

SUPREME COURT OF NIGERIA
15TH JULY, 1999. SC. 111/1993
CORAM:- A. B. WALI, M. E. OGUNDARE, O. ACHIKE, A. O.
EJIWUNMI, E. O. AYoola, JJSC

CHIABEE BAYOL	APPELLANT
AND		
IORKIGHIR AHEMBA	RESPONDENT

***ACTIONS** - Malicious prosecution - Burden - On the respondent to establish - That he had a reasonable cause to make the report - When and how it arises.*

***ACTIONS** - Malicious Prosecution - Proof - Where the plaintiff had failed to adduce evidence enough in proof of his case - The trial judge has no responsibility - To inquire on whether the defendant had made out a defence.*

***APPEALS** - Judgment - Issues - Properly raised and heard by the Court of Appeal - Failure to discharge the duty of determining such issues - May vitiate the judgment - But in the instant case failure to consider such issues - Was not fatal to the decision of the Court of Appeal.*

***APPEALS** - Judgment - Procedural slip - Where the trial judge erroneously examined - The evidence of a witness given in an earlier proceeding - And the evidence was harmless - This procedural slip cannot alone vitiate the proceeding.*

***APPEALS** - Judgment - Reversal - Slip - It is not every slip committed by a court - That leads to the reversal of the judgment of that court - It must be demonstrated that the slip - Substantially affected the outcome of the decision*

***EVIDENCE** - Admissibility - Earlier proceeding - Evidence - Given in*

such a proceeding - Its relevance and admissibility.

EVIDENCE - *Actions - Malicious prosecution - Section 34(1) of the Evidence Act - The exclusionary provisions of that subsection - Have not admitted of any exception in favour of - Actions for malicious prosecution.*

EVIDENCE - *Earlier proceeding - Evaluation - By the trial judge - Of evidence given in an earlier proceeding - By a witness who did not testify in the instant case - Is erroneous.*

JUDGMENTS - *Appeal - Issue - That did not arise under the grounds of appeal - Cannot be raised by the court - And where the court merely raised such issue in the instant case - But did not consider it - It has not occasioned a miscarriage of justice.*

TORTS - *Malicious prosecution - Action - Ingredients - To be established in order to succeed - In an action for malicious prosecution.*

FACTS

At the Katsina-Ala High Court, the plaintiff/appellant instituted a civil suit against the defendant/respondent claiming N250,000.00 general and special damages for malicious prosecution. On the 20th of December, 1985 the defendant made a report against the plaintiff to the Police at Ikyogen, Kwarde. Local Government Area of Benue State alleging that the plaintiff with his two wives and his brother went to the defendant's rice farm to steal his rice by harvesting the rice thereon. Consequent to the said report, the plaintiff with his wives and brother were arrested and prosecuted at the Upper Area Court Adikpo on a First Information Report alleging theft of the defendant's rice. The plaintiff and all the accused persons were found not guilty and accordingly discharged. In proof that the criminal prosecution terminated in his favour, the plaintiff tendered the record of proceedings of the criminal trial which was admitted in evidence as Exhibit 1.

At the conclusion of hearing, the learned trial judge dismissed the plaintiff's claim in its entirety. In his judgment, the learned trial judge extensively examined and evaluated the evidence of PW 3 contained in Exhibit 1. P.W 3 was the investigating Police Officer who testified at the earlier criminal trial but never testified before the trial court in the present case. Dissatisfied, the plaintiff appealed to the Court of Appeal. The Court of Appeal, dismissed the appeal and affirmed the decision of the trial court but it omitted to consider two of the issues raised by the plaintiff in that court. Aggrieved, the plaintiff has further appealed to the Supreme Court raising five issues but the appeal was determined on two major issues.

ISSUES FOR DETERMINATION

(1) Whether in coming to its decision to dismiss appellant's appeal the Court of Appeal dealt with an issue that did not arise under the grounds of appeal while omitting to deal with issues properly raised before it, and if so the Legal consequences of its so doing?

What is the propriety of relying on the evidence of a witness who did not testify before the trial High Court sitting at Katsina-Ala but testified at the criminal trial at the Upper Area Court, Adikpo.

HELD (Unanimously dismissing the appeal per lead judgment of **ACHIKE JSC**)

Judgments - Appeal

1. Clearly, the law is not in doubt that neither the trial nor the appellate court is entitled to raise an issue that never arose from the grounds of appeal or even raise an issue suo motu not submitted for consideration and input by the parties counsel. That will be opening new vistas for the parties completely outside their contemplation which clearly offends the much-cherished principle of fair hearing. The law remains inviolate that the judgment of a court must confine its inquiry entirely to the determination of issues properly raised and canvassed by the parties before it. The court, be it trial or appellate court, must be wary to enter into the arena in the controversy between the parties by projecting the case of one of the parties rather than maintaining the equilibrium of impartiality as arbiter.

Such an appearance in the arena by the court is a direct signal and invitation to miscarriage of justice. Having meticulously perused the record of appeal and found that the learned Justice of the Court of Appeal merely raised the issue but did not pursue the matter to the hilt, it is clearly B unjustified for learned Appellant's counsel to submit that he made a finding on the said issue raised that was favourable to the Respondent. In other words, the issue erroneously raised by the court, not having been considered and resolved obviously merely hangs in the air and goes to no C issue. In my view, it is very speculative to urge that that question, per se and without more, has occasioned a miscarriage of justice. In the result, the authorities of Bamgboye v Olarewaju (1991) 4 NWLR (Pt.184) 132 at p.144 and Umar v Bayero University (1988) 7 SCNJ 380 which are D good authorities and called in aid by learned Appellant's counsel to drive home the contention that neither the appellate nor the trial court should raise issues outside the grounds of appeal and resolve same without affording the parties' counsel opportunity to make an input are wholly inapplicable to the facts and circumstances of this case. (p. 2262 H)

E

Appeals - Judgment

2. It has been said time without number that the judgment of a court must demonstrate in full a dispassionate consideration of the issues raised F and canvassed before it. This duty on the court is imperative otherwise it will be extremely difficult for a party whose case has not been accorded adequate and full consideration to accept that justice has been done to him. Failure to deal with issues raised on appeal may tantamount G that the lower court reached its decision without the advantage of the judgment of the trial court. Failure to discharge the duty of determining issues properly raised and heard by the Court of Appeal is a lapse that could, in some circumstances, vitiate the judgment of the court below. See Okonji v Njokanma (1991) 7 NWLR (Pt.202) 150. The proper order H to make in such circumstances is to set aside the judgment of the court below and remit the case for a proper consideration of all the issues raised. See Ezeoke v. Nwagbo (1988) 1 NWLR (Pt.72) 616 at 627, per Uwais, Ag. C.J.N. (as he then was). In the case in hand, failure to

consider the said two issues was not fatal to the decision of the court below because these issues were not live issues relevant or material for the court to find in favour of the Appellant. As a matter of fact, and as we shall see presently, Appellant's claim failed because he was unable to establish first that the Respondent did not have reasonable and probable cause to make a report to the police, and second that he did so maliciously. In other words, it cannot be said that failure to consider these two issues have occasioned a miscarriage of justice. (p. 2264 G)

Torts - Malicious prosecution

3. What are the ingredients to be established in order to succeed in an action for malicious prosecution? Succinctly put, the plaintiff in an action for malicious prosecution must plead and successfully establish in evidence -

1. That the Defendant prosecuted him in the sense that he set the law in motion against him. Therefore, where the Defendant merely made a report to the police but did not actively instigate the actual prosecution of the plaintiff, having left it open for the police, in its discretion to decide whether to prosecute or not, it cannot in such circumstance be said that the plaintiff was prosecuted by the Defendant. See Pandit Gaya Parshad Tewari v Sardar Bhagat Singh (1908) 24 HR 884 and Farley v Danles (1855) A L x B 493.

2. Consequent to the prosecution, the plaintiff was discharged, that is to say that the prosecution was determined in favour of the plaintiff.

3. The plaintiff must establish that the prosecution was without reasonable and probable cause. Thus where the Defendant makes a false report against the plaintiff leading to the latter's prosecution this is clearly evident that the Defendant had no reasonable and probable cause for making the report to the police. See Payin & anor v Aliuah 14 WACA 267, Innieh v Aruegbon 14 WACA 73 at 74 and Balogun v Amubikanhun (1989) 4 SCN J 249.

4. Finally, it must be established that the prosecution was actuated by malice by the Defendant against the plaintiff. In this regard, malice means absence of honest belief in the charge preferred against the plaintiff.

This point was elucidated in the English case of Meering v Graham-White Aviation Co. 122 L.T. 44 at pp 35 and 36 in these words "Honest belief seems to be the substantial thing that has always to be decided and such belief must be not merely belief by the prosecutor of the guilt of the person, but it must be a belief that the prosecutor will be able to adduce sufficient evidence before a jury or the court as would justify the court in convicting the accused." (p. 2266 G)

4. Evidence - Earlier proceeding

I must say unequivocally that the learned trial Judge was palpably in error and unjustified in law to have extensively examined and evaluated the evidence of PW3 contained in Exhibit 1. One bears in mind that PW3 was a witness who testified in the criminal proceedings and never testified before the trial court in the civil proceedings. I must also stress that the Court of Appeal was in grave error to have approved this tinkering with the evidence of PW3 in Exhibit 1 on the fancied argument that it was necessary for the trial Judge to set out and examine the circumstances that led to the charge preferred against the Appellant and to ascertain the circumstances under which the police had prosecuted. It must be emphasized that Exhibit 1 was admitted in evidence without opposition, for the single purpose, as earlier noted, namely, that the Appellant was criminally prosecuted and that the prosecution terminated in his favour in that he was discharged. Again, the court below, in my view, was in error to have taken the unfortunate posture that the learned trial Judge had a duty to comment on the evidence of PW3 in extenso, or even at all and it is of no moment that the conduct of the trial Judge could be played down because he neither made any findings of fact from the said evidence of PW3 nor relied on that witness's evidence in deciding that the Appellant's case had no merit. That argument will be begging the issue. In my view, I am unaware of the existence of any such duty on the trial Judge to make such comment. No authority was cited to show how such duty has arisen. On the contrary, I shall show anon, relying on the provisions of section 34 (1) of the Evidence Act to demonstrate that the said duty was illusory. In my opinion, there was no power

whatsoever, in all the circumstances of this case, to justify the erroneous use to which PW3's evidence was put, nor the tacit approval given to this irregularity by the court below. (pp. 2667 G/2268 E)

Evidence - Admissibility

B

5. It is now convenient to elaborate on the position of the law in relation to relevance and admissibility of evidence given in an earlier proceeding. It is this: evidence of a witness given in an earlier judicial proceeding is neither relevant nor admissible (except as we shall show presently under section 34 (1) of the Evidence Act) in a subsequent judicial proceeding although such evidence may be used for purposes of cross-examination of the same witness as to credit. See Alade v Aborishade (1960) 5 FSC 167, Folarin v Durojaiye (1988) 1 NWLR (Pt.70) 351 and 369 and Olunjinle v Adeagbo (1988) 2 NWLR (Pt. 75) 238 at 250. In other words, the evidence of PW3 in the previous criminal proceeding did not constitute legal evidence in the civil proceeding before the trial Judge in this case, but Exhibit 1, as a document evidencing the prosecution of the Appellant that terminated in his favour was not only relevant but was also admissible in evidence in proof of one of the major ingredients in the action for malicious prosecution. (p. 2269 A)

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D

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Evidence - Action

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6. It is manifest that the learned trial Judge did not make any effort to bring himself within the purview of the stringent provisions of section 34(1) of the Evidence Act before utilizing the evidence of PW3 in the Criminal trial as contained in Exhibit 1. It is clear that the exclusionary provisions of section 34(1) have not admitted any exception in favour of actions for malicious prosecution. I am clearly of opinion that there was no warrant for the learned trial Judge, in the circumstances of this case, to have justifiably made an inroad into, or use of, PW3's evidence. Nor does it make any difference, as earlier noted, that the Court of Appeal approved this conduct of the trial court, which in my view, was erroneous and legally indefensible. (p. 2270 A)

G

H

Malicious Prosecution - Burden

7. The crucial question that must be asked is what is the legal consequence of this procedural error or irregularity? In justifying this conduct of the trial Judge, the Court of Appeal believed, wrongly in my view, that it was laudable since "the success or failure of the prosecution depended on the evidence of this witness (i.e. PW3). It also considered the evidence adduced before him and came to the conclusion that the Respondent had a reasonable and probable cause to make the report". I must, however, emphasize clearly that both the evidence and conclusion elicited from the trial Judge's tinkering with the evidence of PW3 are of no moment. In law, there is no burden on the Respondent to establish that he had a reasonable cause to make the report unless and until the Appellant must have successfully established that the prosecution was without reasonable and probable cause. To hold otherwise, would be tantamount to, as it were, putting the cart before the horse. It is akin to the ridiculous position where the court embarks on a perilous exercise of insisting in proof of the innocence of the accused person when in fact the prosecution has woefully failed to establish the guilt of the accused person beyond reasonable doubt. All I am trying to say is that the "evidence" or information obtained by the learned trial Judge consequent to evaluating the evidence of PW3 was not used to establish that there was no merit in the Appellant's case. If the reverse was the case, then the Appellant can make a legitimate complaint against the judgment of the learned trial Judge. In other words, the "evidence" erroneously lifted from the evaluation of PW3's evidence was not purposefully utilized to the detriment of the Appellant to warrant disturbing the decision of the learned trial Judge. It is another way of saying that the learned Judge's peep into the evidence of PW3 as contained in Exhibit 1 was a worthless and harmless exercise in the circumstances of this case. (p. 2270 D)

Malicious prosecution - Proof

8. Even if by any strength of imagination the reliance placed on the evidence of PW3 may be viewed differently, Appellant's case was bound to fail in any event because, as pointed out by the learned trial Judge, he

failed to discharge the onus on him of proving two ingredients of the action of malicious prosecution, namely, (1) absence of reasonable and probable cause in the prosecution of the Appellant, and (2) proof that there was malice, i.e. in the sense that the prosecution of the Appellant was actuated by the malice of Respondent against the Appellant. The Court of Appeal also affirmed the decision of the trial Judge with respect to Appellant's failure to establish the above two ingredients of the action for malicious prosecution. The law is patently clear that if the learned trial Judge is satisfied that the Plaintiff/Appellant had failed to adduce evidence enough in proof of the action for malicious prosecution, then, he has no responsibility to inquire on whether the Defendant/Respondent has made out his defence. Such inquiry, if undertaken, is bound to be a futile exercise. (p. 2271 C)

Judgment - Procedural slip

9. In the result, in the circumstance of this case, where the learned trial Judge erroneously examined the evidence of a witness (i.e., PW3) not before him but testified in an earlier proceeding, and the said evidence was harmless in that it was not needed to establish the failure of Appellant's case, this procedural slip of the trial Judge cannot alone vitiate the proceeding of the learned trial Judge but will undoubtedly earn him outright admonition of the appellate court. The decision in Alade v Aborishade (supra) is wholly inapplicable. (p. 2271 G)

Judgment - Reversal

10. Admittedly, from what I have said so far, and for avoidance of doubt, there was a misdirection or mistake of law on the part of the learned trial Judge with regard to his unbridled evaluation and lifting of "evidence" from the evidence of PW3 in Exhibit 1, which on that reason alone, would ordinarily lead to the reversal of the judgment of the trial Judge, and on the same token, the judgment of the Court of Appeal which affirmed the judgment of the learned trial Judge. But it must be emphasized that it is not every slip or error committed by the court that leads to reversal of the judgment of that court by an appellant court. For a slip or

an error in a judgment to lead to its reversal by an appellant court, it must have substantially affected the outcome of the decision. It is therefore not enough to allege error or slip in the judgment in question but the party complaining must demonstrate that the error or slip substantially affected the result of the decision as to result in a substantial miscarriage of justice. See Olubode v Salami (1985) 2 NWLR (Part 7) 282. But that is not what happened in this case. Rather, as I had stated earlier, the "evidence" lifted from the testimony of PW3 in Exhibit 1 was neither used to the advantage of the Respondent nor even to the detriment of the Appellant. (p. 2272 A)

NOTABLE POINTS OF INTEREST

ACHIKE JSC

D I. Divergent issues should not be taken together in determining an appeal

It is Indisputable that these Issues are seemingly cogent but were not given any consideration whatsoever by the court below. The concurring judgments of Aikawa and Okezie JJCA were very brief and unhelpful and routinely covered only five lines of a page of the judgment without any reference whatsoever to these two issues to which submissions were made by learned counsel to the Appellant in that court. In the leading judgment of Katsina-Alu, JCA, he made it clear that the six issues for determination were to be taken together. Regrettably in my opinion, the two matters postulated under Issues (2) and (3) could not, and should not, be taken together with the other issues. For example, Issue (3) which dealt with the difficult problem of " Issue (6) which dealt with the assessment of damages. Nor could Issue (4) dealing with inadequate appraisal and evaluation of evidence be meaningfully considered together with Issue (6) dealing with assessment of damages. Having taken these rather divergent issues together, the learned Justice in his leading judgment completely lost sight of the various major issues that fell due for determination. This was unfortunate. (p. 2264 C)

2. In civil action the trial judge has no duty to field a witness

Clearly, if the learned trial Judge was desirous to elicit certain facts from PW3, the proper cause open to him would have been to field PW3 to testify before him. But bearing in mind that the proceeding before the trial Judge was a claim in civil action, and not one for a criminal trial, he had no duty to field any witness as he would have done suo motu in criminal proceedings. The trial Judge afterall was a mere umpire ensuring that there was no overreaching of either of the parties by the other, but to justly decide the matter in controversy having regard to the evidence led at the trial before him. Being a civil case, the burden was plainly on the Appellant, as Plaintiff, to prove the ingredients of the action for malicious prosecution on balance of probabilities. (p. 2268 C)

REPRESENTATION

Mr. J. D. Moze for the Appellant

CASES REFERRED TO

Bamgboye v Olarewaju (1991) 4 NWLR (Pt.184) 132 at p.144
 Umar v Bayero University (1988) 7 SCNJ 380
 Okonji v Njokanma (1991) 7 NWLR (Pt.202) 150
 Ezeoke v. Nwagbo (1988) 1 NWLR (Pt.72) 616 at 627
 Gaya Parshad Tewari v Sardar Bhagat Singh (1908) 24 IIR 884
 Payin v Aliuah 14 WACA 267
 Innieh v Aruegbon 14 WACA 73 at 74
 Balogun v Amubikanhun (1989) 4 SCN J 249
 Alade v Aborishade (1960) 5 FSC 167
 Folarin v Durojaiye (1988) 1 NWLR (Pt.70) 351 and 369
 Olunjinle v Adeagbo (1988) 2 NWLR (Pt. 75) 238 at 250
 Olubode v Salami (1985) 2 NWLR (Part 7) 282

STATUTE REFERRED TO

Evidence Act, s. 34 (1)

LEAD JUDGMENT BY ACHIKE JSC

On the 20th of December, 1985 the Defendant made a report against the Plaintiff to the Police at Ikyogen, Kwande Local Government Area of Benue State alleging that the Plaintiff with his two wives and his brother went to the Defendant's rice farm to steal his rice by harvesting the rice thereon. Consequent to the said report, the Plaintiff with his wives and brother were arrested and prosecuted at the Upper Area Court Adikpo on a First Information Report alleging theft of the Defendants' rice. The Plaintiff and all the accused persons were however discharged.

Consequent upon the termination of the criminal proceedings, the Plaintiff instituted a civil suit against the Defendant at the Katsina-Ala High Court claiming N25,000.00 general and special damages for malicious prosecution. In proof that the criminal prosecution terminated in his favour, the Plaintiff tendered the record of proceedings of the criminal trial which was admitted in evidence as Exhibit 1. At the conclusion of the hearing and after counsel's addresses, the learned trial Judge dismissed the Plaintiff's claim in its entirety.

The Plaintiff, then as Appellant, appealed to the Court of Appeal relying on seven grounds of appeal. The Court of Appeal, after due hearing, dismissed the appeal and thereby affirmed the decision of the learned trial Judge. That court, per the leading judgment of Katsina-Alu, JCA (as he then was), to which Aikawa and Okezie, JJCA concurred, concluded its judgment thus:

" I must observed (sic) that the court even though it discharged the appellant, did not find that the prosecution was malicious.

The picture that clearly emerges is like this. The appellant did not prove that the respondent instituted the prosecution. There was evidence which the lower court accepted that the respondent had a reasonable and probable cause to make the report to the police. In addition no malice was proved against the respondent. The only ingredient that the appellant proved was that the prosecution terminated in his favour. Clearly this is not enough. To succeed in an action for malicious prosecution the plaintiff must prove all the favour (sic) ingredients against the defen-

dant. So that the decision to dismiss the claim was amply supported by the evidence led.

In the result this appeal fails and it is accordingly dismissed."

Still dissatisfied, the Appellant further appealed to this Court, relying on nine grounds of appeal. His learned counsel, Mrs. F.M. Ebofuame - Nezan formulated the following five issues for determination:

" (1) *whether in coming to its decision to the dismiss (sic) appellant's appeal the Court of Appeal dealt with an issue that did not arise under the grounds of appeal while omitting to deal with issues properly raised before it, and if so the Legal consequences of its so doing?*

(2) *whether the holding by the Court of Appeal that the court considered evidence properly adduced before it, and did not rely on the evidence of a witness not before it in reaching a decision to dismiss appellants case is correct having regard to the Record of Appeal?*

(3) *whether the rule that evidence of a witness in an earlier proceeding is irrelevant in a subsequent proceeding except for purposes of cross-examination as to credit and in circumstances envisaged by S.34 (1) of the Evidence Act, admits of exception in malicious prosecution cases?*

(4) *What is the Legal consequence upon its Judgment of the trial court considering and relying on the evidence of a witness not before it?*

(5) *Whether the misdirection by the Court of Appeal in stating that "it was therefore not surprising when the criminal court wondered why in spite of their findings the police went ahead and prosecuted the appellant occasioned a miscarriage of justice. "*

It may be noted that the Respondent neither filed a Respondent's brief nor was he represented at the oral hearing.

At the hearing, learned counsel for the Appellant, Mr. J. D. Mozie, after adopting Appellant's brief urged us to allow the appeal and order a re-trial.

Issue One

The essence of Issue One is the legal consequence of where the

court below dealt with an issue that did not arise under the grounds of appeal and yet failed to deal with issues properly raised before it. This issue is clearly twofold and each aspect should be treated separately in order to produce clarity. Briefly, the issue complains first that the court below raised an issue that did not arise under the grounds of appeal, and second that it failed to consider two issues that were raised in the appellant's brief at the court below.

The trial Judge of the Benue State High Court, sitting at Katsina-Ala, expressly found that the Appellant had failed to establish only two of the ingredients vital to his claim, namely, absence of reasonable and probable cause and presence of malice, nevertheless, the leading judgment of Katsina-Alu, JCA (as he then was) proceeded to inquire into whether or not the Respondent set the ball in motion for the prosecution of the Appellant. Speaking on this vein, this is how his Lordship posed the question. On the facts of this case, can it be said that the respondent set in motion the prosecution of the appellant?

Strangely enough, no answer was given to this poser and none was necessary because the learned trial Judge, as earlier noted, had thought that the point was conceded by the Respondent. Thus advertng to this point posed in the leading judgment of the court below, this is what the learned trial Judge said, inter alia, in his judgment:

" Since the defendant (i.e. the Respondent herein) has admitted that as a result of his report the plaintiff was unsuccessfully prosecuted for theft all that I have to consider now is whether the plaintiff has therefore proved his case against the defendant." (emphasis in mine)

It is manifestly clear from the foregoing that the submission by the learned Appellant's counsel in her brief that the court below "having thus raised the issue the court considered same and found that the appellant failed to prove that the respondent instituted the prosecution" is not correct. While it is true that the lower court raised that issue nevertheless it neither considered it nor made any finding in respect thereof.

Clearly, the law is not in doubt that neither the trial nor the appellate court is entitled to raise an issue that never arose from the grounds of appeal or even raise an issue suo motu not submitted

for consideration and input by the parties counsel. That will be opening new vistas for the parties completely outside their contemplation which clearly offends the much-cherished principle of fair hearing. The law remains inviolate that the judgment of a court must confine its inquiry entirely to the determination of issues properly raised and canvassed by the parties before it. The court, be it trial or appellate court, must be wary to enter into the arena in the controversy between the parties by projecting the case of one of the parties rather than maintaining the equilibrium of impartiality as arbiter. Such an appearance in the arena by the court is a direct signal and invitation to miscarriage of justice. Having meticulously perused the record of appeal and found that the learned Justice of the Court of Appeal merely raised the issue but did not pursue the matter to the hilt, it is clearly unjustified for learned Appellant's counsel to submit that he made a finding on the said issue raised that was favourable to the Respondent. In other words, the issue erroneously raised by the court, not having been considered and resolved obviously merely hangs in the air and goes to no issue. In my view, it is very speculative to urge that that question, per se and without more, has occasioned a miscarriage of justice. In the result, the authorities of Bamgboye v Olarewaju (1991) 4 NWLR (Pt.184) 132 at p.144 and Umar v Bayero University (1988) 7 SCNJ 380 which are good authorities and called in aid by learned Appellant's counsel to drive home the contention that neither the appellate nor the trial court should raise issues outside the grounds of appeal and resolve same without affording the parties' counsel opportunity to make an input are wholly inapplicable to the facts and circumstances of this case.

On the second arm of Issue One, the question is the legal consequence of failure of the court below to consider Issues No (2) and (3) postulated by the Appellant in that court. These issues are hereby reproduced below:

" (a) *Whether the finding by the criminal court in Exh. 1 that appellant was harvesting his own rice farm at the time of the report by*

the respondent, raised an issue estoppel that precluded the High Court from reopening the issue of whether the appellant was harvesting his own rice or that of the respondent at the time the latter went to the police to report?

B (b) *Whether at the close of pleadings it could be said there arose a question as to the "circumstances under which the police had prosecuted the plaintiff on the report of the defendant", and if no such arose from the state of the pleadings whether it was competent for the learned trial Judge to make it an issue?"*

C It is Indisputable that these Issues are seemingly cogent but were not given any consideration whatsoever by the court below. The concurring judgments of Aikawa and Okezie JJCA were very brief and unhelpful and routinely covered only five lines of a page of the judgment without any
D reference whatsoever to these two issues to which submissions were made by learned counsel to the Appellant in that court. In the leading judgment of Katsina-Alu, JCA, he made it clear that the six issues for determination were to be taken together. Regrettably in my opinion, the
E two matters postulated under Issues (2) and (3) could not, and should not, be taken together with the other issues. For example, Issue (3) which dealt with the difficult problem of " Issue (6) which dealt with the assessment of damages. Nor could Issue (4) dealing with inadequate
F appraisal and evaluation of evidence be meaningfully considered together with Issue (6) dealing with assessment of damages. Having taken these rather divergent issues together, the learned Justice in his leading judgment completely lost sight of the various major issues that fell due for determination. This was unfortunate.

G **It has been said time without number that the judgment of a court must demonstrate in full a dispassionate consideration of the issues raised and canvassed before it. This duty on the court is imperative otherwise it will be extremely difficult for a party whose**
H **case has not been accorded adequate and full consideration to accept that justice has been done to him. Failure to deal with issues raised on appeal may tantamount that the lower court reached its decision without the advantage of the judgment of the trial court.**

Failure to discharge the duty of determining issues properly raised and heard by the Court of Appeal is a lapse that could, in some circumstances, vitiate the judgment of the court below. See Okonji v Njokanma (1991) 7 NWLR (Pt.202) 150. The proper order to make in such circumstances is to set aside the judgment of the court below and remit the case for a proper consideration of all the issues raised. See Ezeoke v. Nwagbo (1988) 1 NWLR (Pt.72) 616 at 627, per Uwais, Ag. C.J.N. (as he then was) opined:

" In the present case the court of Appeal failed to consider the Issue on the admissibility of Exhibit D on the wrong premise that there was neither a ground of appeal nor argument properly advanced in support of the issue. As already shown, this finding is certainly perverse. In a situation, such as the present, the proper order to be made by this court is for the case to be remitted to the court of Appeal, so that all the issues raised by the parties may be properly considered."

See also Jamgbadi v Jamgabdi (1963) 2 SC NLR 311, Loko v Uor (1988) 2 NWLR (Pt.77) 430 and Ebamawo v Fadiyo (1973) 1 All NLR (Pt.11) 134.

In the case in hand, failure to consider the said two issues was not fatal to the decision of the court below because these issues were not live issues relevant or material for the court to find in favour of the Appellant. As a matter of fact, and as we shall see presently, Appellant's claim failed because he was unable to establish first that the Respondent did not have reasonable and probable cause to make a report to the police, and second that he did so maliciously. In other words, it cannot be said that failure to consider these two issues have occasioned a miscarriage of justice.

Accordingly, I resolve the second arm of Issue one against the Appellant.

Issue Nos 2, 3 and 4 appear to me to be closely related and deal with the propriety of relying on the evidence of a witness who did not testify before the trial High Court sitting at Katsina-Ala but testified at the criminal trial at the Upper Area Court, Adikpo. In partial confirmation that these three issues are closely Knitted, it is not surprising, therefore,

to observe that the learned Appellant's counsel in her treatment of Issue four in the Appellant's brief adopts her earlier argument under Issue two.

It is common ground, borne out of the elaborate and detailed examination of Exhibit I as it related to the evidence of PW3 (the Investigating Police officer who testified at the earlier criminal trial) that the trial court incisively examined the evidence of this witness. The learned trial Judge explained that his reason for so doing was that the evidence of PW3 was "the only yardstick I think I can fall back on the circumstances under which the police had prosecuted the plaintiff on the report of the Defendant." Be it noted that Exhibit 1 was put to only one use by the learned trial Judge and therefore, our criticism of his conduct in this regard must be so confined.

The Court of Appeal, per the judgment of Katsina-alu, JCA, and the other two Justices with him concurring, tacitly approved the conduct of the learned trial Judge in examining the evidence of PW3 in Exhibit 1 and stated that it did so as it was necessary for the trial Judge to set out and examine the circumstances that led to the charge and that this was precisely what prompted the trial Judge to do so by referring to the circumstances under which the police had prosecuted. His Lordship cited and relied on the decision of the Federal Supreme Court in Usifo v Uke & anor (1985) 3 F.S.C. 25.

It is this conduct of the learned trial Judge in examining the evidence of PW3 in Exhibit 1 that the Appellant further complained of under Issues Three and Four, and more specifically it was submitted on behalf of the Appellant by his learned counsel that such approach was at variances with the provisions of section 34(1) of the Evidence Act. It is desirable at this point not only to recall that the Appellant's claim, as Plaintiff, against the Respondent, as Defendant, was one of damages for malicious prosecution but also to ask, **what are the ingredients to be established in order to succeed in an action for malicious prosecution? Succinctly put, the plaintiff in an action for malicious prosecution must plead and successfully establish in evidence -**

1. That the Defendant prosecuted him in the sense that he set the law in motion against him. Therefore, where the Defendant

merely made a report to the police but did not actively instigate the actual prosecution of the plaintiff, having left it open for the police, in its discretion to decide whether to prosecute or not, it cannot in such circumstance be said that the plaintiff was prosecuted by the Defendant. See Pandit Gaya Parshad Tewari v Sardar Bhagat Singh B (1908) 24 HR 884 and Farley v Danles (1855) A L x B 493.

2. Consequent to the prosecution, the plaintiff was discharged, that is to say that the prosecution was determined in favour of the plaintiff.

3. The plaintiff must establish that the prosecution was without reasonable and probable cause. Thus where the Defendant makes a false report against the plaintiff leading to the latter's prosecution this is clearly evident that the Defendant had no reasonable and probable cause for making the report to the police. See Payin & anor v Aliuah 14 WACA 267, Innieh v Aruegbon 14 WACA 73 at 74 and Balogun v Amubikanhun (1989) 4 SCN J 249. D

4. Finally, it must be established that the prosecution was acted by malice by the Defendant against the plaintiff. In this regard, malice means absence of honest belief in the charge preferred against the plaintiff. This point was elucidated in the English case of Meering v Graham-White Aviation Co. 122 L.T. 44 at pp 35 and 36 in these words "Honest belief seems to be the substantial thing F that has always to be decided and such belief must be not merely belief by the prosecutor of the guilt of the person, but it must be a belief that the prosecutor will be able to adduce sufficient evidence before a jury or the court as would justify the court in convicting G the accused."

Now, I return to the complaint made against the learned trial Judge of examining and evaluating the evidence of PW3 contained in Exhibit 1. I must say unequivocally that the learned trial Judge was palpably in error and unjustified in law to have extensively examined and evaluated the evidence of PW3 contained in Exhibit 1. One bears in mind that PW3 was a witness who testified in the criminal proceedings and never testified before the trial court in the civil proceedings H

ings. I must also stress that the Court of Appeal was in grave error to have approved this tinkering with the evidence of PW3 in Exhibit 1 on the fancied argument that it was necessary for the trial Judge to set out and examine the circumstances that led to the charge preferred against the Appellant and to ascertain the circumstances under which the police had prosecuted. It must be emphasized that Exhibit 1 was admitted in evidence without opposition, for the single purpose, as earlier noted, namely, that the Appellant was criminally prosecuted and that the prosecution terminated in his favour in that he was discharged. Clearly, if the learned trial Judge was desirous to elicit certain facts from PW3, the proper cause open to him would have been to field PW3 to testify before him. But bearing in mind that the proceeding before the trial Judge was a claim in civil action, and not one for a criminal trial, he had no duty to field any witness as he would have done suo motu in criminal proceedings. The trial Judge afterall was a mere umpire ensuring that there was no overreaching of either of the parties by the other, but to justly decide the matter in controversy having regard to the evidence led at the trial before him. Being a civil case, the burden was plainly on the Appellant, as Plaintiff, to prove the ingredients of the action for malicious prosecution on balance of probabilities.

Again, the court below, in my view, was in error to have taken the unfortunate posture that the learned trial Judge had a duty to comment on the evidence of PW3 in extenso, or even at all and it is of no moment that the conduct of the trial Judge could be played down because he neither made any findings of fact from the said evidence of PW3 nor relied on that witness's evidence in deciding that the Appellant's case had no merit. That argument will be begging the issue. In my view, I am unaware of the existence of any such duty on the trial Judge to make such comment. No authority was cited to show how such duty has arisen. On the contrary, I shall show anon, relying on the provisions of section 34 (1) of the Evidence Act to demonstrate that the said duty was illusory. In my opinion, there was no power whatsoever, in all the circum-

stances of this case, to justify the erroneous use to which PW3's evidence was put, nor the tacit approval given to this irregularity by the court below.

It is now convenient to elaborate on the position of the law in relation to relevance and admissibility of evidence given in an earlier proceeding. It is this: evidence of a witness given in an earlier judicial proceeding is neither relevant nor admissible (except as we shall show presently under section 34 (1) of the Evidence Act) in a subsequent judicial proceeding although such evidence may be used for purposes of cross-examination of the same witness as to credit. See Alade v Aborishade (1960) 5 FSC 167, Folarin v Durojaiye (1988) 1 NWLR (Pt.70) 351 and 369 and Olunjinle v Adeagbo (1988) 2 NWLR (Pt. 75) 238 at 250. In other words, the evidence of PW3 in the previous criminal proceeding did not constitute legal evidence in the civil proceeding before the trial Judge in this case, but Exhibit 1, as a document evidencing the prosecution of the Appellant that terminated in his favour was not only relevant but was also admissible in evidence in proof of one of the major ingredients in the action for malicious prosecution.

Statutorily, the position is no different except that some well-defined exceptions have been made. The relevant statute is section 34(1) of the Evidence Act which stipulates as follows:

" 34. (1) Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceedings, or in a later stage of the same judicial proceedings, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances or the case, the court considers unreasonable: Provided -

(a) that the proceedings was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right

and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceedings."

It is manifest that the learned trial Judge did not make any effort to bring himself within the purview of the stringent provisions of section 34(1) of the Evidence Act before utilizing the evidence of PW3 in the Criminal trial as contained in Exhibit 1. It is clear that the exclusionary provisions of section 34(1) have not admitted any exception in favour of actions for malicious prosecution. I am clearly of opinion that there was no warrant for the learned trial Judge, in the circumstances of this case, to have justifiably made an inroad into, or use of, PW3's evidence. Nor does it make any difference, as earlier noted, that the Court of Appeal approved this conduct of the trial court, which in my view, was erroneous and legally indefensible.

The crucial question that must be asked is what is the legal consequence of this procedural error or irregularity? In justifying this conduct of the trial Judge, the Court of Appeal believed, wrongly in my view, that it was laudable since "the success or failure of the prosecution depended on the evidence of this witness (i.e. PW3). It also considered the evidence adduced before him and came to the conclusion that the Respondent had a reasonable and probable cause to make the report". I must, however, emphasize clearly that both the evidence and conclusion elicited from the trial Judge's tinkering with the evidence of PW3 are of no moment. In law, there is no burden on the Respondent to establish that he had a reasonable cause to make the report unless and until the Appellant must have successfully established that the prosecution was without reasonable and probable cause. To hold otherwise, would be tantamount to, as it were, putting the cart before the horse. It is akin to the ridiculous position where the court embarks on a perilous exercise of insisting in proof of the innocence of the accused person when in fact the prosecution has woefully failed to establish the guilt of the accused person beyond reasonable doubt. All I am

trying to say is that the "evidence" or information obtained by the learned trial Judge consequent to evaluating the evidence of PW3 was not used to establish that there was no merit in the Appellant's case. If the reverse was the case, then the Appellant can make a legitimate complaint against the judgment of the learned trial Judge. B In other words, the "evidence" erroneously lifted from the evaluation of PW3's evidence was not purposefully utilized to the detriment of the Appellant to warrant disturbing the decision of the learned trial Judge. It is another way of saying that the learned C Judge's peep into the evidence of PW3 as contained in Exhibit 1 was a worthless and harmless exercise in the circumstances of this case.

Even if by any strength of imagination the reliance placed on the evidence of PW3 may be viewed differently, Appellant's case was bound to fail in any event because, as pointed out by the learned D trial Judge, he failed to discharge the onus on him of proving two ingredients of the action of malicious prosecution, namely, (1) absence of reasonable and probable cause in the prosecution of the Appellant, and (2) proof that there was malice, i.e. in the sense that E the prosecution of the Appellant was actuated by the malice of Respondent against the Appellant. The Court of Appeal also affirmed the decision of the trial Judge with respect to Appellant's failure to establish the above two ingredients of the action for malicious prosecution. F The law is patently clear that if the learned trial Judge is satisfied that the Plaintiff/Appellant had failed to adduce evidence enough in proof of the action for malicious prosecution, then, he has no responsibility to inquire on whether the Defendant/Respondent G has made out his defence. Such inquiry, if undertaken, is bound to be a futile exercise.

In the result, in the circumstance of this case, where the learned trial Judge erroneously examined the evidence of a witness (i.e., PW3) not before him but testified in an earlier proceeding, H and the said evidence was harmless in that it was not needed to establish the failure of Appellant's case, this procedural slip of the trial Judge cannot alone vitiate the proceeding of the learned trial

Judge but will undoubtedly earn him outright admonition of the appellate court. The decision in Alade v Aborishade (supra) is wholly inapplicable.

Admittedly, from what I have said so far, and for avoidance
 B of doubt, there was a misdirection or mistake of law on the part of
 the learned trial Judge with regard to his unbridled evaluation
 and lifting of "evidence" from the evidence of PW3 in Exhibit 1,
 which on that reason alone, would ordinarily lead to the reversal of
 C the judgment of the trial Judge, and on the same token, the judgment
 of the Court of Appeal which affirmed the judgment of the
 learned trial Judge. But it must be emphasized that it is not every
 slip or error committed by the court that leads to reversal of the
 judgment of that court by an appellant court. For a slip or an error
 D in a judgment to lead to its reversal by an appellant court, it must
 have substantially affected the outcome of the decision. It is therefore
 not enough to allege error or slip in the judgment in question
 but the party complaining must demonstrate that the error or slip
 E substantially affected the result of the decision as to result in a
 substantial miscarriage of justice. See Olubode v Salami (1985) 2
 NWLR (Part 7) 282. But that is not what happened in this case.
 Rather, as I had stated earlier, the "evidence" lifted from the testimony
 F of PW3 in Exhibit 1 was neither used to the advantage of
 the Respondent nor even to the detriment of the Appellant.

In the final analysis, Issues Two, Three and Four, taken together
 herein, have not shown any legal dent sufficient to resolve the appeal in
 appellant's favour.

G Issue Five is wholly digressional. In the leading judgment of the
 court below, the learned Appellant's counsel lifted this statement, to wit,

" It was therefore, not surprising when the criminal court wondered
 why in spite of their findings, the Police went ahead and prosecuted
 H the appellant."

and commented on it "as it does (sic) the impression that even though the
 criminal court discharges the Appellant, it nevertheless entertained some
 inquiry (sic) as to his innocence of the charge." This, counsel submits,

has occasioned a substantial miscarriage of justice. It is unfortunate that the passage credited to the court below was lifted out of context; and the learned counsel proceeded to place an encrustment on the said statement when such mutilation of the view expressed by the court below would have been completely obviated had the learned counsel fairly reproduced B the penultimate sentence to that quotation. The summation of the penultimate sentence is that since there was no appeal against the decision of the criminal court, the finding that the Appellant was harvesting his own rice on his own portion of the farm cannot now be raked up: "no question any longer remains as to the Appellant's innocence which C must be conclusively presumed." (the emphasis is supplied) This summary leaves no one in doubt about the view of the court below of the innocence of the Appellant. Clearly, the contrary impression being urged by the learned Appellant's counsel that the court of Appeal doubted the D Appellant's innocence of the charge is mischievous as much as it is unfortunate, having regard to the record of appeal. The decisive issue in this appeal, as lucidly stated by the trial Judge, confirmed by the court below, and which has been reiterated in this judgment, is that Appellant's E claim failed and stood dismissed because the Appellant failed (1) to establish that the Respondent did not have a reasonable and probable cause to report the Appellant to the police, and (2) that the Respondent had done so maliciously. I am satisfied that the respective decisions of the F trial court and the court below are amply borne out by the evidence led.

Thus, Issue Five is resolved against the Appellant.

In the result, the appeal lacks merit. I would dismiss it. The Respondent neither filed a brief nor was represented at the hearing; accordingly, I make no order as to costs. G

WALI JSC

I have been privileged to read in advance the lead judgment of H my learned brother Achike JSC and I agree with the reasons he gave for dismissing the appeal.

For the same reasons stated in the lead judgment, I also dismiss

the appeal with no order as to costs.

OGUNDARE JSC

B I agree entirely with the judgment of my learned brother Achike
JSC just delivered. True enough there are errors of law committed by
the two Courts below as pointed out by him. But, as the Appellant failed
to prove two of the four essentials of a successful action for malicious
prosecution highlighted in my learned brother's judgment, his action is
C bound to fail, in any event. It cannot therefore, be said that the errors
committed occasioned a miscarriage of justice. That being so, the judg-
ments of the Courts below are not thereby vitiated.

I too, therefore, dismiss the appeal and make no order as to
D costs.

EJIWUNMI JSC

E As I have had the advantage of reading the draft of the judgment
delivered by my learned brother, Achike, JSC, I also dismiss the appeal
for the reasons given in the said judgment. I also make no order as to
costs.

F

AYOOLA JSC

I have had the advantage of reading in draft the judgment deliv-
ered by my learned brother, Achike, JSC. Being in agreement with the
G reasons he gives for dismissing this appeal, I too would dismiss the ap-
peal with no order as to costs.

H