

SUPREME COURT OF NIGERIA
FRIDAY 3RD MAY, 2002. SC. 51/1998
CORAM:- U. MOHAMMED, S. U. ONU, A. I. IGUH,
A. I. KATSINA-ALU, S. O UWAIFO, JJSC

ASAFA FOODS FACTORY LTD APPELLANT
AND
1. ALRAINE NIG LTD
2. THE EAST ASIATIC CO. LTD RESPONDENTS
(Owner/Charterers of MV “FIONIA”)

APPEALS - Issues - Ruling - Supreme Court will not rule on a point
- In which there is no live issue - As between parties before court
(H1)

PLEADINGS - Admitted facts - Proof - Facts pleaded by one party
and admitted by another - Will need no further proof (H2)

CONTRACTS - Bailment - Loss of goods - Burden of proof - In case
of loss of goods - It is the bailees’ duty to prove that the loss was not
caused by his breach of duty - It is not the bailors’ duty to show that
it did (H3)

AGENCY - Agent of foreign principal - Personal liability - Where an
agent contracts on behalf of a foreign principal - It is presumed that
he is personally liable - Unless a contrary intention appears (H4)

FACTS

Plaintiff/appellant ordered a consignment of 6,691 cartons of
Nido instant milk powder from Switzerland. The consignment was
shipped on board 2nd respondent’s vessel Ms “Fionia” in Hamburg.
The consignment landed at the Apapa-Lagos seaport. It was then
transported by road to Kano for the delivery to appellant by 1st re-
spondent i.e. clearing and forwarding agents in Nigeria. It was dis-
covered that of the 6,691 cartons only 6,263 arrived in Kano. There
was short-delivery of 428 cartons.

Consequently, appellant instituted this action at the High Court
of Lagos State wherein it claimed damages against respondents. Ap-

pellant claimed N24,345.43 on special damages for the missing cartons of Nido milk and N20,654.57 as general damages. Though pleadings were filed and exchanged respondents led no evidence, but made a no-case submission and rested on it. At the end of trial, the trial judge refused to award general damages but awarded the special damages of N24,345.43 with interest. Respondents therefore appealed to the Court of Appeal, Lagos Division which allowed his appeal and set aside the judgment of the trial court. Being dissatisfied, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. When does time begin to run for the purposes of a Statute of Limitation in this case, the Carriage of Goods by Sea Act. Cap. 44 Laws of the Federation of Nigeria, 1990

2. Whether on the preponderance of evidence the appellants failed to establish its case against either or both defendant/respondents and or whether the respondents did not have joint custody of the goods at anytime.

3. Whether there has been a mis-joinder of parties and/or cause of action and if yes whether this was sufficient to defeat the claim.

4. Assuming but without conceding that the liability of the 2nd respondent ceased as Ocean carriers when the goods were discharged from the Vessel, was the lower court justified to absolve them from liability notwithstanding the alternative head of claim in the tort of negligence made out and established against both respondents?”

HELD (Unanimously allowing the appeal per **UWAIFO**

JSC)

APPEALS - Issues - Ruling

1. If it was not satisfied with the reasons given by the court below and wishes to have a decision in that regard from this court, it would appear this court is being asked for an academic ruling on a point in which there is no live issue as between the parties before the court. This court will not do so. The appellants would have to await a proper occasion when it would come up with a grievance necessitating a decision on the point. That has been the stand of this court which insists

that it is essential that a suit or an appeal brought before a court should have the quality of an existence of a matter in actual controversy on any issue between the parties upon which a decision can be taken as a live issue. (p. 1154 C)

PLEADINGS - Admitted facts - Proof

2. It seems to me that with the admission the implications are clear. I may just point out one, and that is that the 1st defendant is the agent in Nigeria of the 2nd defendant, and with the admission of paragraph 9 of the amended statement of claim by the 1st defendant, it binds the 2nd defendant to the consequences of that contract of carriage by road. It is elementary principle of procedure that facts pleaded by one party and admitted by the other will generally need no further proof. But there are circumstances in which documents are pleaded and although admitted by the other party, will need to be tendered in evidence in order for the court to be aware of their contents and to give them their proper interpretation. In such situations, a party relying on the effect of such documents must not be content with the admission by the other party. He must go further to prove their contents and this is best done by producing the documents themselves or secondary evidence of them. (p. 1156 E)

CONTRACTS - Bailment - Loss of goods - Burden of proof

3. The circumstances of this case show that there was a contract of bailment in which the 1st defendant is the bailee. In bailment, the burden is upon the bailee to prove that he has discharged his duty under his undertaking to keep safely or deliver intact the goods entrusted to him. In other words, in case of loss of the goods, it is his duty as bailee to prove that the loss was not caused by his breach of duty, it is not the bailor's duty to show that it did. (p. 1158 H)

Agent of foreign principal - Personal liability

4. The position of the law is clear that a person may decide to act by another as his agent and get the benefit or bear the liability of that arrangement. One who authorizes is the prin-

cial while the one authorized is the agent. The agent acts as if it is the principal who does the act. In case of default, the agent normally becomes directly liable while the principal may as well be liable. It has been held that the fact that a person is an agent and is known to be so does not therefore of itself necessarily prevent his incurring personal liability. Whether he contracts so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears. (p. 1159 B)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Pleadings - Need for proper traverse

In this regard, the point cannot be over-emphasized that in order to raise an issue of fact in pleadings there must be a proper traverse. If a defendant refuses to admit a particular allegation in a statement of claim, he must state so specifically and he does not do this satisfactorily by pleading, as in the present case, that he is not in a position to admit or deny the particular allegations raised by the plaintiff and/or that he will, at the trial, put the plaintiff to the strictest proof thereof. (p. 1165 A)

2. Court to act on unchallenged evidence

The defendants rested their defence with the case for the plaintiff and did not call any evidence on their behalf, in such circumstance where evidence given by a party to a proceeding was not challenged by the other side who had the opportunity to do so, it is always open to the court seized of the matter to act on such unchallenged evidence before it. (p. 1165 G)

REPRESENTATION

H Olufemi Atoyebi Esq., with A. Olorunfemi Esq., for the appellant
F. O. Offia Esq., for the respondent

CASES REFERRED TO

- Akeredolu v. Akinremi [1986] 2 N.W.L.R. (Pt. 25) 710
 Uwegba v. A-G Bendel State [1986] 1 NWLR (Pt. 16) 303
 Edokpolo & Co. Ltd. v. Ohenhen [1994] 7 NWLR (Pt. 358) 511
 Kano v. Oyelakin [1993] 3 NWLR (Pt. 282) 399
 Coldman v. Hill [1918-19] All ER 434 B
 Rusholme Ltd v. S.G. Redd & Co. (London) Ltd [1955] 1 All ER 180
 Atake v. Afejuku [1994] 9 NWLR (Pt. 368) 379
 Omoregbe v. Daniel Lawani [1980] 33-4 SC 108 C
 Odulaja v. Haddad [1973] 11 SC 35
 Nigerian Maritime Service Ltd v. Alhaji Bello Afolabi [1978] 2 SC 79
 Lewis and Peat (N.R.L.) Ltd v. Akhimien [1976] 7 SC 157
 Nwadike v. Ibekwe [1987] 4 NWLR (Pt. 67) 718
 Lawal Owosho v. Dada [1984] 7 SC 149 D
 Nwabuoku v. Ottih [1961] 2 SCNLR 232
 Balogun v. U.B.A. Ltd [1992] 6 NWLR (Pt. 247) 336

LEAD JUDGMENT BY UWAIFO JSC

The plaintiff, now appellant, ordered a consignment of 6,691 E cartons of Nido Instant Milk Powder from Concorn Commercial S.A. (the consignor) of Lucerne Switzerland at a cost of \$37.36 per carton, making a total of \$249,975.76. The consignment was shipped on board the 2nd defendant's vessel MS "Fionia" in Hamburg on 17 F December, 1986 to the order of Savannah Bank of Nigeria Ltd. Kano Branch, the consignee being the appellant. The Bill of Lading No. 408 (Exhibit D) listed the details of the consignment in cartons as follows:-

Container No.	Seal No.	Quantity	G
EACU 482853-0	006027	744	
EACU 482793-5	006024	744	
EACU 481363-3	006025	744	
EACU 482705-1	006026	744	
EACU 482683-6	006028	743	H
EACU 482834-0	006029	743	
EACU 482816-6	006030	743	
EACU 482896-1	006031	743	
EACU 482732-3	006032	743	

The consignment landed at the Apapa/Lagos Port, the port of discharge. It was then transported by road to Kano between 18 - 20 March, 1987 for delivery to the appellant by the 1st - defendant, clearing and forwarding agents in Nigeria. It was discovered that of the 6,691 cartons, only 6,263 arrived in Kano. There was short-delivery of 428 cartons. The appellant eventually claimed damages against the two defendants in an action filed on 11 March, 1988 for the shortfall. The particulars of damages were stated thus in the amended statement of claim:-

- C (a) Special Damages - 428 cartons of Nido Instant Milk Powder at US\$15,990.08 C.I.F. per carton [Exchange rate of N10,6568 to US \$1] N24,345.43
- (b) General damages N20,654.57
N45,000.00
- D (c) Interest at 15% p. a. from 13/3/87 till judgment, and thereafter at 9% p/a. till payment.

Although pleadings were filed and exchanged, the defendants led no evidence but, relying on the case presented by the appellant, made a no case submission and rested on it. On 22 February, 1991, Odunowo, J., who presided over the hearing, refused in a considered judgment to award general damages saying it would amount to double compensation to do so in addition to the special damages. He therefore made the following decision:

- F *"Accordingly judgment is hereby given in favour of the plaintiff in the sum of N24,345.43 being special damages for the short-delivery of 428 cartons of Nido Instant Milk plus interest at the rate of 15% per annum from 13 March, 1987 up till today and thereafter at the rate of 9% per annum until actual payment."*

- G Costs of N500.00 were awarded against the defendants.

The defendants appealed to the Court of Appeal, Lagos Division, and raised two issues for determination, namely:

- H *1. Whether the action against the 2nd defendant/appellant shipowner is time barred, having been commenced more than 12 months after discharge of the cargo from the carrying vessel.*

2. Whether the plaintiff/respondent adduced cogent evidence of the stage at which the loss (if any) occurred and whether there were any factors linking either of the appellants with such issue."

The Court of Appeal ruled in respect of issue 1 against time

bar on the ground that there was no evidence as to when the consignment was discharged from the ship.

As regards the second issue, the court held that the appellant failed to establish the liability of either of the defendants for the loss of the goods which it alleged. It allowed the appeal and dismissed the claim. Before arriving at this, the court per Ayoola, J.C.A., who read the leading judgment, observed.-

“The judge did not advert to the pleadings wherein the plaintiff’s case was that the correct numbers of cartons of milk were delivered to the 1st defendant for transportation to Kano. He did not advert to the fact that the action was founded on two separate and distinct contracts of carriage of goods one by sea and the other by land, and that each of the defendants could only be liable for quantity of goods lost while in its custody. The defendants acting on separate contracts and assuming separate duties of care could not both be liable for the same loss or put otherwise for the same breach.”

The learned justice later further observed:-

“The plaintiff had sued the defendants for breach of contract and, in the alternative, in tort alleging negligence. Whichever the cause of action, the plaintiff had to allege and prove that the goods in question came into the custody of the defendants at the relevant point in time and that while still in their several custody part of them was lost as alleged. Even if it had been proved that the goods were delivered to the 2nd defendant to be transported failure to prove that they were not duly delivered would still be fatal in the plaintiff’s case against the 2nd defendant.”

On the further appeal to this court, the appellant has set down four issues for determination as follow:-

“1. When does time begin to run for the purposes of a Statute of Limitation in this case, the Carriage of Goods by Sea Act. Cap. 44 Laws of the Federation of Nigeria, 1990 - (Grounds 1 & 2)

2. Whether on the preponderance of evidence the appellant failed to establish its case against either or both defendant/respondents and or whether the respondents did not have joint custody of the goods at anytime. (Grounds 3 & 6)

3. Whether there has been a mis-joinder of parties and/or cause of action and if yes whether this was sufficient to defeat the claim. - (Ground 4)

4. *Assuming but without conceding that the liability of the 2nd respondent ceased as Ocean carriers when the goods were discharged from the Vessel, was the lower court justified to absolve them from liability notwithstanding the alternative head of claim in the tort of negligence made out and established against both respondents?*

B I have to say that issue 1 needs no resolution since it does not arise from the decision of the court below. That court held that the appellant's claim was not statute-barred. The reason for saying so is immaterial for the present purposes since the appellant cannot claim to be aggrieved by the decision on that point so long as the decision was in its favour.

C ***If it was not satisfied with the reasons given by the court below and wishes to have a decision in that regard from this court, it would appear this court is being asked for an academic ruling on a point in which there is no live issue as***

D ***between the parties before the court. This court will not do so. The appellant would have to await a proper occasion when it would come up with a grievance necessitating a decision on the point. That has been the stand of this court which insists that it is essential that a suit or an appeal brought before a***

E ***court should have the quality of an existence of a matter in actual controversy on any issue between the parties upon which a decision can be taken as a live issue:*** see *Akeredolu v. Akinremi* [1986] 2 N.W.L.R. (pt. 25) 710 at 725; *Atake v. Afejuku* [1994] 9 N.W.L.R. (pt. 368) 379 at 402. On this same point, Viscount Simon L.C. observed in *Sun Life Assurance Company of Canada v. Jervis* [1944] A.C. 111 at 113-114 inter alia as follows:-

F

"I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing list between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties..."

G

H

No doubt, the appellants are concerned to obtain, if they can, a favourable decision from this House because they fear that other cases may arise under similar documents in which others who have taken out policies of endowment assurance with them will rely on the

decision of the Court of Appeal, but if the appellants desire to have the view of the House of Lords on the issue on which the Court of Appeal has pronounced, their proper and more convenient course is to await a further claim and to bring that claim, if necessary, up to the House of Lords with a party on the record whose interest it is to resist the appeal." B

I shall next consider issue 2 which I believe is sufficient for the resolution of this appeal. The kernel of it is whether on the evidence available the appellant failed to establish its case against either or both defendants. I think it is necessary to set out some relevant averments in the amended statement of claim and the defendants' response to them. In paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 the following averments were pleaded by the appellant:- C

"2. *The 1st defendant is also a company incorporated in Nigeria with their offices at 26 Creek Road, Apapa - Lagos State within the jurisdiction of this Honourable Court, and inter alia operates as clearing, forwarding and shipping agents. The 1st defendant were the agents in Nigeria of the 2nd defendant and in that capacity attended the 2nd defendant's vessel, 'FIONIA' as her agents on its voyage to Nigeria at all times material to this action.*" E

3. *The 2nd defendant is a common carrier and/or bailee for reward and carries on business in Nigeria through its agents, the 1st defendant herein at 26 Creek Road, Apapa - Lagos State. The 2nd defendant at all times material to this action were the owners/charterers/operators of the MV 'FIONIA' (hereinafter called 'the vessel') the vessel that transported the plaintiff's goods by sea from the port of Hamburg to Apapa, Lagos.* F

4. *By a valued Invoice dated Lucerne the 19th day of December, 1986 and issued by its overseas business partners and/or agents, the plaintiffs were advised to expect a cargo of Nido Instant Milk Powder on board the 2nd defendant's vessel aforesaid. The plaintiff will place reliance on this Invoice at the trial of this action.* G

5. *By a contract of affreightment evidenced by and/or contained in a Bill of Lading No. 408 dated Hamburg 17th December, 1986 and duly signed for and on its behalf, the 2nd defendant contracted to carry a cargo of 6,691 Cartons of Nido Instant Milk powder (hereinafter referred to as 'the goods') in good order and condition. The said bill of lading shall be founded upon at the trial of this* H

action.

6. *The plaintiff was at all times material to this action the owner/consignee of the said goods or alternatively endorsees of the bill of lading aforesaid to whom the property in the goods passed upon or by reason of the said endorsement.*

B 7. *The 2nd defendant duly acknowledged the safe receipt into its custody in good order and conditions the plaintiff's said goods for carriage and delivery in like good order and condition to the plaintiff in Nigeria.*

C 8. *Accordingly, the defendants were under a duty as common carriers and/or bailees for reward, or alternatively expressly or impliedly contracted by the bill of lading aforesaid to deliver the said plaintiff's cargo in like good order and condition as when shipped.*

D 9. *By yet another but a separate contract, the 1st defendant contracted with the plaintiff for the clearing, discharge and transportation to the plaintiff's warehouse and/or offices at Kano of all cargoes and/or goods of which the plaintiff is receiver. The plaintiff shall refer to and rely on the terms of such contract contained in various correspondence exchanged between the 1st defendant and the plaintiff."*

E The 1st defendant admitted all the above averments. The 2nd defendant also admitted all but paragraph 9. ***It seems to me that with the admission the implications are clear. I may just point out one, and that is that the 1st defendant is the agent in Nigeria of the 2nd defendant, and with the admission of paragraph 9 of the amended statement of claim by the 1st defendant, it binds the 2nd defendant to the consequences of that contract of carriage by road. It is elementary principle of procedure that facts pleaded by one party and admitted by the other will generally need no further proof: see Uwegba v. Attorney-General Bendel State [1986] 1 N.W.L.R. (pt. 16) 303; Edokpolo & Co. Ltd. v. Ohenhen [1994] 7 N.W.L.R. (pt. 358) 511. But there are circumstances in which documents are pleaded and although admitted by the other party, will need to be tendered in evidence in order for the court to be aware of their contents and to give them their proper interpretation. In such situations, a party relying on the effect of such documents must not be content with the admission by the other party. He must go further***

to prove their contents and this is best done by producing the documents themselves or secondary evidence of them: see *Kano v. Oyelakin* [1993] 3 N.W.L.R. (pt. 282) 399.

In the present case, paragraph 4 was supported in evidence by exhibit C, and paragraph 5 by exhibit D. The appellant also pleaded in paragraph 11 as follows:-

“11. The vessel duly arrived Lagos on or about 4th January 1987 but notwithstanding that a total of 6,691 cartons of Nido Instant Milk was consigned to the plaintiff and actually loaded and delivered sound to the 1st defendant, the defendants delivered only 6,263 cartons leaving a balance of 428 cartons as undelivered to the plaintiff. The plaintiff shall place reliance on 1st defendant’s way Bills Nos. 23646-23650 at the trial of this action.”

Commenting in respect of the above averment, the court below said:

“The vessel FIONIA duly arrived in Nigeria and was discharged of its cargo. The vessel arrived in Nigeria on 4th January 1987. The goods were transported to Kano by the 1st defendant as agreed by it and the plaintiff. The plaintiff alleging that the goods were short-delivered sued the defendants. The action was commenced by the plaintiff on 10th March 1988. The plaintiff’s case at the trial seemed to have been encapsulated in paragraph 11 of the amended statement of claim... Had this averment been given due attention and its unmistakable implication adverted to, it would have been clear that there was left no basis for imputing any liability to the 2nd defendant which, as stated in the averment, had delivered ‘sound’ all the goods consigned to the plaintiff to the 1st defendant with which the plaintiff had had a different and separate contract of clearing of goods and carriage of the goods over land, not as an agent of the 2nd defendant but as a principal contracting party in its own right.”

With the greatest respect, the above observation cannot at all be supported. First, it is obvious to me, having regard to the earlier averment in the amended statement of claim and as rightly submitted by learned counsel for the plaintiff/appellant, that the reference to the “1st defendant” as I italicized in the said paragraph 11 which, admittedly, was poorly drafted, is a clerical error which properly should read 2nd defendant. As it is said: *Vitium clerici nocere non debet* [A clerical error ought not to hurt]. Second, there is nothing in that

paragraph to suggest that it was the 2nd defendant who delivered the goods 'sound' to the plaintiff as the court below gratuitously imported into it. Third, to say, as, the court below did, that the 1st defendant contracted with the plaintiff for the carriage by road of the goods in question "not as an agent of the 2nd defendant but as a principal contracting party in its own right" was apparently in disregard of paragraph 2 of the amended statement of claim which both defendants admitted individually. The admission is that the 1st defendant operating as clearing, forwarding and shipping agents is an agent in Nigeria of the 2nd defendant. There was no further need to prove what had thus been admitted? But even so, the appellant through its witness, Paul Okubor (p.w. 2) its Group Insurance and Imports Manager, testified in evidence thus:

"I know the two defendants in this case. I know the 1st defendant as clearing, forwarding and shipping agents. Also they are the agents of the 2nd defendant in Nigeria. The plaintiff contracted the clearing and forwarding of our cargo of 6,691 cartons of Nido Instant Milk powder to the 1st defendant. This was about December 1986. They were supposed to clear our goods from Apapa Port of discharge to Kano."

The witness was not cross-examined on the point of agency nor, as already said, did the defendants lead evidence at least to define or limit the agency between the two of them.

The appellant further gave oral evidence through p.w. 2 that the 1st defendant delivered the consigned cartons of the Nido Instant Milk powder short of 428 cartons. It then tendered five Way Bills issued by the 1st defendant covering what was actually delivered. These were admitted as exhibits E, E1, E2, E3 and E4. This evidence was not challenged in cross-examination.

Going by the pleadings and the evidence, the following emerge. A total of 6,691 cartons were consigned as per the Bill of Lading and were shipped on board MS "Fiona", a vessel chartered by the 2nd defendant. The goods were cleared by the 1st defendant and forwarded to Kano as agent of the 2nd defendant. But only 6,263 cartons were delivered to the appellant leaving a balance of 428 cartons unaccounted for by the 1st defendant. ***The circumstances of this case show that there was a contract of bailment in which the 1st defendant is the bailee. In bailment, the burden is upon the***

bailee to prove that he has discharged his duty under his undertaking to keep safely or deliver intact the goods entrusted to him. In other words, in case of loss of the goods, it is his duty as bailee to prove that the loss was not caused by his breach of duty, it is not the bailor's duty to show that it did: see Coldman v. Hill [1918-19] All E.R. Rep. 434 at 442; British Road Services Ltd. v. Arthur v. Crutchley & Co. Ltd. [1968] 1 All E.R. 811. B

The position of the law is clear that a person may decide to act by another as his agent and get the benefit or bear the liability of that arrangement. One who authorizes is the principal while the one authorized is the agent. The agent acts as if it is the principal who does the act. In case of default, the agent normally becomes directly liable while the principal may as well be liable. It has been held that the fact that a person is an agent and is known to be so does not therefore of itself necessarily prevent his incurring personal liability. Whether he contracts so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears: see Rusholme etc Ltd. v. S.G. Redd & Co. (London) Ltd. [1955] 1 All ER 180 at 183. In Stanley Yeung Kai Yung v. Hong Kong and Shanghai Banking Corpn [1981] A.C. 787 (P.C.). Lord Scarman, delivering the judgment of the Board, observed at p. 795: C D E F

“It is not the law that, if a principal is liable, his agent cannot be. The true principle of the law is that a person is liable for his engagement (as for his torts) even though he is acting for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negated his personal liability.” G

In the present case, the 1st defendant as the agent of the 2nd defendant took the goods in question for delivery to the plaintiff. It issued its own Way Bills for that purpose, but has been unable to account for the loss of some of the goods. There is nothing in the circumstances to negative its personal liability. H

I am satisfied that trial judge was right to have found against the defendants jointly severally. No argument has been canvassed before us that joint liability was not appropriate in the circumstances

in which the contract of bailment was made and performed. The court below was, in my view, undoubtedly wrong to have disturbed the decision of the trial court. I therefore answer issue 2 in the negative. There is no need to consider issues 3 and 4 as issue 2 is virtually inclusive of them. I allow this appeal, set aside the judgment of the court below together with the order for costs and accordingly restore the judgment of the trial court. I award N5,000.00 as costs in the court below and N10,000.00 as costs in this court.

C

ONU JSC

Having been privileged to read before now the judgment of my learned brother, Uwaifo, J.S.C., just delivered, I am in entire agreement with him that the appeal succeeds and it is accordingly allowed by me.

I abide by the consequential orders inclusive of those as to costs contained in the lead judgment.

E

MOHAMMED JSC

I have had the advantage of reading the opinion of my learned brother, Uwaifo, J.S.C., in the judgment just read and I agree with him that the court below was in error to reverse the decision of the learned trial judge.

The facts of this case are simple. A witness P.W. 2 who caves evidence for the plaintiff/appellant told the trial court that the plaintiff entered into a contract of affreightment with the 2nd respondent to carry a cargo of 6,691 cartons of Nido Instant Milk powder by sea from the Port of Hamburg, Germany to Apapa Lagos. The 2nd respondent used its vessel "MV FIONIA" and delivered the cargo intact to its agent the 1st respondent. The 1st respondent transported the goods to Kano. However, instead of delivering a consignment of 6,691 cartons of Nido Instant Milk to the appellant, only 6,263 cartons were delivered, leaving a balance of 428 cartons.

In paragraph 11 of the statement of claim the appellant averred thus:-

"The vessel duly arrived Lagos on or about 4th January 1987 but notwithstanding that a total of 6,691 cartons of Nido Instant Milk

was consigned to the plaintiff and actually loaded and delivered sound to the 1st defendant, the defendants delivered only 6,263 cartons leaving a balance of 428 cartons as undelivered to the plaintiff. The plaintiff shall place reliance on 1st defendant's way Bills Nos. 23646-23650 at the trial of this action."

The respondents in their individual statement of defence denied paragraph 11 of the statement of claim. P.W.1 and P.W.2 gave evidence for the plaintiff and stated that the consignment was short of 428 cartons of Nido powdered milk when it was delivered to the plaintiff in Kano. Five waybills were tendered without objection and it was clear from the waybills that the cartons of milk were short of 428 when delivered to the plaintiff.

The defendants/respondents declined to give evidence in support of their pleadings. With such glaring evidence on the shortage I think the respondents are wrong to fail to put up a counter testimony or document to falsify the assertion. Evidence on material facts which is not contradicted under cross-examination and not rebutted by defence remains unchallenged and must be accepted by the trial judge. See *Adeyemi v. Bamidele* [1968] 1 All N.L.R. 31 and *Nwabuoku v. Otth* [1961] All N.L.R. 487.

It is my view that the appellant had established its claim and was entitled to judgment in its favour as the trial court had done.

The appeal is allowed. The decision of the trial High Court is restored. I abide by the consequential order made in the lead judgment on costs.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Uwaifo, J.S.C., and I am in complete agreement with him that this appeal is meritorious and ought to be allowed.

The particulars of the plaintiff's claim as endorsed in its writ of summons are as follows:-

"The plaintiffs claim against the defendants jointly and/or severally is for the sum of N45,000.00 (Forty-five thousand naira only) being special and general damages for the short-delivery by the defendants as common carriers and/or bailees for reward of 428 out of

6,691 cartons of Nido Instant Milk consigned to the order of the plaintiff and/or as endorsees thereof of the Bill of Lading No. 408 dated Hamburg 17th December, 1986 Ex MS "FIONIA" which arrived Apapa Port, Lagos, on or about 13th March 1987.

The defendants have refused and/or neglected to pay this amount or any part thereof. And the plaintiff claims this amount together with 15% interest per annum from March 1987 until payment and costs."

It is evident from the plaintiff's amended statement of claim that the claims against the defendants jointly and severally are under two heads. The first is under a contract of affreightment which is evidenced by the relevant Bills of Lading whilst the alternative claim is in negligence and/or bailment. I propose by way of emphasis only to say a few words of my own in connection with the plaintiff's alternative claim on negligence and/or bailment. I think it is convenient at this stage to examine briefly the pleadings filed in the case.

The more important of the averments in the amended statement of claim of the plaintiff are contained in paragraphs 3, 5, 6, 7, 8, 11, 14, 15 and 16 thereof. These aver as follows:-

"8. The 2nd defendant is a common carrier and/or bailee for reward and carries on business in Nigeria through its agents, the 1st defendant herein at 26 Creek Road, Apapa - Lagos State. The 2nd defendant at all times material to this action was the owner/charterer/operator of the MV "FIONIA" (hereinafter called "the vessel"), the vessel that transported the plaintiff's goods by sea from the port of Hamburg to Apapa, Lagos.

5. By a contract of affreightment evidenced by and/or contained in a Bill of Lading No. 408 dated Hamburg 17th December, 1986 and duly signed for and on its behalf, the 2nd defendant contracted to carry a cargo of 6,691 Cartons of Nido instant Milk powder (hereinafter referred to as 'the good') in good order and condition. The said bill of lading shall be founded upon at the trial of this action.

6. The plaintiff was at all times material to this action the owner/consignee of the said goods or alternatively endorsees of the bill of lading aforesaid to whom the property in the goods passed upon or by reason of the said endorsement.

7. The 2nd defendant duly acknowledged the safe receipt into

its custody in good order and condition the plaintiff's said goods for carriage and delivery in like good order and condition to the plaintiff in Nigeria.

8. Accordingly, the defendants were under a duty as common carriers and/or bailees for reward, or alternatively expressly or impliedly contracted by the bill of lading aforesaid to deliver the said plaintiff's cargo in like good order and condition as when shipped. ^B

11. The vessel duly arrived Lagos on or about 4th January, 1987 but notwithstanding that a total of 6,691 cartons of Nido Instant Milk were consigned to the plaintiff and actually loaded and delivered sound to the 1st defendant, the defendants delivered only 6,263 cartons leaving a balance of 428 cartons as undelivered to the plaintiff. The plaintiff shall place reliance on 1st defendant's Way Bills Nos. 23646 - 23650 at the trial of this action. ^C

14. The defendants have failed and/or refused to locate the D said balance of the plaintiff's goods despite repeated demands.

15. Further or alternatively, the said loss was occasioned by the negligence of the defendants, their servants and/or agents.

PARTICULARS OF NEGLIGENCE

(a) Fact of loss and/or short-delivery of the plaintiff's goods received in good order and condition on board the MV "FIONIA". ^E

(b) No advice to the plaintiff or its agents from the defendants of any report made to the Police of the loss of the plaintiff's goods received into their custody and/or care and/or control or any outcome of such police investigations into the plaintiffs lost goods. ^F

(c) The defendants as common carriers and/or bailees and/or warehousemen for reward are expected to take reasonable care to ensure the safety of the plaintiff's good in their custody.

(d) The defendants as common carriers and/or bailees and/or warehousemen for reward did not provide adequate security to protect the plaintiff's goods in their custody. ^G

(e) No advice to the plaintiff from defendants that their vessel and/or warehouse was broken into or that goods were otherwise stolen and/or destroyed while in the defendants' custody. ^H

16. By the defendants' said breach of duty and/or contract to carry and deliver plaintiff's good safely the plaintiff has suffered loss and/or damage as follows:-

C.I.F. value of carton

= US\$37.36

C.I.F. value of 6,691 cartons @ US\$37.36 = US\$249,975.76

Therefore 428 cartons C.I.F. = USS15,990.08

Exchange rate of N0.656S to 1 US\$

Therefore 428 cartons = N24,345.43'

Both the 1st and 2nd defendants in paragraph 2 of their
 B amended statement of defence admitted the said paragraphs 3, 6, 7
 and 8 of the plaintiff's amended statement of claim. In effect, the
 defendants admitted that the 2nd defendant was a common carrier
 and/or bailee for reward and that it carried on business in Nigeria
 C through its agent, the 1st defendant. They also admitted that the 2nd
 defendant was at all times material to the filing of their action the
 owner of the vessel MV "FIONIA" that transported the plaintiff's cargo
 of 6,691 cartons of Nido Instant Milk Powder from Hamburg to Ni-
 geria. The 1st And 2nd defendants further admitted that they were
 D under a duty as common carriers and/or bailees for reward to deliver
 the said plaintiff's cargo in like good order and condition as when
 they were shipped. The 1st and 2nd defendants in paragraph 2 of
 their amended statement of defence denied paragraphs 11 and 14
 of the plaintiff's amended statement of claim and averred that they
 E would put the plaintiff to the strictest proof of the allegations therein
 contained. In further answer to the said paragraph 11 of the plaintiff's
 amended statement of claim, the 1st defendant in paragraph 7 of its
 amended statement of defence added that it had no knowledge of
 F and was not a party to any survey conducted to ascertain the extent
 of the loss to the plaintiff's goods.

There are finally paragraphs 15 and 16 of the plaintiff's
 amended statement of claim in respect of which the defendants by
 paragraph 4 of their amended statement of defence pleaded that
 G they were not in a position to admit or deny the contents thereof.
 Those two paragraphs of the plaintiff's amended statement of claim
 averred very material facts in respect of its claims against the defen-
 dants. Whilst paragraph 15 averred the particulars of negligence lev-
 eled against the defendants by the plaintiff in respect of the loss and/
 H or short-delivery of the plaintiff's goods in issue, paragraph 16 quan-
 tified the exact value of the plaintiff's missing cartons in U.S. dollars
 together with their naira exchange rate at all material times.

The defendants by their answer to the said material facts
 pleaded in paragraphs 15 and 16 of the plaintiff's amended state-

ment of claim were unable to raise any issues of fact as known to law in respect thereof. This is because no proper traverse was raised by the defendants in reply to those paragraphs of the plaintiff's amended statement of claim. In this regard, the point cannot be over-emphasized that in order to raise an issue of fact in pleadings there must be a proper traverse. If a defendant refuses to admit a particular allegation in a statement of claim, he must state so specifically and he does not do this satisfactorily by pleading, as in the present case, that he is not in a position to admit or deny the particular allegations raised by the plaintiff and/or that he will, at the trial, put the plaintiff to the strictest proof thereof. See *Lewis and Peat (N.R.L.) Ltd. v. Akhimien* [1976] 7 S.C. 157; *Nwadike v. Ibekwe* [1987] 4 N.W.L.R. (pt. 67) 718 at 841; *Lawal Owosho v. Dada* [1984] 7 S.C. 149 at 163.

Be that as it may, the case put forward by the plaintiff both in its pleadings and by its viva voce evidence is briefly that about December, 1986, it contracted the clearing and forwarding of its cargo of 6,691 cartons of Nido instant Milk Powder to the 2nd defendant whose agent in Nigeria is the 1st defendant. The 1st defendant as agent of the 2nd defendant was to clear the goods from Apapa port and discharge them at the plaintiff's warehouse in Kano. The goods were duly cleared as aforesaid and delivered by the 1st defendant to the plaintiff at Kano between the 18th and 20th March, 1987.

The plaintiff only received 6,263 cartons of the said milk, resulting in a short delivery of 428 cartons. The unit cost of each carton was U.S. \$37.36 and the exchange rate at the time was N0.6568 to 1 U.S. \$. The naira equivalent of the missing cartons was therefore N24,345.43k which the plaintiff claimed together with general damages and interest.

The defendants rested their defence with the case for the plaintiff and did not call any evidence on their behalf, in such circumstance where evidence given by a party to a proceeding was not challenged by the other side who had the opportunity to do so, it is always open to the court seized of the matter to act on such unchallenged evidence before it. See *Omoregbe v. Daniel Lawani* [1980] 33-4 S.C. 108 at 117; *Odulaja v. Haddad* [1973] 11 S.C. 35; *Nigerian Maritime Service Ltd. v. Alhaji Bello Afolabi* [1978] 2 S.C. 79 at 81. This is because a trial court in civil proceedings is obliged to place the evidence of both parties on each side of the imaginary scale so as to

determine which side outweighs the other. In the absence of the defendants in the present case adducing any evidence whatsoever, their own side of the imaginary scale remained weightless and unable to tilt the proverbial scale which clearly was heavily laden in one direction, to wit, on the side of the plaintiff. The onus of proof in such a case by a plaintiff is discharged quite easily on minimal proof. See *Broadline Enterprises Ltd. v. Monterey Maritime Corporation* and another [1995] N.W.L.R. (pt. 417) 1 at 27; *Nwabuoku v. Ottih* [1961] 2 S.C.N.L.R. 232; *Balogun v. U.B.A. Ltd.* [1992] 6 N.W.L.R. (pt. 247) 336 at 354. In the present case, the position is that the 2nd defendant, as bailee, was entrusted with a consignment of 6691 cartons of Nido Instant Milk for shipment from Hamburg to Apapa and thence to the plaintiff's warehouse at Kano. The 1st defendant was the agent in Nigeria of the 2nd defendant and was also involved in such agent in the transportation of the consignment again as bailee from Apapa to Kano. Both 2nd and 1st defendants were therefore master and servant and joint bailees in this transportation transaction in issue. It is not disputed that the plaintiff's aforesaid consignment was delivered at its warehouse in Kano with 428 cartons missing.

It is settled law that in bailment, the onus of proving that there is no negligence is on the bailee. The loss of, or damage to the chattel while it is in the bailee's possession always places the onus of proof on the bailee to show that it occurred without his fault or negligence. See *Ogugua v. Armels Transport Ltd.* [1974] N.S.C.C. 169 at 172; *Coldman v. Hill* [1919] 1 K.B. 443; *Houghland v. R.R. Low (Luxury Coaches) Ltd.* [1962] 1 Q.B. 694 at 697 - 698. The bailee must show that such loss or damage was not caused by any failure on his part to take reasonable care. See *Brooks Wharf and Bull Wharf Ltd. v. Goodman Brothers* [1937] 1 K.B. 534 at 538 - 539. He need not, however, show exactly how the loss or damage occurred. See *Bullen v. Swan Electric Engraving Co.* [1907] 23 T.L.R. 258. But he will be liable to the bailor for the loss of or injury to the chattel entrusted to him caused by the negligence of his employees or agents acting within the scope of their employment or the apparent scope of their authority. See *Beard v. London General Omnibus Co.* [1900] 2 Q.B. 530. So, too, where the bailee entrusts the performance of his duty to take reasonable care of the chattel to an employee, the bailee is liable not only for the employee's negligence which causes the loss of

or damage to the chattel but also for the employee's fraud or dishonesty in making away with the chattel. See *Morris v. C. W. Martin and Sons Ltd.* [1916] 1 Q.B. 716. I think it may rightly be said that bailees do not escape liability unless they establish that the loss occurred in some way not involving their negligence but they would be liable if they adduce no satisfactory explanation of how the loss occurred. See *Woolmer v. D. Price Ltd.* [1955] 1 All E.R. 377; *Coldman v. Hill.* B

In the present case, it is not disputed that the loss of the 428 cartons of Nido Instant Milk Powder occurred while the consignment of the plaintiff's goods was in the possession of the defendants. The onus of proof is therefore on the defendants, as bailees, to show that the loss of the 428 cartons of Nido Milk Powder occurred without their fault or negligence and without any failure on their part to take reasonable care. This onus they did not attempt to discharge in any manner whatever as they opted not to testify in the proceedings but rested their defence on the evidence adduced on behalf of the plaintiff. They neither adduced any satisfactory explanation as required nor any explanation of whatever nature as to how the loss in question occurred. Under such circumstance, the law does hold them liable for this loss. See *Woolmer v. D. Price Ltd.* and *Coldman v. Hill.* C D E

Evaluating the evidence adduced before the trial court, the learned trial judge, quite rightly, in my view, observed:-

"We must now proceed to evaluate the evidence adduced together with the submissions put forward by the learned counsel for the parties. First, it must be stated that the onus of proof on a balance of probability lies on the plaintiff for the claim to succeed while a similar burden lies on the defendants if they must be absolved from liability. Secondly, since the defendants have offered no evidence, it follows that there is no other alternative account before the court apart from the version put forward by the two witnesses who gave evidence on behalf of the plaintiff. Furthermore, the following facts are not in dispute: (a) That the defendants acted as common carriers in respect of the consignment of milk in question. (b) That there was a shortage of 428 cartons. (c) That the vessel, MV. "FIONIA", arrived in Nigeria on, 4th January, 1987. (d) That the right of subrogation is vested in the plaintiff since the insurers, UNIC, had already seined the claim. It will thus be seen that the area of disagreement between the parties is very narrow." He went on:- F G H

"It is manifest to me that the goods were correctly delivered to the defendants in Hamburg. This is clear from the Clean Report of Findings (Ex. M)... I am satisfied that the defendants are liable for the shortage of the 428 cartons of milk valued at \$15,990.08 or N24,345.43." He concluded:-

B *"Accordingly, judgment is hereby given in favour of the plaintiff in the sum of N24,345.43 being special damages for the short-delivery of 428 cartons of Nido Instant Milk plus interest at the rate of 15% per annum from 13th March 1987 up till today and thereafter at the rate of 9% per annum until actual payment."*

C On appeal before the Court of Appeal, that court in allowing the appeal commented:-

D *"On the whole, this appeal must succeed on the ground that the plaintiff had failed to establish the liability of either of the defendants for the loss of the goods which it alleged. In the result, I would allow the appeal. I would set aside the judgment of Odunowo, J. entered for the plaintiff on 22nd February, 1991 and in place therefore I would dismiss the claim in its entirety."*

E I think having regard to all I have stated above, that the court below, with profound respect, was in error by dismissing the plaintiffs claim. It is for the above and the more detailed reasons contained in the judgment of my learned brother, Uwaifo, J.S.C., that I, too, allow this appeal and set aside the judgment of the court below together with the order for costs therein made. The judgment of the trial court
F is hereby restored. I award costs to the plaintiff/appellant against the defendants/respondents whom I assess and fix at N5,000.00 in the court below and N10,000.00 in this court.

G

KATSINA-ALU JSC

H I have had the advantage of reading in draft the judgment just delivered by my learned brother, Uwaifo, J.S.C. I agree with him that this appeal must be allowed. I also therefore allow it, set aside the judgment of the court below and restore the decision of the trial High Court. I also abide by the order for costs.