

SUPREME COURT OF NIGERIA
23RD. FEBRUARY, 2001. SC. 165/1995
CORAM:- A. B. WALI, E. O. OGWUEGBU, U. MOHAMMED,
U. A. KALGO, A. O. EJIWUNMI, JJSC.

1. A. C. B. LIMITED
2. IMO NEWSPAPERS LTD APPELLANTS/CROSS-
3. C. C. MOJEKWU RESPONDENTS
AND
B. B. APUGO RESPONDENTS/
CROSS APPELLANT

DAMAGES - *Interference* - Appeal court may upset the award of damages
- By trial court if a wrong principle of law was applied.

DAMAGES - *Libel* - General damages - Is awarded as of right - Once a
successful claim for libel has been established.

DAMAGES - *Reduction* - Appeal court rightly reduced damages awarded
by trial court - After careful consideration of circumstances of the case.

TORTS - *Defamation* - Justification - Defendant must prove strictly - The
truth of every allegation of fact - And not the truth of every word - In the
libel - In order to succeed - With this defence of justification.

TORTS - *Defamation* - Evidence - As there was no evidence - That the
respondent was indebted to the appellant - It was libellous - To hold him
out as unable to discharge the debt.

TORTS - *Defamation* - liability depends on the facts - And not the
intention of defamation - And one is liable for the reasonable inferences
- Drawn from his words.

TORTS - *Defamation* - Duty - The appellant has a duty - To ensure that

*the notice to the public issued by his auctioneer - Reflected the true position
- And was not libellous.*

FACTS

The proceedings leading to this appeal commenced at the High Court of Umuahia where the plaintiff/cross-appellant claimed against the defendants/appellants/cross respondent, jointly and severally the sum of 10 million naira as general damages for the publication of libellous matter in the Nigerian Statesman Newspapers. The plaintiff in his pleadings averred that he is the chairman and managing director of B. B. Apugo & Sons Ltd, a limited liability company registered in Nigeria and also director or chairman of some other companies while the 1st defendant is a limited liability company licensed to carry on banking business in Nigeria. The second defendant, a limited liability company were the printers and publishers of the "*Nigerian Statesman*" group of Newspapers and the 3rd defendant was a licensed auctioneer. It was his contention that in August 1983, a notice of auction sales was published in the 2nd defendant newspaper by the 3rd defendant at the instance of the 1st defendant for the sales of leasehold and freehold properties of B. B. Apugo purportedly mortgaged for debts which were due and had not been paid. He denied the truth of the publication as he was not the customer of the 1st defendant but rather B.B. Apugo & Sons Ltd who were in court with the 1st defendant over the alleged debt.

He therefore claimed that the publication was libellous and had injured his business credit, character and reputation as a successful businessman. The defendants in their defence denied responsibility for the act of the 3rd defendant who they claimed was an independent contractor, and asserted that B. B. Apugo & Sons Ltd was indebted to them which debt was secured with plaintiff's property. They further contended that the said B. B. Apugo & Sons Ltd had no distinct legal personality from B. B. Apugo as it was not incorporated & also denied the meaning attached to the purported libellous words. The learned trial judge in his judgment found in favour of the plaintiff and awarded general damages in the sum of N2 million against the defendants severally and jointly. On appeal to the

Court of Appeal the finding as to libel was affirmed but the damages awarded was reduced to N250,000.00. The 1st appellant was dissatisfied and appealed to the Supreme Court and the respondent also cross-appealed.

ISSUES FOR DETERMINATION

(i) *Whether the 1st appellant proved the truth of the publication made by them concerning the respondent, and if so whether the plea of justification was available to them.?*

(ii) *Whether the auctioneer was an independent contractor having regard to the instructions, and if he had been employed to do something unlawful thereby making the appellant vicariously liable?*

(iii) *Whether the damages awarded were excessive in the circumstances of this case.?*

(iv) *Was the Court of Appeal right to hold that the preliminary objection raised to the respondent's brief is incompetent?* Etc. see p. 664

HELD (Unanimously dismissing the appeal and cross appeal per lead judgment of **EJIWUNMI JSC**)

Defamation - Justification

1. It is manifest from the above quoted passage from the judgment of Obaseki JSC in Dumbo v. Idugboe (supra) that a defendant who is relying on a plea of justification to avoid liability in respect of an allegation of defamation against such a defendant has, indeed, an uphill task. To succeed he must prove and that very strictly, the truth of every allegation of fact made in the libel. Although, it is not necessary to prove the truth of every word in the libel, the defendant, is however obliged to prove that the main charge or gist of the libel is true. He need not justify the statements or comments which do not add to the sting of the charge. See Sutherland v. Stopes (supra). (p. 669 F)

Evidence - Defamation

2. I think it must be noted that the gist of the libel in the instant appeal is that the respondent was indebted to the appellant, and was unable to pay this debt, hence his properties which he had mortgaged to the appellant as

security for the loan has to be sold. For that defence of justification to absolve the appellant from liability for this libel, the appellant must prove that the respondent was truly indebted to the appellant. The evidence in this regard was not available. The only evidence led and which the courts below had accepted, and rightly too, is that a company known as B.B. Apugo & Sons Limited was the corporate body that was granted the loan, and not the respondent. If the respondent did not take any loan from the appellant and was not even found to be a customer of the appellant, it must follow that he cannot be properly described as a person indebted to the appellant. And if he is not indebted to the appellant it must be libellous to hold him out as one who was indebted. It is therefore also defamatory of the respondent to publish or caused to be published in and other places that the properties of the respondent would be auctioned to liquidate the debt he owed to the appellant. (p. 670 B)

Defamation - Liability depends on the facts

3. In the circumstances, it must be regarded as settled that liability for libel depends, not on the intention of the defamer, but on the fact of defamation. A person is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and if he scatters two-edged and ambiguous statements broadcasts without knowing or making inquiry about facts material to the statements he makes and the inferences which may be drawn from the words he publishes. A statement which on the fact of it is not defamatory may become so when published to persons who know the facts which enabled persons to whom the libel was published to draw an inference defamatory of the plaintiff. See Cassidy v Daily Mirror Newspapers Limited (1929) ALL. E.R. Rep. 117.

Accordingly, when a newspaper published that written instruction has been received from the Mortgagees, the African Continental Bank Limited to the Licensed Auctioneer C.C. Mojekwe Esq. to sell by public auction a (sic) leasehold and freehold properties of B.B. Apugo, that notice to those who knew B.B. Apugo meant that the said B.B. Apugo was indebted to the Bank, and as he was unable to fulfil his financial obligations to the Bank, his properties have to fall by the hammer of the auctioneer.

The respondent, the said B.B. Apugo gave evidence and called witnesses who so testified. The evidence so given was accepted by the trial Court and the Court below. In my respectful view, I find nothing in the contention of the appellant to upset these concurrent findings of the Courts below. (p. 671 G)

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Defamation - Duty

4. Moreover it must be observed that it was the duty of the appellant to have ensured that the notice to the public in respect of this matter reflected the person or persons who were owing the bank, and lead evidence accordingly. I therefore must hold that this issue also lacks merit. (p. 672 D)

C

Damages - Libel - Award of general damages

D

5. The appeal in respect of damages would now be considered. The lower Court though it upheld the decision of the trial Court, thought that the sum of N2 million awarded as damages was on the high side, and reduced it to the sum of N250,000.00. The appellant has also appealed against this award of N250,000.00, and would want this Court to reduce it to the sum of N10,000.00. The contention of learned counsel for that downward review is that the respondent is not entitled to no more than nominal damages. I do not think that argument has merit and it is hereby rejected.... It is no doubt eminently right that the respondent/cross-appellant be awarded general damages. This right flows from his success at establishing his claim for libel against the appellant/cross-respondent. See Ratcliffe v Evans (1892) 2 Q.B.D. 519 at 529. (pp. 672 F / 673 A)

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Damages - Interference

6. However, what has always been the cause of considerable argument in several cases is whether an appellate court ought to interfere with the award of damages made by a trial Court. Now it is a basic principle that an appellate court ought not to upset the award of damages by a trial court merely because if it had tried the matter it would have awarded a lesser amount. See Flint v. Lovel (1935) 1 K.B 354 at 360; However, an appellate

H

court may properly intervene where it is satisfied that the Judge in assessing the damages applied a wrong principle of law such as taking into account some irrelevant factors or leaving out of account some relevant factors, or that the amount awarded is either so ridiculously low or so
B ridiculously high that it must have been a wholly erroneous estimate of the damage. See Harold Shodipe and Co. Limited v Daily Times (Nig) Limited 1972 11 SC 69. (p. 673 B)

Damages - Reduction

C 7. In the instant appeal, the cross-appellant's contention that the lower Court reduced the award on wrong principles cannot be wholly right. A careful reading of that judgment of the lower Court where it dealt with the reduction of damages was a careful assessment of all the circumstances
D of the case to show that the award of the sum of Two Million Naira to the Cross-appellant was ridiculously high. After a careful consideration of the argument advanced for the cross-appellant, I have come to the conclusion that the Court below was right to have reduced the award to
E the sum of N250,000.00. (p. 674 A)

NOTABLE POINTS OF INTEREST

EJIWUNMIJSC

F 1. *When appeal will be deemed argued on the briefs*
However, before considering the issues raised in this appeal, I must note that when the appeal was called for hearing, counsel did not appear for either of the parties. The parties were not also present. But as briefs have been filed and served as indicated above, the appeal was deemed argued
G and heard on the said briefs. (See Order 6 Rule 8(6) of the Rules of the Supreme Court 1985) as amended. (p. 665 B)

KALGOJSC

H 2. *Supreme Court can make any order including a retrial which it thinks just in an appeal*

In any case this court has wide powers to deal with any appeal before it and make any order as it thinks just to ensure the determination on the

merits of the real issues in controversy between the parties. See Order 8 rules 12 (2) and (5) in particular, of the rules of Supreme Court 1985 as amended and the case of Omokhafa v Esekhome (1993) 8 NWLR (pt. 309) 58. Under the general powers of the Court mentioned above, it can even order a retrial where it considered it just and in the best interest of the parties. This objection has no merit and it is also overruled. (p. 675 G)

REPRESENTATION

B. O. Akpamgbo, for the Appellant/Cross-respondents.

G. I. Ikokwu, for the Respondents/Cross-appellant.

CASES REFERRED TO

A. O. Udofia & Ors v. O. A. Udo Afia (1940) 6 WACA 216

Chief Baron Nwizuk v. Chief Waiytco Eneyok (1953) 14 WACA 354 D

Ezekwe v. Otomewo, Lessor and God's Kingdom Society (1957) W.R.N.L.R 130

Bardi v. Maurice (1954) 14 W.A.C.A. 414

Amorc (Nig.) v. M. O. Awoniyi & Ors. (1991) 3 N.W.L.R. (pt. 178) 245 E

Joseph Ojeme v. Prince Momodu (1994) 1 N.W.L.R. (pt.323) 685

Cassidy v. Daily Mirror (1929) 2 K.B. 331; 1929 ALL E. Rep. 117

Dumbo v. Idugboe (1983) 1 S.C.N.L.R. 29 at 51

Peter v. Bradlaugh (1884) 4 T.L.R. 467

Kerr v. Force (1826) 3 Crunch C.C.8 at p.24

Truth (N.Z) V. Holloway (1960) 1 W.L.R. 996 (p.c.)

Wernher Bart v. Markham (1901) 18 T.L.R. 143, 763

LEAD JUDGMENT BY EJIWUNMI JSC

The proceedings leading to this appeal commenced from the High Court of Umuahia in suit No. HU/99/83. In that suit the plaintiff, who is also cross-appellant in this court claimed against defendants, the appellants/cross-respondents, jointly and severally the sum of N10m as general damages for the publication of a libellous matter concerning him in the Nigerian Statesman of the 20th August 1983 and Sunday the 21st of August 1983. H

Following the order for pleadings, the parties filed and exchanged their pleadings. They were further amended with the leave of the trial court. The plaintiff finally settled his pleadings with a Further Amended Statement of Claim. By his pleadings, the plaintiff averred that he is the Chairman and Managing Director of B.B. Apugo and Sons Limited and also Director or Chairman of other companies named in his Further Amended Statement of Claim. He further pleaded that the said B.B. Apugo & Sons Limited is a limited liability company duly registered and incorporated in Nigeria. The plaintiff also pleaded that the 1st defendant is a limited liability company duly registered to carry on banking operations throughout Nigeria and has an office at Okigwe road, Umuahia Ibeku. The second appellant was also referred to in the pleadings as a limited liability company, and the printers and publishers of the “*Nigerian Statesman*” group of Newspapers with an office at Umuahia Ibeku. The plaintiff also pleaded that the 3rd defendant claimed to be a Licensed Auctioneer with an office at No. 93 St. Finbarr’s College Road, Akoka. Yaba, Lagos.

The plaintiff in paragraphs 5, 6, 7, 8 and 10 of his Further Amended Statement of Claim pleaded the alleged libel thus:-

Para: 5 – On Saturday, August 20, 1983, at page five of the Nigerian Statesman and on or about the 21st day of August, 1983, the 3rd Defendant at the instance of the First Defendant published or caused to be published at page 14, of Sunday Statesman Newspapers of 21st August, 1983 the following:-

Auction! Auction! Auction!;

Sales of Land Properties

Going! Going!! Gone!!!

A written instruction has been received from the Mortgagees, THE AFRICAN CONTINENTAL BANK LIMITED to the Licensed Auctioneer C. C. MOJEKWU Esq. to sell by public auction a leasehold and freehold properties of B. B. Apugo.

In subparagraphs (a), (b) and (c) the three properties which formed the subject of the sale were then described. This was followed by this clause “Sale is subject to the consideration and approval of the mortgagees at their absolute discretion. C. C. Mojekwu Esq., A.C.B. Umuahia Branch.”

Para: 6 – The "Nigerian Statesman" and the "Sunday Statesman", Newspapers owned and published by the Imo Newspapers Limited at Owerri have wide circulation throughout Nigeria.

Para: 7 – The plaintiff at all times material to the publication is not indebted to the First Defendant, a limited liability company incorporated in Nigeria – B.B. Apugo & Sons Limited – was the customer of the First Defendant. The said Company and the First Defendant are in Court over the account of the Company with the bank. The judgment of Umuahia High Court In suit No. HU/14/79 A.C.B. Limited vs. B.B. Apugo & Sons Limited has been set aside by the Court of Appeal, Enugu and the case was sent back for retrial..... (a) (b)

(c) Judgment of the Court of Appeal – Enugu.

Para: 8 – The said words in their natural and ordinary meaning meant and were understood to mean that the plaintiff is indebted to the First Defendant and could not meet up his financial obligations to the bank.

Para: 9 – Further or in the alternative the said words meant and were understood to mean that the plaintiff who is a successful businessman is insolvent.

Para: 10 – By reason of the premises the plaintiff who is the Managing Director of several limited liability companies and a successful businessman has been greatly injured in his credit, character and reputation and in his occupation and has been brought into hatred, ridicule and contempt."

Undaunted by the plaintiffs claim, the defendants filed a joint amended statement of defence. The defendants, by their pleading denied that the plaintiff was at all material times the Managing Director of about three Limited Liability Companies. They however claimed that the plaintiff is nothing but a businessman and carried on his business in the name of B.B. Apugo and Sons Limited. They then went on to plead inter alia, in their amended statement of defence in the following paragraphs:-

"3. Defendants deny paragraph 5 of the Further Amended Statement of Claim, and state that the 1st Defendant retained the services of 3rd Defendant permits (SIC) letter No. SEC.BR.22 of 11th August, 1983 which may be founded upon at the trial. 3rd Defendant an independent

contractor for whose acts 1st Defendant is not responsible, in the course of performing his duties as an auctioneer by way of paid advertisement caused the notice of sale complained of to be inserted in the 2nd Defendant's Newspapers, and 2nd Defendant merely published what was given to it by 3rd Defendant without any negligence or malice.

5(i) Defendants deny paragraph 7 of the Further Amended Statement of Claim, and state that B.B. Apugo and Sons Limited at all material times was indebted to the 1st Defendant, and that the Plaintiff's three landed properties advertised in the publication complained of were given to the said B.B. Apugo and Sons Limited to secure the sum of N300,000.00 under a mortgage agreement with 1st Defendant. When the loan could not be repaid, and by way of foreclosure the mortgagee referred the proposed sale of the mortgaged properties to the Auctioneer (3rd Defendant) who caused the notice of the sale of the mortgaged properties to be advertised on account of the unpaid loan. The Auctioneer published no more than was necessary. The mortgage debt is still outstanding as the said B.B. Apugo and Sons Limited fully utilized the entire facility. It is the plaintiff who carries on business in the name of B.B. Apugo and Sons Limited and he produced the title deeds of properties to secure the loan for the so-called B.B. Apugo and Sons Limited.

5(ii) The said B.B. Apugo and Sons Limited, was found by the Umuahia High Court to be indebted to the 1st Defendant in the sum of N1,236,938.66k with interest at the rate of 10% per annum from 1st March 1979 to 25th July, 1983 and thereafter at the rate of 4% until complete payment. The decision of Court of Appeal did not absolve the B.B. Apugo and Sons Limited from the debt but set aside the High Court judgment on the technical question of joinder and sent the case back for retrial.

5(iii) The Defendants shall contend at the trial the said B.B. Apugo and Sons Limited so-called which is just plaintiff's business name, has no distinct legal personality from the plaintiff its alter ego and had incurred heavy debts to the 1st Defendant in its said business name. Any purported certificate of incorporation of B.B. Apugo and Sons Limited was made up and brought into existence after 9th June after two written confirmations to the contrary by the Companies Registry. The 1st Defendant shall found

on letter No. CAD/MISC/Vol.1/58 of 27/3/84 and letter No CAD/MISC/1/59 of 9/6/87. The Defendants shall contend that the purported existence of such certificate is contrary to the result of the searches and inquiries made from the Companies Registry, Lagos and Abuja..."

Para. 6: Defendants deny paragraph 8 of the Further Amended Statement of Claim, and state that Auction Sale Notice inserted in the 2nd Defendant's Newspaper does not mean what plaintiff alleged but merely reflected the true nature of the properties which were the subject matter of the projected sale which was being effected by 3rd Defendant for the mortgagee in exercise of its legal right of sale of the mortgaged properties. Defendant deny that the said word mean to bear were understood to bear or were capable of bearing or being understood the meaning set out in paragraph 8 of the Further Amended Statement of Claim, or any meaning defamatory of plaintiff.

Para. 7: Defendants deny the alternative meaning pleaded by plaintiff in paragraph 9 of the Further Amended Statement of Claim. Defendants did not know anything about plaintiff being a successful or unsuccessful businessman or being solvent or insolvent.

During the trial, the plaintiff gave evidence in his own behalf; and called four other witnesses in support of his case. The defendants for their defence called two witnesses in support of their case. The learned trial judge following addresses of learned counsel, delivered a well considered judgment. By that judgment, the learned trial judge found in favour of the plaintiff and awarded general damages in his favour in the sum of Two Million Naira against all the defendants jointly and severally.

Being very dissatisfied with the judgment, the defendants now appellants appealed to the lower Court. In that Court, the appellants lost their appeal with regard to whether the trial Court was right to have found them liable upon the claim for libel. The finding of the trial Court was therefore affirmed. However, the appellants succeeded partially with respect to the quantum of damages awarded by the Court. This is because the lower Court reduced the sum of N2,000,000 awarded by the trial Court to the sum of N250,000.00.

As the 1st appellant was dissatisfied with that judgment of the

lower Court, a further appeal was filed in this Court. The respondent, who was not also satisfied with the judgment, has also appealed to this Court. For the 1st appellant five grounds of appeal were filed by its learned counsel. And for the respondent, his learned counsel filed three grounds of appeal. Subsequently briefs of arguments were filed and exchanged by the parties.

In the brief of argument filed for the 1st appellant by his learned counsel, G. I. Ikokwu Esq., four issues were identified for the determination of the appeal. They are:-

(i) *Whether he 1st appellant proved the truth of the publication made by them concerning the respondent, and if so whether the plea of justification was available to them.?*

(ii) *Whether the auctioneer was an independent contractor having regard to the instructions, and if he had been employed to do something unlawful thereby making the appellant vicariously liable?*

(iii) *Whether the damages awarded were excessive in the circumstances of this case.?*

(iv) *Was the Court of Appeal right to hold that the preliminary objection raised to the respondent's brief is incompetent?*

The respondent on whose behalf his learned counsel C. O. Akpamgbo Esq., SAN, filed the respondent's brief of argument in which has set up the following issues for the determination of the appeal.

(i) *Is the defence of justification available to the appellant?*

(ii) *Did the Court evaluate properly the evidence oral and documentary, the latter to wit; the High Court suit at Umuahia and suit CA/E/133/83 in dismissing the issue of non liability of the applicant?*

(iii) *Was the Court of Appeal right in holding that the service of the notice of the grounds of Appeal was enough to warn the Appellant not to proceed with the advertisement of sale explicit in Exhibit F when an appeal was still pending?*

(iv) *Was the further reduction of damages awarded prayed for justifiable?"*

As I have observed earlier, the respondent also appealed against certain aspects of the judgment of the Court below. Pursuant thereto

grounds of appeal were filed, and in accordance with the Rules of the court, the learned Senior Advocate, C. O. Akpamgbo Esq., filed an appellant's brief. The appellant in the main appeal did not respond to that brief by filing a respondents' brief.

However, before considering the issues raised in this appeal, I must note that when the appeal was called for hearing, counsel did not appear for either of the parties. The parties were not also present. But as briefs have been filed and served as indicated above, the appeal was deemed argued and heard on the said briefs. (See Order 6 Rule 8(6) of the Rules of the Supreme Court 1985) as amended.

I will now consider the arguments proffered in respect of the main appeal. And it would be considered upon the issues formulated for the appellants in the appellant's brief.

On issue 1, which is whether the plea of justification was available to the appellant, the main contention made for the appellant in the appellant's brief on this issue was that the liability of the appellant ought to be viewed strictly on the basis of the publication and not on imputations which do not expressly arise from it. It was therefore argued for the appellant that the Auction Notices Exhibits A and A1 alone that the court should construe to determine liability of the appellant. He then submitted that the auction notices are innocuous. In his view all that they contained are the cardinal truths in the publications. These are, (a) the existence of a mortgage with the appellant Bank, and (b) the ownership of the mortgaged properties advertised by the respondent B.B. Apugo. Learned counsel then submitted that the learned trial judge and the Court of Appeal were wrong to have accepted the innuendo pleaded by the respondent in respect of the publications in Exhibits A & A1.

It is his further submission that it is immaterial whether the liability is personal or that of a third party provided the owner's property was used as security or collateral. And also submitted that the publication did not say that the respondent owed personally or had a personal account with the appellant, but that his property was to be sold pursuant to a mortgage transaction with the appellant. It is of interest to observe that for the proposition of learned counsel, no authority was cited in support for our

consideration. Upon the basis of this proposition, learned counsel then described as prevarication the view of the Court of Appeal, where it said that *“the point in controversy here concerns the evaluation of Exhibit F which is the written instruction by the appellant bank to the 3rd appellant auctioneer to sell the mortgaged properties of the respondent.”* For the appellant, the view of learned counsel appears to be that if Exhibit ‘F’ had been properly considered, the Court of Appeal ought to have held that as the appellant did not direct the auctioneer, per Exhibit F, to publish the name of the respondent, then the appellant cannot be liable for the libel that resulted by the publications. More so, where the appellant had proved by the judgment in suit HU/14/79 that the respondent was owing the appellant the sum of N1,236,938.66 when the publications were made. Upon that premise the learned counsel for the appellant then argued that the Court of appeal erred in failing to admit as proved the debt owed to the appellant by the respondent. Hence, he argued that the court below misdirected itself when it held that:-

‘To succeed in a plea of justification, the appellants ought to lead evidence to show that the respondent was at the material time indebted to the appellant bank.’

He further argued that with regard to the judgments pleaded, one of which was admitted by the Court below, and also admitted by the parties in their pleadings, it became unnecessary by virtue of S.74 of the Evidence Act to prove the judgments strictly. He cited in support of that submission, the following cases:- A. O. Udofia & Ors v. O. A. Udo Afia (1940) 6 WACA 216; and Chief Baron Nwizuk v. Chief Waiytco Eneyok (1953) 14 WACA 354. He therefore urged that issue 1 be resolved in favour of the appellant.

With the arguments proffered for the appellant copiously set out I will now consider the issue in the light of the argument offered for the respondent by his learned counsel and the judgment of the Court below. The first point made for the respondent is that a plea of justification in libel, if sustained is a complete defence. But if it fails, it aggravates damages. In support of this submission, reference was made to the case of Ezekwe v. Otomewo, Lessor and God’s Kingdom Society (1957) W.R.N.L.R. 130; and he further submitted that it is the defendant that has the burden

of establishing the plea. The following cases were cited in support of that proposition:- Bardi v Maurice (1954) 14 W.A.C.A. 414, Registered Trustees of Amorc (Nig) v. M. O. Awoniyi & Ors. (1991) 3 N.W.L.R. (pt. 178) 245; Joseph Ojeme v. Prince Momodu (1994) 1 N.W.L.R. (pt. 323) 685 at 699 – 701.

It is also the submission of learned counsel for the respondent in the respondent's brief, that if a publication is found to be libellous and actionable the intention of the defamer is not relevant. It is inadvertence – a fact which must be pleaded and to which evidence must be part of the case of the defamer. And then invited our attention to the case of Cassidy v. Daily Mirror (1929) 2 K.B. 331; 1929 ALL E. Rep. 117.

I have earlier in this judgment set out what I considered to be the relevant paragraphs of the pleadings that formed the basis of this appeal. It is evident from a careful study of the pleadings that as part of their defence, the appellant sought to avoid liability for the defamatory publications upon the plea of the truth of the publication in Exhibits A & A1. In other words the appellant is claiming that the publications represent the truth of the transactions between the parties. Put briefly, the contention of the appellant is that the publication has only shown that the respondent's properties were to be sold by public auction. That this only meant that the respondent's properties were to be sold by public auction as the respondent was indebted to the Appellant and had been unable to liquidate the said debt. On the other hand the respondent's case is that he has never been indebted to the appellant. And that for that reason the publication gave the false impression that he was indebted to the appellant, and was to all reasonable persons impecunious, and could not fulfil his financial obligations.

Before the Court below, it was argued for the appellant that the plea of justification was established in that it was established against the respondent that he owed the bank, and his properties which he pledged to the appellant for the loan granted to B.B. Apugo & Sons Limited were properly put up for sale. That argument was duly considered and rejected by the Court below. In the course of its judgment, per Edozie JCA, who read the leading judgment said:-

“To succeed in a plea of justification, the appellants ought to lead evidence to show that the respondent was at the material time indebted to the appellant Bank. This they failed to do for on their own showing, the DWI the Advances Officer of the Bank confirmed in evidence under cross-examination that it was not the Respondent but the company B.B. Apugo and Sons Limited which was its customer and by implication “that the respondent was not indebted to the Bank.”

It is manifest that though it has been argued for the Appellant in this Court that the judgment of the lower Court be set aside, there has been no appeal to challenge this finding of the Court below. The finding as a matter of fact is a confirmation of the conclusion of the trial Court that the appellant did not establish by any evidence that the respondent was a customer of the appellant nor was he shown to have been indebted to the Bank. Hence the Court below like the trial Court came to the conclusion that the appellant did not establish the plea of justification.

In the context of this appeal, I think it is desirable or indeed helpful to consider the effect and the meaning of the plea of justification by a defendant in a case of defamation. In other words, what advantage or effect would the plea of the truth of the words complained of be for a defendant as in the instant appeal.

May I therefore refer to what the learned authors of Gattley on Libel and Slander 7th Edition has to say on the questions I have raised above. At page 152 of their work, paragraph 351, the principle germane to the questions is put thus:-

“The plaintiff establishes a *prima facie* cause of action as soon as he has proved the publication of defamatory words. It is not part of the plaintiff’s case in an action of defamation to prove that the defamatory words are false, for the law presumes this in his favour. Belt v Lawes (1882) 51 L.J.Q.B. 361. It is, however, a complete defence to an action of libel or slander that the defamatory imputation is true. The truth of the imputation is an answer to the action, not because it negatives malice, but because the plaintiff has no right to a character free from that imputation, and if he had no right to it, he cannot in justice recover damages for the loss of it, it is *damnum absque injuria*. M’pherson v. Daniels (1892) 10

B & C. at p. 272.”

But for the defendant to be entitled to this defence he has a burden which he has to discharge. This burden that rests on the defendant was in Dumbo v. Idugboe (1983) 1 S.C.N.L.R. 29 at 51, per Obaseki JSC put thus;-

“To establish a plea of justification the defendant must prove that the defamatory imputation is true. The defendant must justify the precise imputation complained of. In other words, strict proof is demanded. At common law, under a plea of justification, the defendant must prove the truth of all the material statements in the libel. There must be substantial justification of the libel. To make a good plea of the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff. A plea of justification means that the libel is true, not only in its allegation of fact, but also in any comments made thereon. The defendant therefore has the onus to prove not only that the facts are truly stated but also that any comments on them are correct. See Peter v. Bradlaugh (1884) 4 T.L.R. 467; Kerr v. Force (1826) 3 Cranch C.C.8 at p.24; Truth (N.Z.) v. Holloway (1960) 1 W.L.R. 996 (p.c.); E Wernher Bart v. Markham (1901) 18 T.L.R. 143, 763; John v. Gittings (159) Cro Eliz 239; Clarkson v. Lawson (1829) 6 Bing 266; 3 M.O.O. & P; Cooper v. Lawson (1938) 8 A & E 746; Sutherland v. Stopes (1925) A.C. at pp. 62, 63, 75.”

It is manifest from the above quoted passage from the judgment of Obaseki JSC in Dumbo v. Idugboe (supra) that a defendant who is relying on a plea of justification to avoid liability in respect of an allegation of defamation against such a defendant has, indeed, an uphill task. To succeed he must prove and that very strictly, the truth of every allegation of fact made in the libel. Although, it is not necessary to prove the truth of every word in the libel, the defendant, is however obliged to prove that the main charge or gist of the libel is true. He need not justify the statements or comments which do not add to the sting of the charge. See Sutherland v. Stopes (supra).

It follows then that the question that has to be answered in this

appeal is whether the appellant has proved the “*main charge*” or the gist of the libel. The appellant has argued that it has established that burden. The argument in support of that contention is similar to that which was rejected by the Court below. And I have not been shown any reason that B should dissuade me from upholding the judgment of the Court below on this question.

I think it must be noted that the gist of the libel in the instant appeal is that the respondent was indebted to the appellant, and was unable to pay this debt, hence his properties which he had mortgaged to the appellant as security for the loan has to be sold. For that defence of justification to absolve the appellant from liability for this libel, the appellant must prove that the respondent was truly indebted to the appellant. The evidence in this regard was not D available. The only evidence led and which the courts below had accepted, and rightly too, is that a company known as B.B. Apugo & Sons Limited was the corporate body that was granted the loan, and not the respondent. If the respondent did not take any loan from the E appellant and was not even found to be a customer of the appellant, it must follow that he cannot be properly described as a person indebted to the appellant. And if he is not indebted to the appellant it must be libellous to hold him out as one who was indebted. It is F therefore also defamatory of the respondent to publish or caused to be published in and other places that the properties of the respondent would be auctioned to liquidate the debt he owed to the appellant.

G Having reached the conclusion that the appellant has failed to persuade me to overturn the decision of the Court below that the appellant is liable for defaming the respondent by the publication concerning the respondent, I must now consider whether that conclusion could be affected by the conduct of the auctioneer. The auctioneer has not H appeared in this appeal, but he was the 3rd appellant in the Court below. However, it is contended for the appellant that the authority given to an auctioneer does not extend so as to make the vendor liable for injury caused by the auctioneer’s negligence to a person attending the sale; unless the

vendor had instructed the auctioneer to do any unlawful act or thing whereby injury was caused. The response of the respondent to this contention is to the effect that the appellant cannot absolve himself of liability by hiding under the auctioneer.

Earlier in this judgment reference was made to the bidding principle governing obligations of a plaintiff and a defendant in an action in defamation, particularly, where as in the instant case, the defendant is pleading justification as its defence. The principle in this kind of cases, if i may repeat, is that where a plaintiff has established that he was defamed by words published or caused to be published by the defendant, the onus lies on the defendant to prove the truth of the words so published. If, as it is now argued for the appellant that the defamatory words were wrongly published due to the auctioneer, the question then is whether that is a defence that could absolve the appellant from liability. Going by the argument of learned counsel for the appellant, the auctioneer should be regarded as an independent contractor, though he was instructed to sell the properties of the respondent by virtue of the instructions he received from the appellant, via Exhibit F.

In the consideration of this question, I find apposite the statement of Farwell L.J in Hulton & Co. v Jones (1909) 2 K.B. 444, at 478:-

“The rule is well settled that the true intention of the writer of any document whether it be contract, will or libel is that which is apparent from the natural and ordinary interpretation of the written words, and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the plaintiff and the circumstance.”

In the circumstances, it must be regarded as settled that liability for libel depends, not on the intention of the defamer, but on the fact of defamation. A person is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and if he scatters two-edged and ambiguous statements broadcasts without knowing or making inquiry about facts material to the statements he makes and the inferences which may be drawn from the words he publishes. A statement which on the fact of it is

not defamatory may become so when published to persons who know the facts which enabled persons to whom the libel was published to draw an inference defamatory of the plaintiff. See Cassidy v Daily Mirror Newspapers Limited (1929) ALL. E.R. Rep. 117.

B Accordingly, when a newspaper published that written instruction has been received from the Mortgagees, the African Continental Bank Limited to the Licensed Auctioneer C.C. Mojekwe Esq. to sell by public auction a (sic) leasehold and freehold properties of B.B. Apugo, that notice to those who knew B.B. Apugo meant that
C the said B.B. Apugo was indebted to the Bank, and as he was unable to fulfil his financial obligations to the Bank, his properties have to fall by the hammer of the auctioneer.

The respondent, the said B.B. Apugo gave evidence and
D called witnesses who so testified. The evidence so given was accepted by the trial Court and the Court below. In my respectful view, I find nothing in the contention of the appellant to upset these concurrent findings of the Courts below. Moreover it must be observed that it
E was the duty of the appellant to have ensured that the notice to the public in respect of this matter reflected the person or persons who were owing the bank, and lead evidence accordingly. I therefore must hold that this issue also lacks merit.

F The appeal in respect of damages would now be considered. The lower Court though it upheld the decision of the trial Court, thought that the sum of N2 million awarded as damages was on the high side, and reduced it to the sum of N250,000.00. The appellant has also appealed against this award of N250,000.00, and would want
G this Court to reduce it to the sum of N10,000.00. The contention of learned counsel for that downward review is that the respondent is not entitled to no more than nominal damages. I do not think that argument has merit and it is hereby rejected.

H More importantly however the respondent as I have said above filed a cross-appeal against the reduction by the Court of Appeal of the sum of N2million awarded by the trial Court. It is the contention of the learned Senior Advocate, C. O. Akpamgbo Esq., that the lower Court was wrong

to have interfered with the award made by the trial Court.

It is no doubt eminently right that the respondent/cross-appellant be awarded general damages. This right flows from his success at establishing his claim for libel against the appellant/cross-respondent. See Ratcliffe v Evans (1892) 2 Q.B.D. 519 at 529; Williams v Daily Times (1990) 1 N.W.L.R. 1 Dumboe v Idugboe (1983) 1 S.C.N.L.R. 29.

However, what has always been the cause of considerable argument in several cases is whether an appellate court ought to interfere with the award of damages made by a trial Court. Now it is a basic principle that an appellate court ought not to upset the award of damages by a trial court merely because if it had tried the matter it would have awarded a lesser amount. See Flint v. Lovel (1935) 1 K.B 354 at 360; James v. Mid-Motors (Nig) Limited (1978) 12 S.C. 31. However, an appellate court may properly intervene where it is satisfied that the Judge in assessing the damages applied a wrong principle of law such as taking into account some irrelevant factors or leaving out of account some relevant factors, or that the amount awarded is either so ridiculously low or so ridiculously high that it must have been a wholly erroneous estimate of the damage. See Harold Shodipe and Co. Limited v Daily Times (Nig) Limited 1972 11 SC 69; Uwa Printers (Nig) Limited v Investment Trust Co. Ltd (1988) 5 N.W.L.R. (pt. 92) 110; Obere v Board of Management; Eku Baptist Hospital (1978) 6-7 SC 15; Agaba v Otubusin (1961) 25 C.N.L.R. 13; Weideman & Walters (Nig) Limited v Oluwa Re: Intra Motors (Nig) Limited (1968) 1 ALL NLR 383.

It has been argued very vehemently in the instant appeal that the Court below was wrong to have intervened in the award of N2million to the cross-appellant, by reducing it to the sum of N250,000. Learned Senior Advocate C. O. Akpangbo Esq., argued that as the lower Court proceeded mostly on the wrong premises in reducing the damages awarded, though he conceded it that the Court was right to have also considered the diminishing value of the Naira in making the award.

I have before now set down the principles that an appellate court

ought to follow before it may properly intervene in the award of damages made by a trial Court.

In the instant appeal, the cross-appellant's contention that the lower Court reduced the award on wrong principles cannot be wholly right. A careful reading of that judgment of the lower Court where it dealt with the reduction of damages was a careful assessment of all the circumstances of the case to show that the award of the sum of Two Million Naira to the Cross-appellant was ridiculously high. After a careful consideration of the argument advanced for the cross-appellant, I have come to the conclusion that the Court below was right to have reduced the award to the sum of N250,000.00.

In the result, for the reasons given above, the main appeal is devoid of any merit and it is dismissed. The cross-appeal is also dismissed as explained above.

The respondent/cross-appellant is awarded costs in the sum of N10,000.00. There is no order for costs in favour of the appellant/cross-respondent.

WALI JSC

I am privileged to have read before now, the lead judgment of my learned brother Ejiwunmi, JSC and I agree with his reasoning for dismissing both the main appeal and the cross appeal. I also hereby dismiss the main appeal and the cross appeal. I abide by the consequential orders made in the lead judgment.

OGWUEGBUJSC

I have had the advantage of a preview of the judgment of my learned brother Ejiwunmi, JSC. I agree with his reasoning and conclusions. I accordingly dismiss the defendant's appeal and the plaintiff's cross-appeal. There will be costs of N10,000.00 in favour of the plaintiff in the main appeal.

MOHAMMED JSC

I agree that both the main appeal and the cross-appeal have failed. My learned brother, Ejiwunmi, JSC, has considered the facts and the law and reached a conclusion which I agree with entirely. I therefore dismiss both the main appeal and the cross-appeal. I abide by the order made in the lead judgment on costs.

KALGO JSC

I have had the opportunity of reading in draft the judgment of my learned brother Ejiwunmi JSC in this appeal and I am in full agreement with him that the appeal lacked merit and should be dismissed.

Before making any point in emphasising what my learned brother considered in the said judgment, let me deal with the preliminary objection raised by the respondent's counsel on p.8 of his brief. This objection concerned the issue of the notice of preliminary objection which was discussed by the appellant's counsel on p. 16 of his brief. The main objection of the respondent's counsel was that this issue was not related to any ground of appeal, and should therefore be struck out. But in the notice of appeal filed by the appellant to this court, (See page 269 of the record) the issue of the preliminary objection was specifically made ground 1 of the notice on p. 270 of the record. The appellant was perfectly justified in discussing this issue in paragraph 9.0 at p. 16 of his brief. This objection is therefore overruled.

The second objection raised by the respondent's counsel was in the "*conclusion*" at the end of the appellant's brief. In my view this has nothing to do with any ground of appeal and it only contains the final prayers the appellant was asking for in the light of the contents of his brief and the circumstances of the case. In any case this court has wide powers to deal with any appeal before it and make any order as it thinks just to ensure the determination on the merits of the real issues in controversy between the parties. See Order 8 rules 12 (2) and (5) in particular, of the rules of Supreme Court 1985 as amended and the case of Omokhafe v

Esekhomo (1993) 8 NWLR (pt. 309) 58. Under the general powers of the Court mentioned above, it can even order a retrial where it considered it just and in the best interest of the parties. This objection has no merit and it is also overruled.

B The main and the substantive issue to be considered in this appeal is whether the respondent was in any way indebted to the appellant to justify the publication as per Exhibit A and A1 that his leasehold and freehold properties be sold by public auction to settle the debt.

C By a letter dated 11th August 1983, the appellant through its Secretary/Chief Legal Adviser wrote the auctioneer Mr. C.C. Mojekwu informing him that the appellant had obtained judgment against B.B. Apugo & Sons Ltd for N1,236,938.66 in case No. HU/14/79 in the High Court and that the appellant had perfected legal mortgage of certain properties which D should immediately be sold to satisfy the judgment. The letter which instructed the auctioneer to proceed to sell the mortgaged property, was admitted in evidence as Exhibit 'F'. It is significant to observe that Exhibit 'F' did not specifically mention the name of the respondent. Unfortunately E the auctioneer on receipt of Exhibit 'F' decided to advertise the auction and so by publications which appeared in Nigerian States-man and Sunday States-man Newspapers on 20th and 21st August 1983 admitted in evidence as Exhibits A and A1 respectively. The paragraph of Exhibits A F and A1, which formed the basis of this action reads:-

"A written instruction has been received from the mortgagee, THE AFRICAN CONTINENTAL BANK LIMITED to the Licensed Auctioneer (sic) C.C. MOJEKWU ESQ. to sell by public auction a leasehold and freehold properties of B.B. Apugo." (Underlining mine).

G At the trial, the respondent called evidence which was believed by the learned trial judge that he was never indebted to the appellant and that the publication has shown in the eyes of the public that the auction sale of his landed properties was to satisfy the debt he owed to the appellant. H There was also evidence which the court believed to the effect that the respondent was insolvent and unable to pay his debts and as a big businessman, his business prospects were destroyed and his image completely damaged. There is no doubt therefore that the respondent was

defamed and the publications in Exhibits A and A1 constituted the tort of libel. See Nsirim v Nsirim (1990) 3 NWLR (pt. 138) 285. In a case of libel or defamation, justification, fair comment or the proof of the truth of the publication complained of is a complete defence to the action. See Din v African Newspapers (1990) 3 NWLR (pt. 139) 392 at p. 409. The onus of such proof lies squarely on the appellant in this case but unfortunately from the evidence on record, the appellant has failed completely to prove any justification for or the truth of what was published against the respondent in Exhibits A and A1. I therefore agree with the trial court and the Court of Appeal that the appellant was liable in damages for the tort of libel in favour of the respondent.

On the quantum of damages, I am of the view that in assessing the damages in this case, the Court of Appeal has taken into consideration relevant matters in arriving at the sum of N250,000.00 awarded to the respondent in the circumstances of this case. See Ejabulor v Osha (1990) 5 NWLR (pt. 148) 1 at p. 16. The cross-appeal by the respondent on the award of damages by the Court of Appeal therefore fails.

Finally, for the above reasons and all those given in detail by my learned brother Ejiwunmi JSC in the leading judgment, this appeal and the cross-appeal fail. I abide by the order of costs made in the said judgment.

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