

SUPREME COURT OF NIGERIA

22ND JUNE, 2001. SC. 82/1996

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,
U. MOHAMMED, O. ACHIKE, E. O. AYOOLA, JJSC.**

CHIEF OTONYESEIGHA OLOLO PLAINTIFF/APPELLANT
AND

1. NIGERIAN AGIPO OIL CO. LTD DEFENDANTS/RESPONDENTS

2. MESSRS GRANVILLE & SONS LTD

APPEALS - *Contradictions in lower courts judgment - There was no contradiction as alleged - And so the defence of contributory negligence was validly made out (H 4)*

APPEALS - *Damages - Special damages - Awarded by the trial judge - Was validly set aside - As it was not strictly proved by the plaintiff (H 5)*

DAMAGES - *Negligence - Contributory negligence - The measure of damages - Is apportioned according to the proportion - Of responsibility of the parties for the damage (H 3)*

NEGLIGENCE - *Contributory negligence - Burden of proof - Lies on the defendant - And the contributory negligence - Must be the cause of the accident (H 2)*

PLEADINGS - *Contributory Negligence - May be pleaded - By adducing facts to that effect - Without specifically mentioning the defence by name (H 1)*

FACTS

The plaintiff was the owner of a local passenger boat named M. V. Ololo while the 1st defendant owned a barge named NOAC 502. The 2nd defendant was a subcontractor of the 1st defendant at the material time and also owned a Tugboat. The plaintiffs "M.V. Ololo" had on the night of 16/10/82 collided with the NOAC 52 in motion and had conse-

quently been shipwrecked.

The plaintiff/appellant therefore sued the defendants at the Port-Harcourt division of Federal High Court for the sum of N500,000.00 special and general damages arising out of the defendants' negligence in causing collision and wreckage of plaintiff's local boat M.V. Ololo along the Nembe - Port Harcourt inland waterway.

At the close of evidence and address the trial judge dismissed the case against the 1st defendant but entered judgment against the 2nd defendant in the sum of N67,486.16. The 2nd defendant lodged an appeal in the Court of Appeal against the 1st defendant and the plaintiff. His appeal against the 1st defendant was dismissed. His appeal against the plaintiff succeeded in part as the damages awarded by the trial court was reduced and shared between the parties as the plaintiff was found to have contributed to the negligence. The plaintiff being aggrieved has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was correct in law by contradicting itself when it held that the Plaintiff was contributorily negligent despite its earlier upholding in the same judgment of the finding of fact by the court below that the collision was caused by the negligence of the 2nd Defendant/Respondent herein.

2. Whether the Court of Appeal was right in law to have considered and found upon a Defence of Contributory Negligence which was neither specifically pleaded nor canvassed by the parties in the High Court but raised for the first time in the Court of appeal and without its leave.

3. Whether the Court of Appeal can properly set aside the award of damages for the loss of two outboard engines by the High Court when it had earlier on in the same judgment constructively upheld the same award by rejecting the 2nd Defendant/Respondent's contention in relation to the very same award as misconceived.”

HELD: (Unanimously dismissing the appeal per lead judgment of KUTIGI JSC)

Pleadings - Contributory negligence

1. It is thus abundantly clear from the above paragraphs of the Statement of Defence, that the 2nd Defendant did plead contributory negligence. He might not have chosen to use the words “Contributory Negligence” themselves, but the facts pleaded in those paragraphs have the effect of a plea of contributory negligence. The 2nd Defendant did not need a banner headline “Contributory Negligence” before proceeding to plead as it had done in paragraphs 5 and 6 above. The Court of Appeal was therefore right to have held that contributory negligence was pleaded and the trial Federal High Court was certainly wrong when it held in its judgment that:-

“... contributory negligence was not pleaded by any of the Defendants.” (p. 2109 B)

Contributory negligence - Burden of proof

2. Negligence is a question of fact, not law; and each case must be decided in the light of its own particular facts. (See KALLA VS JARMAKANI TRANSPORT LTD (1961) All NLR 747. However, the burden of proving contributory negligence in the Plaintiff rests on the Defendant. And this may be inferred from the Plaintiff’s own evidence, or on a balance of probabilities from the facts. (See for example BAKER VS LONGHURST & SONS LTD (1933) 2 K.B. 461 GIBBY VS . GRINSTEAD GAS AND WATER CO. (1944) 1 All E.R. 358). The contributory negligence must be a cause of the accident as well. This has been demonstrated above. (p. 2111 A)

Contributory negligence - Measure of damages

3. As for the measure of damages, the principle is that the measure of damages is to be apportioned according to the proportions in which the parties are responsible for the damage taking into account both causation and blameworthiness, and the amount recoverable must be reduced to such extent as the court thinks just and equitable having regard to the Plaintiff’s share in the responsibility for the damage. (See STAPLEY VS GYPSUM MINES LTD (1953) A.C. 663 DAVIES VS SWAN MOTOR

CO. (SWANSEA) LTD (1949) 2 K.B. 291). It may be noted that prior to 1945 in England, the contributory negligence of the Plaintiff was a complete defence to his claims. The old common law rule was modified by the Marine Conventions Act, 1911 for shipping cases to the effect that liability was to be apportioned between the vessels concerned according to the degree of fault. This rule has since been generalised by the Law Reform (Contributory Negligence) Act, 1945.

My view therefore is that the Court of Appeal was in the circumstances of this case right in its apportionment of damages as shown above. (p. 2111 D)

Appeals - Contradictions

4. There was therefore no contradiction anywhere in the judgment of the Court of Appeal which has in fact tried only to rectify the error earlier committed by the trial court that contributory negligence was not pleaded. As I said, I am unable to find any contradictions in the judgments of the two lower courts as contended simply because both the Plaintiff and the 2nd Defendant have been found to have each contributed or played a part in causing the marine collision or accident. That is all that a successful plea of contributory negligence is about. It means the two parties must share the blame and consequently the damages.

Issues (1) & (2) must therefore be resolved against the Plaintiff. And I so do resolve them. (p. 2111H/ 2112 E)

Damages - Special damages

5. It ought to be borne in mind that being an item of special damages the law requires that it must be specifically pleaded and strictly proved as well. This much was recognised by the learned trial judge. Now, what did he have to say on this item in his judgment? On page 123 of the record the learned trial judge said as follows:

“The Plaintiff also claims N6,560.00 as cost of outboard engines. There is no receipt for the engines. Defendant witness 2 in his evidence said there were only two (2) outboard engines. This is confirmed by Exhibit K. I therefore find there were two outboard engines on

the boast and I award N2,186./66 for the two engines.”

Clearly the learned trial judge could not have said that “there is no receipt for the engines” in one breath, and then in another breadth proceed to award N2,186.66 for 2 engines without explaining how he arrived at the figure. If the Plaintiff claims N6,560.00 for 3 engines and without any receipt in support thereof, how then was the figure of 2,186.66 for 2 engines made up? The Court of Appeal was clearly of the view that to give a notional price of N2,186.66 to 2 out of 3 engines originally said to cost N6,560.00, “amounted to no more than a guess-work” and that this “fell far short of strict proof of special damages as required by law”. I think the Court of Appeal was right when it set aside the award in respect of the two (2) engines. The issue has no merit. I resolve it against the Plaintiff. (p. 2112 H)

D

REPRESENTATION

L. E. Nwosu for Plaintiff/Appellant.

C. U. Edosonmwan SAN with him O. Okunloye, M. Kwabor (Mrs.) and T. W. Danagogo for the 2nd Defendant/Respondent.

E

CASES REFERRED TO

EHIMARE & ANOR VS. EMHOYON (1985) 1 N.W.L.R. (PT. 2) 177 at 183

F

NWABUEZE VS. OBI OKOYE (1988) 4 N.W.L.R. (PT. 91) 664

OMOREGBE VS. LAWANI (1980) 34 S.C. 109 at 117

KALLA VS. JARMAKANI TRANSPORT LTD. (1961) ALL N.L.R. 747

BAKER VS. LONGHURST & SONS LTD. (1933) 2 K.B. 461

GIBBY VS. E. GRINSTEAD GAS AND WATER CO. (1944) 1 ALL E.R.358

G

STAPLEY VS. GYPSUM MINES LTD. (1953) A.C. 663

DAVIES VS. SWAN MOTOR CO. (SWANSEA) LED (1949) 2 K.B. 291

FOOKES VS. SLAYTOR (1978) 1 W.L.R. 1293

H

STATUTES REFERRED TO

Law Reform (Contributory Negligence) Act, 1945

LEAD JUDGMENT BY KUTIGI JSC

At the Port Harcourt Division of the Federal High Court, the
B Plaintiff sued the Defendants for the sum of N500,000.00 being special
and general damages arising out of the Defendants' negligence in caus-
ing the collision and total wreckage of his (Plaintiff) local passenger/
goods boat "M.V. Ololo" near Degema along Nembe – Port Harcourt
C inland waterway. Only the 1st Defendant was originally sued, but on its
application, it was granted leave to join the 2nd Defendant.

After the filing and exchange of pleadings the case proceeded to
trial. At the hearing the Plaintiff testified on his own behalf and called no
witness. He tendered a number of documentary exhibits in evidence.
D The 1st Defendant also called one witness while the 2nd Defendant called
two witnesses.

After the conclusion of evidence learned counsel for the parties
addressed the court. In a reserved judgment delivered on 30th July 1987,
E the learned trial judge held amongst others that the 2nd Defendant was an
independent contractor which was not under the control of the 1st De-
fendant and that since the 1st Defendant cannot be held liable for the tort
committed by the 2nd Defendant, the case against the 1st Defendant was
F dismissed. The learned trial judge however, entered judgment in favour
of the Plaintiff against the 2nd Defendant in the sum of 67,484.16.

Dissatisfied with the judgment of the trial court, the 2nd Defen-
dant lodged an appeal in the Court of Appeal holden at Port Harcourt . In
a reserved judgment, the Court of Appeal in a unanimous judgment deliv-
G ered on 31 March 1993 dismissed 2nd Defendants appeal against the 1st
Defendant as being without merit. The 2nd Defendants' appeal against
the Plaintiff however succeeded in part. The Plaintiff was found to have
been contributorily negligent to the tune of 75% in causing the accident.
H The damages awarded by the trial court above was reduced to 55,297.50
because certain items of claim were disallowed and the 2nd Defendant
was finally adjudged to be liable to the Plaintiff in the sum of N13,824.38
being 25% or 1/4 of N55,297.50.

Aggrieved by the decision of the Court of Appeal, the Plaintiff has now appealed to this court in respect of that part of the judgment which found him contributorily negligent and thereby reducing the amount of damages payable to him as awarded by the trial court. There was thus no appeal against the concurrent dismissals of the claims against the 1st Defendant. This appeal is therefore clearly a fight between the Plaintiff and the 2nd Defendant only.

Written briefs were filed and exchanged between the parties in accordance with the Rules of Court. Additional oral submission were also made by counsel on both sides at the hearing of the appeal.

In the Plaintiffs brief, the following three issues have been formulated for determination:-

“1. Whether the Court of Appeal was correct in law by contradicting itself when it held that the Plaintiff was contributorily negligent despite its earlier upholding in the same judgment of the finding of fact by the court below that the collision was caused by the negligence of the 2nd Defendant/Respondent herein.

2. Whether the Court of Appeal was right in law to have considered and found upon a Defence of Contributory Negligence which was neither specifically pleaded nor canvassed by the parties in the High Court but raised for the first time in the Court of appeal and without its leave.

3. Whether the Court of Appeal can properly set aside the award of damages for the loss of two outboard engines by the High Court when it had earlier on in the same judgment constructively upheld the same award by rejecting the 2nd Defendant/Respondent's contention in relation to the very same award as misconceived.”

Before going into the issues, it is convenient to state briefly the facts of the case which are largely not in dispute thus:

The Plaintiff was the owner of a 72 foot long Local/Passenger boat named “M.V. Ololo.” The 1st defendant owned a 40m long dumb barge named “NOAC 502,” while the 2nd Defendant owned a Tug boat named “M.V Obuta.” The 2nd Defendant was sub-contractor of the 1st Defendant at the material time of the accident herein. In the night of 16/

10/82 the Plaintiff's "M/V/ Ololo" was sailing from Nembe to Port Harcourt when it had a collision with "NAOC 502" in motion. The "NAOC 502" was sailing in opposite direction when the accident occurred. As a result of the accident Plaintiff's "M.'V. Ololo" was ship wrecked. The Plaintiff thereafter sued the Defendants as stated above.

Now, back to the issues. Issues (1) & (2) will be taken together as they both relate to contributory negligence. Issue (3) will be treated separately.

Issue (1) & (2)

The main contention here is that the Court of Appeal was wrong when in one breadth it upheld the finding of fact by the trial court that the "2nd Defendant/Respondent was negligent in causing the accident," and in another breadth holding that the Plaintiff was 75% contributorily negligent for the cause of the same accident. That the trial court and the Court of Appeal having found that the 2nd Defendant was responsible for the accident, the Court of Appeal was wrong in its conclusion that the Plaintiff was to share in the blame. We were referred to the judgments of the trial court and the Court of Appeal on pages 118 and 338 – 339 respectively.

It was also contended on behalf of the Plaintiff that contributory negligence was neither pleaded nor raised in the trial court and that when the matter was introduced in the Court of Appeal for the first time, leave of the Court of Appeal was not sought to introduce same. The cases of EHIMARE & ANOR VS. EMHONYON (1985) 1 NWLR (PT. 2) 177 at 183 and NWABUEZE VS. OBI OKOYE (1988) 4 NWLR (PT. 91) 664 were cited in support.

The starting point here is certainly from the pleadings. The 2nd Defendant in its Statement of Defence had pleaded in paragraph 6 as follows:-

"... 2nd Defendant avers that Plaintiff failed to observe any safety regulation at sea, neither did he have any light on his vessel. At the time or immediately before the accident, Plaintiff and his wife were asleep on the sun deck of their vessel. The Plaintiff left the helm of his vessel for his child who was too young to steer, and manage a vessel. The

Plaintiff's vessel was not keeping to its own side of the sea but was rather crossing the sea to its side from the left side before the collision."

Paragraph 5 of the same Statement of defence also reads –

"... on the contrary the accident was caused solely by the negligence of the Plaintiff and the 2nd Defendant will lead evidence to show various acts of negligence on the part of the Plaintiff which culminated in the accident."

It is thus abundantly clear from the above paragraphs of the Statement of Defence, that the 2nd Defendant did plead contributory negligence. He might not have chosen to use the words "Contributory Negligence" themselves, but the facts pleaded in those paragraphs have the effect of a plea of contributory negligence. The 2nd Defendant did not need a banner headline "Contributory Negligence" before proceeding to plead as it had done in paragraphs 5 and 6 above. The Court of Appeal was therefore right to have held that contributory negligence was pleaded and the trial Federal High Court was certainly wrong when it held in its judgment that:-

"... contributory negligence was not pleaded by any of the Defendants."

The issue therefore was not only before the trial court but it was also before the Court of Appeal where the 2nd Defendant/Appellant raised it as its issue NO. 2 in the brief in that court thus:-

"3.2 Whether from the state of the pleadings and evidence, the defence of contributory negligence could not have availed the Defendants."

In line with its pleadings above, the 2nd Defendant called two witnesses at the trial. Abraham John Georgewill a sailor by profession who testified as DW1 said amongst others as follows:-

"I work for the 2nd Defendant. I know the parties involved in the accident. They were Chief Ololo and our own barge that is my own barge and the Plaintiff's boat M/V Ololo... The accident happened at about 8.00 p.m. I was going to Brass while the Plaintiff was coming from brass to Port-Harcourt... I have navigation and towing lights on my boat. These lights were on... In the sea we keep to the right of the

channel. The Plaintiff was on my own starboard side. The Plaintiff's vessel hit me by my starboard side... There were five people in the Plaintiff's boat. I saw them after the incident. I saw the driver of M.V. Ololo. He is a small boy. He is about 16 or 17 years... There was no light on the other boat when I put my search light. I have lights on the barge. I was not speeding at all."

Also one Adamu Umaru, a Marine Engineer who testified as D.W. 2 said thus:-

"... I was on deck when I heard the captain shouted astern. That's emergency reverse. I reversed. I then saw the Plaintiff's boat has jammed our barge,... We did not see the boat. Our boat was on the right side. The plaintiff was supposed to be by the left side. If he had stayed on his side he would not have jammed us."

Therefore contributory negligence was not only pleaded but evidence was led in support thereof as shown by the testimonies of the two witnesses above. The Court of Appeal was therefore right when it said:-

"... in relation to the issue of contributory negligence, the evidence of the Plaintiff devoid of any support from that of his pilot in contradistinction and challenge to the credible... testimony of D.W.1 Abraham John Georgewill who was skipper of 2nd Defendant's Tug Boat M.V. NAOC 502, to the effect that the Plaintiff left the helm of his vessel, M.V. Ololo, for a child too young and inexperienced to steer and manage. Further the Plaintiff's M.V. Ololo was not keeping to its own side of the sea way but was rather crossing the sea to the 2nd Defendant's side from the left before the collision, thus depicting by unchallenged evidence that Plaintiff was contributorily negligent and in fact carries the larger blame for the cause of the accident (See OMOREGBE VS. LAWANI (1980) 34 SC 19 at 117).

On the preponderance of credible evidence, the evidence of the defence in respect of the Plaintiff's boat (M.W. Ololo) not keeping its proper side of the sea but rather that it crossed 2nd Defendant's waterway, weighed more than the Plaintiff's evidence. Hence the Plaintiff's contribution (in the absence of his pilots evidence) as to the cause of the accident demonstrably far outweighs that of the 2nd Defendant. I accordingly

assess and qualify the degree of liability of the two parties in the ratio of seventy-five percent (75%) for the Plaintiff and twenty-five percent (25%) to the 2nd Defendant.”

Negligence is a question of fact, not law; and each case must be decided in the light of its own particular facts. (See KALLA VS JARMAKANI TRANSPORT LTD (1961) All NLR 747. However, the burden of proving contributory negligence in the Plaintiff rests on the Defendant. And this may be inferred from the Plaintiff's own evidence, or on a balance of probabilities from the facts. (See for example BAKER VS LONGHURST & SONS LTD (1933) 2 k.b. 461 GIBBY VS. GRINSTEAD GAS AND WATER CO. (1944) 1 All E.R. 358). The contributory negligence must be a cause of the accident as well. This has been demonstrated above.

As for the measure of damages, the principle is that the measure of damages is to be apportioned according to the proportions in which the parties are responsible for the damage taking into account both causation and blameworthiness, and the amount recoverable must be reduced to such extent as the court thinks just and equitable having regard to the Plaintiff's share in the responsibility for the damage. (See STAPLEY VS GYPSUM MINES LTD (1953) A.C. 663 DAVIES VS SWAN MOTOR CO. (SWANSEA) LTD (1949) 2 K.B. 291). It may be noted that prior to 1945 in England, the contributory negligence of the Plaintiff was a complete defence to his claims. The old common law rule was modified by the Marine Conventions Act, 1911 for shipping cases to the effect that liability was to be apportioned between the vessels concerned according to the degree of fault. This rule has since been generalised by the Law Reform (Contributory Negligence) Act, 1945.

My view therefore is that the Court of Appeal was in the circumstances of this case right in its apportionment of damages as shown above.

There was therefore no contradiction any where in the judgment of the Court of Appeal which has in fact tried only to rectify the error earlier committed by the trial court that contributory

negligence was not pleaded. But significantly enough even the trial court made it quite clear that it was prepared to apportion blame between the parties herein if contributory negligence had been in fact pleaded when it said in its judgment as follows:-

B *“I now come to the question of damages. As I have earlier found, the Plaintiff’s driver was unlicensed and inexperienced. In my opinion, this was a serious lapse on the part of the Plaintiff and this might have contributed to the accident. However, contributory negligence was not pleaded by any of the Defendants. Contributory negligence must be specifically pleaded by way of defence to a claim for negligence. In the absence of such a plea, the judge may not reduce the Plaintiff’s damages. See FOOKES VS. SLAYTOR (1978) 1 W.L.R 1293. I would have certainly reduced the Plaintiff’s damages had the Defendants pleaded contributory negligence.”*

There is clearly no doubt at all that the effect of a successful plea of contributory negligence would be the apportionment of blame between the culprits/parties, and consequently the apportionment of liability or damages recoverable in the suit.

As I said, I am unable to find any contradictions in the judgments of the two lower courts as contended simply because both the Plaintiff and the 2nd Defendant have been found to have each contributed or played a part in causing the marine collision or accident. That is all that a successful plea of contributory negligence is about. It mean the two parties must share the blame and consequently the damages.

Issues (1) & (2) must therefore be resolved against the Plaintiff. And I so do resolve them.

Issue (3)

The complaint here is directed against the setting aside by the Court of Appeal of the award of N2,186.66 as damages for the loss of two (2) outboard engines by the trial court.

It ought to be borne in mind that being an item of special damages the law requires that it must be specifically pleaded and strictly proved as well. This much was recognised by the learned

trial judge. Now, what did he have to say on this item in his judgment? On page 123 of the record the learned trial judge said as follows:

“The Plaintiff also claims N6,560.00 as cost of outboard engines. There is no receipt for the engines. Defendant witness 2 in his evidence said there were only two (2) outboard engines. This is confirmed by Exhibit K. I therefore find there were two outboard engines on the boat and I award N2,186./66 for the two engines.” B

Clearly the learned trial judge could not have said that “there is no receipt for the engines” in one breath, and then in another breadth proceed to award N2,186.66 for 2 engines without explaining how he arrived at the figure. If the Plaintiff claims N6,560.00 for 3 engines and without any receipt in support thereof, how then was the figure of 2,186.66 for 2 engines made up? The Court of Appeal was clearly of the view that to give a notional price of N2,186.66 to 2 out of 3 engines originally said to cost N6,560.00, “amounted to no more than a guess-work” and that this “fell far short of strict proof of special damages as required by law”. I think the Court of Appeal was right when it set aside the award in respect of the two (2) engines. The issue has no merit. I resolve it against the Plaintiff. C D E

All the three (3) issues having been resolved against the Plaintiff, the appeal fails. It is hereby dismissed. The judgment of the Court of Appeal is hereby confirmed. The 2nd Defendant is awarded costs assessed at N10,000.00 against the Plaintiff. F

G

KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother I. L. Kutigi, JSC in this appeal. I agree entirely with his reasoning and conclusion dismissing the appeal. I affirm the judgment of the Court of Appeal and hereby dismiss the appeal of the Appellant against the judgment. H

Appellant shall pay costs assessed at N10,000 to the Respondents.

MOHAMMED JSC

I have had a preview of the judgment of my learned brother, Kutigi, JSC, in draft, and I agree with him that this appeal ought to be dismissed. My learned brother has considered all the salient issues raised by the parties, in this appeal, and I have nothing more to add. The appeal is dismissed. I award N10,000.00 costs to the 2nd Defendant.

C

ACHIKE JSC

I have had the privilege of reading the leading judgment of my learned brother, Kutigi, JSC; I agree with the reasoning and the conclusion that the appeal lacks merit and the same ought to be dismissed. Accordingly, I, too would dismiss the appeal with N10,000.00 costs against the plaintiff.

E

AYOOLA JSC

I agree that this appeal should be dismissed for the reasons given in the judgment just delivered by my learned brother, Kutigi, JSC, which I have had the privilege of reading in advance and which I do not wish to add anything. In the result I too would dismiss the appeal with costs as ordered by him.

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H