

SUPREME COURT OF NIGERIA
FRIDAY 8TH FEBRUARY, 2002. SC. 138/1995
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, A. I. IGUH,
A. I. KATSINA-ALU, E. O. AYOOLA, JJSC

JOSEPH SALIBA APPELLANT/CROSS-RESPONDENT
AND
RODA YASSIN RESPONDENT/CROSS-APPELLANT

APPEALS - Determination - Basis - Appeals are decided upon issues raised - And not on grounds of appeal - As grounds are deemed extinguished and replaced by issues (H1)

DAMAGES - Judgments - Correctness of - Since appellant raised issue of quantum of damages - Rather than his liability - Judgments arising therefrom are not perverse (H2)

APPEALS - Concurrent findings - Supreme Court will not interfere - Except if such findings are perverse - Or there was a substantial error (H3)

ACTIONS - Torts - Detinue - Proof - To succeed in an action for detinue - Plaintiff must establish wrongful detention of his chattel by defendant (H4)

PLEADINGS - Binding nature of - Parties are bound by their pleadings - As such a party cannot without amendment - Depart from his pleadings (H5)

CONTRACTS - Conditional contract - Enforcement - Action cannot be maintained to recover expenses - Incurred during negotiation of such contract (H6)

FACTS

Plaintiff/respondent and defendant/appellant had an agreement to the effect that appellant is to hire an Ingersoll Rand Compressor from respondent. The equipment is to be transported from Jos to Kaduna. There was also an understanding that the equipment

will be put to test prior to formal signing of contract between the parties. When appellant breached the agreement, respondent commenced this action against him in the High Court of Plateau State, Jos claiming the following – N200, 000.00 being second hand value for Bohler Quarry Drill Rig and Hammer, N150, 000.00 being second hand value for Ingersoll Rand Compressor, N2,000.00 as cost of transporting the equipment from Jos to Kaduna, N2, 645, 000.00 being cost for loss of use of the equipment, return of the equipment in the condition it was prior to the contract of hire and N150, 000.00 as damages for detention of the equipment.

The court held that there was no formal contract between the parties. However, the court inter alia, granted the award of N200,000.00 as cost for second value of the equipment. Appellant being dissatisfied, appealed to the Court of Appeal, Jos. Respondent was also not happy with some aspects of the judgment. Hence he cross appealed to the same Court of Appeal. The court allowed the main appeal except the award of N200,000.00. Respondent's cross-appeal was dismissed in its entirety. Appellant was aggrieved with the part of the judgment retaining the award of N200,000. As such, he appealed to Supreme Court. Respondent also cross appealed.

ISSUES FOR DETERMINATION

1. *Whether without the Appellant asking that the award by the trial judge of N200,000.00 (Two hundred thousand Naira), being the second hand value of the drill, be set aside the Court of Appeal could set the same aside.*

2. *Since issues No. 3 and 6 were not in the alternative and the Appellant not having asked the setting aside of the sum of N200,000.00 awarded by the trial judge, was the Court of Appeal in its determination of issue No. 6 not right to have held itself confined to the issue of the damages awarded and given judgment as it did based on the evidence given concerning the value of the drill.*

HELD (Unanimously dismissing the main appeal and

the cross-appeal per **KATSINA-ALU JSC**)

APPEALS - Determination - Basis

1. It is now an established practice that an appeal is decided

upon the issues formulated for determination. This means that when issues for determination are formulated, the grounds of appeal upon which they are based are extinguished, as it were, and are replaced by the issues. The appeal is then argued on the issues so raised and not on the grounds. (p. 412 B)

Judgment - Correctness of

2. As the respondent rightly points out, the appellant did not raise any issue touching on his liability for the sum of N200,000.00 awarded by the trial court as the value of the drill. Rather the relief sought was that the value of the drill was not properly assessed and the sum awarded N200,000.00 was in excess of the real value. In this regard, the value the appellant placed on the drill was N50,000.00.

It seems clear to me therefore that the judgment of the court below is unimpeachable. It flows from the evidence before the court of trial. It is not perverse. This appeal therefore fails and it is dismissed. I make no order as to costs.

(p. 412 E)

APPEALS - Concurrent findings - Interference

3. It is right to say therefore that there has been a concurrent findings of fact of the two courts below on this point. This court will not disturb concurrent findings of the lower courts unless a substantial error apparent on the face of the record is shown or such findings are perverse. In the instant case the concurrent finding arrived at by the High Court and the Court of Appeal that there was no contract of hire between the parties is amply supported by the established evidence before the trial court. I therefore have no reason to disturb this finding of fact made by the learned trial Judge and affirmed by the court below. There is a concurrent finding of fact by the High Court and the Court of Appeal. This court will not disturb a concurrent finding of fact unless it is perverse. I have myself examined the cross-appellant's Amended Statement of Claim and the evidence led at the trial. There is no claim in conversion which is the unlawful appropriation and use of another's property. (pp. 414 F/417 A)

Torts - Detinue - Proof

4. An appellate court will ordinarily not disturb findings of fact by a trial court unless such findings are wrong or are not supported by evidence. In the instant case, there is clearly no evidence of a demand by the plaintiff for the return of his machines and a refusal to deliver by the defendant. I am therefore in complete agreement with the Court of Appeal to rightly set aside the finding of fact of the trial court. I agree with the court below that the cross-respondent is not liable in detinue. To succeed in a suit in detinue the plaintiff must establish the wrongful detention of his chattel by the defendant. There was no such averment in the cross-appellant's statement of claim. As I have said before, what the plaintiff must establish in a suit in detinue is wrongful detention by the defendant. This the plaintiff must do by showing that he had demanded a return of his chattel and the defendant refused to deliver. There was no such evidence before the trial court. On the evidence therefore, the cross-respondent, is not liable in detinue. (p. 416 B)

PLEADINGS - Binding nature of

5. It was no wonder then that the learned trial Judge made no reference to the issue of negligence in his judgment. It is now settled that parties are bound by their pleadings. A party cannot without necessary amendment, urge a case different from the one raised in his pleadings. The court below was right to dismiss the cross-appellant's submissions on this issue which did not arise for determination in the court of trial. (p. 417 E)

Conditional contract - Enforcement

6. The last issue is whether the cross-respondent had an obligation to refund the cost of transportation of the equipment. There is no substance in this complaint. It must be remembered that the contract for the hire of the equipment was subject to the happening of an event. That event had not happened. And the expenses of transporting the equipment to Kujama were incurred in the course of negotiations. In such a situation, if the negotiations eventually break down, as in this

case, no action could be maintained to recover such expense. The court below rightly, in my view set aside the award of N2,000.00 in this regard. (p. 417 G)

REPRESENTATION

Isaac S. Akor, George-Taylor, Ashiru & Co., for Appellant/Cross-Respondent

Adefope & Co. for the Respondent/Cross-Appellant

CASES REFERRED TO

LCCC v. Onachukwu (1978) NSCC Vol. 11 200

Thomas v. Odegbesan (1965) 1 All NLR 95

SCDCC Ltd. v. Katonecrest Ltd (1986) 5 NWLR (Pt. 44) 791

Momodu v. Momoh (1991) 1 NWLR (Pt. 169) 608

Sanusi v. Ayoola (1992) 9 NWLR (Pt. 265) 275

Ike v. Ugboaja (1993) 6 NWLR (Pt. 301) 539

Ibodo v. Enarofia (1980) 5-7 SC 42

Amaeze v. Anyaso (1993) 5 NWLR (Pt. 291) 1

Obisanya v. Nwoko (1974) 6 SC 69

Queen v. Ogoto (1961) All NLR 700

Ajuwon v. Akanni (1993) 9 NWLR (Pt. 316) 182

Odubeko v. Fowler (1993) 7 NWLR (Pt. 308) 637

Panalpina World Transport Ltd vs. Wariboko (1975) 5 UILR 4

LCCC v. Onachukwu (1978) NSCC Vol. 11 200

Thomas v. Odegbesan (1965) 1 All NLR 95

LEAD JUDGMENT BY KATSINA-ALU JSC

This case originated in the High Court of Plateau State Judicial Division in suit No. PLD/J210/90. The plaintiff Roda Yassin in that suit had claimed against the defendant Joseph Saliba as per paragraph 20 of the Amended Statement of Claim as follows:

“Wherefore the plaintiff claims against the defendant the sum of N2,997,000.00

PARTICULARS:

Second hand value of the Bohler Quarry Drill Rig and Hammer. N200,000.00. Second hand value of the Ingersoll Rand Compressor N150,000.00 cost of transporting the equipment to Kaduna N2,000.00. Loss of use of equipment from May 1985 to the date of

filing of the

Writ N2,645,000.00

N2,997,000.00.

In the alternative the plaintiff claims from the defendant the sum of N2,997,000.00.

B *PARTICULARS:*

The return of the Ingersoll Rand compressor in the condition in which it was prior to the contract of hire.

Second hand value of the Bohler Quarry Drill Rig and Hammer N200,000.00.

C *Cost of transporting the Equipment to Kaduna N2,000.00*

Loss of use of the equipment from May 1985 to the date of filing of the writ N2,645,000.00

D *Damage for breach of contract and /or detention or conversion of the goods N150,000.00*

Total N2,997,000.00."

The learned trial Judge considered the various heads of claim.

On the issue of whether there was a contract between the parties the learned Judge held that there was no contract. He said:

E *"On the first issue, I find that there was an agreement 'subject to contract,' because the parties have agreed not to be bound until some future event takes place before the execution of the formal contract. The future event to happen before the formal contract was entered was the testing of the equipment to see that they were*

F *working properly before the parties agreed on the price to be paid. The plaintiff said in his evidence that at the time of releasing the machines to the defendant they have not agreed on any figure for hiring because he wanted the defendant to test the machines and*

G *make sure that they were usable before he could give him his figure. The defendant in his evidence also agreed that they did not agree on any price because they had to rely on the quantity of stones blasted. I therefore find that from the evidence of both parties, the price to be paid for the use of the machines was not agreed upon.*

H *And upon the principle of Adebajo Vs. Brown (supra) where it was held, "Generally, where there is a fundamental term in a contract left undecided, then there is no contract." I therefore hold that there was no contract as to the price to be paid for the equipment."*

With regard to the other heads of claim, the learned Judge

held:

"The items which the plaintiff has proved his and is entitled to judgment are:-

(a) Cost of transportation of equipment from Jos to Kaduna which is N2,000.00. There is evidence to this which the defendant did not contradict, and I accept it as true, therefore the plaintiff is entitled to N2,000.00. ^B

(b) The plaintiff is also entitled to the return of the Ingersoll Rand Compressor in the condition in which it was prior to the contract of hire. The defendant is to transport the machine from Kaduna to Jos and deliver it to the plaintiff in the condition it was before the hire within 3 weeks from today. ^C

(c) There is agreed evidence of both plaintiff and the defendant that the Bohler Drill had been cannibalized as people must have stolen some of the parts. Therefore the question of returning it cannot be considered. I therefore have to consider its value. Exhibit 1 gave the value in which it was bought in 1984 at N50,000.00 but there is evidence of P.W. 3 Sodem from Gyatogere who deals on second hand equipments of this nature gives the current price of a second hand Drill at N300,000.00. The plaintiff himself gave N200,000.00 as the value of a second driller. ^E

The defendant did not challenge the value of the second hand Drill but only drew the attention of the court to the fact that machines naturally depreciate. But with the current economic situation in the country which is judicially noticed by decided cases and in particular when damages was awarded against Gani the value of naira was a factor considered. I therefore reject that the value of a second hand machine bought in 1984 has depreciated. In fact it has appreciated. I therefore accept the evidence of the plaintiff that he is entitled to N200,000.00 as the second hand value of his Drill as at present market value. And I so awarded him N200,000.00 for his head of claim. ^F

(d) On the claim of N2,645.000 for loss of use of equipment from May, 1985 to date of filing of the writ. I have earlier on held that parties never agreed on the price to be paid for hire, because it was subject to contract when the machines were satisfactorily tested to a workable condition before a formal contract could be entered into. If no formal contract have been proved to exist between the ^H

plaintiff and the defendant the claim of the plaintiff for estimated profit must fail. See *Trenco Nig. Ltd. v. A.G.B. Ltd and I or (supra)*. Although there is evidence of P.W. 3 as to the cost of hire per day. I am unable to make use of it as the basis for the claim of loss of use because the parties never agreed on any price. And if I should award any amount, I will be making contract for the parties, and this is the duty which i have no power. It was held in *Adebanjo v. Brown (supra)* "That court should not make out a contract for the parties." I therefore dismissed the claim of N2,650,000.00 for loss of use.

On the damages for detainee which is N150,000.00, it is the law as stated in *Kosile Vs. Folorin (supra)* that a plaintiff is entitled to return or the chattel or its value and also damages for its detention. And since I have ordered the return of the compressor, and payment of N200,000.00 as the value of *Bohler Drill*, it follows that the plaintiff is also entitled to damages for the detention of the machines. And I hereby award him N80,000.00 as damages."

The defendant was dissatisfied with the decision of the High Court. He therefore appealed to the court of appeal (Jos Division) upon a number of grounds which some of their particulars read:

"1. The learned trial judge erred in law by holding that there was contract of hire between the defendant and the plaintiff.

2. The learned trial Judge erred in law by holding that the defendant breached the hire agreement between him and the plaintiff because "the defendant failed to repair the machines so as to enable the plaintiff give the price."

3. The learned trial judge erred in law thereby occasioning serious miscarriage of justice by holding that the defendant was liable in detainee when there is no evidence that the defendant detained the plaintiff's machines.

4. The learned trial judge erred in law when he held that the plaintiff had proved his claim for N2,000.00 against the defendant as cost of transporting the machines from Jos to Kaduna because "there is evidence to which the defendant did not contradict."

5. The learned trial judge misdirected himself and thereby came to wrong conclusion by holding that the plaintiff could not have mitigated his losses by retaking or retrieving his machines "because the keepers of the machines will deny knowing him as the owner of the machines.

6. *The learned trial Judge erred in law by awarding damages against the defendant when there is no evidence justifying the award.*

7. *The learned trial judge erred in law and came to a wrong conclusion when he held that the value of the Bohler Drill had appreciated and awarded the plaintiff the sum of N200,000.00 as it value.* B

8. *The judgment is against the weight of evidence.*”

The plaintiff also was not happy with some aspects of the judgment. He cross-appealed to the Court of Appeal upon five grounds of appeal which, without their particulars read: C

GROUND ONE

Having held that though “there was no contract for the price but there was an agreement as to the hire of the equipment” and that “there was a breach of this agreement because the Defendant failed to repair the machines so as to enable the Plaintiff to give him the price” trial judge erred in law when he failed to proceed to fix a reasonable price of hire. D

GROUND TWO

The learned trial judge having received submissions in respect thereof erred in his failure to make a finding on the liability of the Defendant for breach of the contract of bailment and in award for damages accordingly. E

GROUND THREE

The learned trial judge erred in law when he failed to make a finding on the issue of Defendant’s negligence which he considered would have found sufficient facts to find the Defendant liable to the plaintiff. F

GROUND FOUR

The learned judge misdirected himself in law when he held that as there was no claim for conversion any submission as to conversion would not be considered. G

GROUND FIVE

The learned trial judge erred in law in his failure to make a finding as to the loss of use sustained by the plaintiffs due to the Defendant’s detention and or conversion of plaintiff’s Machines. H

The Court below allowed the appeal save the award of N200,000.00 being the value of the Quarry Drill. The plaintiff’s cross-appeal was dismissed in its entirety.

The defendant was dissatisfied with that part of the judgment which retained the award of N200,000.00 as the value of the Quarry Drill. He has further appealed to this Court.

The plaintiff also was not happy with the dismissal of his cross-appeal. He, too, has further cross-appealed to this Court.

B The defendant (referred to hereafter as ‘the appellant’) has submitted two issues for determination in this appeal. These read:

C *1. Whether the Justice of the Court of Appeal were right in law in failing and or refusing to set aside of N200,000.00 despite their finding and holding on the issue of detainue?*

2. Whether having regard to the finding by the court below and the applicable law the said court was right in refusing to set aside the award of N200,000.00 against the Appellant?

D The plaintiff (referred to hereafter as “the cross-appellant”) for his part also raised two issues for determination. They read:

1. Whether without the Appellant asking that the award by the trial judge of N200,000.00 (Two hundred thousand Naira), being the second hand value of the drill, be set aside the Court of Appeal could set the same aside.

E *2. Since issues No. 3 and 6 were not in the alternative and the Appellant not having asked the setting aside of the sum of N200,000.00 awarded by the trial judge, was the Court of Appeal in its determination of issue No. 6 not right to have held itself confined to the issue of the damages awarded and given judgment as it did*
F *based on the evidence given concerning the value of the drill.*

Both sets of issues are similar. However, I prefer the formulation by the cross-appellant. I shall treat both issues together.

G As already indicated, this appeal is against the refusal of the Court below to set aside the award of N200,000.00 being the second hand value of the drill. The court below in the course of its judgment held:

H *“In the instant case the evidence was that the rig was cannibalized, there was evidence which the learned trial judge accepted that a second hand drill would cost N300,000.00. There was no contrary evidence and the learned trial judge was entitled to award the sum of N200,000.00 as claimed by the respondent. Now it should be understood that the appellant under this issue is not complaining of his liability to make good the lost drill, his quarrel was only con-*

financed to the measure of damages awarded. Accordingly, irrespective of my earlier decision on the matter of the appellant's liability, I must confine myself under this head on the issue of the damages awarded... In my view, the respondent had proved the loss of the rig and had proved the amount of money he would apply to secure himself a second hand drilling rig. The finding of the learned trial Judge was supported by the evidence. The respondent was entitled to be compensated by restitutio in integrum. Before I part with this issue I need to further emphasize that the appellant did not complain about his liability for the rig but merely on the question of the measure of damages. I am therefore bound only to look into the issue raised. I am not permitted to deal with any other issue. I accordingly resolve this issue against the appellant." (Underlining for emphasis)

The appellant has attacked this decision. In the appellant's brief of argument, the learned counsel for the appellant attacked the decision of the court below thus:

"This issue dealt with the question whether there was evidence before the High Court to justify the award of N80,000.00 damages made against the appellant by the High Court on the ground that the appellant detained the respondent's machines. The court after reviewing the evidence before it and stating the position of the law, rightly reversed the finding made by the High Court and held that the appellant was not liable in detinue because 'it had not been shown that the appellant held the equipment in defiance of the right of the respondent to possess the equipment.' the court also set aside the damages awarded against the appellant... With the above finding and holding by the court below, one would have expected that the award of N200,000.00 made by the High Court against the appellant as the value of the Quarry Drill said to be detained would have been equally set aside. Curiously, however the Court of Appeal failed to set aside the said award. It is our humble submission that the court committed serious error of law in failing to set aside the said award.... The court's ultimate verdict in refusing to set aside the N200,000.00 imposed on the appellant was very inconsistent with the correct findings and statement of the law it had made..."

I am not impressed by this attack. I am not persuaded by it. It is unfortunate. It shows a complete lack of understanding of the reasoning of the Court of Appeal. The Court of Appeal had rea-

soned that since the appellant had not raised and argued any issue complaining of his liability to make good the lost rig, it was not proper for it to venture into it. The appellant has not proffered any reasons why and how the court was in error. It is indeed curious that in his attack the appellant avoided any discussion on the reason given by the court below in this connection.

It is now an established practice that an appeal is decided upon the issues formulated for determination. This means that when issues for determination are formulated the grounds of appeal upon which they are based are extinguished, as it were, and are replaced by the issues. The appeal is then argued on the issues so raised and not on the grounds: see Sanusi v. Ayoola (1992) 9 NWLR (Pt. 265) 275.

The object of formulating an issue for determination in the appeal is to fix and delimit the question to be decided by the court in the appeal. So that once the parties have identified the issues for determination from the grounds of appeal, it is wrong for counsel to base arguments in their brief on the grounds of appeal as was done in this case. In such a situation, arguments should be based on the issues that have been formulated - SCDCC Ltd. v. Katonecrest Ltd. (1986) 5 NWLR (Pt. 44) 791; Momodu v. Momoh (1991) 1 NWLR (Pt. 169) 608.

As the respondent rightly points out, the appellant did not raise any issue touching on his a liability for the sum of N200,000.00 awarded by the trial court as the value of the drill. Rather the relief sought was that the value of the drill was not properly assessed and the sum awarded N200,000.00 was in excess of the real value. In this regard, the value the appellant placed on the drill was N50,000.00.

It seems clear to me therefore that the judgment of the court below is unimpeachable. It flows from the evidence before the court of trial. It is not perverse. This appeal therefore fails and it is dismissed. I make no order as to costs.

I turn now to the cross-appeal. The following issues were formulated for determination by the cross-appellant:

1. Whether it was not the duty of the Cross-Respondent to care for and return the quarry equipment to the Cross-Appellant on the former's realization that the machines were not good or no longer

needed for the purpose for which they were requested and whether such duty was dependent on the outcome of the contract between the parties.

2. Whether there were material facts pleaded and evidence given which enabled the Cross-Appellant to obtain a remedy against the Cross-Respondent in Negligence. B

3. Whether in spite of the claim for conversion made in paragraph 20 of the Amended Statement of Claim and the facts pleaded in paragraphs 15, 16, 17, 18, and 19 and subsequent evidence given in support thereof, their Lordships were not in error to have held that the claim in conversion was not available to the Cross-Appellant neither having been pleaded or evidence in respect thereof given. C

4. Whether the Cross Respondent hand an obligation to refund the cost of transportation of the equipment and whether such obligation was dependent on conclusion of the agreement for hire. D

5. Whether from all the facts of the case the Cross-Respondent was not liable to the Cross-Appellant for the detention of his machines.

6. Whether the Court of Appeal was not in error to have refused to award the sum of N2,645,000.00 (Two Million, Six Hundred & Forty-five thousand Naira) or so much as was deemed appropriate as loss of use. E

7. Whether the learned Justices were not in error to have substituted their views for the findings of fact made by the trial judge without such findings having been held to be perverse, against the evidence or an improper exercise of the lower Court's discretion. F
For his part the cross-respondent submitted five issues for determination in this appeal. These read:

1. Whether the Cross-Appellant pleaded and gave evidence of negligence against the Cross-Respondent. G

2. Whether conversion was proved against Cross-Respondent.

3. Whether the Cross-Appellant proved detinue against the Cross-Respondent

4. Whether the Cross-Respondent is liable to refund the cost of transporting the equipment from Jos to Kujama. H

5. Whether the Court below was right in refusing to award any sum to the Cross-Appellant as loss of use.

I shall first deal with the issue of loss of use of the equipment.

This was raised in cross-appellant's issue No. 6 and in cross-respondent's issue No. 5. This issue will succeed or fail if there was or not a contract of hire between the parties. The learned trial Judge found as a fact that there was no contract on the price to be paid for the use of the equipment. Said he:

B *"I therefore find that from the evidence of both parties, the price to be paid for the use of the machines was not agreed upon. And upon the principle of Adebajo v. Brown (supra) where it was held "Generally, where there is a fundamental term in a contract left*
 C *undecided, then there is no contract' I therefore hold that there was no contract as to the price to be paid for the equipment."*

On appeal, the Court of Appeal upheld this finding. It said per Musdapher JCA:

"Since the learned trial judge had held that the 'parties in this
 D *case had not agreed as to price to be paid for the contract,' I hold that there was no contract between the parties. As shown above, the appellant claimed that the contract was for the supply of equipment and services, which the respondent claimed that the contract was for the hire of the machines, but in any event, the parties were not to be*
 E *bound until the machines are repaired and tested, in my view it is immaterial which of the two sides was the true position for either of the contracts to be binding, the occurrence of the future event must exist before a binding contract was born. That future event had not occurred and accordingly*
 F *there was no contract between the parties.*
 (Underlining for emphasis)

It is right to say therefore that there has been a concurrent findings of fact of the two courts below on this point. This court will not disturb concurrent findings of the lower
 G ***courts unless a substantial error apparent on the face of the record is shown or such findings are perverse - see Ike v. Ugboaja (1993) 6 NWLR (Pt. 301) 539; Ibodo v. Enarofitia (1980) 5-7 SC 42; Amaeze v. Anyaso (1993) 5 NWLR (Pt. 291) 1. In the instant case the concurrent finding arrived at by***
 H ***the High Court and the Court of Appeal that there was no contract of hire between the parties is amply supported by the established evidence before the trial court. I therefore have no reason to disturb this finding of fact made by the learned trial Judge and affirmed by the court below.***

This issue is also tied to liability for detainee. In other words liability for loss of use follows liability for detainee. As I have already indicated, the learned trial judge held the defendant liable in detainee. In the course of his judgment he said:

"It is quite clear that the defendant who had taken delivery of the machines as per his exhibit 2 and had control over them, had equal duty to return them to the plaintiff. This duty became higher when he moved the machines to another place which the plaintiff did not know and could not remove them even if he wanted to, unless he was introduced by the defendant to those people to whom the defendant trusted the machines for safe keeping. The plaintiff having demand the return of his machines, and the plaintiff told him that it was wrong because he knew where he got the machines from. I therefore hold that the plaintiff has proved the case of detainee against the defendant. The defendant has received the machines from the plaintiff at Kujama.

The defendant claimed that the machines were not workable therefore he had no duty to return them to the plaintiff. The plaintiff who had control over the machines had moved them to another place, unknown to the plaintiff, and therefore it was his duty to take the machines from those people he had given for safe-keeping and return them to the plaintiff. The plaintiff made several trips to Kujama looking for the machines and in fact he saw them. The question is could the plaintiff in his effort to minimize loss even take the machines in the absence of the defendant? I very much doubt it, because the keepers of the machines will deny knowing him as the owner of the machines. I therefore hold that the defendant is not liable in conversion but he is liable in detainee."

As already stated, the Court of Appeal set aside this finding. It held that on the evidence the defendant was not liable in detainee. The Court below per Musdapher JCA held thus:

"Now, an action for detainee lay, at the suit of a plaintiff having a right to immediate possession, for the wrongful detention of his chattel by the defendant, evidenced by the defendant's refusal to deliver on demand ... The demand and the refusal must be unconditional. It must be specific it is not disputed in this case that the respondent at the request of the appellant took the machines to the site at Kujama. It is not disputed that the appellant was in control and cus-

today of the equipment. There was also no dispute that the equipment belonged to the respondent. The question to be decided here is whether the appellant detained the equipment in defiance of the wishes of the respondent... I cannot, considering all the facts of this case hold the view that the appellant deliberately refused to allow the respondent to collect the machines. It was rather the respondent who insisted that the appellant was duty bound to return the equipment to Jos."

An appellate court will ordinarily not disturb findings of fact by a trial court unless such findings are wrong or are not supported by evidence. See *Obisanya v. Nwoko* (1974) 6 SC 69; *Queen v. Ogodo* (1961) All NLR 700. **In the instant case, there is clearly no evidence of a demand by the plaintiff for the return of his machines and a refusal to deliver by the defendant. I am therefore in complete agreement with the Court of Appeal to rightly set aside the finding of fact of the trial court. I agree with the court below that the cross-respondent is not liable in detinue. To succeed in a suit in detinue the plaintiff must establish the wrongful detention of his chattel by the defendant. There was no such averment in the cross-appellant's statement of claim. As I have said before, what the plaintiff must establish in a suit in detinue is wrongful detention by the defendant. This the plaintiff must do by showing that he had demanded a return of his chattel and the defendant refused to deliver.** See *Udechukwu v. Okwuka* (1956) 1 FSC 70. **There was no such evidence before the trial court. On the evidence therefore, the cross-respondent, is not liable in detinue.**

I turn now to the issue of conversion. This is raised in issues 3 and 2 of the cross-appellant's issues and cross-respondent's issues respectively. The complaint of the cross-appellant under this issue is without substance. I will explain. The learned trial Judge in his judgment observed:

"On the issue of whether the defendant converted or detained the plaintiff's machines. From the available evidence there is no claim for conversion and therefore any submission as to conversion will not be considered and any claim in the alternative is dismissed."

The Court of Appeal affirmed this finding. It said:

"The finding above, must of course affect the next issue. It was on the question of conversion. Here again, the cross-appellant never pleaded conversion and never led any evidence as to conversion..."

There is a concurrent finding of fact by the High Court and the Court of Appeal. This court will not disturb a concurrent finding of fact unless it is perverse. I have myself examined the cross-appellant's Amended Statement of Claim and the evidence led at the trial. There is no claim in conversion which is the unlawful appropriation and use of another's property.

I now come to the issue of negligence. The cross-appellant's case from inception was never grounded in negligence. Both the Writ of Summons and the Amended Statement of Claim made no reference to negligence. It must be observed that it was only at the address stage at the trial that counsel for the cross-appellant raised the issue of negligence. Learned counsel said:

"On the issue of negligence I refer the court to the case of Panalpina World Transport Ltd. vs. Wariboko (1975) 5 UILR p. 4 See LCCC vs. Onachukwu (1978) NSCC Vol. 11 p. 200. See the case of Thomas s. Odegbesan (1965) 1 All NLR 95 at 99."

It was no wonder then that the learned trial Judge made no reference to the issue of negligence in his judgment. It is now settled that parties are bound by their pleadings - see Ajuwon v. Akanni (1993) 9 NWLR (Pt 316) 182; Odubeko v. Fowler (1993) 7 NWLR (pt. 308) 637. A party cannot without necessary amendment, urge a case different from the one raised in his pleadings. The court below was right to dismiss the cross-appellant's submissions on this issue which did not arise for determination in the court of trial.

The last issue is whether the cross-respondent had an obligation to refund the cost of transportation of the equipment. There is no substance in this complaint. It must be remembered that the contract for the hire of the equipment was subject to the happening of an event. That event had not happened. And the expenses of transporting the equipment to Kujama were incurred in the course of negotiations. In such a situation, if the negotiations eventually break down, as in this

case, no action could be maintained to recover such expenses. The court below rightly, in my view set aside the award of N2,000.00 in this regard.

In view of the foregoing the cross-appeal fails and I dismiss it. I make no order as to costs. In the result, both the main appeal and
B the cross- appeal are dismissed. Each party to bear his cost.

BELGORE JSC

C I read in advance the judgment of my learned brother, Katsina-Alu, JSC dismissing both the appeal and the cross-appeal and I adopt his reasoning as mine in dismissing this appeal. I abide by his consequential order as to costs.

D

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Katsina-Alu, J.S.C. I agree with his reasoning and conclusions. Both the appeal and cross-appeal lack merit. They are accord-
E ingly dismissed with no order as to costs.

IGUH JSC

F I have had the privilege of reading in draft the judgment just delivered by my learned brother, Katsina-Alu, J.S.C. and I agree entirely with his reasoning that both the main appeal and the cross-appeal lack substance and ought to be dismissed.

For the same reasons as he has given in the leading judgment, I, too, dismiss both appeals and make no order as to costs.
G

AYOOLA JSC

H I have read in advance the judgment just delivered by my learned brother, Katsina-Alu, JSC. I agree that for the reasons he gives this appeal and cross-appeal should be dismissed. I too dismiss both. I order that the parties bear their costs.