

SUPREME COURT OF NIGERIA

14 JANUARY, 2000 SC. 92/1993

**CORAM:- A. B. WALI, E. O. OGWUEGBU, U. A. KALGO,
E. O. AYOOLA, JJSC**

ALHAJI LAWAL TUNBI	APPELLANT
AND		
ISRAEL OPAWOLE	RESPONDENT

***APPEALS** - Briefs of appeal - Consideration of an abandoned brief by the Court of Appeal - Instead of the amended brief - Means failure to hear appellant's case.*

***APPEALS** - Issues - Appeal court must consider all issues raised - Save where a consideration of one issue is enough - To dispose of the appeal.*

***APPEALS** - Rehearing of appeal - Will be ordered in the circumstances of this case.*

FACTS

This case is in respect of a dispute over the ownership of a piece of land in Kwara State. It started in 1956 before the Emir's Court Ilorin, which found that the land belonged to the Respondent's predecessor in title. The proceedings of the Emir's Court was marketed Exhibit "D". In 1978, appellant sued the Respondent over the same land in the High Court and Upper Area Court. But on production of Exhibit D both cases were struck out. Thereafter appellant commenced building construction on the land. Respondent sued him before the Ibolo Area Court Grade II which refused to eject the appellant from the land. Respondent appealed to the Upper Area Court which ordered the appellant to remove his building from the land. Appellant's appeal to the High Court was successful.

Respondent being dissatisfied appealed to the Court of Appeal, which found in his favour. But the Court relied on the abandoned brief of appeal filed by the appellant instead of his amended brief. Appellant has

now appealed to the Supreme Court against the Court of Appeal's decision.

ISSUE FOR DETERMINATION

Whether the judgment of the Court of Appeal is not erroneous on account of the fact that the consideration of the appeal was not based on the brief of argument relied upon by the respondent in that court but on an abandoned brief.

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

Briefs of appeal - Consideration of an abandoned brief

1. There is no doubt that in this case, the Court of Appeal considered an abandoned brief dated 3/6/91 and failed to consider the amended brief dated 5/3/92 in arriving at its decision. The consequences of this is that the Court of Appeal did not hear or consider the appellant's case as presented before it since his case was considered on arguments which he had already abandoned. It does not matter in my view, that the issues involved were straight forward or that the appellant was heard in oral argument as learned counsel for the respondent submitted in his brief. I have also read the authorities he has cited on this point and do not find them useful on this issue. I reject his submission on this issue and find that the decision of the Court of Appeal in this case was erroneous.
(p. 78 F)

Appeals - Issues

2. It is trite law that an appeal court must consider all issues for determination raised before it except where it is of the view that a consideration of one issue is enough to dispose of the appeal. See ANYADUBA V N.R.T.C. LIMITED (1992) 5 NWLR (pt.243) 535 at 561; OKONJI V NJOKANMA (1991) 7 NWLR (pt. 202) 131. In the circumstances of this case, I am of the view that the consideration of issue 1, is enough to dispose of the appeal and that it would serve no useful purpose to consider the other issues. (p. 79 A)

Rehearing of appeal

3. In the circumstances, and for the reasons I have given above, I find that this appeal is meritorious. I allow it and set aside the decision of the Court of Appeal delivered on 23/7/92. I hereby order a rehearing of the appeal by a different panel of the Court of Appeal Kaduna using the appellant's brief dated 5/3/92 or as may be amended. (p. 79 C)

NOTABLE POINT OF INTEREST

OGWUEGBUJSC

1. Test of fairness in appeal proceedings

The test of fairness in appeal proceedings is different from the test of fairness at the court of first instance where the true test is the impression of a reasonable person who was present at the trial. In the appeal court, the test is whether having regard to the rules of court and the law, justice had been done and appears to have been done to the parties. Justice was not done to a party whose case before the appellate court was not considered on his brief before a decision affecting his right was reached. This is against the rule of natural justice as well as a violation of the respondent's right embodied in section 33 of the 1979 Constitution. See the cases of Otapo v. Sunmonu & Ors. (1987) 2 N.W.L.R. (pt. 58) 587 at 605 (p. 82 F)

REPRESENTATION

B. Aluko-Olokun, with A. H. Sulu-Gambari for the appellant

E. A. Aremu Esq. for the respondent

CASES REFERRED TO

Anyaduba v. N.R.T.C. Limited (1992) 5 NWLR (pt.243) 535 at 561

Okonji v. Njokanma (1991) 7 NWLR (pt. 202) 131

Otapo v. Sunmonu & Ors. (1987) 2 N.W.L.R. (pt. 58) 587 at 605

Okonkwo v. Okonkwo (1998) 10 NWLR (pt.571) 554.

Nwokoro v. Onuma [1999] 5 SCNJ 93

hearing the parties, allowed the appeal set aside the decision of the High Court Ilorin, and restored the decision of the Upper Area Court 1, Ilorin. The appellant has now appealed to this court.

Written briefs were filed and exchanged in this court by the parties. It is pertinent to observe at this stage that the appellant filed a brief first on the 5th of May, 1993. This was however superseded by another appellant's brief which was filed on the 24th of November 1998 with the leave of the court.

At the hearing of the appeal, counsel for both parties adopted and relied upon their respective briefs.

In the appellant's brief, the following issues were formulated for the determination of this court:-

"1. Whether the judgment of the Court of Appeal is not erroneous on account of the fact that the consideration of the appeal was not based on the brief of argument relied upon by the respondent in that court but on an abandoned brief.

2. Whether the relief sought by the plaintiff in the trial court amounted to an application seeking to enforce the 1956 judgment of the Emir's court and whether the plaintiff had a right to enforce the judgment in the 1956 suit and if so whether the application could be granted in this case in the light of the fact that the judgment did not define the area of land it affects precisely or adequately.

3. Whether a photocopy of a certified copy of judgment which does not show that it was signed by a judge or other judicial officer authorized to sign a judgment is admissible in evidence in an Area Court.

4. Whether the plea of estoppel per rem judicatam is available to the plaintiff to ground an action by him and not to oppose or defend an action brought against him by adverse party.

5. Whether the judgment of the Court of Appeal which consist of the judgment of only one of the three justices of the court who heard the appeal before the court is valid having regard to the requirements of Section 258 of the Constitution of the Federal Republic of Nigeria, 1979."

The respondent in his brief also identified the issues for determination in the appeal thus:-

"1. Whether the Appellant could be said to have not been heard by the Court of Appeal, Kaduna, before its judgment dated 23/7/92 was entered, when all the points raised both in the brief and in oral address were consider by the court in its said judgment.

B *2. Was the Court of Appeal, Kaduna, in error, when it held that the doctrine of estoppel per res judicatam was available to the Respondent in view of the fact that:-*

C *(a) The Appellant admitted both in his brief and oral address in the court, that the parties in Exhibit D. Were successors in-title to the parties in this case.*

(b) The identity of the land in dispute in the instant case, was the same as the land in Exhibit D and

D *(c) The judgment in Exhibit D was a final judgment of the Court of competent jurisdiction.*

3. Was Exhibit D properly admitted, if yes, was the Respondent not right in applying to the trial court to enforce it, as he did in this case?"

E I consider that the issues formulated by the appellant are more appropriate and acceptable to me having regard to the grounds of appeal filed and I adopt them for the purpose of this appeal.

I shall take issue I first. It reads:-

F *" Whether the judgment of the Court of Appeal is not erroneous on account of the fact that the consideration of the appeal was not based on the brief of argument relied upon by the respondent in the court but on abandoned brief".*

G In arguing this issue, in his brief, the learned counsel for the appellant pointed out that from the judgment of the Court of Appeal, it is very clear that that court used the old brief which was abandoned by the appellant. He explained that the issues which the Court of Appeal referred to in its judgment which they attributed to the appellant's brief H were the issues set out on page 3 of the abandoned brief. In the new relevant brief filed by the appellant with the leave and by order of that court, the issues for determination were properly laid on page 1. And while the learned Justices of the Court of Appeal criticized the issues in

the abandoned brief of not arising from the grounds of appeal filed and that the brief argued grounds of appeal instead of issues, in the new relevant brief those defects were properly taken care of.

Learned counsel therefore submitted that the Court of Appeal used the wrong brief which was not the one presented to that court for consideration of the appeal and that this error completely vitiated the judgment arrived at by the Court of Appeal. In his brief, he cited in support of this submission, the decision of this court in the case of EBENEZER NWOKORO V TITUS ONUMA & ANR (1990) 5 SCNJ 93 which he said was on all fours with the instant case. He asked the court to set aside the judgment of the Court of Appeal and order a rehearing of the whole appeal.

In his brief of argument, the learned counsel for the respondent conceded that " the Court of Appeal Kaduna made a technical mistake" by using the appellant's brief dated 3/6/91 instead of the one dated 3/2/92, but that since the parties counsel were heard orally on their respective briefs by that court and the facts of the case are so straight forward and the law involved a common place, the failure of the Court of Appeal to use or refer to the parties' briefs in the judgment could not by itself occasion a failure of Justice vitiating the judgment of the court. Learned counsel cited in support the case of DONATUS NDU V THE STATE (1991) 12 SCNJ 50 at 61 and NIGER CONSTRUCTION LIMITED V OKUBENI (1987) 11-12 SCNJ 133 at 138. He also contended in the brief that there is a major distinction between the present case and the case of EBENEZER NWOKORO & ors (supra) cited by the appellant's counsel in that in this case, both parties were heard in oral argument. Learned respondent's counsel then stated that if this court disagrees with this submissions, then he prays the court to apply the provisions of Section 22 of the Supreme Court Act, 1960, and do substantial justice in the matter so as not to waste any more time, considering the fact that the dispute in this case started since 1956.

By a motion on notice dated 5th March, 1992, (on pages 24 and 25, of the record) the Chambers of Aluko-Olokun & Company applied to the Court of Appeal for filing respondent's (now appellant's) brief out of

time and for deeming it properly filed and served. The motion was heard on 10th of March 1992 (page 56 of the record), with Mr. Aluko-Okokun appearing with Aderigbigbe and Badmus for the respondent. The record of the Court on that day reads:-

B *"Aluko-Olokun: I have become aware of another brief filed for the respondent. I seek for leave to abandon it. I have a motion seeking for leave of this court to file brief of the respondent out of time.*

Aremu: We are not opposing the application.

C *Court: The application is granted as prayed".*

D That brief was deemed properly filed and was placed on pages 48-53 of volume 11 of the record of appeal in this case. The brief which was referred to by the learned counsel Mr. Aluko-Olokun in moving his application as being abandoned, is the one contained on pages 27-47 of D volume 11 of the record and it was dated 3/6/91. From the above, there is no doubt that the brief signed by Badmus, and dated 3/6/91 on pages 27-47 of the record, was filed earlier and must be the one abandoned. The Court of Appeal granted the prayer to abandon it on the 10th of E March, 1992. Therefore when the appeal was heard on 30/4/92, the only brief of the appellant (then respondent) before the Court of Appeal was the one dated 5/2/92, and was adopted by the counsel Mr. Aderigbigbe before starting his argument on page 60 of the record.

F The Court of Appeal in its judgment appealed against set out the issues formulated by the parties' counsel in their briefs before it as can be seen on pages 69-70 of volume 11 of the record. In the case of the appellant's brief (then respondent before them) only the 3rd issue was set out in the judgment and that issue was on page 3 of the brief filed G earlier and dated 3/6/91. The Court of Appeal commented on the nature of the issues formulated by the appellant then respondent per Musdapher JCA when he said:-

H *"In my view the issues formulated by the respondent's counsel are clearly not satisfactorily borne out of the grounds of appeal further to the above, the learned counsel has failed to discuss the issues formulated by him in the brief but he rather dealt with the grounds of appeal".*

This observation would appear to be correct if one looks at page

3 of the brief dated 3/6/91 on page 29 of the record, but cannot be true of the brief dated 5/2/92. In the latter, the issues were properly laid out on page 49 of the record (volume 11) and only issues and not grounds of appeal were argued. Therefore, I am satisfied and there is no doubt in my mind that the Court of Appeal used the abandoned brief of the appellant (then respondent) earlier filed and dated 3/6/91, in determining the appeal leading to the judgment appealed against. What then is the legal position and the consequences of doing so?

The learned counsel for the respondent though conceding that the wrong brief was used by the Court of Appeal, submitted in his brief of argument in this court that since the appellant was heard in oral argument of his brief, and the issues involved are straight forward, failure of the court to consider the later brief of the appellant could not of itself occasion a failure of justice or constitute a breach of the constitutional right to fair hearing. The learned counsel for the appellant on the other hand submitted very strongly that failure to consider their new brief of argument in determining the appeal was sufficient miscarriage of justice to vitiate the whole judgment of the Court of Appeal and he referred the court to the case of NWOKORO (supra).

I have carefully read NWOKORO's case (supra) and it appears to me that the facts therein were on all fours with the instant case. In Nwokoro's case, the appellant's brief of argument which was defective was amended with the leave of the Court of Appeal, but when the Court of Appeal heard the appeal it used the defective brief in its judgment. It is also pertinent to observe that as a result of the defect in the brief in NWOKORO's case, the Court of Appeal formulated its own issues for determination and the same thing also took place in the instant case. Therefore there is absolute similarity in both cases. In fact the main issue for determination in Nwokoro's case which was similar to Issue I in this appeal read:-

"Whether the judgment of the Court of Appeal can be allowed to stand when the learned Justices of the said court have clearly failed to consider the arguments presented them in the brief filed in support of the defendant's case".

This was the main contention in this appeal. The Supreme Court after hearing the appeal in Nwokoro's case found that the Court of Appeal was wrong in not considering the proper brief of argument of the appellant there; it allowed the appeal and set aside the decision of the Court of Appeal. Karibi-Whyte JSC in the leading judgment of the court had this to say on pages 32-33 of the report:-

"Hence in the instant case, the court below having recognised the defect of the original brief of argument..... had no brief of argument before it on behalf of the appellant. The Court below could not therefore be heard to talk of making use of and relying on the defective brief of argument as it is - see BIOKU V LIGHT MACHINE (1986) 5 NWLR (pt.39) 42.

In the absence of a brief of argument properly so called, and the court having not dispensed with the filing of briefs, the amended brief of argument adopted and relied upon by the parties not considered by the court, it seems to me therefore obvious that the case of the appellant which was before the court below was not considered by that court. A party is entitled as of right to the consideration of his case before the court. Thus where the court has relied on the case abandoned by the litigant in the determination of his grievance before it, it will not only be a mis-use of the expression that he has been given fair hearing, it will also be more accurate to say that he was not heard at all". (underlining mine)

This case was referred to and followed by this court in OKONKWO V OKONKWO (1998) 10 NWLR (pt.571) 554 at 570.

There is no doubt that in this case, the Court of Appeal considered an abandoned brief dated 3/6/91 and failed to consider the amended brief dated 5/3/92 in arriving at its decision. The consequences of this is that the Court of Appeal did not hear or consider the appellant's case as presented before it since his case was considered on arguments which he had already abandoned. It does not matter in my view, that the issues involved were straight forward or that the appellant was heard in oral argument as learned counsel for the respondent submitted in his brief. I have also read the

authorities he has cited on this point and do not find them useful on this issue. I reject his submission on this issue and find that the decision of the Court of Appeal in this case was erroneous.

It is trite law that an appeal court must consider all issues for determination raised before it except where it is of the view that a consideration of one issue is enough to dispose of the appeal. See ANYADUBA V N.R.T.C. LIMITED (1992) 5 NWLR (pt.243) 535 at 561; OKONJI V NJOKANMA (1991) 7 NWLR (pt. 202) 131. In the circumstances of this case, I am of the view that the consideration of issue 1, is enough to dispose of the appeal and that it would serve no useful purpose to consider the other issues.

In the circumstances, and for the reasons I have given above, I find that this appeal is meritorious. I allow it and set aside the decision of the Court of Appeal delivered on 23/7/92. I hereby order a rehearing of the appeal by a different panel of the Court of Appeal Kaduna using the appellant's brief dated 5/3/92 or as may be amended. I award the costs of this appeal which I assess at N10,000.00 in favour of the appellant.

WALI JSC

I have had the privilege of reading in advance a copy of the lead judgment of my learned brother Kalgo, JSC and I entirely agree with his reasoning and conclusion for allowing the appeal.

The decision in Ebenezer Nwokoro & Ors. v. Titus Anor. [1999] 5 SCNJ 93 is on all fours with the facts in this case and so the ratio decidendi laid therein by this court is equally applicable.

It is more than a technical error committed by the Court of Appeal to decide an appeal before it on an abandoned brief. As Karibi-Whyte JSC opined in Nwokoro & Ors. v. Titus & Anor. (supra) to wit.

"In the absence of a brief of argument properly so called, and the court having not dispensed with it it seems to me therefore obvious that the case of the appellant which was before the court below was not considered by that court" the Court of Appeal by relying on the

abandoned brief in arriving at its decision, has not properly considered the appeal before it. The provision of fair hearing as entrenched in the constitution has been breached. The appeal must therefore succeed.

It is for this and the more elaborate reasons contained in the lead judgment that I also allow this appeal. I adopt the consequential orders contained in the lead judgment including that of costs.

OGWUEGBU JSC

I have read the judgment of my learned brother Kalgo, J.S.C. just delivered and I agree with him that the appeal be remitted to the court below for hearing de novo on the respondent's brief dated 3-3-92 and filed on 5-3-92 by a panel of the court differently constituted.

Two briefs of argument dated 3-6-91 and 3-3-92 were filed by the respondent. The first brief was withdrawn on 10-3-92 with the leave of the court below and leave was also granted to the respondent to file the second brief which was deemed as properly filed and served. As a result of the leave granted by the Court of Appeal, Kaduna Division, on 10-3-92, the only valid respondent's brief before the said court was the second brief dated 3-3-92 and filed on 5-3-92.

At the hearing of the appeal on 30-4-92, Aderibigbe, Esq. learned respondent's counsel adopted the said brief dated 3-3-92. He expatiated on it and judgment was reserved. In the judgment 23-7-92, the court below considered three issues formulated in the respondent's first brief which had been withdrawn.

In ground one of the amended notice of appeal before this court, the defendant/appellant complained as follows:

"1. The judgment of the Court of Appeal is erroneous in that the argument which was validly put before it by the respondent before it was not considered at all and instead the Court of Appeal considered the brief which was abandoned by the respondent on 10-3-91 (sic) when the respondent was granted leave to file his brief dated 3-2-92 (sic).

Particulars

(i) All references in the judgment of the Court of Appeal was to

the brief which was abandoned on 10-3-91 (sic) in regard to the brief and argument of the respondent therein.

(ii) On 10-3-91 (sic) the respondent in the Court of Appeal obtained leave to file another brief dated 3-2-91 (sic)

(2) B

At pate 9 of its judgment, the court below reproduced three issues for determination which it claimed was identified by the respondent in his brief. It proceeded to consider the appeal on those issues. Unfortunately, those were the issues contained in the brief 3-6-91 which had been withdrawn. The result was that the appeal was not determined on the valid brief dated 3-3-92 which was before that court. C

The court below in its judgment made uncomplimentary remarks on the brief which it utilized thus:

"In my view the issues thus formulated by the respondent's counsel are clearly not satisfactorily borne out of the grounds of appeal. Further to the above, the learned counsel has failed to discuss the issues formulated by him in the brief but he rather dealt (sic) with the grounds of appeal. It has been stated and restated in a plathora (sic) of cases that in arguing an appeal in a brief of argument, counsel must confine himself to the consideration of the issues formulated by him and not on the grounds of appeal....." D E

The brief filed by the respondent does not clearly refute the specific argument attacking the judgment of the court below as canvassed in the appellant's brief. I shall endeavour however, in this appeal to try to fish out the relevant submissions of counsel as I understand them." F

I have read the two briefs filed by the respondent. The court below could have been justified in its comments on the respondent's brief dated 3-6-91 if it had not been withdrawn with the leave of that court. As at 30-4-92 when the appeal was argued, the respondent's brief which was before the court below was the second brief dated 3-3-92 and signed by B. Aluko Olokun, Esq. That brief was based on an amended notice of appeal containing six grounds of appeal whereas the earlier brief was argued on mine grounds of appeal. The issues formulated in the two briefs were totally different. G H

There is no doubt that the court below inadvertently determined the appeal on the respondent's brief which had been withdrawn. The question to be decided therefore is whether the court below was in the circumstances right to have determined the appeal on a brief of argument which had been withdrawn instead of a valid brief which was before it. The right to a fair hearing is guaranteed by the Constitution. It ensures that both the plaintiff and the defendant and in this case the appellant and the respondent are in equal position to make their case and the case presented adequately considered before judgment is pronounced. In our appellate system a party is required by the rules of court to file and serve on the opposite party a written brief which is a succinct statement of his argument in the appeal and oral arguments are allowed at the hearing only to emphasize or clarify the written arguments in the briefs. In my view, where as in this case, the court below failed to consider a valid brief filed by the respondent, it cannot be said to have heard the respondent. It is patent from the record of appeal that the case presented by the respondent was not considered before the appeal was determined. When arguing the appeal Mr. Aderibigbe learned respondent's counsel adopted and relied on the respondent's brief dated 3-3-92 and filed on 5-3-92. The respondent's case was argued on that brief. The court below having failed to consider the appeal as argued in the respondent's brief, was in breach of the audi alteram partem rule. See the cases of Nwokoro & Ors. & Or. (1990) 3 N.W.L.R. (pt.136) 22 and Okonkwo v. Okonkwo (1998) 10 NWLR (pt.571) 554.

The test of fairness in appeal proceedings is different from the test of fairness at the court of first instance where the true test is the impression of a reasonable person who was present at the trial. In the appeal court, the test is whether having regard to the rules of court and the law, justice had been done and appears to have been done to the parties. Justice was not done to a party whose case before the appellate court was not considered on his brief before a decision affecting his right was reached. This is against the rule of natural justice as well as a violation of the respondent's right embodied in section 33 of the 1979 Constitution. See the case of Otapo v. Sunmonu & Ors. (1987) 2

N.W.L.R. (pt.58) 587 at 605. A hearing de novo on the merits before another panel of Justices of the court below will meet the justice of the case.

For the above reasons and the fuller reasons contained in the judgment of my learned brother Kalgo, J.S.C., I too allow the appeal on ground one only. It is not necessary at this stage to consider the other issues. I abide by all the consequential orders contained in the judgment of my brother Kalgo, J.S.C. including the order as to costs.

UWAIFO JSC

The crucial issue raised on this appeal is issue 1 which leads to a determination of the consequences of an appeal court deciding an appeal on an abandoned brief of argument instead of the current brief. The appellant in this case amended his brief of argument in the court below and abandoned the old brief. It relied on the amended brief and at the same time proffered some oral argument in opposition to the appeal.

The lower court, in error, based the consideration of the appeal on the abandoned brief and gave judgment against the appellant. The question is whether the appellant's case received a fair hearing since the written brief relied on by him was not the basis upon which consideration was given to the merit of the appeal. His argument is that he was not given a hearing or a fair hearing in the case presented by him before a decision was reached by the lower court.

The respondent's argument is that the appellant was heard by the lower court in respect of the issues raised in his brief as well as in oral argument and that reference to the abandoned brief by that court in its judgment was a 'technical mistake' which did not occasion a miscarriage of justice. This court was invited to consider the record of proceedings in the interest of doing substantial justice to see whether the judgment of the lower court would have been different.

A similar argument was put forward by the respondents in Nwokoro v Onuma (1990) 3 NWLR (pt.136) 22. But this court in rejecting that argument, per Karibi-Whyte JSC in his leading judgment, said

at page 33:

"It seems to me learned counsel for the respondents misconceived and not quite grasped the contention of counsel to (sic) the appellants. All I understood counsel to (sic) the appellants to be saying is that, the case of the appellants is contained in his amended brief of argument dated 21/3/86. The court below in determining his appeal did not consider the case he made in the amended brief of argument before the court, rather relied on his abandoned brief of argument. The argument by counsel to (sic) the respondents that the court below considered the main issues in the appeal since the appeal was decided on the grounds of appeal filed by the appellants and the issues for determination covered all the grounds is not an answer. The crucial factor and weakness in this argument is that the appeal was not argued on the grounds of appeal filed simpliciter but also on the briefs of argument filed. The assumption is that although the court below relied on the abandoned brief of argument and that since the amended brief of argument which was not used covered the same grounds of appeal as the one abandoned which was relied upon, the result would have been the same in any event. This is a curious argument and non sequitur. Since the original brief of argument had been abandoned, it can no longer be part of the case of the appellants and should not have been used, and there is no basis for the comparison."

This reasoning was endorsed by the other four learned Justices. The ratio decidendi established by it goes into a strait-jacket: it is that it is fatal for an appeal court to decide an appeal upon the abandoned brief of argument of any of the parties no matter the result arrived at if an appeal is lodged against the judgment.

It seems to me therefore that on the present state of the law, I must reject the respondent's contention and hold that there is merit in this appeal. I think also, as my learned brother Kalgo JSC does, that the first issue raised by the appellant is enough to dispose of this appeal. For the reasons I have given and the fuller reasons contained in the leading judgment of Kalgo JSC, I too allow this appeal and abide by his order for a rehearing of the appeal in the lower court and for costs.

AYOOLA JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kalgo, JSC. For the reasons he gives I too would allow the appeal and order that the appellant's appeal be reheard by the Court of Appeal.

The background facts have been carefully stated in the judgment of Kalgo, JSC. It is not necessary for me to rehearse these facts. The main issue in this appeal is put in the appellant's brief of argument in his issue No.1:

"Whether the judgment of the Court of Appeal is not erroneous on account of the fact that the consideration of the appeal was not based on the brief of argument relied upon by the respondent in that court but on an abandoned brief." It is common ground that the Court of Appeal erroneously regarded the appellant's abandoned brief, for which a fresh brief had been substitute, as the appellant's brief of argument in the appeal. The question is: what is the consequence of that error in this case?

One of the essence of the right of fair hearing is that a party should not be denied of the opportunity of presenting argument and making submission in support of his case and that when such argument has been presented and submissions made, the tribunal should not come to a decision without consideration of the argument and submission. A party cannot be said to have been given his right of fair hearing when his argument have been shut out from consideration, albeit by mistake.

In this case, the respondent described the error which led to the shutting out of the appellant's argument by the court below as a "technical mistake". However, in my view, there is nothing technical about an error which touches on such fundamental aspect of our system of justice and is tantamount to a denial of fair hearing or, as some would regard it, a hearing at all.

A situation substantially similar to the instant case arose in Nwokoro & Ors v. Titus & Anor (1990) 5 SCNJ 93. In that case this court allowed the appeal and ordered a rehearing on the ground that the Court of Appeal failed to consider the argument contained in the appellant's brief. In the present case, not only did the Court of Appeal erroneously

consider the argument contained in the appellant's abandoned brief of argument, that court made adverse comments on that brief. It is trite law that an abandoned brief of argument cannot be made use of in determining the merits of an appeal. The use by the Court of Appeal of the
B abandoned brief was purely a mistake. Notwithstanding, that fact however, the proceeding tainted by such resulting fundamental defect in procedure should not be allowed to stand.

For these reasons and the fuller reasons given in the judgment or
C my learned brother, Kalgo, JSC. I too would allow the appeal. I abide by the consequential orders and order as to costs make by him..

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