adehin (1962) 1 All N.L.R 550; and
Are v. Adisa (1967) N.M.L.R 304.

Seismograph Services Nigeria Limited v. Ogbeni (1976) 1 NMLR 290.

Davie v. Edinburg Magistrates (1953) SC 34 at 40

H U.T.B. v. Awanzigana Enterprises Limited (1994) 6 N.W.L.R (Part 348)
56

Shell Petroleum Development Co. Nigeria Limited v. Otoko (1990) 6 NWLR (Part 159) 693

Wambai v. Kano N.A. (1965) NMLR 15

Seismograph Services Limited v. Onokpasa

Ajami v. Comptroller of Customs 14 WACA 34

Azu v. The State (1993) 6 NWLR (pt. 299) 303

B

BOOKS REFERRED TO

Phipson on Evidence, 12th Edition Para. 1227 page 497

Aguda, Law & Practice Relating to Evidence in Nigeria 1980, Para 904, Page 115.

C

Nwadialo, Modern Nigerian Law of Evidence, Page 87.

STATUTES AND RULES REFERRED TO

Evidence Act, 1990 SS. 57(I), and 135.

Constitution of the Federal Republic of Nigeria 1979, S. 236

D

Court of Appeal Rules, 1981, O.6 r.2

LEAD JUDGMENT BY AKINTAN JCA

This is an appeal against the judgment of Akpiroroh, J delivered on March 20, 1991 at Oleh High Court, now in Delta State. The plaintiffs (now appellant) instituted the action in representative capacities for themselves and on behalf of the people of Olomoro, Isoko in the then Bendel State, now in Delta State. The defendant in the action (now respondent) is a limited liability company incorporated in Nigeria. It is in fact an arm of a multinational commercial giant carrying on the business of crude oil and natural gas exploration and production with installations in many parts of Nigeria, including Olomoro and other areas of Isoko land of Delta State.

F

G

The plaintiffs are natives and inhabitants of Olomoro, Isoko in Delta State, an area in which the defendant carried on some of its oil and gas exploration activities. The defendant, according to the pleadings filed in the case, had been carrying on its said oil and gas exploration activities in the area since about 1962. The gravamen of plaintiffs' case against the defendant was that as a result of the defendant's activities on their land, their said had been seriously and adversely impoverished.

H

They claimed that they were predominantly a farming community and that they depended on farming the said land for their living. They alleged that the activities of the defendant company had greatly diminished the output they used to realise from their farming activities on the land. Their action against the company was to obtain a redress for the losses they suffered from the devaluation effects the company's activities had on their land in question.

Their claim, as set out in paragraph 29 of their amended statement of claim is for:-

"(1) The sum N358,549,500.00 (three and fifty-eight million, five hundred and forty-nine thousand, five hundred naira) representing damages and loss suffered by the plaintiffs as result of the impoverishment of the plaintiffs' tract of land by the defendant's continuing exploitation of crude oil and natural gas at Olomoro and the operations and/or activities negligently carried on by the defendant on a continuing basis since 1962 at its oil wells, heliport, flow and/or processing stations, oil locations and oil fields at Olomoro occupied by, and/or under the control of the defendant being adjacent to the plaintiffs' tract of land at Olomoro, whereby the defendant negligently flared or released and has continued so to flare or released natural gas and/or caused same to escape continuously and/or ceaselessly from the defendant's oil installations and oilfields aforesaid to, on and over the plaintiffs' tract of land aforesaid and thereby caused infertility of, and/or injury and damage to the said tract of land at Olomoro within the jurisdiction of this Honourable Court.

(2) In the alternative the sum of N358,549,500.00 three hundred and fifty-eight million, five hundred and forty-nine thousand, five hundred naira) being general damages for loss and inconvenience suffered by the plaintiffs as a result of the defendant's negligent and/or dangerous exploitation of crude oil and natural gas and in the manner averred her before, particularly in paragraphs 8 to 14, 17-19, 27 and 29(1) hereof."

Pleadings were ordered, filed and exchanged. Evidence was led by each side in support of the pleadings. The plaintiffs produced and tendered a survey plan of the land they claimed as theirs (Exhibit A). Their surveyor, Theophilus John (P.W. 1) told the court, inter alia, that:-

"The plaintiffs took me to the land. I saw 32 oil wells on the land. I showed all the wells in Exhibit A. The plaintiffs showed me villages, farms and schools as their property on the land. I saw the defendant's oil wells emitting fumes burning gas. I saw about two flames. I saw the plaintiffs ' maize, cassava and yam farms on the land B
.....

Apart from the cassava, maize and yam farms, I also saw thick forests and swamps. The thick bush in Exhibit A. is nearest to the oil wells than any farm.....'

Two of the witnesses are members of the community. They are C
Chief Ekpe Okpokre (P.W.2) and Ume Otobo (P.W.3). The sum total of their evidence was that the land in question as shown on their survey plan, Exhibit A, belonged to their community and that the defendant had been prospecting for crude oil and gas thereon. As a result of the D
defendant's activities on the land the value of the land had been adversely affected. Their case was put, inter alis, as follows by Chief Ekpe Okpokre in the course of his evidence:-

"The land belongs to the whole of Olomoro people. The defen- E
dant came to exploit oil on the land about 21 or 22 Years ago. The company dug crude oil wells, barrow pits and make road on the land. The company also lays pipes on the land and burns gas on it. Since the operations of the company on the land, our farms products have become F
very poor. It has even caused tremor on our land

We know that the land is no more fertile because our for-fathers used to harvest big tubes of yams and cassava before the activities of the company on the land. We cannot now produce food to feed ourselves ..."

The witness admitted under cross-examination that his people G
used to practise shifting cultivation in Olomoro by which a particular portion of the land was cultivated only once in every five years. But he said that as a result of growth of population in Olomoro, they could not allow up to 5 years before cultivating a particular portion of the land. But H
he denied that they were now farming on a particular portion of land yearly.

The other 3 witnesses called by the plaintiffs were experts in

their respective fields. The first of the three is Dr. Anthony Unusa Salami (P.W.4), a soil scientist and an agronomist. The second is Chief Miller Uloho (P.W.5), an estate surveyor and valuer; while the third is Chief Birinengi Idoniboye-Obu (P.W.6), an environmental consultant.

B Dr. Salami (P.W.4) told the court that the plaintiffs approached him to take a look and analyse the soil in Olomoro in relation to the exploration by the defendant on their land. He said he did the job by taking samples of soils of the area and adjacent area for comparative study. He made a comparative study and analysis and he set out the result of his study in a report admitted as Exhibit B. The witness said, C inter alia, as follows in his evidence in chief:-

"I compared the two groups of soils, one from Olomoro area and one from the adjacent area and I found that there were not basic difference between the two groups of soils. This means ordinarily that the two groups of soils should perform well if nothing is done to the first group of soil. The only difference was that the defendant was operating on Olomoro soil but not on the adjacent soil. I found that the crops of the adjacent area were growing very well and the yields of crops from the land of Olomoro were very poor. The only conclusion which I drew was that the exploitative and explorative activities and the flaring of gas and the affluents (i.e. the flowing of oil) were responsible for the damages of olomoro soil. I also observed that the yields of crops in the area were reduced. I found that it was the defendant that was carrying on all the activities I enumerated above in Olomoro soil. I put the loss of crops between 25% and 60% from my findings."

G The witness admitted under cross-examination that the soil on the effected and unaffected area could sustain the good growth of any tropical crops. He also admitted that his area of speciality did not include heat and radiation and that although he collected liquid (i.e effluents) from the soil, he did not subject it to scientific analysis. He agreed that heat and H radiation could be measured scientifically. But he said that he did not measure the heat generated by the gas flared scientifically. He also admitted that the chemical analysis of the two types of soils did not show any significant difference in the affected area.

The gist of the evidence given by Chief Miller Uloho (P.W.5), the estate surveyor and valuer was in respect of his valuation of what he considered to be the plaintiffs' losses based on the effect of the defendant's activities on the land as contained in the report of Dr. Salami's investigations and report. The witness told the court that he made several visits to the land during the course of his assignment and that he based his report (admitted as Exhibit C) on the losses established in Dr. Salami's report, Exhibit B. He valued the net losses arising from the defendant's activities on the land as N55,762,500.00.

The third of the expert witnesses called by the plaintiffs was Chief Birinengi Idoniboye-Obu (P.W.6), an environmental consultant. He too told the court that he was invited by the plaintiffs to investigate the effect of oil pollution on the community's land and its environs. He said his team visited the place several times and wrote a report, admitted as Exhibit D. The witness said that he carried out scientific investigation of water in Olomoro. But he admitted under cross-examination that he did not do quantitative analysis of water samples because of lack of found for such investigation. He also admitted that such laboratory analysis could have shown the chemical contents of the water or other chemicals in the water. He also admitted that he did not carry out scientific laboratory test of the air and heat radiation in Olomoro before arriving at the conclusions he set out in his report, Exhibit D.

The case for the defence was a told denial of the claim. Evidence led for the defence hinged on the contention that the company's activities were carried out on the area of land which the company lawfully acquired. Donald Otoakhia (D.W.3), the company's Senior Lands Supervisor, stated the stand of the company as follows:-

I know the plaintiffs' community. The defendant operates in Olomoro area. We have Olomoro fields on the area. Olomoro fields include Oleh and Emede. We started prospecting for oil in the fields in 1961 but actual acquisition and drainage started in 1963. Today we have acquired 38 drilling locations and auxiliary sites in the area. Acquisition involves the purchase of the land from the land owning families and thereafter we pay compensation to the owners. Right from the time

of survey and acquisition, the owners of the land are involved in the survey and payment of compensation for the receipts for the various owners. Up to date we have dealt with 127 families jointly and severally in these three communities. I have all the receipts in court with me here

B "

The witness tendered the receipts and other receipts issued to the company for other payments made for other related matters. The witness admitted that since the company's operations in the area, the company had five oil spoilages between 1973 and 1980. During the spoilages, the company carried out assessment, negotiation and payments of compensation to the people whose lands were affected. The witness said further as follows:-

"Immediately there is a spillage, we go with the land owing family to assess the affected area and carry out clearing. I have receipts for the payment of compensation to claimants affected by the spillage. Olomoro as a community has never claimed any ownership of land or farms since our operations in the area. Olomoro community has never made a claim on our company since we started our operations Most of the farms are individually owned. Most are owned by families. The oil palm trees which grow with wild timbers are claimed by quarters and the families; so also the fishing ponds. The Olomoro community has not put in any personal claim

We did not damage anything owned by Olomoro community. Individual families and quarters who own lands affected by our operations were duly paid. My company is not liable to the plaintiffs' claim."

G The defence also called an expert as a witness. He is Professor Clifford Temple Idigi Odu, (D.W.4), a Professor of Agronomy at the University of Ibadan. He told the court that he was invited by the defendant company in 1983 to study the Olomoro field area with a view to H determining whether the company's operational activities had in any way affected the ecology of the area. He said that he carried out the studies with a team of experts. He went further as follows:-

"I had on the team with me Professor O.F. Esuruoso and Dr.

G.O. Obigbesan. I had other technologists and assistants in the team. Professor Esuruoso studied the plant pathology and insect life while Dr. Obigbesan studied the plant physiology and crop production aspect. All of them worked under me. I studied the soil aspect, the post impact aspect and the physical measurements like radiation etc. We concluded the studies. After concluding the studies. After concluding the studies we wrote a report" B

The report was admitted as exhibit G. The witness then gave a brief summary of their findings, details of which are contained in their report, Exhibit G. their conclusion was that "the operation of the defendant company has not affected plant growth and soil fertility in the area. " The witness also gave a break down of the role played by every member of the three-man team in carrying out their assignment and preparation of their report, Exhibit G. He said thus:- D

"Professor Esuruoso was the plant pathologist in Exhibit G, and he looked after the pests while Dr. Obigbesan looked after crop physiology and crop production. I was responsible for the area dealing with gas flaring in Exhibit G." E

The witness admitted under cross-examination that crops would not grow successfully where oil content is high. But he said he did not compare crop yield in Evwreni with crop yield in Olomoro. He said further that the opinion expressed on page 53 of their report, Exhibit G, about oil contents in soil was based on what he (the witness) was told by one Yomi Odewumi. F

The learned trial judge, in a reserved judgment delivered on 20th March 1991, held, inter alia, that the sum total of what the plaintiffs were claiming was for injury and damages as a result of the defendant's oil exploration which led to the impoverishment of their land and resulted in its infertility thereby causing low yields of crops such as maize, yam and cassava. The court was also of the view that the contention of each party was of a technical nature and as such the evidence in support must necessarily be that of people specially qualified in the particular field of science. G H

Having taken the above posture, the learned Judge then went

into detailed consideration of the evidence led by the parties. As regards the plaintiffs' case, the learned trial Judge made a detailed analysis of the evidence of the main expert witness called by the plaintiffs - i.e. Dr. Salami (P.W.4). To that end the court took into consideration certain admissions made by that witness while under cross-examination. The learned Judge said thus:-

"P.W. 4 did a comparative studies of the soil and the area occupied by the defendant and the adjoining soil and produced Exhibit "B". Under cross-examination, P.W. 4 said :-

"..... Annexure I does not contain effluent analysis. Annexure I does not contain analysis of heat and radiation. The soil in the affected and unaffected areas as shown in Annexure I can sustain good growth of tropical crops Annexure I does not show petroleum contents and gas contents per se. I later collected liquid from soil but I did not subject it to scientific analysis. I cannot tell the court the chemical contents of what I described as effluents because I did not subject it to scientific analysis I did not measured scientifically. Heat and radiation can be measured scientifically. My area of speciality does not include heat and radiation. I found fire scorching the crops in the area. I did not say in Exhibit "B" that I saw fire scorching the crops in the area Annexure I does not show my full physical analysis. The chemical analysis in columns 3-11 does not show any significant difference in the affected and non affected area."

In his conclusion at page 2 of Exhibit "B" he said:-

"From observations and from the result of the chemical and physical analysis, there is no doubt that as stated above, the area under study has been rendered unproductive due to oil installations and explorative activities including heat generated by flaring gas by Shell-BP (Nig.) Limited in the Olomoro area."

In so far as PW4 admitted that he did not carry out analysis of heat and radiation, he cannot therefore say that the area was rendered unproductive due to heat generated by flaring of gas. This also applies with equal force to effluents having admitted that he did not subject it to scientific analysis and that Annexure I did not contain effluents.

At page 1 of Exhibit "B", PW4 said that from the results of the chemical and physical analysis and the observations made, it would appear that productivity of the area has been seriously affected to the extent that losses of crops of up to 100 per cent are evident. This contradicts his evidence under cross-examination in which he admitted that Annexure B 1 did not show full physical analysis and that the chemical analysis in columns 3- 11 in Exhibit "B" did not show any significant difference in the affected area and non affected areas. Besides, there was no basis on which the percentage arrived at on Exhibit "B" was worked out by PW4 C having admitted that he did not do any sample harvesting in the area. He also admitted that there was no approved Government Report on crops yields in Olomoro."

The learned Judge also considered the evidence given by P.W.5 D - the estate surveyor and valuer. The court held that since the witness (P.W.5) said he relied on Dr. Salami's report (Exhibit B) when he said that the defendant's operations affected productivity on the plaintiffs' land, and the witness having admitted that he did not do any physical measurements on the land, the conclusions given in Exhibit C - (the report produced by P.W.5) could therefore not stand. E

The court also referred to the evidence of Chief Idoniboye-Obu (P.W.6), the environmental consultant, and held that since the witness had admitted under cross-examination that he did not do analysis of air, F radiation and heat for lack of funds for the investigation, his evidence and Exhibit D (his report) were therefore of no assistance to the court in determining the deterioration of the soil of Olomoro as a result of the defendant's oil exploration and exploration.

The court also considered the evidence of Professor Odu (D.W.4), G the main expert witness who testified for the defence. The learned trial Judge observed, inter alia, as follows:-

"In the first place, Exhibit G showed that it was prepared by D.W.4, professor O.F. Esuruoso and Dr. Obigbesan. This was admitted H by D.W.4 in examination in chief and under cross-examination. D.W.4 said that Professor O.F. Esuruoso studied the pathology and insects life; Dr. Obigbesan studied plant physiology and crop production while he

studies the soil aspect of the land. Professor O.F. Esuruoso and Dr. Obigbesan were not called to testify..... I am therefore in full agreement with the submission of learned counsel for the plaintiffs that the evidence of D.W. 4 as far as Professor O.F. Esuruoso and Dr. Obigbesan is concerned is hearsay evidence, having admitted that he carried out the studies which led to Exhibit G with them. His evidence alone is not sufficient to determine the infertility of the soil of Olomoro."

The court therefore for the reasons already stated above rejected the evidence given by the various experts. It found as a fact that whenever there was an oil spillage, the defendant cleared up and paid compensation to the owners of the crops affected. Reference was made by the court in this respect to the receipts tendered in respect of the various payments made by the defendant company (Exhibits F - F349). The court came to a conclusion that the plaintiffs failed to prove their claim. The claim was accordingly dismissed with N500.00 costs in favour of the defendant.

The plaintiffs were very dissatisfied with the verdict of the court and have appealed to this court. Two grounds of appeal were filed against the judgment. The defendant also filed a cross-appeal against certain finding of fact made by the trial court.

The parties filed their briefs of argument in this court. The appellant filed the appellants' brief and a reply to cross-appeal. The respondent filed the respondent's brief which incorporated the submissions in respect of the cross-appeal. The following two issues were formulated for determination in the appeal in the appellants' brief:-

(i) *Whether there was any valid ground for the court below to have rejected the testimony of the plaintiffs' expert witnesses.*

(ii) *Even if (which is not conceded) it was right for the court below to reject the testimony of the plaintiff's witnesses, should that lead to the dismissal of the plaintiffs' action?"*

The respondent; on the other hand, formulated three issues. The first two are for the appeal while the third is in respect of the cross-appeal. The three issues are as follows:-

"(i) Whether there was valid ground for the court below to have

rejected the testimony of P.W 4, P.W.5 and P.W.6 called as expert witnesses.

(ii) Whether the court below was right:-

(a) to have rejected the testimony of all the witnesses called by the plaintiffs; and

(b) to have dismissed plaintiffs/respondents' action.

(iii) Was the learned trial Judge right to reject the evidence of D.W.4 the expert witness called by defendant?"

In the appellants' brief, prepared by Chief F.R.A. Williams S.A.N., the rejection of the evidence given by the three expert witnesses - (i.e. P.W. 4, P.W. 5 and P.W 6) was the main complaint against the judgment. Reference was made to the reason given by the learned trial Judge for rejecting the evidence of the three witnesses. It was, that the conclusions reached by them in their report - Exhibits B, C and D, were seriously challenged under cross-examination "which rendered their evidence as of no assistance to the court as to the cause of low yields of crops on the plaintiffs' land." It is submitted that the evidence of an expert can only be effectively discredited by placing before the court alternative evidence on the opinion expressed by the expert and leaving it to the court to determine which of the two opinions is acceptable. This was said not to be the position. Even if that had been so the court was expected to make definite finding to the effect that he accepted the opposing testimony but the court came to no such conclusion.

It is further submitted that it was not enough for the defendant to contend that the evidence of the plaintiffs' expert witnesses ought to be rejected. The defendant ought to go further and show that its operations in the area has not in any way affected vegetation in the area for well over 20 years. The trial court was therefore said to have acted erroneously in coming to the conclusion reached in the case.

Mr. T.E. Williams, learned counsel for the appellants, in his oral submission in this court, referred to the evidence tendered by the various witnesses for the parties in the case and submitted that since it was admitted by the defence that there were oil spillages, that amounted to the admission of the plaintiffs' claim for which the appeal should be allowed.

Mr. Okpoko, S.A.N., learned Senior Counsel for the respondent, submitted both in the respondent's brief and in his oral submission before his court, that what the plaintiffs were claiming was not maintainable because the individuals affected had been compensated. The claim, therefore, was a general one arising from the respondent's operations in the area. The evidence needed to prove the claim of "general impoverishment", he submitted, must be expert scientific evidence. He submitted further that the trial court appreciated that point and there was no appeal against that parameter used by the court.

The learned Senior Advocate referred to the evidence of the three expert witnesses called by the appellants and submitted that a conclusion of an expert must be supported by scientific analysis. This was not so in the instant case and as such the court was right in rejecting the evidence. He referred in particular to the admission of Dr. Salami (P.W.4) that he was not an expert on heat and radiation. His conclusion on effluent could therefore not stand because, he could not tell the court the chemical contents of what he called effluent. The same defect in the evidence of the experts came up again on the issue of radiation.

Another portion of Dr. Salami's conclusion referred to was where he said that his analysis could not produce any difference between the affected and the unaffected soil. The learned Senior Counsel submitted that the learned trial Judge was perfectly in order in rejecting the evidence of the said witnesses.

It is clear from the claim, the pleadings and the evidence led by the appellants in support of their claim, that their case was that the soil and gas exploration and exploration of the defendant/respondent adversely affected their soil thereby leading to the general impoverishment of the soil. Their claim was that the general impoverishment led to reduction of their farming yield.

Section 135 of the Evidence Act 1990 provides that:-
 "(1) *Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exists.*

(2) *When a person is bound to prove the existence of any fact, it*

is said that the burden of proof lies on that person."

The averment of the appellants was that the activities of the respondent led to impoverishment of their land resulting in reduced agricultural farm yields. The burden was definitely on them under Section 135 of the Evidence Act to prove their averment since that averment was not admitted by the respondent. See Ganiyu Tewogbade & Co. v. Arasi Akande & Co. (1968) N.M.L.R 404; Abiodun & Others vs. Adehin (1962) 1 All N.L.R 550; and Are v. Adisa (1967) N.M.L.R 304. The appellants tried to prove the averment through the evidence tendered by their witnesses. The most prominent among the witnesses are those of them that gave expert evidence as to what could lead to the impoverishment of the soil.

Evidence of opinion of experts on scientific matters, as in the instant case, is admissible whenever the court has to determine issues within that field. See section 57 (1) of the Evidence Act 1990; and Seismograph Services Nigeria Limited v. Ogbeni (1976) 1 NMLR 290. An expert is definitely a person specially skilled in a particular field of study enumerated in section 57(1) of the Evidence Act 1990. The correct test of the relevance of the witness's opinion as that of an expert is whether he is specially skilled on the particular field in question. See Seismograph Services Limited v. Onokpasa (1972) 1 All NLR (part 1) 343. The duty of the experts is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. See Phipson on Evidence, 12th Edition, paragraph 1227 on page 497; Davie v. Edinburg Magistrates (1953) SC 34 at 40 per Lord President Cooper; and Section 65 of Evidence Act 1990.

It is therefore not enough for an expert to give a mere opinion and conclusion and leaving out the criteria upon which such opinion and conclusion are based. His opinion and conclusions must be supported by scientific analysis otherwise his evidence would be valueless. See U.T.B. v. Awanzigana Enterprises Limited (1994)

6 N.W.L.R (Part 348) 56, Shell Petroleum Development Co. Nigeria Limited v. Otoko (1990) 6 NWLR (Part 159) 693; and Shell Petroleum Development Co. Nigeria Limited v. Farah & Others (1995) 3 NWLR (Part 382) 148.

B It is the requirement of the law that the expert must be called as a witness and he must give his qualifications and experience before he begins to give his evidence at all; See Wambai & Another v. Kano N.A. (1965) NMLR 15; Aguda, Law & Practice Relating to Evidence in Nigeria, (1980, paragraph 904, Page 115; and Nwadialo, Modern Nigerian Law of Evidence, supra, Page 87.
C Thus in Wambai & Another v. Kano N.A., supra, documents were sent to the N.A. Police to determine if they were forgeries. The opinion that they were, submitted to the court in a report of an expert, could not be
D used where the expert was not called to establish his qualifications and experience to the court.

Applying the law as declared hereof of the facts of the instant case, there is no doubt that the evidence led by the appellants in support
E of their claim was in two parts. The first part was the direct evidence given by the two representatives of the community who told the court that the activities of the respondent impoverished the community's farmland. The conclusion of the two witnesses was based on what they observed over the years while the members of the community were farming
F on the land. They could not make a comparison between what they experienced and what the positions were in other similar oil and gas exploration. Also as they admitted that the period they used to allow for the land to lie fallow before re-use had been reduced due to more demands
G for farming land as a result of increase in population, they failed to tell the court exactly what effect such a reduced period before re-use had on their farm yields. It would therefore not be proper for the learned trial Judge to take their evidence as sufficient proof that the respondent's
H activities caused the impoverishment of their land.

The second part of the evidence led in support of the appellants' case was the evidence tendered by the experts who gave evidence for them. The most important of which was Dr. Salami (P.W.4). The

assignment given to the witness, which was to take look and analyse the soil in Olomoro in relation to the exploration activities by the defendant company on the land, was aimed at resolving the technical aspect posed by the appellants claim. The conclusions of the witness must therefore be supported by scientific analysis before they could satisfy the need for B which such evidence was offered. But the evidence given by the witness failed to satisfy this important requirement particularly on the vital points. Thus, for example, when he said that on analysis of the samples of soils he took from the affected and unaffected areas of the lands, he said there C were not basic differences between the two groups of soils". He went further to say that originally, "the two groups of soils should perform well if nothing is done to the first group of soil. The only difference was that the defendant was operating on Olomoro soil but not on the adjacent D soil". He then said: "I found that the crops of the adjacent area were growing very well and the yields of crops from the land of Olomoro were very poor. The only conclusions which I drew was that the exploitative and explorative activities and the flaring of gas and the effluents (i.e. the following of oil) were responsible for the damage of Olomoro soil." E

Even from the man's evidence in chief, his above conclusion lacks the basic essential requirement of an expert evidence which is, that the conclusion must be supported by scientific analysis. The sum total of his evidence was that he analysed the two samples of soils and found F no difference but that the defendant was operating on one and not on the other. He failed to say it he discovered from his laboratory tests that the defendant was operating on Olomoro soil or that he got the information through seeing the defendant when he went there or by what he was told G by the plaintiffs who engaged him. The two later sources would not qualify as expert evidence. The first source could only pass the test and qualify as expert evidence only if the witness told the court the scientific analysis in support of his said conclusion. Since he failed to do that, his said conclusion was of no value to the court as expert evidence. H

More serious and devastating damages were done to the value to be attached to his evidence in his answers to questions put to him under cross-examination. He admitted, for example, that although the soil on

the affected and the unaffected areas could sustain in good growth of any tropical crops, yet he failed to give any credible scientific analysis for the differences in the farm crops grown on the portions of the land. He failed in particular to exclude the possibility of the use of fertilizer im-
B puts by the farmers on the unaffected soil as a possible reason for the difference in the crop yields.

The witness also admitted that his area of speciality did not include heat and radiation and that although he collected liquid (i.e. efflu-
C ent) from the soils, he did not subject them to scientific analysis. He also agreed that although heat and radiation could be measured scientifically, he said he did not measure the heat generated by the gas flared for the purpose of determining its effect on the crops or the soil. There are
D as that of an expert.

The other expert called by the plaintiffs, Chief Idoniboye-Obu (P.W.6), did not perform better than that of Dr. Salami. P.W.6 told the court that he was an environmental consultant invited by the plaintiffs to
E investigate the effects of oil pollution on the plaintiffs' land and its environs. Although he told the court in his evidence in chief that he carried out scientific investigation of water in Olomoro, but he admitted under
F cross-examination that he did not do quantitative analysis of water samples because of lack of funds for such investigation. He also admitted that he did not carry out scientific laboratory test of he air and heat radiation before arriving at the conclusions he set out in his report, Exhibit D. even
G though he knew such tests were necessary for determining respectively the chemical contents of the water or other chemicals in the water and the possible effect of the heat and radiation on the plants and vegetation. The witness therefore failed to support his conclusions by scientific analysis which would have qualified them as expert evidence. The third expert (P.W. 5) was the valuer. As his evidence was based on the data supplied
H by P.W.4 his evidence could not stand without that of P.W. 4.

The conclusion therefore is that the evidence given by the expert witnesses did not pass the legal requirement of expert evidence. The result is that the learned trial Judge was right in reject-

ing their evidence. Having rejected the evidence, it means that the plaintiffs failed to prove the most important averment in their claim. The court was therefore right in dismissing their claim.

The point raised in the cross-appeal hinges on the rejection of the evidence of Professor Odu (D.W.4) regarding the roles performed by Professor Esuruoso and Dr. Obigbesan on the ground that the two men were not called as witness. The Court's pronouncement being disputed is where the court held thus:-

"I am therefore in full agreement with the submission of the learned counsel for the plaintiffs that the evidence of D.W. 4 as far as Professor O.F. Esuruoso and Dr. Obigbesan is concerned is hearsay evidence having admitted that he carried out the studies which led to Exhibit G. with them. His evidence alone is not sufficient to determine the infertility of the soil of Olomoro."

The contention of the cross-appellant is that since the two other experts worked in a team led by Professor Odu, it was not necessary that every member of the team should testify in court.

As I have already stated above, evidence of opinion of experts on scientific matters is admissible whenever the court has to determine issues within that field. But an important requirement that must be met before a witness can be qualified as an expert witness is that he must satisfy the court that he is specially skilled on the particular fields in question: See Seismograph Services Limited v. Onokpasa, Supra; Ajami v. Comptroller of Customs 14 WACA 34, and Azu v. The State (1993) 6 NWLR (pt. 299) 303. It is therefore a requirement of the law that the expert witness must give his qualifications and experience before he begins to give his witness must give his qualifications and experience before he begins to give his evidence at all. Reports sent by an expert were rejected in Wambai & Another v. Kano N.A., supra, on the ground that the expert was not called to establish his qualifications and experience.

There is definitely no doubt that where a team of two or more experts in different but related fields of study jointly undertook a research project and jointly produced a report, that report tendered by one of them in court proceedings is admissible: See

Shell Petroleum Development Co. Nigeria Limited v. Farah & others, supra. But this general statement of the law will not be applicable where there is evidence of a clear division of labour among the team of experts particularly whereby a specified field of study was carried out by a particular expert or experts in not very related field of study. In such a situation, it may be necessary that at least an expert from each of the specialised field is called to give evidence in the related filed of specialisation.

The facts disclosed in the instant case by Professor Odu (D.W.4) are that "Professor Esuruoso studied the plant pathology and insect life while Dr. Obigbesan studied the plant physiology and crop production aspect". D.W.4 said he studied the soil aspect, the post impact aspect and the physical measurements life radiation etc. Their conclusion was that "the operation of the defendant company has not affected plant growth and soil fertility in the area." It was not shown that the entire study was not in a related field. It was also not shown that D.W.4 was incapable of answering questions about the contents of the report relating to the area of the report containing the aspect of the studies carried out by the two members of the team who did not testify at the trial. Even where D.W. 4 failed to answer such questions, the effect would not make the contents of that portion of the report hearsay or inadmissible. Rather, such could only affect the weight to be attached to the portion of the report.

A similar point came up for determination recently before the Port-Harcourt Division of this court in **Shell Development Co. Nigeria Limited v. Farah & Others, supra.** Edozie, J.C.A. said thus at page 191 of the report:-

"Furthermore, I take the view that where, as in the case, a team of two or more experts in different but related fields of study jointly undertake a research project and jointly produce a report, that report tendered by one of them in court proceedings is admissible. The fact that the expert tendering the report is not as qualified as the one called as a witness in the area he is being cross-examined can at best go to the question of weight to be attached to the report and not to the admissibility of report."

I entirely agree with the above view expressed by my learned brother, Edozie, J.C.A.

My conclusion therefore is that the learned trial Judge was in error when he held that the evidence of D.W.4 as far as Professor Esuruoso and Dr. Obigbesan was concerned was hearsay and that his evidence alone was not sufficient to determine the infertility of the soil at Olomoro. I hold that D.W.4's evidence was quite admissible and sufficient for the purpose for which it was tendered. The cross-appeal therefore succeeds and it is hereby upheld.

In conclusion and for the reasons set out hereof, I hold that the appeal lacks merit and I accordingly dismiss it. I also hold that the cross-appeal succeeds and I accordingly uphold it. The respondent /cross-appellant is awarded N2,000.00 costs.

NSOFOR JCA

This is an appeal by the Olomoro Isoko Community and a cross-appeal by the defendants from the judgment on the 20th March, 1991 by M. E. Akpiroroh, J., sitting in the Oleh High Court of the Oleh Judicial Division of the then Bendel State of Nigeria, in Suit No. HOC/61/82.

The action in the suit was instituted and commenced, by a writ of summons. It was filed on the 24th of December, 1982. The plaintiffs had sued and had prosecuted the action in a representative capacity, that is to say, "for themselves and on behalf of the people of Olomoro Isoko, Bendel State of Nigeria."

After some amendments to their pleadings, not without the leave of court, the pleadings in the suit were eventually settled at an amended statement of claim as further amended - see pages 31 to 38 of the record of proceedings - and a statement of defence, also, as amended. See pages 24 to 29 of the record of proceedings.

Now, I advert to paragraph 29 of the "Further Amended Statement of Claim"; a statement of claim, of course, supersedes the writ. Paragraph 29 of the "Further Amended Statement of Claim", (hereinafter to be referred to for short, simply, as the "claim"), reads:-

"29. Wherefore the plaintiffs felt obliged to institute this action and claim under the rule in *Rylands v. Fletcher*, in nuisance, as well as in negligence as follows

(1) *"The sum of N358,594,500.00 (three hundred and fifty eight million, five hundred and ninety-four thousand, five hundred niara) representing damages and loss suffered by the plaintiffs as a result of the impoverishment land by the defendant's continuing exploitation of crude oil and natural gas at Olomoro and the operations and/or activities negligently carried on by the defendant on a continuing basis since 1962 at its oil wells, heliport, flow and/or processing stations, oil locations and oil fields at Olomoro occupied by and/or under the control of the defendant being adjacent to the plaintiffs' tract of land at Olomoro, whereby the defendant negligently flared or released and has continued so to flare or release natural gas and/or cause some damage continuously and/or ceaselessly from the defendant's oil installations and oil fields aforesaid to, on and over the plaintiffs' tract of land aforesaid and thereby caused infertility of, and/or injury and damage to the said tract of land at Olomoro within the jurisdiction of this Honourable court."*

(The Italics supplied for emphasis).

I shall pause here for a while for a brief comment for the purpose of completeness to put the point aside. For the purpose of elucidation, I think it ought, firstly, to be recognised that even among the academia, there is no consensus whether or not there be the law of "Tort or Torts", or the Law of "Contract" or "Contracts". And this, in my view, arises from the concept as expressed by Maitland, "the forms of action are dead and buried but they still rule us from their graves." But why this government of the living by the "dead"? However, and whichever side one takes or aligns oneself with, it is of common acceptance that the Law's primary objective (and in litigations in Courts of Law and Equity) is to punish "fault" or "Wrong". By "fault" or "Wrong", I mean "injuria", *id est*, legal wrong. But now section 236 of the Constitution of the Federal Republic of Nigeria 1979, has revolutionized the ancient and antiquated concept and in effect has done away with the concept of "forms of Action"; the principle predominating being, *Ubi jus, ibi remedium*".

It is also desirable to observe that, for example, in a tort of trespass or in nuisance or under the rule of Rylands v. Fletcher there ought to be established "Damnum". Unless there be a "Damnum", there need not be, a "Remedium" ,id est, damages in the sense I am discussing. It is guided by the above principle and armed with it, that I am disposed to B approach the appeal, the evidence as led, admitted in or as accepted by the court below, the findings, if any as found by the learned trial Judge, based on the credible evidence accepted by him and the issues as formulated in the appeal for determination and argued. It appears to me, too, C from paragraph 29 (supra), that the sum claimed as damages is in the nature of "General" not "special" damages. And this, in my view, may have a bearing on the eventual conclusion, I may reach in the appeal.

Now, the following allegations of facts, forming the foundation and basis of the plaintiff's claim, are contained in the following relevant D paragraphs 4, 7, 8, 9, 10, 13, 14, 15, 17, 18 19 and 22 of the Further Amended Statement of Claim. They read:-

"(4) At all material times, the plaintiffs were and are the owners and/or occupiers of the parcel of land referred to and known as the plaintiffs' tract of land; while the defendant was and is the occupier of the oil fields adjoining the plaintiffs' tract of land aforesaid.

(7) The plaintiffs have always been in possession and occupation of the said entire parcel of land without any let or hindrance from anyone until 1962 or thereabouts. In that year or thereabouts, the defendants, without the plaintiffs' consent first sought and/or obtained entered part of the land now containing its oil fields on the strength of an oil mining lease granted to it by the Federal Government of Nigeria F" G

(8) The defendant has since its entry on the land in 1962 extended the area of land occupied and/or controlled by it, and had, from time to time dug crude oil wells waste, oil pits and borrow pits, established heliport and flow and/or processing stations and crude oil locations in its oil fields. H

(9) Similarly, the defendant had since the year 1962 constructed, owned and placed along and/or under various portions of the plaintiffs'

tract of land including the defendant's oil fields, pipelines to collect, keep, pump and carry crude oil and natural gas therefrom to the appropriate oil terminals either for export and/or local use or purposes.

(10) *The plaintiffs aver that the defendants further, the defendant has since 1962 or thereabouts been flaring or releasing continuously and/or ceaselessly natural gas from its oil fields to, on and over the plaintiffs' tract of land adjacent to the defendant's oil fields.*

(13) *The digging of crude oil wells and waste oil pits; the construction of flow and/or processing stations and the flaring or release of natural gas and the collection, processing, keeping, pumping and carriage of the crude oil and/or natural gas in and/or through the pipe lines as adumbrated above constitute a non-natural user of both the land under the defendant's occupation and/or control and the plaintiff's tract of land aforesaid.*

(14) *The plaintiffs contend that the crude oil, the waste oil and natural gas aforesaid were and are dangerous things causing injury, damage and loss by their escape.*

(15) *The plaintiffs who are a rural community have always depended for their livelihood, viability and prosperity on their farming, fishing, hunting and other profitable exploits and/or activities carried on their said tract of land including the waters therein.*

(17) *However, contrary to the information and assurance given by the defendant to the plaintiffs as averred, crude oil, and waste oil from time to time since 1962 or thereabouts, escaped from the defendant's oilfields to the adjoining plaintiffs' tract of land; where there was escape of natural gas as a result of the continuous and/or ceaseless flaring or release of natural gas from the oilfields to, on and over the plaintiffs' tract of land.*

(18) *The crude oil and Waste oil that escaped as aforesaid had flowed and/or seeped intermittently into the porous soils of the plaintiffs' tract, while the natural gas escaping continuously and/or ceaselessly had been generating excessive and/or scorching heat to, on and over the plaintiffs' tract of land.*

(19) *The plaintiff aver that the facts and matters pleaded in*

paragraph 18 above had adversely affected the fertility of the plaintiffs' tract of land which has now been substantially impoverished. Further, the plaintiffs have in recent years, witnessed a deterioration and/or progressive deterioration in the yields of crops grown by them on the said land which include, in the main; yams, cassava and maize. B

(22) The plaintiffs eventually consulted relevant experts on the matter and they will at the trial of this action rely on the reports and evidence of the said experts who inspected the area of land concerned and assessed the extent of damage and loss suffered by the plaintiffs as a result of the defendant's wrongful acts, nuisance and/or negligence alleged herein. In this regard, the experts reports on soil and alleged matters " (The Italics is supplied). C

How, then, did the "Amended Statement of Defence" deal with and answer the principal allegations of or by the "Further Amended Statement of Claim"? It becomes necessary to carry the following relevant paragraphs 2, 3, 8, 9, 10 and 19 of the "Defence". They read:- D

"2. Defendant denies paragraphs 3, 4, 5, 6, of the statement of claim and puts plaintiffs to the strictest proof of the same. It states..... E

3. The defendant denies paragraph 7 of the statement of claim and states that it made its first acquisition under its oil mining lease No. 30 in 1963 after the necessary families owning the affected land and to whom F

8. The defendant denies paragraph 13 of the statement of claim and states the exploitation of mineral resources of a country and in the Country is a natural user of the Country's resources including lands and this is duly regulated by the laws of the Country under which the defendant is permitted to operate. G

9. The defendant states that paragraph 14 of the statement of claim Plaintiffs did not suffer such damage and are not entitled to such compensation. Defendant may found on the Receipts for compensation paid to affected owners of damaged crops or structures. H

10. The defendant does not admit paragraphs 15, 16, 17, 18 and 19 of the Statement of Claim and puts plaintiffs to the strictest proof of the averments therein contained. It further states that its operations in

the area have not in any way affected soil and or vegetation in the area for well over 20 years and no crude oil, waste oil or natural gas of the defendant has ever escaped from its acquired land. It further states that

.....

B *19 The defendant denies that the plaintiffs are entitled as claimed or at all at the hearing; it shall contend that the plaintiffs' claim is an act of gold digging and will urge the court to dismiss the same."*

C From the state of the pleadings of the parties, the issue involved and calling for a determination at the trial was simple. It was singular, too, in my view, concisely stated, it was whether or not the defendant company's activity or its operations on the land of the plaintiffs impoverished the land and on that account affected, adversely, the fertility of the soil or land; and caused a deterioration in the produce or yield of the D plaintiffs' yams, cassava and maize, or crops on the land.

The case came up before M.E. Akpiroroh, J. on the 18th April, 1984 for the trial. A full scale trial took place; the plaintiffs summoning the evidence of a host of six (6) witnesses. The defendant-company E similarly offered evidence, viva voce. It summoned the evidence of other witnesses. After receiving all the available evidence - oral and documentary, legally receivable and legally received - and taking the final oral addresses by the learned counsel engaged in the trial, the learned trial F Judge reserved his "decision" till the 15th March, 1991. See page 160 of the record.

The judgment was not, however, delivered on the 15th March, 1991. It was delivered on the 20th of March, 1991. In a reserved and well considered judgment, the learned trial Judge dismissed the claim of G the plaintiffs in its entirety. So, the plaintiffs lost.

In reaching his conclusion finally, the learned trial Judge had expressed himself, inter alia, at page 185 of the record of proceedings as follows:

H *"I have no doubt that from the above definition that P.W.4, P.W.5 and P.W.6 are experts in their own fields of studies. The conclusions reached by them Exhibits 'B', 'C', and 'D' were seriously challenged under the powerful and devastating search light of cross-examination*

which rendered their evidence as of no assistance to the court as to the cause of low yields of crops on the plaintiffs' . I am therefore unable to rely on their evidence as expert evidence.....

In effect the plaintiffs have failed to prove that they suffered damage and loss of N358,594,500.00 as a result of impoverishment of the land by the defendant's continuous exploitation of crude oil and natural gas negligently carried on by it which escaped onto their land and thereby caused its infertility.....".

The learned trial Judge did not stop there. He went further. He wrote:-

"In the end result the plaintiffs' claims fail and they are accordingly dismissed with costs as assessed at N550.00 to the defendant."

See page 186 of the record of proceedings.

The plaintiffs were not happy with their "loss". Not satisfied, indeed dissatisfied and aggrieved with the judgment, they have, naturally and logically, appealed from the judgment to this court. They filed a "Notice of Appeal" together with "Grounds of Appeal - See pages 186 of the record on the 19th of June, 1991.

The plaintiffs had challenged the judgments on two grounds. The grounds of appeal, hereunder immediately set down, shorn of their "Particulars, are:-

"Grounds of Appeal

1. The learned trial Judge erred in law and on the facts when he held:-

"I am therefore unable to rely on their evidence as experts evidence. The evidence adduced by P.W.2 and P.W.3 is of no help to the court as to the cause of low yield of crops on the plaintiffs' land as a result of the activities of the defendant on it because they are not experts."

2. *The judgment is against the weight of evidence."*

Note - Also appearing, at page 187 of the record of proceedings, is the following expression:-

"Further grounds of appeal will be filed on the receipt of the record of proceedings."

In the course of preparing this judgment, I did not see any such "further grounds of appeal " filed. No None was ever drawn to my attention or shown to me. None, indeed, appeared to have, ever, been filed later.

Herein, the plaintiffs are the appellants in the main appeal. The B respondent herein, was the defendant in the trial court; - (An appellant in the Cross-Appeal).

In obedience to and in compliance with the Court of Appeal Rules, 1981. See Order 6 Rule 2 thereof, the parties had filed and ex- C changed their respective Briefs of Arguments. Therein, each party formulated what issues or an issue for determination.

Not satisfied with certain of the aspects of the judgment, the defendant appealed to this court against the judgment. The "Notice of the Cross-Appeal", together with the "Grounds of Appeal" was deemed D properly filed and served on the "17th of May, 1994."

The Grounds of Appeal in the cross-appeal are hereunder set down. They are:

"Grounds of Appeal

E 1. The learned trial Judge misdirected himself in law when he held:-

"I am therefore in full agreement with the submissions of the learned counsel for the plaintiffs that the evidence of D.W.4 as far as F Prof. O. E. Esuruoso and Dr. Obigbesan is concerned is hearsay evidence having admitted that he carried out the studies which led to Exhibit"B" with them. His evidence alone is not sufficient to determine the infertility of the soil.

G Particulars (omitted by me)

2. The judgment of the learned trial Judge in respect of the evidence of D. W. 4 is against the weight of evidence."

Relief Sought from the Appeal Court:

"To allow the cross-appeal and hold that by the evidence of H D.W.4 it has been established beyond dispute that the defendant's operation did not in any way affect the land and confirmed (sic) and dismissal of the a plaintiff's claim."

Formulated for determination in the Appellant's Brief of Argu-

ment in the main appeal are two issues. They are:-

Questions for Determination

1. Whether there was any valid ground for the lower court to have rejected the testimony of the plaintiffs' expert witnesses.

(ii) Even if (which is not conceded) it was right for the court B below to reject the testimony of the plaintiffs' witnesses, should that lead to the dismissed of the plaintiffs' (sic) action?

On their part, the respondent/cross-appellant had formulated three (3) issues in the respondent brief of argument for determination. They C are:-

"(i) *Whether there was valid ground for the court below to have rejected the testimony of P.W.4, P.W.5 and P.W.6 called as experts*

(ii) *Whether the court below was right*

(a) *to have rejected the testimony of all the witnesses called by D the plaintiffs, and*

(b) *to have dismissed plaintiffs' action.*

(iii) *Was the learned trial Judge right to reject the evidence of D.W.4 the expert witness called by the defendant."* E

The appeal came up before us on the 15th January, 1996 for the hearing. At the hearing, Mr. T.E. Williams learned counsel for the appellant/cross-respondent had adopted and relied on both the "*appellants' Brief and the 'Reply to Cross Appeal'*". Mr. T.J. Onomigbo Okpoko, F (S.A.N.) similarly adopted and relied on the "*Respondent's Brief*" filed on the 17th May, 1994.

In the course of the hearing each counsel had made rather elaborate submissions in the further amplification of his Brief of Argument. For the appellants-cross-respondents, Mr. T.E. Williams had submitted, G inter alia, that the testimony by Chief Ekpe Okpoker (P.W.2) at page 63 lines 27 to 33 of the record of proceedings and at page 64 lines 11 to 15 of the record of proceedings was corroborative of the evidence proffered Ume Otobo called as the P.W.3 at page 68 lines 23 to 28 of the H record of proceedings.

Mr. Williams, then, referred to Exhibit 'B', the report of or by Dr. Anthony Unusa Salami. He testified as the P.W.4. Counsel drew attention

to Dr. Salami's conclusion in page 74 lines 13 to 20 of the record of proceedings.

It was the further submissions by Mr. T. E. Williams that the evidence of the respondent and its witnesses, qua defendant at the trial
B was supportive of the case of the appellants, qua plaintiffs in the court below because, according to Mr. E. T. Williams,

- (I) the respondent had admitted and knew of the oil spillage:
- (ii) the oil spillage did affect the appellants' land adversely:
- (iii) the soil of the appellants' land would take a period of
C between six(6) Months and five (5) years "*to get normal.*"

Learned Counsel, further, made reference to the evidence by the D.W.3 (Donald Otoakhia) at page 116 lines 15 to 16 of the record of proceedings, page 123 lines 30 et sequentes and lastly to the testimony at
D page 135(b) lines 12 to 15 of the record by Professor Clifford Temple Ididi Odu, called as the D.W.4.

In conclusion, Mr. Williams had submitted that there was evidence, adequate and sufficient before the trial court, on which it could
E have for and granted to the appellants the relief sought. Mr. Williams, therefore, urged us to set aside the judgment and, eo ipso, allow the appeal accordingly.

On the cross-appeal, learned counsel for the appellants /cross-
F respondents had urged us to dismiss the cross-appeal.

Mr. Okpoko, S.A.N. replicando, was by no means less elaborate and intensive. The learned Senior Advocate (S.A.N.) had predicated his oral submissions on or by a reference to the two grounds of appeal (supra) filed by the appellants in the main appeal. He, therefore, submitted
G that the pieces of evidence to which Mr. Williams had referred, and the submissions and the arguments by the counsel were "*non sequitur*" and "*eo ipso*" irrelevant. Why? Because as Mr. Okpoko S.A.N. argued, those submissions by Mr. Williams were all outside of the issues as formulated for determination by the appellants. Similarly they did not arise
H from the argument canvassed or raised in the appellants' Brief of Argument.

The Senior Counsel had drawn our attention to the pleadings, id

est, paragraphs 9 to 12 of the "*Defence*" as amended; and also to paragraph 29 of the claim as further amended. As the Senior Counsel submitted, the only evidence that would establish and prove the basis of the appellants' claim i.e. impoverishment of the land of the appellants due to the alleged operations by the respondent must be some evidence by an expert(s). He then referred to the finding by the court below at page 181 lines 20 to 26 of the record. No appeal, in challenge to finding by the court below, was filed or made. That finding did set the parameter on which the case, at the trial, was or ought to be determined and decided. The finding, not having been challenged or appealed against, the evidence by the P.W.2 referred to by Mr. Williams had no relevance therefore, the Senior Counsel submitted.

Okpoko, S.A.N. then referred to the testimony of or by the witnesses for the appellants, that is to say, the expert-witnesses, three(3) of them, respectively. He drew attention to "paragraph 2.02", page 3 of the respondent's Brief of Argument. Having referred to the evidence by the P.W.4 (Dr. Salami) at page 74 of the record, the learned S.A.N. posed the question. "*Can the P.W.4 express or claim an opinion in an area he could not lay any claim to an expertise?*" The conclusion reached by Dr. Salami (P.W.4) based on "*heat*" and "*radiation*", could not, therefore, stand, Mr. Okpoko submitted.

Mr. Okpoko, S.A.N. further made some submissions on the "*Issue of effluents*", as per the evidence at page 76 lines 30 to 35 by Dr. Salami (P.W.4). It was the submission by the learned Senior Counsel that the opinion or the conclusion expressed by Dr. Salami (P.W.4) on the "*effluents question*" was worse the counsel argued, the P.W.4 (Dr. Salami) was incompetent to proffer an opinion on a matter he (P.W.4) did never analyse.

The Senior Counsel drew our attention to the finding by the trial court at page 182 lines 28 to 34 and at page 183 lines 1 to 6 of the proceedings. These findings by the court below, as the learned Senior Counsel submitted, were not faulted by the appellants in their Brief of Argument.

It was further pressed on us that the testimony by Dr. Salami

(P.W.4) at page 76 of the record knocked the bottom off the conclusion, expressed by him (P.W.4), on the impoverishment of the soil of the appellants' land. Counsel referred further the evidence by P.W.4 at page 77 lines 17 to 27 of the record. He submitted that the opinion of or by Mr. Salami (P.W.4) that the operation by the respondent affected the soil or the yield of crops by the appellants lacked any basis or foundation.

Concluding, the Senior Counsel urged us to dismiss the appeal as being totally and entirely devoid of any merits. It was frivolous, Mr. Okpoko, S.A.N submitted

The senior counsel, then dealt with the cross-appeal. He referred to the testimony by Professor Odu (D.W.4) and to Exhibit C.

It was the Counsel's submission that the learned trial Judge had no basis for rejecting the opinion of or by the D.W.4. The counsel prayed in aid of the case of Shell Petroleum Development Co. of Nigeria v. Farah (1995) 3 NWLR (pt.382) 148 at pages 183 and 191. It was not necessary for the those two other members of the team with or of the D.W.4 to testify, each, "viva voce" with reference to Exhibit G.

Finally, counsel urged court to allowed the cross-appeal and to hold Exhibit F, admissible in evidence as evidence.

Mr. T.E. Williams, in the exercise of his right to the last word, but purely on issues or an issue of law, had nothing more to urge.

I have scrutinised the two sets of the issues as formulated in the Briefs of Arguments respectively for determination. The "Issue (iii)" as formulated by the respondent/cross-appellant in the respondent's brief apart, the issues as formulated in the briefs of arguments respectively are, in my respectful opinion, conciliatorily inclusive and on that account, they can conveniently, be taken together. That I intend to do, hic et nunc. The arguments on the issue in the cross-appeal, I will deal with subsequently.

It was the contention of the learned counsel for the appellants, in the appellant's Brief, that the ground, solely, on which the learned trial Judge rejected the testimony of or by the P.W.4 (Dr. Anthony Unusa Salami), Chief Obkrikigho Miller Uloho (P.W.5), and the P.W.6 (Chief Birinengi Idoniboye - Obusoun) was the, "powerful and devastating cross-

examination" of the witness. Learned counsel, therefore, submitted that the evidence by or of an expert witness can only be effectively discredited by placing before the court an alternative version of evidence and, thereafter, leaving it to the court to determine by itself which of the two conflicting or opposing versions of the evidence, it accepts or believe. It was the further contention of the counsel that the trial court failed to adopt and follow that approach of selecting which version of the evidence was acceptable to it and accepted by it. Counsel, however, did concede in the "Brief" that the party, putting forward an alternative version of the evidence, does have the privilege to or right of cross-examination to further its side of contention or case.

The learned counsel for the appellants at page 2 of the appellant's brief, "paragraph 3.3" thereof (I seek leave to borrow the language of the brief) contended that.

"It is to be remembered that in this case it appears to be common ground and indeed, the opinion of the court below, that the complaint of the plaintiffs about low yields from their land was established."

(The Italics is mine for emphasis).

And I shall deal with this aspect of the contention later in the judgment. The counsel, consequently submitted, therefore, that it rested on the respondent, qua defendant at the trial, to "show that its operations in the area have not in any way affected vegetation in the area for well over 20 years and no crude oil, waste oil or natural gas of the defendant has ever escaped from its acquired land unto Olomoro Community land." Learned Counsel called attention and referred to "paragraph 10 of the Statement of Defence at page 19 of the record of appeal", for support and in support of his submission. The burden of proof lay on the respondent, qua defendant, at the trial it was submitted. See page 3 of the appellants' brief, paragraph 3.3" thereof. (The Italics is supplied).

In conclusion, Mr Williams submitted, that the trial court was wrong in rejecting the evidence or opinion evidence of the experts summoned by the appellants, qua plaintiffs, at the trial. The court below, in the opinion of the learned counsel for the appellant, ought not therefore to have dismissed the appellants' claim, based on the evidence placed

(before) it.

I shall pause here for the sake of convenience, perhaps, it is too early, to say that "paragraph 10 of the Statement of Defence at page 19 of the record of appeal" referred to, in page 3 of the appellants' brief, formed
B part of the pleadings, id est, "Statement of Defence" Dated at Warri, this 21st day of July, 1993."

Note (ii): The respondent, qua defendant, in the court below, by way of an application by way of a motion on notice to the appellants qua plain-
C tiffs, in the court below, prayed court for leave to amend the statement of defence. Leave was granted. Accordingly, the respondent did file an "Amended Statement of Defence." It is dated the 7th July, 1995. See
D pages 22 to 29 of the record of appeal. Surely, there exists a distinction, clearly, between:- (i) a "Statement of Defence" and an "Amended State-
D ment of Defence" , just as there is difference between a "Statement of Claim" and an "Amended Statement of Claim" or/and "Further Amended Statement", either of a claim or a defence. The case was fought and contested on the issue as joined on the pleadings as finally settled. See
E Howell v. Dering (1915) 1 K.B 54. An "Amended Statement of Defence" having been filed, the "Statement of Defence", to which the counsel referred, became non-existent for the purposes of the trial. I have under-
F taken the above exercise only to enable me emphasise that counsel ought to mind their language and choose carefully the terms they use. Words are the tools of work by the Solicitor or Barrister.

Note (iii): But was there any such,

"Common ground that the complaint of the plaintiffs about low yields from their land was established."?

G Counsel did not make any references in the appellants "Brief to any pages of the judgment or to any paragraphs of the pleadings for the ease of reference by the court. Such references in the briefs, in my view, tend to lighten the task of the Court of Appeal in the course of preparing its
H judgment. I shall, however, have occasion to say more on this "submis- sion", infra. So, I leave it here, for now.

On their part, the learned counsel for the respondent, in the respondent's brief, had referred to and drawn attention to the respective

cases of the parties respectively on their pleadings respectively and particularly to paragraphs 19 and 29 of the " Further Amended Statement of Claim." As the learned counsel contended in the respondent's brief, it was the primary onus on the appellants, qua plaintiffs at the trial to prove, by credible evidence, that the respondent's oil operation in the area impoverished the appellants' land and, eo ipso, affected adversely the crop-yield. And the question whether the activity of the respondent be the "causa causans" the poor crop-yield is a scientific one, the counsel contended. According to the learned Senior Counsel, both parties to the contest at the trial appreciated the question and hence each party at the trial summoned the evidence, -opinion evidence, of some experts in the area of their scientific expertise. B C

Counsel had referred to the testimony by Dr. Salami (P.W. 4) and his conclusions based on his report (Exhibit B.) It was the further contention by the Senior Counsel in the respondent's brief that Dr. Salami's evidence and report (Exhibit B) were riddled with or by grave contradictions and inconsistencies. D

The Senior Counsel, then, dealt with the evidence, respectively, of or by the P.W. 5 and the P.W.6 respectively. It was the submission by the counsel that the testimony by those experts, (the P.W 4, P.W.5 and P.W. 6) was properly and rightly rejected by the learned trial Judge. E

It was part of the argument by the Senior Counsel in page 6 of the respondent's brief that the contention by the counsel for the appellants that the testimony by Dr. Salami (P.W.4) could not be discredited was quite "erroneous." He, further, argued that an expert witness is no more than a witness in a given proceedings. His opinion evidence in the area of his speciality or expertise is an admissible hearsay evidence. It is receivable in evidence as evidence by way only of an exception to the general exclusionary rule to Hearsay Evidence. And it is always open to the Judge, sitting alone or to the Jury, in a Jury trial, to ascribe to the expert witness's evidence its appropriate and deserving probative value. H The Judge or Jury, therefore, may, for good cause, reject the evidence of or by the expert. Counsel prayed in aid of Davis v. Edinburg Magistrates (1953) S.C. 34, per the Lord President Cooper, P. Cited and re-

ferred to us also were:-

(i) "*Evidence*" by Rupert Cross at page 365

(ii) "*Evidence*" by Phipson 12th Edition Article 1226 at page 496 and

B (iii) *Shell Petroleum Development of Nigeria Ltd. v. Otoko* (1990) 6 NWLR (Pt. 159) 693 at page 693.

(iv) *Bowden v. Bowden*, 62 S.J. 105 cited at page 498, Article 1227 by Phipson on "*Evidence*." (12th Edition)

C Concluding, counsel, on this point, submitted at page 7 of the respondent's brief, that the learned trial Judge had a valid legal justification and basis to reject and for rejecting the evidence of or by each of the witnesses for the appellants (i.e. the P.W. 4, the P.W. 5 and the P.W.6) and in dismissing the appellants' case wholly and entirely.

D Continuing in page 8 of the respondent's brief, "paragraph 2.04" thereof, the Senior Counsel had refuted as "unfounded" the contention by the appellants in "paragraph 3.3" at page 2 of the appellants' brief that there was, "common ground"

E He denied that the learned trial judge ever took a view that a "ground was "common" between the parties at the trial.

F Counsel referred to the pleadings (i.e. paragraphs 18,19 and 29 of the "Further Amended Statement of Claim") and to the testimony, respectively, of the P.Ws 4,5 and 6 to Exhibits "B", "C" and "D" respectively. Attention was drawn to the Defence" and the case of Lewis & Peat (NRI) Ltd. v. Akhimien (1976) 7 S.C. 157.

G Counsel then submitted that the conclusions reached by the witnesses, id est, P.W.4, P.W.5 and P.W.6, in their respective reports, Exhibits "B", "C" and "D", respectively were lacerated and effectively discredited in the process of cross-examination.

H Finally, the Senior Counsel submitted that the respondent, qua defendant at the trial, assumed no "onus" or burden in or by its paragraph 10 of the Amended Statement of Defence. The appellants having failed to prove their case - see Abiodun v. Chief Kogun Ogunyomi Adehin (1962) 2 SCNLR 305; (1962) 1, All N.L.R. (Pt.4) page 550, the learned trial Judge rightly dismissed it. He therefore, urged us to dismiss the appeal,

(i.e. the main appeal). Now, before I go on to express my opinion on the issue involved, agitated and canvassed in the main appeal, I shall pause here to dispose of a point as I promised, ut supra, I would, for the purposes or elucidation and clarity to put it aside. The point is in relation to the "contention" by the appellants counsel in "paragraph 3.3", at page 3 of the appellants brief. B

I have, myself, for completeness, looked closely at "paragraph 10 of the Statement of Defence at page 19 of the record of appeal" referred to, by the appellants' counsel. I have, also, looked at paragraph 10 of the "Amended Statement of Defence" on which the respondent, qua defendant at the trial, joined issues with the appellant, qua plaintiffs at the trial. Indeed, I did carry paragraph 10 of the Amended Statement of Defence (supra). I have compared the two paragraphs together. They are in identic terms textually. C D

Now, (at the risk of a repetition but for the purpose of clarity) paragraph 10 of the amended statement of defence commenced as follows:-

"The defendants does not admit paragraphs 15,16,17, 18 and 19 of the statement of claim and puts plaintiffs to the strictest proof of the averments therein contained. Further states its operations on the area have not in any way affected soil and/or vegetation in the area for well over 20 years and no crude oil, waste oil or natural gas of the defendant has ever escaped from its acquired land unto Olomoro Community land." E F

I fail to read into paragraph 10 (supra) any "admission" or any averment capable of being christened, as the counsel for the appellants appeared to me to do, "common ground that the complaint of the plaintiffs about low yields from their land was established." G

Paragraph 10 of the "Defence" (supra) was a good and an adequate traverse of the very complaint of or by the appellants qua plaintiffs at the trial. Besides, speaking for myself, to constitute a traverse it is not even necessary that every paragraph of a statement of claim should be specifically denied. That, of course may be done. Jolly well and good: But what is essential is that the case put forward by a defendant H

conflicts in material particulars with that put forward by a plaintiff and thus puts the different material averments in issue: *Ojo Ajao & Ors. v. Opoola Alao* (1986) 12 S.C. 193; (1986) 5 NWLR (Pt. 45) 802 *Howell v. Dering* (supra).

B Now, without intending any disrespect, indeed respectfully, I am disposed to say straight away that the "contention" by the appellants' counsel in paragraph 3.3." of the appellants "brief was, "ab origine", imagined and baseless. I am, therefore, in agreement, fully, with the learned
C submission by the S.A.N. in "paragraph 2.04" of the respondent's brief that the " contention" was totally most "unfounded." Yes, indeed.

I had, earlier in the judgement, set down, perhaps imperfectly, what, in my humble opinion, based on the state of the pleadings, was the singular live issue before the court of trial. Shortly put, it was an issue of
D causation and consequential damage or liability. And the law, as I comprehend it, is that he who asserts ought to prove his assertion and this by credible evidence. Here, the principle as stated by Webber, C.J. Sierra-Leone and concurred in by Kingdon, C.J. Nigeria and Butter-Lloyd, J; in
E the celebrated case of *Kodilinye v. Mbanefo Odu* (1935) 2 WACA 336 at page 337, although it be a land case, is of a general application, now and for all times. The claimant ought to prove his case relying on the strength of his case and on the weakness of the defendant's case.

F Now, what was the nature of the evidence by the appellant, qua plaintiff, placed before the trial court in proof of the impoverishment alleged, of the soil or the land of the appellants, due to the activity of the respondents, (see paragraphs 18, 19 of the further amended statement of
G claim), "causa causans" the alleged damage the appellants suffered, id est, a deterioration in their crop yield?

I shall pause here for a while to remind and advise myself of the principle to guide me in approaching the evidence as led to record my conclusion on the issue involved, agitated and canvassed in the appeal
H before us. The courts have been accustomed to act on opinion evidence of experts from the earliest times, as long ago as 1553.

"If matters arise in law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it

concerns. This is a commendable thing in our law for thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation."

See Sauders, J. in Buckley v. Rice-Thomas (1554)1, Plowd 118 at page 124. And the extent to which the opinions or conclusions of skilled B persons are receivable, by way of proof in point of fact, has not been seriously in doubt from the time when, in 1782 in Folkes v. Chadd (1782) 6 E.R. 598, 3 Doug 157. Per Lord Mansfield, "the opinion of scientific men upon proven facts may be given by men of science within their own C science.

Lord Russel of Killowen, C. J. explained the rule in the case of R. v. Silverlock (1894) 2 QB 766, 771. The witness must have made a special study of the subject or acquired a special experience therein. "The question is, Lord Russell said, "is he peritus; is he skilled; has he an D adequate knowledge"?

And, again, I remind myself of the role of an appellant court, which this court is. It does not try cases. Trial courts, as the name suggests, do that. Appellate courts do not. They do not believe or disbe- E lieve witnesses. No. they do not make finding of facts. Their main duty is to oversee the trial courts and to ensure that they have used the right procedures and applied the right or proper law to the facts, either as found by them or as admitted by the parties. With regard to the issues of F credibility and confidence to be reposed in the testimony of witnesses, an appellate court may take the view that, not having seen or heard the witness, it cannot, on printed evidence or record, usurp the essential function of the trial court. It is, however, otherwise if the sole question G is the inference or the deduction to be drawn from agreed or uncontested facts - there an appellate court is in as good, a position as, or even better than, the trial court. See Ebba v. Chief Warri Ogodo (1984) 1 SCNLR 372 at 379; (1984) 4 S.C. 84, per Eso, J.S.C.; at page 98 to 99. See also Benmax v. Austin Motors (1955) 1 All E.R. 326 at page 327. H

Guided by and armed with the principle above discussed, I approach, firstly, for the sake of convenience and tidyness, the evidence by Chief Ekpe Okpokre (P.W.2) at pages 63 to 67 of the record of proceed-

ings. He is a farmer. As he admitted, "I am not a successful farmer now because I am old." He put his age at "over one hundred and twenty years."

Part of the evidence of the P.W.2 at page 63 lines 26 to 33 of the B record read:-

"The defendant came to exploit oil on the land about twenty-one or twenty-two years ago. The company dug crude oil wells, burrow pits make roads on the land. The company also lay pipes on the land and burn gas on it. Since the operations of the company on the land our farm products have become very poor. Our people including myself plant yams, cassava, cocoa-yams, maize, beans and other economic crops on the land." (The Italics is supplied)

And at page 64 lines 11 to 14 of the record or proceedings, Chief Okpokre D (P.W.2) further testified in-chief, thus:-

"We know that the land is no more fertile because our fore fathers used to harvest big tubers of Yams and cassava before the activities of the company on the land. We cannot now produce food to feed ourselves."

Concluding he stated at page 64 lines 28 to 30 of the record as follows:-

"We are asking the defendant to pay us money as compensation for all the havoc done to our land as a result of the company's activities on our land."

The P.W.2 was, however, cross-examined for the respondent.

The evidence by Mr. Ume Otobo, (P.W.3) at page 68 was in line with the testimony of the P.W.2 (supra). Part of his evidence at page 68 lines 19 to 28 of the record read:-

"We grow yams, cassava, plantains, maize, pepper and garden eggs The yield from the crops we harvested from the land is poor. When I was young I observed that my father's yams on the land were very big so also cassava. We used to carry the yams on our shoulders. Nowadays, the cassava plants are very small and the yield is poor. The yield from maize was very big in those days but nowadays the yield is very poor."

Of himself, the P.W.3 said:-

"I am a trader. I do a little bit of farming"

See page 68 line 12 of the record.

Again, this witness was not spared a cross-examination by the cross-examining counsel.

From the evidence of the P.W.2 and the P.W.3, ut supra, their B
yams or maize or crop-yields were very big" before but are "nowadays
very poor". But all that is a mere matter of visual or ocular inspection
and comparism. And I did, on purpose, italicize above, parts of the
evidence by the P.W.2. Now, the question is : Is the conclusion that (I) C

*"Since the operations of the company (respondent) on the land
our farm products have become have poor;"*

*or (ii) "the claim for a compensation for the havoc done to our
land as a result of the company's (respondent's) activities on our land,"* D

Not really taking for or as proved, what is required to be proved? D
Is the evidence by either the P.W.2. or the P.W.3 or both of them a proof
of the "Onus Probandum"? And none of them was possessed of any
science knowledge of the soil in which the crops are planted to grow.
Are they skilled in the science of the soil? And is their evidence not E
merely opinion native - an expression of an opinion derivative from the
process of their mere comparison. Put rather nakedly are the witnesses
(P.W.2, P.W.3) "peritus", or is either of them, "peritus"? See section 57 of
the Evidence Act Cap. 112 Laws of the Federation, 1990. F

Now, in the Law of Evidence "admissibility" "weight" and "poor" F
are, each, in a separate department. The learned trial Judge, in this case
giving rise to the appeal before us, was fully aware of this as it is evident
at page 161 of the record of proceedings lines 20 to 24 of the record. He G
wrote as follows:-

*"There is no doubt that the contention of each party is of a
technical nature and therefore such evidence as could support it must
necessarily be that of people specially qualified in the particular field of
science which in this case comprised of the knowledge of soil and valu- H
ation.*

Having said this, and in my view, rightly said, how did he then,
treat or handle the testimony of the P.W.2 and P.W.3? What probative

value, if any, did the trial Judge accord to their evidence? He expressed himself, at page 185 lines 16 to 19 of the record of proceedings, in these terms:-

"The evidence adduced by P.W.2 and P.W.3 is of no help to the court as to the low yields of crops on the plaintiffs' land as a result of the activities of the defendant on it because they are not experts."

I am fully in agreement with the above conclusion, rightly reached - in my judgment, by the learned trial Judge. Therefore, if all the evidence the appellants called at the trial rested here or were limited to the testimony of or by the P.W.3, then conclusively, "cadii quaestio"; the matter ends there. The case has not been proved by credible evidence and eo ipso, ought to be dismissed.

But there were other witnesses, summoned to prove that which is required to be proved by the appellants, qua plaintiffs at the trial. They summoned the evidence of three experts, id est, P.W.4, P.W.5 and P.W.6. Now, what did each say? And how did the learned Judge handle and treat any such evidence as led?

Before I embark on the exercise, I shall pause here, again, for a while to remind myself of and advise myself on what principle, to guide me in reaching my conclusions. I had, above, referred to section 57 of the Evidence Act, Cap. 112 Laws of the Federation, 1990. It only remains for me just to say that an expert witness is no more and no less than a witness in the case he is summoned to give an opinion-evidence on a fact in issue, within the area of his expertise or speciality.

The opinion-evidence by an expert is not, by any means, conclusive of the point on which he testifies because only and only because the opinion is that of an expert. No. All I am trying to say is this. A Judge, in a non-Jury trial, or the Jury, in a Jury trial, does not just, surrender his independent judgment on an issue to the expert witness because he is such an expert. If there be good causes or a good cause, the Judge or the Jury may, well, legitimately reject the opinion evidence of an expert. And I am, respectfully, in agreement with Lord Cooper's dictum in Davie v. Edinburgh Magistrates (supra) when he said talking about expert-witnesses:-

"Their duty is to furnish the Judge or jury with necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or Jury to form their independent judgment by the application of these criteria to the facts proved in evidence."

(The Italics is mine)

B

The point being made here is under-scored, (see Phipson Evidence, 10th edition, page 481, Article 1286: sub-nomen:- ("Value of Expert Evidence", in or by the case of Bowden v. Bowden 62 S.J. 105, thereat referred to:-

"The court has accepted the evidence of a wife as to the paternity of a ten month child inspite of the unanimous opinion of several doctors, (experts)."

C

(The Italics and brackets with their contents are mine)

Lastly, on my reminder, I find the dicta, per Lord Herschell, L.C.,in Browne v. Dunn (1894) 6 R. 67, apt. They are instructive. They repay my respectful quotation. Said the Lord Chancellor:-

D

"It seems to me absolutely essential to the proper conduct of a case where it is intended to suggest that a witness (even an expert-witness) is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit." (The brackets and their contents are mine).

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The message conveyed, rightly to my mind, is that an effective cross-examination may succeed to render useless or worthless and of no probative value, the evidence of a witness or an expert. With the above approach, as a background, now, to the evidence-in-chief, by Dr. Salami, (P.W.4) . His evidence is contained in pages 73 to 78 of the record of proceedings. That he is an expert was not disputed. He holds a Ph.D degree in Soil Science, a Bachelor Degree in Chemistry and Botany: a Masters degree in Agronomy and a Diploma in Agriculture. He had held

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several positions in several state Governments of Nigeria Service.

Part of his testimony, in lines 31 to 34 of page 73 of the record, was:-

"I know the plaintiffs. The plaintiffs approached me to take a
B look and analyse the soil in Olomoro in relation to exploration and
exploitation by the defendant on the land. I did the analysis of their
soil..... I completed the comparative study after my analy-
sis of the soil and wrote a report."

C The report was received in evidence as Exhibit 'B'. Based on
this report, (Exhibit B,) the witness had expressed at the page 74 lines 17
to 30 of the record, the following opinion or conclusion:-

"The only conclusion which I drew was that the exploitative and
explorative activities and flaring of gas and effluents (i.e. the flowing of
D oil) were responsible for the damage of Olomoro soil. I also observed
that the yields of crops in the area were reduced. I found that it was the
defendant that was carrying all the activities, I enumerated above in
Olomoro Soil. I put the loss of crops between 25% and 60% from my
E findings. As for the cropping pattern I found that the people grow maize,
yams and cassava in the area and the yields had diminished. For cas-
sava I observed that the yields were as low as eight tons per hectare as
against 24 tons for cassava, two (2) tons per hectare for maize as against
F seven tons and five tons per hectare for yams as against twelve tons per
hectare."

But Dr. Salami (P.W.4) was not spared the searchlight of a cross-exami-
nation. He was vigorously and intensively cross-examined. He con-
firmed, under the cross-examination by Mr. Okpoko, S.A.N. that the
G studies he (P.W.4) carried out were as set out in the report, (Exhibit B).
Now, answering a question still, under cross-examination, Dr. Salami, at
page 76 lines 16 to 23 of the record of proceedings said, "the analysis I
referred to in Exhibit "B" is soil analysis. The interpretation I referred to
H in Exhibit B refers to Annexure I. Annexure I does not contain effluents
analysis. Annexure I does not contain analysis of heat and radiation.
Exhibit B contains data of effluents. Data of effluents are contained in
Annexure I of Exhibit "B". The soil on the affected and the unaffected

area as show in Annexure I can sustain the growth of any tropical crops."

Pressed further, in cross-examination, Dr. Salami (P.W.4) testified further as follows, in page 76 lines 30 to 35:-

"Annexure I does not show petroleum content and gas content per se on the soil. I collect liquid, i.e. (effluents). I cannot tell the court the chemical contents of what I described as effluents because I did not subject it to scientific analysis."

Still under pressure, at page 77 lines 3 to 9 of the record; Dr. Salami (P.W.4) had this to add:-

"I did not measure the heat scientifically. Heat and radiation can be measured scientifically. My areas of speciality does not include heat and radiation. I found fire scarching (sic) the crops in the area. I did not say in Exhibit B that I saw fire scorching the crops in the area."

And in lines 15 to 18 Ibidem, Dr. had this to say:-

"Columns 3 to 11 on Annexure I is what I referred to as chemical analysis while 12 to 14 constitutes (sic) mechanical analysis which is part of physical analysis. Annexure I does not show my full physical analyse (sic)".

At page 78 lines 1 to 2 the P.W.4, in cross-examination, also admitted. "There is no official Government Scientific Report on crops yield in Olomoro".

What value would a Judge or Jury accord to the opinion-evidence of such an expert, as Dr. Salami is? Or what value would a Judge or any reasonable Jury attach the Report by Dr. Salami, id est, Exhibit B ? Dr. Salami had himself admitted, openly in court, that his report, (Exhibit B), "do not show my full physical analysis". Why?, one may ask. He confessed Annexure I (Exhibit B) does not show petroleum content and gas content per se, "on the soil" of the plaintiffs. And although, Dr. Salami, "collected liquid i.e. (effluents) from the soil", yet, he failed to and, "did not subject it to scientific analysis." And, yet, still, he confessed to the trial court, openly:-

"I cannot tell the court the chemical contents of what I described as effluents because I did not subject it to scientific analysis. "

Was all that what he was employed as an expert to investigate

for his employers (the plaintiffs)?

Now, belief or disbelief, or the acceptance or rejection of evidence is no magic wand which a trial court waves at will. These represent a court's reaction towards facts, their possibilities and probabilities, based on facts. So, when a story looks improbable, a reasonable man rejects it. He disbelieves it. Because it does not induce belief. And as Aristotle said many years ago, "probability has never been detected bearing a false testimony" . When a story looks probable, it induces belief. Reasonable men believe it as true, probability approximates to truth which is eternal. But how, did the trial Judge treat or handle the evidence by the expert Dr. Salami (P.W.4) and his report (Exhibit B) bearing in mind, the issue, what is required to be proved by the appellants, qua plaintiffs at the trial? Writing at page 182 lines 23 to 28 of the record the learned trial Judge held as follows:-

"In so far as P.W.4 admitted that he did not carry out analysis of heat and radiation, he cannot therefore say that the area was rendered unproductive due to heat generated by flaring of gas. This also applies with equal force to effluents having admitted that he did not subject it to scientific analysis and that Annexure I did not contain effluents."

Continuing, the learned trial Judge, further, wrote in lines 29 to 34 of page 182:-

"At page I of Exhibit B, P.W.4 said that from the results of the chemical and physical analysis and observations made it would appear that productivity of the area had been seriously affected to the extent that losses of crops of up to 100 per cent are evident. This contradicts his evidence under cross-examination in which he admitted that Annexure I did not show full physical analysis and that chemical analysis in column 3 to 11 in Exhibit B did not show significant difference in the affected area and non affected areas. Besides, there is no basis on which the percentage arrived at on Exhibit B was worked out by P.W.4 having admitted that he did not do any sample harvesting in the area. He also admitted that there was no approved Government Report on crops yields in Olomoro."

From the above findings the only conclusion I come to readily is

that the trial Judge found the evidence by the P.W.4 (Dr. Salami) worse than useless, to prove what was required to be proved by the appellants to succeed in their claim. Of course, the Judge might not have said so politely, in so many words. He had not accepted or believed the evidence of the P.W.4. He rejected it and Exhibit B, a fortiori. The P.W.4 B was discredited successfully, in or by the process of a powerful and lacerating cross-examination.

Now, to the evidence by Chief Miller Obrikogho Uloho (P.W.5): Did it advance the case of the appellants, qua plaintiffs? The P.W.5 is an expert a fellow of the Royal Institute of Chartered Surveyors of Great Britain, Estate Surveyor and Valuer, a fellow of Nigerian Institute of Surveyors and Valuers. C

The P.W.5 prepared Exhibit C, (the valuation report of damage to the appellants' land in Olomoro). He testified at page 82 lines 23 to 24 D of the record:-

"Exhibit "C" is based on the losses established by Exhibit "B" (i.e. Report by Dr. Salami). Answering a question cross-examination the P.W.5 stated: "I was not commissioned to find out whether the defendant's operation has affected production on the plaintiffs' land" See page 82 lines 31 to 34 of the record. When pressed, further, the P.W.5 replied (see page 83 lines 3 to 6 of the record :- E

"If Exhibit B is taken away, I cannot say that the defendant's operations affected productivity on the plaintiffs' land. I did not carry out any physical measurement of the land." F

How did the learned trial Judge treat the evidence of this expert. (P.W.5)? About him and his evidence the learned trial Judge expressed himself in the following terms:- G

"Since he relied on Exhibit B in arriving at his conclusion on (sic) Exhibit "C" that the defendant's operation affected productivity on plaintiffs land. It is therefore clear that he has not offered any expert evidence as to the productivity of Olomoro soil let alone the area covered by the defendant's operations on the plaintiffs' land to enable him arrive at the sum of N282,333,320.00 due to the plaintiffs as compensation in Exhibit "C". H

The above conclusion, rightly reached by the trial Judge, is an absolute rejection of the evidence by the Expert, (P.W.5) to prove or in proof of the cause of action by the plaintiffs - against the respondent, qua defendant at the trial.

B The P.W.6 (Chief Birinengi Idoniboye - Obu) was a Senior Lecturer in College of Science and Technology, Port Harcourt. He is an environmental Consultant, an expert. Part of his testimony at page 87 lines 9 to 20 of the record read:-

C *"I know the plaintiffs..... They invited my consultancy in September, 1984 to investigate oil pollution in Olomoro oil fields as it affected the community land and its environs. We visited the place several times and made our report in December, 1985..... Three of us took part in writing the report. (Exhibit D).*

D The P.W.6 was not spared the rigors of a cross-examination. Under cross-examination the P.W.6 stated, inter alia, at page 59 lines 34 to 35 of the record: "we did not find out whether the soil was porous because this was done by agricultural expert and practising farmers."

E Continuing at page 93 of the record of proceedings the expert, P.W.6 (Chief Birinengi Idoniboye Obu) had admitted that "the scientific analysis of water in Olomoro is shown at pages 33, 35, 37 and 38 (of Exhibit D) and " the photographs appearing at the above pages are scientific data. And yet the self same expert witness (P.W 6) pressed further,

F still in cross-examination, confessed in lines 6 of page 93, that, "the photographs shown at pages 33, 35, 37 and 38 do not reflect quantitative analysis of water sample in Olomoro. I did not do quantitative analysis of water sample because of lack of funds for the investigation. If funds were made available to me I could have done the water analysis..... It is because I did not do the laboratory test that Exhibit D does not contain the chemical content of water in Olomoro.

G I did (not) do radiation and heat analysis in Olomoro for lack of funds. " Still testifying in cross-examination, the P.W.6 at page 95 added inter alia - see lines 14 to 19, ibidem, "visual observation does not form a final guide as to the appearance of the vegetation but a trained eye can imagine what is happening. In order to determine a final guide as to the

appearance of vegetation, there must be scientific investigation. The type of analysis will be soil, water, radiation and air pollution". Sitting in his dual capacity as both Judge and Jury, how, then did the learned trial Judge as the judge of facts, id est, the jury, treat and handle the testimony of this expert - P.W.6 ? This was what the learned trial Judge wrote at page 185 of the record of proceedings in lines 9 to 15. B

"I have no doubt that P.W.6 and P.W.5 are experts in their own fields of studies. The conclusions reached by them in Exhibit "B", "C" and "D" were seriously challenged under the powerful and devastating search light of cross-examination which rendered their evidence of no assistance to the court as to the cause of low yields of crops on the plaintiffs' land. I am therefore unable to rely on their evidence as experts evidence." C

I quite readily agree with the above conclusion, rightly reached, D by the learned trial judge. In my respectful view, the above finding is unassailable. It is unimpeachable. It had not been impeached or assailed by the appellants in this appeal.

Having rejected the evidence by the appellants, qua plaintiffs at E the trial, their experts having been discredited and glaringly so, my resolution of the live issue in this appeal is obviously, a fortiori. The issues either as formulated by the appellants in the appellants' brief or I did conceived them to be, concisely stated, must ex necessitate be resolved F and I do so resolve them or it in the favour of the respondent and, eo ipso, against the appellants.

The grounds of appeal from which the issues, as formulated by the appellants, arise, must fail and be dismissed. I do dismiss them accordingly. G

The judgment of the court below is therefore affirmed by me. It is for the above reason and for the reasons, more fully detailed in the leading judgment of my Lord Akintan, J.C.A., a draft of which I was privileged to have read before now, that I do agree with his reasoning and H reasoned conclusion that the appeal be dismissed.

My above conclusion, having disposed of the main appeal, I now, proceed to discuss the learned submissions by the counsel, in their

respective briefs, on the argument in the cross-appeal by the respondent/cross-appellant herein.

The submissions by the counsel in their respective briefs, to my mind are quite straight forward. As I pointed out earlier in the judgment, the Senior Counsel has referred to us in the course of the hearing of the appeal to the case of the Shell Petroleum Development Company Ltd. v. Councillor F.B. Farah & Ors. (1995) 3 NWLR (Pt. 382) 148 - a decision of the Court of Appeal, Port Harcourt Division.

It was the contention by the Senior Counsel, Mr. Okpoko, in the respondent's brief that the learned trial Judge was in error in his treatment of Exhibit G - the Report of Professor Clifford Temple Idigi Odu (D.W.4) and Professor O.F. Esuruso and Dr. G.O. Obiebason, the trio working together as a team with Professor Odu as the head of the team.

As the Senior Counsel contended, it was at the final oral addresses stage by the counsel in the court below, that it was submitted to court by the appellants' counsel that the evidence by the D.W.4 (Professor Odu) was inadmissible on the ground that the two members of the team, id est, Professor O.F. Esuruoso and Dr. G.O. Obigbesan were not summoned to testify in the trial, "viva voce". And the learned trial Judge in his judgment upheld the submission, based on the exclusionary rule of Hear-Say Evidence. It was Mr. Okpoko's submission that the expert evidence by the D.W.4 was not discredited or contradicted. His testimony was in support, fully, of the case by the respondent, qua defendant in the court below, Mr. Okpoko further contended. In conclusion, the learned Senior Counsel urged us to allow the cross-appeal accordingly.

On behalf of the appellant/cross-respondent, it has been submitted by counsel in the reply brief at page I thereof that no rule of law entitles an expert witness to give evidence about the opinion of an expert in any field of science in which he (the witness) is not himself an expert. Accordingly counsel contended that the D.W.4 was, therefore, disqualified or disentitled to give an opinion evidence in the area of speciality either of Professor O.F. Esuruoso or Dr. G.O. Obigbesan. Concluding counsel at page 2 of the Reply Brief had supported the reasoning of the learned trial Judge in holding as inadmissible hear - say evidence, the

testimony of Professor Odu D.W.4.

Now, I shall pause here for a while just to say that the "admissibility" of any piece of evidence, (oral or documentary) is a matter of law, id est, decision, qua matters of law.

As I did, above, express myself, perhaps imperfectly, "admissibility" of evidence, "weight" and "proof" are in separate and distinct departments in the law of evidence. Now, the question requiring to be asked to be firstly resolved, in my view humbly, becomes this. The judex, judge, having firstly made the decision in law, admitting as evidence in evidence a piece of evidence, could he, later, in another breath on discovering an error in his decision, qua matter of law, in admitting the evidence, seek to correct himself by declaring such already admitted evidence, as inadmissible? Would he not be usurping the function, the jurisdiction, exclusively, reserved by the Constitution, "SupremaLax" (see Section 219 thereof) for the Court of Appeal?

But least I be misunderstood, let me hasten to say straight away that I am not unaware of, indeed I am fully aware of the decision and principles enunciated or re-stated in Minister of Lands W.N. v. Dr. Nnamdi Azikiwe & ors. (1969) I, All NLR 49; Abolode Alade v. Salawu Okulade (1976) I All NLR (Pt. I) 67, 72 to 75 per Idigbe, J.S.C.: and their line of other cases, cases where a piece of evidence is or may be admissible on certain conditions and cases where the evidence purportedly admitted as evidence in evidence is in itself and by itself, "malum in se lege", inherently inadmissible in or by law. These are quite apart from and outside of the point raised and calling for a determination in this appeal.

The above distinction having been drawn for the purpose of clarity and appreciation, I shall remind myself too, of Section 91 of the Evidence Act Cap. 112 Laws of the Federation, headed, "Admissibility of Documentary Evidence" and the instructive dictum by per Agbaje, J.S.C., at page 282 in Attorney-General of Oyo State & Anor v. Fair Lakes Hotels Ltd. (No.2) (1988) 5 NWLR (Pt.121) 255.

Now, bearing the above in mind, I advert to the testimony of Professor Odu D.W. 4 at pages 130 to 131 of the record of proceedings. He testified as follows:-

"I know the defendant. I know Olomoro Fields I was invited by the defendant in 1983 to study the Olomoro Field Area with a view to determining whether their operational activities have in any way affected ecology of the area. I carried out the studies with a team of experts to study the various areas that were likely to be affected by the activities of Shell in the area. I headed the team of experts All of them worked under me After concluding the studies we wrote a report. This is the report. I signed the report."

The report, when sought to be admitted as evidence in evidence, was not objected to by the counsel of the appellants/cross-respondents. It was, therefore admitted as evidence in evidence by consent. And the record demonstrates this, see lines 6 to 7 of page 131:-

"Mr. Okpoko seeks to tender it (the report). Dr. Odje does not object. It is admitted in evidence and marked Exhibit "G."

Note (i) Pausing here, I am disposed to say, straight away, that the learned trial Judge had made a decision in law, admitting it (the report) as evidence in evidence as Exhibit G. Pure and Simple;

Now, at page 184 of the record, the learned trial Judge, in his judgment in lines 28 to 34, concluded thus:-

"I am therefore in full agreement with the submission of the learned counsel for the plaintiff that the evidence as far as O.F. Esuruoso and Dr. Obigbesan is concerned is hearsay evidence having admitted that he carried out the studies which led to Exhibit G with them. His evidence alone is not sufficient to determine the infertility of the soil of Olomoro." (The Italics is supplied)

And this is the fons et origo of the cross-appeal. The learned counsel for the appellant/cross-respondent says that the Judge was right in the conclusion above, he reached. Mr. Okpoko, S.A.N. says otherwise. Now, who is right?

Firstly, let me refer to certain of the cases the learned trial Judge relied on in reaching the conclusion he did above, for what assistance any of them may afford me in arriving my own decision in the issue. They include (see page 184) : (i) Shell B.P Petroleum Development Nige-

ria Ltd. v. Pere Cole The Pere of Kumbowei Clan (Sagbama) (1978) 3 S.C. 183 at 196.

I consider it rather unnecessary to narrate all the facts of the Shell - B.P. Petroleum Development Company of Nigeria Ltd. v. His Highness Pere Cole The Pere of Kumbowei Clan (Sagbama) & Ors. case B (supra). It is a decision by the Supreme Court, Bello J.S.C. (as he then was) delivering the leading judgment of the court. But suffice it to state, in so far as it is relevant for the present appeal in hand, that the controversy centered on the award of damages. Ground 5 of the appeal refers C (see page) 187 of the Report).

Particulars (b)" thereof read:-

"From the nature and conduct of the case the writer of Exhibit was not available for cross-examination as to how he arrived at the various sums claimed by him on behalf of his clients, the respondents in this D case."

At page 186 of the record appeared the following by the court of trial on the question of the assessment of damages:-

"Of all the materials available before me Exhibit 10 to my mind, E affords some useful guide whereon to proceed in tackling the problem. In that Exhibit, which is a letter written by plaintiffs' Solicitor to the defendant about 5 or 6 months after the dredging the Solicitor set out what he said were the damages done"

In its judgment, the Supreme Court, at page 190 of the Report, said:- F

"We also agree with the learned counsel that the letter, Exhibit 10, which the learned Judge found contained some useful guide for assessment of damages, is hearsay evidence and is inadmissible for the purposes of receiving its contents as sufficient evidence of the valuation G stated therein."

The Shell -BP Petroleum Company case (for short) (supra) is quite distinguishable from the case giving rise to the cross-appeal in more ways than one. Firstly, the Solicitor (the maker of Exhibit 10) was not a H witness at the trial. Secondly, he was not even an expert in valuation of the damage alleged for which he (the Solicitor) attached values or damages set out in Exhibit 10.

The Shell-BP Petroleum case (supra) offers me no assistance. With respect to the learned trial Judge, that case was most irrelevant for his consideration. And this is my humble opinion. (ii) The learned trial Judge also considered Shell Development Co. Ltd. v. Otoko (1990) 6 NWLR (Pt. 159) 693.

The Shell Petroleum Development Company of Nigeria Ltd. v. Chief Graham Otoko & Ors. (1990) 6 NWLR (Pt. 159) 693 was a decision of this court, id est, Court of Appeal, Port Harcourt Division: (Conam: Onu, J.C.A. as he then was but now J.S.C jacks and Omosun JJ.C.A.).

Needless stating in details the facts of the Graham Otoko case (supra). But suffice it to state this much. The respondents employed a firm of experts-Chemical Engineers - which investigated the pollution alleged in various aspects. The Chemical Engineers produced a report Exhibit D. The learned trial Judge, Ichoku, J. had made an extensive use of this report (Exhibit D) in his judgment. Also there was a valuation report (Exhibit E) of the property destroyed. The learned trial Judge relied on Exhibit E in the assessment of damages.

Note:- The Chemical Engineers who prepared the report (Exhibit 10) were not a witness at the trial. The Report (Exhibit 10) was tendered by the P.W.4. Delivering the leading judgment of the Court of Appeal, Omosun, J.C.A. at page 712 of the report said, inter alia, thus:-

"Exhibit D is a report prepared by various experts in different field of callings. At page 23 of Exhibit D is the opinion of, Chemical Engineers. The learned trial Judge relied on the report to find the appellant negligent. He said at page 126 lines 2 to 13 xxxx"

The whole of page 126 is based on Exhibit D which is quoted copiously. The question is where did the learned Judge get the evidence to make this finding. P.W.4 who tendered Exhibit D could not testify as to the cause of the spillage. He was no expert in this field. It is for this reason that the Chemical Engineer prepared the report. The Chemical Engineer was not called."

Again, the Chief Graham Otoko case is distinguishable from the case giving rise the cross-appeal. One important factor, it is significant

to observe, from the excerpt of Omosu, J.C.A. recited above is that, although Exhibit 10 was prepared by "various experts in different field of callings", the Law Report, in no way demonstrated any one of those experts responsible for it, (Exhibit 10), testified. The Court of Appeal did not express any opinion, (as there was no necessity for expressing an opinion, with due respect to that court), what could or would have been the fate of Exhibit 10, had one of the "Various" experts testified at the trial "viva voce", and tendered Exhibit 10. The Chief Graham Otoko case (supra), therefore, offers me no assistance. It is, ipso, irrelevant in this cross-appeal.

(iii) Finally, I proceed to deal with and consider the Farah case (supra) cited to us by the Senior Counsel during the hearing of the appeal. The Shell B.P. Development Company Ltd. v. Councillor F.B. Farah (1995)3 NWLR (Pt.382) 148 is also a decision of Court of Appeal, Port Harcourt Division: (Coram: Edozie, Rowland and Onalaja JJ.C.A).

Needless reciting in any great details the facts of the Councillor F.B. Farah case (supra). But it is rather necessary to state that at the conclusion of the hearing and the parties had closed their respective cases, two referees were appointed, on the application by the counsel engaged in the trial, by the learned trial Judge, Opene J. (as he then was but now, J.C.A.). The evidence by the experts called by the parties respectively was conflicting.

Of the panel of the referees, each was an expert (s) in his field. Mr. Phil Anozie was or is a chartered valuer nominated by the appellant. Dr. Tema, nominated by respondents, was or is a Scientist of the University of Science and Technology, Port Harcourt. These two produced a report. One of these two experts/referees, i.e. Mr. Phil Anozie gave evidence, "viva voce" in the trial court. He tendered their report. The report was admitted as evidence in evidence as Exhibit 5. He also tendered a bill for their work. It was received in evidence as evidence. It was Exhibit 6. Thereafter, counsel respectively addressed the trial court. In a reserved judgment the court below found for the respondents.

On an appeal to the Court of Appeal (see page 171 of the Law Report) Ground 4 of the Ground of Appeal was:-

"The so called reports of the plaintiffs' experts and the referees appointed by the court were hearsay evidence and the court below misdirected itself in law in basing its judgment on damages on the said reports."

B Delivering the leading judgment, concurred in by Rowland and Onalaja, JJ.C.A. Edozie, J.C.A. at pages 183 and 184 of the report said, inter alia, as follows:-

"It has been said that the evidence of an expert is generally an aspect of the entire evidence to be evaluated by a court: U.T.B. v. Awanzigana Ent. Ltd. (1994) 6 NWLR (Pt.348) 56. Where there is conflict in opinions of experts it is the duty of the court to come to a conclusion in the case by resolving such conflict and can do so by rejecting the opinion of one or the other of such experts. John W. Bamiro v. S.C.O.A. Ltd. (1941) 7 WACA 150; Sodo (1975) 61 Cr. App. R.131; In the case in hand, the learned trial Judge appeared to have rejected the evidence of the appellant's expert (D.W.2). At pages 112 to 113 he said among other things thus:-x x x x x "

E Having evaluated the expert's evidence before him and reached a conclusion rejecting the appellant's expert evidence and by implication accepting that of the respondent's having regard to the referees, expert report in support of the respondent's expert evidence, there is ample evidence in support of the finding of the learned trial Judge that the land in question needed rehabilitation."

The Court of Appeal, Port Harcourt Division, therefore, dismissed "Ground 4" of the Grounds of Appeal filed. It becomes necessary to note that only Mr. Phil Anozie and not he (Mr. Phil Anozie) and G Dr. Tema did testify at the trial, just as in the case, giving rise to the appeal before us, only the D.W.4, (Professor Odu) and not Professor Odu and Professor O.F. Esuruosu and Dr. Obigbesan did testify. Both Mr. Phil Anozie and Dr. Tema were or are experts in their respective H fields of studies just as Professor Odu (D.W.4) Professor Esuruosu and Dr. Obigbesan were or are experts in their respective fields of studies. Both Phil Anozie Esq. and Dr. Tema produced a report, (one Report, Exhibit 5) just as Professor Odu, and Professor Esuruosu and Dr.

Obigbesan produced one report (Exhibit G). No part of the evidence by Mr. Phil Anozie was rejected as inadmissible hearsay evidence just because Dr. Tema was not called as a witness. No part of Exhibit 5 prepared by both Mr. Phil Anozie and Dr. Tema was rejected as inadmissible because only Mr. Anozie testified "viva voce". No. B

I will openly confess that the Councillor F.B. Farah case (supra) offers me an invaluable assistance. It is germane to the issue being canvassed and agitated in this cross-appeal. I am much persuaded by the Court of Appeal decision, having regard to the issue involved. Speaking for myself, had the trial Judge in the case giving rise to the cross-appeal had knowledge of the Court of Appeal decision in the Councillor F.B. Farah case (supra), he most certainly, would have held otherwise. C

It is my respectful opinion therefore, that the learned trial Judge fell deeply in error in his treatment of the evidence by Professor Odu (D.W.4) and/or the report (Exhibit G) by regarding and holding any part of the evidence by the Professor Odu (D.W.4) and/or Exhibit G as inadmissible evidence or hearsay evidence because neither Professor O.F. Esuruosu and/or Dr. Obigbesan, co-workers with the D.W.4 (and all joint makers of Exhibit G) did not testify, viva voce, at the trial. But for this, error I am disposed to say and with respect to the learned trial Judge, that the only conclusion I reach is that he accepted the evidence by Professor Odu (D.W.4) as undiscredited and so, accepted wholly, by him (the trial Judge). D E F

Based on the principle above discussed and guided by and armed with it, assume, "argumento", I be right in my humble views and what is more persuaded by the Councillor F.B. Farah's case (supra) the "Issue iii" as formulated in cross-appeal, ex necessitate, ought to be resolved in the favour of the respondent/cross-appellant. And I do so resolved it in its favour and "eo ipso", against the appellant/cross-respondent. The grounds of appeal from which the issue is distilled, therefore, in my judgment, succeed accordingly. The cross-appeal needs must, therefore, succeeds accordingly. G H

It is for my above reason but more particularly for the reasons contained in the lead judgment of my Lord, Akintan, J.C.A., that I do

hereby allow the cross-appeal. I abide by the consequential order for costs in respect of both the main appeal and the cross-appeal as contained in the lead judgment of my Lord.

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IGE JCA

I have had a preview of the judgment just delivered by my learned brother Akintan, J.C.A. I agree with him that this appeal lacks merit and should be dismissed for the reasons given by my learned brother in the lead judgment. I also agree that the cross-appeal succeeds and should be upheld. I too dismiss the appeal and uphold the cross-appeal with N2,000.00 costs to the respondent/cross-appellant.

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